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Note

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NOTES

Administrative Law—Private Search and Seizure

In *Knoll Associates, Inc. v. FTC*,[1] the Seventh Circuit Court of Appeals held that the fourth amendment precludes admission, in a Federal Trade Commission proceeding, of records stolen by a private individual.

In 1962 the Commission filed a complaint charging Knoll, a furniture manufacturer, with price discrimination in violation of section 2(a) of the Clayton Act.[2] At the hearing, Knoll objected to the introduction of certain company records stolen by a former employee, Herbert Prosser. The objection was overruled[3] and a cease and desist order subsequently issued. The court of appeals reversed and remanded to the Commission with instructions to disregard the evidence in question.[4]

The court of appeals decided that the undisputed evidence showed Prosser had stolen the records to aid the FTC and that therefore the records were inadmissible under *Gambino v. United States*.[5] In that case, evidence unconstitutionally seized by state police and given to federal officials was held inadmissible in the ensuing federal trial on the ground that the state police had procured the evidence for the purpose of aiding the United States.

There is some question whether *Gambino* is proper authority for the exclusion of records stolen by a private individual. *Gambino* was decided after *Weeks v. United States*,[6] but before *Elkins v. United States*.[7] *Weeks* made the exclusionary rule applicable in federal trials to evidence seized in violation of the fourth amendment by *federal* offi-

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[1] 397 F.2d 350 (7th Cir. 1968).

[2] 15 U.S.C. § 13(a) (1964), *formerly* ch. 323, § 2, 38 Stat. 730 (1914).

[3] Knoll Assoc., Inc., [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,881, at 21,911 (FTC 1964).

[4] 397 F.2d at 537. The court thus applied the fourth amendment exclusionary rule to an administrative proceeding. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), held that the exclusionary rule was applicable to a forfeiture proceeding because the proceeding's punitive characteristics made it quasi-criminal, thus justifying the use of constitutional safeguards. Arguably, FTC proceedings are sufficiently criminal to warrant application of the exclusionary rule. Jones v. Securities and Exch. Comm'n, 298 U.S. 1, 24-25 (1936), notes that the ever expanding administrative agencies cannot be permitted to encroach on the fundamental rights of individuals. These two cases would seem to support, if not require, administrative application of the exclusionary rule.

[5] 275 U.S. 310 (1927).

[6] 232 U.S. 383 (1914).

[7] 364 U.S. 206 (1960).

cials. It did not apply to the fruits of state officials' unconstitutional activity. As a result, state officers often violated the fourth amendment, giving the resultant evidence to their federal counterparts for use in a federal prosecution.[8] To counter this practice,[9] the Supreme Court, in *Gambino*, extended the exclusionary rule in federal trials to encompass evidence unconstitutionally obtained through *state* illegality whenever that illegality had been perpetrated for the purpose of aiding the United States. *Elkins* ended the need for the *Gambino* rule, for the Court held that all evidence obtained in violation of the fourth amendment by state or federal officials was inadmissible in a federal trial.[10]

Thus, the *Gambino* exclusionary rule was merely an interim device designed to curb the "silver platter" practice. Formulated to control state officials, its application was limited to their activity and it has now been superseded. It would seem that *Gambino's* test of whether an illegal act was committed for the purpose of aiding the United States is irrelevant when private conduct is in issue.

The law of search and seizure as related to the acts of private individuals appears more properly controlled by *Burdeau v. McDowell*.[11] In that case, private detectives stole records later turned over to the United States for use in a criminal prosecution. The Court flatly stated that the fourth amendment did not apply to individual conduct and held that since no connection was shown between the Government and the perpetrators of the illegality, the records were admissible. Thus, the decision seems to be that private illegality will be excluded only when the Government is somehow involved in the wrongdoing.

In *Knoll*, the court of appeals treated *Burdeau* in a summary fashion. The court felt that Prosser's calls to the FTC and his subsequent testimony at the hearing clearly showed governmental involvement in the illegality. This is an arguable finding. In every case in which the Government uses evidence obtained by private individuals there will be involvement of the type noted by the *Knoll* Court, if only to enable the evidence to change hands. *Burdeau* would logically seem to require gov-

[8] This practice later became known as the "silver platter" doctrine. Lustig v. United States, 338 U.S. 74, 79 (1949).

[9] An earlier case, Byars v. United States, 273 U.S. 28 (1927), attempted to curtail this same practice by excluding the evidence when state and federal officials had acted jointly.

[10] Mapp v. Ohio, 367 U.S. 643 (1961), superseded *Elkins* in holding that the exclusionary rule prohibited the use in state *or* federal court of evidence seized in violation of the fourth amendment by state or federal officials.

[11] 256 U.S. 465 (1921).

ernmental involvement in the planning or execution of the illegality, rather than mere contact with the donor of the evidence, in order to justify exclusion. Under this interpretation of *Burdeau's* requirement of governmental action, and on the facts of *Knoll*, the stolen records would be admissible as being the fruits of private illegality. When Prosser first contacted the FTC lawyers, he told them he had been getting a "raw deal [from Knoll]" and that he had "enough papers to hang Knoll."[12] This seems to indicate that Prosser had decided to steal, and possibly had already stolen, the papers before he contacted the Commission and leads to the conclusion that the Government was not "involved" in any meaningful sense of the word.

Why should the Seventh Circuit use such an indiscriminate test for Governmental involvement? This mistreatment of *Burdeau* may have been caused by a feeling on the part of the court that the case is no longer good law. Whether this is so is debatable. It has been urged that *Elkins v. United States* has overruled *Burdeau* in enunciating a general rule that federal courts may not admit evidence obtained by state police during a search, which if conducted by federal officers, would have been illegal.[13] This view assumes that "private individuals" may be substituted for "state police" in the above formula. However, it may be erroneous to assume that state action and individual action are constitutionally equivalent, especially since *Wolf v. Colorado*[14] made it clear that at least the core of the fourth amendment controls state police activity.[15] This assumption would erase all distinction between governmental and non-governmental action, the distinction upon which *Burdeau* is based.

This same distinction has become blurred in other areas,[16] and it has been said that this blurring process will lead to the demise of

[12] 397 F.2d at 532.

[13] See Williams v. United States, 282 F.2d 940, 941 (6th Cir. 1960) (assumes this in dictum); Sackler v. Sackler, 15 N.Y.2d 40, 45, 203 N.E.2d 481, 484, 255 N.Y.S.2d 83, 87 (1964) (dissenting opinion); *contra*, People v. Horman, 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968).

[14] 338 U.S. 25 (1949).

[15] Note, *Mapp v. Ohio and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 YALE L.J. 1062, 1064 n.18 (1963). Although Mapp v. Ohio, 367 U.S. 643 (1961), overruled *Wolf*, this aspect of the case should still be valid. *See* Elkins v. United States, 364 U.S. 206, 213 (1960); Irvine v. California, 347 U.S. 128, 132 (1954); Stefanelli v. Minard, 342 U.S. 117, 119 (1951).

[16] Notably in the civil rights area. United States v. Guest, 383 U.S. 745, 755-56 (1966); Griffin v. Maryland, 378 U.S. 130 (1964); Peterson v. City of Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

Burdeau.[17] However, the breakdown of the distinction is not a *reason* to overrule *Burdeau*, but merely a means to that end. By using this breakdown in other areas as authority, the Court could remove its self-imposed governmental action barrier and exclude the fruits of private illegality. It should not do so unless there is a valid reason.

A valid reason for overruling *Burdeau* may lie in the emergent "right of privacy" recently articulated by the Supreme Court.[18] This right of privacy, embodied in the fourth and fifth amendments, among others, may be so strong as to compel the exclusion of the fruits of its invasion even when the invader is a private citizen. Under this theory it would not matter *who* committed the violation—whenever the government sought to utilize its fruits the exclusionary rule would apply. This reasoning does not deny continued validity to the governmental action requirement, but instead finds such action in the government's attempted use of the evidence. This redefining of "governmental action" hinges on a private individual's illegal searches and seizures being held violative of the emergent right of privacy. The Court may be more willing to find such private illegality a violation of this right of privacy than it has been to find it an unadorned fourth amendment violation. As the right of privacy expands, the chances for *Burdeau's* demise become more real.

However, *Linkletter v. Walker*[19] may indicate that the right of privacy is not as vigorous as might have been assumed. There the Court refused to give retroactive effect to *Mapp v. Ohio*[20] because, it reiterated, the policy of the exclusionary rule is to deter police illegality and no deterrence would be brought about by release of those already imprisoned. Thus, the espousal of a pure deterrence rational seems to imply that the right of privacy is a concept of limited usefulness, for an ever expanding constitutional right of privacy would seemingly have demanded retroactivity for *Mapp* in order that the transgressed privacy of those imprisoned be vindicated.

Thus, it would appear that *Burdeau* has continued validity, at least until the extent of the right of privacy is more fully articulated.[21] In

[17] Comment, *The Exclusion of Evidence Wrongfully Obtained by Private Individuals*, 1966 UTAH L. REV. 271, 274.

[18] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Mapp v. Ohio, 367 U.S. 643 (1961).

[19] 381 U.S. 618, 636 (1965).

[20] 367 U.S. 643 (1961).

[21] *See* United States v. American Rad. & Stand. Sanit. Corp., 278 F. Supp. 241 (W.D. Pa. 1967).

the final analysis, the *Knoll* court seemed to sense this, as shown by its attempt to distinguish *Burdeau*; in reality it based its decision not on *Gambino* but on the idea that judicial integrity and the concept of an ordered society would be jeopardized were the courts to sanction governmental illegality by permitting the use of unconstitutionally obtained evidence.[22] Though disfavoring *Burdeau*, the court of appeals seemed to realize that there is no present ground for overruling that case. By distinguishing rather than disturbing, the court has avoided direct confrontation with a Supreme Court precedent and, at the same time, has undermined that precedent, for to distinguish a case which seems clearly controlling does little to strengthen it as precedent.

W. LUNSFORD LONG

Civil Procedure—Federal Rule of Civil Procedure 50(d)—Disposition of Cases by the Court of Appeals after Granting Judgment Notwithstanding the Verdict

In the recent case of *Neely v. Martin K. Eby Construction Co.*,[1] the Supreme Court attempted to clarify the procedure involved in using the judgment notwithstanding the verdict[2] at the appellate level in the federal system[3] under Federal Rule of Civil Procedure 50(d).[4] *Neely* was a diversity action in which the jury awarded plaintiff damages in her wrongful death action against defendant. After the verdict was returned, defendant moved under Rule 50(b) for judgment n.o.v., or in the alternative, for a new trial. The trial judge denied both motions and ordered judgment entered for plaintiff on the verdict. On appeal, the court of appeals ruled that the evidence was legally insufficient to go to the jury on the issue of negligence and ordered judgment n.o.v. for defendant. Then, instead of remanding the case to the trial court for new trial

[22] Elkins v. United States, 364 U.S. 206, 223 (1960), notes that the courts ought not to be a party to illegality by permitting the Government to use evidence in violation of the Constitution.

[1] 386 U.S. 317 (1967). This case has also been noted in *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 218 (1967).

[2] Hereinafter referred to as judgment n.o.v.

[3] For a general treatment of the practice and procedure in the federal system under Federal Rule 50, see F. JAMES, CIVIL PROCEDURE § 7.22 (1965); 5 J. MOORE, FEDERAL PRACTICE ¶¶ 50.01-.17 (2d ed. P. Kurland recomp. 1966) [hereinafter cited as MOORE]; Annot., 69 A.L.R.2d 449 (1960).

[4] FED. R. CIV. P. 50(d). See note 22 *infra*.

considerations, the court of appeals ordered the case dismissed.[5] The Supreme Court affirmed the decision of the court of appeals, saying that it was within the power of the court of appeals to order judgment n.o.v. and to dismiss the case without giving the verdict winner an opportunity to move for a new trial in the trial court.

Prior to the decision in *Neely*, the Supreme Court had always limited the use of the judgment n.o.v. in the federal system because of its emphasis on the seventh amendment right to jury trial. So great was the Court's reluctance to allow any infringement upon this right that when the judgment n.o.v. device was first brought before the Court, it was ruled unconstitutional in the federal system.[6] It was not until twenty-two years later that the Court relented and held the device constitutional in a new form,[7] which was incorporated into Rule 50 of the Federal Rules of Civil Procedure in 1938. The Court's grudging acceptance of the judgment n.o.v. continued in later cases in which the Court laid down a definite procedure to be followed at the trial court level if a litigant wished to avail himself of the device.[8]

It was only natural that when the Court first turned its attention to appellate use of the judgment n.o.v., it displayed an even greater reluctance toward allowing a court to deprive a verdict winner of his verdict.[9] The Court actually had two problems to face in this area. The first concerned the conditions under which an appellate court could *grant* judgment n.o.v., while the second problem concerned the proper *disposition* of the case by the appellate court once it had decided a judgment n.o.v. was warranted. Concerning the former problem, the Court made it clear from the beginning that the court of appeals has the power to grant judgment n.o.v. only if a motion to that effect is first made at the trial

[5] 344 F.2d 482 (10th Cir. 1965).

[6] Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913). For a more comprehensive treatment of this subject, see 5 MOORE ¶ 50.07.

[7] Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935).

[8] For example, Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940), established the rule that the trial court should also rule on any new trial motion presented if the court decides to grant judgment n.o.v. This rule has been codified in FED. R. CIV. P. 50(c)(1). Another example of the importance of following the proper procedure in the trial court is that if the verdict loser fails to move for a directed verdict at the close of all the evidence, the trial court is powerless to grant judgment n.o.v. See 5 MOORE ¶ 50.08. The Court also stressed that the trial judge could, in his discretion, order a new trial, even though a judgment n.o.v. was warranted, where it was likely that the verdict winner could cure his defect in proof in a new trial. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 215-16, 218 (1947).

[9] For a comprehensive treatment of this development, see 5 MOORE ¶ 50.12.

court level.[10] As long as the verdict loser moves properly in the trial court for judgment n.o.v., it is well settled[11] that the court of appeals can review the sufficiency of the evidence and grant judgment n.o.v.[12] In *Neely*, this issue of appellate power to grant judgment n.o.v. was not presented because the verdict loser had followed the correct procedure in the trial court.[13]

Neely does, however, focus on the second problem concerning appellate use of the judgment n.o.v.—the proper disposition of the case once the court of appeals decides a judgment n.o.v. is warranted. Unfortunately, this problem has not received much attention from the Court in the past, although it has arisen many times in the lower courts.[14] When faced with this situation, appellate courts have frequently remanded the case to the trial court without directions,[15] giving the verdict winner an opportunity to invoke the discretion of the trial judge to grant a new trial. Yet other appellate courts have done exactly what the court of appeals did in *Neely* by granting judgment n.o.v. and ordering the trial court to dismiss the action,[16] thus depriving the verdict winner of an opportunity to invoke the discretion of the trial court. Despite earlier dictum,[17] it was not until *Neely*[18] that the Supreme Court specifically addressed itself to this problem of disposition.[19]

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[10] Two leading cases have established this proposition. In Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947), the verdict loser failed altogether to move for judgment n.o.v. at the trial court level. Yet on appeal, the court of appeals granted judgment n.o.v. The Supreme Court reversed, declaring it fundamentally unfair for an appellate court to deprive the verdict winner of his verdict until the trial court had first addressed itself to the question. Later, in Johnson v. New York, N.H. & H.R.R., 344 U.S. 48 (1952), the Court again reversed the court of appeal's entry of judgment n.o.v. for the verdict loser where the verdict loser had moved only to "set aside" the verdict at the trial court level.

[11] Some commentators, however, have criticized appellate review of the sufficiency of the evidence. *E.g.*, C. WRIGHT, FEDERAL COURTS § 95, at 368 (1963).

[12] *E.g.*, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967). *Cf.* 28 U.S.C. § 2106 (1964).

[13] 386 U.S. at 325.

[14] For a summary of the cases in this area see 5 MOORE ¶ 50.15.

[15] *E.g.*, Sears, Roebuck & Co. v. Barkdoll, 353 F.2d 101 (8th Cir. 1955).

[16] *E.g.*, United States v. Fenix & Scisson, Inc., 360 F.2d 260 (10th Cir. 1966); Kaminski v. Chicago, R. & I.R.R., 200 F.2d 1 (7th Cir. 1952).

[17] Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253-54 (1940) (dictum).

[18] When the Court granted certiorari in this case, it also granted certiorari in another case, Utah Pie Co. v. Continental Baking Co., 382 U.S. 914 (1965), and posed similar questions to the parties. However, in Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), the Supreme Court reversed the decision of the court of appeals and consequently did not reach the questions presented in the writ of certiorari.

[19] Several writers, however, have anticipated this problem. See Kaplan, *Amend-*

Since the judgment n.o.v. device was first incorporated into Federal Rule 50 in 1938, the wording of the rule has undergone change to clarify and codify the judicial tightrope that the Court had previously laid down for litigants.[20] When Rule 50 was amended in 1963, subdivision (d) was proposed[21] to handle the cases like *Neely* where the trial court denies the verdict loser's motions for judgment n.o.v. and new trial. The wording of Rule 50(d)[22] reflects the developments in the law until 1963 as laid down by the Supreme Court. For example, the Rule takes for granted that the appellate court has the power to review the sufficiency of the evidence and to reverse the trial court if necessary.[23] Yet the Rule does not explicitly address itself to the ultimate power of the court of appeals in disposing of a case once the court decides a judgment n.o.v. is warranted. The Advisory Committee's Note to Rule 50 admits this omission and gives this explanation:

> Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied [at the trial court level], since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage.[24]

In light of the Court's earlier reluctance in allowing appellate termination of a verdict winner's case,[25] the *Neely* holding seems to represent a significant departure from the attitude of the Court in the previous cases. To reach such a decision, the Court surprisingly relied almost exclusively on an interpretation of Rule 50. Justice White, writing for a majority

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ments of the Federal Rules of Civil Procedure, 1961-1963 (II), 77 HARV. L. REV. 801, 819-20 (1964); Comment, *Judgment Notwithstanding the Verdict—Rule 50(b)*, 51 NW. U.L. REV. 397, 400-02 (1956); Note, *Rule 50(b): Judgment Notwithstanding the Verdict*, 58 COLUM. L. REV. 517, 524-25 (1958).

[20] Three of the leading cases in this area were Johnson v. New York, N.H. & H.R.R., 344 U.S. 48 (1952); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940).

[21] 31 F.R.D. 643 (1962).

[22] FED. R. CIV. P. 50(d):

> If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

[23] "If the appellate court reverses the judgment. . . ." *Id.*

[24] FED. R. CIV. P. 50, Advisory Comm. Note, 31 F.R.D. 646 (1962).

[25] See cases cited note 20 *supra*.

of six justices,[26] rejected the idea of an automatic remand by the appellate court upon reversal of the trial court's rulings under Rule 50(d), saying such a rule would not serve Rule 50's purpose of speeding litigation and avoiding unnecessary retrials.[27] The Court said that any right to a new trial for the verdict winner lay in the hands of the court of appeals: "Jurisdiction over the case then passed to the Court of Appeals and petitioner's right to seek a new trial after her jury verdict was set aside became dependent upon the disposition by the Court of Appeals under Rule 50(d)."[28] Looking at the wording in Rule 50(d), the Court found nothing in it expressly *denying* to the court of appeals the power of reversal and dismissal, and inferred from this an intent to *allow* such power.[29]

Despite the simplicity of this approach, Justice Black in his dissent argued that Rule 50(d) must be interpreted in the restrictive light in which it evolved,[30] and if viewed in this manner, the failure of the Rule expressly to grant the power of reversal and dismissal must mean an intent to *deny* such power to the court of appeals.[31] Whereas the majority interpreted Rule 50(d) to be permissive in the sense that the court of appeals may remand or dismiss a case after entering judgment n.o.v.,

[26] The Court addressed itself solely to the procedural problem involved and did not review the issue of the sufficiency of the evidence, saying the writ of certiorari did not cover this question. Justices Douglas and Fortas entered an opinion concurring in the construction of Rule 50, but thought the evidence was sufficient to go to the jury. Justice Black dissented on the grounds that the evidence was sufficient to go to the jury, and that he disagreed with the construction of Rule 50.

[27] 386 U.S. at 326.

[28] *Id.* at 324.

[29] *Id.* The Court also rejected the applicability of FED. R. CIV. P. 50(c)(2), which provides: "The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict." The Court said this provision was applicable only in those cases where the trial court had *granted* the motion for judgment n.o.v., whereas in this case, the trial court had denied the motion. Justice Black, however, argued in his dissent that Rule 50(c)(2) should apply. Utilizing the logic of the majority in their interpretation of Rule 50(d), Justice Black argued that nothing in Rule 50(c)(2) expressly indicates that a verdict winner loses his right to move for a new trial in the trial court if that court's entry of judgment n.o.v. against him is on the direction of an appellate court rather than on its own initiative. 386 U.S. at 340.

[30] One writer has described the Supreme Court's treatment of Rule 50 as follows: "At the hands of the present Supreme Court, with its great—perhaps exaggerated—reverence for the supposed benefits of jury trial, this rule has been narrowly interpreted so that he who would have its benefit must indeed walk a tightrope." F. JAMES, CIVIL PROCEDURE § 7.22 at 334 (1965) (footnote omitted).

[31] 386 U.S. at 340-41.

Justice Black pointed out that the rule is really permissive toward the verdict winner, not toward the court of appeals. It says that the verdict winner "*may*, as appellee, assert" his grounds for a new trial to the court of appeals.[32] Nowhere does it say he *must* do so to protect his right to a new trial. Therefore, Justice Black concluded that the case could not be dismissed until the verdict winner had been given an opportunity to move in the trial court for a new trial.

This conflict between Justice Black and the majority on the proper interpretation of Rule 50, especially Rule 50(d), reveals what should have been apparent from the beginning—the Rule simply does not explicitly answer the disposition problem.[33] Whatever the basis of the Court's opinion in *Neely*, however, its effort to deal with this question requires interpretation. The most obvious interpretation of the case is a literal one; any right to a new trial for the verdict winner now lies within the discretion of the court of appeals. In this light, *Neely* represents a radical departure from the Court's previously displayed reluctant attitude[34] and deals the verdict winner in the federal system a damaging blow. The Court is now willing for any appellate court not only to review the sufficiency of the evidence, but also to terminate the case.

This literal interpretation of *Neely* raises the fundamental question of whether the court of appeals is actually the proper forum in which the verdict winner should have to seek his new trial. A long line of state and federal cases require that the trial court, not an appellate court, decide a new trial issue.[35] *Cone v. West Virginia Pulp & Paper Co.*[36] is illustrative:

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. . . .
> . . . [A] litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question.[37]

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[32] See note 22 *supra*.
[33] See note 24 *supra* and accompanying text.
[34] See cases cited note 20 *supra*.
[35] "But the grant or denial of a new trial is primarily addressed to the sound discretion of the trial court, which normally has a feel for the case that an appellate court usually does not have. . . ." 6A MOORE ¶ 59.05, at 3735 (footnote omitted). This point has been recently re-emphasized in Iacurci v. Lummus Co., 387 U.S. 86 (1967). See note 44 *infra* and accompanying text.
[36] 330 U.S. 212 (1947).
[37] *Id.* at 216-17.

Although the facts differed in *Neely* and *Cone* in that *Cone* dealt with the *power* of the court of appeals to grant judgment n.o.v. where the verdict loser failed to make the proper motion in the trial court,[38] the Court did indicate in dictum that the court of appeals would have been powerless to dismiss the case even if the verdict loser had moved properly in the trial court for judgment n.o.v.[39] The Court rejected a suggestion, adopted now in *Neely*, that the verdict winner should have to claim his right to a new trial in the court of appeals.[40]

There is one crucial fact in *Neely* that indicates, when considered in conjunction with some of the Court's language, another possible interpretation of the case more in line with precedent: at no time did Miss Neely try to state to the court of appeals the grounds entitling her to a new trial.[41] This fact, plus the Court's statement in *Neely* that the court of appeals should remand some cases,[42] could be taken to mean that the verdict winner must present his grounds for a new trial in his appellate brief or face dismissal. If he does state his grounds, however, or if they readily appear in the record,[43] then the trial court may still be the proper forum to decide most questions.

It is arguable that one recent Supreme Court case supports this analysis. In *Iacurci v. Lummus Co.*,[44] the procedural setting was similar to that in *Neely*. After a special verdict by the jury for plaintiff, defendant moved for judgment n.o.v. and a new trial. The trial judge denied both motions. On appeal, the court of appeals reversed the trial court, ordering judgment n.o.v. and a dismissal of the case. Contrary to the result in *Neely*, however, the Supreme Court reversed the court of appeals, saying *Iacurci* was one of those cases which should be remanded to the trial court for consideration of a new trial.[45] In a tone distinctly pre-

[38] See note 10 *supra*.

[39] 330 U.S. at 218.

[40] *Id.* Justice Black emphasized this point in his dissent. See 386 U.S. at 341.

[41] Implicit in this course of action was an assumption that the case would be remanded to the trial court for consideration of the new trial issue should the court of appeals reverse. Reply Brief for Petitioner at 12-13, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

[42] 386 U.S. at 325, 329.

[43] The Court said that it was incumbent upon the court of appeals to consider the new trial question in light of its own experience with the case although the verdict winner never presented grounds for a new trial in her appellate brief. *Id.* at 329-30.

[44] 387 U.S. 86 (1967).

[45] The Court did not, however, go so far as to say that every time possible grounds for a new trial were evident on appeal the verdict winner automatically would be entitled to a remand to the trial court. Instead, the Court limited the decision to the particular facts involved.

Neely, the Court said that the trial judge was in the best position to rule on the issue of a new trial.[46] Justice Harlan vigorously dissented, adopting the literal interpretation of *Neely*, and stated that the decision placed the possibility of remand within the informed discretion of the court of appeals.[47] Finding no manifest abuse of this discretion, Justice Harlan saw no reason to reverse.

Only later cases can clarify the true meaning of *Neely* and *Iacurci*. At this point, however, several observations can be made. First, *Neely* has at least effectively changed the wording of Rule 50(d) from a permissive indication to the verdict winner that he *may*, as appellee, assert his grounds for a new trial in his appellate brief, to a strong warning that he *had better* do so or risk dismissal. Secondly, if the Court meant in *Neely* to give the power of dismissal to the court of appeals only when no new trial grounds were presented or were evident from the record, then the choice of words in *Neely* leaves this point in need of clarification. Thirdly, whatever the rule in *Neely* may be, its application to the particular facts in the case seems unfortunate, because the record revealed no independent consideration by the court of appeals of possible grounds for a new trial for the verdict winner.[48]

One possibly critical effect of *Neely* will be its interpretation by the courts of appeal. It seems likely that most appellate courts facing a heavy backlog of cases will construe *Neely* literally, as did Justice Harlan in *Iacurci*, to vest ultimate disposition of a case in their hands.[49] Thus, until the Court clarifies its meaning, the prudent practitioner also should take *Neely* literally. To do so leaves two courses of action open to the verdict winner who finds himself in Neely's position. First, he can do exactly what the Court suggests: state his grounds for a new trial in his appellate brief. In light of the uncertain value of this alternative, a second and perhaps wiser course of action would be for the verdict winner to ask the trial judge for a conditional grant of a

[46] 387 U.S. at 88.

[47] *Id.* at 88-89.

[48] The Court assumed that the court of appeals had not ignored its duty in this area, though it did say it would have been better if the court of appeals had included this consideration in the record. 386 U.S. at 330. Also, Justice Black raised the point in his dissent that since the Court held for the first time that the verdict winner had to raise his grounds for a new trial in his appellate brief or risk dismissal, it would have been fairer to have given Neely a chance to go back to the court of appeals and present her grounds. 386 U.S. at 342-43.

[49] *E.g.*, O'Hare v. Merck & Co., 381 F.2d 286 (8th Cir. 1967); Prudential Ins. Co. of America v. Schreffler, 376 F.2d 397 (5th Cir. 1967).

new trial before going to the appellate court.[50] This procedure is awkward, however, since the verdict winner must argue on the one hand that the verdict be upheld and a new trial be denied the verdict loser, yet must also show errors committed entitling himself to a new trial should the appellate court reverse. Assuming a literal interpretation of *Neely*, this complex procedure may be the only way left to insure that the verdict winner will receive the benefit of the trial court's discretion in new trial considerations.

In addition to possible judicial errors committed at trial, it is also possible for a trial judge to grant a new trial as a matter of grace when there is a good reason why the verdict winner should be given another chance to prove his case. For this reason, it is common for a verdict winner to argue to the trial judge in response to the verdict loser's motion for judgment n.o.v. and new trial that the verdict ought to be upheld and the new trial denied the verdict loser; but that if the trial judge is contemplating giving a judgment n.o.v., then the verdict winner at least deserves a new trial to cure his defect. As in the case of prejudicial error, a verdict winner who wants to make certain that the trial judge has an opportunity to rule on this question must also argue these grounds to the trial judge for a conditional grant of a new trial before going to the court of appeals. Yet it is even more awkward than in the case of prejudical error for the verdict winner to argue conditionally for a new trial to cure a possible defect in his proof before any court has said there was a defect. Of course, the verdict winner could make his argument to the court of appeals, but there would seem to be a fundamental difference between asking an appellate court staring at a cold transcript for a new trial as a matter of grace and making this request to the judge who saw and heard the case and who thought the verdict should stand in the first place.

Clarification of the meaning of *Neely* and *Iacurci* is needed. As the history of drafting, amending, and interpreting Rule 50 indicates, this will be a difficult task because many conflicting considerations are involved in attempting to formulate precisely a rule of practice in this critical context. But it is suggested that this clarification should be made with two points in mind. First, it is probably not possible for a litigant to make a meaningful argument for a new trial when he is a *verdict winner* at the time of framing and presenting this argument. Secondly, the new trial argument becomes even more tenuous at the appellate level

[50] See sources cited in note 19 *supra* for a discussion of this alternative.

than at the trial court level. Allowing the verdict winner the right to argue conditionally for a new trial either at the trial court level or the appellate level seems to ignore the practicalities of advocacy, and indeed of human nature. Only a verdict winner who has been deprived of his verdict can argue meaningfully for a new trial, and he should have the right to argue his case to the trial judge who saw and heard the case.

RALEIGH A. SHOEMAKER

Constitutional Law—Public School Authorities Regulating the Style of a Student's Hair

The availability of public education is often subject to compliance with school regulations governing student appearance and conduct. Courts have jurisdiction by way of mandamus or otherwise to review the legality of such regulations and may order reinstatement or enrollment when the exclusion is made pursuant to regulations that are unreasonable, arbitrary, or discriminatory, or when the exclusion infringes upon some constitutional right.[1] Following this standard, courts have upheld expulsion for using cosmetics, wearing objectionable clothing,[2] smoking,[3] serving liquor to other students,[4] marriage,[5] creating school bus disturbances,[6] and even writing a letter to a newspaper in which the student was "fanatical in his [favorable] views as to atheism."[7]

In *Ferrell v. Dallas Independent School District*,[8] a public high school principal refused to enroll three students—members of a musical group known as "Sounds Unlimited"[9]—because the length and style of their hair could "cause commotion, trouble, distraction, and a disturbance in school."[10] The students claimed that the regulations prescribing appearance constituted an arbitrary and unreasonable violation of their consti-

[1] *The Legal Status of the Public School Pupil*, 26 N.E.A. RESEARCH BULL. 28 (1948).
[2] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).
[3] Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).
[4] State v. Clapp, 81 Mont. 200, 263 P. 433, *cert. denied*, 277 U.S. 591 (1928).
[5] State v. Board of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957).
[6] *In re* Neal, 164 N.Y.S.2d 549 (Child. Ct. 1957).
[7] Robinson v. University of Miami, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958).
[8] 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 37 U.S.L.W. 3127 (U.S. Oct. 15, 1968).
[9] *Id.* at 698.
[10] *Id.* at 699.

tutional rights to freedom of expression and privacy. The federal district court denied their petition for injunctive relief,[11] holding that the school authorities had acted with reasonable discretion.[12] The Court of Appeals for the Fifth Circuit affirmed, with Judge Tuttle dissenting.[13]

While the decision has many implications concerning curtailment of the right to privacy where the mere *likelihood* of school disorder exists,[14] the court in *Ferrell* hardly touched the issue.[15] The court declared that even assuming that haircuts are a constitutionally protected mode of expression under the first amendment, such a right was subordinate to the state's interest in operating an efficient school system.[16] A similar contention by Mayor Hague thirty years earlier, however, was refuted by the Supreme Court, which said:

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[11] Ferrell v. Dallas Indep. School Dist., 261 F. Supp. 545 (N.D. Tex. 1966). The district court accepted jurisdiction on the basis of the constitutional issues involved, citing Brown v. Board of Educ., 347 U.S. 493 (1954).

[12] 261 F. Supp. 545, 552 (N.D. Tex. 1966), *reviewed in, A Student's Right to Govern His Personal Appearance*, 17 J. PUB. L. 151 (1968); 20 ALA. L. REV. 104 (1967).

[13] 392 F.2d 697 (5th Cir. 1968). An abundance of prior statutory and case law in many states upholds the right to grant their school officials almost unlimited discretion in governing the behavior and appearance of students attending their public schools, limited only by the requirement of reasonableness. *See* Langenbach, *The Power of School Officials to Regulate Student Appearance*, 3 HARV. LEG. COMM. 1 (1966); 1 PORTIA L.J. 258 (1966); Note, *The Right to Dress and Go to School*, 37 U. COLO. L. REV. 492 (1965).

[14] The students claimed their hair was an important asset to the popularity of their musical group, thus the school officials' action prevented them from following their chosen occupation free from unreasonable governmental interference in violation of the liberty and property concepts of the fifth amendment. The court recognized such a right, but rejected the claim that it was unreasonably infringed upon. 392 F.2d at 703.

[15] *But see* Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965); Marshall v. Oliver, Case No. B-2932 (Cir. Ct. Richmond, Nov. 28, 1965) (unpublished opinion), *appeal denied*, 207 Va. xcix, *cert. denied*, 385 U.S. 945 (1966) (college student denied enrollment in a state college because of long hair). The issue of privacy was presented to the court in *Ferrell*. *See* Brief for ACLU as Amicus Curiae at 6, 7 and Brief for Appellee at 18, 19, Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir. 1968).

[16] 392 F.2d at 703. The court in *Ferrell* also considered the subordinate claim that the school regulation was discriminatory under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983 (1964), but dismissed such claims, citing Byrd v. Sexton, 277 F.2d 418 (8th Cir. 1960). In *Byrd* a black student claimed the imposition of an enrollment fee to attend public high school was discrimination under the Civil Rights Act, 42 U.S.C. §§ 1983, 1985 (1964). Since the issue of race was not involved, the court refused to extend the statutes, holding any invasion of the student's right to attend the school without paying the fee was an invasion of a personal, not a civil right.

> [U]ncontrolled official supression of the privilege [freedom of speech] cannot be made a substitute for the duty to maintain order in connection with the exercise of that right.[17]

When the court assumes that a student's hairstyle is protected under the first amendment,[18] it becomes susceptible to the attack of the dissenting opinion,[19] namely that the state had failed to demonstrate that the petitioners' hairstyle clearly and seriously impeded the educational process enough to justify such invasion of the first amendment right.[20] A possible justification for the majority position can be found in the opinion of *United States v. O'Brien*,[21] where the Supreme Court dismissed the idea that all types of symbolic conduct are protected speech under the first amendment, and rejected the claim that burning a draft card before a public audience is protected symbolic speech.[22] Moreover, if a student's right to wear long hair were protected by first amendment freedom of expression, it is unclear whether a student has even a qualified right to compel the state to supply a platform—the school—for him to exercise that right.[23]

Perhaps the court's analysis and treatment of first amendment protection in *Ferrell* developed from positions it had taken in previous cases dealing with overtly symbolic speech. But the procedure adopted in *Ferrell*, in justifying infringement on the first amendment right, differs significantly from the procedure used in its previous decisions.

For instance, in *Blackwell v. Board of Education*[24] and *Burnside v.*

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[17] Hague v. CIO, 307 U.S. 496, 516 (1939). *See also* Terminiello v. Chicago, 337 U.S. 1 (1949).

[18] 392 F.2d at 702. In Davis v. Firment, 269 F. Supp. 524, 527 (E.D. La. 1967), the district court, when faced with the same factual situation, did not accept hair style as protected under the first amendment. Hair style, in order to be a symbol of speech, must express something, but "what does it express? Nothing." *Id.* at 527. *See* note 36 *infra* and accompanying text.

[19] 392 F.2d at 705.

[20] "[T]he constitutional rights of an individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very right he seeks to assert." *Id.* at 705. The disruptive reactions of fellow students "should be prohibited, not the expression of individuality by the suspended students." *Id.* at 706.

[21] 391 U.S. 367 (1968).

[22] *Id.* at 376.

[23] *See* Adderly v. Florida, 385 U.S. 30, 43 (1966) (involving the arrest of students for staging a protest picket on public jail property). In Cox v. Louisiana, 379 U.S. 536 (1965), civil rights picketing was held to be symbolic speech protected under the first amendment, but the Supreme Court in *Adderly* held that the state had "the right to control the use of its own property for its own lawful non-discriminatory purpose," regardless of the first amendment rights of the protestors. 385 U.S. at 43.

[24] 363 F.2d 749 (5th Cir. 1966).

Byars,[25] this same court used different reasoning in cases involving high school students who wore freedom buttons inscribed with civil rights slogans. Granting that such buttons were overtly symbolic speech, the court seemed to require proof of disruption *in fact* to justify infringement upon first amendment rights.[26] Thus, in *Blackwell*, after analyzing various sorts of empirical data, the court found *actual* disruption and upheld the school officials' actions barring the buttons.[27] But in *Burnside*, the court held that school officials had failed to demonstrate sufficient *actual* disturbance to justify similar restrictions.[28] Both decisions stress that the educational process involves the grant of considerable discretionary power to teachers and administrators.[29] Together these companion cases seem to imply that discretionary power necessary to the orderly functioning of the public schools cannot infringe upon rights of free expression unless a connection between the prohibited conduct and disruption *in fact* can be clearly demonstrated. Furthermore, in *Blackwell*, the degree of restriction was reasonable—controversial and disruptive buttons can be worn outside school hours. In sum, a reasonable exercise of discretion, resulting in regulations calculated to remedy a demonstrated problem, was upheld.

Yet in *Ferrell*, the court apparently abandoned the procedure followed in *Blackwell* and adopted the procedure of the district court in *Tinker v. Des Moines Independent School District*,[30] which held that actions of school officials "should not be limited to those instances where there *is* material or substantial interference with school discipline."[31] The regulation was promulgated by the schools and upheld by the court in *Ferrell*,

[25] 363 F.2d 744 (5th Cir. 1966).

[26] *Id.* at 749.

[27] 363 F.2d at 754.

[28] 363 F.2d at 748.

[29] *See also* Waugh v. Trustees of Univ. of Miss., 237 U.S. 589 (1915) (upholding the right of college administrators to prohibit fraternities); Barker v. Hardway, 283 F. Supp. 228 (S.D.W. Va. 1968) (upholding the suspension of students involved in a demonstration for student power); Zanders v. Board of Education, 281 F. Supp. 747 (W.D. La. 1968) (upholding the suspension of students involved in a sit-in demonstration in an administration building); Byrd v. Gary, 184 F. Supp. 388 (E.D.S.C. 1960) (upholding the suspension of high school students attempting to organize a milk boycott).

[30] 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *cert. granted*, 390 U.S. 942 (1968). In *Tinker* the district court upheld a principal's rule prohibiting students from wearing black arm bands in school. The court recognized that the arm bands were a known symbol of protest against the Viet Nam war, a symbolic form of expression protected under the first amendment.

[31] *Id.* at 973 (emphasis added).

though disturbance was only "reasonably anticipated,"[32] not present *in fact*.[33]

Some courts have concentrated not on the right of free speech, but on the right of privacy. Thus, they have refused to circumvent the more apparent, if not appropriate, issue when approaching similar haircut rules.[34] Traditionally, the right of privacy has been dominated by the common law concept of a man's home as his castle,[35] and admittedly hairstyle does not fall clearly within such a circumscribed theory. In *Davis v. Firment*,[36] a federal district court reasoned that a student's right of privacy to have his hairstyle left alone neither came from specific constitutional provisions[37] nor was so sacred or fundamental[38] as the right to marital privacy affirmed in *Griswold v. Connecticut*.[39] But other recent Court decisions emphasize that the concept of privacy is not confined to the *place*, but rather to the *person*. In *Katz v. United States*,[40] the Supreme Court held that the fourth amendment freedom from unreasonable governmental interference "protected people, not places."[41] Similarly, the Court, in *Terry v. Ohio*,[42] reasoned that the right of personal security "belongs as much to the citizen in the streets of our cities as

[32] *Id.* at 973.

[33] In *Ferrell* the petitioners had been refused enrollment; thus the school officials did not know from empirical observation that the students' hair style would be a source of disruption *in fact*, but based their opinion on past experiences with *different* students.

[34] *See* note 18 *supra*.

[35] *But see* Boyd v. United States, 116 U.S. 616, 630 (1886) (the Court described the fourth and fifth amendments as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life").

[36] 269 F. Supp. 524 (E.D. La. 1967).

[37] *Id.* at 529. The court felt that Justice Douglas's majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), was based on "penumbras" of the first, third, fourth, and fifth amendments which enabled citizens to create certain zones of privacy that government could not force the citizen to surrender to his detriment.

[38] *Id.* at 529. The court infers that Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 486 (1965), meant that although the right of marital privacy is not explicitly mentioned in the Constitution, the ninth amendment reminds us that there are other fundamental rights implicit in the fourteenth amendment's meaning of liberty, the right to marital privacy being such a fundamental right.

[39] 381 U.S. 479 (1965) (holding Connecticut's anti-contraceptive statute unconstitutional because its enforcement would violate the individual's right to privacy).

[40] 389 U.S. 347 (1967) (use of an electronic listening device to record a conversation in a public telephone booth).

[41] *Id.* at 351.

[42] 392 U.S. 1 (1968) (right of a police officer to "stop and frisk" on reasonable suspicion). *See* Sibron v. New York, 392 U.S. 40 (1968).

to the homeowner closeted in his study to dispose of his secret affairs."[43] In applying this reasoning, a student should be entitled to a certain modicum of privacy, notwithstanding his presence in a public institution.

Dictating the proper hairstyle to be worn in public school could be unreasonably "intruding upon the sanctity of the person,"[44] for unlike freedom buttons or armbands, official proscription of long hair during school hours affects the student in his home. Hair is obviously too much a natural and fundamental characteristic of the person to be put on and off, according to school schedule. Although the official intrusion upon the student's privacy is not as blatant or as confined to the home as the intrusion upon marital privacy in *Griswold*,[45] a student should have a right to be free from unreasonable governmental interference with his person at any hour or place.[46] Just as unreasonable restraints on the street corner may be reasonable restraints in the class room,[47] even reasonable restraints on the street corner or class room could well be *unreasonable* restraints when affecting the student not only at school, but also at home.[48]

Besides possibly infringing on the individual student's right to be left alone, banning long hair in public schools could "unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control."[49] But in *Leonard v. School Committee*,[50] the Massachusetts court upheld the suspension of a student musician with long hair, finding neither an abuse of discretion nor an unreasonable invasion of family privacy by school officials.[51]

Thus, the Court of Appeals for the Fifth Circuit indicates adherence to the policy of other courts in readily allowing school officials to promulgate ad hoc rules. Apparently, these school regulations will be

[43] 392 U.S. 1, 8-9 (1968).
[44] *Id.* at 17.
[45] 381 U.S. 510 (1965).
[46] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).
[47] 392 F.2d at 704-05 (concurring opinion).
[48] *Compare* Terry v. Ohio, 392 U.S. 1 (1968), *with* Griswold v. Connecticut, 381 U.S. 510 (1965).
[49] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
[50] 349 Mass. 704, 212 N.E.2d 468 (1965), *noted in* 1 PORTIA L.J. 258 (1966).
[51] The court in *Leonard* reasoned that rules governing the appearance of students were subject to limited court review, and that rules adopted by authorized school officials would be presumed to be based on reasonable deliberation, unless convinced there could be no reasonable connection with the rule and the successful operation of the school. "[J]ust as with any unusual, immodest or exaggerated mode of dress . . . conspicuous haircuts could result in the distraction of other students." *Id.* at 710, 212 N.E.2d at 472.

upheld as a reasonable exercise of official discretion, though perhaps infringing on the student's constitutional right of privacy. In balancing the "gravity of the 'evil' "[52] with the restraint on the right of privacy and possible first amendment intrusions, courts will uphold, as a reasonable exercise of official discretion, school regulations intended to avert *potential* sources of harm. The source of harm need not in fact be realized in the particular case for the regulation to be upheld. The court in *Ferrell* may have adopted this position to discourage students from testing these ad hoc rules at school, and subsequently in court, and to insure an efficient education for a majority of students, though curtailing a right of others. Adherence to such a policy will build fences amounting to a corral for the "mustangs and mavericks"[53] wishing to attend public school.

JOHN E. BUGG

Criminal Law—The Rehabilitative Ideal Activated by the Sentencing Process

INTRODUCTION

All too often the concept of rehabilitation within the criminal process is embraced by the academic community, but spurned by the black robes of the judiciary. Archaic myths and prejudices, interwoven into the purposes and goals of the criminal law, have resulted in an "antiquated criminal code, which is riveted together by outworn tradition like the iron cuff about the ankle of a chain gang prisoner,"[1] and beyond which the judiciary, historically, has failed to see.

In the case of *People v. Jones*,[2] an Illinois Appellate Court clearly recognized the rehabilitative ideal within the criminal system and applied it to a twenty year old high school boy. The defendant had been convicted of involuntary manslaughter and sentenced to the state penitentiary for not less than six nor more than ten years.[3] The trial court found that the

[52] 392 F.2d at 702.

[53] Pollit, *Free Speech for Mustangs and Mavericks*, 46 N.C.L. REV. 39, 54 (1967).

[1] Note, *Indeterminate Sentence Laws—The Adolescence of Peno-Correctional Legislation*, 50 HARV. L. REV. 677, 686 (1937).

[2] — Ill. App. 2d —, 235 N.E.2d 379 (1968).

[3] ILL. ANN. STAT. ch. 38, § 9-3(c)(1) (Smith-Hurd 1964) reads as follows: "A person convicted of involuntary manslaughter shall be imprisoned in the penitentiary from one to ten years."

accidental death of the defendant's friend had occurred while these two and others were engaged in boyish horseplay involving a revolver that discharged, critically wounding the deceased. Defendant cooperated fully with the arresting officers. An aggravation and mitigation hearing[4] by the trial court disclosed that the defendant was a lifelong resident of Chicago, single, a high school student, of the Baptist faith, and had no previous criminal convictions, although he had been arrested on several misdemeanor charges. The defendant appealed, contending that the sentence, although within the statutory limits, was excessive. In considering all the relevant factors, the appellate court said,

> This is not the picture of a person beyond the reach of the rehabilitative processes. The judge's explanation that: "We have had too many of these accidents" evidences a failure to give proper weight to the individual circumstances of the defendant. We feel that setting the minimum sentence at six years and the maximum at ten years is not in the best interest of either the community or the defendant.[5]

The judgment was accordingly modified to a minimum sentence of three years and affirmed as modified.

In any other jurisdiction the *Jones* case might well have been a landmark decision. In Illinois it is simply another stage in the long trend of cases[6] that clearly pay more than lip service to the goal of rehabilitation of the individual offender.

The Rehabilitative Ideal

This nation's penal system of justice and correction has developed more from accretion than from any dynamic process or innovation. New ideas were tacked onto the pre-existing structure with no effort to relate the old to the new or to eliminate incompatible elements. Thus, the evolving system became a paradoxical and inconsistent phenomenon working "in ways that are unintended toward goals that are neither simple nor

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[4] Ill. Ann. Stat. ch. 38, § 1-7(g) (Smith-Hurd Supp. 1967) reads as follows: For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense.

[5] — Ill. App. 2d at —, 235 N.E.2d at 381.

[6] *See* People v. Tice, 89 Ill. App. 2d 313, 231 N.E.2d 607 (1967); People v. Nelson, 87 Ill. App. 2d 159, 231 N.E.2d 115 (1967); People v. Lillie, 79 Ill. App. 2d 174, 223 N.E.2d 716 (1967); People v. Lannes, 78 Ill. App. 2d 45, 223 N.E.2d 440 (1966); People v. Carroll, 76 Ill. App. 2d 9, 221 N.E.2d 528 (1966); People v. Brown, 60 Ill. App. 2d 447, 208 N.E.2d 629 (1965); People v. Evrard, 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965).

precise."[7] Though many of the non-utilitarian concepts, which were once historically significant, have given way to modern methods and new ideas, their presence, even within the shadows, tends to distort and confuse the overall goals of the criminal process. Concepts of vindication, retribution, and penitence have been superseded by concepts of neutralization, reformation, and re-socialization;[8] but the lingering presence of the former has significantly allied with concepts of deterrence and prevention to weaken the latter. "It is far simpler to receive without challenge the traditional philosophies and to employ well-established techniques. When called upon, one may speak piously of the protection of society or individualized rehabilitation, but these are bones without flesh."[9] Inevitably, a balance is struck among the competing social interests on scales which our criminal system calls justice.

As the criminal process has evolved, two major social goals have become predominant: the protection of society and the preservation of human dignity via the rehabilitative ideal.[10] Since the innovation of probation over a century ago,[11] modern correctional attitudes and ideas have slowly generated change in the philosophy of penology, introducing such concepts as the indeterminate sentence, parole, half-way houses, work-release, and furloughs.[12] In the years after the first world war the social sciences began applying behavioral disciplines to areas of correction. These behavioral science contributions were expressed in a new concept. "Inasmuch as there is no single cause of crime, there can be no single cure of criminal behavior. Therefore, correctional treatment must be individualized and based on the diagnosis of the individualized problems and needs."[13] Thus, the concept of rehabilitation focuses on the individual as a quality control mechanism within a dynamic society to screen out defective elements, rechannel them to be properly remolded, and provide for their re-entry into society.

Even after spanning the gaps in the concepts of criminal law to rec-

[7] P. TAPPAN, CRIME, JUSTICE, AND CORRECTION 237 (1960).

[8] *See generally* Mueller, *Punishment, Corrections and the Law*, 45 NEB. L. REV. 58 (1966). *See also* P. TAPPAN, CONTEMPORARY CORRECTION 3-13 (1951); P. TAPPAN, *supra* note 7, at 241-59; Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

[9] P. TAPPAN, CONTEMPORARY CORRECTION 3 (1951).

[10] Penegar, *The Emerging "Right to Treatment"—Elaborating the Processes of Decision in Sanctioning Systems of the Criminal Law*, 44 DENV. L.J. 163, 224 (1967).

[11] *See generally* Alexander, *Current Concepts in Correction*, 30 FED. PROB. 3, 4 (1966).

[12] *Id.* at 5.

[13] *Id.* at 4. *See also* Penegar, *supra* note 10, at 204.

ognize rehabilitation as a dominant goal, however, there are problems inherent within the concept itself. All too often "individualization in practice reflects more clearly the differences in the judges than in the convicted offenders."[14] Another problem is that emphasis on individualization focuses attention on the individual and away from the offense. There is always the danger to the individual "that he will be punished for what he is believed to be, rather than for what he has done. The danger to society is that the commands of the criminal law will be weaker."[15]

The purposes and goals of the criminal process can be considered at three levels: the legislative level of creation, the judicial level of imposition, and the administrative level of execution.[16] While the legislature must incorporate within the sentencing structure the values held by society and the goals of the system, it is the judiciary which functions in the all-important role of individualizing the abstractions of the law to the offender for societal good. It is the judiciary that bears the burden of *activation* of the rehabilitative ideal to the individual offender. The trend of recent decisions, however, indicates that the judiciary has largely failed to fulfill its obligation in the implementation of the major goals of the criminal process.[17]

GUIDELINES

In light of the many variables involved, perhaps the greatest need of the trial court is for sentencing guidelines. Sentencing measures and alternatives run the gauntlet from the suspended sentence, probation, and fines, to long term imprisonment, sterilization or castration, and death.[18] Within the criminal process there exist numerous mitigative devices,[19]

[14] P. TAPPAN, *supra* note 9, at 13.
[15] Hart, *supra* note 8, at 407-08.
[16] Mueller, *supra* note 8, at 82. This note will discuss only the judicial level of imposition.
[17] Penegar, *supra* note 10, at 224.
[18] *See generally* P. TAPPAN, *supra* note 7, at 422-26.
[19] *Id.* at 375. These devices are recognized:
(a) Police and prosecutor may discharge the accused after preliminary hearing.
(b) The examining magistrate may discharge the accused after preliminary hearing.
(c) The Grand Jury may refuse to indict.
(d) The prosecutor may decide to enter a *nolle prosequi.*
(e) The prosecutor or the court may agree to accept a plea to a lesser offense than that originally charged.
(f) The trial jury may bring in a verdict of not guilty or convict for a lessor crime.
(g) Discretion may be exercised in sentencing to apply a lenient sentence, whether it is probation or brief imprisonment.

the indeterminate sentence being the most crucial.[20] With the two major goals of the criminal process clearly in mind, a trial court judge must impose the harsh realities of a sentence, yet counterbalance the necessity for the sentence to express adequately the community's view of the gravity of the offense against the necessity of a sentence that will be favorable in rehabilitating the defendant.[21] Other than from the statutory provisions,[22] few trial courts have available any concrete guidance in the development of criteria that, when applied to each offender, will best promote the goals of the criminal law. Only in those states which allow appellate review of legal but excessive sentences is there a higher authority to provide guidelines to the trial judge in this crucial role of individualizing the criminal process.

In the majority of jurisdictions, a sentence within the statutory limits for a proven offense is normally within the discretion of the trial court and not subject to appellate review.[23] To allow appellate review would be to allow a higher court to pass judgment on a factual decision of the trial court.[24] It has been said that "an appellate judge could never get the true picture of a defendant and his sentence proceeding from the mere reading

(h) Sentence may be reduced in some jurisdictions through an appeal or motion in mitigation of sentence.
(i) The convicted and incarcerated offender may be released on parole at some time short of the expiration of his maximum sentence.
(j) A pardon may be secured from the executive.

[20] Within the statutory structure of indeterminate sentence laws, accompanied by provisions for probation, is society's *formal* recognition of the rehabilitative ideal within the criminal law. *See generally* Note, *Statutory Structure For Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1144-54 (1960).

[21] Hart, *supra* note 8, at 437.

[22] There exists at least one minimum mandate that guides every sentencing judge. The eighth amendment of the U.S. CONSTITUTION requires that punishment can be neither *cruel* nor *unusual*. Several recent cases have more precisely defined the meaning of these terms. In Robinson v. California, 370 U.S. 660 (1962), the court decided that classification as a criminal and punishment by prison sentence of a person suffering from an illness—narcotic addiction—was cruel and unusual punishment. In Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968), a state court of appeals held that confinement of a juvenile, convicted of rape, to prison for life without privilege of parole constituted cruel and unusual punishment. *See also* Beard v. Lee, 396 F.2d 749 (5th Cir. 1968); Black v. United States, 269 F.2d 38 (9th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960); Edwards v. United States, 206 F.2d 855 (10th Cir. 1953); Hemans v. United States, 163 F.2d 228 (6th Cir. 1947).

[23] *See, e.g.*, State v. Davis, 243 N.C. 754, 92 S.E.2d 177 (1956). *See* Hall, *Reduction of Criminal Sentence on Appeal*, 37 COLUM. L. REV. 521, 522 (1937); Mueller, *Penology on Appeal: Appellate Review of Legal But Excessive Sentences*, 15 VAND. L. REV. 671, 677 (1962); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1452 (1960); Note, *Statutory Structure For Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1162 (1960).

[24] *See generally* Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79 (1967).

of a cold record, any more than he could learn how to milk a cow from reading a book."[25] Even so, fifteen American jurisdictions have either specific statutes authorizing modification of legal but excessive sentences, or precedents which have established such a procedure.[26] An examination of appellate decisions from each of these jurisdictions, however, has failed to reveal any clear guidelines for the judge involved in the sentencing process. Despite the importance and complexity of their decisions, the appellate courts have set few standards for the trial court to measure the appropriateness of its dispositive action. Appellate courts usually fail either to articulate reasons for sentence reductions or to formalize criteria amenable to rational analysis.

State Appellate Decisions

Many appellate courts have found it impossible to set guidelines and standards, or have simply refused to do so. In *Commonwealth v. Cater*,[27] the Pennsylvania Supreme Court stated: "This court has said time and again that there are no fixed and immutable standards to be established to guide trial courts in exercising their discretion."[28] In *State v. Douglas*,[29] the Arizona Supreme Court said that the trial judge "is to pass a value judgment upon a human being for the society which he represents; he is to sit as the conscience of the community. In the performance of this duty, the trial judge is—to a certain extent—deprived of any set standards or legal guideposts."[30] Thus, the machinery of appellate review of sentences has not been employed as a possible means of establishing any general sentencing policy. Appellate courts all too often reverse excessive legal sentences using, as sole criteria, phrases such as "after a careful consideration of the facts,"[31] or "when justice and right require,"[32] or "when the furtherance of justice requires."[33]

In a few jurisdictions the trial court receives some minimum basic guidance. A close scrutiny of several appellate decisions reveals certain

[25] *Id.* at 88.

[26] Mueller, *supra* note 23, at 677, 688; Note, *Statutory Structures For Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1162-64 (1960). These jurisdictions include: Arizona, Arkansas, Connecticut, Hawaii, Idaho, Iowa, Massachusetts, Nebraska, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, and in the federal system, the Seventh Circuit Court of Appeals.

[27] 396 Pa. 172, 152 A.2d 259 (1959).

[28] *Id.* at 179, 152 A.2d at 263.

[29] 87 Ariz. 182, 349 P.2d 622, *cert. denied*, 363 U.S. 815 (1960).

[30] *Id.* at 188, 349 P.2d at 625.

[31] Williams v. State, 52 Okla. Crim. 336, 339, 5 P.2d 410, 411 (1931).

[32] Commonwealth v. Hawk, 328 Pa. 417, 418, 196 A. 5, 6 (1938).

[33] State v. Ramirez, 34 Idaho 623, 634, 203 Pac. 279, 283 (1921).

purposes of the sentencing process and criteria for individualization.[34] In *Davis v. State*,[35] the Florida Supreme Court said that "[r]esponsibility should be the basis of punishment, and individualization the criterion of its application; such is the formula of modern penal law."[36] In *State ex rel. Shock v. Barnett*,[37] the Washington Supreme Court said that "[i]t is contemplated that, in fixing of punishment, the trial court must maintain a due regard for the dignity of the law, the protection of society, the reformation of the offender, and other considerations."[38] In *State v. Wilson*,[39] the Idaho Supreme Court said,

> Whether the appellant was a good risk or a poor risk for probation is not in itself decisive of the issues and possible rehabilitation is not the controlling consideration. In cases of crimes committed against society, the trial court must consider the protection of society, the deterrence of the individual and the public generally, the possibility of rehabilitation and punishment for wrongdoings.[40]

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[34] From those jurisdictions allowing appellate review, the cases cited in the text and those cited below are the better examples of appellate decisions which shed some light on guidance for lower courts: State v. Phillips, 102 Ariz. 377, 430 P.2d 139 (1967); State v. Benn, 101 Ariz. 252, 418 P.2d 589 (1966); State v. Stevens, 93 Ariz. 375, 381 P.2d 100 (1963); State v. Telavera, 76 Ariz. 183, 261 P.2d 997 (1953); Logan v. People, 138 Colo. 304, 332 P.2d 897 (1958); State v. Lyman, 26 Conn. Supp. 70, 213 A.2d 73 (Sen. Rev. Div. 1965); State v. Tirella, 22 Conn. Supp. 25, 158 A.2d 602 (Sen. Rev. Div. 1959); State v. Gonski, 21 Conn. Supp. 468, 159 A.2d 182 (Sen. Rev. Div. 1958); State v. O'Dell, 71 Idaho 64, 225 P.2d 1020 (1950); State v. Rinehart, 255 Iowa 1132, 125 N.W.2d 242 (1963); State v. English, 242 Iowa 248, 46 N.W.2d 13 (1951); State v. Marcus, 240 Iowa 116, 34 N.W.2d 179 (1948); State v. De Stasio, 49 N.J. 247, 229 A.2d 636, *cert. denied*, 389 U.S. 830 (1967); Dickson v. State, 336 P.2d 1113 (Okla. Crim. App. 1959); Williams v. State, 321 P.2d 990 (Okla. Crim. App. 1957), *aff'd*, 358 U.S. 576, *reh. denied*, 359 U.S. 956 (1959); Larkey v. State, 95 Okla. Crim. 338, 245 P.2d 751 (Crim. App. 1952); *Ex Parte* Banks, 74 Okla. Crim. 1, 122 P.2d 181 (Crim. App. 1942); Tuel v. Gladden, 234 Ore. 1, 379 P.2d 553 (1963); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

[35] 123 So. 2d 703 (Fla. 1960). The defendant pleaded guilty to rape of an eleven year old girl and received the maximum penalty, death. An appeal for mercy was denied by the sentencing judge in light of the circumstances and brutal nature of the crime. The decision was affirmed on appeal.

[36] *Id.* at 711.

[37] 42 Wash. 2d 929, 259 P.2d 404 (1953). Defendant was convicted of a felony —taking indecent liberties with a minor female—and sentenced to the penitentiary. The court on appeal denied a request for probation and affirmed the judgment.

[38] *Id.* at 933, 259 P.2d at 406.

[39] 78 Idaho 385, 304 P.2d 644 (1956). Defendant, an adult, was convicted of committing a "crime against nature" with a boy, fourteen years old. A pre-sentence report indicated that the defendant was an habitual, persistent homosexual offender. The trial court refused to hear testimony as to state facilities for treating the defendant, prescribing an active sentence. The decision was affirmed in light of the nature of the crime and character of the offender.

[40] *Id.* at 388, 304 P.2d at 646.

All of these decisions clearly evidence a rehabilitative goal recognized by the appellate courts, but one which truly is "bones without flesh"[41] for lack of any appropriate guiding criteria for individualization. A decision handed down by the Connecticut Sentence Review Division[42] is one of the first to attempt the heretofore indefineable:

> The sentencing problem is not one that yields to exact analysis, although a proper sentence is desirably one that fits both the crime and the individual. Such a sentence must of necessity take in many variables, including the gravity of the crime, both as to the particular circumstances of the offense charged, and the place of that crime in our social order, the prior record of the defendant, the recidivistic factor and the deterrent effect sought with reference to the commission of that crime by others.[43]

Over a period of four years prior to the decision in the *Jones* case, the Illinois Appellate Courts have handed down at least seven[44] decisions, which in view of the case analysis of all other jurisdictions, puts the state years ahead in both recognition and application of the rehabilitative goals of the criminal process. Appellate opinions have actually become working tools for trial court judges. In *People v. Evrard*,[45] the appellate court said,

> The court must strive to render a judgment which will adequately punish the defendant for his misconduct, safeguard the public from further offenses, and reform and rehabilitate the offender into a useful member of society. In order to select an appropriate sentence, it is

[41] P. TAPPAN, *supra* note 9, at 3.

[42] State v. Kelii, 26 Conn. Supp. 215, 216 A.2d 849 (Sen. Rev. Div. 1965). The defendant was convicted of manslaughter and sentenced to not less than seven nor more than fifteen years in prison. In a fit of rage he killed a man with whom his wife was having an affair and who was mistreating the defendant's children under the guise of discipline. The defendant's background included honorable service and discharge from the coast guard and the national guard; an excellent employment record; no previous criminal record; no evidence of any recidivistic tendency; a reliable, cooperative, and even-tempered character; and evidence of strong love toward his family, regardless of the constant infidelity of his wife. The appellate court reduced the minimum sentence to five years.

[43] *Id.* at 218, 216 A.2d at 850.

[44] *See* note 6 *supra*.

[45] 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965). The defendant was convicted of taking indecent liberties with a girl of 15 and sentenced to from one to three years in prison. The defendant was 30 years of age, the father of two, and gainfully employed. He was intoxicated at the time of the incident. The appellate court affirmed the conviction but remanded for re-evaluation of sentence, requiring the trial court to hear all pertinent evidence as to the defendant's past history. The court felt that the present record evidenced no recidivistic tendencies and that probation would be adequate.

> essential that the court be in possession of the fullest possible information concerning the defendant's life and characteristics.[46]

The court is thus required to consider evidence of the defendant's "moral character, life, family, occupation and criminal record"[47] in aggravation or mitigation of sentence. In *People v. Nelson*,[48] the appellate court held that where the record failed to show the education, family situation, background, or employment record of the defendant to any appreciable extent, the sentence would be vacated and the cause remanded to the circuit court for sentencing based upon the fullest information relevant to the defendant. In *People v. Lillie*,[49] the appellate court said,

> Advances in the fields of psychology, psychiatry and sociology have contributed to a greater understanding of the motives underlying the commission of criminal offenses, and the techniques and methods which are of value in the rehabilitation of offenders. The hope of earlier release is a great incentive to a prisoner to participate in the educational and rehabilitative programs provided in modern penal institutions. Excessive minimum sentences, imposed by the courts, may defeat the effectiveness of the parole system by making mandatory the incarceration of a prisoner long after effective rehabilitation has been accomplished.[50]

Federal Appellate Decisions

It has long been a uniform policy of federal appellate courts not to consider a sentence within the statutory limits.[51] The United States Su-

[46] *Id.* at 274-75, 204 N.E.2d at 779.

[47] See note 4 *supra*.

[48] 87 Ill. App. 2d 159, 231 N.E.2d 115 (1967). Defendant was convicted of armed robbery and sentenced to from four to ten years in prison. Scant evidence at trial revealed only that the defendant was twenty-four years old, a photographer, had been convicted previously of second degree burglary, and used obscene and disrespectful language while in jail awaiting trial. The appellate court remanded for re-sentencing based on a fuller knowledge of the defendant's past history and personal characteristics.

[49] 79 Ill. App. 2d 174, 223 N.E.2d 716 (1967). Defendant, age twenty-three, pleaded guilty to burglary in 1964 and was placed on probation. Thereafter probation was revoked and a sentence of from twelve to eighteen years in prison imposed. The defendant had previously been convicted of burglary and larceny, but he had made restitution. Revocation of probation was brought on by charges of disorderly conduct, reckless driving, and illicit sexual activity with minor females. The appellate court reduced the minimum sentence to five years.

[50] *Id.* at 179, 223 N.E.2d at 719.

[51] Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405, 411 (1968); Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379, 380 (1964). The leading case cited for this rule is Gurera v. United States, 40 F.2d 338 (8th Cir. 1930). The only exception is the Court of Appeals for the Seventh Circuit, which held a legal 3-year sentence imposed by a district court excessive and remanded by exercising "its supervisory

preme Court itself refused to "enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment,"[52] stating that "[t]his court has no such power."[53] Although appellate review of criminal sentences in the federal courts has been proposed in Congress, the Judicial Conference of the United States has refused to recommend the adoption of such a procedure.[54] However, the federal judiciary and Congress have not failed to envision a need for the evaluation of sentence disparities and the promulgation of sentencing criteria.

Federal Institutes

In August of 1958, a statute was enacted to authorize the establishment of joint councils and institutes on sentencing under the auspices of the Judicial Conference of the United States.[55] The purposes of the institutes were for study, discussion, and formulation of objectives, policies, standards, and criteria for sentencing in federal courts. Since the pilot institute, there have been fifteen additional sentencing institutes bringing together not only distinguished jurists, but also penologists and educators as well.[56] Out of these institutes have come enlightened ideas toward criteria for sentencing standards. Many of the policies and standards of one circuit have been accepted by other circuits.[57] In November of 1960, the

control of the district court, in aid to its appellate jurisdiction." United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960).

[52] Gore v. United States, 357 U.S. 386, 393 (1958).

[53] *Id.*

[54] Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1453 & n.3 (1960).

[55] 28 U.S.C. § 334 (1964). The Institutes are called at the request of the Attorney General or the Chief Judge of each circuit.

[56] Youngdahl, *Development and Accomplishments of Sentencing Institutes In Federal Judicial System*, 45 NEB. L. REV. 513, 514-15 (1960).

[57] The ninth circuit in 1960 accepted "Policies and Standards for Sentencing" set by the District of Columbia Circuit Sentencing Institute of 1960. These standards are set out in Appendix E of *Sentencing Institutes, the Circuit Conference of the Ninth Judicial Circuit*, 27 F.R.D. 293, 389-91 (1960) and read as follows:

1. The purpose of a sentence combines community protection, correction, rehabilitation, deterrence and punishment. The sentencing judge must determine the proportionate worth, value and requirement of each of these elements in imposing sentence in each case.
2. The prime consideration in proper sentencing is the public welfare. Two major problems in sentencing are:
   (a) to what extent and for what time does the community welfare require protection from this offender, or others, with respect to this offense; and
   (b) in the light of the answer to the first problem, what sentence will permit this offender to take his place in society as a useful citizen at the earliest time consistent with protection of the public.

3. A proper sentence is a composite of many factors, including the nature of the offense, the circumstances—extenuating or aggravating—of the offense, the prior criminal record, if any, of the offender, the age of the offender, all with reference to education, home life, sobriety, and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the current community need, if any, for such a deterrent in respect to the particular type of offense involved.
4. The protection of the community from confirmed and habitual criminals not reasonably susceptible of rehabilitation as useful citizens requires the incarceration of such offenders, for maximum periods. The protection of the community also requires that, to the extent a given sentence may be expected to serve as an effective deterrent to the commission of similar offences by others, this element should be given great weight in the determination of the proper sentence. The public welfare also requires, in general, the maximum use of probation and institutionalized training in respect to offenders who are not confirmed criminals and who manifest capacity for probable return to the community as useful citizens.
5. There is little, if any, disparity in the sentences imposed by individual judges in this circuit for violations of the same statute when all elements of the offence and the offender are considered, as outlined in paragraph 3, *supra*. Despite seeming differences in specific cases, careful evaluation of the cases discloses that the variables in each case, including the defendant's prior criminal record, his background, educational and social status, his marital status, the number of his dependants, the condition of his health, the prospect of rehabilitation and various other elements, readily explain apparent differences in so-called similar cases.
6. Sentences which are merely mathematically identical for violations of the same statute are improper, unfair, and undesirable. Indeed, mathematically identical sentences may be themselves disparate. Each defendant's case must be considered upon its highly individualized basis and a sentence imposed which is tailored to fit that case. Sentencing judges must in all instances consider all of the factors in each case, giving appropriate weight to each factor, and impose a sentence which is just to the defendant and just to the community.
7. The public need for sentences which serve as deterrents to crime may vary from time to time and by type and frequency of offence.
8. A sentencing judge must determine in each case the deterrent effect which the sentence in that case may have upon the offender. The deterrent effect of a sentence upon the other potential offenders with respect to the possible commission of similar crimes and in respect to the commission of crime generally is subject to different and varying viewpoints. It is clear, however, that the most effective deterrent is certainty and swiftness of punishment.
9. The use of the facilities provided by the Youth Correction Act in proper cases appears to be most effective in the guidance, training and supervision of youthful offenders and their restoration to useful life in the community.
10. It is proper, and often desirable, that a sentencing judge explain to an offender in open court the purposes and meaning of a sentence about to be imposed, especially when probation is granted.
11. Equal justice in sentencing is achieved by an experienced objective consideration by the sentencing judge of all of the individual factors in each case weighed in relation to the sentences imposed by other experienced and objective judges in cases which are similar in respect to the

judges of the U.S. District Court of the Eastern District of Michigan instituted new procedures for sentencing.[58] These procedures require that prior to sentencing all trial judges must discuss proposed sentences with other members of the court in an informal panel meeting. Prior to the meeting, each judge on the Council receives a pre-sentence report and fills out his recommendations on a chart. Awareness by the sentencing judge that his thought processes will be exposed to the critical gaze of colleagues should encourage more objective and principled attitudes towards sentencing. The Council has tended to create consensus among the judges as to the relevance and weight of factors in sentencing.[59] The President's Commission on Law Enforcement and the Administration of Justice endorses sentencing institutes and conferences and urges each state to instigate such programs on their own initiative.[60]

Pre-Sentence Reports

Perhaps the most helpful tool ever devised for a sentencing judge is the pre-sentence investigation report. Such a report is required in every federal case, "unless the court directs otherwise."[61] The federal pre-sentence report contains the defendant's prior criminal record, information concerning his character, financial condition and the circumstances affecting his behavior, and such other information as the court may require.[62] In 1960 of all persons convicted of federal offenses, eighty-six percent were investigated and pre-sentence reports were prepared on their backgrounds. Of these eighty-six percent, forty-two percent received probation.[63]

The report of a pre-sentence investigation is made mandatory in some circumstances by statutes in at least thirteen states.[64] Even where no such statutory authority exists, the majority of courts, at least in felony cases,

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nature of the violation of law and background of the individual defendant.

[58] Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499, 499-504 (1966).

[59] *Id.* at 505.

[60] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967).

[61] FED. R. CRIM. P. 32(c)(1), (as amended 1966).

[62] *Id.* at 32 (c)(2) (as amended 1966).

[63] *See* M. PAULSEN AND S. KADISH, CRIMINAL LAW AND ITS PROCESSES 168 (1962).

[64] Note, *Statutory Structure For Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1135 & n.4 (1960). The states include: California, Colorado, Connecticut, Hawaii, Massachusetts, Michigan, Nebraska, Nevada, New Mexico, New York, Rhode Island, Virginia, and New Jersey.

may require such a report.[65] The purpose of the investigation is to glean, from the defendant's past and present circumstances, information that might indicate a potential for rehabilitation or show a definite propensity toward crime. Many reports include an analytical summary of the subject's history and problems, with a recommendation to the court as to his disposition.[66] The President's Commission on Law Enforcement and Administration of Justice recommends that all courts require a pre-sentence report for all offenders.[67]

Model Codes

Even absent beneficial appellate guidelines, there are other available institutions that offer sound sentencing guides. The American Law Institute has proposed a Model Penal Code[68] which includes the following: a statement of the purposes of punishment and treatment,[69] a statement of criteria for withholding a prison sentence and placing an offender on probation,[70] a statement setting forth criteria for imposition of extended

[65] Note, *Employment of Social Investigation Reports In Criminal and Juvenile Proceedings*, 58 COLUM. L. REV. 702, 703 (1958); Note, *Statutory Structure For Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1134 n.5 (1960).

[66] *See generally* 2 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 156 (1939); P. TAPPAN, *supra* note 7, at 556-57 & n.50.

[67] PRESIDENT'S COMMISSION, *supra* note 60, at 144.

[68] MODEL PENAL CODE (Proposed Final Draft No. 1, 1961).

[69] *Id.* § 1.02(2).

The general purpose of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;
(b) to promote correction and rehabilitation of offenders;
(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
(d) to give fair warning of the nature of the sentences that may be imposed on conviction of the offense;
(e) to differentiate among offenders with a view to a just individualization in their treatment;
(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of the offenders;
(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction.

[70] *Id.* § 7.01.

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

terms of imprisonment for felons,[71] a statement setting forth criteria for

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
(c) a lesser sentence will depreciate the seriousness of the defendant's crime.
(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:
(a) the defendant's criminal conduct neither caused nor threatened serious harm;
(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
(c) the defendant acted under a strong provocation;
(d) there were substantial grounds tending to excuse the defendant's criminal conduct, though failing to establish a defense;
(e) the victim of the defendant's criminal conduct induced or facilitated its commission;
(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;
(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;
(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;
(j) the defendant is particularly likely to respond affirmatively to probationary treatment;
(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

. . . .

[71] *Id.* § 7.03.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.
(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors committed at different times when he was over (insert Juvenile Court age) years of age.
(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over the age of twenty-one and:
(a) the circumstances of the crimes show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or
(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

. . . .

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

. . . .

the extended imprisonment of habitual misdemeanants,[72] and a section recommending pre-sentence investigation.[73] Also, the National Council on Crime and Delinquency, through their Advisory Council of Judges, has developed a Model Sentencing Act.[74] This Act provides for a pre-sentence investigation,[75] sets forth criteria for sentencing standards,[76] and provides a requirement that the trial court judge make a brief statement of his basic reasons for the sentence that he imposes.[77]

Prediction Methods

There exists still another source of guidance for the sentencing judge. By the use of prediction methods, a judge is able to arrive at some estimate of the defendant's post-correctional conduct. Considering the statistical experience of the community in sentencing particular classes of defendants to prison or placement on probation, the judge's intuitive process of predicting the defendant's subsequent behavior can now be developed into a more rational process of analysis and into more precise, concrete terms.[78] In the Glueck study[79] of five hundred criminals in a Massachusetts reformatory over a period of five years, social factors and behavioral patterns of each offender were analyzed from childhood through parole. Correlation tables were made and validation studies run. The Gluecks came up with five factors[80] that showed the highest correlation to post-parole conduct. These were given relative weights and incorporated into a table. From such a table it is now possible to predict post-release behavior prior to sentencing.[81]

The Research Division of the California Department of Correction

[72] *Id.* § 7.04.

[73] *Id.* § 7.07. Few states have adopted the provisions in the sections above. Some of the more progressive states have enacted similar kinds of provisions, though none are as extensive as those of the model code. See CAL. PEN. CODE § 1203 (West Supp. 1967); ILL. ANN. STAT. ch. 38, §§ 1-2, 117-1 (Smith-Hurd 1964); N.Y. PEN. LAW §§ 1.05 & 70.10 (McKinney 1967).

[74] ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL OF CRIME AND DELINQUENCY, MODEL SENTENCING ACT (1963).

[75] *Id.* art. 2, § 2.

[76] *Id.* art. 3, § 5.

[77] *Id.* art. 3, § 10.

[78] J. CONRAD, CRIME AND ITS CORRECTION 191 (1965).

[79] Glueck, *Predictive Devices and the Individualization of Justice*, 23 LAW & CONTEMP. PROB. 461, 471-72 (1958).

[80] *Id.* at 472. The factors are: (1) seriousness and frequency of pre-reformatory crime, (2) arrest for crimes preceding the offense for which sentence to the reformatory had been imposed, (3) penal experience preceding reformatory incarceration, (4) economic responsibility preceding sentence to the reformatory, and (5) mental abnormality.

[81] *Id.*

has developed a system of base expectancies that are applicable to various correctional populations.[82] Equations were developed to differentiate risks according to similar kinds of demographic attributes, with twelve factors incorporated into a base expectancy table.[83] The judge might then weigh the risk of recidivism against the hazard of the kind of crime to be expected. "A thirty percent prospect of homicide must be viewed in a different light than an equal prospect of shoplifting. Nothing in sight offers the judge complete relief from the burden of the risk-laden decision."[84] It is the aim under this new system to cut imprisonment or commitment to state institutions by twenty-five percent with a savings extended over a decade of one hundred million dollars, without compromising public safety.[85]

CONCLUSION

In relation to judicial activation of the rehabilitative ideal through individualization, sentencing is presently still "the most neglected part of the most neglected field of the law, criminal law."[86] Even recognizing a rehabilitative ideal predominant within the criminal process, only a few courts have taken any modern, realistic approach in applying the ideal through the sentencing process. Trial judges must be apprised of the fact that individualization can be achieved only through systematic analysis of crucial criteria relevant to each offender. The rehabilitative ideal must be recognized and supported at the legislative level; but, individualization

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[82] J. CONRAD, *supra* note 78, at 185-89.

[83] McGee, *Objectivity in Predicting Criminal Behavior*, 42 F.R.D. 175, 195 (1966). The factors and their weights are:

An arrest-free period of five years or more	12
No history of opiate use	9
Two or less jail commitments	8
The charge is not checks or burglary	7
No family criminal record	6
No alcohol involvement related to offense	6
Not first arrested on auto theft	5
Six or more consecutive months of work for one employer	5
No aliases	5
First imprisonment under this serial number	5
Favorable living arrangements	4
Few prior arrests (zero, one or two)	4
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A score of 53 or higher gives the defendant a seventy-five percent chance of success.

[84] J. CONRAD, *supra* note 78.

[85] McGee, *supra* note 83, at 185.

[86] Barkin, *Sentencing Problems*, 39 F.R.D. 523, 524 (1965).

can only be activated by the judiciary through the sentencing process. Failure here weakens the rehabilitative ideal. The judiciary must recognize its crucial role within the criminal process before this *ideal* can be transformed into reality.

DONALD W. STEPHENS

Evidence—Lay Opinion as to Whether a Person is Under the Influence of Narcotics

In *State v. Cook*[1], defendants appealed from a conviction of possession of a quantity of barbiturates without a prescription.[2] One of the defendants' objections related to the admission of the testimony of a police officer that, in his opinion, based on his observation, the defendants were under the influence of narcotics.[3] Apparently, the officer was not qualified as an expert. The court, however, did not feel this necessary. Relying on a long line of North Carolina cases[4] allowing a lay witness to give his opinion when, by reason of better opportunities for observation, he is in a better position than the jury to make a judgment, the court stated: "Seeing defendants in their drugged condition and observing their manner of speech and movement, the witness was better qualified than the jury to draw inferences and conclusions from what he saw and heard."[5] A rule permitting admission of lay opinion regarding people under the influence of narcotics ventures beyond the limits

[1] 273 N.C. 377, 160 S.E.2d 49 (1968).

[2] N.C. GEN. STAT. § 90-113.2(3) (1965).

[3] He testified that defendants were "sleepy . . . had glassy dilated eyes. . . ." They were "in a stupor . . . mumbling . . . staggering." 273 N.C. at 381, 160 S.E.2d at 52. He also mentioned the fact that there was no odor of alcohol about them. *Id.* This last fact implies that his opinion was at least partially arrived at by the process of elimination (*i.e.*, since they were not drinking, their conduct could be explained only by drugs). The accuracy of this method, standing alone, seems doubtful.

[4] Greensboro v. Garrison, 190 N.C. 577, 130 S.E. 203 (1925); State v. Brodie, 190 N.C. 554, 130 S.E. 205 (1925); Hill & Brooks v. Louisville & N.R.R. Co., 186 N.C. 475, 119 S.E. 884 (1923); Sheperd v. Sellers, 182 N.C. 701, 109 S.E. 847 (1921); Marshall v. Interstate Tel. & Tel. Co., 181 N.C. 292, 106 S.E. 818 (1921).

[5] 273 N.C. at 381, 160 S.E.2d at 52. It should be noted that the court said: "Seeing defendants in their *drugged condition. . . .*" *Id.* Whether or not defendants were drugged was one of the factual issues in dispute. The court, by this language, assumed what was to be proven. It was merely the policeman's opinion that defendants were in a "drugged condition."

imposed by courts in other jurisdictions, which require at least some experience with narcotics addiction before the witness can testify.[6]

The issue involved can be simply stated: What, if any, experience or expertise does a witness need before he can give his opinion as to whether someone was or was not under the influence of narcotics? Although some courts have been slightly stricter than others, the relatively few decisions have been generally uniform, even though they dealt not only with criminal law, but also with such diversified fields as wills,[7] divorce,[8] and slander.[9]

The California courts, contrary to most jurisdictions, have addressed themselves to this question with relative frequency. They have had no trouble admitting testimony if the witness is a medical expert. Thus, in *People v. Vignoli*,[10] the court permitted a doctor to draw an inference that the defendant had been under the influence of narcotics some five hours before the medical examination. But California decisions have not restricted the giving of opinions to such medical experts. In *People v. Mack*,[11] the court expressly rejected the notion that "the subject of narcotic addiction is a medical matter which should only be testified to by medical men, and that the use of non-medical persons to give their opinion is erroneous and prejudicial."[12] California courts consistently have allowed police officials, *with experience in narcotics*, to give their opinion.[13] However, where the witness is inexperienced with narcotics,

[6] The court did rely on two precedents from other states, Commonwealth v. Johnson, 27 Pa. D. & C.2d 301, 182 A.2d 541 (1962), *aff'd*, 198 Pa. Super. 51 (1962), and Miller v. Hamilton Brown Shoe Co., 89 S.C. 530, 72 S.E. 397 (1911), to support its decision. The cases are distinguishable, however, and were misconstrued insofar as the court attempted to have them support its opinion. See notes 25-29 *infra* and accompanying text. Thus, the court cited no precedent for its rule. Nor has a search of the cases disclosed another, with the possible exception of Ellis v. Ellis, 160 Miss. 345, 134 So. 150 (1931). See note 30 *infra* and accompanying text.

[7] Tucker v. Houston, 216 Ala. 43, 112 So. 360 (1927).

[8] Burt v. Burt, 168 Mass. 204, 46 N.E. 622 (1897).

[9] Miller v. Hamilton Brown Shoe Co., 89 S.C. 530, 72 S.E. 397 (1911).

[10] 213 Cal. App. 2d 855, 29 Cal. Rptr. 260 (1963).

[11] 169 Cal. App. 2d 825, 338 P.2d 25 (1959).

[12] *Id.* at 830, 338 P.2d at 29.

[13] People v. Gurrola, 218 Cal. App. 2d 349, 32 Cal. Rptr. 368 (1963) (not an abuse of discretion to allow officer with four years experience, during which time he had examined many narcotic addicts under all stages of influence, to give his opinion that defendant was under the influence of narcotics); People v. Hernandez, 188 Cal. App. 2d 248, 10 Cal. Reptr. 267 (1961) (officer with twenty hours of narcotics schooling who had lived two months with addicts permitted to testify); People v. Holland, 148 Cal. App. 2d 933, 307 P.2d 703 (1957) (officer experienced with narcotics had probable cause for arrest when

California courts have been strict in not permitting opinion evidence. The argument against allowing inexperienced opinion reached its logical extreme in *People v. McLean*,[14] where the court held it was error to permit a sixteen year old girl to testify that a cigarette given to her by the defendant contained marijuana. She had had no previous experience with marijuana and had based her opinion on her own reactions to the cigarette compared with what she had read and seen and with the effects of marijuana as described to her by other people.[15] It follows that an inexperienced bystander observing someone else would not be permitted to give his opinion either.

Other jurisdictions are in accord with California. In one early case,[16] the plaintiff attempted to obtain a divorce on the grounds of "gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs." The court permitted persons "who had been with [the alleged addict] for a long period of time and were familiar with her habits as to the use of morphine"[17] to testify that at various times she was under the influence of that drug. The court carefully restricted this exception to the opinion rule to situations where "a person has seen many times a certain condition resulting from the use of a certain drug. . . ."[18] In *Tucker v. Houston*,[19] the Alabama Supreme Court refused to allow an inexperienced person to testify that the testatrix was under the influence of morphine just before her will was made.

Federal courts have also had occasion to pass on this problem in deciding whether defendants were competent to stand trial. The United States Supreme Court noted in a recent decision that "whether or not

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he observed defendants under the influence of narcotics). See also note 24 *infra* and accompanying text.

[14] 56 Cal. 2d 660, 365 P.2d 403, 16 Cal. Rptr. 347 (1961), *cert denied*, 370 U.S. 958 (1962).

[15] *But cf.* People v. Robinson, 14 Ill. 2d 325, 153 N.E.2d 65 (1958), where the witnesses' testimony that they received heroin from the defendant was held admissible, but where, in contrast to *McLean*, the witnesses had used narcotics on many previous occasions. The court stated:

> [C]ourts have recognized that lay or inexpert witnesses may have, by use, observation, or experience, sufficient knowledge of the appearance, odor, taste, characteristics and effect of intoxicating liquor or drugs to enable them to identify and distinguish them. By analogy, we think it feasible that a narcotics addict would, as the People's expert testified, come to know a narcotics drug by its reaction upon him.

Id. at 332, 153 N.E.2d at 69.

[16] Burt v. Burt, 168 Mass. 204, 46 N.E. 623 (1897).

[17] *Id.* at 206, 46 N.E. at 623.

[18] *Id.*

[19] 216 Ala. 43, 112 So. 360 (1927).

petitioner was under the influence of narcotics would not necessarily have been apparent to the Trial Judge," and thus held that he did not possess the expertise to decide whether defendant was able to stand trial.[20] Likewise, a court of appeals in a 1966 decision[21] judicially noticed that the effects of narcotics are "idiosyncratic"[22] and added that "the symptoms and effects . . . produced by narcotics will often not be apparent to a lay observer, even a judge, but only to an expert."[23]

The North Carolina Supreme Court in the principal case cited three precedents dealing with this issue. It was admitted that one of the cases cited—*People v. Moore*[24]—was contrary to its holding. In that case, a policeman testified as to both alcoholic and narcotic insobriety. The California court distinguished between alcohol and drugs, declaring that no expertise was needed for alcohol, but that the witness had to qualify as an expert before he could testify that someone was under the influence of narcotics. However, the court cited two other cases—*Commonwealth v. Johnson*[25] and *Miller v. Hamilton Brown Shoe Co.*[26]— as supporting its opinion that no expertise is needed before one can testify as to whether someone is under the influence of drugs. On close analysis, these two cases do not support the court's holding. In *Johnson*, the policeman testifying was on special assignment to the Narcotics Unit of the Philadelphia Police Department and had had four years experience with addicts, having observed over one hundred persons under the influence of narcotics. In fact, the *Johnson* court expressly noted: "It must be pointed out that the arrest was made by a police officer experienced in, and familiar with, the narcotic problem and not by a casual citizen or a generally-trained police officer."[27] Likewise, in *Miller*, every witness who testified that the plaintiff[28] was under the influence of narcotics testified that they had previously seen persons under the influence of narcotics. The language of the *Miller* court is clear:

> That the opinion of a witness as to whether a person under his observation was drunk or sober is admissible will hardly be doubted.

[20] Sanders v. United States, 373 U.S. 1, 20 (1963).
[21] Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966).
[22] *Id.* at 923.
[23] *Id.* at 924.
[24] 70 Cal. App. 2d 158, 160 P.2d 857 (1945).
[25] 27 Pa. D. & C.2d 301, 182 A.2d 541 (1962), *aff'd*, 198 Pa. Super. 51 (1962).
[26] 89 S.C. 530, 72 S.E. 397 (1911).
[27] 27 Pa. D. & C.2d at 304, 182 A.2d at 543.
[28] Plaintiff was suing for slander, charging that the defendant had falsely said that plaintiff used narcotics. The witnesses were attempting to justify the defendant's accusation.

> On the same principle a witness *who has observed some of the numerous victims of the drug habit* may express his conclusion, based on observation, that the condition of a certain person was due to the influence of a drug.[29]

While the standard of expertise may have been relatively low in *Miller,* some degree of expertise was necessary before the witness could express his opinion. Thus, both *Miller* and *Johnson* appear contrary to the court's opinion in the principal case.

The only other case the court might have cited (though it did not) as supporting its opinion is *Ellis v. Ellis,*[30] where a lay person with no experience was permitted to give an opinion that the testator was *not* under the influence of drugs at the time he made his will. But this case is distinguishable in several respects: (1) Bromedia and liminol amytol (forms of sleeping pills) were the drugs involved; (2) the question was the mental capacity of the testator to make a will—not whether testator was under the influence of narcotics *per se*; (3) the witness testified that testator was *not* under the influence, an opinion which obviously would require less expertise than pinpointing the cause of a person's abnormal demeanor, that is, testifying that testator *was* under the influence of narcotics.

The court in the principal case placed great stress on the many North Carolina cases[31] reflecting the generally held rule that a non-expert may give his opinion as to whether someone was under the influence of intoxicating liquors.[32] The rationale for this rule is well stated by the New

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[29] 89 S.C. at 534-35 72 S.E. at 399 (emphasis added).

[30] 160 Miss. 345, 134 So. 150 (1931).

[31] There are many other cases besides the ones cited by the court: State v. Mills, 268 N.C. 142, 150 S.E.2d 13 (1966) (drunk driving); State v. Willard, 241 N.C. 259, 264, 84 S.E.2d 899, 902 (1954) (drunk driving); State v Warren, 236 N.C. 358, 359, 72 S.E.2d 763, 764 (1952) (drunk driving); State v. Dawson, 228 N.C. 85, 44 S.E.2d 527 (1947) (involuntary manslaughter); State v. Harris, 213 N.C. 648, 197 S.E. 142 (1938) (drunk driving); State v. Dills, 204 N.C. 33, 167 S.E. 459 (1933) (involuntary manslaughter); State v. Holland, 193 N.C. 713, 138 S.E. 8 (1927) (self defense); Moore v. Jefferson Stand. Life Ins. Co., 192 N.C. 580, 135 S.E. 456 (1926) (automobile accident insurance); Taylor v. Security Life & Annuity Co., 145 N.C. 383, 59 S.E. 139 (1907) (opinion regarding habits of temperance admissible).

[32] The court summarized the rule in State v. Dawson, 228 N.C. 85, 88, 44 S.E.2d 527, 529 (1947):

> A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him. The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility of the testimony.

York court in what is considered to be the leading case:[33] "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely. . . ."[34] The implicit assumption in this rationale is that even a six year old child probably has been exposed to enough drunks to know one when he sees one.[35] But it is doubtful that any lay person—six years old or sixty years old—has had enough contacts with dope addicts to easily recognize when one is under the influence of narcotics. Perhaps if the use of narcotics, legally or illegally, continues to become more commonplace, the day may come when the ordinary layman will have as much exposure to addicts as to drunks. But it is still safe to say that the ordinary layman has had little or no exposure to narcotic addiction and that therefore this exposure should be proven (by way of establishing expertise) and not be assumed as it is in the case of drunkenness.

It should be noted that it is no answer to this problem to argue, as the court did, that "the witness was better qualified than the jury to draw inferences and conclusions from what he saw or heard."[36] A witness, for instance, to a chemical explosion may have been in a better position than the jury to draw inferences, but unless the witness had some knowledge of chemistry, he would be no more able than the jury to conclude that it was some careless act of the chemist rather than an unavoidable accident which caused the misfortune. Likewise, a person who has no knowledge or experience of how persons act while under the influence of narcotics is no more qualified than the jury to opine the cause of the unusual behavior. The witness would be in a better position than the jury to state that the persons were acting abnormally, and he should be allowed to do so; but unless he has knowledge of the symptoms of drug-taking, he should not be allowed to express the conclusion that the drugs caused the abnormal behavior.

It is questionable whether the North Carolina Supreme Court actually intended to pronounce a rule contrary to almost all precedent from other jurisdictions. Even if the admission of this non-expert testimony had been held to have been error, it probably would have been non-prejudical

[33] People v. Eastwood, 14 N.Y. 562 (1856). *See also* Ackerman v. Kogut, 117 Vt. 40, 44, 84 A.2d 131, 134 (1951).

[34] 14 N.Y. at 566.

[35] Query whether it could be argued that the presumption inherent in this rule is rebutable if the witness, because of age or lack of contacts with society, had never been in contact with intoxicated persons.

[36] 273 N.C. at 381, 160 S.E.2d at 52.

error in view of the great amount of circumstantial evidence supporting the conviction.[37] For this reason the court may not have given much thought to the question. If this case had turned on the opinion evidence, and if the court had not misconstrued two cases it thought to be good precedent, it is possible that the court would have reached a contrary result. But until the issue is reconsidered in a future case, what remains is the rule that in North Carolina an ordinary layman is qualified to give his opinion as to whether a person is under the influence of narcotics just as he has always been able to do with regard to alcohol.

RICHARD J. BRYAN

Labor Law—Expulsion From a Union as an Unfair Labor Practice

The question whether a labor union has the power to expel a member for filing an unfair labor practice charge with the National Labor Relations Board, without first exhausting internal union processes, was considered in *NLRB v. Industrial Union of Marine & Shipbuilding Workers.*[1] The United States Supreme Court, in effect, said that expulsion of a member for filing a charge with the Board, even where his job status was not affected by the expulsion, may be itself an unfair labor practice. Such conduct by a union, because it is considered to restrain and coerce union members, is prohibited by section 8(b)(1)(A) of the National Labor Relations Act, which provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .[2]

Although the Act generally permits a union to control its internal matters, the Court concluded that "where a union penalizes a member for filing an unfair labor practice charge with the Board, other considerations of

[37] Circumstantial evidence has been held in many cases to support a charge of possession of narcotics. *See* Carroll v. State, 90 Ariz. 411, 368 P.2d 649 (1962); People v. Anitista, 129 Cal. App. 2d 47, 276 P.2d 177 (1954); People v. Robinson, 14 Ill. 2d 325, 153 N.E.2d 65 (1958); State v. Worley, 375 S.W.2d 44 (Mo. 1964).

[1] 391 U.S. 418 (1968).

[2] 29 U.S.C. § 158(b)(1)(A) (1964).

public policy come into play."[3] By filing a charge with the Board, a member steps beyond internal union affairs into the public domain.[4] The Court also reasoned that the language of section 101(a)(4) of the Landrum-Griffin Act[5] does not grant unions the authority to police more firmly their own membership. Rather it is a mere statement of policy that the public tribunals whose aid is invoked, at their discretion, may refuse to hear a case until the four month period has elapsed, and thus require a member to seek his remedy within the union.[6] In this decision the Court continues recent trends encouraging resort to the Board by individual union members with legitimate grievances against their union.

The facts of the case are straightforward. Edwin Holder, a member of Local 22 of the International Union of Marine and Shipbuilding Workers of America, AFL-CIO, lodged a complaint with Local 22 that its president had violated the constitution of the international. The local decided against Holder, and he did not pursue the internal union appeals procedure available to him. Instead, he filed an unfair labor practice charge with the Board based on the same alleged violations by the president he had presented to the local. Section 5 of the constitution of the international requires that any member "aggrieved by any action of . . . a local . . . shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union." Consequently, while Holder's charge was pending before the Board, Local 22 brought proceedings against Holder alleging that he had violated this section of the international's constitution. After a hearing before Local 22, Holder was expelled from the union. The general executive board of the international upheld the local's action. Holder then filed a second charge with the Board claiming that his expulsion for filing the first charge was a violation of section 8(b)(1)(A). The Board ordered the union to reinstate Holder without any loss of status.[7] Reversing the court of

[3] 391 U.S. at 424.

[4] Roberts v. NLRB, 350 F.2d 427, 429 (D.C. Cir. 1965).

[5] No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings. . . .

Labor-Management Reporting and Disclosure Act of 1959 § 101(a)(4), 29 U.S.C. § 411(a)(4) (1964).

[6] 391 U.S. at 428.

[7] Local 22, Marine & Shipbldg. Workers, 159 N.L.R.B. 1065 (1966).

appeals[8] and reinstating the Board's order, the Supreme Court ruled that certain issues "within the public domain" demand unimpeded access to the Board.[9]

Significantly, the Court applied the same restrictions to unions that hinder access to the Board as had previously been applied solely to employers, and stated that interpreting Congressional intent requires that attention be given to the overall scheme rather than the literal terms of a statute.[10] Though section 8(a)(4) of the Act makes it an unfair labor practice for *an employer* "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act," a similar paragraph restricting unions was deleted from the Act in conference.[11] However, the restrictions placed on unions have been compared to those placed on employers.

> Just as an employer violates the Act by resorting to restraint and coercion to restrict the rights of an employee to file a charge, so too, does a labor organization infringe the rights of employees under this law by resorting to unlawful means to prevent or restrict employees from filing charges. As such conduct by an employer violates Section 8(a)(1),[12] so does a labor organization's use of restraint or coercion violate Section 8(b)(1)(A).[13]

Furthermore, the Court has stated that it was "the intent of Congress to impose upon unions the same restrictions which the Wagner Act (the predecessor of the NLRA) imposed on employers with respect to violations of employee rights."[14] Because similar wording and legislative history indicated that sections 8(b)(1)(A) and 8(a)(1) are parallel provisions,[15] the Court construed 8(b)(1)(A) to prohibit *a union* from

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[8] Industrial Union of Marine & Shipbldg. Workers v. NLRB, 379 F.2d 702 (3d Cir. 1967).

[9] 391 U.S. at 424.

[10] See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

[11] The deleted paragraph would have made it an unfair labor practice for a union:

> to fine or discriminate against any member, or to subject him to any . . . penalty on account of his having . . . made charges or instituted proceedings against the organization or any of its officers. . . .

H.R. 3020, 80th Cong., 1st Sess. (1947). For a general discussion of the legislative history of the Act, see NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

[12] "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . ." 29 U.S.C. § 158(a)(1) (1964) (footnote added).

[13] Local 138, Operating Eng'rs, 148 N.L.R.B. 679, 681-82 (1964).

[14] 366 U.S. 738 (1961).

[15] International Ladies' Garment Workers' Union v. NLRB, 280 F.2d 616, 620-21 & n.8 (D.C. Cir. 1960).

disciplining a member for filing a charge with the Board. One observer has stated that "[a]n individual worker gains no human rights by substituting an autocratic union officialdom for tyranny of the boss."[16]

The Board has interpreted this legislation and decided which actions constitute coercion. First, it is well settled that a fine is coercive,[17] and "the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges."[18] Moreover, the Board has found coercion and a violation of section 8(b)(1)(A) when a union official merely warned a member that he could be fined if he complained to the Board.[19] If a fine is coercive, so is expulsion:[20]

> The ultimate penalty associated with the imposition of a fine is loss of membership in the union which may be avoided by payment of the fine. Explusion from membership leaves no room for grace. The ultimate penalty, with the loss of benefits inherent in union membership including a voice in the democratic decisions of the organization materially affecting the welfare of members, is immediate and final.[21]

Nor is the coercive nature of union expulsion limited to job retention.

> Even though a member may keep his job when expelled, his explusion causes him to suffer a detriment the apprehension of which would no doubt have a coercive effect on the membership. First of all, it is not clear what his rights would be if he quit his job to seek another. . . . Also, he has a financial stake in the strike fund, perhaps a pension fund, and other funds to which he has contributed. Further, he is denied the right to participate in the union "government." Although the union is required by law to represent him impartially . . . he has no voice in how that representation is to be conducted. In addition, there are frequently social ramifications for a non-member working among members that cannot be overlooked.[22]

Though fines and expulsion had been ruled coercive, a union was still considered protected by the proviso since these actions were believed to be matters confined to internal union affairs,[23] unless the member's status as an employee was affected:

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[16] Cox, *The Role in Preserving Union Democracy*, 72 HARV. L. REV. 609, 610 (1959).

[17] Local 113, International Ass'n of Machinists, 111 N.L.R.B. 853, 857 (1955).

[18] Local 138, Operating Eng'rs, 148 N.L.R.B. 679, 682 (1964).

[19] Local 1510, Millwright & Mach. Erectors, 152 N.L.R.B. 1374, 1377 (1965).

[20] Cannery Workers Union, 159 N.L.R.B. 843, 845 (1966).

[21] Local 22, Marine & Shipbldg. Workers, 159 N.L.R.B. 1065, 1069 (1966).

[22] Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 799, 16 Cal. Rptr. 813, 815 (Dist. Ct. App. 1961).

[23] Local 113, International Ass'n of Machinists, 111 N.L.R.B. 853, 857 (1955).

> The Act specifically provides that a labor organization may prescribe its own rules with respect to the acquisition and retention of membership. This limitation on members means, according to the courts and legislative history, that labor organizations may enforce their internal policies upon their membership as they see fit. *It is only to the extent that a labor organization seeks to impair a member's status as an employee that it may not enforce its internal rules governing membership status.*[24]

In *Local 283, UAW (Wisconsin Motors)*,[25] the union was held protected by the proviso when the imposition and collection of a fine did not affect the employment status of the member. However, *Local 138, International Union of Operating Engineers (Charles S. Skura)*[26] held that a union would violate section 8(b)(1)(A) by disciplining a member for violation of a union rule, even when the union does not interfere with the member's status as an employee. The *Skura* decision is considered an exception to the general rule.[27] The *Holder* case was also found to be within this exception, which denied unions the protection of the proviso in view of "the overriding public interest involved,"[28] but required that the member not be engaged in any activities that "attack the very existence of the union,"[29] such as filing a decertification petition with the Board.

The Court also ruled in *Holder* that the "exhaustion of remedies" provision of section 101(a)(4) of the Landrum-Griffin Act does not protect a union that expels a member for filing charges with the Board. Two possible interpretations of this section had been offered earlier.[30] The first was that this provision permits a union to force compliance with provisions in its constitution that require a member to exhaust

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[24] NATIONAL LABOR RELATIONS BOARD, TWENTY-NINTH ANNUAL REPORT 84-85 (1964) (emphasis added).

[25] 145 N.L.R.B. 1097 (1964). *See* Note, *Judicial Enforcement of Labor Union Fines in State Courts*, 46 N.C.L. REV. 441 (1968).

[26] 148 N.L.R.B. 679 (1964). *See* Comment, *Union Fining As an Unfair Labor Practice Under Section 8(b)(1)(A)*, 1966 DUKE L.J. 717; 65 COLUM. L. REV. 1108 (1965).

[27] Local 4028, United Steelworkers, 154 N.L.R.B. 692, 696 (1965); Tawas Tube Prod., Inc., 151 N.L.R.B. 46, 47 (1965). For other cases considered to be within the exception, see Local 307, Philadelphia Moving Picture Mach. Operator's Union, 159 N.L.R.B. 1614 (1966); Local 585, Painters, Decorators & Paperhangers, 159 N.L.R.B. 1362 (1966); Local 22, Marine & Shipbldg. Workers, 159 N.L.R.B. 1065 (1966); Cannery Workers Union, 159 N.L.R.B. 843 (1966); Local 925, Operating Eng'rs, 148 N.L.R.B. 674 (1964).

[28] Cannery Workers, 159 N.L.R.B. 843, 847 (1966).

[29] Tawas Tube Prod., Inc., 151 N.L.R.B. 46, 48 (1965).

[30] Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 839 (1960).

all internal channels before seeking outside help. This was considered to be against public policy. The second interpretation was that courts and administrative agencies have the power to wait until the labor organization has had an opportunity to remedy any injustice that may have occurred within its own system.[31] However, in *Holder* the Court stated that there is no "justification to make the public process wait until the member exhausts internal procedures plainly inadequate."[32] Furthermore, only a disinterested tribunal, such as the Board, can properly balance the adequacy of the union procedures against the public interest. "If the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and the airing of the grievance never had."[33]

The impact of the *Holder* decision extends beyond technical modification in the construction of statutory terms. It represents a shift in the judiciary's attitude toward labor policy. Earlier concepts of unionism were often overly restrictive. For instance, the contract theory of union membership, widely held when section 8(b)(1)(A) was enacted,[34] views membership in a union as a contract between the individual member and the union. The judiciary, always reluctant to interfere with a contractual relationship absent a breach, often refused to consider intra-union matters for this reason. Similarly, courts have hesitated to interfere in the internal affairs of voluntary associations, a reluctance stemming from the frustrating judicial experience of trying to settle disputes within religious and fraternal organizations.[35] While this traditional attitude may remain, labor unions today hardly resemble the voluntary associations of the past. They enjoy exclusive powers granted by government and a high degree of internal organization. Thus with *Holder* there is a further erosion of the traditional philosophy of non-intervention in internal union affairs.

Furthermore, the elimination of an apparently required four month waiting period[36] and the decision that a union cannot restrict access to

[31] *Id.* at 839.
[32] 391 U.S. at 425.
[33] *Id.* at 425.
[34] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 182-83 (1967).
[35] Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1050-51 (1951).
[36] Benjamin Aaron, Acting Director of the Institute of Industrial Relations at the University of California, stated less than a year after the passage of the Landrum-Griffin Act:

Section 101(a)(4) thus wisely includes a proviso requiring a union mem-

the Board by the expulsion of a member expand the jurisdiction and power of the Board and encourage resort to its aid. The extent of jurisdiction, obviously, often controls the scope of the agency's influence, and thus its effectiveness. The broader the Board's jurisdiction, the easier it can effect its policies; the narrower, the more difficult. In *Holder*, the Court upheld the Board's expansion of jurisdiction, thus accomplishing a principal objective of labor policy—prompt access to administrative agencies.[37]

Because of the expected increase in traffic, resulting from the expansion of jurisdiction, the Board may be able to more firmly regulate those practices of the unions tending to repress the individual rights of the members. This decision should promote a modernization of the internal union proceedures, for if the union machinery is cumbersome and slow to react to the needs of the members, they will by-pass the union and seek a remedy with the Board. To off-set this trend, the unions will have to streamline their internal systems so that there will be no need to resort to the Board.

A third effect may be found in the attitudes of the individual union members. Possibly greater democratization of unions themselves might follow, as open disagreement with union officials without fear of expulsion leads to greater member participation in union decisions on all levels. The Court's decision in this case is one step closer to the attainment of union democracy.

ALEXANDER P. SANDS

Real Property—Disposition of Diffused Surface Waters in North Carolina[1]

INTRODUCTION

Water that is derived from falling rain or melting snow or that rises in springs and is diffused over the surface of the ground is denominated

ber to exhaust his internal union remedies before seeking relief in court or before an administrative body.
Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 869 (1960).

[37] Section 10(b) of the NLRA forbids issuance of a complaint based on conduct occurring more than six months earlier. 29 U.S.C. § 160(b) (1959).

[1] The courts have generally referred to this distinct class of water as "surface water." It is more correctly identified as "diffused surface water" since technically all water on the face of the earth is surface water. 1 R. CLARK, WATERS AND WATER RIGHTS § 52.1, at 302 (1967). In keeping with the terminology employed

surface water. It is distinguished from water flowing in a natural watercourse or collected into and forming a definite and identifiable body, such as a lake or a pond.[2] An owner may either use or dispose of the surface water which comes upon his land. These alternatives—use or disposition—pose different problems and, consequently, are governed by different laws.[3] Of the two, the disposition problem has been the more troublesome.[4] The purpose of this note is to examine what a landowner in North Carolina can and cannot do to rid himself of too much surface water.[5]

Three basic doctrines relative to the disposition of surface water have been developed by the courts in the various states: the civil-law rule, the common enemy rule, and the reasonable use rule.[6]

The civil-law rule is usually expressed in specific terms:[7]

> [T]he owner of the upper or dominant estate has a legal and natural easement or servitude in the lower or servient estate for the drainage of surface water, flowing in its natural course and manner; and such natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant proprietor, unless the right to do so has been acquired by contract, grant or prescription.[8]

The rule appeals to a sense of natural justice by requiring the continuation of the drainage conditions imposed by nature; it avoids any compe-

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by the North Carolina Supreme Court, the term "surface water" will be used in this note.

[2] 56 AM. JUR. *Waters* § 65 (1947).

[3] The use of surface water is discussed in Aycock, *Introduction to North Carolina Water Use Law*, 46 N.C.L. REV. 1, 20-21 (1967).

[4] J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 304 (1962).

[5] The law of disposition of surface water is almost exclusively the product of judicial decision. One exception of minor importance will be considered later. See p. 211 & note 34 *infra*. In the broader area of water development, there has been considerable legislative activity with concern centered on the problems of groups or communities. N.C. GEN. STAT. §§ 156–54 to –138 (1964), *as amended*, (Supp. 1967) (drainage districts); N.C. GEN. STAT. § 139 (1964), *as amended*, (Supp. 1967) (soil and water conservation districts and flood plain management). Further consideration of these statutes is beyond the scope of this note.

[6] Kenyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 893 (1940) [hereinafter cited as Kenyon & McClure].

[7] At least one writer has urged a general definition: "In substance, the civil-law rule of surface waters is that a person who interferes with the natural flow of surface waters so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the other." *Id.*

[8] 56 AM JUR. *Waters* § 68, at 550–51 (1947). In the acquisition of rights to drain surface water across the lands of another by grant, license, easement, or prescription, the general principles of property law apply. For North Carolina cases on the subject see Perry v. White, 185 N.C. 79, 116 S.E. 84 (1923) (attempted easement

tition of "might" in disposing of surface waters, and it makes easy the prediction of rights among landowners. On the other hand, it has a pronounced tendency to inhibit any development or improvement of lands since any alteration of the natural contours is certain to interfere with natural drainage.[9]

Under the common enemy rule[10] a proprietor may lawfully obstruct or hinder the natural flow of surface water. He may turn it back upon upper lands or onto the lands of other proprietors and not be subject to liability for such obstruction or diversion.[11] The effect of the rule is to allow one to use his property in any way he chooses, regardless of the effect on his neighbor. Historically, it has served to encourage the development and improvement of land in unsettled country. At the same time it has often provoked contests of "might" between owners as to which could build the highest and strongest embankment to protect his land.[12]

In their original, pure forms the civil-law rule and the common enemy rule were diametrically opposed. Each was rigid and inflexible, embodying strict property law principles. As it became necessary to apply them to new and varied circumstances, the courts began modifying the basic rules, bringing them into step with the needs and conditions of society. Such modification involved the application of the tort principles of reasonableness and negligence to determine liability.[13]

Four states[14] have carried this trend to its logical conclusion and have adopted a reasonable use rule, which differs markedly from both the civil-law rule and the common enemy rule. It neither allows an owner to deal with surface water as he pleases nor prohibits him absolutely from interfering with the natural flow. Rather, it permits him to make reasonable use of his property even though the natural flow is thereby altered. For an act to give rise to a cause of action, there must be an unreasonable alteration which causes harm to another.[15]

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by prescription); Hair v. Downing, 96 N.C. 172, 2 S.E. 520 (1877) (by grant); Shaw v. Etheridge, 52 N.C. 225 (1859) (easement by implication).

[9] Annot., 59 A.L.R.2d 421 (1958).

[10] It is frequently referred to as the "common law rule." However, several writers maintain that England did not follow this rule. Kenyon & McClure 899. Because it was first adopted in Massachusetts, the rule would be more appropriately referred to as the "common enemy or Massachusetts rule." See Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404 (1932).

[11] 56 AM. JUR. *Waters* § 69, at 553-54 (1947).

[12] Annot., 59 A.L.R.2d 421, 423 (1958).

[13] *Id.*

[14] Alaska, Minnesota, New Hampshire, and New Jersey. The reasonable use rule is also advocated by the RESTATEMENT OF TORTS § 833, comment *b* (1939).

[15] Kenyon & McClure 904. The adoption of the reasonable use rule makes it

THE BASIC CIVIL-LAW RULE

As early as 1854 the North Carolina Supreme Court indicated that it favored the natural flow of surface water,[16] which is the basic ingredient of the civil-law rule. Nevertheless, twenty-two years later in 1876, the court in effect applied the common enemy rule without reference to the earlier case.[17] The contradiction can no doubt be explained by the state of confusion which existed in the courts during the early development of the two rules. More often than not one rule would emerge into general usage in a given jurisdiction without a rejection or even an acknowledgement of the other.[18]

In *Porter v. Durham*,[19] decided later in the 1876 term, the court ended the confusion in North Carolina and adopted the civil-law rule. In this case defendants were enjoined from digging canals which would have diverted water from its natural flow onto plaintiff's lands. In affirming the judgment the court stated:

> It has been held that an owner of lower land is obliged to receive upon it the surface-water which falls on adjoining higher land, and which naturally flows on the lower land. Of course, when the water reaches his land the lower owner can collect it in a ditch and carry it off to a proper outlet so that it will not damage him. He cannot, however, raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner. While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of water or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge.[20]

In an unusual case in 1963,[21] defendant State Highway Commission argued that *ocean* waters coming over the dune line during a storm were flood waters and as such were not subject to the laws applicable to surface waters. Defendant urged that the court apply the common enemy doctrine to flood waters. Thus the court was presented with the opportunity

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possible for "all invasions of a possessor's interest in the use and enjoyment of his land [to be] treated as different phases of a single problem involving the application of the same fundamental principles, irrespective of the medium through which the invasions are caused. . . ." *Id.* at 892.

[16] Overton v. Sawyer, 46 N.C. 308 (1854). At this time only two other states, Louisiana (1812) and Pennsylvania (1848), had adopted the rule. Kenyon & McClure 895 nn.11 & 12.

[17] Raleigh & A.A.L.R.R. v. Wicker, 74 N.C. 220 (1876).

[18] Kenyon & McClure 895, 902.

[19] 74 N.C. 767 (1876).

[20] *Id.* at 779-80.

[21] Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), *noted in* 42 N.C.L. REV. 711 (1964).

to limit the application of the civil-law rule.[22] The court, discussing both rules in detail, specifically rejected the common enemy rule and reaffirmed the civil-law rule.[23]

The civil-law rule recognizes the burden that nature has placed on the lower land. Under a strict interpretation of the civil-law rule, anything that renders the natural[24] effect of drainage more burdensome is improper. Any act by an upper owner that causes water from one watershed to flow into another or which alters the direction of the natural flow by artificial means is a diversion[25] and therefore unlawful since it increases the burden. A lower owner can ease the natural burden by collecting water in a ditch and discharging it into a proper outlet. It seems reasonably clear that, historically, "proper outlet" meant a natural watercourse running through the lower owner's land.[26] The right to drain into a natural watercourse passing through one's own land was apparently a part of the basic civil-law rule in North Carolina.[27] If the right was "exercised in good faith, and in a reasonable manner, for the better adaptation of the land to lawful and proper uses, no damage [could] be recovered if the lands of a lower proprietor [were] injured."[28]

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[22] Brief for Defendant at 3-4, Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963).

[23] Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963).

[24] The word *natural* when used in this context

> has reference to that course which would be taken by such waters falling (or, in the case of springs, rising) on the land of the upper proprietor, or carried thereto from still higher land and flowing or running therefrom onto the lands of the lower proprietor undiverted and unaccelerated by any interference therewith by the upper proprietor.

56 AM. JUR. *Waters* § 67, at 550 (1947).

[25] For the various meanings the court has given to the word *diversion*, see pp. 216-17 *infra*.

[26] Jenkins v. Wilmington & W.R.R., 110 N.C. 438, 15 S.E. 193 (1892).

[27] Porter v. Durham, 74 N.C. 767 (1876).

[28] Jenkins v. Wilmington & W.R.R., 110 N.C. 438, 443, 15 S.E. 193, 194 (1892). Ostensibly, a railroad was like any other citizen in its right to drain surface water. Incident to the acquisition of a right of way, a railroad clearly obtained the right to gather surface water which collected thereon and to conduct it to its proper outlet, or to an outlet capable of receiving it. *Id.* at 442-45, 15 S.E. at 194. There is some dispute as to the standard of care required of the railroad. The basic civil-law rule would require that no water be diverted to the injury of the lower owner. There is authority to the effect that the railroad is held only to a standard of reasonableness. Parks v. Southern Ry., 143 N.C. 289, 297, 55 S.E. 701, 704 (1906). There is also some confusion as to whether a railroad has a duty to collect and dispose of surface water which occurs naturally upon its right of way or whether it may, as any private owner, let it pass on to lower land. *Compare* Greenwood v. Southern Ry., 144 N.C. 446, 57 S.E. 157 (1907), *with* Davenport v. Norfolk S.R.R., 148 N.C. 287, 62 S.E. 431 (1908).

MODIFICATION OF THE CIVIL-LAW RULE

A rule that required the preservation of natural drainage may have been adequate, or even beneficial, in a undeveloped frontier environment, but it was not suited to an urban, industrialized society. The North Carolina Supreme Court early recognized that a strict application of the civil-law rule would prohibit any alteration of natural drainage and consequently discourage the improvement and effective use of land.

The court expressed its awareness of the dangers of an inflexible rule and demonstrated its intention to deal with the problem in *Mizzell v. McGowan*,[29] a case which was to come before the court three times in four years. Defendant had dug ditches and canals upon his land in order to drain water from a swamp into a natural watercourse. Plaintiff alleged that the drainage had increased and accelerated the watercourse to the point that it had overflowed and flooded his lands. The court said:

> The upper owner can not divert and throw water on his neighbor, nor the latter back water on the other with impunity. *Sic utere tuo, ut alieum non laedas.* This rule, however, can not be enforced in its strict letter, without impeding rightful progress and without hindering industrial enterprise. Minor individual interest must sometimes yield to the paramount good. Otherwise the benefits of discovery and progress in all enterprises of life would be withheld from activity in life's affairs. 'The rough outline of natural right or liberty must submit to the chisel of the mason that it may enter symmetrically into the social structure.' *Under this principle the defendants are permitted not to divert, but to drain their lands, having due regard for their neighbor, provided they do not more than concentrate the water and cause it to flow more rapidly and in greater volume down the natural streams through or by the lands of plaintiff.* This license must be conceded with caution and prudence.
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> . . . Porter v. Durham . . . was a case solely for diverting water from its natural course and throwing it on the plaintiff. That question was reserved by the court and is not before us. . . .[30]

Mizzell's second appearance before the court[31] was inconclusive. On the third appeal,[32] however, the *Mizzell* rule was further defined and explained. The right to accelerate and increase was not limited to the size or capacity of the watercourse. The water to be drained, however, must come from within the natural boundaries of the watershed.[33] Finally, the court reaffirmed the narrow scope of the rule:

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[29] 120 N.C. 134, 26 S.E. 783 (1897).
[30] *Id.* at 138, 26 S.E. at 784 (emphasis added).
[31] Mizzell v. McGowan, 125 N.C. 439, 34 S.E. 538 (1899).
[32] Mizzell v. McGowan, 129 N.C. 93, 39 S.E. 729 (1901).
[33] *Id.* at 95, 39 S.E. at 729.

> A man can dig ditches wherever he pleases upon his own land, provided he runs them into a *natural watercourse* before leaving his land, subject only to the limitation against diversion. But if he cannot reach a natural watercourse without going into the lands of another, he must proceed under . . . the Code.[34]

Beyond the obvious facilitation of the drainage and reclamation of swamp lands, the significance of the *Mizzell* rule—that one may increase and accelerate but not divert—is two-fold. First, though it modified the substantive civil-law rule very little (one could already drain into a natural watercourse), it gave rise to the phrase "increase and accelerate but not divert," which the court was later to make the touchstone of the law of surface water. Second, it demonstrated the court's commitment to a flexible application of the civil-law rule.

Mizzell deals with the right to increase and accelerate the flow *in a natural watercourse* as a by-product of drainage. The rule is not so broad as to encompass the increase and acceleration of the natural flow of surface water *onto lower lands* incident to grading, paving, or building upon the upper land. Initially, this distinction was recognized,[35] but it soon became blurred[36] and was subsequently mentioned in some cases[37] and ignored in others.[38] Ultimately, the court explicitly stated that the *Mizzell* rule—that one may increase and accelerate but not divert—governed the drainage of surface water onto the lands of another.

The first application of this modified civil-law rule is found in *Parker v. Norfolk & Carolina Railroad*,[39] decided between the first and second *Mizzell* cases. In *Parker*, defendant had allegedly diverted water from its natural flow onto plaintiff's lands. In upholding the finding of diversion the court said:

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[34] *Id.* at 96, 39 S.E. at 730 (emphasis added). The statute to which the court refers was originally enacted in 1795 and is still in effect today. N.C. GEN. STAT. §§ 156-1 to -36 (1964). If a landowner has swamp lands which have no natural outlet and which cannot be drained into a natural watercourse, the statute enables him to drain through the lands of a lower proprietor. References to this procedure by the court in the late nineteenth century indicate that it may have had some vitality at that time. There is no indication that it is used today.

[35] Mizzell v. McGowan, 120 N.C. 134, 26 S.E. 783 (1897).

[36] Parker v. Norfolk & C.R.R., 123 N.C. 71, 31 S.E. 381 (1898).

[37] Barcliff v. Norfolk S.R.R., 168 N.C. 268, 269-70, 84 S.E. 290, 291 (1915); Briscoe v. Parker, 145 N.C. 14, 17, 58 S.E. 443, 444 (1907); Rice v. Norfolk & S.R.R., 130 N.C. 375, 378, 41 S.E. 1031, 1032 (1902); Mizzell v. McGowan, 129 N.C. 93, 96, 39 S.E. 729, 730 (1901).

[38] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947); Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909); Parker v. Norfolk & C.R.R., 123 N.C. 71, 31 S.E. 381 (1898).

[39] 123 N.C. 71, 31 S.E. 381 (1898).

> It was held in [*Mizzell*] that the dominant tenant had the right to carry off his surface water by cutting ditches, by which the flow of water, naturally flowing therein, is increased and accelerated, and *discharged on the land of the servient tenant.* . . . It has been previously held that neither a railroad nor an individual could divert water from its natural course and throw it upon abutting lands and cause damage. . . . It may now be stated that the upper holder may increase and accelerate the flow of the water in its natural course, but cannot divert other waters to the damage of the lower lands.[40]

Nowhere in *Mizzell* does there appear language that would allow such a discharge. In fact, there is clear language to the contrary.[41] The second and third *Mizzell* cases came after *Parker* and would apparently overrule it, yet the court continued to quote the rule in cases involving drainage of surface water onto lower lands.[42] It is perhaps significant that the issue in each of these later cases[43] was diversion, and not increase and acceleration. Since diversion resulting in injury to the lower proprietor is not permitted under the basic civil-law rule, it would have been sufficient for the court to state only that principle. However, the *Mizzell* rule offered a convenient phraseology which embodied the basic principle prohibiting diversion, so the court seized upon it and used it. In doing so, by association, it applied the remainder of the rule (permitting increase and acceleration) to drainage onto the lands of another. Thus the court significantly liberalized the civil-law rule in North Carolina.

Application of the Civil-Law Rule

A mere statement of the liberalized civil-law rule offers broad guidelines to landowners, but it does little to tell them specifically what they may and may not do. An examination of the cases demonstrates the application of the broad principles. For convenience, the rights and duties of upper and lower owners are discussed separately. Practically speaking, nearly all tracts are both dominant and servient—dominant over those below and servient to those above. In some instances, as where a railroad or highway right of way passes through a tract of land, the owner of the land assumes the rights and obligations of upper and lower owner in relation to the holder of the right of way.[44]

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[40] *Id.* at 73, 31 S.E. at 381-82 (emphasis added).

[41] See p. 210 & note 30 *supra.*

[42] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947); Sykes v. Sykes, 197 N.C. 37, 147 S.E. 621 (1929); Barcliff v. Norfolk S.R.R., 168 N.C. 268, 84 S.E. 290 (1915); Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909); Briscoe v. Parker, 145 N.C. 14, 58 S.E. 443 (1907).

[43] Cases cited note 42 *supra.*

[44] Greenwood v. Southern Ry., 144 N.C. 446, 57 S.E. 157 (1907).

The Upper Owner

The upper owner is possessor of an easement or servitude in the lower land. This easement is imposed by nature and recognized by law. The easement, according to North Carolina law, includes the right to accelerate and increase the natural flow, but does not include the right to divert. In at least two cases, the issue of *acceleration and increase* was squarely presented to the court. In one of these the court held that defendant could fill in a roadside ditch, thereby increasing and accelerating the flow of surface water onto the lower land, as long as the ditch was on his property. If the road in question was public, and the ditch on the right of way, then defendant had no such right.[45]

The other, *Davis v. Atlantic Coast Line Railroad*,[46] presented the court with an unusual opportunity to examine, in a single case, nearly every situation in which an upper owner could be held liable for interference with natural flow. Plaintiff's lower parking lot was periodically flooded after upper defendant shipbuilding company had leveled and paved its parking lot. Defendant railroad, whose tracks ran between the two pieces of property, provided three culverts under its road to pass water from the upper lot to the lower. On the general nature of surface water, the trial judge correctly stated the rule of law:

> [U]nder the law when one owns or occupies lower lands, he must receive waters from higher lands when they flow naturally therefrom. There is a principle of law to the effect that where two tracts of land join each other, one being lower than the other, that the lower tract is burdened with an easement to receive waters from the upper tract, which naturally flow therefrom.
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> I charge you further that the owner or one in charge of the higher lands or premises, may increase the natural flow of water, and may accelerate it, but cannot divert the water and cause it to flow upon the lands of the lower proprietor in a different manner, or in a different place from which it would naturally go. . . .[47]

In applying the foregoing rule the judge, in substance, charged: if the shipbuilding company did no more than increase and accelerate the natural

[45] Sykes v. Sykes, 197 N.C. 37, 147 S.E. 621 (1929).

[46] 227 N.C. 561, 42 S.E.2d 905 (1947).

[47] *Id.* at 564, 42 S.E.2d at 908. The last sentence of the quotation contains an interesting paradox. If an acceleration and increase of the natural flow would not "cause it to flow upon the lands of the lower proprietor in a different manner," then it is not clear what would constitute a "different manner." This seemingly conflicting language appears in other cases: Barcliff v. Norfolk S.R.R., 168 N.C. 268, 84 S.E. 290 (1915); Brown v. Southern Ry., 165 N.C. 392, 81 S.E. 450 (1914).

flow of water, it would not be liable; if it diverted water which would otherwise not have flowed upon plaintiff's land and caused it to flow thereon it would be liable; if there were no natural flow from the higher premises onto plaintiff's land prior to the grading and paving, and if a flow was created by such grading and paving, then the flow is artificial and defendant shipbuilding company would be liable, but if a natural flow existed prior to the paving and grading and the construction only accelerated and increased that water, the company is not liable.[48] As to defendant railroad: if the water came down in its natural state and the railroad did nothing to accelerate the flow under its track, then the railroad would not be liable;[49] if it was not a natural flow which came down, but an artificial one created by the diversion of the shipbuilding company, and the railroad gathered up the wrongfully diverted flow in pipes and discharged it upon plaintiff's property in a manner different than it would have naturally gone and in a way so as to damage plaintiff's property, then the railroad would be liable; but if the flow were diverted from above and the railroad put it into pipes to enable it to pass under its tracks instead of over them and plaintiff was not damaged to any greater extent than if the water had flowed over the tracks, then the railroad is not liable.[50]

The court, in approving the charge of the trial judge, stated that not to allow an upper owner to increase and accelerate the flow of water in improving his land would have the effect of depriving him of the use of his property.

The two most recent surface water cases,[51] involving the reciprocal rights of upper and lower owners, give rather complete statements of the civil-law rule in North Carolina, but no mention is made of the right to increase and accelerate. In one of these, *Phillips v. Chesson*,[52] the issue was the diversion of the natural flow of surface water by an upper owner as a result of construction of a rock wall and a dirt embankment. After

[48] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 564-65, 42 S.E.2d 905, 908 (1947).

[49] *Id.* at 565, 42 S.E.2d at 908. This is a curious statement. If, as the court has stated many times, a railroad has the same rights as any other proprietor to drain surface water, why should it not be able to increase the flow under its tracks? The instruction is probably incorrect, but it was not challenged on appeal since defendants won at the trial court level.

[50] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 565, 42 S.E.2d 905, 908-09 (1947).

[51] Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963); Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950).

[52] 231 N.C. 566, 58 S.E.2d 343 (1950).

holding that the upper owner could not divert, nor alter the natural flow with artificial devices, the court stated:

> The question whether more water or less water is caused to flow onto the lower land—which may be a factor bearing on liability—is often by no means the most important. The manner of its collection and release, the intermittent increase in volume and destructive force, its direction to a more vulnerable point of invasion, may often become important.[53]

This dictum might indicate that even the right to increase and accelerate is subject to limitation. Apparently some standard of reasonableness may be applied in future cases involving increase and acceleration.

Several jurisdictions that follow the civil-law rule have modified it to make it more workable in an urban environment.[54] North Carolina has not yet made such a general modification. It has, however, by special application of the increase and accelerate principle, carved out an exception to the civil-law rule which has facilitated the grading and paving of streets by governmental agencies.

In *Yowmans v. City of Hendersonville*,[55] the court recognized that in most circumstances defendant would be liable if he diverted water onto plaintiff's land, but stated:

> [I]n regard to the flow and disposal of surface water incident to the grading and pavement of streets, a different rule is recognized, and a municipality, acting pursuant to legislative authority, is not ordinarily responsible for the increase in the flow of water upon abutting owners unless there has been negligence on their part causing the damage complained of. . . . It is held in this jurisdiction, however, that the right referred to is not absolute, but is on condition that the same is exercised with proper skill and caution, and if, in a given case, or as it may affect the property of some abutting owner, there is a breach of duty in this respect, causing damage, the municipality may be held responsible.[56]

Apparently a city is not required as a matter of law to curb and gutter its streets, but it is subject to the duty to exercise reasonable care in deciding whether or not to construct such drainage facilities.[57] Further, having decided to construct artificial drains, the city is required to exer-

[53] *Id.* at 569, 58 S.E.2d at 346.
[54] Annot., 59 A.L.R.2d 421, 433 (1958).
[55] 175 N.C. 574, 96 S.E. 45 (1918).
[56] *Id.* at 577, 96 S.E. at 46. This distinction was first recognized in Brinkley & Lassiter v. Norfolk S.R.R., 168 N.C. 428, 84 S.E. 700 (1915).
[57] Eller v. City of Greensboro, 190 N.C. 715, 130 S.E. 851 (1925).

cise ordinary skill and caution in that construction.[58] Generally, this is taken to mean that the artificial drains must be adequate to receive the amount of surface water which will flow into them under ordinary conditions and in the light of ordinary experience.[59] An increase in the level of water in a city's artificial drain, even to the point of its being completely filled, does not constitute negligence either in paving the streets which caused the increase or in failing to widen and deepen the drain.[60]

The paving and grading exception to the civil-law rule is subject to two limitations: first, a city may not collect and concentrate surface water into artificial drains and discharge it onto plaintiff's property without adequately providing for its proper outflow unless compensation is paid;[61] second, it apparently applies only to the grading and paving of existing streets and not to the construction of new ones.[62]

The court has given the word *diversion* several meanings. First, to cause water which would naturally have flowed in one watershed to flow into another is a diversion.[63] Second, to collect surface water in an artificial ditch or canal and discharge it upon the lower land at a different place[64] or in a different manner[65] than usual is a diversion.[66] Third, to erect artificial barriers that, without collecting the flow, alter the direction

[58] Gore v. City of Wilmington, 194 N.C. 450, 140 S.E. 71 (1927).

[59] *Id.*

[60] Roberson v. City of Kinston, 261 N.C. 135, 134 S.E.2d 193 (1964).

[61] Yowmans v. City of Hendersonville, 175 N.C. 574, 577, 96 S.E. 45, 47 (1918).

[62] Braswell v. Highway Comm'n, 250 N.C. 508, 108 S.E.2d 912 (1959) (dictum). The court gives no explanation for this distinction, nor is there any indication what rule would apply to new streets.

[63] Clark v. Norfolk S.R.R., 168 N.C. 415, 84 S.E. 702 (1915); Hooker v. Norfolk S.R.R., 156 N.C. 155, 72 S.E. 210 (1911); Hocutt v. Wilmington & W.R.R., 124 N.C. 214, 32 S.E. 681 (1899).

[64] Chappel v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963); Darr v. Carolina Alum. Co., 215 N.C. 768, 3 S.E.2d 434 (1939) (no right to drain into artificial channel); Cardwell v. Norfolk & W.R.R., 171 N.C. 365, 88 S.E. 495 (1916); Mullen v. Lake Drummond Canal & Water Co., 130 N.C. 496, 41 S.E. 1027 (1902) (water in canal brought on premises by artificial means and thus product of diversion); Porter v. Durham, 74 N.C. 767 (1876).

[65] Sherill v. Highway Comm'n, 264 N.C. 643, 142 S.E.2d 653 (1965). A culvert placed under the highway was not properly aligned with the axis of the ditch; the increased flow of water from above caused acceleration and a whirlpool, which washed away the land. The culvert was said to be an artificial device that diverted the flow.

[66] Brown v. Southern Ry., 165 N.C. 392, 81 S.E. 450 (1914). Some authorities say any water brought on premises by artificial means cannot be abandoned and treated as surface water. 3 H. FARNUM, LAW OF WATERS AND WATER RIGHTS § 881 at 2569 (1904). For implication that overflow from ice box and water barrel is surface water, *see* Holton v. Northwestern Oil Co., 201 N.C. 744, 161 S.E. 391 (1931). *But cf.* Mullen v. Lake Drummond Canal & Water Co., 130 N.C. 496, 41 S.E. 1027 (1902).

and cause the water to flow upon the lower land at a different place than usual is a diversion.[67] Fourth, to create an artificial flow where previously no natural flow existed and to direct the artificial flow onto lower land is a diversion.[68] If some natural flow did exist, even though small, the upper owner might increase and accelerate the natural flow and this would not constitute a diversion.[69]

Whether or not water has been diverted is an issue of fact for the jury, while the effect of such diversion is a question of law for the court.[70] Negligence need not be alleged to state a cause of action for diversion,[71] but there must be an allegation of injury. Diversion is evidently not unlawful *per se;* there must be actual damage before the statute of limitations begins to run.[72] Flooding by unlawful diversion is not a continuing trespass, and therefore all damages incurred within the three years preceding the bringing of the action may be recovered.[73]

The Lower Owner

The lower owner as proprietor of the servient estate must receive the natural flow of surface water upon his land. He may not throw up barriers, dikes, or embankments[74] or in any way obstruct the natural flow from above.[75] As previously discussed,[76] he may collect the natural flow into artificial channels and ditches once it reaches his land and discharge it into its natural outlet or into a proper outlet adequate to receive it. Should a lower owner, or an upper owner for that matter, choose to replace a natural drainway with an artificial conduit, he then becomes liable to exercise ordinary care to maintain the conduit so that the natural flow

[67] Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950) (stone wall); Winchester v. Byers, 196 N.C. 383, 145 S.E. 774 (1928) (pile of dirt).

[68] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947) (artificial flow may not be created by leveling and paving); Rice v. Norfolk & S.R.R., 130 N.C. 375, 41 S.E. 1031 (1902) (artificial flow may not be created by draining a natural basin or swamp which had no natural outlet). Such swamps or basins may be drained into natural watercourses. See pp. 210-11 *supra.*

[69] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947).

[70] Rice v. Norfolk & S.R.R., 130 N.C. 375, 376, 41 S.E. 1031, 1032 (1902).

[71] Braswell v. Highway Comm'n, 250 N.C. 508, 511, 108 S.E.2d 912, 914 (1959); Yowmans v. City of Hendersonville, 175 N.C. 574, 578, 96 S.E. 45, 47 (1918).

[72] Barcliff v. Norfolk S.R.R., 168 N.C. 268, 270, 84 S.E. 290, 291 (1915).

[73] Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909).

[74] Porter v. Durham, 74 N.C. 767 (1876) (dictum).

[75] Evidently this burden has been well accepted in North Carolina. No case has been located in which an upper owner has sued a lower for obstructing the natural flow of surface water. There are cases in which an adjacent owner has sued another for diversion caused by failure to keep drainage ditches open. *See, e.g.,* Price v. Norfolk S.R.R., 179 N.C. 279, 102 S.E. 308 (1920).

[76] See pp. 210-11 *supra.*

will not become obstructed.[77] Finally, there is one circumstance in which the lower owner might obstruct the flow coming onto his land. If the flow from above is not natural, but the result of diversion by the upper, then the lower owner may block it and pond it upon the upper land without incurring liability, so long as he does not also obstruct the passage of water that would naturally flow onto his land.[78]

CONCLUSION

Recently, in comparing the civil-law and common enemy rules, the North Carolina Supreme Court noted that many jurisdictions have so modified the basic rules that there remained only a very fine line of distinction between them.[79] Apparently the court was referring to developments in other jurisdictions, for it appears that North Carolina has not substantially deviated from its original version of the civil-law rule. This is not to say that the North Carolina version is antiquated. Indeed, an examination of the surface water litigation in the state shows that since 1930 only thirty-eight cases have come before the supreme court, an average of one case a year. Only three of the recent cases have involved disputes between private individuals.[80]

At the same time, it would be unwise to assume that the law in its present state is sufficient to deal with all future problems. The current trend toward industrialization and urbanization will no doubt severely test the existing law. The court has indicated that it will make modifications when they become necessary. In making these changes it will be acting in accordance with the philosophy it expressed in the first *Mizzell* case: "The rough outline of natural right or liberty must submit to the chisel of the mason that it may enter symmetrically into the social structure."[81]

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[77] Johnson v. City of Winston-Salem, 239 N.C. 697, 81 S.E.2d 153 (1954).

[78] 56 AM. JUR. *Waters* § 119 (1947). *See* Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 565, 42 S.E.2d 905, 908-09 (1947).

[79] Midgett v. Highway Comm'n, 260 N.C. 241, 244, 132 S.E.2d 599, 604 (1963).

[80] Most of the litigation in North Carolina has arisen from the activities of municipalities and railroads and other quasi-public corporations. Less than half of the total number of surface water cases have involved disputes between private landowners.

[81] Mizzell v. McGowan, 120 N.C. 134, 138, 26 S.E. 783, 784 (1897).

Religious Societies—Church Property Disputes—The Implied Trust Doctrine

Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.

—Thomas Jefferson[1]

The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.—Justice Samuel F. Miller.[2]

The Christian church has been beset with disagreement and dissent since its establishment. The differences within the early church[3] were only preludes to the bitter disputes that eventually splintered the unified church into hundreds of denominations and sects. Carl Zollmann, one of the foremost authorities on American church law, calls these divisions, or "schisms," within the church "blessings in disguise" and "the process by which the living church continually adapts itself to the living society upon which it operates."[4] While these schisms may be beneficial, they are also painful, often leaving wounds that take centuries to heal and scars that may never be erased.

Most disputes can be resolved within the church structure and do not lead to discernable divisions. Only when the differences become irreconcilable do the disputes overflow the confines of the church and become the concern of society as a whole. Ultimately the problem of who has the right to use and control the church property arises and must be resolved. The parties must either turn to the service of an impartial agency of the community or resort to force as a final arbiter. Society's interest in maintaining settled property titles and social order thus makes the courts the natural forums for church property disputes.

In a recent dispute within the Presbyterian Church in the United States, the Supreme Court of Georgia answered the question of property control in a novel fashion. In *Presbyterian Church in the United States*

[1] Quoted in A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 88 (1964).

[2] Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871).

[3] "I appeal to you, brethren, by the name of our Lord Jesus Christ, that all of you agree and that there be no dissensions among you, but that you be united in the same mind and the same judgment." I Corinthians 1:10 (rev. stand. version).

[4] C. ZOLLMANN, AMERICAN CIVIL CHURCH LAW 172 (Colum. ed. 1917).

v. Eastern Heights Presbyterian Church,[5] the general organization of the Presbyterian Church was at odds with two dissident churches in Savannah. Disagreement centered mainly on actions of the General Assembly,[6] which had decided, among other things, that women could hold positions in the church previously reserved for men. The two Savannah churches also disagreed with the positions of the general church in the recent dispute over required Bible reading in public schools,[7] United States involvement in Vietnam, civil disobedience, predestination, and the general church's membership in the National Council of Churches of Christ.[8] In 1966, both local churches "withdrew" from the general church, claiming that the General Assembly's stand violated the original tenets of faith of the Presbyterian Church as set down in 1861.[9] The Presbytery of Savannah[10] thereafter notified the two Savannah churches that it was securing ministers for them and would maintain the church buildings for those who desired to continue their relationship with the general church. The Savannah churches sought judicial relief in the form of temporary and permanent injunctions. A predominantly Baptist jury[11] found that the general church had departed from the original tenets of faith, and the court, accordingly, granted the requested relief.[12] The Georgia Supreme Court affirmed the trial court's decision by overruling well-settled precedent[13] and rejecting the argument that such a decision concerned matters of faith, and was, therefore, an area protected from intrusion by civil courts.[14] The Georgia court explained that under the "implied trust" doctrine, church property is impressed with an "implied trust" for the benefit of the general church. When a local church is dissolved or withdraws from the denomination,[15] the doctrine operates

[5] 224 Ga. 61, 159 S.E.2d 690 (1968), *cert. granted sub nom.* Presbyterian Church in the United States v. Mary Eliz. Blue Hull Mem. Presby. Church, 392 U.S. 903 (1968).

[6] *See generally* PRESBYTERIAN CHURCH IN THE UNITED STATES, BOOK OF CHURCH ORDER § 13-1 (rev. ed. 1964) [hereinafter cited as BOOK OF CHURCH ORDER].

[7] *See* Hanft, *The Prayer Decisions*, 42 N.C.L. REV. 567 (1964).

[8] 224 Ga. at —, 159 S.E.2d at 692.

[9] The year of the formation of the Presbyterian Church of the Confederate States of America. J. LESLIE, PRESBYTERIAN LAW AND PROCEDURE 24 (1930).

[10] The Presbytery is the second highest church court. BOOK OF CHURCH ORDER §§ 13-1, 14-5.

[11] The Washington Post, May 4, 1968, § D, at 11, col. 5.

[12] 224 Ga. at ——, 159 S.E.2d at 692-95.

[13] See Mack v. Kime, 129 Ga. 1, 58 S.E. 184 (1907).

[14] 224 Ga. at ——, 159 S.E.2d at 695-96.

[15] The Georgia court reasoned that the two local churches were already out of the general church's jurisdiction and, therefore, did not need to press an appeal within the church structure to validate that separation. 224 Ga. at —, 159 S.E.2d

to give the local church property to the general church. However, the doctrine allows the local church to retain control of the church property by proving that the general church departed from the original tenets of faith. The court, in awarding the property to the two local churches, claimed "virtually unanimous"[16] support for the rule's application to the Savannah church property.[17]

The "implied trust" doctrine invoked by the court in *Eastern Heights* first appeared in England during the early nineteenth century.[18] The English courts assumed that property obtained by a local church without any express limitations as to its use was given with the intention that it should be used for the promulgation of the church's faith as it existed at the time of the conveyance. If the grantor of the property, or the donor of the funds used for its purchase, had not specified these conditions, the courts would imply them—hence the "implied trust." In case of a schism, the property would go to the faction adhering to the tenets of faith as they existed when the property was acquired.[19]

The English rule made little headway in the United States; in 1871 it was expressly rejected by the Supreme Court in the landmark decision of *Watson v. Jones*.[20] Mr. Justice Miller, speaking for the court, recognized that different forms of church government exist in this country. Some churches operate as independent self-governing congregations, such as the Congregational and Baptist denominations. These are labeled "congregational" since matters of religious concern are settled by majority vote of the church membership. Others, like the Presbyterians and Meth-

at 696. *Contra*, Evangelical Luth. Synod v. First English Luth. Church, 47 F. Supp. 954, 962 (W.D. Okla. 1942).

[16] 224 Ga. at —, 159 S.E.2d at 695.

[17] The court based its authority on a Georgia statute which appears to refer only to "express trusts": "Courts are reluctant to interpose in questions affecting the management of the temporalities of a church; but when property is devoted to a *specific* doctrine or purpose, the courts will prevent it from being diverted from the trust." GA. CODE ANN. § 22-408 (emphasis added). A careful reading of the court's supporting cases reveals that they do not support the conclusions of the court, and in many instances demand a contrary holding. See Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); Saint John's Presbytery v. Central Presby. Church, 102 So. 2d 714 (Fla. 1958); Presbytery of the Everglades v. Morgan, 125 So. 2d 762 (Fla. Ct. App. 1961); Sapp v. Callaway, 208 Ga. 805, 69 S.E.2d 734 (1952); Tucker v. Paulk, 148 Ga. 228, 96 S.E. 339 (1918).

[18] Craigdallie v. Aikman, 1 Dow 1, 3 Eng. Rep. 601 (H.L. 1813) (Scot.).

[19] Attorney General *ex rel.* Mander v. Pearson, 3 Mer. 353, 418, 36 Eng. Rep. 135, 157 (Ch. 1817). For a thorough treatment of the history of the "implied trust" doctrine, see Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1149-54 (1962).

[20] 80 U.S. (13 Wall.) 679 (1871). A minority faction of the Walnut Street Presbyterian Church of Louisville sought control of the local church in defiance of the general church. The dispute centered on the church's stand on slavery.

odists, are governed by a series of church tribunals arranged in hierarchical order.[21] The decisions of these representative bodies are held to be binding upon every congregation within the denomination.

When disputes arise in churches of the first type, Mr. Justice Miller explained, the courts must look to the decision of the majority of the congregation for the determination of matters involving religion.[22] The court would make no inquiry into the theological dispute. Likewise, in decisions involving religious matters within a hierarchical church structure, the courts look to the proper church tribunal. The decision of the church's highest tribunal is held binding upon the courts on matters of doctrine and faith.[23] Only in cases of an express trust for the support of a specific religious doctrine would there be an inquiry by the courts into the religious tenets of the church. This was the only circumstance in which the Court found justification for making such an intrusion.[24]

The Supreme Court further pointed out that the "implied trust" doctrine violates a basic principle of our government, that of the separation of church and state.[25] By voluntarily uniting with a church, the member thereby bound himself to the church's rulings on religious matters.[26] If the courts interfered by inquiring into doctrine, it would undermine the governmental structure of the church.[27]

The great majority of American jurisdictions[28] professed allegience to the *Watson* rule,[29] but in practical application one modification became

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[21] *See, e.g.*, BOOK OF CHURCH ORDER §§ 13-1, 14-5.

[22] 80 U.S. (13 Wall.) at 725.

[23] *Id.* at 727. Sometimes determining into which category a church government falls presents difficulty. *See, e.g.*, Ginossi v. Samatos, 3 Ill. App. 2d 514, 123 N.E.2d 104 (1954); Maryland and Va. Eldership of the Churches of God v. Church of God,—— Md. ——, 241 A.2d 691 (1968).

[24] 80 U.S. (13 Wall.) at 722-23. *See, e.g.*, Chatfield v. Dennington, 206 Ga. 762, 58 S.E.2d 842 (1950).

[25] 80 U.S. (13 Wall.) at 727. For a modern statement of the rule, see Maryland and Va. Eldership of the Churches of God v. Church of God, — Md. —, —, 241 A.2d 691, 697 (1968).

[26] 80 U.S. (13 Wall.) at 728.

[27] *Id.* at 733.

[28] The case was decided before Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and was therefore based on federal common law. Kedroff v. Saint Nicholas Cath., 344 U.S. 94, 116 (1952).

[29] Goodson v. Northside Bible Church, 261 F. Supp. 99 (S.D. Ala. 1966); Evangelical Luth. Synod v. First English Luth. Church, 47 F. Supp. 954 (W.D. Okla. 1942); Barkley v. Hayes, 208 F. 319 (W.D. Mo. 1913); Bouchelle v. Trustees of the Presby. Congreg., 22 Del. Ch. 58, 194 A. 100 (1937); Stewart v. Jarriel, 206 Ga. 855, 59 S.E.2d 368 (1950); Mack v. Kime, 129 Ga. 1, 58 S.E. 184 (1907) (see note 13 *supra*); First Protest. Ref. Church v. DeWolf, 344 Mich. 624, 75 N.W.2d 19 (1956); Kelly v. McIntire, 123 N.J. Eq. 351, 197 A. 736 (1938); True Ref. Dutch Church v. Iserman, 64 N.J.L. 506, 45 A. 771 (1900); Tubreville v. Morris, 203 S.C. 287, 26 S.E.2d 821 (1943). Two jurisdictions appear not to

necessary. It was obvious that the decisions of ecclesiastical authorities must be legitimate and derived by proper methods of procedure if they were to be accepted at face value by the courts. An ecclesiastical due process rule evolved which, when added to the original *Watson* rule, meant that the decisions of the church would be accepted as final by the courts provided there was fair play and substantial justice rendered in the process.[30] The resulting rule provided a workable formula for the courts[31] by keeping judicial inquiries into matters of religious doctrine to a minimum, while allowing suitable recourse for parties in the face of mismanagement.[32]

While rendering allegiance to *Watson*[33] with one hand, however, the state courts modified portions of the rule with the other. Despite the Supreme Court's express rejection of the "implied trust" doctrine,[34] it

have accepted the rule. *See, e.g.*, Boyles v. Roberts, 222 Mo. 613, 121 S.W. 805 (1909); Bonham v. Harris, 125 Tenn. 452, 145 S.W. 169 (1911); *but see* Hayes v. Manning, 263 Mo. 1, 172 S.W. 897 (1914).

[30] Mr. Justice Brandeis speaking for the Court: "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." Gonzalez v. Roman Cath. Arch., 280 U.S. 1, 16 (1929). *See, e.g.*, Brundage v. Deardorf, 55 F. 839 (C.C.N.D. Ohio 1893); Tubreville v. Morris, 203 S.C. 287, 26 S.E.2d 821 (1943).

[31] There have been some exceptions. *See, e.g.*, Master v. Second Parish, 124 F.2d 622 (1st Cir. 1941).

[32] A similar rule is applied to other non-profit corporations such as fraternal organizations. *See, e.g.*, Johnson v. Prince Hall Grand Lodge, 183 Kan. 141, 325 P.2d 45 (1958).

[33] *Watson* may have been given constitutional status by the Supreme Court in Kedroff v. Saint Nicholas Cath., 344 U.S. 94 (1952). This decision strongly implies that the "freedom of religion" concept applies not only to individuals, but also to church organizations. In this case, the Supreme Court struck down a New York statute that prevented the Soviet-influenced hierarchy of the Russian Orthodox Church from asserting control over its subordinate bodies within the state. Mr. Justice Reed for the court concluded:

> "Ours is a government which by the 'law of its being' allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. . . . Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. . . . This under our Constitution necessarily follows in order that there may be free exercise of religion."

Id. at 120-21. (Citations omitted) *See* Goodson v. Northside Bible Church, 261 F. Supp. 99 (S.D. Ala. 1966); Comment, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1123-39 (1965). *See generally* Duesenberg, *Jurisdiction of Civil Courts Over Religious Issues*, 20 OHIO ST. L.J. 508 (1959).

[34] 80 U.S. (13 Wall.) at 725.

re-emerged under the cloak of the "fundamental change" doctrine.[35] Its application, however, was limited to those disputes involving congregational polities where there was no forum of appeal except the civil courts.[36] In a split involving a Baptist church, for example, the church property would be awarded to that faction adhering to the original beliefs of the church regardless of how many persons took the opposite view. If a majority did not adhere to those beliefs, they were said to have forced a "fundamental change" in the use of the church's property in disregard of the wishes of those members who remained loyal to the faith.[37] The result was that of the "implied trust."

After *Watson*, the use of the term "trust" also emerged in cases involving hierarchical polities. The term, however, was not employed in the same sense as in the "implied trust" doctrine.[38] Principally, its use came from the lack of a better word to describe the *Watson* rule as applied to disputes in hierarchical polities. It was a label used to denote the particular concept of property ownership that allowed a local church to use and hold property in its own name—property that would, without exception, revert to the general church's control if the local church withdrew from the general denomination. The Georgia court in *Eastern Heights* apparently took the invasion of the term "trust" into disputes of hierarchical church polities to mean that it should be employed in the same way that the "implied trust" was applied to congregational polities under the "fundamental change" doctrine.[39] The decisions, however, reveal a contrary conclusion, for the only thing that the two procedures have in

[35] Specific guidelines for the rule have been almost impossible to formulate. *See, e.g.*, Ragsdall v. Church of Christ, 244 Iowa 474, 55 N.W.2d 539 (1952); Parker v. Harper, 295 Ky. 686, 175 S.W.2d 361 (1943); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954). Until *Eastern Heights*, the Georgia courts rejected any form of the "implied trust" doctrine. *See, e.g.*, Sapp v. Callaway, 208 Ga. 805, 69 S.E.2d 734 (1952); Stewart v. Jarriel, 206 Ga. 855, 59 S.E.2d 368 (1950).

[36] *See, e.g.*, Saint John's Presby. v. Central Presby. Church, 102 So. 2d 714 (Fla. 1958); Tucker v. Paulk, 148 Ga. 228, 96 S.E. 339 (1918); Ragsdall v. Church of Christ, 244 Iowa 474, 55 N.W.2d 539 (1952); Parker v. Harper, 295 Ky. 686, 175 S.W.2d 361 (1943); Protestant Ref. Church v. Tempelman, 249 Minn. 182, 81 N.W.2d 839 (1957); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954).

[37] Parker v. Harper, 295 Ky. 686, 175 S.W.2d 361 (1943).

[38] *See, e.g.*, Presbytery of the Everglades v. Morgan, 125 So. 2d 762 (Fla. Ct. App. 1961); Presbytery of Indianapolis v. First United Presby. Church, —— Ind. ——, 238 N.E.2d 479 (Ind. Ct. App. 1968); Presbytery of Bismark v. Allen, 74 N.D. 400, 22 N.W.2d 625 (1946); Kelly v. McIntire, 123 N.J. Eq. 351, 197 A. 736 (1938). *Cf.* Protestant Ref. Church v. Tempelman, 249 Minn. 182, 192-93, 81 N.W.2d 839, 847-48 (1957).

[39] 224 Ga. at —, 159 S.E.2d at 625.

common is the use of the word "trust." The cases involving hierarchial polities still cling strongly to the *Watson* rule.[40]

The Supreme Court will soon review the *Eastern Heights* decision.[41] It is timely, therefore, to examine the practical as well as the legal effect of applying the "implied trust" doctrine to property disputes within a hierarchical church.

First, the doctrine hinders the operation of the general church as it seeks to adapt itself to the times. The general church makes statements of doctrine and faith at the peril of being declared in error and losing those churches whose congregations disagree. One or two such instances would not appreciably affect the operation of the general church, but a series of differences could be catastrophic.[42] By making innovations so costly, the courts actually impose the status quo upon hierarchical religious bodies.[43]

Second, as in *Eastern Heights*, any dissatisfied congregation could claim a departure from the original tenets of faith by its church hierarchy and by majority vote effectively operate contrary to the directives of the general church. The result is not unlike that system of government in congregational polities. It eliminates the binding nature of the general church's decisions, a fundamental characteristic of hierarchical church bodies. The use of the "implied trust" doctrine, therefore, imposes a different form of government upon the general church. Yet this by no means classifies the church government as "congregational" since the organization still operates under a representative system. Hierarchical polities are by court decree forced into a type of limbo, suspended between the congregational form on the one hand, and the hierarchical form on the other. The process disregards the system of government agreed upon in the church's constitution.[44]

[40] *See, e.g.*, Saint John's Presby. v. Central Presby. Church, 102 So. 2d 714 (Fla. 1958); Knight v. Presbytery of Western New York, 26 App. Div. 2d 19, 270 N.Y.2d 218 (1966).

[41] See note 5 *supra*.

[42] An unusual situation occurred in Scotland. In 1900, two major Presbyterian denominations, the Free Church of Scotland and the United Presbyterian Church of Scotland, merged to form the United Free Church of Scotland. A very small minority of the former Free Church, represented by 24 out of a total of approximately 1100 ministers, contended that the merger violated the basic tenets of faith. They were awarded the entire property holdings of the former Free Church. General Ass. of Free Church of Scotland v. Overtoun, [1904] A.C. 515 (Scot.). Parliament could not accept such a result and ordered the property divided equitably between the dissident faction and the United Free Church. Churches (Scot.) Act, 5 Edw. 7, c. 12 (1905).

[43] *See* Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 452 (1964).

[44] *See* Goodson v. Northside Bible Church, 261 F. Supp. 99 (S.D. Ala. 1966),

Finally, the courts, as arms of the state, are forced to intrude into the religious affairs of the church.[45] The "implied trust" doctrine removes disputes over theological matters from ecclesiastical authorities and forces them into secular courts. This result has questionable constitutional validity[46] and was one of the primary reasons for the doctrine's rejection in *Watson*.[47] The doctrine removes decisions on ecclesiastical matters from the agencies[48] of the church that are most qualified to handle such cases,[49] thereby requiring judges and juries to delve into the "theological thicket."[50] The courts are not trained for such a function. It is absurd that a jury of laymen be given the task of deciding whether the highest constituted church court of a major religious denomination is in error on matters of doctrine and faith.[51]

The inevitable conclusion is that the "implied trust" doctrine demands a most undesirable result. But does the *Watson* rule present a suitable solution to the problem? The answer lies in the determination of how hierarchical church bodies actually hold property.

Most local churches are incorporated bodies and hold their property through trustees. But holding formal title does not give the congregation or the trustees absolute control. The *Watson* rule necessarily gives the general church the power to define those persons belonging to its member congregations. If certain members of the congregation deny the authority of the general church, excluding this dissident faction from membership in the congregation effectively eliminates the threat to the general church's

aff'd 387 F.2d 534 (5th Cir. 1967); Presbytery of Indianapolis v. First United Presby. Church, — Ind. —, 238 N.E.2d 479 (Ind. Ct. App. 1968); BOOK OF CHURCH ORDER § 6-3. *Cf.* Kedroff v. Saint Nicholas Cath., 344 U.S. 94 (1952). For criticism of such a result as a court imposed system of uniform land tenure on churches, see Comment, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1132-33 (1965).

[45] Northside Bible Church v. Goodson, 387 F.2d 534, 537 (5th Cir. 1967).

[46] Kedroff v. Saint Nicholas Cath., 344 U.S. 94 (1952). *Cf.* School District v. Schempp, 374 U.S. 203 (1963); Everson v. Board of Education, 330 U.S. 1 (1947). *See also* W. O. DOUGLAS, THE RIGHT OF THE PEOPLE 138 (1948). For a treatment of the complexities of the constitutional question, see Comment, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1965).

[47] 80 U.S. (13 Wall.) at 733-34.

[48] The constitution of the Presbyterian Church in the United States actually refers to these bodies as courts. BOOK OF CHURCH ORDER, §§ 13-1, 14-5.

[49] Watson v. Jones, 80 U.S. (13 Wall.) 679, 725 (1871); Bouchelle v. Trustees of the Presby. Congreg., 22 Del. Ch. 58, 64, 194 A. 100, 103 (1937); Sapp v. Callaway, 208 Ga. 805, 811, 69 S.E.2d 734, 739 (1952).

[50] Maryland and Va. Eldership of the Churches of God v. Church of God, — Md. —, —, 241 A.2d 691, 697 (1968).

[51] *See* Bouchelle v. Trustees of the Presby. Congreg., 22 Del. Ch. 58, 194 A. 100 (1937).

authority.[52] In *Eastern Heights*, the Savannah Presbytery attempted to exercise this prerogative by declaring that those who had disaffiliated from the church were no longer members, and that those who desired to maintain their general church connection would be allowed to use the church.[53]

At first glance this would appear to give excessive power to the ecclesiastical tribunals, but it does not appear so in the light of the *Watson* rule. First, as has been mentioned, the application of the doctrine demands fairness in procedure.[54] The court may inquire into the process used and the legitimacy of the source. Second, in hierarchical polities power is wielded by representative bodies whose authority comes from the members of the general church as a whole.[55] Finally, as Mr. Justice Miller pointed out, those who join an ecclesiastical organization and derive the benefits of their affiliation must accept the decisions of the proper religious authorities. "[I]t would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed."[56]

If the local congregations of hierarchical church polities do not in fact have ultimate control of their local property, who does? In the light of *Watson*, the property must be said to be controlled by the membership of the general church as a whole through the system of hierarchical church courts. This result satisfies the general notions of the proper function of representative government and is both practical and equitable.[57] Abiding by the *Watson* precedent would, therefore, have the desirable effect of maintaining the representative type of church government in this country, while honoring the fundamental principles of the separation of church

[52] "All of which leads one to the ineluctable conclusion that these dissident lambs at one time happy and contented in the Central Church voluntarily bounded the theological fold in search of what they thought were greener ecclesiastical pastures but missed the boat and are now like the children of Israel grazing in the wilderness of dispair absent a church home which no human agency except perhaps intercession can restore."
Saint John's Presby. v. Central Presby. Church, 102 So. 2d 714, 719 (Fla. 1958). *Cf.* Trustees of Presby. v. Westminister Presby. Church, 222 N.Y. 305, 118 N.E. 800 (1918).

[53] 224 Ga. at —, 159 S.E.2d at 693.

[54] Gonzalez v. Roman Cath. Arch., 280 U.S. 1, 16 (1929).

[55] Protestant Ref. Church v. Tempelman, 249 Minn. 182, 191, 81 N.W.2d 839, 847 (1957). *See, e.g.*, BOOK OF CHURCH ORDER, § 1-4.

[56] Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871); *accord*, Barkley v. Hayes, 208 F. 319, 323 (1913).

[57] *See* Presbytery of Bismark v. Allen, 74 N.D. 400, 413, 22 N.W.2d 625, 631 (1946). *See generally* Comment, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1134-35 (1965).

and state.[58] To hold otherwise would effectively destroy the concept of representative church government in the United States.[59]

THOMAS B. ANDERSON

Social Welfare—The "Man in the House" Returns to Stay

Under the type of state welfare regulation popularly known as the "substitute father" rule, children otherwise eligible for benefits under the Aid to Families with Dependent Children[1] program are denied assistance if their natural parent maintains a continuing sexual relationship with someone of the opposite sex. This person is deemed to be a non-absent parent within the meaning of the Social Security Act, thus rendering the family ineligible for AFDC payments. Whether this person is legally obligated to support the children is irrelevant; whether he does in fact contribute to their support is also irrelevant; eligibility under such a rule is determined solely by the relationship between the parent (usually the mother of the children) and the "substitute" (usually an unrelated male).

In *King v. Smith*,[2] the Supreme Court unanimously held Alabama's "substitute father" rule invalid as inconsistent with Title IV of the Social Security Act, 42 U.S.C. § 601-09 (1964). Declining to reach the constitutional issue presented, the Court found the Alabama provision to be violative of the "Flemming Ruling"[3] and held that it defined

[58] *Cf.* Kedroff v. Saint Nicholas Cath., 344 U.S. 94, 110 (1952); Goodson v. Northside Bible Church, 261 F. Supp. 99, 103 (S.D. Ala. 1966).

[59] Barkley v. Hayes, 208 F. 319, 323 (W.D. Mo. 1913).

[1] Aid to Families with Dependent Children [hereinafter cited as AFDC] is one of the major components of the public assistance program established by the Social Security Act of 1935, 42 U.S.C. § 601-09 (1964). The program grants aid to dependent, needy children who have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent," and who live with any of certain enumerated relatives. 42 U.S.C. § 606(a)(1) (1964). For a thorough discussion of AFDC and its predecessors, see W. BELL, AID TO DEPENDENT CHILDREN (1965).

[2] 88 S. Ct. 2128 (1968).

[3] 42 U.S.C. § 604(b) (1964). The ruling, given statutory approval in 1961 in response to a directive issued by the then Secretary of the Department of Health, Education & Welfare, Arthur Flemming, provides that

> A State plan for aid to dependent children may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be

"parent" in a broader sense than that intended by the Social Security Act.[4] Although aid can be granted under the Act only if a "parent" is continually absent from the home, Congress intended the word "parent" to designate one owing a duty of support to the child imposed by state law. A state's definition of the word should therefore be no broader; one who owed no state-imposed duty of support was not a "parent," his association with the mother was not parental presence, and it did not justify severance of AFDC funds. An unrelated male adult in Alabama owed no such legal duty, and therefore the Court found the regulation invalid.

Some nineteen states[5] and the District of Columbia have such regulations and have been directly affected by the ruling.[6] This note will attempt to deal with the probable impact of the court's holding upon the welfare systems in these states and will consider, as an example, North Carolina's experience with the substitute father rule and the effect of the decision on this state.

There is a marked scarcity of case law on "man-in-the-house" rules, as there is on welfare law in general.[7] Such regulations have generally

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continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.
Bureau of Public Assistance, Social Security Administration, Dep't of Health, Educ., and Welfare, State Letter No. 452 (Jan. 17, 1961).

[4] The Alabama regulation called for the termination of aid if the mother cohabited with the "substitute father," either inside the home or elsewhere; the mother then bore the burden of proving that the relationship had been discontinued before assistance could be resumed. The substitute's relationship with the children themselves was immaterial. ALABAMA STATE DEP'T OF PENSIONS AND SECURITY, MANUAL FOR ADMINISTRATION OF PUBLIC ASSISTANCE, Part I, Ch. II, § VI(V)(A) (1964). The plaintiff in *King* found her AFDC payments terminated because of alleged—and undisputed—weekend visits by one Willie Williams. Mr. Williams lived 15 miles away with his wife and eight of his nine children; he was not the father of any of Mrs. Smith's children and was both unwilling and unable to provide for their support, since he could hardly support his own family. This determination by the local welfare board left Mrs. Smith in the position of having to support her family on her cook's salary of 16 dollars a week. 88 S. Ct. at 2131.

[5] Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. 88 S. Ct. at 2143.

[6] The decision "beneficially affect[ed] more than 21,000 in Alabama and perhaps as many as 400,000 throughout the country. . . ." N.Y. Times, Aug. 25, 1968, § 6 (Magazine), at 28.

[7] This is understandable in that most potential plaintiffs have neither the means of securing legal aid, nor knowledge of their rights, and are usually placated with administrative review of their case—if even this right is exercised by them. For example, appeals in one North Carolina County were estimated at no more than two per month. Interview with Gerald Allen, University of North Carolina School of Social Work, in Chapel Hill, N.C., Sept. 6, 1968. The right to ad-

withstood attack in the state courts in the few instances in which they have been challenged.[8] Recently, however, at least one state has liberalized its rule by administrative review,[9] and other similar regulations are being challenged in the federal courts.[10] In other jurisdictions, recent administrative decisions have reversed denials of AFDC benefits to children on the grounds that their mother was convicted of welfare fraud,[11] and have required a high standard of proof as to the existence of a "man-in-the-house" before curtailing AFDC payments.[12] The decision in *King*[13] marked the first time such a regulation has been challenged successfully in the federal courts, and perhaps in any appellate court.

Essentially, the Supreme Court held that denial of AFDC payments to otherwise eligible children must not leave a vacuum in the support provided the child—there must be either a legally responsible adult as defined under a state's own support laws, or "other adequate care and assistance" as required by the statutory implementation of the Flemming Ruling.[14] The effect of the opinion is to prohibit denial of the funds solely on the basis of the mother's relationship with a man not legally obligated to support her children. The significance of the decision is not so sweeping as it might appear, however. The Court noted that actual contributions from a "man-in-the-house" could be taken into considera-

ministrative appeals, however, is carefully pointed out in most generally distributed welfare literature. *See, e.g.*, N.C. DEPT. OF PUBLIC WELFARE, PUBLIC ASSISTANCE FOR NEEDY PEOPLE IN NORTH CAROLINA, INFOR. BOOKLET No. 36 (1968).

[8] *See, e.g.*, People v. Shirley, 55 Cal. 2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961); People v. Ford, 236 Cal. App. 2d 438, 46 Cal. Rptr. 144 (4th Dist. Ct. App. 1965), *appeal dismissed*, 384 U.S. 100 (1966); People v. Rozell, 212 Cal. App. 2d 875, 28 Cal. Rptr. 478 (3d Dist. Ct. App. 1963). All of these decisions affirmed convictions of "grand theft" of welfare benefits by reason of nondisclosure of an alleged "man-in-the-house." *See also* County of Kern v. Coley, 229 Cal. App. 2d 172, 40 Cal. Rptr. 53 (5th Dist. Ct. App. 1964), affirming a judgment for the plaintiff county in a suit to recover alleged overpayments of ANC (California's AFDC) funds because of the unreported income of an unrelated male living in the house.

[9] Matter of D, Hearing before N.Y. State Dep't of Social Welfare (1966), *noted in* 5 WELFARE L. BULL. 3 (1966).

[10] McPherson v. Montgomery, Civ. No. 46759 (N.D. Cal., filed March 25, 1967), *noted in* 9 WELFARE L. BULL. 9 (1967); Robinson v. Board of Comm'rs., No. 3399-66 (D.D.C., filed Dec., 1966), *noted in* 7 WELFARE L. BULL. 3 (1967).

[11] Matter of J., Case No. U.C.—1858, N.J. Dep't of Inst. & Agencies (May 25, 1967); Matter of W., Case No. U.C.—808, N.J. Dep't of Inst. & Agencies (May 2, 1967); *noted in* 9 WELFARE L. BULL. 10 (1967).

[12] Matter of C., Case No. C-29-208-0, D.C. Dep't of Public Welfare (April 20, 1967) ("reasonable and substantial evidence"); Matter of D., Case No. VC—1210, N.J. Dep't of Inst. & Agencies (April 20, 1967) ("beyond a reasonable doubt"), *noted in* 9 WELFARE L. BULL. 9 (1967).

[13] Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967).

[14] 42 U.S.C. § 604(b) (1964).

tion in computing need.[15] Also, states apparently may still terminate AFDC payments under such a rule, provided the man is one whom the state has defined as owing a legal duty of support to the child. In any case, in fact, where an alternative provision is made for the child's support, *King* will have little effect. The "substitute father" rule is overturned only in those instances where AFDC funds are completely terminated and the children left without other adequate care.

It is possible that states may attempt to amend their laws to impose duties of support on stepfathers and common-law husbands. If only *King* were controlling, these devices might be successful in decreasing the AFDC caseload. The Department of Health, Education, and Welfare (HEW), however, has responded to the Court's decision by amending its regulations to provide that the determination of whether a child has been deprived of parental support or care "will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under state law."[16] In another section, the directive specifically excludes reliance by a state on a "substitute parent" or "man-in-the-house" as a basis for a finding of ineligibility or for assuming availability of income.[17]

Thus, HEW has apparently substituted its own authority for that of the state in defining "parent," for the Court's decision alone probably left states free under the Social Security Act to define "parent" as long as their definition was limited to those owing a duty of support imposed by state law. Now HEW has further limited the policy by eliminating, for instance, common-law stepfathers, regardless of the state's support laws. In addition, the new regulation prohibits a state from assuming income from a non-parent to be available in the computation of the family's resources. Rather, the state must assume the burden of proving "actual contributions."[18]

[15] 88 S. Ct. at 2134. In addition, states are free, under the Social Security Act, to set their own standards of need and the amount of support to be given, and may take into consideration in determining need any resources a family might have. 42 U.S.C. § 602(a)(7) (1964). Any contributions counted, however, must be "actual" and on a regular basis. DEP'T OF HEALTH, EDUC. AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, IV, § 3131. In fact, states have been asked since the ruling to encourage contributions from an unrelated adult living in the home. Letter from Mary E. Switzer, Administrator, Social and Rehabilitation Service, HEW, to State Administrators, August 8, 1968.

[16] 33 Fed. Reg. 11290 (1968).

[17] *Id.*

[18] *Id.*

The principal difficulty with HEW's extension of the *King* holding is the absence of any real enforcement power, short of complete termination of federal matching funds—hardly a desirable alternative.[19] To the extent that the new regulation exceeds the Court's decision, a more useful power of enforcement is advisable.[20] In any case, there is little likelihood that dilatory or evasive measures will be undertaken by the states for the time being;[21] Congress recently enacted legislation, effective July 1, 1969, "freezing" the amount of federal matching funds that will be available to the states for their AFDC programs, using as a base period the first quarter of 1968.[22] Ordinarily, then, the proportion of AFDC children eligible for these grants would be set, and there would be no incentive on the part of the states to absorb more children into their caseloads, since the base period has passed. Congress, however, provided an exception in the Act for children who began to receive aid after March, 1968, as a result of the judicial decision invalidating a substitute parent rule or residence test.[23] Thus the children readmitted as a result of *King* will be added to the total during the base period in order to determine the proportion to be granted federal matching aid. In light of the impending "freeze," there is every incentive for a state to comply fully and immediately with the Court's decree, so as to make eligible for federal matching grants the greatest possible number of children during the base period.[24]

[19] Though it is not an unprecedented one. *Cf.* Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 88 S. Ct. 773 (1968) (order terminating federal funds for noncompliance with the Civil Rights Act of 1964 upheld).

[20] Federalizing the whole AFDC program has been suggested by one noted author. BELL, *supra* note 1, at 186. Bell points out that although the federal taxpayer in 1960 paid 58.4 per cent of the cost of AFDC, in Southern states the federal government paid such proportions of the cost as 79.8 per cent in Alabama, 80.2 per cent in Arkansas, and 77.8 per cent in North Carolina. *Id.* at 219 n.36.

[21] Although North Carolina, subsequent to the lower court decision in *King*, adopted a welfare regulation conditioning receipt of AFDC upon proof that instruction in birth control methods had been received by the applicant (or that she was sterile), the regulation has since been repealed, upon order from HEW. Resolution of the State Board of Public Welfare of North Carolina, Sept. 25, 1968.

[22] Tax Adjustment Act of 1968, H.R. 15414, 90th Cong., 2d Sess. 114 CONG. REC. H4685 (1968).

[23] *Id.* North Carolina's birth-control restriction mentioned above did not come within this categorical exception; there was, therefore, no incentive for the state to refrain from applying it.

[24] After July 1, 1969, however, restrictive measures by some states designed to weed out certain classes of recipients from the welfare rolls may occur. Administrative review of such measures will be needed to insure that the newly-won rights of AFDC mothers and children are not jeopardized by state-imposed

North Carolina, for example, recently deleted its version of the "substitute father" rule[25] in response to an advisory letter from HEW;[26] it is reasonably safe to assume that the decision will have a similar effect in other states with such rules. In order to understand the significance of *King* in states other than Alabama, it is helpful to examine briefly the North Carolina rule and its background. The original North Carolina rule was adopted in 1955 and underwent at least two revisions, the latest of which (May 1, 1968) probably represented an attempt to accomodate the lower court decision in *King* and its anticipated affirmation by the Supreme Court.

As revised in 1959, the rule provided simply that a county board of public welfare could terminate aid to a woman with an illegitimate child if it found that a "common law relationship" existed between the woman and a man to whom she was not married.[27] The manual then enumerated several "factors" for determining the existence of such a relationship.[28] This rule discriminated against illegitimate children (or children with illegitimate siblings); in addition, it obviously came within the type of rule proscribed by *King* and the HEW directive, in that the sole basis for determining eligibility was the "common law" relationship between the woman and her paramour, without regard to the support and needs of the child.

In 1965, the State Board of Public Welfare received a new chairman,[29] who personally revised the regulation,[30] effective May 1, 1968:

> No child who is living with one of his or her parents, such parent not being physically or mentally incapacitated, shall be deemed de-

restrictions. It is perhaps regrettable that HEW does not have more power to insure these rights by administrative sanctions than by recourse to piecemeal litigation in the federal courts.

[25] DIVISION OF PUBLIC ASSISTANCE, N.C. STATE BD. OF PUBLIC WELFARE, PUBLIC ASSISTANCE MANUAL § 440 (1968) [hereinafter cited as PUBLIC ASSISTANCE MANUAL].

[26] Resolution of the State Board of Public Welfare of North Carolina, Sept. 25, 1968.

[27] PUBLIC ASSISTANCE MANUAL § 440 (1959).

[28] These included frequent association with one another, "evidence of pregnancy, evidence that the man provides food or makes regular contributions toward support of the mother and children, or that he shows an interest in the mother and children that would be expected of a husband and father." *Id.*

[29] Governor Moore appointed Robert C. Howison, Jr., a Raleigh attorney, to succeed Howard E. Manning as Chairman, effective April 1, 1965. N.C. STATE BD. OF PUBLIC WELFARE, BIENNIAL REPORT, JULY 1, 1964—JUNE 30, 1966, 15 (1966).

[30] Interview with Robert H. Ward, Assistant Commissioner, N.C. Dep't of Public Welfare, in Raleigh, N.C., Sept. 6, 1968.

> prived of parental support or care, for the purpose of determining eligibility for aid to families with dependent children, if some person of the opposite sex from such parent is acting in loco parentis to the child. A person shall be deemed acting in loco parentis to the child if such person acts as a parent to the child and treats the child as his own.[31]

Several significant changes are to be noted: the rule referred to "no child," reflecting the intent of the Board not to restrict the rule to mothers of illegitimates;[32] in addition, the language was made mandatory instead of being in the discretion of the local welfare boards; finally, "in loco parentis" terminology was substituted for the "common law" relationship previously required. Apparently this subtle modification was designed to circumvent semantically the effect of the lower court ruling in *King*, that decision having censured restrictions on eligibility based on the mother's relationship with a man, but having said nothing explicit about the *child's* relationship with his "substitute parent." The distinction, however, was insignificant; for, as stated later by the Supreme Court, "the actual financial situation of the family [was] irrelevant in determining the existence of a substitute father."[33] The criteria of *King* had not been met: there was still no state-imposed duty of support, no "other adequate care and assistance" provided for the child. The rule also fell squarely within HEW's prohibition of eligibility conditions based on persons other than "parents," as HEW defined the term. The regulation could not survive.

The *King* decision is a salutary one, for "substitute parent"-type rules have little to recommend them. A variety of persons familiar with the problems of social welfare have attacked them;[34] the National Advisory Commission on Civil Disorders has recommended their total abolition;[35] and at least some state welfare administrators, trained in social

[31] PUBLIC ASSISTANCE MANUAL § 440 (1968).

[32] Interview with Clifton M. Craig, Commissioner, N.C. Dep't of Public Welfare, in Raleigh, N.C., Sept. 6, 1968. Bell notes a similar instance in Mississippi where, after federal attorneys pointed out the discrimination of such a rule, it was changed to exclude all children. BELL, *supra* note 1, at 98.

[33] 88 S. Ct. at 2135.

[34] *See* People v. Shirley, 55 Cal. 2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961) (Peters, J., dissenting). *See generally* BELL, *supra* note 1; Reich, *Individual Rights and Social Welfare: The Emerging Issues*, 74 YALE L.J. 1245 (1965); tenBroek, *The Impact of Welfare Law upon Family Law*, 42 CALIF. L. REV. 458 (1954); Wickenden, *Poverty, Civil Liberties, and Civil Rights: A Symposium*, 41 N.Y.U.L. REV. 328, 333 (1966); *Symposium*, 54 CALIF. L. REV. 319 (1966).

[35] REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 464 (1968).

work, have reservations as to their merits.[36]

Such restrictions permit discrimination by biased local officials; they hold the AFDC mother to an uncommonly strict code of personal conduct;[37] they may be self-defeating in purpose—for if all but the most casual contact with a man is suspect, how is an AFDC mother ever to gain a husband? The "substitute parent" rule is arguably incorrect in its basic assumptions—the presence of a "man-in-the-house," far from rendering a home "unsuitable," may be beneficial to the psychological growth of the children;[38] he may develop a relationship with them warmer than that of many "natural" parents, particularly the type whose support is sought to be enforced by abandonment proceedings. Further, the backbone of such laws—the "worthy poor" concept, which confined poor relief to the "morally fit" indigent—is scarcely consistent with modern notions of social welfare.[39]

King v. Smith very likely signifies a new role for the Supreme Court in protecting the rights of welfare recipients, though it is of but small significance compared with the work yet to be done. The entire, complex system of social welfare needs to be reformed—"legalized"—by insuring recipients of their basic rights in a modern welfare state[40] and by guaranteeing them the procedural safeguards needed to assert those rights. Ideally, the reform should come from within, by administrative decision coupled with realistic welfare legislation and funding by Congress and the states. It is more likely, however, that in the interim it will fall to the courts to insure these rights—even though, as in *King*, their decisions may only implement already-existing administrative regulations.

[36] Interview with Clifton M. Craig, *supra* note 29; interview with Robert H. Ward, *supra* note 27.

[37] See BELL, *supra* note 1; Commissioner King, defendant in the *King* case, has another view: "[T]he mother has a choice in this situation to give up her pleasures or act like a woman ought to act and continue to receive aid. . . ." King v. Smith, 88 S. Ct. 2128, Append. Vol. I, 103 (1968).

[38] Brief for appellants at 32, King v. Smith, 88 S. Ct. 2128 (1968).

[39] For an extended discussion of the origins of poor relief and the evolution of the "worthy poor" concept, see BELL, *supra* note 1. There is another reason, perhaps more compelling to welfare administrators, for rejecting any "suitable home" provision: a rule allowing very much local discretion may well run afoul of the federal requirement that the state plan be uniformly administered by a single state agency whose rules, regulations, and standards are mandatory on local administrative authorities. *See* 42 U.S.C. § 602(a)(1), (3) (1964).

[40] While we would question any tendency to accept welfare dependency as a permanent condition of any group, it is both humane and necessary for the nation to take thought now for the 15 per cent of its citizens who would be reached by welfare reform.
The Christian Science Monitor, Sept. 4, 1968, at 16, col. 1.

Perhaps this reformation will come with an opinion as significant in the area of poverty law as *Brown v. Board of Education*[41] was in civil rights. *King v. Smith* is far from being that case. What is called for is something on the order of a decision insuring, as a right, a minimum standard of material comfort.[42]

C. FRANK GOLDSMITH, JR.

Torts—Recent Extensions in Builder-Vendor's Liability for Defects

For the buyer of a home who suffers injury or loss due to defective construction,[1] the traditional obstacle in a suit against the builder-vendor has been the ancient rule of caveat emptor,[2] that unless the vendee has a claim of fraud or of breach of expressed warranty, he takes the risk himself of quality and condition.[3] Today that rule is subject to broad and growing exceptions,[4] which threaten to replace it with implied warranty and a general duty of due care.

Some of these expanding areas are touched upon by a recent South Carolina case. In *Rogers v. Scyphers*,[5] the wife of the vendee of a new house sued the subdeveloper[6] for negligent construction and for negligent

[41] 347 U.S. 483 (1954).

[42] Or one implementing Professor Reich's "theory of entitlement" to welfare benefits; Professor Reich would elevate the receipt of public assistance, long regarded as a privilege, to the status of a legal right. Reich, *supra* note 34, at 1252.

[1] Construction is described as "defective" if it is faulty, or lacking something essential to its completeness, or not reasonably safe for its anticipated use. Galloway v. City of Winchester, 299 Ky. 87, 92, 184 S.W.2d 890, 893 (1944); Schipper v. Levitt & Sons, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); BLACK'S LAW DICTIONARY 506 (4th ed. 1951).

[2] *See, e.g.*, Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925), *overruled by* Belote v. Memphis Dev. Co. 208 Tenn. 434, 346 S.W.2d 441 (1961). *See generally* 55 AM. JUR. *Vendor and Purchaser* § 57 (1946); 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926A (3d ed. 1963).

[3] *See, e.g.*, State *ex. rel.* Jones Store Co. v. Shain, 352 Mo. 630, 634, 179 S.W.2d 19, 20 (1944), *overruled by* Morrow v. Caloric Appl. Corp., 372 S.W.2d 41 (Mo. 1963). See Note, *Right of Purchaser in Sale of Defective House*, 4 WEST. RES. L. REV. 357 (1953) for a survey of vendee's limitations fifteen years ago.

[4] *See* notes 8, 24, 25, 41 & 43 *infra*. *See generally* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541 (1961) [hereinafter cited as Bearman].

[5] — S.C. —, 161 S.E.2d 81 (1968).

[6] Mrs. Rogers sued the Industrial Life Insurance Company, which actually built the house, and Scyphers, who was president and principal stockholder in the company and was supervisor of the construction. The company conveyed the house to Scyphers, who sold it to Rogers. The court does not distinguish one defendant from the other. *Id.*

failure to disclose a latent danger. The complaint alleged that a fold-up attic stairway had been attached by merely hanging it in the molding, without any bolts or other secure fastenings. Mrs. Rogers used the stairway and was injured when it collapsed.

In affirming the sufficiency of the complaint, the Supreme Court of South Carolina held:

> [T]here was a duty on the defendants as builders to use reasonable care in the construction of the home to avoid unreasonable risk and danger to those who would normally be expected to occupy it, and a duty to disclose to the purchaser any dangerous condition of which they knew or *should have known,* in the exercise of reasonable care.[7]

The leading authority for the decision is a growing body of negligence law[8] reflected by 2 *Restatement (Second) of Torts* § 353 (1965), which subjects to liability a vendor who fails to disclose an unreasonably risky condition of which he knows or has reason to know.[9]

The most significant language of the court's opinion deals with the degree of knowledge of the defect that the vendor must have before liability will attach. The present *Restatement's* phrase that vendor "know or have reason to know"[10] of the defect is a distinct shift[11] from the first

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[7] — S.C. at —, 161 S.E.2d at 84 (emphasis added).

[8] Bray v. Cross, 98 Ga. App. 612, 106 S.E.2d 315 (1958), *criticized in* Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964); Derby v. Public Serv. Co., 100 N.H. 53, 119 A.2d 335 (1955); McCabe v. Cohen, 268 App. Div. 1064, 52 N.Y.S.2d 903, *aff'd per curiam,* 294 N.Y. 522, 63 N.E.2d 88 (1945); Waggoner v. Midwestern Dev. Co., — S.D. —, 154 N.W.2d 803 (1967); Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961); *see* note 11 *infra. Cf.* Farragher v. City of New York, 26 App. Div. 2d 494, 275 N.Y.S.2d 542 (1966); 2 RESTATEMENT (SECOND) OF TORTS § 353(2) (1965) [hereinafter cited as RESTATEMENT 2D]. *See generally* Annot., 8 A.L.R.2d 218 (1949).

[9] RESTATEMENT 2D § 353(1), *quoted in full in* Rogers v. Scyphers, — S.C. —,—, 161 S.E.2d 81, 83 (1968), states:

> A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
>
> (a) the vendee does not know or have reason to know of the condition or risk involved, and
>
> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

[10] RESTATEMENT 2D § 353(1)(b).

[11] *See* Caporaletti v. A-F Corp., 137 F. Supp. 14 (D.D.C. 1956), *commented on in* Bearman at 568; Belote v. Memphis Dev. Co., 208 Tenn. 434, 346 S.W.2d 441 (1961), *noted in* Note, *Liability of Vendor of Real Property,* 29 TENN. L. REV. 588 (1962). These cases, both of which cite 2 RESTATEMENT OF TORTS § 353(1) (1934), best demonstrate the change in judicial thinking that resulted in the "know or have reason to know" standard.

Restatement, which required actual knowledge.[12] *Rogers* took one further step and held that the vendor must disclose defects of which he "knew or should have known." This is not a meaningless change in words.[13] Although it is not clear whether the court recognized the importance of the phrase, the court clearly adopted a broader standard of negligence. "To have reason to know" means that the vendor possesses certain information that would lead a reasonable man to infer that the defect exists. That the vendor should disclose defects of which he knew or "should have known" implies that he is under a legal duty to use ordinary care to warn of any defect that a reasonable man would have perceived.[14] The threshold problem of vendor's knowledge is avoided, and defendant builder-vendor's conduct will be judged entirely by the reasonable man standard.[15] In practical terms, if the plaintiff's attorney cannot prove the defendant did have actual knowledge, he may rely on the jury's decision whether a reasonable man would have known of (or taken steps to discover) the defective condition.

This problem of the degree of knowledge vendor must have is analogous to the divergence of authority on the comparable point in the law of landlord and tenant.[16] Irrespective of any lease provisions about a duty to repair, the landlord will be responsible for any injury due to a latent

[12] 2 RESTATEMENT OF TORTS § 353(1) (1934). The early basis for holding a vendor liable for hidden defects was fraud. A vendor owed a duty to reveal facts of which he knew or had notice. *See, e.g.*, Herzog v. Capital Co., 27 Cal. 2d 349, 164 P.2d 8 (1945); Weikel v. Stearns, 142 Ky. 513, 134 S.W. 908 (1911); Mincy v. Crisler, 132 Miss. 223, 96 So. 162 (1923); Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960).

The only authority for § 353 of the first RESTATEMENT was dicta in Kilmer v. White, 254 N.Y. 64, 171 N.E. 908 (1930) and in Palmore v. Morris, Tasker & Co., 182 Pa. 82, 90, 37 A. 995, 999 (1897), according to W. PROSSER & Y. SMITH, CASES AND MATERIALS ON TORTS 540 n.3 (4th ed. 1967); however, *Kilmer* was itself based on the tentative draft of § 353, first RESTATEMENT.

[13] *Cf., e.g.*, State *ex. rel.* Bohen v. Feldstein, 207 Md. 20, 113 A.2d 100 (1955). The court sustained with leave to amend a demurrer to a complaint that alleged the lessor knew or should have known of the defect. The court said the complaint must allege that he knew or should have had reason to know.

[14] RESTATEMENT 2D § 12 & comment *a*. *See also id.* § 353, comment *c*.

[15] It is not clear whether a vendor would be under a duty to inspect his premises. A jury could decide that a reasonable man using ordinary care would not inspect under the circumstances. In a similar field of law, a landowner is under a general duty to use reasonable care to protect his invitees. Many courts have held that this means he must inspect in order to discover dangerous conditions. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.12 at 1487 (1956); W. PROSSER, THE LAW OF TORTS § 61, at 402-05 (3d ed. 1964).

[16] Some courts have criticized the analogy of the vendor's duty to the lessor's duty, arguing that the lessor and lessee have a continuing relationship, but the relationship between the vendor and the vendee terminates upon completion of the sale. *See* Sarnicandro v. Lake Dev., Inc., 55 N.J. Super. 475, 480, 151 A.2d 48, 51 (App. Div. 1959); Annot., 8 A.L.R.2d 218, 220 (1949).

defect in the premises at the time of letting, if the landlord in fact knew of the danger, and if the tenant did not.[17] Many courts will go farther, and impose liability if the landlord had some reason to believe or information to infer that the defect existed.[18] To complete the disarray, other jurisdictions, comparable to South Carolina in *Rogers*, ask only whether the landlord should have known of the defect.[19] Since this inconsistency in the older field of landlord's liability has not yet been resolved, it may persist in vendor-vendee law for some time.

The *Rogers* court did not extend its new standard to all of vendor-vendee law. Although the court broadened the scope of liability,[20] it limited that liability to builder-vendors. Because the non-building vendor is likely to be an ordinary citizen re-selling a used house, courts may be reluctant to abandon the "reason to know" standard of the *Restatement*.

In subjecting the builder-vendor to a duty of due care, the South Carolina court cited another group of cases that hold a building contractor responsible for his negligence.[21] *MacPherson v. Buick Motor Co.*[22] held that a chattel manufacturer may be liable to a third person for injury caused by the negligent manufacture of his product. Subsequently, courts applied the same rule to a contractor, that is, that he would be liable if his negligent work caused harm to a third person with whom he was not in privity, even after the contractee had accepted the work as satisfactory,[23] or had purchased the structure from the contractor.[24]

[17] Hendricks v. Socony Mobil Oil Co., 45 Ill. App. 2d 44, 195 N.E.2d 1 (1963); Taylor v. Geroff, 347 Ill. App. 55, 106 N.E.2d 210 (1952); Janis v. Jost, 412 S.W.2d 498 (Mo. 1967); Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (App. Div. 1953); Corcione v. Ruggieri, 87 R.I. 182, 139 A.2d 388 (1958). *Cf.* United States v. Inmon, 205 F.2d 681 (5th Cir. 1953).

[18] Brandt v. Yeager, — Del. —, 199 A.2d 768 (Super. Ct. 1964); State *ex rel.* Bohen v. Feldstein, 207 Md. 20, 113 A.2d 100 (1955); Johnson v. O'Brien, 258 Minn. 502, 105 N.W.2d 244 (1960); Meade v. Montrose, 173 Mo. App. 722, 160 S.W. 11 (1913); RESTATEMENT 2D § 358.

[19] Downs v. Powell, 215 Ga. 62, 108 S.E.2d 715 (1959); Harrill v. Sinclair Ref. Co., 225 N.C. 421, 35 S.E.2d 240 (1945) (dictum).

[20] *Cf.* Waggoner v. Midwestern Dev. Co., — S.D. —, —, 154 N.W.2d 803, 806 (1967) (dictum), which suggests that the standard be liability for defects of which a reasonable man (builder-vendor) would have known.

[21] — S. C. at —, 161 S.E.2d at 83.

[22] 217 N.Y. 382, 111 N.E. 1050 (1916). *See* RESTATEMENT 2D § 395.

[23] Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956); Dow v. Holly Mfg. Co., 49 Cal. 2d 720, 321 P.2d 736 (1958); Inman v. Binghamton Housing Auth., 1 App. Div. 2d 559, 152 N.Y.S.2d 79 (1956), *rev'd on other grounds*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957); Strakos v. Gehring, 360 S.W.2d 787 (Tex. 1962); RESTATEMENT 2D § 385. *Cf.* Stewart v. Cox, 55 Cal. 2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961). *Contra*, Clyde v. Sumerel, 233 S.C. 228, 104 S.E.2d 392 (1958).

[24] Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Leigh v. Wadsworth, 361 P.2d 849 (Okla. 1961).

If caveat emptor would be no defense in an action by an injured third party against a builder-vendor, then neither should it be an obstacle to the contractee-vendee. Like other cases before it,[25] *Rogers* held that the builder-vendor[26] owed the same duty to his vendee that he would owe to a foreseeable third party. The court thus places liability upon the subdeveloper in his role both as a vendor and as a builder.

One serious limitation to recovery, which is reiterated in *Rogers*,[27] is that liability will arise only for those defects that are latent or concealed. The rule that a producer is under no duty to safeguard against an obvious danger is widely applied in the field of negligent manufacture of chattel,[28] and has been carried over into cases of lessor's[29] or vendor's[30] failure to disclose defects.

Problems appear with the latent defect rule when a court fails to distinguish between an obvious defective physical condition and the risks inherent in that condition.[31] The lack of a safety cab atop an earthmover is certainly obvious, but how obvious is the risk that the uplifted shovel will fall backwards and crush the operator?[32] Trial courts limit the jury

[25] Sabella v. Wisler, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963); Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961). *See also* Brown, *Building Contractor's Liability After Completion and Acceptance*, 16 CLEV.-MAR. L. REV. 193 (1967).

[26] *Cf.* Connor v. Conejo Valley Dev. Co., 253 Cal. App. 2d —, 61 Cal. Rptr. 333 (Dist. Ct. App. 1967), which held that the financier (a savings and loan association) of the subdeveloper owed a duty of due care to the ultimate home purchaser. He could be found to have breached that duty by negligently backing an inexperienced subdeveloper.

[27] — S. C. at —, 161 S.E.2d at 85.

[28] Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir. 1959); Standard Conveyor Co. v. Scott, 221 F.2d 460 (8th Cir. 1955); Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S.W.2d 217 (1945); Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965); Tyson v. Long Mfg. Co., 249 N.C. 557, 107 S.E.2d 170 (1959); Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950); Parker v. Heasler Plumb. & Heat. Co., 388 P.2d 516 (Wyo. 1964).

[29] Kearns v. Smith, 55 Cal. App. 2d 535, 131 P.2d 36 (Dist. Ct. App. 1942); Brandt v. Yeager, — Del. —, 199 A.2d 768, (Super. Ct. 1964); Downs v. Powell, 215 Ga. 62, 108 S.E.2d 715 (1959); Janis v. Jost, 412 S.W.2d 498 (Mo. 1967); Harrill v. Sinclair Ref. Co., 225 N.C. 421, 35 S.E.2d 240 (1945). *Cf.* United States v. Inmon, 205 F.2d 681 (5th Cir. 1953).

[30] Fisher v. Simon, 15 Wis. 2d 207, 213, 112 N.W.2d 705, 709 (1961) (dictum); *cf.* Inman v. Binghamton Housing Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (building contractor).

[31] *See, e.g.*, Meade v. Montrose, 173 Mo. App. 722, 160 S.W. 11 (1913) (roof poles too weak to support the roof were an obvious defect); Harrill v. Sinclair Ref. Co., 225 N.C. 421, 35 S.E.2d 240 (1945) (The difficulty in raising an overhead door was obvious, even if the faulty construction, which would cause the door to fall, was not.).

[32] Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir. 1959) (held an obvious danger), *criticized in* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 837-39 (1962).

function by citing a lack of evidence of a *latent* defect[33] and then dismissing the case on the ground that the defendant owed the plaintiff no duty.[34]

A new approach to the latent defect rule has been taken in the case of *Totten v. Gruzen*,[35] in which the minor son of a tenant sued the builder of the apartment for negligently exposing a steam pipe. The infant became entangled with the pipe in his own bedroom and was severely burned. The court refused to follow a strict latency rule, holding instead that the obviousness of a defect is only one factor in the jury's determination of the defendant's negligence, and not an insurmountable barrier to recovery. The defendant's creation of a highly visible defect may still create an unreasonable risk.[36] This recent decision assuages the harsher aspects of the latency requirement, and restores to the jury its freedom to judge the defendant's conduct by a reasonable man standard.

Yet if *Totten* signals an abandonment of "latent defect," tort liability will not have advanced far.[37] A vendee injured by an obvious danger will likely be faced with the defenses of contributory negligence or assumption of the risk.[38] If a vendor warns his vendee of an otherwise latent defect, but an unwarned third person is nonetheless injured, the patency created by the warning may not permit the judge to dismiss because of the absence of a duty, but the warning will perhaps cause the jury to find the vendor not to be negligent.[39]

The law of negligence has not been the only field in which the builder-vendor's liability has grown. Recent years have featured widespread imposition of strict liability upon manufacturers for injuries to the ultimate consumer caused by defective products. The courts imply a war-

[33] *See, e.g.*, Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S.W.2d 217 (1945). In affirming a non-suit, the court held that any reasonable person would have realized the unusually high risk of flammability of a "Fuzzy Wuzzy" lounging robe.

[34] If the case should get to the jury, the defendant would of course have the advantage of the defenses of contributory negligence and assumption of risk. It is suggested that the hesitancy of juries to reach a defendant's verdict based on one of these defenses is a strong influence in the retention of the latency rule. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 837 (1962). Some courts compromise the problem by submitting to the jury the issue of whether there was latent defect. *See, e.g.*, Couch v. Pacific Gas & Elec. Co., 80 Cal. App. 2d 857, 183 P.2d 91 (Dist. Ct. App. 1947).

[35] 52 N.J. 202, 245 A.2d 1 (1968).

[36] This holding was suggested in Schipper v. Levitt & Sons, 44 N.J. 70, 87, 207 A.2d 314, 323 (1965).

[37] RESTATEMENT 2D does not speak in terms of latent defect, but still manages adequately to define liability. See §§ 351-56, 358, 402A.

[38] See note 34 *supra*.

[39] *See generally* W. PROSSER, THE LAW OF TORTS § 33, at 179-81 (3d ed. 1964).

ranty that the product is safe for its intended use.[40] *Schipper v. Levitt & Sons*[41] moved the law into the home construction industry.[42] It broke through the traditional distinction between realty and chattel, and asserted that mass production of housing should be treated like mass production of personal products. The buyer of a home may rely on an implied warranty that his house was built in a workmanlike manner and is suitable for habitation.[43] The South Carolina court in *Rogers* recognizes that implied warranty is the modern trend and (as dictum) cites favorably the leading cases.[44]

Implied warranty theory transcends problems of the vendor's knowledge of a defect. Liability is imposed without fault and without regard to a judgment upon the defendant's conduct. It is, nevertheless, the contrast between the inexperience of the typical home buyer and the knowledge and training of the builder-vendor that allows the former to rely on the latter by way of implied warranty.[45] Liability does not pivot on whether the builder-vendor should have known of a defect, but rather upon the vendee's reliance on the builder-vendor's skill to build a house fit for habitation.

In order to recover on strict liability, the plaintiff must still prove a defective condition.[46] The home buyer may feel that his new purchase

[40] Henningsen v. Bloomfield Mtrs., Inc., 32 N.J. 358, 161 A.2d 69 (1960); *cf.* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); RESTATEMENT 2D § 402A. *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[41] 44 N.J. 70, 207 A.2d 314 (1965), *noted in* Note, *Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236 (1965).

[42] Implied warranty already had a foothold. Several courts had held there to be an implied warranty of fitness when the purchaser bought his house while the builder-vendor was in the process of erecting it, but not after the house was completed. Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Bldrs., Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958); Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390 (C.A.). *But see* Carpenter v. Donohoe, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964), which refutes this distinction as unreasonable.

[43] *Accord*, Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Waggoner v. Midwestern Dev. Co., — S.D. —, 154 N.W.2d 803 (1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

[44] — S.C. at —, 161 S.E.2d at 83.

[45] Bethlahmy v. Bechtel, 91 Idaho 55, 62, 415 P.2d 698, 705 (1966); Schipper v. Levitt & Sons, 44 N.J. 70, 91, 207 A.2d 314, 325 (1965); Waggoner v. Midwestern Dev. Co., — S.D. —, —, 154 N.W.2d 803, 807 (1967). *Cf.* Bearman 574.

[46] Markwell v. General Tire & Rubber Co., 367 F.2d 748 (7th Cir. 1966); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Schipper v. Levitt & Sons, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); Levy v. C. Young Constr. Co., 26 N.J. 330, 139 A.2d 738 (1958); Annot., 13 A.L.R.3d 1057, 1078-79 (1967). *But cf.* Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 858, 32 Cal. Rptr. 754, 757 (Dist. Ct. App. 1963).

is generally unsatisfactory,[47] but he may only win damages for harm caused by workmanship unfit for the anticipated use. The defendant will be held to the standard of normal, safe construction, not to the standard of perfection.[48]

Strict liability based upon implied warranty has not yet been extended beyond the builder-vendor. The vendor who resells an old house (and who may be liable under *Restatement* § 353) stands usually on the same level as the vendee himself and cannot be analogized to the manufacturer. Courts may be hesitant also to impose strict liability upon the ordinary building contractor, because he is selling his services but not selling any goods.[49]

Although the law of builder-vendor's liability is now in a fluid state, its broad direction is evident. Special protections for the defendant are being replaced by obligations comparable to those of a supplier of chattel or of a negligent building contractor. For the individual who is injured by defective construction, the field of builder-vendor's liability offers new potential for recovery.

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Trade Regulations—Robinson-Patman Act Section 2(d)—Promotional Allowances

The Robinson-Patman Act[1] has been labeled a "masterpiece of obscurity," "prolix and perplexing," and a "hodgepodge of confusion and inconsistency."[2] As predicted,[3] the Federal Trade Commission and the

[47] One wag stated, "Today's buyers do not understand that when you buy a $10,000 house, you just can't expect gold doorknobs." Bearman 573 n.143.

[48] Schipper v. Levitt & Sons, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); Waggoner v. Midwestern Dev. Co., — S.D. —, —, 154 N.W.2d 803, 809 (1967).

[49] RESTATEMENT 2D § 402A & comment *f*; *cf.* Koenig v. Milwaukee Blood Center, 23 Wis. 2d 324, 127 N.W.2d 50 (1964). *But see* Totten v. Gruzen, 52 N.J. 202, —, 245 A.2d 1, 5 (1968), which refused to deny that strict liability would be applied to building contractors.

[1] 15 U.S.C. §§ 13, 13a-c, 21a (1964).

[2] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 19, 535 & n.4 (1962, Supp. 1964) [hereinafter cited as ROWE]. "In the end, the political process of pressure, counterpressure and compromise created a cryptic and sloppy legislative enactment, whose ineptitudes and solecisms opened up more legal questions than they closed." *Id.* at 535.

[3] Representative Celler, during debate of the proposed Act in the House of Representatives, predicted: "[T]he courts will have the devil's own job to unravel the tangle. . . . You will have the herculean task to make it yield sense." 80 CONG. REC. 9419 (1936).

courts have had a "herculean task" in attempting to make the Act yield sense.[4] In *FTC v. Fred Meyer, Inc.*[5] the Supreme Court clarified a key provision of the Act by defining the scope of the term "customer" in section 2(d).[6] It is the purpose of this note to examine the history of the case, to point out the difficulties suppliers will face in complying with the Court's decision, and to speculate as to the effect of the decision on other sections of the Robinson-Patman Act.

Fred Meyer, Inc. is the operator of a chain of thirteen supermarkets in the Portland, Oregon area. One of Meyer's principal sales promotional activities has been an annual four-week promotional campaign based on the distribution of coupon books in the Meyer stores. The coupon books consists of approximately seventy-two pages or coupons with each page featuring a product which, upon surrender of the appropriate coupon-page, is sold at a reduced price by the Meyer store. The public can obtain coupon books for ten cents each and can realize savings of up to one-third on each featured item. In addition to the nominal sum paid by the public to obtain the coupon books, Meyer finances the promotional campaign by charging the suppliers (from whom Meyer buys directly) of each featured product at least 350 dollars per coupon-page of advertising. Moreover, some of the suppliers contribute further to the financing of the campaign by replacing at no cost a percentage of the goods sold by Meyer during the campaign or by redeeming coupons in cash at an agreed rate.

The FTC found that Meyer's promotional campaign, as conducted in the years 1956 through 1958, violated section 2(d) of the Robinson-Patman Act because the 350 dollars paid by four of the participating suppliers for advertising in Meyer's coupon books represented promotional allowances which were not made available on proportionally equal terms to competing customers of Meyer.[7] However, section 2(d) applies

[4] *See, e.g.*, ROWE at 20.

[5] 390 U.S. 341 (1968).

[6] 15 U.S.C. § 13(d) (1964) provides:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[7] The FTC also found that section 2(a) of the Act was violated in that the free replacement of goods and coupon redemptions by some of the participating

only to sellers and in order to charge Meyer with a violation the Commission had to resort to section 5(a)[8] of the Federal Trade Commission Act, which makes unfair methods of competition in commerce illegal and empowers the FTC to prevent the use of such unfair methods of competition.[9] The Commission thus found that Meyer had violated section 5(a) of the Federal Trade Commission Act by knowingly inducing its suppliers to grant promotional allowances prohibited by section 2(d) of the Robinson-Patman Act.[10]

In finding a violation of section 2(d), the FTC held that the participating suppliers, having chosen to grant promotional allowances to Meyer who bought from them directly, should have made promotional allowances available on proportionally equal terms to those wholesalers who sell to retailers in competition with the Meyer stores.[11] Meyer argued, on the other hand, that wholesalers were not entitled to promotional allowances on proportionally equal terms because they were not "competing" with the Meyer stores within the meaning of section 2(d). Meyer argued further that retailers buying through wholesalers were not entitled to promotional allowances on proportionally equal terms, regardless of their competition with the Meyer stores, because they were not "customers" of the suppliers within the meaning of section 2(d). Following this line of reasoning, only those retailers who buy directly from the suppliers and are also in competition with the Meyer stores are entitled to promotional allowances on proportionally equal terms. The Commission found this conclusion "startling" and in total conflict with the objectives of the Robinson-Patman Act to protect independent retailers from the "chains' " ability to exact discriminatory concessions from suppliers.[12]

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suppliers constituted price discrimination prohibited by that section. The Commission, therefore, found Meyer to be in violation of section 2(f) of the Act which prohibits any person from knowingly inducing a price discrimination forbidden by section 2(a). [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 at 21,206 (FTC 1963). It is beyond the scope of this note to examine the violation of section 2(a) and thus the violation of section 2(f).

[8] 15 U.S.C. § 45(a) (1964).

[9] See Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962), where it was first held that a buyer's participation in transactions prohibited by section 2(d) of the Robinson-Patman Act is reachable under section 5(a) of the Federal Trade Commission Act.

[10] [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 at 21,206 (FTC 1963).

[11] *Id.* at 21,216-17.

[12] *Id.* at 21,214-16. The Commission observed:

> Thus, in a geographical market served by, say, two direct-buying "chains," and one wholesaler with 100 retailer-customers, a supplier who gave a

The FTC was still confronted with the contention that those wholesalers who sold to Meyer's retail competitors were not in fact competing with Meyer and thus not entitled to promotional allowances on proportionally equal terms. The Commission answered this contention by pointing to the language of the statute. "[T]he statute speaks of competition in the 'distribution' of the products, not merely of competition in their 'resale.' These wholesalers, through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after."[13] The Commission thus believed that the independent retailer could best be protected by requiring suppliers to make promotional allowances available to wholesalers who would presumably pass them on to their retailer customers or use them for the benefit of those customers.[14]

On appeal the court of appeals agreed with Meyer's interpretation of "customers competing" in section 2(d) and reversed the Commission.[15]

The Supreme Court in granting the Commission's petition for certiorari limited its review to the question "[w]hether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who sells to retailers competing with the direct buying retailer violates Section 2(d) of the Robinson-Patman Act."[16] The court agreed with the Commission in holding that the interpretation of "customers competing" in section 2(d) urged by Meyer was wholly untenable,[17] but it concluded that Meyer's retail competitors, rather than the wholesalers who sell to the retailers, were competing customers within the meaning of section 2(d) and thus

promotional allowance to Chain A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who . . . need its protection very badly indeed.

Id. at 21,214.

[13] *Id.* at 21,215.

[14] *Id.* Commissioner Elman, while agreeing that Meyer's promotional activities constituted violations of the Robinson-Patman Act, disagreed with respect to what made the practice illegal. He took the position that the suppliers should have made promotional allowances available directly to Meyer's retail competitors. Requiring the allowances to be made available to wholesalers whose customers compete with Meyer, he reasoned, would in no way insure that Meyer's retail competitors will receive the protection that the Act intended them to have. *Id.* at 21,231-32.

[15] 359 F.2d 351, 362-63 (9th Cir. 1966).

[16] 386 U.S. 907 (1967).

[17] 390 U.S. at 349.

entitled to promotional allowances on proportionally equal terms.[18] Starting with the proposition that "the Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power,"[19] the Court undertook a review of the legislative history surrounding the enactment of section 2(d). The Court concluded that section 2(d) was aimed at a form of indirect price discrimination which resulted from the "chains" being able to command large promotional allowances from their suppliers while the small independent competitors of these "chains" were in no position to command such allowances. These allowances enabled the "chains" to shift part of their advertising costs to their suppliers while the smaller competitors could not.[20]

While recognizing that legislative history is inconclusive with respect to the meaning of "customer" in section 2(d), the Court found that its definition of customer "to include retailers who purchase through wholesalers and compete with direct buyers" was necessary to prevent anomalous results. "If we were to read 'customer' as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class."[21]

In rejecting the Commission's findings that wholesalers who sold to retail competitors of Meyer are competing customers within the meaning of section 2(d), the Court held that the Commission's definition of competition was too broad. Once again the Court found legislative history to be inconclusive, but concluded that it does "strongly suggest that the competition with which Congress was concerned in 2(d) was that between buyers who competed in resales of the supplier's products."[22] Moreover, the Court pointed to section 2(a) of the Robinson-

[18] *Id.* at 352.

[19] *Id.* at 349, *quoting* FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960).

[20] 390 U.S. at 350-51.

[21] *Id.* at 352.

> On the one hand, direct-buying retailers like Meyer, who resell large quantities of their suppliers' products and therefore find it feasible to undertake the traditional wholesaling functions for themselves, would be protected. . . . On the other hand, smaller retailers whose only access to suppliers is through independent wholesalers would not be entitled to this protection. Such a result would be diametrically opposed to Congress' clearly stated intent. . . .

Id.

[22] *Id.* at 355-56. "While it cannot be doubted that Congress reasonably could have employed such a broad concept of competition in § 2(d), we do not believe that the use of the word 'distribution' rather than 'resale' is a clear indication that it did, . . ." *Id.* at 356.

Patman Act and its broad definition of competition[23] as evidence that Congress did not intend competition in section 2(d) to have such a broad scope. "When Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms."[24]

As indicated above the *Fred Meyer* decision answers important questions concerning section 2(d) of the Robinson-Patman Act. It is well known that the Robinson-Patman Act grew out of a fear, widespread during the 1930's, that the independent retailer was about to be swallowed up by the large "chain" stores.[25] An investigation ordered by Congress revealed that the "chains" by virtue of their greater purchasing power could exact concessions from their suppliers which the independent retailers could not obtain.[26] Among these concessions were large allowances for advertising and other sales promotional activities.[27] The investigation also revealed that these concessions were wholly beyond the reach of existing antitrust laws.[28] Congress attacked this type of discrimination by providing in sections 2(d) and 2(e)[29] of the Robinson-Patman Act that any services or facilities[30] or payment in consider-

[23] Section 2(a) prohibits price discrimination that may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

[24] 390 U.S. at 356-57.

[25] *See, e.g.*, ROWE at 3-14. Appearing before the House Judiciary Committee, Representative Patman stated:

> I believe it is the opinion of everyone who has studied this subject, that the day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive. . . . So we have reached the crossroads; we must either turn the food and grocery business of this country . . . over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and saved it in time of war, an opportunity to exist. . . .

Hearings on H.R. 8442, 4495, 5062 *Before the House Comm. on the Judiciary*, 74th Cong., 1st Sess. 5-6 (1935).

[26] FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st Sess. 57-65 (1935).

[27] *Id.* at 44-46, 61.

[28] *Id.* at 63-65.

[29] 15 U.S.C. § 13(e) (1964) provides:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

[30] See FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240.5 (1968), for examples of services and facilities covered by sections 2(d) and 2(e).

ation of such services or facilities cannot be granted to one customer or purchaser unless made available to all competing customers or purchasers on proportionally equal terms.[31]

Section 2(d) applies to the situation where payments are made to a customer and the customer himself furnishes the services or facilities in connection with the distribution of the supplier's products. Section 2(e) applies to the situation where services or facilities are furnished directly to the customer.[32] The application of these two sections is relatively simple when a supplier is dealing with customers on the same functional level. However, complex problems arise when a supplier deals with customers on different functional levels, such as direct-buying retailers and wholesalers. As the Supreme Court pointed out in *Meyer*, the Robinson-Patman Act was intended to prevent a supplier from granting discriminatory promotional allowances such as those granted to Meyer.[33] However, prior to the *Meyer* decision the language of section 2(d), specifically the phrase "customers competing," presented an obstacle to the FTC and to the courts in barring such allowances when the supplier was dealing with customers on different functional levels.

One device that might have been used to combat the discriminatory granting of promotional allowances to direct-buying retailers by suppliers dealing on different functional levels was the "indirect purchaser doctrine," whereby a retailer buying the supplier's product through a wholesaler is nevertheless treated as the supplier's customer.[34] In

[31] Although there are several semantic disparities in sections 2(d) and 2(e), the courts have generally interpreted the two sections as being two sides of the same coin. *See, e.g.*, Exquisite Form Bra., Inc. v. FTC, 301 F.2d 499, 502 (D.C. Cir. 1961).

[32] See ROWE at 373-76 for examples of typical arrangements subject to sections 2(d) and 2(e).

[33] 390 U.S. at 352.

[34] For a discussion of the doctrine see ROWE at 57-59, 398-99. Formulated by the FTC, the indirect purchaser doctrine "treats as the supplier's own customers, in contemplation of the law, the accounts of his [the supplier's] distributors whose autonomy he has supplanted by his own activities." *Id.* at 57. *But see* Klein v. Lionel Corp., 237 F.2d 13, 15 (3d Cir. 1956), where the validity of the doctrine has been questioned, at least with respect to treble-damage actions. The doctrine has evidently not been used in the situation where a supplier, dealing on different functional levels, grants discriminatory promotional allowances to a direct-buying retailer. However, its applicability in such a situation was recognized in Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 709-10 (9th Cir. 1964). The indirect purchaser doctrine has normally been used in connection with section 2(d) when a supplier, whose products are distributed exclusively by wholesalers, grants promotional allowances to certain of its indirect-buying retailers while not making such allowances available to the indirect-buying competitors of the favored retailers. If the doctrine is applicable, then all indirect-buying retailers

order for this doctrine to be applicable there must be some kind of direct-dealing between the supplier and the indirect purchaser.[35] In the *Meyer* case, for example, the court of appeals found no evidence of direct-dealing between the suppliers participating in Meyer's promotional scheme and those of Meyer's competitors who bought the suppliers' products through wholesalers. Finding the "indirect purchaser doctrine" inapplicable, the court held there was no violation of section 2(d).[36] Another device available to the Commission was to include in appropriate cease and desist orders a ban on the granting of discriminatory promotional allowances to direct-buying retailers by suppliers dealing on different functional levels.[37] When confronted with a case in which discriminatory promotional allowances were granted to a direct-buying retailer, the FTC wavered as to the proper application of section 2(d). In the *Atalanta Trading Corp.* case,[38] the Commission held that promotional payments to a direct-buying retail "chain" did not require that similar payments be made available to wholesalers whose retail customers competed with the "chain." In the later *Liggett & Myers* decision,[39] the FTC was divided on the question. Although a majority of the Commission refused to decide the issue because they felt there was insufficient evidence to raise it,[40] the dissenting opinion, following the reasoning of a district

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are "customers" within the meaning of section 2(d) and thus entitled to the protection of that section. See American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir. 1962). The *Fred Meyer* decision would seem to obviate the need to resort to the doctrine in this situaion.

[35] *E.g.*, American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962). The doctrine was invoked where the supplier controlled retail prices and negotiated directly with the indirect-buying retailers.

[36] 359 F.2d at 362-63.

[37] See FTC v. Elizabeth Arden, 39 F.T.C. 288 (1944), *aff'd*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947), a case involving section 2(e), where the FTC issued a cease and desist order directing Arden to restrain from discriminating among competing purchasers of its product by furnishing cosmetic demonstrators "to any retailer purchasing their products when such services are not accorded on proportionally equal terms to . . . other retail purchasers who in fact resell such products in competition with retailers who receive such services." 39 F.T.C. at 305. Some commentators interpreted the *Elizabeth Arden* decision as meaning that "purchaser" in section 2(e) includes not only those purchasers buying directly from the supplier but also those purchasers who buy the supplier's products through independent wholesalers. This view was adopted by Commissioner Elman in his *Fred Meyer* dissenting opinion. [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 at 21,231 (FTC 1963). Other commentators and courts interpreted the decision as merely a recognition by the court of the "indirect purchaser doctrine" since Arden was dealing directly with the retailers involved.

[38] 53 F.T.C. 565, 566, 573 (1956) (by implication).

[39] 56 F.T.C. 215 (1959).

[40] *Id.* at 250-52.

court decision,[41] stated that where promotional payments are made to a direct-buying retail "chain," comparable payments must be made available to wholesalers whose customers compete with the direct-buying "chain."[42] The *Liggett & Myers* dissenting opinion became the view of the Commission in *Fred Meyer*.

Numerous difficulties confront the supplier in complying with the dictates of the *Meyer* decision. If a supplier desires to undertake the financing of a retailer-oriented promotional plan, he has the responsibility of making the plan available to all competing customers, both direct-buying and indirect-buying (buying through wholesalers) customers, on proportionally equal terms. This responsibility involves a duty to inform all competing customers of the existence of the plan, its terms, and the availability of any alternative plans.[43] Informing those retailers to whom he sells directly presents no problem to the supplier. However, informing those retailers who buy through wholesalers presents a formidable problem. The supplier may be able to utilize his wholesalers to inform the indirect-buying retailers. However, the Court in *Fred Meyer* made it clear that the responsibility remains on the supplier to see that all competing customers are informed of the availability of the plan.[44] Thus the supplier may be unable to utilize his wholesalers to discharge his duty to inform because he knows them to be unreliable. The supplier himself might undertake to inform the indirect-buying retailers of the availability of the plan, but such an undertaking would also require reliable, cooperative wholesalers to identify those retailers who buy the supplier's products. If the supplier is unable to obtain the co-operation of his wholesalers, then he must inform the indirect-buying retailers by some other means. The FTC's Proposed Guides suggest that the supplier might publicize his promotional plan in trade publications or in advertising brochures.[45] However, the supplier cannot be certain that all retailers entitled to be informed of the plan will have access to such publications and brochures. Another suggested

[41] Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230, 236 (D.N.J. 1956).

[42] 56 F.T.C. at 253-57.

[43] See Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 485 (2d Cir. 1962); FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. 240.8 (1968); proposed amendments to FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 33 Fed. Reg. 10615, 10617-18 (1968).

[44] 390 U.S. at 358.

[45] See proposed amendments to FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 33 Fed. Reg. 10615, 10618 (1968).

means of informing indirect-buying retailers of the availability of a promotional plan is to print the offer on shipping containers or to pack "fliers" describing the plan in the containers,[46] and this appears to be the best means for the supplier to be assured that its duty to inform has been discharged.[47]

Another problem confronting the supplier is the task of formulating a flexible promotional plan so that all competing customers can participate. A plan designed to suit the needs and capabilities of certain retailers may be unsuitable to the needs and capabilities of others. Providing a flexible plan in which all competing customers can participate has always been a requirement of section 2(d),[48] but the task now involves a greater burden since the competing customers entitled to participate under *Fred Meyer* are likely to be more multifarious than before—from the nation-wide "chain" store to the neighborhood grocery store, from the large discount department store to the small town novelty store.

The *Meyer* decision also complicates the supplier's obligation under section 2(d) to make promotional payments in consideration for services or facilities available on proportionally equal terms. This requirement that payments be made on proportionally equal terms is often satisfied by proportioning payments according to the number of units of supplier's products purchased by each customer over a certain period of time or according to the dollar volume representing each customer's purchases. Therefore, in order to use the number of units sold or dollar volume as a basis for proportioning payments among indirect-buying retailers, the supplier must have access to his wholesalers' records. Thus, once again the supplier is placed at the mercy of his wholesalers.[49]

In light of these difficult problems, the supplier may desire to turn over a large portion of the administration of his retail-oriented promotional plans to his wholesalers and compensate them to administer the plan with respect to the indirect-buying retailers entitled to participate.[50] Once again, the supplier remains ultimately responsible for

[46] *Id.*

[47] However, many suppliers believe that informing indirect-buying retailers of the availability of promotional plans by these means is impractical. Most promotional plans are short term, and since the supplier has no way of controlling the distribution of the cases containing information of the plan, retailers will be receiving the cases long before the promotion and long after the promotion.

[48] See FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240.9 (1968).

[49] *See* BNA ANTITRUST & TRADE REG. REPORT No. 357 at B-3 (May 14, 1968).

[50] The Court specifically stated in *Fred Meyer* that a supplier may utilize its

seeing that the plan is properly administered and "[s]ome manufacturers consider their independent wholesalers much too apathetic about retailer-advertising assistance to be counted on for a vital role in administration of a cooperative-advertising program."[51] With so many problems confronting him in complying with the *Fred Meyer* decision, the supplier may choose to discontinue entirely retailer-oriented promotional activities and to concentrate, instead, on conducting such activities exclusively on a regional or nation-wide basis.

While the Supreme Court's *Fred Meyer* decision deals only with section 2(d) of the Robinson-Patman Act, the repercussions of the decision may very well affect other sections of the Act. The decision's most direct effect will be on section 2(e) where the term "purchaser" will almost certainly be interpreted coextensively with the Court's interpretation of "customer" in section 2(d).[52]

Another more far-reaching consequence of the *Meyer* decision may be its effect on section 2(a)[53] of the Robinson-Patman Act. In cases involving the Act there is a great deal of language indicating that the terms "customer" and "purchaser" in sections 2(a), (d), and (e) should be interpreted to have the same meaning.[54] Thus, it is arguable that "purchaser" in section 2(a) should now be interpreted to include not only those purchasers who buy directly from the supplier but also those purchasers who obtain the supplier's products from a direct-buying purchaser. If this interpretation is accepted, then the scope of section 2(a)

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wholesalers "to distribute payments or administer a promotional program." 390 U.S. at 358.

[51] BNA ANTITRUST & TRADE REG. REPORT No. 357 at B-3 (May 14, 1968). Furthermore, Mr. Justice Harlan, dissenting in *Fred Meyer*, states that "the supplier could deal through his wholesalers, imposing restrictions on them to guarantee that an 'allowance' is actually passed through to retailers, only by running afoul of the Sherman Act." 390 U.S. at 361.

[52] *See* proposed amendments to FTC Guides for Advertising and Other Merchandising Payments and Services, 33 Fed. Reg. 10615, 10616 (1968); note 31 *supra*.

[53] 15 U.S.C. § 13(a) (1964) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

[54] *E.g.*, "The term 'customer' in § 2(d) should be given the same meaning as 'purchaser' in § 2(a) and (e) in order to harmonize parallel sections of a statute aimed at a common purpose." American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir. 1962).

is greatly expanded. For example, in one typical situation the supplier sells both to wholesalers who in turn sell to retailers and to direct-buying retailers. Employing a functional discount schedule, the supplier charges the same price to both his wholesalers and his direct-buying retailer customers. The result of this distribution system is that the direct-buying retailer is able to sell the supplier's products at lower prices than his retail competitor who buys the supplier's products through wholesalers, resulting in competitive injury within the meaning of section 2(a). However, it has been held that there is no violation of section 2(a) because there is but one price and that price is paid by all purchasers. Thus, there is no discrimination in price between different purchasers—those purchasers being the wholesaler and the direct-buying retailer.[55] But if retailers buying through wholesalers are "customers" for the purpose of section 2(d), it can be argued that they are "purchasers" for the purposes of section 2(a). Therefore, in addition to competitive injury within the meaning of section 2(a), there are two prices, the price paid by the direct-buying retailer to the supplier and the inevitably higher price paid by the indirect-buying retailer to the wholesaler, resulting in discrimination between different purchasers—those purchasers being the direct-buying retailer and the indirect-buying retailer. If such an application of section 2(a) is correct, it seems likely that suppliers will discontinue their use of functional discounts and will begin to employ quantity discounts exclusively, effectuating this policy by refusing to sell in small lots. Under this type of discount schedule it would be possible for retailers buying through wholesalers to obtain a supplier's products at lower prices than their retailer competitors who buy directly from the supplier.

Because it would so greatly expand the scope of section 2(a), the above application of the *Fred Meyer* decision may not be accepted. However, the decision has another potential effect on section 2(a). It is possible that in complying with the *Meyer* decision a supplier's collaboration with his wholesalers or indirect-buying retailers to insure that promotional allowances are made available to all competing customers on proportionally equal terms might reach such a point that under the "indirect purchaser doctrine" the indirect-buying retailers would be con-

[55] Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 353-54 (E.D.N.Y. 1960); Klein v. Lionel Corp., 138 F. Supp. 560, 565-66 (D. Del. 1956); Bird & Son, 25 F.T.C. 548, 553 (1937). *Cf.* FTC. v. Morton Salt Co., 334 U.S. 37, 55 (1948); Guyott Co. v. Texaco, Inc., 261 F. Supp. 942, 950-51 (D. Conn. 1966).

sidered the supplier's own customers.[56] In that case the indirect-buying retailers would be entitled, under section 2(a), to purchase the supplier's products at the same price as their direct-buying retail competitors.

The *Fred Meyer* result is sound in light of the legislative history of the Robinson-Patman Act. It is at least arguable however that the benefit that will be realized by the small retailer buying suppliers' products through wholesalers is at most minimal and does not justify the predicament in which suppliers now find themselves. If suppliers decide to continue retail-oriented promotional plans, the cost of administering such plans is likely to be substantially increased because of the new requirements imposed by the *Meyer* decision. Furthermore, the suppliers' higher cost will then be passed on in the form of higher product prices which will ultimately be borne by the consumer. In addition, a number of suppliers believe that many small indirect-buying retailers who buy in one or two case lots will not take advantage of the promotional allowances made available to them, because of the red tape they will encounter in collecting the small payments to which they are entitled. However, if small indirect-buying retailers band together and act jointly to collect the payments to which they are entitled, then the potential benefit to these retailers may be substantial.

To be extricated from the precarious position in which they now find themselves, suppliers will have to turn to Congress for relief in the form of amendments to the Robinson-Patman Act. Realistically, however, it is doubtful that the *Meyer* decision will precipitate congressional action. Therefore, suppliers can only hope that the FTC will issue a definitive set of guidelines to aid them in complying with the *Meyer* decision. No set of guidelines can possibly be expected to cover every situation and, consequently, an increased reliance on FTC advisory opinions is likely. Further complicating the suppliers' dilemma is the FTC's relative inactivity recently in the Robinson-Patman area.[57] "Therefore, it may be that the most substantial immediate hazard for suppliers who stray from the narrow path of proportional equality is treble-damage liability in private civil actions."[58]

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[56] See note 34 *supra.*

[57] During the period from May 1967 to May 1968 the FTC filed only three complaints under the Robinson-Patman Act. BNA ANTITRUST & TRADE REG. REPORT No. 357 at B-4 (May 14, 1968).

[58] *Id.*

Uniform Commercial Code—Estoppel—Forged Indorsements

In a recent New Jersey decision, *Gast v. American Casualty Co.*,[1] the court had to decide the extent to which the estoppel provisions of the UNIFORM COMMERCIAL CODE[2] precluded recovery of a check paid over a forged indorsement. Under a standard clause in a real estate contract, the buyer, Hanna, was required to carry fire insurance. Upon loss, the moneys jointly receivable by seller and buyer were to be put in escrow by the seller's attorney; the buyer was to order the necessary repairs; and the seller's attorney was to pay for them out of the escrow funds.[3] In settlement of a fire claim, the insurance company drew a draft upon itself,[4] jointly payable to the seller, Gast, the buyer, Hanna, and the public adjuster involved.[5] Having obtained the adjuster's indorsement, the seller's attorney mailed the draft to the buyer's attorney with instructions to obtain the buyer's indorsement, then return it for deposit in the escrow account.[6] Apparently the buyers, upon gaining possession of the draft, forged the indorsement of the sellers, cashed the check, and absconded. Shortly thereafter the sellers were advised by the buyer's attorney that he had not heard from his clients and no longer considered himself representing them.[7] The sellers, however, waited for more than a month[8] to notify the insurance company of this irregularity and to

[1] 99 N.J. Super. 538, 240 A.2d 682 (Super. Ct. 1968).

[2] UNIFORM COMMERCIAL CODE § 3-406 [hereinafter cited as U.C.C.].

[3] Exhibit DA-8, Brief for Respondent at 12a, Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (Super Ct. 1968).

[4] The draft stated that it was "payable through the Berks County Trust Co., Reading Pa., upon acceptance by American Casualty Company," making the insurance company both drawer and drawee. The bank involved was merely a collecting bank. That the bank was not a drawee is made clear by U.C.C. § 3-120, which provides:

> An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

[5] The draft was made payable to three persons, thus requiring multiple indorsement, to insure discharge of multiple claims. It is somewhat inconsistent, therefore, for the insurance company to later assert payment of plaintiff's claim by reason of draft made out to multiple payees, for had the draft been made out only to the Gasts, the forgery would probably never have occurred.

[6] Brief for Respondent, note 3 *supra*, at Exhibit DA-8.

[7] Brief for Respondent, note 3 *supra*, Exhibit DA-7 at 12.

[8] Had plaintiff been a merchant fully cognizant of the provisions of the U.C.C., his delay in notification of the insurance company would have had more serious consequences than were levied by the court. *See* U.C.C. §§ 2-602(1), 1-204(2), (3).

request cancellation of the draft.[9] The notice was too late, for the insurance company had already accepted the draft and paid it. In a contract action by the sellers on the fire insurance policy,[10] the court held the insurance company liable for conversion of the draft,[11] and the sellers free from any negligence within the meaning of the New Jersey Statute.[12]

Negligence is usually not a defense to a contract action; one either performs a contract or not, and the *method* itself makes no difference to the *fact* of performance.[13] The defense has been allowed, however, when the negligence is offensive to a rational sense of justice and fair play. The U.C.C. seems to adopt this position, providing:

> Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.[14]

Yet neither the U.C.C. nor most of the courts that have considered this problem[15] provide a clear definition of the phrase "substantially contributes."[16] The court in *Gast* attempted to resolve the problem by adopting a definition offered by the Oregon court in *Gresham State Bank v. O & K Construction Co.*:[17]

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[9] Brief for Respondent, note 3 *supra*, Exhibit DA-5 at 8a. This delay from May 10 to June 21 is the basis of defendant's charge of negligence.

[10] The contract action was against the insurance company on the policy rather than one against the bank because:

(a) If action is brought first against the bank, plaintiff will probably lose his rights against the insurance company.

(b) Bringing action against the bank would increase discovery problems.

(c) If action is brought first against the bank, the bank might lose some of its defenses, which it could have asserted against the insurance company. For a discussion of this problem, see Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust, 345 Mass. 1, 184 N.E.2d 358 (1962).

[11] N.J. REV. STAT. § 12A: 3-419 (1962). In effect this section imposes absolute liability for conversion, subject only to certain U.C.C. defenses.

[12] N.J. REV. STAT. § 12A: 3-406 (1962).

[13] A possible exception is the contract doctrine of substantial performance, where the method of performance may bear upon the decision.

[14] U.C.C. § 3-406.

[15] *See, e.g.*, Park State Bank v. Arena Auto Auction, Inc., 59 Ill. App. 2d 235, 207 N.E.2d 158 (1965); Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

[16] REPORT OF THE NEW YORK LAW REV. COMM'N FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE, 247 (1955) [hereinafter cited as 1955 REPORT].

[17] 231 Ore. 106, 370 P.2d 726 (1962).

> [T]he requirement that the negligence 'substantially contributes' to the making of the unauthorized signature is necessary to satisfy the test of factual causation; it is the equivalent of the 'substantial factor' test applied in the law of negligence generally.[18]

If the above definition is used in conjunction with the statute, a twofold method of determining whether the defense of estoppel is available emerges.[19] The one against whom the estoppel is sought must have: (1) been negligent and (2) that negligence must have been a "substantial factor" in contributing to the forgery.[20]

The statute omits the usual third step of proximate cause analysis—a policy limitation on liability determined by the court. The omission raises at least two implications: that proximate cause analysis is to be assumed and used if necessary, or that proximate cause analysis is not necessary in the cases that will foreseeably arise under Section 3-406. The latter seems more logical, although it does not appear to be supported by any declared statement of intent by the draftsmen of the U.C.C., nor specifically recognized by any court considering the question.[21]

As a general rule, for conduct to be negligent it has to be foreseeable that the conduct involved will create an "unreasonable risk of causing damage to others."[22] In addition, the risk involved has to be one to the particular class or individual injured, not merely one to the community generally.[23] The question of foreseeability on a proximate cause level, in contrast to that on the negligence level, "means a foreseeability much more closely identified with the particular plaintiff or the class of which he is a member and the interest of the plaintiff which is actually invaded."[24]

To a large extent, therefore, foreseeability analysis on a proximate cause level is a refinement of that conducted on the negligence level. Yet, in the restricted situation usually encountered with Section 3-406, is such a policy limitation on liability needed at all? For instance, in the *Gresham* case, where a principal gave his agent the appearance of author-

[18] *Id.* at 120, 370 P.2d at 732.

[19] The test has an additional step; the party seeking to use the estoppel must have paid the instrument "in good faith and in accordance with the reasonable commercial standards" of its business. U.C.C. § 3-406.

[20] *Id.*

[21] Only five courts appear to have considered the question in any depth, and of these, only two have defined the term.

[22] W. PROSSER, LAW OF TORTS § 31, at 149 (3d ed. 1964).

[23] For the initial analysis of "negligence in the air," see Palsgraf v. Long Island R.R., 248 N.Y. 334, 162 N.E. 99 (1928).

[24] Campbell, *Duty, Fault, and Legal Cause*, 1938 WIS. L. REV. 402, 408-09.

ity[25] to cash checks, when actually no such authority existed,[26] the risk was clearly that the agent would convert the checks to his own use. The only way to accomplish the conversion is by a forged indorsement, and the checks must be paid or purchased by some party convinced of the agent's authority. In other words, the possible methods of accomplishing the conversion are extremely limited. If those methods are inherent in the act and can be clearly ascertained by the two-step negligence analysis, of what use is a proximate cause step?

Even though the statute may simplify the analytical steps needed to reach a conclusion of negligence and estoppel, the problem remains, for what type of negligence will the actor be liable? The Official Comment to Section 3-406[27] points out that the statute "adopts the doctrine of Young v. Grote, 4 Bing 253 (1827), which held that a drawer who so negligently draws an instrument as to facilitate its material alteration is liable to the drawee who pays the altered instrument in good faith."[28]

In *Young*, a businessman, leaving London on a trip, left five signed drafts, drawn on his bank, with his wife, who knew nothing about his business. Her instructions were to use the drafts as was necessary. In the course of business it became necessary to use a draft and the wife instructed her husband's agent to fill in the proper sum on the draft. The agent did so, but left obvious spaces where alterations could be made. The agent showed the draft to the wife, who apparently approved it. The agent then altered the draft, cashed it, and absconded.[29] The arbitrator charged Young with "gross negligence"[30] for giving the agent the opportunity to alter the draft.[31] The majority of the court on appeal agreed with the judgment of the arbitrator, one of the justices calling the negligence of Young "great."[32] The inference of *Young* and Comment One,[33] therefore, is that simple or ordinary negligence will not raise the defense of estoppel under Section 3-406.

In both *Gresham* and *Gast*, however, the court took a softer line than

[25] The negligence of the principal consisted of giving his agent the appearance of the authority in spite of the absence of it.

[26] 231 Ore. at 109, 370 P.2d at 728.

[27] U.C.C. § 3-406, Comment 1.

[28] *Id.*

[29] Young v. Grote, 4 Bing 253, 254, 255 (1827).

[30] *Id.* at 256.

[31] Note here the application of the negligence-estoppel concept to contract law.

[32] 4 Bing at 260.

[33] U.C.C. § 3-406, Comment 1 further states: "It should be noted that the rule as stated in this section requires that the negligence 'substantially' contribute to the alteration."

did *Young* or the Official Comment, by adopting the "substantial factor" formula propounded in *Anderson v. Minneapolis, Saint Paul & Sou Saint Marie Railroad*[34] by the Minnesota court. The formula, as Prosser notes, is closely related to the old "but for" rule, while being "clearly an improvement"[35] over it. Even granting the improvement, in the majority of cases the rule means little more than "the defendant's conduct is not a cause of the event, if the event would have occurred without it."[36] The language of the formula indicates that the conduct necessary to qualify as a cause of an event does not have to be the dominant cause, it must merely be a cause without which the event would not have happened.

It appears that the reasoning of the *Gast* and *Gresham* courts is in conflict with that of the statute. The language of the statute and the Official Comment would not qualify all negligent conduct as estoppable under the statute, but only conduct that was more than simply negligent and that was a major cause of the event.[37] The language adopted by the two courts in question seems to let the statutory estoppel fall on any negligent conduct that was an actual cause of the result complained of.

Although the court in *Gast* varies from the Comment and *Young*, the more practical method of determining the cause in fact issue seems to be the substantial factor test. To decide whether one cause contributed more to an event than another results in the loss of the objectivity that should necessarily be present in the determination of the cause in fact issue.[38] The same applies in determining whether one sort of negligence is of a higher degree than another.[39] Moreover, in a study of the U.C.C. and its possible effect on New York law, the New York Law Revision Commission approved the comment that "[T]he Code Section [3-406]

[34] 146 Minn. 430, 179 N.W. 45 (1920). The rule is that "defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about."

[35] W. PROSSER, LAW OF TORTS § 41, at 244 (3d ed. 1964).

[36] *Id.* at 242. The quoted material explains the *"sine qua non"* or "but for" rule, which Prosser indicates tended to break down in certain limited fact situations. The "substantial factor" test was adopted by the Minnesota court to cover one of these. Except for these particular cases, the operation of the "substantial factor" formula is basically the same as the "but for" test.

[37] This conclusion is drawn from the language of *Young* and U.C.C. § 3-406, Comment 1.

[38] *See generally* Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

[39] For an example of the confusion that can occur in trying to determine degrees of negligence, note the problems the courts have run into in trying to apply degrees of negligence to the guest passenger area. See W. PROSSER, LAW OF TORTS § 34, at 186 (3d ed. 1964).

would substitute a principle of complete estoppel by negligence. . . . The negligent person is made fully liable and can only pursue the wrongdoer."[40] This statement may represent a change in the original position of the writers of the U.C.C. If so, the position of the court in *Gast* is not only judicially sound, but is in line with the "intent" of the framers of the statute.

Section 3-406 thus presents a two-fold problem of statutory interpretation in deciding whether the section cuts off proximate cause analysis and in interpreting the meaning of "substantially contributes"—is it a test of factual causation, or does it modify "negligence" and call for "substantial" and not "simple" negligence for estoppel. The court did not reach the proximate cause issue, but it was not faced with a set of facts that called for its resolution. The negligence issue was properly solved and further analysis, which would have contributed little to the decision of the case, was suspended. In addition the court seems to have correctly resolved the "substantial-simple" negligence conflict, in favor of the substantial factor test.

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[40] 1955 REPORT at 248.