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Notes and Comments

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Civil Procedure—Use and Constitutionality of the Federal Interpleader Act

After the passage of the Federal Interpleader Act,[1] uncertainty developed as to the extent to which the Act should be available to insurance companies defending assureds against two or more injured parties.[2] The question also arose whether its authorization of federal jurisdiction on the basis of minimal diversity is constitutionally permissible. In *State Farm Fire & Cas. Co. v. Tashire*[3] the United States Supreme Court addressed itself to both problems in defining the proper use of the Act and holding it constitutional.

Tashire arose out of a collision between a truck and a bus in Northern California in which many passengers were injured. Four passengers from California brought suit in a California state court against the bus line and bus driver, both citizens of California, and the truck driver, a citizen of Oregon. It was anticipated that other passengers from California and elsewhere would also sue. Before other suits were brought or judgment was reached in any pending suit, State Farm, representing only the truck driver on a liability insurance policy for 20,000 dollars,[4] interpleaded in the

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[1] The first Federal Interpleader Act was passed in 1917 and successive amendments expanded its usefulness. For legislative history see 3 J. MOORE, FEDERAL PRACTICE § 22.06 (2d ed. 1967). Relevant portions of the Act read as follows:

> The district courts shall have original jurisdiction of any civil action of interpleader . . . filed by any person, firm, or corporation . . . having in his custody or possession money or property of the value of $500 or more, or having issued a . . . policy of insurance . . . of value or amount of $500 or more . . . if
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> (1) Two or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property, or to any one or more benefits arising by virtue of any . . . policy . . . ; and if
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> (2) the plaintiff has . . . paid . . . the amount due under such obligation into the registry of the court, there to abide the judgment of the court . . . .

28 U.S.C. § 1335 (1965).

[2] *See, e.g.*, 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 551 (1961, Supp. 1967).

[3] 386 U.S. 523 (1967).

[4] The policy was a standard automobile liability insurance contract in

United States District Court for the District of Oregon. State Farm asked that all persons who were suing or might sue the assured, i.e., persons with potential claims to the proceeds of assured's insurance policy, be enjoined from any action in any other court against both the *assured* and insurer, and that such actions be confined to that district court. When the injunction was granted, it appeared that State Farm, which could not be made a party to any state court suit until a judgment against the assured might be had, would be able to force all persons suing the assured into a federal district court of its own choosing both for trial on liability and for apportionment of the insurance policy proceeds.[5]

The Ninth Circuit Court of Appeals construed the statutory language, "claimants . . . [who] are claiming or may claim," to mean only persons with judgments against the assured who would then be entitled under the insurance contract to sue the insurer and held that interpleader did not lie against potential claimants to the insurance fund.[6] On appeal to the Supreme Court, it was held that the words "may claim" do permit the insurer to interplead potential claimants to the insurance proceeds.[7] But it was further held that the scope of interpleader should be limited to proration of the

which State Farm promised to defend the assured in any action against him arising out of an automobile accident. State Farm was required under the contract to pay only if the assured were found liable for the accident or upon settlement. Under California law and the contract an injured party could not maintain a direct action against the insurance company until a final judgment against the assured was reached. 386 U.S. at 539.

[5] Interpleader is a procedural device, arising out of equity, in which a stakeholder asks the court to determine the rights of parties with conflicting claims that equal or exceed the amount of a fund in the stakeholder's possession. The classic example of an interpleader is one who has found a treasure trove to which he has no right and whom is being sued or threatened by several parties claiming the money. The interpleader pays the money into court and asks the court to bring in the parties and adjudicate their rights. Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957). The Federal Interpleader Act was passed primarily to make this device available in the situation where there are claimants in several states and no state process would be sufficient to bring all the parties into a single forum. *See generally* Chafee, *Interpleader in the United States Courts*, 41 YALE L.J. 1134 (1932); Chafee, *The Federal Interpleader Act of 1936*, 45 YALE L.J. 1161-67 (1936); Chafee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 414-17 (1940).

[6] Tashire v. State Farm Fire & Cas. Co., 363 F.2d 7 (9th Cir. 1966). The theory of the Ninth Circuit was that since the injured parties had no direct action against the insurance company until after judgment, they could not be "claimants" against the insurance company.

[7] 386 U.S. at 533.

insurance proceeds.[8] Under this construction, the Act amounts to a device for impounding insurance funds for eventual proration among parties successful in securing judgments on liability in whatever courts they chose to bring their actions.

In addition, the Supreme Court raised, on its own motion,[9] the question of the use of minimal diversity[10] in the Act and held that it is consistent with the grant of federal jurisdiction in article III of the Constitution "to controversies . . . between citizens of different states . . . "[11] This question was left in the wake of *Strawbridge v. Curtiss*,[12] the famous case that laid down the rule of complete diversity. In *Strawbridge* a plaintiff from Massachusetts was not permitted to join a defendant from Massachusetts with a defendant from Vermont. In holding that jurisdiction would not lie unless every party to the suit could sue in diversity every party aligned against him, the Court seemed to construe only the general diversity statute. Nevertheless, the similarity of the statutory language "or the suit is between the citizen of a state where the suit is brought, and a citizen of another state . . . "[13] to the word-

[8] *Id.* at 537.

[9] Even if an issue of the court's jurisdiction is not argued, the Supreme Court may still raise it. This procedure was followed in Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) where the Court considered the constitutionality of the Interpleader Act of 1936 and held that if claimants were from different states and the interpleader was from the same state as one of the claimants, there was still complete diversity because the interpleader was not a real party in interest.

[10] The Act grants jurisdiction where there is minimal diversity between claimants regardless of the citizenship of the interpleader. Where all the claimants to a fund are from state A and the stakeholder is in state B, the Act is not available for lack of diversity among the claimants, but the stakeholder in state B can interplead through FED. R. CIV. P. 22 because there is complete diversity between the claimants and the stakeholder. If claimants are citizens of states A and B and the stakeholder is a citizen of state C, there is complete diversity *and* there are claimants of diverse citizenship, but only under the Act can the stakeholder get service of process on all claimants. Under rule interpleader, service of process is limited to the state where the action is brought. FED. R. CIV. P. 4(f). 28 U.S.C. § 2361 (1965) gives, on the other hand, nationwide service of process when the Act is used. Where claimants are citizens of states A and B and the stakeholder is a citizen of State A, there is incomplete or minimal diversity, and only the Act is available. This unusual use of minimal diversity to support federal jurisdiction is dramatically illustrated in Haynes v. Felder 239 F.2d 868 (5th Cir. 1957), where a stakeholder from Texas was allowed to interplead one claimant from Texas along with a rival group of persons with a joint claim, of whom three were from Texas and one was from Tennessee.

[11] U.S. CONST. art III, § 2.

[12] 7 U.S. (3 Cranch) 267 (1806).

[13] Judiciary Act of Sept. 24, 1789, 1 Stat. 78.

ing of Article III gave rise to the question whether the Constitution likewise requires complete diversity.[14] Later cases limited the force of *Strawbridge*,[15] and critics argued that the rule of complete diversity should be applied solely to the general diversity statute.[16] In so holding in *Tashire* the Supreme Court settles the issue and leaves Congress free to expand or contract the use of diversity as long as there is at least minimal diversity.

The construction of the Federal Interpleader Act in *Tashire* presents an ironic situation. The holding allowing expansion of interpleader to potential as well as judgment claimants for proration is at least a technical victory for insurers. But it is actually of much greater benefit to claimants because there is no other device available at present by which claimants can procure proration of insurance funds.[17] The holding limiting the use of interpleader solely to proration denies insurers, however, a great advantage sought from the statute, i.e., to use the statute as a joinder device to bring trials on liability into a single court.[18] It will remain to be

[14] In Shields v. Barrow, 58 U.S. (17 How.) 130, 145 (1855) the Supreme Court indicated that complete diversity might be required by the Constitution.

[15] *E.g.*, Wichita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48 (1922); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Louisville, C. & C. R.R. v. Letson, 43 U.S. (2 How.) 497, 554-56 (1844).

[16] 3 J. MOORE, FEDERAL PRACTICE § 22.09 [1] (2d ed. 1967); Chafee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 393-98 (1940).

[17] The "first-in-time, first-in-right" rule, followed in most states that have decided the question, gives an insurance fund to the first of several claimants to get judgment against the assured. Thus one of several injured parties may not petition the court to have the insurance fund impounded for distribution or require the insurers to settle with all claimants. Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958); Annot., 70 A.L.R.2d 416 (1960). In Comment, *Pro-Rating Automobile Liability Insurance to Multiple Claimants*, 32 U. CHI. L. REV. 337 (1965) four significant reasons from the opinions for denying proration to plaintiffs are listed:

1. The injured party has no standing to sue an insurer.
2. Proration would result in undue delay for the parties.
3. The insurer should not be burdened with duty to judge the settlement value of all possible claims.
4. If an insurer is not free to settle as it will, it might result in higher judgments for which the insurer might later be liable to the assured for failure to settle in good faith.

For suggested solutions to the problems in this complex area see Keeton, *Preferential Settlement of Liability-Insurance Claims*, 70 HARV. L. REV. 27 (1956).

[18] In *Tashire* the District Court not only required that trials on liability against State Farm be tried in Oregon, but later broadened the injunction to require that all suits against the bus line and bus driver, citizens of California, *also* be tried in Oregon. For a dramatic report on the reaction this kind of tactical move can have on plaintiffs, see Travelers Indem. Co. v. Greyhound Lines Inc., 260 F. Supp. 530 (W.D. La. 1966).

seen whether the advantages to insurers of the right to interplead potential claimants will be sufficient to motivate insurers so to use the Act and thereby make the device of proration available to all claimants.

It has always been held that once two or more injured parties obtained judgments against an assured in excess of policy limits, the insurer could interplead them to prorate the fund.[19] This procedure has several advantages to the insurer. It relieves him of the need to go into several courts to defend against several judgment creditors racing for execution. It also eliminates the possibility of liability in excess of the policy limits because the insurer is absolved of responsibility for distribution of the fund.[20] Finally, other claimants to the fund are cut off.[21] Although the first-in-time rule would usually protect the insurer after the fund is exhausted, it has been suggested by at least one court that if an insurer exhausted funds in a state that applies the first-in-time rule, it might still be held liable for failure to apportion funds equitably between the injured parties in a state that does not recognize that rule.[22]

Although two early cases, decided before the words "may claim" were written into the Interpleader Act in 1948, limited the use of interpleader to injunctions against parties that had obtained judgments on liability in other courts,[23] later decisions permitted the insurer to interplead all claimants whether or not any judgment had been reached.[24] In upholding this construction of the 1948 Act, the Supreme Court in *Tashire* noted that it would, by negating the first-

[19] *E.g.*, Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474, 482 (E.D. La. 1960) *See also,* Klaber v. Maryland Cas. Co., 69 F.2d 934 (8th Cir. 1934) (implying this possibility under 1926 Act).

[20] Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960).

[21] Burchfield v. Bevans, 242 F.2d 239 (10th Cir. 1957).

[22] Underwriters at Lloyd's v. Nichols, 363 F.2d 357 (8th Cir. 1966).

[23] Klaber v. Maryland Cas. Co., 69 F.2d 934 (8th Cir 1934); American Indem. Co. v. Hale, 71 F. Supp. 529 (W.D. Mo. 1947).

[24] Underwriters at Lloyd's v. Nichols, 363 F.2d 357 (8th Cir. 1966); Pacific Indem. Co. v. Marceaux, 263 F. Supp. 892 (W.D. La. 1966); Travelers Indem. Co. v. Greyhound Lines, Inc., 260 F. Supp. 530 (W.D. La. 1966); Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860 (S.D. Ind. 1964); Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960). *But cf.* Burchfield v. Bevans, 242 F.2d 239 (10th Cir. 1957) (applying state law); National Cas. Co. v. Insurance Co. of North America, 230 F. Supp. 617 (N.D. Ohio 1964) (rule interpleader). For state cases allowing interpleader see Century Indem. Co. v. Kofsky, 115 Conn. 193, 161 A. 101 (1932); Underwriters for Lloyds v. Jones, 261 S.W.2d 686 (Ky. 1953); Fidelity & Cas. Co. v. LePage, 105 N.H. 327, 200 A.2d 12 (1964).

in-time rule, eliminate the motivation for a race to judgment on the issues of liability and therefore allow an insurer a more orderly defense.[25] Implicit in the decision, however, is the idea that since proration allows an equitable division of funds that is otherwise unavailable, it is hoped that public-spirited insurers will often use it.[26]

Nevertheless, the second holding in *Tashire,* limiting the use of the Act to proration alone, may discourage insurers from using the Act. Probably the real motive behind the increased use of the Act by insurers has been a desire to sweep into a single court all litigation arising out of an accident, including the issues of liability.[27] That this use of interpleader as a bill of peace could also be advantageous for claimants is illustrated by the recent case of *Commercial Union Ins. Co. v. Adams*[28] in which an insurer interpleaded seventy persons of diverse citizenship who were injured in a gas explosion. In granting an injunction against all trials on liability in any state or other federal court, the district court said it was "essential that the claims be determined by the same trial of facts . . . in order to minimize the disparity that would otherwise result" in the later proration of claims.[29]

Under the facts in *Tashire,* however, it was obviously unfair to the claimants to force them into a district court in another state for trials on liability, and one may suspect that this was a tactical move largely designed to pressure claimants into unfavorable settlements.[30] The opinion also points out that the claimants in *Tashire* had joined several defendants and it would be especially anomalous to allow a party with a relatively minor stake in a case to choose the forum for all litigants.[31] Federal courts are, in addition, properly reluctant to deprive claimants of their choice of courts or to re-

[25] 386 U.S. at 533.
[26] *Id.*
[27] See recent cases cited *supra* note 22.
[28] 231 F. Supp. 860 (S.D. Ind. 1964).
[29] *Id.* at 867.
[30] 386 U.S. at 534. This could be cured, however, by change of venue under 28 U.S.C. 1404(a) (1964).
[31] In *Tashire* the suits against the bus line and bus driver were more important than those against the truck driver. Assuming that the truck driver was insolvent, the most that claimant could hope to collect would be 20,000 dollars on the policy. Suits against the other defendants involved large sums as they were financially responsible. See also Travelers Indem. Co. v. Greyhound Lines, Inc., 260 F. Supp. 530 (W.D. La. 1966) where relief similar to that in *Tashire* was given for similar reasons.

move litigation from state courts unless a statute clearly so requires.[32]

The Supreme Court was undoubtedly correct in its construction of the Act. Even though the use of interpleader to effect proration among all claimants will result in delay before any successful claimant can get execution against an insurer, and even though a claimant will have to go into a second court to collect, the benefits of an equitable distribution will inure to all claimants and outweigh the procedural disadvantages. This is the only effective device at present to achieve proration, and it might be desirable for Congress to extend the provisions of the Act to allow an insurer to bring in the underlying litigation in appropriate cases,[33] since this would in turn encourage insurers to interplead all claimants. But the better solution might be other legislation, based on minimal diversity,[34] to allow a claimant to demand proration, leaving injured parties free to bring their actions on liability in whatever courts they choose.

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Constitutional Law—De Facto Segregation—The Courts and Urban Education

In the controversial decision of *Hobsen v. Hansen*,[1] the United States District Court for the District of Columbia[2] found evidence of discrimination in the policies, practices and administration of the School Board and in the continued existence of *de facto* segregation[3] in the school system. The court concluded that the Negro

[32] *E.g.*, National Cas. Co. v. Insurance Co. of North America, 230 F. Supp. 617 (N.D. Ohio 1964). Professor Chaffee argued that interpleader should not extend to trials on liability. Chaffee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 420 (1940).

[33] For example, when most of the claimants are from a single state and the interpleading insurer is the principal fund holder as in Commercial Union Ins. Co. v. Adams, *supra* note 28.

[34] In the words of the Supreme Court, "Art. III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." 386 U.S. at 531.

[1] 269 F. Supp. 401 (D.D.C. 1967)

[2] Judge J. Skelly Wright, a member of the United States Court of Appeal for the District of Columbia, was sitting as District Judge in this suit pursuant to 28 U.S.C. § 291 (c) (1964).

[3] *De facto* segregation is a term used interchangeably with racial imbalance denoting a fortuitous separation of races. A predominantly northern and western phenomenon, it occurs when rigid neighborhood pupil assignments are imposed on racially homogeneous neighborhood populations. See

students were being unconstitutionally deprived of their right to equal protection under the law as guaranteed by the fourteenth amendment.[4]

The decision itself is susceptible to various interpretations, for educational, social, and political considerations are intricately interwoven within it. To acquire a meaningful understanding of the court's position it is necessary to make a threefold analysis of the decision: (1) the legal and constitutional issues in the decision, (2) the practical effect of the decision on the D.C. school system, and (3) the impact of the decision on the national level, particularly as it relates to the development of educational policy in the urban public schools. No attempt will be made to resolve the problems raised in this analysis, but certain alternatives to the court's position will be suggested.

Legal and Constitutional Issues

The conclusions of law enunciated in *Hobsen v. Hansen* were based on a close scrutiny of the evidence presented, which included a detailed empirical study of the D.C. School System. The court subsequently made the following findings of fact: the school authorities, relying principally on the neighborhood concept[5] of pupil assignment, were indifferent and apathetic to the resultant *de facto* segregation and demonstrated in their attitudes an affirmative acceptance of the status quo;[6] discriminatory practices were used in the placement of teachers and principals; inequality existed in

Comment, *Racial Imbalance in the Public Schools: Constitutional Dimensions*, 18 VANDERBILT L. REV. 1290, 1291 (1965).

[4] In Bolling v. Sharpe, 347 U.S. 497 (1954), the companion case of Brown v. Bd. of Educ., 347 U.S. 483 (1954), the Supreme Court held that the equal protection clause's proscription against *de jure* segregation was an element of due process in the fifth amendment and thereby applicable to the District of Columbia. Recent developments in the field of constitutional law, including the frequent "incorporation" of parts of the first eight amendments in the fourteenth amendment due process clause and the increasing use of the equal protection clause to protect individual liberties, lead the court to conclude that "the doctrine of equal educational opportunity—the equal protection clause in its application to public education—is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment." Hobsen v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967)

[5] The neighborhood concept of school districting and assignment has long been considered a basic tenet of American public education. The critics feel that this concept, which originated in a predominantly rural environment, no longer has relevance in the complex, urbanized, and more impersonalized school systems of today. *Id.* at 409.

[6] *Id.* at 503.

the distribution of educational resources to the segregated schools;[7] and the track system[8] discriminated in practice, if not in theory, as it grouped students on the basis of their socio-economic or racial status instead of their natural ability.

In response to these findings, the court permanently enjoined the District of Columbia school system against racial and economic discrimination, abolished the optional zones[9] and the track system, ordered bussing of volunteer Negro students who wished to transfer to undercrowded (white) schools, and ordered substantial integration of the faculty of each school.[10] The court further ordered the Board to submit a plan to the court by October 2, 1967, concerning reasonable alternatives, such as educational parks or school pairing,[11] to correct the racial imbalance.[12] The court refused to support plaintiff's contention that an "area-wide" metropolitan system, crossing state lines, was constitutionally required, although it did suggest that defendants inquire into the possibility of such an alliance with the surrounding suburbs.[13]

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[7] The court considered the following factors: (a) age of buildings, (b) physical condition of schools, (c) physical congestion within the schools, (d) quality of faculty, (e) textbooks and supplies, (f) per pupil expenditures, and (g) curricula and special programs. *Id.* at 431-442.

[8] The track system is a form of ability grouping at both the elementary and the secondary levels in which students are placed on certain curricula tracks according to their ability to learn as determined by teacher evaluation and standardized tests. Approximately 50 of the 114 pages of the original text were devoted to an examination of the system, evidencing the court's awareness of the danger of abolishing a legitimate, even if poorly administered, educational technique.

[9] The optional zones allowed students to choose from two or more schools instead of being assigned to a specific neighborhood school; this had the net effect of allowing whites to escape from predominantly Negro schools to predominantly white schools. Hobsen v. Hansen, 269 F. Supp. 401, 415-18 (D.D.C. 1967).

[10] *Id.* at 516.

[11] *Id.* These are the two most frequently mentioned methods to integrate schools, but both require that white communities be reasonably close to Negro communities.

[12] Racial balance is a physically impossible goal in the District schools, for over 90 percent of the students enrolled are Negroes, and this percentage is increasing annually.

[13] *Id.* at 516. If this case had involved only school districts within a single state, a different result might have occurred. See Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation,* 40 N.Y.U. L. REV. 285, 305-06 (1965): "Undoubtedly if and when the Supreme Court tackles the suburban *vis-a-vis* the slum problem, it will again remit the remedy to the district courts [as it did in the reapportionment cases] with instructions to ignore the state-created political lines separating the school boards and to run its orders directly against the state, as well as local, officials."

The court's recognition and application of the equal educational opportunity principle in the *de facto* context represents the most controversial aspect of its decision.[14] It examines the evidence in light of three distinct theories—separate-but-equal, *de jure* segregation, and *de facto* segregation—to arrive at the conclusion that the Negroes have not received an equal educational opportunity under the law.

The separate-but-equal principle, a modern day reformulation of *Plessy v. Ferguson,*[15] means simply:

> [I]f white and Negroes, rich and poor, are to be consigned to separate schools . . . the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality, at least until all inequalities are adequately justified.[16]

This theory is novel in the *de facto* context, but it has precedent in cases which preceded *Brown v. Board of Education.*[17] Although *Brown* appeared to reject any further application of this theory, the recent Supreme Court decision of *Rogers v. Paul,*[18] has been interpreted as implicity revitalizing this approach.[19]

The real importance of the theory lies in the larger question of whether a disproportionate share of resources need be given to the Negro schools to provide an equal educational opportunity. The court speaks of equality under the separate-but-equal theory in terms of "objectively measurable" aspects, but if the Negro is to overcome environmental and psychological handicaps and achieve at the same grade level as his white schoolmates, the quality of the facilities, teachers, and curricula must be superior to those in predominantly white schools.

In the court's discussion of necessary remedies, it speaks of the necessity of including measures of compensatory education in

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[14] This concept has been subject to close review recently by legal scholars. See T. EMERSON, P. HABER, AND N. DORSEN, POLITICAL AND CIVIL LIBERTIES IN THE UNITED STATES 1779 (3d ed. 1967); FISS, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564 (1964); Rousselot, *Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West: The Emerging Role of Private Constitutional Litigation,* 35 GEO. WASH. L. REV. 698 (1967).

[15] 163 U.S. 537 (1896).

[16] Hobsen v. Hansen, 269 F. Supp. 401, 496 (D.D.C. 1967).

[17] 347 U.S. 483 (1954).

[18] 382 U.S. 198 (1965).

[19] *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd per curiam on rehearing en banc,* March 29, 1967.

the court-ordered plan, but it is uncertain whether this arises from the separate-but-equal theory.[20] Since it is equal educational opportunity rather than equality of expenditures that is the controlling constitutional principle, the distribution of unequal resources might well be justified:

> [C]ultural deprivation [suggests a] . . . classification wherein equality of concern and the equalization of educational opportunity requires the energetic and imaginative use of unequal resources in order to achieve essentially equal results.[21]

Under the *de jure* segregation theory, the court held that the system of assigning teachers and principals to schools according to personal preferences put the School Board in the position of sanctioning the resultant segregation patterns and thus was unconstitutional. A question arises whether the Board is constitutionally required to have a definite ratio of white and Negro teachers in each school. The court explicitly rejects the proposal for the present time.[22] The use of optional zones was also declared unconstitutional under this theory, as it constituted a subtle discriminatory policy allowing whites to escape from integrated schools to predominantly white schools.

The most important segment of the opinion, in terms of the constitutional issues involved, dealt with the third theory that *de facto* segregation in the D.C. school system unjustifiably denied Negro students the opportunity of an equal education. Following the lead of previous decisions[23] and recent views of legal commen-

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[20] Where because of the density of residential segregation or for other reasons, children in certain areas, particularly the slums, are denied the benefits of an integrated education, the court will require that the plan include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all school children. Hobsen v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967).

[21] COMM'N ON RACE AND EDUCATION, RACE AND EQUAL EDUCATIONAL OPPORTUNITY IN PORTLAND'S PUBLIC SCHOOLS 187 (1964), *as quoted in* Rousselot *supra* note 14 at 717. See also Horowitz, *supra* note 4 at 1167.

[22] Hobsen v. Hansen, 269 F. Supp. 401, 516 (D.D.C. 1967).

[23] See Blocker v. Bd. of Educ., 226 F. Supp. 208, *remedy considered on rehearing,* 229 F. Supp. 709 (E.D.N.Y. 1964). The court found unconstitutional segregation where the most that could be said of the Board, as in *Hobsen,* was that it had failed to correct an obvious racial imbalance for which it was not responsible. Jackson v. Pasadena City School Dist., 59 Cal.2d 876, 382 P.2d 878 (1963). Barkesdale v. Springfield School Comm'n, 237 F. Supp. 543 (D. Mass. 1965), *vacated and remanded with direction to*

tators,[24] the court interpreted *Brown* as requiring an independent assessment of the effects of segregation. *Brown* established the principle of equal educational opportunity, and it held that any segregation sanctioned by the "mandate of law or public policy pursued under color of law" was inherently unequal and unconstitutional.[25] But it did not speak to the question of whether a quantum of official discrimination was necessary to invoke the principle when significant harm was visited upon the Negro student, as determined by a close study of the fields of education, sociology, and psychology.[26]

Thus, where there is *de facto* segregation, for which the government is not responsible, the focus of inquiry must shift from an examination of the official's motives to an evaluation of the amount of detriment which occurs in the racially imbalanced schools. The *Brown* rationale is not applicable, however, if the court can find adequate justification for the inequality-producing classification—in this case adherence to the neighborhood school system of pupil assignment:[27]

> [W]ith every inequality producing classification there remains the question of justification. Ordinary statutory classifications resulting in inequalities economic in nature are traditionally upheld whenever the reviewing court can imagine a reasonable or rational basis supporting the classification . . . [T]he objectives they [the classifications] further must be unattainable by a narrower or less offensive legislative course; and even so, those objectives must be of sufficient magnitude to override,

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dismiss without prejudice, 347 F.2d 261 (1st Cir. 1965), unequivocably takes the position adopted in *Hobsen*:

> The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. While *Brown* answered that affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education [based on expert testimony presented]—is the same in this case, and I so find. . . .

Id. at 546-47.

[24] Sedler, *School Segregation in the North and West: Legal Aspects*, 7 ST. LOUIS L.J. 228 (1962) states this concept in the form of a question:

> Can the state still educate him [the Negro] on an integrated basis thus providing equal educational opportunities and preventing feelings of inferiority and at the same time effectively operate its educational system?

Id. at 256.

[25] Hobsen v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967).

[26] *Id.* at 419-21.

[27] *Id* at 506-07.

in the court's judgment, the evil of the inequality which the legislature engenders.[28]

The court also justifies the need for careful consideration of the merits of the neighborhood policy because this particular practice operates in such a way that the Negro and the poor are harshly and disproportionately disadvantaged, even though neither group is intentionally singled out for special treatment.[29] The cases which are cited to support this position, *Griffin v. Illinois*[30] and *Harper v. Virginia Board of Elections*,[31] are concerned primarily with economic discrimination. Taken by itself, a single reference to the economic factor is unimportant, but when it is added to references of economic discrimination in other parts of the opinion, specifically in the discussion of the track system and the separate-but-equal theory, the court's approach becomes ambiguous.

This constant equation of the Negro and the poor might be the embryonic beginning of a non-racial attitude by the courts toward the whole problem of urban living. This may mitigate the effects of the monolithic approach of many judges who are so preoccupied with the integration problem that they lack the prospective to comprehend the interrelated economic problems. The decision also avoids saying that *de facto* segregation is unconstitutional on its face; but it is doubtful that this court will ever accept a *de facto* segregation situation as permanently justified or necessary, at least from a legal standpoint. When the court balances the different considerations mentioned above, the educational and social advantages of integrated schools accrued to both white and Negro children outweigh the policies supporting strict adherence to the neighborhood schools concept.[32] Although the neighborhood plan per se is not held unconstitutional, the decree that the Board consider the feasibility of alternate measures suggests that strong reasons must be given before the benefits of an integrated education are denied to the Negro.[33]

The track system was held unconstitutional as it, too, represents an unjustifiable arbitrary classification. Although the court accepts ability grouping in general as reasonably relating to the govern-

[28] *Id.*
[29] *Id.*
[30] 351 U.S. 12 (1956) (fees required for appeal).
[31] 383 U.S. 663 (1960) (poverty and poll tax).
[32] Hobsen v. Hansen, 269 F. Supp. 401, 509-10 (D.D.C. 1967).
[33] *Id.*

mental function of public education, it maintains that such grouping must be founded on something other than the standardized tests[34] presently administered. These tests, the evidence shows, group according to environmental and psychological factors, not on the basis of innate ability. The results therefore are catastrophic to the Negro child who is grouped in the lower tracks with rigid curricula and little chance of freeing himself from the false self-prophecy of intellectual inferiority. The system is also condemned for its failure to include and implement a compensatory educational program that would provide more flexibility and more movement upward in the tracks.

Undoubtedly, the specific constitutional issues raised by the decision are important, but a significant legal problem exists on a more abstract level. The uncertainties[35] accompanying any balancing of constitutional rights on the basis of empirical data and the complexities of implementing a decree, once interference in the educational system is found to be necessary, obviously do not create stability or certainty in the legal process. The court is intervening in an area in which it has an acknowledged lack of expertise,[36] and its involvement causes one to ask certain elementary but important questions. Relating to the track systems, there is a real question of what type of ability grouping is justifiable, and how accurate tests must be before they constitute legitimate bases for grouping. If no satisfactory tests are developed, will the disadvantaged child be forced to compete in the classroom with the middle class white (though this is practically impossible) because no satisfactory tests (in the court's view) are devised? If bussing is the solution to correct the unconstitutional inequalities, then what practical considerations are involved? What weight is to be given to costs,

[34] See P. SEXTON, EDUCATION AND INCOME (1961), for the rationale supporting this position.

[35] "There can, of course, be no mathematical formula to determine at what point the unequal educational opportunity inherent in racial imbalance . . . rises to constitutional dimensions." Wright, *supra* note 13, at 303. Fiss agrees that "no matter how conscientious the court that decides the question, an irreducible amount of uncertainty will remain." Fiss, *supra* note 14, at 596.

[36] "It is regrettable, of course, in deciding this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government." Hobsen v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967). See Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem,* 58 NW. U.L. REV. 157, 182-86 (1963).

time spent in transit, or ineffective or detrimental results from the integrated experience? What considerations will guide the court if the "area-wide" school system is found to be constitutionally necessary, and how will the many side issues such as educational financing be resolved?

Practical Effects

Despite the prevalence of constitutional and legal problems in this area, the conclusions of the court are extremely important in terms of the actual impact of the decision on the D.C. school system. The decision will invariably have these initial consequences in Washington: (1) an increase in the number of white students migrating to the suburbs or to private schools, thereby increasing the total percentage of Negroes well over the ninety per-cent-plus figure that presently exists, and (2) the withdrawal from the system of many white teachers who are eligible for retirement benefits, especially if the court finds reassignment necessary. The court ruling has already forced Superintendent Hansen to resign his position.[37]

Regarding the actual decree in light of subsequent developments, the decision might have been unnecessary. Within a week of the decision Negroes gained a majority on the School Board for the first time in its history,[38] and would certainly have implemented most of the measures the court decreed. Moreover, as Carl Hansen pointedly noted in an interview[39] subsequent to the decision, the track system was to be abolished; a proposal for the discontinuance of the optional zones was already being considered; and the free bussing for children in overcrowded schools had been initiated prior to the issuance of the opinion. Finally, the Passow Report,[40]

[37] See The Washington Post and Times Herald, July 4, 1967, at A 1, col. 8. This resignation resulted specifically from the Board's refusal to appeal the decision which repudiated Hansen's policies and, to some degree, his integrity as an individual. The fact that he would probably resign in the face of an adverse decision, despite the three year renewal of his contract in March, 1967, was well known by those who participated in the suit.

[38] With a new majority the Negroes elected the first Negro President of the Board of Education. See The Washington Post and Times Herald, July 2, 1967, A 1, col. 1.

[39] U.S. NEWS AND WORLD REPORT, July 24, 1967, p. 42.

[40] The report on the D.C. school system made by Dr. Henry A. Passow of the Columbia Teachers College, cost 250,000 dollars and involved over 180 consultants and specialists. For a brief summary of the findings, see The Washington Post and Times Herald, Sept. 7, 1967, A 1, col. 6.

preliminary findings of which were available to the Board soon after the issuance of the opinion, contained extensive recommendations for the D.C. System, which included many of the court's ideas. It was based on exhaustive educational research and had been commissioned by the Board.

It would seem from these factors that the decision was to serve a dual purpose: (a) to repudiate the attitude implicit in the practices and policies of the school authorities and (b) to provide a new legal and moral basis for change. The public reaction[41] to the decision in Washington reinforces this view, for an atmosphere was created which made positive action by the School Board not only politically feasible but inherently necessary.

National Impact

Judge Wright was not interested, however, solely in the decision's catalytic effect on the D.C. educational power structure. The length of the text and its exhaustive detail emphasize that the impact of the decision was intended to be nationwide. Judge Wright obviously expected the case to be appealed ultimately to the Supreme Court, which required that the decision have a solid foundation in fact and in law. Moreover, as a Federal District judge, Judge Wright had been closely connected with the desegregation of public schools in Louisiana and the admission of Negroes to Tulane University.[42] His judicial experience thus eminently qualified him to make the first official, authoritative statement by a member of the federal judiciary on the relationship of the equal educational opportunity principle to the problem of *de facto* segregation in urban education.

It can also be surmised that Judge Wright was writing to and for the legal profession. In his decision, he establishes a model for legal change in the *de facto* area by constructing a framework in which the lawyer knows what type of evidence must be presented, and the judge is given a method by which specific constitutional issues can be resolved. Concurrently, his decision was intended to be a catalyst for change on the national level, to spur action in

[41] "The significance of the Wright decision . . . is that it gives the school system a mandate for change." Jacoby, *Mandate for Change*, The Washington Post and Times Herald, July 22, 1967, A 1, col. 4. The plaintiff, Julius Hobsen, stated that the Passow Report "would have wound up in the dust bin like the Strayer Report [the last study of the D.C. schools in 1949] if it weren't for the court decision." *Id.*

[42] See NEWSWEEK, July 3, 1967, at 49.

legislative bodies and school systems which have long bypassed this problem.[43]

The primary area in which this opinion will have national impact is the present-day civil rights movement. There is a split among civil rights leaders evidenced in their attitudes toward attempts to improve the educational resources in predominantly Negro schools. Some groups oppose a major commitment to ghetto schools. Other elements, primarily associated with the "Black Power" movement, have favored the improvement of educational resources in the ghetto schools.[44] The difference in attitude is explained by the former's assumption that the only possible avenue to equal education opportunity for the Negro child is through integrated classrooms. Such a view is implicit in *Hobsen v. Hansen,* and evidenced by the data[45] which is judicially noted to support the court's conclusions.[46]

The dilemma in which the court finds itself is that in Washington, and in other urban areas, integration is impossible, at least in the near future. Although the court is aware that racial imbalance cannot be solved in the D.C. schools (and this is what the separate-but-equal theory is all about), its attempt to deal with it is undermined by the acceptance of a principle which unequivocably rejects the segregated school. *Hobsen v. Hansen* advocates a self-defeating policy by focusing its attention on integration as the sole means enabling the Negro to attain the ultimate goal of educational equality. This is especially important since there is some indication that quality education can be had in the all-Negro school. The Passow Report[47] emphasized that quality education was possible, if and when adequate resources were allocated to the predominately Negro

[43] New York, California, Maryland and New Jersey were the first, and still remain, the principal states to take legislative action to correct imbalance. See 7 RACE REL. L. REP. 269 (1962); 7 RACE REL. L. REP. 738 (1962); 8 RACE REL. L. REP. 738 (1963); 8 RACE REL. L. REP. 1226 (1963).

[44] See Rousselot, *supra* note 14, at 715.

[45] See 1 U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967) (published in 2 vols.) [hereinafter cited as U.S.C.R.C. REPORT]; U.S. OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY (Coleman ed. 1966) [hereinafter cited as COLEMAN REPORT].

[46] Alsop, *No More Nonsense About Ghetto Education,* THE NEW REPUBLIC, June 22, 1967, at 20, characterizes this attitude of the liberals:

> [G]hetto children can never be rescued, can never be educated, unless they are subject to the benign classroom influence of middle class children.

[47] *See supra* note 40; The Washington Post and Times Herald, Sept. 7, 1967, A 1.

D.C. schools. The "More Effective Schools"[48] program, initiated in Harlem in 1964-1965 is the latest of several new programs initiated for the ghetto schools. Its tests results indicate that Negro children can achieve at the same grade level with his middle class white counterpart even if taught in a segregated school.[49]

Though these special programs have not been as successful as their advocates might hope,[50] the realities of the situation alone dictate a more flexible approach by the court's than is found in *Hobsen v. Hansen.* If the white community does not accept the necessity of integration, and there is no indication that it is so predisposed at present,[51] then it may effectively block any implementation of corrective measures by moving further into the suburbs or by sending its children to private schools. And bussing is by its very nature confined to certain time and space limits.

This conflict between constitutional necessity and social reality will often leave the courts with no alternative but to revive such theories as the separate-but-equal principle. But again the basic dilemma reappears if the court has already committed itself to the view that a segregated education is inherently unequal for the Negro and that no amount of compensatory education can effectively overcome this disadvantage.

The court reaches its position that the integrated school is the primary solution to this problem by citing the latest sociological and psychological findings in this area, and by emphasizing the inherent destructiveness of a segregated society.[52] In the former, it implicitly relies on the *Coleman Report*[53] and the *United States Civil Rights Commission Report*[54] which includes the very latest research in this area.

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[48] See Alsop, *supra* note 46, at 21.

[49] See Maslow, *De Facto Public Segregation,* 6 VILL. L. REV. 353, 374-75 (1962); also Nancy Hoyt St. John, *The Effect of Segregation on the Aspirations of Negro Youth,* 36 HARV. L. REV. 284, 286 (1965). For a discussion of the different measures that can be used to educate the disadvantaged child, see Ornstein, *Program Revision For Culturally Disadvantaged Children,* 35 J. OF NEGRO ED. 117 (1965).

[50] See Swartz, Pettigrew and Smith, *Fake Panaceas For Ghetto Education: A Reply to Joseph Alsop,* THE NEW REPUBLIC, Sept. 23, 1967, at 16.

[51] See Alsop, *supra* note 46, at 19, for statistics on this rapid migration.

[52] Judge Wright quotes Fiss in the opinion: "Segregation perpetuates the barriers between the races; stereotypes, misunderstandings, hatred and the inability to communicate are all intensified." Hobsen v. Hansen, 269 F. Supp. 401, 504-05 (D.D.C. 1967).

[53] See *supra* note 45.

[54] *Id.*

The *Coleman Report* did not attempt to separate all other factors such as cultural deprivation or social class in determining the effects of racial imbalance. Its basic findings, however, did show that the equality of educational opportunity was lowered when culturally disadvantaged children were placed together in public schools. Also, it concluded that pupil achievement is more closely correlated to the aspirations and educational experience of the other students in the school than to the quality of the facilities, teachers, or curriculums.[55] The *U.S.C.R.C. Report,* however, re-analyzed the data in the *Coleman Report* and declared that there was a direct correlation between racial imbalance and Negro achievement: "There is . . . a relationship between the racial composition of schools and the achievement and attitudes of most Negro students, which exists when all other factors are taken into account."[56]

Despite this conclusion of the *U.S.C.R.C. Report,* the most significant finding in either report was that a Negro child's achievement is highly correlated with his belief that he can control his own destiny.[57] Coleman himself feels that "the one factor more highly related to achievement than anything else was the child's concept of whether his environment was responsive in any way to him."[58] Floyd McKissick, National Director of CORE explains this view:

> One wonders if that thing 'middle class' is not really a way of saying that the middle class child is helpless and vulnerable, that he knows his parents can and will go to bat for him, that he carries that attitude around with him, that his teachers perceive him differently, and that he is treated differently.[59]

It should be noted that the *Coleman Report* and the *U.S.R.C. Report* suggest that it is the poor in general, rather than the Negro in particular, who respond to good and bad schools.[60]

Hobsen v. Hansen foresees the danger in such a separatist view, and it appreciates the need for an integrated society as an ultimate

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[55] COLEMAN REPORT 22

[56] U.S.C.R.C. REPORT 204.

[57] See Jencks, *The Racial Gap,* THE NEW REPUBLIC, Oct. 1, 1966, at 22. This article contains an excellent summary of the findings of the *Coleman Report.*

[58] NEWSWEEK, Sept. 25, 1967, at 75.

[59] McKissick, *Is Integration Necessary?* THE NEW REPUBLIC, Dec. 3, 1966, at 35.

[60] See U.S.C.R.C. REPORT 79.

goal. But is not the court irresponsible in telling the Negro community that an integrated education is indispensable to a quality education for their children when it has neither the power nor the resources to create this necessary prerequisite. If it is accepted that the educational needs for the Negro are immediate and pressing, then the court should not create impediments to the resolution of these needs. Integration is only one of the means to an end, which is equality for all. Since there may be another means which are capable of producing this equality in education, the liberal community, and the expression of its views in the courts, must not limit the attention of "Negroes to the sole issue of integration, so that they cannot conceive of any other road toward equality."[61]

CONCLUSION

Hobsen v. Hansen is presently being appealed in the Circuit Court of Appeals for the District of Columbia. Regardless of whether the decision reaches the Supreme Court of the United States, its impact has already been felt nationwide.[62] In the process of dissemination, the actual content of the decision and its implications have often been inaccurately reported. This discussion was intended to give a more accurate analysis of the decision, concentrating not only on the narrow legal and constitutional issues involved, but on the intended and actual impact of the decision.

In the examination of the case several basic problems in the court's reasoning have been discussed. First, there is a latent ambiguity in the decision, resulting from the court's vacillation between an economic and racial analysis of the issues, although the racial element ultimately dominates the court's thinking.

Another problem raised is the role of the court in the educational process. Where should the line be drawn when judges decide issues normally delegated to the sphere of professional educators, to local school authorities, to the local community? Conversely, how may school authorities pursue legitimate educational concepts even if integration is not a primary factor in their formulation?

The third and major area of concern is the court's view that

[61] Oscar Handlin, *Is Integration the Answer?*, ATLANTIC MONTHLY, March 1964, at 49. Handlin continues: "[T]herefore, integration is not an end but a means toward an end. Equality of education, housing, employment, and politics is the goal, and genuine progress in that direction will push the problem of de facto segregation in the background, as it has for other groups." *Id.*

integration is the only feasible means to obtain equal educational opportunity. This doctrine collides head-on with the social impossibility at present of achieving this goal. Whether other courts will be flexible enough to explore alternative solutions, instead of following the precedent of *Hobsen v. Hansen*, with its inherent rigidity, might have an important bearing on the ultimate means employed to solve the educational crisis in the urban schools.

There has been no attempt to formulate answers to the issues raised in the case, except to suggest that the courts not narrow their inquiry to the integration question alone. While few educators would deny that integration should be an important goal of any educational system, if techniques and programs are developed which prove to be effective within the different locales, the court should reconsider before condemning them as discriminatory, merely because integration is not an end result.

NEILL G. MCBRYDE

Constitutional Law—Governmental Regulation of Surface Mining Activities

> Surface mining in the United States has affected 3.2 million acres of land. Of this total, 2.0 million acres need varying degrees of treatment to alleviate a range of environmental damage both on-site and off-site. About 20,000 active operations are disturbing the land at a rate estimated in excess of 150,000 acres annually. Data submitted by the surface mining industries indicate that, in 1964, the amount of land partially or completely reclaimed was equivalent to only 31 percent of the area disturbed in that year. Surface mining activities are expected to expand rapidly in coming years. By 1980, it is expected that more than 5 million acres will have been affected by surface mining.
>
> Some damage from surface mining is inevitable even with the best mining and land restoration methods. But much can be done to prevent damage and to reclaim mined lands.[1]

I. INTRODUCTION

In an operation having the magnitude of surface mining in the United States, the relationship existing between this activity and the general public and the degree of control to be exercised in the

[1] STRIP AND SURFACE MINE STUDY POLICY COMM., U.S. DEP'T OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 104 (1967).

public's interest are of paramount importance. The rapidly increasing population, the expansion of suburban areas, and the recognized need for area-wide control of land uses are on a collision course with the desirability of exploiting our natural resources, particularly the numerous mineral resources found in North Carolina. This problem is exemplified by current surface mining practices and the probability that they will be increasingly utilized within the state.

Surface mining may be subdivided into the general categories of strip mining and quarrying.[2] While these two methods differ technically, the legal problems involved in their regulation are similar. Strip mining is accomplished from the surface of the earth and is generally performed by stripping off the earth, known as overburden, which lies over the mineral, and then by removing the mineral uncovered beneath the overburden. Open-pit is synonymous with quarry, and quarrying involves a large opening in the earth from which rock, sand or ores are taken. The term "quarry" is not properly applicable to the comparatively slight excavation made primarily for construction. Both strip mining and quarrying entail the removal of a large volume of surface "waste" material with a resulting piling of this material at a nearby location and an excavated opening or openings which accumulate water if not refilled with the waste or other substance. Both operations are characterized by noise, dust, and extensive use of mechanical equipment.

That a person's property shall not be taken except by due process of law and that he is entitled to equal protection of the laws are guarantees afforded by the United States Constitution[3] and the North Carolina Constitution.[4] Into this area of historical rights

[2] Governmental controls over commercial mining practices extend to surface evacuation of ore and minerals and of sand and gravel, by the "open pit" and "strip mining" methods; to subsurface extraction of ore and materials; to air and stream pollution; to the processing plants where crushing, washing and mineral-gangue separation is accomplished; and to disposition of the gangue (non-commercial minerals and rock separated from the desired mineral). The scope of this comment will be limited to controls exerted over surface evacuations. Unless otherwise noted, no distinction will be stressed between excavations of ore and of sand and gravel. While regulations of strip mining methods are emphasized, some material deals with open pit methods, and it is believed that the problems encountered and the extent of permissible regulations of the two methods, relative to the excavation process, are essentially the same.

[3] U.S. CONST. amend. XIV, § 1.

[4] N.C. CONST. art. I, § 17.

stalks the police power as an inherent right of governmental units to provide for the public health, welfare, safety and morals of their citizenry.[5] This power, while incapable of an exact definition or limitation,[6] is relied on "to *prohibit or regulate* certain acts or functions of the populace as may be deemed to be inimical to the comfort, safety, health and welfare of society."[7] Utilization of this power is the basis by which state and local government units will be in a position to cope with developing problems, relatively new to North Carolina but previously encountered in other states, attenddant to surface mining activities.

There is no legal right to exploit natural resources wherever they may be found.[8] This principle, in conjunction with the police power, furnishes the foundation for a governmental unit's endeavors to regulate mining activities. Development of controls over surface excavation practices has followed a familiar pattern of judicial and legislative reaction to the changing social and economical conditions created by an increasing population and urbanization. This envolvement has progressed from earlier prohibitory legislation, closely scrutinized by the courts as an invasion of property rights, to the more recent utilization of zoning plans and direct regulations that are recognized as requisites for protecting the public interest. Both procedures are generally viewed as proper applications of the police power, subject to an ever present requirement of reasonableness. While the courts stand ready to oversee the reasonableness of legislation and to protect constitutionally granted rights, control of such mining activities is basically one for legislative concern.[9]

Regulation of surface activities may be classified into direct regulations enacted by the state legislative bodies and having statewide effect, and local regulations enacted by the states' political subdivisions pursuant to the authority delegated by the states. The local regulations may be by direct control of particular conduct

[5] *See, e.g.*, Lees v. Bay Area Air Pollution Control Dist., 238 Cal. App. 2d 850, 856, 48 Cal. Rptr. 295, 299 (Dist. Ct. App. 1965).

[6] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[7] Davis v. Barrett, 253 Iowa 1178, 1180, 115 N.W. 2d 839, 841 (1962) (emphasis added).

[8] *E.g.*, Township of Bloomfield v. Beardslee, 349 Mich. 296, 84 N.W.2d 537 (1957).

[9] Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725, 728 (Ky. 1960), where the court stated: "Short of that which is proved to be arbitrary, wanton, or malicious, the control of commercial mining practices is strictly a matter of legislative regulation."

where the activity is prohibited or the manner of conducting the activity is regulated, or through zoning legislation involving comprehensive regulation of land uses by districts and regulation of certain permitted conduct within the district. Both the direct and zoning controls may have the practical effect of prohibiting a desired usage.

II. Early Views

Early attempts to regulate surface activity were local legislations of a direct nature. The earliest were in the form of outright prohibitions directed at undesirable activities such as pig sties and livery stables. If found to be a nuisance per se, the activity could be regulated; but, if not, it was an unconstitutional taking of property in violation of the fourteenth amendment. This approach was relaxed in *Reinman v. City of Little Rock*[10] where the United States Supreme Court upheld the state's finding that a livery stable was a nuisance in fact and in law, provided the state did not act arbitrarily or unjustly discriminatorily, and that a municipal ordinance forbidding the conduct of a livery stable within a designated area could not be enjoined. Early legislation prohibiting surface mining was viewed in respect to the public safety but was generally held to be an unconstitutional taking of property[11] and to be a restriction that could not be imposed upon a legitimate business without compensation.[12] This approach was predicated on use of the police power being justified only if the operation of a quarry or mine *would* result in injury to the person or property of another.[13] Illustrative of this is *Ex parte Kelso*[14] where a municipal ordinance prohibited the operation of rock quarries within designated limits of San

[10] 237 U.S. 171 (1915).

[11] *See* Consolidated Rock Prod. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed,* 371 U.S. 36 (1962). The California Supreme Court discussed the earlier California cases and distinguished them in view of the more recent developments in comprehensive zoning.

[12] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Pacific States Supply Co. v. City of San Francisco, 171 F. 727 (C.C.N.D. Cal. 1909); Commonwealth *ex rel.* Keator v. Clearview Coal Co., 256 Pa. 328, 100 A. 820 (1917); Stone v. Kendall, 268 S.W. 759 (Tex. Civ. App. 1925).

[13] Annot., 10 A.L.R.3d 1226 (1966).

[14] 147 Cal. 609, 82 P. 241 (1905). While the court invalidated the ordinance as prohibiting quarrying, they did recognize the state's power to regulate the manner in which the quarrying operation was conducted, on the basis that uncontrolled quarrying may be performed in such a manner to occasion injury.

Francisco, irrespective of whether a quarry *might* cause injury to others. Holding the ordinance to be an improper use of the police power, the court emphasized that the use to which a person could put his property could not be interfered with or limited except to the extent that such use would definitely result in legal injury.

While outright prohibitions were generally unfavorably accepted, a regulation of the *manner* of conducting an activity was likely to be sustained if the court found the regulation to be reasonable, even if the practical effect of the regulation amounted to a prohibition. This judicial approach is exemplified by the landmark case, *Hadacheck v. Sebastian*.[15] A Los Angeles ordinance made it unlawful to establish or operate a brickyard or brickkiln within designated areas. The petitioner owned a tract of land located within the designated area and containing a valuable deposit of clay used in the manufacture of bricks. He contended that, if required to manufacture his bricks at a location other than on the tract containing the clay deposit, the operation could not be economically conducted. The Supreme Court upheld the ordinance as a valid regulation of the manner in which the overall brickmaking process could be conducted. Recognizing that such a control could result in prohibiting the petitioner from mining his clay and that it would be an extension of the *Reinman* case, since the mining operation could not be conducted elsewhere, the Court insisted that the ordinance was only a regulation within the designated locality over the manufacture of the clay into bricks. It distinguished the *Kelso* case by viewing the ordinance as a control over the offensive effects of a commercial operation rather than as a deprivation of the mineral deposit.

III. Transition Stage

That a governmental unit could prohibit the uses of property without compensation, and without justifying it as being a common law nuisance or creating a risk of imminent injuries, was recognized for the first time by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*[16] A municipality's comprehensive zoning plan for regulating and restricting the location of commercial and residential structures, the lot area to be built upon, and the size and height of buildings was held to be a valid

[15] 239 U.S. 394 (1915).
[16] 272 U.S. 365 (1926).

exercise of the police power. In justifying the advent of such restrictions, the Court, speaking through Mr. Justice Sutherland, pointed to the increase and concentration of population as creating new problems requiring regulations that earlier would have been rejected as arbitrary and oppressive. This was accomplished, not by varying the meaning of constitutional guaranties, but by adjusting the scope of their application to meet the changing conditions within the field of their operation. The Court further emphasized that such ordinances, and all similar laws and regulations, must find their justification in *some* aspect of the police power, as it is asserted for the general public welfare, and that the line separating the legitimate from the illegitimate assumption of power is not capable of precise delimitation but varies with circumstances and conditions. The role of the judiciary in the zoning process was reiterated by the Court's statement: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[17] Of particular interest is the Court's acceptance that, in comprehensive regulations, some "innocent" activities may suffer the same fate as offensive activities, but the inclusion of a reasonable margin reaching innocent activities will not invalidate the controls.

The *Euclid* case stands as a milestone in the acceptance of a new innovation which places permissible limitations on individual rights. This raises a question as to why the courts differentiate between direct prohibitions and zoning controls that may, and often do, have the effect of a prohibition. While a direct prohibition is an outright regulation of a single or related group of activities, a prohibition fostered by zoning is an essential part of an overall comprehensive plan of uses within a designated district. The preferential treatment afforded zoning regulations by the courts seems to have its basis in the fact that a particular prohibition is only one cog in the comprehensive scheme, rather than a "one-shot" effort directed at an undesirable activity and uncoordinated with other controls that have been enacted or may be enacted in the future by the governmental subdivisions.[18]

[17] 272 U.S. at 388, citing from Radice v. New York, 264 U.S. 292, 294 (1924). *Accord*, Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925).

[18] *See* City of Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931) where the court upheld a zoning regulation prohibiting the construction of a filling station after previously invalidating an ordinance directly prohibiting such construction.

Judicial acceptance of zoning legislation, rather than direct prohibitory legislation, as a constitutional regulation of property uses even though the particular use could not be conducted at another location, is illustrated in *Blancett v. Montgomery*.[19] A municipal ordinance prohibited the drilling of oil wells within the corporate limits, and a general zoning ordinance classified the proposed drilling sites as residential. The trial court held the prohibitory ordinance to be invalid as unreasonable, arbitrary and discriminatory but did not make a finding as to the validity of the zoning ordinance. The Kentucky Court of Appeals reversed the trial court's results; and assuming, but without deciding, that the prohibitory ordinance was invalid, the court held the general zoning ordinance to be a valid exercise of the police power and not to be a taking of property without due process nor an abridgment of equal protection rights.[20]

IV. Regulation Through Zoning

As a general proposition, the principles applied in the zoning of other industries and buildings are also applicable to the regulation of surface mining.[21] The legislation must have a real or substantial relation to the police power goals,[22] and its effect on the landowner should be considered.[23] Since the *Euclid* case, a gradual accumulation of case law on zoning controls over surface mining activities has provided insights into the requisites for judicial acceptance of these regulations. While the courts' principal concerns are that the legislation be reasonable and not discriminatory and that the legislative bodies have discretion to act within these limits, the cases also reveal an influence derived from various aspects of zoning's relation to aesthetic considerations, non-conforming uses, and special use permits.

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[19] 398 S.W.2d 877 (Ky. 1966).

[20] The court stated: "As a general proposition a valid exercise of the police power resulting in expense or loss of property is not a taking of property without due process of law or without just compensation, nor does it abridge the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." 398 S.W.2d at 881, citing 6 E. McQuillin, Municipal Corporations §§ 24.05-.06, (3d ed. 1949). *E.g.*, Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634 (1931).

[21] *Cf.* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Town of Seekonk v. John J. McHale & Sons, Inc., 325 Mass. 271, 90 N.E.2d 325 (1950).

[22] 58 Am. Jur. *Zoning* § 97 (1948). *See, e.g.*, Kane v. Kreiter, 25 Ohio Op. 2d 295, 195 N.E.2d 829 (C.P. Tuscarawas County 1963).

[23] *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

A. *Prohibition of a Use*

A well documented opinion of the power to prohibit a use is *Consolidated Rock Products Co. v. City of Los Angeles.*[24] An ordinance established a comprehensive zoning plan for Los Angeles, restricting the plaintiff's property to agricultural and residential uses, but with provisions for a supplemental use district. A request for the supplemental use was denied. The trial court, after finding that dust from the proposed rock, sand and gravel quarrying would carry to nearby residences and sanitariums, denied injunctive relief to the plaintiff. Since the property was suitable only for gravel pit operations, the ordinance not only prohibited a desired use but also prevented any economical use of the property. Applying a test of limiting the legislative action only if it is unreasonable, arbitrary or discriminatory, the California Supreme Court found that reasonable minds could differ,[25] in which case the court would not substitute its judgment for that of the legislative body, and that the ordinance was a valid exercise of the police power. Earlier California cases had indicated legislative authorities could not constitutionally prohibit the extraction of natural resources when they were the primary or preponderant value of the property. In rejecting this view, the court pointed to an extended line of cases upholding zoning ordinances that prohibited the removal of natural resources and refusing to distinguish between the prohibition of their removal and the prohibition of other uses.[26] As a basis for this approach, the court traced the history of prohibitory legislation from the period before comprehensive zoning, through its acceptance in *Village of Euclid v. Ambler Realty Co.*,[27] and into its more recent applications.[28]

Attacks on zoning controls are often predicated on financial loss to the owner. This is particularly applicable to removal of natural products as a result of their immobility and the impossibility of conducting the industry at another locality. Although a comparison of values before and after the regulation is relevant, it is not

[24] 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed,* 371 U.S. 36 (1962). See 50 Calif. L. Rev. 896 (1962).

[25] Disagreement between the city planning commission and the city council relative to granting the plaintiff's application for a supplemental use is indicative of how reasonable minds may differ.

[26] See cases cited 57 Cal. 2d at 529, 370 P.2d at 351, 20 Cal. Rptr. at 647.

[27] 272 U.S. 365 (1926).

[28] *E.g.*, West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881, *appeal dismissed,* 302 U.S. 658 (1937).

conclusive in determining the validity of controls.[29] A typical approach is that an exercise of the police power, either through zoning or direct prohibition that precludes what may be a more profitable use of the property, does not violate a person's constitutional rights if the exercise of the power is otherwise valid.[30]

In *Consolidated* the court did not apply a test relating to the effect on the landowner, but relied on the "fairly debatable" effect quarrying had on contiguous property and the overriding principle of protecting the general public. Support for the position that the prohibition was not an unconstitutional taking without compensation was found in *Marblehead Land Co. v. City of Los Angeles*[31] where the federal court upheld a comprehensive zoning ordinance prohibiting extraction of oil from lands in a residential zone. Additional support for this position is *City of Trussville v. Porter*[32] involving a municipal ordinance zoning an area for "General Industry." The *Porter* opinion extended judicial acceptance of "legislative" action by upholding the delegation of authority to a building inspector to permit or deny quarrying based on his opinion of whether it would create objectionable conditions affecting a considerable portion of the city. The court upheld the inspector's denial of a permit and refused to enjoin what it found to be a valid ordinance even though it deprived people of a right to earn an income. This approach is traceable to the United States Supreme Court's statement relating to the police power in *Hadacheck v. Sebastian*:[33]

> It is to be remembered that we are dealing with one of the most essential powers of the government,—one that is the least

[29] *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

[30] *E.g.*, Village of Spillertown v. Prewitt, 21 Ill. 2d 228, 171 N.E.2d 582 (1961); La Salle Nat'l Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965). *But see* East Fairfield Coal Co. v. Booth, 166 Ohio St. 379, 143 N.E.2d 309 (1957). While not discussing the removal of natural products, the North Carolina Supreme Court held in City of Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931) that financial loss is not the test of the reasonableness of a zoning ordinance.

[31] 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634 (1931); *accord*, Blancett v. Montgomery, 398 S.W.2d 877 (Ky. 1966).

[32] 279 Ala. 467, 187 So. 2d 224 (1966); *accord*, Southern Rock Prod. Co. v. Self, 279 Ala. 488, 492, 187 So. 2d 244, 246 (1966) where the court stated: "Unquestionably a municipality has authority to pass zoning ordinances which regulate the use of private property and the authority to promulgate ordinances prohibiting the removal or crushing of rock from lands lying in certain areas or under certain conditions."

[33] 239 U.S. 394, 410 (1915) (citations omitted).

> limitable. It may, indeed, seem harsh in its exercise, usually is on some individual but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.

Consideration of the prohibition's effect on the property owner and the necessity for more than a passing acceptance of the legislative determination that such a prohibition is needed find support in *Kane v. Kreiter*[34] where a township ordinance zoned an area as agricultural, thereby preventing the strip mining of coal. Recognizing that the classification of uses must be reasonable, the court further required that pre-existing vested rights be considered and protected. It noted that the plaintiff's land was steep, hilly, rundown and unsuited for farming and held the deprivation to be a taking without due process in violation of the United States and Ohio Constitutions. A frequent view is that incidental damage resulting from zoning, such as a dimunition of land values, does not violate due process unless the restriction practically or substantially renders the land useless for all reasonable purposes.[35]

Efforts to establish a control as an exercise of eminent domain, rather than of police power, as a basis for invalidating a zoning regulation have been unsuccessful once the ordinance was found to bear a reasonable relationship to the general public welfare. As observed in *Beverly Oil Co. v. City of Los Angeles*,[36] the very essence of the police power, as differentiated from the power of eminent domain, is that the deprivation of individual rights and property cannot prevent its operation if its exercise is proper and the method of exercise is reasonably within the meaning of due process.

Whether the mining operation will constitute a common law

[34] 25 Ohio Op. 2d 295, 195 N.E.2d 829 (C.P. Tuscarawas County 1963). *See* Midland Elec. Coal Corp. v. Knox County, 1 Ill. 2d 200, 115 N.E.2d 275 (1953); East Fairfield Coal Co. v. Booth, 166 Ohio St. 379, 143 N.E. 2d 309 (1957). The East Fairfield court stated: "[W]e must consider the protective effect of the constitutional guaranties upon the owner of the land in question; whether the power exists to forbid the use must not be considered abstractly, but in connection with all the circumstances and locality of the land itself and its surroundings." 166 Ohio St. at 382, 143 N.E.2d at 311.

[35] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Buhler v. Racine County, 33 Wis. 2d 137, 146 N.W.2d 403 (1966).

[36] 40 Cal. 2d 552, 254 P.2d 865 (1953).

nuisance is not controlling in determining the validity of a zoning ordinance, but the law of nuisances may be consulted for the helpful assistance of its analogies in ascertaining the reasonableness of the controls.[37] A modification of this approach is advanced in *Kane v. Kreiter*[38] where, in addition to considering the reasonableness of the prohibition, the court stated that the desired control would be valid only if it prohibited what would become an actual nuisance.

Aesthetic considerations are generally held to be insufficient, when unsupported by other factors, to sustain the zoning power although there is authority indicating the law in this area is not settled and that a solely aesthetic approach may have a definite relation to the public welfare.[39] Aesthetics are usually an auxiliary consideration, with the validity of controls on mineral extraction supported by other considerations.[40] The North Carolina Supreme Court has taken the position that aesthetic factors alone are insufficient to support use of the police power.[41]

While needing support from other factors, aesthetics have played an influential role in decisions upholding zoning controls of mining activities. The court in *Town of Burlington v. Dunn*[42] seemed to be swayed by aesthetic considerations of possible consequences in upholding a zoning ordinance preventing the removal of top soil from land within the town. They discussed the disagreeable dust and noise that would result from machinery removing the soil but considered, as more important, that a "desert" area would remain after removal of the top soil and that such an unsightly waste in a residential area would permanently depress the value of surrounding property. An interesting approach was taken by the court in *Midland Electric Coal Corp. v. Knox County*,[43] invalidating a zoning prohibition on strip mining of coal, where they

[37] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *cf.* Township of Bloomfield v. Beardslee, 349 Mich. 296, 84 N.W.2d 537 (1957).

[38] 25 Ohio Op. 2d 295, 195 N.E.2d 829 (C.P. Tuscarawas County 1963).

[39] 58 AM. JUR. *Zoning* § 30 (1948). In Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967), the court overruled prior New York cases and held that aesthetic objectives alone will support a zoning ordinance although the exercise of the police power should not extend to every artistic conformity or nonconformity.

[40] *See* Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (S.D. Cal. 1946).

[41] State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959). This case did not involve regulation of surface mining activities.

[42] 318 Mass. 216, 61 N.E.2d 243, *cert. denied*, 326 U.S. 739 (1945); *accord*, Billerica v. Quinn, 320 Mass. 687, 71 N.E.2d 235 (1947).

[43] 1 Ill. 2d 200, 115 N.E.2d 275 (1953).

distinguished the *Dunn* case by a casual remark that coal is not as plentiful as top soil.

Nonconforming uses may generally be continued irrespective of subsequently enacted prohibitions. In controls over mining and quarrying this is sometimes extended to permit continuance of the nonconforming use over the entire property in question and not restricted solely to the portion which was mined or quarried prior to adoption of the prohibition.[44] Contrary to this position are the decisions which have found that the continued operations "vary" from the prior uses and therefore are not within the nonconforming uses doctrine. In *De Felice v. Zoning Board of Appeals*[45] a change in the mechanical process for washing and screening sand prior to its removal from the sand pit was sufficient to prevent the altered process from being an existing use within the zoning classification. The *Dunn* court also refused to consider the removal of top soil as an existing use when the prior use was a gravel pit from which the top soil had been removed.

B. *Regulation of a Use*

Use of the zoning power to regulate, rather than to prohibit, surface mining activity has taken the format of applying a zoning classification to an area but permitting the extraction as a special use if a special permit is obtained. "Special use" is defined as a method of land use control where the zoning ordinance retains the usual residential, commercial and industrial zones, and in addition establishes special uses that are permitted if approved by a zoning board or governing legislative body.[46] The purpose of a special use is to provide the board with a procedure for the alleviation of land usage restrictions which result in limitations bearing no reasonable relation to the objectives of the police power.[47] The government's ability to regulate specific onsite activities and to require other conditions to be fulfilled is treated in a subsequent discussion of state acts.

The general rule of reasonableness applies to the regulation and to the action of the agency issuing the special use permits. In *La*

[44] Annot., 10 A.L.R.3d 1226 (1966).

[45] 130 Conn. 156, 32 A.2d 635 (1943); *see* Wilbur v. Newton, 302 Mass. 38, 18 N.E.2d 365 (1938).

[46] Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960).

[47] City of Warwick v. Del Bonis Sand & Gravel Co., 209 A.2d 227 (R.I. 1965).

Salle National Bank v. County of Cook[48] an ordinance zoning an area for heavy industry also provided for quarrying as a special use upon issuance of a permit by the county commissioners. The commissioners refused to issue a special permit for the quarrying of limestone. The court considered evidence of lower property values, pollution of wells, harmful effects due to the general noise, and the dirt and attractive nuisance qualities and held the commissioner's refusal to be reasonable and not arbitrary or capricious.[49] Decrease in value of the zoned deposits was also considered to be an insufficient basis for invalidating the ordinance. However, refusal to issue a special permit was held to be an unenforceable regulation of quarrying in *City of Warwick v. Del Bonis Sand & Gravel Co.*[50] where sand and gravel were being removed prior to the enactment of a zoning ordinance requiring a permit for continuation of the operation.

Powers delegable to a board in the issuance of a special permit were etended in *Houdaille Construction Materials, Inc. v. Board of Adjustment*[51] where the court upheld the board's imposition of certain performance standards that were in addition to the standards required by the zoning ordinance. Although the company could meet the standards of the ordinance, the court further required it to meet the board's additional standards that were considered to be reasonable.

Dangers of infringement of equal protection rights are prevalent in the issuance or denial of special permits. Provisions for permitting a special use are likely to authorize inadvertent or arbitrary treatment of a specific operation that is not afforded other similar ones; and they are likely to authorize any given operation having essentially identical effects as non-permitted operations.

Considering these discriminatory aspects, the court in *Town of Caledonia v. Racine Limestone Co.*[52] held that requiring a permit

[48] 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965). The court also gave six guidelines for determining whether a zoning ordinance is valid or is invalid as a taking without compensation.

[49] *Accord,* Raimondo v. Board of Appeals, 331 Mass. 228, 118 N.E.2d 67 (1954).

[50] 209 A.2d 227 (R.I. 1965).

[51] 92 N.J. Super. 293, 223 A.2d 210 (App. Div. 1966).

[52] 266 Wis. 475, 63 N.W.2d 697 (1954). *Accord,* Northern Ill. Coal Corp. v. Medill, 397 Ill. 98, 72 N.E.2d 844 (1947) where the ordinance was held to discriminate against strip miners unless it regulated everyone and every industry that endangered the public health or conservation in a manner similar to strip mining.

to operate a stone quarry in areas zoned as agricultural, but not requiring one for similar quarries in industrial zones or for other mining operations in agricultural zones, was an unreasonable classification and not germane to the police power objectives. The court emphasized that any ordinance which limits or restricts the right of a person to engage in a legitimate business must apply equally to all persons engaged in a like business where the circumstances and conditions are similar.

Zoning ordinances providing for a variance from the zoned classification are subject to rules similar to those pertaining to special uses. Discretionary refusal of a board to grant a permissive variance for sand and gravel removal in an agricultural-residential district was held in *Calcagno v. Town Board*[53] not to be a taking of property without compensation when the court found the evidence insufficient to establish that the property met the criteria for a variance within the ordinance.

V. Direct Prohibitions and Regulations (non-zoning)

Direct prohibitions and regulations, as distinguished from zoning legislation, have been upheld as a valid exercise of the police power where the restrictions exemplify a substantial and definite purpose to serve the public and the means adopted bear a reasonable relationship to the accomplishment of this purpose. Such controls are generally predicated on protection of the public safety. General prohibitions having no apparent basis for their action, particularly when left to the unrestrained control of a governing authority, are usually held to be invalid.[54]

The requisite relationship to the public health and safety is demonstrated in *Village of Spillertown v. Prewitt*[55] where a municipal ordinance prohibited strip mining of coal within the city. The ordinance declared the stripping method to be dangerous and hazardous to the person and property of the citizens and was predicated on the operation's proximity to houses where small children played and on the tendency of prior excavations to fill with water. Holding the operation to be an obvious danger to the public safety, the court refused to invalidate the ordinance as a taking of property without compensation or as violating due process. It found the

[53] 265 App. Div. 687, 41 N.Y.S.2d 140 (App. Div. 1943).
[54] Annot., 10 A.L.R.3d 1226 (1966). See particularly § 13 and §§ 15-18.
[55] 21 Ill. 2d 228, 171 N.E.2d 582 (1961).

ordinance to be reasonable and the preclusion of the most profitable use of the property not to violate the owner's constitutional rights.[56]

The emphasis placed on protection of the public safety is apparent upon considering that the *Prewitt* court, which took a liberal view when the public safety was obviously endangered, was the same court that earlier, in *Midland Electric Coal Corp. v. Knox County*,[57] had adopted a strict approach and invalidated a zoning ordinance prohibiting strip mining upon a failure to find a substantial relationship between the prohibition and the preservation of the public health and safety. The *Midland* operation was considered to have no detrimental effect on neighboring persons or properties, and the land was suitable for reclamation as agricultural.

Principal opposition to a mining prohibition is found in *Pennsylvania Coal Co. v. Mahon*[58] which held an attempt to prohibit coal mining within a city to be an unconstitutional taking without compensation. The value of *Pennsylvania Coal* as precedent for this position is weakened by the United States Supreme Court's subsequent recognition of comprehensive zoning and its necessarily prohibitory effect on commercial activities.[59]

Validity of direct legislation as a proper use of the police power received substantial support in *Goldblatt v. Town of Hempstead*.[60] A city had grown around a sand and gravel quarrying operation and a 20-acre lake created by the excavations. A prior ordinance requiring a wire fence around the land and specific berm and slope requirements was complied with by the operator, but an attempt to prohibit the quarrying through zoning legislation failed when the operation was found to be a prior nonconforming use. An ordinance directed at regulation of the quarrying provided that no excavation could be made below two feet above the maximum ground water level, prior excavations below the water level must be refilled, and a permit must be obtained. The United States Supreme

[56] *See* Schreiber v. Town of Cheektowaga, 195 Misc. 748, 91 N.Y.S.2d 403 (Sup. Ct. 1949).

[57] 1 Ill. 2d 200, 115 N.E.2d 275 (1953).

[58] 260 U.S. 393 (1922). *Accord, Ex parte* Kelso, 147 Cal. 609, 82 P. 241 (1905); *see* note 12 *supra* and accompanying text.

[59] *See, e.g.*, Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945), for a discussion of the effect of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) on the earlier view taken by the Supreme Court in the *Pennsylvania Coal* case.

[60] 369 U.S. 590 (1962). *Accord*, Farmington River Co. v. Town Plan & Zoning Comm'n, 25 Conn. Supp. 125, 197 A.2d 653 (Super. Ct. 1963).

Court upheld the city's attempt to enjoin the operation in violation of the ordinance despite the fact that it deprived the property of its most beneficial use and, in essence, amounted to a prohibition of the beneficial use to which the property had previously been devoted. Conceding that no set formula exists for determining where regulation ends and "taking" begins, the Court considered a comparison of values before and after the regulation to be relevant but by no means conclusive, and relied on their previously established rule that depriving property of its most beneficial use does not render an ordinance unconstitutional.[61] Instrumental in the Court's decision was the legislative intent that the ordinance serve as a safety measure, and it was held to be a reasonable exercise of the city's police power.

Regulatory legislation may be considered a taking without compensation if it interferes with operations which do not injure others in their person or property[62] or if the granting of permission to engage in the lawful activity regulated by the legislation is left to the unrestricted discretion of an administrative agency,[63] thereby not insuring a reasonable relationship to the public safety and welfare.

VI. State Regulations

Fortified by judicial acceptance of prohibitory and regulatory controls, by both zoning and direct legislation, as valid exercises of the police power, the more recent trend indicates an increasing role by the states through direct regulation of surface mining. This state role is in addition to the continuing local regulatory schemes. Early state controls were essentially limited to mine safety requirements, but these are being replaced or supplemented by statewide regulations and an Interstate Compact which concentrate on rehabilitation of the disturbed land and protection of neighboring properties. A principal development is the interest of the federal government in this area. Identical bills are pending in the House of Representatives and the Senate.[64] These bills would authorize the establishment of an office within the Department of the Interior

[61] Hadacheck v. Sebastian, 239 U.S. 394 (1915).
[62] *Ex parte* Davison, 321 Mo. 370, 13 S.W.2d 40 (1928).
[63] Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (S.D. Cal. 1946); Morton v. Superior Court, 124 Cal. App. 2d 577, 269 P.2d 81 (1954).
[64] S. 217, 90th Cong., 1st Sess. (1967); H.R. 4719, 90th Cong., 1st Sess. (1967).

for administration of their provisions and are directed to the "reclamation, acquisition, and conservation of lands and water adversely affected by coal mining operations."[65] They would require an operator to obtain a permit, post a bond, preplan reclamation procedures, and report his progress. Provisions are also included for rendering financial and technical assistance to state and local agencies. Coverage of the bills extends to previously mined coal lands as well as to land to be affected by future strip mining of coal.

Regulations at the state and federal levels will assume legal and practical difficulties of a more significant magnitude than have been encountered at the local levels. The most outstanding of these problems is affording equal protection to all affected operators. Inherent in a more widespread control are the difficulties of treating all similar operations in an identical manner or of justifying any preferential treatment directed at a particular class as a reasonable classification. State regulations also face the problem of not being correlated within an overall comprehensive scheme of usage regulations, and therefore encounter the judicial objections experienced by local direct prohibitions. The administration of a statewide enactment raises practical questions as to the requisite administrative structure and the ever present dilemma of what authority may and should be delegated to various subordinate echelons. Offsetting these adverse aspects is the potential in a state structure for better trained and more competent professional personnel and for research and development facilities.

At least nine states[66] have adopted statewide enactments designed to eliminate, or contain within acceptable bounds, the undesirable effects attendant with surface excavations and to reclaim the affected land. Characteristics common to all or to a majority of these legislative schemes include: (1) an application for a permit must be filed; (2) the operator is required to post a performance bond to insure compliance with the law; (3) the operator must sub-

[65] *Id.*

[66] ILL. ANN. STAT. §§ 180.1-.13 (Supp. 1966); IND. STAT. ANN. §§ 46-1501 to -1528 (Supp. 1967); KY. REV. STAT. §§ 350.010-.990 (Supp. 1966); MD. ANN. CODE art. 66C, §§ 657-674 (Supp. 1967); OHIO CODE ANN. §§1513.01-.19 (Supp. 1966); PA. STAT. ANN. chap. 4, §§ 681.1-.22 and chap. 6, §§ 1396.1-.21 (1966); TENN. CODE ANN. chap. 15 (Supp. 1967); VA. CODE ANN. chap. 15, §§ 45.1-162 to -179 (1967); W. VA. CODE §§ 22-2A-1 to -14 (1966). The federal government and forty-six states regulate surface mining on government owned or controlled lands, but this discussion will be limited to governmental controls exerted on privately owned lands.

mit with his application a description of lands to be mined, and periodic reports on the progress of the operation; (4) the disturbed area must be reclaimed within specified time limits; (5) the disturbed land must be graded to varying degrees; (6) performance bonds are held until the state concludes that the reclamation has met the requirements of the law; (7) failure to complete reclamation results in forfeiture of the bond and, in some cases, prohibits the issuance of new permits to the operator involved; and (8) criminal penalties are prescribed for operating without a permit or license. Three of the state laws regulate the surface mining of all minerals,[67] one state law applies to all minerals except limestone, marble and dimension stone,[68] one state law applies to clay and coal,[69] and the remaining four apply only to coal.[70]

Judicial testing of these state enactments is found in three leading cases decided during the period 1947-49. Of particular interest in all three is the courts' concern with equal protection of the rights of the operators and property owners. The Illinois act[71] regulating strip mining of coal was challenged by seventeen coal companies in a successful attempt to enjoin its enforcement.[72] The state pleaded its police power as the basis for the act; but the court, in examining the provisions, held that preservation of the public health was not the object and purpose of the regulation. This was predicated on the act's requirement that the land be restored to its original configuration, which would include the restoration of a mosquito breeding pond if one had originally existed, and that the final open cut could be left unfilled if there was insufficient material available for refilling, thereby leaving one open excavation for the accumulation of water. The court indicated it would find a reasonable relation to protecting the public health if the act required the elimination of all ponds and other sources for the accumulation of water. A conservation argument as justification for the requirement that the land be restored to a condition suitable for row crops, rather than reclaimed by reforesting or reseeding of the unleveled ridges as

[67] Illinois; Indiana; West Virginia.
[68] Tennessee.
[69] Kentucky.
[70] Maryland; Ohio; Pennsylvania; Virginia.
[71] The Illinois act, as well as those of Pennsylvania and Maryland, contained provisions essentially identical to the common characteristics discussed in the preceding textual paragraph. Selected provisions of these acts are reiterated only as they are pertinent to the courts' considerations.
[72] Northern Ill. Coal Corp. v. Medill, 397 Ill. 98, 72 N.E.2d 844 (1947).

previously conducted by the individual operators, was rejected as a confiscation on the basis that the state cannot compel a private owner, at his own expense, to convert his land to what the state considers a better usage. The court further stipulated that, even assuming the act to be a valid protection of the public health, it was fatally defective as discriminatory against coal strip mining. A regulation preventing the creation of water-filled excavations and requiring contouring suitable for cultivation was held to be an unconstitutional discrimination against coal operators unless it applied equally to all operations leaving such excavations or land unsuitable for cultivation. The court reiterated that it is the method of mining employed, not the nature of the product removed, that produces the undesirable result, and the object of the legislation must be to prevent the use of that *method.* The Illinois law was subsequently amended to eliminate these objectionable features and to encompass the surface mining of *all* minerals within the State.

The Pennsylvania act regulated bituminous coal strip mining operations. In an action to enjoin enforcement of the act,[73] the court upheld the legislature's authority to create a classification for regulation and would not subject this classification (bituminous coal miners) to judicial revision unless it was grounded on artificial or irrelevant distinctions rather than real distinctions. Sufficient evidence of real distinctions between bituminous coal operations and other mining operations was found, and the act was upheld as a constitutional exercise of the police power. One justice dissented on the basis of a violation of equal protection under the fourteenth amendment upon finding no material differences between persons subject to the act and persons similarly situated but not subject to it. The dissent failed to find sufficient distinctions to justify legislative regulation of bitunimous coal operations while not regulating *all* persons engaged in open pit or strip mining.[74] Coverage of the law has now been expanded to include anthracite and bituminous coal operations. A challenge to the registration fee as an unconstitutional tax, resulting from the non-uniformity of its application, was countered by treating it as a license fee for the privilege of mining; therefore it was not subject to the requirement of uniformity of taxation.

[73] Dufour v. Maize, 357 Pa. 309, 56 A.2d 675 (1948).

[74] The non-regulated operations included limestone, shale, flint, clay, ganister, iron ore, and cannel coal.

The Maryland act regulating coal operations was the object of a suit for a decree to declare it unconstitutional and for injunctive relief to restrain its enforcement.[75] This legislation was found to have a real and substantial relation to the police power with a purpose of preserving the public health and safety, but was held to be unconstitutional in violation of equal protection rights due to the exclusion of one county from its coverage. An increase in the cost of mining was considered to be immaterial. In answer to a challenge on denial of equal protection through the act's non-coverage of limestone and slate quarries, the court, citing from *Jeffrey Manufacturing Co. v. Blagg*,[76] upheld the state's power to classify the subjects of legislation. Such classification was held to be within the equal protection clause provided it is not arbitrary or unreasonable. The dangers from limestone and slate quarrying were found to be considerably less than the dangers from strip mining of coal, therefore it was reasonable to exclude them from the act's coverage. The court further upheld the delegation of authority to the Director of the Bureau of Mines, an administrative official, to set the required bond between statutory limits of 5000 dollars to 20,000 dollars and to decide the degree of refilling that would be required.

VII. North Carolina

Twentieth century developments in North Carolina have brought this state to the threshold where impending governmental control of surface mining activities has become a paramount public concern, particularly in selected areas of the state. Entrance of state and local legislative influence into this area has been minimal, but recent activities and legislation indicate a transitional period has been initiated.

A framework within which the state and local governments may operate is available. The North Carolina Constitution provides:

> The General Assembly shall not pass any local, private, or special act or resolution relating to health, sanitation, and the abatement of nuisances; . . . regulating labor, trade, mining, or manufacturing. . . . Any local, private or special act or resolution passed in violation of the provisions of this section shall

[75] Maryland Coal & Realty Co. v. Bureau of Mines, 193 Md. 627, 69 A.2d 471 (1949).
[76] 235 U.S. 571 (1915).

be void. The General Assembly shall have power to pass *general laws* regulating matters set out in this section.[77]

Through this provision the General Assembly is authorized to enact statewide legislation within its police power but still subject to the guarantees of due process and equal protection afforded the individual and his property.[78] There are presently no general regulations of surface mining activities of the nature discussed in this article, although the Interstate Mining Compact commits the state to establishment of a program for the conservation and use of mined lands.

Entrance of North Carolina in 1967 as a member of the Interstate Mining Compact[79] is a milestone in the state's recognition of the pressing problems facing its mining activities. The Compact represents the realization by its member states of the adverse and undesirable effects of mining on public and private interests, of the need for regulation, conservation and restoration, and of the state's position of responsibility in protecting the interests of all affected parties. Each member state is committed to formulating and establishing an effective program for the use and conservation of productive mineral lands through the establishment of standards, enactment of laws, and continuation of currently effective schemes. This program must be directed to the protection of the public and individual landowners; to the conduct of mining in a manner designed to reduce adverse effects on the economic, residential, recreational or aesthetic value and utility of land and water; to the requirement for restoration and rehabilitation of mined lands; and to the abatement and control of land, water and air pollution. The Interstate Mining Commission has the function to study operations and techniques, make recommendations, gather and disseminate information, and cooperate with the federal government and any public or private entities having interest within the purview of the Compact.

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[77] N.C. CONST. art. II, § 29 (emphasis added).

[78] U.S. CONST. amend XIV, § 1; N.C. CONST. art. I, § 17.

[79] Ch. 946, [1967] N.C. Sess. Laws. The Compact is sponsored by the Council of State Governments and became effective upon enactment by four states. It provides for a Commission to be composed of a representative (the Governor or an alternate) from each member state and for an advisory body in each member state. The North Carolina advisory body will be an eleven-member "Mining Council" composed of state administrative officials, members of the General Assembly, representatives of mining industries, and representatives of nongovernmental conservation interests.

North Carolina's commitment to a program designed to accomplish these purposes places the burden on the state to enact general laws or to delegate adequate authority to state agencies or local governments. Accomplishment of this through general laws creates the difficulties of statewide legislation over the entire surface mining industry or, as a minimum, over one particular industry, *e.g.* gravel quarry operations. The wide range of topography, cultivation and population density existing across the breadth of the state poses significant problems for any control that would be appropriate and acceptable under the various situations. Large variations of interests must be co-ordinated in the establishment of such controls. The need for regulation is also not as prevalent in certain areas of the state as in other areas where metropolitan centers are developing or where adverse mining practices have developed or will probably develop. North Carolina does not have a single extractive industry of essentially statewide import, as is found in several of the coal mining states, which warrants statewide regulation of the industry. These factors indicate that local controls would be more effective with incentive and assistance furnished by the state. To ensure the local governments' ability to enact adequate regulations, they should be delegated both zoning and direct regulatory powers.

Local governments have only the regulatory powers delegated by the General Assembly.[80] The power for both counties and municipal corporations to effectuate *zoning* controls has been delegated. "For the purpose of promoting health, safety, morals or the general welfare," the boards of county commissioners and the legislative boards of incorporated towns are empowered to regulate and restrict "the location and use of buildings, structures, and land for trade, industry, residence or other purposes, except farming."[81] The statutes also enable the local bodies to provide for a board of adjustment to determine and vary the application of enacted regulations in harmony with their general purpose and intent and in accordance with rules contained within the regulations. The 1967 General Assembly amended both statutes to permit the local legislative bodies or boards of adjustment to issue special use permits or conditional use permits in accordance with procedures contained

[80] *See* Kass v. Hedgpeth, 226 N.C. 405, 38 S.E.2d 164 (1946).
[81] N.C. GEN. STAT. §§ 153-266.10, 160-172 (Supp. 1967).

in the regulations and to impose reasonable and appropriate conditions and safeguards on the permits.[82]

Powers of *direct* prohibition and regulation are furnished to municipal corporations "to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof."[83] The county commissioners were delegated power "to prevent and abate nuisances, whether on public or private property; . . . to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience and welfare of the people . . . ; and to make and enforce any other types of local police, sanitary, and other regulations . . . ."[84] Due to the exclusion of forty-four counties from the coverage of this statute, the North Carolina Supreme Court held it to be a local act and therefore void under article II, section 29 of the Constitution.[85] As a consequence of this ruling, any controls to be exerted by the county commissioners under the present enabling laws must be under their zoning authority.

Success of local governments in enacting zoning or direct controls will be aided by the position of the North Carolina Supreme Court that when an ordinance is enacted within the grant of power to the local body, there is a presumption that it is reasonable.[86]

An example of the county commissioners' utilization of their zoning power is furnished by the recently enacted amendments to the Chapel Hill Township Zoning Ordinance.[87] The ordinance previously permitted extractive uses in residential and industrial districts upon conformance with minimum restrictions, approval of a rehabilitation plan, and issuance of a permit by the County Planning Board.

As amended, the ordinance creates a Rural Industrial District (RID) providing for extractive uses, and a Rural Processing District (RPD) providing for extractive use processing. Extractive

[82] Ch. 1208, [1967] N.C. Sess. Laws.
[83] N.C.GEN. STAT. § 160-200(6) (1964).
[84] N.C. GEN. STAT. § 153-9(55) (Supp. 1965).
[85] High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965). This statute was not amended by the 1967 General Assembly.
[86] *See* Gene's, Inc. v. City of Charlotte, 259 N.C. 118, 129 S.E.2d 889 (1963).
[87] Orange County, N.C., Chapel Hill Township Zoning Ordinance § 8 (1967).

uses are defined to include mining, quarrying, stripping, and other removal of natural resources for non-farming purposes and are permitted only in RID and RPD districts. Normal sand, gravel and quarrying removal *and* processing operations are permitted in the RID districts, but for other extractive uses *only* the removal operation is permitted in RID districts. Both situations are subject to special provisions.

An *annual* permit must be obtained for all extractive uses. Sand, gravel and quarrying operations may be under a Limited Extractive Use Permit issued by the County Board of Adjustment and subject to provisions similar to those existing prior to the amendment. All other operations must be under an Extractive Use Permit issued after a public hearing by the County Commissioners and on a recommendation by the County Planning Board. The Extractive Use Permit can be obtained only after an operations plan and program is submitted and approved, an operations bond is filed, a rehabilitation plan and program is submitted and approved, and a rehabilitation bond is filed. A fee of 150 dollars is charged for the application. Existing extractive uses must comply with the provisions of the ordinance. The operation plan must include a detailed topographic map showing estimated ultimate maximum depth and surface extent of the operation; provisions for a buffer strip of at least 200 feet; and provisions for testing and control to maintain pre-existing air, surface water, and ground water qualities. Strict noise and vibration limits are imposed. The rehabilitation plan must include a topographic map and an aerial photograph of the proposed excavation site and detailed plans for returning the site to the condition shown on the map and photograph. Rehabilitation includes regrading, replacement of the topsoil, refertilization, and vegetation replacement. Failure to comply with the plans, as approved, will result in forfeiture of the bonds and revocation of the permit.

The stated objectives of the Chapel Hill Township ordinance are to further the general welfare of all residents by safeguarding property values and to provide for residential, commercial and industrial growth in Orange County. The unique intermingling of industrial technology and research facilities with the advanced educational facilities in the area makes these objectives particularly applicable and, apparently, necessary. The avowed legislative

intent to further this growth and to protect property interests, with the interrelated aesthetic considerations of an "historical" surrounding, should provide an ample basis of reasonableness for the classification and regulation of land uses.

Certain difficulties may be encountered in the application of the ordinance. The provision for topographic rehabilitation to the original configuration presents the same objection that the court found in the Illinois act[88] relative to requiring the reconstruction of a mosquito breeding pond, if one had previously existed. By requiring approval of the rehabilitation plan and providing for its modification by the County Commissioners, the ordinance is not forever fixed to this objective of the plan; it provides sufficient flexibility for a court to distinguish the Illinois difficulty. Testing for dust and noise qualities on all property lines and adherence to stringent standards in suppressing them appear to present problems of first impression relative to surface removal operations. There is a possibility that compliance with these requirements will make an operation economically unattractive, therefore the ordinance would have the effect of prohibiting a desired usage. This objection is countered by the majority approach of not invalidating a *zoning* control that prohibits a use, if it is otherwise within the police power.[89] To the credit of this ordinance is its adoption prior to the influx of any sizeable new mining operation and its notification to any potential operator of the requisite quality standards for activities in the regulated districts.

The Chapel Hill Township Zoning Ordinance facilitates a comparison with the previously discussed benefits and detriments resulting from statewide regulations. An attempt to impose the above discussed quality control standards throughout the state would raise serious questions of equal protection for an operation in Guilford County as opposed to a similar operation in Brunswick County. It is hardly conceivable that the same noise level values could be reasonably imposed in both areas. A satisfactory and mutually beneficial compromise would be the use of local regulations, adopted and enforced at the city and county level, with state agencies and their professional staffs providing advisory, research and testing assistance. An additional consideration, and one of primary con-

[88] Northern Ill. Coal Corp. v. Medill, 397 Ill. 98, 72 N.E.2d 844 (1947).
[89] *See* note 26 *supra.*

cern to many political and industrial factions, is that regulations at the local level should tend to deter "big brother," be it the state or federal government, from imposing its own influence and solutions on the local scene.

WILLIAM H. THOMPSON

Constitutional Law—Legislative Election of a Governor

When the "one man, one vote" principle first arose in a case concerning the county unit system in Georgia,[1] the question asked was how far it would be extended. The answer came quickly in two historic decisions. The Court ordered that congressional districts be approximately equal in population,[2] and that both houses of state legislatures be apportioned on the basis of population.[3] Yet these decisions raised more questions concerning what limitations the Court would put on the "one man, one vote" maxim. These questions were partially answered in *Fortson v. Morris*,[4] where the Court, with a vigorous dissent, did put a limitation on the applicability of the "one man, one vote" concept,[5] refusing to use it to prevent the legislative election of a governor in which the winning candidate might have been (and, in fact, eventually was) the loser at the polls.

The case arose out of the 1966 race for Governor of Georgia. Democrat segregationist Lester Maddox contested with conserva-

[1] Gray v. Sanders, 372 U.S. 368, 381 (1963): "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

[2] Wesberry v. Sanders, 376 U.S. 1 (1964).

[3] Reynolds v. Sims, 377 U.S. 533 (1964).

[4] 385 U.S. 231 (1966).

[5] Since *Fortson v. Morris* the Supreme Court has limited further the application of "one man, one vote." In Sailors v. Bd. of Educ., 387 U.S. 105 (1967), *aff'g* 254 F. Supp. 17 (W.D. Mich. 1966), the Court held that "one man, one vote" was not applicable to the selection of a county school board because the choice was not by an elective process, no election being required because the offices were nonlegislative. In Dusch v. Davis, 387 U.S. 112 (1967), *rev'g* 361 F.2d 495 (4th Cir. 1966), the Court refused to apply "one man, one vote" to the at-large election of a city council, where there was a requirement that the members reside in certain boroughs. The Court, however, did not reach the merits of applying "one man, one vote" to local governments in these cases, or in Moody v. Flowers and Supervisors of Suffolk County v. Bianchi, 387 U.S. 97 (1967), dismissed on jurisdictional grounds.

tive Republican Howard "Bo" Callaway. Mainly as a protest move, a write-in campaign was launched for Ellis Arnall, a former governor, and a man of more liberal persuasions. The votes received by Arnall were enough to prevent either Callaway or Maddox from obtaining a majority.[6] This result invoked a section of the Georgia Constitution[7] which provides that if no candidate receives a majority the General Assembly shall choose among the two candidates receiving the highest number of votes, regardless of which one had a plurality.

The right of the Georgia legislature to make this choice was challenged in federal district court. In *Morris v. Fortson*[8] the legislature was enjoined from selecting the governor, the court relying heavily on *Gray v. Sanders*[9] and reasoning as follows:

> This [allowing the legislature to choose a candidate who did not receive a plurality] would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number may be ignored. In addition each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate.[10]

The Court in *Fortson v. Morris* reversed, by a 5-4 decision, the district court's holding, saying tersely: "There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select

[6] Howard H. Callaway—449,894 or 47.07%; Lester G. Maddox—448,044 or 46.88%; Ellis G. Arnall—57,832 or 6.05%.

[7] GA. CONST. art. V, § 1, para. 4:

> The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary for a choice.

[8] 262 F. Supp. 93 (N.D. Ga. 1966).

[9] 372 U.S. 368 (1963).

[10] 262 F. Supp. 93, 95 (N.D. Ga. 1966).

its governor."[11] The dissent, composed of the "liberal" faction of the Court,[12] rested their rationale upon two major points: (1) A malapportioned legislature, such as the Georgia legislature,[13] should not be permitted to choose a governor; (2) In any case, a legislative choice of governor, after the popular will has made a choice,[14] is in violation of the equal protection clause of the fourteenth amendment,

[11] 385 U.S. at 234.

[12] The Chief Justice, and Justices Brennan, Douglas, and Fortas. But Justice Black, normally a "liberal," joined with the "conservatives"—Justices Clark, Harlan, Stewart, and White—and wrote the majority opinion.

[13] See Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962).

[14] In a separate dissenting opinion, Justice Fortas, joined by the Chief Justice and Justice Douglas (but not Justice Brennan), went even further, casting doubt on whether a legislature could elect its governor in any circumstance:

> Moreover, the Court today announces in an offhand manner, as a side effect of today's decision, without adequate argument or consideration, that a State may today, as some States did long ago, provide that its Governor shall be selected by its legislature in total disregard of the voters. I do not believe that the issue is so easy. 385 U.S. at 246-47.

Justice Fortas does not say precisely on what basis such a system would be unconstitutional, whether due process, equal protection, or guarantee of a republican form of government (long recognized by the Court as being a political matter). In Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957), Chief Justice Warren stated: "Moreover, this Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments. . . ." (see also Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902)). If, therefore, it would be permissible for a state not to have an independent and separate executive, it is difficult to see how the manner in which a state chooses a governor becomes a constitutional issue, unless it violates some explicit constitutional mandate (*e.g.* not permitting Negroes to vote for governor). Furthermore, even though all states now elect their governor by popular vote (at least initially), Fortas's dictum is more than an academic nicety. How would such a viewpoint affect the generally successful and progressive city manager forms of urban government (in which the city's top executive is not chosen by the people), if, for instance, New York City, which has a larger budget than New York State, chose to adopt such a system? Would not whatever rights Justice Fortas thinks would be denied the people of New York State, if not permitted to choose their governor, be equally denied to the eight million residents of New York City if not permitted to choose their de facto mayor?

Justice Fortas also develops a rather clumsy analogy by discussing a hypothetical situation where the governor selects the legislature, which he assumes, no one would deny is unconstitutional. But consider the language in Willis v. Blue, 263 F. Supp. 965, 969 (N.D. Ga. 1967), citing the principle case: "There is no federal requirement intended to compel a state to elect any of its officers or agents through the popular vote of the people. So long as the method does not constitute an *unreasonable delegation* of power, it is sufficient." Few would deny that permitting a governor to select a legislature would be an "unreasonable delegation," *i.e.* that it would thwart the very purpose of a democracy—rule by the people or their representatives. The converse, however, does not follow. It would seem hard to call legislative election of a governor an "unreasonable delegation" that would raise government as a citadel above the control of the popular will.

especially as interpreted in *Gray v. Sanders*.[15] These points shall be considered in turn.

Election by a Malapportioned Legislature

In *Toombs v. Fortson*[16] the district court, following the lead of the United States Supreme Court in *Baker v. Carr*,[17] ruled that Georgia's legislature was malapportioned because neither house was apportioned according to population. The Georgia legislature responded by adopting a new apportionment plan. In the meantime, however, the Supreme Court had handed down its decision in *Reynolds v. Sims*, ordering that both houses of state legislatures must be apportioned on a population basis. Following *Reynolds*, the district court in the second *Toombs v. Fortson* decision[18] held that a population deviation of as much as fifteen per cent between legislative districts would not satisfy constitutional requirements. However the district court gave the legislature until May, 1968 to come up with a new plan, and gave it de facto status until that time.[19] This decision was affirmed without comment by the Supreme Court.[20]

In accordance with this, the majority in *Fortson v. Morris* dismissed the challenge to an election by Georgia's malapportioned legislature: "[W]e held [in *Tombs v. Fortson*[21]] that with certain exceptions,[22] not here material, the Georgia Assembly could continue to function until May 1, 1968. Consequently the Georgia Assembly is not disqualified to elect a Governor as required by Article V of the State's Constitution."[23] The dissent, however, viewed it in a different light. Referring to the language of the majority just quoted above, the dissent, per Justice Fortas, said:

> This is indeed a weak reed for so monumental a conclusion. . . . We have declined to deprive a malapportioned legislature of its de facto status as a legislature. . . . [But] [i]f this Court

[15] 372 U.S. 368 (1963).
[16] 205 F. Supp. 248 (N.D. Ga. 1962).
[17] 369 U.S. 186 (1962).
[18] 241 F. Supp. 65 (N.D. Ga. 1965).
[19] Previously the district court had enjoined the legislature from proposing a new constitution, but this order was vacated and remanded by the Supreme Court, because, in the light of new facts, the issue had become moot. Fortson v. Toombs, 379 U.S. 621 (1965). However, the prohibition against proposing a new constitution while so malapportioned remains, by implication, in effect. See also note 26 *infra*.
[20] 384 U.S. 210 (1966).
[21] *Id.*
[22] Proposing a new constitution.
[23] 385 U.S. at 235.

> had foreseen that events would place the Georgia Legislature in a position to override the vote of a plurality of the voters and to select as Governor of the State the loser at the polls, I expect that it would have included this power as one of the 'exceptions,' forbidden to this Legislature which, this Court has held, functions only by judicial sufferance despite its constitutional infirmity. To a reader of *Gray v. Sanders, Fortson v. Toombs,* and *Toombs v. Fortson,* it must seem inconceivable that the Court would permit this malapportioned legislature to select Georgia's Governor in these circumstances. Indeed, the irony of the matter is that a three judge federal court held that the Georgia legislature was so malapportioned that it could not properly submit to the voters a new Constitution, adopted by both houses of the Georgia legislature, which would have abolished the provisions for legislative selection of a Governor[24] and have substituted a run-off or special election. . . . But now the Court holds that this same, unreformed legislature is not so malapportioned that it cannot itself select the Governor by direct action! I confess total inability to understand how the two rulings can be reconciled.[25]

What the Court might have said if it had foreseen the results of the 1966 Georgia gubernatorial election and what it actually did say are two different things. The basic issues, then, dividing the majority and dissent are these: (1) Should the Court add other exceptions to the granted de facto status of a malapportioned legislature when unforeseen contingencies arise? (2) Is a legislative election of a governor an act of the same quality or importance as the adoption of a new constitution? The answers to both the questions are basically subjective policy decisions. It should be noted that the reason malapportioned legislatures are given temporary de facto status is functional. Leaving a state without a legislature would grossly disrupt the political, economic and social well being of its people. In the Court's view, a malapportioned legislature is better than no legislature at all. It might well be said that a malapportioned legislature is better than an ineffective one. The possibility that every legislative act might be voided by a judicial afterthought would put the legislators in a straight jacket. What would happen, for instance, if the Georgia legislature, while functioning under "judicial sufferance," attempted a major revision of the penal code? Would it not be just as "inconceivable" that a malapportioned legislature should be allowed to affect such a change

[24] See note 35 *infra.*
[25] 385 U.S. at 245-46.

as to elect a governor? There is one possible distinction. The Court gave the Georgia legislature de facto status to "enact such legislation as shall properly come before it." Electing a governor is not legislation. Nonetheless, the Court specifically excepted from legislative power one thing only—proposing a new constitution. The truth of the matter is that the possibility of the Georgia legislature electing a governor never crossed the Court's mind. If it had, it is idle speculation to guess whether it would have been made an exception. A court may perhaps properly limit the power of a malapportioned legislature,[26] but such limitations should be prospective. Invalidating legislative acts or enjoining legislative power on an ad hoc[27] basis will result in uncertainty and instability, and put the Court in an undesirable political role which would confirm all the fears that Mr. Justice Harlan originally voiced in *Baker v. Carr*.[28]

Legislative Election and Equal Protection

There are three basic methods by which governors have been elected: (1) legislature alone; (2) popular vote alone; and (3) a combination of the popular vote and legislative action. Although many states, including Georgia before 1824, left the election to the legislature, no state employs such a method today. Only nine states leave the election entirely to the popular will,[29] while forty-one others have some form of legislative involvement. Thirty-eight[30]

[26] This issue is by no means clear. It was raised in Fortson v. Toombs, 379 U.S. 621 (See note 19 *supra*), but the Court did not reach the merits because of mootness. Justice Harlan's separate opinion implied that he, at least, did not favor limiting the power of a legislature once it has been allowed to function.

[27] And what would be the standard for ad hoc invalidation? The nature of the power to be exercised or the importance of the power? If it is the importance, is it the theoretical importance or the actual importance? In *Fortson v. Morris* the actual effect of legislative malapportionment on the result of the legislative election is nugatory. Under any scheme of apportionment the Georgia legislature would still have elected Lester Maddox as governor. Thus the dissent, while arguing for an additional limitation on the power of the Georgia legislature as though some great injustice were about to occur, based their rationale not on political realities but on theoretical abstractions. Whether such an approach in this particular context is wise or unwise is debatable. True, in general courts should ignore strictly political considerations. But when courts have entered such highly political areas as legislative apportionment, such considerations begin to become unavoidable.

[28] 369 U.S. 186 (1962).

[29] See 385 U.S. at 235 & n. 3.

[30] *Id.*

of these provide for legislative election when there is a tie vote.[31] Two other states, Mississippi and Vermont, have provisions similar to that of Georgia.[32]

Previous to 1824, the Georgia General Assembly chose the governor, the House selecting three candidates and the Senate choosing one of the three by majority vote.[33] On November 6, 1824 the Georgia Senate, by a 47-9 vote, called for a constitutional amendment setting up the present election system. Six days later the House approved the plan by a 90-10 vote.[34] Five times since then the same system has been incorporated into new constitutions, the latest being in 1945.[35] Thus, this method of choosing a governor had been a part of the Georgia Constitution for 142 years before it was challenged in this case.[36]

The principal difference between the majority and dissent centered around the question of the continuity of the electoral process. Under the majority's interpretation, election of the governor by the

[31] One method, at least, of settling a tie vote has generally been held constitutional—namely, drawing straws. *See* Webster v. Gilmore, 91 Ill. 324 (1878); Johnston v. State *ex rel.* Sefton, 128 Ind. 16, 27 N.E. 422 (1891); Keeler v. Robertson, 27 Mich. 116 (1873). But deciding by lot must be provided for by statute or constitutional provision. *See* State *ex rel.* King v. Solomon, 82 Neb. 200, 117 N.W. 348 (1908). Compare with *Fortson v. Morris* the words of the Indiana Supreme Court: "We can not concur with counsel, that where an election is held and results in a tie vote for opposing candidates, the General Assembly may not provide for determining the right to office otherwise than by making provision for another election." 128 Ind. 16, 18, 27 N.E. 422 (1890).

[32] MISS. CONST. art. V, § 141; VT. CONST. ch. II, § 39.

[33] GA. CONST. art. II, § 2 (1789). Note the nomination process provided for in this system. The 1824 Amendment, in a sense, gave the nomination process to the people, unless the people could muster a majority for one candidate, in which case they would elect.

[34] The lopsided vote, however, is not indicative of a grandiose plan by the General Assembly to extend the franchise. The same House that voted 90-10 for this amendment, turned down a bill providing for the popular election of presidential electors by a 45-55 margin.

[35] A proposed new constitution, however, would change this method of choosing a governor. It has been delayed because of malapportionment problems. See Toombs v. Fortson, 384 U.S. 210 (1966), *aff'g* 241 F. Supp. 65 (N.D. Ga. 1965); Fortson v. Toombs, 379 U.S. 621 (1965).

[36] It is interesting to note the similarity between this method of choosing a governor and the federal method of choosing a president. If a presidential candidate does not receive a majority of the electoral college vote (which usually means he would fail to receive a majority of the popular vote), the election reverts to the House of Representatives, which, with each state having one vote, chooses among the top three candidates. U.S. CONST. amend XII. While the Court has not been impressed by federal analogies, the question of whether they should be regarded as completely inapposite is discussed in note 63 *infra*.

legislature is an alternative procedure which commences upon the failure of the people to elect by majority vote. In other words, the right granted to the people under the 1824 amendment to elect their governor is limited to the general election, and when that election is over, the right simultaneously ceases.[37] The dissent, however, rejected this "alternate procedure" view by stating succinctly: "The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office."[38] The dissent argued that once the people are permitted to make a choice, their voice can not be silenced until an eventual winner is selected. The people's right *continues* beyond the general election and can not be overruled by any "alternate procedure." Thus, the dissent reasoned, to allow the legislature to disregard the plurality of the voters is ipso facto a violation of the equal protection clause.[39]

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[37] 385 U.S. at 233-34:

> It [the Georgia Constitution] set up two ways to select the Governor. The first, and preferred one, was election by a majority of the people; the second, and alternative one, was selection by the State Assembly if any one candidate failed to receive a majority of the popular vote. Under the second method, in the legislative election the votes of the people were not to be disregarded but the State Assembly was to consider them as, in effect, nominating votes and to limit itself to choosing between the two persons on whom the people had bestowed the highest number of votes. . . . A method which would be valid if initially employed is equally valid when employed as an alternative.

[38] *Id.* at 238.

[39] The rejection of the "continuity" theory by the majority was decisive in settling a third minor challenge to the legislative election—the pledge of the Democratic legislators. Each Democratic candidate in Georgia took the following pledge: "I further pledge myself to support at the General Election of November 8, 1966, all candidates nominated by the Democratic Party of the State of Georgia." This pledge was advanced as evidence that the Democratic legislators would not be free to choose between the two candidates. The majority quickly dismissed this contention by saying: "That election is over, and with it, terminated any promises by the Democratic legislators to support the Democratic nominee." 385 U.S. at 236. The dissent took a different view: "We would be less than naive to believe that the momentum of that oath has now been dissipated and that the predominantly Democratic legislature has now become neutral." *Id.* at 241-42. Yet as regards the pledge, it is not so important what the Court thought about "continuity" as what the legislators though about it. The only issue is whether or not the legislators felt bound by the pledge. Empirical data, while of course not available to the Court at the time of the decision, answers the question. The Democrats have a 229-30 edge in the Georgia legislature. Yet Maddox, the Democrat, won over Callaway by only a 182-66 margin. Therefore approximately thirty-six Democrats did not feel themselves bound by the pledge. Barring gross dishonor or apostasy on the part of the Democrats who voted for Callaway, it is apparent that the pledge did not have the continuity the dissent suggested (even if all the Democrats had remained loyal to Maddox, it would be merely *post hoc ergo propter hoc* reasoning to assume that the pledge was the motivating force).

There is evidence both in the language of the Georgia Constitution,[40] and other extrinsic facts to support both the majority and the dissent in their disagreement over continuity. A case in point is *Thompson v. Talmadge*.[41] In that 1947 case, the candidate for governor elected by a *majority* of the voters had died before taking office. The Georgia Constitution provides that when the legislature is making a choice, they shall choose between the two top candidates "who shall be in life."[42] The General Assembly, interpreting the "in life" phrase to extend beyond election day, proceeded to choose between the top two defeated candidates (both of whom were write-ins receiving less than 1000 votes). The majority in *Thompson* overruled the action of the General Assembly, saying that "in life" refers only to the situation where the General Assembly is making a choice because no candidate received a majority. "By the terms of the Constitution, full and complete power to elect a Governor is reserved to the people, but if the voters *fail to elect* because they do not cast a majority of their votes for one person, then and then only is the power given to the legislature to elect a Governor."[43] The Georgia Supreme Court thus treated the failure of the people to give a candidate a majority of the votes as a constitutional divesting of their electoral rights, and an *eo instante* vesting of the same right in the General Assembly. Such an interpretation does not lend itself to a continuity rationale.[44]

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[40] See note 7 *supra*.

[41] 201 Ga. 867, 41 S.E.2d 883 (1947).

[42] See note 7 *supra*.

[43] 201 Ga. 867, 880, 41 S.E.2d 883, 895 (emphasis added).

[44] Even more striking in regard to the dissent's view in *Fortson v. Morris* is the language, in *Thompson*, of dissenting Chief Justice Jenkins (who dissented upon the interpretation of the phrase "in life," rather than on the more general principles enunciated by the majority):

> It is well to observe at the outset that the paragraph of the Constitution giving the General Assembly the right and duty to elect a Governor when the election by the people has thus failed, whether wise or unwise, antiquated or not, is not mere cast-up driftwood littering the shore line of today. . . . Much has been said about changed conditions since the language of the quoted paragraph of the Constitution was embedded within our organic law in the year 1824. It is true many things have come to pass since then, but what has all this to do with the language of the Constitution requiring the General Assembly to elect a Governor under a named contingency? Language has not changed. Dictionaries were in vogue then just as they are now. The language under discussion has five times been carried forward and five times solemnly embedded within our organic law. The last time [1945] that this was done was but as yesterday, after the horses and buggies were mostly put away. There in clear cold print it stands, and there it should re-

It is noteworthy that the Georgia court painstakingly insisted that the power of the legislature to elect a governor arose only upon a definite condition precedent—the failure of the people to muster a majority for one candidate. The power did not arise merely because in hindsight the people in fact made no choice (since the candidate they had selected had died). It is also relevant, in lieu of the "in life" clause, that the framers of the 1824 amendment intended to give the legislature, once it was vested with the power by the necessary condition precedent, a real choice (i.e., *inter alia*, live candidates) and not merely a *pro forma* duty.

Notwithstanding all this, the *Thompson* case illustrates the lurking dangers and inequities in such a system, dangers that may well have been on the dissenting justices' minds in *Fortson v. Morris*. If the Georgia court had interpreted the "in life" phrase differently, the General Assembly would have been allowed to choose between two candidates who received less than 1000 votes. No one could deny that such a situation would completely discard any remnant of a popular system of electing a governor, and thwart the spirit of the 1824 amendment.[45] Furthermore the General Assembly does not have a free choice, but is restricted to choosing from the top two living candidates. Thus the alternate procedure is not totally independent of the original popular procedure. One has to employ legal fictions to change the votes from electoral votes to nominating votes when no candidate receives a majority, something which is

main until the power that wrote it in shall write it out. . . . [The power of] the General Assembly to elect a Governor under the contingency stated . . . is as plain now as it was in 1824.

201 Ga. 867, 902-04, 41 S.E.2d 883, 907-08. *But compare* the declaration "there it should remain until the power that wrote it in shall write it out" in the above quotation with the language in Lucas v. General Assembly, 377 U.S. 713, 736-37 (1964): "A citizen's constitutional right can hardly be infringed simply because a majority of the people choose that it be."

[45] But again consider the language of dissenting Chief Justice Jenkins in *Thompson:*

> Laws and constitutions in a government of law as distinguished from an autocracy are not decreed and administered to fit some special occasion *after it has happened*; but being fashioned in advance to meet all future contingencies, they are more like ready made garments, and for this very reason do not always by specific, as distinguished from general, language fit unusual future contingencies as perfectly as we can afterwards see that they might possibly been made to do. But there are few indeed in all this land who would exchange their liberty under a government of law for any other system where rights and liberties, if any, are doled out as a matter of grace from some malevolent or even benevolent autocrat.

201 Ga. at 900, 41 S.E.2d at 900-01.

quite casually done by Justice Black. Yet a voter might vote differently if his vote were a nominating vote.[46] It is overstating an otherwise supportable position to claim that no aspects of continuity exist between the original popular vote and the final choice of the legislature.

But whatever continuity is present, it is weak and partial in character. It thus seems that there is a rational basis for both the continuity theory of the dissent and the alternate procedure theory of the majority. Faced with such a situation, the Court acted rightly in not declaring a law unconstitutional when there was a rational basis for upholding its constitutionality.[47]

Because of the majority and the dissent's differences over "alternate procedure" and "continuity," the two rendered conflicting interpretations of *Gray v. Sanders*.[48] In *Gray*, the Supreme Court held that Georgia's county unit system used in primaries for statewide office, including governor, was unconstitutional, the Court for the first time unfolding its "one man, one vote" concept.[49] Under the county unit system, the eight largest counties would have three votes, the thirty next largest two votes, and the rest one vote. These votes would be cast in a block, as in the federal electoral college, for the candidate that carried the county.[50] The smaller counties had a disproportionate share of the vote.[51] The Court had held that such a system violated the equal protection clause, remarking:

> Once the geographical unit from which a representative is to be chosen is designated, all who participate in this election are to

[46] Take, for instance, a hypothetical election between candidates *A*, *B*, and *C*. Voter *V* is in favor of *A*, and would vote for him in a normal election. Let us further assume that in a normal election *A* would in all probability receive a plurality. However, *V* dislikes candidate *B* even more than he favors *A*. If the legislature were to choose between the two candidates receiving the most nominating votes, and there was only a 50-50 chance that the legislature would choose *A*, *V* (assured that *A* will be one of the nominees) might well cast his nominating vote for *C*, in order that *B*, whom he dislikes, will lose to *C*, and thus not be one of the nominees. Thus while *V* would vote for *A* in a regular election, he would vote for *C* in a nomination.

[47] *Cf.*: U. S. v. Carolene Prods. Co., 304 U.S. 144 (1938); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1934).

[48] 372 U.S. 368 (1963).

[49] See note 1 *supra*.

[50] To win, however, a candidate needed both the county unit vote and the popular vote. If different candidates won the county unit vote and the popular vote, those two candidates would have a run-off; in the run-off the county unit vote would prevail.

[51] Fulton County, for instance, with 556,326 residents, had only three times the voting strength of Echols County, with 1,878 residents.

> have a equal vote. . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.[52]

The Court also struck down the district court's holding[53] that such disparity was acceptable if it did not deviate more than the federal electoral college,[54] holding that such comparisons with the federal system were inapposite.[55]

The majority in *Fortson v. Morris*, relying on the "alternate procedure" theory, dismissed any applicability of *Gray* by holding that it was "only a voting case" and adding: "Not a word in the [*Gray*] Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly."[56] The dissent, however, viewing the legislative election as a part of the popular vote process, could see no difference between the "evils" abolished in *Gray*, and the "evils" of a legislative election.[57]

Yet despite the clear logical framework,[58] it is quite likely that

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[52] 372 U.S. 368, 379-80.

[53] 203 F. Supp. 158 (N.D. Ga. 1962).

[54] The relative voting strength between Alaska and New York, the smallest and largest states respectively in the electoral college, is approximately five to one. Each state has an electoral vote equal to its representation in Congress. Since each state has two senators and at least one representative, regardless of population, inbalance results.

[55] See note 63 *infra*.

[56] 385 U.S. at 233.

[57] *Id.* at 240-41:

> If the legislature is used to determine the outcome of a general election, the votes cast in that election would be weighted, contrary to the principles of 'one person, one vote.' All the vices we found inherent in the county unit system in *Gray v. Sanders* are inherent when the choice is left to the legislature. A legislator when voting for governor has only a single vote. Even if he followed the majority vote of his constituency, he would necessarily disregard the votes of those who voted for the other candidate, whether their votes almost carried the day or were way in the minority. He would not be under a mandate to follow the majority or plurality votes in his constituency, but might cast his single vote on the side of the minority in his district. Even if he voted for the candidate receiving a plurality of votes cast in his district and even if each Senator and Representative followed the same course, a candidate who received a minority of the popular vote might receive a clear majority of the votes cast in the legislature.

[58] However, for a different approach to the problem consider Jones v. Fortson, 223 Ga. 7, 152 S.E.2d 847 (1967) concerning the same fact situation as *Fortson v. Morris*. A Georgia statute (GA. CODE ANN. § 34-1514 (Supp. 1966)) provides that where no candidate "receives a majority of the

more general considerations influenced this decision, causing Justice Black, for instance, to change sides abruptly. The Court may have simply felt that enough is enough.[59] Indeed, somewhere the line will have to be drawn. A too literal interpretation of the concept that it is a violation of equal protection to have one man's vote count more than another's, and that no vote can either be diluted or aggrandized, could lead to absurdities. For example, when one candidate defeats another, the vote of the 49 per cent or less minority is disregarded—diluted to zero. The only effective way to avoid this dilution would be a system of proportional representation, a system that would present both political (e.g. the destruction of the two-party system) and constitutional problems.[60] As Justice Stewart commented, dissenting in *Lucas v. Colorado General Assembly*:[61] "It is just because electoral systems are intended to serve functions other than satisfying mathematical theories, however, that the system of proportional representation has not been widely adopted." And how would the practice of demanding extraordinary majorities on certain occasions be reconciled with a "no dilution" rule?[62] Indeed, the whole system of representative government could be theo-

votes cast, a runoff primary or election shall be held between the two candidates receiving the highest number of votes. . . ." The plaintiffs in this case, decided after *Fortson v. Morris*, argued that this statute should govern and take the election out of the hands of the General Assembly. The majority of the Georgia Court rejected this argument saying simply that when the constitution and a statute are in conflict, the constitution governs. The dissenting opinion in *Jones*, however, interpreted the constitutional provision as merely an escape clause to be invoked only if no provisions for handling runoffs had been established by statute. (This dissenting opinion was written by Chief Justice Duckworth, who also wrote the majority opinion in *Thompson v. Talmadge*). Such an interpretation was not discussed by the dissent in the *Fortson v. Morris* case at the Supreme Court level, but was suggested in the original opinion of the district court, Morris v. Fortson, 262 F. Supp. 93, 95 & n.2 (N.D. Ga. 1966).

[59] See note 5 *supra*.

[60] *See* People *ex rel.* Devine v. Elkins, 59 Cal. App. 396, 211 P. 34 (1922); Wattles v. Upjohn, 211 Mich. 514, 179 N.W. 335 (1920); Opinion to the Governor, 62 R.I. 316, 6 A.2d 147 (1939). But as regards federal constitutional problems, consider the language in Bianchi v. Griffing, 238 F. Supp. 997, 1004 (E.D.N.Y. 1965): "It is not for the courts to prescribe the type of representative government that is best suited to the needs of the voters. . . . The task of the courts is to determine whether particular methods transgress the Constitution."

[61] 377 U.S. 713, 750 & n.12 (1964).

[62] In Georgia, for instance, two-thirds of the voters must agree in order to adopt a constitutional amendment. Thus, two votes must be cast "yes" for every "no" vote. The "no" voters then would have twice the voting power of the "yes" voters.

retically challenged. The dissent in *Fortson v. Morris* criticizes the legislative election because a legislator is free to ignore the plurality or even the majority choice of the voters in his district. But a legislator has always been free to ignore the desires of his constituents. The dissent would hardly suggest that we reduce all government to the level of a New England town meeting. At some point function must supersede arithmetical abstractions.[63]

Conclusion

A proposed new constitution for Georgia would end such legislative elections[64] as the one that gave rise to the problems in *Fortson v. Morris.* Although such provisions would remain in Mississippi and Vermont, it is not likely that such a case will rise again. But *Fortson v. Morris* is not without practical significance. It demonstrates a recognition by at least a majority of the Court that the "one man, one vote" lodestar, while perhaps useful in certain situations, has its limitations. It is not clear precisely how far the ambit of its usefulness extends; but the Court in *Fortson v. Morris* has at

[63] It would be appropriate to reflect upon the Court's distaste for electoral comparisons with the federal system. As said by the Court in Gray v. Sanders, 372 U.S. 368, 378:

> We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.

Besides the "inequalities" of the electoral college and equal representations of senators which the Court mentions, one can find many other violations of "one man, one vote" in the Federal Constitution, such as counting non-voting slaves as three-fifths of a person, giving each state at least one representative in the House regardless of population, and if and when the presidential election is thrown into the House, giving each state delegation one vote irrespective of its size. While it may be unwise to run strict and inflexible comparisons between the federal and state system, it is going a bit too far to declare it completely inapposite. The Constitution was not written in a political vacuum. The delegates to the Convention in Philadelphia gathered their political wisdom and experience from state governments. The multitude of violations of the "one man, one vote" maxim in the Federal Constitution is evidence that the Founders worried little, if at all, about any "one man, one vote" postulate. Nor can it be said that the writers of the fourteenth amendment had any different attitude. To ignore totally any comparison between the federal and state systems is to disregard history, distort reality, and to foster some strange conclusions.

[64] See note 35 *supra.*

least recognized that such an ambit exists, and that the "one man, one vote" principle should not venture outside of it lest the theoretical tail end up wagging the functional dog.

RICHARD J. BRYAN

Constitutional Law—Miranda v. Arizona and the Fourth Amendment

An interesting new dimension of *Miranda v. Arizona*[1] was presented in two recent cases, *State v. Forney*[2] and *State v. McCarty*.[3] The defendants in these cases argued for application of *Miranda's* requirements[4] concerning confessions to those rights guaranteed by the fourth amendment.[5] Despite the judiciary's contemporary tendency to emphasize the necessity of protecting the individual's constitutional rights, neither court would apply the *Miranda* test because *Miranda* dealt specifically with only the fifth and sixth amendments.

In *Forney* the defendant willingly went to the police station to answer questions after being apprehended in his car as a suspect for burglary. When the defendant was asked by an officer at the station if the officer could look in his car, the defendant agreed. Later, in testimony, the defendant described the situation: "Ah Well, they asked me if I was—they could search my car, and I said, 'Yeah, go ahead.' I couldn't stop them."[6] As a result of the search, a bag

[1] 384 U.S. 436 (1966).
[2] 150 N.W.2d 915 (Neb. 1967).
[3] 427 P.2d 616 (Ore. 1967).
[4] As for procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence . . . the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. 384 U.S. at 444.
[5] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV. See Camara v. Municipal Court, 385 U.S. 523. (1967).
[6] 150 N.W.2d 915, 917 (Neb. 1967).

and loaded revolver were found and these articles were held to be admissible evidence by the Supreme Court of Nebraska.[7]

In *McCarty* the defendant and a companion were apprehended as suspects for robbery. After being taken to the police station, the defendant signed a written consent to a search of the living quarters over the tavern where he had been apprehended. This search yielded evidence which was significant in the defendant's conviction of robbery.[8]

The defendants in *Forney* and *McCarty* were asked to waive their constitutional rights under the fourth amendment. Explanation of their rights was not offered nor was counsel suggested or offered to help them. For all practical purposes, the defendants waived rights of which they were not clearly aware; and the abandonment of these rights resulted in evidence detrimental to their cases. It is in this context that the defendants argued that a valid consent-search should be subject to the same or similar requirements established in *Miranda* for confessions.[9]

In both *McCarty* and *Forney* the defendants' arguments were rejected by the state supreme courts for substantially the same reasons. The court in *McCarty* said:

> *Miranda* deals only with the compulsory self-incrimination barred by the Fifth Amendment, not with the unreasonable search and seizure proscribed by the Fourth Amendment. There is an obvious distinction between the purposes to be served by these two historic sections of the Bill of Rights. The Fifth Amendment prohibits the odious practice of compelling a man to convict himself; the Fourth guards the sanctity of his home and possessions as those terms have been judicially interpreted. An indispensable element of compulsory self-incrimination is some degree of compulsion. The essential component of an unreasonable search and seizure is some sort of unreasonableness.[10]

An attempt to separate completely the purposes of the fourth and fifth amendments is also found in *Forney* when the court states that

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[7] *Id.* at 916-18.

[8] 427 P.2d 616, 619 (Ore. 1967).

[9] Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the persons of the accused for weapons or for the fruits of or implements used to commit the crime.
Preston v. United States, 376 U.S. 364, 367 (1964).

[10] 427 P.2d 616, 619-20 (Ore. 1967).

Miranda in that jurisdiction will pertain "only to the issue tried therein, and will not be extended by analogy to cover the Fourth Amendment . . . ."[11]

Whatever may have been the limited intention of the framers of the fourth and fifth amendments, case history illustrates that the scope of the two amendments has been undeniably expanded.[12] The Supreme Court has emphasized that "the Fourth and Fifth Amendments run almost into each other,"[13] that they are "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy,"[14] and that the "values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect."[15] Any other view which attempts to separate the two amendments in regard to limited and outdated objectives seems wholly anachronistic and tends to destroy the vitality of the Constitution.

The court in *McCarty* emphasized that the key word in the fifth amendment is "compulsion" while the crucial word in the fourth is "unreasonableness." The court, however, apparently overlooked the Supreme Court's holding in *Boyd v. United States* that the two amendments "throw great light on each other."[16] In that case the Court recognized that the search and seizure of evidence within an accused's possession might well violate the self-incrimination clause of the fifth amendment. If the possibility of self-incrimination is

[11] 150 N.W.2d 915, 917 (Neb. 1967). The court added:

> The trial court sustained the motion to suppress on the theory that in order for a consent to be voluntary it was necessary that the defendant be first advised that he need not submit to a search, and that if he does consent, the fruits of the search may be used as evidence against him. To reach this result the trial court held that *Miranda v. Arizona*, 384 U.S. 436, which involved the Fifth and Sixth Amendments to the Constitution of the United States, by analogy was applicable to search and seizure under the Fourth Amendment to the Constitution of the United States.

Id. at 917.

[12] See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 55 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL STUDIES 211, 261-88 (1937). See also Miranda v. Arizona, 384 U.S. 436 (1966); Murphy Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Quinn v. United States, 349 U.S. 155 (1955); McCarthy v. Arndstein, 266 U.S. 34 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892).

[13] Boyd v. United States, 116 U.S. 616, 630 (1886).

[14] Feldman v. United States, 322 U.S. 487, 489-90 (1944).

[15] Schmerber v. California, 384 U.S. 757, 767 (1966).

[16] 116 U.S. 616, 633 (1886).

present, said the Court, then the search itself is unreasonable.[17] Thus, compulsion and unreasonableness can rarely, if ever, be separated.

As can be seen from *Boyd* and other cited cases, the fourth and fifth amendments protect inter-related zones of privacy.[18] Both *Forney* and *McCarty* appear to be relying on an insecure basis in maintaining that the fourth amendment applies only to the security of one's possessions and does not overlap the area of privacy guaranteed by the fifth. Not only is the fifth amendment incorporated into the fourth by the provision that people are to be "secure in their persons," but the protection offered by the fourth is also incorporated into the fifth.[19] A consent-search necessarily includes a degree of communication or testimony. One who consents to a search is, for all practical purposes, saying either "Yes, I am guilty" or "No, I am not guilty."[20] The only remaining alternative is that the individual's consent is the product of hope or fear, both of which have been held to be invalid consents under the two amendments.[21]

Thus, it seems unsatisfactory to deny application of the *Miranda* test for the reason that the fourth and fifth amendments have separate purposes.[22] Indeed, the two amendments have been insepa-

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[17] *See* 1967 DUKE L.J. 366.

[18] See the dissenting opinion of Douglas, J. in Schmerber v. California, 384 U.S. 757, 778-79 (1966), where he says:

> The Fifth Amendment marks 'a zone of privacy' which the Government may not force a person to surrender . . . . Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons."

[19] *See* Miranda v. Arizona, 384 U.S. 436, 459-60 (1966) where the Court says that "the privilege [against self-incrimination] was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard.'" See also Mapp v. Ohio, 367 U.S. 643 (1961).

[20] *See* 67 COLUM. L. REV. 130, 135 n.29 (1967). Also see Miranda v. Arizona, 384 U.S. 436, 477 (1966) in which the Court says that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'"

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> There is no doubt but that the defendant was influenced by his situation, and, when all the surrounding circumstances are considered in their true relations, not only is the claim that the consent was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both operating on the mind.

United States v. Baldocci, 42 F.2d 567, 568 (9th Cir. 1930). *See also* Quinn v. United States, 349 U.S. 155 (1955) and Johnson v. United States, 333 U.S. 10 (1948).

[22] *See* Gouled v. United States, 255 U.S. 298, 304 (1921):

> The effect of the decisions cited [Boyd v. United States, 116 U.S. 616 (1886), Weeks v. United States, 245 U.S. 618 (1914), and Silver-

rably woven together both by their own language and by the Supreme Court's interpretations. To separate them is to enter upon an absurdity not unlike trying to separate the concept of freedom into life without liberty, or liberty without the pursuit of happiness.

Regardless of their views toward the fourth and fifth amendments, the courts in *Forney* and *McCarty* expressed one more reason why they would not apply *Miranda* to the fourth amendment. In the words of the Nebraska Supreme Court, "So far as I have been able to determine, the United States Supreme Court has not applied the *Miranda* test to searches and seizures. Until it does so, if it ever does, we should not further shackle law enforcement."[23] This belief is reiterated in *McCarty*.[24] The courts' reasoning, however, flies in the face of *Miranda* itself. Searching for precedent to justify a decision cannot by any means insure justice. In *Miranda*, the Supreme Court emphasized the fact that "our contemplation cannot be only of what has been but of what may be,"[25] and it encouraged courts to find new solutions to guarantee justice.[26]

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thorne Lumber Co. v. United States, 251 U.S. 385 (1920) concerning the Fourth and Fifth Amendments] is: that such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty, and private property;" that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and is imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.

[23] State v. Forney, 150 N.W.2d 915, 917-18 (Neb. 1967). *But see* Berger v. New York, 388 U.S. 41, 62-63 (1967) where the Court said:

In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While 'the requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement,' . . . it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded.

[24] 427 P.2d 616, 619 (Ore. 1967).

[25] 384 U.S. 436, 443 (1966). The Supreme Court went on to say:

Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be loss in reality.

[26] Our decision in no way creates a constitutional straightjacket

Moreover, although the two state courts were reluctant to apply the *Miranda* test to searches and seizures, a lower federal court did not hesitate to apply requirements similar to those of the *Miranda* test to guarantee the rights secured by the fourth amendment. In *United States v. Blalock*,[27] three F.B.I. agents encountered the defendant in a hotel lobby. The defendant, who was suspected of robbing a bank, was frisked by the agents after they had identified themselves. Although they had no warrant, they accompanied the defendant to his room. The defendant denied any knowledge of the crime, but the entire party entered his room. When asked if he would consent to a search of his room, the defendant replied that he would not object. As a result of this consent-search, money from the robbery was found and used as evidence at the defendant's trial.[28] In a well-reasoned opinion citing numerous other decisions, the district court said that "rights given by the Constitution are too fundamental and too precious for waiver lightly to be found."[29] An effective waiver is present "only where there is 'an intentional relinquishment or abandonment of a known right or privilege.' "[30] The district court maintained that where the government relies on consent to validate a warrantless search, the consent must not only be voluntary but also intelligent[31] or knowing.[32] It, therefore, held that a defendant who is not warned of his fourth amendment rights cannot be said to have abandoned them.[33] In conclusion, the district court emphasized that the requirements for waiver are the same for both the fourth and fifth amendments:

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which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[27] 255 F. Supp. 268 (E.D. Pa. 1966).

[28] *Id.* at 268-269.

[29] *Id.* at 269. See also Pennsylvania *ex rel.* Whiting v. Cavell, 244 F. Supp. 560, 567 (M.D. Pa. 1965).

[30] United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938).

[31] Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right.' 255 F. Supp. 268, 269 (E.D. Pa. 1966). *See* United States *ex rel.* Mancini v. Rundle, 337 F.2d 268 (3d Cir. 1964); Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); Channel v. United States, 285 F.2d 217 (9th Cir. 1960).

[32] United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966).

[33] *See also* United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966).

> The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd . . . . To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation.[34]

Not only is the reasoning behind the decisions questionable in *Forney* and *McCarty*, but justice itself demands that a *Miranda*-type test or an objective standard be applied to guarantee the rights secured by the fourth amendment. A warning—similar to the one imposed by *Miranda*—has been suggested by a student for dealing with warrantless searches:

> You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things which I couldn't even if I could get a search warrant. You have a right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search.[35]

This type of warning serves several important purposes. In the first place, it informs the individual of his rights. The ignorant and the well-informed are brought to a less unequal position, especially when one knows he may have an attorney present.[36] Authorities are less able to exploit the deprived or ill-equipped. Moreover, the warning impresses the consequences of his decision upon the individual and makes him more reluctant to abandon his constitu-

[34] 255 F. Supp. 268, 269-70 (E.D. Pa. 1966).
[35] 67 COLUM. L. REV. 130, 158 (1967).
[36] Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal.
Griffin v. Illinois, 351 U.S. 12, 16 (1956). *See also* Douglas v. California, 372 U.S. 353 (1963).

tional rights. Such an objective standard is held in high regard by the Supreme Court, as indicated by *Miranda*.[37] Finally, because of the warning's content and its likely effect upon the individual, the warning requirement would encourage authorities to seek the judicially preferred search warrant.[38] The skeptical practice of conducting a warrantless search in reliance upon the individual's uninformed consent would grow increasingly rare.

It seems fair to say that if courts adopt the *Forney-McCarty* position, justice will suffer because fourth amendment rights will be protected by subjective good faith alone. And, as the Supreme Court said in *Beck v. Ohio*:

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.[39]

D. S. DUNKLE

Constitutional Law—Racial Discrimination—Expansion of State Action

Since the *Civil Rights Cases*[1] the Supreme Court has held that the fourteenth amendment prohibits "state action" and not purely private action. Subsequent decisions have greatly expanded the reach of "state action." Indeed the expansion has been so great that commentators have suggested that the search for "state action" is a "misleading search,"[2] that some sort of state action can always be found, and that the Supreme Court should be using a different mode of analysis.[3]

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[37] 384 U.S. 436, 468-69 (1966).

[38] *See* United States v. Ventresca, 380 U.S. 102 (1956); Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 362 U.S. 257 (1960); Brinegar v. United States, 338 U.S. 160 (1949); Johnson v. United States, 333 U.S. 10 (1948); United States v. Lefkowitz, 285 U.S. 452 (1932).

[39] 379 U.S. 89, 97 (1964).

[1] 109 U.S. 3 (1883).

[2] *See* Horwitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

[3] St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *Twilight of State Action*, 41 TEX. L. REV. 347 (1963). Williams suggests that the test should be whether the private group has so moved into the area of public concern that the public's interest in eliminating the particular

Still, in cases involving the application of the proscriptions of the fourteenth amendment to private organizations, the courts continue to look for connections between the private organization and the state.[4] But they have replaced the semantic rigidity of "state action" with a formula which better explains actual case results. To hold a private organization to the standards which the fourteenth amendment sets for the state, the plaintiff must be able to establish that the state has become "involved" in the discriminatory acts of the private organization to a "significant extent."[5] In practice, if the plaintiff can show significant state involvement in a private organization which serves a public function and can also show discrimination by that private organization, he has established his case.[6] He need not show that the state induced or encouraged the discrimination.

The leading case applying this analysis is *Burton v. Wilmington Parking Authority.*[7] In *Burton* the Supreme Court decided that a private restaurant located in a publicly owned and operated parking lot could not refuse service to a person because of his race. The action of the restaurant could not be considered, the Court said, "so 'purely private' as to fall without the scope of the Fourteenth Amendment."[8] In the face of criticism that its decision would subject a vast number of private organizations to the sweep of the fourteenth amendment, the Court issued a disclaimer:

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discrimination must outweigh the personal right to discriminate. *Id.* at 389-90.

[4] Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083, 1101-07 (1960); Shanks, *"State Action" and the Girard Estate Case,* 105 U. PA. L. REV. 213, 227 (1956) [hereinafter cited as Shanks]. "Under some circumstances state contact, control and encouragement may be so intimately fused with the activities of private groups . . . in the performance of a public function that it seems fair to call the activity 'state action' . . . ." *Id.*

[5] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[6] *See, e.g.,* Smith v. Hampton Training School, 360 F.2d 577 (4th Cir. 1966); Hawkins v. North Carolina Dental Soc'y 355 F.2d 118 (4th Cir. 1966); Griffin v. Board of Supervisors, 339 F.2d 486 (4th Cir. 1964); Smith v. Holiday Inns, 336 F.2d 630 (6th Cir. 1964), *modifying* 220 F. Supp. 1 (M.D. Tenn. 1963); Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963). *But see, e.g.,* Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101 (D.D.C. 1957).

[7] 365 U.S. 715 (1961).

[8] *Id.* at 725. *Burton* extended earlier case law which had subjected the private lessee of government property to the fourteenth amendment's ban on racial discrimination when the purpose of the lease was to provide a *service to the public* on state property. *Burton* ignored the distinction. 75 HARV. L. REV. 144 (1961). See, *e.g.,* Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied,* 353 U.S. 924 (1957); Jones v. Marva Theatres, Inc., 180 F. Supp. 49 (D. Md. 1960).

> . . . [T]he conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths by means of which every state leasing agreement is to be tested. Owing to the very largeness of government a multiple of relationships might appear to some to fall within the Amendment's embrace, but that . . . can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law . . . ."[9]

The purpose of this note is to examine the application of the concept of state action in the recent case of *Ethridge v. Rhodes*;[10] to show that *Ethridge* differs from other state action cases (particularly the progeny of *Burton*); and to consider possible implications of this difference.

In *Ethridge* a federal district court applied the fourteenth amendment to another of the multiple relationships between "private" organizations and government. William Ethridge was not admitted to a Columbus, Ohio, local of the International Brotherhood of Electrical Workers because he was a Negro. When he went directly to construction contractors, he was told that they hired only through the union.[11] In this situation a number of circumstances combined to give Ethridge the opportunity for a novel flank attack on union discrimination.[12] The State of Ohio was

[9] 365 U.S. at 725-26. The Court listed the following factors to support its finding that the public Parking Authority had become involved in the discrimination of the privately owned restaurant to a significant extent. The building in which the restaurant was located was publicly owned; as an entity the building was performing an essential governmental function of providing parking space; the restaurant was physically an integral part of the public building; and the revenue obtained by leasing the space the restaurant occupied was essential to the state's plan to operate the project as a financially self-sustaining unit. 365 U.S. at 723-24.

[10] 268 F. Supp. 83 (S.D. Ohio 1967).

[11] *Id.* at 85.

[12] The legal attack was not entirely novel. *See* Todd v. Joint Apprenticeship Comm. of Steel Workers, 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964). In *Todd* the federal government was building a courthouse. The sub-contractor in question obtained his labor only from the Steel Workers. The two Negro plaintiffs were accepted by the sub-contractor for work on the project but, in spite of the vigorous efforts of the federal officer in charge of insuring equal employment opportunity, the union refused to indenture the plaintiffs. The district court found the necessary connection between the government and the private organization simply in the "continued erection of the Federal

about to build a new medical school building at Ohio State University. The contractors who were about to be awarded the state building contracts would obtain their labor exclusively from unions. Like the electrical workers, most of the unions discriminated against Negroes. The result was summed up by the court:

> Since the contractors will hire only through unions and a majority of craft unions do not have Negro members and will not refer non-member Negroes, the contractors will hire only non Negroes in a majority of the crafts needed to work on this project.[13]

The court found that the plaintiffs had stated a cause of action under section 1983 of Title 42, United States Code.[14] Finding that the plaintiffs would suffer irreparable injury, the court enjoined officers of the state from entering into contracts for the construction of the Medical Basic Sciences Building with

> any persons who are bound by agreement, or otherwise, to secure their labor force exclusively or primarily from any organization or source that does not supply or refer laborers and craftsmen without regard to race, color or membership in a labor union.[15]

Courthouse." By continuing to build the courthouse the federal government was "unwillingly fostering and becoming an integral part of" the union's discrimination. 223 F. Supp. at 20. The court was able to find a sort of "state action" by the *federal* government by analogy to *Bolling v. Sharpe*, 347 U.S. 497 (1954). The court also found government action in two other aspects of the fact situation less relevant here. For an unsuccessful attack on union discrimination applying the analogy to Bolling, *see* Oliphant v. Brotherhood of Locomotive Firemen, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

[13] 268 F. Supp. at 87.

[14] Section 1983 provides that:

> 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 proceedings for redress.

[15] 268 F. Supp. at 89. Plaintiffs had several possible remedies. (1) 42 U.S.C. § 2000(d) (1964) prohibits discrimination in programs which receive federal financial assistance. The primary remedy available is the power of the federal department in question to cut off the federal grant, loan, or contract. But under § 2000(d)-(3) the act provides that no action shall be taken by any department or agency with respect to any employment practice except where the primary objective of the federal financial assistance is to provide employment.

(2) 42 U.S.C. §§ 2000(e)-(1) to -(15) (1964) and OHIO REV. CODE

The court found that "[d]efendants' failure to assure qualified minority workers equal access to job opportunities on public construction projects by acquiescing in the discriminatory practices of contractors and craft unions clearly falls within the proscription of the Fourteenth Amendment . . . . "[16] According to the court, the fourteenth amendment's ban on racial discrimination does not apply to the acts of private persons such as union officials. But here the state was about to become a "joint participant" in racial discrimination by "placing itself in a position of interdependence"[17] with the discriminating unions and contractors. "[W]here a state . . . undertakes to perform essential governmental functions, . . . with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely

ch. 4112 (Anderson 1965) both contained provisions which the defendants claimed would be adequate to secure plaintiffs' admission to the unions in question with back pay. The court dealt with this argument in a cryptic sentence: it was apparent that the threatened injury was not fully reparable through the use of these proceedings. Furthermore, the court found that the remedies proposed were not adequate because they did not take a single step toward mending the psychological damage done to the party discriminated against. 268 F. Supp. at 88-89. The court dealt with the problem of a remedy as if the question was simply one of whether the remedy at law was adequate. At least as far as the Ohio statute is concerned a prior question would seem to be whether Section 42 U.S.C. § 1983 (1964) is available regardless of the existence of a state remedy. This approach to the question was not taken by the court. The question is beyond the scope of this note. See Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Educ., 373 U.S. 668 (1963).

[16] 268 F. Supp. at 88. The decree in *Ethridge* enjoined the State of Ohio from dealing with contractors who obtained their labor exclusively from unions which discriminated. It did not take the direct approach of ordering the union to admit the plaintiff. One reason for not doing so is clear. Since the contract had not been signed, the union had not yet become a joint participant with the government. Thus, the fourteenth amendment did not yet apply. From the state action aspect of the problem, there seems to be no basis in logic or authority for drawing the line at enjoining the state from dealing with discriminatory private organizations. Since the restrictions of the fourteenth amendment apply to acts of the state's private partners, the plaintiff (once the project had begun) could sue directly for admission to the union if he were discriminated against. In the case of Todd v. Joint Apprenticeship Comm. of Steelworkers, 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot,* 332 F.2d 243 (7th Cir. 1964), the court ordered just such relief. In other state action cases, the plaintiff has obtained relief directly against the private organization. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Smith v. Holiday Inns, 336 F.2d 630 (6th Cir. 1964); Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963). Such an approach might raise problems for the plaintiff beyond the state action question. See *e.g.,* Note, *Alternative Remedies for Denial of Union Membership: Applicability of Constitutional Relief,* 50 CORNELL L.Q. 75 (1964).

[17] 268 F. Supp. at 87.

ignoring or failing to perform them."[18] To support these propositions the court cited the *Burton* case.

As the opinion in *Ethridge* implies, there are important similarities between *Ethridge* and *Burton* and the cases which have followed *Burton*.[19] Both the State of Ohio and the Wilmington Parking Authority found themselves in a position of "interdependence" with private discriminators. The Court's suggestion in *Burton* that the Parking Authority had a positive duty to see that its lessee did not discriminate[20] indicates a parallel duty on the part of state officials in *Ethridge* to prevent their contractors from discriminating. In neither case did the state control the private organization.[21] Furthermore, the possibility of limiting *Burton* to leases of state property has been ignored. The federal cases which have followed *Burton* have not limited it to its peculiar facts or even to lease agreements. Instead they seem to interpret *Burton* as meaning that certain governmental contacts with private organizations serving

[18] *Id.*

[19] *See, e.g.*, cases cited note 10 *supra*; Wimbish v. Pinellas County 342 F.2d 804 (5th Cir. 1965); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), *cert. denied*, 371 U.S. 911 (1962).

[20] 365 U.S. at 725. The Court in *Burton* said:

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment. *Id.*

On the state's duty of control, see Comment, *State Action and Private Choice*, 50 CORNELL L.Q. 473, 498 (1965).

[21] Some authorities suggest that government "control" of the private organization is required before the fourteenth amendment can be applied. *E.g.*, Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101 (D.D.C. 1957). "Governmental control is the decisive factor in the determination of whether a corporation is public or private and governmental control of the club corporation does not exist." *Id.* at 108. In most recent state action cases of this sort, unusual state controls or regulations of the private organizations have been present. But the controls have not been so extensive as to justify the assertion that the state "controlled" the private organization. *See, e.g.*, Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), *cert. denied*, 371 U.S. 911 (1962).

a public function are sufficient to subject the private organization to the proscriptions of the fourteenth amendment. In *Simkins v. Moses H. Cone Memorial Hospital*,[22] for example, the Court of Appeals for the Fourth Circuit held that the state and federal government had become so involved in the activities of an otherwise private hospital that it could not discriminate on the basis of race in granting staff privileges. The court found that the necessary degree of state involvement was present as a result of the hospital's participation in the Hill-Burton program.[23] Just as the Court in *Burton* found Eagle Coffee Shoppe an integral part of a public building devoted to a public service, the court in *Simkins* found the hospital an integral part of a joint state-federal program to effect a proper allocation of available hospital resources.[24]

Despite the similarities, there are also important practical differences between *Ethridge* and earlier state action cases. The differences exist both in the sort of service the private organization provided and in the state contact considered sufficient to apply the proscriptions of the fourteenth amendment. It is difficult to provide any generalized explanation of the sorts of state contacts which will subject a private organization to the standard the fourteenth amendment sets for the state. Indeed, the Supreme Court has implied that it may be "an impossible task."[25] While no precise formula exists, the cases do seem to fit into broad groups. Although the classification is far from exhaustive, four such groups of cases should be mentioned: (1) those in which the private organization is performing an "exclusive" state function,[26] (2) those in which it is performing a function sufficiently like that of the state to sub-

[22] 323 F.2d 959 (4th Cir. 1963). Similarly in Smith v. Holiday Inns, 336 F.2d 630 (6th Cir. 1964), *modifying* 220 F. Supp. 1 (M.D. Tenn. 1963), the Sixth Circuit found that a motel located in a redevelopment area could not deny service to Negroes. The fact that the Holiday Inn owned the land did not serve to distinguish the case from *Burton*. The court pointed to public design, public financing, and continuing public controls to justify its decision.

[23] The Hill-Burton Act, 60 Stat. 1041 (1946), *as amended*, 42 U.S.C.A. § 291e(f) (1964), provides for federally assisted hospital construction. Funds to assist the hospital's building program were paid by the United States to the State of North Carolina and in turn by North Carolina to the hospitals. 323 F.2d at 963.

[24] 323 F.2d at 967.

[25] 365 U.S. at 722.

[26] *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

ject it to the same standard;[27] (3) those in which the private organization provides a direct service to the public at large on state property dedicated to public service;[28] (4) those in which the private organization receives unusual state aid, state powers, or is subject to unusual state control.[29]

The situation in Ethridge does not fit easily into any of these categories. Constructing buildings is not an exclusive governmental function, such as holding a primary election. Nor is it a function much like that of the state, such as running a public park. Nor is it a case of a public service enterprise conducted on public property. Payment to the contractor is not a sort of state aid ordinarily thought sufficient to apply the fourteenth amendment. Of the four categories, the situation in Ethridge looks least like the first; building buildings is clearly not an *exclusive* governmental function.

With the exception of the first, each of these groups of cases seem to have one common element. In each the fourteenth amendment was applied to private organizations which had significant state contacts and which provided services directly to the general public. In *Simkins,* for example, the hospital received unusual state aid and control, and it served the public directly. In contrast, the contractors in *Ethridge* were not providing a direct public service. By constructing a medical school building they were supplying an entity which stood between them and the general public—that is, the State of Ohio. In terms of public service their position is analogous to that of a dairy which supplies milk to a public school cafeteria.

Thus, *Ethridge* differs from the other progeny of *Burton* in

[27] The category is just beginning to develop. *See* Evans v. Newton, 382 U.S. 396 (1966); Guillory v. Adm'rs of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962) (dictum), *vacated* 207 F. Supp. 554 (E.D. La. 1963), *aff'd per curiam,* 305 F.2d 489 (5th Cir. 1962).

[28] *See, e.g.,* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 791 (1954), *vacating and remanding* 202 F.2d 275 (6th Cir. 1953), *aff'g* 102 F. Supp. 525 (W.D. Ky. 1951); Jones v. Marva Theatres, 180 F. Supp. 49 (D. Md. 1960). *But cf.* Wimbish v. Pinellas County, 342 F.2d 804 (5th Cir. 1965).

[29] *See, e.g.,* Smith v. Holiday Inns, 336 F.2d 630 (6th Cir. 1964), *modifying* 220 F. Supp. 1 (M.D. Tenn. 1963); Griffin v. Bd. of Supervisors, 339 F.2d 486 (4th Cir. 1964); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), *cert. denied,* 371 U.S. 911 (1962); Kerr v. Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), *cert. denied,* 326 U.S. 721 (1945).

that it applied the fourteenth amendment to an organization which was supplying the state, rather than to a state "controlled" or assisted organization serving the public.[30] The case also represents the emergence of a new sort of state contact sufficient to apply the fourteenth amendment's commands to a private organization. The holding in *Ethridge* seems to be that, in at least some situations, a contract with the state is a sufficient state contact. Of course, cases involving leases of public property have applied the fourteenth amendment to those in contractual relations with the state. But in those cases the state contact was thought to be based more on the nature of the property than on the simple fact of a contractual agreement.[31] These distinctions seem to indicate that *Ethridge* has moved the law nearer to the doctrine that states and their extensions are constitutionally prevented from having economic relations with private businesses that discriminate.

The rationale of *Ethridge* seems to be that when the state and a private organization enter a contractual relation, public officials have a duty and a responsibility to see that public funds do not indirectly foster private discrimination. If so, the case represents an application of the fourteenth amendment to a new layer of state-private relations. Thus, a public school could be enjoined from buying milk from a dairy which discriminates; state pencils, furniture, copying machines, and a myriad of other items would have to come from equal-opportunity employers. Furthermore, one passage in the court's opinion indicates that the impact might be even more widespread:

> In a venture, such as this one, where the state as a governmental entity becomes a joint participant with private persons, the

[30] Of course, some of the progeny of *Burton* have involved contacts other than state assistance or regulations. *See, e.g.*, Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966).

[31] The Court made its decision in *Burton* assuming that the surplus property distinction of Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957), would be significant. 365 U.S. at 723. The court in *Derrington* thought that when there was "no purpose of discrimination," no "joinder in the enterprise" and "no reservation of control" the state could lease property not needed for state purposes to private persons. If all of these conditions were met the lessee's conduct would be purely private. *Id.* at 925. If a mere contractual relation is enough to hold the lessee to the standard of the fourteenth amendment, the surplus property distinction "assumed" in *Burton* would be irrelevant. A number of commentators have assumed that the nature of the property rather than the mere fact of a contract was the crucial factor in the lease cases. 75 HARV. L. REV. 144 (1961); Shanks 221.

> restrictions of the Fourteenth Amendment apply not only to the actions of the state but also to the acts of its private partners—the contractors . . . . [32]

Arguably, since the state could not deal with a private organization which discriminates, neither could its private partners such as the contractor. His nails, bricks, pipes, and other supplies would all have to come from equal-opportunity employers. The impact of such a decision would be ubiquitous; logically the proscriptions of the fourteenth amendment could be applied to the state's entire chain of supply.

Another practical problem raised by *Ethridge* should be briefly noted. If the sanctions of the fourteenth amendment were directly applied to private economic organizations in contractual relations with the state, this would raise the question of how the private organization could disengage itself and regain its purely private status. Since the tie with the state would be economic, severing the tie would probably be sufficient.[33] Avoiding the reach of the fourteenth amendment might be easy enough for an organization not presently bound by some state contract. But a private organization which had a long-term state contract and which was determined to practice racial discrimination might have difficulty. It could find itself trapped between the rock of equal opportunity and the whirlpool of breach of contract.

It is difficult to find a rationale for *Ethridge* which will both achieve a desirable result and contain any logical limitation. One is faced with the spectre of the rationale of the case cruising on its own logical power through the net of economic "interdependence" into situations in which the state's contribution to, and responsibility for, discrimination is very small indeed. Two possible limitations should be mentioned.

First it is possible that *Ethridge* can be given a narrower reading than that suggested here. There is language in the decision which suggests some limitation. At one point in its opinion, the court refers to the situation as one where the state was undertaking to perform essential governmental functions with the aid of private persons.[34] But any limitation to those performing essential gov-

[32] 268 F. Supp. at 88.
[33] *Cf.* Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960).
[34] 268 F. Supp. at 87.

ernmental functions seems to be more apparent than real. Even with such a qualification the decision would seem to reach all those in contractual relations with the state. It is difficult to see why the contractor who supplies the state with a hospital building is performing an "essential governmental function," while the company which supplies the hospital beds is not. Without one, the other is useless.

While the "essential governmental functions" test seems to provide no effective limitation, one commentator has suggested a test which might. The question would be whether the state is the "effective source" of the discrimination.[35]

> In determining whether the state is the effective source of the discrimination, the relationship with the state is all that is important. It is irrelevant that the private party is also responsible for the discrimination; only by showing that the state is not responsible may constitutional restraints be avoided.[36]

Of course there are various degrees of state contribution to discrimination. Application of the test to a situation of the *Ethridge* type seems to require a practical inquiry into the extent of the state's contribution to and, hence, responsibility for, discrimination. In *Ethridge,* by its decision to build a medical school building, the state created all the construction jobs on the project. Without the state's economic participation these jobs simply would not exist. It is hard to imagine a situation in which a state, by simply awarding a contract to a private discriminator, could do more to contribute to discrimination. When the state is only a very small buyer among a great many (for example, in the purchase of toothpaste for state institutions) the state's contribution to discrimination is less.

Ethridge is in keeping with the current judicial trend toward the expansion of "state action." It reached a desirable result: jobs created by government funds alone should be open to qualified applicants without regard to race. *Ethridge* clearly differs from earlier state action cases in that it applied the fourteenth amendment to a new layer of state-private relations. An earlier line of cases had applied the fourteenth amendment to private organizations receiving unusual state aid (and often subject to unusual regula-

[35] Shanks 231.
[36] *Id.* at 232.

tion).[37] *Ethridge* seems to extend this line of cases to (at least some) payments made under state contracts. Together *Ethridge* and the earlier line of cases seem to be consistent with a new principle. Substantial state payments to a discriminating private organization make the discriminatory acts of the private organization "state action."[38]

MICHAEL KENT CURTIS

Defamation—Damages—Requirements for Collection of Substantial Damages in Actionable Per Se Defamation

In *R.H. Bouligny, Inc. v. United Steelworkers*,[1] a defamation action arising out of a labor organization campaign, the North Carolina Supreme Court stated the following rule in regard to damages recoverable for a defamatory statement adjudged actionable per se:[2]

[37] *See, e.g.*, Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963).

[38] *Compare* Griffin v. Bd. of Supervisors, 339 F.2d 486 (4th Cir. 1964) *with* Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) *and* Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

[1] 270 N.C. 160, 154 S.E.2d 344 (1967). For the complete text of the defendant's five further answers and defenses and the various motions, demurrers and rulings that gave rise to its appeal, see *id.* at 163-66, 154 S.E.2d at 349-51. The basic issues raised concern questions of qualified privilege in labor organization campaign communications, federal preemption of labor defamation actions under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1964), and the Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1964), state jurisdiction to award damages for labor dispute defamation under the first and fourteenth amendments to the United States Constitution, and whether plaintiff's damages allegations were sufficient to state a cause of action. The court held in favor of the plaintiff on all questions but that of privilege, ruling on that point that the defense of qualified privilege does extend to defamatory statements made during labor organization campaigns.

[2] Defamation considered sufficient to establish a cause of action without proof of specific monetary loss, i.e., special damages, is referred to as actionable per se. Slander is generally not actionable per se unless it imputes commission of a crime, a loathsome disease, unchastity to a woman, or tends to affect the plaintiff in his trade or profession. W. PROSSER, LAW OF TORTS 772 (3d ed. 1964). Under the common law, all libel was considered actionable per se. However, confusion has arisen in this country over the division of libel into two types—libel per se and libel per quod. In some states, libel per se—or libel defamatory on its face—maintains its actionable per se character, although libel per quod—that requiring the introduction of extrinsic evidence to establish its defamatory nature—is not considered actionable without proof of special damages. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); Eldridge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966). The North Carolina courts have not escaped this confusion. *See* Kindley v. Privette, 241 N.C. 140, 84 S.E.2d

> [E]ven though the alleged statements were published by the defendant, were not privileged, were false and had a natural and immediate tendency to impair the plaintiff's repuation in the area of its customer or employee relations, *the plaintiff can recover, under the law of this State, as compensatory damages, only a nominal amount in absence of proof of both the fact and the extent of damages actually suffered by it as a result of the publications.*[3]

Although the statement is dictum, it represents a change in defamation law. Most jurisdictions hold that general damages[4] are presumed as a natural consequence of actionable per se defamation, thus establishing a cause of action and insuring at least a verdict for the plaintiff.[5] Further, the plaintiff who fails to plead or prove some actual injury resulting from the defamation is not automatically limited to a nominal recovery; substantial damages may be awarded based solely on the presumption.[6] North Carolina, at least

660 (1954) (all libel actionable per se). *Contra,* Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938) (libel per quod requires proof of special damages to be actionable). The conflicting language used in both *Flake* and *Kindley* is quoted with apparent approval in *Bouligny.* R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 168-69, 154 S.E.2d 344, 353 (1967). The libel per se—libel per quod confusion in this state is not within the scope of this note. For a full discussion of this problem, see *Torts, Fourth Annual Survey of North Carolina Case Law,* 35 N.C.L. REV. 177, 256 (1957); 33 N.C.L. REV. 674 (1955).

[3] R.H. Bouligny, Inc. v. United Steelworkers, 270 N.C. 160, 170, 154 S.E.2d 344, 353-54 (1967) (emphasis added). Although discussed, the question of proof required in order to collect more than nominal damages, a cause of action having been established, was not directly submitted to the court.

[4] The elements of general damages include injury to reputation, physical pain and inconvenience, humiliation, embarrassment and mental suffering. Payne v. Thomas, 176 N.C. 401, 97 S.E. 212 (1918); Osborne v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

[5] Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Stidham v. Wachtel, 41 Del. 327, 21 A.2d 282 (Super. Ct. 1941); Hermann v. Newark Morning Ledger, 48 N.J. Super. 420, 138 A.2d 61 (Super. Ct. 1958); Badame v. Lampke, 242 N.C. 755, 89 S.E.2d 466 (1955); Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); James v. Powell, 154 Va. 96, 152 S.E. 539 (1930); Arnold v. National Union of Marine Cooks, 44 Wash.2d 183, 265 P.2d 1051 (1954), *aff'd on other grounds,* 348 U.S. 37 (1954); C. MCCORMICK, LAW OF DAMAGES 423 (1935) (hereinafter cited as MCCORMICK); M. NEWELL, SLANDER AND LIBEL 810 (4th ed. 1924).

[6] Holden v. American News Co., 52 F. Supp. 24 (D.D.C. 1943); Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Barnett v. McClain, 153 Ark. 325, 240 S.W. 415 (1922); Stidham v. Wachtel, 41 Del. 327, 21 A.2d 282 (Super. Ct. 1941); Walsh v. Trenton Times, 124 N.J.L. 23, 10 A.2d 740 (Ct. Err. & App. 1940); Arnold v. National Union of Marine Cooks, 44 Wash.2d 183, 265 P.2d 1051 (1954); *see* Youssoupoff v. Metro-Goldwyn-

prior to the 1962 opinion cited as authority for Bouligny,[7] has been in accord with this rule.[8] Since then, however, this presumption of damages appears to suffice only to establish a cause of action in those situations where proof of special damages is not required.[9] It no longer will support a recovery of more than a nominal amount.

One possible explanation for the language is that it is influenced by the recent U.S. Supreme Court decision of *Linn v. Plant Guard Workers*.[10] In that case, it was held that the Labor Management Relations Act does not preempt state jurisdiction in libel actions arising out of labor organization campaigns.[11] It was also held that in order to recover the plaintiff must prove that the statements were made with malice and caused some form of harm recognized as compensable under state tort law.[12] As interpreted by *Bouligny*, this *Linn* proof requirement is necessary in order to establish a cause of action.[13] The *Bouligny* dictum under consideration, however, calls for proof of damages in order to collect more than a

Mayer Pictures, Ltd., 50 T.L.R. 581 (C.A. 1934); Tripp v. Thomas, 107 Eng. Rep. 792 (1824); McCORMICK 423; M. NEWELL, *supra* note 10, at 821; 3 RESTATEMENT OF TORTS § 621, comment *a* (1938); RESTATEMENT OF TORTS, Explanatory Notes § 569, comment *c* at 91 (Tent. Draft No. 11, 1965). Some cases indicate that even if the presumption of damages is controverted, plaintiff is still entitled to a substantial award. *See* Modisette & Adams v. Lorenze, 163 La. 505, 112 So. 397 (1927); Hermann v. Newark Morning Ledger, 48 N.J. Super. 420, 138 A.2d 61 (Super. Ct. 1958); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd. *supra*.

[7] Jones v. Hester, 262 N.C. 487, 137 S.E.2d 846 (1964) (per curiam). Refusing to hold a jury's award of nominal damages invalid, the court stated that a verdict on publication of the libel "entitled the plaintiff to nominal damages. Any further compensatory damages (other than nominal) could be awarded only upon the basis of proof, by the greater weight of the evidence." New trials have been awarded in other jurisdictions due to inadequacy of the verdict. *See, e.g.*, Kehoe v. New York Tribune, Inc., 229 App. Div. 220, 241 N.Y.S. 676 (1930).

[8] Barringer v. Deal, 164 N.C. 246, 80 S.E. 161 (1913); *see* Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1939) (dictum); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1937) (dictum); Brandis & Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C.L. REV. 249, 272 & n.157 (1953).

[9] R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 169, 154 S.E.2d 344, 353 (1967).

[10] 383 U.S. 53 (1966).

[11] *Id.* at 61.

[12] *Id.* at 64-65. The *Linn* decision required proof of malice and damages in order to protect labor unions and smaller employers from "the propensity of juries to award excessive damages for defamation," thereby attempting to balance the state's interest in protecting its residents from malicious libel with the "effective administration of national labor policy." *Id.*

[13] R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 176, 154 S.E.2d 344, 358 (1967).

nominal award, the cause of action already having been established. Of course, this difference of emphasis between proof allowing judgment and proof allowing substantial recovery does not in itself mean that *Linn* was not the motivation behind the *Bouligny* proof requirement. However, the *Bouligny* language itself is broad, and it was arrived at by the North Carolina court without mention of *Linn*. Indeed, the only case cited as authority for *Bouligny* in this regard was an action involving two individuals.[14] All these factors considered together point to the conclusion that the particular *Bouligny* paragraph in question is not controlled by the *Linn* case. Thus it seems that the language is meant to apply to all libel and slander suits in North Carolina that are deemed actionable without proof of special damages.

Although *Bouligny* calls for proof of the fact and extent of harm before substantial damages will be awarded, there are several possibilities as to the degree of proof that will satisfy this demand. It may be argued that the proof of damages required by *Bouligny* can be satisfied by the presumption of damages arising under the common law. This was the result in a New Jersey case, which held that:

> This requirement that the damages be 'proved' is not necessarily inconsistent with an allowance of general damages by 'presumption.' Such a presumption arises by logical inference from the patently defamatory character of a publication, assisted by the reasoning of experience, and stands as an element of proof which, until overcome by contrary proof, will support a verdict for general damages.[15]

Under such an interpretation, there would be no practical change made by *Bouligny*.

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[14] Jones v. Hester, 262 N.C. 487, 137 S.E.2d 846 (1964).

[15] Bock v. Plainfield Courrier-News, 45 N.J. Super. 302, 312, 132 A.2d 523, 528 (Super. Ct. 1957). The issue arose under the New Jersey Retraction Statute, which provides that if a non-malicious statement has been retracted, the plaintiff "shall recover only his actual damage proved and specifically alleged in the complaint." N.J. STAT. ANN. § 2A: 43-2 (1952). Construction of the North Carolina Retraction Statute has never required consideration of this point, the statute providing only that "plaintiff . . . shall recover only actual damages. . . ." making no mention of the need to prove those damages. N.C. GEN. STAT. § 99-2 (1965). The phrase "actual damages" has been defined as encompassing all but punitive damages, i.e., special damages, physical pain and suffering, mental suffering and injury to reputation. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616 (1927); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

General damages are said to be proved by introduction of evidence tending to show the probable impact of the defamation (as opposed to direct proof of injury).[16] This, then, is another possible interpretation of the degree of proof of harm required by *Bouligny*. Elements admissible as evidence usually include such things as the severity of the language, plaintiff's social and financial standing, the extent of publication of the defamation, and the defendant's influence as measured by his standing in the community.[17] Introduction of such evidence is always advisable in an effort to increase the damages award.[18] To require it would amount to a shift from the realm of "ought to" in an effort to increase the damages award to the realm of "must" in order to qualify for a substantial damages verdict. It would have little practical effect, since such evidence is most often introduced as a matter of course.[19] However, the general intangible nature of reputational injury[20] dictates that the absence of this evidence would not necessarily mean that the plaintiff had gone unharmed.

When the North Carolina court required proof "of both the fact and the extent of damages actually suffered," it could have been imposing a requirement that the plaintiff prove special damages—a specific dollars and cents loss—to collect more than nominal damages. This strict interpretation is arguable in light of the court's holding that a meeting of the *Linn* proof of injury requirements[21] by the plaintiff would be sufficient "to permit recovery of nominal damages."[22] This may mean, by inference, that a stricter proof requirement than that imposed by *Linn* must be met in order to

[16] *See* McCormick § 117.

[17] *Id.* There is conflicting authority over the admissibility of other factors, such as plaintiff's general good reputation (deemed presumed by many courts), evidence of repetition by third persons, specific instances of the effect of the defamation on individual recipients, and defendant's wealth (allowed by most courts only on the issue of punitive damages). *Id.*; Note, *Direct Proof of General Damage by Defamation*, 2 N.Y.L. Rev. 305 (1924); Comment, *Developments in the Law of Defamation*, 69 Harv. L. Rev. 875 (1956).

[18] Brandis & Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C.L. Rev. 249, 272 & n. 157 (1953).

[19] McCormick 423-24.

[20] See note 36 *infra* and accompanying text.

[21] As interpreted by the court in *Bouligny*, the *Linn* case requires proof "that the publications 'injured the relations between the plaintiff and its employees' or damaged 'the good name and reputation' of the plaintiff in the eyes of the employees or prospective employees . . . ." R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 178, 154 S.E.2d 344, 359 (1967).

[22] *Id.*

get *more* than nominal damages.[23] Such a stricter requirement would probably mean proof of pecuniary harm.[24] The result would be that compensation for often real but immeasurable harm (in monetary terms) to reputation and feelings would become a rarity in North Carolina defamation law.

The most likely interpretation of *Bouligny*'s proof of damages requirement, judging from the language on its face, is that the plaintiff must provide *direct proof* of both the fact and the extent of injury before qualifying for substantial compensation. For example, the plaintiff must objectively prove that his relationship with friends has been unfavorably influenced, and perhaps the degree of this influence, or how many of his friendships have been so affected. Because of this likelihood, attention should be directed to whether this is a desirable requirement.

In favor of such a requirement is the possibility that it may inject a greater element of control and rationale into defamation damages awards by juries.[25] It would facilitate the jury's understanding of the exact harm that their award should compensate and would make easier the court's review of the jury's award.[26] This same desirable goal could be approached, however, through clearer explanation to the jury of the elements of presumed injury to reputation for which they are to award compensation.[27] The advantage

[23] On the other hand, the phrase "to permit recovery of nominal damages" may be intended to refer only to the establishment of a cause of action, and not to be read as meaning plaintiff can recover *only* nominal damages in the absence of further proof. At best, the language is unclear.

[24] This assumes, of course, that the degree of proof required by *Linn* is interpreted by *Bouligny* as being direct proof of claimed injury. This appears to be the case. See note 21 *supra*.

[25] Amounts of verdicts vary from nominal damages of a few cents to a fortune in six figures, according to numberless factors, such as the age, sex, wealth, and personal attractiveness of the parties, the skill of the respective counsel, the pungency of the defaming words, and the infinite variety of experiences, sympathies, and prejudices of the jurymen.

McCORMICK, *supra* note 10, at 443.

[26] The criteria used by the courts in determining the reasonableness of a damages award is whether it appears to be the result of passion or prejudice. See, *e.g.*, Yates v. Mullins, 233 Ky. 781, 26 S.W.2d 757 (1930).

[27] Comment, *Developments in the Law of Defamation*, 69 HARV. L. REV. 875 (1956). The harms resulting from injury to reputation would consist of such things as pecuniary injury, physical injury, mental suffering, and loss of association.

By focusing directly upon these specific harms to the individual rather than on the injury to reputation which caused them, the arbitrary nature of jury awards of general damages might be somewhat reduced

of such a practice, in lieu of requiring proof of damages, is that it permits compensation for defamatory harm not subject to direct proof. Besides, there is no guarantee that different men would not assign different values to those injuries that were directly proved. Thus the uncertainties in amounts of awards would continue to be a factor under the *Bouligny* proof requirement.

Under the interpretation of *Bouligny* being considered here, those unable to prove directly some harm resulting from defamation still would have the benefit of a verdict in their favor. This fact forces one to consider the vindicatory function of a verdict without damages. Vindication, or restoration of reputation, is probably the relief most desired by victims of defamation. Thus, a verdict without damages (or with only a nominal award) may satisfy the defamed[28] while not burdening the defamer with potentially large damages payments.[29]

> The allowance of nominal damages performs a vindicatory function by enabling the plaintiff to brand the defamatory publication as false. The rule that permits satisfaction of the deep seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes. The judgement also partakes of the nature of relief in equity by subduing, or at least minimizing, the spread of harm to reputation.[30]

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and the courts might be provided with at least a general standard for determining the outer limits of proper awards of damages.

Id. at 936.

[28] Of course, punitive damages may be assessed against a defendant in some libel and slander cases. In North Carolina, such damages can be awarded only if the defamation was perpetrated with actual malice (the implied malice considered to accompany libel or slander per se will not suffice), and the award must bear some reasonable relation to the circumstances. *See, e.g.*, Cotton v. Fisheries Prods. Co., 181 N.C. 151, 106 S.E. 487 (1921). This note deals only with the compensatory damages aspect of actionable per se defamation.

[29] The "lie bill," a form of action apparently once used in some northern Arkansas counties, provided a somewhat similar result. The slandered party would file a "lie bill" against the defamer in a justice of the peace court. If the plaintiff won his case, the verdict took the form of a declaratory judgment in which the defendant was required to sign an admission that he had lied about the plaintiff. See Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423 (1952).

[30] Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966). The language was used in rejecting a requirement of proof of special damages to establish a cause of action for libel per quod. However, the court indicated that (similar to *Bouligny*) it would require proof of injury before allowing more than a nominal award: "[A] plaintiff need not show any pecuniary damage in order to establish the libel *and recover nominal*

Closer scrutiny, however, reveals several practical considerations which tend to limit the effectiveness of these vindicatory functions of a nominal damages verdict. First, a nominal award may indicate to the general public that the plaintiff's damaged honor and reputation have been assessed at a similar small value.[31] As put by one English adjudicator, "[T]he damages awarded have to be regarded as the demonstrative mark of vindication."[32]

Further, any idea that the spread of harm to reputation will be minimized by a judgment must be considered in light of the speed—or lack of it—with which verdicts are rendered. Crowded court calendars and complex issues combine to make judicial vindication painfully slow.[33] At the same time, harm to reputation and feelings can result in no less time than it takes a newspaper to be published, distributed and read by the public. Indeed, the harm has run its full course and been long ingrained in both recipients and victim before judgment is rendered.

Finally, before any judicial vindication can assert itself, the judicial system must be available to the victim of defamation. One must contend with the prohibitive expense of defamation litigation,[34] and any further limitation of the possibility of making the action pay its own way—i.e., by requiring direct proof of injury before substantial damages may be awarded—may effectively close the court's doors to less wealthy plaintiffs.

The vindicatory value of a verdict without substantial damages is thus open to question. Compensation for injury from defamation is probably the primary value of an action for damages. A requirement of direct proof of injury before the victim can collect substan-

damages, or compensation for non-pecuniary damage supported by the proof." Id. at 659 (emphasis added).

[31] "The very nature of an action which prays for damages, in a society where economic values dominate, implies failure in the action if substantial damages be not awarded." Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 428 (1952). "Thus a libel impugning the virtue of the village banker's daughter that results in a verdict for six cents implies that her repuation for chastity was worth only that much." Donelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 873 (1948).

[32] Dingle v. Associated Newspapers Ltd., [1960] 3 W.L.R. 229, 240 (H.L.), cited in Note, *Problems of Assessing Damages for Defamation*, 79 L.Q. REV. 63, 64 (1963).

[33] Comment, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1732 (1967).

[34] Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 604 (1964).

tial damages limits the compensatory function of a defamation action since direct proof of specific injury caused by defamation is often difficult if not impossible.[35]

> By the very nature of the harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle. The door of opportunity may be closed to the victim without his knowledge, his business or professional career limited by the operation of forces which he cannot identify but which, nonetheless, were set in motion by the defamatory statements.[36]

In light of these considerations—an uncertain and perhaps unnecessary method of regulating jury determinations, the questionable vindicatory value of a judicial verdict without damages, and the inherent difficulty of the proof required—it seems more desirable to permit the award of substantial compensation for defamatory harm based on a presumption of damages. Maintenance of the full scope of this presumption, coupled with more thorough instructions to juries and a greater readiness to review their damages awards, is a preferable alternative to the requirement of direct proof of damage to qualify for substantial award—which seems to be the most probable effect of *Bouligny*. This alternative permits compensation for unprovable but present harm, and also offers greater protection from unreasonable damages awards.

Finally, it must be admitted that it remains basically unclear exactly what the *Bouligny* dictum intends to require of a plaintiff seeking compensation for damages resulting from actionable per se defamation. This added uncertainty as to what he must do to gain substantial compensation for defamatory harm should be clarified at the court's earliest opportunity.

RICHARD W. ELLIS

Estate Tax—Deductions—Life Beneficiary with Power to Invade Corpus of Charitable Remainder

The Internal Revenue code of 1954 provides that in the determination of the taxable estate the value of all transfers, bequest, legacies, or devises of property to certain public, charitable, or

[35] Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966); RESTATEMENT OF TORTS § 621, comment *a* (1938).

[36] 1 F. HARPER & F. JAMES, THE LAW OF TORTS 468 (1956).

religious organizations is to be deducted from the value of the gross estate.[1] By allowing the deduction congress hoped to shift to the private sector charitable expenditures it would probably otherwise have to assume. The theory seems to be that the private sector can maintain the charitable programs more economically, efficiently, and with less political interference than either federal or state government. Realizing the possibilities created for obtaining funds, the charitable organizations have undertaken extensive campaigns for contributions; and the response has been good since there are tax advantages in charitable giving for both the wealthy and those with more moderate means.[2]

A frequently used method of giving entails the establishment of a trust directing the trustee to pay the income to a private lifetime beneficiary with the remainder over to charity. The trustee is also given the power to invade the corpus of the trust in favor of the lifetime beneficiary. By using this method the testator hopes to insure the comfort and happiness of the private beneficiary and at the same time obtain a charitable deduction. In the absence of a power to invade, the amount of the deduction can be easily determined.[3] But where such a power exists a considerable amount of controversy has developed over what circumstances should exist before a deduction is allowed. The source of this controversy is the uncertainty as to the value of the interest charity will ultimately receive. The Treasury Department has taken the position that a deduction is allowable; but, to insure that charity will take an amount commensurate to the deduction allowed, the Treasury requires that the value of the remainder interest be "presently ascertainable and, hence severable from the private interest"[4] and that the possibility of an invasion be "so remote as to be negligible."[5] These requirements may seem to present few complexities

[1] INT. REV. CODE of 1954, § 2055.

[2] See generally, Lowndes, *Tax Advantages of Charitable Giving*, 46 VA. L. REV. 394 (1960); Merritt, *Tax Incentives for Charitable Giving*, 36 TAXES 646 (1958); Yohlin, *Tax Blessings of Charitable Giving*, 10 PRAC. LAW 43 (May 1964); Young, *Tax Effects of Gifts to Charity*, 41 TAXES 351 (1963).

[3] Treas. Reg. § 20.2055-2(A) (1958). This section allows a deduction for the present value of the remainder interest created when property is placed in a trust to pay the income to a private lifetime beneficiary and then to pay the principal to charity. The remainder interest is valued according to the rules stated in § 20.2032-7.

[4] Treas. Reg. § 20.2055-2(A) (1958).

[5] Treas. Reg. § 20.2055-2(B) (1958).

but in their application the courts have been faced with three major questions: In what order should the tests be applied? What does "presently ascertainable" mean? And what is "so remote as to be negligible?"

To obtain a deduction the burden is on the taxpayer to show that the necessary requirements have been met.[6] First, he must prove that the power of invasion is limited by a "presently ascertainable" standard. Without such a standard no deduction is allowed.[7] If such a standard is found, he must then prove that the possibility of an invasion is negligible; but where no standard exists the courts refuse to consider this problem.[8] In those cases where there is a standard but the possibility of invasion is more than remote the courts must decide what amount of the claimed deduction is to be denied.

In *Moffet v. Commissioner*[9] the Fourth Circuit denied the entire deduction when it found that the possibility of invasion was not "so remote as to be negligible." In that case the testator established a million and a half dollar trust from which yearly payments were to be made to his widow for life. Charity was to receive the remainder. In denying the deduction the court was unimpressed by the taxpayer's argument that a deduction should be allowed for the present value of the charitable remainder computed after subtracting from the original trust corpus an amount determined by the multiplication of the expected annual invasion by the widow's life expectancy. This decision was clearly repudiated by the Second Circuit in *Schildkraut v. Commissioner*.[10] There, on substantially the same facts, a partial deduction was allowed. The court held that the requirement that the possibility of invasion be negligible did not apply in this context. It felt that the proper test was whether there is an interest that is "presently ascertainable" and "assurance" that charity will ultimately receive it. In short, the court took the position of the Treasury Department in Revenue

[6] Lincoln Rochester Trust Co. v. Commissioner, 181 F.2d 424 (2d Cir. 1950); Commerce Trust Co. v. United States, 167 F. Supp. 643 (W.D. Mo. 1958).

[7] Ithaca Trust Co. v. United States, 279 U.S. 151 (1929).

[8] Henslee v. Union Planters Nat'l Bank and Trust Co., 335 U.S. 595 (1949); Merchants Nat'l Bank v. Commissioner, 320 U.S. 256 (1943); Salisbury v. United States, 377 F.2d 700 (2nd Cir. 1967); Merrill Trust Co. v. United States, 167 F. Supp. 474 (D. Me. 1958).

[9] 269 F.2d 738 (4th Cir. 1959).

[10] 368 F.2d 40 (2d Cir. 1967).

Ruling 54-285[11] that "if the facts indicate the probability of an invasion to a limited extent which is calculable in accordance with an ascertainable standard, the deduction should be denied only to such extent." From these two cases it is clear that there is a serious dispute as to whether a negligible possibility of invasion is a prerequisite for any deduction. In the light of this dispute it would be advisable for the testator to utilize some other tax saving method where it appears that even a limited invasion is probable. The simplest solution would be an outright devise by the testator, after consultation with an attorney, to the widow and charity of interests approximately equal in value to those they would have taken under the trust.

There has been some criticism of the requirement that a "presently ascertainable" standard must exist within the will before a deduction is allowed. Those who criticize are in effect rejecting the "two-step" analysis. In a dissent in *Merchants National Bank v. Commissioner*[12] Mr. Justice Douglas, with whom Mr. Justice Jackson concurred, argued that in determining whether the standard was ascertainable the court should consider such outside factors as the frugality and conservatism of the trustee, the habits of the beneficiary, and the nature of the investments. These factors might make certain what on the face of the will appears uncertain; thus, the likelihood of invasion should be the determining factor. By using this test it is felt that the congressional policy of favoring charity would be better served. In support of this argument cases can be cited where the charitable deduction was denied even though the facts showed that, as a matter of common experience, the charitable beneficiary was as assured of receiving the corpus intact as in other cases where an ascertainable standard was found and a deduction allowed.[13] This inconsistency seems to be the basis for most objections to the present "two-step" test.

In answer to these criticisms the Court has said that "[w]hat common experience may regard as remote in the generality of cases

[11] 1954-2 CUM. BULL. 302.

[12] 320 U.S. 256 (1943).

[13] *Compare* Merchants Nat'l Bank v. Commissioner, 320 U.S. 256 (1943), Gammons v. Hassett, 121 F.2d 229 (1st Cir. 1941), *cert. denied*, 314 U.S. 673 (1941), and Merrill Trust Co. v. United States, 167 F. Supp. 474 (D. Me. 1958), *with* Estate of Mary C. Wood, 39 T.C. 919 (1963) and Estate of Leonard O. Carlson, 21 T.C. 291 (1963).

may nonetheless be beyond the realm of precise prediction in the single instance."[14] In sum, the Court was pointing to the additional uncertainty created by the absence of a "presently ascertainable" standard. Whether or not a standard exists would in itself be an important factor in determining the likelihood of an invasion. Without a limiting standard the courts can only speculate as to the needs or desires of the lifetime beneficiary. Of course the courts can look to the beneficiary's past station in life and draw some conclusions as to his frugality but in light of the general uncertainty surrounding human affairs no adequate projection can be made. In fact, without first establishing a standard it is difficult to see how the likelihood of an invasion can be determined. Furthermore it must be remembered that the tax is imposed on the transfer of property or the act of the testator[15] and that when he creates a trust giving charity a vested interest subject to divestment for the benefit of the private beneficiary he is only secondarily concerned with the charitable beneficiary. When this intent is considered in conjunction with the broad power of invasion given the trustee it does not seem unfair to deny the deduction.

What language constitutes an "ascertainable standard?" In answer to this question the Court has said that the purposes for which the corpus may be invaded must be subject to "reliable prediction"[16] rather than "rough guesses" or "approximation"[17] and that there must be a standard "fixed in fact and capable of being stated in definite terms of money."[18] The first class of standards held to be ascertainable are those where the trustee's power of invasion is limited to the amount necessary to insure that the lifetime beneficiary will continue to live according to his or her accustomed standard of living.[19] Other language held to connote the objective station in life standard includes "support, maintenance, welfare, and comfort,"[20] "comfort and support,"[21] "comfort and welfare,"[22]

[14] Henslee v. Union Planters Nat'l Bank and Trust Co., 335 U.S. 595, 599 (1949).

[15] Young Mens Christian Ass'n v. Davis, 264 U.S. 47 (1924).

[16] Merchants Nat'l Bank v. Commissioner, 320 U.S. 256, 262 (1943).

[17] *Id.* at 261.

[18] Ithaca Trust Co. v. United States, 279 U.S. 151, 154 (1929).

[19] Ithaca Trust Co. v. United States, 279 U.S. 151 (1929); Lincoln Rochester Trust Co. v. Commissioner, 181, F.2d 424 (2d Cir. 1950); Estate of Leonard O. Carlson, 21 T.C. 291 (1953).

[20] Estate of Mary C. Wood, 39 T.C. 919 (1963).

[21] Estate of Edwin E. Jack, 6 T.C. 241 (1946).

[22] Blodget v. Delaney, 201 F.2d 589 (1st Cir. 1953).

"care and maintenance,"[23] and "comfortable maintenance and support."[24] The objective standard has also been implied where the invasion was limited to periods created by physical or economic emergencies.[25]

Where there is subjective language such as "use and benefit,"[26] "comfortable support and maintenance and for any other reasonable requirements,"[27] "need or desire,"[28] "support, maintenance, and comfort, including luxuries,"[29] and "welfare, comfort, and happiness,"[30] the courts have been prone to say that the standard is unascertainable. Expansive language directing the trustee to invade the corpus for the proper maintenance and support of the beneficiary to the same generous extent that the testator, if living, could do has caused an otherwise objective standard to fail for subjectivity.[31] Directions by the testator to the effect that the trustee in exercising his discretion is to favor the private beneficiary over the charity have also rendered the remainder nondeductible.[32]

[23] Estate of Nellie H. Jennings, 10 T.C. 241 (1946).

[24] Hartford-Connecticut Trust Co. v. Eaton, 36 F.2d 710 (2d Cir. 1929).

[25] Payment by the trustee was to be limited to cases of need "on account of any sickness, accident, want, or other emergency," Commissioner v. Wells Fargo Bank & Union Trust Co., 145 F.2d 130 (9th Cir. 1944); "in case she should, by reason of accident, illness, or other unusual circumstances so require," Commissioner v. Bank of America Trust & Savings Ass'n, 133 F.2d 753 (9th Cir. 1943); "in case of illness or other emergency" affecting the beneficiary or his family, Union & New Haven Trust Co. v. United States, 265 F. Supp. 800 (D. Conn. 1967); and for any "emergency, illness, or necessity," Estate of Oliver Lee, 28 T.C. 1259 (1957).

[26] Newton Trust Co. v. Commissioner, 160 F.2d 175 (1st Cir. 1947).

[27] State Street Bank & Trust Co. v. United States, 313 F.2d 29 (1st Cir. 1963).

[28] Gammons v. Hassett, 121 F.2d 229 (1st Cir. 1941), *cert. denied*, 314 U.S. 673 (1941).

[29] Vaccaro v. United States, 224 F. Supp. 307 (D. Mass. 1963).

[30] United States v. Powell, 307 F.2d 821 (10th Cir. 1962).

[31] Kline v. United States, 202 F. Supp. 849 (N.D. W.Va. 1962), *aff'd per curiam*, 313 F.2d 633 (4th Cir. 1963). Directions to the trustee to make payments "for any other purpose which my trustee shall deem expedient, necessary, or desirable for the benefit and use of my sister," Zentmayer v. Commissioner, 336 F.2d 488 (3d Cir. 1964); "for any purpose which may add to her (beneficiary's) comfort or convenience," Seubert v. Shaughnessy, 233 F.2d 134 (2d Cir. 1956); and "of such portion of the trust as my sister may in writing request" with her judgement as to need being conclusive, Merrill Trust Co. v. United States, 167 F. Supp. 474 (D. Me. 1958), have rendered an otherwise objective standard subjective.

[32] Typical examples are directions that the trustee's first object to be accomplished is to provide for the beneficiary in "such manner as she may desire," Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595 (1949); that in the exercise of his discretion he is to be liberal to the life time beneficiary, Merchants Nat'l Bank v. Commissioner, 320 U.S. 256

Furthermore the use of subjective or expansive language in conjunction with a limitation permitting invasion only in cases of emergency have caused the standard to be unascertainable.[33] It seems though that in this latter situation the courts will more readily imply an objective standard.[34]

In the construction and interpretation of a will the primary purpose of the court is to ascertain the intention of the testator.[35] To do this the courts must necessarily interpret the will in accordance with the applicable state law since it is that law which ultimately determines the extent of the trustee's power of invasion.[36] This dependence upon state law in determining the existence of a standard creates what at first appears to be an inconsistency between the courts' words and actions. The federal courts have consistently refused to consider outside circumstances in order to make the standard ascertainable.[37] Yet we find that the state courts construe the language used by the testator in the light of such outside circumstances as the condition of the testator's family, how he was circumstanced, his relationship to the beneficiary, the financial condition of the beneficiary (at least where it was known to the testator), and even the motives which are reasonably supposed to influence him.[38] Thus, in a sense, extrinsic circumstances sometimes in-

(1943); that he is to give "sympathetic consideration to any request" made by the beneficiary, Union Trust Co. v. Tomlinson, 355 F.2d 40 (5th Cir. 1966); and that his powers are to be liberally construed in favor of the private beneficiary, Industrial Trust Co. v. Commissioner, 151 F.2d 592 (1st Cir. 1945), *cert. denied*, 327 U.S. 788 (1946).

[33] In DeCastro v. Commissioner, 155 F.2d 254, (2d Cir. 1946), *cert. denied*, 329 U.S. 727 (1946), the court held that a provision allowing invasion if other income did not "amply" provide for the life beneficiary's needs rendered the remainder nondeductible. A similar result was reached in Estate of Helen H. Thompson, 27 P-H Tax Ct. Rep. & Mem. Dec. ¶ 58-100 (1958), where the trustee was directed to make payments "for the best interest of the beneficiary during illness or emergency of any kind."

[34] *Compare* Salisbury v. United States, 378 F.2d 700 (2d Cir. 1967) *and* Union & New Haven Trust Co. v. United States, 265 F. Supp. 800 (D. Conn. 1967), *with* Newton Trust Co. v. Commissioner, 160 F.2d 175 (1st Cir. 1947).

[35] Salisbury v. United States, 378 F.2d 700 (2d Cir. 1967).

[36] Blodget v. Delany, 201 F.2d 589 (1st Cir. 1953).

[37] Seubert v. Shaughnessy, 233 F.2d 134 (2d Cir. 1956). The court indicated that extrinsic facts such as the financial condition of the life beneficiary were irrelevant to the question of whether or not there was an ascertainable standard.

[38] Rufty v. Brantly, 204 Ark. 32, 161 S.W.2d 11 (1942); Stern v. Stern, 410 Ill. 377, 102 N.E.2d 104 (1951); Herring v. Williams, 153 N.C. 231, 69 S.E. 140 (1910); *In re* Jackson's Estate, 377 Pa. 561, 12 A.2d 338 (1940); Mitchell v. Mitchell, 129 S.C. 321, 123 S.E. 854 (1924).

directly enter into the determination of an "ascertainable standard."[39] Despite the apparent inconsistency there is a distinction that can be drawn between these two practices. In the latter instance the courts are using the outside factors to determine the testator's intent expressed in the language of the will. In the former if the court finds that the language is subjective it will not allow the deduction just because those same factors show that the likelihood of invasion is remote.

What is "so remote as to be negligible?" Must the taxpayer prove that it is impossible for charity not to take? This question was answered in the negative by the court in *Hamilton National Bank v. United States.*[40] The court made it clear that a charitable deduction will be allowed even though some uncertainty exists. In defining "so remote as to be negligible" the court said "a negligible possibility is a possibility that would in the ordinary and reasonable affairs of men be disregarded in arriving at a present valuation of a future remainder interest in a serious business transaction, with *no* deduction in the value of the remainder interest being made by reason of the existence of such a possibility."[41] Whether such a possibility exists is a question of fact. No general rules or conclusions can be reached as each case must necessarily be decided on its own particular facts.

What facts are to be considered? The courts have stated that only those facts existing at the testator's death are relevant.[42] In

[39] Where there has been a state court decision which is neither collusive nor inoperative, on the extent of the trustee's power of invasion, it seems that the federal courts in applying the federal tax statute must make their determination in accordance with the state court ruling. Henrickson v. Baker-Boyer Nat'l Bank, 139 F.2d 877 (9th Cir. 1944). Professors Lowndes and Kramer point out that where there is no state court decision on the particular trust under consideration the federal courts generally construe and apply the state law for themselves. C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES, 57 (2d ed. 1962). In construing the will the federal courts must necessarily take into account all the factors which are relevant in the particular state jurisdiction to the interpretation of a will. To do otherwise would be unrealistic as no accurate interpretation of the language used could be made. Furthermore, if the outside factors were completely ignored a tax might often be imposed on interests which by State Law were certain to go to charity.

[40] 236 F. Supp. 1005 (E.D. Tenn. 1965), *aff'd*, 367 F.2d 554 (6th Cir. 1966).

[41] 236 F. Supp. 1005, 1016 (E.D. Tenn. 1965), *aff'd*, 367 F.2d 554 (6th Cir. 1966).

[42] Ithaca Trust Co. v. United States, 279 U.S. 151 (1929); Lincoln Rochester Trust Co. v. McGowan, 217 F.2d 287 (2d Cir. 1954).

Lincoln Rochester Trust Co. v. McGowan the court said that "actual events occurring after the testator's death may never be substituted for the estimate of probable events made as of the time of the testator's death and based upon circumstances as they existed on that date."[43] For later events to be considered their admission must "have sufficiently high probative value in establishing or clarifying the circumstances as they existed at the time of the testator's death."[44]

In *Allen v. First National Bank*[45] property was left by the testator to his wife for life and then to the children (including those born posthumously) and descendants that survive her. In the event there were no survivors the property was to go to designated charities. In allowing a deduction the court had to decide whether or not it was proper to admit evidence of the fact that no child had been born posthumously. In admitting the evidence the court said that it was merely evidence establishing the existence of a state of facts which existed at the date of the testator's death. The evidence tended to establish that as of the date of death there would not and could not be any child born of the marriage. Later events held inadmissible included an actual invasion of the corpus after the date of death[46] and evidence of the later death of the private beneficiary.[47] The distinction is, as the above court pointed out, that evidence of this nature has no connection at all with the facts existing at the time of the testator's death.

The factors which seem to weigh most heavily with the courts are the life expectancy of the beneficiary, the beneficiary's past standard of living, the income of the trust, and the independent means of the beneficiary available for the payment of such expenses.[48] In their consideration of this last factor another important question must be answered by the court: does the applicable state law require that the lifetime beneficiary substantially exhaust his own

[43] 217 F.2d 287, 293 (2d Cir. 1954).
[44] *Id.*
[45] 169 F.2d 221 (5th Cir. 1948).
[46] Wells Fargo Bank & Union Trust Co. v. Commissioner, 145 F.2d 132 (9th Cir. 1944). The court said that it was improper to be influenced by such evidence.
[47] Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 559 (1949); Merrill Trust Co. v. United States, 167 F. Supp. 474 (D. Me. 1958).
[48] Estate of Eunice M. Greene, 11 T.C. 205 (1948); Estate of John W. Holmes, 5 T.C. 1289 (1945).

private resources before an invasion can be made? In *Christy v. Commissioner*[49] a deduction was not allowed principally because Pennsylvania had no such requirement. Had this case arisen in another jurisdiction the deduction probably would have been allowed.[50] Some other factors considered by the courts include the beneficiary's ability to work, the probability that he will continue to work, the number of his dependants, the state of the beneficiary's health, and the character of the trustee.[51]

In reviewing the decisions of the courts in this area it is evident that much confusion exists. But from these cases several general propositions can be deduced. First, the power of invasion should be limited to that amount necessary to maintain the beneficiary according to his prior station in life. Secondly, subjective or expansive language should not be used to limit the power of invasion as it seems to be an invitation to a law suit. Furthermore most charitable interests have been held nondeductible where this language was used. Thirdly, if tax considerations are the prime concern, a provision to the effect that the beneficiary must exhaust his assets before an invasion can be made should be included in the testator's will if the applicable state law has no such requirement. Lastly, the testator should not rely upon getting a partial deduction. If a trust has been established and it later appears that a deduction will be denied consideration should be given to disclaiming the power of invasion.[52]

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[49] 8 T.C. 862 (1947).

[50] Union & New Haven Trust Co. v. United States, 265 F. Supp. 800 (D. Conn. 1967). In Connecticut the invasion of the corpus is conditioned upon the exhaustion of the beneficiary's assets.

[51] Estate of Mary C. Wood, 39 T.C. 919 (1963); Estate of Lucius H. Elmer, 6 T.C. 944 (1946); Estate of Charles H. Wiggins, 3 T.C. 464 (1944); Union Nat'l Bank v. Looker, 64-2 U.S. Tax Cas. ¶ 12,258 (N.D. W.Va. 1964).

[52] INT. REV. CODE of 1954, § 2055. This section provides that included in the amount deductible is the value of all the interest which passes to charity as the result of an irrevocable disclaimer. For a deduction to be taken the disclaimer must be filed in the probate court before the estate tax return is filed.

Insurance—Accidental Means v. Accidental Death or Tweedledum v. Tweedledee*

The insured in *Henderson v. Hartford Acc. & Indem. Co.*[1] was a member of the local fire department who entered a burning dwelling in furtherance of his duties as a fireman. While inside the house he inhaled heavy smoke which caused him to collapse. He was revived, but he died after a few minutes from a cardiac arrest brought on by the smoke inhalation. The group accident insurance policy covering the fire department members provided that death or injury must be "effected . . . *through accidental means.*"[2] On the basis of this wording the North Carolina Supreme Court denied recovery to the insured's beneficiary, distinguishing the terms "accidental means" and "accident." The insured's death, the court held, occurred by "accident" and not by "accidental means."

The common definition of an "accident" is an unusual, unexpected and unintended event—an event which happens fortuitously and without design.[3] In light of the fact that the term "accident" has acquired no special technical meaning in law and is to be given its ordinary and common meaning,[4] it would appear that recovery would be had in the above case. The distinction drawn by the North Carolina court to deny recovery, however, is also drawn in many other jurisdictions. On the other hand, some courts, while recognizing the technical distinction between the terms, flatly refuse to drawn any legal distinction between them. The

* In the poem "On the Feuds between Handel and Bononcini," which was written about two feuding schools of musical theory between which there was no real difference, the English poet John Byron wrote this familiar line:

"Strange all this difference should be
Twixt Tweedledum and Tweedledee."

This expression has a special relevance when discussing the terms "accidental means" and "accident" in insurance law.

[1] 268 N.C. 129, 150 S.E.2d 17 (1966).

[2] *Id.* at 130, 150 S.E.2d at 18 (emphasis added). The term "accidental means" is common in accident policies and in double indemnity provisions of life insurance policies. *See* Franklin, *Accidental Death—As It Relates to Health and Accident Policies and Double Indemnity Provisions of Life Policies,* ABA INS., NEGL., & COMP. LAW SECTION 91 (1965). The two types of policies will be treated together here since the use of the term has the same effect in both. For a brief history of how the term came into use *see* M. CORNELIUS, ACCIDENTAL MEANS 1-4 (1932).

[3] *E.g.,* 29A AM. JUR. *Insurance* § 1164 (1960).

[4] 2 G. RICHARDS, INSURANCE 725 (5th ed. 1952).

resulting controversy is no small one.[5] It is helpful, for purposes of analysis, to regard the courts and legal scholars as divided into two distinct groups, but it is not always clear to which group some courts belong.

The first group, of which North Carolina is a member, follows the "strict approach" or "Georgia rule."[6] This group distinguishes between the terms and is considered to be in the majority. Basically, the distinction is founded upon the idea that "means" is synonymous with "cause;"[7] that when the term "accidental means" is used in a policy, the *cause* of the injury or death must be accidental. To these courts it is not sufficient that the *result* can be classified as an accident. Under this theory an insured's injury or death may be an "accident" and yet not caused by "accidental means." The means are not considered accidental when the insured does a voluntary and intentional act and is injured or killed, even though the injury or death does not ordinarily follow such an act and was not in any way intended or expected.

The North Carolina court's reasoning in the *Henderson* case provides a clear example of the strict approach. There the insured was voluntarily and intentionally fighting the fire. The court held that the means were not accidental since the insured was voluntarily performing an intentional act, even though the result (i.e. death) was unusual, unexpected, and unforseen.[8]

If a slip or mishap occurs in the doing of a voluntary and intentional act, an element of unexpectedness is added and the means become accidental.[9] Therefore the distinction or strict approach becomes important only where the insured is injured or killed as the result of an intentional act in which no slip or mishap occurred, but where the result was totally unexpected and unintended as in *Henderson.*

The second group of courts and legal scholars follows the

[5] *See generally* 29A AM. JUR., *supra* note 3, at §§ 1164-67; 1A J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 391-93 (rev. ed. 1965); 45 C.J.S. *Insurance* §§ 753-54, 938 (1946); 2 G. RICHARDS, *supra* note 4, at §§ 213-17; W. VANCE, INSURANCE §§ 179-81 (3rd ed. 1961).

[6] This "strict approach" stems from the case of United States Mut. Acc. Ass'n v. Barry, 131 U.S. 100 (1889).

[7] 29A AM. JUR., *supra* note 2, at § 1166.

[8] 268 N.C. at 133, 150 S.E.2d at 20.

[9] Thus in *Henderson* the court ruled by implication that if a slip, mishap, or mischance had occurred in the doing of the act, recovery would have been allowed.

"liberal approach" or "New York rule."[10] Mr. Justice Cardozo, dissenting in *Landress v. Phoenix Mut. Life Ins. Co.*,[11] paved the way for this liberal rule by his apparently logical statement to the effect that an accident is an accident throughout or it is no accident at all.[12] To the followers of the liberal approach the terms "accidental means" and "accident" are regarded as being legally synonymous. To these courts the *means* are accidental when the *result* is an accident. Therefore, when the result is unusual, unexpected, and unintended, even though resulting from an intentional act in which no slip or mishap occurs, the means are held to be accidental and recovery is allowed.

Added to the controversy is confusion. Mr. Justice Cardozo predicted in his celebrated dissent in *Landress* that "[t]he attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog.[13] The confusion that has resulted has prompted one writer to the conclusion that this "prophecy . . . is now close to fulfillment. This whole

[10] Among the courts following the "liberal approach" are those of *Arkansas*, Travelers Ins. Co. v. Johnston, 204 Ark. 307, 162 S.W.2d 480 (1942); *Colorado*, Equitable Life Assurance Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); *Florida*, Gulf Life Ins. Co. v. Nash, 97 So.2d 4 (Fla. 1957); *Idaho*, O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P.2d 707 (1944); *Illinois*, Taylor v. John Hancock Mut. Life Ins. Co., 11 Ill.2d 227, 142 N.E.2d 5 (1957); *Iowa*, Comfort v. Continental Cas. Co., 239 Iowa 1206, 34 N.W. 2d 588 (1948); *Louisiana*, Schonberg v. New York Life Ins. Co., 235 La. 462, 104 So.2d 171 (1958); *Nebraska*, Murphy v. Travelers Ins. Co., 141 Neb. 41, 2 N.W.2d 576 (1942); *New Mexico*, Scott v. New Empire Ins. Co., 75 N.M. 81, 400 P.2d 953 (1965); *New York*, Burr v. Commercial Travelers Mut. Acc. Ass'n, 295 N.Y. 294, 67 N.E.2d 248 (1946); *North Dakota*, Jacobson v. Mutual Benefit Health & Acc. Ass'n, 69 N.D. 632, 289 N.W. 591 (1940); *Oklahoma*, Provident Life & Acc. Ins. Co. v. Green, 172 Okla. 591, 46 P.2d 372 (1935); *Pennsylvania*, Beckham v. Travelers Ins. Co., 424 Pa. 107, 225 A.2d 532 (1967); *South Carolina*, Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937); *Utah*, Browning v. Equitable Life Assurance Soc'y, 94 Utah 532, 72 P.2d 1060 (1937); and *Vermont*, Griswald v. Metropolitan Life Ins. Co., 107 Vt. 367, 180 A. 649 (1935). Other courts have followed the liberal approach in particular cases without announcing it as a general rule, *e.g.*, King v. Travelers Ins. Co., 123 Conn. 1, 192 A. 311 (1937).

[11] 291 U.S. 491 (1934).

[12] 291 U.S. at 501. See Note, *"An Accident Is an Accident Is An Accident . . ." or "An Accident By Any Other Name . . . ,"* 12 N.Y.U. INTRA. L. REV. 250, 255 (1957).

[13] 291 U.S. at 499. The term "Serbonian Bog" is from 2 J. MILTON, PARADISE LOST line 392 (1667):

> A gulf profound as that Serbonian Bog
> Betwixt Damiato and Mount Casius old,
> Where armies whold have sunk. . . .

branch of insurance law has become shrouded in a semantical and polemical maze. . . . The situation is fast approaching a point where the slight frame of legal theory involved is being smothered.[14]

Part of the confusion is created by the fact that different courts following the strict approach will often reach contradictory results on similar fact situations. The Michigan court allowed recovery where an insured hunter froze to death on a hunting trip,[15] but the Montana court denied recovery on similar facts.[16] Another example is the division among the courts following the strict approach as to whether sunstroke is caused by accidental means.[17] The reason for these inconsistent results is that many courts which draw the distinction have modified the approach in particular cases in an effort to achieve more equitable results.[18] Thus it appears that some courts have abolished the distinction without repudiating it.[19]

Another source of confusion in this area is that the courts which attempt to achieve a more equitable result often do so by resorting to a confusing analysis of the case in order to preserve the distinction. An example of such an analysis is found in *Traveler's Ins. Co. v. Ansley*.[20] There the insured died from an overdose of a "nerve remedy." There was no slip or mishap causing the insured to take a poisonous quantity. He intentionally took the precise amount involved without knowing it was deadly in that quantity. That the Tennessee court professes to follow the strict rule is evidenced by the statement that an accidental means policy "does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended."[21] Applying this strict rule to the facts of the case, there would normally be no recovery since the insured voluntarily, intentionally, and with an ordinary movement, took the medicine. But, in allowing recovery

[14] Annot., 166 A.L.R. 469, 477 (1934).
[15] Ashley v. Agricultural Life Ins. Co., 241 Mich. 441, 217 N.W. 27 (1928).
[16] Tuttle v. Pacific Mut. Life Ins. Co., 58 Mont. 121, 190 P. 993 (1920).
[17] *E.g.*, The *Landress* majority held sunstroke not to be by accidental means, but the Wisconsin court holds that it is. O'Connell v. New York Life Ins. Co., 220 Wis. 61, 264 N.W. 253 (1936).
[18] Kirsch, *Accidental Means*, 1953 INSUR. L.J. 545, 547 [hereinafter cited as Kirsch].
[19] Thompson, *The Judicial Approach to "Accidental Means" Policies in California*, 13 HASTINGS L.J. 255 (1961) (suggests that California has done just that).
[20] 22 Tenn. App. 456, 124 S.W.2d 37 (1938).
[21] *Id.* at 459, 124 S.W.2d at 39.

the Tennessee court reasoned that while insured intentionally consumed the medicine taken, and in the precise quantity taken, his real intent was only to take a "harmless nerve remedy."[22] The apparent meaning of this is that while the insured intentionally took an amount that was toxic, in the sense that the taking was a deliberate act, he unintentionally took a toxic amount, in the sense that death was not his desire. In other words, an intentional act is intentional only up to the point that it has the effect that the actor thought it would have. From that point on, to the actual result that follows the intentional act, the act is unintentional and the means are therefore accidental. It is apparent that this logic could be used to allow recovery in spite of the distinction in *any* case where the insured does an intentional act that has an unintended or unexpected result. For example, if applied to *Henderson*, recovery would be allowed since the insured there was doing a voluntary and intentional act, but he did not intend the result that followed that act.

While many courts following the strict rule have become bogged down in the confusion and have given only lip service to the distinction, the North Carolina Supreme Court has, for the most part, been consistent in denying recovery on the basis of the distinction whenever insured did an intentional act without a slip or mishap. The *Henderson* case is only the most recent example.[23] The North Carolina court has not, however, escaped the confusion entirely. In several cases the court has employed a natural and probable consequence approach to the problem.[24] The use of this approach by

[22] *Id.* at 462, 124 S.W.2d at 41.

[23] Other cases include Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966) (insured, without warning, "jumped straight backward," hit is head on a cement floor and died of a cerebral hemorrhage); Langley v. Durham Life Ins. Co., 261 N.C. 459, 135 S.E.2d 38 (1964) (insured lay face down on his bed, went to sleep, and suffocated); Allred v. Prudential Ins. Co. of America, 247 N.C. 105, 100 S.E.2d 226 (1957) (insured lay in highway to show his companions how brave he was, was hit, and died); Fletcher v. Security Life & Trust Co., 220 N.C. 148, 16 S.E.2d 687 (1941) (insured received a spinal anesthesia preparatory to gall bladder operation which unexpectedly caused a collapse of his respiratory system and death); Scott v. Aetna Life Ins. Co., 208 N.C. 160, 179 S.E. 434 (1935) (insured had a tooth pulled and germs entered the hole and caused swelling which necessitated an operation and insured died from a blood clot following the operation); and Mehaffey v. Provident Life & Acc. Ins. Co., 205 N.C. 701, 172 S.E. 331 (1934) (insured died from liquor poisoning).

[24] Allred v. Prudential Ins. Co., 247 N.C. 105, 100 S.E.2d 226 (1957); Scarborough v. World Ins. Co., 244 N.C. 502, 94 S.E.2d 558 (1956); Mehaffey v. Provident Life & Acc. Ins. Co., 205 N.C. 701, 172 S.E. 331 (1934);

some courts is another factor causing confusion in the accidental means area because, as will be seen by an examination of the rule, it is the very antithesis of the strict approach which these courts profess to follow.[25]

The rule concerning natural and probable consequences in this area of law has been stated as follows:

> An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or falls under the maxim that every man must be held to intend the natural and probable consequences of his deeds. On the other hand, an effect which is not the natural and probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of these means . . . , *is produced by accidental means.*[26]

Examining the rule, it can be seen that the natural and probable consequence approach is the antithesis of the strict approach since *results*, instead of *means*, are being tested by its use.[27] Courts, in using it, are examining the result to determine if it is the natural and probable consequence of the act producing it. If it is not, recovery is allowed. Thus, if the result is unexpected and unintended and does not ordinarily follow the act, then that result is produced by accidental means, and this is in effect a restatement of the liberal approach.

The North Carolina court has never stated the natural and probable consequence rule as explicitly as set out above. But, in *Harris v. Jefferson Standard Life Ins. Co.*[28] the insured died as a result of pneumonia which developed from a chest injury received in a high school basketball game when he attempted to block a shot by an opponent. In allowing recovery, the court reasoned that although he "engaged voluntarily in the game . . . , and while he anticipated collisions during the progress of the game . . . , no such injury as that which he suffered . . . was probable as the result of the game."[29] In *Mehaffey v. Provident Life & Acc. Ins. Co.*[30] the

Harris v. Jefferson Standard Life Ins. Co., 204 N.C. 385, 168 S.E. 208 (1933).

[25] Kirsch 547.

[26] Western Commercial Travelers Ass'n v. Smith, 85 F. 401, 405 (8th Cir. 1898) (emphasis added).

[27] Kirsch 547.

[28] 204 N.C. 385, 168 S.E. 208 (1933).

[29] *Id.* at 388, 168 S.E. at 210.

[30] 205 N.C. 701, 172 S.E. 331 (1934).

court, referring to poisoning of the insured from consumption of alcohol, said that "any poison in the stomach of the deceased was the natural and probable consequence of an ordinary act in which he voluntarily engaged."[31] These cases show the court's implicit acceptance of the natural and probable consequence rule. The *Mehaffey* decision, perhaps, is not surprising. Recovery would have been denied without the use of the natural and probable consequence rule by merely following the normal strict rule, since the means by which insured died was an intentional act and not accidental. The *Harris* decision, however, would have been different without the use of the natural and probable consequence rule. There the means was as much an intentional act as in *Mehaffey*, but recovery was allowed. A possible explanation for the court's use of the natural and probable consequence rule in *Harris* is that the court had not accepted the strict rule at that time. But it did accept it one year later in *Mehaffey* by saying that "[i]f the result, although unexpected, flows directly from an ordinary act in which the insured voluntarily engages, then such is not deemed to have been produced by accidental means."[32] Despite this acceptance of the strict rule, the court proceeded to deny recovery by using natural and probable consequence language.[33] Thus, it can be seen that the court was not using the natural and probable consequence rule in *Harris* merely because it had not accepted the strict rule as yet, since it later applied it in *Mehaffey* after acceptance of the strict rule. Although the court did not accept the strict rule in *Harris*, it discussed it and its acceptance by other courts, concluding that "if conceded to be sound, [it] is not applicable to the instant case."[34] It would seem that if the court considered the rule applicable in any case, it would be applicable in *Harris* since the facts seem to present a clear case for its application. The insured was injured as a result of a voluntary and intentional act although the result was not intended.

Since the court employed the natural and probable consequence rule in *Harris* where the facts seem to call for application of the strict rule, it is not clear why it failed to employ the rule in other

[31] *Id.* at 705, 172 S.E. at 333.
[32] *Id.* at 705, 172 S.E. at 333.
[33] *Id.* at 705, 172 S.E. at 333.
[34] 204 N.C. at 388, 168 S.E. at 210.

cases.[35] As much confusion as the approach has caused, however, it does provide a means of achieving a fair result without the necessity of repudiating the strict rule.[36]

There seem to be only three possible justifications for distinguishing between the terms "accidental means" and "accident." The first is that the parties are free to contract as they desire.[37] This argument has lost its appeal in insurance cases and the Utah court disposed of it properly in *Browning v. Equitable Life Ass. Soc.*[38] by stating that

> [i]nsurance policies, while in the nature of written contracts, are not prepared after negotiations between the parties, to embrace the terms at which the parties have arrived. . . . They are prepared beforehand by the insurer. Normally, the details and provisions are not discussed. He seldom sees the policy until it has been issued and delivered to him. He signs an application blank in which the policy sought is described either by form number or by general designation, pays his premium, and in due course thereafter receives . . . his policy. Many of the terms and all of its defenses and super-refinements he has never heard of and would not understand them if he read them. . . .[39]

The second possible justification is that there *is* a technical difference between the terms. They are not in fact synonymous. But, insurance policies do not give the reader an opportunity to distinguish between the terms. Policies do not say that "coverage is provided against death or injury by 'accidental means'—as opposed to death or injury by 'accident.'" They contain only the term "accidental means" *or* the term "accident," not both. The average

[35] If it were applied to other North Carolina cases where the strict rule was applied and recovery was denied, recovery could have been allowed and a more equitable result achieved. For instance if applied to Fletcher v. Security Life & Trust Co., 220 N.C. 148, 16 S.E.2d 687 (1941), recovery would surely be allowed since a collapse of the respiratory system and death are not the natural and probable consequences of a normal spinal anesthesia; neither is death the natural and probable result of a tooth extraction as occurred in Scott v. Aetna Life Ins. Co., 208 N.C. 160, 179 S.E. 434 (1935); nor is death the natural and probable consequence of a fireman fighting an ordinary fire in an ordinary manner with no great risks taken, as occurred in *Henderson.*

[36] This fair result is attained by merely not applying it. The Texas court uses this natural and probable consequence analysis in accidental means cases although it purports to follow the strict rule, *e.g.*, Perry v. Aetna Life Ins. Co., 380 S.W.2d 868 (Tex. Civ. App. 1964).

[37] 31 N.C.L. REV. 319, 324 (1953).

[38] 94 Utah 532, 72 P.2d 1060 (1937).

[39] *Id.* at 561-62, 72 P.2d at 1073.

person would not stop to distinguish between the terms upon seeing one of them, although he probably would if he saw them together. Even if the insured realized that there is a distinction between the terms, that they are not the same, he would not know of the legal ramifications of this distinction.

> And yet—despite the entanglement in the decisions, the difficulty which even courts of last resort in several of the states have had with the distinction, and the fact that the problem appeared to so eminent a jurist as Mr. Justice Cardozo to be in such a muddle—the rationale of the courts drawing the distinction would hold the insured to a full knowledge of the distinction and of its ramifications and implications. Certainly, as a practical matter, it can safely be said that the average person taking out accident insurance assumes that he is covered for any fortuitous, undesigned injury, and it can hardly be wondered at that the average person purchasing a policy from an insurance company—even if such person had the time, acumen, and energy to cope with the matter thoroughly—has no conception of the judicial niceties of the problems and no idea of what coverage he is *not* getting under the term 'accidental means.'[40]

For this reason many courts feel that the term should be given its ordinary meaning.[41] After all, "[i]t is the layman, not the insurance attorney, who is insured. . . ."[42]

The third and final justification for distinguishing between the terms is that by using the term "accidental means" rather than "accident," the insurance company is attempting to restrict liability. To fail to distinguish between the terms would be to provide greater coverage than was intended. While this is undoubtedly the intent of the insurance company, it is hardly the intent of the ordinary policyholder. To make the distinction is to assume the insured intended to make it when, in actuality, he knowns nothing of it.[43] Also, courts should be unwilling, as the Pennsylvania court now is, "to recognize such a restriction on the basis of the ambiguous language . . . which the company knew was susceptible of different

[40] Annot., *supra* note 14, at 478.

[41] Equitable Life Assurance Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); Murphy v. Traveler's Ins. Co., 141 Neb. 41, 2 N.W.2d 576 (1942); Scott v. New Empire Ins. Co., 75 N.M. 81, 400 P.2d 953 (1965); Mansbacher v. Prudential Ins. Co., 273 N.Y. 140, 7 N.E.2d 18 (1937); Griswald v. Metropolitan Life Ins. Co., 107 Vt. 367, 180 A. 649 (1935).

[42] 1A J. APPLEMAN, *supra* note 5, at 23.

[43] Annot., *supra* note 14, at 478.

interpretations."[44] To continue to make the distinction would condone ambiguity.[45] By a judicial ruling that the terms are legally synonymous, the insurer would be forced to clarify the restriction. The insurer has the power to remove all doubt by using clear and simple language to explain all policy exclusions.[46] Also in this connection, many courts give as a reason for not distinguishing between the terms the well settled rule that since the insurance company prepared the contract, it is to be construed strictly against it in the case of ambiguities and uncertainties.[47]

For the above reasons, many courts have rejected the strict approach and there is a definite trend away from it.[48] The Pennsylvania court recently decided "to confront the issue directly and to expressly abandon the artificial distinction. . . ."[49] The court noted[50] that both Florida[51] and New Mexico,[52] the only courts to consider the question as one of first impression in the past decade, have chosen the liberal approach. So definite is the trend that one authority flatly states that the majority of jurisdictions no longer maintains the distinction.[53] In light of the highly unjust result achieved in *Henderson* and other North Carolina cases in which the distinction was applied and recovery denied, and in light of the fact that the reasons for removing the distinction far outweight the very tenuous justifications for it, it is submitted that North Carolina

[44] Beckham v. Traveler's Ins. Co., 424 Pa. 107, 110, 225 A.2d 532, 537 (1967).

[45] *Id.* at 108, 225 A.2d at 535.

[46] Murphy v. Traveler's Ins. Co., 141 Neb. 41, 2 N.W.2d 576 (1942); Scott v. New Empire Ins. Co., 75 N.M. 81, 400 P.2d 953 (1965).

[47] Equitable Life Assurance Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); Mansbacher v. Prudential Ins. Co., 273 N.Y. 140, 7 N.E.2d 18 (1937); Carter v. Standard Acc. Ins. Co., 65 Utah 465, 238 P. 259 (1925). The North Carolina court accepts this well settled rule of insurance law: "when any provision, condition, or exception is uncertain or ambiguous in its meaning or is capable of two constructions . . . it should receive that construction which is most favorable to the insured." Penn v. Standard Life Ins. Co., 158 N.C. 24, 26, 73 S.E. 99, 100 (1911). However, the court refuses to admit that the term "accidental means" is ambiguous or capable of two constructions. In light of all the confusion caused by the term and the fact that the courts and legal scholars are divided as to its meaning, it is not understood how the term could be said to be anything other than ambiguous and uncertain in its meaning.

[48] Kirsch 554.

[49] Beckham v. Traveler's Ins. Co., 424 Pa. 107, 108, 225 A.2d 532, 535 (1967).

[50] *Id.* at 108 n.2, 225 A.2d at 534 n.2.

[51] Gulf Life Ins. Co. v. Nash, 97 So.2d 4 (Fla. 1957).

[52] Scott v. New Empire Ins. Co., 75 N.M. 81, 400 P.2d 953 (1965).

[53] 2 G. RICHARDS, *supra* note 4, at 734.

should cease to allow such a spurious distinction to stand between the injured insured and the compensation for which he paid his premium dollar.[54]

PATRICK H. POPE

Local Government—Airport Not a "Necessary Expense" within Meaning of Article VII, Section 6, of North Carolina Constitution

The "necessary expense" exception contained in article VII, section 6, of the North Carolina Constitution[1] affords county and municipal governments limited relief from the onerous burden of submitting proposed expenditures to a vote of the people before taxes can be levied and collected or debts contracted. No clear test exists for determining what expenses of local governments are necessary, and the North Carolina Supreme Court has proceeded in catalogue fashion, classing some public functions as necessary within the meaning of the constitution and others as unnecessary.[2]

In the recent case of *Vance County v. Royster*,[3] the court declined to overrule thirty years of precedent and declare a public airport to be a "necessary expense" within the meaning of article VII, section 6. The decision attracted widespread attention throughout North Carolina when the Federal Aviation Agency immediately suspended payment on all grant agreements with airports

[54] See Clifford, *Insurance, Survey of N.C. Case Law*, 45 N.C.L. REV. 955, 962 (1967) (suggests that it is time for North Carolina to get out of the "Serbonian Bog").

[1] *No debt or loan except by a majority of voters.*—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same *except for the necessary expenses thereof*, unless approved by a majority of those who shall vote thereon in any election held for such purpose. (emphasis added). Prior to an amendment adopted in the general election of 1948, the last clause of the section read "unless by a vote of the majority of the qualified voters therein." The amendment reduces the number of voters necessary to approve any proposal submitted. Also note that this section was formerly section 7 of article VII; by amendment adopted November 6, 1962, sections 6, 9, and 10 were deleted from article VII, and the remaining sections numbered accordingly.

[2] See Coates & Mitchell, *"Necessary Expenses" within the Meaning of Article VII, Section 7, of the North Carolina Constitution*, 18 N.C.L. REV. 93, 94-105 (1940) [Hereinafter cited as Coates].

[3] 271 N.C. 53, 155 S.E.2d 790 (1967).

in the state; the suspension was ordered because FAA attorneys feared that the *Royster* decision cast doubt on the lawfulness of the agreements under the constitutional provision.[4] Upon intervention by members of the North Carolina congressional delegation, the suspension was revoked at the end of August.[5]

Royster involved a condemnation proceeding. The county commissioners had joined with the City of Henderson and the Henderson Township Airport Authority in submitting a "project application" and executing a grant agreement with the FAA, in order to secure federal funds. A site for the airport was chosen, and the county, together with the city and the airport authority, entered into a twenty-five year lease with the Secretary of the Army. *At no time was the proposed airport put before the voters of the county in an election.* The land of respondents adjoined the airport site, and the county attempted to condemn three and three-tenths acres of it to remove the trees and thereby provide a safe approach to the runway. The condemnation proceedings were contested in superior court, where condemnation was approved and damages awarded.[6]

The supreme court reversed, denying the county's right to exercise the power of eminent domain on behalf of the airport. It was conceded that the proposed airport was a public use for which private property could be taken,[7] but the court held that the power of eminent domain failed for lack of authority to construct and maintain the airport.[8] The terms of the twenty-five year lease and cer-

[4] Durham Morning Herald, Aug. 3, 1967, § A, at 3, col. 1.
[5] *Id.*, Aug. 31, 1967, § C, at 1, col. 5.
[6] 271 N.C. at 54-59, 155 S.E.2d at 792-95.
[7] It is clearly established by the decisions of this Court that the acquisition of land for, and the construction and operation of, an airport for use by the public is a purpose for which a city or a county or both may appropriate and expend public funds and for which it or they may acquire land by the exercise of the power of eminent domain.
Id. at 60, 155 S.E.2d at 795-96.
[8] It is clear upon the record before us that the proposed taking of the land of respondents is to provide a safe approach to an airport which is to be constructed pursuant to the lease of the land for the airport proper, the 'grant agreement' and the 'project application,' and not otherwise. If the petitioner does not have authority to construct and operate the contemplated airport pursuant to the provisions of these documents, the taking of the land of the respondents so as to provide a safe approach to such airport is beyond the authority of the petitioner.
Id. at 61-62, 155 S.E.2d at 796-97.

tain provisions of the grant agreement were found to obligate the county's credit in violation of article VII, section 6.[9]

The court refused to preserve the constitutional validity of the airport project by bringing airports within the ambit of the "necessary expense" exception. Without discussing the merits of including airports in the list of "necessary expenses," the opinion dismissed the question in three sentences, citing precedent from 1938 and 1946:

> [I]t is the duty of the court to determine whether the proposed indebtedness is for a "necessary expense" within the meaning of the above provision of the Constitution . . . Pursuant to this authority and duty, this Court has determined that the construction of a public airport is not a "necessary expense" in that sense. *Airport Authority v. Johnson, supra*;[10] *Sing v. Charlotte, supra*.[11] Thus a county or city may not contract a debt or pledge its faith for the construction or operation of such an airport without first submitting the question to a vote of the people of such county or city.[12]

Thus the court declined to review the holding made thirty years ago, when aviation was in its infancy, notwithstanding the progress and development made in the intervening years, and the resultant demand for airport facilities.

Article VII, section 6, was inserted into the constitution of 1868 as a popular check on the discretion of the legislature and local officials. It was largely motivated by dissatisfaction with the financial chaos occasioned by the failure of railroads and other internal improvements in which local governments had heavily invested; prior to 1868, counties and municipalities had been free to levy taxes and issue bonds upon approval by the General Assembly.[13]

Since adoption of the constitution of 1868, the North Carolina

[9] The court found that the "full credit" of the county was pledged to pay the annual rent of 1,250 dollars under the lease, and that even though there was a provision for termination of the lease, the provision did not permit unilateral termination by the county. Also stressed were covenants contained in the project application and incorporated into the grant agreement which obligated the county to complete construction, and operate and maintain the airport. According to the court, neither the obligation to construct nor the obligation to maintain the airport was limited in the terms of the documents. *Id.* at 62, 155 S.E.2d at 797.

[10] 226 N.C. 1, 36 S.E.2d 803 (1946).

[11] 213 N.C. 60, 195 S.E. 271 (1938)

[12] 271 N.C. at 63-64, 155 S.E.2d at 798.

[13] *See* University R.R. v. Holden, 63 N.C. 410, 426, 431-32 (1869); 30 N.C.L. REV. 313 (1952).

Supreme Court has been perplexed by the challenge of devising a formula by which the expenses of county and municipal government could be divided into those "necessary" and those unnecessary to local governmental administration.[14] By and large, it has been a problem of weighing the democratic, libertarian principles of article VII, section 6, against the modern demands of efficient, effective local government.[15] Among other definitions, "necessary expenses" have been held to be those "ordinary and usual expenditures reasonably required to enable a county to properly perform its duties as part of the State Government."[16] A subsequent attempt at precision sheds little more light:

> The decisions heretofore rendered by the Court make the test of a 'necessary expense' the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is "necessary" . . . .[17]

One writer, commenting on this definition, noted, "Reasonable judges as well as reasonable men may reasonably differ on the meaning of these shibboleths."[18] None the less, the court has reviewed local expenditures, finding some "necessary" and others unnecessary. Among those functions for which taxes can be levied

[14] " 'It would be difficult or impossible to draw a precise line between what are and what are not the necessary expenses of the government of a city,' said the court in *Wilson v. Charlotte,* 74 N.C. 748, 759 (1876); and court decisions from that day to this have demonstrated the truth of this observation." Coates 100. This article gives excellent treatment to judicial interpretation of the "necessary expense" clause prior to 1940.

[15] An absolute prohibition to contract a debt is a prohibition to contract at all, for every contract may and naturally does end in a debt. We cannot suppose that the Constitution intended to deprive these great and necessary public corporations of a power which is usual to all corporations, which these have possessed, and which is necessary to their usefulness, if not to their very existence . . . . Wilson v. Charlotte, 74 N.C. 748, 758-59 (1876). Compare with that, this statement from *Royster*: "When the Constitution puts into, or leaves in, the hands of the people a checkrein upon the discretion of their duly elected officials, it is not a true Liberalism which would give to the constitutional provision an interpretation such as to loosen the hold of the people upon the checkrein." 271 N.C. at 63, 155 S.E.2d at 797.

[16] Keith v. Lockhardt, 171 N.C. 451, 456, 88 S.E. 640, 642 (1916).

[17] Henderson v. Wilmington, 191 N.C. 269, 279, 132 S.E. 25, 30-31 (1926).

[18] Coates 105.

and debts contracted without a referendum are abattoirs,[19] payment of interest on bonds already issued,[20] construction of a courthouse and jail,[21] building and maintenance of public roads,[22] lighting of streets,[23] training and paying of policemen,[24] water and sewer systems,[25] medical treatment for indigents,[26] construction of jetties and boardwalks,[27] and construction of a garbage incinerator.[28] Among purposes which have been classified as unnecessary are parks, playgrounds and recreational centers,[29] public libraries,[30] municipal auditoriums,[31] urban redevelopment programs,[32] construction of a public hospital,[33] and, of course, airports.

Goswick v. Durham,[34] the first case involving the legitimacy of local expenditures for construction of an airport, came before the court in 1937. The City of Durham had purchased land for the airport from funds derived from non-tax revenues, and was preparing to construct the airport, without submitting the project to a referendum. The court upheld the land purchase, but granted an injunction against expenditure of funds for construction. The city made no claim that the airport was a "necessary expense" within the meaning of article VII, section 6; but the court noted:

> While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal expense within the meaning of Article VII, sec. 7, of the Constitution . . . yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities for the use of the "argosies of magic sails . . . dropping down with costly bales"

[19] Moore v. Greensboro, 191 N.C. 592, 132 S.E. 565 (1926).
[20] Wilson v. Charlotte, 74 N.C. 748 (1876).
[21] Wilson v. High Point, 238 N.C. 14, 76 S.E.2d 546 (1953).
[22] Ellis v. Greene, 191 N.C. 761, 133 S.E. 395 (1926).
[23] Ellison v. Williamston, 152 N.C. 147, 67 S.E. 255 (1910).
[24] Green v. Kitchen, 229 N.C. 450, 50 S.E.2d 545 (1948).
[25] Eakley v. Raleigh, 252 N.C. 683, 114 S.E.2d 777 (1960).
[26] Martin v. Raleigh, 208 N.C. 369, 180 S.E. 786 (1935).
[27] Storm v. Wrightsville Beach, 189 N.C. 679, 128 S.E. 17 (1925).
[28] *Id.*
[29] Purser v. Ledbetter, 227 N.C. 1, 40 S.E.2d 702 (1946).
[30] Westbrook v. Southern Pines, 215 N.C. 20, 1 S.E.2d 95 (1939).
[31] Greensboro v. Smith, 241 N.C. 363, 85 S.E.2d 292 (1955).
[32] Horton v. Redevelopment Comm'n, 262 N.C. 306, 137 S.E.2d 115 (1964).
[33] Barbour v. Carteret County, 255 N.C. 177, 120 S.E.2d 448 (1961).
[34] 211 N.C. 687, 191 S.E. 728 (1937).

> to the same extent that paved streets and roads are now regarded for purposes of communication and transportation on land.[35]

A year later, in *Sing v. Charlotte*,[36] the court faced the question of whether a municipality could transfer money in a contingent fund derived from tax revenues to a fund for the maintenance and operation of its municipal airport; the issuance of bonds and levying of additional taxes to finance construction had been approved by the people, but no referendum was held on the transfer of funds for maintenance and operation. The supreme court affirmed the order granting an injunction, applying the test laid down in *Henderson v. Wilmington*,[37] and concluding, "When thus tested, an airport is not a necessary governmental expense."[38] Justice Clarkson dissented vigorously from the determination that the airport was not a "necessary expense" for Charlotte. The dissent pointed to the initial referendum approving construction, and argued that it imposed an implied obligation upon the city to make expenditures necessary to maintain the airport.[39] Seeking to limit the inclusion of airports within "necessary expenses," the Justice argued that an expense might be necessary for one municipality, but not for another.[40] He concluded, "I think that the overwhelming logic of the instant case compels the recognition that a municipal airport at Charlotte, under the conditions set out in the judgment, is a 'necessary expense.' "[41]

In subsequent cases involving airports and article VII, section 6, the court has resolved the question with a brief restatement of

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[35] *Id.* at 689-90, 191 S.E. at 729.

[36] 213 N.C. 60, 195 S.E. 271 (1938).

[37] If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is "necessary" within the meaning of art. VII, sec. 7, and the power to incur such expense is not dependent on the will of the qualified voters. 191 N.C. at 279, 132 S.E. at 30-31.

[38] 213 N.C. at 65, 195 S.E. at 273.

[39] *Id.* at 74, 195 S.E. at 279.

[40] For a full discussion of the role of the courts in determining what are necessary expenses, particularly in relation to the power of the courts to declare an expenditure to be a necessary expense for a narrowly-drawn class of counties and municipalities, *see* Coates 112-15.

[41] 213 N.C. at 76, 195 S.E. at 280.

the *Sing* holding.[42] The dictum in *Goswick* and Justice Clarkson's dissent in *Sing* have gone unnoticed in later cases.

Today, North Carolina airports are constricted in their development and operation by the constitutional prohibition. Common sense would dictate that the costs incidental to minor improvements and operation hardly justify resort to the cumbersome and expensive machinery of county-wide referendum; yet the developed case law requires that a referendum be held before a local government can appropriate money out of a contingent fund,[43] or contract any debt,[44] for its airport—even if acquisition of the airport was previously approved by a vote of the people.[45]

A survey of the constitutions and statutes of neighboring states indicates that the constitutional disability under which public airports labor in North Carolina is unique to the state. South Carolina permits its counties and cities to levy taxes and issue bonds for construction and maintenance of airports, upon approval of the legislature.[46] In Virginia, the constitutional prohibitions relating

[42] Vance County v. Royster, 271 N.C. 53, 64, 155 S.E.2d 790, 798 (1967); Yokley v. Clark, 262 N.C. 218, 222, 136 S.E.2d 564, 567 (1964); Airport Authority v. Johnson, 226 N.C. 1, 7, 36 S.E.2d 803, 808 (1946).

[43] Sing v. Charlotte, 213 N.C. 60, 65, 195 S.E. 271, 273 (1938), proceeds on the theory that the money in such funds was derived in whole or in part from *ad valorem* taxes; the county or municipality is free to appropriate moneys derived from non-tax sources for airport purposes. Airport Authority v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946).

[44] Yokley v. Clark, 262 N.C. 218, 136 S.E.2d 564 (1964). The indebtedness cannot be rendered constitutional by providing for its payment from non-tax funds. *Id.* at 222, 136 S.E.2d at 567; Vance County v. Royster, 271 N.C. 53, 64, 155 S.E.2d 790, 798 (1967). The dangers of a literal, too-exacting construction of the phrase "contract a debt" were pointed out in Wilson v. Charlotte, 74 N.C. 748, 758 (1876): "Such a prohibition would be unreasonable. The duties of a county or city government cannot be performed without often contracting debts . . . . An absolute prohibition to contract a debt is a prohibition to contract at all, for every contract may and naturally does end in a debt." So long as the court construes "debt" restrictively, so that almost any contract made by a city or county is held to incur a debt within the meaning of article VII, section 6, the opportunity for North Carolina local governments to secure federal aid may be curtailed. Most federal grants have "strings" attached; the local government is called upon to make certain covenants, contractual in nature (as in *Royster,* to operate and maintain the airport). Unless the particular purpose for which federal aid is sought falls within the perimeter of "necessary expenses," the county or municipality may find itself without the authority to execute the grant agreement. Yokley v. Clark, *supra* at 224, 136 S.E.2d at 568, cited in Vance County v. Royster, *supra* at 65, 155 S.E.2d at 799.

[45] Sing v. Charlotte, 213 N.C. 60, 195 S.E. 271 (1938).

[46] S.C. CONST. art. 10, § 6. This section was amended in 1945, by insertion of a clause which reads "[T]he General Assembly shall have power to authorize a county or township to levy a tax or issue bonds for the pur-

to debt apply to borrowing by local governments, rather than to the assumption of contractual obligations *per se*;[47] and by statute, local governments are empowered to appropriate funds for the construction and maintenance of airports.[48] Under the Georgia Constitution,[49] the General Assembly is authorized to permit counties to levy taxes to construct, improve, and maintain airports; and a general enabling statute was enacted.[50] Another section of the Georgia Constitution permits counties and municipalities to contract debts up to a value equal to one-fifth of one percent of the assessed value of taxable property on the county or city's books.[51]

The Mississippi Constitution[52] provides that the General Assembly is to make laws to prevent abuse by local governments of their powers to tax and assume debts; there is no provision in the constitution comparable to article VII, section 6. Legislation enabling counties and cities to acquire and maintain airports has been enacted.[53] In other states, the constitutional limitations on debt are directed to the amount of the debt, rather than to the purposes for which the debt is incurred.[54]

The growth of commercial aviation and the comparative lack of constitutional restrictions on airport development in other states seem to suggest a need for a fresh examination of airports as "necessary expenses." That examination was not undertaken in *Royster*. Any contention that the airport contemplated by Vance County is presently necessary for the county would be dubious at best;[55] the court declined, however, to limit its holding to the airport in ques-

poses of construction and maintenance of an airport or the construction and maintenance of landing strips." For the law prior to the 1945 amendment, see Parrott v. Gourdin, 205 S.C. 364, 32 S.E.2d 14 (1944).

[47] VA. CONST. art. 7, § 115a.

[48] VA. CODE ANN. §§ 5.1-43, 45 (1966).

[49] GA. CONST. art. 7, § 2-5701.

[50] GA. CODE ANN. § 11-206 (1933).

[51] GA. CONST. art. 7, § 2-6001.

[52] MISS. CONST. art. 4, § 80.

[53] MISS. CODE ANN. §§ 7537-7539 (1957).

[54] CAL. CONST. art. 11, § 18; ILL. CONST. art. 9, § 12; IND. CONST. art. 13, § 1; OKLA. CONST. art. 10, § 26; W. VA. CONST. art. 10, § 8.

[55] At the time of the arguments in *Royster*, there were only a few privately-owned aircraft in Vance County, and there was no indication that the airport would be served by commercial airlines. No feasibility study was undertaken; the principal benefit argued by proponents of the airport was that it would increase the use of recreational facilities at Kerr Lake and thereby boost the county's economy. 271 N.C. at 57, 155 S.E.2d at 793. The failure of the county commissioners to hold a referendum was unexplained.

tion. Instead it reapplied the rule of thirty years ago, that airports are not one of those purposes which may be considered "necessary" within the meaning of article VII, section 6.

In *Goswick v. Durham,* the first of the "airport cases," the opinion noted that "The law is an expanding science, designed to march with the advancing battalions of life and progress and to safeguard and interpret the changing needs of a commonwealth or community."[56] It is questionable whether the court in *Royster* has stayed in step with those battalions.

WILLIAM VANN MCPHERSON, JR.

Securities Regulations—Convertible Debentures Not A Class of Equity Security

In *Chemical Fund, Inc. v. Xerox Corp.*,[1] the Second Circuit Court of Appeals was for the second time[2] faced with construing the meaning of "any class of any equity security" in section 16[3] of the Securities Exchange Act of 1934. Chemical Fund is an open end diversified investment company. Early in December 1962, the Fund owned 91,000 shares which represented 2.36 percent of the Xerox common stock.[4] In 1961 the Fund acquired four and one

[56] 211 N.C. at 690, 191 S.E. at 730.

[1] 377 F.2d 107 (2d Cir. 1967).

[2] In Ellerin v. Massachusetts Mut. Life Ins. Co., 270 F.2d 259 (2d Cir. 1959), the court held that the ten percent holder of a series of stock was not the ten percent holder of a class of equity security for the purposes of section 16(b).

[3] Section 16(a) of the statute defines insider for the purposes of the statute as "Every person who is directly or indirectly the beneficial owner of more than ten percentum of any class of any equity security . . . or who is a director or an officer of the issuer of such security. . . ." Securities Exchange Act of 1934, 15 U.S.C. § 78p(a) (1964). The section under consideration in the principal case reads:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or 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 entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . .

Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1964).

[4] At that time Xerox had 3,851,844 shares of common stock outstanding. Chemical Fund, Inc. v. Xerox Corp., 377 F.2d 107, 110 (2d Cir. 1967).

half percent convertible subordinate debentures due May 1, 1981. Each 1,000 dollar debenture was convertible into approximately nine and one half shares of common stock and was protected against dilution of the conversion right, but carried no immediate participation in the equity of Xerox. From December 4 through 20, 1962 and again from April 24 through August 2, 1963, the Fund purchased debentures convertible into 3,029 shares of common and sold 3,000 shares of common stock. Besides this sale of 3,000 shares offset by the purchase of debentures, the Fund sold an additional 13,500 shares of common. These purchases and sales were part of a program designed to increase Chemical Fund's secured position and improve its yield from its Xerox investment without sacrificing its ability to take advantage of the continuing appreciation of Xerox common stock. With the purchase of 11,000 dollars principal amount of debentures on December 4 and again on December 12, 1962, however, Chemical Fund became the holder of more than ten percent of the outstanding convertible debentures, a position it held until November, 1963.[5] As a result, Chemical Fund sought declaratory judgment in the district court as to whether the profits made from the sales of common stock and purchases of debentures between December 1962 and November 1963 would inure to Xerox as a violation of section 16(b). The district court granted summary judgment to Xerox for 153,922.43 dollars without interest.

On appeal the court of appeals reversed, holding that Chemical Fund was not liable under section 16(b) for short swing profits as a beneficial owner of ten percent of "any class of any equity security," for had Chemical Fund converted its debentures, it would have commanded only 2.72 percent of the Xerox common stock. Reasoning that a convertible debenture is an "equity security" only because of its convertible nature, the court held that the debentures alone would not be a "class of equity security."[6] According to the court, the holder of convertible debentures would not normally have standing with officers, directors or large stockholders to be the recipient of inside information.[7] Consequently, Chemical Fund would be outside the purview of the statute, for, as the court states, "the

[5] The Fund continued to hold more than ten percent of the convertible debentures until November 22, 1963, when pursuant to a call for redemption it converted the debentures into 17,180.95 shares of common stock. *Id.*

[6] 377 F.2d at 111.

[7] *Id.*

purpose of section 16 to impose liability on the basis of actual or potential control is clear, and we should give it effect."[8]

By exempting the holder of ten percent of the convertible debentures, it is questionable whether the court gave effect to the stated purpose of the statute—to prevent the unfair use of inside information.[9] The court based its decision on control and seemed to equate "control" for the purposes of section 16(b) with ownership of ten percent of the common stock. This note is thus directed to the question of whether ownership of ten percent of the underlying common stock is necessary for the convertible debenture holder to be party to the abuses which 16(b) was designed to prevent.

At the time the Securities Exchange Act of 1934 was passed, "profits from 'sure thing' speculation were regarded by members of the financial community as one of the usual emoluments of office."[10] As cases indicate, the entire purpose of section 16(b) is "to discourage corporate insiders from trading for short swing profits on the basis of information about corporate circumstances, plans and prospects not available to the public,"[11] and "to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty."[12] To put teeth into the statute Congress required that profits made on short swing—six months—transactions be forfeited to the corporation. Congress indicated its desire to minimize misuse of confidential information, without unduly discouraging bona fide long term investment, by basing forfeiture of profits on the length of the insider's investment commitment.[13] The statute is remedial in operation, and regardless of whether the in-

[8] *Id.*

[9] Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1964).

[10] Cook and Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 386 (1953) [Hereinafter cited as Cook].

[11] Heli-Coil Corp. v. Webster, 352 F.2d 156, 172 (3d Cir. 1965).

[12] Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir. 1943); *see* Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1966) (In this case the court commented that "[a]rmed with information not available to ordinary stockholders, these 'insiders' brought about artificial, but predictable, fluctuations in the market and, in so doing, were able to reap substantial profit with little or no investment risks to themselves—all at the expense of outside stockholders. . . ." 367 F.2d at 352); Perfect Photo, Inc. v. Grable, 205 F. Supp. 569, 571 (1962).

[13] Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir. 1965), *cert. denied*, 382 U.S. 892 (1965). In this decision the court pointed out that confidential information is valuable for just a short period and that the attractiveness of trading is enhanced if the capital is invested for only a short time. 342 F.2d at 308.

sider actually uses information, he must forfeit profits from short term speculation.[14]

On the issue of whether convertible debentures are a "class of equity security"[15] *Chemical Fund* was a case of first impression. However, an examination of the Second Circuit's interpretation of 16(b) in relation to other issues such as conversion as a purchase and sale, recapitalization, and stock options reveals an interesting trend in the court's attitude toward and application of this seemingly absolute, arbitrary statute. When the court first interpreted the rule in *Smolowe v. Delendo Corp.*[16] and later in *Park & Tilford v. Shulte, Inc.*,[17] it adhered to the idea that the statute was an absolute "crude rule of thumb."[18] There was little consideration of surrounding factors which might justify or delimit the application of this somewhat harsh rule. The fact that the Shulte brothers in *Park & Tilford* could have prevented the dividend declaration because of the control which they exerted over the corporation was mentioned as a collateral point; nevertheless, the court based its decision on the broad language of the statute designed to deprive the violator of all possible profit.[19] In its later decisions the Second Circuit moved away from this automatic application of 16(b) and began to inquire into the possibility for speculation in a given situation.[20] *Blau v. Lamb*,[21] a 1966 case, involved controlling insiders

[14] According to Rheem Mfg. Co. v. Rheem, 295 F.2d 473, 475 (9th Cir. 1961), "[t]he excuses of various insider transactions which were presented to Congressional Committees convinced the authors of the legislation that civil liability and an objective measure of proof were indispensible ingredients of an effective remedy for the proven vice." *See* Western Auto Supply Co. v. Gamble-Skogmo, Inc. 348 F.2d 736 (8th Cir. 1965); B.T. Babbit, Inc. v. Lachner, 332 F.2d 255 (2d Cir. 1964).

[15] In Ellerin v. Massachusetts Mut. Life Ins. Co., 270 F.2d 259 (2d Cir. 1959), the issue involved a series of stock, not convertible debentures.

[16] 135 F.2d 231 (2d Cir. 1943).

[17] 160 F.2d 984 (2d Cir. 1947), *cert. denied*, 332 U.S. 761 (1947).

[18] Thomas G. Corcoran, the draftsman of the Securities Exchange Act of 1934 used the term "crude rule of thumb" to describe 16(b). Hamilton, *Convertible Securities and Section 16(b): The End of an Era*, 44 TEXAS L. REV. 1447, 1448 n.6 (1966) [Hereinafter cited as Hamilton].

[19] 160 F.2d 984, 988 (2d Cir. 1947), *cert. denied*, 332 U.S. 761 (1947).

[20] *See* Blau v. Lehman, 286 F.2d 786 (2d Cir. 1960), *affirmed*, 368 U.S. 403 (1962); In this opinion the court declared, "There is no rule of thumb, nor would it be wise to attempt to formulate such a rule." 286 F.2d at 792. Where the defendant became a director after his initial purchase and then sold stock, the court applied its original test, stating: "it [the statute] must be strictly construed in favor of the corporation and against any person who makes profit dealing in the corporation stock." Adler v. Klawans, 267 F.2d 840, 846 (2d Cir. 1959). In Roberts v. Eaton, 212 F.2d 82 (2d Cir. 1954), *cert. denied*, 348 U.S. 827 (1954), involving a reclassification in which full

who clearly had the power to misuse inside information. The court asked whether there was the slightest opportunity to exercise that power and stated:

> [W]e reject the possible suggestion in the lower court's opinion that the existence of an opportunity for speculative profits can be inferred from the fact of control alone, because such a suggestion is inconsistent with our responsibility to analyze the conversion in order to determine whether the possibility of unfair speculative profits might have existed at all even with full corporate control.[22]

Other circuits interpreting the statute have followed the pattern of the Second Circuit with one notable exception.[23] In spite of the Second Circuit's bold declaration in *Blau v. Lamb*, the court in *Chemical Fund* seems to have expanded the test requiring "opportunity for speculation" by the requirement that in order for there to be inside information for "speculation" there must be control over the common stock, thus moving completely away from the broad remedial application of the rule in *Park & Tilford* which would make the officer, director, or ten percent beneficial holder liable irrespective of actual knowledge, speculation or control.

As a practical matter, it is possible for the ten percent convertible debenture holder to have inside information and to engage in the abuses that rule 16(b) was intended to halt. An examination of three factors may aid in understanding this problem. In the first place, the convertible debenture holder by the very nature of the security has the opportunity for speculation and quick profit—the evils prohibited by the statute. Many investors view convertible issues as an opportunity for profit with small risk.[24] In a sense

disclosure had been made, the court said that "[t]he reclassification at bar could not possibly lend itself to the speculation encompassed by § 16(b)." 212 F.2d at 86. One opinion states, "And speculation, actual or potential, is the only vice within the purview of § 16(b)." Blau v. Ogsbury, 210 F.2d 426, 427 (2d Cir. 1954); *see also* Shaw v. Dreyfus, 172 F.2d 140, 142 (2d Cir. 1949).

[21] 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

[22] *Id.* at 521.

[23] In Heli-Coil Corp. v. Webster, 352 F. 2d 156, 166 (3d Cir. 1965), the court applied the crude rule of thumb. For cases in which courts looked for the speculative aspect, *see* Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1966); Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir. 1965), *cert. denied*, 382 U.S. 892 (1965); Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958).

[24] *See generally*, B. GRAHAM, D. DODD & S. COTTLE, SECURITIES ANALYSIS PRINCIPLE AND TECHNIQUE 602 (4th ed. 1962).

these securities are favorable to both the investor and the corporation since the investor has the protection of a bond or preferred stock plus the possibility of participation in any substantial rise in the value of the common.[25] Using the six months limitation, Congress drew a practical line prohibiting profit made with the aid of inside information while simultaneously permitting bona fide investment by the insider.[26] The person holding convertible debentures is in a position analogous to the holder of preferred stock with warrants or option privileges. Until the option is exercised, the holder does not bear the same risk as the owner of the junior security even though the market price of the security may at times be based upon the value of the junior security.[27] Similarly, until the convertible debenture holder converts, he does not have the same risk as the owner of the underlying security. Although the court in *Chemical Fund* treated the purchase of the convertible debentures as the purchase of the underlying securities,[28] a purchase of convertible securities is not considered such for all purposes.[29] As some authorities indicate, the fungible nature of convertible securities makes them attractive for insider speculation in situations such as *Chemical Fund* where the owner purchases the convertible security and offsets the purchase with a transaction in the conversion security.[30] Thus with limited risk the convertible debenture holder can make considerable profit through speculation. Therefore, the holder of ten percent of the convertible debentures of a corporation should not be allowed to escape the burden of section 16(b) unless he holds for the required six months necessary to make his purchase a bona fide investment.

In the second place, when compared with preferred stock, which would certainly be a "class of equity security" within the scope of 16(b), there is little reason not to label convertible debentures as a class of equity security. From the standpoint of control, the rights

[25] *Id.* at 601.

[26] Meeker and Cooney, *The Problem of Definition in Determining Insider Liabilities Under Section 16(b)*, 45 VA. L. REV. 949, 963 (1959) [Hereinafter cited as Meeker].

[27] *Id.* at 964.

[28] 377 F.2d at 110. The court said that a convertible debenture was "an equity security only because it can be converted," and that to determine if ten percent of the convertible debentures would be ten percent of a class of equity security, there must be a hypothetical conversion.

[29] Hamilton 1491.

[30] *Id.* at 1488; Meeker 960-61.

held by each are relatively equal. Although neither usually has voting rights, some states permit the corporation to give the debenture holder voting and inspection rights.[31] While the preferred stockholder can bring a derivative suit, the debenture holder can sue in case of default in payment.[32] Also the debenture holder has a degree of control over the corporation through the restrictions on corporate activities set forth in the indenture.[33] Given these circumstances, to include preferred stock under 16(b) and exclude convertible debentures seems slightly inconsistent.

Finally, the holder of ten percent, and for that matter lesser amounts, of the convertible debentures in a corporation will probably have access to inside information, especially if the debenture holder is a large institutional investment company such as Chemical Fund. Institutional investment companies are powerful, holding in the aggregate approximately thirty to forty percent of the aggregate value of all common stocks listed on the New York Stock Exchange.[34] These companies can be quite helpful to portfolio companies in locating needed capital and furnishing expert advice on financing and management. As one authority points out, investment company officers and analysts are often in contact with the officers and directors of the companies in which the investment company has holdings.[35] Such contact creates relationships of confidence which permit the art of gentle persuasion and result in the institutional investor being sought for advice.[36] Thus, although this authority contends that the investment company shuns favoritism and direct involvment in the control of the portfolio companies,[37]

[31] *E.g.*, Del. Code Ann. Title 8, § 221 (1953); N.Y. Bus. Corp. Law § 518c (McKinney 1963).

[32] As a practical matter instead of suing, the debenture holder usually reaches a compromise with the corporation, a point which illustrates the give and take between the corporation and the debenture holders.

[33] As stated in the XEROX ANNUAL REPORT at 40 (1962), "Under the terms of the several loan agreements and the indenture, varying restrictions exist. At Dec. 31, 1962 among other conditions, the company was required to limit investments in other subsidiaries and additional indebtedness and to maintain consolidated working capital (as defined) equal to consolidated aggregate indebtedness (as defined). In addition, restrictions exist on the payment of cash dividends on common stock."

[34] *See generally*, Brown, *The Institutional Investor As a Shareholder*, in CONFERENCE ON SECURITIES REGULATIONS 209 (R. Mundheim ed. 1964).

[35] *Id.* at 215-16.

[36] *Id.*

[37] *Id.* at 213.

they are in a strategic position for access to inside information which may be valuable in speculation.

The use of ten percent in the statute is an arbitrary figure. From the legislative history it is evident that Congress recognized the possibility that the holder of less than ten percent of an equity security might be in control of the corporation.[38] It should be noted, however, that in the statute Congress did not mention "control." Instead it chose the arbitrary ten percent beneficial owner of any class of any equity security, thereby making a distinction between control and the use of inside information. In *Gratz v. Claughton*,[39] Judge Hand emphasized the idea that the legislature may adopt whatever measure is necessary to deal with the harm although sometimes it applies to situations where the evil is not present.[40] For authority that the legislature's intent in passing the Act was for the convertible debentures to be an equity security only in relation to the conversion security, the court in *Chemical Fund* cited the legislative hearings pointing out that in the original draft bondholders were mentioned specifically, but were omitted in the final bill.[41] As one writer has stated:

> What constitutes an equity security has been the subject of considerable difference of opinion. Any definition must be couched in broad language if it is to be applicable to the infinite variety of security issues and is to thwart ingenious attempts to escape its terms.[42]

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[38] 78 CONGRESSIONAL RECORD 8037 (1934) (Mr. Lea answering Mr. Pettingill's motion to strike out "beneficial owner" in the bill):

> I recognize the fact that the five percent [later changed to ten percent] line is an arbitrary one. It is variable in its effects in reference to different corporations. As to all corporations listed on the great exchanges of the country, five percent represents an important part of the stock of such corporations. It is so commonly the case that a man who owns a large amount of stock, but nothing like a majority, controls the directors of the corporation that the committee thought it was advisable to require these large stockholders who may be trafficking in the stock of the corporation to reveal the facts.

Mr. Rayburn, speaking before the House, said: "We know, however, that in the case of any corporation having widely scattered stockholders the concentration of five or ten or twenty or thirty percent of stock ownership is control; they can always get the proxies." *Id.* at 8038.

[39] 187 F.2d 46 (2d Cir. 1951).

[40] If the plaintiff had the burden of proving that the defendant had a bargaining advantage, the purpose of the statute would be defeated. *Id.* at 49.

[41] 377 F.2d 107, 111 n. 6 (2d Cir. 1967).

[42] Cook 393.

The definition of an equitable security as "any stock or similar security; or any security convertible. . . . into such a security . . ."[43] could represent a compromise position in which Congress recognized the possibility that holders of convertible debentures might engage in speculation and thus fall within the policy of the statute.

Interpreting section 16(b) in cases from *Smolowe* through *Chemical Fund*, the court used three basic tests[44]—the automatic "crude rule of thumb," the opportunity for speculation, and finally control. The validity of these tests must be governed by the policy and purpose of the statute—to prevent the unfair use of inside information. The court in *Chemical Fund* held that ten percent of the convertible debentures alone would not constitute a class of equity security. In light of the purpose of the statute, did the court reach a result in harmony with the statutory objectives by basing liability on control—actual or potential? An affirmative answer to this question is doubtful. The facts disclose that an institutional investment company holding convertible debentures could have access to inside information and could use this information for speculation to the detriment of outside shareholders.[45] Furthermore, the legislative history reveals that Congress drew an arbitrary line of ten percent and did not intend control as the criterion. Thus had the Second Circuit used the *Blau* test—opportunity for speculation—the decision would probably have been more in keeping with the legislative purpose and policy of the statute. Section 16(b) is remedial, not penal, and the interpretation must be given which is most consistent with the legislative intent.[46] As one writer has commented: "[I]n view of the history and apparent purpose of this legislation, the fundamental consideration in all doubtful cases should be 'not whether the defendant actually used inside knowledge to profit, but rather whether the situation was one in which such in-

[43] Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(11) (1934). "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation. . . ." Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (1934).

[44] For commentary on the various tests applied by the courts see Hamilton 1454-58.

[45] For a discussion of the ability of institutional investors to control the market, *See generally*, Henderson, *Institutional Investors in the Equity Market*, in CONFERENCE ON SECURITIES REGULATION 136 (R. Mundheim ed. 1964).

[46] Adler v. Klawans, 267 F.2d 840, 844 (2d Cir. 1959).

side knowledge could have been advantageously used.' "[47] To require control in terms of ten percent of the common stock diminishes the effectiveness of the statute. The statute itself vests the power in the Securities Exchange Commission to exempt certain securities and transactions,[48] and exceptions to the statute should not be created by narrow judicial interpretation[49] One authority is of the opinion that "the express purpose of preventing the unfair use of inside information might suggest an application of the statute to all cases which may come literally within its scope."[50] By virtue of the ten percent and six months arbitrary cut off points, the statute is already limited, and the court should not limit further what is remedial legislation[51] when, as in *Chemical Fund*, there is the slightest possibility for unfair use of inside information.

SARAH E. PARKER

Torts—Dignity As a Legally Protectable Interest

A recent New Jersey decision[1] presents the question of what injury, if any, has been suffered by a mother who has been denied the opportunity to obtain an abortion. Plaintiffs, a defective infant and his parents, brought a malpractice action against the mother's obstetricians alleging that they negligently assured Mrs. Glietman that her recent illness of German measles would not affect the infant then in gestation.[2] The basis of plaintiffs' claim was that defendants' repeated assurances induced Mrs. Glietman

[47] Painter, *The Evolving Role of Section 16(b)*, 62 MICH. L. REV. 649, 678 (1964).
[48] Cook 387.
[49] Hamilton 1455.
[50] Meeker 958.
[51] Adler v. Klawans, 267 F.2d 840 (2d Cir. 1959). As the opinion states, "One can speculate on whether the moral or ethical values are altered by the passage of 24 hours, but the statute makes an honest if not an honorable man out of the insider in that period." *Id.* at 845. A line had to be drawn somewhere by the lawmakers as in any other area governed by statute.

[1] Glietman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).
[2] At present it is well established that rubella virus can cause malformations of the eye (cataract and microphthalmia); internal ear (congenital deafness due to destruction of the Organ of Corti); heart (persistence of the ductus arteriosus as well as atrial and ventricular septal defects); and occasionally of the teeth (enamel layer). The virus may also be responsible for some cases of brain abnormalties and mental retardation.
J. LANGMAN, MEDICAL EMBRYOLOGY 73 (1963). In the principle case the infant had substantial defects in sight, hearing, and speech.

to forego an abortion which, plaintiffs asserted, would have freed the infant from a life with defects, the mother from emotional harm, and the father from added expenses. Defendants denied plaintiffs' allegations and testified that they had advised Mrs. Glietman of a twenty per cent chance of some deformity. The trial court, on motion by defendants, dismissed the suit for want of proximate cause and because it felt the New Jersey statute[3] prohibited the suggested abortion. The factual dispute, therefore, was not resolved by the jury.

On appeal the New Jersey Supreme Court took plaintiffs' evidence as true[4] and further assumed that Mrs. Glietman could have obtained an abortion unattended by any criminal sanctions and failed to do so in reliance upon defendants' assurances. The decision of the lower court was affirmed, three justices dissenting. The reason for affirmance as to the infant was that he had suffered no damages cognizable at law.[5] The parents were denied recovery

[3] Any person who maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine, or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.
N. J. STAT. ANN. § 2A: 87-1 (1953).

[4] This assumption will also be made throughout this note. It might be proper to suggest that the court's decision may be due, in part, to the improbability of plaintiffs' allegations. It has been stated that a large percentage of malpractice litigation is without foundation, Regan, *Medical Legal Problems—The Physician's and Lawyer's Viewpoint,* in MEDICOLEGAL SYMPOSIUM 17 (1955), and the likelihood that a practicing obstetrician would either not know of the possible effects of rubella during pregnancy or would lie about them does indeed seem small.

[5] Although our prime concern is the mother, the issue raised by the infant's claim warrants mention. Since there was no evidence that measures could have been taken to improve the infant's chances of a normal life, *see, e.g.,* Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966); First Nat'l Bank v. Rankin, 59 Wash.2d 288, 367 P.2d 835 (1962), the decision seems correct because to recover he must maintain that he should not have been born, and it does seem impossible to "[W]eigh the value of life with impairments against the nonexistence of life itself." Glietman v. Cosgrove, 49 N.J. 22,—, 227 A.2d 689, 692 (1967). Two cases were cited in support. In Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), an illegitimate child sought recovery against his father for damages caused by his birth out of wedlock. Although the court found the existence of a tort, recovery was denied on the grounds that recognition of such a claim should come from the legislature. In Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), plaintiff's mother was raped while a patient at a state hospital for the mentally ill, and plaintiff sued for damages caused by the state's negligence in failing properly to protect its patient. The court found no wrong was done to plaintiff. For more on the "wrongful life" action see notes, 43 N.D.L. REV. 99 (1966); 11 S.D.L. REV. 180 (1966); 18 STAN. L. REV. 859 (1966).

because 1) they also suffered no damages cognizable at law and 2) even if there were legal damages, policy considerations "prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life."[6] It is submitted that the court should have determined whether the abortion was legal in New Jersey before affirming the dismissal and that, in any event, Mrs. Glietman suffered an injury to her dignity for which she should be compensated.

The court's assumption was only that plaintiff could have obtained a non-criminal abortion, the place being undetermined, and policy reasons were still found to prevent recovery. This is a logical conclusion if the abortion were illegal in New Jersey. If, however, such abortions were legal in that state,[7] then it does not follow that public policy is a bar to plaintiff's recovery as the law would have weighed the relative rights of the mother and the embryo, and concluded that the mother's was the superior one. Otherwise, the abortion should be illegal. Thus, the fact that the infant "would almost surely choose life with defects as against no life at all"[8] would be of no moment as the choice would not be his at that time. The choice would be the mother's and compensation for the denial of that right should not be withheld because an exercise thereof might result in the termination of an embryonic life. The right to end that life would be the very right impliedly given if the abortion were legal. It seems, therefore, that a determination of the legality of such an abortion in New Jersey was necessary to decide the case correctly. Given the other elements of liability, the decision would depend on whether plaintiff could have obtained the abortion had she been correctly advised by the defendants.

As to the issue of damages, the plaintiff may encounter some difficulty. In a majority of the cases where the question has been considered, recovery to the parents for harm resulting from the birth of a child was denied on the grounds that it was either too remote[9] or was against public policy.[10] Although plaintiff is seeking damages for emotional harm, the event which gave rise to that

[6] Glietman v. Cosgrove, 49 N.J. 22,—, 227 A.2d 689, 693 (1967).

[7] The assumption must be that the abortion is legal in New Jersey for even if plaintiff could have easily been aborted in a nearby state, the court would be reluctant to lend its aid to the circumvention of its own law. *But see*, dissenting opinion, *id.* at—, 227 A.2d at 703.

[8] *Id.* at —, 227 A.2d at 693.

[9] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

[10] Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957).

harm was the birth of her child. Several factors, however, are in her favor. In the first place, it seems without reason to establish a right in the parents to decide that they do not wish to risk a deformed child and then deny recovery when that right is wrongfully taken from them. Secondly, a recent California decision, *Custodio v. Bauer*,[11] may well be indicative of a new trend. In that case plaintiff-wife, after bearing nine children and being advised that another might threaten her health, underwent a sterilization operation. The operation was apparently unsuccessful, as a year and a half later Mrs. Custodio gave birth to her tenth child. The decision of the lower court which had sustained defendants' demurrer was reversed. The court stated, "It is clear that if successful on the issue of liability, they [the plaintiffs] have established a right to more than nominal damages."[12] *Doerr v. Villate*,[13] wherein plaintiff sued for breach of an oral contract to sterilize her husband, was discussed in the opinion. Although the sole issue there was whether the two-year statute of limitations for personal injuries or the five-year statute for oral contracts applied, the *Custodio* court observed that *Doerr* does demonstrate, "that the birth of a child may be something less than the 'blessed event' referred to in those cases [those denying recovery]."[14] Of course this reasoning is of no avail unless the abortion were found to be legal in New Jersey.

But if the abortion were illegal in New Jersey, has Mrs. Glietman then suffered no injury? It is suggested that she has, that the real injury is an affront to her dignity as a human being, and that this is true regardless of whether she could have obtained an abortion. Mrs. Glietman, by virtue of the fact that she is a human being, had a right to know that she might become the mother of a defective child. To the extent that she was uninformed of that possibility, she was that much less an individual.

In examining plaintiff's injury it is helpful initially to inquire into the nature of defendants' corresponding duty under these facts. In general, a fiduciary relationship exists between a physician and his patient.[15] A necessary extention of this is the duty

[11] 59 Cal. Rptr. 463 (Dist. Ct. App. 1967).
[12] *Id.* at 477.
[13] 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).
[14] 59 Cal. Rptr. at 475.
[15] *See, e.g.*, Batty v. Dental Bd., 57 Ariz. 239, 112 P.2d 870 (1941); Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).

of the physician to give accurate, truthful information in the absence of any justification not to do so.[16] Alleged breaches of this duty are most frequently encountered in the so-called "informed consent" cases. *Natanson v. Kline*[17] is an example. There plaintiff was injured by radiation therapy following a mastectomy. The claim was that since Mrs. Natanson had not been advised of the risks inherent in the treatment, her consent to it was not informed. In reversing a judgement for the defendants, the court observed,

> Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be the master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgement for that of the patient by any form of artifice or deception.[18]

Here, as opposed to *Glietman,* it is easy to see why the defendant had the duty to inform plaintiff because with this information the latter could make an intelligent decision. But does the law require such disclosure merely to avoid a technical battery? The better analysis, and the one which the quoted material tends to support, is that as a matter of human dignity an individual should be accorded the right to have such information. The right goes beyond the right to determine one's own course in that it embraces our very identity as individuals.[19] Performing an operation without valid consent is only one way to offend the dignity. On the basis of this analysis plaintiff's legal inability to obtain an abortion should neither preclude her from this same right to know, nor should it excuse defendants from the performance of their duty.

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[16] Note, 20 OKLA. L. REV. 214 (1967), lists nine factors which have affected the duty: likelihood of injury, seriousness of injury, feasibility of alternative methods, certainty of particular method, interest of patient, knowledge of patient, emotional stability of patient, necessity of treatment, and existence of emergency.

[17] 186 Kan. 393, 350 P.2d 1093, *aff'd on rehearing,* 187 Kan. 186, 354 P.2d 670 (1960).

[18] 186 Kan. at 406-07, 350 P.2d at 1104.

[19] Perhaps the poet made this distinction between merely determining one's own course and the broader concept of dignity when he wrote,

> "It matters not how straight the gate,
> How charged with punishment the scroll
> I am the master of my fate:
> I am the captain of my soul."

Henly, "Invictus," A TREASURY OF GREAT POEMS ENGLISH AND AMERICAN 985 (1942).

An analogous situation is presented in *United States v. Kalish*.[20] There petitioner, as a tactical move advised by counsel, refused to take the required step forward at his induction and was arrested. As a result of the arrest, he was photographed and fingerprinted, and after his aquittal and subsequent induction into the service, he sought to have these fingerprint and photograph records destroyed. The government resisted, contending that since the Army had these same records on petitioner, the destruction of only one of the files could be of no benefit to him. The court held that as a matter of privacy and personal dignity petitioner had the right to have the records destroyed. Here petitioner stood to lose only a dignitary sense if the requested relief were denied, just as Mrs. Glietman lost when the requested information was denied her. The destruction of the records did not free petitioner from having records kept on him, just as the requested information would not have freed Mrs. Glietman from having a defective child. This, however, is unimportant because both have been injured in their dignity; and for this there should be some legal redress.

Dignity is protected in other contexts, although few courts have expressly acknowledged that dignity is, in fact, the interest being safeguarded. In assault a cause of action arises for the mere insult of being threatened,[21] while in battery an offensive touching with no physical harm is sufficient. The true injury in being spit on[22] is the indignity of it—the dignity is more battered than the person. The recent recognition of mental distress as a cause of action rather than as an element of damages resulting from some other tort[23] represents an increasing concern for the dignity of man. Privacy is perhaps the best example with which to demonstrate that dignity is an interest worthy of the law's protection. This expanding tort is a judicial recognition of the citizen's need to be secure in his thoughts, and unfettered in his customs and beliefs. It is the law's response to the stimulus of an ever-encroaching society. If state intrusion into marital affairs[24] does not offend the dignity of the citizen, then in what manner is he offended? If peeping tom laws are not designed to protect the integrity of the individual in his home, then what is the protected interest?

[20] 271 F. Supp. 968 (D.P.R. 1967).
[21] W. PROSSER, TORTS § 10 (3rd ed. 1964).
[22] Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884).
[23] W. PROSSER, TORTS § 11 (3rd ed. 1964).
[24] Griswold v. Connecticut, 381 U.S. 479 (1965).

Perhaps it is because dignity and individuality are so intangible that damages are rarely given on these express grounds. Yet it is clear that this has not impeded courts from granting relief in the assault, battery, mental distress, and privacy contexts. In the assault situation the plaintiff need not actually be afraid, for the protection is against a purely mental disturbance of his personal integrity.[25] In the medical setting, an operation which exceeds that for which consent is given may subject the physician to liability even though the operation was beneficial.[26] Surely dignity is being protected here, albeit in the form of personal security. And once dignity is recognized to be the real injury to Mrs. Glietman, damages no longer present a problem. Professor Bloustein expresses the concept best by concluding that in privacy actions,

> Unlike many other torts, the harm caused is not one which may be repaired and the loss suffered is not one which may be made good by an award of damages. The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.[27]

It is submitted that Mrs. Glietman, simply because she is a human being, had a right to know facts which so vitally concerned her. The defendants, having accepted her as their patient, had the duty to respond truthfully to her inquiries. That duty was breached and, for this, there should be some legal remedy.[28] Recovery should not be made to depend upon what use, if any,[29] the mother may have made of this information, since this is pure conjecture. She

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[25] See note 20 *supra.*

[26] *See, e.g.,* Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

[27] Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U.L. REV. 962, 1002-03 (1964). *See also* Westin, *Science, Privacy, and Freedom; Issues and Proposals for the 1970's,* 66 COLUM. L. REV. 1003, 1205 (1966). Compare, Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?,* 31 LAW & CONTEMP. PROB. 326 (1966).

[28] It could be argued that by granting Mrs. Glietman a recovery, the court would be indirectly punishing defendants for not aiding in the circumvention of state law. To whatever extent this reasoning is valid, the policy of protecting the individual in his dignity should outweigh such a consideration.

[29] One use may have been to prepare, emotionally and financially for the possible tragedy. *See,* Smith, *Therapeutic Privilege to Withhold Specific Diagnosis From Patient Sick with Serious or Fatal Disease,* 19 TENN. L. REV. 349 (1946).

should have been informed regardless of whether it would be of any benefit to her. That a decision favorable to plaintiff may deter other such abuses by a powerful profession is additional grounds for recovery.

LAURENCE V. SENN, JR.