UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 46 | Number 4 Article 6

6-1-1968

Notes

North Carolina Law Review

NOTES

Antitrust—Division of Territory by Competitors in a Franchise System

The defendant in *United States v. Sealy, Incorporated*[1] was a corporation that owned the Sealy tradename and licensed small manufacturers around the country to make Sealy bedding products. Sealy was not an ordinary trademark licensor, however, because almost all of its stock was owned by the manufacturers,[2] who completely controlled its day-to-day activities. Nevertheless, Sealy provided a number of services which were designed to allow the small manufacturers to compete more effectively against larger bedding producers: it advertised and promoted the Sealy name on a national basis, rendered technical and management assistance, and conducted research. It also worked with the manufacturers to fix retail prices. Finally, it served as a device whereby each manufacturer could maintain an exclusive territory in which to sell its product. Sealy licensed only one manufacturer to make and sell under the Sealy name in a particular area. In return each manufacturer promised not to make or sell outside its area.

In the district court the case was tried on the theory that Sealy and the manufacturers had conspired to fix retail prices and allocate territory in violation of Section 1 of the Sherman Act.[3] The district court held that there was a conspiracy to fix prices and enjoined further efforts to regulate retail prices except for the use of suggested retail price lists. The district court also found that there had been no conspiracy to allocate territory. It found that there were agreements to allocate territory, but that they were ancillary to a lawful plan of trademark licensing and therefore reasonable.[4]

On appeal to the United States Supreme Court the Government argued that Sealy was a joint venture of the manufacturers and that

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[1] 388 U.S. 350 (1966).

[2] Stock in Sealy, Inc. was owned disproportionately by all of the manufacturers, and the corporation was usually under the control of several of the largest shareholders. Rudnick, *The Sealy Case: The Supreme Court Applies the Per Se Doctrine to a Hybrid Distribution System for Trademarked Bedding Products*, 57 TRADEMARK REP. 479 (1967).

[3] United States v. Sealy, 1964 Trade Cas. ¶ 71258 (N.D. Ill.).

[4] *Id.*

the agreements to divide territory should be viewed as horizontal agreements among competitors. The United States Supreme Court agreed. Drawing on the lower court holding that there had been price fixing, the Court further held that where manufacturers combine to fix prices and use territorial restraints as part of such a plan, the territorial restraints must be considered per se unreasonable and unlawful.[5]

Although the use of a central agency in the form of a corporation to advertise and market a trademarked product seems to have been found mostly in the bedding industry, the technique is of general interest because it offers a possible way for small manufacturers to enter a national market. The basic elements of the Sealy organization are not affected by the opinion. Sealy may still advertise nationally, suggest retail prices and in general promote the efficiency of its licensees. But it has been suggested that territorial limitations are an important part of such an organization.[6] It will therefore be of interest to see to what extent agreements to divide territory are affected by *Sealy*.

The Government argued that the agreements to divide territory were horizontal in nature because it desired to take advantage of the rule that horizontal divisions of territory by competitors is per se unreasonable. This rule was recently expressed in *White Motor Company v. United States*[7] where the issue was whether vertical territorial restrictions imposed by a manufacturer on its dealers were per se unlawful. In *White Motor,* the United States Supreme Court held it would not determine the vertical issue until extensive market evidence should be presented at a trial. Only then did the Court feel a proper decision could be made whether to use a per se or rule of reason approach to the solution of vertical territorialization.[8] The rationale of the decision in *White Motor* is important here because of the comparison made by the Court between vertical and horizontal territorial restrictions. It was felt that vertical restrictions might deserve rule of reason treatment because a manufacturer could have strong procompetitive reasons for imposing territorial restrictions. By contrast, horizontal agreements to divide territory were considered per se unreasonable because of the high probability of anti-

[5] 388 U.S. at 357.
[6] Rudnick, *supra* note 2.
[7] 372 U.S. 253 (1963).
[8] *Id.* at 261.

competitive effects and the low incidence, if any, of good effects.[9] In *Sealy* the Supreme Court said it "would violate reality to treat [the territorial agreements] . . . as equivalent to territorial limitations imposed by a manufacturer upon independent dealers as incident to the sale of a trademark product. Sealy, Inc. is an instrumentality of the licensees for purposes of the horizontal territorial allocation."[10]

Having found the arrangement in *Sealy* to be horizontal, it is striking that the Court *did not use* the rule that horizontal divisions of territory by competitors are per se unreasonable.[11] The theory actually used by the Court was that the territorial division should be found per se unreasonable because it was part of a per se unreasonable plan of price-fixing. It was, as stated by the Court, "part of 'an aggregation of trade restraints' including unlawful price fixing and policing . . . unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the market place, or their reasonableness."[12] The fact that the Court used this approach rather than apply the easily available per se rule against horizontal division of territory expressed in *White Motor* may indicate that the Court did not consider *Sealy* an appropriate case for that rule. This leads therefore to the question whether, absent price fixing, the rule of reason might have been applied to the issue of territorialization alone.

A strong argument can be made that where competitors of little market power have franchised and advertised a brand name (and no price-fixing is practiced), the Court should then treat territorial restrictions under the rule of reason. At least one writer has noted that the per se rule expressed in *White Motor* is derived from a line of cases in which the competitors were possessed of large shares of the market and great market power.[13] It was also suggested in an amicus curiae brief filed with the *White Motor* case that the per se rule should not be applied in the horizontal franchise situation where

[9] *Id.* at 263.
[10] 388 U.S. at 354.
[11] Zeidman, *The Growth and Importance of Franchising—Its Impact on Small Business,* 12 ANTITRUST BULL. 1191, 1200 (1967); Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy,* 1967 DUKE L.J. 732, 737.
[12] 388 U.S. at 357.
[13] Rudnick, *supra* note 2, at 465.

no price fixing is involved.[14] The Court paid little heed to this brief in *White Motor,* but it may, by way of an interesting dictum in *Sealy,* be hinting that it overstated the rule in *White Motor*:

> It is argued . . . that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as per se unlawful. But condemnation of appellee's territorial arrangements certainly does not require us to go so far as to condemn that quite different situation, whatever might be the result if it were presented to us for decision.[15]

The case for application of the rule of reason is also buttressed by the dissent in *Sealy.* The dissent argued that the rule of reason ought to be applied, but hung this conclusion on its view that the restrictions were vertical in nature.[16] It would seem, however, that the facts of the case make it more desirable to view the arrangement as horizontal, because Sealy, Inc. was completely dominated by the manufacturers and had little life of its own. Thus it could be argued that the real point of the dissent is that in an appropriate case of territorial division by competitors of little market power and with a small share of the market, the rule of reason should be applied.

If it is still possible for firms with little aggregate market power to use territorial division in a franchise system under the rule of reason, the next question is what factors would be considered in applying the rule of reason? As to anticompetitive effects, it is clear that any division of territory will cause some reduction in competition. Indeed, it has been argued that division of territory is even more damaging to competition than price fixing, because it eliminates all *intrabrand* competition in the sale of the product.[17] As to pro-

[14] Brief as Amicus Curiae, White Motor Co. v. United States, 372 U.S. 235 (1963). This brief was filed by Serta Associates, a bedding licensor, to correct a false impression it felt that White Motor Company was making on the Court. White Motor Company, in an attempt to distinguish between vertical and horizontal arrangements, had assumed that horizontal territorial agreements were per se unlawful. Serta attempted to show in the brief that the rule of reason should be applied. *See* Bureau of National Affairs, Inc., Antitrust and Trade Regulation Today: 1967, at 71.

[15] 388 U.S. at 357.

[16] *Id.* at 378.

[17] Brief for Appellee, United States v. Sealy Inc., 388 U.S. 350 (1966). In White Motor Co. v. United States, 372 U.S. 253, 263 (1963), it was said that "[h]orizontal territorial limitations, like '[g]roup boycotts, or con-

competitive effects, the main argument in justification is that, notwithstanding a reduction in intrabrand competition, division of territory can lead to an increase in *interbrand* competition.[18] This is said to result from the fact that each manufacturer will concentrate his efforts on the maximum penetration of his area, rather than waste effort trying to sell in the areas assigned to his counterparts. This concentration is said to insure keener competition between rival brands than would be the case if the franchisees were in competition with each other.[19] The rebuttal to this justification is that if interbrand competition were healthy, prices would be so low that franchisees would not need protection from their counterparts. If this is so, it would appear that the attempt to limit intrabrand competition is only a ruse to eliminate at least some degree of competition from the market as a whole.[20]

Perhaps a stronger argument for territorial division can be made when firms adopt franchising in order to enter a new market or to prevent the failure of their businesses due to changing market conditions. In such event a temporary restraint on territory might be acceptable because of the promise of an additional product in the market. This argument draws support from the dicta in *Sealy* which seems to contemplate the situation where firms may wish to franchise in order to meet the competition of giant merchandisers.[21] As the new brand became established, and as interbrand competition were im-

certed refusals by traders to deal' . . . are naked restraints of trade with no purpose except stifling of competition."

[18] Brief for Appellee, United States v. Sealy, Inc., 388 U.S. 350 (1966).

[19] This argument is more often made on behalf of a manufacturer who is attempting to justify territorial limitations placed on the retail sale of franchised goods. See generally, Handler, *Recent Antitrust Developments,* 112 U. PA. L. REV. 159, 166 (1963); Note, *Restricted Channels of Distribution under the Sherman Act,* 75 HARV. L. REV. 795, 827 (1962).

[20] In Brief for Appellant, United States v. Sealy, Inc., 388 U.S. 350 (1966) at 15, the Government argued:

> Protection from the competitive inroads of the relatively few manufacturers who compose the Sealy system and who in the aggregate compose but a small segment to the bedding industry would be futile if the competition from other brands were as effective as competition within the Sealy family. The principal justification suggested by appellee for the territorial restriction—that Sealy cannot attract licensees without offering them protection against competition from existing licensees—presupposes that the restriction is an effective method for reducing the competitive pressures upon the manufacturers who are party to the scheme.

[21] 388 U.S. at 358.

proved, it would seem that intrabrand restrictions would become less important to the franchisees and eventually could be lifted.

Sealy adds a new dimension to the law of antitrust because it is the first case in which the agreements of firms with little market power to divide territory have been found unlawful.[22] Yet because the Court used the presence of price fixing to find the agreements per se unlawful, it is possible to argue that not *all* horizontal agreements to divide territory need be per se unlawful. It would seem that it might be possible to convince the Court to apply the rule of reason favorably, especially where the success of a new entry or a group of failing firms was at stake.

HENRY C. MCFADYEN

Civil Rights—Racially Discriminatory Employment Practices Under Title VII

In *Quarles v. Phillip Morris, Incorporated,*[1] the United States District Court for the Eastern District of Virginia held that present differences in departmental seniority of Negroes and whites that resulted from the company's past and intentional racially discriminatory hiring policy were unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964.[2] *Quarles* was the first such case to be litigated under Title VII.[3]

Prior to 1966, Phillip Morris employed Negroes only in one of three departments covered by a collective bargaining agreement with Local 203 of the Tobacco Workers International Union, the prefabrication department.[4] The jobs available in prefabrication were generally lower paying and less desirable than those in either

[22] Cases behind the rule in *White Motor,* all involving firms with large market power, are Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. National Lead Company, 332 U.S. 319 (1947); Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899).

[1] 279 F. Supp. 505 (E.D. Va. 1968).

[2] Pub. L. No. 88-352, 78 Stat. 241. There were also allegations of racial discrimination in the employer's hiring practices, employment and promotion of supervisory personnel, and the payment of wages. The court summarily dismissed the first two issues, and found racial discrimination in the payment of wages only as to two Negro employees.

[3] 42 U.S.C. §§ 2000e to 2000e-15 (1964).

[4] Negroes were also employed for seasonal work in another department, but this was covered by a different collective bargaining agreement.

the fabrication or the warehouse and shipping departments for which whites were hired. Each department had its own job progression ladder and seniority roster, and Phillip Morris usually hired employees for entry level positions in a department, filling higher rated jobs by advancement based primarily on departmental seniority. Further, the company prohibited interdepartmental transfers by Negroes until 1961, when the collective bargaining agreement was changed to permit a few transfers each six months. The employees competed for the transfers on the basis of seniority, merit and ability. Later a provision was added to allow transfers in the discretion of management, but transfers were conditioned on the loss of departmental seniority. However, in the event of layoff, the employee could return to his previous department with his employment date seniority unimpaired. The effect of all this was to "lock in" the Negro employees in the less desirable jobs while whites with no seniority in the company were hired into the better jobs off the streets. After exhausting his administrative remedies,[5] the plaintiff brought this action on behalf of the Negro employees as a class who had been hired and had continued to work under these conditions. The Negro employees sought to be trained and promoted to fill vacancies on the same basis as white employees with equal ability and employment seniority.

Although racial discrimination in employment has been dealt with previously by other measures,[6] Title VII of the Civil Rights

[5] In Quarles v. Phillip Morris, Inc., 271 F. Supp. 842 (E.D. Va. 1967), the court held that the plaintiffs had sufficiently exhausted their administrative remedies.

Title VII provides for the complainant to file with the Equal Employment Opportunity Commission "within ninety days after the alleged unlawful employment practice occurred. . . ." After investigation, if the commission determines that there is reasonable cause to believe that the charge is true, the commission must attempt to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. If voluntary compliance fails, the complainant has thirty days to commence suit in the appropriate federal court. Further, upon timely application, the court in its discretion may allow the Attorney General of the United States to intervene if he certifies that the case is of general public importance. Also, in certain instances the Attorney General may bring suit on his own initiative. 42 U.S.C. §§ 2000e-5-6 (1964).

[6] The first attempt by the government to eliminate discrimination in employment was in the form of an executive order issued by President Roosevelt in 1941. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). It prohibited discrimination in government and defense industries. An executive order issued by President Johnson requires that all government agencies include a nondiscrimination clause in all of their contracts. However, contractors

Act of 1964 represents "the first time the Congress of the United States has declared racial discrimination in private employment unlawful."[7] Following the pattern established by state fair employment practice laws, Title VII makes it an "unlawful employment practice" for any employer covered by the Act:[8]

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .[9]

Nor may an employer, on such grounds, "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . ."[10] Labor organizations covered

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are to undertake not merely to refrain from discrimination; in addition, they are to promise to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color or national origin." Exec. Order No. 11246, 3 C.F.R. 167-68 (Supp. 1965). To process complaints, each President created a Committee on Fair Employment Practices or, as it was called under President Kennedy, the President's Committee on Equal Employment Opportunity.

Many states attempted to eliminate racial discrimination in employment by enacting state fair employment practice laws. In 1945 New York, the first of thirty-six states to pass such a statute, established a commission and directed it "to eliminate and prevent discrimination in employment . . . because of race, creed, color, or national origin. . . ." Ch. 118 [1945] N.Y. Sess. Laws 125. Further, the statute specified a number of "unlawful employment practices." Ch. 118 [1945] N.Y. Sess. Laws 131.

The National Labor Relations Act and the Railway Labor Act have also offered assistance in the elimination of racial discrimination in employment. Since the statutes provide for the representative union to be the exclusive representative of the employees, a duty of fair representation has been imposed on the union. Wallace Corp. v. NLRB, 323 U.S. 248 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Local 12, URW v. NLRB, 368 F.2d 12 (5th Cir. 1966); Hughes Tool Co., 147 N.L.R.B. 1573 (1964). For discussions of this duty, see Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Rosen, *The Law and Discrimination in Employment*, 53 CALIF. L. REV. 729 (1965); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).

Although Title VII is the latest and most comprehensive governmental action for the elimination of racial discrimination, the above mentioned methods should continue to be used to supplement it. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205-13 (1966) [hereinafter cited as SOVERN].

[7] SOVERN 101.

[8] Employers covered by the Act with some exceptions include all employers "engaging in an industry affecting commerce" who have twenty-five or more employees. 42 U.S.C. § 2000e(b) (1964).

[9] 42 U.S.C. § 2000e-2(a)(1) (1964).

[10] *Id.* at § 2000e-2(a)(2).

by the act[11] may not deny membership to a worker or act to deprive him of or limit his employment opportunities or "otherwise adversely affect his status as an employee or as an applicant for employment" because of his race, religion, sex or national origin.[12] In addition, labor organizations cannot lawfully "cause or attempt to cause an employer to discriminate against an individual" in violation of the duties imposed on the employer by Title VII.[13] Finally, employers and labor organizations may not discriminate in programs of apprenticeship or retraining.[14]

The court apparently assumed that any racial discrimination in employment, unless specifically condoned by the Act, would violate Title VII, since it failed to analyze the Act's provisions as they related to the particular facts of the case. Thus, the basic inquiry was whether racial discrimination did in fact exist. In resolving this question, the court closely scrutinized the plight of Negroes hired during the period when Phillip Morris maintained its discriminatory hiring policy. It noted that the Negroes, to be eligible to compete for the better jobs, first had to transfer to either the fabrication or warehouse and shipping department. But to transfer they had to either compete with Negroes of greater seniority in the prefabrication department or transfer with a loss of departmental seniority. Upon transfer, they were at the bottom of the seniority roster in the new department, regardless of their overall plant seniority. In case of lay-off, they were the first to go, although they could return to the old department with seniority accumulated while working there. Further, the Negroes, while waiting for an opportunity to transfer, continued to be paid less than the white employees in other departments. On the other hand, white employees of equal ability and equal or less company-wide tenure would already be in the department to which the Negroes were attempting to transfer. Furthermore, the whites' departmental seniority would be greater than or at least equal to the seniority which the Negroes could acquire if and when they were allowed to transfer. This situation led the court to conclude that, although the restrictive

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[12] *Id.* at §§ 2000e-2(c)(1)-(2).

[13] *Id.* at § 2000e-2(c)(3).

[14] *Id.* at § 2000e-2(d).

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[14] *Id.* at § 2000e-2(d).

transfer provisions were now being administered on a nondiscriminatory basis and Phillip Morris was no longer discriminating in its hiring in any department as of 1966, the restrictive transfer provisions continued to perpetuate the past discrimination and amounted to present discrimination in violation of Title VII.[15]

NLRB v. Local 267, IBEW,[16] which was litigated under the National Labor Relations Act, supports the premise that past discrimination can not be perpetrated by continued use of an employment practice even though it is not itself discriminatory on its face. There the union had maintained a hiring hall and in the past had preferred union members to nonmembers for work referrals. Further, priority in referral had been and continued to be based upon past employment. The court reasoned that, although section 8(f)(4) of the NLRA specifically sanctioned priority based on experience, the subsection did not sanction "the use of seemingly objective criteria as a guise for achieving illegal discrimination."[17]

The congressional hearings and debates do not lend substantial support to either the court's viewpoint or a contrary position.[18] Congress never discussed *departmental* seniority, which was involved in *Quarles*. But the legislators did state that Title VII would not affect established *employment* seniority rights, i.e., since the Act was "prospective and not retrospective,"[19] it would not require subsequently hired Negroes to be preferred on the basis of race over previously hired whites.[20] In fact, section 703(j)[21] specifically barred this "reverse discrimination." At any rate, the court appears correct in concluding that congressional debate did not significantly weaken its position.

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[15] 279 F. Supp. at 518, 19.

[16] 357 F.2d 51 (3d Cir. 1966).

[17] *Id.* at 57.

[18] *See*, BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT of 1964 (1964); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). The court acknowledged that it relied heavily on this note.

[19] 110 CONG. REC. 6992 (daily ed. April 8, 1964).

It should be noted that, although a finding of discrimination would not cause the Act to apply retroactively, the court's remedy could still be retroactive. For a discussion of this and the remedy in *Quarles*, see note 29 *infra*.

[20] *Quarles* does not require any change of employment seniority. It only requires that Negro employees transferring to other departments compete with white employees on the basis of their length of time in the company's employment, i.e., on the basis of employment seniority, rather than on the basis of their length of time in that department.

[21] 42 U.S.C. § 2000e-2(j) (1964).

Although the congressional discussion alone is not very instructive as to what effect Title VII was intended to have on pre-existing departmental seniority rights, a proviso to section 703 which was added as an amendment has some bearing on this determination. In particular, section 703(h)[22] states that, notwithstanding other provisions of Title VII, an employer may:

> apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race. . . .[23]

It has been suggested that this proviso, read in light of the congressional discussion, "reflects a congressional consensus favoring the protection of all seniority rights existing before Title VII's effective date."[24] But, however one reads the proviso,

> it does not seem possible to interpret it as providing a blanket exemption for all differences in treatment resulting from seniority arrangements set up before Title VII came into force. The proviso does not expressly refer to such preexisting systems, but to all "bona fide" systems. A "bona fide" seniority system seems to be one which can be explained or justified on nonracial grounds.[25]

Whitfield v. United Steelworkers,[26] decided prior to passage of Title VII, is the only case either before or after the passage of Title VII in which there were similar facts. Phillip Morris and Local 203 relied heavily on *Whitfield,* which held that there was no discrimination even though the Negro employees with greater seniority had to go to the bottom when they transferred departments.[27] However, the court in *Quarles* distinguished *Whitfield* on the grounds that the skills obtained in the departmental pro-

[22] This was one of a series of amendments negotiated to gain the support of a group of Senators headed by Senator Dirksen against the filibuster conducted by southern opponents of the Civil Rights Act. Vaas, *Title VII: Legislative History,* 7 B.C. IND. & COM. L. REV. 431, 449 (1966).

[23] 42 U.S.C. § 2000e-2(h) (1964).

[24] Note, *Title VII, Seniority Discrimination, and the Incumbent Negro,* 80 HARV. L. REV. 1260 at 1272; *accord,* Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions,* 41 ST. JOHN'S L. REV. 58, 78 (1966).

[25] Note, *Title VII, Seniority Discrimination and the Incumbent Negro,* 80 HARV. L. REV. 1260 at 1272.

[26] 263 F.2d 546 (5th Cir. 1959), *cert. denied,* 360 U.S. 902 (1959).

[27] *Id.* at 551.

gression were necessary for advancement to higher level jobs.[28] In *Quarles,* the only skills required, if any, were those that each employee, whether white or Negro, had to acquire on the particular job or through training just prior to taking the job.

Under Title VII, the court must find that "the respondent has intentionally engaged in . . . an unlawful employment practice" before it can enjoin the practice and "order such affirmative action as may be appropriate. . . ."[29] The court concluded that Phillip Morris and Local 203 had intentionally engaged in unlawful employment practices by discriminating on the grounds of race without discussing what was necessary to constitute the requisite intent. The court did state that the defendants' pre-Title VII hiring practices were intentionally discriminatory and this conclusion appears to be justified by the evidence.[30] However, surely the court did not intend that this should suffice as the neccessary intent, because such an interpretation would seem susceptible to the objection of retroactivity. In fact, it appears difficult to allege realistically that the condemned practices by themselves were intentionally dis-

[28] 279 F. Supp. at 518.

[29] 42 U.S.C. § 2000e-5(g) (1964).

In fashioning a remedy which would award the complainants "affirmative relief," the court had two basic choices which have been referred to as the "rightful place" remedy and the "freedom now" remedy. 80 HARV. L. REV. at 1268. The "rightful place" remedy

> would allow an incumbent Negro to bid for openings in "white" jobs comparable to those held by whites of equal tenure, on the basis of his full length of service with the employer. If he met the existing ability requirements for such a job, he would be entitled to fill it, without regard to the seniority expectations of junior white employees. The "rightful place" approach requires an adjustment in competitive standing with regard to future job movements arising in the ordinary course of an employer's business.

Id. In contrast, the "freedom now" remedy would displace whites for Negroes who would have had the job if there had not been originally a discriminatory hiring policy. The court, after considering the merits of the efficiencies obtained through the company's present departmental organization and the economic losses to the Negro employees, awarded a variation of the "rightful place" remedy. Any lesser relief, e.g., allowing Negroes to transfer to entry level positions in the other departments when vacancies occurred, would have continued to subordinate the Negroes to the white employees. The "freedom now" approach insofar as it would reverse job awards made before Title VII became law "seems vulnerable to the charge that it is retroactive," although this is only one of many reasons why this remedy does not seem viable.

For an example of a pre-Title VII remedy similar to that in *Quarles,* see Central of Ga. Ry. Co. v. Jones, 229 F.2d 648 (5th Cir. 1956), *cert. denied,* 352 U.S. 848 (1956).

[30] 279 F. Supp. 518.

criminatory. It was never contended that the restrictive transfer policies were conjured up to defeat the intent of Title VII, and, in fact, this arrangement had been in effect previously. Further, the court recognized that the departmental system in combination with the restrictive transfer system had offered the company many legitimate benefits.[31] However, in support of the court's decision, it seems that discriminatory intent can be inferred from the employer's continued use of its restrictive transfer system, since the employer must have known that the practical effect would be to discriminate against senior Negro employees in the prefabrication department.[32]

Although *Quarles* appears to be consistent with the overall intent of Title VII,[33] in the absence of clarifying congressional amendment, the continued use of Title VII for the elimination of present differences in seniority caused by prior racial discrimination in hiring will raise three problems—whether such differences are in fact discriminatory; what is required to establish the requisite intent; and what effect qualifications of skill and ability have on the issues of intent and discrimination.

It seems that an argument equally meritorious to that of the court in *Quarles* can be made to the effect that, if an employer has discontinued his racially discriminatory practices, there is no present discrimination although vestiges of the old system remain in the form of differences in seniority.[34] Further, assuming no present intent can be found, it can be argued that *Quarles* applies the act retroactively.

Convincingly showing the necessary intent is the second major obstacle in upholding the *Quarles* interpretation. If a court requires a demonstration of a particular state of mind, the burden of proof could be almost insurmountable. On the other hand, if the court reasons that the parties intended the natural and probable consequences of their actions, the problem will be less significant.[35]

Finally, although qualification requirements for promotion were

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[31] *Id.* at 513.

[32] *See* Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions,* 41 ST. JOHN'S L. REV. 58, 77 (1966).

[33] BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964 at 160 (1964).

[34] This was the position of the defendants in *Quarles.*

[35] *See* Rachlin, *Title VII: Limitations and Qualifications,* 7 B.C. IND. & COM. L. REV. 473, 479-80 (1966).

not in issue in *Quarles,* they will be an important factor in many future cases.[36] The easiest situation is where an employer's qualification requirements are only a facade. In such instances, upon a showing of sufficient evidence, the court will probably consider this only as evidence of the company's intention to discriminate. Another situation is like that in *Quarles* where the company maintains a training program to qualify employees for higher level positions. Title VII specifically states that such training programs will be administered without discrimination.[37] The most difficult type case arose in *Whitfield,* where the qualification requirements were legitimate and the white employees obtained the skills by progression through the department.[38] The court in *Quarles* implied that Title VII would not damage the *Whitfield* finding of no discrimination.[39] However, it can be contended that, although the Negro employees would have to go to the bottom of the department to obtain the necessary skills, they should not lose their seniority as they did in *Whitfield.* This would allow the Negroes to progress as quickly as they grasped the required skills for advancement and as soon as vacancies for which they were qualified came open. In *Whitfield,* the court emphasized the good faith of the union in fairly representing all the employees.[40] Under Title VII, it appears that the elimination of seniority rights upon transfer, whether the employee has to obtain skills or not, would continue to perpetuate the past discrimination and, therefore, under *Quarles* should be in violation of the Act.

Although employers and unions may be faced with practical problems in complying with Title VII as interpreted in *Quarles,* Congress expressed its intention to eliminate racial discrimination in employment and, because of the magnitude of the evil to be eliminated, did not provide for any balancing of interests. *Quarles* is consistent with this general purpose of Title VII, but the court could have augmented the significance of its decision by analyzing the pertinent provisions of the Act and pointing out which facts demonstrated a violation of which provisions.

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[36] *Id.* at 476-8.
[37] 42 U.S.C. § 2000e-2(d) (1964).
[38] 263 F.2d at 550.
[39] 279 F. Supp. at 518.
[40] 263 F.2d at 551.

Constitutional Law—Ads on Busses

In *Wirta v. Alameda-Contra Costa Transit District*[1] the California Supreme Court enjoined a metropolitan transit district from refusing to accept for display on its busses an advertisement critical of the war in Vietnam. The transit district is a public body which operates busses in several California counties. It sells advertising space above the passengers seats. The district had a policy of accepting only two classes of advertising: (1) advertisements for the sale of goods and services and (2) advertisements for candidates and ballot proposals at the time of a duly called election. The Women for Peace at Berkeley tried to put an advertisement on the district's busses at the standard rate. It read:

> Mankind must put an end to war or war will put an end to mankind.
>
> President John F. Kennedy
>
> Write to President Johnson: Negotiate Vietnam
>
> Women For Peace
>
> P.O. Box 944, Berkeley

In keeping with its policy the district refused the advertisement.[2] The California Supreme Court found that the district's policy restricting advertisements was a violation of the first and fourteenth amendments.[3] Transit advertising, the court found, is "an acceptable and effective means of communication." By accepting advertisements the district had opened a forum for the expression of ideas: "A regulation which permits those who offer goods and services for sale and those who wish to express ideas relating to elections access to such forum while denying it to those who wish to express other ideas and beliefs, protected by the first amendment, cannot be upheld."[4] The dissent denied that the district had opened a forum for the expression of ideas.

Recognizing the importance of a place where the citizen has a

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[1] —Cal. 2d—, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). For another recent case with similar facts and result see Kissinger v. New York City Transit Auth., 274 F. Supp. 438 (S.D.N.Y. 1967).

[2] — Cal. 2d at — 434 P.2d at 984, 64 Cal. Rptr. at 432. The advertising on the busses was handled by an advertising agency which leased the space from the district and then sub-leased it. *Id.*

[3] *Id.* at —, 434 P.2d at 985, 64 Cal. Rptr. at 433.

[4] *Id.* at —, 434 P.2d at 990, 64 Cal. Rptr. at 438.

right to communicate, the courts have created[5] the public forum,[6] a place where the citizen has access to the attention of his fellows:

> Traditionally our public streets, meeting halls, parks and similar places have been recognized as locations in which this sacred right may be exercised, not only because such places, being dedicated to public use, are held in trust for all citizens, but also because they are usually locations where the ears of large numbers of fellow citizens can most effectively be reached.[7]

The existence of a forum, or something like it, is a necessary precondition to an uninhibited, free trade in ideas. Before the public can choose among competing ideas, it must be exposed to them.[8] Forums have been created in streets,[9] parks,[10] railway and bus terminals,[11] and in public (usually school) auditoriums.[12] The forum is always created on public property or on private property which (under the rubric of state action) is treated as if it were public.[13] How the forum comes into existence and the extent to which the state may regulate it may vary with the type of property involved.

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[6] In Davis v. Massachusetts, 167 U.S. 43 (1897), the Supreme Court held that since the legislature could absolutely prohibit first amendment activities in streets and parks, it could require a license. *Id.* at 48. Later the Supreme Court reversed itself holding that such places had been used for assembly from time immemorial. Hague v. CIO, 307 U.S. 496 (1939); Schneider v. New Jersey, 308 U.S. 147 (1939). Time immemorial, as Mr. Chief Justice Traynor has noted, dates from 1939. In re Hoffman, — Cal. 2d —, —, 434 P.2d 352, 355, 64 Cal. Rptr. 97, 99 (1967).

[9] For a discussion of the public forum with particular emphasis on "speech plus" see H. Kalvin, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 SUPREME CT. REV. 1.

[7] Wolin v. Port Authority, 268 F. Supp. 855 (S.D.N.Y. 1967).

[8] Of course, distributing leaflets and holding meetings in school auditoriums are limited as means of getting different points of view before the public. Jerome A. Barron has criticized the Supreme Court for indifference to creating opportunities for expression. To protect an idea after it has come to the fore, he insists, is not enough. Barron, *Access to the Press,* 80 HARV. L. REV. 1641 (1967). "The test of a community's opportunities for free expression rests . . . in an abundance of opportunities to secure expression in media with the largest impact." *Id.* at 1653.

[9] *E.g.,* Schneider v. New Jersey, 308 U.S. 147 (1939).

[10] *E.g.,* Niemotoko v. Maryland, 340 U.S. 268 (1951).

[11] *E.g.,* Wolin v. Port Authority, 268 F. Supp. 855 (S.D.N.Y. 1967).

[12] *E.g.,* Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946).

[13] Marsh v. Alabama, 326 U.S. 501 (1946); In re Hoffman, — Cal. 2d —, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). The Supreme Court has also created a limited right of access to persons at their doors. Martin v. Struthers, 319 N.C. 141 (1943); Breard v. City of Alexandria, 341 U.S. 622 (1951).

The doctrine of the public forum had its solid beginning in the case of *Schneider v. State*.[14] In that case the Supreme Court struck down municipal ordinances which flatly prohibited the distribution of leaflets in city streets. The object of the ordinances was to prevent littering. The Court found them a violation of the first amendment. Streets are "the natural and proper places for the dissemination of information and opinion."[15] The purpose of preventing littering was not sufficient to justify such an abridgement of freedom of speech.[16] Later cases suggested that while the state could regulate such distribution in the interest of traffic flow, it could not bar it altogether.[17] In cases involving the right to distribute literature on the street, two factors are important. No voluntary act by the state was required to create a public forum on the street. And while the state could regulate the forum, it could not close it at will.

At the other extreme is the public forum in school auditoriums. Dicta in court opinions suggest that the forum is created by the voluntary decision of the state to open the doors of the school to the expression of ideas,[18] by allowing one group with a particular point of view to use the school auditorium after school. These dicta insist that "the state need not open the doors of a school building as a forum and may at any time close them,"[19] if it closes them to all.

Another group of cases deals with the right to distribute leaflets in terminals.[20] These cases, based perhaps on a somewhat more restrictive reading of *Schneider* and its progeny, hold that regulations may be adopted to insure traffic flow, safety, etc. But, as expressed in one case,

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[14] 308 U.S. 147 (1939).

[15] *Id.* at 163.

[16] *Id.* at 162.

[17] Marsh v. Alabama, 326 U.S. 501 (1946); Jaminson v. Texas, 318 U.S. 413 (1943). *Schneider* also recognized the right of the state to regulate the streets to assure the movement of people and property. 308 U.S. 147, 160.

[18] Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 545, 171 P.2d 885, 891 (1946); East Meadow Concerts Ass'n v. Board of Educ., 18 N.Y.2d 129, 133, 219 N.E.2d 172, 174, 272 N.Y.S.2d 341, 344 (1966).

[19] Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 547, 171 P.2d. 885, 892 (1946). Cases cited note 18 *supra*. Doubt has been expressed about the assertion that the state is under no duty to open up its facilities after school. Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

[20] Wolin v. Port Authority, 268 F. Supp. 855 (S.D. N.Y. 1967; In re Hoffman, — Cal. 2d —, 434 P.2d. 353, 64 Cal. Rptr. 97 (1967).

> In the absence of proof that the proposed activities . . . would obstruct or hamper the Terminal for transportation purposes, the Port Authority may not ban such activities altogether. In balancing the citizen's right to communicate ideas and views against public responsibility to maintain a free flow of traffic, the exercise of constitutional rights will be favored unless it is shown that the prohibition is essential under the circumstances to insure the operation of the Terminal for its primary purposes.[21]

Since it seems difficult to prove that an absolute ban on the distribution of leaflets is essential to ensure the operation of a terminal for its main purpose, the result may be that the state cannot prohibit such distribution.

The court in *Wirta* relied heavily on cases involving public school auditoriums.[22] These cases, as indicated above, suggest that school auditoriums need not be opened up to the public after school hours. But once the privilege of using the auditorium is made available to some in the community it cannot be denied to others for reasons that are inconsistent with the first amendment.[23] Such a denial is seen as censorship prohibited by the first amendment. Once

[21] Wolin v. Port Authority, 268 F. Supp. 855, 862 (S.D.N.Y. 1967). *Cf.* Brown v. Louisiana, 383 U.S. 131 (1966).

No case seems to require that facilities be constructed so that citizens will have a place to exercise their first amendment rights. Rather, opening up a forum refers to requiring the state to allow a citizen to use a facility for the exercise of first amendment rights although others have not been allowed before to use it for that purpose.

[22] Cases cited notes 18 and 19 *supra*. The school cases are direct descendants of cases involving streets and parks. *See* Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946). When *Danskin* was decided a line of Supreme Court cases had struck down ordinances and practices which gave city officials unlimited discretion in licensing parades and in restricting use of parks. *See, e.g.*, Largent v. Texas, 318 U.S. 418 (1943); *cf.* Cox v. New Hampshire, 312 U.S. 569 (1940). The reason given is that city officials must not be allowed to censor unpopular causes by controlling access to the public forum. Largent v. Texas, 318 U.S. 418, 422 (1943).

When city officials have (under such ordinances) attempted to pick and choose among potential users, their action has been held a violation of the first amendment. Niemotko v. Maryland, 340 U.S. 268 (1951). In many of these cases an attack is available under both the equal protection clause and under the first and fourteenth amendments. *Niemotko* used both. *Id.* at 273. Fowler v. Rhode Island, 345 U.S. 67 (1953).

[23] Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946). Some have interpreted these decisions as based on the equal protection clause. Van Alystyne, *Political Speakers at State Universities*, 111 U. PA. L. REV. 328, 338 (1963). While equal protection might have provided an adequate basis, they were decided on first amendment grounds. In cases of discriminatory denial of equal access to a public forum equal

the state opens a forum "it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable."[24] Therefore, absent a showing of a clear and present danger, it cannot open its schools to political discussion but exclude those topics considered "subversive"[25] or "controversial."[26] This line of cases has been summarized by Judge Markel in *Buckley v. Meng*:

> The principle of these cases is the simple one that what the state cannot do directly it may not do indirectly. Since there is no power in the state to stifle minority opinion directly by forbidding its expression, it may not accomplish this same purpose by allowing its facilities to be used by proponents of majority opinion while denying them to dissenters.[27]

Following the principle of the school cases,[28] the court found the advertising policy of the transit district deficient in two respects. First, by accepting only election advertisements the district was choosing between classes of ideas entitled to constitutional protection, allowing the expression of ". . . only those selected, and banning all others." "Thus," the court stated, "the district's regulation exercises a most pervasive form of censorship."[29] Second, the court insisted that commercial advertising is not speech protected by the

protection and the first amendment often overlap. *See* Mr. Justice Black's concurring opinion in Cox v. Louisiana, 379 U.S. 536, 580-81 (1963); Niemotko v. Maryland, 340 U.S. 268 (1951).

[24] Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 547, 171 P.2d 885, 892 (1946).

[25] *Id.*

[26] East Meadow Concerts Assn. v. Board of Educ., 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966), *on remand* 26 A.D.2d 819, 273 N.Y.S.2d 736 (1966), *aff'd per curiam*, 19 N.Y.2d 605, 225 N.E.2d 888, 278 N.Y.S.2d 393 (1967).

[27] Buckley v. Meng, 35 Misc. 2d 467 at —, 230 N.Y.S.2d 924 at 934 (Sup. Ct. 1962).

[28] The court in *Wirta* recognized the difference between the school cases and the case presented by the advertising policy of the transit district. "The vice is not that the district has preferred one point of view over another but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning all others. Thus the district's regulation exercises a most pervasive form of censorship." — Cal. 2d at —, 434 P.2d at 986, 64 Cal. Rptr. at —. To bolster its conclusion the court in *Wirta* cited the concurring opinion of Mr. Justice Black in *Cox v. Louisiana*. In *Cox*, Negro demonstrators were convicted of blocking public passageways in violation of a statute which prohibited such blockage but excluded labor unions from its operation. Mr. Justice Black found the statute "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." 379 U.S. at 580-81.

[29] — Cal. 2d at —, 434 P.2d at 986, 64 Cal. Rptr. at 434.

first amendment.[30] On this premise the court found that the policy of accepting commercial messages in preference to protected speech violated the first amendment. The argument seems to be that since the state can prohibit commercial messages and cannot prohibit pure speech, it cannot restrict its advertising slots to purely commercial advertisements.[31]

The court in *Wirta* seems to have held that the advertising policy of the district had voluntarily opened its bus advertising slots as a forum for the expression of ideas. Once the characterization is accepted the result follows: to refuse the advertisement of the

[30] On this point the majority and the dissent were in agreement. The conclusion seems essentially correct. Speech whose sole object is the sale of goods and services can be prohibited altogether. See note 31 *infra*. However if the speech is the type covered by the first amendment, that protection is not withdrawn simply because it is published in the form of an advertisement. New York Times v. Sullivan, 376 U.S. 254 (1964); Murdock v. Pennsylvania, 319 U.S. 105 (1943). The Supreme Court found that the advertisement in the New York Times case was not a "commercial" advertisement because, "it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public concern." 376 U.S. at 266. The Court has recently reiterated that it does not view "purely" commercial advertising as first amendment speech, though only by way of analogy. "Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech. . . ." Ginsburg v. United States, 383 U.S. 463, 474 n. 17 (1966). The example of commercial expression dressed up as "speech" suggested by the Court was Valentine v. Chrestensen, 316 U.S. 52 (1942). *Cf.* Time v. Hill, 385 U.S. 374, 381 (1967). The Court has had some difficulties in borderline cases such as Breard v. City of Alexandria, 341 U.S. 622 (1951). There Justice Black joined by Justice Douglas dissented on the ground that the ordinance interfered with the exercise of first amendment rights. Still, Justice Black reaffirmed his faith in the commercial non-commercial dichotomy: "Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'" 341 U.S. at 650. Comment, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

[31] — Cal. 2d —, 434 P.2d at 986, 64 Cal. Rptr. at 434. The court said:

> Thus, although a city may not prohibit public distribution of handbills expressing protected ideas (Schneider v. State (1939)) . . . it may ban commercial advertising in the form of handbills (Valentine v. Chrestensen (1942)) . . . A distributor of notices for a religious meeting may not be barred from soliciting homeowners by an ordinance against ringing doorbells to distribute advertisements (Martin v. City of Struthers (1943)) . . . , but door to door solicitation for the sale of magazines may be banned (Breard v. City of Alexandria, La. (1951)) . . . . In the case at bar, the policy of the district reverses these acceptable priorities and perversely gives preference to commercial advertising over nonmercantile messages.

Id.

Women for Peace violates the first amendment. But the question which the opinion of the court leaves in some confusion is just how and why the advertising slots have become a forum for the expression of ideas. On this point the court says:

> The second elementary factor we recognize is that the determination of the district to accept advertising on its motor coaches serves as its considered conclusion that this form of communication will not interfere with its primary function of providing transportation. Thus, we avoid the considerations applicable to ascertaining whether public Property must be made available as a forum for the exercise of First Amendments rights. (See In re Hoffman (Cal. 1967) 64 Cal. Rptr. 97, 434 P.2d 353). Here that affirmative determination has been made by the district . . .
>
> Our problem, therefore, is reduced to a situation in which a governmental agency has refused to accept an advertisement expressing ideas admittedly protected by the First Amendment for display in forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements. . . . We conclude that defendants, having opened a forum for the expression of ideas by providing facilities for advertisements on its busses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.[32]

The court then proceeds to quote *Danskin v. Unified School District* as "directly in point."[33] The quotation includes that portion of the Danskin opinion which stresses that the state has no duty to make public school buildings available for public meetings.

There are two possible models the court could be using on the question of opening a forum—the school cases[34] and the terminal cases.[35] By the school cases the citizen has no right to use school facilities unless the state volunteers them by a general policy or by practices allowing groups to use them.[36] In the terminal cases the court requires that property be made available for the exercise of first amendment rights unless the state can show such use would interfere with the primary function of the terminal.[37] There is language in *Wirta* which suggests that the court might be following either model.

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[32] — Cal. 2d at —, 434 P.2d at 985, 64 Cal. Rptr. at 433.
[33] *Id.*
[34] Cases cited note 18 *supra.*
[35] Cases cited note 20 *supra.*
[36] Cases cited note 18 *supra.*
[37] Cases cited note 20 *supra.*

The school cases have the advantage of making it appear that the state rather than the court has chosen to open the forum. But it is difficult to make the school cases fit the facts in *Wirta*. Clearly there was no transit district policy (similar to the statute in *Danskin*)[38] opening bus advertising to political, economic, and social discussion. Of course the acceptance of election advertisements alone could be seen as "volunteering a forum." But there are problems with this line of argument. If the existence of a forum on the bus depends solely on the presence of election advertisements, then the analogy to the school cases[39] suggests that the forum is open only when the state decides to open it, that is, when the political advertisements are accepted at election time. During this time the district could not discriminate between election advertisements and other protected speech. Using the theory that the district had "volunteered a forum" and relying only upon the acceptance of political advertisements to prove it, the result might have been a much narrower forum than that the court found, a forum opened at the pleasure of the state for one month or so a year at election time. A second possible argument based on the school cases would be that the acceptance of commercial advertisements volunteered a forum. But it is difficult to show that the district decided to provide a place for the expression of first amendment ideas by a policy which restricted its advertising to ideas *outside* the protection of the first amendment.[40] In the school cases the finding that the school volunteered a forum seems to have been based on the acceptance of ideas *within* the orbit of the first amendment.[41]

In spite of some indications to the contrary, it seems that the court in *Wirta* was following the rule of the terminal cases. But in doing so, the court avoided any direct admission that the court's decision, rather than some action of the transit district, opened the forum. The result is a hybrid. The majority's emphasis on a voluntary decision to open a forum makes it seem that the court is relying on the school cases. But the reasons given for finding a forum

[38] Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946). The statute required the governing boards of school districts to allow groups formed for political, educational, economic and other purposes to use the schools for meetings.

[39] Cases cited note 18 *supra*.

[40] The only exception to the generalization is that election advertisements were accepted at certain times.

[41] *See* cases cited note 18 *supra*.

(based on primary function[42] and the existence of the facility[43]) are taken from the terminal cases. Instead of confusing the basis of its decision with the assertion that the district had "opened a forum," the court in *Wirta* should have admitted that it was *requiring* the district to provide a forum.

In any event the rule of the terminal cases seems a sounder basis for decision than the rule of the school cases. The conclusion that the state need not make public school auditoriums available after school hours unless it lets some groups use them (and that it can withdraw them at will) is of questionable validity anyway.[44] Of course, there is no requirement that the state provide a facility so that it can be used as a forum. It need not build a high school auditorium so that local groups can use it after school, or a bus terminal so that leaflets can be distributed. Nor need it provide a system for placing advertising on its busses. However, once a facility exists which is an appropriate place for the exercise of first amendment rights different questions are raised. Judicial inquiry should not end with the discovery that in the memory of man no local groups have been allowed to use the local public school auditorium. Rather groups which want to use the schools after hours should be allowed to do so unless that would place an intolerable burden on school facilities and interfere with the primary function of the school.[45] That is the rule of the terminal cases. The same rule should be applied to advertising slots on busses. By establishing a system for

[42] The court treated the district's decision to accept advertisement as proof that the acceptance of other advertisements would not interfere with the primary function of the busses. The court treats the decision to accept any advertisements as a decision that advertising will not interfere with the primary function of the bus and hence as a decision to open a forum. Since there would be no interference with primary function the conclusion based on the terminal cases is clear: the advertising slots must be provided as a forum. In addition to the primary function test there is probably also a requirement that the place be an appropriate one for the exercise of first amendment rights (or at least that it not be inappropriate). *Compare* Adderley v. Florida, 385 U.S. 39 (1966) *with* Brown v. Louisiana, 383 U.S. 131 (1966) *and* Wolin v. Port Authority, 268 F. Supp. 855 (S.D. N.Y. 1967).

[43] The court's argument in *Wirta* that the district had opened a forum "by providing facilities for advertisements," — Cal. 2d at —, 434 P.2d at 985, 64 Cal. Rptr. at 433, on its busses also suggests reliance on the terminal cases. For, under the dicta of the school cases, merely providing a facility, such as a school auditorium, is not enough.

[44] Van Alystyne, *Political Speakers at State Universities,* 111 U. PA. L. REV. 328, 338 (1962).

[45] *Id.* at 339. Cases cited note 20 *supra.*

accepting commercial advertisements (like building a terminal or school auditorium) the district has provided a facility that could reasonably be used for the expression of first amendment rights. It need not establish the facility. Once it does, however, it should not be allowed to reject advertisements protected by the first amendment and for which space is available unless it can show that to accept them would intolerably burden the busses and interfere with their primary purpose for providing transportation.

MICHAEL KENT CURTIS

Constitutional Law—Chronic Alcoholism and the Eighth Amendment in North Carolina

A man gets up in the morning and the first thing he does is to "take a drink." From that point on throughout the day he is constantly "taking a drink." By mid-afternoon or early evening, he is picked up by the police for public drunkenness. Far from being his first "offense," this series of events has happened to him many times before—sometimes ending with arrest and sometimes not. This man is a chronic alcoholic; he suffers from a disease and has no control over his behavior.[1] Should he be punished as a "public drunk" or is it "cruel and unusual punishment" under the eighth amendment to do so? Recently several courts across the nation have faced this question and reached conflicting results. The following is a brief attempt to highlight these decisions and some future problems raised therein.

The first such case was *Driver v. Hinnant*.[2] Defendant had been found guilty of a violation of a North Carolina statute making it a misdemeanor for "any person . . . [to] be found drunk or intoxicated on the public highway, or at any public place or meeting,"[3] and sentenced to two year's imprisonment. Driver had been convicted of the same offense over 200 times previously. On appeal, the North Carolina Supreme Court held in a per curiam opinion that the sentences were authorized by the statute and therefore that

[1] See authorities collected in Driver v. Hinnant, 356 F.2d 761, 764 n. 6 (4th Cir. 1966).

[2] 356 F.2d 761 (4th Cir. 1966). *See also,* 44 N.C.L. REV. 818 (1966).

[3] N.C. GEN. STAT. § 14-335 (1953). As will be shown and discussed, *infra,* this statute underwent significant amendment in 1967.

conviction thereunder was not cruel and unusual punishment.[4] The United States District Court for the Eastern District of North Carolina denied a writ of Habeas Corpus,[5] but on appeal the Fourth Circuit held that the conviction was unconstitutional as cruel and unusual punishment.[6] The court said that chronic alcoholism "is now almost universally accepted medically as a disease,"[7] the symptoms of which may appear as "disorder or behavior."[8] Since this includes unwilled and ungovernable appearances in public by the victim, no judgement of criminal conviction can be based thereon. It is cruel and unusual punishment to brand him a criminal, irrespective of consequent detention or fine, for those acts "which are compulsive as symptomatic of the disease."[9]

The *Driver* case was followed soon thereafter by the District of Columbia Circuit in *Easter v. District of Columbia.*[10] Easter had been found guilty of being "drunk and intoxicated" on a Washington street in violation of D.C. CODE ANN. § 25-128(a) (1961)—the court ruling that chronic alcoholism was not a defense. He was given a 90 day suspended sentence.[11] Hearing the appeal en banc, the Court of Appeals held that chronic alcoholism is not itself a crime and is a defense to a charge of public intoxication in Washington, D.C.[12] Furthermore, since "it is the fact of criminal con-

[4] State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).
[5] Driver v. Hinnant, 243 F. Supp. 95, 96 (E.D.N.C. 1965).
[6] 356 F.2d at 765.
[7] *Id.* at 764.
[8] *Id.*
[9] *Id.* The Fourth Circuit felt that the decision of the United States Supreme Court in Robinson v. California, 370 U.S. 660 (1962), sustained, if not commanded, the view they enforced. In that case it was held that drug addiction was an illness and a statute punishing such an involuntarily assumed "status" was cruel and unusual punishment in violation of the eighth amendment. *Id.* at 667. See 27 LA. L. REV. 340, 346-47 (1967) where the foregoing conclusion is challenged as misplaced reliance. See also 12 S.D.L. REV. 142, 145 (1967) where it is pointed out that *Driver* extends the immunity from criminal prosecution from *status*—a passive state of being, to *acts* symptomatic of the disease—overt action. That is, the North Carolina statute punished an involuntary symptom of a status, public intoxication.
[10] 361 F.2d 50 (D.C. Cir. 1966).
[11] *Id.* at 51.
[12] *Id.* While the entire court felt that Congress in passing the Rehabilitation of Alcoholics Act Ch. 472, 61 Stat. 744, c. 472 (1947), D.C. CODE ANN. § 24-501 to -514 (1967), intended that alcoholics not be punished for public drunkenness and therefore commanded the result reached, four of the eight judges also felt the result was constitutionally commanded, citing *Driver* as authority. 361 F.2d at 55.

viction that is critical,"[13] it was immaterial that the sentence had been suspended.[14]

Although the *Driver* and *Easter* cases are perhaps indicative of a trend in judicial thought, more recent state court pronouncements have maintained the position that such a conviction is *not* cruel and unusual punishment. In *People v. Hoy*,[15] the Michigan court said: "[W]hile we are aware that some courts have recently held it is cruel and unusual punishment to sentence to prison a chronic alcoholic on a charge of drunk and disorderliness, such decisions are not controlling precedent for this court and we decline to adopt them. . . ."[16] One of the reasons given for this position was insufficient persuasion in the record that defendant was a chronic alcoholic. Therefore, since *Driver* and *Easter* did not hold that the punishment for public drunkenness was cruel and unusual, but rather that the conviction and punishment of a chronic alcoholic was unconstitutional, this Michigan case may not be a true test of the *Driver-Easter* principle.[17] However, in *Budd v. California*[18] the record involved was similar to that in *Driver* and *Easter*. There was testimony that Budd had been an alcoholic for over thirty years and that he had lost control over the use of intoxicating beverages. The trial court made no finding as to whether defendant was a chronic alcoholic, saying that such a finding was not pertinent. He was thus convicted under CAL. PENAL STAT. § 647(f) (Supp. 1967) providing in part that any person "found in any public place under the influence of intoxicating liquor . . . in such a condition that he is unable to exercise care for his own safety or that of others" is guilty of a misdemeanor. Budd then challenged the conviction and imprisonment as cruel and unusual punishment under the eighth amendment by seeking a writ of Habeas Corpus in the California Supreme Court. The writ was denied and the United States Supreme Court denied certiorari to review the California Supreme Court action.[19] The possibility of final constitutional determination by the Supreme Court on this question was thus temporarily eliminated. However, another op-

[13] 361 F.2d at 55.
[14] *Id.*
[15] 143 N.W.2d 577 (Mich. App. 1966).
[16] 143 N.W.2d at 578.
[17] See 11 ST. LOUIS U. L.J. 250, 257 (1967).
[18] *Cert. denied*, 385 U.S. 909 (1966).
[19] *Id.*

portunity for the Supreme Court to rule on the question has been presented in *Powell v. Texas,* now awaiting decision—oral argument having been heard.[20]

Regardless of the state of this issue in other jurisdictions, it is a settled question in North Carolina. The Fourth Circuit's decision in *Driver* is binding here unless and until the Supreme Court reaches a different result. Furthermore, the North Carolina General Assembly in 1967 amended its "public drunkenness" statute.[21] As far as relevant here, that amendment reads:

> (c) Chronic alcoholism shall be an affirmative defense to the charge of public drunkenness. For the purpose of this section, chronic alcoholism shall be as defined in article 7A of chapter 122. When the defense of chronic alcoholism is shown to the satisfaction of the trier of fact, and a judgment by reason of chronic alcoholism is entered, the court may follow the treatment procedures outlined in article 7A of chapter 122.[22]

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[20] Powell v. Texas, 36 U.S.L.W. 3353 (U.S. March 12, 1968). Counsel for appellant argued only that the chronic alcoholic cannot be convicted, expressly refusing to question the right of a police officer to arrest the chronic alcoholic, place him in jail, and have him subjected to trial. Amici curiae argument against constitutionality agreed with appellant's counsel with the one qualification that, when a police officer is familiar with the chronic alcoholic, questions concerning probable cause for arrest may arise. Counsel for the state of Texas attempted to impress upon the court the "revolutionary implications" of holding that the conviction is unconstitutional. Appellee suggests that if a chronic alcoholic cannot be convicted of public intoxication, he will not be amenable to other criminal laws either. He concluded his argument by explaining that if a chronic alcoholic cannot be sent to jail, the court must either allow him to remain on the streets or subject him to involuntary civil commitment. The latter is neither wholly effective nor wholly constitutional, he argues, while the former would endanger the alcoholic's health and life and would be more cruel than sending him to jail.

[21] N.C. GEN. STAT. § 14-335 (Supp. 1967).

[22] *Id.* As defined in article 7A of chapter 122, a chronic alcoholic is any person found by any court to have the illness or condition known as chronic alcoholism. Chronic alcoholism is the chronic and habitual use of alcoholic beverages to the extent of losing the power of self-control with respect to the use of such beverages. Any court having jurisdiction over a chronic alcoholic may provide for treatment through any one or more of the following actions: (1) order the clerk of the superior court to commence judicial hospitalization as per article 7 of chapter 122, (2) direct, in cooperation with a family member or other responsible person, the making and following of plans for treatment in a private facility or program approved by the North Carolina Department of Mental Health, (3) refer him to a private physician or psychiatrist or to a hospital diagnostic center or to a private or social welfare organization, (4) request such as the local department of public welfare to work with the chronic alcoholic and make reports as to his treatment or condition as requested, (5) make or approve any other appriate plan and require for as long as appropriate to treatment

Though obviously under some compulsion to bring the statute in line with the Fourth Circuit's ruling, this amendment demonstrates a praiseworthy understanding of the plight in which the chronic alcoholic has traditionally found himself.

The North Carolina Supreme Court also is to be commended for its application of this statute in *State v. Pardon.*[23] Prior to the passage of the above amendment, the defendant was arrested and charged with his fourteenth offense of public drunkenness within twelve months. Having pleaded guilty, he was examined in the superior court for the purpose of determining sentence. Though the examination and investigation revealed him to be a chronic alcoholic,[24] the court, seeing no alternative, sentenced him to eight months in jail.

On appeal, the North Carolina Supreme Court remanded for a new trial in light of the intervening statute. The court said that since judgment is not final as long as the appeal is pending, "the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."[25] The court reasoned that the rule prohibiting *ex post facto* legislation only prevents *aggravation* of punishment, not all changes. Therefore it is not an invalid *ex post facto* application of the amendment to allow defendant the defense of chronic alcoholism at this stage. The legislature may always *remove* a burden imposed upon citizens for state purposes.[26] Thus defendant was granted a new trial and an opportunity to prove the affirmative defense of chronic alcoholism.

Though North Carolina is now firmly committed to the more enlightened approach, the trial advocate's problems with the eighth amendment are just beginning. Numerous questions arise con-

submission of periodic reports as to his treatment or condition, in the courts discretion. N.C. GEN. STAT. § 122- 65.6 to -65.9 (Supp. 1967).

[23] 272 N.C. 72, 157 S.E.2d 698 (1967).

[24] He had been convicted of public drunkenness over fifty times; he had been in institutions for alcoholics in Missouri and Kentucky; he had a record of traffic violations, larceny, vagrancy, gambling, trespass, forgery and other offenses. At the time arrested he was a patient at the Veterans Hospital in Durham but was home on a "weekend pass." That hospital refused to readmit him after this conviction. *Id.*

[25] *Id.* at 76, 157 S.E.2d at 701, citing Gulf, Col. & S. F. Ry. v. Dennis, 224 U.S. 503, 506 (1912).

[26] *Id.* at 76, 157 S.E.2d at 701.

cerning the application and possible extensions of the Fourth Circuit's rationale. Must the defense be raised by counsel or may the judge raise it on his own motion?[27] The vagueness of the limiting factor of the *Driver* case, *i.e.*, "acts symptomatic of the disease," may be susceptible to unlimited interpretations.[28] What is the effect of the court's[29] likening the movements of an alcoholic to those of an imbecile or person in a delirium fever?[30] It has been said that an alcoholic's presence in public is not a willful act and thus evil intent and consciousness of wrong-doing, indispensible elements of a crime, are missing. This raises the question whether chronic alcoholism may be extended as a defense to crimes in general and, if so, when, to what crimes and to what extent.[31] Once the chronic alcoholic is protected from criminal prosecution, it becomes a problem as to what treatment or handling is both possible and desirable,

[27] *See, e.g.*, Hutt, *Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts*, 19 S.C.L. REV. 305, 309-11 (1967).

[28] *See, e.g.*, Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S.C.L. REV. 349, 354 (1967); 1966 DUKE L.J. 545, 554-55 (1966); 27 LA. L. REV. 340, 346 (1967); 12 S.D.L. REV. at 146 (1967), *See also* argument of appellee, note 20 *supra*.

[29] 356 F.2d at 764; 361 F.2d at 54.

[30] *See, e.g.*, Deddens, *Volitional Fault and the Intoxicated Criminal Offender*, 36 U. CIN. L. REV. 258, 281-85 (1967); 20 ARK. L. REV. 365, 367 (1966); Note, 12 S.D.L. REV. 142, 147 (1967).

[31] *See, e.g.*, Deddens, *supra* note 30; Hutt, *Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts*, 19 S.C.L. REV. 305, 306, 330-31 (1967); Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 343, 345-47, 350 (1967); Slovenko, *Alcoholism and the Criminal Law*, 6 WASHBURN L.J. 269, 279-81 (1967); Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S.C.L. REV. 349, 356-69 (1967); Tao, *Drunkenness and Criminal Law*, 13 WAYNE L. REV. 530, 539-540, 544-45 (1967); 20 ARK. L. REV. 365, 368-70 (1966); 16 DEPAUL L. REV. 493 (1967); 1966 DUKE L.J. 545, 555-56; 52 IOWA L. REV. 492, 495-97 (1966); 27 LA. L. REV. 340, 344-46 (1967); 12 S.D.L. REV. 142, 147-48 (1967). It is also interesting to note that "chronic alcoholic" as defined by the court may well come within the traditional definition of "involuntary drunk." Since drunkenness is presumed to be voluntary unless some special circumstance is established to remove it from that category, "involuntary drunkenness" is most easily defined in the negative. If the intoxicating character of the liquor or drug is not understood or known to be present or if the liquor or drug is taken under duress or medical advice, the resulting condition is usually said to be involuntary. This characterization is not all-inclusive. There are instances where a person has become intoxicated without doing so intentionally or recklessly, and though the above factors were missing, it was held to be involuntary. A state of involuntary intoxication establishes that the derangement is without culpability and hence is dealt with as if it were the result of mental disease or defect. R. PERKINS, CRIMINAL LAW 782-87 (1957).

i.e., compulsory or voluntary, where, how long, etc.[32] Should a court be allowed discretion whether to *treat* such alcoholics civily or criminally?[33] More general considerations which the General Assembly, the courts and counsel for chronic alcoholics must face involve the psychology of an alcoholic[34] and the use of alcohol and its relation to crime generally.[35] These questions will have to be met and solved through legislative action and the adversary system and it is hoped the articles here cited will be of some help to the legislator and trial advocate in this process.

SAM G. GRIMES

Constitutional Law—Freedom of Speech in the Military

On graduation from college Henry Howe was commissioned as a Second Lieutenant in the U. S. Army Reserve. After being on active duty about one year he found himself assigned to Fort Bliss in El Paso, Texas. While he was stationed there, on November 6, 1965, he participated in a demonstration opposing the war in Vietnam. The degree of his protest as well as the fact of his involvement caused him to be brought before a general court-martial, resulting in an end to his short military career and his imprisonment for one year.[1]

The demonstration was planned and organized by a group of students and professors from El Paso State College as a protest "against American policy." The marchers had requested permission from the city council to conduct a side-walk demonstration

[32] *See, e.g.*, Deddens, *supra* note 30; Hutt, *Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts*, 19 S.C.L. REV. 305, 312-23 (1967); Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 342, 351-58 (1967). Murtagh, *Arrests for Public Intoxication*, 35 FORDHAM L. REV. 1, 12-13 (1966); Myerson and Mayer, *Origins, Treatment and Destiny of Skid Row Men*, 19 S.C.L. REV. 332 (1967); Slovenko, *supra* note 31, at 281-84; Swarty, *Compulsory Legal Measures and the Concept of Illness*, 19 S.C.L. REV. 372 (1967); Tao, *supra* note 31, at 543, 545-47; 16 DE PAUL L. REV. 493, 495 (1967); 1966 DUKE L.J. 545, 557-61; 52 IOWA L. REV. 492, 497-99, 508-10 (1966); 27 LA. L. REV. 340, 344 (1967); 18 S.C.L. REV. 504, 506-08 (1966); 12 S.D.L. REV. 142, 148-50 (1967).

[33] *See, e.g.*, 12 S.D.L. REV. 142, 150 (1967).

[34] *See, e.g.*, Murtagh, *supra* note 32, at 9-10; 18 S.C.L. REV. 504, 505 (1966).

[35] *See, e.g.*, Slovenko, *supra* note 31, at 271-72.

[1] Court-Martial 413739.

in San Jacinto Plaza. Permission was initially denied, but on the advice of the City Attorney who said that there were constitutional implications in the refusal, the council reversed its decision. For two weeks prior to the march it had been the subject of a controversy which was intensively reported in all the local news media. One result of this publicity was a spontaneous counter-demonstration. The marchers were met by a crowd of about 2,000 whose attitude is best symbolized by those who wore "Win in Vietnam" stickers pasted to their foreheads and by the American Legionaires who passed out small United States flags. The group itself consisted of twelve demonstrators carrying signs reading: "Let's get out of Vietnam," "Get out of Vietnam," "Peace in Vietnam," and "Would Jesus carry a draft card."[2] Lt. Howe was not a member of the group that planned the demonstration, only joining the march as it began. As the marchers started moving, he fell in at the rear, displaying a sign which previously he had been carrying rolled in his hand. As he walked he reversed the sign occasionally so both sides could be seen. The front of the sign read, "Let's have more than a choice between petty ignorant Fascists in 1968."[3] The reverse exhorted, "End Johnson's Fascist aggression in Vietnam."[4] Lt. Howe was not in uniform at the time of his participation in the demonstration.[5]

The Lieutenant was convicted by a general court-martial[6] of violations of articles 88 and 133 of the Uniform Code of Military Justice,[7] entitled "Contempt Towards Officials"[8] and "Conduct Unbecoming an Officer and a Gentleman"[9] respectively. He was sen-

[2] United States v. Howe, 17 U.S.C.M.A. 165, 168, 37 C.M.R. 429, 432 (1967).

[3] *Id.*

[4] *Id.*

[5] United States v. Howe, 37 C.M.R. 555, 556 (1966).

[6] This is one of the types of courts-martial which are classified in order of formality and power to try and punish offenses. The three classifications are, from least to most comprehensive: summary, special and general courts-martial.

[7] 10 U.S.C. §§ 801-940 (1964), as amended, (Supp. 1966). [hereinafter cited as U.C.M.J.].

[8] U.S.C. § 888 (1964).

[9] 10 U.S.C. § 933 (1964). Although this article seems to tread dangerously close to the line of unconstitutionality for vagueness, as was argued to the court, a discussion of it is outside the scope of this note. Violations of this article are rarely, if ever, prosecuted except in concert with another article as was done in *Howe*.

tenced to dismissal[10] and confinement at hard labor for two years[11] with total forfeitures. After the case went through the normal automatic review process, Lt. Howe's petition to the United States Court of Military Appeals to review his conviction was denied. A petition for reconsideration of the refusal to grant discretionary review was also denied. The court handed down a lengthy opinion, in *United States v. Howe*,[12] giving the reasons for denial of the latter petition.

The unanimous opinion of the court lists seven arguments[13] pre-

[10] Equivalent to a dishonorable discharge.

[11] The sentence was reduced by the convening authority (the officer in Command with the authority to convene a court marital and first reviewing authority) to one year. Lt. Howe was released under commandant's parole three months and two days after his trial.

[12] 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). It should be pointed out that under Article 76 of the U.C.M.J. this is Lt. Howe's last direct appeal. 10 U.S.C. § 876 (1964). This article provides that after the review procedures required by the U.C.M.J. are completed, "Orders publishing the proceedings of courts-marital and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States. . . ." *Id.* The result is that the Supreme Court does not exercise supervision over the military judicial system, and its doctrines and interpretations are not binding on the military as they are on civilian courts. Thus the product of the military judicial system can only be attacked collaterally in a habeas corpus proceeding and then only on limited grounds. *See* Burns v. Wilson, 346 U.S. 137 (1953).

[13] 17 U.S.C.M.A. at 169, 37 C.M.R. at 433. The arguments listed are these:

1. The charges against appellant violate the First Amendment to the to the Constitution.
2. Articles 88 and 133 are so vague and uncertain that they violate the Due Process clause of the Fifth Amendment.
3. The charge under Article 133 fails to state an offense.
4. The law officer erred to the substantial prejudice of the appellant in failing to instruct, *sua sponte*, that if the court-martial found the allegedly contemptuous words to have been uttered in the course of a political discussion, then it had to find that appellant intended them to be personally disrespectful.
5. Appellant was substantially prejudiced by the law officer's ruling that the maximum sentence for the charged offenses included confinement at hard labor for three years.
6. The law officer erred to the substantial prejudice of the appellant by instructing the court-martial, over defense objections, that in determining whether the words uttered by appellant were contemptuous of the President the court-martial "should apply the test of how the words were understood and what they were taken to mean by the persons who saw them, or some of them."
7. The appellant was prejudiced in his appeal before the board of review by Lieutenant Colonel Jacob Hagopian's participation in the oral argument and decision of the instant case.

Id.

sented to it for consideration, three of which are relevant here.[14] These three points were directed at the validity of the prosecution under article 88 of the U.C.M.J.[15] Entitled "Contempt Towards Officials," the Article reads as follows:

> Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor, or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.[16]

The major issue in *Howe* was the validity of article 88 under the first amendment. Also assigned as error was the ruling by the law officer that, if the court-martial board found the words to have been uttered in the course of a political discussion, then it must find that Lt. Howe intended them to be personally disrespectful.[17] Another ground urged was based on the test the court-martial was to use in the determination of whether the words were contemptuous. The standard used was, "How the words were understood and what they were taken to mean by persons who saw them, or some of them."[18]

Over half of the opinion is devoted to the constitutional issues raised by these charges. The court's holding that article 88 does not violate the first amendment is supported by two arguments. The first consists of an historical exposition of the article and its antecedents going back to the period preceding the founding of the Republic. This chronicle points out that a predecessor to this statute constituted a contemporary construction of the Constitution, i.e., a similar law was passed when many of the framers of the first amendment were still in Congress.

The fundamental basis for the court's decision, however, is found in a comparatively short paragraph which states:

> The evil which Article 88 of the Uniform Code, supra, seeks to avoid is the impairment of discipline and the promotion of insubordination by an officer of the military service in using

[14] See arguments 1, 4, and 6, note 13 *supra.*

[15] 10 U.S.C. § 888 (1964).

[16] *Id.*

[17] The discussion in the MANUAL FOR COURTS-MARTIAL 1951, ¶ 167 specifically exempts political speech from the operation of Article 88. *See* U.S. DEP'T OF DEFENSE, MANUAL FOR COURT MARTIAL 1951, ¶ 167 (1951).

[18] United States v. Howe, 17 U.S.C.M.A. 165, 169, 37 C.M.R. 429, 433 (1967).

> contemptuous words towards the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States.[19]

Taking judicial notice of the conflict in Vietnam and the demands it is placing on our armed forces, the court goes on to say, "That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument."[20]

The other two assignments of error were also rejected by the court. The argument questioning the standard to be applied in determining contemptuousness failed as immaterial since the words were "obviously contemptuous *per se*."[21] Similarly, the court refused to confer a privilege for political discussion, stating that intent was not an element of the article.[22]

The thesis of this note is that *New York Times Company v. Sullivan*,[23] a case mentioned only briefly by the court in *Howe*, should control the general problem of military free speech there encountered; and that the "clear and present danger" test[24]—which may have no validity at all after the *Times* case[25]—was too loosely used in the area of seditious libel, to which it should have no relevancy.[26] The opinion in *Times* gave an unequivocal answer as to the status of seditious libel under the Constitution. In ruling the Sedition Act of 1798[27] unconstitutional and thereby eliminating the concept of seditious libel from the vocabulary of the law the Supreme Court created an important test for interpretation of the first amendment.[28] The *Times* case declared as unconstitutional the use by government of any form of seditious libel to suppress speech. Since article 88 as here interpreted by the Court of Military Appeals is

[19] *Id.* at 173, 37 C.M.R. at 437.
[20] *Id.* at 174, 37 C.M.R. at 437.
[21] *Id.* at 181, 37 C.M.R. at 445.
[22] *Id.* at 180, 37 C.M.R. at 444.
[23] 376 U.S. 254 (1964).
[24] *See* note 20 *supra* and accompanying text.
[25] Kalven, *The New York Times Case*, 1964 SUPREME COURT REVIEW 191 (1964).
[26] *See* note 78 *infra*, and accompanying text.
[27] Act of July 14, 1798, ch. 74, 1 Stat. 596.
[28] Kalven, *supra* note 25. Professor Kalven may be one of the few commentators who sees these implications in *Times*. The *Times* case arose in tort and is, of course, open to a strict interpretation limiting it to that field. *But see* Garrison v. Louisiana, 379 U.S. 64 (1964).

capable of being applied as a seditious libel statute, it may have been unconstitutionally applied in the *Howe* case, because the standards set out in *Times* were arguably not met. All of this, of course, is based on the assumption that the first amendment applies to the military, a question which the court never squarely faced.

Although the *Times* case arguably was not aimed solely at seditious libel,[29] its impact on that aspect of the first amendment is significant and can best be understood by defining seditious libel and outlining two theories relating to its status that emerged prior to the *Times* case. To define seditious libel is difficult, and perhaps the best definition is one that has been pieced together from actual prosecutions.

> The crime consisted of criticizing government: its form, constitution, officers, laws, symbols, conduct, policies, and so on. In effect, any comment about government which could be construed to have the bad tendency of lowering it in the public esteem or of disturbing the peace was seditious libel, subjecting the speaker or writer to criminal prosecution.[30]

Prior to the *Times* opinion at least two theories emerged as to the status of seditious libel at the time of ratification of the first amendment. One argument, generally accepted by the courts since Justice Holmes wrote his opinion in *Schenck v. United States*,[31] argues that the amendment nullified the common law of sedition. A revisionist view contends that the authors of the amendment left the common law crime of seditious libel in force.[32] The conflict between these two theories is largely academic, however, when viewed in the light of *Times*. There the court acknowledged the existence of the two schools of thought, but held that the Sedition Act of 1798[33] was unconstitutional:

> Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . These views reflect a broad consensus that the act, be-

[29] *See* note 28 *supra*.

[30] L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 10 (1960). Since the trial of John Peter Zenger, truth has been recognized as a defense. This can be of dubious value since the jury must pass on the truth or falsity of sometimes unpopular ideas.

[31] 249 U.S. 47 (1919).

[32] L. LEVY, *supra* note 30.

[33] Act of July 14, 1798, ch. 74, 1 Stat. 596.

> cause of the restraint imposed upon criticism of government and public officials, was inconsistent with the First Amendment.[34]

Thus the *Times* case, which addressed itself at least in part to the question of seditious libel, was perhaps a significant breakthrough in the interpretation of the first amendment. It has been noted that, "The exciting possibilities in the court's opinion derive from its emphases on seditious libel and the Sedition Act of 1798 as the key to the meaning of the First Amendment."[35] By this opinion, it is argued, the court has marked out the central meaning of the first amendment. As a result, Professor Kalven feels that the court has implicitly abandoned some of the tests used earlier, notably the "clear and present danger" test. Hence it is possible that the court in *Howe* has applied outdated law. A clear statement of policy regarding the attitude toward seditious libel appears in *Times*:

> Thus we consider this case against the background of a profound national committment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[36]

Times, in voicing previous dissatisfaction with the court's handling of first amendment problems,[37] seems to represent a shift toward absolutist theories in the area of political speech.[38]

The proposition supported by *Times* as to seditious libel in civil suits is reaffirmed and extended to criminal prosecutions by *Garrison v. Louisiana.*[39] In that case public statements by New Orleans District Attorney, Jim Garrison, attributed a huge backlog of cases in the criminal district court to excessive vacations by the judges. He further accused these judges of hampering enforcement of vice laws by their refusal to authorize expenses for necessary investigations. These assertions caused his conviction under the Louisiana Criminal Defamation Statute.[40] The Supreme Court

[34] New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).
[35] Kalven, *supra* note 25, at 204.
[36] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
[37] *See, e.g.,* Beauharnais v. Illinois, 343 U.S. 250 (1952).
[38] *See generally A.* MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963).
[39] 379 U.S. 64 (1964).
[40] LA. REV. STAT. § 14:47 (1950).

reversed, holding that this was a type of seditious libel prosecution held unconstitutional in *Times*.[41] The court said,

> The reasons which led us so to hold in New York Times . . . apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy.[42]

It remains to be seen, of course, whether the language of article 88 enables it to be applied as a seditious libel statute in a manner proscribed by *Times*. A brief description of the article and its history is necessary. The statute has its origins in the Articles of War of Gustavus Adolphus,[43] the form of the offense being disrespect towards the Royal Person or Family. The British Articles of War of 1765 contained a similar provision.[44] In 1776 the American Articles of War added the clause in a modified form to suit the needs of the democracy. It was an offense to be disrespectful towards "the authority of the United States in Congress assembled or the legislature of any of the United States."[45] Periodically, until 1950, additions were made to the list of persons and institutions protected. Professor Morgan of Harvard Law School, who headed the committee which drafted the U.C.M.J., tried to have the article stricken from the new code but failed.[46]

In 1956 Article 88 was amended by Congress. Though a very minor change of phraseology, this revision had the effect of narrowing the scope of the statute. The phrase "Secretary of a military department" was substituted for "Secretary of a department." The effect was to exclude some of the officials who have absolutely no relation to the military. This may have been a recognition of the overinclusiveness of this statute, in that formerly more officials were

[41] Garrison v. Louisiana, 379 U.S. 64, 78 (1964).

[42] *Id.* at 74.

[43] J. SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 751 (1953).

[44] *Id.*

[45] *Id.* at 752.

[46] *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 330 (1949). Those who fought to retain the provision had their arguments summed up well by Senator Saltonstall: "I hate to see a fellow called out on a Saturday night and say everything against his government, and then on Monday morning he appears in uniform with a great smile on his face and squared-up shoulders." *Id.* at 332.

covered them were necessary to achieve the purpose of the article.[47]

The elements of the offense under article 88 are those obvious in the statement of the statutory language.[48] The accused must have been a commissioned officer and must have used contemptuous words towards an official or institution specified in the article. He must, at the time of the offense, have had a wrongful intent.[49] Guidance for use of article 88 is included in the *Manual For Courts Martial*.[50] The discussion lists exceptions to the statute and matters in aggravation. Criticism of protected officials or groups in the course of a political discussion is excluded from the operation of the statute. This exemption applies even though the words are emphatically expressed, unless they are personally contemptuous. Giving broad circulation to a written publication, or the utterance of such language in the presence of military inferiors, both serve to aggravate the offense. Further, truth or falsity may be immaterial, since the gist of the offense is the contemptuous and malicious quality of the words employed.[51]

A comparison of article 88 of the U.C.M.J. and the Sedition Act of 1798, declared unconstitutional by *Times*, points out the similarity of the two statutes. After condemning conspiracy against the laws, institutions or officers of the United States, the Sedition Act, in section two, prohibits seditious libel:

> And be it further enacted, that if any person shall write, print, utter or publish or shall cause to be written, printed, or published, or shall knowingly and willfully assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States or either house of the Congress of the United States, or the President of the United States with the intent to defame said government, or either house of said congress, or the said President or to bring them, or either of them into contempt or disrepute; or to excite against them or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite against them or any of them, the hatred of the good people of the United States, or to

[47] See note 19 *supra* and accompanying text. The article may still be overinclusive by virtue of the state officials retained.

[48] *See* note 17, *supra*, and accompanying text.

[49] J. SNEDEKER, *supra* note 43, at 752.

[50] U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS MARTIAL 1951, ¶ 167 (1951). Manual published to implement the U.C.M.J.

[51] *Id.*

> excite any unlawful combination therein, for opposing or resisting any law of the United States or any act of the President done in pursuance of any such law, or of the powers in him vested by the constitution of the United States or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[52]

Section three of the Act allows truth as a defense without elaborating its value and makes truth a jury question. The fourth and final section provides for the expiration of the act on March 3, 1801.

The language of this act[53] should be compared with that of article 88 punishing contemptuous words against the President, Congress and various other officials and institutions of government. The phrase "any commissioned officer who uses contemptuous words . . . ."[54] has the same ring as "or to bring them or either of them into contempt or disrepute."[55] In both cases the wording seems to be the same in purpose and effect.

The proposition that *Times* precludes the application of article 88 to Lt. Howe, however, depends ultimately on whether the first amendment applies to the military. Even if applicable, the first amendment need not be an absolute as to the military, nor must it apply in the same measure as it does to civilians. There are compelling reasons for limiting some types of speech in the military. The most frequently raised, and the most justified, is the need to protect national security. Material and information vital to the

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[52] Act of July 14, 1798, ch. 74, 1 Stat. 596.

[53] *See also* the Espionage Act, as amended in May 1918, ch. 75, § 1, 40 Stat. 553 which continues this type of suppression—now with the excuse of wartime necessity:

> Whoever, when the United States is at war, shall willfully, utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the Uniform of the Army or Navy of the United States, or any language intended to bring [these] . . . into contempt, scorn, or contumely or disrepute . . . shall be punished by a fine of not more than $10,000.

Id.

[54] 10 U.S.C. § 888 (1964).

[55] Act of July 14, 1798, ch. 74, 1 Stat. 596.

national defense must be protected from disclosure. This necessarily requires that speech which would divulge such information be suppressed. The need to maintain discipline, and the position of the military in policy formulation, are the less clear-cut areas where some regulation is required. The military must have discipline to carry out its function; it must be able to command unquestioning obedience at the proper time. How much of a limitation on speech is required to insure this response is the problem at the core of the *Howe* decision. Certainly the army is justified in prosecuting a soldier who curses his company commander. On the other hand, the soldier who merely complains about army life should not be prosecuted. As usual, the line where speech limitation becomes questionable lies somewhere between these extremes.

In the area of national policy formulation there are at least two facets to the problem. The officer who speaks to influence decisions on policy matters by either his military or civilian superiors or in violation of a determination already made forms one aspect of the difficulty. The other is the officer whose words are taken by his listeners to be reflective of policy despite his assertions to the contrary. Some regulation is required in this area to avoid jeopardizing civilian control of the military. However, there should be proof of specific necessity before basic freedoms are limited.[56]

There is some indication, from both case authority and the Constitution itself, that constitutional protections are intended to cover the military. Even in the *Howe* decision some support for this proposition can be found. The opinion is primarily devoted to the constitutional issues raised—on the assumption that the first amendment applies to the military.[57] Moreover, the court bases its holding, at least in part, on the clear and present danger test,[58] an unnecessary gesture if the first amendment is inapplicable to the military.

[56] As Chief Justice Warren has said, "a most extraordinary showing of military necessity in defense of the Nation has been required for the Court to conclude that the challenged actions in fact squared with the injunctions of the Constitution." Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 197 (1962).

[57] An analogous situation may be seen in cases involving state governmental action and the first amendment, where the court no longer feels compelled to say that the first amendment is made applicable to the states by the fourteenth. *Compare* Gitlow v. New York, 268 U.S. 652 (1925), *with* New York Times v. Sullivan, 376 U.S. 254 (1964), *and* Garrison v. Louisiana, 379 U.S. 64 (1964).

[58] See note 20 *supra*, and accompanying text.

The fifth amendment guarantee of indictment by grand jury specifically excludes the military from its coverage.[59] That none of the other amendments contain such an exclusion would indicate that amendments not so qualified do apply to the armed services.[60] In the second[61] and third[62] amendments the framers indicate a distrust of standing armies and an intention that military requirements should be fulfilled by citizen soldiers whose rights would be as nearly equal to those of their civilian counterparts as possible. Further, there is no reason to assume that the grant of power to Congress, "To make rules for the government and regulation of the Land and Naval forces,"[63] permits it to exceed the limitations of the Bill of Rights. This combination of powers and limitations was emphasized in a speech by Justice Black. "It seems obvious to me that Congress in exercising its general powers, is expressly forbidden to use means prohibited by the Bill of Rights."[64] Another possible argument is that the due process clause of the fifth amendment, which is applicable to the military, includes the right not to have freedom of speech abridged.

Case law, either military or civilian, applying the first amendment to the armed forces is rare. A military decision on point is *United States v. Voorhees*,[65] in which an army officer was accused of submitting a manuscript to a publisher without prior clearance of the contents, a violation of army regulations. This case, in which all three judges filed opinions, only brushed the constitutional issue. By straining the interpretation of the regulation's phrase "policy and proprietary considerations" to be the equivalent of security considerations, the court was able to bring the regulation within acceptable limitations on speech. The opinion did make a point of expressing the court's position on the first amendment rights of the military: "I think I should make it clear that in my opinion every individual in the military is entitled to the same constitutional rights, privileges and guarantees as every other American citizen, except

[59] U.S. CONST. amend. V.

[60] *Cf. Ex Parte* Quirin, 317 U.S. 1 (1942), extending this exclusion to the sixth amendment guarantee of trial by jury.

[61] U.S. CONST. amend. II.

[62] U.S. CONST. amend. III.

[63] U.S. CONST. art. I § 8.

[64] Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 875 (1960).

[65] 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1953).

where specifically denied or limited by the Constitution itself."[66] The majority and the dissenting opinions found a common ground on this point, with the dissent pointing out: "Even as to service personnel, I deem applicable to a partial—even to a substantial—extent the doctrine of the Supreme Court that the rights deriving from the first amendment are to be jealously safeguarded by the judiciary this regardless of whether they may be said to enjoy a 'preferred position.' "[67]

Civilian courts have generally declined to interfere in the administration of justice within the military itself. This partially explains the dearth of cases applying the Constitution to members of the armed forces. The civilian courts have enforced the due process rights of the military, however. *Burns v. Wilson*[68] stands as the leading case on civilian review of court-martial proceedings. This review is limited to collateral attack on very restricted grounds. The court emphasized the application of constitutional principles: "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his Constitutional Rights."[69] *United States v. Hiatt*,[70] an earlier Third Circuit opinion still cited by courts with approval, also supports the due process rights of the military. "We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court."[71] Thus at a minimum the due process rights of the military are protected by the Constitution, and although military due process does not embody quite the same privileges,[72] it does have a constitutional basis.

Whatever the status of the military under the Bill of Rights, it would seem invalid, once the application of a specific right has been accepted, to limit the scope of that right indiscriminately and without a compelling reason for the precise limitation involved. This occurred in the *Howe* case when the court made its only significant reference to *Times*: "[T]he search for the outer limits of

[66] *Id.* at 531, 16 C.M.R. at 105.
[67] *Id.* at 545, 16 C.M.R. at 119.
[68] 346 U.S. 137 (1953).
[69] *Id.* at 142.
[70] 141 F.2d 664 (3d Cir. 1944).
[71] *Id.* at 666.
[72] W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 187 (1955).

that right [freedom of speech] . . . has, in the main, been restricted to the civilian and not the military community."[73] Such a blind, sweeping restriction of the application of the *Times* case seems unwarranted; some compelling justification must be advanced in any given situation.

Indeed, there are policy reasons why protection should be extended to the military. The first amendment, more than any other, stands as an end in itself. Many provisions of the Bill of Rights are designed to insure an accused a fair trial, but few taken alone could be called as definitive of a democratic society as the first amendment. Suppression of speech will tend to discourage critical thought and debate on public issues. It follows that an ambivalent feeling toward current affairs will prevail among people not allowed to express their opinions. This has grave implications in an age where a military career requires increasing political astuteness and sophistication. This can only have the effect of encouraging mediocrity in the military. Conscription points up another argument. Although officers are not directly effected by the draft, many officers would not have volunteered had they not been faced with the draft as an alternative. Thus, an argument that an officer is in service by choice and has waived his rights may not be as strong as it might seem. Still another consideration is the number of people affected. In a time of high mobilization the size of the military can run to several millions. Thus a large segment of the population is potentially deprived of its first amendment rights. A final point is the effect of the loss of these rights on the exercise of the franchise. Without being able to participate in the political process in an active way the right to vote can, for some, appear an empty formality.

There are several arguments against military free speech. The maintenance of civilian control of the armed forces by keeping the military out of politics is one. This has special appeal in an hemisphere where military involvement in government is a fact of life.[74]

[73] United States v. Howe, 17 U.S.C.M.A. 165, 177, 37 C.M.R. 429, 441 (1967).

[74] These arguments raise questions about the degree of civilian control necessary to effectuate the purposes of that control. This dominance seems to have been, if anything, increasing since the creation of the Department of Defense in 1947. Secretary Robert S. McNamara represented this trend, being the strongest Secretary of Defense to date. The Court of Military Appeals refused to make an exception in Lt. Howe's case because of the

This argument is based on a form of discipline, *i.e.,* the need for the military to be subservient to civilian control. It is true that there cannot be a double standard of discipline, one for wartime and another in peace. It is also a fact that unquestioning obedience is a pre-eminent requirement for the military to be an effective instrument. This is particularly high-lighted by the fact that the military is a tool of national policy and not a maker of that policy. What effect does a law like article 88 have in effectuating these goals of civilian control?[75] To justify this statute the question must be answered convincingly.

These arguments for application of the first amendment to the military establishment, when joined with *Times'* invalidation of the concept of seditious libel and the similarity between this concept and article 88 of the U.C.M.J., permit the contention that article 88 was unconstitutionally applied in the *Howe* case. This is not to say that the article is unconstitutional *per se,* but rather that standards laid down in the *Times* opinion must be satisfied to avoid the label of seditious libel which will be equated with unconstitutionality.

The rule announced by the *Times* case, "prohibits a public official from recovering for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[76] The argument that there might be a separate standard in criminal cases is rebutted by *Garrison v. Louisiana.*[77]

When measured by the *Times* standard, Lt. Howe's actions appear to fall within the scope of the first amendment protection defined by that case. The statements undoubtedly refer to a public official, the President. They are critical of official conduct, the Vietnam conflict. In a determination of actual malice the real question here posed under the *Times* test is whether advocacy of a

implications it might have for "the man on the white horse." United States v. Howe, 17 U.S.C.M.A. 165, 175, 37 C.M.R. 429, 439 (1967). This seems to be less than justified, given the strength of the concept of civilian control of the military.

[75] The Navy has traditionally used less formal means to accomplish its objectives in this area. A recent example can be found in the case of Capt. Richard Alexander, U.S.N., who was reassigned from command of the battleship *New Jersey* as a result of his public statements. New York Times, Jan. 9, 1968, at 1, Col. 2.

[76] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[77] 379 U.S. 64 (1964).

legitimately held political belief, no matter what its basis, is to be equated with knowing or reckless disregard of the truth. In any case, the test for malice is a subjective one and not the objective standard applied by the court.

There are, of course, counter-arguments which may be advanced under the *Times* standard. It is arguable that Lt. Howe's acts were personally contemptuous of the President rather than critical of his official conduct. There is some basis for the contention that the term "Fascist" is of such a nature as not to be applied except knowingly or at least recklessly as to its falsehood.

In addition to the court's failure to apply the *Times* test in *Howe,* it arguably misapplies the "clear and present danger" test to justify its holding. Aside from questions raised about the current soundness of the test and about the present status of the test in the courts,[78] it is doubtful that the facts of this case meet the standards intended by its authors. Justices Holmes and Brandeis eschewed what has become known as the "bad tendency" test[79] and insisted that the danger of a substantive evil which Congress has a right to prevent be both clear and immediate.[80] In *Howe* the court did not even feel compelled to justify its use of the "clear and present danger" test. The danger cited by the court is prejudice to the good order and discipline of the military.[81] It would appear that civilians engaged in similar protests present only slightly less of an evil. This is especially true since Lt. Howe was virtually indistinguishable from a civilian. However, if this type of statute were applied to civilians it would be clearly unconstitutional.

It may be said that this type of restriction involves a minimal loss of freedom of speech, and that the contemptuous language contemplated by the article is not a necessary adjunct to meaningful political activity. The principle, however, remains the same. These rights have always been jealously guarded and even minor encroachments have been corrected because of their implications of increasingly large sacrifices of freedom. Therefore, Lt. Howe's conviction should have been reversed due to the unconstitutional application of article 88. "It is anomalous that one who enters the armed forces is

[78] Kalven, *supra* note 25, at 214.
[79] Whitney v. California, 274 U.S. 357 (1927); Abrams v. United States, 250 U.S. 616 (1919).
[80] *But see* Dennis v. United States, 341 U.S. 494 (1951).
[81] *See* note 19 *supra* and accompanying text.

performing his greatest role as a citizen and yet is reduced to a status where he can no longer enjoy the rights which protect his civilian counterpart."[82]

THOMAS C. NORD

Corporations—Reserved Powers and Fundamental Corporate Changes—Protection of Minority Stockholders' Interests

In the recent decision of *Brundage v. The New Jersey Zinc Company*,[1] the New Jersey Supreme Court upheld a corporate merger approved by two-thirds of the stockholders of the corporation. The merger was effected pursuant to a state statute[2] which was enacted subsequent to New Jersey Zinc's incorporation,[3] but which nevertheless was applicable to New Jersey Zinc under the statutory reservation of powers of the state. This reservation, subjecting corporate charters to "alteration, suspension and repeal" in the discretion of the legislature,[4] was contained in the corporation act under which New Jersey Zinc was chartered. In allowing less than all of the stockholders to validate this fundamental corporate change, the court disavowed the longstanding precedent of *Zabriskie v. Hackensack & New York Railroad Company*.[5]

In *Zabriskie*, a railroad sought to extend its line beyond that allowed in its original charter under the authority of a legislative enactment amending the charter to allow the extension. The court held that this action could not be taken even though only a single stockholder dissented, since the reserved powers could not be used to validate corporate changes affecting the stockholders' interest without unanimous consent. It applied the reasoning of the English case of *Natusch v. Irving*,[6] which held that a joint stock company formed to sell life insurance could not undertake to sell marine insurance—an activity which was unlawful when the company was formed, but which Parliamentary statute subsequently made law-

[82] Pearl, *The Applicability of the Bill of Rights to a Court Martial Proceedings*, 50 J. CRIM. L.C. & P.S. 561, 565 (1960).

[1] 48 N.J. 450, 226 A.2d 585 (1967).
[2] N.J. STAT. ANN. § 14:12-1 (Supp. 1967).
[3] The New Jersey Zinc Co. received its charter in 1880.
[4] Ch. 67 [1875] N.J. Laws (now N.J. STAT. ANN. § 14-1 (1937)).
[5] 13 N.J. Eq. 178 (Ch. 1867).
[6] 47 Eng. Rep. 1196 (Ch. 1824).

ful—without unanimous stockholder consent. *Zabriskie* recognized that the concurring opinion of Justice Story in *Trustees of Dartmouth College v. Woodward*[7] had stated that although the corporate charter constituted a contract between the state and the corporation, a reservation of powers by the state would preclude state action from constituting an impairment of this contract in violation of article I, section 10 of the Constitution.[8] It held, however, that the subsequent adoption of the statutory reservation by New Jersey was not meant to change the *Natusch* situation where fundamental corporate changes directly affected the stockholders' contractual rights in addition to those rights of the corporation in its contract with the state.[9]

Zabriskie thus interpreted the reservation of powers as applying only to the amendments relating to the contract between the corporation and the state. The reservation was not considered to apply to or be a constituent part of the corporation's contract with its stockholders or of the stockholders' contract *inter se.* Any legislative enactments in exercise of the reserved powers which affected these latter contractual obligations without unanimous approval were considered invalid.[10]

The *Brundage* decision, noting the changed nature and role of the corporation today in contrast to that found in the *Zabriskie* period, accepts the more modern view that "each successive legislative authorization becomes a part of the stockholder's contract because of the implied consent that this should be so, by virtue of the state's power to amend and repeal, which power existed at the birth of the corporation."[11] The authorization might be a direct amendment imposed on the corporate charter or a grant of power enabling

[7] 17 U.S. (4 Wheat) 518 (1819).

[8] *Id.* at 712 (concurring opinion).

[9] See Durfee v. Old Colony & F.R. R.R., 87 Mass. (5 Allen) 230 (1862), where the contractual arrangements between the stockholders and the corporation and between the stockholders *inter se* are examined.

[10] The court reasoned as follows:

> It was a reservation to the State, for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances nor apparent objects . . . can, by any construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before.

18 N.J. Eq. 178, 185 (Ch. 1867).

[11] N. LATTIN, CORPORATIONS 51 (1959).

a certain percentage of stockholders to enact such amendment. Unanimity is not required.

Prior to *Brundage,* there was a series of New Jersey decisions[12] anticipating *Zabriskie's* demise, which ignored the limitations of *Zabriskie* whenever there was a substantial "public interest" in the legislative enactments involved. By virtue of the "public interest" doctrine the infringement on the stockholder's interest increasingly expanded in scope, culminating in *A. P. Smith Manufacturing Company v. Barlow*[13] which stated that the retrospective application of a charitable contribution statute to a corporate charter was a valid exercise of the state's reserved powers, despite its obvious effect on the stockholders' contractual rights.

A parallel line of cases[14] in New Jersey had voided certain corporate actions which had been authorized by "reserve power" post-incorporation statutes because they deprived minority share interests of their "vested rights." In these cases, the "public interest" was held not to justify the legislative authorization of destruction or change of these "vested rights." The decisions have never adequately defined this concept but generally a "vested right" has been considered a present property interest, the destruction of which constitutes an impairment of the contractual rights of the stockholder under article 1, section 10 of the Constitution, or a taking of property without compensation which is a violation of the "due process" clause of the fourteenth amendment.[15]

Most of the courts which have held the reservation of powers

[12] *See In re* Collins-Doan Co., 3 N.J. 382, 70 A.2d 159 (1949); Bingham v. Sav. Inv. & Trust Co., 101 N.J. Eq. 413, 138 A. 659 (Ch. 1927), *aff'd,* 102 N.J. Eq. 302, 140 A. 321 (E. & A. 1928); Grausman v. Porto Rican-Am. Tobacco Co., 95 N.J. Eq. 155, 121 A. 985 (Ch. 1923), *aff'd. on other grounds,* 95 N.J. Eq. 223, 122 A. 815 (E. & A. 1928); Murray v. Beattie Mfg. Co., 79 N.J. Eq. 604, 82 A. 1038 (E. & A. 1912); Berger v. United States Steel Corp., 63 N.J. Eq. 809, 53 A. 68 (E. & A. 1902).

[13] 13 N.J. 145, 98 A.2d 581, *appeal dismissed,* 346 U.S. 861 (1953).

[14] *See* Wessel v. Guantanamo Sugar Co., 134 N.J. Eq. 271, 35 A.2d 215 (1944); Buckley v. Cuban Am. Sugar Co., 129 N.J. Eq. 322, 19 A.2d 820 (1940); Longsdale Sec. Corp. v. Int'l Mercantile Marine Corp., 101 N.J. Eq. 554, 139 A. 50 (Ch. 1927). *But see* Franzblau v. Capital Sec. Co., 1 N.J. Super. 519, 64 A.2d 644 (1949). For cases in other jurisdictions, *see* Keller v. Wilson & Co., 21 Del. Ch. 391, 180 A. 584 (1935); Breslav v. New York & Queens Elec. Light & Power Co., 249 App. Div. 181, 291 N.Y.S. 932 (1936), *aff'd per curiam,* 273 N.Y. 593, 7 N.E.2d 708 (1937).

[15] *See* Keller v. Wilson & Co., 21 Del. Ch. 391, 180 A. 584 (1935) where the court makes the flat statement that the destruction of a vested right of a stockholder could violate both the due process and the contract clause.

to be applicable to the stockholders' contract have abandoned the vested rights concept.[16] They recognize the inherent inconsistency in holding that the reservation is a part of the stockholder's contract and constitutes his consent that it be subject to change by the legislature, while at the same time holding that his interests have become "vested" under the same contract and unchangeable by legislative enactment.[17] Once it is recognized that the stockholders' relationship with the corporation is contractual and the provisions of the charter are incorporated into this contract, it is illogical to contend that a right or interest "vests" when legislation in exercise of the reserved powers expressly becomes a part of the charter, except in cases where an actual legal debt has been created such as a declared dividend.

A few courts, however, have applied the vested rights concept to corporate actions where a pre-incorporation statute is involved.[18] These courts generally fail to discern the distinction between the use of the concept when there is a reservation of powers problem, i.e., a post-incorporation statute, and when there is a pre-incorporation statute which authorizes the corporate action.

With the confusion in applying this term to corporate amendments, it is not surprising that the vested rights doctrine has often been used by the courts as a mere label to affix to the stockholders' interest when the equities of the transaction were in his favor. The established practice of the New Jersey equity courts[19] of scrutinizing all fundamental corporate changes to insure essential "fairness" would seem to be a more direct and proper means of protecting the minority stockholder's interest. The whole tenor of *Brundage* points to the need of discarding outmoded concepts in this area of corporate law, and it is probable that the "vested rights," as well as the "public interest," terminology is rendered obsolete by this opinion.

Although the court in *Brundage* expressly accepts the broader

[16] *See* McNulty v. W. & J. S. Sloane, 184 Misc. 835, 54 N.Y.S. 2d 253 (Sup. Ct. 1945), for the landmark opinion repudiating the "vested rights" concept.

[17] See H. BALLANTINE, CORPORATIONS 649 (1946); Becht, *Corporate Charter Amendments: Stock and the Alteration of Dividend Rates,* 50 COLUM. L. REV. 900, 925 (1950).

[18] *See* Consolidated Film Indus., Inc. v. Johnson, 22 Del. Ch. 407, 197 A. 489 (Sup. Ct. 1937).

[19] *See* H. BALLENTINE, CORPORATIONS 657 (1946), where it is pointed out that New Jersey is one of a few states that reviews the question of

view on the reservation of powers, it curiously qualifies its disavowal of *Zabriskie:*

> Its notions [Zabriskie] as to unanimity may have had some force in the days when commerce was conducted largely through individuals and small partnerships or closely held corporations; they have no force in today's society of large corporate enterprises . . . with their stockholders spread throughout the nation.[20]

The language implies that *Zabriskie* doctrine will still be applicable in the close corporation context.[21] There are several reasons, however, why a contrary interpretation is more realistic.[22] First, *Brundage* requires that the application of the reserved powers to tripartite nature of contractual obligations be recognized regardless of the size of the corporation. Whenever a corporation is recognized as a legal entity, the court must be consistent in its interpretation of the contractual incidents involved unless it is willing to adopt the fiction that a close corporation is qualitatively different from the large public corporation and not of the same genus. Also, if the *Brundage* reasoning is not applied to the close corporation, this would create practical problems for the court in defining

"fairness" of amendments whenever there is substantial prejudice, though short of fraud.

[20] 48 N.J. at 469, 226 A.2d at 595.

[21] The failure of the New Jersey legislature to enact specific provisions dealing with the special problems of the close corporation lends support to this position. Present New Jersey statutory and case law invalidate charter provisions allowing (1) high voting and quorum requirements at stockholder meetings, *see* N.J. STAT. ANN. § 14:10-9 (quorum requirement); Clausen v. Leary, 113 N.J. Eq. 324 (Ch. 1933) (voting requirement); *but see* Katcher v. Ohsman, 26 N.J. Super. 28 (Ch. Div. 1953); (2) stockholders' agreements restricting the actions and discretion of directors, or allowing management of the corporation like a partnership, *see, e.g.,* Jackson v. Hooper, 76 N.J. Eq. 592 (E. & A. 1910); and (3) dissolution provisions in case of deadlock. Yet, the enforceability of these types of provisions would seem to be imperative in the close corporation context to insure that the individual stockholder is protected from corporate action detrimental to his interest in the *absence* of the unamity requirements of *Zabriskie.* Certainly in those states which do have close corporation provisions, the need for a restricted view of reserved powers or for the "vested rights" doctrine is diminished considerably. In the 1967 Preliminary Draft made by the Commissioners appointed to revise the New Jersey Business Corporation Act, all these provisions were recommended for inclusion: § 14A:5-9, to -12 (high quorum and voting requirements for stockholder meetings); § 14A:5-21(2) (stockholder agreements restricting the normal powers and discretion of directors); and § 12-5 (dissolution).

[22] See the New Jersey Business Corporation Act (Preliminary Draft 1967) § 14A:1-5 where the Commissioners in the Comment interpret *Brundage* as unqualifiedly overruling *Zabriskie.*

the close corporation and in determining the nature of the "public interest" in legislation relating to it.

The opinion itself supports a broader reading since the section qualifying the disavowal of *Zabriskie* can be construed to be dictum; and, significantly, the next full paragraph in the opinion summarizes the court's position *without* qualification:

> The power reserved . . . should be liberally construed as part and parcel of the tripartite arrangement between the State, the corporation, and the stockholders, and thus viewed, as permitting reasonable corporate charter amendments having legitimate business ends.[23]

There are, however, several problems in interpreting this statement. "Reasonable corporate amendments" would seem to refer to those amendments which satisfy the basic requirements of "fairness," but the terms "fairness" and "reasonableness" are not necessarily compatible. The "reasonableness" of an action usually refers to the intent of the majority and whether they acted in good faith; whereas "fairness" logically concerns the intrinsic character and effect of the transaction. Also, there is the question of whether the phrase "legitimate business ends" embodies substantive requirements such that the "public interest" and "vested rights" concepts might still be applicable. Most likely this is just a general statement that any amendment furthering business needs is valid; and "legitimate" probably means that an amendment must not violate public policy.

A significant factor in determining whether the *Brundage* reasoning will be applied to all corporations, regardless of size, is the tradition of the New Jersey equity courts of requiring "fairness" in any fundamental corporate change. The *Brundage* opinion stresses the importance of the independent determination of "good faith" and "fair treatment"[24] required in the merger transaction, and this type of safeguard can easily be enforced in the close corporation context to protect the minority interests.

The reasoning employed in *Brundage* is, of course, not limited to the merger, consolidation, or reorganization area. Undoubtedly, such fundamental changes as the elimination of accrued dividends, the issuance of prior preferred to eliminate accrued dividends in-

[23] 48 N.J. at 470, 226 A.2d at 595.
[24] 48 N.J. at 470, 226 A.2d at 596.

directly, and the compulsory amendment altering liquidation preferences—which have been held invalid in prior New Jersey cases[25]—will be re-examined under the broad interpretation of reserved powers in *Brundage*.[26]

Although the court leaves many questions unanswered in *Brundage*, its overall significance in the development of corporate law is threefold: (1) it represents an increasing awareness by the courts that the needs of the modern corporate require both legislative flexibility in enabling corporations to adjust to changing economic conditions and the compromising of minority interests in favor of a more democratic process within the corporation; (2) it possibly represents a shift in the means employed to protect the minority interests—from the random application of such nebulous concepts as "vested rights" and from the harsh requirement of unanimity, to the direct imposition of equitable limitations on majority shareholder action; and (3) it should provide the impetus for the remaining states which hold to a more restricted view of the reserved powers to reconsider their position in light of modern corporate needs.

NEILL G. MCBRYDE

Credit Transactions—Knowledge and Priority Under Uniform Commercial Code Sections 9-301(1)(a) and 9-312(5)

In *Bloom v. Hilty*[1] the plaintiff sold and delivered to Charles Hilty a quantity of gas drilling pipe. At the time of the sale it was orally agreed that title to the pipe would remain in the plaintiff until the full purchase price was paid. Subsequently Hilty executed a chattel mortgage to the defendant covering the pipe sold to Hilty by the plaintiff. At the time the mortgage was executed the defendant knew of the plaintiff's claim of an interest in the pipe. The defendant duly perfected his security interest by filing a financing statement. The plaintiff did not perfect his interest.

In holding that the defendant's interest was entitled to priority

[25] *See* H. BALLENTINE and G. STERLING, CALIFORNIA CORPORATIONS LAWS 9 (1938); Gibson, *How Fixed Are Class Shareholder's Rights*, 23 LAW & CONTEMP. PROB. 283, 294 (1958); Lattin, *A Primer on Fundamental Corporate Changes*, 1 W. RES. L. REV. 3, 26 (1949).

[1] 427 Pa. 463, 234 A.2d 860 (1967).

over that of the plaintiff, the Supreme Court of Pennsylvania applied Uniform Commercial Code sections 9-301(1)(a) and 9-312(5)(b). The former section provides that "an unperfected security interest is subordinate to the rights of persons entitled to priority under section 9-312." Under section 9-312(5)(b) where one of two conflicting interests is perfected,[2] the first to perfect is given priority. The court held that lack of knowledge of a prior unperfected security interest was not a requirement for priority under these sections.[3] Thus the defendant's knowledge of the prior interest at the time his interest attached was insignificant. The court reasoned that since neither section explicitly makes lack of knowledge a prerequisite for its operation, knowledge is irrelevant. Moreover, the comments to section 9-312(5) support the view that lack of knowledge is not required.[4]

The court's position is clearly correct. The argument that knowledge is a factor would not have been advanced were it not for pre-Code law. Prior to the Code's adoption most states made knowledge a factor in determining priorities with the usual result that a perfected junior interest was subordinated to an unperfected prior interest of which the holder of the junior interest had knowledge.[5] Except for the two sections under consideration (9-301(1)(a) and 9-312(5)) the Code has either expressly adopted or rejected this position in its priority sections.[6] Thus, it has been suggested that the

[2] This section does not apply where both interests are perfected by filing. UNIFORM COMMERCIAL CODE § 9-312(5)(a) covers this situation.

[3] *Accord, In Re* Gunderson, 4 UCC REPORTING SERV. 358 (S.D. Ill. 1967); 1 P. COOGAN, G. HOGAN, & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 177 n.23 (1967); 2 G. GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY § 34.2, at 902 (1965) [hereinafter cited as GILMORE]; Felsenfeld, *Knowledge as a Factor in Determining Priorities under The Uniform Commercial Code*, 42 N.Y.U.L. REV. 246, 247 (1967) [hereinafter cited as Felsenfeld]; Smith, *Article Nine: Secured Transactions-Perfection and Priorities, The Uniform Commercial Code in North Carolina: A Symposium*, 44 N.C.L. REV. 753, 793 n.179 (1966).

[4] UNIFORM COMMERCIAL CODE § 9-312(5), comment 4, examples (1) ("it makes no difference whether or not A knew of B's interest when he made his advance"), (2) ("it makes no difference whether or not he knows of the other interest at the time he perfects his own"), (3) ("A has priority whether or not he knows of B's interest when he files"), (4) ("it makes no difference whether or not A knows of B's intervening advance when he makes his second advance").

[5] 1 GILMORE § 21.2, at 584; Felsenfeld, *supra* note 3, at 249.

[6] The pre-Code position is adopted by UNIFORM COMMERCIAL CODE § 9-301(1)(b); 9-301(1)(c); 9-301(1)(d); 9-307(2); 9-308. It is rejected by UNIFORM COMMERCIAL CODE §§ 9-307(1); 9-308; 9-312(2); 9-312(3).

requirement of lack of knowledge may have been inadvertently omitted from these two sections and that it should be supplied by analogy.[7] However plausible this argument may seem, there is little question that the lack of knowledge requirement was deliberately omitted. By the explicit use of knowledge in the other sections of the Code the drafters indicated their awareness of its significance.[8] Other evidence of this intent is found in the manner in which the pre-Code position was changed. Prior to 1956, Code section 9-301(1)(b) provided that a subsequent party with knowledge would not take priority.[9] This section was replaced in the present Code by the two sections under consideration, neither of which require lack of knowledge. In light of these events knowledge should not be implied by analogy to the other Code sections.[10]

It has been suggested that the good faith requirement of section 1-203 may supply the knowledge factor.[11] This court rejected that contention. It correctly concluded "that some leading on or other basis for estoppel would seem necessary to deprive one of priority given him by statute."[12] The obvious meaning of section 9-312(5) is that good faith in the lack of knowledge sense is not to be a limitation. Once it is concluded that knowledge was deliberately omitted as a factor under this section it naturally follows that a secured party can act in good faith even though he has knowledge of the prior unperfected security interest.

The *Hilty* decision is also illustrative of the difficulties encoun-

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[7] 2 GILMORE § 34.2, at 901.

[8] Felsenfeld at 249.

[9] 2 GILMORE § 34.2, at 898.

[10] It seems that the Code is in accord with prior North Carolina law. Before the Code's adoption the first security interest to be registered prevailed, Commercial Inv. Trust v. Albemarle Motor Co., 193 N.C. 663, 177 S.E. 874 (1927). Furthermore, notice or actual knowledge on the part of the prior interest on the part of lien creditors or purchasers for value [Included in this classification is the chattel mortgagee, Odom v. Clark, 146 N.C. 544, 60 S.E. 513 (1908)], would not take the place of actual registration. Bank v. Cox, 171 N.C. 76, 87 S.E. 967 (1916); Piano Co. v. Spruill & Bro., 150 N.C. 168, 63 S.E. 723 (1909).

[11] Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 858 n.80 (1959). For a general discussion of good faith see Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code,* 30 U. CHI. L. REV. 666 (1963); Comment, *Good Faith Under the Uniform Commercial Code,* 23 U. PITT. L. REV. 754 (1962).

[12] 427 Pa. 463, 464, 234 A.2d 860, 864 (1967). This same result was suggested in 1 P. COOGAN, G. HOGAN, AND D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 177 n.26 (1967).

tered in applying the Code. The court without mentioning the point assumed that the plaintiff's oral reservation of title created an enforceable security interest.[13] It seems that Code section 2-401(1) was the basis for this assumption. This section provides that "any retention or reservation by the seller of title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."[14] Under section 2-401(2) the seller, to reserve title once the debtor has lawfully obtained possession of the property, must enter an explicit agreement with the debtor. To create a security interest under the Sales Article the provisions of the Secured Transactions Article must be fully met.[15] Section 9-203 (1)(b) provides that once the debtor has possession of the goods a security interest is not enforceable against either the debtor or third persons unless "the debtor has signed a security agreement which contains a description of the collateral . . . ."[16] Since the only agreement in *Hilty* was oral, the plaintiff's security interest was unenforceable.[17] Thus the court needlessly dealt with the problem of priority under sections 9-301(1)(a) and 9-312(5) as they are applicable only where conflicting security interests in the same collateral exist.

One of the primary purposes of the Code is "to make uniform the [commercial] law among the various jurisdictions."[18] This end can be attained only if the decisions of one jurisdiction are fol-

[13] In the course of its opinion the court often referred to a lease-purchase agreement made between the plaintiff and Hilty. As this agreement was executed subsequent to the execution and perfection of the defendant's security interest it should have no effect on the priorities between the conflicting interests.

[14] The vendor's interest would be a purchase money security interest. Evan's Prod. Co. v. Jorgensen, — Ore. —, 421 P.2d 978 (1966); UNIFORM COMMERCIAL CODE § 9-107. It should be noted that the rights, obligations and remedies of a party under the Secured Transactions Article are not affected by the location of title. UNIFORM COMMERCIAL CODE § 9-202.

[15] UNIFORM COMMERCIAL CODE § 9-102(1)(a). This section provides that The Secured Transactions Article applies to all transactions which are intended to create a security interest. "Security interest" is defined by Code section 1-201(37). The definition specifically includes those interests which arise under section 2-401.

[16] An exception to this rule exists where the security interest arises solely under the Sales Article. If in such a case the debtor is neither in, nor lawfully obtains, possession of the goods no written agreement is necessary. UNIFORM COMMERCIAL CODE § 9-113(a).

[17] Evan's Prod. Co. v. Jorgensen, — Ore. —, 421 P.2d 978 (1966); Grantham v. Paul, 203 Pa. Super. 158, 199 A.2d 519 (1964).

[18] UNIFORM COMMERCIAL CODE § 1-102(2)(c).

lowed by other jurisdictions. This case is illustrative of one of the main obstacles to the achievement of that purpose. The court's reasoning was faulty. Furthermore, it is unreasonable to assume that other courts will perpetuate a mistake for the sake of conformity. As a result, the uniformity of the Code will be further disrupted unless the Supreme Court of Pennsylvania refuses to recognize this decision, insofar as it relates to the creation of a security interest, as precedent.

JOHN M. MASSEY

Damages—Rightful Recovery for Wrongful Death—The Income Tax Factor

Most problems involving the income tax concern a resolution of whether or not the tax is applicable. There *is,* however, a problem that arises because the tax is unquestionably *not* applicable. Under the Internal Revenue Code, damage awards for personal injury and wrongful death are tax exempt.[1] The recipient of such an award is allowed to exclude it from his gross income for income tax purposes. Because of this, the court in *Brooks v. United States*[2] held that the amount of damages to be given to the widow and children of a South Carolina decedent, whose wrongful death was caused by an agent of the federal government, should be computed so as to give recognition to this tax saving. This was done by using a net earnings instead of a gross earnings figure as the measure of future earnings lost as a result of decedent's death. This position taken by the court is in the minority in the United States.[3]

The question of whether to take cognizance of the tax-exempt status of the award when computing damages is an important one." "The increase in the amount of damage verdicts . . . and the high level of income taxes makes the question immediate."[4] It seems

[1] The Internal Revenue Code expressly exempts from gross income "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." INT. REV. CODE of 1954, § 104(a)(2). Wrongful death damages are also non-taxable. Rev. Rul. 54-19, 1954-1 CUM. BULL. 179. *See also* N.C. GEN. STAT. § 105-141(b)(5)(iv) (Supp. 1967).

[2] 273 F. Supp. 619 (D.S.C. 1967).

[3] *See* Annot., 63 A.L.R.2d 1393, 1395-96 (1959).

[4] Note, *Income Taxation and Damages for Personal Injuries,* 50 KY. L.J. 601, 601 (1962).

natural, therefore, to expect defense attorneys to make attempts to inject the issue of income tax saving into a case wherever appropriate.[5] Even though such awards have been tax-exempt since 1918,[6] however, the issue is seldom raised, and many jurisdictions, including North Carolina, have never resolved the issue.[7] In *Brooks,* the court was in a position free "to follow the commands of reasonable justice. . . ."[8] because the South Carolina court had not decided the issue and neither had the circuit court.[9]

There are logical and seemingly compelling reasons why the *Brooks* court took the position it did. The soundness of the court's position should become apparent when one considers several important factors. First, the fundamental principle or theory of damages in Anglo-American law is that of compensation for the injury caused.[10] The object is to restore the injured party (meaning the beneficiaries under the applicable statute in the case of wrongful death[11]) to the position he would have occupied had there been no injury (or death). On the other hand, it is never contemplated that

[5] Burns, *A Compensation Award for Personal Injury or Wrongful Death Is Tax Exempt: Should We Tell The Jury?,* 14 DE PAUL L. REV. 320, 321 (1965).

[6] Rev. Act of 1918, § 213(b)(6), 40 Stat. 1066 (now INT. REV. CODE of 1954, § 104(a)(2)).

[7] While North Carolina has not decided this question, the measure of damages used in wrongful death cases could accommodate a deduction of income taxes from gross expected future earnings. In Journigan v. Little River Ice Co., 233 N.C. 180, 184-85, 63 S.E.2d 183, 186 (1951), the court stated the rule as to the appropriate measure of damages to be

> the present worth of the *net* pecuniary value of the life of the deceased to be ascertained by deducting the probable cost of his own living and *usual or ordinary expenses* from his probable gross income which might be expected to be derived from his own exertions during his life expectancy. . . . [t]he end of it all being . . . to enable the jury fairly to arrive at the *net income* from which the deceased might reasonably be expected to earn from his own exertions, had his death not ensued . . . . (emphasis added).

[8] 273 F. Supp. at 632.

[9] For a collection of the state and federal court decisions which have resolved the issue, see Annot., note 3 *supra.*

[10] C. MCCORMICK, DAMAGES § 137 (1935) [hereinafter cited as MCCORMICK]; James, *Damages in Accident Cases,* 41 CORNELL L.Q. 582 (1956).

[11] Under the wrongful death statutes of most states the widow and family are the designated beneficiaries. However, in six states, including North Carolina, the estate of the decedent is the beneficiary and the action can be brought only by the personal representative. The widow and family receive the proceeds in the latter states through distribution of the estate according to the intestate succession statutes, whether or not the decedent died intestate. N.C. GEN. STAT. § 28-173, -174 (1949); Comment, *Wrongful Death Damages in North Carolina,* 44 N.C.L. REV. 402 (1966).

the injured party should be put in a better position than he would be in had the wrong not been done. The basic idea is, therefore, *compensation,* not punishment of the defendant or profit to the plaintiff.[12]

Second, an important element of damages in personal injury and especially wrongful death cases is the amount of future earnings that will now be lost as a result of the injury or death.[13] In the case of a personal injury, future earning capacity may or may not be impaired by the injury. If it is, the wrongdoer will be required to compensate the injured party to the extent of this impairment. However, in the case of wrongful death, future earning capacity is totally destroyed, and consequently, this loss of future earnings is the primary, if not the sole, element of damages recoverable.[14]

Third, "[i]f plaintiff gets in tax-free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, the plaintiff is getting more than he lost."[15] That is, if plaintiff's recovery is based on lost earnings before taxes which would have been taxable had there been no injury or death[16] and is tax-free, plaintiff is being *over-compensated* by the award. This violates the guiding principle that plaintiff is to be made whole, but is not to profit.

Even though "reasonable justice" and the logical application of the underlying principle of damages would seem to require other-

[12] Some states allow recovery of punitive damages where the defendant's act is willful or amounts to gross negligence. McCORMICK §§ 79, 103. As early as 1872, the North Carolina court said, in referring to the measure of damages under the wrongful death statute, that "our statute . . . does not contemplate *solatium* for the plaintiff nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being; how much the plaintiff lost by the death of the injured person?" [*sic*] Collier v. Arrington, 61 N.C. 356, 358 (1872). This language is still quoted with approval today. *See, e.g.,* Gay v. Thompson, 266 N.C. 394, 398, 146 S.E.2d 425, 428 (1966).

[13] McCORMICK § 96.

[14] Wrongful death actions in the United States are wholly statutory creations and the statutes generally provide the measure of damages. The North Carolina statute provides for such damages as are "a fair and just compensation for the pecuniary injury resulting from such death." N.C. GEN. STAT. § 28-174 (1950). The basic item of damages under any such statute is the loss of future earnings caused by the death.

[15] 2 F. HARPER & F. JAMES, TORTS § 25.12 at 1326 (1956).

[16] "If the income, or a portion thereof, of the person injured or killed was exempt from liability for income tax, there would be no basis for deducting income tax on such exempt income in fixing damages for the destruction of such income." Annot., 63 A.L.R.2d 1393, 1398 (1959). An example of such tax exempt income is interest received on government bonds, certain federal pensions, etc.

wise, the view of most American courts is that the income tax consequences should not be taken to consideration in computing damage award.[17] A possible reason is a feeling on the part of the courts that to allow the damages to be reduced by the income tax payable on future earnings would be to confer some type of benefit on the wrongdoer by reducing the damages he has to pay. This is a distorted view of the problem, however. The question, in reality, is not one of reducing any damages the defendant has to pay, but one of *accurate assessment* of the plaintiff's injury. "No one would suggest that the defendant should be compelled to pay damages over and above that which the plaintiff has actually suffered by reason of the defendant's wrongdoing."[18]

Although this feeling might be the real basis for the majority position, there are several reasons explicitly advanced by the courts following the majority view. The primary reason is that future income tax liability is too conjectural.[19] Uncertainties exist as to what decedent's future tax liability would be because of the possibility of changes in the tax rates, allowable exemptions and deductions, etc. But, in computing damages, the generally accepted rule is for the jury or the court to make an estimate, if there is a reasonable basis for computation, even though the result is only approximate.[20] It would seem better to make a fair estimate of the future tax liability and reach a reasonably just result, than to ignore the tax liability completely and reach a result certainly wrong. In addition, it is no more conjectural to estimate the amount of income

[17] *See* Annot., note 3 *supra.* In England, which has an income tax provision similar to section 104(a)(2), the House of Lords overruled a long line of precedent and held that this tax exemption *should* be considered in computing damage awards. British Transport Comm'n v. Gourley, [1956] A.C. 185. For a discussion of the English cases, see Jolowiez, *Damages and Income Tax,* 1959 CAMB. L.J. 86.

[18] 60 W. VA. L. REV. 378, 381 (1958).

[19] Phoenix Indem. Co. v. Givens, 263 F.2d 858, 863 n.4 (5th Cir. 1959); Stokes v. United States, 144 F.2d 82, 87 (2d Cir. 1944); Rouse v. New York Cent. & St. L. Ry., 349 Ill. App. 139, 110 N.E.2d 266 (1953); Smith v. Penn R.R., 99 N.E.2d 501, 504 (Ohio App. 1950); Dixie Feed & Seed Co. v. Byrd, 52 Tenn. App. 619, 376 S.W.2d 745 (1963), *appeal dismissed,* 379 U.S. 15, *cert. denied,* 379 U.S. 878 (1964).

[20] 25 C.J.S. *Damages* § 26(c), at 678-80 (1966). The courts requiring use of net earnings after taxes, as the appropriate measure of future earnings lost, use estimates and do not require computation of the tax liability with mathematical precision. *See, e.g.,* O'Conner v. United States, 269 F.2d 578, 585 (2d Cir. 1959); Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918, 926 (1957).

taxes that decedent would have paid on his future earnings than it is to estimate the amount of future earnings he would have made, how long he would have lived, and other elements of his overall earning potential that must be and are estimated in computing such a damage award.[21]

Another reason often cited is that by making such awards tax exempt, it was Congress's intent to confer a benefit on injured persons; to base the future earnings element of a damage award on net earnings after taxes would be to subvert that intent.[22] But Congress clearly did not intend to confer a benefit by making such awards tax exempt. As the legislative history indicates,[23] Congress made the exemption because it doubted whether tort damages were "income" within the meaning of the sixteenth amendment. Such damages are more accurately characterized as a reparation of capital than as income. The "Congressional intent" argument appears to be but another example of attributing a non-existent intent to a legislature to reach an already-decided-upon result."[24] Even if it *were* Congress's intent to confer a benefit by exempting the award,

> exempting the *award* once obtained from inclusion in gross income does not necessarily have anything to do with an intention that the amount of tax that the plaintiff was paying prior to the injury should or should not be considered by the jury in arriving at the *amount of the award.* It merely says that once the proper measure of damages has been used to arrive at the award, it will not be included in gross income. . . .[25]

A third reason often cited is the "collateral source doctrine."[26] This doctrine states that compensation received from a source wholly independent of the wrongdoer will not lessen the damages recoverable from the wrongdoer. The validity of the doctrine is questionable in light of the principle that plaintiff is entitled to compensation

[21] Burns, *supra* note 5, at 324; Moffa v. Perkins Trucking Co., 200 F. Supp. 183, 188 (D. Conn. 1961).

[22] Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151-52, 125 N.E.2d 77, 86 (1955); Dixie Feed & Seed Co. v. Byrd, 52 Tenn. App. 619, 376 S.W.2d 745, 749 (1963), *appeal dismissed,* 379 U.S. 15, *cert. denied,* 379 U.S. 878 (1964); 9 VAND. L. REV. 543, 549-50 (1956).

[23] Nordstrom, *Income Taxes and Personal Injury Awards,* 19 OHIO ST. L.J. 212, 222 (1958). *See also* Cutler, *Taxation of the Proceeds of Litigation,* 57 COLUM. L. REV. 470 (1957); Merchants Loan & Trust Co. v. Smietanka, 255 U.S. 509 (1920).

[24] Nordstrom, *supra* note 24, at 223.

[25] *Id.* at 222.

[26] 69 HARV. L. REV. 1495, 1496 (1956); 35 N.C.L. REV. 401, 404 (1957).

only to the extent necessary to make him "whole."[27] But, even if one accepts the validity of the doctrine, it would appear to have no application to the instant problem. The two usual applications of the doctrine are where funds are paid to an insured injured party, or to the designated beneficiary in the case of death, by an insurance company, and where the injured party, or survivors in the case of death, receives a gift from a third person. An example of the latter is where a physician renders services as a gratuity. There is no analogy between receiving a tax exemption and receiving insurance proceeds. In the latter the insured has contracted and paid premiums in order to receive the insurance proceeds if the contingency insured against occurs.[28] The reason for including within the doctrine the situation where one receives collateral compensation as a gratuity is because it is thought that if the value of the gift were deducted from a damage award, it would frustrate the intent of the donor to confer a benefit. But that situation is not analogus to the instant problem since, as was noted above, it was not an intention to confer a benefit which prompted the tax exempt status of damage awards.[29]

A fourth reason advanced in some cases is that to allow presentation of evidence as to tax matters would unduly complicate the trial and cause difficulties in trial administration.[30] It is not denied that to undertake tax computations would add an element of complexity to the trial; however, tax experts could be used to assist the court. "Taxes are complicated, but are they any more complicated than annuity and mortality tables, reduction to present worth or any of a hundred problems that courts and juries solve every day?"[31] Besides, the greater burden is borne by the defense attorney who must produce and present the evidence. It would seem a better solution to let him, instead of the court, decide whether the possible savings to be had are worth the additional effort required.[32]

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[27] *See* 77 HARV. L. REV. 741 (1964).

[28] Feldman, *Personal Injury Awards: Should Tax Exempt Status Be Ignored?*, 7 ARIZ. L. REV. 272, 275 (1966).

[29] See note 24, *supra*, and accompanying text.

[30] Combs v. Chicago, St. P., M. & O. Ry., 135 F. Supp. 750 (N.D. Iowa 1955); Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956); Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956); Pfister v. Cleveland, 96 Ohio App. 185, 113 N.E.2d 366 (1953), *appeal dismissed*, 159 Ohio St. 580, 112 N.E.2d 657 (1953).

[31] Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274, 328 (1960).

[32] 22 OHIO ST. L.J. 225, 228-29 (1961).

Some courts refuse consideration of the tax consequences with no discussion of the problem and no real reason given for their holdding.[33] Others hold that the question should be left to the sound discretion of the trial judge,[34] and still others consider the tax factor when reviewing a damage award to determine if it is excessive.[35] The Second Circuit, as noted by the court in *Brooks*,[36] has adopted a flexible rule whereby the future earnings element of a damage award is reduced by the future tax liability where the earnings in question are in an upper income tax bracket, but no reduction is made where the earnings fall into a lower bracket.[37] This approach has now been approved and adopted by the Seventh Circuit.[38] The reasoning behind the approach is apparently that the taxes which would be payable when the earnings are in a lower bracket would be so small that the significance of deducting them would be lost in the rounding and estimating processes used in computing a damage award of this nature. While this may be true in the case of a *very* small annual income, there would seem to be few cases in which the tax is so insignificant, since a minimum of 14 per cent of an individual's gross earnings is paid in income taxes.

There appears to be a trend developing, at least in the federal courts, towards requiring a reduction for income taxes. The *Brooks* decision is recent evidence of it.[39] Although the court in *Brooks*

[33] *See, e.g.*, Boston & Me. R.R. v. Talbert, 360 F.2d 286, 291 (1st Cir. 1966).

[34] *See, e.g.*, United States v. Sommers, 351 F.2d 354, 360 (10th Cir. 1965).

[35] *See, e.g.*, Southern Pac. Co. v. Guthrie, 186 F.2d 926, 927 (9th Cir. 1951), *cert. denied*, 341 U.S. 904 (1951).

[36] 273 F. Supp. at 631.

[37] Petition of Marina Mercanto Nicaraguense, S.A., 364 F.2d 118 (2d Cir. 1966) (annual income of 11,500 dollars; held that deduction here was error); Leroy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965), *cert. denied*, 382 U.S. 878 (1965) (annual income of 16,000 dollars; held that deduction was appropriate); Cunningham v. Rederiet Vindeggen, S.A., 333 F.2d 308 (2d Cir. 1964) (annual income of 6,200 dollars; no deduction allowed); Montellier v. United States, 315 F.2d 180 (2d Cir. 1963) (annual income of 11-12,000 dollars—held that at this level it was discretionary with the trial court); McWeeney v. New York, N.H. & H.R.R. Co., 282 F.2d 34 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1960) (annual income of 4,800 dollars-held that no deduction was proper).

[38] Cox v. Northwest Airlines, 379 F.2d 893 (7th Cir. 1967) (annual income of 15-20,000 dollars; held that deduction was required).

[39] For other evidence *see* Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965); Nollenberger v. United Air Lines, 216 F. Supp. 734 (S.D. Cal. 1963), *petition for cert. dismissed*, 379 U.S. 951, *modified on other grounds*, 335 F.2d 379 (9th Cir. 1964); Moffa v. Perkins Trucking

clearly limited its holding to wrongful death cases,[40] the same reasons would seem to exist for application of the holding in personal injury cases in which an element of damages recoverable relates to lost future earnings. But, the reasons are much more compelling in the case of wrongful death because there the damage award is primarily, if not entirely, based on loss of future earnings.

The *Brooks* decision represents a commendable effort to render "reasonable justice" in spite of many practical problems of tax computation and in the face of the prevailing line of authority. It is hoped that the decision will prompt courts which have not resolved the issue to follow suit when the issue is presented, and prompt others to revaluate their current stand.

PATRICK H. POPE

Damages—The Not So Blessed "Blessed Event"

"[T]he birth of a child may be something less than the 'blessed event.' . . ."[1] said a California Court of Appeals in *Custodio v. Bauer*.[2] The context out of which the case arose is not unique but the attitude of the court differed from similar cases where the courts adhered to more traditional concepts of the family structure.

Plaintiff in *Custodio* underwent a salpingectomy, a female sterilization operation,[3] after she and her husband decided to limit their family for health and economic[4] reasons. After the operation

Co., 200 F. Supp. 183 (D. Conn. 1961); Meehan v. Central R.R. Co., 181 F. Supp. 594 (S.D.N.Y. 1960).

[40] 273 F. Supp. at 632.

[1] Custodio v. Bauer, 59 Cal. Rept. 463, 475 (Ct. App. 1967).

[2] *Id.* at 475.

[3] Couples wishing to prevent conception through sterilization usually have the operation performed on the husband for the reason that a male sterilization (vasectomy) is a relatively simple procedure that can be performed with a local anesthetic in a doctor's office. A salpingectomy on the other hand is classified as major surgery and carries with it a certain risk of death, although the operation is simplified if performed immediately after child-bearing. However, recanalization, the process whereby the body naturally overcomes the effects of sterilization, occurs more frequently after a vasectomy than a salpingectomy. Because recanalization would be a valid defense to a cause of action based on negligence or malpractice when a pregnancy results after a sterilization operation, the plaintiff would have an easier time overcoming the defense in an unsuccessful salpingectomy.

[4] The apparent economic motivation of the Custodios was implicit in the court's opinion.

she became pregnant with her tenth child. Mrs. Custodio and her husband sued on the basis of negligence, malpractice, fraud and deceit, negligent misrepresentation, and breach of contract. In addition to other damages plaintiffs prayed for special damages in the sum of 50,000 dollars for the expense of rearing the child.[5] Defendants demurred, *inter alia,* on the grounds that: (1) Pregnancy, birth of child, and cost and expense of delivery and rearing are not legally cognizable; (2) breach of duty was not the proximate cause of the pregnancy. The trial court sustained the general demurrer whereupon the plaintiff appealed successfully to the court of appeals which overruled the demurrer and remanded the case for trial. This note will consider the legal problems concerning the 50,000 dollar claim for the support and rearing expenses of the unwanted child.

Courts have consistently denied recovery for the cost of rearing a child[6] on the theory that a child's birth is a "blessed event" and that the happiness derived from rearing a child far outweighs the financial liability.[7] The court in *Custodio* thought it premature to discuss such questions because the issue would become moot if the plaintiffs failed to sustain their burden of proof.[8] However, in dis-

[5] From the plaintiff's complaint: "That the birth of plaintiff's child will require of the plaintiff, additional costs and expenses to properly care for and raise the said child to the age of maturity, that said cost is estimated to be in the sum of Fifty Thousand Dollars ($50,000.00) over said period of time, which constitutes additional special damages to this plaintiff."

[6] However, several courts have avoided the issue by disposing of the case by other means, or addressing themselves to other issues. *See, e.g.,* Doerr v. Villate, 14 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

[7] Consider for instance the language in Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), where the court denied recovery to a couple who had a child after a vasectomy (motivated by concern for the wife's health), but where the child and mother survived nicely. The court said: "The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. *As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority." Id.* at 126, 255 N.W. at 622 (emphasis added). See also Doerr v. Villate, 14 Ill. App. 2d 332, 220 N.E.2d 767 (1966); Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. Lycoming Co. 1957), criticized in 19 U. PITT. L. REV. 802 (1958); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[8] Determination of principles of public policy which are claimed to render certain consequences of proved wrongful acts and omissions

cussing "criteria" for the remand of the case the court left little doubt which way it would decide the issue should the danger of mootness pass. The court noted that despite precedent denying recovery, the same precedent demonstrated that birth is not always a "blessed event." The court then stated the crux of its predispositions by saying, "With fear being echoed that Malthus was indeed right, there is some trend of change in social ethics with respect to the family establishment."[9]

Clearly there are many unwanted children born in wedlock. The ever increasing use of and demand for birth control devices evidences this fact. The truism that most couples will naturally love and care for the unwanted child does not alter the fact that it is unwanted or that they would have been happier without it.[10] These family planning motivations distinguish *Custodio* from earlier cases denying recovery for unwanted child support in which sole considerations of health motivated the sterilization.[11] In *Custodio* the plaintiffs apparently wished to limit the family for economic reasons as well.[12] It may be argued that the damages should be commensurate with the injuries anticipated. Thus if a couple has a sterilization operation for reasons of health and due to the doctor's malpractice the woman bears another child which injures or kills her, a right of action is maintainable against the doctor.[13] Sim-

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noncompensable may best await the proof of the elements of damage claimed by the plaintiffs. The failure to prove an actionable wrong, or the failure to show injuries of the nature alleged, would render further pursuit of the subject moot.

59 Cal. Rept. at 468.

Indeed, the court took one paragraph to state the above (i.e., that it was premature to decide), and then spent four pages discussing "criteria"—or, in other words, what it would have decided if it were time to decide.

[9] 59 Cal. Rept. at 477.

[10] One commentator has said:

Moreover the fact that the parents love this child and feel responsible for its welfare once it has been born does not mean that they would not have been generally happier without it or that its birth constitutes a "blessed event" in every way. An inability to provide for and educate their previously born children as they anticipated or to maintain a higher standard of living once contemplated may be a constant source of sorrow for which the joy derived from the newest child compensates only inadequately.

113 U. PA. L. REV. 415, 435-36 n.79 (1965).

[11] *See, e.g.*, Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[12] *See supra* note 4.

[13] Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945).

ilarly if a couple's motive is not only that of health but also of economic considerations, and the unwanted child increases the economic burden, then a right of action for child support should also be maintainable against the doctor. Ideally one should be able to contract for what one wants, and to recover for the foreseeable consequences of someone else's negligence. The shock and frustration of having an unexpected and unwanted child may have psychological repercussions on the parents. Indeed it could be said that to some extent the dignity of the human person is violated by upsetting a couple's rights to choose its family's size.[14] It follows that relieving the economic burden of the unwanted child would assuage the unhappy situation which the couple sought to avoid and would have avoided but for the negligence or misrepresentation of the doctor. Yet an eventual decision allowing such recovery for unwanted child support would seem to embrace more fundamental issues.[15]

Courts have long recognized that considerations other than the

[14] *Cf.* 46 N.C.L. REV. 205, 208-212 (1967).

[15] One "fundamental issue," however, seems to be well settled—that voluntary sterilization is not against public policy. Indeed *compulsory* sterilization was held to be constitutional for mentally deficient persons in Buck v. Bell, 274 U.S. 200 (1927); *but cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942). In one of the earliest cases resembling *Custodio,* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), the court decided that such operations were not against public policy, and the courts have consistently held this position where the legislature has not held to the contrary. Two states have afforded statutory protection for doctors performing voluntary sterilization operations. *See* N.C. GEN. STAT. §§ 90-271 to -75 (Supp. 1967); VA. CODE ANN. §§ 32-423 to -26. *See also* a proposed statutory code in 113 U. PA. L. REV. 415, 442-43 (1965). Only in those states where there is a legislative restriction on sterilization (*see* CONN. GEN. STAT. REV. § 53-33 (1958); UTAH CODE ANN. § 64-10 to -12 (1961)) would the courts be unwilling to allow recovery. While these statutory restrictions may have constitutional problems in light of Griswold v. Connecticut, 381 U.S. 479 (1965), these states could still deny recovery in a tort or contract suit arising out of a sterilization operation even though they could not constitutionally prohibit the act itself. (For an argument that voluntary sterilization should be against public policy even in the absence of statutory dictates, see Smith, *Antecedent Grounds of Liability in the Practice of Surgery,* 14 ROCKY MT. L. REV. 233, 278 (1942)). But judicial acceptance of voluntary sterilization does not solve the problem of recovery. "It is submitted . . . that acceptance of sterilization and whether or not damages should be awarded for the birth of a child following such an operation are entirely different questions and different policy considerations underlie each." 9 UTAH L. REV. 808, 810 n.6 (1965). Acquiescence by the courts in one method of birth control is quite a different thing from judicially stamping a human as unwanted.

standard of living affect the well-being of the child.[16] One such consideration in unwanted child support cases is that either by necessity or accident the child may become aware of the litigation and develop into an "emotional bastard."[17] Of course the child, especially as he grows older, may by conjecture develop suspicions that he was unwanted. However, a child is less likely to become an "emotional bastard" when he may have some vague notion that his parents' family planing scheme went astray, than when he discovers that he is a 50,000 dollar judicially declared burden.[18] This being the case, would the 50,000 dollar demanded by Custodio compensate for the mental anguish the child may suffer upon making the discovery? If not, should a married couple be allowed to claim that their child is unwanted?[19]

Even if it would be permissible to claim that the child is unwanted, a recovery for support of the unwanted child presents some interesting contrasts when juxtaposed with the measure of damages in wrongful death actions. When a parent sues for the wrongful death of a child, the damages are computed by subtracting the cost of his support from the value of the enjoyment, affection and services that would have been derived from the child had he lived. Recovery is possible because the courts have assumed that the latter is a greater sum than the former.[20] If the latter figure becomes less when the child is unwanted, it may be argued that a couple who re-

[16] Most notably, of course, the rights of the natural parents. *See, e.g.*, State *ex rel.* Nelson v. Whaley, 246 Minn. 535, 75 N.W.2d 786 (1956).

[17] For a well stated argument for this position, see 9 UTAH L. REV. 808, 811-12 (1965).

[18] The *Custodio* court, however, did not make this distinction. The court dismissed the "emotional bastard" argument by saying:

> The emotional injury to the child can be no greater than that to be found in many families where "planned parenthood" has not followed the blueprint. . . . One cannot categorically say whether the tenth arrival in the Custodio family will be more emotionally upset if he arrives in an environment where each of the other members of the family must contribute to his support, or whether he will have a happier and more well-adjusted life if he brings with him the wherewithal to make it possible.

59 Cal. Rept. at 477.

[19] Thus, just as a married couple may not normally testify to non-access in order to show the illegitimacy of their child, it might be argued that the plaintiffs . . . should not be allowed to claim . . . that a child born of their marriage was unwanted, burdensome, and caused by a doctor's negligence or breach of warranty.

9 UTAH L. REV. 808, 813 (1965).

[20] *See, e.g.* Thompson v. Town of Ft. Branch, 204 Ind. 152, 178 N.E. 440 (1931).

covered for the support of an unwanted child should not be allowed to recover for the wrongful death of the same child, or at least should not be permitted to claim more than nominal damages. In addition, if a child is only slightly unwanted it is possible that the two figures may be equal and the couple would be unable to claim damages in either unwanted child support or wrongful death as each off-sets the other. Indeed, would not judicial acceptance of the proposition that the life of a child may sometimes be more a burden than a blessing require investigation into every wrongful death action to discover whether it was truly a tragic event or the happy relief of an unwanted burden? Should a couple suing for wrongful death of their child be forced to go through the agonizing and preposterous proof that they loved the child more than the going rate in unwanted child support actions? Or for that matter should the courts tolerate couples in unwanted child support cases attempting to prove how little they love the child in order to maximize the recovery? More is involved than a mere legal anomaly. The contradiction between recovery in wrongful death and unwanted child support embraces two irreconcilable concepts of the dignity and value of human life.

These concepts highlight the question of whether the courts should venture into this delicate area of family structure. Judicial cognizance of the fact that a child is unwanted, however well qualified and limited, could cause a subtle weakening in the family structure by lay misinterpretation of the purpose and meaning of the court's opinion. In short, the issue may be too subjective[21] to be handled properly by even the most adept court. As expressed by one writer: "There are some wrongs which must be suffered and the law cannot provide a remedy for them. To attempt to do so may do more social damage than if the law leaves them alone."[22]

But regardless of whether the "Blessed Eventors" or the "Non-Blessed Eventors" win the debate, courts should treat this type of recovery as *sui generis*. Decisions and considerations concerning certain analogous topics such as "wrongful life" should have only limited bearing. The "wrongful life" cases involve a suit by an

[21] Even the prerequisite decision that voluntary sterilization is not against public policy (*see* note 15, *supra*) would not be accepted by a large number of people. Many religions, especially Roman Catholic, take the position that sterilization for any purpose is against the natural law and morally wrong. *See* 31 N.Y.U.L. REV. 1170, 1181-82 (1956).

[22] Ploscowe, *An Action for "Wrongful Life,"* 38 N.Y.U.L. REV. 1078, 1080 (1963).

illegitimate against those responsible for his birth for the recovery of damages inflicted by the fact of being illegitimate (e.g., suit by the bastard son against his father).[23] The court in *Custodio* tended to commingle the "wrongful life" cases. As the court said: "The ramifications of this case also embrace the subject of 'wrongful life.' "[24] The defendant also raised the issue of "wrongful life" on petition for rehearing, arguing that the "wrongful life" cases, which generally have been unsuccessful, established that the fact of life itself could not be a ground for recovery. Yet the principles and policies involved in "wrongful life" and unwanted child support have more differences than similarities. The desired deterrent effect[25] in "wrongful life" actions (i.e., curbing extramarital sexual activity[26] or lessening carelessness on the part of guardians of *non sui juris* women[27]) is quite different from that in unwanted child support (i.e., discouraging doctors from being negligent in performing sterilization operations). Moreover a court that disallows recovery in unwanted child support because of the fear that the child may become an "emotional bastard" or that such a recovery would be disruptive of the family structure would not be inconsistent in allowing "wrongful life" recovery to a real bastard who obviously knows

[23] The term "wrongful life" was coined by the court in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964). In *Zepeda,* a bastard son sued his father for damages received by the stigma of going through life as an illegitimate. The court, while acknowledging a wrong, refused recovery because the ramifications of the decision would be so far reaching that such an innovation, it was felt by the court, should be pursued by the legislature. However, in Williams v. State, 46 Misc. 2824, 260 N.Y.S.2d 953 (Ct. Cl. 1965) the New York court did not exercise such judicial restraint. In that case there was a suit by a bastard child against a state-run mental hospital for negligence in allowing an inmate to rape the child's mother. However, this decision was later reversed in a pithy two-paragraph opinion, 269 N.Y.S.2d 786 (1966). For extensive comment on these cases see 28 ALBANY L. REV. 174 (1964); 49 IOWA L. REV. 1005 (1964); 38 N.Y.U.L. REV. 1078 (1963); 25 OHIO ST. L.J. 145 (1964); 18 STAN. L. REV. 530 (1966); 112 U. PA. L. REV. 780 (1964).

[24] 59 Cal. Rept. at 476 n.11 (1967).

[25] *See* W. PROSSER, TORTS 23 (3d ed. 1964).

[26] It is questionable whether one who gives into his lusts in spite of possible claims of child support in paternity suits, theological condemnation, social stigma, personal frustration and guilt, possible criminal penalties, and the danger of venereal disease, is likely to be deterred because of a possible "wrongful life" action.

[27] Mental institutions could probably not avoid such incidents as occurred in *Williams* without interfering with the vital group therapy treatment. The likely result, if suits multiplied, would be the dispensing of birth control pills to the female inmates.

that he was unwanted and who was never a part of a traditional "family structure." Nonetheless it seems more likely that a court will grant recovery in unwanted child support while denying it in "wrongful life." This is because unwanted child support does not entail the crippling problem present in "wrongful life" actions.

The difficulty of granting recovery in "wrongful life" is an internal paradox peculiar to the action. It is *not* a situation where the child would have been legitimate but for the actions of defendant which made him illegitimate, but rather the child is illegitimate where but for the actions of the defendant he would not have been at all. The defendant, however wrong or negligent he may have been, did bestow the gift of life upon the child.[28] Unless the illegitimate child is a thanatomaniac he has no cause to complain.[29] The situation in *Custodio* is quite different. Here the plaintiff is not questioning the value of his own life but that of another person to whom he has legal and moral responsibilities. One can not be burdened with one's own existence but one can be burdened with someone else's existence. Recovery should be denied in "wrongful life" because the value of a person's life to himself is almost infinite (limited only by the concept of an afterlife), while the disadvantages of life whether they be illegitimacy, poverty, or physical or mental[30] deformity are always somewhat less than infinite, and thus there can never be any net damage.[31] But the value of someone's else's life

[28] As one writer summarized, referring to the *Williams* case:

> She, as the genetic product of a particular man and woman, both institutionalized for mental care, either had to be born illegitimate or not at all. When a court recognizes a cause of action under these circumstances, is it acknowledging no life as the preferred alternative? If so, is it also giving its approval to abortion in cases where the disadvantages of being born are thought by the court to outweigh the advantages? . . . . Or is the court adhering to traditional views that life under any circumstances is a positive benefit, but that the bastard nevertheless should recover damages for purposes of deterring the defendant's conduct?

18 STAN. L. REV. 530, 533 (1966).

[29] *Cf.* RESTATEMENT OF TORTS § 920 (1939).

[30] Anyone who was ever moved by John Steinbeck's OF MICE AND MEN would testify to the dignity of life, however retarded in intelligence.

[31] The New York court in reversing the *Williams* decision (*see* note 23 *supra*) took a somewhat different tack, saying that the damages, if any, would be impossible to measure:

> In essence, and regardless of the verbiage of the claim above quoted, the damages asserted rest upon the very fact of conception and would have to comprehend the infirmities inherent in claimant's situation as against the alternative of a void, if nonbirth and nonexistence may be

is not limitless to another person.[32] The burdens which the other person imposes may well outweigh the benefits he might bestow.[33]

It does not necessarily follow from the above that recovery should be allowed in *Custodio*. It is merely to stress that the difficult ironies in the "wrongful life" cases are not present in this case. It is for this reason that the court would do well to keep the "wrongful life" cases on the periphery of the decision making process. Recovery in *Custodio* and other unwanted child support cases would not be internally paradoxical. Recovery would depend on whether, in judicial opinion, the subjective fear of undermining family life and psychologically harming the child is outweighed by the objective financial damage to the plaintiff. It is this question that the court must consider if it receives the case again on appeal.

RICHARD J. BRYAN

Domestic Relations—Custody—Evidence—Has the Polar Star Been Obscured by Statute in North Carolina?

"[T]he welfare of the child is the polar star by which the discretion of the court is to be guided. . . ." This oft quoted[2] phrase appears to be the guiding precept for the North Carolina courts in custody cases except where it collides with the conflicting policy of judicial economy.[3]

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expressed; and could not, without incursion into the metaphysical, be measured against the hypothesis of a child or imagined entity in some way identifiable with claimant but of normal and lawful parentage and possessed of normal or average advantages.

269 N.Y.S.2d 786, 787 (1966).

[32] To use an extreme example: The value of the life of someone attacking an innocent victim with a knife would be *de minimis* from the viewpoint of the innocent victim.

[33] One commentary glossed over this distinction. Referring to Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964), an unwanted child support case, and *Zepeda*, the writer said:

> In both . . . the claim is essentially that life could be damaging. Viewed in this light, the claims seem contrary to a concept, fundamental to our legal system, that life is inherently valuable. The practical importance of all ramifications of this concept may be doubted in view of the current population explosion. However, it is only realistic to consider that it would seem extraordinary for a court to declare that life under any adverse condition or to any person could be damaging.

9 UTAH L. REV. 808, 814 n.37 (1965).

[1] *In re* Lewis, 88 N.C. 31, 34 (1883).

[2] R. LEE, NORTH CAROLINA FAMILY LAW § 224 (1963).

[3] "Should we accept the contentions of the defendant and forbid the use

In *Gustafson v. Gustafson*[4] Judge Mintz awarded custody of a minor child to the mother after a preliminary hearing at which *ex parte* affidavits were submitted to establish her mental stability. The defendant husband's requests to cross examine the affiants and to examine the physicians who treated Mrs. Gustafson for the illness allegedly caused by the defendant's conduct were refused. The supreme court[5] found that Judge Mintz did not abuse his discretion in disallowing the cross examination of the affiants, and further stated that he was not *authorized* under the proviso to the physician-patient privilege statute[6] to compel the disclosures sought by the defendant since he was not a "presiding judge of a Superior Court in term."[7] The court in the instant case appears to have foreclosed the "polar star" in future cases by stating that the judge conducting the preliminary hearing does not have the power to compel disclosure under N.C. GEN. STAT. § 8-53 (1953) even though the proper administration of justice requires it.

Custody was granted to the plaintiff approximately six months after her return from a two year rest in a mental institution. Plaintiff twice attempted to take her own life while at the institution. In light of the above facts, the welfare of the child dictates a full investigation into the fitness of the mother before awarding custody to her. It is impossible to perceive how the welfare of the child has been enhanced by snatching her away from a home where she has spent two years, especially in light of the fact that the defendant's fitness is unchallenged[8] and the plaintiff's is so questionable. The

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of affidavits and require the presence, examination and cross examination of each of the witnesses at preliminary and temporary hearings and motions pending trial, it would cause serious and unnecessary delay." Gustafson v. Gustafson, 272 N.C. 452, 455, 158 S.E.2d 619, 621 (1967).

[4] 272 N.C. 452, 158 S.E.2d 619 (1967).

[5] *Id.*, 158 S.E.2d 619 (1967).

[6] N.C. GEN. STAT. § 8-53 (1953): Communications between physician and patient.—No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

Id.

[7] The words "presiding judge of a superior court" refer to the superior court judge who presides at the trial. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

[8] "From the record it appears that both the plaintiff and the defendant

disruptive effect of a change of custody on a child's world should alone prevent a court from shifting custody where both parties appear to be fit guardians.[9]

The court in the instant case appears to be more concerned with establishing that the procedures employed for determining custody did not work an injustice upon the defendant than with providing for the welfare of the child.[10] The court stressed the temporary nature of the custody award. Theoretically, at least, the defendant has not been seriously deprived of any of his rights since after the trial of the case on the merits, the custody question will be considered de novo.[11] But practically he has been denied the companionship of his child for an indeterminate period of time—the length of which depends upon the congestion of the local calendar. Also, this period of time spent with the mother is bound to influence the malleable child's feelings and preference as to her choice of a permanent guardian. The North Carolina Court has stated that "[t]he wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between parents, but is not controlling."[12] Often, in close cases where both parents are fit guardians, the judge at the *de novo* hearing will be reluctant to cast the child's world into chaos by changing the custody order. In the above situation it is possible that the original defeated party has had his rights foreclosed at the abbreviated preliminary custody hearing.

In order to remedy the above mentioned ills, a certain amount

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are of good character and that the court could well have adjudged that both were fit and suitable persons to have custody of this child." 272 N.C. 452, 458, 158 S.E.2d 619, 623 (1967).

[9] "[W]here young children have been placed in one home . . . for a substantial period of time and the situation seems satisfactory, there is a reluctance to uproot the children from familiar surroundings and place them in a strange home with a parent who hardly knows them." 24 Am. Jur. 2d. *Divorce and Separation* § 820 (1966).

[10] "The ultimate right of cross examination will be afforded the parties at the trial of the cause, and this is within the purview of the Court's decision in *Stanback v. Stanback* (citations omitted)." 272 N.C. 452, 455, 158 S.E.2d 619, 621 (1967). "It must be recalled that at the trial of the case affidavits will not be admissible and that the witnesses must appear in person. Therefore the fact that in this hearing for a *temporary* purpose the plaintiff used affidavits of physicians who treated her does not bring into play the proviso of G.S. 8-54." *Id.* at 457, 158 S.E.2d at 622.

[11] Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

[12] James v. Pretlow, 242 N.C. 102, 105, 86 S.E.2d 759, 761 (1955).

of judicial economy[13] will have to be sacrificed in the interest of justice and the welfare of children. It will be necessary to grant a full judicial hearing in the first instance on the custody question. At present, the presiding judge has the authority to make these hearings as broad or as narrow as he, in his discretion, deems necessary. This power is nugatory when mental or emotional stability is the critical issue since the judge does not have the authority to compel disclosure from treating physicians under N.C. GEN. STAT. § 8-53 (1953). A statutory amendment will be necessary to extend the N.C. GEN. STAT. § 8-53 (1953) proviso power to a judge presiding at custody hearings.[14]

The legislature will be required to amend N.C. GEN. STAT. § 8-53 (1953) in order to avoid the inconsistency and embarassment of having, in effect, two different physician-patient privilege statutes —one absolute, and one qualified. The privilege in the newly created district courts would be absolute since the district court judges do not possess the power to compel disclosure under the present statute.[15] This factor gains added significance since the district court has exclusive jurisdiction over custody matters.[16] The legislature need only take a short, but prudent, step to extend the proviso power to judges presiding at custody hearings. The rationale behind the pro-

[13] Much of the evidence presented at the custody hearing will be duplicated at the trial on the merits.

[14] The court has construed the proviso power to be limited to "the presiding judge of a Superior Court in term." A superior court judge in chambers has been denied the proviso power. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

[15] The only possible method of avoiding this result would be for the courts to construe N.C. GEN. STAT. § 7A-291(6) (Supp. 1967) as a catch-all phrase granting the proviso power to district court judges. The language of this section does not appear broad enough for such a construction:

> To issue all process and orders necessary or proper in the exercise of his powers and authority, and to effectuate his lawful judgments and decrees.

Id.

It is doubtful that the court will adopt such a liberal construction of this section in order to grant the proviso power to district court judges in light of the court's marked reluctance to construe liberally the proviso power in the past. *See* Sims v. Insurance Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

[16] *See* N.C. GEN. STAT. § 7A-244 (Supp. 1967): Domestic Relations.—The district court division is the proper division, without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody.

viso,[17] the unique character of custody proceedings,[18] and the lack of a strong foundation for the physician-patient privilege[19] all strongly favor this step. It is in fact necessary to return the "polar star" to its rightful position.[20]

WILLIAM J. DOCKERY

Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements

In *Todd v. Watts*,[1] plaintiff sought damages for persistent headaches and backaches allegedly resulting from injuries she had sustained in an automobile collision. Her evidence showed a collision, and that she had been thrown forward, striking her head on the windshield, her knees on the dashboard and wrenching her back. An orthopedic surgeon who had treated plaintiff testified in her behalf. He first related the history of the complaints, as told by the plaintiff on her first visit to him for treatment. This testimony included reference to the accident and a recitation that she told him "she was thrown forward when the collision occurred, striking her head and forehead against the front windshield glass, breaking the glass and abrading her forehead. She told me . . . she also wrenched and contused both knees and her low back."[2] There was no objection to this testimony, although on request of defense counsel its use was limited to corroborating the testimony previously given by the plaintiff.[3] The doctor then was asked to give certain opinions as

[17] The proviso was inserted by the legislature to prevent the privilege from serving as a bar to justice.

[18] As noted above, time may be a controlling factor in this type of litigation. Also, it may be extremely important to the welfare of the child that the initial determination be correct.

[19] *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 Yale L.J. 607 (1943).

[20] The question of whether to remove a child from the custody of its natural mother is one over which judges have agonized from time immemorial. *See In re* Two Mothers, 1 Kings 3:11-28, decided by King Solomon, evidently the first 'reported' case. Klein v. Klein, 204 So. 2d 239 (Fla. Ct. App. 1967), *aff'd per curiam*, 18 L. Ed. 2d 1580 (1967).

[1] 269 N.C. 417, 152 S.E.2d 448 (1967). For a previous discussion of this case, see Brandis, *Evidence, Survey of North Carolina Case Law*, 45 N.C.L. REV. 934, 949-51 (1967) [hereinafter cited as Brandis].

[2] 269 N.C. at 421, 152 S.E.2d at 451-52 (dissenting opinion).

[3] *Id.* at 421, 152 S.E.2d at 451. This seems consistent with North Caro-

to the permanency and cause of plaintiff's continuing pains. Over objection, he was permitted: (1) to give his diagnosis, which included reference to both the accident and the resultant injuries; (2) to answer that, in his opinion, plaintiff would suffer "some continuing lumbo-sacral strain and persistent headaches as a result of her auto accident;" and (3) to answer that a congenital spine defect found in plaintiff could have been aggravated by an injury received in the accident.[4] The jury awarded damages to the plaintiff. The North Carolina Supreme Court awarded a new trial (Chief Justice Parker dissenting), solely because of error in admitting this testimony.

The majority held that allowing the physician to express an opinion based on matter beyond his personal knowledge and not properly grounded upon a hypothetical question was error. The dissenting Chief Justice relied on the earlier case of *Penland v. Bird Coal Company*[5] (which the majority did not mention). That case held a treating physician's opinion to be admissible although based wholly or in part on statements of the patient and allowed the physician to testify to the statements in order to show the basis for his opinion, even when not admissible as substantive evidence.[6] As a result of the majority holding, the viability of the *Penland* rule is open to serious question.

In considering the effect of *Todd* on the *Penland* decision, certain related problems should be distinguished. As a practical matter, a doctor might be called upon to testify to what his patient told him for one of two reasons. First, the testimony might be sought as substantive evidence, i.e., to prove the truth of the matter stated.[7] This is clearly hearsay[8] and, to be admissible, it must fall under

lina's liberal use of the "corroboration" rule to allow testimony otherwise excludable as hearsay. *See, e.g.*, Bowman v. Blankenship, 165 N.C. 519, 81 S.E. 746 (1914). The rule is discussed in D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE §§ 50-52 (2d ed. 1963) [hereinafter cited as STANSBURY].

[4] 269 N.C. at 419-20, 152 S.E.2d at 450-51.

[5] 246 N.C. 26, 97 S.E.2d 432 (1957).

[6] *Id.* at 31, 97 S.E.2d at 436.

[7] *See, e.g.*, Peterson v. Richfield Plaza, 252 Minn. 215, 89 N.W.2d 712 (1958).

[8] "[W]henever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay." STANSBURY § 138, at 336. See also C. MCCORMICK, LAW OF EVIDENCE § 225 (1954) [hereinafter cited as MCCORMICK].

one of the recognized exceptions to the hearsay rule.[9] Second, the doctor might base his opinion on his patient's statements and repeat the statements only to show the grounds for his opinion.[10] In the former instance, due to a high degree of trustworthiness,[11] most courts allow a witness (physician or layman) to testify to a person's statements of *present pain and suffering* as substantive evidence.[12] Admitting a patient's statements to his treating physician of *past symptoms* seems equally trustworthy,[13] and courts are beginning to adopt this view.[14] If the patient's statements concern the supposed *cause* of his injuries or illness, they are usually not admissible to prove the occurrence of the causal event.[15]

Although some courts fail to recognize it,[16] the hearsay problems

[9] Professor Wigmore described the requirements for allowing hearsay testimony as being (1) necessity, and (2) a circumstantial probability of trustworthiness. 5 J. WIGMORE, EVIDENCE §§ 1421, 1422 (3d ed. 1940) [hereinafter cited as WIGMORE].

[10] *See, e.g.,* Goldstein v. Sklar, 216 A.2d 298 (Me. 1966).

[11] See WIGMORE §§ 1421-22, 1718.

[12] See Biles v. Holmes, 33 N.C. 16 (1850) (statements to physician); Salinas v. Casualty Co. of California, 323 S.W.2d 600 (Tex. Civ. App. 1959) (statements to layman). Many North Carolina cases recognizing this exception to the hearsay rule are collected in Note, 13 N.C.L. REV. 228 (1935).

[13] "A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment." Meaney v. United States, 112 F.2d 538, 540 (2d Cir. 1940) (L. Hand, J.). For obvious reasons, statements of past symptoms to a layman would not be imbued with a similar motive for truth, and thus the hearsay exception as applied to laymen does not extend beyond declarations of present pain and suffering. See WIGMORE § 1722. Note further that the reasons for the hearsay exception are not so readily applicable when the physician is consulted only to qualify him to testify. See note 20 *infra.*

[14] Meaney v. United States, 112 F.2d 538 (2d Cir. 1940); *accord,* Peterson v. Richfield Plaza, 252 Minn. 215, 89 N.W.2d 712 (1958) (overruling prior inconsistent cases). North Carolina has approached, if not adopted, this exception. *See* Moore v. Summers Drug Co., 206 N.C. 711, 175 S.E. 96 (1934), *noted in* 13 N.C.L. REV. 228 (1935).

[15] Roosa v. Loan Co., 132 Mass. 439 (1882); Pinter v. Parsekian, 92 N.J. Super. 392, 223 A.2d 635 (Super. Ct. 1966); WIGMORE § 1722. *But cf.* Hillman v. Utah Power & Light Co., 56 Idaho 67, 51 P.2d 703 (1935); Greenfarb v. Arre, 62 N.J. Super. 420, 163 A.2d 173 (Super. Ct. 1960) (patient deceased, no other testimony as to cause available), *petition for cert. denied,* 33 N.J. 454, 165 A.2d 233 (1960); MCCORMICK § 266.

[16] *See* Paulk v. Thomas, 115 Ga. App. 436, 154 S.E.2d 872 (1967); Schears v. Missouri Pac. R.R., 355 S.W.2d 314 (Mo. 1962); Reid v. Yellow Cab Co., 131 Ore. 27, 279 P. 635 (1929). In *Reid,* a concurring justice pointed out: "The prevailing opinion fails to recognize the distinction between receiving in evidence the communications of a patient to his physician as proof of the truth of the matter stated and admitting them for the purpose of showing the basis of the physician's judgment." *Id.* at 35-36, 279 P. at 638 (discussing the distinction).

set out above are not involved when the treating physician gives his opinion grounded on the patient's subjective statements and relates this history only to show the basis for the opinion.[17] Testimony is not generally objectionable as hearsay if introduced for any reason other than to prove the truth of the matter stated.[18] Absent these hearsay considerations, there seems no logical basis for differentiating between opinions based on patient's statements of present pain and suffering, past symptoms or cause. Courts not applying hearsay rules to physician opinion testimony usually do not make these distinctions.[19] Finally, the above rules which allow admission of patient's statements, either as substantive evidence or as basis for opinion, usually do not extend to statements made by the plaintiff to a *non-treating* physician[20] or to statements made to the treating physician by a third party (rather than the patient).[21] This note is confined to the *Todd* context of statements made by a *patient* to a *treating physician* and referred to by the physician during the trial only as indicating *basis for opinion.*

As pointed out by the dissenting Chief Justice in *Todd,* the general rule is that a treating physician may base his opinion on state-

[17] "In such an instance the patient's statements are not regarded as hearsay; the statements are introduced without regard for the truthfulness of the fact stated, but merely as observed facts forming part of the physician's data." Gonzales v. Hodson, 420 P.2d 813, 816 (Idaho 1966). Instructions that the statements are to be considered only in explanation of the physician's opinion should counteract any tendency of the jury to use the evidence as proof of the facts stated. Goldstein v. Sklar, 216 A.2d 298 (Me. 1966).

[18] STANSBURY § 141.

[19] *See* WIGMORE § 688.

[20] Most courts exclude patient's statements as substantive evidence when the physician was consulted to qualify him to testify, even when the statements are of present pain and suffering. MCCORMICK § 267; WIGMORE § 1721. Distinctions between treating and non-treating physicians also are made when the patient's statements are used only as grounds for the physician's opinion. Troj v. Smith, 199 So. 2d 285 (Fla. 1967) (distinction between treating and diagnosing physician); Rossello v. Friedel, 243 Md. 234, 220 A.2d 537 (1966); Cooper v. Seaboard Airline R.R., 163 N.C. 150, 79 S.E. 418 (1913) (dictum). *Contra,* Waldrop v. Driver-Miller Plumbing & Heating Corp., 61 N.M. 412, 301 P.2d 521 (1956); *see* Ray, *Testimony of Physicians as to Plaintiff's Injuries,* 26 TUL. L. REV. 60, 67-69 (1951).

[21] Seawell v. Brame, 258 N.C. 666, 129 S.E.2d 283 (1962) (opinion based on facts related by patient's wife and others); WIGMORE § 688(4). *But see* State Realty Co. v. Ligon, 218 Ala. 541, 119 So. 672 (1929) (opinion based on report of another doctor); Yellow Cab Co. v. Henderson, 183 Md. 546, 39 A.2d 546 (1944) (doctor's opinion based on history given by injured child's mother). *See generally* Comment, *The Admissibility of Expert Medical Testimony Based in Part Upon Information Received From Third Persons,* 35 S. CAL. L. REV. 193 (1962).

ments made to him by his patient for purposes of treatment[22] and, in doing so, may testify to these statements insofar as they show the grounds for his opinion.[23] Courts adopting this rule have not disapproved the well established device of the hypothetical question as a proper method of extracting opinion testimony.[24] It seems rather that asking the doctor to repeat what he has learned of the case history from his patient and then asking his opinion thereon is a permissible alternative to the hypothetical question method. To be logically consistent with a fundamental concept of expert opinion testimony,[25] it would still seem necessary for the facts contained in the statements to be introduced at some point as substantive evidence, since a jury cannot be expected to evaluate an opinion, whether elicited by a hypothetical question or otherwise, without first being able to determine the validity of its factual basis.[26] Thus it appears that this rule functions much like the hypothetical question. "[T]he only difference is that in the former instance the witness supplies both the premise and the answer, whereas in the latter [opinion based on hypothetical question] he supplies only the one."[27]

Despite the similarity between the two methods of admitting doctors' opinion testimony, the rule allowing a physician to base his opinion on his patient's subjective statements, and in doing so to indicate these statements as his premise, seems a desirable one to maintain. It frees litigants, courts and juries from the mazes

[22] People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944); Brown v. Blauvelt, 152 Conn. 272, 205 A.2d 773 (1964) (dictum); Electro-Motive Div., General Motors Corp. v. Industrial Comm'n, 32 Ill. 2d 35, 203 N.E.2d 408 (1965); State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959). Numerous authorities for this rule are cited in 31 Am. Jur. 2d *Expert and Opinion Evidence* § 108 (1967); Annot., 51 A.L.R.2d 1051 (1957); Annot., 65 A.L.R. 1217 (1930).

[23] Lowery v. Jones, 219 Ala. 201, 121 So. 704 (1929); Wise v. Monteros, 93 Ariz. 124, 379 P.2d 116 (1963); Simpson v. Heiderich, 4 Ariz. App. 232, 419 P.2d 362 (1966); Goldstein v. Sklar, 216 A.2d 298 (Me. 1966). *See also* authorities cited note 22 *supra*; WIGMORE §§ 655, 1720(1). Annotations collecting cases on this rule can be found in Annot., 130 A.L.R. 977 (1941); 80 A.L.R. 1527 (1932); 67 A.L.R. 10 (1930).

[24] *See* People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944) (example of use of both devices in same testimony).

[25] *Cf.* WIGMORE § 672.

[26] Peters v. Mutual Life Ins. Co. of New York, 107 F.2d 9 (3d Cir. 1939).

[27] Reid v. Yellow Cab. Co., 131 Ore. 27, 37, 279 P. 635, 638 (1929) (concurring opinion). For example, the doctor might be asked for his opinion "based on these things the patient told you, to which you have testified."

and misuses of the hypothetical question.[28] Since it is in step with the common practices of medical science, there seems no compelling reason to place judicial mistrust on medical opinion based on the same subjective statements the physician frequently must consider for purposes of treatment.[29] North Carolina had clearly adopted this rule in *Penland v. Bird Coal Company*.[30] The *Todd* decision places the future of this rule in confusion and doubt.

The effect of *Todd* on the *Penland* rule is purely conjectural, since the majority chose neither to discuss nor cite the earlier case.[31] There are, however, several possible interpretations. First, it may be argued that *Penland* has been distinguished and limited to its factual context.[32] This possibility stems from the fact that the medical opinions in these cases are grounded on slightly different types of statements by the patients. In *Penland,* a Workmen's Compensation case,[33] plaintiff sought payment for disability suffered from a fall while at work. His physician repeated what the patient had told him—a case history of a broken rib, punctured lung, and subsequent weakness and easy tiring—and gave an opinion as to percentage of disability based on this history. He did not relate the opinion

[28] The hypothetical question is frequently criticized by writers. Professor Wigmore wrote forcefully that "[i]ts abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice." WIGMORE § 686. See also MCCORMICK 33-34 & nn.2 & 3. The North Carolina court recognized the wide dissatisfaction with the hypothetical question in Ingram v. McCuiston, 261 N.C. 392, 399-400, 134 S.E.2d 705, 711 (1964) (dictum) (six page hypothetical question).

[29] *See* WIGMORE § 688. Physicians occasionally take the opportunity to proselytize in court for judicial acceptance of the rule allowing them to base their opinions on the subjective statements of their patients. See Wise v. Monteros, 93 Ariz. 124, 126, 379 P.2d 116, 117 (1963) ("'The history of these cases . . . [is] the only way that a physician can deduce what happened . . . .'"); Paulk v. Thomas, 115 Ga. App. 436, 441, 154 S.E.2d 872, 877 (1967) ("'[S]o I can't come in and start feeling of a man's spine—he's got to tell me something about it. . . .'").

[30] 246 N.C. 26, 31, 97 S.E.2d 432, 436 (1957).

[31] Part of the confusion resulting from *Todd* springs from the very fact that the majority avoided any mention of *Penland.* The earlier case was clearly brought to their attention, both by the dissenting opinion and in the plaintiff's brief. Brief for Appellee at 13.

[32] See Brandis 950.

[33] The rules of evidence in hearings before administrative tribunals seem somewhat less stringently enforced. STANSBURY § 4. Hence it might be argued that the *Todd* majority considered the *Penland* rule valid in a hearing before the Industrial Commission, but not in a jury trial. However, the court in *Penland* gave no indication that the rule was to be so limited. Further, had the *Todd* majority intended to distinguish *Penland* on this basis, it seemingly would have done so expressly.

of disability directly to the fall, but rather to the *past symptoms* of the plaintiff.[34] In *Todd,* however, the opinion dealt with and was based on the patient's statements of external *cause* (accident and initial injuries).[35] Due to the trustworthiness and necessity requirements of exceptions to the hearsay rule, this distinction between statements of past symptoms and statements of external cause is frequently made when the issue is admissibility of the patient's statements as substantive evidence.[36] Even assuming the validity of this distinction, there seems no strong reason for applying it to the question of admissibility of opinion.[37] The problems and policies of the hearsay rule are not involved.[38] To disallow medical opinion based on patient's statements of supposed cause is to divest the doctor of a normal part of his total considerations for purposes of diagnosis and treatment.[39] It simply seems unnecessary and impractical to balance the outcome of litigation on such a tenuous distinction.

Another possible effect of *Todd* is that the *Penland* rule has been abandoned altogether. The *Todd* majority quoted a standard rule regarding the eliciting of a physician's opinion as to cause by hypothetical question[40] and stated that "[a] witness is not permitted to base an opinion on facts of which he has no knowledge,"[41] but that

[34] 246 N.C. 26, 30, 97 S.E.2d 432, 435.

[35] See note 4 *supra* and accompanying text.

[36] *Compare* authorities cited note 14 *supra with* authorities cited note 15 *supra.*

[37] See note 19 *supra* and accompanying text. Express efforts to exclude medical opinion testimony as to cause when based on patient's history of the case, including statements of supposed cause, have been rejected by many courts. Atchison, T. & S.F. Ry. v. Preston, 257 F.2d 933 (10th Cir. 1959); North American Acc. Ins. Co. v. Burkett, 281 P.2d 434 (Okla. 1956). See also WIGMORE § 688(3); Annot., 66 A.L.R.2d 1082, 1100-04 (1959); Annot., 136 A.L.R. 965, 980-82 (1942).

[38] Cases cited note 17 *supra.*

[39] WIGMORE § 688(3). Even when a physician would not need to consider possible causes for purposes of diagnosing or treating his patient, there would seem no need to exclude his opinion based on his patient's statements of supposed cause.

[40] "'It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question.'" 269 N.C. 420, 154 S.E.2d 451, quoting from Spivey v. Newman, 232 N.C. 281, 284, 59 S.E.2d 844, 847 (1950). The court in *Spivey* was dealing with the form of a hypothetical question and the physician's answer. The holding does not appear to address itself to an issue such as the one in *Todd.*

[41] 269 N.C. 420, 152 S.E.2d 451. Authority for this proposition came

"this . . . is what the doctor purported to do. . . . The doctor could not assume the source of the symptoms which plaintiff reported to him. . . ."[42] The court further stated that "[t]he Physician's opinion as to possible cause of these symptoms and their probable permanency, should have been elicited as the response to a properly phrased hypothetical question. . . ."[43] The references to "cause" and "source" in this language lend weight to the aforementioned possibility that *Todd* was meant to limit the *Penland* rule to opinions utilizing patient's statements of past symptoms. Considered together, however, the court's observations permit an even broader interpretation: that in no event will a physician's opinion, if not based on matter within his personal knowledge, be admissible unless elicited by a hypothetical question. To grant such exclusive status to the hypothetical question would in effect do away with the *Penland* rule.

Any final analysis of *Todd* must depend at least partly on the reasons for the ruling in that case itself. A main objection of the court in *Todd* to the physician's opinion seems to have been the manner in which it was stated. As phrased by the majority, although the physician had no personal knowledge of the plaintiff's accident or initial injuries, "Yet he stated as a fact . . ." that she had low back injuries and pain and that certain results occurred in or were caused by her automobile accident.[44] The court stated that "Whether plaintiff had persistent headaches and continuous backaches and if so, whether the collision caused them, were crucial questions in the case."[45] This language is reminiscent of the rule that expert opinion as to cause "invades the province of the jury" if stated in terms more definite than "could" or "might."[46] The rule has been applied in cases where improperly phrased hypothetical questions called forth medical opinions as to cause in terms of certainty analogous to the situation in *Todd*.[47] Although severely criticized by many courts

from Robbins v. Meyers Trading Post, Inc., 251 N.C. 663, 111 S.E.2d 884 (1959), in which a witness was erroneously allowed to give his opinion as to the probable value of a house had it been constructed "exactly like" another home, the witness having never seen the other house. Any relation between this case and the question of admissibility of a physician's opinion based on his patient's statements is tenuous, at best.

[42] 269 N.C. at 420-21, 152 S.E.2d at 451.

[43] *Id.*

[44] 269 N.C. 420, 152 S.E.2d 451.

[45] *Id.* at 421, 152 S.E.2d at 451.

[46] See STANSBURY § 137, at 332-33.

[47] Stathopoulos v. Shook, 251 N.C. 33, 110 S.E.2d 452 (1959) (injuries

and writers[48] and frequently avoided by technical distinctions,[49] this "could" or "might" rule has never been repudiated by the North Carolina Court.[50] The majority in *Todd* may have had this concept in mind. If so, the ruling in the case was possibly intended to prevent prospectively similar errors in opinion testimony as to cause, since by definition a "properly phrased hypothetical question" must state the grounds for the opinion as assumptions and elicit that opinion in the proper "might" or "could" incantation.[51] If this was the rationale behind the *Todd* decision, it is arguable that the holding should be limited in future application to those situations where the physician's opinion as to *cause* is sought. Even then use of the *Penland* rule should be allowed unless the opinion is stated in the objectionable terms of certainty.[52] This construction of *Todd* would leave the *Penland* rule as a functioning alternative to the rigors of the hypothetical question. It would also permit complete restoration of the *Penland* rule if the "could" or "might" rule is ever abandoned.[53]

It seems that a new trial was awarded in *Todd*—and a practical evidentiary rule jeopardized to an undeterminable degree—because the plaintiff found herself on the wrong side of an exceedingly fine line. It is highly unlikely, in light of all the surgeon's testimony,[54] that the jury considered the part held erroneous as "fact" rather than opinion as to cause based on certain implicit assumptions.[55]

"were caused by the collision"); Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1912).

[48] *E.g.*, Griswold v. Consolidated Prod. Co., 232 Iowa 328, 5 N.W.2d 646 (1942). *Griswold* collects, quotes and discusses both text and case authority in a lengthy opinion criticizing the "invading the province of the jury" and "could" or "might" rules.

[49] STANSBURY § 137 at 333 & n.67.

[50] The rule has in fact been reiterated in recent decisions. Apel v. Queen City Coach Co., 267 N.C. 25, 147 S.E.2d 566 (1966) (Higgins, J., quoting but indicating dissatisfaction with the rule); Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964), *noted in* 43 N.C.L. REV. 979 (1965).

[51] STANSBURY § 137.

[52] So long as the "could" or "might" rule remains functional, attorneys would be wise to instruct their physician-witnesses to avoid stating opinions as to cause in any terms other than the approved formula, even if the opinion is to be elicited by the hypothetical question method.

[53] Since the court has indicated dissatisfaction with the rule, Apel v. Queen City Coach Co., 267 N.C. 25, 147 S.E.2d 566 (1966), its abandonment hopefully is in the near future.

[54] See note 2 *supra* and accompanying text.

[55] It is further relevant to the technicality of the decision that these implicit assumptions were largely uncontradicted. See Brandis 950-51.

"If any error was involved, it seems hardly prejudicial enough, standing alone, to justify a new trial, at which the questions will explicitly state the assumptions clearly implicit in the testimony at the first trial."[56]

Pending judicial exposition of the scope of *Todd's* effect on the *Penland* rule, attorneys should follow the *Todd* formula of introducing evidence and having it incorporated into a hypothetical question designed to elicit carefully phrased opinions of their physician-witnesses. Caution is advised, for *Todd's* undermining of *Penland* and its spiritual affinity with criticized evidence concepts[57] may wipe out verdicts presumptively grounded on medical testimony which, though uniformly acceptable outside of court, is not twisted into phrases suitable for the strangely dissimilar ears of jurymen.

RICHARD W. ELLIS

Evidence—Traffic Violations to Impeach a Witness

Although counsel may coach his witness to "assume a virtue, if you have it not,"[1] with the witness having a criminal record, it may be of little avail. Courts have assumed that such a witness does not have virtue and have not hesitated to allow questions about prior criminal convictions for impeachment purposes,[2] "to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case."[3]

In the recent case of *Ingle v. Roy Stone Transfer Corporation*,[4] the North Carolina Supreme Court held that it was not error for the trial judge to allow defense counsel on cross examination to question plaintiff's witness concerning the following convictions: speeding 65 miles per hour in a 55 miles per hour zone, exceeding a safe speed, drunken driving, operating a motor vehicle while his

[56] *Id.* at 951.

[57] See note 28 *supra* (hypothetical question); note 48 *supra* ("could" or "might" rule).

[1] Shakespeare, *Hamlet* (III iv 160); *see* Bander, *Shakespeare and the Law*, CASE & COMMENT, Jan.-Feb. 1968 at 47.

[2] 3 J. WIGMORE, EVIDENCE § 926 (3d ed. 1940) [hereinafter cited as WIGMORE].

[3] State v Nelson, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930).

[4] 271 N.C. 276, 156 S.E.2d 265 (1967).

license was suspended, disregarding a stop signal, public drunkenness, and allowing an unlicensed minor to operate a motor vehicle. This holding reaffirmed the North Carolina Court's position that convictions of all crimes, be they felonies or misdemeanors, are admissible for impeachment purposes.[5] The reasoning behind this rule and the criteria on which convictions are admitted or excluded should be revaluated.

Underlying this rule of evidence is a syllogism similar to the following: all men convicted of a crime are bad men; all bad men are untruthful; *ergo,* all men convicted of a crime are untruthful.[6] The obvious fallacy in this theory is that it is an all inclusive generalization[7] which ignores the problem of relevancy. With some men and some crimes a conviction, especially if repeated, may be indicative of the witness' lack of credibility,[8] but such is not always the case. A consideration of three general observations will illustrate the danger of relying on such a fallacious theory to determine truth at a trial.[9] In the first place even a person convicted of a crime involving dishonesty may have superior powers of observation and memory, and in the absence of a reason to falsify, his testimony may be worth more than that of a witness with a spotless reputation whose powers of observation are limited and whose past experiences

[5] *Accord,* State v. Sims, 213 N.C. 590, 593, 197 S.E. 176, 178 (1938). D. STANSBURY, NORTH CAROLINA EVIDENCE § 112 (2d ed. 1963). [hereinafter cited as STANSBURY].

[6] "It is not the specific tendency of the witness to falsify but the general bad character of the witness as evidenced by the single act of which he was convicted that creates the basis of admissibility." Ladd, *Credibility Tests—Current Trends,* 89 U. PA. L. REV. 166, 176 (1940). [hereinafter cited as Ladd].

[7] The psychologist would probably find the major and minor premises of the syllogism blatantly false, for as Wigmore indicates, "to the psychologist, the common law's reliance on character as an index of falsehood is crude and childish." WIGMORE § 922, at 447.

[8] "While truth is truth whether it comes from a polluted or pure source when facts are in dispute the source of the conflicting testimony may cast light in determining what the truth is." Ladd 171.

[9] For an analysis of problems involved in determining truth in a jury trial see Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials,* 66 COLUM. L. REV. 223 (1966). The weakness of the rule permitting prior criminal convictions to reduce the credibility of a witness is emphasized in those jurisdictions such as North Carolina where the witness' answer is conclusive and the record may not be introduced. While asking the question to make the jury disbelieve the testimony, if the witness blatantly lies about his prior conviction, the jury never knows. *See* State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944); Coleman v. Railroad, 138 N.C. 351, 50 S.E. 690 (1905); STANSBURY § 112, at 254.

unconsciously influence his credibility.[10] Secondly, there may be people without criminal records who have no qualms about prevaricating even under oath.[11] Finally, the nature of the crime rather than the seriousness of the crime is important.[12] As one writer has indicated, there may be some felonies, even murder and manslaughter, which have no bearing on a man's propensity to dishonesty or falsification; while some misdemeanors, for example petty larceny, may well be indicia of the credibility of the witness.[13]

From the nature of the crime, it is apparent that traffic violations should not be admissible to impeach a witness because they have no bearing on his credibility.[14] Thus, the holding in *Ingle* illustrates the problem of establishing a relationship between the prior conviction and the search for truth in a trial, and the necessity of making relevancy the criterion. The immediate need in North Carolina,

[10] Ladd, *Some Observations on Credibility: Impeachment of a Witness,* 52 CORNELL L. REV. 239, 241-42 (1967).

[11] With many telling the truth is a habit and a principle which they adhere to always though they may indulge in drinking, swearing, gambling, roystering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth. Atwood v. Impson, 20 N.J. Eq. 150, 157 (Ch. 1869).

[12] See 21 AM. JUR. 2d *Criminal Law* §§ 18-21 (1965) for a discussion of the distinction between the terms felony and misdemeanor.

[13] Ladd 180.

[14] A number of courts have excluded evidence of traffic convictions to impeach a witness. In New York the use of traffic violations is prohibited by statute, and in Same v. Davison, 1 N.Y.S.2d 374 (1937) the court said that though a conviction arising out of the same occurrence was permissible as prima facie evidence of the facts, on cross-examination of the defendant, it should not have been permitted solely to affect credibility. *accord,* De Stassio v. Jansen Dairy Corp., 279 N.Y. 501, 18 N.E. 2d 833 (1939); *see* Dixie Culvert Mfg. Co. v. Richardson, 218 Ark. 427, 236 S.W.2d 713 (1951); Nesbit v. Cumberland Contracting Co., 196 Md. 36, 75 A.2d 339 (1950); Nelson v. Seiler, 154 Md. 63, 139 A. 564 (1927); State v. Hickman, 102 Ohio App. 78, 141 N.E.2d 202 (1956); *Contra,* Monaghan v. Keith Oil Co., 281 Mass. 129, 183 N.E. 252 (1932); Brown v. Howard, 42 R.I. 571, 114 A. 11 (1921). *See also* ANNOT., 20 A.L.R.2d 1217 (1951). It is interesting to note that some courts refusing to admit evidence of traffic violations have justified the exclusion on grounds of relevancy as in *Nesbit v. Cumberland Contracting Co.* where the judge said, "prior convictions for traffic violations of the motor vehicle law seem clearly to have no direct bearing upon veracity. . . ." 196 Md. 36, 41, 75 A.2d 339, 341 (1950). In State v. King, 224 N.C. 329, 333, 30 S.E.2d 230, 232 (1944), Justice Seawell suggested that traffic violations not be used to impeach a witness, and Stansbury later termed this a "wholesome suggestion." STANSBURY § 112, at 255.

therefore, is to limit the felonies and misdemeanors[15] admissible to those involving dishonesty and false statement. This formulation is the one proposed by the Uniform Rules of Evidence[16] and has been praised as possibly the best solution.[17]

A look at the problem from the viewpoint of the jury and of the witness will further illustrate the wisdom of making this change in the rule. If a witness is a party to the action, it is doubtful that the jury will ignore these convictions in deciding the verdict, especially if these prior convictions are of a similar nature. The jury

[15] Since the nature of the crime rather than the seriousness of the crime should be emphasized, the use of all crimes, both felonies, and misdemeanors, in North Carolina avoids the complications found in other jurisdictions using a different formula to determine the types of criminal convictions admissible. Either by legislation or judicial determination some courts allow felonies and misdemeanors involving *crimen falsi,* for example forgery, counterfeiting, and perjury, while other jurisdictions allow felonies and misdemeanors involving moral turpitude. *See generally* 98 C.J.S. *Witnesses* § 507 nn. 70 & 69 (1957); 58 AM. JUR. *Witnesses* § 740 (1948). For jurisdictions following the same rule as North Carolina *see* Bostic v. United States, 94 F.2d 636 (D.D.C. 1937); Black v. State, 215 Ark. 618, 222 S.W.2d 816 (1949); McMullen v. Cannon, 129 Ind. App. 11, 150 N.E.2d 765 (1958); Quigley v. Turner, 150 Mass. 108, 55 N.E.2d 765 (1889); Breland v. State, 221 Miss. 371, 73 So. 2d 267 (1954); State v. McKissic, 358 S.W.2d 1 (Mo. 1962).

[16] Uniform Rule of Evidence § 21.

[17] C. MCCORMICK, EVIDENCE § 43, at 90 (1954) [hereinafter cited as MCCORMICK]. It should be noted here that there is another rule of evidence relied upon in the principal case, *i.e.,* proof of general character to impeach a witness, which may hinder the North Carolina court in making this much needed transition. Most courts permit only reputation for veracity to be shown to impeach a witness and expressly refuse to allow proof of general character. *See* Ladd 172. In *Ingle,* however, the first statement made by the court was that "a witness may be impeached by evidence that his general character is bad. . . ." 271 N.C. 276, 279, 156 S.E.2d 265, 268 (1967). Then, quoting from State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938), the court continued: "any act of the witness which tends to impeach his character may be inquired about or proven by cross examination." 271 N.C. at 280, 156 S.E.2d at 269. Having made this determination, the court came rather easily to its holding that all crimes including traffic violations are admissible to impeach a witness's character by stating:

> Nor do we think that a person who has been guilty of drunken driving or consistently violates laws designed to protect life and property on the highway can claim an unblemished *general character.*

Id. at 282, 156 S.E.2d at 270. (emphasis added). Thus, by using general character, the court avoided the issue of the relevancy of the prior criminal convictions to ascertain the witness's credibility. It should be noted, however, that an inconsistency between the rule for proving character to impeach and the rule for admitting prior criminal convictions exists even in jurisdictions permitting only character for veracity to be shown to impeach a witness. In these latter jurisdictions honesty and veracity do not seem to be the criteria for admitting prior criminal convictions. WIGMORE § 926, at 470; § 982, at 550.

will decide on the basis of the witness' record rather than on the merits of the case.[18] The North Carolina court felt that because jurors are intelligent people they will be able to weigh such evidence properly,[19] but not all authorities agree.[20] If the witness is not a party to the action, introducing prior convictions of traffic violations having no bearing on veracity is judicially inefficient. Since most jurors are motorists, the chances are quite good that many of them will also have a record of traffic violations. Realizing that if they were the witness, the same would be used to cast doubt on their credibility, many jurors will simply ignore the evidence or else become antagonized.

Since the effect on the jury may be highly negative, a second reason for excluding proof of prior traffic convictions is the abuse to the witness. The court in *Ingle* said "responsible counsel will not abuse the rule."[21] Counsel have not always been noted for such restraint, however.[22] It should be remembered that "witnesses have rights as well as parties; it is too often the case that they are set up as marks to be shot at."[23] When this element of abuse is overlooked, the witness stand becomes a nightmare of pain and embarrassment. A witness of upstanding character in the community, coerced into exposing a prior drunken driving charge, may find himself prejudiced thereafter. Under these circumstances witnesses with the true

[18] It would seem that the same reason for not allowing evidence of general character of the party to a civil suit should apply to evidence of prior criminal convictions for impeachment purposes when the party becomes a witness on his own behalf and consequently subject to cross-examination. *See* STANSBURY § 103, at 238-39; 59 WIS. L. REV. 312, 320-21 (1959).

[19] Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 282, 156 S.E.2d 265, 270 (1967).

[20] As one author has eloquently stated:

> One may consciously accept impeachment evidence for what it is worth, but the barbs of prejudice possess an uncanny faculty for impressing the unconscious self. Warning judicial instructions may carefully distinguish the uses to which particular items of proof may be put, yet it is highly improbable that cold, judicial analysis will temper or control the juror's very human propensity to take all things into account.

Slough, *Impeachment of Witnesses; Common Law Principles and Modern Trends,* 34 IND. L.J. 1, 21-22 (1958). *See also,* 59 WIS. L. REV. 312, 322 (1959).

[21] 271 N.C. 276, 282, 156 S.E.2d 265, 270 (1967).

[22] In WIGMORE § 983, at 550-51 the suggestion is made that abuse of witnesses may be one policy reason for excluding some evidence that is relevant.

[23] *Id.* at 551.

facts will hesitate voluntarily to subject themselves to the ordeal.[24] Consequently, the judicial process is hampered.

In many jurisdictions allowing evidence of all crimes for impeachment purposes, it is possible for the trial judge to exclude evidence of some prior convictions.[25] After *Ingle,* this safeguard may or may not exist in North Carolina. Having stated the absolute rule that all convictions are admissible to impeach a witness, the court said, "furthermore, the judge is in charge of the trial, and he has plenary power to protect a witness from harrassment and to keep cross-examination within the bounds of reason."[26] Thus the phantom of certainty vanishes. Attorneys and trial judges are left to ponder what will happen on appeal if the judge exercises his discretion and excludes evidence of a prior criminal conviction. Will the Supreme Court uphold the mandate that all convictions are admissible, or will the court uphold the trial judge's exercise of plenary power?

The need to avoid cluttering up the trial with confusing, collateral issues and to prevent abuse of witnesses supports having broad discretion in the trial judge. Since most courts place no time limit on convictions admissible to impeach a witness,[27] absent discretion in the trial judge to eliminate some convictions, the jury might be considering a conviction so remote as not even to have bearing on general character.[28] Moreover, at the trial the judge has the advantage of demeanor evidence to guide him.[29]

It is interesting to note that in the case of *McMullen v. Cannon*[30] cited in *Ingle* to support the admissibility of traffic convictions, the Indiana court definitively resolved in the negative the issue of dis-

[24] WIGMORE § 921, at 446.

[25] "There should be some discretion in the court to determine whether the question is asked for the purpose of honestly discrediting the witness or whether its purpose is merely to arouse suspicion in the mind of jurors." Williams v. United States, 3 F.2d 129 (8th Cir. 1924); *see* Hunter v. State, 193 Md. 596, 69 A.2d 505 (Ct. App. 1949); Commonwealth v. Quaranta, 295 Pa. 264, 272, 145 A. 89, 92 (1928).

[26] 271 N.C. 276, 282, 156 S.E.2d 265, 270 (1967).

[27] Ladd 176; MCCORMICK § 43, at 91.

[28] *See* Simond v. State, 127 Md. 29, 39, 95 A. 1073, 1077 (1915) where the court said that to permit evidence of a conviction for drunkeness ten years prior tended "to reflect on the intelligence of the jury to suppose they would be influenced in passing on credibility by such evidence."

[29] Being able to observe the reaction of both the witness and the jury, the trial judge is in a better position to detect abuse than is the appellate court with only a record of the trial.

[30] 129 Ind. App. 11, 150 N.E.2d 765 (1958).

cretion in the trial judge to eliminate some evidence.[31] However, until the North Carolina court further elucidates the nature of this "plenary power" and the "bounds of reason," the answer in this jurisdiction is uncertain.

The argument has been made that if the legislature labels certain conduct a crime, it is indicative of the moral tenor of society, and he who violates that law should thereafter be accountable for impeachment purposes in a court of law.[32] It should not be forgotten, however, that "there may be convictions of violations of hundreds of police regulations, which in no real sense can be taken as tending to make one so convicted unworthy of belief."[33] No one would contend that, with traffic fatalities mounting each year, traffic laws should be regarded lightly, but the law makes provision for punishment of such offenders, and the witness stand is not the proper place. Veracity and honesty should be the criteria as to the type of criminal convictions permitted in evidence. The trial judge should have discretion to eliminate evidence of convictions that are irrelevant, remote and abusive. Only when these prerequisites are met will the jury have testimony that can be weighed with intelligence rather than emotion.

SARAH E. PARKER

Labor Law—Decreasing Importance of Employer Motivation as an Element of Unfair Labor Practice

Though inquiry under section 8(a)(3) of the National Labor Relations Act[1] specifically requires a finding of discrimination and a

[31] The court followed the decision in Niemeyer v. McCarty, 221 Ind. 688, 700-01, 51 N.E.2d 365, 370 (1943) where the court held that the trial judge was not authorized to exclude entirely evidence of a prior criminal conviction even though the extent to which cross examination may be carried is within his sound discretion. 129 Ind. App. 11, 150 N.E.2d 765, 767 (1958).

[32] State v. Johnson, 76 Utah 84, 116, 287 P. 909, 921 (1930).

[33] Burgess v. State, 161 Md. 162, 173, 155 A. 153, 157 (1931).

[1] 61 Stat. 140 (1947), *as amended*, 29 U.S.C. § 158(a) (1964): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 61 Stat. 140 (1947), *as amended*, 29 U.S.C. § 157 (1964): "Employees shall have the right to self-

resulting discouragement of union membership, such finding has normally turned on whether the discriminatory conduct was motivated by antiunion purpose or animus.[2] Where the employer's conduct is "inherently destructive" of important employee rights and is largely without legitimate business justification, courts have had no difficulty in holding that antiunion purpose can be inferred from the conduct itself.[3] However, the necessity of an affirmative showing of the employer's antiunion purpose in activities not "inherently destructive" of employee interests has been a source of continuing uncertainty in the interpretation of sections 8(a)(1) and (3).[4]

The means of combatting union activity are becoming increasingly sophisticated. The clever and well-advised employer can find many ways to conceal his antiunion purpose, to camouflage antiunion purpose with purported business justifications. Thus, instead of discharging employees who are sympathetic to the union, the employer may reassign them to jobs with dangerous equipment, give more desirable assignments to non-union men, or direct strict enforcement of certain theretofore loosely enforced shop rules. It cannot be said that these activities are "inherently destructive" of employee rights, nor does the employer have difficulty in making a case for the contention that the action was necessitated by legitimate business reasons. Consequently courts have been caught in the semantic tangles of requiring an affirmative showing of antiunion purpose on one hand, and an inclination to balance conflicting legitimate interests on the other.

The courts have interpreted section 8(a)(3) to mean "discrimination . . . [with intent] to encourage or discourage membership in a labor organization," and employer responses to union activity have been considered primarily under this section.[5] The most emphatic statement of the importance of employer intent or motiva-

organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

[2] *See* NLRB v. Brown, 380 U.S. 278 (1964); Radio Officers Union v. NLRB, 347 U.S. 17 (1954); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[3] Local 357, Teamsters Union v. NLRB, 365 U.S. 667 (1961).

[4] *See* Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 743 (1965).

[5] *See*, Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1198 (1967).

tion is contained in *American Ship Building Company v. NLRB.*[6] The Court, however, has not chosen to continue the reasoning of *American Ship Building,* and the decisions in *NLRB v. Great Dane Trailers, Incorporated*[7] and *NLRB v. Fleetwood Trailer Company*[8] have diminished the importance of employer motivation as an element of unfair labor practice.[9]

The question in *American Ship Building* was whether an employer commits an unfair labor practice when he temporarily lays-off or locks-out his employees in support of his economic position after reaching a bargaining impasse. In anticipation of a contract expiration the employer, a shipyard owner, entered into a series of negotiating sessions with the union, but failed to reach a new agreement. There was no strike at the expiration of the contract, but the employer's experience with the union caused him to fear that a strike would occur later during his peak repair season. The employer felt that such a strike would do serious harm to his business. The contract expired during the employer's "off" season, and, by laying off his employees and shutting off his operation the employer took advantage of an opportunity to deny the initiative to the union.[10]

In holding that the employer had not violated the statute, the Court gave careful consideration to the importance of antiunion animus in violations of 8(a)(1)[11] and 8(a)(3).[12] While admitting that some acts are so damaging to legitimate employee interests that inquiry into actual motivation is unnecessary, the court stated that in most cases an affirmative showing of antiunion animus is required.[13] Moreover, the Court agreed that the employer's action discriminated against the employees and to some extent interferred with the exercise of their rights under the act. Nevertheless, the Court did not feel that the discrimination or the interference with employee rights was sufficient to label the activity an unfair labor practice absent a showing of antiunion purpose.[14]

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[6] 380 U.S. 300 (1965).
[7] 388 U.S. 26 (1967).
[8] 389 U.S. 375 (1967).
[9] The Court also seems less concerned with employer motivation under section 8(a)(5). *See* NLRB v. Katz, 369 U.S. 736 (1962), where the Court states that affirmative showing of a failure of subjective good faith is unnecessary in making out a charge of refusal to bargain.
[10] American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 303-4 (1965).
[11] *Id.* at 305.
[12] *Id.* at 308.
[13] *Id.* at 311.
[14] *Id.*

The lines of the controversy over employer intent are drawn with particular clarity by the concurring opinions. Three members of the Court reject the majority's contention that an affirmative showing of antiunion animus is necessary under section 8(a)(3) unless the activity complained of is "inherently destructive" of important employee rights.[15] One concurring opinion would eliminate consideration of employer intent or motivation and rely completely on the test of whether the legitimate business interests of the employer justify his interference with employee rights.[16]

In *NLRB v. Great Dane Trailers, Incorporated,*[17] the employer allowed strike breakers and replacements to collect accrued vacation benefits on the same basis as would have been allowed under the expired contract, while at the same time denying accrued vacation benefits to strikers. There was no finding that the employer acted with an antiunion purpose, intending his action to discourage the strikers' activity.[18] After carefully reviewing the Supreme Court's reasoning in *American Ship Building,* the circuit court held that the employer's activity was not so destructive of employee interests as to make inquiry into motivation unnecessary. Thus, the court held that the Board had erred in finding a violation of 8(a)(1) or (3) without making an affirmative showing of antiunion animus.[19]

The Supreme Court reversed. Though purporting merely to review cases involving antiunion motivation in order to distill a general rule, the Court apparently reconsidered the reasoning of *American Ship Building*:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justification for his conduct.[20]

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[15] *Id.* at 323 (concurring opinion of White, J.); *compare* NLRB v. Brown, 380 U.S. 278 (1964) (dissenting opinion of White, J.), *with* NLRB v. Erie Resistor, 373 U.S. 221 (1963).

[16] 380 U.S. at 340 (concurring opinion of Goldberg and Warren, J.J.).

[17] NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967.)

[18] *Id.* at 34.

[19] NLRB v. Great Dane Trailers, Inc., 363 F.2d 130 (1966).

[20] NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

Under this rule, the employer has the burden of showing that he was motivated by business considerations whenever he is found to have engaged in discriminatory activity "which could have adversely affected employee rights to *some* extent. . . ."[21] Dissenting, Mr. Justice Harlan points out that this reasoning is a considerable deviation from that of *American Ship Buildding.*[22]

In *NLRB v. Fleetwood Trailer Company,*[23] the union lost an economic strike. Due to cutbacks in the work schedule and the hiring of some permanent replacements, the employer was not immediately able to rehire all the strikers who wished to return to their jobs. It was shown that the employer had every intention of returning to pre-strike production levels as soon as possible. Six of the strikers continued to be available for rehire. Several weeks later the employer filled the jobs formerly held by these employees with new personnel.[24] The circuit court held that the right of the strikers to be rehired must be determined at the time when the strike ends, and, following *American Ship Building,* held that the employer's action did not constitute an unfair labor practice absent a showing of anti-union motivation.[25]

The Supreme Court disagreed on both counts,[26] and citing *Great Dane,* stated that the facts were sufficient to sustain a finding of unfair labor practice irrespective of the Court's holding as to when a striker looses his right to rehire.[27] The Court found that the workers in question were available at the time the employer filled

[21] *Id.*

[22] Prior to today's decision, § 8(a)(3) violations could be grouped into two general categories: those based on actions serving no legitimate business purposes or actions inherently severely destructive of employee rights where improper motive could be inferred from the actions themselves, and in the latter instance, even a legitimate business purpose could be held by the Board not to justify the employer's conduct; . . . and those not based on actions 'demonstrably so destructive of employee rights and so devoid of significant service to a legitimate business end,' where independent evidence evincing the employer's antiunion animus would be required to find a violation.

Id. at 37.

[23] NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

[24] *Id.* at 377.

[25] NLRB v. Fleetwood Trailer Co., 366 F.2d 126 (1966). The circuit court decided *Fleetwood* prior to the Supreme Court's ruling in *Great Dane.*

[26] Significantly, the Court commented on the issue of employer motivation though it was unnecessary in reaching the majority's result. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 383 (1967) (concurring opinion of Harlan, J.).

[27] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967).

their jobs with new personnel. He could have rehired the strikers; he did not. Nor did he give any justification for not rehiring them. Under these facts the employer committed an unfair labor practice and no inquiry into his motivation was necessary. The employer was obliged to come forward with legitimate business justification for his action. Only then would there have had to be an affirmative showing of antiunion animus.

Thus, under *Great Dane* and *Fleetwood Trailers,* inquiry into the employer's motivation is required only if (1) the activity complained of damages employee interests to a "comparatively slight" degree, and (2) the employer comes forward with evidence of substantial business justification for the activity. Unfortunately this rule does not completely close the door to confusion, and employers may still be afforded opportunity to discriminate with impunity against employees because of union activity, disguising discrimination with "legitimate business reasons."

The semantic tangles and inconsistencies which consideration of motivation has produced are not very useful in establishing unfair labor practice. No matter what is said about employer motivation, in the final analysis the business interests of the employer must be balanced against the organizational and bargaining rights of the employees. Nor is the balancing of conflicting interests anything new under the act. The Board has engaged in this balancing process since its inception.

The objectionable feature of the *Great Dane* rule is the necessity of determining whether the employer's conduct interferes with employee interests to a "substantial degree" or to a "comparatively slight" degree before weighing the employer's economic interests against the rights of the employees under the act. There is a better and simpler rule. Alleged violations of section 8(a)(1) and (3) can be grouped into two categories: (1) those activities which are so inherently harmful to employee interests that no economic justification is sufficient to redeem them, and (2) those activities where, once the employer has come forward with legitimate economic justification for his action, it is appropriate to balance the economic justification of the employer against the conflicting rights of the employees. Problematical attempts to produce evidence of the employer's state of mind or subjective intent would be completely unnecessary.

DONALD W. CARSON

Labor Law—Extension of the Discretionary Jurisdiction of the National Labor Relations Board

The Labor Management Relations Act of 1947 gives to the National Labor Relations Board power to assert jurisdiction over any question of representation or any unfair labor practice "affecting [interstate] commerce."[1] The Act further provides:

> [t]he Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, *the effect of such labor dispute on commerce* is not sufficiently substantial to warrant the exercise of its jurisdiction . . . .[2]

The Board in *Flatbush General Hospital*,[3] decided in 1960, declined to assert jurisdiction over private hospitals. Had it been so inclined the Board could have properly done so, but it felt that the operation was "essentially local in nature and therefore, the effect on commerce . . . is not substantial enough to warrant the exercise of . . . jurisdiction."[4] The Board also felt that if labor disputes arose in private hospitals the states would step in and regulate such disputes.

In *Butte Medical Properties*[5] the Board reexamined its position with respect to private hospitals and overruled *Flatbush*. It adopted a new standard by which jurisdiction will be asserted over private hospitals which receive at least 250,000 dollars in annual gross revenue. The Board found

> that the considerations bearing on . . . the jurisdictional determination in this industry have markedly changed since the Flat-

[1] Labor Management Relations Act §§ 9(c)(1)(B), 10(a), 29 U.S.C. §§ 159(c)(1)(B), 160(a) (1964) [hereinafter cited as Taft-Hartley].

[2] Taft-Hartley § 14(c)(1), 29 U.S.C. § 164(c)(1) (1964) (emphasis added). The term "labor dispute" includes questions of representation as well as unfair labor practices. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1093 (1960).

[3] 126 N.L.R.B. 144 (1960).

[4] *Id.* at 145. Until 1960 the Board had asserted jurisdiction over private hospitals in only three situations:

> where the hospital was located in the District of Columbia, where the operations of the hospital vitally affected national defense, and where the hospital was an integral part of the establishment whose operations met the Board's jurisdictional standards.

Id.

[5] 168 N.L.R.B. No. 52, 66 L.R.R.M. 1259 (1967).

> bush decision and that it will effect the policies of the Act to assert . . . discretionary jurisdiction over . . . [this] Employer as well as over proprietary hospitals generally.[6]

In refusing to follow *Flatbush* the Board considered several factors which indicate the impact of the operation of private hospitals on interstate commerce. The Board pointed out that there are about 970 private hospitals in 44 states in the United States and they constitute one of the country's largest industries; that personnel such as nurses, dieticians and therapists often must be recruited from other areas; that "there has been a substantial increase in the number of beds, admissions, census, personnel, payroll, assets and gross revenues . . . ."[7] The Board enumerated the purchase of supplies and equipment by all private hospitals and noted the resulting significant effect on commerce. Impressive also were the billions of dollars spent by 79.2 percent of Americans for health insurance which results in substantial payments to hospitals, as well as expenditures by the federal government on behalf of recipients of public health and welfare benefits. Similar factors were involved in the simultaneous assertion of jurisdiction by the Board over private nursing homes where the employer receives at least 100,000 dollars in annual gross revenue.[8]

While the effect of an employer's operations on interstate commerce is a prime consideration in deciding whether or not to assert jurisdiction in most cases, there is an area of the Board's discretionary jurisdiction where it is apparently of no consequence. Even though an employer's operations may affect commerce and may measure up to the Board's applicable jurisdictional dollar standards,[9] the Board has not taken jurisdiction over nonprofit educational, research and charitable organizations "where the activities involved are non-commercial in nature and intimately connected with the . . . purposes and . . . activities of the institution."[10] This idea is conceptually known as the *Columbia University* doctrine[11] and has been applied in a long line of cases.[12] However, if the

[6] 66 L.R.R.M. at 1261.
[7] *Id.* at 1260.
[8] University Nursing Home, Inc., 168 N.L.R.B. No. 53, 66 L.R.R.M. 1263 (1967).
[9] The standards can be found in 23 NLRB ANN. REP. 8 (1958).
[10] Trustees of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).
[11] 29 NLRB ANN. REP. 34 (1964).
[12] Horn & Hardart Co., 154 N.L.R.B. 1368 (1965) (employer was cor-

enterprise, even though a nonprofit educational, charitable or research organization, has activities commercial in nature jurisdiction will be asserted.[13]

There is a considerable doubt as to the propriety of the Board's view in this matter. In so holding, the Board very early in the course of its opinions in this area pointed to the Conference Report on the Labor Management Relations Act of 1947 wherein it is stated:

> [t]he nonprofit organizations [other than nonprofit hospitals] excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations

poration operating food service facilities in a hospital); Massachusetts Institute of Tech., 152 N.L.R.B. 598 (1965) (employer was data processing research laboratory operated by a university); Prophet Co., 150 N.L.R.B. 1559 (1965) (employer was nationwide food service enterprise operating University dining facilities); Iowa State Memorial Union, N.L.R.B. Admin. Decis., 1964, 55 L.R.R.M. 1362 (1964) (employer was student union at a college); University of Miami, 146 N.L.R.B. 1448 (1964) (employer was a university division operating three ocean-going vessels for courses and research); Crotty Bros., N.Y., Inc., 146 N.L.R.B. 755 (1964) (employer managed food service facilities on a college campus); Young Men's Christian Ass'n, 146 N.L.R.B. 20 (1964) (employer was community service organization); Sheltered Workshops, 126 N.L.R.B. 961 (1960) (employer provided work rehabilitation for handicapped persons); Lutheran Church, Mo. Synod, 109 N.L.R.B. 859 (1954) (employer was a radio station operated by religious organization); Armour Research Foundation, 107 N.L.R.B. 1052 (1954) (employer was engaged in research in conjunction with a university); Trustees of Columbia Univ., 97 N.L.R.B. 424 (1952) (employer was university; union was seeking to represent clerical employees in library).

[13] Bay Ran Maint. Corp., 161 N.L.R.B. No. 74, 63 L.R.R.M. 1345 (1966) (employer provided cleaning and maintenance services for hospital); Maritime Advancement Programs, 152 N.L.R.B. 348 (1965) (employer created to administer trust fund for training unlicensed seamen); Woods Hole Oceanographic Inst., 143 N.L.R.B. 568 (1963) (employer operated ocean-going vessels to conduct marine research and teach oceanography); South Bend Broadcasting Corp., 116 N.L.R.B. 1166 (1956) (employer a university-owned corporation operating a radio and television station); Massachusetts Institute of Tech. (Lincoln Laboratory), 110 N.L.R.B. 1611 (1954) (employer operated research facility in connection with university and federal government); California Institute of Tech., 102 N.L.R.B. 1402 (1953) (employer operated research facilities under university auspices in conjunction with private industries); Kennecott Copper Corp., 99 N.L.R.B. 748 (1952) (employer was hospital and dispensary maintained by copper company for employees); Sunday School Board of S. Baptist Conv., 92 N.L.R.B. 801 (1950) (employer published and distributed religious literature); Port Arthur College, 92 N.L.R.B. 152 (1950) (employer was a radio station operated by a college); General Elec. Co., 89 N.L.R.B. 1247 (1950) (employer was hospital operated by G.E. for employees and families); Illinois Institute of Tech., 81 N.L.R.B. 201 (1949) (employer was college-operated research foundation for industry and government).

> or their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.[14]

The Board takes this language as providing a "guide," if not a "mandate," and as approval of the Board's practice prior to the legislation in 1947.[15] The language of the Conference Report seems only to indicate approval of the Board's practice of not taking jurisdiction when the activities of the organization are not considered to affect commerce. It is not at all clear from the language that the Board should refuse to assert jurisdiction if the activities of educational, charitable and research organizations do in fact affect commerce. Whether or not the Board has properly interpreted the Conference Report, the questionability as to the nonassertion of jurisdiction over these organizations remains.

It is freely admitted by the Board that activities of educational, charitable or research organizations may and do affect commerce.[16] This being so, it is difficult to ascertain why jurisdiction should not be asserted in light of the purpose and policy of the Act "to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, . . . and to protect the rights of the public in connection with labor disputes affecting commerce."[17] These organizations buy goods and services and often sell services;[18] they hire employees as well. Any of these would be difficult to accomplish today without affecting interstate commerce. The sheer number of cases where the Board refused to assert jurisdiction indicates the substantial impact on commerce resulting from the activities over which the Board will not assert jurisdiction.[19]

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[14] H. R. REP. No. 510, 80th Cong., 1st Sess. 32 (1947), cited in 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505, 536 (1948).

[15] Trustees of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).

[16] University of Miami, 146 N.L.R.B. 1448, 1450 (1964).

[17] Taft-Hartley § 1(b), 29 U.S.C. § 141(b) (1964).

[18] Crotty Bros., N.Y., Inc., 146 N.L.R.B. 755 (1964). In this case a nonprofit educational institution hired a corporation to manage its food service facilities. The corporation was in the business of providing food service management for educational, hospital and business establishments in several states. Jurisdiction was not taken. The case was followed in Prophet Co., 150 N.L.R.B. 1559 (1965).

[19] Note 12 *supra*. Twelve cases are cited. Further implications as to the effect on interstate commerce can be drawn from the application of these cases to organizations similar to those in the cited cases. For instance there are many organizations in the United States associated with the Young

It might be argued that these nonprofit charitable, educational and research organizations with primarily noncommercial activities perform functions that may otherwise have to be performed by the government, either local, state or national, and that, therefore, they should not be subjected to the regulation in labor disputes since government activities are not. However, recent labor strife concerning teachers, nurses and sanitation workers illustrate the very definite need in these areas for regulation of labor disputes. Work stoppages in the governmental sector jumped from 42 involving 12,000 workers in 1965 to 142 involving 105,000 workers in 1966.[20] Further, there is some question as to whether the governments should or even would operate some of the activities engaged in by some of the organizations over which the Board refused to assert jurisdiction.

It is submitted that the Board should take jurisdiction over these organizations, and, that, despite the Board's interpretation of the Conference Report, it is perfectly free to do so. If necessary the Congress should consider empowering the Board to do so.

PENDER R. MCELROY

Pleadings—Limitations on the Reply

In *Davis v. North Carolina State Highway Commission*,[1] the North Carolina Supreme Court echoed a long standing notion about the nature of the reply, which merits examination in light of the proposed changes in the state's rules of civil procedure, as well as present practice. The complaint in *Davis* stated that the state highway commission had taken plaintiff's property on January 14, 1965, when in fact it was not needed at that time. It was further alleged that the taking was accomplished by means of false representations, with intent to deceive plaintiffs and force them out before their departure was necessary. Included was a prayer for 50,000 dollars actual and 1,000,000 dollars punitive damages.[2]

Defendants moved to strike the portions of the complaint alleg-

Men's Christian Association; there are many nonprofit research foundations associated with colleges and universities.

[20] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 249 (88th Ed. 1967).

[1] 271 N.C. 405, 156 S.E.2d 685 (1967).

[2] *Id.* at 406-07, 156 S.E.2d at 686-87.

ing false representations and asking for punitive damages. In their answer, defendants admitted taking the property on January 14, 1965, and stated that they had deposited 15,500 dollars as their estimate of the value of the property.[3] Plaintiffs filed a reply stating that the property had actually been taken on April 24, 1967. They alleged that defendants had pretended to take it on January 14, 1965, pursuant to a scheme to induce them to leave so that the property would deteriorate in value during the interim. Claiming they had been defrauded out of the use of the property for two years, plaintiffs prayed for damages based on the fair market value of the property on April 24, 1967, which they alleged to be 45,000 dollars. The portions of the complaint pertaining to fraud and punitive damages and the entire reply were ordered stricken. The trial court held that the only issue to be tried was that of the value of the property on January 14, 1965. From this ruling plaintiffs unsuccessfully appealed.[4]

The North Carolina Supreme Court held that since both the allegations of the complaint and the reply were grounded in variations of intentional tort, the highway commission was clearly immune from suit under the state Tort Claims Act.[5] By way of dictum the court stated that, even if the reply was sufficient to state a cause of action, it was properly stricken because the reply is a defensive pleading and the cause of action must be stated in the complaint.[6]

Plaintiffs often have to contend with the problem of anticipatory pleading in the complaint versus new affirmative matter in the reply. Dicta such as that found in the principal case tend to perpetuate the problem. It is said that "[t]he purpose of the reply is to deny such allegations of the answer as plaintiff does not admit and to meet new matter set up in the answer. . . . [i]t must be limited to an admission or denial of the new matter set up in the answer."[7]

Apparently, the two principal errors which the North Carolina courts find in replies are (1) inconsistency with the complaint and

[3] *Id.* at 407, 156 S.E.2d at 686-87.

[4] *Id.* at 407, 156 S.E.2d at 687.

[5] N.C. GEN. STAT. § 143-291 (1963). Plaintiffs clearly lost the case on the basis of this statute, and not the ruling on the reply. The commission is only liable for negligence, and is not subject to suit except as provided in the act. Ayscue v. Highway Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967), Nello L. Teer Co. v. Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965), Midgett v. Highway Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).

[6] 271 N.C. 405, 409, 156 S.E.2d 685, 688 (1967).

[7] Spain v. Brown, 236 N.C. 355, 357, 72 S.E.2d 918, 919 (1952).

(2) attempts to state a cause of action, rather than to reply to allegations of new matter in the answer. Such inconsistency is forbidden in North Carolina by statute,[8] and there is sufficient judicial interpretation of the term to give meaning to the prohibition. The North Carolina Supreme Court has held that inconsistency means that the complaint and reply are contrary to one another, so that one is necessarily false if the other is true.[9] Plaintiff's new matter may be totally unconnected with the complaint as long as it is responsive to defendant's answer.[10]

The court in *Davis* made no mention of inconsistency. However, the facts of the case indicate that such an argument could certainly have been made, since the complaint and the reply contained conflicting allegations as to the date of the taking of plaintiffs' property. Inconsistency has been found in instances where it was not as clearly apparent as in *Davis*. In *Miller v. Grimsley*,[11] plaintiff, suing defendant for cutting timber on plaintiff's land, admitted in the complaint that his deed had reserved a portion of the land to the use of defendant and described that portion to some extent. When defendant answered setting up the deed, plaintiff's reply, stating that the reservation in the deed was too vague for any purpose, was stricken as inconsistent.[12] Inconsistency as to theory of the cause of action, however, is apparently permissible. The court found no inconsistency in *Berry v. Hyde Land & Lumber Company*[13] where the complaint alleged that defendant's canal blocked plaintiff's ingress and egress (tort). Defendant answered that he had a contract with plaintiff to dig the canal. Plaintiff replied that the canal was not dug according to the terms of the agreement (contract).

It is much easier to determine the boundaries of consistency, however, than it is to tell when a reply has lost the defensive character deemed essential by the North Carolina courts. A most striking contrast to the principal case came in *Gilliam Furniture Incorporated v. Bentwood Incorporated*.[14] Here plaintiff brought suit on a note, claiming defendant had guaranteed it. Defendant answered that the alleged guarantee was made to "save face" for one of the com-

[8] N.C. GEN. STAT. § 1-141 (1953).
[9] Scott v. Jordan, 235 N.C. 244, 247, 69 S.E.2d 557, 560 (1952).
[10] Boyette v. Vaughan, 79 N.C. 528, 530 (1878).
[11] 220 N.C. 514, 17 S.E.2d 642 (1941).
[12] *Id.* at 515, 17 S.E.2d at 643-644.
[13] 183 N.C. 384, 111 S.E. 707 (1922).
[14] 267 N.C. 119, 147 S.E.2d 612 (1966).

pany's officers and that, being without consideration, it was of no legal effect. Plaintiff replied that if the guarantee was not authorized, it was fraudulently executed. Plaintiff was later given leave to add to his reply "certain additional facts" which he claimed to be material to the controversy. The court made essentially the same statement as in *Davis* about the necessity of alleging causes of action in the complaint, but then proceeded to treat the reply as an amended complaint, ordering the pleadings to be recast later.[15] Also varying somewhat from the holding in *Davis* was *Bryan v. Acme Manufacturing Company*.[16] In an action to cancel notes due, the complaint alleged delivery of useless cotton fertilizer instead of the desired tobacco fertilizer. Defendant answered that cotton fertilizer was ordered and included a copy of the order form. Plaintiff was allowed to allege in his reply, not only fraud in procuring the order, but also misbranding of the product in violation of a statute. This was held merely to amplify the complaint.[17] It could be said that plaintiff in *Davis* should have been entitled under *Furniture Company* to have his "certain additional facts" concerning the alleged later taking and scheme to be treated also by the court as an amended complaint. It is also arguable that the allegations that these same events, which occurred subsequent to the original complaint, should be construed as merely amplifying the complaint as in *Bryan*.

Even after the adoption of the proposed new rules of civil procedure in North Carolina, plaintiffs will have to contend with a degree of uncertainty about what is to be allowed in the reply and whether their errant replies will be stricken or simply treated as amended complaints. The question is whether the matter is not really one of form rather than substance. The statutory provision which grants judges power to permit amendment of any pleading at any stage[18] and the North Carolina Supreme Court's statement

[15] *Id.* at 121, 147 S.E.2d at 614. *See also* Every v. Every, 265 N.C. 506, 144 S.E.2d 603 (1965) where no defects were found although plaintiff's complaint alleged domestic difficulties as grounds for alimony and in reply to defendant's defense of a separation agreement she alleged fraud and want of consideration.

[16] 209 N.C. 720, 184 S.E. 471 (1936). *See also* the earlier case of Winstead v. Acme Mfg. Co., 207 N.C. 110, 176 S.E. 304 (1934) where the same attorney for the plaintiff, against the same defendant got into difficulty with his pleading and was not even allowed to amend his complaint.

[17] Bryan v. Acme Mfg. Co., 209 N.C. 720, 722, 184 S.E. 471, 472 (1936).

[18] N.C. GEN. STAT. § 1-163 (1953).

that such power is inherent even in the absence of statute[19] support the desirability and propriety of denominating all new affirmative matter in the reply as an amendment to the complaint.

The proposed new rules limit the scope of the problem considerably since a reply is only allowed in response to a counterclaim denominated as such, or when ordered by the court.[20] Thus, unless the courts hold contrary to the apparent intention of the new rules, the number of instances when plaintiff may run afoul of North Carolina restrictions on the reply will be sharply reduced. Noting, however, that under the new rules, the *complaint* may contain claims which are alternative, inconsistent, or unrelated,[21] the striking of the reply as not being defensive seems to find even less justification.

WILLIAM S. GEIMER

Taxation—Reintroduction of the Premium Payment Plan?

In Revenue Ruling 67-463[1] the Commissioner of Internal Revenue has taken the position that when a husband transfers all incidents of ownership of an insurance policy to his wife more than three years prior to his death, but continues to pay the premiums until his death, the premiums paid within the last three years are paid in contemplation of death and represent a transfer of an *interest* in the policy. The interest transferred is measured by the proportion the amount of premiums so paid bears to the total amount of premiums paid; therefore, the proportionate value of the insurance bought by these premiums is includible in his gross estate under section 2035.[2] Arguably, this ruling is a reintroduction of the old "premium payment" plan rejected by Congress in 1954.

In making this ruling, the Commissioner could have taken two

[19] Gilliam Furniture Inc. v. Bentwood Inc., 267 N.C. 119, 120, 147 S.E.2d 612, 613 (1966).
[20] PROPOSED N.C. RULES CIV. PROC. 7(a) (1967).
[21] PROPOSED N.C. RULES CIV. PROC. 8(e) (1967).

[1] Rev. Rul. 67-463, 1967 INT. REV. BULL. No. 52, at 15.
[2] INT. REV. CODE of 1954, § 2035. For example, if A buys an insurance policy worth one hundred thousand dollars and pays eight thousand dollars in premiums over a four year period, with six thousand dollars being paid over the last three years prior to death, the Commissioner would include in his gross estate three-fourths of the value of the policy or seventy-five thousand dollars, and not the six thousand paid for the premiums.

other positions.[3] He might have included the entire proceeds of the policy in decedent's estate on the theory that the payment of the last premium kept alive the right to receive the proceeds upon death. Or he could have included in the taxable estate only the amount of the premium payments actually made by the decedent within the three year period. However, the Commissioner chose the third alternative, ruling that "unlike the unrestricted gift of money, a premium payment is a gift of insurance protection, a *transfer of an interest in the policy.*"[4] The Revenue Ruling's position is contrary to that in *Lamade v. Brownell.*[5] The two fact situations seem indistinguishable. The court in *Lamade* holds that where the insured has absolutely assigned the policy to his wife, having never exercised any incidents of ownership in the policy, the proceeds are not includible in his gross estate even though the insured *had paid premiums on it for the two years immediately prior to his death.* The court said that "the payment of premiums on said policy by the decedent for the two years immediately prior to his death was by way of gift."[6]

The Internal Revenue Code of 1954 changed the then existing law and provided in Section 2042[7] that the sole test for determining whether proceeds, not payable to the executor, are includable in the decedent's estate is whether the decedent retained any of the incidents of ownership in the policy at his death.[8] The congressional intent was to place life insurance on a par with other property, which may be given away free from estate tax if not made in contemplation of death or in violation of the other inter vivos transfer sections. It was felt by the majority of members of the House Ways and Means Committee that to discriminate against life insurance was unjustified, in that it should be the nature of the dis-

[3] Moses, *Irrevocable Life Insurance Trusts Can Be Attractive Estate Planning Tool,* 18 J. TAXATION 206, 211 (1963).

[4] Rev. Rul. 67-463, 1967 INT. REV. BULL. No. 52, at 15.

[5] 245 F. Supp. 691 (M.D. Pa. 1965). Cited with approval in United States v. Rhode Island Trust Co., 355 F.2d 7, 12 n.4 (1st Cir. 1966).

[6] 245 F. Supp. at 697.

[7] INT. REV. CODE of 1954, § 2042.

[8] H.R. REP. No. 1337, 83d Cong., 2nd Sess. 90 (1954). The House Ways and Means Committee said: "The bill (sec 2042) would make a basic change by excluding life insurance proceeds from the taxable estate of the insured unless at his death he possesses 'incidents of ownership' of the policy. Where the insured gives away the beneficial interest in the policy, but pays the premiums, the death benefits would no longer be taxed in his estate." *Id.* at B 14.

position rather than the property which determines the testamentary character of the gift.[9]

Section 2042 of the Internal Revenue Code, is not, of course, the only section under which the proceeds of life insurance can be included in the gross estate. Section 2035[10] treats a transfer of the incidents of ownership within three years of death as being in contemplation of death. However, the Revenue Ruling applies where all the incidents of ownership of the policy itself are transferred more than three years before death. The only question of this Revenue Ruling is whether the money used to pay the premiums, admittedly transferred in contemplation of death, represents more than the actual dollar amount of the premium.

The Commissioner cites several cases in support of his affirmative position. *Chase National Bank v. United States*[11] is cited for the proposition that a "transfer" means more than the passing of items of property *directly* from the decedent to the transferee, and includes the transfer of property procured through expenditures by the decedent which results in having it pass to another. The court in this refund case was concerned with plaintiff's argument that because the proceeds were payable from the insurance company to the beneficiary, rather than *directly* from the insured, there was nothing on which a transfer tax from the insured to the beneficiary could be imposed. The crux of the argument centers on the word *directly*. The court said that "the power to tax the privilege of transfer at death cannot be controlled by the mere choice . . . of the particular methods by which his purpose is effected, so long as he retains control over those benefits."[12] This case is distinguishable from the Revenue Ruling, because it involves a complete transfer of the policy in which the decedent has no control over the benefits already transferred. The only property under his control is the money used to pay the premiums.

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[9] *Id.* The minority position is also stated in the Reports "But life insurance is not like other property. It is inherently testamentary in nature. It is designed, in effect, to serve as a will, regardless of its investment features. Where the insured has paid the premiums on life insurance for the purpose of adding to what he leaves behind at his death for his beneficiaries, the insurance proceeds should certainly be included in his taxable estate." *Id.*

[10] INT. REV. CODE of 1954, § 2035.

[11] 278 U.S. 327 (1929). Lehman v. Commissioner, 109 F.2d 99 (2d Cir. 1940), *cert. denied,* 310 U.S. 637 (1940), is cited for the same proposition.

[12] 278 U.S. at 338.

Liebman v. Hassett,[13] according to many writers,[14] constitutes valid authority for the Commissioner's position in the Revenue Ruling. The case involved an assignment of a policy by the decedent to his wife two years before his death, thus raising a presumption of a transfer "in contemplation of death." Since the assignee had paid the two premiums during the period between assignment and death, it was held that the face value of the policy less the pro rata amount of insurance purchased with the two premiums paid by the assignee was to be included in the gross estate. In anticipation of the position taken by the Commissioner in this Revenue Ruling two writers[15] have already explored the differentiating factors between the *Liebman* situation and the rationale of the present ruling. The most distinguishable factor is that in *Liebman* the policy itself was transferred in contemplation of death. In the Revenue Ruling the policy and all incidents of ownership were transferred more than three years before death with only a premium payment being transferred in contemplation of death. Moreover, it is necessary to consider the word "transfer" as used in Section 2035, which includes in the gross estate "property [except real property situated outside of the United States] to the extent of any *interest* therein of which the decedent has at any time made a transfer . . . in contemplation of his death."[16] The emphasis is on a transfer of property made during decedent's life, and what is included is the value of the property which was the *subject of the inter vivos transfer*. "Although the tax is to be measured by the value of the transferred property as of the date of the donor's death, this does not mean that, for the purpose of determining what

[13] 148 F.2d 247 (1st Cir. 1945).

[14] See W. WARREN & S. SURRY, FEDERAL ESTATE AND GIFT TAXATION 523 (1961 ed.); Mannheimer, Wheeler, Friedman, *Gifts of Life Insurance By the Insured*, N.Y.U. 13TH INST. ON FED. TAX. 260 (1954); Moses, *Irrevocable Life Insurance Trusts Can Be Attractive Estate Planning Tool*, 18 J. TAXATION 206, 211 (1963); J. AM. SOC'Y C.L.U., Spring 1962, 117, 131.

[15] Brown & Sherman, *Payment of Premiums as Transfers in Contemplation of Death*, 101 TRUSTS & ESTATES 790 (1962). The authors also point out that even if there had been no assignment the same portion of the proceeds would have been excluded. The case was decided under the Revenue Act of 1926, Sec. 302(g). This section made life insurance, payable to named beneficiaries, taxable to the extent that it was "taken out" by the decedent. Under T.D. 5032, 36 TREAS. DEC. INT. REV. 15 (1941), "taken out" meant the extent decedent paid the premiums.

[16] INT. REV. CODE of 1954, § 2035.

property was transferred, the gifts should be regarded as having been made as of the date of death."[17] It is arguable therefore that if the decedent owns no part of the policy (having transferred all incidents of ownership to the assignee more than three years before death) the value of the gift should be determined by what property is still under his control, i.e. the money used to pay the premiums. Reinforcing this argument is the expressed wish of Congress to eliminate the payment of premium plan in section 2042 of the 1954 Code,[18] and the fact that *Liebman* is a 1943 decision. Whether *Liebman* should be considered good authority in a contemplation of death case, even if it were on "all fours," is questionable in view of the 1954 changes in section 2042. It seems reasonable to assume that Congress intended to eliminate the payment of premium test altogether, considering the expressed purpose of the Committee to treat insurance like any other property. If decedent transfers income producing property, the taxability of the income depends on whether the transferor completely divested himself of all interests in the property, and if he did, the income is not taxable to him.[19] Similarly, the increased value of the policy should not be taxed to him because he has completely transferred all incidents of ownership.

The recent case of *Scott v. Commissioner*[20] is cited by the Commissioner as holding that upon the husband's death, the proportionate part of the proceeds of the policy attributable to his payment of the premiums is includible in his gross estate. The facts show that decedent and his wife owned the policies as community property under California law. The wife predeceased her husband and bequeathed to her sons her one-half community interest in policies on his life. After her death, the husband paid premiums on the policies, and the court held that the proportionate part represented by his payment of premiums was includible in his estate.[21]

[17] McGhee v. Commissioner, 260 F.2d 818, 820 (5th Cir. 1958).

[18] H.R. REP. No. 1337, 83d CONG. 2d SESS. 90 (1954).

[19] *See* Treas. Reg. § 20.2035-1(e) (1964); Jacob Gidwitz, 14 T.C. 1263 (1950) *aff'd*, 196 F.2d 813 (7th Cir. 1952); James E. Frizzel, 9 T.C. 979 (1947), *aff'd on reconsideration*, 11 T.C. 576 (1948), *aff'd* 177 F.2d 739 (5th Cir. 1949).

[20] 374 F.2d 154 (9th Cir. 1967).

[21] The regulations since 1949 have stated that in determining whether or not a decedent possessed any incidents of ownership in a policy, regard must be given to the effect of the state or applicable law upon the terms of the policy. Thus, California property law must be consulted to determine whether incidents of ownership are possessed in an insurance policy purchased with community funds. *See* R. PAUL, SELECTED STUDIES IN FEDERAL

California cases clearly hold that such insurance contracts may be separate property, community property, or mixed, depending upon the source of the premium payments.[22] Thus, to the extent of determining whether a policy is community property the premium payment test is preserved. This is quite different from the Revenue Ruling in that the question is not the determination of a community property interest, but whether the transfer involved more than the actual money given in contemplation of death.

The issue facing the Commissioner involved the basic determination of exactly what property interest the payment of a premium represented. As stated by the Supreme Court, the estate tax "extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property."[23] Basic to a transfer is the transmission from one to another of an interest in property. The interest must be capable of existing and must be one which is in fact transferred.[24] If the interest exists, then a determination of some value on the interest should be possible. To find the fair market value of a property interest at the decedent's death the test is to put oneself in the position of a potential purchaser of the interest at that time.[25] It is submitted that a purchaser would give little for the "interest" decedent had in the policy for the three years prior to death. He had transferred all incidents of ownership and therefore had no control over the property which was in the hands of the recipient.[26]

It is hoped that the reasoning of the *Lamade* case, combined with the expressed intent of Congress, will be followed when Revenue Ruling 67-463 is litigated. To find for the Commissioner would be a reintroduction of the payment of premium test, at least in spirit. This test was abandoned by Congress in 1954 and should not be reestablished by judicial interpretation of section 2035. If the result advocated by the Revenue Ruling is desirable, then section 2035 or section 2042 should be amended by Congress to reflect such a desire.

JAMES M. MILES

TAXATION 1-33 (2d ser. 1938). *See also* Lang v. Commissioner, 304 U.S. 264 (1938).

[22] Travelers Ins. Co. v. Fancher, 219 Cal. 351, 26 P.2d 482 (1933); Gettman v. Los Angeles, 87 Cal. App. 2d 862, 197 P.2d 817 (Dist. Ct. 1948).

[23] Fernandez v. Wiener, 326 U.S. 340, 352 (1945).

[24] Eleanor A. Bradford, 34 T.C. 1059, 1064 (1960).

[25] United States v. Land, 303 F.2d 170 (5th Cir. 1962).

[26] *But see* Walter v. United States, 341 F.2d 182 (6th Cir. 1965).

Taxation—The Tax Benefit Rule of *Perry* Overruled

In *Alice Phelan Sullivan Corporation v. United States*[1] taxpayer, a California corporation, received two parcels of land, each of which it had previously donated and claimed as a charitable deduction.[2] The first donation, valued at 4,243.49 dollars, was made in 1939; the second, valued at 4,463.44 dollars, was made in 1940. Under the tax rates applicable in those years,[3] the claimed deductions resulted in an aggregate tax benefit of 1,877.49 dollars to taxpayer. The conveyances, however, were made subject to the condition that the realty be used either for religious or educational purposes. In 1957 the donee decided not to use the property and therefore reconveyed it to taxpayer. The Commissioner of Internal Revenue, characterizing the reconveyances as taxable at the 1957 corporate rate,[4] included in taxpayer's gross income the amount of 8,706.93 dollars[5]—the value of the charitable deductions previously claimed and allowed.[6] Relying on *Perry v. United States*,[7] taxpayer paid and sued for refund[8] in the Court of Claims on the theory that the reconveyances constituted a return of capital[9] and that a proper assessment could require no more than payment to the government of the tax benefit originally obtained.[10] The court held that recovery

[1] 381 F.2d 399 (Ct. Cl. 1967).

[2] See INT. REV. CODE of 1954, § 170.

[3] The corporate tax rate in 1939 was 18 per cent; in 1940, 24 per cent.

[4] The applicable corporate tax rate in 1957 was 52 per cent.

[5] This resulted in a deficiency assessment of 4,527.60 dollars.

[6] Gross income normally includes only the amount of the previous deduction regardless of any increase in value. *See* Buck Glass Co. v. Hofferbert, 176 F.2d 250 (4th Cir. 1949); Commissioner v. First State Bank, 168 F.2d 1004 (5th Cir. 1948); Crabb v. Commissioner, 119 F.2d 772 (5th Cir. 1941); Perry v. United States, 160 F. Supp. 270 (Ct. Cl. 1958).

[7] 160 F. Supp. 270 (Ct. Cl. 1958). In this case taxpayers in 1944, 1945, 1946, 1947, and 1948 made charitable gifts of cash and securities to a town for the purpose of constructing an addition to a library. Taxpayers deducted the appropriate amount from their gross income each year. In 1953 the gifts were returned to taxpayers. It was held that taxpayers should have added to their income tax the amount by which their income taxes in previous years had been decreased.

[8] The amount of the refund sought was 2,650.11 dollars.

[9] See Perry v. United States, 160 F. Supp. 270, 271 (Ct. Cl. 1958), in which the court stated: "As stated, the return to the taxpayer of the property he had tried to give away cannot possibly be considered as income—he merely got back his own property."

[10] That is, 1,877.49 dollars instead of the Commissioner's assessment of 4,527.60 dollars.

of charitable contributions for which full tax benefit had been enjoyed is properly classified as income taxable at the current rate at the time of recovery. The *Perry* decision, with its new tax benefit rule,[11] was expressly overruled.[12] However, Judge Collins, even though writing the opinion for the court, criticized the holding.[13] Upon examination of the law and scrutiny of the court's reasoning, it is justifiable to conclude that the decision is more legally correct than equitably just.[14]

The recovery of charitable contributions removes the equitable basis[15] upon which previous deductions were taken. The rule requiring taxation of such recoveries[16] or an appropriate adjustment[17] in favor of the government is necessary to prevent the unjust enrichment of a taxpayer and to offset the tax benefit of deductions which subsequent facts have rendered unwarranted.[18] Recoveries have been taxed as income under the theory that since deducted items result in the non-taxation of a part of gross income, these

[11] The *Perry Case* set forth what has been called the "new tax benefit rule" or the "tax dollar benefit rule." That is, a taxpayer who recovers gifts is required to add to his income tax in the year of recovery no more than the amount of taxes saved in prior years due to charitable contribution deductions. *See* 33 TUL. L. REV. 247 (1959).

[12] Concluding its opinion, the court says:

> Since taxpayer in this case did obtain full tax benefit from its earlier deductions, those deductions were properly classified as income upon recoupment and must be taxed as such. This can mean nothing less than the application of that tax rate which is in effect during the year in which the recovered item is recognized as a factor of income.

381 F.2d 399, 403 (Ct. Cl. 1967).

[13] In the words of Judge Collins,

> This opinion represents the views of the majority and compiles with existing law and decisions. However, in the writer's personal opinion, it produces a harsh and inequitable result. Perhaps, it exemplifies a situation 'where the letter of the law killeth; the spirit giveth life.'

Id. at 403, n.5.

[14] In the instant case, the court says of *Perry* that "it achieved a result which was more equitably just than legally correct." *Id.* at 403.

[15] See INT. REV. CODE of 1954, § 170.

[16] See Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946); Estate of Block v. Commissioner, 39 B.T.A. 338 (1939), *aff'd sub nom.* Union Trust Co. v. Commissioner, 111 F.2d 60 (7th Cir. 1940), *cert. denied,* 311 U.S. 658 (1940).

[17] See Perry v United States, 160 F. Supp. 270 (Ct. Cl. 1958).

[18] See Plumb, *The Tax Benefit Rule Today,* 57 HARV. L. REV. 129, 176 (1943).

[19] See National Bank of Commerce v. Commissioner, 115 F.2d 875 (9th Cir. 1940); Estate of Collins, 46 B.T.A. 765 (1942). *But see,* Helvering v. State-Planters Bank & Trust Co., 130 F.2d 44 (4th Cir. 1942), where another theory relying on estoppel or implied waiver is set forth.

items when recovered must stand in the place of the gross income which previously escaped taxation.[19] The lack of adequate statutory treatment of recoveries, however, has lead to extensive litigation.[20]

The only exception to the taxation of recoveries is found in the equitable tax benefit rule[21] whereby recovered items may be excluded from income so long as their previous deduction did not provide a tax saving.[22] Initially, the rule was not accepted unanimously, some courts adopting the view that a recovery of a deducted item is includible in taxable income regardless of whether the deduction resulted in a tax benefit.[23] However, the tax benefit rule achieved limited statutory recognition in 1942.[24] Moreover, its overall equitable policy was guaranteed expanded recognition by the Supreme Court in *Dobson v. Commissioner*.[25] Today the tax benefit rule has been broadened by both the Internal Revenue Code of 1954[26] and by the Income Tax Regulations.[27] The goal of the tax benefit rule has been regarded as commendable by both courts[28] and writers.[29]

In denying taxpayer's claim in the instant case the court rightly determined that the present regulations on the tax benefit rule controlled the tax consequences of the recovery of charitable contributions.[30] The principle applies not only to bad debts, prior taxes and

[20] For collected cases see 1 J. MERTENS 1962 FEDERAL INCOME TAXATION §§ 7.34-7.37.

[21] *See* Dobson v. Commissioner, 320 U.S. 489 (1943).

[22] *See* Lassen, *The Tax Benefit Rule and Related Problems*, 20 TAXES 473 (1942); Plumb, *The Tax Benefit Rule Today*, 57 HARV. L. REV. 129 (1943); 33 TUL. L. REV. 247 (1959); 44 VA. L. REV. 639 (1958).

[23] *See* Commissioner v. United States & Int'l Sec. Corp., 130 F.2d 894 (3d Cir. 1942), *modified*, 138 F.2d 416 (3d Cir. 1943).

[24] INT. REV. CODE of 1939, § 22(b)(12), added by 56 STAT. 812 (1942). The statute applied to only bad debts, prior taxes and delinquency amounts.

[25] 320 U.S. 489 (1943).

[26] INT. REV. CODE of 1954, § 111. *See also* INT. REV. CODE of 1954, § 1016(a)(2), which makes the tax benefit rule applicable to excessive deductions based upon wear and tear, amortization, obsolescence and depletion.

[27] TREAS. REG., § 1.111-1 (1956).

[28] See Dobson v. Commissioner, 320 U.S. 489 (1943); California Hawaiian Sugar Ref. Corp. v. United States, 311 F.2d 235 (Ct. Cl. 1962).

[29] *See* Eustice, *Cancellation of Indebtedness and the Federal Income Tax: A Problem of Creeping Confusion*, 14 TAX L. REV. 225, 252 (1959), where it is said: "The role of the tax-benefit doctrine as an approach to taxability in the cancellation of indebtedness area has been far from clear. As a general proposition, the theory seems logical and fair. . . ." *See also* Lassen, *The Tax Benefit Rule and Related Problems*, 20 TAXES 473 (1942); Plumb, *The Tax Benefit Rule Today*, 57 HARV. L. REV. 129 (1943).

[30] The court said:

> Drawing our attention to the broad language of this regulation

delinquency amounts,[31] but also "to all other losses, expenditures, and accruals made the basis of deductions from gross income for prior taxable years."[32] In applying the principle the court rejected taxpayer's argument that the reconveyances represented merely the return of capital. In doing so it relied upon the authority of numerous cases[33] and also the reasoning expressed in the dissenting opinion of the *Perry* case to the effect that "[h]aving been written off, the later realization of the claim was, *again for tax purposes,* like a windfall to the taxpayer, and within the broad definition of taxable income."[34] But for the fact that taxpayer deducted the value of the contributions from his gross income, it is difficult to see why the return to taxpayer of property he had given away is income.[35] In any event, the label placed on the reconveyances should not be controlling as to the equitable tax consequences.

The primary point of controversy between the government and taxpayer arises because the tax benefit statute[36] and the income tax regulations[37] are silent as to the tax rate applicable to recoveries.[38] Taxpayer suggested that the fair solution would be to add the amount of tax saved in previous years due to the gift deductions to its tax for the year in which the property was returned. Thus, the precise amount of the tax benefit enjoyed would be restored to the government.[39] This equitable solution was rejected by the court

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[TREAS. REG., § 1.111-1], the Government insists that the present recovery must find its place within the scope of the regulation and, as such, should be taxed in a manner consistent with the treatment provided for like items of recovery, i.e., that it be taxed at the rate prevailing in the year of recovery. We are compelled to agree.

381 F.2d 399, 402 (Ct. Cl. 1967).

[31] INT. REV. CODE of 1954, § 111.

[32] TREAS. REG. § 1.111-1 (1956).

[33] Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946); California & Hawaiian Sugar Ref. Corp. v. United States, 311 F.2d 235 (Ct. Cl. 1962); Citizens Fed. Sav. & Loan Ass'n v. United States, 290 F.2d 932 (Ct. Cl. 1961); Estate of Block v. Commissioner, 39 B.T.A. 338 (1939), *aff'd sub nom.* Union Trust Co. v. Commissioner, 111 F.2d 60 (7th Cir. 1940), *cert. denied,* 311 U.S. 658 (1940).

[34] Perry v. United States, 160 F. Supp. 270, 273 (Ct. Cl. 1958).

[35] *Id.* at 271.

[36] *See* note 32 *supra.*

[37] *See* note 27 *supra.*

[38] See definition of "recovery exclusion" in INT. REV. CODE of 1954, § 111(b)(4).

[39] For a good discussion, *see* Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases,* 15 TAX L. REV. 201 (1960).

on the ground that it exceeded the legal limits of both statutory and judge-made law.[40] In arriving at its decision to tax the recoveries at the current rate in the year of recovery, the court relied upon such policy considerations as annual accounting,[41] the statute of limitations,[42] general administrative ease,[43] and the lack of judicial power to legislate.[44] Strong as these policy considerations are, they should not outweigh the need for justice. The court's interpretation of the present tax benefit rule necessarily promotes injustice.[45] The recoveries, for example, may come in a year of high income so that the taxpayer pays a much greater tax on the recoveries than he saved by the deductions. Also, the recoveries may come in years when tax rates have increased. Moreover, the inclusion in one year of deductions taken in several years inevitably pushes the taxpayer into a higher tax bracket.[46] This is not to say, however, that the present tax benefit rule cannot work in favor of the taxpayer[47] although the odds are against it. To remedy this injustice the taxpayer could file an amended return for the year in which

[40] *See* Bird v. United States, 241 F.2d 516 (1st Cir. 1957); Friehofer Baking Co. v. Commissioner, 151 F.2d 383 (3d Cir. 1945); Boehm v. Commissioner, 146 F.2d 553 (2d Cir. 1945); Ben Bimberg & Co., Inc. v. Helvering, 126 F.2d 412 (2d Cir. 1942); Universal, Inc. v. Commissioner, 109 F.2d 616 (7th Cir. 1940); National Forge & Ordnance Co. v. United States, 151 F. Supp. 937 (Ct. Cl. 1957); United States v. Detroit Moulding Corp., 56 F. Supp. 754 (E.D. Mich. 1944); H. Sheldon Mfg. Co. v. Commissioner, 13 B.T.A. 1296 (1928); Birmingham Terminal Co. v. Commissioner, 17 T.C. 1011 (1951). *See also* S. SURREY & W. WARREN, FEDERAL INCOME TAXATION 538 (1960); J. MERTENS, FEDERAL INCOME TAXATION § 7.37 (1962); Rev. Rul. 59-141, 1959-1 CUM. BULL. 17.

[41] INT. REV. CODE of 1954, § 441. *See also* Burnet v. Sanford & Brooks Co., 282 U.S. 359, 365 (1931), where the court said:

> It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation.

[42] INT. REV. CODE of 1954, § 6511.

[43] See cases cited in note 40 *supra*.

[44] "[T]he court cannot legislate and any change in the existing law rests within the wisdom and discretion of the Congress." 381 F.2d 399, 403 (Ct. Cl. 1967).

[45] *See* Plumb, *The Tax Benefit Rule Today*, 57 HARV. L. REV. 129, 176-77 (1943).

[46] This, of course, is less likely in the case of a corporate taxpayer.

[47] The taxpayer would benefit if the deduction was taken in a profitable year, while the recovery came in a loss year or a year of low income or in a year when tax rates were lower. *See* Inland Prod. Co v. Blair, 31 F.2d 867 (4th Cir. 1929).

the deduction was allowed thereby making a fair adjustment with the government.[48]

Although the remedy of an amended return would violate the concepts of annual accounting and undoubtedly would cause some administrative inconvenience, such drawbacks have never prevented change.[49] The tax benefit rule itself deviates from the concept of annual accounting.[50] Congress, in the name of equity, has deviated from the statute of limitations and annual accounting and has accepted administrative inconvenience by enacting provisions covering the carryover-carryback of losses,[51] recoveries from unconstitutional processing of taxes,[52] inconsistently treated items,[53] and periods of abnormally high income.[54] To allow an amended return for recoveries of charitable contributions would be no greater departure.

If the court was correct in its holding that judicial legislation[55] cannot go as far as the taxpayer wished, it is submitted that Congress should reevaluate the tax benefit rule. Legislation granting the taxpayer an option to account for the recovery of a charitable contribution in the year of recovery or to file an amended return for a previous year would not only achieve substantial justice,[56] but also would promote public policy by encouraging taxpayers to make contributions to charity.[57]

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[48] *See,* Plumb, *The Tax Benefit Rule Today,* 57 HARV. L. REV. 129, 177 (1943).

[49] *Id.* at 178-79.

[50] *See Hearings Before House Ways and Means Committee on Revenue Revision of 1942,* 77th Cong., 2d Sess., Vol. I, 80, 87-88 (1942).

[51] *See* INT. REV. CODE of 1954, § 172(b).

[52] *Id.* § 1346.

[53] *Id.* § 1311.

[54] *Id.* at 1301-1304.

[55] *See* Commissioner v. Beck's Estate, 129 F.2d 243, 245 (2d Cir. 1942), where the court said:

> Judicial legislation is one of the facts of life, an inescapable and necessary one. But courts may not, as legislatures may, roam at large, confined only by the Constitution; their function, when dealing with legislative legislation, does not go beyond that of filling in small gaps left by the legislature—and to closing those gaps in accordance with what appears to have been the legislative purpose.

[56] Although some may not agree that granting an option to the taxpayer achieves substantial justice, this would be in accord with other sections of the Code, such as section 1341.

[57] For additional discussions of the tax benefit rule, *see* Eustice, *Cancellation of Indebtedness and the Federal Income Tax: A Problem of Creeping Confusion,* 14 TAX L. REV. 225 (1959); Lassen, *The Tax Benefit Rule and Related Problems,* 20 TAXES 473 (1942); Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases,* 15 TAX L. REV. 201 (1960); Plumb, *The Tax Benefit Rule Today,* 57 HARV. L. REV. 129 (1943); 33 TUL. L. REV. 247 (1959); 44 VA. L. REV. 639 (1958).

Torts—Causal Relationship

The existence of a causal relationship between defendant's act or omission and plaintiff's injury is an essential element in any negligence action.[1] In *Maharias v. Weathers Brothers Moving & Storage Company*[2] defendant used a room in his warehouse for refinishing furniture and had allowed rags soaked with inflammable liquid to accumulate in a corner. A fire started and spread to plaintiff's adjoining building. Expert testimony showed that the fire could have started by spontaneous combustion, but that it was possible that it had started from any one of a number of sources. The court affirmed a non-suit for insufficient evidence of the causal relationship. There were three distinct possibilities. The fire could have started (1) in the rags and from spontaneous combustion, (2) in the rags but from an outside source, or (3) at another place within the room and without fault on the part of the defendant. If defendant's liability was to hinge on whether the fire actually started in the rags, then perhaps the court was justified in refusing to allow the case to go to the jury since there was no way to determine exactly where the fire started. However, even if this be the case, it seems strongly arguable that the very fact that defendant allowed a condition to exist which created a risk of fire should, in itself, go far toward establishing the chain of causation. But why should the point at which the fire started be determinative? In a California case,[3] the defendant had stored large quantities of paint

[1] The traditional test which courts have applied to determine whether the causal relationship exists is the familiar "but for" rule—but for the negligence the injury would not have occurred. Although this rule has not gone without criticism, *see, e.g.*, Green, *The Causal Relationship Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962), it has been used effectively in the great majority of the cases. However, in a limited number of cases involving multiple causation the rule has proven inadequate, and courts have formulated the "substantial factor" test—was defendant's negligence a "substantial factor" in contributing to the plaintiff's injury? *See* Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 146 Minn. 430, 179 N.W. 45 (1920), where the fire set by defendant merged with a second fire from another source. Either one, acting alone, would have produced the same result. Obviously the "but for" rule would not impose liability, but the defendant's negligence was a "substantial factor" in contributing to the loss. *See* RESTATEMENT (SECOND) OF TORTS § 432 (1965).

[2] 257 N.C. 767, 127 S.E.2d 548 (1962).

[3] Reid & Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal. App. 2d 60, 285 P.2d 364 (1955).

thinner on the premises. Even though he was not responsible for the starting of the fire, the court held that the evidence was ample to warrant the conclusion that the inflammable material contributed substantially to the spread of the fire and increased the difficulty of fighting it. It has been suggested that a similar approach could have been taken in *Maharias*.[4]

In the recent case of *Phelps v. Winston-Salem*[5] the city's agent was the manager of a large building in which stalls were rented to local produce dealers. One of the tenants had built a shed in which he "cured" tomatoes. The roof of the shed was cluttered with crates, paper, and other debris. The exhaust pipe from an oil heater protruded through the roof and on a previous occasion had started a small fire. The manager had never reported this incident, nor had he taken steps to see that the combustibles were removed. There was also evidence of several "pot-bellied" stoves being in the building, and one tenant had been allowed to store cylinders of ethylene gas. A nightwatchman first saw the fire "about two feet over the top of the Blalock shed."[6] It was small, "something like two feet high."[7] He barely had time to alert the other tenants before there was an explosion which spread the fire.[8] Firemen arrived and seemed to have the situation under control when a second explosion put the entire building in flames.[9] In affirming a non-suit the court said that the jury should not be allowed to "speculate" on the origin of the fire.[10] The eyewitness testimony of the nightwatchman, together with other evidence, was more than adequate to

[4] *See* Note, *Spreading Fires, Tenth Annual Survey of North Carolina Case Law*, 41 N.C.L. REV. 521 (1963).

[5] 272 N.C. 24, 157 S.E.2d 719 (1967). Plaintiff also alleged that defendant was negligent in failing to provide firefighting equipment. The court held that lack of such equipment was not a causal factor because there was nothing to show that the nightwatchman would have had time to use it. *Accord*, Wainwright v. Jackson, 291 Mass. 100, 195 N.E. 896 (1935).

[6] 272 N.C. 24, 27, 157 S.E.2d 719, 721 (1967).

[7] Record at 82: "the fire was very small. . . .," record at 89.

[8] Record at 83, 86.

[9] Record at 41.

[10] The court cited Maguire v. Seaboard Airline Ry., 154 N.C. 384, 70 S.E. 737 (1911), for the proposition that the plaintiff must prove the origin of the fire. However, in *Maguire* the only evidence was that defendant's train passed by two hours before the fire was discovered on plaintiff's adjoining land. Contrary to a statement in *Phelps*, there was insufficient evidence of a foul right-of-way. Other railroad cases where there *was* evidence of a foul right-of-way held that defendant was liable when sparks from the engine ignited combustibles on the right of way, and circumstantial evidence was sufficient to prove this. See cases cited note 14 *infra*.

sustain the inference that the fire actually started in the combustibles on the roof of the shed.[11] However, the opinion of the court is unclear as to whether it accepts this explanation, or whether it is concerned with the possibility that the fires started elsewhere and somehow spread to the top of the shed. As previously pointed out, the point at which the fire started should make no difference.[12] If it did start in the combustibles, then it is a reasonable assumption that they were ignited by the heater flue as on the previous occasion.[13] In refusing to submit this possibility to the jury, the court has taken a very restrictive view of the probative value of circumstantial evidence. In *McRainey v. Virginia & Carolina Southern Railway*,[14] the evidence was also purely circumstantial. Defendant-railroad allowed its right-of-way to become cluttered with combustible material. The fire was discovered more than three hours after the train had passed. No one saw the engine emitting sparks and there was no evidence of burned cinders on the right-of-way. The jury was allowed to infer that the spark which ignited the material had come from defendant's engine. If the *Phelps* fire started at another location and was communicated to the roof of the shed, the combustibles were still a substantial factor in contributing to its spread.[15] Admittedly this might not be the proper analysis had the fire been a conflagration by the time it reached the shed, but evidence clearly shows that the fire was very small when first seen.

In concerning itself with the origin of the fire, the court in *Phelps* overlooks the possibility that the ethylene gas cylinders could have caused one or both of the explosions. Although the fire chief stated that the cause of the explosions was unknown,[16] there was

[11] Record at 40, 82, 86, 89.

[12] *See* note 3 *supra* and accompanying text.

[13] There was some question as to whether the oil heater had been lighted on the day of the fire; *see* Brief for Appellee at 6, and Brief for Appellant at 28. However, the evidence taken in the light most favorable to the plaintiff would seem to support the inference that the heater flue could have been hot.

[14] 168 N.C. 570, 84 S.E. 851 (1915). *See also* Gainey v. Rockingham R.R., 235 N.C. 114, 68 S.E.2d 780 (1951); Betts v. Southern Ry., 230 N.C. 609, 55 S.E.2d 76 (1949); Simmons v. John L. Roper Lumber Co., 174 N.C. 220, 93 S.E. 736 (1917). For two recent fire cases which give an indication of the quantum of evidence that will be sufficient to avoid a non-suit, see Drum v. Baisner, 252 N.C. 305, 113 S.E.2d 560 (1960) and Patton v. Dail, 252 N.C. 425, 114 S.E.2d 87 (1960).

[15] RESTATEMENT (SECOND) OF TORTS § 431 (1965).

[16] Record at 48, 50.

testimony which negated several other possible explanations,[17] and further testimony indicated that at least one exploded cylinder had been found.[18]

Another fire case which deals with the cause issue is *Broughton v. Standard Oil Company of New Jersey.*[19] The prior lessee of the filling station testified that he noticed the odor of gasoline while digging near a large underground storage tank. His records indicated that the tank was losing ten gallons per day. The tank was buried so that it was on a level with the basement of the station, and the ground sloped in that direction. A few months after decedent's employer took over the station a heavy rain caused the basement to flood. A three-fourths-inch coating of gas was found on the top of the water. The basement was drained and cleaned, but three days later the fumes were again noticeable. When the manager struck a match to assist a customer in looking for his keys, a bluish flame appeared along the floor. The customer and manager escaped but decedent was killed in the ensuing explosion. The court held that there was insufficient evidence of negligence, but also stated that the evidence of causal relationship was inadequate, alluding to the possibility that gas could have gotten into the basement due to improper use of the pumping equipment by the filling station attendants. However, in *Masten v. Texas Company*[20] the court held that there was sufficient evidence to be submitted to the jury. Plaintiff's well had contained pure water prior to the installation of defendant's gas pumps. There was a strata of rock which ran from the pumps to the well, and the slope of the ground was in the same direction. Plaintiff recovered for contamination of his well.

Two "harmful substance" cases take a very harsh approach, and illustrate how one unjust decision may lead to another. The cases are particularly significant because they deal with the evidentiary requirements unclouded by any subsidiary elements of multiple causation or intervening cause. In the first case, *Wall v. Trogdon,*[21] the plaintiff and two witnesses testified that they saw defendant's cropdusting plane emit spray as it circled near the fish pond, that they noticed an oily substance on the surface of the water, and that

[17] Record at 43, 56.
[18] Record at 57, 61.
[19] 201 N.C. 282, 159 S.E. 321 (1931).
[20] 194 N.C. 540, 140 S.E. 89 (1927).
[21] 249 N.C. 747, 107 S.E.2d 757 (1959).

immediately thereafter the fish began to die. An expert fish biologist testified that several other possible causes had been ruled out and that poisoning was the "only possible cause of death"[22] which he could discover. In affirming a non-suit the court discounted the expert opinion as "purely speculative and founded on possibilities,"[23] and indicated that the plaintiff should have offered evidence of the constituent elements of the spray, that the oily substance on the water was the spray, that it was poisonous to fish, and that it did in fact kill plaintiff's fish.

Other jurisdictions do not seem to impose such harsh requirements. In *S.A. Gerrard Company v. Fricker*[24] the defendant contended that the burden was on the plaintiff to show that the substance which allegedly killed his bees was in fact poisonous to them. The court held that the mere fact that the substance come into contact with the bees and that they died was sufficient. And in *Pitchfork Land and Cattle Company v. King*[25] the plaintiff brought an action for damages allegedly caused by defendant's negligence in allowing herbicide chemicals to drift into the plaintiff's crops. Defendant, contending that there was no causal relationship, offered expert testimony that the effects of such a chemical would appear not more than ten days after application and that the damage to plaintiff's crops did not appear until fifteen days after the crop spraying. Evidence also showed that the damage was confined to a narrow strip rather than a wide area as would be expected if the spray had been dispersed by the wind. An expert testified that he had seen such a confined damage pattern before and that the more probable explanation was that an airplane which was leaking spray had flown over the plaintiff's land. The damaged crops were located from seven and one-half to fifteen miles from the point at which the cropdusting

[22] *Id.* at 751, 107 S.E.2d at 760.

[23] *Id.* at 754, 107 S.E.2d at 762.

[24] 4 Ariz. 503, 27 P.2d 678 (1933); *see* Lundberg v. Bolon, 67 Ariz. 259, 194 P.2d 454 (1948); Hammond Ranch Corp. v. Dodson, 199 Ark. 846, 136 S.W.2d 484 (1940). *See generally* Annot., 12 A.L.R.2d 436 (1950).

[25] 162 Tex. 331, 346 S.W.2d 598 (1961). *See* Casey v. Phillips Pipeline Co., 431 P.2d 518 (Kan. 1967) (Evidence which showed that there had been a rupture of a high pressure gasoline line, that it was in close proximity to plaintiff's lake, that a "mist" was seen hanging over the lake, that the lake water was used to water plaintiff's grass crop, and that soon thereafter the grass died, was held sufficient to establish the causal relationship). *See also* Ebers v. General Chemical Co., 310 Mich. 261, 17 N.W.2d 176 (1945) (Evidence held sufficient even though etymologist testified that they did not know what killed plaintiff's trees).

had been conducted. The court held that there was sufficient evidence on the issue of cause to be submitted to the jury. In a North Carolina case, *Nance v. Merchant's Fertilizer & Phosphate Company*,[26] evidence tended to show that the defendant emptied waste into a stream. Heavy rains caused the stream to overflow into plaintiff's pasture. Soon afterwards his hogs began to die. Examination of the hogs' entrails showed that they were perforated and traces of acid were found in samples of mud from the pasture. The court held that even though the evidence was circumstantial, "the probative force was for them [the jury]—not us."[27]

In the second "harmful substance" case, *Reason v. Singer Sewing Machine Company*,[28] the court relied heavily on *Wall*. Plaintiff was sprayed in the face with oil from defendant's defective sewing machine and two hours later her eyes began to burn and water. A doctor who examined her the next day testified that the second degree burns on her eyelids could have been caused by "either hot oil . . . or warm oil so spraying, depending on the chemical composition."[29] The court said that the plaintiff had not shown the chemical composition of the oil or that it was hot. The case never reached the jury. Admittedly questions of physical injury may reach a point where difficult problems of medical causation are involved.[30] But where the relationship between act and injury is of such a nature that the layman can readily comprehend cause and effect, there seems to be no justification for such an approach. Indeed, the court has held on previous occasions where the question of causation appeared to be much more obscure that the issue was for the jury. For example, in *Metz v. City of Asheville*[31] the court allowed the jury to find that pollution of the stream which ran near decedent's house could have caused his death from typhoid, even

[26] 200 N.C. 702, 158 S.E. 486 (1931).
[27] *Id.* at 706, 158 S.E. at 488.
[28] 259 N.C. 264, 130 S.E.2d 397 (1963).
[29] *Id.* at 266, 130 S.E.2d 398.
[30] The question of medical causation is clearly beyond the scope of this note. However, for some case law in this area, Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1964) (proof insufficient to establish causal relationship between blow to plaintiff's back and ruptured disc); Lee v. Stephens, 251 N.C. 429, 111 S.E.2d 623 (1959) (proof insufficient to establish causal relationship between head injury and cerebral hemorrhage); Byrd v. Express Co., 139 N.C. 273, 51 S.E. 851 (1905) (proof insufficient to establish causal relationship between failure to deliver medicine on time and death of a patient). *See generally* Annot., 2 A.L.R.3d 487 (1965).
[31] 150 N.C. 748, 64 S.E. 881 (1909).

though neither his wife nor his child caught the disease. And in *Cook v. Town of Mebane*[32] testimony indicated that there never had been pools of stagnant water or mosquitoes prior to defendant's polluting the stream with sewage. The court held that the question of whether the pollution caused plaintiff's mill workers to get malaria was for the jury. In *Harper v. Bullock*[33] the jury was allowed to find the causal relationship where decedent died after eating weiners which contained decomposed meat, although another who had eaten them did not die, and although decedent's doctor testified that she had been suffering from nephritis and did not die from the effects of the meat.

There may be many factors contributing to the approach which the court has taken in these cases, and an attempt to enumerate them would be impractical. The most obvious factor is simply a failure to give the proper probative value to circumstantial evidence. Of course the burden of proof on the issue of causation, like other elements of the negligence case, is normally on the plaintiff.[34] He must show by the greater weight of the evidence,[35] be it direct or circumstantial, that defendant's negligence was a substantial factor in contributing to the injury. But he need not negate entirely the possibility of other "causes" for which the defendant is not responsible.[36] Since the issue is essentially a factual determination, it should normally be one for the jury, and it has been stated that *courts should seldom rule on it as a matter of law.*[37]

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[32] 191 N.C. 1, 131 S.E. 407 (1926).

[33] 198 N.C. 448, 152 S.E. 405 (1941).

[34] There are rare decisions which shift the burden of proof to the defendant. *See, e.g.,* Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). *See also* W. PROSSER, TORTS 247 (3d ed. 1964) [hereinafter cited as PROSSER].

[35] There are, however, a limited number of cases in which much less than a preponderance of the evidence is required to establish the causal link. *See* Malone, *Ruminations on Cause-In-Fact,* 9 STAN. L. REV. 60 (1956). For a rather liberal decision in the area of medical malpractice see Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), noted in 45 N.C.L. REV. 799 (1967). In Bear v. Harris, 118 N.C. 476, 24 S.E. 364 (1896), defendant moved plaintiff's boat without permission and it was damaged by a storm. The court held that it was no defense to show that the damage might have been the same or greater had the boat been at its original mooring. Where the tort is intentional it is clear that courts will impose liability for a greater range of consequences. Are cases such as *Bear* an indication that courts will also be more lenient in establishing causation when the tort is intentional? *See e.g.,* Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940) (trespasser accused of causing fire).

[36] *See* PROSSER 246. *See also* RESTATEMENT (SECOND) OF TORTS § 433B, comment b at 443 (1965).

[37] Kearns v. Railroad, 139 N.C. 470, 476, 52 S.E. 131, 134 (1905) (dis-

In speaking of circumstantial evidence, the court in *Phelps* stated:

> [I]n criminal cases it [circumstantial evidence] must point unerringly to the guilt of the defendant, and in effect, must show not only that the defendant is guilty but that upon no reasonable interpretation of the evidence could he be innocent. And also, that if the evidence is consistent with a finding of either guilt or innocence, that the innocent interpretation must be adopted.
>
> *The law in civil cases is so similar that little difference can be found.* The innocent interpretation is applicable when we recall that the defendant, in such cases is not required to prove his lack of responsibility, but the plaintiff must affirmatively fix it by the greater weight of the evidence. And it is not sufficient to show that the circumstantial evidence introduced *could* have produced the result—it must show that it *did.*[38]

Although this statement is somewhat clarified by the "greater weight of the evidence" language near the end, it still seems totally unnecessary to analogize guilt in a criminal case to proof of cause in a civil case. And to state that circumstantial evidence must show, not that it *could* have produced the result, but that it *did,* is clearly erroneous. The *Phelps* court also cites *American Jurisprudence,* and states that

> [P]roof of the burning alone is not sufficient to establish *liability,* for if nothing more appears, the presumption is that the fire was the result of accident or some providential cause.[39]

However, the cited section of *American Jurisprudence* deals with the law of arson, and reads as follows:

> [P]roof of the burning alone is not sufficient to establish the *corpus delicti,* for if nothing more appears the presumption is . . . that the fire was the result of accident or some providential cause rather than of *criminal design.*[40]

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senting opinion): "[I]t is also the better doctrine that where the negligent act has been established or admitted, it is only in *clear and exceptional instances* that the question of proximate cause should be withdrawn from the jury and determined by the judge." (Emphasis added). *See* PROSSER 246; RESTATEMENT (SECOND) OF TORTS § 433B comment b at 443 (1965). It has also been suggested that, as a practical matter, once it is shown that the harm suffered by the plaintiff is clearly within the ambit of risk created by the defendant, courts are often willing to allow the issue of cause to get to the jury on the "slightest factual plausibility;" *see* Malone, *Ruminations on Cause-In-Fact,* 9 STAN. L. REV. 60 (1956).

[38] 272 N.C. 24, 28, 157 S.E.2d 719, 722 (1967) (Emphasis added).

[39] *Id.* at 31, 157 S.E.2d at 724 (Emphasis added).

[40] 5 AM. JUR. 2d *Arson and Related Offenses* § 46 at 836 (1962) (Emphasis added).

How can the crime of arson, where the question is whether a criminal agency started the fire, be analogous to a civil case where the issue is whether an accumulation of combustible materials was the "cause" of the fire?

Another factor may be faulty conceptualization and analysis. For example, in *Phelps* the court was obviously concerned with the possibility that an outside source ignited the combustibles as evidenced by statement that the origin of the fire could have been a discarded cigarette or match. In making this a point of emphasis the court indicates that it was thinking in terms of an intervening cause which would insulate defendant from liability.[41] While the doctrine of intervening cause is quite different from cause-in-fact, it is significant to note that *Phelps* is in conflict with the rule which is well-established in other jurisdictions.[42] In the case where defendant had stored paint thinner the fire did not originate from any act or omission on his part.[43] His liability was for creating a dangerous condition which was conducive to the starting or spread of a fire. And in *B.W. King Incorporated v. Town of West New York*[44] the defendant-municipality allowed wood, lumps of coal, coal dust and other debris to accumulate on an unused pier. The fire was started by a trespasser who flipped a lighted cigarette onto the pier. The court held that since the defendant had kept the premises in an unsafe condition, it was liable even though the fire was started by the act of a third party. Such an act was reasonably foreseeable as the natural and probable consequences of the negligence. In this respect, *Phelps* also seems to be in conflict with clear North Carolina precedent. In *Lawrence v. Yadkin River Power Company*[45] lightning struck defendant's power line and blew out an insulator. Molten parts of the insulator fell into dry brush which had accumulated on

[41] On the doctrine of intervening cause see PROSSER 309.

[42] The great majority of jurisdictions impose liability where defendant has permitted his property to exist in such an unsafe condition that a fire may easily be started, regardless of the origin of the fire. *See* Annot., 18 A.L.R.2d 1081 (1951).

[43] Reid & Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal. App. 2d 60, 285 P.2d 364 (1955).

[44] 49 N.J. 318, 230 A.2d 133 (1967); *accord,* Menth v. Breeze Corp., 4 N.J. 428, 73 A.2d 183 (1950).

[45] 190 N.C. 664, 130 S.E. 735 (1925). *See* Harton v. Telephone Co., 141 N.C. 455, 54 S.E. 299 (1906), where the court said "the test is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably forseen and expected." *Id.* at 464, 54 S.E. at 302.

the right-of-way and started the fire. The court held that defendant was negligent in maintaining his property in such condition and that the intervening cause did not absolve him from liability. In *Newton v. Texas Company*[46] defendant maintained a distributing plant where he stored large quantities of gasoline. Gas leaked from the warehouse and into the street. In imposing liability for the ensuing explosion, the court said that a reasonable inference could be drawn that the spark came from a passing train, from carelessly discarded matches, cigarettes, or otherwise. Thus *Phelps* cannot be correctly explained on the grounds of an intervening cause which may have ignited the combustibles.

These cases indicate that the court has taken a very restrictive approach to the issue of causal relationship. While all the reasons may not be apparent, the implications are quite clear—trial practitioners who find themselves confronted with the issue of cause had best proceed with utmost care.

JAMES G. BILLINGS

Torts—Products Liability—Is Privity Dead?

The movement to abolish the privity requirement in "warranty" actions has in the past decade played an increasingly successful role in the American judicial theater.[1] The crusade has not left the North Carolina Supreme Court unaffected, and a recent decision by that court may prove to be the signal for privity's final exit from the legal stage in North Carolina.

In *Corprew v. Geigy Chemical Company*[2] the North Carolina Supreme Court sustained a complaint based on warranty and

[46] 180 N.C. 561, 105 S.E. 433 (1920). The court said:

> [I]f the defendant, by its negligence, produced a situation or condition of danger by allowing gasoline to escape . . . where it would probably come into contact with fire, sparks . . . or live ashes from a lighted cigar or cigarette . . . we do not see why this would not be negligence . . . . [I]f the negligence of the defendant combined with the act of some other person . . . the defendant would be liable, though he had no connection with the conduct of the third party and had no control over him.

Id. at 563-64, 105 S.E. at 434.

[1] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[2] 271 N.C. 485, 157 S.E.2d 98 (1967).

negligence even though no privity of contract existed between the plaintiff and the defendant-manufacturer. Plaintiff, a farmer, purchased a chemical weed killer from a retail seller who in turn had procured it from the distributor, an agent of the manufacturer. Instructions on the bags of the chemical specified its use as a weed killer on corn, but warned against planting another stand of corn or other crop of the small grain variety on the same land in the same year. Plaintiff used the chemical on his corn crop with satisfactory results. The following year the plaintiff planted soybeans and peanuts on the land and due to the low yield and poor quality he suffered financial loss for which he brought suit.

The privity rule for warranty and negligence actions has traditionally been an obstacle to the consumer for recovery from the manufacturer. The court explicitly removed this barrier in negligence actions—a rather hollow victory since the "inherently dangerous" exception had already swallowed the rule[3]—but just how far the court went in discarding privity in "warranty" actions is uncertain.

To understand the changed position taken by *Corprew,* a brief review of case law on the privity requirement is necessary, including a look at a recent food and drink case which may have significant consequences in this area.[4] North Carolina freed itself from the doctrine of caveat emptor and adopted the rule of implied warranty in sales between purchaser and seller as early as 1925.[5] In an early decision dealing with food,[6] however, the court held that no liability to the ultimate consumer arose on an implied warranty where no contractual relation, *i.e.,* privity, existed between the manufacturer and the consumer. The manufacturer, said the court, was not an insurer of his product. An exception was recognized to the privity requirement in *Simpson v. American Oil Company.*[7] A spray can of "Annox" insecticide purchased by the plaintiff had a statement printed on it informing the user that the contents were deadly to bugs, but non-poisonous to human beings. The plaintiff de-

[3] Gwyn v. Lucky City Motors, Inc., 252 N.C. 123, 113 S.E.2d 302 (1960); Tyson v. Long Mfg. Co., 249 N.C. 557, 107 S.E.2d 170 (1959).

[4] Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967).

[5] Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 543 (1925).

[6] Thompson v. Ballard & Ballard, 208 N.C. 1, 179 S.E. 30 (1935). The plaintiff sued for breach of implied warranty when he became ill after eating baked bread and subsequently discovered a dead mouse in the sack of flour produced by the defendant, but bought at a local grocery.

[7] 217 N.C. 542, 8 S.E.2d 813 (1940).

veloped a severe skin ailment after spraying a room with the insecticide and brought suit against the manufacturer. The court held that where an express warranty on the product's container was addressed to the ultimate consumer no privity was required. In *Davis v. Radford*[8] the plaintiff's intestate died after using a salt substitute which contained poisonous ingredients. Suit was brought only against the retailer, but in dictum the court suggested that, based upon *Simpson,* the plaintiff could bring an action against the distributor on implied warranty despite the lack of privity. The court said that the wholesale distributor would be primarily liable since the retail seller could recover over against him. By a later holding[9] it seems that to come within the *Simpson* rule in non-food cases, the express warranty must appear on the package itself and be addressed to the ultimate consumer. Yet language in another case strictly limits the *Simpson* doctrine to food and drink for human consumption sold in sealed containers with labels addressed to the purchaser.[10] A green fly in a soft drink bottle offered the court an opportunity to re-examine its policy on privity in implied warranty actions in *Terry v. Double Cola Bottling Company,*[11] but the court reaffirmed its view that warranty was contractual in nature and required privity. A concurring opinion,[12] however, argued for privity's abandonment and gave the first suggestion of possible change.

This, then, was the procedure generally followed in an implied warranty action before the court altered its position. One injured by a defect in a product could bring an action on implied warranty only against the immediate seller with whom he was in the "holy state of privity."[13] The seller, in turn, could seek redress on the same theory against the distributor or manufacturer who was in privity with him.[14] The obvious defects in this procedure are that the retailer may be insolvent, there may be a multiplicity of actions, the suit may become barred by the statute of limitations, and often the court may lack jurisdiction over the parties.

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[8] 233 N.C. 583, 63 S.E.2d 822 (1951).

[9] Murray v. Bensen Aircraft Corp., 259 N.C. 638, 131 S.E.2d 367 (1963).

[10] Perfecting Serv. Co. v. Product Dev. & Sales Co., 261 N.C. 660, 136 S.E.2d 56 (1964).

[11] 263 N.C. 1, 138 S.E.2d 753 (1964).

[12] *Id.* at 3, 138 S.E.2d at 754.

[13] Aldridge Motors, Inc. v. Alexander, 217 N.C. 751, 9 S.E.2d 469 (1935).

[14] *Id.*

In *Tedder v. Pepsi Cola Bottling Company,*[15] a decision handed down in the late spring of 1967, the first shift took place. A woman became ill after drinking a portion of the defendant's bottled beverage which contained deleterious matter. She sued the bottler for breach of implied warranty of fitness though the drink was purchased at a local supermarket. The bottler's employee had placed the bottles on the shelves of the grocer, and the plaintiff was the only person to handle the bottle before opening. The court held that the mass advertising conducted by the bottler and the direct manner of travel of the product from the bottler to the consumer were sufficient to take the case to the jury on the theory of implied warranty. The court stopped short of abolishing the privity requirement in the food and drink area. Whether or not a manufacturer by placing his product on the market impliedly warrants to the ultimate consumer that the food and drink in sealed containers is fit for human use was not decided by the court. However, the court did make reference to the legal principles of Justice Sharp's concurrence in *Terry* which had argued for privity's repudiation in cases involving food products. *Tedder* can be viewed as a narrow decision, limiting the area emancipated from the privity requirement to cases of food and drink sold in sealed containers where there has been mass advertisement and direct travel of the product to the consumer.

What is *Corprew's* affect on the privity requirement? The decision lacks clarity and is open to at least four possible interpretations.

(1) The narrowest interpretation would limit the area free of the privity rule to cases where a product was sold in a sealed package which contained a label of warning or instruction. If either element were lacking, the consumer would have to meet the privity requirement to state a cause of action against the manufacturer. For example, if a new outboard motor boat sunk shortly after being launched and several persons were drowned, the owner could not sue the maker even if a label appeared on the vessel since it was not sold in a sealed package.

(2) Under a less narrow interpretation of *Corprew,* the privity rule would be eliminated in cases where the article is sold in a sealed container. Both *Tedder* and *Corprew* involve products marketed in closed packages. Under this interpretation a label or advertising would not be required, but the privity rule would still be viable for

[15] 270 N.C. 301, 154 S.E.2d 337 (1967).

such products as lawn mowers, automobiles, and airplanes which are not sold in sealed packages. The matter of the sealed container, however, would seem to go more to the evidence of breach as is discussed later.

(3) Since the court found that the statement on the package amounted to an express warranty that the chemical would not be harmful to crops planted in the next year, a third interpretation is that the court in effect was restating the doctrine set out in the earlier *Simpson* decision, *i.e.,* that where a warranty appears on the product addressed to the ultimate consumer no privity is required. Under this interpretation it is the label, not the container, that is important. Thus the exception to the privity rule would again include non-food items. If so construed, privity would remain a requirement except where a label of warning or instruction is printed on the product; or where, as in *Tedder,* there is mass advertising which can be viewed as equivalent to a label. The court's thinking quite possibly could revolve around the notion that the label or mass advertising bridges the gap between the manufacturer and consumer and creates a type of privity or bond between the two sufficient to sustain an action. This reasoning might be influenced by the fact that the plaintiff could have been induced to purchased the product by the representations made by the producer on the product itself, or by the advertisement.

The question immediately arises: Should a label be required? If a person is injured when the blade flys off a lawn mower the first time it is started, should he have to show that there was a label of safety or warning on the mower before he could sue the manufacturer? Under this latter interpretation he would.

(4) There is broad language in the opinion making it susceptible to the more liberal interpretation that the court has finally abrogated the privity requirement for warranty and has adopted in effect a theory of strict liability:

> Under modern marketing conditions a manufacturer places goods upon the market in sealed containers, and the container without substantial change is sold to the ultimate purchaser in the condition in which it is placed by the manufacturer on the market for sale. By placing its goods upon the market, the manufacturer represents to the public that they are suitable and safe for use, and by packaging, advertising, and otherwise, frequently upon a national scale, it does everything it can to induce that

> belief. The middleman is no more than a conduit, a mere mechanical device through which the thing is to reach the ultimate consumer. The manufacturer has invited and solicited the use of its product, and when it leads to disaster it should not be permitted to avoid the responsibility by saying that it made no contract with the consumer. The manufacturer should be held liable because it is in a position to insure against liability and add the cost to the product.[16]

In this paragraph the court states the forceful argument that a manufacturer ought to be held accountable if his product causes injury to a lawful user or consumer even though the manufacturer is not negligent. This sounds like the theory of strict liability in tort. In dictum[17] the court strengthens this interpretation by reference to Justice Sharp's concurring opinion in *Terry*. Evidently the court intended to incorporate into *Tedder* the legal principles stated in this concurrence which had cogently argued for the demise of privity in food product cases, contending that the manufacturer should be held liable, label or not.[18] Though the case concerned food products in sealed containers, the same policy arguments apply to non-food articles as in *Corprew*. Under this last interpretation, a consumer would have recourse against the manufacturer whether or not the product was in a sealed container or a label was attached thereto. The manufacturer would be subject to strict liability.

While rejoicing at the prospects of privity's departure, lawyers must remember that the manufacturer is not being served to the

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[16] Corprew v. Geigy Chemical Corp., 271 N.C. 485, 491, 157 S.E.2d 98, 102 (1967). It is arguable that the court was talking about negligence only, but the broad language would indicate that the court was also referring to "warranty."

[17] As to implied warranty as between manufacturer and consumer, in the absence of immediate privity of contract, in respect of food and drink placed on the market by the manufacturer in sealed containers, see the legal principles set forth in the concurring opinion of Sharp, J., in *Terry v. Bottling Co.*, 253 N.C. 1, 138 S.E.2d 753, and the application thereof in our decision of May 10, 1967, in *Tedder v. Bottling* Co., 270 N.C. 301, 154 S.E.2d 337.

Id. at 498, 157 S.E.2d at 107.

[18] Having held him to his label in *Simpson v. Oil Co., supra,* can we seriously argue or reasonably contend that a manufacturer or supplier who, after extensive advertising, sells a retailer bottled drinks, canned pineapple, or boxes of candy for resale to the consumer, does not likewise represent to the buying public that his product is fit to eat, even though no label or imprint on the container specifically says so?

Terry v. Double Cola Bottling Co., 263 N.C. 1, 12-13, 138 S.E.2d 753, 761 (1967) (Sharp, J., concurring).

consumer on a silver platter. The plaintiff must still prove his case. It is necessary for him to show that: (1) he was injured by the manufacturer's product; (2) the injury was due to a defect in the product; (3) the defect existed when the product was sold to the plaintiff; and (4) the product was being reasonably used for the purposes intended.[19]

In the area of damages, the type of loss for which recovery is sought will be important. Where economic loss is involved the plaintiff must show compliance with the provisions of the Uniform Commercial Code to recover from the seller.[20] Recovery in a tort action for personal injury and property damage is possible against the seller and the manufacturer under the Code,[21] since it is neutral on the privity requirement.[22] Under two of the interpretations of *Corprew,* proof of a label would be necessary if the customer sought recovery from the manufacturer for injury to person or property. Corprew sued for losses incurred when crops were damaged, which the court treated as property damage. If the plaintiff had been seeking to recover the cost of the chemical because it was ineffective, the recovery sought would have been for loss of the commercial bargain—economic loss. In such an action in contract[23] the court probably would not have allowed the plaintiff to go against the manufacturer, even though a label were present, since the plaintiff would be seeking recovery on his contract in the absence of privity. If the plaintiff attempts to recover the loss of the bargain from the seller, he needs no label since his action is directed against the seller with whom he contracted. Here the purchaser has relied only on the bargain between himself and the seller. These two parties set the terms of the agreement and if the bargain is not fulfilled the plaintiff has recourse against the seller.

The proof of the elements necessary for recovery against the

[19] *Id.* at 3, 138 S.E.2d at 755.

[20] UNIFORM COMMERCIAL CODE § 2-103(1)(d); § 2-106(1); § 2-607(3)(a).

[21] UNIFORM COMMERCIAL CODE § 2-715(2)(b).

[22] UNIFORM COMMERCIAL CODE § 2-318, comment 3.

[23] The New Jersey court has had trouble already in mixing the contract and tort theories in Santor v. A & M Karagheunian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), where it allowed a purchaser to recover the value of the product from the manufacturer for the loss of the bargain. The California court, in dictum, separated the two types of losses and stated that strict liability should govern personal injuries as well as physical injury to property, but that "breach of warranty" was the proper action to recover for loss of commercial bargain. Seeley v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145 (1965).

manufacturer on a "warranty" action remains a formidable task. The plaintiff can perhaps take advantage of circumstantial evidence and inferences from the facts, but he will still have to overcome any inference that the defect was caused by intervening parties, including himself, or by a long lapse of time between manufacture and use.[24] There is no warranty that the product will not eventually deteriorate after a long period or if it is misused and abused.[25] These are matters of evidence, but proof that a defect existed when it left the manufacturer is only one step removed from proving fault, *i.e.*, negligence, by the producer. For products sold in sealed containers the burden is perhaps less weighty since there is a reasonable inference that any harmful substance in the product became sealed within it when it was manufactured. This, of course, is not conclusive. The fact that the package is sealed goes far in proving that the defect was in the package when sold to the plaintiff, but the manufacturer need not fear that it will be "taken to the cleaners" by every claimant seeking enrichment on a spurious claim.[26]

In a products liability case where a person has suffered personal injury or property damage, he has recourse against the processor under the theories of negligence, warranty, or strict liability. *Corprew* has implications for the plaintiff regardless of which theory he selects.

(1) Negligence remains a proper theory for recovery, and *Corprew* only officially cancels the privity requirement. The plaintiff, however, will have to sustain the extra burden of showing fault by the manufacturer without the aid of res ipsa loquitur and under the weight of the "similar instances" rule in North Carolina.[27]

(2) The plaintiff can also sue for breach of warranty—express, implied and implied for special purposes.[28] Under the *Simpson* doctrine he could rely on express warranty for his cause of action, but

[24] Jakubowski v. Minnesota Mining & Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964); Gomex v. E.W. Bliss Co., 27 Misc. 2d 649, 211 N.Y.S.2d 246 (Sup. Ct. 1961).

[25] *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1144 (1960).

[26] Terry v. Double Cola Bottling Co., 263 N.C. 1, 10, 138 S.E.2d 753, 759 (1964).

[27] Graham v. Winston Coca-Cola Bottling Co., 257 N.C. 188, 125 S.E.2d 429 (1962); Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935).

[28] For an example of an implied warranty for special purposes, see UNIFORM COMMERCIAL CODE § 2-315, comment 2.

this might be limited to food and drink unless *Corprew* reasserts that doctrine for nonconsumption items. Under a theory of implied warranty in food cases he might bring an action under the *Tedder* decision.[29]

To be considered with a "warranty" theory is the impact of the Uniform Commercial Code which went into effect in North Carolina last year. The Code establishes a warranty by law in all sales of goods,[30] but does not require privity for a warranty action against the manufacturer. As noted, the Code's official position is one of neutrality,[31] but it requires that notice of breach of warranty be given,[32] and the warranties themselves can be disclaimed.[33]

(3) Finally, if *Corprew* can be interpreted broadly as rejecting the privity rule for "warranty actions," the plaintiff could bring an action under the theory of strict liability. The language used in the opinion resembles the language of strict liability in tort,[34] but the court uses the phrase "breach of warranty" instead. Strict liability is non-fault liability. The manufacturer is held liable for injuries caused by a defective product even if it has exercised the highest degree of care and skill. If the court has indeed adopted strict liability in tort for the manufacturer, it is submitted that the continued use of the word "warranty" is undesirable and should be rejected in favor of the more accurate phrase—"strict liability in tort." "Warranty" is a contract term, as is recognized by the court,[35] and in this area the distinction between tort and contract is important. Professor Prosser, in several law review articles,[36] refers to sales warranty as the offspring of the illicit relationship between

[29] Problems may arise in determining what the implied warranty covers. In Prince v. Smith, 254 N.C. 768, 119 S.E.2d 923 (1961), where a bottle of Coke exploded in the plaintiff's hands, the court held there was no liability even to the retailer since an implied warranty did not extend to the container. Under the UNIFORM COMMERCIAL CODE § 2-314(2)(e), recovery against the retailer would be allowed.

[30] UNIFORM COMMERCIAL CODE §§ 2-313 to -315.

[31] UNIFORM COMMERCIAL CODE § 2-318, comment 3.

[32] UNIFORM COMMERCIAL CODE § 2-607(3)(a).

[33] UNIFORM COMMERCIAL CODE § 2-316.

[34] Prosser, *Strict Liability to the Consumer,* 18 HASTINGS L.J. 9, 15 (1966). Prosser states that twenty-two jurisdictions have adopted strict liability for all products on one theory or another.

[35] Terry v. Double Cola Bottling Co., 263 N.C. 1, 3, 138 S.E.2d 753, 754 (1964).

[36] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966).

tort and contract and argues for its discontinued use to describe strict liability.[37] Liability for "breach of warranty" is the proper term to be used to refer to a breach in a contractual relation. Strict liability should be employed to describe the liability imposed by law on the manufacturer regardless of fault. The *Restatement of Torts* adopts the strict liability theory without using the word "warranty"[38] and a comment urges this practice.[39] This section of the *Restatement* has been adopted in several states by judicial decision.[40]

By using the terminology of strict liability as recommended by the *Restatement,* the court would also avoid the confusion and problems that are likely to arise with the notice of breach and disclaimer

[37] "Why not, then, talk of strict liability in tort, a thing familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, libel, misrepresentation, and respondeat superior, and discard the word "warranty" with all of its contract implications?" Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791, 802 (1966).

[38] RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[39] RESTATEMENT (SECOND) OF TORTS § 402A (1965), comment m, states:

The rule stated in this Section is not governed by the provisions . . . of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitations to "buyer" and "seller" in [the Code]. . . . Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs as is provided by [the Code]. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it is between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

[40] Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Wights v. Staff Jennings, Inc., 241 Or. 301, 405 P.2d 624 (1965); Ford Motor Co. v. Lonam, 217 Tenn. 400, 398 S.W.2d 240 (1966).

sections of the Code.[41] The Code is a statute designed to codify the law of commercial transactions. Strict liability in tort—and it bears repeating—is liability without fault, imposed by law on the manufacturer for personal injury or physical damage to property caused by its product.

At the least it seems safe to forecast that *Corprew* signals stormy weather for privity in the near future. Currently, the case can be limited to the abolition of the privity rule only where labeled products are sold in sealed containers. With the proper set of facts, however, the court might be convinced to impose strict liability expressly on the manufacturer across the board since it is clear that the theory does not provide automatic recovery for the consumer.

ROBERT A. WICKER

Trusts—Cy Pres Enacted in North Carolina

The 1967 General Assembly enacted legislation giving North Carolina courts power to use the doctrine of cy pres[1] in charitable trust administration. The North Carolina Supreme Court has long rejected the cy pres doctrine[2] while upholding modification

[41] In a California case which involved the UNIFORM SALES ACT, not the UNIFORM COMMERCIAL CODE, the California court held that where damages were sought for personal injuries no notice was required in an action for breach of warranty. The court treated the potential liability as non-contractual in nature and referred to it as strict liability. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 67, 377 P.2d 897 (1963). *See generally* Comment, *Products Liability—Sales Warranties of the Uniform Commercial Code*, 46 N.C.L. REV. 451 (1968).

[1] The words "cy pres" are Anglo-French for "as near" and were originally part of the phrase "cy pres comme possible" meaning "as near as possible." The doctrine of cy pres gives to a court the power to alter the particular purpose of a charitable trust under certain circumstances. Where the testator or settlor intended that the trust property be applied to some particular purpose and yet also had a more general charitable intent, he presumably would have desired that the property be applied to a purpose "as near as possible" to the specific disposition chosen by him rather than that the trust be allowed to fail. Therefore, if the particular purpose named by the settler becomes impossible, illegal, or impracticable, the court will exercise its cy pres powers to select a disposition similar to that named by the settlor or testator. The cy pres doctrine is limited in its use to charitable trusts and is widely accepted among United States jurisdictions. *See* G. BOGERT, TRUSTS § 431 (2d ed. 1964) [hereinafter cited as BOGERT]; A. SCOTT, TRUSTS § 399 (2d ed. 1956) [hereinafter cited as SCOTT].

[2] As to the previous status of the cy pres doctrine in North Carolina, *see* E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES § 2.03(g) (1950)

of trust provisions under an equity court's general power to supervise trust administration. Because of new problems developing as to charitable trusts, the cy pres power has become an increasingly valuable tool of trust administration and public policy. This note will analyze the 1967 legislation, fit it into the scheme of existing North Carolina law, and forecast possible future applications of the cy pres doctrine.

The 1967 Charitable Trusts Administration Act[3] sets forth the generally accepted requisites[4] for a court's use of cy pres power:

1. the existence of a charitable trust, bequest, or devise;
2. impossibility, impracticability, or illegality of fulfilling the settlor's particular intent;
3. a general, rather than specific, charitable intent by the settlor;
4. the absence of an alternative disposition provided by the settlor.

Where these requirements are met, the court can order modification of trust provisions to apply the trust fund or income "as nearly as possible" to the disposition outlined by the settlor. Courts must exercise discretion in selecting an alternative disposition; nevertheless, a major limiting factor exists in the requirement that the disposition selected closely approximate the settlor's intent as set out in the trust instrument. Although the cy pres power can be exercised only by the court, some interested party or the Attorney General must initiate an action for application cy pres of trust funds.[5] The language of the 1967 Act[6] gives authority to the North Carolina

[hereinafter cited as FISCH]; Note, 27 N.C.L. REV. 591 (1949); Note, 1 N.C.L. REV. 41 (1922).

[3] N.C. GEN. STAT. § 36-23.2 (Supp. 1967) [hereinafter cited as the 1967 Act]. For examples of similar statutes, *see* ALA. CODE tit. 47, § 145 (1958); MD. ANN. CODE art. 16, § 196 (1957); VT. STAT. ANN. tit. 14 § 2328 (1959). *See* other cy pres statutes collected in SCOTT § 399 n.2.

The 1967 Act is based on the MODEL ACT CONCERNING THE ADMINISTRATION OF CHARITABLE TRUSTS, DEVISES AND BEQUESTS, 9 UNIFORM LAWS ANNO. 25 (1967).

[4] *See* BOGERT §§ 436-438; FISCH § 5.00; Peters, *A Decade of Cy Pres*, 39 TEMPLE L.Q. 256 (1966).

[5] The 1967 Act also deals with the troublesome question of which charitable intent to follow where the settlor has designated an alternative charitable disposition, but it also fails: the intention shown in the original plan is to prevail. For a discussion of the effect of an alternative plan, see BOGERT § 437.

[6] For an interpretation of the language of the 1967 Act, *see* [1967] N.C. GEN. STAT. COMM'N REP. item 10.

courts to make needed changes in charitable trusts for the public benefit yet protects the charitable intent of the trust's creator.

Prior to the 1967 Act, the North Carolina Supreme Court has rejected the doctrine of cy pres whenever the question was raised, basing this position on vintage decisions of questionable validity. Despite a well-established judicial policy favoring charitable trusts as well as a trend toward more court-ordered adjustment of both private and charitable trust terms, the court failed specifically to adopt the cy pres doctrine. This failure is all the less understandable in light of a strong legislative policy favoring validity of charitable trusts. As an alternative to cy pres power, the court has used its equitable power over trust administration to produce results much like those obtained in other jurisdictions under the cy pres doctrine. Charitable trusts have been saved from failure in particular cases; however, the decisions are unclear as to how far the courts can or will go to avoid frustration of the settlor's charitable intent. A brief survey of the salient case law and statutory development will demonstrate the reasons for the 1967 Act.

North Carolina courts initially accepted the validity of charitable trusts and jurisdiction over their administration in broad terms.[7] This acceptance was followed by complete disavowal of the cy pres doctrine.[8] Early opinions failed to distinguish between prerogative cy pres, which had been productive of abuse in England, and judicial cy pres, which is limited by usual equitable rules.[9] The court feared complete perversion of the settlor's intent under the cy pres doctrine. Simultaneously, the rule developed that a charitable trust instrument indefinite on its face as to objects or beneficiaries left too much discretion to the trustee and, therefore, was unenforcible. As a corollary, the court held the doctrine of cy pres inapplicable to cure such a deficiency, treating the doctrine as purely arbitrary and prerogative. The rare use of *judicial* cy pres to remedy uncertainty in an at-

[7] Griffin v. Graham, 8 N.C. 96 (1820).

[8] McAuley v. Wilson, 16 N.C. 276 (1828).

[9] Bridges v. Pleasants, 39 N.C. 26 (1845); Holland v. Peck, 37 N.C. 255 (1842). For a discussion of the confusion between judicial and prerogative cy pres, *see* BOGERT § 432; FISCH § 203(g).

[10] Taylor v. American Bible Soc'y, 42 N.C. 201 (1857); Bridges v. Pleasants, 39 N.C. 26 (1845); Holland v. Peck, 37 N.C. 255 (1842). For a discussion of the connection between cy pres and charitable trusts invalid for definiteness, *see* BOGERT § 434.

tempted charitable trust[11] further demonstrates the early courts' failure to understand the doctrine.

These first cases firmly established the rule that courts in North Carolina do not have cy pres powers. Thus, when a situation arose for use of the cy pres doctrine, the court properly noted that the doctrine would allow the application of excess trust funds "as near as may be" to the settlor's specific intent, but it declined so to order because North Carolina courts do not have such power.[12] In later cases where the cy pres issue has properly been urged upon the court, it has been summarily rejected because it is "well settled" that cy pres power does not exist in North Carolina courts.[13] In other cases, the court has discussed the application of the cy pres doctrine and refused it where the doctrine would have no possible validity.[14] Apparently, the merits of the cy pres doctrine have not been discussed by a North Carolina court since 1857, and thus it seems that recent North Carolina judicial rejection of cy pres is based wholly on *stare decisis*.

Even in the absence of cy pres power, however, the cases reveal an increasing judicial willingness to modify specific provisions of charitable trusts which would otherwise fail or prove ineffectual.[15] Where trust funds prove inadequate to achieve the designated purpose, the courts have consistently applied the fund as far as it will go to carry out "the leading and primary intent of the testator."[16]

[11] FISCH § 5.01(b); *But cf.* BOGERT § 434.

[12] Trustees of Davidson College v. Chambers, 56 N.C. 253 (1859). Where the trust fund was excessive for its purpose, the court refused to apply the excess amount cy pres. There is some question as to whether a gift to a particular college is made with *general* charitable intent. *See* BOGERT § 437.

[13] *See, e.g.*, Woodcock v. Wachovia Bank and Trust Co., 214 N.C. 224, 199 S.E. 30 (1938); Thomas v. Clay, 187 N.C. 778, 122 S.E. 852 (1924); Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 107 S.E. 238 (1921).

[14] Lemmonds v. Peoples, 41 N.C. 137 (1848) (a *private* trust); Board of Educ. v. Town of Wilson, 215 N.C. 216, 1 S.E.2d 544 (1929) (application of tax funds to purposes designated by statute).

[15] This trend in North Carolina is in accord with a similar trend which has developed throughout the United States and has led to the adoption of the cy pres doctrine in many jurisdictions. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375 (1953); Fisch, *Judicial Attitudes Towards the Application of the Cy Pres Doctrine*, 25 TEMPLE L.Q. 177 (1951).

[16] Paine v. Forney, 128 N.C. 237, 241, 38 S.E. 885, 886 (1901); University of North Carolina v. Gatling, 81 N.C. 508 (1879).

Most jurisdictions hold that such facts call for the cy pres doctrine;[17] but, the North Carolina court has contended that its remedy does not amount to the application of the cy pres rule because the fund is applied to the "very purpose named" by the settlor and not to a purpose "equally as good."[18] The court departed from "the very purpose named" in *Trustees of Watts Hospital v. Board of Commissioners.*[19] Increased hospital operational costs had made trust income inadequate. Therefore, the trust indenture was modified to allow conveyance of the hospital property to the county. This holding was based upon the inherent power of an equity court "to modify the terms of the trust to the extent necessary to preserve the trust estate and to effectuate the primary purpose of the creator of the trust."[20] Language of this sort is normally used in other jurisdictions to justify the application of cy pres powers.[21]

The North Carolina Supreme Court has also used the administrative change concept[22] to order sale of trust property where necessary to avert failure of the trust or material impairment of its usefulness.[23] In order "to give effect to the general intent expressed" by the settlor, the trust corpus will be liquidated despite a trust provision forbidding its sale.[24] The earlier cases provided that the sale proceeds be used for the express purpose chosen by the settlor for the original property. Implicitly, alteration of trust provisions was

[17] BOGERT § 438.

[18] Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 328, 107 S.E. 238, 241 (1921).

[19] 231 N.C. 604, 58 S.E.2d 696 (1950).

[20] *Id.* at 615, 58 S.E.2d at 705.

[21] *See, e.g.,* Noel v. Olds, 78 App. D.C. 155, 138 F.2d 581 (1943).

[22] Cy pres power is more extensive than the ordinary power of the court to permit deviation from the terms of a trust whether it be private or charitable. The court under cy pres can order the application of trust property to a charitable purpose other than that designated in the trust instrument; however, this could not be done under the deviation or administrative change rule. *See* SCOTT § 399.

The North Carolina Supreme Court has drawn no distinction between charitable and private trusts in its use of the administrative change concept. *Compare* Wachovia Bank and Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967) (court-ordered sale of *private* trust property), *with* Brooks v. Duckworth, 234 N.C. 549, 67 S.E.2d 752 (1951) (court-ordered sale of *charitable* trust property). Nevertheless, using the administrative change rule, the court has ordered the change of the particular purpose of a charitable trust. Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941).

[23] Bond v. Tarboro, 217 N.C. 289, 7 S.E.2d 617 (1940); Holton v. Elliot, 193 N.C. 708, 138 S.E. 3 (1927); *Ex Parte* Wilds, 182 N.C. 704, 110 S.E. 57 (1921); Church v. Ange, 161 N.C. 315, 77 S.E. 239 (1913).

[24] Brooks v. Duckworth, 234 N.C. 549, 67 S.E.2d 752 (1951).

held permissible so long as the means, and not the settlor's designated ends, were changed. However, in *Johnson v. Wagner*[25] the court abandoned the "very purpose" requirement and applied the cy pres doctrine without identifying it. Trust land impracticable for its designated use as a religious assembly was sold and the proceeds dedicated to "other religious purposes" in accordance with the terms of an entirely separate trust created by the settlor. In ordering this change of purpose, the court ascertained the settlor's general charitable intent and directed the trust res to a similar but different purpose within that intent.

As the *Johnson* and *Watts Hospital* decisions demonstrate, the North Carolina judiciary has become willing to modify specific trust provisions where the trust has become impossible or impracticable.[26] This judicial policy is completely in accord with the favored position enjoyed by charitable trusts[27] in both case law and statute. The North Carolina cases on charitable trusts are replete with references to the rule that every effort should be made to save a trust which is by definition beneficial to the public.[28] A lone exception to this general attitude has been the hostility of the courts to charitable trusts with uncertain or indefinite dispositive provisions.

The 1925 General Assembly acted expressly to validate charitable trusts with indefinite objects or discretionary powers of selection in the trustee.[29] The 1925 Act enables the trustor to give the trustee

[25] 219 N.C. 235, 13 S.E.2d 419 (1941).

[26] For opinions where the court demonstrated its responsive attitude toward the need to adjust trust terms by direct or implicit approval of plans suggested by the trustees, *see* Wachovia Bank and Trust Co. v. McMullan, 229 N.C. 746, 51 S.E.2d 473 (1949) (trustees' plan to modify means and time of trust income dispersal approved); West v. Lee, 224 N.C. 79, 29 S.E.2d 31 (1944) (court failed to comment on alternate application of funds by trustees); Lassiter v. Jones, 215 N.C. 298, 1 S.E.2d 845 (1939) (alternate plan for use of trust property, approved as proposed by trustees). *See also* McKay v. Trustees of the Gen. Assem. of the Presby. Church, 228 N.C. 309, 45 S.E.2d 342 (1947) (dictum). The court found no impossibility of the designated purpose, but indicated that the fund might have been applied to a similar purpose had there been impossibility.

[27] The public policy favoring charitable trusts is especially apparent in their exemption from most federal, state, and local taxation. *See* FISCH § 4.02(b).

[28] Brooks v. Duckworth, 234 N.C. 549, 67 S.E.2d 752 (1951); Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941); Wachovia Bank and Trust Co. v. Ogburn, 181 N.C. 324, 107 S.E. 238 (1921); Paine v. Forney, 128 N.C. 237, 38 S.E. 885 (1901); Keith v. Scales, 124 N.C. 497, 32 S.E. 809 (1899).

[29] N.C. GEN. STAT. § 36-21 (1957) (hereinafter referred to in the text as the 1925 Act).

discretion to deal with unforeseen contingencies, thus reducing the need for court intervention in charitable trust administration. There was speculation that this legislation would lead to judicial adoption of the cy pres doctrine.[30] Indeed, it is reasonable to argue that if the legislature deems it proper to grant a trustee discretionary powers where a trust is indefinite, then the courts should exercise similar powers where a trust's specific purpose has been frustrated but the testator's general charitable intent is evident. The North Carolina Supreme Court ignored this opportunity to adopt the cy pres rule and proved its reluctance to abandon precedent by invalidating a charitable trust for indefiniteness regardless of the 1925 Act.[31] The legislative response was a clear restatement of the public policy favoring the validity of charitable trusts even though they be indefinite.[32] In broadly construing the language of this subsequent legislation, the court commented that the statute "will not permit us to misunderstand what the law-making power meant."[33]

The 1967 Act is properly viewed as the third step in a statutory scheme insuring the validity of trusts having a general charitable purpose. It is clear that the law-making power intends that the cy pres doctrine be effectively employed by the courts. Now that a strong legislative basis exists, the North Carolina Supreme Court should reconsider the value of the cy pres doctrine for the first time in over a century and adopt it as an important tool of trust administration. With such a conclusion to the long trend toward more court-ordered modification of charitable trusts, predictability can be established for a facet of charitable trust administration previously characterized by the uncertain application of equity's general administrative powers. The public interest in charitable trusts as well as the settlor's interest in the effectuation of his charitable purpose require that the courts act to save duly constituted charitable trusts under a rule with clearly delineated guidelines such as those of the cy pres doctrine as embodied in the 1967 Act.

Two subjects of current interest may soon call for the application

[30] *See* Note, 4 N.C.L. REV. 15 (1926).

[31] Woodcock v. Wachovia Bank and Trust Co., 214 N.C. 224, 199 S.E. 30 (1938) (funds to be paid out within 20 years by trustees to charitable organizations of a designated class).

[32] N.C. GEN. STAT. § 36-23.1 (1957). For a discussion of this legislation, *see* Note, 25 N.C.L. REV. 476 (1947).

[33] Banner v. North Carolina Nat'l Bank, 266 N.C. 337, 340, 146 S.E.2d 89, 92 (1966).

of the cy pres doctrine by the courts of North Carolina and other states: federal regulation of charitable trusts and racially discriminatory trusts.[34]

Charitable foundations (corporations) and trusts now play a large role in the economy of the United States.[35] Alleged rampant abuses perpetrated by donors, settlors and trustees acting under the guise of charitable intent have precipitated proposals for federal legislation to regulate these financial giants.[36] Where trusts are involved, the illegality of trust provisions which contravene federal regulatory legislation and rulings may prove fertile ground for use of cy pres powers by state courts. For example, regulations seriously curtailing certain commercial activities involving trust property[37] might well impair a charitable trust's effectiveness to such an extent that court action to carry out the testator's intent as near as possible would be required. The doctrine of cy pres might be used to excise specific trust provisions illegal under federal law. Should a federal regulatory agency[38] be created to supervise the financial activities of charitable trusts, a partnership for the control of the charitable giants may emerge comparable to that between the Securities Exchange Commission and state courts for the control of business corporations.

A recent United States Supreme Court decision indicates that a charitable trust which performs functions "in the public domain" may be held to violate the fourteenth amendment if it discriminates among the races.[39] Since the definition of a charitable trust requires that it be beneficial to the general public,[40] the presently expanding state action concept may in the future subject many charitable trust activi-

[34] *See* Note, 40 N.C.L. REV. 308 (1962).

[35] *See* CHAIRMAN OF THE COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES, 87th Cong., 2d Sess., TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY (Comm. Print 1962) (Patman Report).

[36] *Id.*

[37] *See* Krasnowiecki and Brodsky, *Comment on the Patman Report,* 112 U. PA. L. REV. 190 (1963); Riecker, *Foundations and the Patman Committee Report,* 63 MICH. L. REV. 95 (1964).

[38] *See* articles cited *supra* note 37.

[39] Evans v. Newton, 382 U.S. 296 (1966). When a public park which was trust property had previously been operated by the city, but had since come under private trustee's control, the Court held that the park's mass recreational activities were plainly in the public domain and that the courts, under the fourteenth amendment, could not aid private trustees in performing those activities on a segregated basis.

[40] *See* SCOTT § 368.

ties to fourteenth amendment requirements. The courts often state that charitable trusts perform services which would otherwise be government responsibilities.[41] Cy pres power could be used by state courts to remove the offending provision or, if the trust be rendered impossible by its illegality, to apply the fund to a similar non-discriminatory purpose.[42]

Using the doctrine of cy pres as suggested above, the state judiciary can insure the continued existence of charitable trusts in forms beneficial to the community while acting to control those features of charitable trusts not in the public interest.

DAVID MCDANIEL MOORE II

[41] *See, e.g.*, Pierce v. Attwill, 234 Mass. 389, 125 N.E. 609 (1920).

[42] *See* La Fond v. City of Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959) (equally divided court). Where the bequest was to the city to establish a white playground, four justices voted to apply the trust cy press for the benefit of all children.