offense carrying serious offense implications for the repeat offender; (2) parole revocation—a petty offense resulting in return to prison; and (3) accumulative or consecutive penalties—sentencing procedures which permit a sentence to be imposed for each of several minor offenses, *e.g.*, a shoplifter who takes three articles each of a value under twenty dollars and is prosecuted on three counts. Though the recent United States Supreme Court decision[55] extending the sixth amendment right to counsel to misdemeanants at trial may remedy the above inequities in part, the failure of the courts to extend fifth amendment protections to these situations through broad application of *Miranda* principles may permit diverse, if not unjust, results.

This Case Note has attempted to demonstrate the meandering path *Miranda* has taken along the misdemeanor-felony border. As seen initially, difficulty in comparing the decisions of the various jurisdictions is magnified by their categorization and sub-categorization of unlawful activity. Application of *Miranda* has been diverse and inconsistent. Some jurisdictions have declined to apply *Miranda* to petty offense investigations claiming coerciveness did not occur in such interrogations. Some have declined to rule on *Miranda* application by reasoning that the question was not reached because custodial interrogation was not involved in the facts before them. It might be queried whether this suggests by implication that *Miranda* may apply if custody had been shown to exist. Others have argued that judicial economy and impairment of the role of the police precludes application of *Miranda* principles to petty offenses. Still others have expressed dismay over the likely degradation of the police and infliction of fear and anxiety among "innocent" citizens should such extension be permitted.

Conversely, other states declined to make a distinction between some or all unlawful activities and applied *Miranda* broadly; some in this category have designated certain traffic offenses as beyond the limit of *Miranda* application. Though the tone of this Case Note may seem to favor broad application of *Miranda,* an attempt has been made to show the complexity of, and an appreciation for, the law enforcement agencies' job. In sum, it is not clear where the lines will be drawn as to lesser offenses, though a significant number of courts now seem to support extension of *Miranda* principles to minor offenses. Courts, such as the Supreme Court of Iowa, who decline to generally extend *Miranda,* but say "the door is not closed, upon a showing of coercion," as was done in *Gabrielson,* perhaps are engaging in a positive compromise to preserve both the principles and the system. It is suggested, however, that a stronger stance in favor of broad application could make easier the decision-making of the police officer, the prosecutor and the court, as well as affording greater protection to the accused petty offender.

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[55] Argersinger v. Hamlin, 40 U.S.L.W. 4679 (U.S. June 12, 1972).

Constitutional Law—THE UNITED STATES GOVERNMENT HAS THE SOLE AUTHORITY, UNDER THE DOCTRINE OF IMPLIED PRE-EMPTION, TO REGULATE RADIOACTIVE DISCHARGES FROM NUCLEAR POWER PLANTS.—*Northern States Power Co. v. Minnesota* (8th Cir. 1971).

Northern States Power Company (hereinafter Northern) is engaged in the production and distribution of electrical power in interstate commerce. The present action was generated by Northern's construction of a nuclear utilization facility which consisted of a nuclear fueled electric generating plant. Construction of the facility was commenced upon the issuance of a provisional permit by the Atomic Engergy Commission (AEC) in compliance with section 104(b) of the Atomic Energy Act of 1954, as amended,[1] and the regulations contained in 10 C.F.R. § 50 (1971). Northern applied to the Minnesota Pollution Control Agency for a waste disposal permit which was issued subject to conditions which regulated the level of radioactive discharges from the plant. The regulations imposed by Minnesota covered substantially the same area as the federal regulations governing effluent discharges, but were much more restrictive. While later operating under a provisional license, Northern initiated a declaratory judgment action which presented the question of whether the Atomic Energy Act of 1954, as amended,[2] had expressly or impliedly pre-empted the authority of the states to regulate effluent discharges from nuclear power plants. *Held*, affirmed, one justice dissenting. Where the federal enactment and its legislative history indicate a clear intention to pre-empt a field, the United States Government has the sole authority to regulate that field to the exclusion of the states. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971).

The question of federal pre-emption of the subject matter involved in this case is one of first impression in the federal appellate courts. The proper allocation of governmental power in our changing society has been a continual problem, and the inter-governmental difficulties which arise as a consequence of the assimilation of nuclear technology, while arousing widespread interest,[3] may have a dramatic impact upon the future course of federalism in our nation.

The doctrine of federal pre-emption has as its basis article VI, clause 2,[4] of the Constitution of the United States, which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." On the other hand, the

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1 42 U.S.C. § 2134 (1970).

2 *Id.*

3 One indicia of the widespread interest generated by this litigation is the number of amici curiae briefs filed in support of Minnesota. Briefs were filed by the Michigan Department of Natural Resources, the Michigan Department of Public Health, the Wisconsin Society of Professional Engineers, and the states of Wisconsin, Illinois, Maryland, and Vermont.

4 Article VI is commonly referred to as the "supremacy clause."

tenth amendment to the United States Constitution states that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, article VI, clause 2, and the tenth amendment serve not only to elevate the federal law, but equally to limit the scope of federal enactments.

The doctrine of pre-emption may be viewed as a spectrum, with well-defined perspectives at each end. A first view of pre-emption, marking one end of the spectrum, envisions the state as precluded from acting in any area of actual or potential conflict with a federal enactment.[5] The other end of the spectrum is delineated by the view that the states should be free to act until such time as an actual conflict emerges, and the state enactment, if allowed to stand, would be inconsistent with the objectives of the federal regulation.[6] In the area between these two extremes, the courts have exhibited a willingness to tolerate state action, depending upon a variety of factors, such as: federal inaction,[7] the compatibility of the objectives of the state and federal enactments,[8] the predominantly local nature of the action,[9] or a need for the authority combined with an unwillingness on the part of the federal government to make provisions therefor.[10]

However, with any approach to federal pre-emption, there are two conditions which must be satisfied in order for pre-emption to take place. First, there must be a constitutional basis for pre-emption. In this regard, it is necessary to establish that the congressional enactments seeking to regulate a particular field have been undertaken pursuant to powers delegated to the federal government by the Constitution.[11] The Eighth Circuit Court of Appeals had little difficulty in determining in the instant case that Congress acted pursuant to one of its constitutionally delegated powers in establishing a regulatory system which encompassed the entire field of nuclear energy. In the instant case, the congressional findings concerning the development, utilization, and regulation of atomic energy sufficiently demonstrated to the court a reliance upon the constitutionally granted powers of defense, regulation of interstate and foreign commerce, and the promotion of the general welfare.[12] Second, once it is established that the federal government has a constitutional basis for regulation of the field, it must be determined whether the exercise of federal authority over the subject matter has established a pattern which would indicate pre-emption, and a resulting exclusion of state action.[13] With respect

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[5] Pennsylvania v. Nelson, 350 U.S. 497 (1956).
[6] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).
[7] *See* Auto Workers Union v. Russell, 356 U.S. 634 (1958).
[8] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).
[9] *See* Linn v. Plant Guard Workers, 383 U.S. 53 (1966).
[10] *See* Allen Bradley Local v. Board, 315 U.S. 740 (1942); Helman, *Pre-emption: Approaching Federal-State Conflict over Licensing Nuclear Power Plants*, 51 MARQ. L. REV. 43, 47-48 (1967).
[11] *Cf.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947).
[12] 447 F.2d 1143, 1147 (8th Cir. 1971). The congressional findings which prefaced the Atomic Energy Act may be found in 42 U.S.C. §§ 2011, 2012 (1970).
[13] *See* Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955).

to this determination, the courts have encountered considerable difficulty in delimiting those situations in which pre-emption exists as a matter of law. In their attempts to discern a pattern of federal authority, the courts have frequently considered the possibility of physical compliance with both the state and federal regulations.

Where compliance with both the federal and state regulations is a physical impossibility, an exclusion of state law becomes an unavoidable conclusion, which eliminates any necessity for inquiry into congressional intent in the enactment of the legislation.[14] In the instant case, it was not physically impossible for Northern to comply with the regulations of both the AEC and the State of Minnesota, as they relate to radioactive discharges, and the Eighth Circuit Court of Appeals so found.

Second, where compliance with both sets of regulations is possible, an inquiry into the Congressional design for the enactment is necessary to reveal whether Congress has expressly and unequivocally declared the authority conferred to be exclusive, to the extent that the state will be prohibited from asserting concurrent or supplemental regulation over the subject matter.[15] As was conceded by the parties to this action, the Atomic Energy Act contains no provision which expressly declares the authority of the United States Government to be exclusive of all other regulation.[16] Even in those circumstances in which Congress has not expressly declared the authority to regulate the subject matter to be exclusive, pre-emption may be implied.[17] The key factors which have been utilized by the courts in determining whether Congress has impliedly pre-empted the field are: the objectives and intent of Congress as revealed by the statute and its legislative history,[18] the scope of the legislation and the manner in which it has been carried into effect by the administrative agency,[19] the nature of the subject matter as it demands uniformity of regulation in the national interest,[20] and the effect of the state regulation as it stands as an obstacle to the accomplishment of the objectives of the federal enactment.[21] In light of these factors, any inquiry concerning implied pre-emption involves an examination of the federal statute, its legislative history, and the pattern of administrative activity following the enactment of the statute.

From the inception of the AEC in 1946, the United States Government has exercised virtually complete control over regulation of radiation health and

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[14] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). *See also* Case v. Bowles, 327 U.S. 92, 102-03 (1946); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156 (1942).

[15] Campbell v. Hussey, 368 U.S. 297, 302 (1961).

[16] 447 F.2d at 1147.

[17] Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 772 (1947); Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 613 (1926).

[18] Florida Lime & Avacado Growers, Inc. v. Paul, 373 U.S. 132, 147 (1963); Campbell v. Hussey, 368 U.S. 297, 301-02 (1961).

[19] Pennsylvania v. Nelson, 350 U.S. 497, 502, 504 (1956).

[20] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241, 244 (1959).

[21] Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 542 (1945).

safety matters. This was a very natural development in 1946, as until that time the only uses of atomic energy had been in military applications.[22] The rapid development of peace-time uses for atomic energy, which emerged after 1946, caused Congress to amend the Atomic Energy Act to accommodate these technological achievements.[23] The effect of the 1954 amendments was to encourage and permit private industry to enter into the development and utilization of nuclear energy for peaceful purposes. While the 1954 amendments to the Atomic Energy Act permitted a slackening of the previously monopolistic control of the federal government, the exclusive rights of the federal government could only be surrendered by compliance with the licensing provisions established by the new amendments.[24] In 1957, the Atomic Energy Act was further amended in order to protect the young nuclear power industry from unlimited tort liability. However, control over the adjudication of radiation injury claims arising from private utilization sources was left primarily to the states.[25]

The year 1959 brought an additional amendment to the Atomic Energy Act, permitting the AEC to enter into "turn-over" agreements with the states thereby allowing state regulation of the health and safety aspects of many varied areas of radiation usage. The amendment outlines procedures for the transfer of regulatory responsibilities,[26] and also authorizes the AEC to discontinue its regulatory authority with respect to certain enumerated nuclear materials in quantities insufficient to form a critical mass.[27] It is important to note, however, that the State of Minnesota never entered into a "turn-over" agreement with the AEC.[28] A third subsection within the 1959 amendment to the Atomic Energy Act prohibits the AEC from releasing its regulatory responsibilities with respect to certain enumerated activities, including the construction and operation of nuclear utilization facilities.[29] It was the contention of the State of Minnesota in *Northern States Power*[30] that this particular subsection had application only to a total relinquishment of control by the AEC, and that in the instant case, the subsection did not prohibit concurrent regulation by the states. The court rejected this contention, reasoning that the statutory language of the 1959 amendment demonstrated a congressional recognition of the exclusivity of the AEC's regulatory authority.[31]

In analyzing the intent of Congress as evidenced by the statutory lan-

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22 Helman, *Pre-emption: Approaching Federal-State Conflict over Licensing Nuclear Power Plants,* 51 MARQ. L. REV. 43, 52 (1967).

23 *Id.* at 53.

24 42 U.S.C. §§ 2061, 2134 (1970). *See generally* Power Reactor Dev. Co. v. International Union of Elec. Workers, 367 U.S. 396 (1961), which presents an analysis of the AEC's licensing procedure.

25 42 U.S.C. § 2012(i) (1970).

26 42 U.S.C. § 2021(a) (1970).

27 42 U.S.C. § 2021(b) (1970).

28 447 F.2d 1143, 1148-49 (8th Cir. 1971).

29 42 U.S.C. § 2021(b) (1970).

30 447 F.2d 1143 (8th Cir. 1971).

31 *Id.* at 1149.

guage and legislative history of the Atomic Energy Act, the court found further support for a conclusion of implied pre-emption. The affirmative action of Congress which permitted a discontinuance of the AEC's regulatory responsibilities with regard to specified activities, the complex licensing procedure outlined by the 1954 amendments, and the detailed procedures enacted for the execution of "turn-over" agreements, were all held to be illustrative of implied federal pre-emption. The legislative history of the Atomic Energy Act was found to present additional support for pre-emption of the field, the manifestations of intent contained in the House-Senate Joint Committee report taking precedence over any conflicting opinions expressed in the course of the hearings or debate.[32]

The legislative scheme of the Atomic Energy Act, as established by Congress and carried into effect by the AEC, was found by the court to be extraordinarily pervasive, the scope of the enactments being amply demonstrated by the licensing requirements promulgated by the AEC, and the statutory construction given the Atomic Energy Act by the AEC. The position taken by the AEC in their administrative rules is that the states lack authority to regulate the discharge of radioactive effluents from nuclear utilization facilities.[33]

The congressional findings, which prefaced the Atomic Energy Act of 1954, included a number of specific statements to the effect that the field of nuclear energy demanded exclusive federal regulation in the interest of national uniformity.[34] In the instant case, however, it was the contention of the State of Minnesota that the subject matter sought to be regulated was that of pollution control, an area singularly related to the health and safety of citizens of Minnesota. Although pre-emption is more readily implied in cases not involving the public safety and health,[35] the court rejected this pollution control argument as the regulation of radioactive discharges was found to be so intimately related to other phases of the AEC's regulatory functions that concurrent regulation by the states might thwart the congressional scheme. As a consequence, the court agreed with the congressional findings and declared the field of nuclear energy to be one demanding federal regulation in the interest of national uniformity.

In light of the foregoing authority, the finding of implied federal pre-emption by the court should be recognized as correct in the circumstances presented. The dissent, however, raised several points suggestive of a need for additional legislative change in the area of nuclear energy. At the time of the 1954 amendments to the Atomic Energy Act, Congress was aware that several states were interested in exercising concurrent regulatory authority over atomic energy. The committee hearing upon the proposed amendments revealed the intention of Congress to be that of allowing the detailed problems of pre-

32 Zuber v. Allen, 396 U.S. 168, 186 (1969).
33 10 C.F.R. § 8.4 (1972).
34 42 U.S.C. §§ 2011, 2012 (1970).
35 California v. Taylor, 353 U.S. 553 (1957).

emption to be decided by the courts.[36] Although this may have been a suitable solution at the time, the rapid growth of the nuclear power industry, coupled with an increased demand for electrical power, has occasioned the construction of numerous nuclear utilization facilities, offering the prospect of increased litigation concerning the extent of federal authority. This would suggest the present need for a clear delineation of state-federal authority, especially in light of the great interest shown in this litigation by other states.

In addition, the problem of environmental degradation has been dealt with legislatively in several widely different enactments since the original passage of the Atomic Energy Act and its subsequent amendments. These enactments have recognized the special interest which the states have in protecting the natural environment in the interest of the health and safety of their citizens.[37]

Section 274(k) of the 1959 amendment to the Atomic Energy Act provides that nothing contained in the Act should be construed so as to affect the authority of the states to regulate activities other than protection against radiation hazards.[38] As stated previously, the concurrent regulation of the discharge of radioactive effluents as pollution control measures may impair the federal superintendence in other facets of radiation protection. Thus, section 274(k) would appear to indicate a need for congressional action to eliminate possible conflicts between the policies of regulation of atomic energy and environmental protection.

Sections 102(2)(a) and (b) of the National Environmental Protection Act (NEPA)[39] anticipate the use of an interdisciplinary approach which gives consideration to environmental factors in addition to technological and economic considerations. The AEC is charged with the responsibility of observing the requirements of the NEPA. When first created, the AEC was charged with the dual functions of both promoting and regulating the atomic energy industry—a combination of objectives which may in certain circumstances become mutually exclusive or the basis for numerous administrative difficulties. When combined with the environmental directive of the NEPA, these administrative difficulties may become almost insurmountable.

Although it is readily apparent that Congress has impliedly pre-empted the field of atomic energy, the delicate balancing process required by the NEPA would seem to suggest the need for a legislative clarification of responsibilities so as not to impair the highly sensitive right of the states to legislate for the protection of the health and safety of their citizens.

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36 Note, *Jurisdiction—Atomic Energy*, 68 Mich. L. Rev. 1294, 1303-04 (1970).

37 Environmental Education Act, 20 U.S.C. § 1531 (1970); Water Quality Improvement Act of 1970, 33 U.S.C. § 1151 (1970); Air Quality Act of 1967, 42 U.S.C. § 1857 (1970); Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4372 (1970). An extremely thoughtful discussion of these acts may be found in *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1111-29 (D.C. Cir. 1971).

38 42 U.S.C. § 2021(k) (1970).

39 National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970).

Damages—RECOVERY FOR LOSS OF MINOR'S COMPANIONSHIP AND SOCIETY WAS ALLOWED IN A WRONGFUL DEATH ACTION BY PARENTS WITHOUT GIVING ANY CONSIDERATION FOR GRIEF, MENTAL ANGUISH, OR SUFFERING OF THE PARENTS BY REASON OF SUCH CHILD'S WRONGFUL DEATH.—*Wardlow v. City of Keokuk* (Iowa 1971).

Four minor children were killed by drowning in a public park owned and maintained by the city of Keokuk, Iowa. All four children, while playing in a stream of water, were swept into a storm sewer opening in or near the park and drowned. In an action by the parents for wrongful death of the children, the trial court struck from the petitions allegations concerning loss of companionship and society and those relating to mental anguish of the parents as not constituting a proper measure of damages. *Held,* affirmed in part, reversed in part, and remanded with directions. Where an action is prosecuted by the father, or in circumstances where it is permitted, by the mother for wrongful death of a minor under Iowa law, loss of companionship and society of a minor during his minority is a proper element to be considered by trier of fact in fixing amount awarded for "loss of services" without giving any consideration for grief, mental anguish, or suffering of the parents by reason of such child's wrongful death.[1] *Wardlow v. City of Keokuk,* 190 N.W.2d 439 (Iowa 1971).

At common law there was no civil cause of action for the negligent killing of a human being.[2] Damages could only be awarded when the negligent act produced a non-fatal injury.[3] Although a fatal negligent act was tortuous, at common law the cause of action died with the plaintiff. The result was that it was more profitable for the defendant to kill the plaintiff than to merely injure him.[4] Since this was intolerable, it was changed in England by the passage of the Fatal Accidents Act of 1846, commonly known as Lord Campbell's Act.[5] Every American state now has a wrongful death statute.[6] Most of these statutes were modeled after Lord Campbell's Act. These are true death acts which create a new cause of action for the death in favor of certain designated persons, usually relatives. The designated survivors of the decedent have a cause of action for their own personal loss due to the death of the decedent. A minority of states merely have "survival acts" which proceed upon the theory of preserving the cause of action vested in the decedent at the moment of his

1 Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971).
2 C. MCCORMICK, DAMAGES § 93 (1935).
3 *Id.*
4 W. PROSSER, LAW OF TORTS § 121 (3d ed. 1964).
5 9 & 10 Vict. c.93 (1846).
6 W. PROSSER, LAW OF TORTS § 121 (3d ed. 1964). See Decof, *Damages in Actions for Wrongful Death of Children,* 47 NOTRE DAME LAWYER 213 (1971) for a state by state survey of the statutes and case law on recovery for wrongful death of a child.