RECENT DECISIONS

ANTITRUST

ARIZONA'S BAR EXAMINATION RECEIVES A PASSING GRADE

The United States Supreme Court recently examined the scope of the state action doctrine[1] of antitrust immunity. In *Hoover v. Ronwin*,[2] the Court held that the grading procedure established for the Arizona bar examination was state action and thus not subject to federal antitrust scrutiny.[3]

Ronwin took the Arizona bar examination in February, 1974.[4] Two months later, he was notified he had failed the examination. Ronwin subsequently filed a $1.2 million damage action under Section 1 of the Sherman Act against the State Bar of Arizona, members of the Committee on Examinations and Admissions of the Supreme Court of Arizona (the Committee), and their spouses[5] for refusing to allow him to practice law in Arizona. Ronwin claimed that the Committee illegally restrained competition by limiting the number of people who receive passing grades on the bar examination in a given year. The United States District Court for the District of Arizona dismissed Ronwin's complaint for failure to state a claim upon which relief could be granted. The Ninth Circuit Court of Appeals reversed, holding that the Committee's status as a state agency did not render its actions absolutely immune from antitrust liability. The Supreme Court granted certiorari to review the court of appeals' application of the state action doctrine and reversed, holding there was state action.

Who Denied Ronwin Admission to the Bar?

The Arizona Supreme Court established the Committee on Examinations and Admissions to examine and recommend applicants for admission

1. In *Parker v. Brown*, 317 U.S. 341 (1943) the Supreme Court articulated the "state action" doctrine: antitrust laws are addressed to action by private parties and not to action by state legislatures or state administrative bodies. *Id.* at 351. *See infra* notes 15-17 and accompanying text for a further explanation of the state action doctrine.

2. 104 S. Ct. 1989 (1984).

3. *Id.* at 2002.

4. The facts and controversy of *Ronwin* are set forth at 104 S. Ct. at 1991-95.

5. The Ninth Circuit affirmed the dismissal of the spouses of the individual Committee members. *Id.* at 1993 n.12.

to the Arizona Bar.[6] Arizona Supreme Court Rule 28 (a) delegates certain responsibilities to the Committee, but the court reserves the ultimate authority to grant or deny admission.[7] One of the Committee's delegated responsibilities is to formulate an appropriate grading procedure for the bar examination.[8] The Committee is required to file the grading formula that it intends to use with the court thirty days prior to giving the examination.[9] Although the Committee grades the examinations and recommends to the court those applicants whom it considers qualified,[10] only the court has the authority to admit or deny admission.[11] Thus, in challenging the Committee's actions, Ronwin was really challenging the actions of the Arizona Supreme Court.

Development of the State Action Immunity Doctrine

In *Parker v. Brown*,[12] the leading state action case, the United States Supreme Court recognized that in a dual system of federalism the states are sovereign, limited only to the extent Congress may constitutionally subtract from their authority.[13] Consequently, the Court was unwilling to infer that an unexpressed objective of the Sherman Act is to nullify a state's control over its officers and agents.[14] Although *Parker* did not create the state action exemption, it is often recognized for its conclusion that the Sherman Act was intended to regulate private practices and not to restrain state action or official action directed by a state.[15]

At issue in *Parker* was a raisin marketing plan, formulated and administered by the Agricultural Prorate Advisory Commission.[16] The Cali-

6. ARIZ. SUP. CT. R. 28(a) provides:

The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court. . . . The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions . . . . The court will then consider the recommendations and either grant or deny admission.

7. *Id.*

8. *Id.*

9. ARIZ. SUP. CT. R. 28(c) VII B provides:

The Committee on Examinations and Admissions will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

10. *Ronwin*, 104 S. Ct. at 1997-98. *See supra* note 6 and accompanying text.

11. *Ronwin*, 104 S. Ct. at 1998. *See supra* note 6 and accompanying text.

12. 317 U.S. 341 (1943).

13. *Id.* at 351.

14. *Id.* The legislative history of the Sherman Act indicates its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations. *Id.* at 351.

15. Cantor v. Detroit Edison Co., 428 U.S. 579, 615-16 (1976) (Stewart, J., dissenting).

16. The facts and controversy of *Parker* are set forth at 317 U.S. at 344-49.

In *Parker*, the California Agricultural Prorate Act authorized the creation of the Agricultural Prorate Advisory Commission. The Commission followed the procedure set forth in the act to establish a market plan: 1) Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity, the Commission selected a program committee from among

fornia Agricultural Prorate Act created the Prorate Advisory Commission to establish marketing programs to allocate demand among agricultural commodities growers and to maintain prices in distribution to the packers. A packer challenged the marketing plan on the ground it was an illegal interference with and an undue burden on interstate commerce.

The *Parker* Court analyzed the language and legislative history of the Sherman Act and concluded that the Act was not intended to restrain a state or its officers or agents acting by the command of the legislature. The legislature established the Commission to create the prorate program; the State, acting through the Commission, adopted and enforced the program as part of a comprehensive government plan. The Court stated the Sherman Act did not prohibit the program that restrained trade since it was an act by the State acting as a sovereign.[17]

Twenty-three years after *Parker*, the Court again addressed the station action issue in *Goldfarb v. State Bar of Virginia*.[18] The *Goldfarb* Court clarified and reaffirmed *Parker* by holding that minimum fee schedules for title examination services, published by a private County Bar Association and enforced by the State Bar, violated Section 1 of the Sherman Act.[19] The Court focused on the language in *Parker* that the Sherman Act does not prohibit an anti-competitive program created under the direction of the legislature if the state imposes the restraint as an act of government.[20] From this language, the *Goldfarb* Court established a threshold test for determining if an anti-competitive activity is state action and therefore not prohibited by the Sherman Act: Is the activity required by a State acting as sovereign?[21]

The State Bar in *Goldfarb* did not satisfy this threshold test.[22] The Court found that the State of Virginia did not specifically require the challenged anti-competitive activities either through its Supreme Court Rules or by statue.[23] The Court concluded that the state acting as sovereign must

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nominees chosen by qualified producers; 2) this program committee formulated a marketing program for that commodity; 3) when the Commission found that the program was reasonably calculated to carry out the objectives of the Prorate Act, it had the authority to approve the program; 4) when 65 percent of the producers in the zone owning 51 percent of the acreage devoted to production of the regulated crop consented to approve the program, the Director of Agriculture declared the program instituted; 5) then the program committee had the authority to administer the program.

17. *Id.* at 352.

18. 421 U.S. 773 (1975). A financing agency required the purchasers of a home to obtain title insurance. This necessitated a title examination that could legally be performed only by a member of the Virginia State Bar. The purchasers were unable to find a lawyer who would charge less than the minimum fee prescribed in a fee schedule published by the County Bar Association.

The fee schedule listed the recommended minimum fees for common legal services. The County Bar was a purely voluntary association and had no power to enforce the fee schedules, so the State Bar provided enforcement. *Id.* at 775-75.

19. *Id.* at 780-93. The challenged fee schedule resulted in a rigid price floor. Every lawyer contacted by the purchasers followed the fee schedule. The Court found that these price-fixing activities were unusually damaging because title examination is required for financing. Since only a licensed attorney could provide this service, purchasers did not have alternative sources. *Id.* at 776, 792.

20. *Id.* at 788 *Parker*, 317 U.S. at 351.

21. *Goldfarb*, 421 U.S. at 790.

22. *Id.*

23. *Id.*

"compel", not merely "prompt" the anti-competitive conduct.[24]

The Court applied the *Goldfarb* test in *Bates v. State Bar of Arizona*.[25] The Court distinguished *Bates* from *Goldfarb* and found that the test was satisfied. In *Goldfarb*, the State of Virginia, acting through its Supreme Court Rules, did not require the anti-competitive activities of the State Bar.[26] In contrast, the restraint challenged in *Bates* was an affirmative command of the Arizona Supreme Court, specifically imposed by Rules 27(a) and 29(a) of the Rules of the Supreme Court of Arizona.[27] The *Bates* Court concluded that the State, acting as sovereign, compelled the restraint.[28]

In *California Retail Liquor Dealers Association v. Midcal Aluminum*,[29] the Supreme Court established two immunity standards. These standards are applied when the challenged activity is not directly that of the legislature or supreme court, but is nonetheless authorized by the State: (1) the challenged restraint must be "clearly articulated and affirmatively expressed as state policy"; and (2) the policy must be "actively supervised" by the State itself.[30] *Midcal* satisfied the first requirement because a California statute specifically provided for resale price maintenance.[31] However, the second requirement was not satisfied because the state merely authorized price setting and enforced the prices established by private parties without a review for reasonableness.[32]

In *Cantor v. Detroit Edison Co.*,[33] the Court narrowed the scope of the *Parker* doctrine by holding that a private party could not immunize itself from federal antitrust regulation merely by having a state commission preapprove its plan for anti-competitive practices.[34] The Court noted that while the state participated in the planning of the challenged activity, the option to implement it remained with the private defendant.[35] Thus, the state's participation in the decision was not so dominant as to justify relieving the private defendant of responsibility for his conduct in implementing it.[36] The Court distinguished *Cantor* from *Parker* on the ground that *Can-*

24. *Id.* at 791.

25. 433 U.S. 350 (1977). A complaint filed by the State Bar President charged that the defendant attorneys in *Bates* violated Arizona Supreme Court rules 27(a) and 29(a), which prohibit attorneys from advertising in papers and other media. *Id.* at 356.

26. *Goldfarb*, 421 U.S. at 790. *See supra* note 24 and accompanying text.

27. *Bates*, 433 U.S. at 360. *See supra* note 25.

28. *Bates*, 433 U.S. at 360.

29. 445 U.S. 97 (1980).

30. *Id.* at 105. In *Midcal*, a California statute required all wine producers and wholesalers to file price schedules with the state. Wholesalers were prohibited from selling to retailers at prices less than those fixed by the schedules and faced fines or license suspensions if they did. *Id.* at 99.

31. *Id.* at 105.

32. The Court stated: "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106.

33. 428 U.S. 579 (1976).

34. *Id.* at 598. At issue in *Cantor* was a private utility's distribution of free lightbulbs to its customers. A comprehensive tariff filed with and approved by the Michigan Public Service Commission set the utility's rates and service obligations, including the terms of the lightbulb program. A drugstore owner who sold lightbulbs brought the antitrust action; he claimed the private utility had damaged his business by distributing free lightbulbs to residential consumers. *Id.* at 582-85.

35. *Id.* at 594.

36. *Id.*

tor involved a private party defendant while *Parker* did not.[37]

In a very close decision in *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*,[38] the Court refused to extend state action immunity to the activities of municipal power companies unless the state "authorized" their anti-competitive conduct with the intention of displacing antitrust laws.[39] The Court noted that in a dual system of government, cities are not sovereign and do not receive all the federal deference of the states that create them.[40] Thus when a city acts, it is not acting as a sovereign. If, however, the state directs a city's actions they are immune.[41] Municipalities are instrumentalities of the state for the administration of government within their limits.[42] The Court recognized that matters of local concern are often left to local governments.[43] Thus, a city's policy may reflect a local preference rather than that of the state, or may even be contrary to state policy.[44]

The Court concluded that the *Parker* doctrine exempts only anti-competitive conduct engaged in as an act of government by the state as sovereign or by one of its subdivisions acting pursuant to state policy to displace competition with regulation or monopoly public services.[45] The state may delegate power to political subdivisions. However, when the state itself has not directed or authorized an anti-competitive practice, the state's subdivisions, when exerting their delegated power, must comply with antitrust laws.[46]

The Supreme Court reaffirmed the *Lafayette* holding in *Community Communications Co., Inc. v. City of Boulder, Colorado*.[47] Boulder, a "home rule" municipality,[48] claimed antitrust immunity under the *Parker* doctrine.[49] The Court recognized that for a municipality's act to be exempt

37. *Id.* at 591-92. One commentator has noted that the identity of the defendant as a private utility rather than as a state agency is not the dispositive factor. The *Cantor* court left open for future litigation the possibility of federal preemption in situations in which the federal interest in antitrust outweighs the state's interest in regulation. Note, Parker v. Brown *Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898, 907 (1977).

38. 435 U.S. 389 (1978). Mr. Justice Brennan delivered the majority opinion of the Court in which four justices joined. Mr. Chief Justice Burger concurred in the judgment, but would have distinguished proprietary enterprises engaged in by cities (not immune) from nonproprietary government functions (immune). Four justices dissented. *Id.* at 390.

The State of Louisiana granted power to cities to own and operate electric utility systems both within and beyond their city limits. The city claimed that, as a city and subdivision of the state, federal antitrust laws were inapplicable. *Id.* at 391-92.

39. *Id.* at 413.

40. *Id.* at 412.

41. *Id.* at 413.

42. *Id.*

43. *Id.* at 414 n.43.

44. *Id.* at 414.

45. *Id.* at 413.

46. *Id.* at 417.

47. 455 U.S. 40 (1982). At issue in *Boulder* was an "emergency" ordinance which prohibited petitioner cable company from expanding its business into other areas of the city for three months. Petitioner alleged such a restriction was a violation of § 1 of the Sherman Act. *Id.* at 45-47.

48. *Id.* at 43. The Colorado Home Rule Amendment, COLO. CONST., art. XX, § 6 grants to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters. The Colorado statutes are applicable except as superceded by the municipalities' charters or ordinances. *Id.* at 43-44 n.1.

49. *Id.* at 57.

from antitrust scrutiny, it (1) must constitute the action of the state as a sovereign, or (2) must constitute municipal action in furtherance of a clearly articulated and affirmatively expressed state policy.[50]

Boulder claimed that the Home Rule Amendment vested in the city of Boulder all the authority possessed by the legislature in municipal matters; therefore, an act of the city is actually an "act of government performed by the *city acting as the State* in local matters."[51] The Supreme Court rejected this argument by emphasizing that our dual system of government has no place for sovereign cities and reaffirming the view in *Lafayette* that municipalities themselves are not sovereign.[52]

Boulder also did not satisfy the alternative requirement of "clear articulation and affirmative expression."[53] The Court held this requirement is not satisfied when the state's position is neutral respecting the municipality's allegedly anti-competitive actions.[54] In *Boulder*, the state allowed the municipalities to do as they pleased.[55] The Court recognized that this general grant of power to enact ordinances does not imply state authorization to enact specific anti-competitive ordinances.[56] Since Boulder's ordinance satisfied neither requirement of the *Parker* exemption, it was subject to antitrust scrutiny.

A recent Ninth Circuit case, *Golden State Transit Corp. v. City of Los Angeles*,[57] held that a city was not required to show active state supervision of its policy to qualify for state action immunity. The court noted that other circuits found the active state supervision, required under the *Midcal* analysis,[58] unnecessary when a city performs a traditional municipal function under a clearly expressed state policy.[59] In *Golden State*, the City of Los Angeles proved that the California Constitution and statutes articulated a clear policy favoring regulation over competition in the taxicab market.[60] The city was thus immune from antitrust liability under *Parker*.[61]

When is an Act State Action?

After *Goldfarb*, *Bates*, and *Lafayette*, some generalizations can be made about when an act is state action for purposes of the *Parker* doctrine. When the state itself is acting or being sued, it is entitled to *Parker* immunity against the Sherman Act.[62] In contrast, when private parties are act-

50. *Id.* at 54.
51. *Id.* at 53 (emphasis in original).
52. *Id.* at 50-51, citing *Lafayette*, 435 U.S. at 413.
53. *Id.* at 52-53.
54. *Id.* at 55.
55. *Id.*
56. *Id.* at 56.
57. 726 F.2d 1430 (9th Cir. 1984).
58. *See supra* note 31 and accompanying text.
59. *Golden State*, 726 F.2d at 1434-35.
60. *Id.*
61. *Id.*
62. New Mexico v. American Petrofina, Inc., 501 F.2d 363, 370 (9th Cir. 1974). The *Petrofina* court reasoned that since the suit was directly against the state, there could be no question on whether the conduct was committed by the state. Further analysis was unnecessary. *Id.* For a

ing, they generally are not entitled to *Parker* immunity.[63]

These are the two clear, extreme cases. The distinction blurs in cases involving state agencies, the boards of self-regulating industries, and municipalities. Beginning with *Parker*, the programs of the Prorate Committee were immune because the Committee derived its authority from legislative command.[64] Therefore, the State, acting through the Committee, adopted and enforced the program.[65] Similarly, in *Bates*, the Court held that the challenged restraint on attorney advertising was an affirmative command of the Arizona Supreme Court.[66] Since the supreme court ultimately wields the State's power over the practice of law, the State acting as sovereign, compelled the restraint that was thus immune from antitrust scrutiny.[67] In *Goldfarb*, the activities of the State Bar were not state action because the State of Virginia, through its Supreme Court Rules, did not require the anti-competitive activities.[68]

After *Lafayette*, *Boulder*, and *Los Angeles*, it can generally be said that cities are not within the *Parker* exemption simply because of their status.[69] Rather, the anti-competitive conduct of a municipality may be exempt only when the municipality acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation.[70] Also, the state legislature must have contemplated the allegedly anti-competitive actions.[71]

Ronwin *Grading Procedure was State Action*

In *Ronwin*, the actions of the Committee were analogous to the activities of the program committees in *Parker*; the Court held that the actions in both were state action.[72] In both *Parker* and *Ronwin*, committees composed of industry members were created pursuant to state authority to deal with conditions unique to their industries. Each committee proposed a program to displace competition with regulation, and each program was approved by the state, acting through the Prorate Commission in *Parker* and the Arizona Supreme Court in *Ronwin*.[73] The Court's holding in *Ronwin* is consistent with its prior holdings.

As the Court recognized in *Goldfarb*, the State Bar is a state agency

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recent case following the *Petrofina* rationale, see *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F. Supp. 976, 982 (D. Hawaii, 1983).

63. *See* Cantor v. Detroit Edison, 428 U.S. 579 (1976). In *Cantor*, the defendant was a private utility. No public officials or agencies were named as parties, and there was no claim that any state action violated the antitrust laws. Even through the anti-competitive program was part of a state-approved tariff, the Supreme Court held it was an unlawful restraint of trade. *See supra* notes 34-38 and accompanying text.

64. *See supra* notes 16 and 17 and accompanying text.

65. *Id.*

66. *See supra* notes 27 and 28 and accompanying text.

67. *Id.*

68. *See supra* notes 24 and 25 and accompanying text.

69. *See supra* notes 41 and 53 and accompanying text.

70. *See supra* notes 40, 42, 46, and 47 and accompanying text.

71. *Id.*

72. *See supra* notes 3 and 17 and accompanying text.

73. *See supra* notes 11 and 17 and accompanying text.

for certain limited purposes.[74] In *Goldfarb*, the private county bar association published a minimum fee schedule.[75] The State Bar, by enforcing the fee schedule with disciplinary action, voluntarily joined in a private anti-competitive activity, even after the Virginia Supreme Court warned it to refrain.[76] In contrast, the Committee in *Ronwin* acted within the scope of authority delegated to it by the Arizona Supreme Court.[77]

In *Lafayette*, the Court found no antitrust immunity because the state had not authorized the municipality's actions.[78] *Ronwin* can be distinguished from *Lafayette*. In *Lafayette*, a municipality conducted the anti-competitive activity.[79] The Court was reluctant to hold that a city's anti-competitive activity was state action because the activity might reflect the policy of the city, not that of the state.[80] In *Ronwin*, an arm of the Arizona Supreme Court with statewide jurisdiction promulgated the anti-competitive policy. Regulation of admission to the bar is thus a statewide interest.[81] To have authorized the challenged grading procedure, the Committee must have acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition.[82] Although any restriction on admission to the bar, has the effect of limiting competition,[83] it is the policy of the Arizona Supreme Court to replace competition with regulation in the legal profession.[84] As part of a comprehensive regulatory scheme, the supreme court authorized the Committee to examine the applicants and to recommend for admission to the bar those who have the necessary qualifications.[85] However, the court reserved strict supervisory authority over the Committee, and the Arizona Supreme Court rules specified the subjects to be tested and the general qualifications required for admission to the bar.[86] Once the examination was given and graded, the Committee's authority was limited to giving its recommendations to the supreme court.[87] The Arizona Supreme Court ultimately decided whether to grant or deny admission to the bar.[88] Since the Arizona Supreme Court exercised sovereign power with respect to admission to the Arizona Bar, the grading procedure challenged in *Ronwin* was state action and thus immune from attack under the Sherman Act.

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74. *Goldfarb*, 421 U.S. at 791.
75. *Id.* at 776.
76. *Id.* at 791-72.
77. *Ronwin*, 104 S. Ct. at 1997-98.
78. *Lafayette*, 435 U.S. at 414. *See supra* note 39 and accompanying text.
79. *See supra* note 39 and accompanying text.
80. *See supra* note 45 and accompanying text.
81. Ronwin v. State Bar of Arizona, 686 F.2d 692, 707 (9th Cir. 1981) (Ferguson, C.J., dissenting).
82. *Id.* at 706.
83. *Id.*
84. *Id.*
85. *See supra* note 6 and accompanying text.
86. *Id.*
87. *Id.*
88. *Id.*

ENVIRONMENTAL LAW

PSYCHOLOGICAL HEALTH DAMAGE AS AN ENVIRONMENTAL EFFECT: *METROPOLITAN EDISON CO. V. PEOPLE AGAINST NUCLEAR ENERGY*

The National Environmental Policy Act (NEPA)[1] requires that all federal agencies prepare a statement detailing the possible environmental impacts and effects of proposed major federal actions significantly affecting the quality of the human environment. Recently, in *Metropolitan Edison Co. v. People Against Nuclear Energy*,[2] the United States Supreme Court took a narrow view of the term "environmental," stating that, to be an environmental effect within NEPA, an effect must have a "reasonably close causal relationship" to a change in the physical environment.[3] The Court concluded that psychological health damage to neighbors of a nuclear power plant caused by their perception of the risk of a nuclear accident was not an environmental effect recognized by NEPA.[4]

The Metropolitan Edison *Facts*

On March 28, 1979, the "worst nuclear accident Americans have yet

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1. 42 U.S.C. §§ 4321, 4331-4335, 4341-4347, 4361-4370 (1976 & Supp. V. 1981). The National Environmental Policy Act directs all federal agencies to:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C).

Every federal agency is to prepare an environmental impact statement (EIS) as part of the planning process of any major federal action significantly affecting the human environment. If the project or the environmental circumstances change, NEPA requires a supplemental environmental impact statement. 40 C.F.R. § 1502.9 (1982). In either case, the agency may prepare an environmental assessment to determine whether an impact statement is required. 40 C.F.R. § 1501.3 (1982). If, for instance, the agency determines in the environmental assessment that no major federal action is involved, then the agency action does not fall within NEPA and no environmental impact statement is required. For a general discussion of the EIS process, see Comment, *People Against Nuclear Energy v. United States Nuclear Regulatory Commission: Redefining Environmental Policy in the Stressful Aftermath of a Nuclear Accident*, 18 N. ENG. L. REV. 449 (1983).

2. 103 S. Ct. 1556 (1983).

3. *Id.* at 1561. The Court stated that the congressional concerns that led to the enactment of NEPA suggest that the terms "environmental effect" and "environmental impact" include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. The Court analogized this requirement to the proximate cause doctrine of tort law. *Id.*

4. *Id.* at 1562.

experienced" occurred at the Three Mile Island Unit 2 nuclear power plant (TMI-2) operated by Metropolitan Edison Co. near Harrisburg, Pennsylvania.[5] Prior to the accident, Metropolitan Edison had shut down the twin reactor Three Mile Island Unit 1 (TMI-1) for refueling.[6] After the accident, the Nuclear Regulatory Commission (NRC) ordered Metropolitan Edison to keep TMI-1 shut down until the NRC could determine that Metropolitan Edison could operate the plant safely.[7]

The NRC held extensive hearings on the proposed restart of TMI-1. People Against Nuclear Energy (PANE), a group of Harrisburg-area residents, intervened in the proceedings, contending that to restart TMI-1 would cause severe damage to the psychological health of area residents.[8] PANE argued that NEPA required the NRC to consider this psychological harm in the restart proceedings.[9] The NRC refused to address PANE's contentions, and PANE filed a petition for review in the Court of Appeals for the District of Columbia.[10] The D.C. Circuit held that potential harms

5. People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n, 678 F.2d 222, 223 (D.C. Cir. 1982), *rev'd*, 103 S. Ct. 1556 (1983).

6. *Metropolitan Edison*, 103 S. Ct. at 1558.

7. *Id.*

8. *Id.* People Against Nuclear Energy (PANE) described the health damage the residents suffered to the United States Supreme Court as follows:

> Renewed operation of Three Mile Island, Unit 1 (TMI-1) would cause severe psychological distress to PANE's members and other persons living in the vicinity of the reactor. The accident at Unit 2 has already impaired the health and sense of well being of these individuals, as evidenced by their feelings of increased anxiety, tension and fear, a sense of helplessness and such physical disorders as skin rashes, aggravated ulcers, and skeletal and muscular problems. Such manifestations of psychological distress have been seen in the aftermath of other disasters. The possibility that TMI Unit 1 will reopen severely aggravates these problems. As long as this possibility exists, PANE's members and other persons living in the communities around the plant will be unable to resolve and recover from the trauma which they have suffered. [The] operation of Unit 1 would be a constant reminder of the terror which they felt during the accident, and of the possibility that it will happen again. The distress caused by this ever present spectre of disaster makes it impossible for the NRC to operate TMI-1 without endangering the public health and safety.

Petition for Writ of Certiorari, Appendix at 115a, Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556 (1983).

Following the TMI-2 accident, the governor of Pennsylvania recommended the temporary evacuation of pregnant women and pre-school children from a five-mile radius surrounding the plant. REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, THE NEED FOR CHANGE: THE LEGACY OF TMI 119 (Oct. 1979). The President's Commission concluded:

> [the] major health effect of the accident appears to have been on the mental health of the people living in the region of Three Mile Island and of the workers at TMI. There was immediate, short-lived mental distress produced by the accident among certain groups of the general population living within 20 miles of TMI. . . . Workers at TMI experienced more distress than workers at another plant studied for comparison purposes. This distress . . . continued in the months following the accident.

Id. at 35.

9. *People Against Nuclear Energy*, 678 F.2d at 224. In the court of appeals, PANE had also contended that the Atomic Energy Act required the NRC to address its contentions and that restarting TMI-1 would cause serious damage to the stability and well-being of neighboring communities. The court of appeals rejected the former argument, and neither party sought review of the holding. The court of appeals held that the NRC must consider the community damage if it found that the psychological health damage warranted the preparation of an EIS. In holding that the NRC need not consider the psychological harm, the United States Supreme Court also precluded inquiry into the community damage. *Metropolitan Edison*, 103 S. Ct. at 1560, 1561 n.5.

10. *People Against Nuclear Energy*, 678 F.2d at 225.

to psychological health are cognizable under NEPA. It ordered the NRC to determine whether the psychological effects of renewed operation of TMI-1 were sufficient to require a supplemental environmental impact statement.[11]

The United States Supreme Court granted certiorari to the NRC[12] and utility owners of Three Mile Island and unanimously reversed the D.C. Circuit. The Supreme Court concluded that the psychological damage at issue was not an environmental effect within the meaning of NEPA; therefore, the Court held that the NRC need not consider evidence of potential psychological harm to area residents in deciding to permit the restart of TMI-1.[13]

Background to Metropolitan Edison

Prior to *Metropolitan Edison*, urban dwellers had voiced claims of psychological distress in opposition to the construction of various government projects.[14] The claims expressed "psychological distaste"[15] for and "community attitudes and fears"[16] about increased dangers of crime, reduced property values and changes in the character of neighborhoods. The courts treated these not as claims of health damage, but as sociologically based community anxieties outside the purview of a NEPA environmental study.[17] Courts rejected these "people pollution" claims because they were founded on the dislike and fear of a particular socioeconomic class of people rather than on the environmental impact of the proposed projects.[18]

The D.C. Circuit distinguished PANE's position from prior cases on two grounds. First, PANE claimed direct, severe damage to human health, as opposed to the sociological fears and anxieties asserted in prior cases.[19] Second, both the existence and the extent of the harm were specu-

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11. *Id.* at 223.

12. *Metropolitan Edison*, 103 S. Ct. at 1559.

13. *Id.* at 1562.

14. *See, e.g.*, Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975) (low-rent housing); Maryland-National Capital Park and Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973) (bulk mail center); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (jail); Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974) (low-rent housing).

15. *Hanly*, 471 F.2d at 833.

16. *Trinity Episcopal School Corp.*, 387 F. Supp. at 1078.

17. The D.C. Court of Appeals coined the term "people pollution" to describe the opposition to a proposed bulk mail center. The court stated:

> [A factor] was the prospect of an influx of low-income workers into the County. Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on "environment," if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.

Maryland-National Capital Park and Planning Comm'n, 487 F.2d at 1037.

18. *See generally People Against Nuclear Energy*, 678 F.2d at 229.

In *Metropolitan Edison*, 103 S. Ct. 1556 (1983), the Supreme Court characterized prior cases as holding that the risk of crime, or plaintiffs' concerns about crime, do not constitute environmental effects. The cases did not consider specific allegations that psychological health damage would arise from the risk of crime. *Id.* at 1562, n.11.

19. *People Against Nuclear Energy*, 678 F.2d at 227-30. *See also supra* text accompanying notes 14-18. The psychological harm alleged by PANE, unlike that of prior cases, lacks the "people pollution" element.

lative in prior cases. PANE claimed, however, that the restart of TMI-1 would aggravate the demonstrable damage to the mental health of area residents that the accident at TMI-2 already had caused.[20] Because NEPA requires federal agencies to consider the effects of federal actions on human health, the D.C. Circuit held that the NRC was required to consider whether the risk of an accident at TMI-1 might cause harm to the psychological health of area residents.[21]

The Metropolitan Edison *Decision*

To determine whether NEPA contemplated the psychological effects alleged by PANE, the United States Supreme Court looked first at the language and legislative purpose of the statute. The Court found that NEPA is aimed at the physical environment commonly conceived as "the world around us."[22] The Court stated that Congress did not intend NEPA to be all-inclusive legislation protecting all aspects of general human health and well-being. Congress' goal was to protect human health and welfare;[23] but according to the Supreme Court, protecting the physical environment achieves NEPA's goal.[24] Having thus defined the purpose of NEPA, the Court concluded that, to be an environmental effect cognizable under NEPA, a particular effect must have a close, causal relationship to a change in the physical environment brought about by the major federal action at issue.[25]

The proposed major federal action affecting the environment in this case was the NRC's approval of renewed operation of TMI-1.[26] According to the Supreme Court, cognizable effects of the federal action would be the release of warm water into a nearby river and the release of low level radiation, both of which an environmental impact statement (EIS) had al-

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20. 678 F.2d at 230. *See supra* note 9. The President's Commission on the Accident at Three Mile Island found that the major health effect of the TMI-2 accident was on the mental health of the people living in the region and the workers at TMI. REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, *supra* note 8, at 35.

21. 678 F.2d at 228-29.

22. *Metropolitan Edison*, 103 S. Ct. at 1560. "[W]e think, the context of the statute shows that Congress was talking about the physical environment—the world around us, so to speak." *Id.*

23. The congressional declaration of the purpose of NEPA states:

> The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321.

Metropolitan Edison raises serious policy questions. Just what is the "human environment" that Congress sought to protect through NEPA? How broadly or narrowly should those words be construed? Compare the Court's discussion of the term "environment" in NEPA with Note, *Psychological Effects at NEPA's Threshold*, 83 COLUM. L. REV. 336 (1983), in which the author argues for an expansive view of the human environment.

24. *Metropolitan Edison*, 103 S. Ct. at 1560-61. The Court stated: "although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment." *Id.* (emphasis in original).

25. *Id.* at 1561.

26. *Id.*

ready considered.[27]

PANE's alleged psychological health damage caused by the residents' perception of the risk of a nuclear accident did not pass the causal relationship test; as a result, the Court refused to characterize PANE's alleged harm as an environmental effect. PANE contended that psychological health damage would "flow directly from the risk of a nuclear accident";[28] therefore, PANE argued, the perception of that risk was an environmental effect under NEPA. Justice Rehnquist, writing for the Court, seized upon PANE's own language to refute its claim. According to the Court, because a risk of harm is unrealized it has no effect on the physical environment, and any damage which would flow directly from the risk is even further removed from the physical world with which NEPA is concerned.[29] The Court held that the NRC need not consider PANE's allegations of psychological health damage under NEPA because the causal chain running from the renewed operation of TMI-1, to the risk of an accident, to the perception of that risk by PANE's members, with the alleged resulting psychological health damage, was too attenuated.[30]

Psychological Health Claims After Metropolitan Edison

1. *Quantifiability Is No Longer a Bar*

In cases prior to *Metropolitan Edison*, courts had rejected psychological harm claims on the ground that such effects are not readily quantifiable

27. *Id.* The environmental impact assessment made pursuant to the restart of TMI-1 is contained in the Joint Appendix of *Metropolitan Edison. Id.* at Joint Appendix 48. The original environmental impact statement was reprinted as NUREG-0552 in April 1979.

28. 103 S. Ct. at 1561 (quoting Brief for Respondent at 23). The NRC considered the risk of an accident in its environmental assessment made pursuant to the restart of TMI-1 and concluded that the risk had not significantly changed since the original EIS was prepared for TMI-1 in 1972. *Id.* at Joint Appendix 58-60.

29. 103 S. Ct. at 1561-62. The Court stated that a risk is "unrealized in the physical world." *Id.* at 1562. This seems difficult to apply as a standard by which to identify environmental effects unless it is confined to the present circumstances—the risk of the occurrence of some identifiable event. The majority in the D.C. Circuit did not discuss this element of perception of risk although dissenting Judge Wilkey emphasized it:

> Instead of being required to assess *the risk* of a proposed activity in determining whether the activity should go forward, the agency is now required to assess *how people perceive and react to the risk*. . . . [P]sychological concerns are simply too far removed from the purpose of NEPA, which is to ensure that an agency considers the environmental effects of a decision, not the reactions of affected individuals to the risk of those environmental effects.

People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n, 678 F.2d 222, 239-40 (D.C.Cir. 1982) (Wilkey, J., dissenting) (emphasis in original), *rev'd*, 103 S. Ct. 1556 (1983).

30. 103 S. Ct. at 1562.

The Court's analysis of what constitutes a NEPA environmental effect is similar to the analysis suggested in Note, *Psychological Effects at NEPA's Threshold*, 83 COLUM. L. REV. 336, 363-69 (1983). The Court, however, reaches a different conclusion. The Note suggests that the causal connection requirement is satisfied if the effect at issue is a reasonably foreseeable result of the change in the physical environment. This follows from the wording of the guidelines of the Council on Environmental Quality, 40 C.F.R. § 1508.8 (1983). Justice Rehnquist wrote that "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or the effect on the environment", 103 S. Ct. at 1560 (emphasis in original), and "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within § 102 [of NEPA] because the causal chain is too attenuated." *Id.* at 1561. Thus, in the Court's view, reasonable foreseeability is not a stringent enough test to keep NEPA within reasonable bounds. *See infra* note 39 and accompanying text.

and thus cannot be meaningfully assessed.[31] The *Metropolitan Edison* holding impliedly rejects this reasoning. The *Metropolitan Edison* court concluded that the quality of the alleged harm as an environmental effect is the factor relevant to cognizability under NEPA. If, as the Court stated, the severity of the harm does not affect its quality, neither should the inability to quantify the harm affect its quality.[32] The relevant inquiry after *Metropolitan Edison* is whether the alleged harm has a sufficiently close causal relationship to a change in the physical environment. If the harm meets this test, it is an environmental effect and should be considered under NEPA regardless of its measurability.

2. *Psychological Effects As Lesser-Included Effects in an EIS*

In the environmental impact assessment prepared pursuant to the restart of TMI-1, the NRC concluded that the environmental impact of operating TMI-1 had not changed sufficiently since the original 1972 EIS to require preparation of a supplemental EIS.[33] The *Metropolitan Edison* court held that psychological health damage caused by the perception of a risk of a nuclear accident is not a factor that the NRC must consider in its decision not to prepare an EIS and to approve restart of TMI-1.

In *Metropolitan Edison*, the Supreme Court rejected PANE's psychological health damage claim because the restart of TMI-1 would not cause a change in the physical environment which would in turn cause the psychological health damage. The Court implied that if additional physical impacts of the operation of TMI-1 would require a supplemental EIS, PANE's claim would still not have to be considered because it was not caused by those physical changes.

The Council on Environmental Quality (CEQ) regulations classify effects of agency actions as "direct" and "indirect."[34] An EIS must consider both types of effects, and if they are significant, both can require the prepa-

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31. In *Hanly v. Kleindienst*, the Second Circuit Court of Appeals stated that psychological and sociological effects upon neighbors of a proposed jail need not be considered in the decision whether to prepare an EIS because "they do not lend themselves to measurement." 471 F.2d 823, 833 (2d Cir. 1972). Unlike factors such as noise and crime, psychological effects are not "readily translatable into concrete measuring rods," such as decibels and crime statistics. *Id.* at 833 n.10.

Language to this effect has been quoted with approval by several courts. *See, e.g., Maryland-National Capital Park and Planning Comm'n*, 487 F.2d at 1038; *Trinity Episcopal School Corp.*, 387 F. Supp. at 1079.

Some commentators have maintained that the NEPA statutory language does not contain an objective quantification requirement. Observing that NEPA expressly requires agencies to consider unquantified values such as beauty and historical significance they conclude that NEPA itself belies that quantification requirement often imposed on psychological harm claims. *See, e.g.*, Note, *Searching for a Bright Line Test: People Against Nuclear Energy v. Nuclear Regulatory Commission*, 15 CONN. L. REV. 303 (1983); Note, *People Against Nuclear Energy v. United States Nuclear Regulatory Commission: Potential Psychological Harm Under NEPA*, 32 CATH. U.L. REV. 495 (1983); Note, *Psychological Effects at NEPA's Threshold*, 83 COLUM. L. REV. 336 (1983). *See also, People Against Nuclear Energy*, 678 F.2d at 228. *See* 42 U.S.C. § 4332(2)(B).

32. *See Metropolitan Edison*, 103 S. Ct. at 1563.

33. Environmental Impact Appraisal by the NRC Division of Engineering Evaluating the Proposed Restart of Three Mile Island Nuclear Station, Unit 1, Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556, Joint Appendix at 48 (1983).

34. 40 C.F.R. § 1508.8 (1983). Section 202 of NEPA created the Council on Environmental Quality in the Executive Office of the President to supervise the Act's implementation. 42 U.S.C. § 4342 (1976).

ration of an EIS.[35] CEQ defines "indirect effects" as effects removed in time and distance from an agency action but still reasonably foreseeable.[36]

PANE's alleged damage in *Metropolitan Edison* was a reasonably foreseeable effect of the restart of TMI-1; however, the decision adds a new dimension to the CEQ classification. *Metropolitan Edison* recognized that some effects may be so indirect that they are not environmental effects at all and therefore need not be considered at any stage of the NEPA process. In disallowing PANE's claim, the *Metropolitan Edison* court suggested that foreseeability is not a stringent enough standard.[37] Health effects which are the foreseeable result of an agency action may not be environmental effects cognizable under NEPA unless they are also caused directly by a change in the physical environment.

Unresolved Issues

While making clear that NEPA does not recognize certain psychological harm claims, the Supreme Court's opinion in *Metropolitan Edison* leaves unclear what, if any, psychological harm claims NEPA does recognize. *Metropolitan Edison* suggests that psychological health damage that is directly caused by a change in the physical environment is cognizable under NEPA.[38] By stating that agencies are not obliged to identify genuine claims of psychological health damage, however, the Court implied that federal agencies need not consider any psychological health claims under the current statute.[39] The Court suggested that because of the limited time, resources and expertise of individual federal agencies, the tasks of identifying and analyzing genuine claims of psychological damage is simply too great to impose on them.[40]

In a brief concurrence, Justice Brennan acknowledged that some psychological injuries may indeed be NEPA environmental effects. As an example, he stated that psychological injury arising out of the "direct sensory impact of a change in the physical environment" would be an environmental effect within NEPA.[41] The mere perception of risk, however, as in *Met-*

35. 42 U.S.C. § 4332(C). Among the effects considered "indirect," only social and economic effects cannot alone require the preparation of an EIS. 40 C.F.R. § 1508.14 (1983). *See* Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517 (5th Cir. 1978), which held that "when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger an agency's obligation to prepare an EIS." *Id.* at 522.

36. 40 C.F.R. § 1508.8.

37. *See supra* note 30.

38. The Court refers to PANE's claim as a health claim, refraining from relegating it to the realm of political and social discontentment. 103 S. Ct. at 1562. Also, the Court does not narrowly confine its discussion to the context of a nuclear accident, as the D.C. Circuit had done. By setting up a test by which to judge psychological harm claims, the Court seems to acknowledge that NEPA requires consideration of psychological harm claims in some instances.

39. The Court, per Justice Rehnquist, stated:

> It would be extraordinarily difficult for agencies to differentiate between "genuine" claims of psychological health damage and claims that are grounded soley in disagreement with a democratically adopted policy. Until Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies are obliged to undertake the inquiry.

Id. at 1563.

40. *Id.* at 1562.

41. *Id.* at 1564.

ropolitan Edison, would not be.

Justice Brennan cited *Chelsea Neighborhood Association v. United States Postal Service*[42] as an example of psychological injury which arises out of the direct sensory impact of a change in the physical environment. In *Chelsea*, the Second Circuit Court of Appeals required the Postal Service to consider in an EIS the possible psychological effects of living in an apartment building constructed atop a postal facility.[43] *Chelsea* differed from other cases in that it addressed the effects on residents of the proposed facility rather than the neighbors' reactions to those residents.[44] Any adverse psychological effects suffered by the apartment dwellers would be the direct impact of their perception of the physical environment in which they lived, not the result of any perception of risk attendant upon occupying the building. Thus, potential injury to psychological health had a close causal connection to a change in the physical environment, and the agency assessing the environmental impact of the proposed action should have considered the potential injury.[45]

As Justice Brennan suggested, some psychological effects of agency actions should be cognizable under NEPA. A question remains, however: for which psychological health effects can the necessary causal relationship be established?[46] In *Metropolitan Edison*, the Court's characterization of the harm at issue as psychological health damage caused by the apprehension of a risk was fatal to PANE's claim.[47] In the future, psychological harm claims that can be linked to social or political concerns[48] or fear of the realization of a risk will be disallowed. In addition, a "but for" causal link between the claim and the federal action is insufficient. Under *Metropolitan Edison*, claimants must establish a direct causal link to the physical environment by careful characterization of claimed psychological effects and must present a clear factual basis for the claim.[49]

Conclusion

In *Metropolitan Edison v. People Against Nuclear Energy*, the United

42. 516 F.2d 378 (2d Cir. 1975).

43. *Id.* at 388. In *Chelsea*, the City of New York and the Postal Service proposed to construct an apartment building atop an 80-foot-high garage. The court cited emotional isolation from the community as an example of the "human factors" that the Postal Service must consider. *Id.*

44. *See supra* note 18 and accompanying text.

45. *See* Jordan, *Psychological Harm After PANE: NEPA's Requirement to Consider Psychological Damage*, 8 HARV. ENVT'L L. REV. 55, 76 (1984).

46. For an extensive discussion of psychological damages claim which may be cognizable under NEPA after *Metropolitan Edison* see Jordan, *supra* note 45.

47. 103 S. Ct. at 1562.

48. *See supra* text accompanying notes 14-18.

49. For example, in the situation where federal approval of a strip mine results in a rural community becoming a "boom town," the psychological effects of living in such a boom town are indirect effects of the federal action. A court could therefore characterize residents' psychological harm claims as resistance to change or fear of the increased risk of crime or decreased services. Alternatively, a court could characterize them as psychological health damage directly resulting from the stress of sudden overcrowding. Of course, both concerns may be present. The Court may have had such a scenario in mind when it said in *Metropolitan Edison* that federal agencies need not undertake to differentiate between genuine claims of psychological health damage and others. *Metropolitan Edison*, 103 S. Ct. at 1563.

States Supreme Court stated that the purpose of the National Environmental Policy Act is to protect the physical environment. Federal agencies need not consider any claim not sufficiently related to that purpose. Psychological health damage caused by the perception of the risk of a nuclear accident is not, in the Court's view, an environmental effect cognizable under NEPA.

Although some particular claims of psychological health damage may fall under NEPA, claims of psychological harm not firmly based on some direct environmental impact generally do not. The status of psychological health damage as an environmental effect cognizable under NEPA depends upon the closeness of the relationship between a change in the physical environment and the alleged psychological harm. Therefore, litigants seeking the protection of NEPA must carefully examine the origin and nature of alleged psychological harms and frame their complaints accordingly.

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