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Notes and Comments

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Admiralty—The Ocean of the Air Revisited

In the embryonic stage of air travel there was uncertainty as to what body of law should control its development. The theory arose that the air surrounding the earth was an ocean in itself and therefore properly the subject of maritime jurisdiction.[1] This theory was never generally accepted, and as early as 1921 Judge Cardozo, analyzing the characteristics of a hydroaeroplane,[2] determined that although it qualified as maritime while afloat "a hydroaeroplane, while in the air, is not subject to the admiralty . . . because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction."[3] Other courts followed suit by holding that an "amphibian plane"[4] and "overseas transport flying boat"[5] were not "vessels"[6] within the purview of admiralty jurisdiction. As a result of such consensus of opinion, the commerce clause of the Constitution, not maritime law,[7] became the basis for federal legislation involving air travel.[8]

This theory was revised in the recent case of *Notarian v. Trans World Airlines*.[9] The plaintiff, Mrs. Notarian,[10] was a passenger on a direct transoceanic flight from Rome, Italy, to Pittsburgh, Pennsylvania. She was returning to her seat from the rest-room when the airplane was "jolted violently,"[11] and personal injury re-

[1] Wilson v. Transocean Airlines, 121 F. Supp. 85, 91-92 n.23 (N.D. Cal. 1954).

[2] Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921).

[3] *Id.* at 118, 133 N.E. at 372.

[4] Dollins v. Pan-Am. Grace Airways, Inc., 27 F. Supp. 487 (S.D.N.Y. 1939).

[5] Noakes v. Imperial Airways, Ltd., 1939 Am. Mar. Cas. 1048 (S.D.N.Y. 1939).

[6] "Transactions are maritime only when connected with a 'vessel.'" ROBINSON, ADMIRALTY § 8 (1939).

[7] Admiralty jurisdiction was opposed on the rationale that "aerial navigation is more akin to transportation on the earth's surface than it is to sea travel . . . ." Bogert, *Problems in Aviation Law*, 6 CORNELL L.Q. 271, 304 (1921).

[8] The Air Commerce Act, 44 Stat. 568-76 (1926), as amended, 49 U.S.C. § 176 (1964).

[9] 244 F. Supp. 874 (W.D. Pa. 1965).

[10] Her husband was also a plaintiff.

[11] 244 F. Supp. at 875.

sulted. The aircraft was unaffected by the disturbance and continued to its destination. The suit for failure to provide a "reasonably safe passage"[12] was brought in admiralty, although there was no physical contact between the airplane and the ocean.

The defendant acknowledged numerous maritime cases involving aircraft[13] but contended that contact with the water is essential for admiralty jurisdiction. The court referred to the "ocean of the air theory" and the fact that the Death on the High Seas Act,[14] a maritime law, has been applied to air travel where no contact with the water was present.[15] Relying on *D'Aleman v. Pan Am. World Airlines*[16] it said:

> [I]t has been held that the Death on the High Seas Act grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high seas.... [W]hether a plane comes in actual physical contact with the sea does not matter. What does matter is that the cause of action occurs over the sea.[17]

Holding that admiralty jurisdiction was properly invoked, the court declared that the question of necessity for contact with the water has never been settled and admiralty has a long history of altering its boundaries when necessity and progress demand.

Assuming that the expansion of admiralty jurisdiction authorized in *Notarian* would be generally received, what are the consequences to personal injury claimants such as Mrs. Notarian?

At present suits of this nature are usually governed by the Warsaw Convention.[18] A significant element of this international agree-

[12] *Ibid.*

[13] *E.g.*, Trihey v. Transocean Air Lines, 255 F.2d 824 (9th Cir. 1958) (plaintiff's decedent died in a crash in the Pacific Ocean); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) (death resulting from a crash off the New Jersey coast). The defendant in *Notarian* contended that the case came within the purview of the Warsaw Convention, but the court held that this was insufficiently pleaded and not to be considered. For the significance of this determination see notes 18-21 *infra* and the accompanying text.

[14] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964). The act provides for suit in the district courts, in admiralty, when death occurs "on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." 41 Stat. 537 (1920), 46 U.S.C. § 761 (1964).

[15] Choy v. Pan-Am. Airways Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941).

[16] 259 F.2d 493 (2d Cir. 1958).

[17] 244 F. Supp. at 877.

[18] Warsaw Convention, July 31, 1934, 49 Stat. 3000, T.S. No. 876. See

ment is the limitation on the amount of recovery in personal injury claims to 125,000 French francs.[19] This is the equivalent of 8,300 dollars.[20] In jurisdictions where tort recoveries are often generous, an injured plaintiff may find that the limitation makes his compensation considerably less than it would be if the same injury had been sustained in another mode of transportation. In fact, the severity of this limitation has resulted in the proposed rejection of the convention by the United States as of May, 1966, if the maximum recoverable amount is not raised.[21]

An aspect of admiralty law that is clearly not appropriate in cases of personal injury or death to airplane passengers while flying over the high seas is the right of a shipowner to the benefits of the Limitation of Liability Act.[22] Under that act the liability of the owner of a vessel for any loss that was occasioned without his privity or knowledge[23] is limited to the value of his interest in the vessel and pending freight with the further proviso that in cases of personal injury or death the limitation fund shall in no event be less than sixty dollars per ton of the vessel's gross tonnage. Tonnage for admiralty purposes refers to the internal space of a vessel, not its weight. An admiralty ton is one hundred cubic feet of space.[24]

Considering the relatively small internal capacity of a passenger aircraft, the inequity of applying the above criteria for limitation of liability to air travel is obvious.[25] It can be argued that the possibility of such application was never contemplated by Congress and

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U.S. CIVIL AERONAUTICS BD., AERONAUTICAL STATUTES AND RELATED MATERIAL 290-331 (rev. ed. 1959). The convention is an international agreement regulating air travel between the participating nations. The original convention was held October 12, 1929.

[19] Warsaw Convention, art. 22(1).

[20] Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775 (D.C. Cir.), *cert. denied,* 368 U.S. 921 (1961).

[21] Time, Oct. 29, 1965, p. 98. The United States proposal for elevating the limitation is for an immediate raise to $75,000 with an ultimate ceiling of $100,000.

[22] 9 Stat. 635 (1851), as amended, 46 U.S.C. §§ 181-89 (1964).

[23] There is much litigation involving the interpretation to be placed on the words "privity or knowledge." See Coryell v. Phipps, 317 U.S. 406, 410 (1943); and 3 BENEDICT, ADMIRALTY §§ 489-90 (6th ed. 1940).

[24] Inman S.S. Co. v. Tinker, 94 U.S. 238, 243 (1876).

[25] The *manner* of ascertainment of the internal capacity in tons is equally foreign to aircraft. It is couched in such nautical terms as "the inside of the plank on the stern timbers . . . the rake of the bow in the thickness of the deck . . . the rake of the stern timber in one-third of the round of the beam . . . ." REV. STAT. §§ 41-53 (1875), 46 U.S.C. § 77 (1964).

therefore the attempt should not be made. If this assumption is valid, it can be further contended that the present dissatisfaction with the personal injury limitation of the Warsaw Convention is evidence that nothing short of the 100,000-dollar permanent limitation, proposed by the United States as an amendment to the Convention, should be placed on recovery. It is submitted that the original purpose of the limitation in admiralty—to encourage the expansion of commerce and trade—is no longer a practical consideration in personal injury suits. Commerce and trade have long since reached an economic level that no amount of personal injury recovery is likely to discourage.

Given the difficulty of fitting the airplane into this phase of maritime law, there are aspects of admiralty that could be applied with ease and benefit to the plaintiff.[26] For example, the relevance of contributory[27] and comparative negligence[28] doctrines could be a significant tactical consideration for the personal injury claimant suing in admiralty. Under the Warsaw Convention, contributory negligence may be a complete bar to recovery.[29] In admiralty, the doctrine of comparative negligence prevails.[30] The fault of the plaintiff may be used to mitigate damages but not to defeat the claim entirely.

The prerequisites to federal jurisdiction could be a monumental reason for bringing suit in admiralty. A trial in federal court, absent a federal question,[31] requires that the claimant show diversity of citizenship and meet the 10,000-dollar amount-in-controversy

[26] 18 U.S.C. § 7 (1964) has already brought aircraft into maritime jurisdiction for criminal purposes. It deals with crimes committed over the high seas and provides:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes: . . . .
>
> (5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

[27] For a discussion of contributory negligence see PROSSER, TORTS § 64, at 426-37 (3d ed. 1964).

[28] For a discussion of comparative negligence see *id.* § 66, at 443-49.

[29] Warsaw Convention, art. 21.

[30] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

[31] 28 U.S.C. § 1331(a) (1964) provides that "the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

requirement.[32] In an admiralty suit, the federal court has jurisdiction in "any civil case of admiralty and maritime jurisdiction"[33] regardless of diversity or amount in controversy.

A possible disadvantage to exclusive admiralty jurisdiction is that the case will be tried by judge without jury.[34] But if the claimant desires a jury trial and is able to meet the requirements previously mentioned for suit in a federal court, the language of the "saving clause"[35] may afford the opportunity. This exception to maritime jurisdiction preserves a common-law cause of action, where one exists, to the plaintiff with an in personam[36] claim. It allows the suit to be brought on the law side of the federal court (a state court proceeding is also available) with a jury trial even though the case arises in a maritime context. If this choice is made the plaintiff must be prepared to meet the diversity and amount-in-controversy requirements. It was urged by the plaintiff in *Romero v. International Terminal Operating Co.*[37] that a suit founded in admiralty, if the claimant chooses the law side of the federal court by way of the "saving clause," does not require diversity of citizenship as the claim arises under the Constitution and laws of the United States. Plaintiff, an alien seaman, had a basis for his contention because admiralty jurisdiction is authorized by the Constitution[38] and codified.[39] But in a five-to-four decision the Court rejected this interpretation. The dissent, led by Justice Brennan,

[32] 28 U.S.C. § 1332(a) (1964).

[33] 28 U.S.C. § 1333 (1964).

[34] ROBINSON, *op, cit. supra* note 6, § 1, at 2. It is interesting to note that not all attorneys consider a jury trial advantageous in litigation involving aircraft. At the Twenty-first Annual Law Institute of the University of Tennessee College of Law and the Knoxville Bar Association, Mr. Lee S. Kreindler, member of the New York Bar, expressed a definite preference for judge trials. Referring to recent cases in which he was counsel for the plaintiffs in suits against air lines, he said that it was the defendant air lines that requested a jury. This was explained in part by the inability of many jurors to identify with air line passengers as many have yet to fly and still think that one who "is fool enough to set foot on an airplane is assuming a very, very serious risk." *Trial Tactics in Aviation Litigation,* 28 TENN. L. REV. 173, 181-82 (1961).

[35] 28 U.S.C. § 1333 (1964). It is so designated because it preserves a common-law cause of action for the plaintiff who qualifies and operates as an escape valve from the exclusive maritime jurisdiction.

[36] A claim against the owner of the vessel as opposed to an in rem proceeding against the vessel itself. A suit to attach a lien on the vessel would be an example of the latter.

[37] 358 U.S. 354 (1959). For a full discussion of the case see BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-13, at 62-69 (1963).

[38] U.S. CONST. art III, § 2.

[39] 28 U.S.C. § 1873 (1964).

agreed with the plaintiff that no diversity should be required. It has been suggested that an acceptance of the minority position would be desirous "because there is little logic in a system of law which affords a seaman suing on a maritime cause of action a federal jury trial if there happens to be diversity of citizenship but which denies him a jury in the same federal court if there is no diversity."[40] If this rationale were adopted, it would apply to passenger claimants as well as seamen and be an additional inducement to seeking maritime jurisdiction.[41]

The advantages, disadvantages, and problems evidenced in the previous discussion must be considered in the light of possible departure of the Warsaw Convention from the transoceanic flight scene in the United States.[42] If these rules disappear, admiralty is a logical replacement.

Some aspects of admiralty, like the tonnage provision,[43] would be difficult to employ. It is submitted that a selective process would be in order, a new set of rules governing transoceanic air travel using the basic concepts of admiralty as a foundation with liberal provision for adjustment to the rapid developments that characterize modern aviation.

WILLIAM H. FAULK, JR.

Constitutional Law—Cruel and Unusual Punishment—Chronic Alcoholism

In *Driver v. Hinnant*[1] defendant had been found guilty and sentenced[2] to imprisonment for two years for violation of a North Carolina statute making it a misdemeanor for "any person . . . [to] be found drunk or intoxicated on the public highway, or at any public place or meeting . . . ."[3] Defendant had been convicted of

[40] BAER, *op. cit. supra* note 37, at 69.

[41] The problem does not arise if the state forum is chosen. But if contributory negligence is an issue, it may nullify any prospective advantage of jury trial. In *Notarian,* contributory negligence was not an issue but this writer is informed that a three- or four-year backlog in the Pennsylvania courts played a significant role in the decision to sue in admiralty. Letter from plaintiff's attorney to the writer, Jan. 31, 1966.

[42] See text accompanying note 21 *supra.*

[43] See text accompanying note 22 *supra.*

[1] Driver v. Hinnant, 34 U.S.L. Week 2422 (4th Cir. Jan. 22, 1966).

[2] Driver v. Hinnant, 243 F. Supp. 95, 96 (E.D.N.C. 1965).

[3] N.C. GEN. STAT. § 14-335 (1953).

the same offense over 200 times previously and had spent two-thirds of his life "on the roads" for drinking.[4] He appealed to the North Carolina Supreme Court contending that his conviction under this statute was cruel and unusual punishment.[5] In a per curiam opinion the court affirmed the conviction saying that the sentences were authorized by the statute and that the prison authorities provided adequate medical treatment for prisoners during their confinement.[6] The defendant then petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina.[7] The district court denied the writ, holding that the application of the statute to the defendant does not subject him to cruel and unusual punishment.[8] On appeal the United States Court of Appeals for the Fourth Circuit held that the conviction violated the eighth amendment to the Constitution as being a cruel and unusual punishment.[9]

The eighth amendment has been held applicable to the states through the due process clause of the fourteenth amendment.[10] It has been held to prohibit punishment disproportionate to the offense for which it was imposed[11] and denationalization for wartime desertion.[12] In *Robinson v. California*[13] the Supreme Court of the United States held that drug addiction was an illness and a statute punishing such an illness inflicted cruel and unusual punishment in

[4] Driver v. Hinnant, 243 F. Supp. 95, 96 (E.D.N.C. 1965).
[5] State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).
[6] *Ibid.*
[7] Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).
[8] *Id.* at 101.
[9] 34 U.S.L. Week 2422 (4th Cir. Jan. 22, 1966).
[10] In Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462-63 (1947), the Supreme Court assumed without deciding the issue that a violation of the eighth amendment by a state would violate the due process clause of the fourteenth amendment. In Robinson v. California, 370 U.S. 660, 666 (1962), the Court specifically decided that the eighth amendment applied to the states through the due process clause.
[11] Weems v. United States, 217 U.S. 349 (1910), where the defendant made false entries in public records and was sentenced to imprisonment attended by punishment that included the carrying of chains, deprivation of civil rights during imprisonment, and thereafter perpetual disqualification from holding office.
[12] Trop v. Dulles, 356 U.S. 86 (1958).
[13] 370 U.S. 660 (1962). For cases in which the Supreme Court has held that the particular punishment did not violate the eighth amendment see, *e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), where the court denied petitioner's contention that it was cruel and unusual punishment for Louisiana to electrocute him after a prior abortive attempt. *Accord, In re* Kemmler, 136 U.S. 436 (1890) (electrocution).

violation of the fourteenth amendment.[14] In *Driver,* the court said that chronic alcoholism is a disease and punishment by criminal prosecution for those acts on the part of a chronic alcoholic " 'which are compulsive as symptomatic of the disease' " is a cruel and unusual punishment.[15] Thus the defendant could not be convicted under a public drunkenness statute, since the symptoms of chronic alcoholism may appear as a disorder of behavior, and this " 'obviously . . . includes appearances in public, as here, unwilled and ungovernable by the victim.' "[16]

Although the court did limit its decision to the " 'excusal of the chronic alcoholic from criminal prosecution . . .' " for " 'those acts on his part which are compulsive as symptomatic of the disease,' "[17] the case raises numerous questions with respect to its immediate application to the public drunkenness statute and its potential application to other areas of the law. Perhaps the most immediate problem inherent in the decision is the determination of the symptoms of chronic alcoholism. It would seem to be extremely difficult, if not impossible, for the medical profession, much less the courts, to make a definitive determination of those acts which are symptomatic of the disease.[18] Consequently, whether or not an act of a chronic alcoholic is a symptom of his illness will hinge upon the facts of each case; thus the general limitation imposed by the Fourth Circuit would seem to be too vague for application in subsequent cases.

Does it follow from the *Driver* decision that a chronic alcoholic cannot be convicted for a crime, other than public drunkenness, committed while he is intoxicated? The answer to this question would seem to turn on the question of whether or not a chronic alcoholic could be classified as insane or whether his drinking had destroyed his will so that his act was involuntary. Professor Paulsen has said: "At present psychiatry does not seem to recognize a psychosis which gives rise to an uncontrollable urge to drink although heavy drinking may be a symptom of a psychosis having other

[14] Robinson v. California, 370 U.S. 660, 667 (1962).
[15] 34 U.S.L. Week at 2422.
[16] *Ibid.*
[17] *Ibid.*
[18] Comment by Dr. John Ewing, A Panel on Alcoholism and the Law, at the University of North Carolina School of Law, February 10, 1966.

related characteristics of disordered behavior and psychic life."[19] Thus it would seem that chronic alcoholism itself would not be a defense to a crime other than a violation of a public drunkenness statute, but that insanity caused by chronic alcoholism would be a defense.[20] In essence, only insanity would be a defense to the crime and alcoholism would be only a symptom to be admitted into evidence on the question of insanity.

The only other means by which a chronic alcoholic could be exculpated for a crime committed while he was intoxicated would be to say that the intoxication destroyed his will.[21] The Fourth Circuit said: " 'This conclusion does not contravene the familiar thesis that voluntary drunkenness is no excuse for crime. The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease.' "[22] The normal rule is that voluntary intoxication is no excuse for crime[23] but that involuntary intoxication may exculpate the accused.[24] At first glance, by saying that the intoxication of the chronic alcoholic is involuntary, the Fourth Circuit seems to imply that a chronic alcoholic would be exculpated for any crime he committed while intoxicated. But it is possible that the court considers the intoxication of a chronic alcoholic involuntary only in connection with the violation of a public drunkenness statute. The statute under which Joe Driver was convicted requires no mens rea[25] and voluntary intoxication would be no defense to the conviction.[26] But, by saying that the defendant's intoxication was involuntary, the court pro-

[19] Paulsen, *Intoxication as a Defense to Crime,* 1961 U. ILL. L.F. 1, 20. See generally VI JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASSOCIATION, THE PROBLEM OF INTOXICATION (1961).

[20] Generally, legal insanity brought on by intoxication is a complete defense to a crime. *E.g.,* People v. Herrin, 295 Ill. App. 590, 15 N.E.2d 598 (1938); State v. Painter, 135 W. Va. 106, 63 S.E.2d 86 (1950).

[21] Involuntary intoxication is a complete defense to a crime if it destroys the criminal capacity of the defendant's mind. *E.g.,* Choate v. State, 19 Okl. Crim. 169, 197 Pac. 1060 (1921). See generally PERKINS, CRIMINAL LAW 781, 787 (1957).

[22] 34 U.S.L. Week at 2422.

[23] See generally PERKINS, CRIMINAL LAW 787 (1957).

[24] See note 21 *supra.*

[25] N.C. GEN. STAT. § 14-335 (1953). This type of statute provides that the doing of certain acts is a crime and no mens rea is required.

[26] For cases illustrating that voluntary intoxication is no defense to a crime that requires no general mens rea see, *e.g.,* People v. Cochran, 313 Ill. 508, 145 N.E. 207 (1924) (homicide); Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941) (rape).

vides the defendant with a defense since involuntary intoxication completely exculpates a defendant from a crime whether or not mens rea is required.[27] It is doubtful that the court would say that a chronic alcoholic's intoxication was involuntary if he committed any crime other than violation of a public drunkenness statute, since that would mean that no chronic alcoholic could be convicted for any crime committed while he was intoxicated.[28] A conclusion such as this would seem to violate the principle purpose of incarceration—protection of the public from the criminal.[29]

Although it was conceded in this case that Joe Driver was a chronic alcoholic,[30] the question arises how the court should determine who is and who is not a chronic alcoholic. The Fourth Circuit said, " '[W]hen on arraignment the accused's helplessness comes to light . . . [the Constitution intercedes so that] . . . no *criminal* conviction may follow.' "[31] But the court provides no guidance regarding how the determination should be made if it does not appear at arraignment that the defendant is a chronic alcoholic. One plausible method of deciding this issue could be found in the District of Columbia Code where Congress has provided that in any criminal case in which the evidence indicates that the defendant is a chronic alcoholic, the judge may suspend the proceedings so that the person can be confined in a rehabilitation center and treated.[32] If the experts at the rehabilitation center should determine that the accused is actually a chronic alcoholic, it would seem that the court would be required to accept this evidence, and no conviction for public drunkenness could follow.[33] Perhaps a better means by which to determine whether a defendant is a chronic alcoholic would be to place the burden of proof on the defendant, thereby retaining an

[27] See note 21 *supra.*

[28] *Ibid.*

[29] Commonwealth v. Ritter, 13 Pa. D. & C. 285, 291 (Oyer & Terminer Ct. 1930).

[30] Driver v. Hinnant, 243 F. Supp. 95, 97 (E.D.N.C. 1965).

[31] 34 U.S.L. Week at 2422.

[32] Under this statute, the judge may suspend the proceedings and order a hearing to be held to determine whether the defendant is a chronic alcoholic. If the judge or jury should find that the defendant is a chronic alcoholic, he can then be committed to a clinic for diagnosis and treatment for ninety days. After the ninety-day period has expired, the director of the clinic can recommend that the defendant be set free conditionally and under supervision, or be placed in an institution for treatment as a chronic alcoholic, or be returned to stand trial for the offense charged. D.C. CODE ANN. §§ 24-504 to -514 (1961).

[33] *Ibid.* This idea seems to be implied in the statute. *Cf.* Easter v. District of Columbia, 34 U.S.L. Week 2534 (D.D.C. Mar. 31, 1966).

independent evaluating function for the judge or jury.[34] Medical testimony, subject to cross-examination, could be introduced by either side in the proceedings. Thus, the determination would not be for the police on arraignment or for the doctors in a rehabilitation center.

If a person is deemed a chronic alcoholic and cannot be convicted for violating a public drunkenness statute, the problem arises what the state can do with him to protect him and the public. In the *Robinson* decision the Court speaking of narcotics addicts said:

> In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanction might be imposed for failure to comply with established compulsory treatment procedures.[35]

In the *Driver* case the court said, " '[N]othing we have said precludes appropriate detention of him for treatment and rehabilitation so long as he is not marked a criminal.' "[36] It would seem to follow that a state could commit a chronic alcoholic to a rehabilitation center but could not call him a criminal. This could be accomplished by means of a civil commitment statute such as is found in North Carolina.[37] But, before a state enters upon any program to provide for chronic alcoholics, the courts must make it clear what type of confinement would be permitted.

THOMAS SIDNEY SMITH

[34] In a criminal case where the defendant interposes the defense of intoxication the normal rule is that he has the burden of proof to that fact and the ultimate issue is for the jury to decide. *E.g.*, State v. Tansimore, 3 N.J. 516, 71 A.2d 169 (1950). Since the court considers chronic alcoholism a disease, it would seem to follow that the rules governing the proof of insanity could possibly apply to chronic alcoholism. In a trial during which insanity is brought into issue the burden of proof of insanity is on the party alleging it. *E.g.*, Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947); State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949). If the party asserts insanity that was only temporary, the burden is on him to prove that he was insane at the time alleged. *E.g.*, Barbour v. State, 262 Ala. 297, 78 So. 2d 328 (1954); State v. Shackleford, 232 N.C. 299, 59 S.E.2d 825 (1950). The existence of insanity is a question to be decided by the jury. *E.g.*, Wilson v. State, 9 Ga. App. 274, 70 S.E. 1128 (1911); State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949); State v. Harris, 223 N.C. 697, 28 S.E.2d 232 (1943). See generally 44 C.J.S. *Insanity* § 7 (1945). For an excellent bibliography on insanity and the criminal law see TOMPKINS, INSANITY AND THE CRIMINAL LAW (1960).

[35] Robinson v. California, 370 U.S. 660, 664-65 (1962).

[36] 34 U.S.L. Week at 2422.

[37] N.C. GEN. STAT. § 35-2 (Supp. 1965).

Constitutional Law—Custody Requirement for Federal Habeas Corpus

Jurisdiction of the federal courts to grant the writ of habeas corpus is available in five situations.[1] An overwhelming number of habeas corpus petitions are filed pursuant to the requirement that the petitioner be "in custody in violation of the Constitution or laws or treaties of the United States."[2] It is evident from the express wording of the statute and from judicial declaration[3] that custody is a jurisdictional prerequisite to the federal courts' power to hear and determine the constitutional claims presented in a habeas corpus petition.

The custody requirement is not limited to but can be something less than incarceration[4] and is "something more than moral restraint."[5] Outside the fact of actual incarceration, it has been held that a person released on parole,[6] or probation[7] satisfies the custody requirement. In *Jones v. Cunningham,*[8] the Supreme Court, holding that a state parolee was "in custody," equated custody with any significant restraint on a person's liberty "to do those things which in this country free men are entitled to do."[9] This decision provided the lower federal courts with a flexible formula to apply in determining whether the extent and character of a particular restraint on liberty constitutes "custody."

The United States Court of Appeals for the Fourth Circuit, sitting *en banc,* recently applied the *Jones* rationale in *Martin v. Virginia.*[10] The petitioner escaped while serving a concededly valid

[1] 28 U.S.C. 2241(c) (1964).

[2] 28 U.S.C. 2241(c)(3) (1964). Habeas corpus petitions filed by state prisoners in federal district courts increased from 1,903 to 3,531, or 85.5%, from the 1963 to the 1964 fiscal year. Henry v. Mississippi, 379 U.S. 443, 453 n.8 (1965), citing ANN REP. OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, p. 46 (1964).

[3] Fay v. Noia, 372 U.S. 391, 427 n.38 (1963).

[4] See Jones v. Cunningham, 371 U.S. 236 (1963).

[5] Wales v. Whitney, 114 U.S. 564, 571 (1885).

[6] Jones v. Cunningham, 371 U.S. 236 (1963).

[7] Benson v. California, 328 F.2d 159 (9th Cir. 1964). The present Supreme Court rule is that a person is not in custody who has been released on bail. Stallings v. Splain, 253 U.S. 339, 343 (1920). There is a split on this issue in the circuit courts. *Compare* Bates v. Bates, 141 F.2d 723 (D.C. Cir. 1944), *with* Rowland v. Arkansas, 179 F.2d 709 (8th Cir. 1950).

[8] 371 U.S. 236 (1963), noted in 51 CALIF. L. REV. 228 (1963), 17 RUTGERS L. REV. 808 (1963), 48 VA. L. REV. 112 (1963).

[9] 371 U.S. 236, 243 (1963).

[10] 349 F.2d 781 (4th Cir. 1965).

fifteen-year sentence for murder. He was subsequently convicted for escape and grand larceny and sentenced to terms of five and three years respectively. Petitioner contended that these convictions were constitutionally defective because he had been denied counsel of his own choosing and the effective assistance of court-appointed counsel. According to Virginia law, the latter sentences, in addition to the valid sentence, were to be considered in computing petitioner's parole eligibility. As a result of this rule, his parole eligibility was automatically deferred for three years. Petitioner established that the parole board would look with favor upon his parole application if the latter convictions were set aside. The court held that the petitioner was "in custody" and therefore entitled to a hearing on his petition attacking the validity of the sentences to take effect in the future.

The court expressly rejected the Supreme Court ruling in *McNally v. Hill*,[11] that habeas corpus is not available to attack a future sentence when the petitioner is serving a valid sentence. It reasoned that the decisions of *Jones v. Cunningham*[12] and *Fay v. Noia*[13] provided "reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider McNally and hold that a denial of eligibility for parole is a 'restraint of liberty' no less substantial than the technical restraint of parole."[14]

Martin raises two distinct, but interrelated, questions with respect to the "custody" requirement. First, is the adverse effect of the second sentence upon the petitioner's parole eligibility a sufficient restraint upon his liberty to constitute custody? Second, is the attack on the second conviction premature and hence "moot" in the sense that the petitioner would still be confined under a valid conviction, even if the second conviction is set aside?[15]

In *McNally*, the Court looked to the common law and derived the rule that a sentence to be served in the future in no way affects the lawfulness of the detention under a valid first sentence and that

[11] 293 U.S. 131 (1934).
[12] 371 U.S. 236 (1963).
[13] 372 U.S. 391 (1963). See Comment, 39 N.Y.U.L. REV. 78 (1964); Comment, 42 N.C.L. REV. 352 (1964). See generally Bator, *Finality in Criminal and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961).
[14] 349 F.2d at 783-84.
[15] See SOKOL, FEDERAL HABEAS CORPUS §§ 5.3, 6 (1965).

"without restraint which is unlawful, the writ may not be used."[16] The *McNally* test for habeas corpus was one of immediate release from present physical detention, and, since a successful attack on the second sentence would not produce this result, habeas corpus was not available.[17] In *Ex Parte Hull,*[18] the Court carved out an exception to *McNally* by permitting attack on a future sentence that was the sole cause of the petitioner's parole revocation and recommitment to prison under a prior valid conviction. The Court distinguished *McNally* by reasoning that an immediate declaration of the invalidity of the second sentence would enable the petitioner to regain his former parole status, rather than to be subject to continued incarceration under a valid sentence as in *McNally.*

The *McNally* rule is firmly entrenched in federal case law,[19] and as late as 1959 the Supreme Court indicated that it still subscribes to the rule.[20] The *McNally* rule is generally considered a test of mootness in the sense that an attack on a second sentence is premature as long as there remains time to be served under a valid sentence.[21]

In *Martin,* it is clear that the court was primarily concerned with the custody requirement and did not consider the mootness problem presented by *McNally.* Relying heavily upon the *Jones* rationale, the court reasoned that the "subsequent convictions which cause the vast difference between continued confinement without eligibility for consideration for parole and conditional release are in the truest sense a present restraint upon . . . [petitioner's] liberty,"[22] and "that a denial of eligibility for parole is a 'restraint of liberty' no less substantial than the technical restraint of parole."[23]

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[16] McNally v. Hill, 293 U.S. 131, 138 (1934).

[17] The purpose of the proceeding . . . [is] to inquire into the legality of the detention, and the only judicial relief authorized . . . [is] the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful.

Id. at 136-37.

[18] 312 U.S. 546 (1941).

[19] *E.g.,* Holiday v. Johnston, 313 U.S. 342 (1941); Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965), *cert. denied,* 34 U.S.L. WEEK 3172 (U.S. Nov. 16, 1965); Palumbo v. New Jersey, 334 F.2d 524 (3d Cir. 1964); Osborne v. Taylor, 328 F.2d 131 (10th Cir. 1964); Holland v. Gladden, 226 F. Supp. 654 (D. Ore. 1963); United States *ex rel.* Jackson v. Banmiller, 187 F. Supp. 513 (E.D. Pa. 1960).

[20] Heflin v. United States, 358 U.S. 415, 418 (1959).

[21] See SOKOL, *op. cit. supra* note 15, at § 6.

[22] 349 F.2d at 784.

[23] *Ibid.*

The *Martin* decision establishes a distinct modification of the "release from custody" test set out by the Supreme Court in *McNally*. Under the *Martin* rationale, a successful habeas corpus proceeding need only result in the petitioner's release from the restraints on his liberty, and not his immediate release from actual physical restraint. Conceptually, the restraints in *Martin* are but one form of custody, and relief from them necessarily results in a "form of discharge from custody."[24]

The total effect of this form of relief from custody is to render the petitioner eligible to be considered for parole in the same manner as he would have been had the second sentences not been imposed. There is a very strong argument that since parole is a matter of legislative grace,[25] exercised through the sole discretion of state parole boards,[26] the federal district courts should summarily dismiss habeas corpus petitions in cases such as *Martin* because there is no assurance that the petitioner will be granted parole.[27] Furthermore, the state has a viable interest in the enforcement of its penal laws and may desire to retry the petitioner. A retrial does not expose the petitioner to former jeopardy,[28] and a valid conviction effectively diminishes the petitioner's eligibility for parole. Whether or not a state elects to grant parole or to deny it or to retry the petitioner would, of course, vary from case to case depending upon the individual petitioner's record. The court anticipated this problem and recognized the possibility that future courts might limit *Martin* to its facts and require the petitioner to show that he will be favorably considered for parole. This possibility was negated

[24] Fay v. Noia, 372 U.S. 391, 427 n.38 (1963).

[25] See Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964), where it was stated that "freedom, on parole from confinement in a penal institution prior to serving all of an imposed sentence, is a matter of legislative grace—it is neither a constitutionally guaranteed nor a God-given right." *Id.* at 874.

[26] The West Virginia statute illustrates this point: "The board of probation and parole, *whenever it shall be of the opinion that the best interests of the state and the prisoner will be subserved thereby,* . . . shall have authority to release any such prisoner on parole for such terms and upon such conditions as are provided by . . . [statute]." W. VA. CODE ANN. § 6291(20) (1961). (Emphasis added.)

[27] The court in *Martin* assumed that the Virginia Parole Board would not substantially penalize the petitioner for his escape. But see the VA. CODE ANN. § 53-227 (1958), which provides that "in case a prisoner attempts to escape or leaves, without permission, the State penitentiary . . . *he shall, upon being recaptured or taken, lose all his accumulated time.*" (Emphasis added.)

[28] United States v. Tateo, 377 U.S. 463 (1964).

when the court expressly stated that the principle of custody applied by it to permit attack on a future sentence was not "limited to one . . . who is able to state a strong case for parole consideration."[29]

The decision in *Martin* appears to be sound on three grounds. First, *Martin's* designation of denial of parole eligibility as custody is but a logical extension of the *Jones* formula equating parole with custody. The only difference between the restraints on liberty in the two cases is one of degree and not substance. In each case the petitioner has a distinct interest in procuring his release from custody. Second, a present attack on these convictions appears to be more practical because it lessens the possibilities that witnesses will die or move away or that the record of the case will become "cold." If the *McNally* rule had been followed in *Martin,* the second sentences could not have been attacked until they had been implemented.[30] Third, the rationale of *Martin* is in harmony with the trend of the Supreme Court's progressive motions[31] as to the scope and purpose of habeas corpus to protect "individuals against erosion of their right to be free from wrongful restraints upon their liberty."[32]

It is implicit in the *Martin* decision that the Fourth Circuit recognizes the importance of parole, in contrast to continued confinement, as a means of rehabilitating a prisoner, and that the possibility of his being extended the privilege of parole is a protectable interest of the petitioner who is being denied it because of an invalid future sentence. Whether the states,[33] in the administration of their post-conviction procedures, the other circuits,[34] or the Supreme

[29] 349 F.2d at 784.

[30] See SOKOL, *op. cit. supra* note 15, at § 6.

[31] See Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Jones v. Cunningham, 371 U.S. 236 (1963).

[32] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[33] The states of New York, Oregon, and Maryland presently permit an attack on a sentence to be served in the future. 349 F.2d at 784 n.2. It is reasonable to infer from the very broad language of the North Carolina post-conviction statute that it is permissible to attack a sentence to be served in the future. N.C. GEN. STAT. § 15-217 (1965). See Note, 44 N.C.L. REV. 153 (1965).

[34] *But see* Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965), *cert. denied,* 34 U.S.L. WEEK 3172 (U.S. Nov. 16, 1965), where the petitioner was denied relief under the *McNally* and *Hull* rules. However this case is distinguishable from *Martin* in that the immediate invalidation of the second sentence would not have entitled petitioner to immediate release from incarceration, nor would it have rendered him eligible for parole.

Court follow the lead in *Martin* is yet to be seen. It is hoped that neither the technical requirement of *McNally* that petitioner be released from physical custody, nor the states' discretionary power to deny parole or retry petitioner, will be utilized as a jurisdictional barrier to prevent federal district courts from determining the validity of sentences to be served in the future.

C. RALPH KINSEY, JR.

Corporations—"Profit Realized" In Section 16(b)—Insider Transactions

Gamble-Skogmo, Inc., owner of more than ten per cent of the stock of the plaintiff corporation, bought 32,000 additional shares for a Gamble-Skogmo employees' trust fund.[1] Only 25,942 of those shares were transferred to the fund, however, and the remaining shares were retained by the purchaser. Within six months of this purchase, Gamble-Skogmo sold[2] all of its stock in the plaintiff except that held by the trust fund. Plaintiff sought recovery of Gamble-Skogmo's "profits" on all 32,000 shares under section 16(b) of the Securities Exchange Act of 1934.[3] Only the profit made on the 6,058 retained shares was paid, and plaintiff sued for the profits[4] that would have been realized had the 25,942 shares in the trust fund been included in the short-swing transaction. The district

[1] Gamble-Skogmo was not required to make its contribution to the trust fund in Western Auto stock, or in any other stock for that matter. Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736, 738 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).

[2] The sale was pursuant to an antitrust consent decree. United States v. Gamble-Skogmo, Inc., Civil No. 12776, W.D. Mo., July 18, 1960.

[3] 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1964). See 44 N.C.L. REV. 835 n.3 (1966) for the full text of the statute. See generally 2 Loss, SECURITIES REGULATIONS 1040-90 (2d ed. 1961); Cole, *Insiders' Liabilities Under the Securities Exchange Act of 1934*, 12 SW. L.J. 147 (1958); Cook & Feldman, *Insider Trading Under the Eecurities Exchange Act* (pts. 1 & 2), 66 HARV. L. REV. 385, 612 (1963); Painter, *The Evolving Role of Section 16(b)*, 62 MICH. L. REV. 649 (1964); Rubin & Feldman, *Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders*, 95 U. PA. L. REV. 468 (1947). At the time their articles were written, Mr. Cook was Chairman, and Mr. Feldman, Special Council, of the Securities and Exchange Commission, though they did not purport to be speaking on behalf of the Commission.

[4] The profit was calculated at $3.65 per share, a total of $116,800.00, based on the difference between the price per share paid for the 32,000 shares and the price per share received when all 1,262,102 shares were sold. Also, two dividends of $.35 per share, paid on the stock before the short-swing sale, were included.

court held in favor of the defendant,[5] but in *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*[6] the United States Court of Appeals for the Eighth Circuit reversed, holding that the plaintiff should recover profits, realized or not, on all 32,000 shares.

Under section 16(b) liability is based upon an objective measure of proof.[7] A plaintiff need only show that the "insider"[8] traded in his company's stock within a six-month period. A showing of actual unfair use of inside information is not necessary,[9] and the good faith or intention motivating the insider's trading is irrelevant.[10] Since the statute does not prohibit insider trading,[11] it is meant to be broadly construed by the courts so as to have a prophylactic effect.[12] At the same time, section 16(b) makes an insider liable only for "any profit realized"[13] by him on his short-swing transactions. However, neither "profit" nor "realized" is defined in the statute or in the rules issued by the Securities and Exchange Commission. Since in the ordinary violation the "profit realized" is simply the difference between the sale price and the purchase price,

[5] Western Auto Supply Co. v. Gamble-Skogmo, Inc., 231 F. Supp. 456 (D. Minn. 1964).

[6] 348 F.2d 736 (8th Cir. 1965), *cert. denied,* 382 U.S. 987 (1966). This was a two-to-one decision.

[7] Smolowe v. Delendo Corp., 136 F.2d 231, 235 (2d Cir.), *cert. denied,* 320 U.S. 751 (1943).

[8] An "insider" is a director, officer, or a stockholder owning 10% or more of the stock of the corporation. See Securities Exchange Act of 1934, § 16(a), 48 Stat. 896 (1934), 15 U.S.C. § 78p(a) (1964).

[9] It has been suggested that the preamble of § 16(b), which refers to this, was intended merely as an aid to constitutionality and a guide to the SEC in the exercise of its rule-making authority. Smolowe v. Delendo Corp., 136 F.2d 231, 236 (2d Cir.), *cert. denied,* 320 U.S. 751 (1943). However, while actual motive is irrelevant, the absence of any possibility of improper motive has sometimes been considered relevant by the courts in determining whether a conversion or reclassification of securities involved a "purchase" or "sale." 2 Loss, *op. cit. supra* note 3, at 1041 n.14.

[10] Blau v. Max Factor & Co., 342 F.2d 304, 307 (9th Cir.), *cert denied,* 382 U.S. 892 (1965); B. T. Babbitt, Inc. v. Lachner, 332 F.2d 255, 257 (2d Cir. 1964); Rheem Mfg. Co. v. Rheem, 295 F.2d 473, 475 (9th Cir. 1961); Blau v. Lehman, 286 F.2d 786, 791 (2d Cir. 1960), *aff'd,* 368 U.S. 403 (1962); Walet v. Jefferson Lake Sulphur Co., 202 F.2d 433, 434 (5th Cir.), *cert. denied,* 346 U.S. 820 (1953); Gratz v. Claughton, 187 F.2d 46, 51 (2d Cir.), *cert. denied,* 341 U.S. 920 (1951); Smolowe v. Delendo Corp., *supra* note 9, at 235.

[11] As originally drafted, § 16(b) was to have been a complete prohibition against any insider trading, and criminal penalties were to attach to any of its violations. *Hearings Before Senate Committee on Banking and Currency on S. Res. 84, 56, and 97,* 73d Cong., 1st Sess., pt. 15, at 6430 (1934).

[12] Blau v. Lehman, 368 U.S. 403, 414 (1962).

[13] 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1964).

only one court[14] has had occasion thus far to consider what should be the definition of "any profit realized":

> [W]e think it is clear that Congress intended that ordinarily no gain in the value of securities should be deemed to be realized as a profit under the Act until there had been a definitive act by the owner of the securities whereby the paper value of the securities has become a real and includible one . . . .[15]

In *Gamble-Skogmo* there was likewise only a paper profit made on the 25,942 trust fund shares. Consequently it would seem that the court should have affirmed the decision that only the profit admittedly made on the 6,058 shares was recoverable. While those shares were purchased at the same time as the others, they were never transferred to the fund. Instead, they were retained by Gamble-Skogmo and sold along with its earlier-acquired stock less than six months later at a higher price. Although it is not clear in either the opinions or the briefs what the exact relationship of the trust fund to the corporation was, two arguments support the position of this note that no recoverable profit was made on the 25,942 shares.

The Eighth Circuit apparently felt that the trust fund was not enough a separate entity for the corporation to have lost any real control over the shares of stock transferred to the fund.[16] Therefore, it reasoned that because Gamble-Skogmo within a six-month period had purchased a certain number of shares at one price and had sold an equivalent number of shares at a higher price when it disposed of its entire holding, a recoverable profit could be imputed

[14] Heli-Coil Corp. v. Webster, 352 F.2d 156 (3d Cir. 1965), 44 N.C.L. REV. 835 (1966). The term "any profit realized" has been considered indirectly, however, in two cases dealing with an investment banking house's partners who were sitting on the board of directors of the issuing corporations at the time of the partnership's short-swing transactions. In Rattner v. Lehman, 193 F.2d 564 (2d Cir. 1952), the court concluded that the partner was liable only for his distributive share of the profits since "under a literal reading of the statute he cannot be held liable for profits 'realized' by other partners from the firm's short swing transactions." 193 F.2d at 565. In Blau v. Lehman, 368 U.S. 403 (1962), the only Supreme Court case interpreting § 16(b), the Court reached a similar conclusion based on *Rattner*.

[15] 352 F.2d at 167. This definition has been quoted subsequently in Brief for the SEC as Amicus Curiae, p. 19, in Blau v. Lamb, 242 F. Supp. 151 (S.D.N.Y. 1965), now on appeal before the Second Circuit.

[16] The court of appeals, contrary to the district court, held that dividends received on the 25,942 shares in the trust fund were recoverable by plaintiff. 348 F.2d at 744. This might lend strength to the implication that the court of appeals felt that the trust fund was indistinguishable from the corporation.

to the 25,942 shares. The court said that section 16(b) required that purchases and sales be matched arbitrarily so as to disgorge the insider of his maximum profit, regardless of the insider's intent or the time when the stock was purchased.[17] This was based on the widely accepted rule of the leading case of *Smolowe v. Delendo Corp.*[18] There the insiders argued that the sales of the shares involved were made from a backlog of stock they had kept longer than six months. Stressing that the object of the statute was "to squeeze all possible profits out of stock transactions,"[19] the court rejected the insiders' argument[20] that they be allowed to match stock certificates and held that the only rule whereby all possible profits could surely be recovered was that of "lowest price in, highest price out" within six months.[21]

Although the corporation in effect sought to match certificates in opposition to the *Smolowe* rule, the facts of *Gamble-Skogmo* seem sufficiently distinguishable to warrant segregation of shares. Had *Smolowe* permitted matching of certificates, the insiders would have retained measurable profits in violation of the spirit if not the letter of section 16(b). Such a holding would also violate the concept of shares as fungibles.[22] Unlike the insiders in *Smolowe,* Gamble-Skogmo's earlier acquired interest in the plaintiff was not being used as a backlog of stock to evade the statute by speculating in plaintiff's stock. Since the *Smolowe* rule contemplates an arbi-

[17] 348 F.2d at 743.

[18] 136 F.2d 231 (2d Cir.), *cert. denied,* 320 U.S. 751 (1943).

[19] *Id.* at 239.

[20] The insiders argued for the "identity of shares" theory or its corollary, the "first-in, first-out" rule, both borrowed from the tax field. See Treas. Reg. § 1.1012-1(c) (1958), as amended, T.D. 6837, 1965 INT. REV. BULL. No. 31, at 13. They also argued for the striking of an average purchase and sale price, but the court rejected that argument, too, because allowing losses to offset profits would encourage more, not less, insider trading. 136 F.2d at 239. The harshness of the lowest-price-in, highest-price-out rule may be seen by Gratz v. Claughton, 187 F.2d 46 (2d Cir.), *cert. denied,* 341 U.S. 920 (1951), which reasserted the *Smolowe* doctrine after an independent analysis. There the court assessed a judgment of $300,000 against the defendant for his insider "profits," although his trading in the stock had resulted in an actual loss of over $400,000.

[21] The lowest-price-in, highest-price-out test had been specifically included in the original drafts of § 16(b) and deleted without explanation. S. 2693 and H.R. 7852, § 15(b)(1), 73d Cong., 2d Sess. (1934). For an explanation of the way in which the test is meant to be applied, see 2 Loss, *op. cit. supra* note 3, at 1062-66.

[22] Gratz v. Claughton, 187 F.2d 46, 51 (2d Cir.), *cert. denied,* 341 U.S. 920 (1951).

trary matching of purchases and sales, it should not be blindly applied in every case. To apply it here would be to penalize Gamble-Skogmo for a profit as yet unrealized. Until such time as the 25,942 shares in the trust fund are sold, their appreciation, as measured by the difference between what Gamble-Skogmo paid for the stock and what it received from the sale of its other stock, is merely a paper profit. Section 16(b) neither prevents an insider from investing in his company's stock nor penalizes him for using inside information to speculate if the trading is done at six-month intervals.

Furthermore, the court's fear that the policy of section 16(b) would be frustrated by permitting Gamble-Skogmo's defense of segregating shares appears groundless. The statute has not been applied as arbitrarily as the language of the opinions might suggest.[23] For example, conflicting results[24] in applying the term "purchase and sale"[25] to various transactions indicate that most of those decisions have been rendered on an *ad hoc* basis. It has been said that while not doing violence to the supposedly "objective" thrust of the statute, the courts have inferred that Congress did not intend the application of section 16(b) to be purely mechanical and automatic in every respect.[26]

The district court, on the other hand, apparently felt that the trust fund was distinct from the corporation.[27] Thus, at the time Gamble-Skogmo sold all of its interest in the plaintiff, it had no claim to the 25,942 shares, which had already passed into the assets of the trust fund some five months earlier. This would be a distinguishing

[23] See, *e.g.*, Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir.), *cert. denied*, 382 U.S. 892 (1965); Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959).

[24] *Compare* Walet v. Jefferson Lake Sulphur Co., 202 F.2d 433 (5th Cir.), *cert. denied*, 346 U.S. 820 (1953) (exercise of stock options a "purchase"); Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947) (conversion of preferred stock into common a "purchase"); Marquette Cement Mfg. Co. v. Andreas, 239 F. Supp. 962 (S.D.N.Y. 1965) (receipt of stock pursuant to corporate liquidation a "purchase"), *with* Roberts v. Eaton, 212 F.2d 82 (2d Cir.), *cert. denied*, 348 U.S. 827 (1954) (receipt of stock in reclassification not a "purchase"); Blau v. Ogsbury, 210 F.2d 426 (2d Cir. 1954) (acquisition of stock under option contract not a "purchase"); Shaw v. Dreyfus, 172 F.2d 140 (2d Cir.), *cert. denied*, 337 U.S. 907 (1949) (receipt of rights distributed to all stockholders proportionately not a "purchase").

[25] 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1964).

[26] Painter, *supra* note 3, at 665.

[27] 231 F. Supp. at 461. Letter From Edward J. Callahan, Jr., Counsel for Gamble-Skogmo, Inc., to the writer, April 12, 1966, on file with the *North Carolina Law Review*, states that the trust fund "was a wholly separate entity . . . and no one at Gamble-Skogmo had any position with it nor control over it."

feature from the *Smolowe*-type cases[28] where the insiders still held other stock of the issuer but argued that those shares were of stock acquired more than six months before the sale in question. The "undeniable fact"[29] to the district court was that there was no "purchase" of the stock on Gamble-Skogmo's part. Rather, the corporation had acted simply as a "conduit" through which the shares destined for the trust fund passed.[30] Accordingly, this transfer of stock was not a short-swing transaction. Furthermore, since Gamble-Skogmo delivered the stock to the trust fund at the same price it paid for it,[31] no profit inured to Gamble-Skogmo on the transfer and the whole transaction was the same as if Gamble-Skogmo had made a voluntary gift of the stock to the fund.[32]

While the district court was obviously trying to avoid the "purposeless harshness"[33] of section 16(b), it would have been more

[28] See, *e.g.*, Walet v. Jefferson Lake Sulphur Co., 202 F.2d 433 (5th Cir.), *cert. denied*, 346 U.S. 820 (1953); Gratz v. Claughton, 187 F.2d 46 (2d Cir.), *cert. denied*, 341 U.S. 920 (1951); Blau v. Allen, 163 F. Supp. 702 (S.D.N.Y. 1958).

[29] 231 F. Supp. at 461.

[30] *Ibid.* The district court's argument was accepted by the dissenting judge in the court of appeals. 348 F.2d at 745 (dissenting opinion). Although the SEC argued that the district court's conclusion that Gamble-Skogmo acted as a "conduit" for the purpose of making the purchase for the trust fund "appears to be without support," it conceded that if Gamble-Skogmo had acted "solely as agent for the trust fund, the trial court's result might have been reached without endangering the principles which we feel must not be impaired." Brief for the SEC as Amicus Curiae, p. 13 n.16, Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966). But, *quaere* whether the abuse of inside information would be any the less in one situation than in the other.

[31] Had Gamble-Skogmo actually sold the 25,942 shares on the market on the day of the transfer, it would have sustained a loss of $.60 per share. Wall Street Journal, Jan. 29, 1960, p. 18, col. 6.

[32] Compare the two so-called "gift" cases cited by the district court, Shaw v. Dreyfus, 172 F.2d 140 (2d Cir.), *cert. denied*, 337 U.S. 907 (1949), and Truncale v. Blumberg, 80 F. Supp. 387 (S.D.N.Y. 1948), where it was held that the making of gifts of warrants or the shares purchased on exercise of the warrants was no violation of § 16(b). The reasoning in both cases was placed on the ground that no profit had been realized by the insiders. In *Truncale* the SEC in its amicus curiae brief specifically argued for the theory that there had been no "profit realized" by the insider, rather than that there had been no "sale." 80 F. Supp. at 391. But, *quaere* whether the making of a gift of appreciated securities is not an economic benefit equal to a profit to the insider, either in terms of taxes, prestige in the community, or recompense for personal services. See Shaw v. Dreyfus, *supra* at 143 (dissenting opinion by Clark, J.). The court of appeals in *Gamble-Skogmo* sought to distinguish these two cases on the basis that they both dealt with bona fide gifts and that neither involved a sale within six months of the gift. 348 F.2d at 743 n.7.

[33] Blau v. Max Factor & Co., 342 F.2d 304, 307 (9th Cir.), *cert. denied*, 382 U.S. 892 (1965).

reasonable if the court had held that the acquisition and transfer of the 25,942 shares were a "purchase" and "sale" by Gamble-Skogmo which resulted in a technical violation of the statute.[34] But, since no profit was realized on the transaction, there was nothing the plaintiff could recover. Again, the only recoverable profit would be on the 6,058 shares that were retained by Gamble-Skogmo and later sold.

It is unfortunate that both of the courts in *Gamble-Skogmo* failed to express clearly their concept of the trust fund's relationship to the corporation. Nevertheless, whether the trust fund be considered separate from or part of the corporation, there seemingly was no "profit realized" by Gamble-Skogmo on the 25,942 trust fund shares. Therefore, it is submitted that a correct application of the statute in this case should have allowed plaintiff to recover only the profit made on the 6,058 shares actually involved in the short-swing transaction.

F. LEE LIEBOLT, JR.*

Corporations—Section 16(b) Liability—Conversion Transactions by Insiders

In *Heli-Coil Corp. v. Webster*,[1] the United States Court of Appeals for the Third Circuit has taken a novel approach to certain questions concerning liability under the Securities Exchange Act of 1934.[2] Defendant Webster, a director of Heli-Coil Corporation, purchased a quantity of the corporation's callable debentures, which were convertible into common stock any time before redemption or maturity. Within six months of the purchase of the debentures, Webster converted, exchanging the bonds for 3,600 shares of common stock, and within six months of conversion, he sold 1,300 shares of the Heli-Coil common. There had been no call on the debentures. The corporation brought suit to recover short-swing profits under the provisions of section 16(b) of the Securities Exchange Act.[3] The district court held that the conversion of the

[34] *Cf.* Heli-Coil Corp. v. Webster, 352 F.2d 156 (3d Cir. 1965).

* Student at the University of North Carolina School of Law.

[1] 352 F.2d 156 (3d Cir. 1965).

[2] 48 Stat. 881 (1934), 15 U.S.C. § 78 (1964).

[3] (b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or

debentures into common stock was a "purchase" of the common and a "sale" of the debentures within the meaning of section 16(b)[4] and decided that Webster was therefore liable for profits derived from the "sale" of the bonds within six months of their "purchase," and for profits from the "sale" of the common within six months after it was "purchased" in the conversion transaction. An award of 116,544.36 dollars was rendered in favor of the corporation. The court of appeals affirmed the finding of the lower court, but decided that Webster had realized no "profit" within the meaning of section 16(b) from the "sale" of the debentures and reduced the judgment to 45,144.36 dollars, representing the profits from the "sale" of the common stock only.

Section 16(b) of the act provides for recovery by a corporation of any profits realized by an "insider" of the corporation if its securities are listed on a national exchange or traded over-the-counter and it has a total of 750 or 500 shareholders, depending upon the date, and assets of at least 1,000,000 dollars.[5] An "insider" is any officer, director, or ten per cent beneficial owner of any class of securities of the corporation.[6] Enforcement of this provision is aided by section 16(a), which requires that insiders of such corporations file reports as to their holdings and transactions in any of

officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in intering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1964).

[4] Heli-Coil Corp. v. Webster, 222 F. Supp. 831 (D.N.J. 1963).

[5] 78 Stat. 565, 15 U.S.C. § 78*l* (1964).

[6] See note 7 *infra.*

the corporation's equity securities.[7] The act was designed to insure to the public the maintenance of fair and honest markets in securities.[8] Section 16(b) itself was prompted by many abusive practices of corporate insiders in securities transactions prior to 1934.[9]

In its application, section 16(b) is meant to impose an objective, strict liability, requiring no proof of actual use of inside information.[10] The fact that the person comes under the definition of "insider" is sufficient.[11] This requirement is needed in order that the provision be effective, because of practical difficulties in proving use of such information. The strict wording of the statute notwithstanding, there is allowance for some administrative flexibility in that the Securities and Exchange Commission is given the power to make rules exempting from the section types of transactions that it believes were not comprehended to be within its purview.[12] The

[7] (a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.
48 Stat. 896 (1934), 15 U.S.C. § 78p(a) (1964).

[8] Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78b (1964).

[9] Among these were situations in which insiders with advance knowledge of facts that would depress the market price sold their stock at then current prices and repurchased when publication of the information had the anticipated effect, and situations in which insiders with advance knowledge would buy stock and sell after an anticipated subsequent rise in prices. See Smolowe v. Delendo Corp., 136 F.2d 231, *cert. denied*, 320 U.S. 751 (1943); S. REP. No. 792, 73d Cong., 2d Sess. 9 (1934).

[10] "[W]e are of the opinion . . . that it was the intention of Congress in enacting § 16(b) to obviate any necessity for a search of motives of the insider or require an investigation of whether or not his actions were animated by inside information to gain a speculative profit." Heli-Coil Corp. v. Webster, 352 F.2d 156, 165 (3d Cir. 1965).

[11] See Blau v. Lehman, 286 F.2d 786 (2d Cir. 1960), *aff'd*, 368 U.S. 403 (1962).

[12] See note 3 *supra*.

Commission has thus become the "watchdog" of section 16(b), by acting in this statutory capacity to prevent harsh liabilities.[13]

Under section 16(b), there must be a "purchase and sale," or "sale and purchase," and "profit realized" within the definition of the act.[14] The question whether conversion of a convertible security fits into these requirements is the problem in *Heli-Coil* and will be the concern of this note.

The act defines "purchase" as any "contract to buy, purchase, or otherwise acquire,"[15] and "sale" as "any contract to sell or otherwise dispose of."[16] Thus under section 16(b) the two terms are given broader definitions than those usually understood.[17] Some courts,[18] relying on *Park & Tilford, Inc. v. Schulte,*[19] one of the two leading decisions in the area, have decided that conversion of a convertible security into common stock is a "purchase" of that stock under section 16(b). In *Park & Tilford,* the defendants were beneficial owners of over ten per cent of the common stock of the corporation and of a large block of convertible preferred shares. The corporation gave notice of a redemption of the preferred, and the defendants then converted their preferred into common and sold at a profit within six months. The court found the conversion a "purchase" of the common and held the defendants liable for the profits of the subsequent "sale," reasoning that if conversion was not deemed a "purchase," it would put the defendant in a position to abuse any possession of inside information. The court had no difficulty with the fact that there was a call on the preferred shares, because the defendants had sufficient voting power to control the call.

The second of the leading decisions on this question is *Ferraiolo v. Newman.*[20] Here the defendant director owned convertible pre-

[13] In the administration of § 16(b) the Securities and Exchange Commission has adopted twenty rules exempting various transactions in whole or in part from its provisions. Rules 16a-1 to -10, 17 C.F.R. § 240.16a-1 to -10 (1964); and rules 16b-1 to -10, 17 C.F.R. § 240.16b-1 to -10 (1964).

[14] See note 3 *supra.*

[15] Securities Exchange Act of 1934, 48 Stat. 882, 15 U.S.C. § 78c(a)(13) (1964).

[16] Securities Exchange Act of 1934, 48 Stat. 882, 15 U.S.C. § 78c(a)(14) (1964).

[17] See Blau v. Lamb, 163 F. Supp. 528 (S.D.N.Y. 1958).

[18] *E.g.,* Heli-Coil Corp. v. Webster, 352 F.2d 156 (3d Cir. 1965); Blau v. Lamb, *supra* note 17.

[19] 160 F.2d 984 (2d Cir.), *cert. denied,* 332 U.S. 761 (1947).

[20] 259 F.2d 342 (6th Cir. 1958), *cert. denied,* 359 U.S. 927 (1959).

ferred shares of the corporation, and a call was issued at a redemption price less than market price. To avoid loss, defendant converted the preferred to common and sold the common within six months. The court did not follow *Park & Tilford* but held instead that the preferred and common were substantial economic equivalents and that the conversion was in reality forced because defendant played no part in the call and had no power to control it. The transaction was found to be "not one that could have lent itself to the practices which section 16(b) was enacted to prevent."[21]

Ferraiolo has been criticized as advocating a *subjective* approach to liability under section 16(b) by requiring examination of the actual circumstances behind the conversion.[22] On the other hand, *Park & Tilford* has been favored as representing the *objective* approach to section 16(b)[23] by imposing liability as a rule of thumb if the transaction is of a type open to insider abuse by use of special information. As pointed out, the act itself requires an *objective* approach to liability. To take a *subjective* view would be to compromise the statute and hamper full realization of its purposes. Admittedly, there must be a policy determination made here, for an entirely objective approach will of necessity cause hardship when, as in *Ferraiolo,* there is a forced conversion. This hardship must, however, be weighed against the value of fully implementing the statute itself. When this consideration is viewed in conjunction with the power of the Commission to make exemptions from the section, the objective view seems to be correct.

The district court determined that *Heli-Coil* should be governed by *Park & Tilford.*[24] The defendant contended the case was analogous to *Ferraiolo,* arguing that there was no "purchase" of the common because the convertible and the common shares were substantial equivalents.[25] The court rejected this, seeing the distinction between *Park & Tilford* and *Ferraiolo* as the involuntary nature of the conversion in the latter case, and held the conversion a "purchase" of the common and, *in addition,* a "sale" of the con-

[21] 259 F.2d at 346.
[22] Heli-Coil Corp. v. Webster, 352 F.2d 156, 164 (3d Cir. 1965); Petteys v. Northwest Airlines, Inc., 246 F. Supp. 526, 529 (D. Minn. 1965). *But see* Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir. 1965).
[23] *Ibid.*
[24] Heli-Coil Corp. v. Webster, 222 F. Supp. 831 (D.N.J. 1963).
[25] 222 F. Supp. at 835.

vertible, purchased less than six months previously.[26] This was the first time a court had considered the conversion also to have been a "sale," and, though the idea was not mentioned in *Park & Tilford,* the *Heli-Coil* court had no trouble basing its decision on that case. It recognized that *Park & Tilford* had not actually dealt with this new question, but decided that its ratio decidendi would determine that issue.[27]

The ramifications of such a decision are apparent. By treating the paper profits on conversion as actual realized profits, the court subjects the insider to liability for two sets of "purchases" and "sales" rather than the customary one, thereby compelling the defendant to account for a far greater amount than he actually realized.[28] Thus, in *Heli-Coil* his liability was almost doubled—a harsh result adding an element of punishment to the usual liability under section 16(b). Sustaining this result would contravene the statute's *remedial* purpose[29] as much as adherence to the subjective standard suggested in *Ferraiolo.* This was the position of the Securities Exchange Commission when the lower court decision in *Heli-Coil* was rendered. In the court of appeals, the Commission, appearing as *amicus curiae,* asserted that section 16(b), literally construed, meant that conversion is *both* a "purchase" of the common shares and a "sale" of the convertible shares,[30] but introduced a "substantial and novel"[31] concept, arguing that defendant did not "realize" any profits in the "sale" at conversion.[32] It pointed out that the district court had not considered this issue and said that the words "profit realized" in the act mean a great deal more than mere paper profits, and

> neither words used nor the statutory purpose calls for a finding that a profit was "realized" upon the conversion of the debentures under the circumstances of this case. When used with reference to investments, the term "realized" generally refers to the liquidation of an investment position and the collection of whatever profit has accrued. Although in some situations the statutory purpose may require a broader concept, this is not such a case.

[26] *Ibid.*

[27] 222 F. Supp. at 834.

[28] For a discussion of the tremendous losses this can cause the defendant, see 19 RUTGERS L. REV. 151, 152 (1964).

[29] See Ellerin v. Massachusetts Mut. Life Ins. Co., 270 F.2d 259 (2d Cir. 1959); Adler v. Klawans, 267 F.2d 840 (2d Cir. 1959).

[30] Brief for the SEC as Amicus Curiae, pp. 8-13, Heli-Coil Corp. v. Webster, 352 F.2d 156 (3d Cir. 1965).

[31] *Id.* at 13.

[32] *Ibid.*

> In no real sense did Mr. Webster [the insider] liquidate his position or collect a profit when he converted. . . . After the conversion, as before . . . [he] retained his investment position in the securities of Heli-Coil and whatever profits had accrued continued to be at the risk of the market and could disappear without "realization" if the market price of the common were to decline substantially. In the parlance of investors, these profits continued to be "paper" profits both before and after the conversion.[33]

The court of appeals, adopting the Commission's position, said:

> Measuring the terms "profit" and "realize" in conjunction, we think it is clear that Congress intended that ordinarily no gain in the value of securities should be deemed to be realized as a profit under the Act until there has been a definitive act by the owner of the securities whereby the paper value of the securities has become a real and an includible one—in the case at bar, by a sale of the common stock by Webster for cash.[34]

Accordingly, Webster's liability was reduced to the actual profit "realized," this being the difference between the value of the common at conversion, and its subsequent sales price.

Practically the same issue as that presented in *Heli-Coil* has arisen in *Blau v. Lamb*,[35] a case now on appeal to the Second Circuit. There the defendants acquired convertible preferred shares, within six months converted into common, and then sold the common within six months. The court below held that the transaction constituted a "purchase" of the common, and a "sale" of the convertible preferred.[36] The Securities and Exchange Commission, as *amicus curiae,* cited *Heli-Coil* and took the same position it had taken there, saying that

> the court below correctly held that the voluntary conversion of preferred stock into common stock constituted a "sale" of the preferred and a "purchase" of the common. . . . However, that . . . under the circumstances of this case, no profit was realized by Appellants from the disposition of the preferred stock upon conversion.[37]

It will not be surprising if the Second Circuit in *Blau v. Lamb* follows the "no profit realized" position of the Commission as did

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[33] *Id* at 14, 15.
[34] Heli-Coil Corp. v. Webster, 352 F.2d 156, 167-68 (3d Cir. 1965).
[35] 242 F. Supp 151 (S.D.N.Y. 1965).
[36] *Ibid.*
[37] Brief for the SEC as Amicus Curiae, p. 5, Blau v. Lamb, 242 F. Supp. 151 (S.D.N.Y. 1965).

the Third Circuit in *Heli-Coil.* This would be only proper in view of the closeness of the Commission to such transactions and its statutory power as "watchdog" over section 16(b).[38] The approach in *Heli-Coil* is a novel one; however, convincing as it may be, it is difficult to avoid the impression that it is actually no more than a stopgap—giving the courts an opportunity to impose a reasonable liability in accordance with the purpose of section 16(b) while allowing the Commission a chance to formulate and express its own policy by adopting rules of exemption. This impression is strengthened by the fact that the Commission recently has passed an amendment to its rule 16b-9[39] that will apparently remedy the problems discussed here. Previously, rule 16b-9 allowed an exemption from 16(b), under certain circumstances, for acquisitions and dispositions of securities in the conversion of one class of security into another class that has *similar characteristics.*[40] The amendment *extends* the exemption to

> conversion of an equity security convertible into any class of equity security of the same issuer; provided that, no more than 15 per cent of the value of the security received at the time of conversion is received or paid, in cash or other property (other than the convertible security given in exchange), in connection with the conversion.[41]

This rule will apparently cause the six month short-swing period to be measured from the time of "purchase" of the convertible security, to the time of the "sale" of the "security as to which the conversion privilege relates,"[42] and *will* allow profits realized

[38] See notes 3 and 13 *supra.*

[39] See note 42 *infra.*

[40] Rule 16b-9, 17 C.F.R. 240.16b-9 (1964).

[41] Notice of Proposal to Amend Rule 16b-8 and Rule 16b-9 Under the Securities Exchange Act of 1934, SEC Release, No. 7750, Nov. 27, 30 Fed. Reg. 14742 (1965).

[42] The full text of the rule as amended by SEC Release, No. 7826, Feb. 17, 31 Fed. Reg. —— (1966): § 240.16b-9 Exemption from section 16(b) of transactions involving the conversion of equity securities.

(a) Any acquisition or disposition of an equity security involved in the conversion of an equity security, which, by its terms or pursuant to the terms of the corporate charter or other governing instruments, is convertible immediately or after a stated period of time into another equity security of the same issuer, shall be exempt from the operation of Section 16(b) of the Act; *Provided, however,* That this rule shall not apply to the extent that there shall have been either (i) a purchase of any equity security of the class convertible (including any equity security of the class issuable upon conversion, or (ii) a sale

from any such sale or purchase transactions to be recovered by the corporation. Its impact in cases such as *Heli-Coil* or *Blau v. Lamb* is obvious, for in either situation it possibly would have relieved the defendant of all liability under secton 16(b).[43]

Thus, by the amendment, the Securities and Exchange Commission has acted as quickly as could be expected to remedy an unfortunate development under section 16(b) of the Securities Exchange Act of 1934. The new rule will terminate any questions on the propriety of the *Heli-Coil* decision.[44]

JOHN R. JOLLY, JR.

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of any equity security of the class convertible and any purchase of any equity security issuable upon conversion, (otherwise than in a transaction involved in such conversion or in a transaction exempted by any other rule under Section 16(b) within a period of less than six months which includes the date of conversion.

(b) For the purpose of this rule, an equity security shall not be deemed to be acquired or disposed of upon conversion of an equity security if the terms of the equity security converted require the payment or entail the receipt, in connection with such conversion, of cash or other property (other than equity securities involved in the conversion) equal in value at the time of conversion to more than 15% of the value of the equity security issued upon conversion.

(c) For the purpose of this rule, an equity security shall be deemed convertible if it is convertible at the option of the holder or of some other person or by operation of the terms of the security or the governing instruments.

[43] *Ibid.*

[44] In relation to the amendment, the Commission has moved for leave to file as amicus curiae in the case of Petteys v. Northwest Airlines, Inc., 246 F. Supp. 526 (D. Minn. 1965), now on appeal to the Eighth Circuit. This case presents a situation different from—but closely related to—that in *Heli-Coil* and *Blau v. Lamb*. In *Petteys* the defendants held convertible securities more than six months and then converted to common when a call on the shares was issued, selling the common shares within six months of the conversion. The district court, applying very strictly the objective standard established by *Park & Tilford*, held that the conversion, *though involuntary* (defendants were directors, but had no control over the call), and the subsequent "sale" of the common constituted a "purchase" and "sale" under section 16(b). The case is thus diametrically opposed to the position taken in *Ferraiolo* by the Sixth Circuit. The Commission has directed the court's attention to the amendment to rule 16b-9, which "would have an impact on the factual situations such as those in this case." See Motion Re Amicus Curiae Participation by SEC, p. 2, Petteys v. Northwest Airlines, Inc., *supra*. The Commission does point out, however, that the new rule would not apply to cases such as *Petteys*, where judgment has already been rendered, but it apparently feels that the Eighth Circuit will give weight to the new rule in its determination of the case. It seems that the court of appeals *should* do this, because of the Commission's statutory position under section 16(b), and its obvious feeling that section 16(b) was not intended to produce liability in the ordinary security conversion transaction.

Criminal Law—Felony Murder—Homicide by Fright

X, in committing armed robbery of a tavern, fires a warning shot into the ceiling to show he means business. *Y*, a customer in the tavern and one of the intended victims, has a heart attack and dies. May *X* be convicted of first degree murder? In *State v. McKeiver*,[1] a New Jersey Superior Court, applying its felony-murder statute,[2] held that this situation was sufficient to support an indictment for first degree murder. This note will attempt to examine the felony-murder rule, its purpose and the validity of this extended application.

At common law the felony-murder rule was simply that a homicide resulting from the perpetration or attempted perpetration of a felony was designated as murder.[3] Today, the rule, as generally codified in this country, is that a *murder*[4] committed in the perpetration or the attempted perpetration of one of the "dangerous" felonies[5] designated by statute is a first degree offense.[6] There are

[1] 89 N.J. Super. 52, 213 A.2d 320 (Super. Ct. 1965). This case has now been terminated as the State has accepted a plea to manslaughter.

[2] "Murder which . . . is committed in perpetrating or attempting to perpetrate arson, burglary, kidnaping, rape, robbery or sodomy, is murder in the first degree . . . ." N.J. REV. STAT. § 2A:113-2 (1953).

[3] HOLMES, THE COMMON LAW 57-59 (1881).

[4] Twenty-seven jurisdictions require this "murder" threshold. ARIZ. REV. STAT. ANN. § 13-452 (1956); ARK. STAT. ANN. § 41-2205 (1964); CAL. PEN. CODE § 189; COLO. REV. STAT. ANN. § 40-2-3 (1953); CONN. GEN. STAT. REV. § 53-9 (Supp. 1963); DEL. CODE ANN. tit. 11, § 571 (Supp. 1964); IDAHO CODE ANN. § 18-4003 (1948); IOWA CODE ANN. § 690.2 (1950); KAN. GEN. STAT. ANN. § 21-401 (1964); MD. ANN. CODE art. 27, § 410 (Supp. 1965); MASS. ANN. LAWS ch. 265, § 1 (1956); MICH. STAT. ANN. § 28.548 (1954); MO. ANN. STAT. § 559.010 (1953); MONT. REV. CODES ANN. § 94-2503 (1949); NEV. REV. STAT. § 200.030 (1957); N.H. REV. STAT. ANN. § 585:1 (1955); N.J. REV. STAT. § 2A:113-2 (1953); N.M. STAT. ANN. § 40A-2-1 (1964); N.C. GEN. STAT. § 14-17 (1953); N.D. CENT. CODE § 12-27-12 (1960); PA. STAT. ANN. tit. 18, § 4701 (1963); R.I. GEN. LAWS ANN. § 11-23-1 (1957); TENN. CODE ANN. § 39-2402 (1955); UTAH CODE ANN. § 76-30-3 (1953); VT. STAT. ANN. tit. 13, § 2301 (1958); VA. CODE ANN. § 18.1-21 (Supp. 1964); W. VA. CODE ANN. § 5916 (1961). Other jurisdictions give the felony-murder rule a broader coverage by designating as a first degree offense (a) "every homicide" committed during a dangerous felony, ALA. CODE tit. 14, § 314 (1959), or (b) "every unlawful killing" during a dangerous felony, see, *e.g.*, FLA. STAT. ANN. § 782.04 (1965); IND. ANN. STAT. § 10-3401 (1956); N.Y. PEN. § 1044; ORE. REV. STAT. § 163.010 (1963); WASH. REV. CODE ANN. § 9.48.030 (1961); WYO. STAT. ANN. § 6-54 (1959).

[5] Felony murder is considered a first degree offense in thirty-six Ameri-

two elements of felony murder: (1) the defendant must commit or attempt to commit a "dangerous" felony, and (2) the defendant must commit a murder. The second element generally requires malice and causation. Upon proof of these elements the state establishes a first degree murder charge.

The first element is a limitation imposed by the purpose of the rule—the prevention of the unintended, unpremeditated and sometimes accidental deaths that too often occur in the perpetration of certain felonies.[7] Since the common characteristic of these "dangerous" felonies is the creation of a substantial risk to human life, the first element is also important in establishing the second. Malice aforethought must be exhibited by a defendant in order to charge him with murder. This vague term was at first nothing more definite than a general intention to commit a wrong,[8] but it is now considered an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind.[9] This requisite mental state may be either express or implied, and because of the common characteristic of a "dangerous" felony, the courts will normally imply malice from the felon's actions. It has been said that

> this imputation is justifiable only on the assumption that the risk of death or serious bodily harm as a consequence of a felony, or the risk in concert with the felonious intent, is sufficient to imply malice on the ground that the felon demonstrates that he has no concern for human life.[10]

This does not mean, however, that the malice with which a "dangerous" felony is committed will always satisfy the murder requirement of the felony-murder rule, because the rule allows only malice

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can jurisdictions recognizing two degrees of murder. 66 YALE L.J. 427 n.1 (1957).

[6] The "dangerous" felony requirement was the earliest restriction on the application of the felony-murder rule. Powers v. Commonwealth, 110 Ky. 386, 63 S.W. 976 (1901); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924). The usual felonies designated today are arson, burglary, rape and robbery. N.C. GEN. STAT. § 14-17 (1953) contains the language "or other felony" and it is still an open question whether any statutory felony or only a felony dangerous to life is intended. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

[7] MODEL PENAL CODE § 201.2, comment 4, at 37 (Tent. Draft No. 9, 1959); REPORT OF ROYAL COMMISSION ON CAPITAL PUNISHMENT, CMD. No. 8932, at 35-36 (1949-53).

[8] 66 YALE L.J. 427, 430 (1957).

[9] Perkins, *A Re-Examination of Malice Aforethought,* 43 YALE L.J. 537 (1934).

[10] 71 HARV. L. REV. 1565 (1958).

and not the act of killing to be imputed to the felon. Causation must still be proved.[11] This should be only "but for" causation—a negative concept that unless the felony causes the death, no murder is committed.[12] Although there is judicial authority to the contrary,[13] the recent trend of decisions is to reject an affirmative application of proximate cause. Because of this rejection, a defendant is not guilty of felony murder for justifiable homicide by a policeman or excusable homicide by a victim committed during the course of the defendant's felony.[14] Thus the mere coincidence of homicide and felony is not sufficient to satisfy the requirements of the felony-murder rule.

The establishment of these elements enables the court and the jury to impose the severest penalty allowed by the state; this is the real significance of the felony-murder rule. It is not the imposition of criminal responsibility that should be criticized but rather the degree of responsibility the rule demands. The degree of responsibility was of little consequence at common law because all felonies were punishable by death.[15] But with the curtailment of capital punishment and the division of murder, its continued characterization as a first degree offense is of great importance. At common law, malice aforethought was the only requirement for murder, as it is for second degree murder today. First degree murder, to the layman, has the additional requirement of wilful, premeditated and deliberate action.[16] The felony-murder rule, however, relieves the state of the difficult burden of proving this mental state characterized by a design to kill. By eliminating inquiry into whether such design exists,[17] the rule greatly expands the application of first degree

[11] 5 SANTA CLARA LAW. 172, 176 (1964).

[12] 34 N.C.L. REV. 350, 353 (1956).

[13] Ludwig, *Foreseeable Death in Felony Murder,* 18 U. PITT. L. REV. 51 (1956).

[14] People v. Washington, 44 Cal. Rptr. 442, 402 P.2d 130 (1965) (disapproving any inconsistency in People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (Dist. Ct. App. 1959); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958) (overruling Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955)).

[15] James, *The Felony Murder Doctrine,* 1 AM. CRIM. L.Q. 33, 37 (1963).

[16] 66 YALE L.J. 427, 432-33 (1957).

[17] When a homicide is committed during a robbery, premeditation is not an element, robbery being the legal equivalent thereof. State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963). Affirmative defenses to the specific intent to kill also have no validity. *E.g.,* United States *ex rel.* Rucker v. Myers, 311 F.2d 311 (3d Cir. 1962) (intoxication); State v. Pastet, 152 Conn. 81, 203 A.2d 287 (1964) (temporary insanity).

murder and places at the disposal of law enforcement officials a formidable weapon. Of course, it is evident that in many instances the felon deserves the severest penalty allowed by law, as where a robber kills his victim to prevent identification. Such punishment could be obtained by a straight first degree murder indictment without the support of the felony-murder rule. In absence of facts establishing a wilful, premeditated and deliberate killing, as in the principal case, the maximum offense, theoretically justifiable, would be second degree murder. Moreover, in the rare case where the chances of death resulting from the commission of the felonious act is so remote that no reasonable man would have taken it into account, only a manslaughter conviction should be sustained.[18] Although it is foreseeable in the perpetration of *armed* robbery that violence may erupt causing death, it is arguable that in the principal case death by heart attack is not foreseeable.[19] Even if the state is able to establish factual causation through medical evidence and the "thin skull" doctrine,[20] the real question of whether liability should attach still remains. "[T]his is a question not of causation but of culpability."[21] However, the consideration of whether the legislature intended to impose this severe penalty on such conduct is excluded by operation of law, and the homicide is classified as first degree murder. Professor Packer states that

> in form, this means that absolute liability for murder is being imposed. In substance, however, the felony-murder rule simply relieves the jury of having to infer what can usually be inferred with great ease, that the actor foresaw that death might result from his conduct. The irrationality of the rule, which has long drawn the attack of scholars, lies in the result that it compels in

[18] Perkins, *supra* note 9, at 560.

[19] Such an argument is no longer strengthened by the fact that death was not caused by corporal harm. Today, of course, most jurisdictions impose criminal responsibility for death from fright resulting from battery upon the deceased. *E.g.*, Snowden v. State, 133 Md. 624, 106 Atl. 5 (1919); State v. Knight, 247 N.C. 754, 102 S.E.2d 259 (1958). But jurisdictions also impose such responsibility even though no hostile demonstration or overt act was directed at the deceased. People v. Studer, 59 Cal. App. 547, 211 Pac. 233 (Dist. Ct. App. 1922); In the Matter of Heigho, 18 Idaho 566, 110 Pac. 1029 (1910); Graves v. Commonwealth, 273 S.W.2d 380 (Ky. 1954) (rev'd on other grounds). For a general discussion of homicide by fright or shock, see Annot., 47 A.L.R.2d 1072 (1956).

[20] Although this is a tort concept, the idea that one takes his victim as he finds him may be applicable here.

[21] Packer, *The Model Penal Code and Beyond,* 63 COLUM. L. REV. 594, 603 (1963).

> the rare case in which the evidence shows the absence of culpable foresight. It is this *automatic* and *conclusive* imputation of culpability that has been rightly criticized.[22]

What is the justification for such a special ban? It may be said to be warranted as vengeance or retribution for fearful harm. But in those felony homicides lacking the additional requirements for first degree murder, the community would not demand the most severe penalty and, in fact, to do so weakens the concept of first degree murder.[23] Most proponents of the felony-murder rule expound its deterrent effect.[24] Even though it can be argued that the deterrent effect is dubious, it is more important to point out that mere increase in punishment beyond that provided for the underlying felony or warranted by the evidence of culpability is not the correct method.[25]

One solution to this problem in any legal system is to abolish the rule, as England and Ohio have done.[26] However, this solution is undesirable, for it ignores the valuable insight drawn from common experience that unintended deaths too often occur during certain felonies. Moreover, abolishing the rule is not necessary. By lowering the degree of criminal responsibility imposed upon the felon, who unintentionally "causes" a death, a rational basis may be maintained in attempting to prevent crime and to preserve human life. While in the majority of cases, an enactment that embodies the felon-murder rule within second or third degree murder[27] will punish the offender according to his state of mind or culpability, there still remains the rare instance where the remote death occurs

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[22] *Id.* at 598.

[23] Morris, *The Felon's Responsibility For the Lethal Acts of Others,* 105 U. PA. L. REV. 50, 66 (1956).

[24] *E.g.,* People v. Washington, 44 Cal. Rptr. 442, 447, 402 P.2d 130, 135 (1965) (dissent).

[25] The efficacy of punishment in preventing crime depends both on its severity and its certainty. Centuries of common law experience have demonstrated that certainty of punishment is more effective in deterring potential offenders than severity. It has also demonstrated that excessive severity may diminish certainty of punishment. This is so because the criminal law depends for its enforcement on laymen as complainants, witnesses and jurors.

Ludwig, *supra* note 13, at 61-62.

[26] English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11; OHIO REV. CODE ANN. §§ 2901.01, 2901.05 (Page 1958). In the MODEL PENAL CODE § 201.2, comment 4, at 35-36 (Tent. Draft No. 9, 1959) these two statutes are discussed in conjunction with the doctrine's rejection or nonexistence in other foreign countries.

[27] See, MINN. STAT. § 609.195 (1964).

during a felony. Thus the best solution[28] appears to be that adopted in the Model Penal Code.[29] The Code provides that homicides occurring in the course of the commission of felonies "will only constitute murder if they are committed purposely or knowingly, or recklessly where the recklessness demonstrates extreme indifference to the value of human life, subject, however, to a presumption of such recklessness if the actor is committing"[30] one of the dangerous felonies normally found in a felony-murder statute. This presumption of extreme recklessness is rebuttable,[31] and the jury may find that the recklessness lacks extreme indifference.[32] The homicide, however, may still be adjudged reckless, in which event it constitutes manslaughter.[33] In this manner, the Code recognizes and corrects the real evil of the felony-murder rule, *i.e.,* the irrelevant issue of whether the homicide was purposely or accidentally committed.[34] The Code's effect is concisely stated by Professor Packer.

> In short, the felony-murder rule is transformed from a rule of law to a rule of evidence. The principle of *mens rea,* as it applies in the law of homicide, is fully preserved, but the jury's attention is explicitly directed to the justifiable evidentiary implication of homicide in the course of a felony.[35]

The results may not often differ,[36] but a conviction under the Code would rest upon sound grounds.

Whether the defendant in the *McKeiver* case could overcome the presumption of extreme indifference will not be discussed here.

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[28] One attempt at punishing according to culpability is the declaration that homicide in the commission or attempted commission of a crime punishable by death or life imprisonment is first degree murder. MASS. ANN. LAWS ch. 265, § 1 (1956). Another solution that has been suggested is to increase the penalty for the underlying felony. Morris, *supra* note 23, at 77. "If the object of the rule is to prevent such accidents, it should make accidental killing with fire-arms murder, not accidental killing in the effort to steal; while, if the object is to prevent stealing, it would be better to hang one thief in every thousand by lot." HOLMES, THE COMMON LAW 58 (1881).

[29] MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962).

[30] MODEL PENAL CODE § 201.2, comment 4, at 33 (Tent. Draft No. 9, 1959).

[31] *Ibid.*

[32] MODEL PENAL CODE § 201.2, comment 2 (Tent. Draft No. 9, 1959).

[33] MODEL PENAL CODE § 201.2, comment 4, at 33 (Tent. Draft No. 9, 1959).

[34] MODEL PENAL CODE § 201.2, comment 4, at 39 (Tent. Draft No. 9, 1959).

[35] Packer, *supra* note 21, at 599.

[36] The Code declares that murder is a first degree felony which may have the death sentence. MODEL PENAL CODE § 210.2(2) (Proposed Official Draft 1962).

The writer only suggests that to impose first degree murder automatically without inquiry into whether the actor had the requisite culpability with respect to the result threatens the very foundation of the criminal law—the principal of punishing according to culpability. If the Code with its firm foundation has not been accepted, the law enforcement officials must analyze each fact situation and if necessary, as in the principal case, punish *only* the justifiable crimes —armed robbery and manslaughter. The system should not be jeopardized in an attempt to gain the maximum penalty in every case.

DAVID A. IRVIN

Eminent Domain—Cul-de-Sac Doctrine

In *Wofford v. Highway Comm'n*,[1] the North Carolina Supreme Court abolished the doctrine of eminent domain known as the cul-de-sac principle.[2] If a public authority blocks or vacates a portion of a road, leaving any owner whose land abuts the remaining road without access from one direction, the situation is generally called a cul-de-sac. In the 1931 decision of *Hiatt v. City of Greensboro*,[3] the court held that the creation of a cul-de-sac was compensable under eminent domain.[4] The rationale of the court was that the owner whose property abuts a road has a private easement to have the street remain open in both directions, and that the damage to abutting owners was different in kind as well as in degree from that of the general public. The court stated that the majority of courts agreed with this view.

Since *Hiatt* the court has gradually restricted the application of

[1] 263 N.C. 677, 140 S.E.2d 376 (1965).

[2] Cul-de-sac is French for "the bottom of a bag." The North Carolina Supreme Court has defined the cul-de-sac principle as:

> The rule that an abutting owner has a right of access to the general system of streets and to the remainder of his street with all of its connections to a point where they cease to be of more than remote advantage to him, and that when one end of the street is closed he is entitled to compensation . . . .

Snow v. Highway Comm'n, 262 N.C. 169, 172, 136 S.E.2d 678, 681 (1964).

[3] 201 N.C. 515, 160 S.E. 748 (1931).

[4] North Carolina has no eminent domain provision in its constitution. However, just compensation for the taking of private property for public use has been considered necessary under art. I, § 17 of the North Carolina Constitution. Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960); Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955).

this doctrine. In *Sanders v. Town of Smithfield*[5] the court refused to allow compensation when the road was obstructed in a block other than the one on which plaintiff's land was situated. *Hiatt* was distinguished on the grounds that a cul-de-sac is not created when there is an intersecting street between plaintiff's property and the obstruction. This distinction seems to be generally recognized by courts which hold cul-de-sac to be recoverable.[6]

In *Snow v. Highway Comm'n*[7] the court refused to apply the cul-de-sac principle in a rural situation. It made no justifiable distinction between the application of cul-de-sac in urban and rural situations. The real reason for making such a distinction apparently was that the court did not wish to overrule *Hiatt* without warning. The distinction made will not bear analysis, but the case did serve to give warning that the end of cul-de-sac was near in North Carolina. This was particularly emphasized by the last sentence of the case: "Quaere: If the questions presented by *Hiatt* arise again in this jurisdiction, should this court re-examine its holding in that case in the light of modern conditions and the trend of recent opinion in other States?"[8]

Within a year the *Wofford* case overruled the *Hiatt* decision. The first principle asserted by the court by *Hiatt*—that the owner had a private easement of travel in both directions—had been considerably weakened by well-settled rules that there is no compensation when a municipality converts a street to a one-way street[9] or places permanent divider strips between the traffic lanes.[10] With all the degrees of interference that are said to be reasonable under the police power, it is doubtful if the abutting owner has any right to a flow of traffic by his property.[11] Because of this, the

[5] 221 N.C. 166, 171, 19 S.E.2d 630, 634 (1942).

[6] *E.g., In re* Hull, 163 Minn. 439, 204 N.W. 534 (1925); Annot., 49 A.L.R. 361 (1927), 93 A.L.R. 642, 644 (1934).

[7] 262 N.C. 169, 136 S.E.2d 678 (1964).

[8] *Id.* at 177, 136 S.E.2d at 684.

[9] *E.g.*, Cities Serv. Oil Co. v. New York, 5 N.Y.2d 110, 154 N.E.2d 814, 180 N.Y.S.2d 769 (1958); City of Memphis v. Hood, 208 Tenn. 319, 345 S.W.2d 887 (1961); Walker v. State, 48 Wash. 2d 587, 295 P.2d 328 (1956).

[10] *E.g.*, Daugherty County v. Hornsby, 213 Ga. 114, 97 S.E.2d 300 (1957); Turner v. Roads Comm'n, 213 Md. 428, 132 A.2d 455 (1957); Walker v. State, *supra* note 9.

[11] See Barnes v. Highway Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962). It seems odd that courts holding cul-de-sac compensable would take this position since the real damage is suffered from the loss of traffic by the property, not from the landowner's own inability to travel in either direction.

court decided that any damage done to an abutting owner's property by being placed in a cul-de-sac was different only in degree from that of the general public and not in kind. Therefore, the damage was not compensable. The fact that the owner can now travel only in one direction, necessitating a more circuitous route to go in the other, is *damnum absque injuria.*

The above is a synopsis of the court's reasoning. However, two reasons that were probably the real basis for the change in the North Carolina view were unmentioned by the court: (1) the impractical consequences of the *Hiatt* rule under modern conditions, and (2) a shift of the weight of authority on the question. It is apparent that the theory of building roads and highways is quite different today from what it was at the time of the Hiatt decision. Limited access highways for rapid transit in rural and in urban areas have become a necessity, and their costs are extremely high. A recovery for the creation of a cul-de-sac would add considerably to the costs. The Kansas Supreme Court, which has held cul-de-sac to be compensable, recently recognized in dictum that "this new concept [controlled access highways], which was not fully recognized in our previous decisions, requires a complete review and reappraisal of the correlative rights of . . . owners of abutting lands"[12] and "a present statement of public and private highway rights must reflect prevailing conditions."[13]

In *Hiatt,* the court cited American Law Reports annotations to show that its decision was consistent with the weight of authority.[14] This majority has clearly shifted.[15] Of the latest decisions that could be found in the United States, twenty-three courts do not allow recovery in the cul-de-sac situation,[16] and fourteen

[12] Brock v. Highway Comm'n, —— Kan. ——, ——, 404 P.2d 934, 939 (1965).

[13] *Id.* at ——, 404 P.2d at 942.

[14] See Annot. 49 A.L.R. 361 (1927), 93 A.L.R. 642 (1934).

[15] Justice Parker, dissenting in *Wofford,* disagrees. 263 N.C. at 685, 140 S.E.2d at 386.

[16] Ralph v. Hazen, 93 F.2d 68 (1937); Jackson v. Birmingham Foundary & Mach. Co., 154 Ala. 464, 45 So. 660 (1908); Gayton v. Dep't. of Highways, 149 Colo. 899, 367 P.2d 899 (1962); Micone v. City of Middletown, 110 Conn. 664, 149 Atl. 408 (1930); Tift County v. Smith, 219 Ga. 68, 131 S.E.2d 527 (1963); Warren v. Highway Comm'n, 250 Iowa 473, 93 N.W.2d 60 (1958); Dep't of Highways v. Jackson, 302 S.W.2d 373 (Ky. 1957); La Croix v. Commonwealth, —— Mass. ——, 205 N.E.2d 228 (1965); Krebs v. Uhl, 160 Md. 584, 154 Atl. 131 (1931); Phelps v. Stott Realty Co., 233 Mich. 486, 207 N.W. 2 (1926); Handlan-Buck Co. v. Highway Comm'n, 315 S.W.2d 219 (Mo. 1958); State v. Hoblitt, 87 Mont. 403, 288

do.[17] It is unclear in two jurisdictions previously permitting recovery whether such is still the law.[18] Of the courts that have decided or reaffirmed their positions since 1955, eleven have said there is to be no recovery[19] while only six have held that the owner can recover.[20] Therefore, it would seem that the weight of authority has shifted and that the cul-de-sac principle is disappearing.

The courts holding that one may recover for his property's being

Pac. 181 (1930) (limited to rural roads); Fougeron v. County of Seward, 174 Neb. 753, 119 N.W.2d 298 (1963); Cram v. City of Laconia, 71 N.H. 41, 51 Atl. 635 (1901); Mayor v. Hatt, 79 N.J.L. 548, 77 Atl. 47 (Ct. Err. & App. 1910) (damages not allowed in the absence of statute); State *ex rel.* Highway Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962); Reis v. City of New York, 188 N.Y. 58, 80 N.E. 573 (1907); Wofford v. Highway Comm'n, 263 N.C. 677, 140 S.E.2d 376 (1965); Babin v. City of Ashland, 160 Ohio St. 328, 116 N.E.2d 580 (1953); Hyde v. Minnesota D. & P. Ry., 29 S.D. 220, 136 N.W. 92 (1912); City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674 (1926); State *ex rel.* Woods v. Road Comm'n, —— W.Va. ——, 136 S.E.2d 314 (1964) (dictum upholding previous case); Stefan Auto Body v. Highway Comm'n, 21 Wis. 2d 363, 124 N.W.2d 319 (1963). In addition intermediate courts of two states have held that no damages were recoverable. Jarnagin v. Highway Comm'n, 5 So. 2d 660 (La. Ct. App. 1942); City of Waco v. DuPuy, 386 S.W.2d 192 (Tex. Civ. App. 1964).

[17] Highway Comm'n v. Kesner, —— Ark. ——, 388 S.W.2d 905 (1965); Mabe v. State, 83 Idaho 222, 360 P.2d 799 (1961); Gibbons v. Paducah & I.R.R., 284 Ill. 559, 120 N.E. 500 (1918); Falender v. Atkins, 186 Ind. 455, 114 N.E. 965 (1917); Lacascio v. Northern Pac. Ry., 185 Minn. 281, 240 N.W. 661 (1932) (dictum following the leading case *in re* Hull, 163 Minn. 439, 204 N.W. 534 (1925)); Highway Comm'n v. Fleming, 248 Miss. 187, 157 So. 2d 792 (1963); Turnpike Authority v. Chandler, 316 P.2d 828 (Okla. 1957); Ail v. City of Portland, 136 Ore. 654, 299 Pac. 306 (1931); Hedrich v. City of Harrisburg, 278 Pa. 274, 122 Atl. 281 (1923); Wolfe v. City of Providence, 77 R.I. 192, 74 A.2d 843 (1950); Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963); Sweetwater Valley Memorial Park v. City of Sweetwater, 213 Tenn. 1, 372 S.W.2d 168 (1963) (dictum indicating the court would follow two earlier cases); Boskovich v. Midvale City Corp., 121 Utah 445, 243 P.2d 435 (1952); Fry v. O'Leary 141 Wash. 465, 252 Pac. 111 (1927).

[18] In Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943), the court declared that an abutting landowner could recover for his property's being placed in a cul-de-sac. However, in Breidert v. Southern Pac. Co. 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964), the court said a cul-de-sac alone would not give recovery unless there has been a "substantial impairment" of plaintiff's access to the streets. What the court considers a substantial impairment is not yet clear. In Bolmar v. Board of Comm'rs, 114 Kan. 552, 220 Pac. 245 (1923), the court said there could be recovery for cul-de-sac. But in Brock v. Highway Comm'n, —— Kan.—, 404 P.2d 934 (1965), the court said it would have to re-examine its rules in this area in the light of the modern controlled-access highway.

[19] See cases from Colo., Ga., Iowa, Ky., Mass., Mo., Neb., N.M., N.C., W.Va., and Wis. cited in note 16 *supra.*

[20] See cases from Ark., Idaho, Miss., Okla., S.C., and Tenn. cited in note 17 *supra.*

placed in a cul-de-sac generally base their decisions on reasoning similar to that in the *Hiatt* case—*i.e.*, that an abutting land owner has an easement in travel on the streets and highways in both directions, and there is damage to him different in kind and in degree from that suffered by the public generally.[21] On the other hand, courts holding that no recovery can be had reason much as the court in *Wofford*—that a person has no right to traffic in front of his property, and that the damage to the abutting landowner is different only in degree from damage to the general public. It is suggested that none of these reasons is the real basis for any of the courts' decisions. The courts' decisions are in reality a result of a balancing of interest of the landowner, who has unquestionably been damaged, with that of society in having an efficient and safe means of transportation at the lowest possible cost. If the cases are viewed in this manner, the reason for the shift of the weight of authority is obvious. With the costs of building highways and other means of land transportation rising and with the shift in highway building to the limited-access road, the balance has swung to the side of the public interest.

DENNIS JAY WINNER

Investment Securities—Duty to Register Transfer

In *Kanton v. United States Plastics, Inc.*,[1] the plaintiff, a New York resident, was owner and holder of 10,920 shares of Class A stock of defendant, United States Plastics, Inc. ("Plastics"), a Florida corporation.[2] Plaintiff acquired the shares while employed by Plastics from one Scharps who, as president, "dominated and controlled" Plastics.[3] On termination of his employment, plaintiff decided to sell the shares. The stock certificates carried a legend

[21] Textual writers generally favor giving compensation in this situation. *E.g.*, 4 MCQUILLAN, MUNICIPAL CORPORATIONS 358-59 (Moore, 2d ed. 1943).

[1] 248 F. Supp. 353 (D.N.J. 1965).

[2] Plaintiff actually paid $27,500 for 10,000 Class B convertible shares, which he later converted on a share-for-share basis into an equal number of Class A shares. In addition, 920 shares were received through stock dividends in 1962 and 1964. *Id.* at 355.

[3] *Id.* at 363. Scharps was held not to be an indispensable party to this suit, which concerns not Scharps' possible adverse claim to the shares, but solely the question of the duty of Plastics and the transfer agent to register transfer of the shares. *Id.* at 360.

reciting that the shares had been purchased for investment purposes and not with a view to distribution or resale.[4] Plaintiff, however, secured from the Securities and Exchange Commission a "no-action letter" indicating that it was unlikely that the SEC would challenge sale of these shares as a violation of the Securities Act of 1933. On March 10, 1965, plaintiff submitted the stock certificates along with the no-action letter to Plastics' transfer agent, a New Jersey corporation and also a defendant. On March 24, 1965, the transfer agent, assertedly acting under Plastics' instructions, definitively refused to register transfer of the shares into the plaintiff's name and returned the certificates. On the same day plaintiff instituted a diversity suit seeking a mandatory injunction to compel the defendants to register transfer of the shares into plaintiff's name or, alternatively, damages measured as of March 24, 1965, the refusal date.[6] The district court granted the injunction.

Initially, the court held that both defendants were properly parties to the New Jersey suit. Although the transfer agent, a New Jersey corporation, was no longer serving Plastics in that role, it was still amenable to suit for its alleged defaults while functioning as such. Plastics, as principal, was properly named since its activities in this case gave it sufficient minimum contacts with New Jersey to subject it to an in personam judgment. Avoiding any broad ruling that "the mere presence in . . . [New Jersey] of . . . [the transfer agent] without more, is sufficient to subject Plastics to personal jurisdiction,"[7] the court pointed to four activities that laid a sufficient predicate for the assertion of jurisdiction over the Florida issuer: (1) the New Jersey transfer agent had long served Plastics in that capacity, (2) the refusal to register transfer, on Plastics' instructions, occurred in New Jersey, (3) Plastics had frequently communicated with its transfer agent in this matter, and (4) Plastics had agreed to indemnify the transfer agent for any

[4] Actually, only one certificate carried the legend, *id.* at 356, but in view of the final disposition of the case, this fact is immaterial.

[5] Since the court held, *id.* at 359, that "plaintiff's claim, realistically viewed, is not related to, and does not arise under, the Securities Acts," *i.e.*, the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-aa (1964), and the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. §§ 78a-hh (1964), jurisdiction rested only upon diversity and jurisdictional amount.

[6] The requested damages were $327,000, the alleged value of the shares on the refusal date, 248 F. Supp. at 356, but the court made no decision on this point since it granted an injunction, the primary relief sought.

[7] *Id.* at 359.

loss entailed by its refusal to register transfer of these shares pursuant to Plastics' instructions.[8] Considering the issuer's unusual degree of intervention into the otherwise routine work of its stock transfer agent—especially since the issuer's activities sought only to promote interests of its controlling shareholder—the court could properly find that the issuer's New Jersey contacts justified suing it there without offense to "traditional notions of fair play and substantial justice."[9]

This holding is particularly significant in that it allows a shareholder seeking registration of transfer to obtain jurisdiction in at least two states when the issuer and transfer agent reside in different jurisdictions and when, as may often be the case, the shareholder wishes to join both issuer and transfer agent. In the present case, jurisdiction over the issuer was important, since the transfer agent's resignation made it impossible for it actually to register transfer (although not to pay damages if assessed in a proper case), but the issuer could be compelled to take the required action either by its own action or by instructions to its new transfer agent. In practice, the holding here means that in the frequent case where a issuer has or must maintain a New York City transfer agent,[10] the shareholder may join both of them in a suit in federal court in the southern district of New York, at least if the issuer's activities are sufficiently substantial in relation to the problem as the court found them to be here. However, the court properly declined ruling on the difficult question whether maintainance of a transfer agent is alone sufficient to make the issuer amenable to suit in the transfer agent's jurisdiction.[11]

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[8] *Id.* at 360.

[9] *Id.* at 359.

[10] For securities listed on the New York Stock Exchange it is customary for the issuer to maintain a transfer agent and a registrar in New York City. Additionally, it is common practice to maintain a "local" agent in the jurisdiction of incorporation. For example, Virginia Electric and Power Company, whose shares are listed on the New York Stock Exchange, has transfer agents in Richmond, New York City, and Boston.

[11] Relevant here is a common provision in corporation statutes that a foreign corporation is not deemed to transact business in a state merely because it maintains a stock transfer agent in the state, at least for purposes of determining any obligation to obtain from the Secretary of State a certificate of authority. See, *e.g.*, N.C. GEN. STAT. § 55-131(b)(4) (1965). A statute sometimes specifies that such an exemption "shall not be deemed to establish a standard for activities which may subject a foreign corporation to service of process . . . ." *E.g.*, S.C. CODE ANN. § 12-23.1(c) (Supp. 1965).

Furthermore, the federal court made several significant determinations on the merits. Since suit was brought in New Jersey, where the Uniform Commercial Code is in effect, the court properly applied Code section 8-106,[12] which refers registration-of-transfer questions to the law of the issuer's incorporating state, in this case Florida. Finding no relevant law in Florida, where the Code had been enacted but had not taken effect at the time of decision,[13] the court undertook "to prophesy . . . how the Florida courts would decide the issue if called upon to do so"[14] and used both Code and pre-Code common-law rules to make this prediction. Thus, the Code is recognized as a significant source of general law, although as it becomes effective in most of the states, there will be fewer occasions to use it in this way, since it will be applied directly to problems.

The transfer agent had refused to register transfer of the shares on the ground that a stock certificate legend recited purchase for investment rather than for resale, although plaintiff submitted an SEC no-action letter along with the certificates. The court did not have to determine squarely the letter's legal impact. For one thing, as it stressed, federal criminal sanctions could not be invoked against the transfer agent for registering transfer,[15] since the prohibitions of the federal securities acts relate only to the "sale"[16] of securities, a term that is not defined to include registering transfer of a security after it has changed hands. Moreover, where the 1933 act has dealt with post-sale events, such as delivering a security after sale, it has specified them.[17] Finally, as a policy matter, registering transfer does not usually involve the dangers that the securities acts seek to avert, for these dangers inhere in the actual sale rather than in the issuer's recognition of a transferee as record owner for purposes of, *e.g.*, notices of meetings, dividend payouts, and other phases of the established relationship between a corporation and its shareholders. A second reason why the court could avoid squarely determining the effect of the no-action letter is its fact-finding that

[12] UNIFORM COMMERCIAL CODE § 25-8-106 [hereinafter cited as UCC], N.C. GEN. STAT. § 25-8-106.

[13] 248 F. Supp. at 361. The Code was apparently enacted after the court wrote its opinion.

[14] *Ibid.*

[15] *Id.* at 358-59.

[16] 48 Stat. 74 (1933), as amended, 15 U.S.C. § 77b(3) (1964).

[17] 48 Stat. 77 (1933), as amended, 15 U.S.C. § 77e(b)(2) (1964).

the real reason for refusing transfer was to accommodate the wishes of the seller, in this case Scharps.[18] Presumably because of the increased value of the shares, the seller was seeking ways to rescind the sale and to accomplish this putative purpose had the issuer (which seller controlled) give instructions against registering transfer. Since this was obviously not an acceptable defense, the court's mandatory injunction implies at least this much: that a restriction on registering transfer of shares originally acquired for investment does not of itself suspend a duty under state law to register transfer into a purchaser's name, where an SEC no-action letter is furnished and no other tenable or good faith grounds to refuse registration are present. Such an implied holding accords to the SEC no-action letter the effect and weight normally assigned to it, without going so far as to make it conclusive on the courts.[19] Nor would the Uniform Commercial Code seemingly dictate a contrary result. Code section 8-204[20] only states a negative rule that an admittedly lawful transfer restriction is ineffective unless conspicuously noted on the certificate; but it does not logically follow that every lawful restriction conspicuously noted must always be effective or enforced.[21] Thus, for purposes of ascertaining a duty to register transfer (or a liability for refusal), the transfer itself would appear to be "rightful" within the meaning of Code section 8-401.[22]

Finally, the court determined whether Scharps had stated an

[18] 248 F. Supp. at 358.

[19] See 3 Loss, SECURITIES REGULATION 1844 n.533, 1896 n.15 (2d ed. 1961), indicating the extent to which the SEC honors no-action letters. Loss quotes a former SEC chairman as stating in print "there seems never to have been 'any case where the Commission has initiated any proceedings after a letter of this nature has been issued, provided that the letter requesting the "no-action" position has accurately presented all the facts.'" *Id.* at 1844 n.533. This does not conflict with the SEC's view, quoted in the instant case, that a no-action letter "is not binding in a court of law on the question of the liability of an issuer for permitting a sale of its securities without registration under the Securities Act of 1933, nor would such an opinion preclude an issuer from maintaining that a sale of its unregistered securities by a stockholder would be in violation of Section 5 of the Securities Act of 1933." 248 F. Supp. at 357.

[20] UCC § 8-204, N.C. GEN. STAT. § 25-8-204.

[21] Stock transfer restrictions, including restrictions like the one in the present case, are analyzed in Folk, *Article Eight: Investment Securities*, 44 N.C.L. REV. 654, 680-82 (1966); a typical "investment" restriction legend appears at 681 n.131.

[22] UCC § 8-401, N.C. GEN. STAT. § 25-8-401(1)(e). The Code imposes a duty to register transfer only if, among other things, "the transfer is in fact rightful. . . ." For further discussion, see Folk, *supra* note 21, at 706-09.

"adverse claim"[23] to the security, for if so, both under the Code and prior law, the transfer agent would be justified in delaying registration of transfer while it investigated the claim. The court ruled that an issuer's direction not to register transfer of particular shares alone is not sufficient notice of an "adverse claim" as to impose a Code duty of inquiry on the transfer agent.[24] Not only was the bare instruction not to register transfer an insufficient identification of the "adverse claim," but even if this were enough to create a duty of inquiry, the transfer agent failed to follow through on the Code-approved procedure for discharging that duty of inquiry.[25] Hence, under the Code neither the transfer agent nor Plastics was privileged in refusing to register transfer.

Alternatively, the court held, assuming the Code inapplicable, that both Plastics and its transfer agent had a common-law duty to register transfer. The precise ground and scope of this holding is unclear. First, the court noted the control exerted by Scharps over Plastics to further his personal interests in this transaction by inducing refusal to register transfer. This holding may be roughly stated as follows: that an issuer acts in bad faith and without reasonable grounds in refusing to register transfer (or inducing its transfer agent's refusal), if personal desires of a controlling shareholder prompt refusal, *i.e.*, where the issuer uses its strategic position to promote the interests of one as against another claimant.[26] Thus, the issuer must act without favoritism or discrimination in registering stock transfers. To this extent, such an obligation accords with modern corporate law concepts imposing duties of fairness on directors, officers, majority shareholders and others in a position to exert corporate powers. Although the court articulates these ideas under

[23] See UCC § 8-301(1), N.C. GEN. STAT. § 25-8-301(1), for a definition of this term.

[24] 248 F. Supp. at 360, 362.

[25] See UCC § 8-403, N.C. GEN. STAT. § 25-8-403, on the duty of inquiry and methods of discharging that duty. This is discussed in detail in Folk, *supra* note 21, at 699-702.

[26] A crucial affidavit in the case

> concludes with the statement that Plastics, not being able to make a determination with respect to the conflicting claims to the stock, refused to allow a transfer to be made of the certificates in question.
>
> This statement . . . on its face, presupposes an adverse claimant dealing at arms length with the corporation of which he is a stockholder. But this Court cannot shut its eyes to the relationship existing between the adverse claimant and his corporation, and the latter's conduct by reason thereof.

248 F. Supp. at 363.

common law, they would appear equally to apply under the Code via its requirement that issuers and transfer agents must always act in good faith.[27]

ERNEST L. FOLK, III*

Military Law—Sixth Amendment Right to Counsel Applied to Special Court-Martial

Petitioner in *Application of Stapley*,[1] a private first class in the regular Army, was tried for and convicted of four violations[2] of the Uniform Code of Military Justice by special court-martial convened at Fort Douglas, Utah. He was sentenced to be confined at hard labor for three months, to forfeit fifty-five dollars of his pay per month for six months and to be reduced in rank to private. At the outset petitioner requested that he be represented by a qualified military lawyer. His request was denied, and he was told that to retain individual civilian counsel would cost about 150 dollars. Unable to pay that amount, he proceeded to trial represented by a captain in the Veterinary Corps and a second lieutenant, "neither . . . [of whom] had any experience before or with any court-martial or in advising persons charged with offenses."[3] Acting on their advice, petitioner entered into a pretrial agreement[4] with the convening authority, pleaded guilty to all charges, made no request for enlisted members on the court, did not object at the trial to the denial of

[27] Under the Code, the transfer agent has a duty of good faith running to the holder or owner of securities. N.C. GEN. STAT. § 25-8-406(1)(b). "'Good faith' means honesty in fact in the conduct or transaction concerned." N.C. GEN. STAT. § 25-1-201(19). On good faith, see Folk, *supra* note 21, at 708.

* Associate Professor of Law, University of North Carolina at Chapel Hill.

[1] 246 F. Supp. 316 (D. Utah 1965).

[2] UNIFORM CODE OF MILITARY JUSTICE arts. 86 (unauthorized absence), 90 (willful disobedience of a superior commissioned officer), 117 (provoking speech or gestures), 123a (making, drawing or uttering check, draft or order without sufficient funds), 10 U.S.C. §§ 886, 890, 917, 923a (1964) [hereinafter cited as UCMJ].

[3] 246 F. Supp. at 319.

[4] A pretrial agreement is an administrative procedure, or "negotiated plea," whereby the accused agrees to enter a plea of guilty to all charges in return for a guarantee that any sentence in excess of a stipulated maximum (here two months confinement and two months forfeiture of pay) will be disapproved.

his request for counsel and said only "yes sir" or "no sir" to questions asked by the court.

Without seeking review of his conviction through military channels, petitioner applied to the Federal District Court for the District of Utah for a writ of habeas corpus. The court issued the writ, holding that the sixth amendment right to counsel applied to this special court-martial. The court concluded that because the facts involved substantial charges of moral turpitude and considerable risk of incarceration, counsel with training beyond that common to all military officers was required.[5]

The court felt that it was

> appropriate, timely and necessary to recognize that it may be repugnant to minimal requirements of due process, even in the military service, for the juridically blind to lead the blind under a system or in a particular command accepting this as the rule rather than a militarily necessitated exception . . . [and that the sixth amendment's right to] assistance of counsel, however adaptably we may interpret the term in view of military expediency, cannot be constitutionally debased to mean the substantial absence of any legal assistance . . . .[6]

Within the framework of the military judicial system, the United States Court of Military Appeals[7] held in *United States v. Culp*[8] that the accused in a special court-martial, as distinguished from a general court-martial,[9] is not entitled to lawyer counsel.[10]

[5] The Justice Department did not appeal the decision. Charlotte Observer, Dec. 1, 1965, p. 7A, col. 5. Apparently the thought was that *Stapley* would not receive immediate acceptance in other judicial districts. See notes 34-35 *infra*, and accompanying text.

[6] 246 F. Supp. at 322.

[7] A statutory court vested with the power of final review of courts-martial proceedings. UCMJ art. 67, 10 U.S.C. § 867 (1964).

[8] 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

[9] There are three types of courts-martial: general, special and summary. The primary difference is sentencing power. A general court-martial is empowered to impose the maximum statutory sentence for any offense. The special court-martial is limited in power to a sentence of six months confinement for any offense while the summary court-martial is limited to a sentence of thirty days confinement for any offense. See UCMJ arts. 18-20, 10 U.S.C. §§ 818-20 (1964).

[10] The UCMJ requires in general courts-martial cases that every accused be represented by free appointed military counsel, free military counsel of accused's own choice, or by civilian counsel paid for by the accused. However in a special court-martial case, if the government is represented by a nonlawyer (the situation in the principal case), the accused need only be represented by "counsel" with substantially similar training—or lack thereof. UCMJ art. 27, 10 U.S.C. § 827 (1964).

Each of the three judges wrote separate opinions, yet all concluded for differing reasons[11] that a qualified lawyer was not required. Thus petitioner Stapley could assert no denial of "military due process"[12] by having been refused the services of a military lawyer in such circumstances.

From the standpoint of civilian constitutional law, it is clear that federal courts have habeas corpus jurisdiction over military prisoners.[13] But to what extent that jurisdiction encompasses consideration of alleged denials of constitutional due process is debatable. In a two-step argument, petitioner Stapley first contended that the United States Supreme Court in *Burns v. Wilson*,[14] while denying the writ, said that civil courts have jurisdiction to consider due process denials if those denials are so extreme as to deprive the *military* tribunal of its jurisdiction.[15] Secondly, he contended that since due process now includes the right to counsel in a state criminal trial, the military court had by denying his request for a lawyer deprived him of such a fundamental right that it was without jurisdiction.[16]

Burns was decided in 1953 and contains four separate opinions,

[11] Sixth amendment right to counsel does not apply to courts-martial, 14 U.S.C.M.A. 199, 215-16, 33 C.M.R. 411, 427-28 (1963) (opinion of Kilday, J.); sixth amendment right to counsel does apply, but appointment of nonlawyer counsel satisfies, *id.* at 217, 33 C.M.R. at 429 (opinion of Quinn, C.J.); sixth amendment right to counsel applies, but the accused is not deprived of his rights because he chose to be defended by nonlawyer counsel, *id.* at 219, 33 C.M.R. at 431 (opinion of Ferguson, J.).

[12] The traditional Supreme Court view is that "to those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts." Reaves v. Ainsworth, 219 U.S. 296, 304 (1911). See also United States *ex rel.* French v. Weeks, 259 U.S. 326, 335 (1944); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944). This authority was acknowledged by the civilian court of appeals in the *Burns* case hereafter discussed. Burns v. Lovett, 202 F.2d 335, 341 (D.C. Cir. 1952). The decision in *Culp, supra* note 11, then, has the effect of a declaration by the Court of Military Appeals that denial of a lawyer in a special court-martial *is not* a denial of military due process.

[13] *Ex parte* Reed, 100 U.S. 13 (1879).

[14] 346 U.S. 137 (1953), *rehearing denied*, 346 U.S. 844 (1953).

[15] This argument was prompted by the basic rule that the only ground for habeas corpus relief is lack of jurisdiction on the part of the sentencing court. Traditionally, inquiry may extend to whether the court was legally constituted, whether it had jurisdiction of the offense charged and of the person tried, and whether it imposed a sentence within the maximum limits. See AYCOCK & WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 365 & n.201 (1955).

[16] Brief for Petitioner, p. 2, Application of Stapley, 246 F. Supp. 316 (D. Utah 1965).

the rationale in none of which captured the assent of more than four justices.[17] While Mr. Chief Justice Vinson's opinion *does* seem to say that military habeas corpus jurisdiction extends to due process denials, it is important in assessing its force in the principal case to keep in mind the facts and the Court's holding there. Petitioners were convicted of murder and rape and sentenced to death by a general court-martial.[18] The sentence was approved by the Board of Review, the Court of Military Appeals and the President. In an application for habeas corpus petitioners alleged, *inter alia,* illegal detention, coerced confessions and denial of counsel and effective representation.[19] The allegations concerned matters outside the original record of trial, but all were considered upon military appellate review. In the eyes of one judge of the civilian court of appeals these allegations would, if proved, have constituted a denial of civilian due process.[20] Yet the possibility of denial of due process and the imposition of the death sentences notwithstanding, the Supreme Court denied the writ holding that military habeas corpus jurisdiction included due process review only to determine whether the military judicial system gave fair consideration to each contention raised by the petitioners.[21]

Burns does not seem to be good authority upon which to base the decision in *Stapley.* That case did contain allegations of serious due process denial and involved death sentences, but the issue of absence of representation was not presented and the writ was

[17] The judgment of the Court, announced by Mr. Chief Justice Vinson and in which Justices Reed, Burton and Clark joined, affirmed the lower court's dismissal of the application for habeas corpus on the ground that, having found that the military had given fair consideration to petitioners' claims, the civil court had performed its function. 346 U.S. at 144. Mr. Justice Jackson concurred in the judgment of the Court without opinion. Mr. Justice Minton concurred in the judgment, but on the ground that the sole function of the civil courts is to determine whether "the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction." *Id.* at 147. Mr. Justice Douglas, joined by Mr. Justice Black, dissented on the ground that the civil courts had jurisdiction to review military decisions where the military had not fairly and conscientiously applied the Supreme Court's due process standards and that here the undisputed facts showed there had been a failure to properly apply those standards. *Id.* at 150-55. Mr. Justice Frankfurter in a separate opinion, neither concurring nor dissenting, felt that the case should be set down for reargument since issues of far-reaching importance were involved. *Id.* at 148-50.

[18] *Id.* at 138.

[19] Burns v. Lovett, 202 F.2d 335, 343, 346 (D.C. Cir. 1952).

[20] *Id.* at 348-53 (opinion of Bazelon, J., dissenting).

[21] 346 U.S. at 144.

denied.[22] Whatever view one takes of the subsequent expansion of due process and the right to counsel,[23] the facts in *Burns,* if not the holding, drastically restrict its applicability in *Stapley.*

The court in *Stapley* recognized that the decisional basis for petitioner's position was weak.[24] Despite this, the Supreme Court's concept of due process *has* expanded considerably since *Burns.* The rationale in *Stapley* seems to be that this factor, coupled with the increased speed and ease of transportation, the availability of military lawyers and, although not mentioned by the court, the increased effect of the draft in what is now a wartime situation, requires that an accused in these circumstances[25] be given the right to representation by a trained lawyer.[26] In essence the court's conclusion is that if the right to trained counsel is not the law, it should be. Mr. Chief Justice Warren has given apparent off-the-bench support to such a conclusion. In a speech at the New York University Law Center in 1962[27] he commented that on the basis of *Burns v. Wilson*[28] courts-martial proceedings could be challenged by habeas corpus and that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[29]

It is appropriate here to note that Congress has before it eighteen proposed amendments to the Uniform Code of Military Justice designed further to protect the constitutional rights of servicemen.[30] These are the result of hearings and protracted research by the Senate Judiciary Committee's Subcommittee on Constitutional Rights.[31] While the amendments would substantially increase the

[22] There was no denial of counsel found in *Burns,* since the accused were represented by lawyers. In fact, the majority opinion of the court of appeals decision below states that the "accused were vigorously defended at all points." 202 F.2d 335, 347 (D.C. Cir. 1952).

[23] Gideon v. Wainwright, 372 U.S. 335 (1963).

[24] "The precedential structure *within, or upon the periphery of which,* these conclusions have been reached . . . are indicated in the margin." 246 F. Supp. at 321-22 (footnotes omitted). (Emphasis added.)

[25] The circumstances were petitioner's youth, the frustration of his efforts to obtain qualified legal counsel and the fact that the charges involved claimed moral turpitude and risk of substantial incarceration. *Id.* at 318, 321.

[26] *Id.* at 321.

[27] Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. REV. 181 (1962). The address was delivered as the third James Madison Lecture on February 1, 1962.

[28] 346 U.S. 137 (1953).

[29] Warren, *op. cit. supra* note 27, at 188.

[30] S. 745-62, 89th Cong., 1st Sess. (1965).

[31] Creech, *Congress Looks to the Serviceman's Rights,* 49 A.B.A.J. 1070 (1963).

rights of military personnel, including a requirement that the accused be represented by a lawyer before special courts-martial where a bad conduct discharge can be awarded,[32] they would not provide a lawyer to the accused where no bad-conduct discharge can result.

Historically the premise upon which denial of certain constitutional rights to those in the military rests is that proper order and discipline cannot otherwise be achieved.[33] Nevertheless, a substantial argument can be made that the guarantee of a lawyer in special courts-martial would have little adverse affect on the maintenance of discipline.[34] One author in the field of military justice has proposed to the Constitutional Rights Subcommittee that its bill to abolish summary courts-martial be extended to include special courts. This would insure that each military criminal prosecution would be before a general court-martial with the due process protection there afforded, including the right to legally qualified counsel. The present provisions for non-judicial punishment for minor offenses would of course remain in force.[35]

The problem raised in *Stapley* of providing legally trained counsel in courts-martial is far from settled and probably will not be resolved until the issue is presented to the Supreme Court. Subsequent to the principal case, the Federal District Court for the District of Kansas has denied an application for habeas corpus by a serviceman who did not request a lawyer until after trial by special court-martial. That court distinguished *Stapley* on the ground that it was limited to its facts.[36] The California District Court of Appeals for the Second District, however, has held that a national

[32] S. 750, 89th Cong., 1st Sess. (1965).

[33] Comment, *Constitutional Rights of Servicemen Before Courts-Martial,* 64 COLUM. L. REV. 127, 131 (1964). This is the substance of "military exigency" to which the court alludes. 246 F. Supp. at 320. For opposing views as to a historical basis for applicability of the Bill of Rights to the military, see Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 HARV. L. REV. 293 (1957); Wiener, *Courts-Martial and the Bill of Rights,* 72 HARV. L. REV. 1 (1958).

[34] The UCMJ already expressly prohibits self-incrimination, cruel and unusual punishments and command influence on courts-martial personnel. UCMJ arts. 31, 55, 37, 10 U.S.C. §§ 831, 855, 837 (1964). These guarantees have brought no discernible protest of damage to the military's capability to maintain discipline. In this setting, the addition of the right to a lawyer would hardly seem likely to raise difficulties.

[35] Statement of Professor Seymour W. Wurfel to the Subcommittee on Constitutional Rights, p. 3, January 25, 1966.

[36] Le Ballister v. Warden, United States Disciplinary Barracks, 247 F. Supp. 349 (D. Kan. 1965).

guardsman tried by a summary court-martial, where no counsel is provided, was entitled to object to such trial and to be tried by a special or general court-martial where counsel is provided.[37]

Many servicemen tried by special courts-martial are young and are draftees. In civilian life, from which they have recently come, one's right to a lawyer has been upheld in a misdemeanor case in which a sentence of ninety days was imposed.[38] Considering these factors and the fact that a court-martial conviction can frequently have effects that continue in civilian life, perhaps the military should no longer be, in the words of the case here noted, "a constitutionally uninhabitable wasteland beyond even the scan of the Great Writ where the court is powerless to reach out a protective hand,"[39] at least as far as providing legal counsel is concerned.

PHILIP L. KELLOGG

Torts—Police Immunity—Civil Rights Arrests

The Fifth Circuit decision in *Pierson v. Ray*[1] illustrates the predicament of police officers, both at common law and under federal statute, with respect to liability for torts arising out of the official scope of their authority. In *Pierson* police officers arrested plaintiffs, participants in a civil rights pilgrimage, for disorderly conduct under a Mississippi statute[2] when they attempted to enter a coffee shop in a bus terminal. They were convicted at a trial before a police justice but on appeal to the county court, where there was a trial de novo, were found not guilty. They then brought suit against the arresting officers in federal district court alleging a common-law tort claim for false imprisonment and a statutory claim for depriva-

[37] Application of Palacio, 48 Cal. Rptr. 50 (Dist. Ct. App. 1965). In a special court-martial however, under the UCMJ, "counsel" need not be a lawyer. Hence this state case does not really shed light on the principal question of the right to *legal* counsel.

[38] Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

[39] 246 F. Supp. at 322.

[1] 352 F.2d 213 (5th Cir. 1965), *petition for cert. filed,* 34 U.S.L. WEEK 3306 (U.S. Mar. 8, 1966) (No. 1074).

[2] The statute in effect provides that whoever congregates in any public accommodation where a breach of the peace is threatened and fails to disperse when ordered to do so by any law enforcement officer is guilty of disorderly conduct. MISS. CODE ANN. § 2087.5 (Supp. 1964).

tion of their civil rights under section 1983 of the Judicial Code.[3] A jury found for the defendants, and on appeal the Fifth Circuit reasoned that, although the doctrine of official immunity protected the police officers from the common-law claim,[4] that defense was not available under section 1983. However, the court concluded from the memoranda used in organizing the pilgrimage that it could be inferred the plaintiffs invited or consented to the arrest, which would preclude recovery on the civil rights claim. Thus a new trial was ordered to determine this question of fact.

The legal reasoning behind the court's decision seems unsound.[5] The court was apparently struggling to find a way to prevent liability of a police officer acting in good faith within the scope of his authority in order to place him in a position comparable to that of other public officers. It is well established that, in the absence of

[3] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964).

[4] As is subsequently discussed, this does not appear to be the general rule, and the court in asserting it cites its previous decision in Norton v. McShane, 332 F.2d 855 (5th Cir. 1964). However, that case involved federal and not state or local officials.

[5] The decision appears vulnerable to attack in the following manner: (1) Even before Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. § 2000(a) (1964), if the plaintiffs were completely orderly, which they were in this case, they had a legal right to eat in the coffee shop of the bus terminal. The Interstate Commerce Act, 76 Stat. 397, 49 U.S.C. § 316(d) (1964), provides that a passenger has a federal right to be served without discrimination in an interstate bus terminal. The Supreme Court in 1960 interpreted the statute to mean that one was on the premises "under authority of law" and that a state statute making it unlawful to remain after being forbidden to do so was invalid in such a case. Boynton v. Virginia, 364 U.S. 454 (1960). The defendants thus had no authority for the arrest and deprived plaintiffs of a "right" secured by the Constitution and laws. (2) Although the court in *Pierson* attempts to distinguish the decision in Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964), on a procedural ground, that decision seems clearly on point. The plaintiffs were arrested under a breach-of-the-peace statute similar to the one involved in *Pierson* while they were eating with a group of Negroes in a cafe. After acquittal on the charges the plaintiffs sued the arresting police officers. The court held there was total lack of legal justification for the arrest, as there was nothing that remotely resembled a breach of the peace, and therefore the act of the officers was unlawful, the imprisonment false, and the defendants liable for their conduct violating rights of freedom from unlawful arrest and freedom of association.

federal statute, judicial,[6] legislative,[7] and executive[8] officials are immune from suit based on wrongful conduct, where they are acting within the general scope of their authority or in the discharge of their duties. The immunity of executive officials[9] has been applied to numerous officials for many different torts.[10] The law with respect to subordinate executive officials, however, is inconsistent. Many courts draw the distinction between torts growing out of "discretionary" actions and those growing out of "ministerial" actions, holding that where official action involves the exercise of discretion, it is protected, but where the challenged action is ministerial, no immunity is afforded.[11]

Most jurisdictions hold individual police officers personally

[6] *E.g.*, Alzua v. Johnson, 231 U.S. 106 (1913); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Fraley v. Ramey, 239 F. Supp. 993 (S.D.W. Va. 1965); Hardy v. Kirchner, 232 F. Supp. 751 (E.D. Pa. 1964); Haigh v. Snidow, 231 F. Supp. 324 (S.D. Cal. 1964).

[7] *E.g.*, Yellin v. United States, 374 U.S. 109 (1963); Kilbourn v. Thompson, 103 U.S. 168 (1880).

[8] *E.g.*, Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1895); Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961); Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert denied*, 339 U.S. 949 (1950); Gamage v. Peal, 217 F. Supp. 384 (N.D. Cal. 1962).

[9] Spalding v. Vilas, 161 U.S. 483 (1895), is generally considered the first decision applying the immunity doctrine to executive officials.

[10] *E.g.*, Barr v. Matteo, 360 U.S. 564 (1959) (Acting Director of Office of Rent Stabilization—malicious defamation); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964) (officials of United States Department of Justice—malicious arrest and imprisonment); Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964) (government psychiatrist—false imprisonment); Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961) (Internal Revenue Service officers); Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (immigration officials—false imprisonment); Gamage v. Peal, 217 F. Supp. 384 (N.D. Cal. 1962) (Air Force doctor). The doctrine has even been stretched to include a civilian supervisor of pavement maintenance at a missile site. See Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965).

[11] *E.g.*, Spalding v. Vilas, 161 U.S. 483 (1895); Papagianakis v. The Samos, *supra* note 10. See cases cited note 10 *supra*. See generally 2 HARPER & JAMES, TORTS § 29.10 (1956). The distinction has been widely criticized by many authorities. Judge Medina in Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963) reasoned:

> There is no litmus paper test to distinguish acts of discretion . . . and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?

See generally Comment, 44 CALIF. L. REV. 887, 888-89 (1956).

liable for torts growing out of their law enforcement activities without regard to the ministerial-discretionary distinction.[12] This is presumably the result of the common-law tradition in tort making every man responsible for the natural consequences of his own action.[13] However, why should the police officer be an exception to the general immunity doctrine involving other public officials? The anomaly is stretched to an even greater disparity in the situation where a police officer is personally liable for false imprisonment that is a result of an arrest made in good faith, whereas a judge charged with the same tort,[14] as well as the district attorney who is alleged to have prosecuted the person through spite and malice,[15] are uniformally held to be immune. Hence, the action that resulted in malicious imprisonment is immune, but the action that resulted in good faith imprisonment leads to personal liability.

Under federal law the police officer may be in an even worse position than at common law. Although section 1983 speaks in terms of the liability of "every person" who under color of state law deprives one of a federally secured right, this broad language has been interpreted not to mean that Congress intended to abrogate any common-law immunity afforded judicial,[16] legislative,[17] or high executive officials.[18] However, where the suit involves subordinate officials not directly participating in legislative or judicial processes,

[12] See, *e.g.*, Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965). California does recognize this distinction. See, *e.g.*, Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965).

[13] Monroe v. Pape, 365 U.S. 167 (1961). The only area in which police officers are afforded any protection is when they are found to be acting in a quasi-judicial capacity and are thus deemed officers of the court. See, *e.g.*, Summers v. McNamara, 239 F. Supp. 806 (D. Ore. 1965). The Fifth Circuit clearly recognizes this principle and applied it to a codefendant in Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964).

[14] *E.g.*, Arnold v. Bostick, 339 F.2d 879 (9th Cir. 1964); Rhodes v. Meyer, 334 F.2d 709 (8th Cir.), *cert. denied*, 379 U.S. 915 (1964); Harvey v. Sadler, 331 F.2d 387 (9th Cir. 1964); Sires v. Cole, 320 F.2d 877 (9th Cir. 1963). The court in *Pierson* also applied the general rule to a codefendant. See cases cited note 6 *supra*.

[15] See, *e.g.*, Hurlburt v. Graham, 323 F.2d 723 (6th Cir. 1963); Sires v. Cole, 320 F.2d 877 (9th Cir. 1963); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961); Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938); Zellner v. Wallace, 233 F. Supp. 874 (M.D. Ala. 1964).

[16] See cases cited note 14 *supra*.

[17] Tenney v. Brandhove, 341 U.S. 367 (1951).

[18] Norton v. McShane, 332 F.2d 855 (5th Cir. 1964).

there is uncertainty in the law to what extent, if any, they are protected.[19]

The Supreme Court's decision in *Monroe v. Pape*[20] seems to resolve the question where local police officers are involved. Although the Court did not expressly discuss the immunity concept, the result has been interpreted as necessarily implying a rejection of this defense as a general proposition.[21] The Court, in *Monroe,* went even further when it stated that individual police officers are personally liable for violations under section 1983 without proof of a specific intent to deprive one of a federal right as required by the criminal sections of the statute.[22] Although the facts in the case depict a horrid example of police excess justifying liability, the decision can place the police officer in an undesirable position, since it may result in liability even though he may be acting in good faith within the scope of his authority.[23] This problem has led many courts since *Monroe* to distinguish it on the basis of its peculiar fact situation,[24] *i.e.,* outrageous conduct on the part of the police officers. The decisions have expressed the idea that the actionable conduct should be "reprehensible"[25] or "callous and shocking"[26] before liability should be imposed.

The basic policy advanced for application of the immunity doc-

[19] *Id.* at 860-61. See generally Comment, 18 ARK. L. REV. 81 (1965); Comment, 44 CALIF. L. REV. 887 (1956).

[20] 365 U.S. 167 (1961).

[21] Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

[22] 18 U.S.C. § 241 (1964). For the Supreme Court's interpretation of the specific intent required see Screws v. United States, 325 U.S. 91 (1945).

[23] Cohen v. Norris, 300 F.2d 24, 34 (9th Cir. 1962) pointed out that the expanded interpretation of the statute in *Monroe* could lead to an opening of the "flood gates" to private action brought under it but holds it is up to Congress to change this. This warning is exemplified by the fact that in 1945, the year of the *Screws* decision, the total number of private actions brought under the civil rights statutes in federal courts was 29. ADMIN. DIR. U.S. COURTS ANN. REP. 83, at table c-2 (1945). In the fiscal year ending June 30, 1961, during which *Monroe* was decided, the number was 270. ADMIN. DIR. U.S. COURTS ANN. REP. 238, at table c-2 (1961). Three years later the number was 645. ADMIN. DIR. U.S. COURTS ANN. REP. 218, at table c-2 (1964).

[24] See, *e.g.,* Striker v. Pancher, 317 F.2d 780 (6th Cir. 1963); Bowens v. Knazze, 237 F. Supp. 826 (N.D. Ill. 1965); Raab v. Patacchia, 232 F. Supp. 71 (S.D. Cal. 1964); Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964); Selico v. Jackson, 201 F. Supp. 475 (S.D. Cal. 1962). See generally, Shapo, *Constitutional Tort: Monroe v. Pape, and The Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965).

[25] Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1963).

[26] Raab v. Patacchia, 232 F. Supp. 71, 94 (S.D. Cal. 1964).

trine to public officials is to promote fearless performance of duty.[27] To permit a citizen to have an action for damages where a police officer is acting in good faith undermines this basic policy.[28] The threat of personal financial liability hanging over the police officer in the performance of official duty is a continual and substantial deterrent to effective law enforcement. As one writer has stated: "Confronted with such a delicate choice and personal responsibility for its correctness, it would not be surprising if police officers generally decided to err on the side of caution and think of home and family instead of the public interest in law enforcement."[29]

It can also be said that where the conduct of the police officer is not found to be outrageous but rather a good faith performance of his duty, the real grievance is against the state or municipality that employs him. However, with regard to suits under section 1983, the *Monroe* decision unanimously rejected the idea that Congress intended to bring municipal corporations within the purview of the statute, thus unfortunately blocking one possible solution to the problem.[30]

The *Pierson* decision also illustrates another predicament of the police officer. The state statute authorizing the defendants to make the arrest was subsequently declared unconstitutional.[31] Should the police officer who acts in an otherwise nontortious manner but under the authority of a presumptively valid state statute be liable for his actions if the statute is subsequently declared unconstitutional? The majority of jurisdictions still hold the police officer liable on the theory that an unconstitutional statute imposes no duty on officials to enforce it and affords no protection to anyone acting under authority of it.[32] However, a growing number of jurisdictions,[33]

[27] Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

[28] See generally, Jaffe, *Suits Against Government Officers: Damage Action,* 77 HARV. L. REV. 209 (1963).

[29] Mathes & Jones, *supra* note 12, at 898.

[30] Monroe v. Pape, 365 U.S. 167 (1961).

[31] Thomas v. Mississippi, 380 U.S. 524 (1965). The court cited Boynton v. Virginia, 364 U.S. 454 (1960), as the basis for its per curium decision. See note 5 *supra.*

[32] *E.g.,* Norton v. Shelby County, 118 U.S. 425 (1886); Miller v. Stinnett, 257 F.2d 910 (10th Cir. 1958); Smith v. Costello, 77 Idaho 205, 290 P.2d 742 (1955).

[33] *E.g.,* Manson v. Wabash R.R. Co., 338 S.W.2d 54 (Mo. 1960); Yekhtikian v. Blessing, 90 R.I. 287, 157 A.2d 669 (1960); Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953); Wichita County v. Robinson, 155 Tex. 1, 276 S.W.2d 509 (1954).

including Mississippi,[34] have reached the opposite, and sounder, result. In *Bowens v. Knazze*,[35] an action brought under section 1983, a federal district court reasoned that

> the retroactive application of the judgment of a court as to the requirements of the Constitution—based not on community standards but on legal reasoning—would place a defendant in an impossible position.
>
> It would require law enforcement officers to respond in damages every time they miscalculated in regard to what a court of last resort would determine constituted a invasion of constitutional rights, even where, as here, a trial judge—more learned in the law than a police officer— held that no such violation occurred.[36]

This appears to be the more reasonable approach.[37]

In all the situations mentioned above, the balance between the need for fearless performance of duty on the part of police officers wihtout fear of harassment and the corresponding need for satisfying the loss of an injured party would best be achieved by a finding of no liability where an officer acts in good faith within the scope of his authority.[38] It would seem that the Fifth Circuit in *Pierson* could have established a far more sound and workable criterion for the future by adopting this approach. This would mean that if the defendants were in fact acting in bad faith, then liability would be imposed; however where the officer was acting in good faith, there would be no liability. The question of bad faith would be for the trier of fact. Instead the court bases its decision on the specious reasoning that the plaintiffs by going on the pilgrimage consented to an illegal arrest. There seems to be little justification for such a statement either on the facts of the case[39] or on the law.[40]

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[34] Golden v. Thompson, 194 Miss. 241, 11 So. 2d 906 (1943).

[35] 237 F. Supp. 826 (N.D. Ill. 1965).

[36] *Id.* at 829.

[37] California has recently adopted this position in statutory form. See CAL. GOVT. CODE § 820.6.

[38] See the excellent discussion in Mathes & Jones, *supra* note 12.

[39] The pertinent facts given are that the plaintiffs in letters between themselves discussed the length of time they would remain in jail and made arrangements for bail bonds and counsel. In one of the communications it was said: "All in all, I think you can count on becoming familiar with the Jackson jail . . ." The court held that from this a jury could find that the plaintiffs consented to the arrest. This seems a doubtful conclusion from the evidence. It seems more doubtful that a jury should be able to question the motive of one exercising a constitutional right.

[40] The only cases cited by the court for this proposition involved the

Wills—"Next of Kin"—Time of Determination

In *Central Carolina Bank & Trust Co. v. Bass*,[1] a residuary clause in a will posed serious constructional problems for the North Carolina Supreme Court. The residuary estate was given in trust and was to be divided between a son's fund and a granddaughter's[2] fund.[3] Basically it was provided that the incomes from the funds were to go to the son and the granddaughter in the trustee's discretion,[4] and the principal of the granddaughter's fund was to be paid to her when she reached twenty-five years of age.[5] Upon the son's death, any principal that might be remaining[6] in his fund was to be paid and delivered over to the testator's "next of kin."[7]

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general rule that consent to accompany an officer to the police station to clear a matter up would bar any right to redress should the confinement subsequently be determined groundless. This appears distinguishable from the *Pierson* situation. See State v. Moore, 174 So. 2d 352 (Miss. 1965).

[1] 265 N.C. 218, 143 S.E.2d 689 (1965).

[2] The granddaughter was not the natural born child of the testator's son, and it was unsettled whether the testator knew of this fact at the time of his death. *Id.* at 232, 143 S.E.2d at 699. However, in prior litigation it had been determined that the child qualified as beneficiary regardless of any misrepresentations that were made to the testator, and subsequently the child was treated as the testator's granddaughter. *Id.* at 225, 143 S.E.2d 694.

[3] "To divide said residuary estate into two parts, one such part to consist of three-fifths (3/5) of said residuary estate and to be known and designated as 'Thomas L. Shepherd Fund' and the other such part to consist of two-fifths (2/5) of the said residuary estate and to be known and designated as 'Annie Moore Shepherd Fund.'"
Id. at 221, 143 S.E.2d at 690.

[4] "[T]he net income . . . to the said Thomas L. Shepherd and/or the said Annie Moore Shepherd . . . in such proportions, either part to each or all to one, as the said Trustee may, in its sole . . . discretion consider best calculated to achieve the purposes hereinafter set out."
Ibid.

"Upon and after the death of Thomas L. Shepherd or Annie Moore Shepherd the net income thereafter arising from that part of the trust estate not distributable upon the death of that one of them so dying shall be paid to the survivor . . . so long as he or she shall live and any part of the trust estate shall continue in the hands of the trustee as hereinafter provided."
Id. at 221; 143 S.E.2d at 691.

[5] It was further provided that if the granddaughter should die before reaching twenty-five years of age, the principal would go to "her child or children then living . . . but if there be no such child or children then living," the principal was to go to the testator's next of kin. *Id.* at 222, 143 S.E.2d at 691.

[6] The trustee was given the discretion to make distributions from the son's principal to the son upon certain conditions. *Id.* at 222, 143 S.E.2d at 692.

[7] "Upon the death of my son . . . the Trustee shall pay and deliver over the entire principal of the 'Thomas L. Shepherd Fund' . . . to my next of kin. . . ." *Id.* at 222, 143 S.E.2d at 691.

The testator died in 1939 and was survived by the son, the granddaughter, three sisters, and the issue of a brother and a sister who predeceased him. In 1950 the granddaughter reached twenty-five years of age, and the trustee distributed to her the corpus of her fund. On July 14, 1963, the son died leaving neither widow nor issue. Conflicting claims[8] subsequently arose, and the trustee instituted this action in the superior court under the Declaratory Judgment Act.[9]

On appeal,[10] there were three questions:

> (1) When the testator directed the trustee to distribute the remainder as then constituted "to my next of kin," did he mean his nearest of kin or those who would take from him under the statute of distributions? (2) Did testator intend to include . . . [the] granddaughter . . . in the class he designated as 'my next of kin'? (3) Are 'my next of kin' to be ascertained at the death of the testator or at the death of the life beneficiary?[11]

In answer to the first question, the court determined that the words "next of kin" mean "nearest of kin." There is strong authority in North Carolina[12] and elsewhere[13] in support of this conclusion.

[8] The conflicting claims arose from the following interests: (1) the granddaughter's contention that she should receive all the corpus and accrued income from the son's fund; (2) the contention of sole legatee under the son's will that he should get all income accrued before the son's death; (3) the contention of nieces and nephews of the testator that they should get the son's fund "to the exclusion of the issue of their deceased brothers and sisters," *id.* at 228, 143 S.E.2d at 696; and (4) the testator's grandnieces' and grandnephews' contention that "my next of kin" referred to persons living on the son's death "who are issue of testator's brothers and sisters." *Ibid.*

[9] N.C. GEN. STAT. § 1-253 (1953).

[10] The lower court concluded that the testator did not intend for either the son or the granddaughter to be included as his next of kin and that the testator used the term "my next of kin" to designate those who would take under the intestate succession laws at the time of the son's death. It also concluded that the granddaughter should get undistributed net income that accrued prior to the son's death. The appealing parties are the granddaughter, the son's legatee, and the nieces and nephews of the testator who were living on July 14, 1963.

[11] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 230-31, 143 S.E.2d 689, 698 (1965).

[12] *E.g.*, Wallace v. Wallace, 181 N.C. 158, 106 S.E. 501 (1921), where the court said that "on this question it has been held in this jurisdiction, in a long line of cases in which the question was directly considered, that these words mean 'nearest of kin' . . . ." *Id.* at 163, 106 S.E. at 504.

[13] *E.g.*, Williams v. Fulton, 4 Ill. 2d 524, 123 N.E.2d 495 (1954); Clark v. Mack, 161 Mich. 545, 126 N.W. 632 (1910). See 95 C.J.S. *Wills* § 682 (1957).

Though this appears to be the general rule,[14] some jurisdictions hold that reference in a will to the testator's "next of kin" indicates those who would take by intestacy under the statute of distribution, and not the nearest relations in blood to the deceased.[15] A caveat to the North Carolina approach is that if a contrary intent is shown by the terms of the instrument, that intent, rather than the rule of construction, will prevail.[16] Indicia of a contrary intent are indicated in the following quote:

> If to the words "next of kin" these words had been added, "as in case of intestacy" or "as by the statute of distributions," or if the language of that statute had been adopted, "to the next of kin in equal degree, or to those who legally represent them," we might have included the grandchildren; but upon the words "next of kin," simply, they cannot be included.[17]

What are the consequences of holding that the words "next of kin" mean "nearest of kin?" The court in the principal case concluded that this prohibited operation of the principle of representation.[18] Thus, for example, a brother or sister would take to the exclusion of the children of a deceased brother or sister.[19] Further, though not mentioned in the principal case,[20] the North Carolina court has consistently construed "nearest of kin" to mean "nearest of *blood* kin."[21] This means that relationship by marriage is not within the scope of "nearest of kin," and thus a surviving husband or wife will be excluded[22] unless a contrary intention is shown.[23]

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[14] See, *e.g.*, Redmond v. Burroughs, 63 N.C. 242 (1869). See generally 57 AM. JUR. *Wills* §§ 1375-76 (1948).

[15] *E.g.*, Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W.2d 578 (1945). See Annot., 32 A.L.R.2d 296, 307 (1953).

[16] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 231, 143 S.E.2d 689, 698 (1965). "[A] court should not put rules of construction into competition with an intent which is clearly and fully found." ATKINSON, WILLS § 146 (2d ed. 1953).

[17] Simmons v. Gooding, 40 N.C. 382, 390 (1848).

[18] 265 N.C. 218, 231, 143 S.E.2d 689, 698 (1965).

[19] See, *e.g.*, Knox v. Knox, 208 N.C. 141, 179 S.E. 610 (1935); Redmond v. Burroughs, 63 N.C. 242, 246 (1869). See generally 95 C.J.S. *Wills* § 682 (1957).

[20] Evidently because the court was not faced with a blood relation problem.

[21] *E.g.*, Wallace v. Wallace, 181 N.C. 158, 106 S.E. 501 (1921); Jones v. Oliver, 38 N.C. 369 (1844). See Annot., 32 A.L.R.2d 296, 305 (1953).

[22] Jones v. Oliver, 38 N.C. 369 (1844).

[23] "This Court has repeatedly held that the intent of the testator is the polar star that must guide the courts in the interpretation of a will." 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965). See generally 57 AM. JUR. *Wills* § 1376 (1948).

Principle-of-representation and nearest-of-blood-kin questions of recent vintage should be approached cautiously in light of North Carolina's new Intestate Succession Act.[24] Though the principle of representation is still recognized for some purposes in the new provisions,[25] there are interesting questions that would appear to pose serious problems for the North Carolina courts when faced with these inquiries in a will executed subsequent to July 1, 1960.[26]

In regard to whether the granddaughter should be included among the "next of kin," the court answered in the negative. The court in reaching that conclusion first decided that the testator also intended to exclude the son from that class. The fact that a prior taker is at the death of the testator a member or the sole member of the class to which a limitation over is made is not in itself enough to exclude the prior taker from participating in the gift over.[27] The court in the principal case appropriately considered additional factors[28] and clearly seems to have arrived at the testator's real intention.

It has been stated that where the prior taker is a next of kin

[24] N.C. GEN. STAT. ch. 29 (Supp. 1965).

[25] See generally McCall, *North Carolina's New Intestate Succession Act*, 39 N.C.L. REV. 1 (1960).

[26] The new provisions became effective July 1, 1960, and abolished the distinction between real and personal property as to those who take by intestate succession. Since the phrase "next of kin" was peculiarly applicable to the distribution of personal property, perhaps in the light of the new law consideration should be given to revising the meaning of the phrase. Also, the new provisions make the wife a statutory heir. *Ibid.* See McCain v. Womble, 265 N.C. 640, 144 S.E.2d 857 (1965). This case was decided subsequently to the *Bass* case, but involved a will executed prior to 1960. The court repeated its position by saying, "For at least 120 years . . . the words 'next of kin' have had a well-defined legal significance. . . ." *Id.* at 645, 144 S.E.2d at 861.

[27] See, *e.g.*, Thomas v. Castle, 76 Conn. 447, 56 Atl. 854 (1904); Smith v. Winsor, 239 Ill. 567, 88 N.E. 482 (1909). See also Annot., 13 A.L.R. 615 (1921).

[28] The testator imposed several restrictions on the trustee's discretion to pay any part of the principal to the son before the son's death. The testator prohibited payment from the principal for five years after his death and at anytime after his death that the son filed a suit disputing the fifth article of the residuary clause. Also, no amount of the income was to be paid to the son if such payment would discourage a sober life. The son had a serious drinking problem, which was well known to the testator. The principal of the granddaughter's fund was to go to the testator's "next of kin" and not to his son specifically if the granddaughter died before reaching twenty-five without children surviving her. These factors were considered by the court in determining intent. Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 232-33, 143 S.E.2d 689, 699 (1965).

and there has been a limitation over to the next of kin, two questions arise:

> First, whether such circumstance supports the inference of an intention that the members of the class to take under the gift over are to be ascertained upon the termination of the particular estate, rather than at the time of the testator's death; and second, whether, where the class is to be ascertained at the death of the testator, the first taker is to be excluded from taking as a member of the class.[29]

In *Bass*, the court stated similar issues in the opposite sequence.[30] By doing so, it seems that the court used a more appropriate order of determination because, as will be shown later, the intent to exclude the first taker from the class is an important factor in deciding when to determine the next of kin.

The third question posed in the *Bass* case—the time next of kin are to be ascertained—seems to have presented the most difficulty. There are two general rules of construction in this area. First, in the absence of a contrary intent, "where the gift is to the heirs or next of kin of another than the testator it ordinarily refers to the death of such other. . . ."[31] Secondly, and also in the absence of a contrary intent, "the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's . . . next of kin. . . ."[32] The second rule is the one of concern in the principal case.

What are the factors in the present case that show an intention contrary to the general rule, *i.e.*, that the class should be determined at the death of the life tenant? The court pointed out the following factors: (1) the provision in the residuary clause that upon certain conditions the trustee could make payments to the son from the principal; (2) the testator instructed the trustee to "pay and deliver over"[33] the principal of the son's fund to the testator's next of kin upon the son's death; (3) the son, at the testator's death, was the only member of the class designated in the gift over, *i.e.*, next of kin; (4) the court's determination that the son was excluded from

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[29] Annot., 13 A.L.R. 615, 616 (1921).

[30] *Supra* note 11.

[31] Witty v. Witty, 184 N.C. 375, 379, 114 S.E. 482, 484 (1922).

[32] *Ibid.* A reason given for this rule is the preference for early vesting of estates. SIMES, FUTURE INTERESTS § 80 (1951).

[33] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 222, 143 S.E.2d 689, 691 (1965).

the next of kin; and (5) if the son should subsequently have a child born to him, the testator would probably prefer the child to have the whole principal rather than to share it with the estates of deceased sisters who survived the testator.

According to the court's analysis, none of the above factors alone would be sufficient to overcome the general rule of construction. Also, factors (1) and (2) together would not be sufficient.[34] Further, standing alone, factor (3) plus the use of words of plurality in designating the class to take the gift over would not be sufficient.[35] The court held that the next of kin should be determined in this case at the death of the son. Thus, what combination of factors was sufficient to overcome the general rule? It appears that it required all of the above listed factors and that if factor (3) had been missing, the court would have reached a contrary result.[36]

In utilizing this factor type of analysis, the court followed the general approach to the problem[37] and appears to have reached a sound result. The court possibly indicated that in a similar situation, it might reach the same result with less factor analysis. After indicating that "my nearest of kin" cannot mean "my *next* nearest of kin," the court made the following statement:

> Where the remainder is limited to a testator's next of kin, *i.e.*, his nearest of kin, and where the life tenant is himself the sole nearest of kin, it seems to us impossible to determine the takers of the remainder during the life tenancy, if the life tenant is himself to be excluded.[38]

In other words, if the determination were made before the life tenant's death, the next nearest of kin and not the nearest of kin

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[34] *Id.* at 239, 143 S.E.2d at 704.

[35] *Id.* at 241, 143 S.E.2d at 705.

[36] In form and phraseology the devise under consideration here is indistinguishable from that in *Witty v. Witty* . . . and, but for the fact that the life tenant here was the sole representative of the class, testator's next of kin, this case would in fact be indistinguishable from *Witty v. Witty*. This fact, however, makes the difference between the vested remainder in *Witty* and the contingent remainder here.

Id. at 242, 143 S.E.2d at 706. There may be some doubt whether *Witty v. Witty*, 184 N.C. 375, 114 S.E. 482 (1922), involved all the factors the court said it did.

[37] Annot., 49 A.L.R. 174 (1927). Another factor mentioned in this annotation that the court failed to consider *directly* in *Bass* is that at the death of the testator an alcoholic would have been the sole member of the class to take the gift over.

[38] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 242, 143 S.E.2d 689, 706 (1965).

would be determined. Such a rule might save a great deal of judicial effort, but it also might be hard to reconcile with the preference for vestedness.[39]

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[39] "The law favors the construction of a will which gives to the devisee a vested interest at the earliest possible moment that the testator's language will permit." Elmore v. Austin, 232 N.C. 13, 19, 59 S.E.2d 205, 210 (1950).