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Notes

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NOTES

Evidence—Expert Testimony: Admissibility of Human Factors Testimony Under the Federal Rules of Evidence

In recent years courts have liberalized the standards for admission of expert testimony. Federal Rules of Evidence 702 through 705 reflect this trend and are now in effect in many states as well as in the federal court system.[1] To be admissible under the rules, expert testimony need only assist the trier of fact.[2] Furthermore, a qualified expert is allowed to give opinions on ultimate issues,[3] which were previously reserved for determination by the trier of fact. Certain ultimate issues, including conclusions concerning whether a particular legal standard is satisfied, are still inappropriate for expert testimony, however, because simply telling the jury the result to reach does not constitute assistance. Moreover, when the mode of analysis applied by an expert lacks scientific reliability, there is a further danger that the expert's testimony will not assist but, instead, mislead. Human-factors analysis testimony demonstrates both of these dangers.

According to a practitioner in the field, human-factors analysis is the "study of all the factors which combine to influence the decision of the individual, such as past experience, present feelings, and immediate motor response in terms of the present situation or environment."[4] In a line of recent Florida cases involving railroad crossing accidents,[5] several psychologists and engineers have qualified as human factors experts and have been permitted to give their opinions on the probable behavior of the average or reasonable person in the actual accident settings. Assuming human-factors testimony satisfies the threshold test of assistance to the jury, the Florida courts nevertheless have failed to consider qualifications of the proferred experts adequately, neglected to determine whether human-factors analysis is scientifically reliable and overlooked the problem that expert testimony on the behavior of a reasonable person is not permitted even under the present ultimate issue rule.[6]

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1. The Federal Rules of Evidence took effect in United States courts on July 1, 1975. Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975). Twenty-one states have adopted these rules with omissions and variations. Fed. R. Evid. Serv. (state correlation tables) (1981).

2. Fed. R. Evid. 702.

3. Id. 704.

4. Public Health Foundation v. Cole, 352 So. 2d 877, 879 (Fla. 4th Dist. Ct. App. 1977), cert. denied, 361 So. 2d 834 (Fla. 1978). The witness provided this explanation of human engineering, his subspecialty. Another human-factors specialist has defined his field as the study of how a human uses and interacts with his products. Fowler, Human Factors Analysis, 10 Trial, Nov.-Dec. 1974, at 53. "Products" presumably refers to items such as consumer goods found in the home and more complicated devices like automobiles.

5. See text accompanying notes 7-41 infra.

6. The Florida legislature substantially adopted the Federal Rules of Evidence in 1976. Law of June 23, 1976, ch. 76-237, 1976 Fla. Laws 556. The Florida Evidence Code appears in chapter 90 of the State statutes. Fla. Stat. Ann. (West 1979). The Florida evidence rules substantially follow the federal rules but contain numerous variations, omissions and additions. 13

The line of Florida decisions in which human factors testimony was offered began in 1971 with *Seaboard Coast Line Railroad v. Hill*.[7] In that case decedent's automobile automobile crashed into the side of a train on an extremely dark, foggy night. Neither a flagman nor flares had been posted at the crossing. Plaintiff alleged negligent operation of the train; defendant denied this charge and counterclaimed contributory negligence.[8] At trial a human-factors psychologist who had never seen the crossing or the decedent[9] testified that an average driver would not have been able to gather adequate information to react properly to the obstruction on the tracks. In reaching this conclusion, the expert contended that the darkness, fog, absence of flares and absence of sound would create perceptual problems for a driver.[10]

The Fourth District Court of Appeal held that the judge did not abuse his discretion in concluding that the expert was qualified.[11] To decide whether the subject matter was appropriate for expert testimony, the court examined the expert's explanation of the causes of the perceptual difficulties. The court concluded that "the subject matter of the opinion was not just the visibility of the train on the crossing, but also the deceptive quality of various factors that were present in the environment . . . , and the manner in which a person would react to these factors."[12] Such reactions could be found to lie beyond the scope of the jurors' common knowledge and within the expert's sphere of expertise. Finally, the court held that even if the decision to admit the expert testimony was erroneous, there was sufficient independent evidence supporting the jury's conclusion that the defendant was negligent to render the error harmless.[13]

Four years later a different panel of the same court ruled that a human-factors expert's opinion about the behavior of an average man in given circumstances was improperly admitted. In *Seaboard Coast Line Railroad v. Kubalski*[14] decedent's truck was stopped, during the day, on railroad tracks, despite the presence of numerous warning devices.[15] The court distinguished

U.L.A. 213 (1980). Differences involving expert testimony, however, are minor. The Florida Evidence Code did not take effect until July 1, 1979. Law of June 21, 1978, ch. 78-379, § 1, 1978 Fla. Laws 1052. Therefore, none of the human-factors decisions applied the federal rules in determining the admissibility of and limits on testimony in this area.

7. 250 So. 2d 311 (Fla. 4th Dist. Ct. App. 1971) (2-1 decision), writ discharged, 270 So. 2d 359 (Fla. 1972).

8. Id. at 313-15. In each of the Florida cases examined in this Note, plaintiffs employed human-factors witnesses to demonstrate that there was no contributory negligence.

9. Id. at 314.

10. Id. at 315. Contra, St. Louis Southwestern Ry. v. Jackson, 242 Ark. 858, 416 S.W.2d 273 (1967) (factors such as position of the sun, elements distracting to motorists, weather and obstructions to vision are individually within the comprehension of the average juror); Owre v. Crown Zellerbach Corp., 260 Or. 454, 490 P.2d 504 (1971) (expert testimony not permitted because the distracting influences were hazards to good vision encountered regularly by motorists).

11. 250 So. 2d at 314. This decision to qualify the witness as an expert is criticized in text accompanying notes 54-58 infra.

12. Id. at 315.

13. Id.

14. 323 So.2d 32 (Fla. 4th Dist. Ct. App. 1975).

15. Id. at 33.

Hill by contending that the environmental conditions in that case amounted to "extraordinary circumstances." Noting the absence of unusual circumstances, the *Kubalski* court held that "inroads upon the province of the jury to decide what the reasonable man should do" were unwarranted.[16] Because the testimony by the human-factors expert, a president of a safety consulting firm, may have significantly affected the jury's allocation of negligence, the court further determined that the admission of this testimony was not harmless error.[17]

In the only case not involving a railroad crossing accident, the trial court in *Public Health Foundation v. Cole*[18] upheld the admissibility of human-factors testimony. Plaintiff was injured on the Fourth of July while diving into a river on defendant's property. The accident occurred late in the afternoon as the tide was receding; no warnings were posted about the presence of dangerous diving conditions at low tide.[19] Plaintiff testified, however, that she had intimate knowledge of the location of the accident and of most of the environmental factors affecting the area. Furthermore, she had observed that the tide was going out swiftly that afternoon, to the extent that she could "see shallow places and deep places."[20]

When asked a hypothetical question posed in this factual context, Dr. Isadore Scherer, the same expert witness who testified in *Hill*, concluded that a reasonably prudent individual could have this accident because of the nature of the situation and the other described factors.[21] In addition to the factors already mentioned, Dr. Scherer took into account three other conditions. By analyzing a survey map of the area, Scherer noted that plaintiff may have been bothered by glare from the sun, making it more difficult to judge the depth of the water. Murky water would also interfere with determining depth. Finally, Dr. Scherer thought that the occurrence of the accident on the Fourth of July was a significant variable. Because it was a holiday, plaintiff was happy and enjoying herself; therefore, she may have dived into the river faster than she ordinarily would.[22] In drawing these conclusions, Dr. Scherer utilized the

16. Id. at 34. The court contrasted "extraordinary circumstances" with ordinary ones to explain the admission of expert testimony in *Hill*. Ordinary circumstances would be found to be within the competence of the jury; therefore, expert testimony on such conditions would be barred.

17. Id. Decedent had been found 60% negligent, and the railroad 40% negligent. Were it not for the prejudicial testimony, decedent's negligence might have been found to be even greater.

18. 352 So. 2d 877 (Fla. 4th Dist. Ct. App. 1977) (2-1 decision) (none of the judges had been on either the *Hill* or *Kubalski* panel) cert. denied, 361 So. 2d 834 (Fla. 1978).

19. Id. at 879.

20. Id. at 880. When asked why the accident happened, plaintiff replied, "I don't know. I guess I just didn't pay enough attention to the depth of the water." Id.

21. Id. at 880-81.

22. Id. at 881. With respect to plaintiff's intimate knowledge of the area, the expert noted that habit inference would have downgraded her alertness to the situation, concluding that this was another reason that a reasonably prudent person could have had the same accident. Id. On the other hand, some courts have reasoned that familiarity with the scene of the accident makes it more likely that the party is negligent. See, e.g., Owre v. Crown Zellerbach Corp., 260 Or. 454, 490 P.2d 504 (1971) (testimony by consulting engineer regarding the difficulty of seeing traffic light excluded since decedent knew of the light).

deposition testimony of plaintiff and eyewitnesses, as well as photographs of the scene of the accident and the survey map of the area.[23]

The Fourth District Court of Appeal affirmed the trial court's decision to admit Dr. Scherer's testimony, reasoning that the opinion testimony was related to the deceptive quality of factors present in the environment.[24] This is the same justification that the *Hill* court propounded.[25] Since the environmental conditions created a situation that may have been beyond the ordinary experience and understanding of the jury, the *Cole* court determined that expert testimony was appropriate.[26]

Although the *Cole* decision gives further support to admission of human-factors testimony, the panel there came very close to setting aside the *Hill* precedent. The concurring judge considered the decision in *Hill* an "unhappy one" but reluctantly followed it because it was a precedent of his own court.[27] Believing that opinions on whether a party's conduct was negligent completely usurp the jury's function, the judge did not think that the harmless error rule could justify the decision. Because Dr. Scherer had concluded that a reasonable person could have had this accident, the judge reasoned that the jury may have been persuaded to ignore other evidence in finding Mrs. Cole totally free of negligence.[28]

Finally, the most recent Florida case that considered the admissibility of human-factors testimony, *Seaboard Coast Line Railroad v. Buchman*,[29] involved a complicated intersection of railroad tracks and highways, and the questionable audibility of the train whistle. Even though the train's headlamps were on and its bell had been ringing continuously, decedent had never slowed while approaching the crossing.[30] The trial judge admitted testimony given by two human-factors experts. The first expert, Frank Fowler, testified that a number of "confusion factors" were present at the crossing. These included the multiple intersections of highways and crossings, the slight incline of the railroad crossing and the restricted view of the tracks because of an orange grove.[31] The second expert, Norman Korobow, stated that eighty to eighty-seven percent of the population would not have been able to hear the whistle, a conclusion he based on the facts in evidence, including the velocity of the wind on the day of the accident.[32]

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23. 352 So. 2d at 881.

24. Id. at 879.

25. 250 So. 2d at 315. See text accompanying notes 11-13 supra.

26. 352 So. 2d at 879. Physical conditions that the court mentioned included the angle of the sun, glare, the tide and overall weather conditions.

27. Id. at 882.

28. Id.

29. 358 So. 2d 836 (Fla. 2d Dist. Ct. App. 1978), reversed, 381 So. 2d 229 (Fla. 1980).

30. Id. at 837.

31. Id. at 840.

32. Id. Also, at the time of the accident, decedent had the car radio turned on and the windows rolled up. Id. at 837.

A third expert, not a human-factors expert, testified about the absence of proper warning devices at the crossing. Id. at 840-41. Similar testimony was excluded in *Hill* because it was found to be within the comprehension of the jury. 250 So. 2d at 314.

The Second District Court of Appeal reversed the lower court's determination of admissibility. Because it was particularly concerned with the prejudicial effect that improper expert testimony could have on the jury in this case because there was no independent evidence of negligence on the part of the railroad, the court held that the confusion factors were within the jury's experience.[33] While mention of these factors would have been appropriate in the closing argument of counsel, allowing Fowler to make these observations, in the court's view, unduly influenced the jury and invaded its province.[34] The *Buchman* court rejected Korobow's testimony for a different reason. Because of the absence of extraordinary circumstances, testimony concerning the ability of the general populace to hear the whistle was unwarranted.[35]

The Florida Supreme Court reversed the court of appeal's decision in *Buchman* in its first consideration[36] of the admissibility of human-factors testimony. The court[37] relied upon the *Hill* "deceptive quality of the environment" test and referred to the *Kubalski* unusual circumstances distinction, in finding conditions sufficiently analogous to warrant expert testimony.[38] Rather than invading the province of the jury, the expert testimony would assist the jury in its deliberations.[39] The dissent maintained, however, that no unusual circumstances existed; hence, the jury should have been free to draw its own conclusions.[40]

Prior to the adoption of the Federal Rules of Evidence, Florida's test of admissibility of expert testimony was whether the facts to be determined were obscure and not within the ordinary experience of the jury. Florida courts restricted admission to situations in which special knowledge or experience was necessary to draw a valid conclusion.[41] For this reason, courts considering the admissibility of human-factors testimony felt constrained to support their decisions by showing that the particular facts evidenced "extraordinary

33. 358 So. 2d at 841-42.

34. Id. at 842. For explanation of the use of the phrase "invades the province of the jury," see C. McCormick, Handbook of the Law of Evidence § 12 (2d ed. 1972 & Supp. 1978).

35. 358 So. 2d at 842. The court questioned the reliability of Korobow's opinion, since his testimony did not imply that the responsibility of motorists to be alert for trains was a factor given consideration in his analysis. Id. at 840.

36. Trial courts allowed human-factors testimony in two cases that preceded *Buchman* to the supreme court. Seaboard Coast Line R.R. v. Welfare, 350 So. 2d 476 (Fla. 1st Dist. Ct. App. 1977), quashed, 373 So. 2d 886 (Fla. 1979); Seaboard Coast Line R.R. v. Helman, 330 So. 2d 761 (Fla. 4th Dist. Ct. App. 1976), quashed, 349 So.2d 1187 (Fla. 1977). Neither the appellate nor the supreme court opinion in *Helman* analyzes admissibility of the testimony. In *Welfare*, however, the Florida Supreme Court considered the human-factors evidence as proper—in dicta—over the dissent of Justice Alderman.

37. Buchman v. Seaboard Coast Line R.R., 381 So. 2d 229 (Fla. 1980).

38. Id. at 230.

39. Id.

40. Id. at 231 (Alderman, J., dissenting). One of the two dissenting justices was, ironically, Justice Alderman, who had written the *Cole* opinion while serving on the appellate court. His dissent emphasized that the jury was fully competent to appreciate the conditions existing at the time of the accident.

41. Mills v. Redwing Carriers, Inc., 127 So. 2d 453 (Fla. 2d Dist. Ct. App. 1961). The court noted that if expert testimony were permitted in instances when the jury was competent, there was a potential danger that the jury might be unduly influenced by the opinion of the expert. Id. at 456.

circumstances" or a "deceptive quality of the environment." Either characteristic would remove the subject matter from the ordinary experience of the jury. The major difficulty, however, lies in determining what circumstances are extraordinary. The *Hill* court noted such factors as darkness, fog, and absence of flares in deciding that human-factors testimony was admissible. Arguably, each of these conditions is well within the common knowledge of jurors.[42]

Federal Rule of Evidence 702 considerably simplifies this problem. As long as the testimony will assist the jury, it is admissible.[43] Under rule 702 expert testimony pertaining to a particular subject should be permitted whenever it will assist the trier of fact in understanding the evidence or determining a fact in issue.[44] This is a more liberal standard than the traditional common law requirement that the subject of the testimony must be beyond the comprehension of the average layman.[45] Thus, under the statutory standard, even though a layman has a fundamental grasp of a particular issue or subject, a court may still permit expert testimony if it would provide additional aid to the jury.[46] When the trier of fact is as competent as the expert to evaluate an issue, however, the use of expert testimony should be precluded.[47]

The Florida Supreme Court advanced this assistance rationale when supporting the trial judge's admission of expert testimony in *Buchman*,[48] even though the assistance test was not in effect at the time of the trial.[49] As will be seen below, it is doubtful that human-factors opinions genuinely help the jury make a more informed decision than it could make on its own.[50]

Even if expert testimony would be helpful to interpret certain information, the judge must still decide whether the prospective witness possesses the

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42. See note 10 and accompanying text supra. Of course, one reason that human-factors testimony may still be appropriate despite the jury's ability to comprehend the individual factors is that multiple factors may combine to create an environment with which the jury is unfamiliar.

43. Fed. R. Evid. 702, Adv. Comm. Note.

44. Id. See, e.g., United States v. Masson, 582 F.2d 961 (5th Cir. 1978) (testimony of qualified expert regarding gambling operations necessary to aid jury in understanding taped conversations in the jargon of this business).

45. See C. McCormick, supra note 34, § 13. Although North Carolina has yet to adopt the federal rules, decisions of the state courts generally apply the federal standard. See, e.g., Hubbard v. Quality Oil Co., 268 N.C. 489, 151 S.E.2d 71 (1966) (proper test is whether additional light can be thrown on question under investigation by qualified expert). But see Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965) (testimony about the propensity of an automobile to fishtail not allowed).

46. Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856 (8th Cir. 1975) (witness with Ph.D. in engineering mechanics and familiar with principles of agricultural machinery would have provided assistance to the jury concerning the defective design of a corn picker); Englehart v. Jeep Corp., 122 Ariz. 256, 594 P.2d 510 (1979) (applying federal rules, court held that experts could draw conclusions more precisely and scientifically than the average juror).

47. Salem v. United States Lines Co., 370 U.S. 31, (1962) (expert testimony may be excluded if jury is as capable of comprehending primary facts and drawing correct conclusions as are witnesses who have had special training); Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 581 P.2d 271 (Ct. App. 1978) (jury as competent as an expert to determine whether the warning 'Flammable Liquid' was adequate).

48. 381 So. 2d at 230.

49. Because the appellate decision came down in 1978, the trial must have occurred well before the Florida Evidence Code took effect on July 1, 1979.

50. See text accompanying notes 58-84 infra.

requisite knowledge, skill, experience, training or education to qualify as an expert in his particular field.[51] If the witness can assist the trier of fact, he should qualify.[52] Once the witness is classified as an expert, questions related to his background and credibility affect the weight to be given his testimony, not its admissibility.[53]

Of the four cases under consideration, only in *Hill* did the appellate court analyze the qualifications of the human-factors witness. Presumably, this question was not at issue in later cases because of the difficulty of establishing that the trial judge abused his discretion, a condition for proving an admission error.[54] To support the trial court's admission of expert testimony, the *Hill* court concluded from Dr. Scherer's testimony that he had considerable academic and practical experience in his field of psychology. Specifically, the court referred to Dr. Scherer's statement that he had done "research relating to motivation, attention, and other variables in personal history which relate to a person's inability to work . . . [and] research into the subject of the requisite knowledge and ability for the operation of machinery."[55] Neither operation of machinery nor inability to work, however, seems to have any bearing on the subject matter of the expert's testimony—the effect of certain environmental factors on the perception of the average automobile driver. When an expert's testimony departs from his field of knowledge, any further opinions may mislead the trier of fact. Thus, courts must consider whether a witness qualifies as an expert with respect to the subject matter of his proposed testimony.[56] Although Dr. Scherer would certainly qualify as an expert in his areas of specialty, the *Hill* court was not warranted in admitting his testimony without establishing the relationship between his credentials and perception problems.[57] Neither an unqualified witness nor an expert testifying outside his

51. Fed. R. Evid. 702. See generally C. McCormick, supra note 34, § 13.

52. United States v. Lopez, 543 F.2d 1156 (5th Cir. 1976) (trial judge made meaningful examination of psychologist's qualifications before excluding his testimony), cert. denied, 429 U.S. 1111 (1977).

The tests for appropriateness of subject matter and qualifications of prospective experts are apparently the same—assistance to the trier of fact. Thus, while expert testimony on a particular topic may be appropriate, a particular expert witness may not be personally capable of providing the requisite assistance.

53. United States v. Fortune, 513 F.2d 883, (5th Cir.), (trier of fact to determine questions of credibility), cert. denied, 423 U.S. 1020 (1975); Behm v. Division of Administration, 336 So. 2d 579 (Fla. 1976) (jury to decide credibility to be given expert testimony).

A court may still reject expert testimony if a reasonable basis for the opinions is not established. For example, an accident reconstruction expert may not give an opinion on the point of impact based solely on eyewitness testimony, since experts in this field generally require more information to formulate an opinion. Fed. R. Evid. 703, Adv. Comm. Note.

54. Berdeaux v. Gamble Alden Life Ins. Co., 528 F.2d 987, 990 (5th Cir. 1976); Buchman v. Seaboard Coast Line R.R., 381 So. 2d 229, 230 (Fla. 1980).

55. 250 So. 2d at 314. No other qualifications or explanations were given by the *Hill* court.

56. Perkins v. Volkswagen of Am., Inc., 596 F.2d 681 (5th Cir. 1979) (specialist in mechanical engineering, who had no automobile design background, allowed to testify on general engineering principles but not as an expert on automobile design). But cf. United States v. Viglia, 549 F.2d 335, (5th Cir.) (expert whose principal area of practice was pediatrics and who did not treat obesity held to have sufficient medical training to testify on the use of controlled substances to treat obesity), cert. denied, 434 U.S. 834 (1977).

57. When expert testimony is based upon false assumptions, Florida courts have not always

realm of expertise can provide the necessary assistance to the jury required both by Florida's pre-Federal Rules test and by rule 702.

Although recognizing the importance of establishing the credentials of an expert witness, the Florida courts totally failed to consider another crucial test of admissibility of human-factors testimony—whether it qualifies as scientific evidence.[58] Not every ostensibly scientific technique should be recognized as the foundation for expert testimony. The trier of fact may be unduly influenced by an expert claiming a scientific basis for his opinion because of the expert's apparent objectivity. Moreover, rebuttal of such an opinion can be accomplished only through use of other experts or by cross-examination based on a thorough acquaintance with the underlying principles.[59]

If the state of the expert's field has not developed to the point that his opinions have a reasonable scientific basis, the Federal Rules of Evidence do not permit the testimony.[60] Opinions that fail to satisfy this requirement cannot furnish assistance to the jury as required by rule 702.[61] Nevertheless, there must be an opportunity for new fields of scientific and specialized knowledge to be verified by courts as reliable. "[N]either newness nor lack of absolute certainty suffices to render it inadmissible. . . . Every useful new development must have its first day in court."[62] During that first day in court, however, the judge must scrutinize innovative developments before ruling that the proferred expert testimony is admissible.[63]

Two recent decisions by federal courts of appeals analyze many of the factors that should be considered when determining the admissibility of a new scientific method. The Court of Appeals for the Second Circuit, in *United*

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followed the rule that questions concerning the evidence go to its weight, not its admissiblity. See E.R. Squibb and Sons, Inc. v. Stickney, 274 So. 2d 898 (Fla. 1st Dist. Ct. App. 1973) (jury verdict not sustained because expert's conclusion that a product was defective and unfit for its intended use was unsupported by the facts; therefore, the testimony had no probative value), cert. denied, 416 U.S. 961 (1974).

58. See United States v. Baller, 519 F.2d 463 (4th Cir.), cert. denied, 423 U.S. 1019 (1975). See generally Comment, The Psychologist as Expert Witness: Science in the Courtroom, 38 Md. L. Rev. 539 (1979).

59. United States v. Brady, 595 F.2d 359, 362-63 (6th Cir. 1979).

The traditional standard for admission of scientific evidence is promulgated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). For a scientific principle or discovery to be admissible, the *Frye* test required that the principle "be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014.

Recent decisions have emphasized that reliability of the scientific technique is the most important factor in determining general acceptance. E.g., United States v. Franks, 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 (1975).

60. United States v. Fosher, 590 F.2d 381 (1st Cir. 1979). See generally C. McCormick, supra note 34, § 13.

61. Cf. United States v. Scavo, 593 F.2d 837 (8th Cir. 1979) (testimony must be helpful to the trier of fact and is also subject to exclusion under rule 403 if it will confuse the issues).

62. United States v. Stifel, 433 F.2d 431, 438 (6th Cir. 1970), cert. denied, 401 U.S. 994 (1971).

A scientific technique developed specifically for use in a particular trial may even be admissible, giving further credence to the view that reliability is the courts' major concern. *See* Coppolino v. State, 223 So. 2d 68 (Fla. 2d Dist. Ct. App.) (expert testimony evaluating test developed for trial to determine presence of poison in body of defendant's wife held admissible), appeal dismissed, 234 So. 2d 120 (Fla. 1969), cert. denied, 399 U.S. 927 (1970).

63. See C. McCormick, supra note 34, § 203.

States v. Williams,[64] permitted spectrographic voice analysis[65] to be presented through expert testimony. The court emphasized the high percentage of successful voice identifications as well as the expert's certification in his field and extensive practical experience. The expert's opinion had a minimal potential to mislead, since the jury could examine the objective components of the tests. Finally, normal safeguards were available, including the opportunity to challenge the reliability of the equipment and the technique of analysis, and to question the expert's qualifications.[66]

In *United States v. Fosher*[67] the Court of Appeals for the First Circuit held that the trial court did not abuse its discretion in excluding a psychologist's testimony concerning the unreliability of eyewitness identifications. The court reasoned that proof offered to assist the jury must provide a system of analysis that will be reasonably likely to add to the common understanding of a particular issue.[68] Thus, an expert must give some indication of how he reached his opinion. With no such system evident in *Fosher*, the court determined that the jury was as capable of assessing an eyewitness' ability to perceive and remember an assailant as the proffered expert. The *Fosher* court upheld the trial court's conclusion that the expert testimony was not "sufficiently beyond the ken of lay jurors to satisfy Rule 702."[69] Moreover, admission of opinions based on scientific subject matter of unproven reliability would raise a substantial danger of prejudice, given the aura of reliability surrounding scientific evidence.[70]

Florida courts have reached the same conclusion in excluding opinions on the unreliability of eyewitness identification. In *Nelson v. State*[71] the expert never examined the victim of an attack who had subsequently identified her assailant. The trial court rejected testimony concerning factors that might affect perception and the memory process in general. On review, the appellate court supported this exclusion, observing that the expert's opinion was largely comprised of hypotheses, theories, generalization and speculation.[72] Courts in

64. 583 F.2d 1194 (2d Cir. 1978).

65. This is commonly known as voiceprint identification. It involves examination of spectrographic representations of the human voice, with the skill of the examiner being the critical factor in the degree of success. C. McCormick, supra note 34, § 204, at 489 n.31. See generally Kamine, The Voiceprint Technique, 6 San Diego L. Rev. 213 (1969).

66. 583 F.2d at 1198-1200. But see People v. King, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1966) (even extensive qualifications of the expert in the fields of speech and acoustical engineering may be insufficient to justify admissibility).

67. 590 F.2d 381 (1st Cir. 1979).

68. Id. at 383. The court was obviously concerned that expert testimony in this area could be quite arbitrary. If the jury does not have a means to interpret the testimony, it is apparent that the expert opinions will be of no assistance.

69. Id. at 383.

70. The court held that, "[q]uite apart from questions of limited relevance and reliability," rule 403 of the Federal Rules of Evidence allows the trial court to exclude evidence whose probative value is outweighed by the danger of confusion and prejudice. Id. The possibility of prejudice in criminal cases, such as *Fosher*, may also raise constitutional questions about the right of a defendant to a fair trial.

71. 362 So. 2d 1017 (Fla. 3d Dist. Ct. App. 1978).

72. Id. at 1021.

other jurisdictions have generally concurred.[73]

Many of these weaknesses are found in the human-factors cases. For example, there is no evidence that any of the witnesses had firsthand knowledge of the settings of the accidents. At best they developed familiarity by studying photographs and survey maps,[74] at worst through an attorney's recitation of facts in a hypothetical question.[75] As in *Nelson*, the expert opinions dealt not with the perceptions and reactions of the specific person involved in the accidents but with how the general population, as typified by the average[76] or reasonable[77] man, would have responded to this situation.

Some human-factors testimony goes further and becomes entirely conjectural. In the *Cole* case, Dr. Scherer stated that looking into the sun would have made it more difficult for plaintiff to judge the depth factor. That plaintiff dove in the direction of the sun, however, was not deduced from testimony but from the expert's examination of a map of the region.[78] Dr. Scherer was also speculating when he concluded that plaintiff may have acted faster on the day of the accident simply because it was a holiday.[79] Furthermore, he failed to establish the basis for his determination that a holiday causes reckless actions.[80] Without further explanation or justification for his conclusion, Dr. Scherer's statement does not appear to satisfy the assistance test.

Similarly, Professor Korobow's conclusion in *Buchman* that at the minimum eighty percent of the population would not have been able to hear the train whistle lacks a method of analysis that the jury could use to independently evaluate the testimony.[81] More important, however, is whether such a conclusion is reliable. The voice print evidence in *Williams* showed a high correlation between actual voices and test identifications.[82] Without a "demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached,"[83] testimony based on a scientific field should not be admitted. The

73. See State v. Galloway, 275 N.W.2d 736 (Iowa 1979); State v. Porraro, 404 A.2d 465 (R.I. 1979). But see People v. Hurley, 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (1979) (dissenting opinion) (testimony related to misidentifications would be of assistance).

The *Galloway* case indicates a recurring problem with expert testimony, that of the professional witness. Defendant in this Iowa case offered Dr. Elizabeth Loftus as the expert, the same witness whose testimony was rejected in the Florida *Nelson* decision. For proposals to improve the practice of employing experts, see C. McCormick, supra note 34, § 17.

74. Public Health Foundation v. Cole, 352 So. 2d at 880.

75. See Seaboard Coast Line R.R. v. Hill, 250 So. 2d at 314.

76. Id. at 315; Seaboard Coast Line R.R. v. Kubalski, 323 So. 2d at 33.

77. 352 So. 2d at 879. See also Seaboard Coast Line R.R. v. Buchman, 358 So. 2d at 840 (expert opinion that a minimum of 80% of population would not have been able to hear whistle).

78. 352 So. 2d at 880. Dr. Scherer himself characterized as only a possibility his conclusion that plaintiff was unable to see because of the direction she was facing. Id.

79. Id.

80. Scherer testified, "[I]t is the Fourth of July. She is feeling happy. She is enjoying herself. It is a holiday, and she just jumps so that the emotional tone was set for doing something like this." Id.

81. 358 So. 2d at 840.

82. 583 F.2d at 1198-99.

83. United States v. Brady, 595 F.2d 359, 363 (6th Cir. 1979).

unproven reliability of human-factors testimony leads one to the conclusion that the jury has the ability to analyze the same variables and make determinations just as valid as those of the experts.[84]

While the Florida courts committed a serious error by failing to establish the reliability of human-factors testimony, they made a graver mistake by accepting testimony concerning the behavior of the reasonably prudent person. Until recent years a general doctrine existed that no witness, expert or not, could state opinions or conclusions about an ultimate issue of fact. Issues of law, such as whether a person's action constituted negligence, were even further removed from the province of witnesses than issues of fact.[85] Following the general trend of relaxing this doctrine, Federal Rule of Evidence 704 (rule 703 in Florida) formally removes the bar to testimony that includes an ultimate issue of fact.[86] All other requirements for admission must still be satisfied.[87]

Decisions by state supreme courts in Oregon and North Dakota are indicative of conflicting approaches to the question of admitting testimony on legal standards. In the Oregon case,[88] which involved facts similar to those in the Florida human-factors cases, the court held that an expert in railroad crossing safety should not have been permitted to testify that the crossing was extrahazardous. The Oregon test of this "extrahazardous" standard is whether a reasonably prudent person can use a crossing safely. Despite the witness' experience in designing railroad crossings, the court ruled him incompetent to aid the jury on this question because he possessed no special knowledge of the characteristics of the reasonably prudent person.[89] The court barred only the conclusion about the standard of law, however, and allowed testimony on the factors that increased the dangerousness of the crossing and the preventive measures that could have been taken.

The North Dakota court,[90] holding that a qualified expert could give an opinion whether a crossing was extrahazardous, applied rule 702 and deter-

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84. Psychological evidence may fail to provide accuracy greater than would occur by chance. See Comment, supra note 58, at 599. Though advocating curtailment of psychologists testifying as experts, the author of this Comment supports a continuation of the psychologist's role in interpreting human behavior based on firsthand knowledge. Id. at 599 n.286.

85. See generally C. McCormick, supra note 34, § 12.

North Carolina retains the traditional "ultimate issue" rule. The form of the question may determine admissibility of the opinion. Given a hypothetical question, an expert may state what causes would lead to a particular result, yet an assertion that the result was actually produced by a particular cause is inadmissible. Also inadmissible is expert testimony that is speculative or conjectural. Hubbard v. Quality Oil Co., 268 N.C. 489, 151 S.E.2d 71 (1966).

86. Fed. R. Evid. 704; Fla. Stat. Ann. § 90.703 (West 1979).

87. United States v. Scavo, 593 F.2d 837, 844 (8th Cir. 1979). See Fed. R. Evid. 704, Adv. Comm. Note.

88. Koch v. Southern Pac. Co., 266 Or. 335, 513 P.2d 770 (1973).

89. Id. at 343-44, 513 P.2d at 774. The court noted that the expert was asked "not what a reasonably prudent railroad crossing designer or builder would do, but whether a reasonably prudent automobile driver could safely use the crossing . . . ," and held that this was "not the subject of expert testimony." Id. at 347, 513 P.2d at 775. But see Harrell v. City of Belen, 93 N.M. 601, 603 P.2d 711 (1979) (clinical psychologist permitted to give opinion as to what would have been a reasonable action for the police to have taken to prevent decedent's suicide).

90. South v. National R.R. Passenger Corp., 290 N.W.2d 819 (N.D. 1980).

mined that an expert could offer assistance on a legal question. The expert was a civil engineer who had researched highway traffic patterns as well as driver behavior and reactions. Since he was intimately familiar with both design of roads and how drivers react to dangers, the expert could assist the jury in determining whether the crossing was extrahazardous.[91]

Compared to the North Dakota approach, the Oregon court's view—that no expert could ever be qualified to voice an opinion concerning the behavior of the reasonable person—is more consistent with the tradition of leaving the determination of ultimate legal issues to the trier of fact.[92] The Federal Rules of Evidence seem to be in accord with this reasoning, although there is no specific exclusion of opinions on ultimate legal issues. Two justifications for exclusion may be derived from the assistance requirement of rule 702. First, no witness can be an expert on the behavior of the reasonably prudent person, since the reasonable person is a mythical one, "not to be identified with any ordinary individual."[93] Accordingly, an expert has no basis for his testimony and cannot satisfy the assistance test. Second, opinions that only instruct the trier of fact on which result to reach also fail to provide the requisite assistance.[94]

Of the four Florida human-factors cases discussed above, the *Cole* decision went the farthest in admitting improper legal standard testimony. Dr. Scherer testified that a reasonably prudent person could have had plaintiff's accident,[95] thus effectively concluding that plaintiff was not negligent. Dr. Scherer's qualifications to testify as an expert on perception difficulties, appear to be questionable,[96] and certainly do not indicate that he could be classified as an expert on the reasonably prudent person standard. His testimony would also be barred under the traditional approach, which reserves determination of ultimate legal issues to the jury alone.

How the Federal Rules of Evidence will affect future decisions about admission of human-factors testimony in Florida and other jurisdictions is unclear. The standard for admission of expert testimony since adoption of the Federal Rules of Evidence, is whether proffered opinions will assist the trier of fact. The former test was whether the subject matter of the opinion exceeds the scope of knowledge of the average layperson. Although the Florida Supreme Court in *Buchman* recognized the propriety of the current standard, the court applied it only superficially. Since the jury had to consider questions

91. Id. at 831 (the court specified that its determination of admissibility was made with respect to rule 702).

92. See C. McCormick, supra note 34, § 12.

93. W. Prosser, The Law of Torts, § 32, at 151 (4th ed. 1971).

94. Fed. R. Evid. 704, Adv. Comm. Note (opinions that tell the jury what result to reach do not meet the rule 702 requirement of assisting the jury and also violate the rule 403 provision against evidence that, although relevant, wastes time). See Stoler v. Penn Cent. Transp. Co., 583 F.2d 896 (6th Cir. 1978) (although noting that there has not been a conclusive determination concerning admissibility of ultimate legal opinions, court held that exclusion of such an opinion was not an abuse of discretion).

95. 352 So. 2d at 879-81.

96. See text accompanying notes 55-57 supra.

of driver reaction time and whistle audibility, subjects on which two human-factors specialists had testified at trial, the court held that the assistance requirement was satisfied.[97] By failing to determine whether human-factors testimony met the level of reliability necessary to qualify as scientifically based, the supreme court created the substantial possibility that the foundation of the jury's negligence determination consisted of invalid expert conclusions.

Similarly, prejudice[98] arises when a witness testifies on a subject outside his area of expertise, as in *Hill*. And if a witness is not an expert on the specific topic that he addresses, his opinions cannot assist the jury. Finally, conclusions about the behavior of the reasonably prudent person only declare what result the jury should reach rather than provide any assistance. Such testimony should always be rejected as being "an unwarranted incursion into the sphere of influence belonging solely to the jury."[99]

To counter the danger of prejudice, the Florida Evidence Code provides for significant attorney input into the decision to admit expert testimony. Rule 705 stipulates that a party opposing admission of an expert opinion may conduct a voir dire examination of the proposed witness before trial. If prima facie evidence that the witness lacks sufficient basis for his opinion is established, the court will bar the testimony, subject to subsequent proof of the basis.[100] Federal rule 705 allows cross-examination of the expert at trial concerning his basis but does not specifically provide for pretrial probing.[101] Thus, an alert attorney in Florida may prevent testimony before the jury by an expert who is not sufficiently qualified or whose field is not scientifically reliable. This system is more effective than allowing an expert to testify and then relying on cross-examination to correct misconceptions in the minds of the jurors.

It remains the ultimate responsibility of the courts themselves, however, to bar opinions on legal standards. If the jury is to have a more meaningful role in the trial process than that of a conduit for experts' determinations, conclusions on whether particular conduct satisfies the applicable legal standard should remain solely with the jury. Human-factors testimony should be challenged by opposing counsel and excluded by the court unless it is demonstrated that the evidence has scientific reliability. Otherwise, there is a

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97. 381 So. 2d at 230.

98. If the prejudicial impact of expert opinion evidence substantially outweighs its probative value, such evidence may be excluded by the trial court. United States v. Milton, 555 F.2d 1198 (5th Cir. 1977).

The Florida courts that rejected human factors testimony were concerned with the prejudicial impact that improper expert testimony could have on a jury. That the jury might have reached the same verdict based on evidence independent from the expert opinions did not justify deeming the expert opinions harmless error. *Kubalski*, 323 So. 2d at 34. Moreover, unnecessary expert testimony can have the effect of unduly influencing the jury's determination of negligence. *Buchman*, 358 So. 2d at 842.

99. 352 So. 2d at 880 (Downey, J., concurring).

100. Fla. Stat. Ann. § 90.705(2) (West 1979).

101. Fed. R. Evid. 705.

significant danger that the functions of the jury will be usurped by the human-factors "expert."

ROBERT LYMAN DEWEY

Constitutional Law—*United States v. DiFrancesco*: "Continuing Jeopardy"—An Old Concept Gains New Life

In *Kepner v. United States*[1] Justice Holmes stated in regard to the double jeopardy clause of the fifth amendment:[2] "[L]ogically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause."[3] While the United States Supreme Court repeatedly has rejected Holmes' concept[4] of "continuing jeopardy,"[5] a recent decision has given it new life. In a case of first impression,[6] the Court in *United States v. DiFrancesco*[7] considered the constitutionality of a statute that allows the government to appeal a sentence as too lenient.[8] In affirming the

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1. 195 U.S. 100 (1904).

2. "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

3. 195 U.S. at 134 (Holmes, J., dissenting).

4. The phrase "continuing jeopardy" has been said to describe "both a concept and a conclusion." Breed v. Jones, 421 U.S. 519, 534 (1975). The concept denotes the notion advanced by Justice Holmes: once jeopardy attaches in a particular action a defendant remains in jeopardy throughout the proceedings related to that action. 195 U.S. at 134. However, the conclusion "has occasionally been used to explain why an accused who has secured the reversal of his conviction on appeal may be retried for the same offense." 421 U.S. at 534. See, e.g., Price v. Georgia, 398 U.S. 323, 326-29 & n.3 (1970); Green v. United States, 355 U.S. 184, 189 (1957).

5. See, e.g., United States v. Scott, 437 U.S. 82, 90 & n.6 (1978); Breed v. Jones, 421 U.S. 519, 534 (1975); United States v. Jenkins, 420 U.S. 358, 369 (1975); Green v. United States, 355 U.S. 184, 193, 197 (1957).

6. United States v. DiFrancesco, 449 U.S. 117 (1980), was the first case in which the government appealed a sentence imposed pursuant to 18 U.S.C. § 3575 (1976). For a discussion of § 3575, see note 12 infra. In several other cases, the government has appealed because of the trial court's refusal to sentence a defendant under § 3575. See, e.g., United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Bailey, 537 F.2d 845 (5th Cir. 1976); United States v. Stewart, 531 F.2d 326 (6th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Kelly, 519 F.2d 251 (8th Cir. 1975).

7. 449 U.S. 117 (1980).

8. 18 U.S.C. § 3576 (1976). This statute provides:

> With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and impo-

constitutionality of this statute, the Court held that section 3576 of the Criminal Code[9] did not violate either the guarantee against multiple trials or the guarantee against multiple punishment, both inherent in the double jeopardy clause.[10]

Eugene DiFrancesco was convicted of racketeering and bombing in two separate jury trials in the United States District Court for the Western District of New York.[11] Subsequently, the court conducted a special sentencing hearing at which it ruled that DiFrancesco was a "dangerous special offender,"[12]

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sitions of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of a sentence taken by the United States shall foreclose imposition of a sentence more severe that that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

9. Section 3576 is part of the Dangerous Offender Sentencing Statutes of Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 950 (1970) (codified at 18 U.S.C. §§ 3575-78 (1976)).

10. 449 U.S. at 126-43. In so holding, the Court to some extent settled what has become a favorite controversy among academic and professional commentators. For conclusions that prosecutorial appeals of sentences are constitutional, see Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19 (1978); Stern, Government Appeals of Criminal Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences, 18 Am. Crim. L. Rev. 51 (1980); Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001 (1980); Note, Double Jeopardy Limits on Prosecutorial Appeal of Sentences, 1980 Duke L. J. 847; Recent Development, Government Appeal of Dangerous Special Offender Sentence Violates Double Jeopardy Clause, 65 Cornell L. Rev. 715 (1980).

For conclusions that such appeals are unconstitutional, see ABA Ad Hoc Committee on Federal Criminal Code, Report on Government Appeal of Sentences, 35 Bus. Law. 617 (1980); Freeman & Earley, *United States v. DiFrancesco*: Government Appeal of Sentences, 18 Am. Crim. L. Rev. 91 (1980); Spence, The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?, 37 Md. L. Rev. 739 (1978); Note, Twice in Jeopardy: Prosecutorial Appeals of Sentences, 63 Va. L. Rev. 325 (1977).

See also Note, The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals, 89 Harv. L. Rev. 356 (1975) (question unclear).

11. United States v. DiFrancesco, 604 F.2d 769, 772-73 (2d Cir. 1979), rev'd, 449 U.S. 117 (1980). DiFrancesco was indicted first on the bombing charges (18 U.S.C. §§ 1361, 371, 842(j) (1976)), but was tried first on the racketeering indictment (18 U.S.C. §§ 1962(c), (d) (1976)). 604 F.2d at 772-73.

12. 604 F.2d at 779-80. Prior to the trial on the racketeering charges, the government filed notice pursuant to 18 U.S.C. § 3575(a) (1976), alleging that DiFrancesco was a "dangerous special offender" as defined in sections 3575(e)(3) and (f). 604 F.2d at 779. Such notice indicates the government's intention to seek, upon defendant's conviction, imposition of an enhanced sentence under section 3575(b). Section 3575(b) requires the district court to hold a special sentencing hearing to determine whether the defendant is a "dangerous special offender." This statute provides in pertinent part:

> Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. . . . If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony.

and sentenced him to concurrent ten-year prison terms on the racketeering charges, to be served concurrently with the nine-year sentence imposed previously on the bombing charges.[13] Dissatisfied with this sentence, the government appealed pursuant to section 3576.[14] The United States Court of Appeals for the Second Circuit, rejecting the government's request for an enhanced sentence on the ground that section 3576 violated the double jeopardy clause,[15] affirmed both the sentences and the convictions.[16]

In reversing the Second Circuit, the Supreme Court analyzed three basic issues. First, noting that the double jeopardy focus fell on the sentence rather than on the appeal,[17] the Court considered whether a criminal sentence should be accorded the degree of finality that attaches to a verdict of acquittal.[18] Citing early English common law,[19] *North Carolina v. Pearce*,[20] and the policy behind the double jeopardy bar to reprosecution after an acquittal,[21] the Court concluded that "neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy sup-

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The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

18 U.S.C. § 3575(b) (1976).

13. 604 F.2d at 780.

14. Id. The government based its appeal on the ground that the trial court abused its discretion: despite its findings that defendant was a "dangerous special offender," the trial court imposed sentences that amounted to additional imprisonment for defendant of only one year. See notes 8, 12 and accompanying text supra. DiFrancesco appealed from both convictions, but did not seek review of the sentences. 449 U.S. at 123.

15. 604 F.2d at 783. The Second Circuit's holding was based principally on Kepner v. United States, 195 U.S. 100 (1904), and United States v. Benz, 282 U.S. 304 (1931). 604 F.2d at 783-85. For a discussion of *Kepner* and *Benz*, see text accompanying notes 35-38 & 59-63 infra. The court distinguished North Carolina v. Pearce, 395 U.S. 711 (1969), on the ground that the defendant in *Pearce* had voluntarily subjected himself to the risk of an increased sentence. 604 F.2d at 786; see text accompanying notes 53-57 infra. By holding that section 3576 was unconstitutional, the Second Circuit lacked jurisdiction to consider the merits of the government's appeal, and therefore dismissed it. See United States v. Wilson, 420 U.S. 332, 339 (1975).

In a concurring opinion, District Judge Haight (sitting by designation from the Southern District of New York) argued that the government's appeal should have been dismissed because 18 U.S.C. §§ 3575-76 did not apply to the defendant. He reasoned that DiFrancesco could have been sentenced to two consecutive 20-year terms without imposition of the "dangerous special offender" sentence, and therefore did not qualify under section 3575(f) for the special sentence. 604 F.2d at 787-89 (Haight, J., concurring). He added, however, that in the event his interpretation proved incorrect, he would support the majority's constitutional analysis. Id. at 789 n.7.

16. Id. at 773-79.

17. 449 U.S. at 132-35.

18. Id. at 132-33.

19. Id. at 133-34. The Court observed that at early English common law, the trial court practice of increasing a sentence during the same term of court was not thought to violate double jeopardy principles. For several brief summaries of the United States Constitution's assimilation of early English common law principles of double jeopardy, see United States v. Scott, 437 U.S. 82, 87 (1978); United States v. Wilson, 420 U.S. 332, 339-40 (1975); Green v. United States, 355 U.S. 184, 187-88 (1957); id. at 200 (Frankfurter, J., dissenting).

20. 395 U.S. 711 (1969). See text accompanying notes 52-55 infra.

21. "We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent." 449 U.S. at 136 (paraphrasing Green v. United States, 355 U.S. 184, 187-88 (1957)). The Court stated that a government appeal of a sentence did not subject a defendant to this ordeal, because the appeal must be taken promptly and because the appeal is essentially a nonadversarial judicial review of the record of the sentencing court. 449 U.S. at 136-37.

port" the proposition that a sentence carries the same degree of finality as an acquittal.[22] The Court then considered whether an increase in a sentence pursuant to section 3576 constituted multiple punishment. In concluding that it did not, the Court stated that the Second Circuit's reliance on dictum in *United States v. Benz*[23] was unfounded, because the dictum's source, *Ex parte Lange*,[24] stood only for the proposition that a defendant may not be sentenced beyond what is legislatively authorized.[25] Finally, the Court compared the sentence review procedure provided in section 3576 with the two-stage criminal proceeding held constitutional in *Swisher v. Brady*.[26] Noting that the procedure under section 3576 is more limited in scope than the procedure in *Swisher*, the Court concluded that "the limited appellate review of a sentence authorized by section 3576 is necessarily constitutional."[27]

In a vigorous dissent,[28] Justice Brennan argued that sentencing and acquittal procedures are sufficiently similar so that no meaningful distinction may be drawn between the two for double jeopardy purposes.[29] He also criticized the majority's refusal to follow established dicta in *Lange, Benz*, and *Reid v. Covert*,[30] which stated that an increase in sentence severity subsequent to its imposition constituted multiple punishment.[31] He characterized the Court's comparison of the procedure provided in section 3576 with that upheld in *Swisher v. Brady* as being "similarly misplaced."[32]

Although the Supreme Court's application of the double jeopardy clause has been infamously amorphous,[33] a brief survey of prior decisions is a pre-

22. 449 U.S. at 132. Accordingly, a government appeal of a sentence did not constitute a second prosecution in violation of the double jeopardy clause. Id. at 139.

23. 282 U.S. 304 (1931). See text accompanying notes 59-63 infra.

24. 85 U.S (18 Wall.) 163 (1874). See text accompanying notes 56-58 infra.

25. 449 U.S. at 138-39.

26. 438 U.S. 204 (1978). See text accompanying notes 67-69 infra.

27. 449 U.S. at 141. The Court interpreted section 3576 "as establishing at the most a two-stage criminal proceeding." Id. at 439 n.16.

28. Id. at 143-52 (Brennan, J., dissenting; White, Marshall, Stevens, JJ., joining). In addition to joining Justice Brennan's dissent, Justice Stevens filed a separate dissenting opinion that merely echoed Justice Harlan's dissent in *Pearce*. See note 54 infra.

29. "The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the Double Jeopardy Clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal." Id. at 146. In Bullington v. Missouri, 101 S. Ct. 1852 (1981), the Court adopted this position with respect to the sentencing procedure employed by the State of Missouri. See discussion at note 70 infra.

30. 354 U.S. 1, 37 n.68 (1957) (plurality opinion) ("In *Swain v. United States*, 165 U.S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional."). *Reid* was subsequently adopted as the controlling opinion of the Court in Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 237 (1960); Grisham v. Hogan, 361 U.S. 278, 280 (1960); and McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 284 (1960).

31. 449 U.S. at 144-45. This criticism approved the position taken by the Second Circuit. See note 15 supra.

32. 449 U.S. at 151.

33. "[V]irtually all of the [double jeopardy] cases turn on the particular facts and thus escape meaningful categorization. . . ." Illinois v. Somerville, 410 U.S. 458, 464 (1973). "[T]he riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with

requisite to understanding the Court's tripartite analysis in *DiFrancesco*. Beginning with *United States v. Ball*,[34] the Supreme Court established that the double jeopardy clause is an absolute bar to a second trial following an acquittal. In *Kepner v. United States*[35] the Court applied this rule to a government appeal.[36] In that case, the defendant was acquitted at his original trial, but the government appealed pursuant to traditional Philippine procedure that provided for a trial de novo in the Philippine Supreme Court. Applying the *Ball* principle, the United States Supreme Court rejected Justice Holmes' "continuing jeopardy" theory[37] and held that the procedure in the appellate court was a second trial on the merits.[38] The Court subsequently has applied the *Ball* principle to bar retrials following an acquittal even when "the acquittal was based upon an egregiously erroneous foundation."[39]

In *Green v. United States*[40] the Court extended this rule to cases of "implied acquittals." In *Green*, the defendant was convicted of first-degree murder after an appellate court had reversed his prior conviction on the lesser included offense of second-degree murder. Rejecting an argument based on *Trono v. United States*[41] that the defendant had "waived" his double jeopardy claim by appealing his first conviction, the Court reversed the second conviction on the ground that the prior verdict of guilty on the second-degree murder

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confusion upon confusion." Note, 24 Minn. L. Rev. 522, 522 (1940), quoted in Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 82. This Note does not attempt to examine the vast and integrated history of the double jeopardy clause. For a brief but in-depth survey of such history, see J. Sigler, Double Jeopardy 1-37 (1969).

34. 163 U.S. 662 (1896). In *Ball*, three defendants were tried upon a technically defective murder indictment: one was acquitted and two were convicted. Subsequent to the Supreme Court's reversal of the convictions in Ball v. United States, 140 U.S. 118 (1891), all three defendants were retried and convicted. On second appeal, the Court held that the double jeopardy clause prohibited reprosecution of the formerly acquitted defendant but did not prohibit reprosecution of the defendants formerly convicted. The Court reasoned that the double jeopardy clause prohibited retrial of a defendant following a favorable ruling by the finder of fact. 163 U.S. at 671.

35. 195 U.S. 100 (1904).

36. Prior to 1970 the government's authority to appeal was severely limited. In United States v. Sanges, 144 U.S. 310 (1892), the Supreme Court held that the government could not appeal a criminal decision absent explicit legislative authorization. Id. at 318, 322-23. This authorization was first granted by the Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246 (1907), which empowered the government to appeal from a decision dismissing an indictment or arresting a judgment when such decision was based upon the construction or invalidation of a statute. After several amendments, Congress repealed the 1907 Act in 1970 and replaced it with its current version: the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1890 (1971) (codified at 18 U.S.C. § 3731 (1976)). For a thorough account of the evolution of the Omnibus Act, see United States v. Sisson, 399 U.S. 267, 291-96 (1970).

37. See notes 3-5 and accompanying text supra.

38. 195 U.S. at 133.

39. Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam); Arizona v. Washington, 434 U.S. 497, 503 (1978) (quoting *Fong Foo*) (dictum). But cf. United States v. Wilson, 420 U.S. 332, 344-45 (1976) (government appeals following acquittals are prohibited only when there is the possibility of reprosecution for the same offense).

40. 335 U.S. 184 (1957).

41. 199 U.S. 521 (1905). See text accompanying notes 45-47 infra. With respect to the waiver doctrine of *Trono*, the *Green* Court stated: "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." 355 U.S. at 193-94 (footnote omitted).

charge operated as an "implicit acquittal" of the first-degree murder charge.[42] The Court reasoned that with respect to the first-degree murder charge, jeopardy attached in the first trial when the jury "was given a full opportunity to return a verdict" on that charge.[43]

The Court has refused to extend the absolute rule applied to acquittals of substantive offenses to the sentencing area. The Court has at various times advanced several different theories to explain the permissibility of increasing a sentence following an appeal of a conviction.[44] The oldest of these theories was enunciated in *Trono v. United States*.[45] There the defendants were acquitted of murder but convicted of assault. On defendants' appeal, the Philippine Supreme Court reversed the assault conviction but convicted the defendants of murder.[46] The United States Supreme Court upheld the murder conviction, stating that the defendants had "waived" their right to invoke the plea of former jeopardy on the murder charge by appealing their assault convictions.[47]

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42. 355 U.S. at 190.

43. Id. at 191.

44. Aside from the waiver doctrine of *Trono*, the Court has employed two other theories. One is the balancing theory espoused by Justice Harlan in United States v. Tateo, 377 U.S. 463 (1964):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Id. at 466. Although this theory easily explains reprosecution following a conviction, it does not easily explain an increase in sentence following reconviction. To strike the balance in favor of the state, a court would have to find that the defendant did not preserve his interest in avoiding the anxiety of resentencing, and his interest in having the same tribunal that tried the case fix the sentence. Clearly, the balance swings against the defendant, provided that he forfeits his interests by appealing his conviction; however, this result simply restates the "waiver" theory.

The third theory is the continuing jeopardy "conclusion" most recently employed in Price v. Georgia, 398 U.S. 323, 326-27 & n.3 (1970). Although the *Price* opinion referred to the theory as a "concept," id. at 326, the Court later sought to distinguish Holmes' notion of continuing jeopardy from *Price*'s by denoting Holmes' as a "concept" and *Price*'s as a "conclusion." Breed v. Jones, 421 U.S. 519, 534 (1975). See note 4 supra. Despite this unnecessary confusion, the two notions are readily distinguishable. Holmes' *concept* means simply that for any one crime there can attach only one jeopardy regardless of how often a defendant may be tried for that crime. For example, if a defendant's sentence for a certain crime is increased, he is not subjected to a second jeopardy because he is being punished only for the *one* crime he committed. Thus, the jeopardy does not terminate until the state has exhausted its power to pursue the defendant. *Price*'s *conclusion* is just that: a conclusory or *post hoc* characterization of a certain event that facilitates an understanding of the rationale upon which the event is based. Price permitted reprosecution of a defendant whose conviction was reversed because of an erroneous jury instruction. In this context, "continuing jeopardy" was merely a shorthand expression used to convey the Court's belief that a defendant once adjudged guilty should not be set free upon a procedural technicality which may or may not be related to the original verdict.

45. 199 U.S. 521 (1905).

46. As in *Kepner*, the Supreme Court of the Philippine Islands was empowered to determine the guilt or innocence of the defendants and to impose sentences upon appeal. Id. at 533-34.

47. Id. at 533. With respect to a defendant's appeal from the judgment of a trial court, the Court stated:

> As the judgment stands before he appeals, it is a complete bar to any further prosecu-

This waiver doctrine was extended in *Flemister v. United States*,[48] *Ocampo v. United States*,[49] and *Stroud v. United States*[50] to allow sentence increases following conviction upon retrial.

Although *Green* is cited for substantially vitiating *Trono* and its progeny,[51] the underlying substantive import of these decisions was reaffirmed emphatically in *North Carolina v. Pearce*.[52] There the defendant was sentenced to prison after his conviction for assault with intent to commit rape. Upon securing the reversal of his conviction, the defendant was again convicted and was sentenced to a prison term greater than the original. In holding that the double jeopardy clause did not bar an increase in sentence following a retrial for the same offense[53], the Court rejected the argument that the defendant's initial sentence should be treated as an "implied acquittal" of any greater sentence, distinguishing *Green* as "based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was *acquitted*."[54] In what smacks of a subtle resurrection of the waiver doctrine, the

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tion for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.

Id.

48. 207 U.S. 372 (1907). In *Flemister*, the defendant was convicted in the court of first instance of resisting arrest. On defendant's appeal, the Philippine Supreme Court decided that the offense fell within a different statute, and increased the sentence. The United States Supreme Court upheld the increase. Id. at 374.

49. 234 U.S. 91 (1914). The facts in *Ocampo* were very similar to those in *Flemister*. The Court relied on *Kepner* and *Flemister* in again upholding an increase in sentence by the Philippine Supreme Court. Id. at 102.

50. 251 U.S. 15 (1919). The defendant in *Stroud*, popularly known as the "Birdman of Alcatraz," was tried and convicted three times on the same first degree murder charge. Imposed respectively were sentences of death, life imprisonment, and death. Relying on *Trono*, the Court held that the sentence of life imprisonment following the second trial did not prohibit imposition of the death penalty following the third trial. Id. at 17-18. The Court observed that "the plaintiff in error himself evoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution." Id. at 18.

51. See, e.g., Burks v. United States, 437 U.S. 1, 17 (1978) (citing *Green*) ("It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial."). But see note 55 & accompanying text infra.

52. 395 U.S. 711 (1969).

53. Id. at 719-23.

54. Id. at 720 n.16 (emphasis in original). See also Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973) ("The possibility of a higher sentence was recognized and accepted [in *Pearce*] as a legitimate concomitant of the retrial process."). In response to the *Pearce* majority's distinction of *Green*, Justice Harlan wrote:

> Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. . . . And the concept or fiction of an "implicit acquittal" of the greater offense . . . applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment . . . .
>
> If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the

Court argued that the "rationale" for allowing the government to retry a defendant after a reversed conviction "rests ultimately upon the premise that the original conviction has, *at the defendant's behest*, been wholly nullified and the slate wiped clean."[55]

In the multiple punishment area, the Supreme Court in *Ex parte Lange*[56] established that a trial court may not impose an additional sentence subsequent to one legally imposed and fully executed. In *Lange*, the defendant was convicted of stealing mail bags, a crime punishable by imprisonment for not more that one year *or* a fine of not less than $10 nor more than $200. Nonetheless, the defendant was sentenced to one year's imprisonment *and* fined $200. Noting that the defendant had paid the fine, the Court granted defendant's writ of habeas corpus, holding that "when the prisoner, as in this case, had fully suffered one of the alternative punishments for which alone the law subjected him, the power of the court to punish further was gone."[57] More importantly, the Court observed in dictum that "after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he [cannot] be again sentenced on that conviction to another . . . punishment."[58]

In *United States v. Benz*,[59] the Court again addressed the issue of a trial court's sentencing authority. There the defendant pleaded guilty to a charge of violating the National Prohibition Act and was sentenced to a ten-month prison term. While serving this sentence, and before expiration of the term of the federal district court which had imposed the sentence, the defendant petitioned the court for a modification of his punishment. Over the government's objection, the court reduced the term of imprisonment to six months. On appeal by the government, the Circuit Court of Appeals for the Third Circuit certified to the Supreme Court the question of whether a federal court had the power to reduce a term of imprisonment under such circumstances.[60] Holding that such reduction was permissible,[61] the Court, citing *Lange*,[62] added in dic-

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provision does not comprehend "sentences"—as distinguished from "offenses"—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one.

395 U.S. at 746-47 (Harlan, J., dissenting) (citations omitted).

55. Id. at 720-21 (emphasis added). At least one commentator recognized the possible effect of *Trono* and its progeny post-*Green*. Low, Special Offender Sentencing, 8 Am. Crim. L.Q. 70, 86-87 (1970) ("It seems clear to me that if *Stroud, Ocampo*, and *Flemister* are correct, then it should be constitutional for the government to seek an increase in the sentence on appeal.").

56. 85 U.S. (18 Wall.) 163 (1874).

57. Id. at 176.

58. Id. at 173.

59. 282 U.S. 304 (1931).

60. Id. at 306. The question certified to the Court was:

> After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?

61. Id. at 306-07, 311.

62. Although the Court cited *Lange* extensively, it did not attempt to rationalize the distinguishing fact that *Lange* dealt only with the prohibition against imposing punishment beyond that which was statutorily authorized.

tum "that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment . . . ."[63]

Sixteen years later, however, the *Benz* dictum was qualified in *Bozza v. United States*.[64] The defendant in *Bozza* was convicted of violating several Internal Revenue provisions that mandated both a fine *and* imprisonment, but was sentenced to imprisonment only. Upon discovering his error, the trial judge several hours later returned the defendant to court and added the mandatory fine. Relying on *Benz*, the defendant urged that the increased punishment placed him twice in jeopardy. The Court rejected this argument on the ground that the pronouncement of final sentence does not preclude correction when that sentence is invalid.[65] Accordingly, the court held that substitution of a valid sentence for an invalid one, despite its increased severity, "did not twice place the [defendant] in jeopardy for the same offense."[66]

In the recent case of *Swisher v. Brady*,[67] the Court again had occasion to examine the double jeopardy clause. In that case, the Court considered a challenge to a procedure employed by the Maryland juvenile criminal system. Under that procedure, a master submitted a record of findings of fact, conclusions of law and recommendations to the juvenile court judge who could adopt, modify or reject it. This record was then subject to review at the election of the juvenile defendant, the State or the judge sua sponte, except that when the State filed exceptions and sought review of the judge's decision, the review was limited solely to the record developed by the master.[68] In rejecting the argument that the Maryland procedure required a juvenile defendant to stand trial a second time in violation of the double jeopardy clause, the Court stated that "an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge."[69]

Faced with these variegated and tangentially related prior cases, the Supreme Court decided *United States v. DiFrancesco*. Although yet to express

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63. 282 U.S. at 307. Similar dicta have been expressed in other Supreme Court and lower court cases. See, e.g., Reid v. Covert, 354 U.S. 1, 37 n.68 (1957); United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977); Virgin Islands v. Henry, 533 F.2d 876 (3d Cir. 1976); United States v. Turner, 518 F.2d 14 (7th Cir. 1975); Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); United States v. Walker, 346 F.2d 428 (4th Cir. 1965); United States v. Chiarella, 214 F.2d 838 (2d Cir.), cert. denied, 348 U.S. 902 (1954); Oxman v. United States, 148 F.2d 750 (8th Cir.), cert. denied, 325 U.S. 887 (1945); Frankel v. United States, 131 F.2d 756 (6th Cir. 1942); Rowley v. Welch, 114 F.2d 499, 501 n.3 (D.C. Cir. 1940). But cf. Vincent v. United States, 337 F.2d 891 (8th Cir. 1964), cert. denied, 380 U.S. 988 (1965) (sentence could be increased where defendant has not commenced service). See also Robinson v. Warden, 455 F.2d 1172, 1176 (4th Cir. 1974) (upholding increase) ("We find no suggestion that by dictum the *Benz* Court intended to broaden *Ex parte Lange's* interpretation of the double jeopardy clause.").

64. 330 U.S. 160 (1947).

65. Id. at 166.

66. Id. at 167.

67. 438 U.S. 204 (1978).

68. Id. at 210-11 & n.9 (describing and quoting Md. R.P. 911).

69. 438 U.S. at 215.

a satisfactory rationale,[70] the Court's prior decisions have evidenced different treatment of acquittals and sentencing. In *United States v. Ball* and *Kepner v. United States*, the Court established that the double jeopardy clause is an absolute bar to a second trial following an acquittal.[71] This rule was extended in *Green v. United States* to preclude retrial of a defendant for a greater offense following a reversal of his conviction on a lesser included charge.[72] In *North Carolina v. Pearce*, however, the Court refused to extend *Green*'s rationale to sentencing.[73] Based arguably on the waiver doctrine of *Trono v. United States*,[74] *Pearce* effectively demonstrated that a sentence does not carry the finality of an acquittal.

The *DiFrancesco* Court's reliance on *Pearce* nonetheless may be criticized in at least two respects. First, the *DiFrancesco* Court's interpretation of *Pearce*'s dictate regarding the finality of sentences is illogical. The Court reasoned that "[i]f any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial."[75] The Court then added that any difference between the imposition of a new sentence after retrial and one imposed following an appeal "is no more than a 'conceptual nicety.' "[76] However, this "conceptual nicety"—retrial before resentencing—is the very mechanism that removed the sentence ceiling in *Pearce*: "[W]e deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials."[77] Second, the waiver doctrine asserted in *Pearce* does not fit *DiFrancesco*. In *Pearce*, the defendant initiated the appeal; in *DiFrancesco*,

70. The *DiFrancesco* Court did note Professor Westen's explanation of the underlying basis for the Court's distinction between judgments of acquittal and verdicts of conviction: the jury's prerogative to acquit against the evidence. 449 U.S. at 130 n.11. See Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1064-65 (1980). The cogency of this rationale can be seen in Bullington v. Missouri, 101 S. Ct. 1852 (1981), a decision handed down several months after *DiFrancesco*. There the defendant initially was convicted of first-degree murder and sentenced to life imprisonment, and subsequently reconvicted and sentenced to death. Under Missouri procedure, once a defendant is convicted of first-degree murder, the prosecutor in a separate proceeding before the same jury must prove beyond a reasonable doubt that the defendant's crime warrants imposition of the death penalty. The Court held that because under Missouri law the sentencing proceeding at the defendant's first trial was almost identical to the trial on the question of innocence or guilt, the death penalty could not be imposed upon retrial. Id. at 1862. The Court distinguished *Pearce*, on the ground that "there was no separate sentencing proceeding at which the prosecution was required to prove—beyond a reasonable doubt or otherwise—additional facts in order to justify the particular sentence." Id. at 1858.

As Professor Westen points out, however, this rationale cannot explain the Court's willingness to attribute the same degree of sanctity to bench trial acquittals as it does to jury acquittals. He suggests that the Court could eliminate a great deal of the confusion plaguing the double jeopardy decisions by recognizing *why* acquittals should be accorded such a high degree of finality—because the jury should be the final arbiters of the defendant's innocence or guilt. This recognition would of course entail a redefining of the word "acquittal." See Westen, supra, at 1064-65.

71. See text accompanying notes 34-39 supra.

72. See text accompanying notes 40-43 supra.

73. See text accompanying notes 52-55 supra.

74. See text accompanying notes 45-47 supra.

75. 449 U.S. at 135 (footnote omitted).

76. Id. at 136.

77. 395 U.S. at 722.

the government appealed over the objection of the defendant.[78]

Similarly, the Court's analysis of the multiple punishment issue is also subject to criticism. In concluding that an increase in sentence on appellate review does not constitute multiple punishment, the Court stated that a defendant has no expectation of finality in an original sentence that Congress specifically subjected to review.[79] Manifestly, this syllogism merely begs the constitutional question of the validity of such a provision.

Though the Court's characterizations of the holdings in *Ex parte Lange* and *United States v. Benz* are technically correct, the Court chose to ignore a well-established principle spawned by dicta in both of the cases. The Court observed that *Lange* stated simply that a trial judge may impose only a statutorily authorized sentence, while *Benz* stated that a trial judge had the power to reduce a defendant's sentence after service had begun.[80] In limiting the *Benz* dictum to *Lange*'s specific context,[81] however, the Court ran roughshod over dicta in those cases[82] and others which stated that a trial court may not increase a validly imposed sentence once service of that sentence had begun.[83] Furthermore, such cavalier treatment of these time-honored dicta cannot be justified on *Bozza*'s qualification of *Benz*.[84] *Bozza* dealt with the issue of increasing an invalid sentence and in no way addressed the issue of increasing a valid sentence. Thus, *Bozza* does not disturb the *Lange-Benz* prohibition against increasing validly imposed sentences.[85]

Finally, the *DiFrancesco* Court's analogy to the procedure upheld in *Swisher v. Brady*[86] invites criticism. The *DiFrancesco* Court lightly dismissed the difference between an informal master's proceeding and a federal trial as being "of no constitutional consequence."[87] The Court failed to recognize, however, that under the Maryland system the master has no authority to impose sentences.[88] As Justice Brennan pointed out in his dissent, surely the majority did not intend to characterize a federal trial judge's imposition of

78. Brief for Respondent at 2-9, United States v. DiFrancesco, 449 U.S. 117 (1980). Congress attempted to circumvent this problem by providing for an automatic review of a defendant's conviction and sentence upon the taking of a review by the government. See note 8 supra. Such a provision, however, is at most a forced consent.

79. 449 U.S. at 139.

80. Id. at 138. See text accompanying notes 56-63 supra.

81. 449 U.S. at 139.

82. See text accompanying notes 58 & 63 supra.

83. See cases cited note 63 supra.

84. See text accompanying notes 64-66 supra.

85. Indeed, several circuit courts have treated *Bozza* in precisely this manner. See, e.g., Mayfield v. United States, 504 F.2d 888 (10th Cir. 1974); United States v. Scott, 502 F.2d 1102 (8th Cir. 1974); United States v. Richardson, 498 F.2d 9 (8th Cir.), cert. denied, 419 U.S. 1020 (1974); Thompson v. United States, 495 F.2d 1304 (1st Cir. 1974); United States v. Mack, 494 F.2d 1204 (9th Cir. 1974), cert. denied, 421 U.S. 916 (1975). Nevertheless, *Bozza* may provide precedential support for the Court's holding in *DiFrancesco*. If *DiFrancesco*'s initial sentence is regarded as invalid because of the trial court's abuse of discretion in imposing it, *Bozza* mandates that the sentence *must* be increased. The *DiFrancesco* Court, however, failed to make this argument.

86. 438 U.S. 204 (1978). See text accompanying notes 67-69 supra.

87. 449 U.S. at 141.

88. See Swisher v. Brady, 438 U.S. 204, 211-12 n.9 (1978) (quoting Md. R.P. 911).

sentence as a "mere recommendation."[89] Logically extended, *Swisher*'s rationale would define a federal trial as "a single proceeding which begins with a [trial judge's] hearing and culminates in an adjudication by [an appellate court]."[90]

Criticism notwithstanding, the impact of *DiFrancesco* cannot be underestimated. With the appellate door now open, prosecutors will be free to appeal a sentence whenever a defendant falls within the definition of a "dangerous special offender."[91] Although this freedom will not be without statutory restraint,[92] appeals pursuant to section 3576 possibly could deluge the already overburdened appellate courts. Nevertheless, appellate review of sentences imposed under the Dangerous Special Offender provisions could to a limited extent provide a check on what has become a major problem in the criminal justice system: lack of sentence uniformity.[93]

Moreover, *DiFrancesco* could have a profound impact on both existing and future legislation. The Dangerous Special Drug Defender provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970[94] practically mirrors the Dangerous Special Offender provisions. To date, the appeal provision provided in section 849(h) of the Act—the counterpart of section 3576[95]—has not been used by the government. In light of *DiFrancesco*, however, it will not be surprising to see a proliferation in the government's use of this appeal provision. More importantly, section 3576 could be a forerunner of a wide-ranging system of appellate review of all criminal sentences. Legislation now pending in Congress would allow the government to appeal any sentence that falls below that established by a set minimum guideline.[96] The timeliness of *DiFrancesco* is thus crucial in that it may well assuage Congress'

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89. 449 U.S. at 152 (Brennan, J., dissenting).

90. 438 U.S. at 215. See text accompanying note 69 supra. Furthermore, the appellate procedure in *DiFrancesco* conceivably could allow the prosecution a forbidden "second crack" at the defendant, because review may incorporate facts outside the trial record.

> The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or *remand for further sentencing proceedings and imposition of sentence* . . . .

18 U.S.C. § 3576 (emphasis added).

91. See 18 U.S.C. § 3575(e) (1976).

92. The government may appeal only when "the sentencing procedure employed [is] [un]lawful, the findings made [are] clearly erroneous, or the sentencing court's discretion [is] abused." 18 U.S.C. § 3576 (1976).

93. See, e.g., S. Rep. No. 553, 96th Cong., 2d Sess. 918 (1980) ("Unwarranted disparity occurs in the sentences imposed by judges in the same district and in sentences imposed from one district or circuit in the Federal system to another."). See generally M. Frankel, Criminal Sentences: Law Without Order (1973); P. O'Donnel, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System (1977). This argument was one of the underlying bases of the decision in *DiFrancesco*. 449 U.S. at 142.

94. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. §§ 841-849 (1976)).

95. 21 U.S.C. § 849(h) is a verbatim replication of 18 U.S.C. § 3576.

96. Compare S. 1722, 96th Cong., 1st Sess. § 3725 (1979) (allowing government appeals of sentences) with H.R. 6915, 96th Cong., 2d Sess. § 4101 (1980) (omitting any provision allowing government appeals of sentences).

doubts concerning the constitutionality of such legislation.[97] Similarly, *DiFrancesco* may give rise to the enactment of state statutes similar to section 3576. Thus far, no state has allowed its prosecutors to appeal a sentence unilaterally.[98] But with the constitutionality of section 3576 now secure, states may begin affording their prosecutors the same power as that enjoyed by their federal counterparts.[99]

The Supreme Court rightly decided *United States v. DiFrancesco*, but not without paying a high price. As the Court noted, the Dangerous Special Offender provisions, including section 3576, represent a concentrated effort by Congress to attack a specific problem in our criminal justice system.[100] Section 3576 was enacted as a direct result of the lenient sentences imposed in cases involving organized crime management personnel.[101] As a result of the legal maze created by the double jeopardy cases, the Court was able to effectuate Congress' intent by concocting a decision that rests precariously within the bounds of stare decisis. Though the Supreme Court has in good faith attempted to find its way through this maze, it has done nothing less than return to the point from which it began. By failing to articulate a satisfactory theory for its conviction-acquittal distinction regarding double jeopardy, the *DiFrancesco* Court has given life to a theory that it long ago rejected.[102] *DiFrancesco* redefines double jeopardy, at least for defendants designated as "dangerous special offenders," as "one continuing jeopardy from its beginning to the end of the [appeal]."[103]

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97. See S. 1722, 96th Cong., 1st Sess. § 3725(b) (1979). Despite the Second Circuit's holding in *DiFrancesco*, the Senate Judiciary Committee Report on S. 1722 noted that while the Committee disagreed with that holding, it modified its bill to provide that an initial sentence subject to review is "provisional." S. Rep. No. 553, 96th Cong., 2d Sess. 1140 (1979). For a complete documentary tracing the American Bar Association's sinuous history concerning its position on government appeals, see ABA Ad Hoc Committee on Federal Criminal Code, Report on Government Appeal of Sentences, 35 Bus. Law. 617 (1980).

98. Several states allow appellate courts to increase sentences, but only upon the defendant's motion for review. For a list of state statutes permitting such increases, see Note, Double Jeopardy Limits on Prosecutorial Appeal on Sentences, 1980 Duke L.J. 847, 847 n.5.

99. This result assumes that the state constitution in question would allow government appeals of sentences.

100. 449 U.S. at 142.

101. See S. Rep. No. 617, 91st Cong., 1st Sess. 85-87 (1969), reprinted in 1970 U.S. Code Cong. & Ad. News 4007-09.

102. See notes 51 & 70 supra.

103. Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting). See text accompanying note 3 supra.

Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia

Sex discrimination in academic employment has been found to be both appalling and blatant.[1] In 1958 the consensus of the academic community was that "[w]omen scholars are not taken seriously and cannot look forward to a normal professional career."[2] Since 1962 the federal government has attempted to combat sexism in academic employment through three major statutes[3] and an executive order.[4] The most important of these efforts was the Equal Employment Opportunity Act of 1972,[5] which amended Title VII of the Civil Rights Act of 1964. Title VII originally exempted educational institutions from the federal mandate forbidding employment discrimination.[6] When the Equal Employment Opportunity Act of 1972 was debated, however, Congress concluded that public policy did not justify exemption of educational employees from Title VII coverage.[7] Senator Allen argued that to subject academic institutions to federal antidiscrimination legislation would be to risk their academic freedom,[8] but this argument was rejected by a substantial margin.[9]

Despite the clear intent of Congress to eliminate sex discrimination in

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1. The United States Congress has recognized the acute nature of the problem:

> It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotyped categorizations which in turn would lead to future patterns of discrimination.

Senate Comm. on Labor and Public Welfare, Equal Employment Opportunities Enforcement Act of 1971, S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971).

2. T. Caplow & R. McGee, The Academic Marketplace 226 (1958).

3. The three major pieces of antidiscrimination legislation are as follows: 1) the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. III 1979)), which forbids employment discrimination by public and private educational institutions; 2) Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235 (codified, as amended, at 20 U.S.C. §§ 1681-1686 (1976) and amending scattered sections of 29, 42 U.S.C.), which forbids discrimination under any educational program receiving federal funds; and 3) the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976)), which prohibits sex discrimination in employee remuneration.

4. Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Comp.) (amending Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Comp.), which forbids employment discrimination by employers holding government contracts.

5. Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979)).

6. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241.

7. House Comm. on Educ. and Labor, Equal Employment Opportunities Enforcement Act of 1971, H.R. Rep. No. 238, 92d Cong., 1st Sess. 19-20, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2155.

8. 118 Cong. Rec. 946, 1993 (1972). Senator Allen was joined by Senator Ervin in his attempts to have religious and academic institutions exempted from Title VII coverage. See id. at 1977-95.

9. Id. at 1995. The vote was 55-25.

employment in federally funded institutions, courts have shown reluctance to intervene in academic personnel decisions.[10] A number of cases have been brought since antibias legislation was made applicable to colleges and universities in 1972.[11] In the early cases, plaintiffs were generally denied relief. The theme of the early decisions, as set forth in *Green v. Board of Regents*[12] and as emphasized in *Faro v. New York University*,[13] was that courts should abstain from intervening in hiring, promotion, tenure and salary decisions made by colleges and universities.

As the judiciary's experience with academic employment matters increased, however, its articulated policy began to change. In January 1978 the United States Court of Appeals for the First Circuit decided *Sweeney v. Board of Trustees*.[14] In *Sweeney* a state college professor alleged sex discrimination as the basis for her failure to obtain promotion at an earlier date and for the disparity between salaries of males and females on the faculty. In backdating Dr. Sweeney's promotion and concomitantly adjusting her salary for the intervening years, the court voiced "misgivings over . . . [the recurrent] notion that courts should keep 'hands off' the salary, promotion, and hiring decisions of colleges and universities."[15] The court acknowledged that decisions concerning hiring, promotion and tenure rights require subjective evaluation and that such evaluation can most appropriately be made in the academic setting but cautioned against "permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits."[16]

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10. E.g., State Div. of Human Rights v. Columbia Univ., 39 N.Y.2d 612, 619, 350 N.E.2d 396, 399, 385 N.Y.S.2d 19, 23 (1976); Pace College v. Commission on Human Rights, 38 N.Y.2d 28, 33, 339 N.E.2d 880, 884, 377 N.Y.S.2d 471, 478 (1975). See generally O'Neill, God and Government at Yale: The Limits of Federal Regulation of Higher Education, 44 U. Cinn. L. Rev. 525, 526 (1975). It is noteworthy that, in general, the most inefficient and ineffective strategy for achieving an equal employment policy is litigation of individual cases, in part because judges vary in their degree of commitment to equal employment. Ratner, Equal Employment for Women: Summary of Themes and Issues, in Equal Employment Policy for Women 419, 421 (R. Ratner ed. 1980).

11. E.g., Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977); Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974); Green v. Board of Regents, 474 F.2d 594 (5th Cir. 1973) (suit under § 1983); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977) (dissolving preliminary injunction issued in 359 F. Supp. 1002 (W.D. Pa. 1973)); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976).

12. 474 F.2d 594 (5th Cir. 1973). A female associate professor claimed she was refused promotion to full professor because of her sex. The Court of Appeals for the Fifth Circuit stated that "the University's standards are matters of professional judgement" and that the findings of the trial court must be sustained unless clearly erroneous. Id. at 596.

13. 502 F.2d 1229 (2d Cir. 1974). A female Ph.D. was terminated from the university after she refused to accept an appointment she regarded as a demotion. The court stated that "[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." Id. at 1231-32.

14. 569 F.2d 169 (1st Cir. 1978).

15. Id. at 176.

16. Id.

In November 1978 the United States District Court for the Eastern District of Pennsylvania analogized academic institutions to industry in *Kunda v. Muhlenberg College*.[17] In *Kunda* a female college teacher alleged that sex discrimination was the basis for the college's refusal to grant her promotion and tenure. The court declared that "[t]he decision to grant or deny a promotion to a college faculty member is not substantially different from a similar decision in business or industry."[18] The court recognized that under Title VII the "disparate treatment" theory of *McDonnell Douglas Corp. v. Green*[19] and the "disparate impact" theory of *International Brotherhood of Teamsters v. United States*[20] are applicable to academic institutions as well as to industry.[21] Applying these theories, the *Kunda* court concluded that the denial of tenure to the female teacher was the result of the college's discriminatory acts in failing to inform her that a master's degree was required for promotion.[22] The court's remedy was to mandate that the college should allow the female teacher two years to complete the required degree and, upon completion, award her tenure.[23]

Sweeney and *Kunda* are significant for their potential effect on challenges to sex discrimination in academia. The *Sweeney* court expressly rejected the prevailing abstention policy of *Faro* and was the first court specifically to order promotion as the appropriate remedy when a female had been a victim of discrimination in academia.[24] The *Kunda* court was the first to present a thorough, systematic analysis in which criteria used to evaluate the legality of employment decisions in industry were made applicable to employment decisions in academia.

The United States Supreme Court has not specifically addressed the applicability of the academic freedom defense to enforcement of legislation ensuring equal opportunity in appointment, promotion and tenure decisions.[25]

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17. 463 F. Supp. 294 (E.D. Pa. 1978), aff'd, 621 F.2d 532 (3d Cir. 1980).

18. Id. at 307.

19. 411 U.S. 792 (1973). Under the disparate treatment theory, a plaintiff must demonstrate that the defendant's actions were based on a discriminatory motive. See text accompanying notes 29-38 infra.

20. 431 U.S. 324 (1977). See also Griggs v. Duke Power Co., 401 U.S. 424 (1971). Discriminatory motive is not an essential element under a disparate impact theory. The "plaintiff need only show that the employment standards under scrutiny have a statistically significant discriminatory impact." 463 F. Supp. at 307.

21. 463 F. Supp. at 306-07.

22. Id. at 313.

23. Id.

24. Broad, Ending Sex Discrimination in Academia, 208 Science 1120, 1121 (1980).

25. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the United States Supreme Court addressed the legality of race-conscious admissions programs. Justice Powell, announcing the judgment of the Court, cited with approval the four essential university freedoms which Justice Frankfurter had expounded in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (who may teach, what may be taught, how it shall be taught, and who may be admitted to study). 438 U.S. at 312. See notes 69-72 and accompanying text infra. Justice Powell perceived that deciding who may be admitted to study may constitute a constitutional interest protected by the first amendment but concluded that there are limits to the exercise of this aspect of academic freedom. 438 U.S. at 314. In Justice Powell's view, academic freedom could be used to justify a flexible admissions plan premised on many factors including race and ethnic status. Id. In contradistinction, establishing a quota-type methodology for selec-

It is reasonable, however, to anticipate that the Court would apply the criteria set forth in *McDonnell Douglas Corp. v. Green*[26] and in *International Brotherhood of Teamsters v. United States*[27] to evaluate an allegation of employment discrimination brought against a college or university. Although these cases involve industrial employers, lower federal courts have already applied their reasoning in employment discrimination cases against academic institutions.[28]

If the *McDonnell Douglas* formula[29] for evaluating discrimination in hiring is applied, the female who alleges disparate treatment may establish a prima facie case by proving that she is a member of a protected group, that she applied and was qualified for a job for which the academic institution was seeking applicants, that she was rejected despite her qualifications, and that the academic institution continued to seek applicants from persons with her qualifications. *McDonnell Douglas* does not require that the plaintiff provide "direct proof of discrimination"; it merely requires a showing that "rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought."[30] In accordance with the *McDonnell Douglas* formula, a female denied promotion may establish a prima facie case of discrimination by proving that she was a faculty member, that she was qualified for promotion, that she was considered for and denied promotion, and that males with comparable qualifications were granted promotion.[31] A female denied tenure may establish a prima facie case by showing the first three elements of a cause of action for discrimination in promotion.[32]

After the female has established her prima facie case of discrimination in

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tion of a student body to achieve educational diversity is not permissible even under the guise of academic freedom. Thus, the Supreme Court did not permit academic freedom to be a defense for discrimination. In Cannon v. The University of Chicago, 441 U.S. 677 (1979), a 43-year-old woman brought a private suit alleging that rejection of her application for medical school was made on the basis of sex. The Association of American Medical Colleges, in an amicus brief, argued that to imply a private right to sue would be inconsistent with the constitutional interest in academic freedom. Association of American Medical Colleges Weekly Report #79-19, May 15, 1979. The Supreme Court considered the academic protest to be a policy issue and held that the woman had a right to bring a private suit in the federal courts.

26. 411 U.S. 792 (1973).

27. 431 U.S. 324 (1977). See note 20 supra.

28. See notes 17-23 and accompanying text supra.

29. The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

30. 431 U.S. at 358 n.44.

31. Kunda v. Muhlenberg College, 463 F. Supp. at 307.

32. Id. at 308. An additional requirement in a tenure case may be the showing that males with similar qualifications were granted tenure during the time in which the female was considered or that there were significant procedural irregularities in the processing of the female's tenure application. Id. See Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152 (D. Mass. 1975).

hiring, promotion or granting of tenure, the academic institution has the burden of presenting a "legitimate, nondiscriminatory basis for the employment decision."[33] If the institution rebuts the prima facie case, the female has the burden of showing "that the defendant's stated reason . . . was pretextual"[34] and that the disparate treatment to which she was subjected "constituted purposeful discrimination on the basis of sex."[35]

The ultimate burden of persuasion rests on the plaintiff.[36] The academic institution may attempt to hinder plaintiff's preparation of her case by resorting to three major obstacles: (1) secrecy in decision-making processes; (2) subjectivity in evaluation criteria; and (3) notions of academic freedom. Direct evidence of sex discrimination will be rare because of the level of sophistication in academia.[37] Inferential proof of discriminatory motive may be used, but the plaintiff must present that proof in her case.[38]

Academic decisions concerning appointment, promotion and tenure traditionally have been veiled in secrecy. Paralleling the increase in the number of discrimination suits filed against colleges and universities has been an increase in resistance on the part of academicians to revealing the bases for employment decisions.[39] For example, in *EEOC v. University of New Mexico*,[40] an associate professor alleged illegal discharge because of national origin and sought access to personnel files during the preparation of his case. The university refused to comply with a subpoena duces tecum requesting files of present and previously terminated members of the college faculty. The United States District Court for the District of New Mexico, however, ruled that the university must produce the personnel files even though the college considered them to be confidential and sensitive.[41] The Supreme Court of Appeals of West Virginia also narrowed the use of secrecy in academic decision-making in

33. 463 F. Supp. at 309-10.

34. Id. at 310. Accord, McDonnell Douglas Corp. v. Green, 411 U.S. at 804.

35. 463 F. Supp. at 311. See International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15.

36. Sweeney v. Board of Trustees, 569 F.2d at 177. See generally Divine, Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion, 5 J.L. & Educ. 429 (1976).

37. 569 F.2d at 175. But see Broad, supra note 24, at 1121 (describing a situation in which a University of Minnesota chemistry professor, as part of his evaluation of a female applicant for a faculty position, declared in writing, "I have to state that she would have problems because she is a woman. I guess I am a male chauvinist pig.").

38. 569 F.2d at 177.

39. Middleton, Academic Freedom vs. Affirmative Action: Ga. Professor Jailed in Tenure Dispute, Chronicle of Higher Educ., Sept. 2, 1980, at 1, col. 2. See also Fields, The U.S. vs. Berkeley over Affirmative Action, Chronicle of Higher Educ., Sept. 22, 1980, at 4, col. 1 (The Labor Department's Office of Federal Contract Compliance Programs has contended that the University of California at Berkeley has "engaged in maneuver after maneuver frustrating investigatory efforts." For example, the university has refused to reveal confidential letters of recommendation to investigators in the Office of Civil Rights.). Cunningham & Brodie, Academic Freedom & Tenure: St. Mary's College (California), 62 Am. Ass'n U. Professors Bull. 70, 74 (Spring 1976) (The President of the College "had received, and intended to follow, the advice of his legal counsel not to give reasons so as to make it difficult for Professor Versluis to litigate against the denial of tenure in a civil court suit.").

40. 7 Fair Empl. Prac. Cas. 653 (D.N.M. 1973), aff'd, 504 F.2d 1296 (10th Cir. 1974).

41. Id. at 654.

State ex rel. McLendon v. Morton.[42] In *McLendon* an assistant professor alleged that she was denied due process when the college denied tenure. McLendon had six years of full-time employment in academic teaching, thus meeting the objective eligibility criteria enunciated by the college.[43] The court held that she had a sufficient entitlement to prohibit denial of tenure on the issue of competency without procedural due process, including a notice of the reasons for denial and an opportunity to rebut the evidence relevant to those reasons.[44]

Academicians argue that destroying secrecy in academic employment decisions chills candor in discussions and criticisms of colleagues' professional competence.[45] This argument, however, is of little merit. There is no evidence of a chilling effect resulting from federal legislation requiring higher educational institutions to open their academic files to students.[46] Furthermore, increased openness would not increase liability for defamation since evaluations made in good faith and as part of institutional responsibilities are privileged.[47] Openness in decision-making processes would alleviate suspicion that employment decisions are based on impermissible reasons, and, such fears mitigated, females would not feel compelled to resort to litigation for relief.[48]

Another obstacle facing the female alleging sex discrimination in academic employment is the use of subjective criteria in academic decisions concerning appointment, promotion and tenure; the use of subjectivity makes it difficult to prove discriminatory motive. The United States District Court for the Northern District of Illinois pointed out in *Lewis v. Chicago State College*[49] that teaching ability is clearly a matter of subjective judgment.[50] In

42. 249 S.E.2d 919, 925 (W. Va. 1978).

43. Id.

44. Id. at 926. A similar conclusion was reached by the United States Supreme Court in Perry v. Sindermann, 408 U.S. 593 (1972).

45. See Gellhorn & Boyer, The Academy as a Regulated Industry, in Government Regulation of Higher Education 25, 36-37 (W. Hobbs ed. 1978).

46. Id. at 40. The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1976), provides that students who attend institutions of higher education must be given access to their education records and must be provided an opportunity for a hearing to challenge information in those records that is "inaccurate, misleading, or otherwise in violation of the privacy or other rights of students." Id. § 1232g(a)(2). See generally Schatken, Student Records at Institutions of Post-Secondary Education: Selected Issues Under the Family Educational Rights and Privacy Act of 1974, 4 J.C. & U.L. 147 (1976-77).

47. See Stevens, Evaluation of Faculty Competence as a "Privileged Occasion," 4 J.C. & U.L. 281 (1976-77). See also Rugenstein v. University of Wis. Bd. of Regents, 422 F. Supp. 61 (E.D. Wis. 1976) (not defamatory to call a professor an old biddy not suitable for promotion); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264 (M.D. Pa. 1976) (not defamatory to evaluate a professor as below average); Petroni v. Board of Regents, 115 Ariz. 562, 566 P.2d 1038 (1977) (not defamatory for department head to make an unfavorable recommendation regarding promotion and tenure); Byars v. Kolodiziej, 48 Ill. App. 3d 1015, 363 N.E.2d 628 (1977) (not defamatory to say a professor does not deserve tenure). But see Dauterman v. State-Record Co., 249 S.C. 512, 154 S.E.2d 919 (1967) (defamatory to say a professor drinks excessively).

48. Van Alstyne, Furnishing Reasons for a Decision Against Reappointment: Legal Considerations, 62 Am. Ass'n U. Professors Bull. 285, 285 (Summer 1976).

49. 299 F. Supp. 1357 (N.D. Ill. 1969).

50. "A professor's value depends upon his creativity, . . . his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards." Id. at 1359. See also Fishbein, The Academic Industry—A Dangerous Premise, in Government Regulation of

Peters v. Middlebury College[51] another district court permitted the use of subjective criteria in an academic reappointment decision because "evaluation of . . . teaching ability is necessarily a matter of judgment."[52] Judicial approval of the use of subjective criteria is consistent with decisions involving use of subjective evaluations in industrial settings. For example, in *Rogers v. International Paper Co.*,[53] a nonacademic racial employment discrimination case, the Court of Appeals for the Eight Circuit ruled that subjective criteria were not unlawful per se.[54] Nevertheless, the Court of Appeals for the Fifth Circuit, in the industrial case of *Rowe v. General Motors Corp.*,[55] cautioned that subjective criteria provide "a ready mechanism for discrimination."[56]

Because discriminatory practices can easily be disguised,[57] the use of subjective criteria has been one of the major obstacles for women in proving their claims against academic institutions. The judiciary has been reluctant to interject its opinion into matters of promotion and tenure, preferring to "leave such decisions to the Ph.D.'s in academia."[58] For example, the Court of Appeals for the Fourth Circuit, in *Clark v. Whiting*,[59] refused to make a comparative inquiry into either the quantity or the quality of the work of a male faculty member who alleged an equal protection violation, stating that "courts may not engage in 'second-guessing' the University authorities in connection with faculty promotions."[60] This decision reflects the traditional belief that courts should defer to the academician's judgment on qualifications for appointment, promotion or tenure.[61] At the same time, the judiciary recognizes that sex discrimination in academic employment cannot be prevented unless courts are willing to become involved once a plaintiff establishes a prima facie case. For

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Higher Education 57, 62 (W. Hobbs ed. 1978) (a scholar cannot be evaluated by quantitative and visible standards).

51. 409 F. Supp. 857 (D. Vt. 1976).

52. Id. at 868.

53. 510 F.2d 1340 (8th Cir. 1975) (a civil rights action brought against a wood-paper mill alleging racial discrimination in employment and promotion in skilled craft jobs).

54. Id. at 1345.

55. 457 F.2d 348 (5th Cir. 1972) (blacks alleged racial discrimination in promotion and transfer practices at auto plant).

56. Id. at 359.

57. Sweeney v. Board of Trustees, 569 F.2d at 175. "When overt discrimination becomes illegal, it often goes underground in the beliefs of employers, labor leaders, educators, etc. Covert forms of discrimination are traps that spring on women, like blacks, along paths marked by 'equal opportunity' signs." M. Butler & W. Paisley, Women and the Mass Media 30 (1980). See generally Dipboye, Arvey & Terpstra, Sex and Physical Attractiveness of Raters and Applicants as Determinants of Resume Evaluations, 62 J. Applied Psychology 288 (1977) (raters' evaluations of applicants' resumes are affected by sex and physical attractiveness); Schmitt & Hill, Sex and Race Composition of Assessment Center Groups as a Determinant of Peer and Assessor Ratings, 62 J. Applied Psychology 261 (1977) (ratings of women appear to vary according to the proportion of men in the evaluation group).

58. Broad, supra note 24, at 1121.

59. 607 F.2d 634 (4th Cir. 1979) (male associate professor sued university because of denial of his request for promotion to full professor in violation of his equal protection and due process rights).

60. Id. at 640.

61. See Green v. Board of Regents, 474 F.2d 594 (5th Cir. 1973) (academic standards are matters of professional judgments); Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969) (academic promotion decisions are not usually justiciable).

example, the court in *Clark* stated that the judiciary may review a university's evaluations of quantity and quality of scholarly work performed by a female alleging sex discrimination.[62] And in *Sweeney* the court allowed several witnesses to testify that Dr. Sweeney had been qualified for promotion several years before it was granted by the university and that her qualifications had not substantially changed between the time she was denied promotion and the time, several years later, when she was granted promotion via normal university peer review.[63]

A third major obstacle facing the female alleging sex discrimination by colleges and universities is the notion of academic freedom. Academic freedom, as practiced in American institutions,[64] was adapted from the nineteenth century German ideals of *Lehrfreiheit* (freedom to teach) and *Lernfreiheit* (freedom to learn).[65] Freedom to teach ensured that faculty could conduct research independently and convey the results of that research, as well as

62. 607 F.2d at 640-41.

63. 569 F.2d at 178 n.18.

64. A senior member of the University of North Carolina faculty defined academic freedom as the "removal of fear from independent thought: freedom to teach, to do research, to participate in politics. With this freedom comes the ability to invent, to experiment, to test, to explore, to disagree." Interview with Dr. Paul D. Brandes, Professor of Speech Communication, University of North Carolina at Chapel Hill, in Chapel Hill, N.C. (Sept. 10, 1980).

An official statement, the 1940 Statement of Principles on Academic Freedom and Tenure, was formulated by the Association of American Colleges and the American Association of University Professors (AAUP), and remains effective. It provides as follows:

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman.

Menard, "May Tenure Rights of Faculty be Bargained Away?", 2 J.C. & U.L. 256, 267 (1974-75).

Courts have frequently relied on this 1940 Statement and its interpretation by the AAUP in deciding disputes arising in the academic community. See, e.g., Browzin v. Catholic Univ. of Am., 527 F.2d 843 (D.C. Cir. 1975) (court upheld AAUP's interpretation of the "suitable position" rule in the 1940 Statement); Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975) (appellate court observed that a university regulation which allegedly was unconstitutionally vague and overbroad had been adapted almost verbatim from the 1940 Statement; the court concluded that since the regulation had been interpreted in an advisory letter by the AAUP "any overbreadth resulting in facial invalidity" was eliminated); Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972), aff'd in part, rev'd in part, 512 F.2d 109 (9th Cir. 1975) (district court referred to the requirements of "appropriate restraint" contained in the 1940 Statement and held that certain language used by a faculty member was not protected by the first amendment).

65. See R. Hofstedter & W. Metzger, The Development of Academic Freedom in the United States 275 (1955); Nisbet, Max Weber and the Roots of Academic Freedom, in Controversies and Decisions 103, 119-21 (C. Frankel ed. 1976).

speak openly and freely of other matters, to their students. In Germany this privilege was not extended to citizens outside the university, nor was it extended to faculty when they were outside the university.[66] In the United States, however, the federal constitution guarantees all persons the fundamental rights of *Lehrfreiheit* and *Lernfreiheit*.[67] Because of the fundamental differences in the individual liberties afforded citizens of Germany and the United States, academic freedom in the United States has not been considered a right independent of the laws of the land as it was in Germany.[68] An academic freedom interest, however, derived from the rights of association and expression guaranteed by the Bill of Rights and by the fourteenth amendment, was expressly recognized in *Sweezy v. New Hampshire*.[69]

In *Sweezy* a faculty member refused to relate the content of a lecture he had delivered at the university. The Supreme Court, in dicta, stated that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[70] The Court feared that state inquiry into a faculty member's teaching might chill the academic environment. Justice Frankfurter wrote a forceful concurring opinion in which he set forth " 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[71] Justice Frankfurter's remarks, however, should not be interpreted to mean that academic freedom can be used as a defense to all legislative or judicial intervention in academic matters.[72] In *Sweezy* a faculty member's political autonomy was being invaded and the countervailing state interests were minimal. Accordingly, resort to the notion of academic freedom was appropriate.

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66. R. Hofstedter & W. Metzger, supra note 65, at 389. See generally Fuchs, Academic Freedom—Its Basic Philosophy, Function, and History, 28 Law & Contemp. Probs. 431 (1963); Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045 (1968).

67. Comment, Academic Freedom—Its Constitutional Context, 40 U. Colo. L. Rev. 600, 603 (1968).

68. "As a result of this constitutional 'incorporation,' the proposition that academic freedom should be considered a *right* with independent character as it was in Germany has not been generally accepted as a sound legal principle in the United States." Id.

"As significant as academic freedom is in our American tradition, no court has squarely held that academic freedom is a distinct and legally enforceable independent right absent and beyond constitutional guarantees." Brown, Tenure Rights in Contractual and Constitutional Context, 6 J.L. & Educ. 279, 297 (1977). But see Murphy, Academic Freedom—An Emerging Constitutional Right, 28 Law & Contemp. Probs. 447, 455 (1963); Note, Academic Freedom and Federal Regulation of University Hiring, 92 Harv. L. Rev. 879, 881 (1979).

69. 354 U.S. 234, 250 (1957).

70. Id.

71. Id. at 263 (Frankfurter, J., concurring).

72. See id. at 265 (Frankfurter, J., concurring). Justice Frankfurter stated:

> Inquiry pursued in safeguarding a State's security against threatened force and violence cannot be shut off by mere disclaimer. . . . But the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.

Id.

Two years after *Sweezy* the United States Supreme Court ruled in *Barenblatt v. United States*[73] that the House Committee on Un-American Activities could investigate subversive activities in education. The Court was sensitive to congressional intrusion into the constitutionally protected areas of "academic teaching—freedom and its corollary learning—freedom"[74] but held that public interest superseded individual and academic immunity.[75] Subsequently, in *Shelton v. Tucker*,[76] the Supreme Court took the opportunity to articulate clearly a two-pronged test for evaluating the appropriateness of the government's intrusion into constitutionally protected personal liberties. According to the Court the government purpose (1) must be legitimate and substantial and (2) cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[77]

In 1967, in *Keyishian v. Board of Regents*,[78] the Court declared that academic freedom is a "special concern of the First Amendment" and that laws which cast a shadow over the robust exchange of ideas in the classroom would not be tolerated.[79] The following year, in *Pickering v. Board of Education*,[80] the Supreme Court upheld a teacher's first amendment guarantee of freedom of speech. Although such protection could have been included specifically within the concept of academic freedom, the Court stated that the state had no greater interest in monitoring the speech of the teacher-citizen than it did in monitoring the speech of the citizenry in general.[81] In short, the Supreme Court has generally been quick to vindicate the constitutional rights of academicians. It has stricken loyalty-oath requirements as violative of the first amendment[82] and promoted autonomy by prohibiting restrictions on curriculum and activities.[83] Academicians have been further protected by the Court's

73. 360 U.S. 109 (1959). During interrogation before a congressional committee, Barenblatt refused to answer questions concerning his political or religious beliefs, as well as other personal and private affairs. His refusal was based on the first amendment specifically and on academic freedom in general.

74. Id. at 112.

75. Id. at 124-34.

76. 364 U.S. 479 (1960). A state statute required teachers to file an affidavit annually listing the organizations to which they belonged or regularly contributed during the preceding five years; the Supreme Court held that such forced disclosures impaired a person's right of free association.

77. Id. at 488.

78. 385 U.S. 589 (1967).

79. Id. at 603.

80. 391 U.S. 563 (1968). The Court held that speaking on issues of public importance may not be used as the basis for dismissing a teacher from his teaching position.

81. Id. at 568.

82. In Whitehall v. Elkins, 389 U.S. 54 (1967), plaintiff who was offered a teaching position at the University of Maryland, challenged the constitutionality of a state loyalty-oath requirement. The Supreme Court stated, "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom." Id. at 59-60. But see Connell v. Higgenbotham, 403 U.S. 207 (1971), in which a primary school teacher was dismissed from her job for refusing to sign a loyalty oath. The Court ruled that requiring all teachers to pledge to support the Constitution of the United States and of the State of Florida is acceptable. Id. at 208.

83. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court struck down a state law that forbade teaching any modern language other than English to children below the eighth grade. The Supreme Court did not mention academic freedom per se but stated that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance

recognition of their freedom of association rights,[84] due process rights in dismissal proceedings[85] and freedom of speech rights in political activity.[86]

Since federal antidiscrimination legislation was made applicable to colleges and universities in 1972, both academicians and nonacademicians have become increasingly alarmed by what they allege is an infringement of academic freedom by the federal government. The presidents of four leading universities in Washington, D.C., have asserted that "government interference is disrupting higher education to a point where institutional autonomy is seriously threatened."[87] The president of the National Academy of Science has told members of the academy that there is a conflict between academic excellence and equal opportunity.[88] A faculty member of the University of Geor-

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which should be diligently promoted." Id. at 400. The Court considered the state law to "materially . . . interfere with the calling of modern language teachers" and reversed the state supreme court's holding of its constitutionality. Id. at 401.

In Epperson v. Arkansas, 393 U.S. 97 (1968), a secondary school teacher challenged the constitutionality of a state law that made it unlawful for a teacher in a state-supported academic institution to teach evolution. The Supreme Court did not discuss academic freedom but held the law unconstitutional as a violation of the fourteenth amendment as it embraces the first amendment's prohibition of state laws establishing a religion. In White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975), police officers posed as students and enrolled in the state university. They engaged in covert practice of recording class discussions, compiling police dossiers and intelligence reports. Without discussing academic freedom, the Supreme Court of California stated, "[a]s a practical matter the presence in a university classroom of undercover officers taking notes to be preserved in police dossiers must inevitably inhibit the exercise of free speech both by professors and students." Id. at 767, 533 P.2d at 229, 120 Cal. Rptr. at 101.

84. Keyishian v. Board of Regents, 385 U.S. 589 (1967). University faculty members alleged that the state's teacher loyalty laws and regulations were unconstitutional. The Supreme Court stated, "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Id. at 603.

85. Slochower v. Board of Educ., 350 U.S. 551 (1956). An associate professor was summarily discharged because he refused to answer questions concerning his membership in the Communist Party on the grounds that his answers might tend to incriminate him. The New York City Charter provided for termination of employment under such circumstances. The Supreme Court did not discuss academic freedom but merely held that the teacher's summary dismissal violated the due process clause of the fourteenth amendment.

In Perry v. Sindermann, 408 U.S. 593 (1972), a college teacher who had been employed for four successive years under a series of one-year contracts was dismissed. The Supreme Court concluded that he may have a sufficient property interest to warrant a due process hearing during which he could be informed of the grounds for dismissal and allowed to challenge the sufficiency of those grounds. But see Board of Regents v. Roth, 408 U.S. 564 (1972), in which a teacher was hired by the university for one academic year. He was not rehired the next year. The Supreme Court held that under the circumstances he did not have a property interest in being rehired sufficient to require a due process hearing.

86. Pickering v. Board of Educ., 391 U.S. 563 (1968). A teacher was dismissed because he wrote a letter published in a local newspaper criticizing the school board's allocation of school funds. Not addressing academic freedom per se, the Supreme Court stated that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568.

87. Lacovara, How Far Can the Federal Camel Slip Under the Academic Tent?, 4 J.C. & U.L. 223, 224 (1976-77).

88. Broad, supra note 24, at 1121-22. Dr. Philip Handler, president of the National Academy of Science, stated:

gia alleged academic freedom as the reason for his refusal to obey a court order requiring him to reveal the bases for his vote on the promotion and tenure of a female assistant professor.[89] The University of California at Berkeley refused to provide confidential letters of recommendation to civil rights investigators in the Department of Labor.[90]

Academicians have resisted review of their employment practices by arguing that such review violates their academic freedom.[91] Historically, academicians have enjoyed independence from regulation far greater than their counterparts in industry.[92] This independence is based on the premise that educators must be afforded autonomy in teaching, research, and publishing in order to preserve freedom and integrity of thought.[93] External supervision of employment decisions, however, in no way interferes with a faculty member's privilege of teaching, conducting research or publishing, the areas traditionally protected by academic freedom. In contradistinction, an institution's refusal to hire, promote or grant tenure to a female because of her sex directly interferes with that female's privilege of teaching, conducting research and publishing and is a definite violation of her academic freedom. Furthermore, even

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> The government has sought and obtained university records concerning the details of individual faculty appointments—explicit affirmation by government that it considers other criteria to be as significant as academic competence, if not more so, in apointments to the faculty. Yet nothing can so damage the future of a university as an appointment to the faculty of anyone less than the best whom the university might otherwise have attracted to its company.

Id. at 1122.

89. Middleton, supra note 39, at 1, col. 2. Professor James Dinnon, under the pretext of academic freedom, disobeyed a court order to reveal how he voted and the bases for his vote on the promotion and tenure of Dr. Maija S. Blaubergs. On July 3, 1980, when Mr. Dinnon surrendered himself to initiate his three-month jail term, he wore full academic regalia to demonstrate that "in effect, the federal government will be locking up the University of Georgia." Id. Dr. Blaubergs had filed suit for violation of Title VII of the Civil Rights Act of 1964.

90. Fields, supra note 39, at 4, col. 1. The University of California at Berkeley continued its refusal to reveal confidential letters of recommendation to the Office of Civil Rights investigators, and the Department of Labor threatened to deny the university $25 million in federal contracts.

91. But see McGill, Is Federal Regulation a Threat to Academic Freedom?, Columbia Today, March 1977, at 2, 34-36. President McGill of Columbia University acknowledged that the principle of federal regulation is not a threat to academic freedom—he claims the threat is the regulators.

92. See Winkler, Government Rulemaking: Any Hope for Simplification?, Chronicle of Higher Education, Dec. 20, 1976, at 5, col. 5.

93. Brown, supra note 68, at 300. See also Searle, Two Concepts of Academic Freedom, in The Concept of Academic Freedom 86 (E. Pincoffs ed. 1975). However, faculties must accept specific teaching responsibilities and must conform classroom teaching to the subject matter promulgated in the course description. Libelous or obscene writing is not protected even when presented as a work of scholarship. See Hamling v. United States, 418 U.S. 87 (1974).

The traditional definition of academic freedom has recently been expanded to encompass institutional autonomy and faculty self-rule. J. Fleming, G. Gill & D. Swinton, The Case for Affirmative Action for Blacks in Higher Education 84 (1978).

> [T]his expanded meaning of academic freedom translates largely into a direct attack on only one government regulation: affirmative action. No other type of government regulation or legislation that is applicable to higher education—pension rights and retirement benefits, health and safety regulations, equal student aid and veterans benefits, and student rights legislation—has been or is subjected to the wrath of members of academia as is affirmative action.

Id.

assuming that the institution's academic freedom is invaded and that such freedom is a constitutionally protected liberty, the government's intrusion is permissible under the *Shelton* test.[94] The goal of ensuring that jobs in academia are assigned on the basis of merit is legitimate. Moreover, the government's means of accomplishing this goal does not broadly stifle personal liberties, and the goal cannot be achieved by a more narrow means, such as requesting voluntary nondiscrimination.

Although the status of women in academic institutions has improved since antidiscrimination legislation was enacted,[95] an unjustified disparity continues to exist between female and male faculty members. For example, seventy-two percent of men, but only forty-six percent of women, hold tenured appointments,[96] and female scientists are paid approximately seventeen percent less than their male colleagues at all faculty levels.[97] Despite the continued inequalities, the judiciary has been conservative in its response to allegations of sex discrimination in academia. During the past three years, however, the courts have developed standards, analogous to those applicable in industry, for evaluating alleged discriminatory acts. The courts delve behind the college's or university's final decision, inquire into the reasons for the decision, and scrutinize the bases on which the decision was made. But the judiciary refrains from acting as a "super-tenure" committee imposing its own evaluations of a female's qualifications for academic appointment, promotion or tenure. The court's aim is not to impose its own judgment concerning who will hold academic appointments but rather to ensure that academic employment decisions are not based on illegal sexually-discriminatory reasons. Such action by our courts is both necessary and appropriate.

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94. See notes 76-77 and accompanying text supra.

95. See Greenberger, The Effectiveness of Federal Laws Prohibiting Sex Discrimination in Employment in the United States, in Equal Employment Policy For Women 108 (R. Ratner ed. 1980).

96. Status Improves for Women Scientists in Academe, Chemical and Engineering News, May 7, 1979, at 6.

97. Comm. on the Educ. and Employment of Women in Science and Eng'r, Comm'n on Human Resources, U.S. Nat'l Research Council, Climbing the Academic Ladder: Doctoral Women Scientists in Academe (1979).