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NOTES

Administrative Law—Constitutional Law—Is Governmental Policy Affecting the Employment of Homosexuals Rational?

"I accept the moral responsibility to account to my God for my own conduct. I accept the moral responsibility to account to my fellow men for any conduct which causes them 'demonstrable harm.' I ask only that a spirit of tolerance prevail in the exchange."[1]

Thus spoke the plaintiff in *Schlegel v. United States*[2] in contesting his removal from an Army Civil Service position for immoral and indecent conduct. Schlegel was specifically charged with having engaged in four homosexual acts with three different men over a period of a year. These alleged acts became known to intelligence officials during a routine background investigation by the Army for upgrading his *Secret* security clearance to *Top Secret*. To sustain his removal, the Court of Claims had to find that Schlegel's conduct affected his job, reflected discredit upon the employing installation, or detrimentally affected the efficiency of the service.[3] Furthermore, since the plaintiff was a veteran, he fell within the ambit of protection afforded by the Veterans' Preference Act[4] so that his removal had to promote the efficiency of the service.

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[1] Schlegel v. United States, No. 369-63 at 30-31 (Ct. Cl., Oct. 17, 1969). The quotation is from the findings of fact.

[2] 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 38 U.S.L.W. 3403 (U.S. April 21, 1970).

[3] *Id.* at 1373-77. The court followed the guidelines of DEP'T OF THE ARMY CIVILIAN PERSONNEL REGULATIONS S1.3-3c(2) (1961) in setting out the tests for justifying removal. *Id.* at 1377.

Judicial review of administrative actions is an uncertain area of the law. It seems clear that an abuse of discretion or arbitrary actions are subject to correction by the courts, especially when they may have a stigmatizing affect. *See* Slochower v. Board of Education, 350 US.. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952). *But see* Murray v. Macy, Civil No. 67-382 (N.D. Ala., Nov. 27, 1967), *aff'd sub nom.* Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 1041 (1969).

Additional procedural problems, such as the rights of the accused to subpoena and to cross-examine witnesses, are generated by administrative actions. Such difficulties existed in *Schlegel* and in the other principal cases discussed in this note, but consideration of them is beyond its scope. See generally Note, *Administrative Law—Evidence—Hearsay and the Right of Confrontation in Administrative Hearings*, 48 N.C.L. REV. 608 (1970).

[4] 5 U.S.C. §7512(a) (Supp. IV, 1965-68). The Act provides that a veteran can be discharged from the Civil Service only for such cause as will promote the efficiency of the service.

The court found that the burden of establishing compliance with the Act was satisfied by the testimony of the plaintiff's superiors that the morale and efficiency of the office would have been affected by his continued presence. Moreover, the court reasoned that since homosexual acts are immoral and indecent, efficiency would inevitably be adversely affected by allowing one who had engaged in such acts to remain in Civil Service.[5]

The Court of Claims distinguished on the facts *Norton v. Macy*,[6] an earlier decision by the Court of Appeals for the District of Columbia. In *Norton* two of the three judges rejected the government's contention that, once the label "immoral" is plausibly attached to an employee's off-duty conduct, further inquiry into an adequate rational cause for his removal is unnecessary.[7] The plaintiff, a veteran, committed what the court believed to be a homosexual advance by feeling the leg of a stranger who had accepted a ride from him and by inviting the man to his apartment for a drink. Following the incident with the stranger, the plaintiff admitted to government investigators that he had engaged in mutual masturbation with other males in high school and college; had homosexual desires while drinking; and occasionally had undergone a temporary blackout after drinking, during two of which occasions he suspected that he might have engaged in homosexual activity.[8] The Civil Service Commission considered this evidence sufficient to warrant dismissal from the service, but the court, disagreeing, stated that a reasonable connection between the alleged conduct and the efficiency of the service had to

[5] 416 F.2d at 1378.

[6] 417 F.2d 1161 (D.C. Cir. 1969).

[7] *Id.* at 1165. The court also refused to adhere to the decision of the Court of Appeals for the Fifth Circuit in *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968), that courts have no authority to review on the merits a determination by the Civil Service Commission of fitness of an employee. *Id.* at 1163-65.

The plaintiff in *Anonymous* had nearly nineteen years of federal service and was a postal-window clerk in a small Alabama town whose citizens held him in high regard. A sailor, while in the brig of a Naval base in Florida, had admitted having participated with him in homosexual acts; and the plaintiff, questioned by authorities shortly thereafter, confessed to other private consensual acts that were in no way connected with his job. A psychiatrist testified that a wound received in World War II had rendered the employee impotent and had ultimately led to his participation in homosexual activities, which were not sufficient to classify him a pervert or sexual deviant. The psychiatrist further testified that the employee was of gentle disposition and low sexual drive and was far less likely to act violently than the average adult male; too, the acts would in no way affect his ability to perform his job. Nevertheless, the plaintiff's confession led to his discharge and a losing struggle in the federal courts. Petitioner's Brief for Certiorari at 3-12, Murray v. Macy, 393 U.S. 1041 (1969) (petition denied).

[8] 417 F.2d at 1162-63.

be demonstrated to justify discharge.[9] However, the court limited its decision to the particular circumstances involved and stated flatly that it was not holding that homosexual conduct may *never* be cause for dismissal of a federal employee protected by the Veterans' Preference Act.[10] Nor did the court conclude that potential embarrassment from an employee's private conduct could not affect the efficiency of the service.[11]

Indeed, the court manifested this circumscription in *Norton* a scant five months later in *Adams v. Laird*.[12] The majority in *Adams* upheld the denial to the plaintiff, employed by private industry in defense-related work, of a *Top Secret* security clearance and the suspension of his *Secret* clearance based on findings of homosexual conduct. His conduct had come to light during the background investigation to examine the appropriateness of upgrading his security clearance.[13] One judge, objecting to the assumption that all homosexuals are security risks, dissented vigorously on the ground that no relationship between the alleged homosexual conduct and Adam's ability to protect classified information had been demonstrated.[14]

Notwithstanding *Adams* and *Schlegel*, *Norton* represents a new dawn in the plight of homosexual federal employees, for it threatens a heretofore unquestioned federal policy of regarding homosexual acts as an ipso facto basis for dismissal from the Civil Service.[15] This policy stems

[9] *Id.* at 1162. *But see* Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963). Note, however, the court's treatment of this case in *Norton*. 417 F.2d at 1166.

[10] See note 4 *supra*.

[11] 417 F.2d at 1168. "What we do say is that . . . an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame.'" *Id.* The court pointedly distinguished the type of embarrassment or discredit that financial irresponsibility of a governmental employee would create. The effect in such an instance is more ascertainable and concrete than a general tarnishing of an agency's antiseptic public image. *Id.* For an incisive analysis of homosexuality and the efficiency of the Civil Service, which presaged *Norton* by one month, see Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969).

[12] 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 38 U.S.L.W. 3404 (U.S. April 21, 1970). Two of the judges who decided *Norton* sat on the court in *Adams*. The dissenting judge in *Norton* voted in the majority in *Adams*, and the other judge, who was with the majority in *Norton*, dissented strongly. It is interesting to speculate what would have happened had the third judge in *Adams* been the second judge who voted with the majority in *Norton*.

[13] *Id.* at 232-34. Without the proper security clearance, Adams was effectively precluded from technical occupations for which he was highly qualified. *Id.* at 241; Affidavit No. 1 of Robert Larry Adams, filed in the United States District Court for the District of Columbia, March 8, 1968.

[14] 420 F.2d at 240-42.

[15] In Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965), the court overruled a dis-

primarily from public repugnance to homosexual behavior[16] and represents a fear by the government of the loss of public confidence and of the discomfiting effect on other employees if known homosexuals are allowed to remain in employment.[17] As indicated by *Adams*, a fear of compromise of classified information is also often involved.

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missal by the Civil Service Commission of an employee on a general charge of homosexual conduct. The Commission did not specify the exact acts with which the employee was charged, and the court held that the basis for dismissal was impermissibly vague. Dictum indicated that the court would demand for the Commission to show how the individual's conduct related to his occupational fitness. *Id.* at 184-85. A similar result obtained in a subsequent action brought by the Commission against Scott based on the same alleged conduct. The court did not feel that the earlier problem of ambiguity had been resolved and reversed again. Scott v. Macy, 402 F.2d 644, 647-48 (D.C. Cir. 1968).

Dissenting in both cases, the current Chief Justice of the United States, who then sat on the court of appeals, indicated that it was unnecessary for the Commission to relate the alleged homosexual conduct with suitability for federal employment; disqualification based solely on homosexual conduct, he contended, was not arbitrary. 349 F.2d at 189-90, 402 F.2d at 652. *Cf.* Wyngaard v. Kennedy, 295 F.2d 184 (D.C. Cir. 1961) (per curiam). *But see* Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 125-35 (1967) (dissenting opinion).

[16] A recent Louis Harris poll reported that sixty-three per cent of the people of the nation regard homosexuals as harmful to American life. *The Homosexual: Newly Visible, Newly Understood*, TIME, Oct. 31, 1969, at 61 [hereinafter cited as TIME, Oct. 31, 1969]. This poll was in accord with one taken a short while earlier. Slovenko, *Sexual Deviation: Response to an Adaptational Crisis*, 40 U. COLO. L. REV. 222, 233 (1968) [hereinafter cited as Slovenko].

[17] *See* Scott v. Macy, 402 F.2d 644, 648-49 (D.C. Cir. 1968); Note, *Government-Created Employment Disabilities of the Homosexual, supra* note 11, at 1741-46. The Civil Service Commission has indicated that it would admit homosexuals in service as soon as the general public comes to view them with less repulsion. The Commission claims that it avoids expelling homosexuals with many years of service and excludes only those whose homosexuality is a matter of public knowledge or record. *Id.* at 1742, 1745-46. In the principal cases discussed in this note, however, the homosexual acts of the plaintiffs became a part of the public record only after the government took action against them. See also note 7 *supra*.

Illuminating federal policy is a letter from the Civil Service Commission to the plaintiff's attorney during the litigation in Murray v. Macy, Civil No. 67-382 (N.D. Ala., Nov. 27, 1967), *aff'd sub nom.* Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 1041 (1969). The letter quoted in part another letter, addressed to the Mattachine Society, from Commission Chairman John W. Macy, Jr., dated February 25, 1966:

> Suitability determinations also comprehend the total impact of the applicant upon his job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees by homosexual advances, solicitations or assaults, the unadvoidable [*sic*] subjection of the sexual deviate to errotic [*sic*] stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a

The federal policy contributes significantly to the stigmatization suffered by those whose homosexual conduct is uncovered. Such stigmatization usually not only results in the loss of job and reputation but also severely hinders the search for a new job. One caught engaging in homosexual conduct suffers the alienation of friends and family and may be forced into the "gay" world by social ostracism even though the conduct may have been an isolated incident caused by curiosity, seduction, or other reasons. Engaging in homosexual acts may render one particularly vulnerable to extortionists; to criminal assaults; to harassment by police and private citizens; and, perhaps most disconcertingly of all, to official and community indifference to his trammeled rights.[18]

In this light, the pragmatic mind must seek a rationale for the penalizing intolerance of homosexual behavior because constitutional repercussions may result if no rational basis can be found: while the Constitution imposes no direct restraint on private irrationality, through the due process clause it does forbid irrational governmental deprivation of liberty and property.[19] Other constitutional mandates[20] may also be affected by a determination that the general federal[21] policy works irra-

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Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

Appendix D to Petitioner's Brief for Certiorari, Murray v. Macy, 393 U.S. 1041 (1969) (petition denied).

[18] *See* W. CHURCHILL, HOMOSEXUAL BEHAVIOR AMONG MALES 226 (1967) [hereinafter cited as CHURCHILL]; A. ELLIS, HOMOSEXUALITY: ITS CAUSES AND CURE 87-90 (1965) [hereinafter cited as ELLIS]; P. GEBHARD, J. GAGNON, W. POMEROY, & C. CHRISTENSON, SEX OFFENDERS: AN ANALYSIS OF TYPES 623 (1965) [hereinafter cited as GEBHARD]; A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 663 (1948) [hereinafter cited as KINSEY/MALE]; E. SCHUR, CRIMES WITHOUT VICTIMS 83 (1965) [hereinafter cited as SCHUR]; Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L.C. & P.S. 441, 449-51 (1964) [hereinafter cited as Cantor]; Slovenko at 236 n.41.

[19] There is controversy over the application of substantive due process to protect individuals within the public sector against arbitrary governmental action. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[20] The right to privacy, as illumined by such decisions as Griswold v. Connecticut, 381 U.S. 479 (1965), may be invaded by governmental efforts to ferret out homosexuals. But note the dictum contained in Justice Goldberg's concurring opinion to that case. *Id.* at 498-99. Also, the constitutional sanction against cruel and unusual punishment may be violated by criminally punishing private, adult, consensual homosexual practices. *See* Perkins v. North Carolina, 234 F. Supp. 333, 337 (W.D.N.C. 1964).

[21] Of course, state and local governmental policies and laws would be similarly affected by the fourteenth amendment.

tionally to severely penalize homosexual behavior ipso facto without regard to individual circumstances.

To determine rationality, one must seek knowledge of the causes and ramifications of homosexual behavior. At the start, one should understand that not all those who manifest homosexual behavior are truly homosexual. A substantial number of persons, who are basically heterosexual, engage in homosexual acts for a variety of reasons, including curiosity, seduction, or peculiar situational demands such as those confronting prisoners whose sexual outlet is limited. Still others may participate in homosexual conduct simply because they seek any convenient relief for their sexual drive and are not particular about the means. The terms "homosexual" and "homosexuality" properly describe only persons who are *dominantly* or *exclusively* homosexually oriented.[22]

Some authorities believe that man is born with a neutral sexual disposition that is subjected to environmental conditioning leading to a particular preference. They would agree with Kinsey that "[t]here is nothing known in the anatomy or physiology of sexual response and orgasm which distinguishes masturbatory, heterosexual, or homosexual reactions."[23] According to this theory, humans are born with a potential

[22] GROUP FOR THE ADVANCEMENT OF PSYCHIATRY REPORT No. 30 at 2-3 (Jan. 1955) [hereinafter cited as GROUP]; KINSEY/MALE at 615-66; Bowman and Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMP. L.Q. 273, 313 (1956) [hereinafter cited as Bowman and Engle]; Glueck, *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187, 194 (1957) [hereinafter cited as Glueck].

Kinsey's research revealed that, as a minimum, thirty-seven per cent of American males have had at least one overt homosexual experience to the point of orgasm between adolescence and old age. Ten per cent are more or less exclusively homosexual for at least three years between the ages of sixteen and fifty-five, and four per cent are exclusively homosexual throughout their lives after the onset of adolescence. These figures are probably understatements. KINSEY/MALE at 623-25, 650-51.

Kinsey reasoned that the incidence and frequency of homosexual behavior, similar throughout all strata of American society, militated against the view that erotic sexual reactions between individuals of the same sex are abnormal or unnatural. KINSEY/MALE at 659. He is reported to have remarked that "[t]he only kind of abnormal sex acts are those that are impossible to perform." CHURCHILL at 69. For a criticism of Kinsey's reasoning, see Kubie, *Psychiatric Implications of the Kinsey Report*, 10 PSYCHOSOMATIC MEDICINE, Mar. 1948, at 95.

There is no evidence that homosexuality involves more males, or fewer males, today than it did among earlier generations. Furthermore, if all persons with any trace of homosexual history were eliminated from today's population, there is no reason for believing that the incidence of homosexuality in the next generation would be materially reduced. KINSEY/MALE at 631, 666.

[23] A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 446-47 (1953) [hereinafter cited as KINSEY/FEMALE].

to respond erotically to sexual stimulus without regard to the gender of the source; man has come to prefer a heterosexual outlet only because of the conditioning effect of his culture.[24] Therefore, sexual gratification with a member of one's own sex may be considered just as "natural" a response as with a member of the opposite sex, but the latter inclination may predominate in a given society by virtue of historically developed norms that are taught and adhered to by custom from generation to generation.[25]

Other authorities would not be content with this view of homosexual behavior as far as the dominant or exclusive homosexual is concerned. They would agree that homosexuality is *not* a product of any known hormonal or chromosomal factors[26] but would contend that there must be something amiss in the basic constitution of the homosexual since he undertakes great personal risk in pursuing his sexual inclination to the exclusion of the less portentous offerings of heterosexual relief. Perhaps man may learn through conditioning to enjoy one erotic stimulus more than others, but he also learns the mores of his society and the personal risks of flouting them. American society is extremely hostile to the homosexual,[27] and hence it is enigmatic that some Americans persist in and prefer a homosexual outlet for the basic sexual drive.[28] To explain this enigma, these authorities assert that homosexuality appears to be a product of personality development of such a subtle nature as to avoid a conscious recognition and to preclude a conscious choice.[29] Beyond this basic premise, there is considerable divergence of opinion on causative factors, but at least two general schools of thought emerge.

Present-day adherents of basic Freudian theory[30] insist that adult

[24] *See* CHURCHILL at 101-05; ELLIS at 78; KINSEY/FEMALE at 446-47, 481; Marmor, *Introduction* in SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY 9-16 (J. Marmor ed. 1965) [hereinafter cited as Marmor].

[25] For general discussions of the historical, religious, and anthropological aspects of homosexuality, see CHURCHILL at 199-210; GROUP at 1-2; KINSEY/FEMALE at 481-83; Taylor, *Historical and Mythological Aspects of Homosexuality* in SEXUAL INVERSION, *supra* note 24, at 140; Bowman and Engle at 276-78. See also Note, *The Law of Crime Against Nature*, 32 N.C.L. REV. 312 (1954).

[26] CHURCHILL at 105; GROUP at 3, 6; Pare, *Etiology of Homosexuality: Genetic and Chromosomal Aspects* in SEXUAL INVERSION, *supra* note 24, at 70; Perloff, *Hormones and Homosexuality* in SEXUAL INVERSION, *supra* note 24, at 44.

[27] KINSEY/FEMALE at 477, 483. *Cf.* CHURCHILL at 199-210; Szasz, *Legal and Moral Aspects of Homosexuality* in SEXUAL INVERSION, *supra* note 24, at 128.

[28] *See* ELLIS at 78-84; GROUP at 2; Marmor at 11.

[29] GROUP at 3; Marmor at 11-15; Cantor at 442.

[30] Freudian theory has been described as "the departure point for all subsequent explorations." C. SOCARIDES, THE OVERT HOMOSEXUAL 22 (1968). Dr. Socarides

homosexuality represents an arrest of, or a pressured regression to, a universal childhood phase of personality development that is homoerotically oriented—a phase of maturation wherein the child's instinctive disposition for social intercourse and sexual exploration leans toward those of his own sex.[31] On the other hand, proponents of modern psychoanalytic theory challenge the idea that adult homosexual preference manifests a carry-over of a childhood phase. Rather, they assert that adult homosexuality represents an unconscious, incapacitating anxiety toward heterosexual relations. Homosexual release of the basic sex drive is easier than confronting this deep, unfathomable anxiety.[32]

Briefly stated, an important difference between these theories is that the latter interprets heterosexuality as a basic tendency of man and homosexuality as a manifestation of some psychological obstacle to heterosexual adaptation.[33] Those who adhere to the former theory admit of no basic heterosexual tendency while regarding homosexual adaptation, though at odds with cultural expectations, as the probable resultant of the interplay of environmental influences and the process of maturation.[34]

Whatever theory, or amalgamation of theories, is followed, there is significant support for the belief that the underlying impediment to heterosexual orientation is rooted in personality development. Early environmental circumstances, especially within the immediate family,[35] and other socio-economic and cultural forces amass to shape personality; and some subtle interplay among numerous, multifarious factors affects the course of development. One may broadly conclude, then, that an enigmatic quirk in personality development, quite beyond the control of the individual, ultimately leads to a homosexual predisposition.[36]

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is critical of Freud's view that homosexuality cannot be considered an illness. For a capsule form of Dr. Socarides' concepts, see TIME, Oct. 31, 1969, at 66-67. Freud's view is concisely set out in *A Letter from Freud*, 107 AM. J. PSYCHIATRY 786 (1951).

[31] *See, e.g.*, Marmor at 2, 9-10; L. OVESEY, HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY 15-18 (1969). *See also* SCHUR at 72-73.

[32] *See, e.g.*, Bieber, *Clinical Aspects of Male Homosexuality* in SEXUAL INVERSION, *supra* note 24, at 248; GROUP at 3; Marmor at 10-12; SCHUR at 72-73. *But see* CHURCHILL at 260-322; Marmor at 16.

[33] See sources cited note 32 *supra*.

[34] See sources cited note 31 *supra*.

[35] Frequently found in the personal history of a homosexual is a passive or hostile father and a domineering mother. Parental influences, particularly during the early years, appear to be a very important factor in the development of a homosexual bent. *See* GROUP at 3; SCHUR at 74; Glueck at 196-201.

[36] The presentation in the text was an over-simplification of a very complex problem. There are many unknown quantities and many variations of theories involved

The prognosis for reversing the homosexual penchant is dismal. All men carry a latent homoerotic potential, but most successfully repress it in their subconscious.[37] Homosexuals, on the other hand, cannot repress it because of the deep, underlying forces, instilled during youth, that work against heterosexual adaptation. Psychotherapy may overcome these forces if the patient both consciously and unconsciously really desires, but it is seldom that his subconscious can abandon the role dictated during the development of his personality. Hence, psychotherapy, a long and difficult process, may be curative for only a few homosexuals and beneficial to others only in the sense of enhancing social adjustment.[38] Moreover, there is universal agreement that criminal and civil penalties for, and societal hostility toward, homosexuality greatly hinder social adjustment.[39]

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in the development of homosexuality in an individual. For general discussions on causation, see ELLIS; KINSEY/FEMALE at 447-48; L. OVESEY, HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY (1969); SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY (J. Marmor ed. 1965); Glueck; Slovenko; TIME, Oct. 31, 1969, at 66-67.

Homosexuals have become weary from having their sexual penchant analyzed. As put by the founder and president of the Washington Mattachine Society:

> [H]omosexuality has been *defined* into a sickness or disorder through subjective personal, social, moral, cultural, and religious value judgments cloaked and camouflaged in scientific language. . . . [H]omosexuality cannot properly be considered to be a sickness, disorder, or pathology, nor a symptom of any of these, but must be considered a preference, orientation, or propensity that is different from heterosexuality.

Kameny, *The Federal Government vs. The Homosexual*, THE HUMANIST, May/June 1969, at 20. Kameny's views are also set forth in TIME, Oct. 31, 1969, at 66-67.

[37] GROUP at 2; Glueck at 194. Many psychiatrists believe that those who denounce homosexuals the loudest are plagued by fears of their own latent homosexuality. GEBHARD at 638 n.4; SCHUR at 113.

[38] *See* E. BERGLER, HOMOSEXUALITY: DISEASE OR WAY OF LIFE 10, 302 (1956); GROUP at 3-4; SCHUR at 72; R. SLOVENKO, SEXUAL BEHAVIOR AND THE LAW 91 (1965); Bowman and Engle at 280.

[39] *See, e.g.*, ELLIS, at 87-88; GEBHARD at 623; Marmor at 20; Cantor at 448-51; Glueck at 203; TIME, Oct. 31, 1969, at 64.

Many eminent commentators have long recognized the need for relaxing criminal penalties for homosexual acts. Commonly, they reject the idea that such sanctions effectively serve any worthwhile societal goals; rather, they believe that much social harm may be caused by treating private, consensual homosexual conduct as criminal. The moral foundation of the sanctions is regarded as an inadequate basis for the laws although reform is neither considered an approval nor condonation of homosexuality nor a likely inducement for homosexual practices. However, violations of public decency or other notorious acts, such as offensive solicitation or the seduction of youth, *are* considered a proper concern of the law. See generally F. CAPRIO & D. BRENNER, SEXUAL BPHAVIOR: PSYCHO-LEGAL ASPECTS 162 (1961); CHURCHILL at 215-34; GREAT BRITAIN, COMMITTEE ON

The spectrum of personality of the homosexual is as wide and diverse as that of the heterosexual,[40] and his homoerotic bent alone reveals absolutely nothing of his character and social adjustment. This penchant is at most an indication of a unique constellation of factors influencing his personality development that has led to his particular sexual propensities. To say that the homosexual state demonstrates abnormality or perversity is to beg the question. The pertinent inquiry is: what is his character, and how well adjusted socially is he? *Authorities are in agreement that this query is answerable only by considering the homosexual individually in his own setting, just as a heterosexual must be personally considered in evaluating character and social adjustment.*[41]

At present the federal government does not adequately consider individual circumstances before harshly penalizing an employee for homosexual conduct. Failing to do so, in light of modern knowledge about homosexual behavior, may therefore be deemed unreasonable and the policy adjudged as irrational.[42] That the policy is founded on public opinion makes it no less irrational. Admittedly, the government must be concerned with public confidence, but it must also recognize that it

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HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 42-48 (Amer. ed. 1963); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); MODEL PENAL CODE § 207.5, Comment (Tent. Draft No. 4, 1955); MODEL PENAL CODE §§ 213.2-.6, 251.1-.3 (Proposed Official Draft, 1962); Note, *Deviate Sexual Behavior Under the New Illinois Criminal Code*, 1965 WASH. U.L.Q. 220; Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623 (1961).

[40] Hooker, *Male Homosexuals and Their Worlds* in SEXUAL INVERSION, *supra* note 24, at 86-87; Marmor at 19. *See also* GEBHARD at 623, 642. There are probably more neurotics among homosexuals than among heterosexuals, but this fact is inevitable in a hostile society. Marmor at 19; Cantor at 450.

[41] *See, e.g.*, GEBHARD at 623; GROUP at 6; Hooker, *Male Homosexuals and Their Worlds* in SEXUAL INVERSION, *supra* note 24, at 86-87; Marmor at 5, 16-19.

[42] *See* GROUP at 6; Marmor at 21; Szasz, *Legal and Moral Aspects of Homosexuality* in SEXAL INVERSION, *supra* note 24, at 128, 138; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 407-11 (1963).

A recent report prepared under the auspices of the National Institute of Mental Health not only urges reform of penal sanctions against private, consensual homosexual practices but also urges tolerance of homosexuals by both private and public employers. The distinguished task force that prepared the report included this poignant remark:

> The extreme opprobrium that our society has attached to homosexual behavior has done more social harm than good, and goes beyond what is necessary for the maintenance of public order and human decency. Homosexuality presents a major problem for our society largely because of the amount of injustice and suffering entailed in it, not only for the homosexual but also for those concerned about him.

TIME, Oct. 24, 1969, at 82.

often sets the trend in public attitudes and that its present policy toward homosexuals tends to perpetuate hostility rather than to promote tolerance.[43] Similar reasoning pertains to the problem of morale of employees.

Susceptibility to blackmail seems to be the primary reason for denying homosexuals a security clearance, but that rationale breaks down in the case of a professed homosexual who is not apprehensive of public disclosure of his sexual inclination. Furthermore, susceptibility to blackmail largely stems from the homosexual's fear of losing his job, a fear created in great part by present government policy. Heterosexuals may become vulnerable to extortion too, but there is no reason to believe that they could resist coercion any more successfully than homosexuals.[44]

Adverse public attitudes toward homosexual conduct are not likely to mollify within a short period of time, but the federal government must weigh individual rights against popular prejudices. Through prudent personnel management, the Civil Service could beneficially employ homosexuals while minimizing the anxiety of the public and of fellow employees.[45] For instance, counseling by a superior official might have had a desirable restraining influence on the plaintiff in *Norton v. Macy*[46] and possibly could have prompted him to seek professional help. He was not employed in a position requiring him to meet the public, and whatever homosexual potential he may have had was not a part of the public record.

The plaintiff in *Schlegel v. United States*[47] presents a more difficult problem due to his security clearance and the findings as to his particular acts. He had been found to have used slight force once in an unsuccessful attempt to accomplish sodomy on an unwilling partner, and the objects

[43] SCHUR at 110. *See also* Hyams, *The Spurious Problem*, NEW STATESMAN, June 25, 1960, at 945-46; Wolfenden, *The Homosexual and the Law, Ahead of Public Opinion?*, NEW STATESMAN, June 25, 1960, at 941.

[44] *See* Marmor at 21-22; Wicker, *The Undeclared Witch-Hunt*, HARPER'S, Nov. 1969, at 108; Note, *Government-Created Employment Disabilities of the Homosexual, supra* note 11, at 1749-51.

[45] For a reasoned plan by which the federal government could smoothly alter its present policy toward homosexuals, see Note, *Government-Created Employment Disabilities of the Homosexual, supra* note 11, at 1742-46. See also Bowman and Engle at 316; TIME, Oct. 24, 1969, at 82.

The New York City Civil Service Commission has recently adopted a policy of accepting homosexual workers except for some positions such as penitentiary guards and playground attendants. Note, *Government-Created Disabilities of the Homosexual, supra* note 11, at 1745 n.30.

[46] 417 F.2d 1161 (D.C. Cir. 1969).

[47] 416 F.2d 1372 (Ct. Cl. 1969).

of all his ascribed homosexual advances were young servicemen.[48] These disturbing circumstances must be balanced, however, with his excellent record of over eleven years of governmental service that was free of trouble with the law.[49] Again, perhaps counseling or a transfer would have had an ameliorative effect.[50]

In *Adams v. Laird*[51] the court's decision was partly based on findings that the plaintiff had engaged in homosexual acts with two fellow employees.[52] Admittedly, sexual affairs among employees, whether homosexual or heterosexual, may create problems at the place of work. In Adams' case, however, there was no complaint against him, and his homosexual propensities were not a matter of public knowledge. In order not to lose his considerable technical skills but at the same time not to endanger security requirements, the government might reasonably have required him to present positive proof of his reliability in safeguarding classified information, including perhaps a psychiatric evaluation.

As recognized in *Norton*, a homosexual may be a source of embarrassment to the Civil Service, as when he engages in notorious conduct. His personal behavioral traits may present other problems with which the Civil Service should not have to cope. But *Norton* projects the idea that job performance and compatibility with others turn on the whole of a person's personality and integrity rather than solely on his private, discreet sexual conduct. An individual's character and social adjustment, his past work performance, the notoriety of and reasons for his conduct, the nature of the job, and the alternative corrective measures available should as a minimum be considered by the government before imposing severe penalties on one merely for homosexual behavior. In short, individual conduct must be individually treated; to do less may produce the

[48] *Id.* at 1373-74, 1383.

[49] Schlegel v. United States, No. 369-63 at 19-20 (Ct. Cl., Oct. 17, 1969) (findings of fact).

[50] DEP'T OF THE ARMY CIVILIAN PERSONNEL REGULATIONS S1.3-1b(3) (1961), as quoted by the court in the findings of fact, Schlegel v. United States, No. 369-63 at 28-29, states:

> Before proceeding with an action affecting an employee's employment or pay status, consideration should be given to the possibility of correcting the situation by counseling or training the employee, or through utilization of a reassignment or an oral or written reprimand. In many instances, such action will remedy the situation and, at the same time, will save the cost of replacement or work disruption which attends the actions of removal or suspension.

[51] 420 F.2d 230 (D.C. Cir. 1969).

[52] *Id.* at 234.

ill-effects of stigmatization and the needless loss of valuable skills to the country.

WILLIAM B. CRUMPLER

Admiralty—Dockside Injuries under the Longshoremen's and Harbor Workers' Compensation Act

In *Nacirema Operating Co. v. Johnson*[1] three longshoremen had been attaching cargo from railroad cars located on piers to ships' cranes for loading onto the vessels. One longshoreman had been killed when cargo hoisted by a crane knocked him to the pier or crushed him against the side of the railroad car. The other two had been injured in the same accident.

Deputy Commissioners of the United States Department of Labor denied claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act[2] in each case on the ground that the injuries had not occurred "upon the navigable waters of the United States," as required by the statute. The federal trial courts upheld the commissioners' decisions.[3] The Court of Appeals for the Fourth Circuit in *Marine Stevedoring Corp. v. Oosting*[4] reversed. The Supreme Court on certiorari reversed the Fourth Circuit and held that the Longshoremen's and Harbor Workers' Compensation Act did not cover longshoremen injured on docks, piers, or bridges. The basic reasons for the Court's denial of coverage to the longshoremen in *Nacirema* is best explained by the historical development of state and federal jurisdiction over maritime workers.

Although inadequate common-law remedies for injured workers led to the adoption of state workmen's compensation statutes following the industrial revolution,[5] there was no corresponding federal development

[1] 396 U.S. 212 (1969).

[2] 33 U.S.C. §§ 901-50 (1964).

[3] Nacirema Operating Co. v. Johnson, 243 F. Supp. 184 (D. Md. 1965); Traynor v. Johnson, 245 F. Supp. 51 (E.D. Va. 1965).

[4] 398 F.2d 900 (4th Cir. 1968).

[5] The statutes of Washington, Iowa, and New York were constitutionally sustained in aspects not concerning the extent of their coverage. Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Hawkins v. Bleakly, 243 U.S. 210 (1917); New York Cent. R.R. v. White, 243 U.S. 188 (1917). See G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 337 (1957).

in admiralty.[6] Moreover, an attempt to extend state workmen's compensation to borderline maritime cases was struck down in 1917 by the Supreme Court in *South Pacific Co. v. Jensen.*[7] In *Jensen* a longshoreman was killed while operating a truck on a gangway connecting a vessel with a pier. After New York permitted recovery under its compensation statute, the Supreme Court reversed and held that both the situs of the accident and the nature of the work being performed were maritime and that any attempt to apply a state act to such facts was an unconstitutional interference with the uniformity of federal maritime law. Congress attempted twice to circumvent the ruling in *Jensen* by legislation authorizing state compensation acts to cover such cases,[8] but both efforts were declared unconstitutional.[9] In *Washington v. W. C. Dawson & Co.*[10] the Court suggested that Congress enact national legislation covering maritime workers whom the state could not constitutionally protect.[11]

Meanwhile, the Court, possibly realizing the harshness of a strict application of *Jensen*, began to make exceptions to the rule. The maritime-but-local exception was created in *Western Fuel Co. v. Garcia.*[12] The Court held that state workmen's compensation and wrongful death acts could validly apply to maritime activities that were of "local," as opposed to "national," concern. The reasoning was that application of state law in such cases would "not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law as to international and interstate relations."[13] Unfortunately, what constitutes a maritime-but-local exception is often unclear.

The second important exception to the rule in *Jensen* was developed

[6] The United States Constitution places admiralty and maritime matters in the original federal jurisdiction. U.S. CONST. art. III, § 2.

[7] 244 U.S. 205 (1917).

[8] Act of Oct. 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

[9] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

[10] 264 U.S. 219 (1924).

[11] *Id.* at 227. The Court stated:

> Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employees' Law of general provisions for compensating injured employees, but it may not be delegated to the several states.

[12] 257 U.S. 233 (1921).

[13] *Id.* at 242. The Court allowed coverage of a longshoreman working on an incomplete vessel in navigable waters because of the "local" nature of his work.

in *Industrial Commission v. Nordenholt Corp.*[14] and confirmed by subsequent decisions.[15] In this line of cases, the Court emphasized that state workmen's compensation laws were applicable to injuries occurring on docks, piers, and similar structures permanently affixed to the shore and extending over navigable waters because they are considered extensions of the land. The Court reasoned that since admiralty jurisdiction for torts does not encompass injuries occurring on land or its extensions,[16] workers injured on docks and piers could legitimately be covered by state compensation statutes. Hence, while a longshoreman was within the broader maritime jurisdiction for contracts by virtue of the status of his employment, he came within the domain of state law if the injury occurred upon the land or an extension of the land.[17] Consequently, the cumulative effect of the two exceptions declared in *Garcia* and *Nordenholt* was to allow coverage under state workmen's compensation statutes if the injury occurred on a dock, pier, or similar structure permanently affixed to the land or, if the matter was sufficiently "local," on navigable waters.

In 1927, in answer to the Court's earlier suggestion, Congress passed the Longshoremen's and Harbor Workers' Compensation Act to provide a recovery under federal law for injured maritime workers. The Act provided compensation

> in respect of disability or death of an employee, but only if the disability or death results from an injury occurring *upon the navigable waters* of the United States (including any dry dock) and if recovery for the disability or death through workman's compensation *may not be provided by State law.*[18]

Seemingly there are two prerequisites for an award under the Act: (1) that the injury occur upon the navigable waters of the United States and (2) that no compensation can be paid under state law. The interpretation of these two provisions has since been the subject of extensive litigation.[19]

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[14] 259 U.S. 263 (1922).

[15] *See, e.g.*, Swanson v. Manor Bros., 328 U.S. 1 (1946); T. Smith & Son v. Taylor, 276 U.S. 179 (1928).

[16] *See* Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316 (1908).

[17] The *nature* of the contract determines maritime jurisdiction over contracts, but it is the *situs* of the tort that is the test for maritime jurisdiction. *See* Industrial Comm'n v. Nordenholt, 259 U.S. 263 (1922).

[18] 33 U.S.C. § 903(a) (1964) (emphasis added).

[19] *See, e.g.*, Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953);

It is apparent from the legislative history of the Act that Congress intended for state coverage to be as extensive as possible and for the federal statute to provide relief only in cases in which there is no state remedy.[20] But, as has been pointed out, it is often unclear how far state coverage extends, particularly under the maritime-but-local exception created by the Court. To alleviate the harshness that could have resulted from a mistake in the choice of forums in difficult borderline cases,[21] the Court in *Davis v. Department of Labor and Industries*[22] enunciated the "twilight-zone" doctrine. The effect of *Davis* was to grant presumptive validity to both federal and state compensation statutes in cases involving waterfront mishaps if a reasonable argument could be made that either remedy was applicable. Thus the injured harbor worker could elect either state or federal compensation in "twilight-zone" cases.[23] However, the "twilight-zone" doctrine was not considered to apply to injuries to longshoremen on piers or docks, and the injured worker could not choose the federal Act as his remedy.[24]

In 1962, the Court went further and judicially deleted from the Longshoremen's Act the prerequisite that compensation under it is allowed only in cases in which the state may not provide an award. Ignoring the express language of the Act, the Court in *Calbeck v. Travelers Insurance Co.*[25] stated that

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Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941); Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967); Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967).

[20] An investigation of the legislative intent underlying the statute revealed that the original version of the bill provided:

> This act shall apply to any employment performed on a place within the admiralty jurisdiction of the United States except to employment of local concern and of no direct relation to navigation and commerce; but shall not apply to employment as master and member of the crew of a vessel.

S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1927). The phraseology "local concern" was objected to by the chairman of the Senate Committe because "to create an exemption for 'employment of local concern' threatened to perpetuate the very uncertainties of coverage that Congress wished to avoid." Calbeck v. Travelers Ins. Co., 370 U.S. 114, 122-23 (1962).

[21] Two such borderline cases are Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959) and Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941).

[22] 317 U.S. 249 (1942).

[23] See, *e.g.*, Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959). The Court said that as to cases within this "twilight-zone," *Davis*, in effect, gave "an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation law of the State in which the injury occurred." *Id.* at 273.

[24] See 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION 410 (1952). Injuries on docks or piers were considered clearly within state jurisdiction and not borderline cases to which the "twilight-zone" doctrine could apply.

[25] 370 U.S. 114 (1962).

> our conclusion is that Congress invoked its constitutional power so as to provide compensation for *all injuries* sustained by employees on navigable waters *whether or not* a particular injury might also have been within the constitutional reach of a state workmen's compensation law.[26]

The claimants in *Calbeck* had been injured while working on incomplete vessels lying in navigable waters, but they were allowed recovery under the Act. Previously, workers injured while engaged in such work were allowed compensation only under state laws because such employment was considered clearly maritime but local in nature.[27] The result of *Calbeck* was to extend the area of overlapping federal and state coverage and increase the occasions when a claimant had a choice between federal and state compensation remedies.

Just as the earlier exceptions to *Jensen* left open the question of how far *seaward* state workmen's compensation could extend, *Calbeck* failed to answer how far toward *land* the federal remedy extended. Cases following *Calbeck* generally interpreted the Longshoremen's Act to require that the injury occur on the navigable waters of the United States. Thus injuries suffered on docks and piers were not generally thought to give rise to federal compensation.[28] Then in 1968 the Fourth Circuit became the first court of appeals to extend coverage of the Longshoremen's Act to injuries consumated on a pier when it decided *Oosting*.

The issue confronting the Fourth Circuit was stated by Judge Sobeloff, the author of the majority opinion in *Oosting*, to be "whether an injury on a pier falls within the coverage of the Act."[29] In a three-pronged opinion the majority held that (1) the Longshoremen's Act is status and not situs oriented and covers all longshoremen working under the same contract regardless of where the injury occurs; (2) the Admiralty Extension Act,[30] which extends admiralty jurisdiction over torts to cover

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[26] *Id.* at 117 (emphasis added).

[27] The factual situation in *Calbeck* was the same as that in Grant Porter-Smith Ship Co. v. Rhode, 257 U.S. 469 (1922), in which the maritime-but-local doctrine was applied.

[28] Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967); Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967); Travelers Ins. Co. v. Shea, 382 F.2d 344 (5th Cir. 1967). *But see* Michigan Mutual Liab. Co. v. Arrien, 233 F. Supp. 496 (S.D.N.Y. 1964).

[29] 398 F.2d at 902. See Note, *Dockside Injuries Under the Longshoremen's and Harbor Workers' Compensation Act*, 3 GA. L. REV. 622 (1969) (approving the court's holding); Note, *The Ambiguous, Amphibious Employee: The Relationship Between the Longshoremen's Act and State Compensation Legislation*, 18 HAST. L.J. 891 (1967) (disapproving the court's holding).

[30] 46 U.S.C. § 742 (1964).

injuries occurring on the land that are caused by a vessel on navigable waters, impliedly extends coverage of the Longshoremen's Act to the same degree, and (3) an injury occurring on a pier extending over navigable waters is an injury occurring "upon navigable waters" and thus is within the coverage of the Longshoremen's Act.

The majority's first contention was that the Longshoremen's Act, irrespective of the situs of the injury, was intended by Congress to cover injuries to longshoremen by virtue of their employment. Judge Sobeloff found support for this position in the Supreme Court's holding in *Calbeck* that "Congress intended the compensation act to have a coverage co-extensive with the limits of its authority."[31] Moreover, interpreting the coverage of the Longshoremen's Act to extend to the broad jurisdiction of admiralty over workers' contracts would seem to comply with the Supreme Court's mandate in *Reed v. The Yaka*[32] that the statute should be liberally construed to avoid harsh and incongruous results. Indeed, it would seem to be "harsh and incongruous" to permit recovery to a longshoreman on a ship and to deny it to his fellow worker on a nearby pier when both were injured by the same crane.[33]

The majority also relied heavily on the language in *Michigan Mutual Liability Co. v. Arrien*[34] "that 'upon navigable waters' [as used in the Longshoremen's Act] is to be equated with 'admiralty jurisdiction.' "[35] But this decision was not based on the theory of the worker's status; on the contrary, the court found that "upon navigable waters" was impliedly expanded by the Admiralty Extension Act of 1948.[36] It should also be noted that the Supreme Court in *Calbeck* implicitly accepted the validity of applying the test of the situs of the injury to determine whether an employee is covered by the Longshoremen's Act.[37]

The second approach taken by the majority in *Oosting* was that the Admiralty Extension Act of 1948, by extending the jurisdiction of admiralty over torts to include all injuries caused by a vessel that were consumated on land, also impliedly expanded coverage of the Longshoremen's Act. But the trial court in *Johnson v. Traynor*[38] had exhaustively

[31] Calbeck v. Travelers Ins. Co., 370 U.S. 114, 130 (1962).
[32] 373 U.S. 410, 415 (1963).
[33] 398 F.2d at 903.
[34] 233 F. Supp. 496 (S.D.N.Y. 1964). This decision also had permitted recovery under the Longshoremen's Act for injuries suffered on a pier.
[35] *Id.* at 501.
[36] *Id.* at 502.
[37] *See* Calbeck v. Travelers Ins. Co., 370 U.S. 114, 115-17, 124-27 (1962).
[38] 243 F. Supp. 184 (D. Md. 1965).

studied this possibility and concluded that the legislative history of both statutes, the express coverage of the Extension Act, and the administrative interpretations of the compensation statute clearly negate an implied extension of coverage of the Longshoremen's Act. Moreover, a House report made in 1958 concluded that longshoremen are protected by "state safety standards when performing work on docks and in other shore areas."[39] Hence it is not surprising that most courts confronted with this issue have agreed with the opinion in *Johnson* that the Extension Act cannot be construted to extend the coverage of the Longshoremen's Act.[40]

In the third prong of his opinion in *Oosting*, Judge Sobeloff reasoned that by virtue of *D'Aleman v. Pan American Airways*[41] the scope of the phrase "upon navigable waters" used in the Longshoremen's Act extends to injuries occurring *above* such waters.[42] *D'Aleman*, however, involved interpretation of the phrase "on the high seas" used in the Death on the High Seas Act.[43] While the Second Circuit in *D'Aleman* did expand the phrase "on the high seas" to cover a cause of action arising in a plane flying above the ocean, the value of the case as precedent for Judge Sobeloff's position is at best dubious.

Chief Judge Haynesworth, dissenting in *Oosting*, rejected all three of the majority's arguments.[44] He admitted the "incongruity" of a remedy that depends on where a worker who frequently passes between a ship and the dock happens to be when injured, but proposed that the dock's edge is at least a clear and convenient place to draw a line between application of state and federal compensation remedies. Even under the approach of the majority in *Oosting*, incongruities are easy to anticipate. For example, a longshoreman can be injured several miles from shore on an errand for his employer unconnected with maritime work. "If the line is moved shoreward of the dock's edge, short of inclusion of every longshoreman wherever he may be and however he may be injured, it is bound to be vague and fuzzy and a fruitful source of contention and litigation. . . ."[45]

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[39] H.R. Rep. No. 2287, 85th Cong., 2d Sess. 16 (1958).

[40] *E.g.*, Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967); Atlantic Stevedoring Co. v. O'Keefe, 220 F. Supp. 881 (S.D. Ga. 1963); Revel v. American Export Lines, Inc., 162 F. Supp. 279 (E.D. Va. 1958).

[41] 259 F.2d 493 (2d Cir. 1958).

[42] 398 F.2d at 908.

[43] 46 U.S.C. §§ 761-67 (1964).

[44] *Id.* at 909-14 (dissenting opinion).

[45] *Id.* at 912-13 (dissenting opinion).

Perhaps the most telling point in the dissenting opinion was made in an analysis of congressional intent in passing the Longshoremen's Act. Quoted was a Senate report in which it was stated that "injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."[46]

When the case was taken on appeal, the logic of the dissent in *Oosting* was accepted by a majority of the Supreme Court in its decision in *Nacirema.* Rejecting all three prongs of Judge Sobeloff's opinion, the Court asserted that

> construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion which previously existed on the seaward side.[47]

The decision in *Nacirema* approving Chief Judge Haynesworth's rationale is laudable in that it provides a definite line beyond which the federal compensation remedy will not extend shoreward to overlap state coverage of longshoremen and harbor workers.

Remaining after *Nacirema* is concurrent federal and state jurisdiction over navigable waters in cases in which a worker's injury stems from a transaction that is maritime but local in nature. It is now desirable to eliminate this overlap. After all, the exception allowing state coverage to extend beyond the shoreline to encompass transactions on navigable waters was justified mainly on the ground that there was no federal remedy when the maritime-but-local doctrine was created. The federal remedy under the Longshoremen's Act is clearly available after the Supreme Court's decision in *Calbeck* to a longshoreman or harbor worker injured on navigable waters as a result of his employment. The line drawn in *Nacirema* should now be applied by the Court to limit the coverage of both the *state* and *federal* remedies. Under such an application of *Nacirema,* the state remedy would be available only for injuries suffered on shore or on structures that can be considered an extension of the land. The federal remedy under the Longshoremen's Act would be applied only to provide compensation for injuries suffered on maritime waters.

[46] S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1927). See note 20, *supra* for a general discussion of the legislative history of the Longshoremen's Act.

[47] 396 U.S. at 223. (The three dissenting justices agreed with Judge Sobeloff.)

Such a result would provide a definite line to enable lawyers and judges to determine with certainty whether an injured longshoreman is covered under the federal or the state act.

GEORGE HACKNEY EATMAN

Attorneys—Admission to the Bar—Consideration of the Constitutionality of Bar Examiners' Inquiries into Political Associations and Beliefs

Bar examiners for years have considered the "subversive applicant" an inherent danger to the legal profession[1] and have all but avowed a duty to deny him the privilege to practice.[2] Although most, if not all, states have a requirement of a finding of "good moral character" and some form of constitutional oath prior to admission,[3] some states have made demanding inquiries into the loyalty of applicants in bar-examination character questionnaires.[4] Bar-admission committees face increasing numbers of applicants whose interests in law reform, civil rights, and other "causes" present sharply divergent political views from those of the traditionally conservative bar.[5]

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[1] Remarks of Samuel J. Kanner, Chairman of the Florida Board of Bar Examiners in 54 BRIEF 154-55 (1959) (tracing the downfall of many constitutional governments to "subversive elements" infiltrating the bar) [hereinafter cited as Kanner Remarks]; Address of George T. Cronin, Secretary of the National Conference of Bar Examiners in 32 BAR EXAMINER 84-85 (1963) [hereinafter cited as Cronin Address].

[2] "The right to deny the privilege to practice to such an applicant appears to be fundamental." Cronin Address at 85.

> In this great democracy of ours, we, as bar examiners, are, therefore, intrusted with what might well prove to be the key to the preservation of what we know as a "way of life." . . . If we, as bar examiners, can successfully eliminate the subversive applicant . . . we will have prevented the infection of the bar. . . . This is our responsibility and task.

Kanner Remarks at 154-55.

[3] 7 C.J.S. *Attorney and Client* §§ 7(b), 12 (1937); Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480 & n.1 (1953) [hereinafter cited as Brown and Fassett]. *See also* Konigsberg v. State Bar of California, 366 U.S. 36, 40 & n.4 (1961).

[4] "Twenty-eight states report a character examination procedure that usually includes a personal appearance." SURVEY OF THE LEGAL PROFESSION, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 257 (1952). See generally Brown and Fassett at 483-87.

[5] Note, *Constitutional Limitations on the Process of Admission to the Bar*, N.Y.U. INTRA. L. REV. 135, 152 (1969). *See generally* Larson, *The Lawyer as Conservative*, 40 CORNELL L.Q. 183 (1955).

Recently a group of New York law students, applicants for the New York Bar,[6] and several organizations of lawyers and law students[7] challenged the statutory regulations governing admission to that bar.[8] After disposing of several procedural problems,[9] Judge Friendly, expressing the majority's view in *Law Students Civil Rights Research Council, Inc. v. Wadmond*,[10] wrote what must be considered the most significant opinion limiting the scope of bar-admission inquiry since the first decision in *Konigsberg v. State Bar of California*.[11]

The portion of section 90(1)(a) of the New York Judiciary Law providing that an applicant for the state bar must possess the "character and general fitness requisite for an attorney"[12] was found by Judge Friendly to be constitutional. He analogized this language to the "good moral character" approved by the Supreme Court in its second decision in *Konigsberg v. State Bar of California*.[13] Judge Friendly quoted *Konigsberg II* as standing for the proposition that the requirement for bar

[6] The individuals had passed the required written examination.

[7] Law Students Civil Rights Research Council, Inc.; Columbia Law Students Guild; and New York City Chapter of the National Lawyers Guild.

[8] The plaintiffs invoked the court's jurisdiction under the Judiciary Act of 1948, 28 U.S.C. § 1343(3) (1964) to enforce the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A three-judge court was convened pursuant to 28 U.S.C. § 2281 (1964).

[9] The procedural issues are beyond the scope of this note. The court found standing, Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117, 122 (S.D.N.Y. 1969); found that the remedy sought was appropriate, *id.* at 123; and declined to abstain on the merits. *Id.* at 124.

[10] 299 F. Supp. 117 (S.D.N.Y. 1969), *prob. juris. noted*, 38 U.S.L.W. 3253 (U.S. Jan. 13, 1970).

[11] 353 U.S. 252 (1957).

[12] N.Y. JUDICIARY LAW § 90(1)(a) (McKinney 1968) states in full:

> Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the *character and general fitness requisite for an attorney and counsellor-at-law*, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys. (emphasis added)

[13] 366 U.S. 36 (1961).

applicants to possess good moral character could not "well be drawn in question."[14] Although there is some doubt that *Konigsberg II* actually stands for that point,[15] Friendly was probably correct in avoiding the issue, since it was not squarely raised by the plaintiffs in his court.

Judge Friendly for the majority also held constitutional rule 9406 of article 94 of the New York Civil Practice Law and Rules, which requires that the applicant "furnish satisfactory proof to the effect . . . that he believes in the form of government of the United States and is loyal to such government." In light of *Speiser v. Randall*,[16] a 1958 Supreme Court decision, rule 9406 raises a serious question about the constitutionality of the burden of proof imposed upon an applicant for the New York Bar. In *Speiser*, the Court held that a California statute requiring a loyalty oath as a prerequisite to a veteran's tax exemption placed an unconstitutional burden of proof on veterans by limiting their freedom of speech and denying due process. Judge Motley, dissenting in part in *Law Students*, found *Speiser* a binding precedent:

> Here an applicant for admission to the bar has the burden of proving that he is loyal to the government. If in the opinion to some members of the character committee he should fail in this burden, he is denied the requisite certificate. This means that the applicant is denied the opportunity to enter the profession for which he has spent large sums of money and much time in study. "So far as I am concerned the consequences to the applicant whether considered from a financial standpoint, a social standpoint, or any other standpoint I can think of, constitute a more serious 'penalty' than that imposed upon Speiser," Konigsberg v. State Bar of California . . . 366 U.S. at 77 . . . Mr. Justice Black dissenting.
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> If, as in *Speiser*, the state cannot constitutionally impose upon a veteran seeking a tax exemption the burden of proving loyalty to our government, by what reasoning can the state constitutionally impose such burden on one seeking a license to practice law?[17]

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[14] 299 F. Supp. at 124.

[15] Konigsberg was denied admittance to the bar for obstructing the investigation into his background, not for lack of good moral character. The exact quotation in *Konigsberg II* reads: ". . . is not, nor could well be, drawn in question *here*." 366 U.S. at 41 (emphasis added). Obviously, Mr. Justice Harlan, writing for the majority in *Konigsberg II*, intended his remark to convey the thought that the requirement of "good moral character" could not be drawn into question in *that* case.

[16] 357 U.S. 513 (1958).

[17] 299 F. Supp. at 148 (opinion concurring in part and dissenting in part).

Speiser was distinguished by the majority in *Law Students*, however, on the ground that lawyers are within a limited class of persons who could create a serious danger to the public if evilly motivated.[18]

Certain questions included in the questionnaires promulgated by the bar-admission committees under the authority of the above statute and rule were also challenged. It is in an analysis of the validity of these questions that the court confronted the central issue of *Law Students*: Does the state exert a chilling effect on the associational and expressive rights of applicants by demanding an answer to broad political questions as a prerequisite to admission to the bar? Two of the questions survived the constitutional challenge, and they require little discussion:

> 27(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?[19]
>
> . . . .
>
> 32(a) Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?
>
> (b) Will you conscientiously endeavor to conform your professional conduct to them?[20]

But three others were found to be improper.

The first and most significant was Question 26:

> Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means?[21]

The court ordered that this question be clarified to indicate "that the organization's teaching or advocacy of violent overthrow must have coincided in time with applicant's membership."[22] In declaring Question 26 overbroad, Judge Friendly stated that

> [t]he prospect of having to respond to [such] inquiry . . . might have a deterring effect on exercise of the constitutionally protected

[18] *Id.* at 125.
[19] *Id.* at 129.
[20] *Id.* at 132.
[21] *Id.* at 129.
[22] *Id.* at 131.

> right of free association . . . [which may be] justified only when . . . the interest of the state is compelling.[23]

Perhaps the major case paralleling this proposition is *Elfbrandt v. Russell*,[24] in which the Supreme Court, invalidating a similar oath for Arizona state employees, stated, "[a] law which applies to membership without the 'specific intent' to further the illegal aims [overthrow of the government] of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."[25]

Question 27(a) asked simply, "Do you believe in the principles underlying the form of government of the United States of America?"[26] This question was declared so impermissibly vague and imprecise as to be unconstitutional.[27] The court in its conclusion concerning this question appeared to draw an extremely fine line between it and rule 9406, requiring belief in the form of government of the United States. The distinction apparently hinged on two considerations. First, the court accepted the bar examiners' interpretation of rule 9406 "as directing them 'to test whether applicants for admission can truly subscribe to the constituitonal oath of office.' "[28] Thus, the phrase "form of government" was judicially accepted to mean "constitution." Second, invalidation of one item on an administrative questionnaire is not so abrasive as invalidation of the statutory rule under which the entire questionnaire is promulgated. Furthermore, the court was confronted only with the potential for abuse under the broadly worded rule; no actual abuse was alleged by the plaintiffs in their action for a declaratory judgment.

One wonders how far a committee of bar examiners could go in denying admission to the bar on political grounds under a standard of the applicant's loyalty to form of government. Could one who conscientiously objects to war,[29] who is arrested during civil-rights activities,[30]

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[23] *Id.*

[24] 384 U.S. 11 (1966). See also Keyishian v. Board of Regents, 385 U.S. 589, 606-10 (1967).

[25] 384 U.S. at 19.

[26] 299 F. Supp. at 129.

[27] "It seems unnecessary to require such an imprecise declaration from an applicant for admission to the bar." *Id.* at 130.

[28] *Id.* at 126. Judge Friendly "assume[s] a proper implementation of Rule 9406" to reach his conclusion.

[29] For a positive answer, see *In re* Summers, 325 U.S. 561 (1945), in which the Supreme Court upheld Illinois' contention that Summers' refusal as a con-

or who is an outspoken advocate of abolition of the draft and the end of the Viet Nam War[31] be barred? Would any of these actions be evidence tending to rebut a belief in the form of government of the United States, or even in the Constitution? The problem is that no one can tell—the words "form of government" are broad and vague.

Question 31 asked: "Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is 'yes' state the facts."[32] This question was held impermissible because of its serious *in terrorem* effect, especially in light of the directions at the head of the bar-application questionnaire:

> This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.[33]

The plaintiffs also claimed that required submission to personal interviews was an unwarranted invasion of personal and political privacy. The court refused to interfere with this practice and said, "We have no reason to assume that as the scope of the committees' written inquiry is contracted, there will not be a similar adjustment in the focus of their spoken questions."[34] It should be mentioned that the defendant-examiners, perhaps aware of the potential infringement on first-amendment rights, made efforts during the course of litigation to remedy several particularly defective questions.[35]

How do bar-examiners' questions about past associations have a

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scientious objector to serve in the military made it impossible for him to take the constitutional oath. The Court found no violation of the fourteenth amendment.

[30] For a negative answer, see Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966), in which the court held that convictions and fist fights surrounding civil-rights activities did not warrant refusal of certification for admission to the bar.

[31] A majority of the members of the Georgia Legislature felt that Mr. Julian Bond's statement of opposition to the draft and the Viet Nam War disqualified him from taking a constitutional oath of office for service in that body. The Supreme Court rejected this contention. Bond v. Floyd, 385 U.S. 116, 125 (1966).

[32] 299 F. Supp. at 131.

[33] *Id.* at 132.

[34] *Id.* This assumption is only one of a number made by Judge Friendly. *Quaere,* should the court assume a narrowing of the oral investigation when it is within the court's power to order such a step?

[35] *Id.* at 129.

chilling effect on applicants' first-amendment rights of free speech and association?[36] A law student generally discovers quite early in his legal career that he will be held accountable for his associations before the bar; thus he may be encouraged to avoid anything but the most orthodox political associations.[37] Furthermore, the vagueness and breadth of the questions often contained in questionnaires by bar examiners make it difficult to decide what to include in the answers.[38] It has been suggested

[36] Mr. Justice Black, dissenting in *Konigsberg II*, described the effect well:

> If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might possibly be against, including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment.

[37] A letter, dated March 18, 1970, from Julius L. Chambers, a prominent black attorney and graduate of the University of North Carolina School of Law, to J. Michael Brown indicates that

> [m]any Negro law students, including myself, were deterred from joining controversial organizations while in law school because of fear of possible reprisals in efforts for admission to the North Carolina Bar. One of the associations . . . was the NAACP.

[38] The North Carolina State Bar Admission Application Questionnaire provides classic examples of broad inquiries into a prospective lawyers' past associations and political activities:

> 39. Are you now or have you ever been a member of any civic, fraternal, professional, charitable, honorary or other organization? If so, name them.
>
> 40. Are you now or have you ever been a member of any organization, association, movement, group or combination of persons engaged in the activity or business of influencing public opinion or legislation or fostering or attempting to foster legislation in this or any other State or relating to any branches of the Federal Government? If so, give full particulars.
>
> 41. Are you now or have you ever been a member of any organization, association, movement, group or combination of persons which advocates the overthrow of our constitutional form of government, or which has adopted the policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or which seeks to alter the form of government of the United States by unconstitutional means? If so, give full particulars.
>
> 42. Are you now or have you ever been a member of the Communist Party? If so, give the date or dates of your membership.
>
> 43. Are you now or have you ever been a member of, or associated with any organization, association, movement, group or combination of persons affiliated with, dominated by, or sympathetic to the Communist Party, or having other anti-social aims or objectives, or identified as being so affiliated? If so, give full particulars.
>
> 44. Have you ever engaged in any of the following activities of any organization of the type described above (Questions 39 through 43): contributions to, attendance at or participation in any organizational, social, educational, or other activities of said organizations or of any projects sponsored by them; the sale, gift, or distribution of any written, printed, or

that "hectoring students about membership in left-wing organizations, like National Lawyers Guild . . ." may force them to perjure themselves by giving answers best fitted to assure admission.[39]

If questions by bar examiners concerning past associations have a chilling effect on a law student's associational freedoms, is it permissible for the bar to ask them no matter how precisely they are phrased? In *Konigsberg I*,[40] the Supreme Court refused to reach first-amendment grounds raised by an applicant for admission to the California bar although Mr. Justice Black, speaking for the majority, indicated that the claims involving freedom of speech and association were not frivolous.[41] At his bar-admission hearing, Konigsberg had refused to answer questions that he considered to be political in nature. On the basis of this refusal, the admission committee found that he had not sustained his burden of proof of good moral character. The Supreme Court held that a mere refusal to answer the questions was not sufficient evidence to support that finding.[42] In a companion case, *Schware v. Board of Bar Examiners*,[43] the Court held that facts about Schware's political activities that were brought out at the administrative hearing[44] bore no rational connection to his fitness to practice law. The bar's refusal to admit him on lack of good moral character was held to have violated due process.[45]

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other matter, prepared, reproduced, or published, by them or any of their agents or instrumentalities? If so, give full particulars.

. . . .

68. Are there any unfavorable incidents in your life whether at school, college, law school, business, or otherwise, which may have a bearing upon your character or your fitness to practice law, not called for by the questions contained in your questionnaire or disclosed in your answers? . . . if yes, give full details.

[39] Brown and Fassett, *supra* note 3, at 501.

[40] Konigsberg v. State Bar, 353 U.S. 252 (1957).

[41] *Id.* at 270.

[42] *Id.* at 262. The Court found a violation of due process and equal protection. A close examination reveals the embryo of the "obstruction theory" (see text preceding note 47 *infra*), which flowered in *Konigsberg II*:

> If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political association . . . then we would be compelled to decide far-reaching and complex questions . . . .

Id. at 261. *See also, id.* at 259 & n.12. Bar examiners were quick to catch this distinction. *See* Kanner Remarks at 160-61.

[43] 353 U.S. 232 (1957).

[44] Schware had been a member of the Communist Party between 1932 and 1940, had used an alias in labor-organizing activities to avoid prejudice against Jews, and had been arrested several times when involved in labor disputes but had not been convicted. *Id.* at 236-38.

[45] *Id.* at 247.

In 1961, the Supreme Court was directly faced with the first-amendment issues in *Konigsberg* II[46] and developed the "obstruction rule." Essentially on the same facts as those in *Konigsberg I*, the Court held that a refusal to answer questions considered relevant to the investigation by the bar-admission committee could constitutionally result in a denial of admission on the ground that the applicant was obstructing the committee. Mr. Justice Harlan, writing for the five-man majority, had no trouble in deciding that the state's interest outweighed *any* intrusion into an area protected by the first amendment.[47] A companion case, *In re Anastaplo*,[48] reaffirmed the "obstruction rule," notwithstanding overwhelming evidence of the applicant's good moral character.[49] Anastaplo had persistently refused to answer any questions about his political associations,[50] and the Court again rejected the first-amendment argument.[51]

It has now been nine years since the "obstruction rule" was formulated, and in no case during this period has the Supreme Court considered the constitutional aspects of political inquiry by bar examiners. There have been, however, a number of cases that indicate the Court's unwillingness to sanction answers to political questions as a condition to public employment or office. The attorney's position is analogous to that of a public employee since he occupies a position of trust and of responsibility to the public at large. The usual differentiation made between lawyers and public employees is that the former are not agents of the state nor salaried by it and therefore need not be as closely scrutinized. Justice Fortas, concurring in *Spevack v. Klein*,[52] a case involving the fifth amendment, illustrated the point:

> But a lawyer is not an employee of the State. He does not have the responsibility of an employee to account to the State for his actions

[46] Konigsberg v. State Bar, 366 U.S. 36 (1961).
[47] *Id.* at 49-53.
[48] 366 U.S. 82 (1961).
[49] *Id.* at 105-06 (dissenting opinion).
[50] He was questioned about association with the Ku Klux Klan, Silver Shirts, any organization on the Attorney-General's subversive list, Democratic Party, Republican Party, Communist Party, and the Diety. *Id.* at 102 (dissenting opinion). He did advocate a "right to revolution" and grounded his belief on a paraphrase of the Declaration of Independence. *Id.* at 99.
[51] "[T]he State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association . . . ." *Id.* at 89.
[52] 385 U.S. 511 (1967).

> because he does not perform them as [an] agent . . . . The special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights.[53]

Judge Friendly in *Law Students* was confronted with the bar examiners' counterargument that public teachers deserve more protection of their constitutional rights because of their peculiar, sensitive need for academic freedom,[54] but he apparently rejected this theory.[55] The close analogy between attorneys and public officers or employees militates for a review of the doctrines underlying *Konigsberg II* and *Anastaplo*.

The Supreme Court's aversion to the conditioning of public employment or office on a limitaiton of first-amendment freedoms is evident in the line of cases since 1961 that involved loyalty oaths.[56] The earliest of these cases, *Cramp v. Board of Public Instruction*,[57] held a loyalty oath for teachers in Orange County, Florida, impermissibly vague. The Court declared, "[T]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of freedoms affirmatively protected by the Constitution."[58] In *Baggett v. Bullitt*[59] the Court held that states may not condition employment upon oaths[60] that are so vague that they serve to inhibit free speech.[61] And in *Bond v. Floyd*[62] the Court rejected, on first-amendment grounds, the notion that the Georgia Legislature could deny Bond his seat in that body on the basis that his opposition to national foreign policy and the selective-service system rendered him unable to take with sincerity the Georgia oath of office.[63]

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[53] *Id.* at 520 (concurring opinion).

[54] Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[55] 299 F. Supp. at 130-31.

[56] Keyishian v. Board of Regents, 385 U.S. 589 (1967), is the most recent affirmation of the Court's aversion to loyalty oaths for those seeking public positions.

[57] 368 U.S. 278 (1961).

[58] *Id.* at 287.

[59] 377 U.S. 360 (1964).

[60] The challenged oath read: "I solemnly swear (or affirm) that I will . . . by precept and example promote respect for the flag and the institutions of the United States . . . reverence for law and order and undivided allegiance to the government of the United States." *Id.* at 361-62.

[61] *Id.* at 372-73. The Court also held that the oath violated due process. *Id.* at 371.

[62] 385 U.S. 116 (1966).

[63] Interestingly, Judge Friendly quoted *Bond v. Floyd* in *Law Students* (299 F. Supp. at 126) for the proposition that a legislature need *not* seat one elected

As this case note goes to press, *Law Students*[64] and its companion cases[65] are before the Supreme Court. They will again provide the Court with the opportunity to balance first-amendment freedoms against the need of society for political inquires by bar examiners. The Court's reappraisal will have to be made in light of the aforementioned cases dealing with loyalty oaths.

What is socially desirable about the practice of bar-admission committees excluding or even searching out subversive applicants?[66] A recent article suggests that even the "hard-core revolutionary" does not present a great danger to the state and that whatever dangers he creates can be adequately handled through the contempt powers of the courts and disbarment procedures.[67] Would it not be better for one who believes in radical political reform to work within the existing system than without? If bar committees "chill" leftwing applicants, will not the bar's membership increase by a proportionately greater number of orthodox, conservative members—thus further dividing those who seek radical political and social reform from those within the "power structure?" Such stratification cannot be said to be in the best interests of a democratic government.[68] This generation of politically active students should be encouraged to

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to membership who swears to an oath pro forma but who disagrees with that oath. Judge Friendly felt that bar-admission committees may make a reasonable inquiry whether a student can take an oath with sincerity.

[64] Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (1969), *prob. juris. noted*, 38 U.S.L.W. 3253 (U.S. Jan. 13, 1970).

[65] *In re* Stolar, *cert. granted*, 396 U.S. 816 (1969); Baird v. State Bar, *cert. granted*, 394 U.S. 957 (1969). These two cases, having already been orally argued before the court, have been restored to the calendar for reargument: *Baird*, 396 U.S. 998 (1970); *Stolar*, 396 U.S. 999 (1970). They involve the petitioners' refusal to answer bar committees' political questions and subsequent denials of admission that were grounded, as in *Konigsberg II* and *Anastaplo*, on the "obstruction rule."

[66] Apparently some state bars do not. See Brown and Fassett, *supra* note 3, at 497:

> It is also relevant, for the sake of perspective, to record that at least seventeen states apparently make no loyalty investigation and have no loyalty tests at all, except the traditional oath to uphold the constitution. They are Arizona, Georgia, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, Nebraska, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. To these may be added Connecticut, except New Haven County.

[67] Taylor, *Inquiries into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 COLUM. SURVEY OF HUMAN RIGHTS L. 33, 40-45 (1967-68).

[68] In short, "[t]o force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it." *In re* Anastaplo, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting).

enter the field of law rather than discouraged. No one should feel that leftwing political leanings or associations might result in a denial of admission to the bar. As Judge Motley pointed out in his opinion in *Law Students*, "It is nothing short of a complete irony that lawyers who fought for and won constituitonal protections for other professions are the last to receive protection for themselves."[69] It is true that only a very small percentage of all applicants are rejected by state bars on grounds of character.[70] However, the real problem to be confronted is not the denial of admission occasioned by political probing of bar examiners, but the "chilling effect" on freedom of speech and association. Until required by the courts, all bar examiners should voluntarily share the view of Robert E. Seifer, Secretary of the Missouri Board of Law Examiners in 1952:

> Speaking solely for myself, I so not think that inquiry into political beliefs has any place in bar examination work. I think that the study of law is the best training anyone can have for becoming a good American and I do not think it should be cluttered up with investigations about political beliefs and whether or not the applicant happens to agree with what a majority of the people may or may not consider at the moment to be subversive.[71]

J. MICHAEL BROWN

Colleges and Universities—Constitutional Law—Legality of Broad Rules Governing Student Behavior

It is clear that the federal courts are concerned about the standards of procedural fairness observed by colleges and universities at disciplinary hearings.[1] But the courts have been extremely reluctant to scrutinize substantive rules that govern student behavior and more reluctant still to void such rules because of constitutional infirmity.[2] Using *Esteban v.*

[69] 299 F. Supp. at 146 (opinion concurring in part and dissenting in part).

[70] Estimates from New York, California, and Illinois bar admission rejections in 1952 indicates that only one-half of one per cent of all applicants were rejected on grounds of character. Brown and Fassett, *supra* note 3, at 497.

[71] *Id.* at 508. *Quoting* a letter from Robert E. Seifer.

[1] *E.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967).

[2] *See e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957); Steiner v. New

Central Missouri State University,[3] a recent case by the Court of Appeals for the Eighth Circuit, as a framework for analysis, this note will consider the extent to which the courts can adequately protect students from arbitrary action by school administrations if judicial review is limited to procedural matters at the expense of substantive considerations. This examination will be done, first, by measuring the college regulations in *Esteban* against the constitutional standards of vagueness and overbreadth and, second, by considering the Eighth Circuit's application of the rules to the factual events of the case. Throughout the note, a comparison will be drawn between the court's handling of the students' acts in *Esteban* and the judicial treatment generally accorded similar occurrences in a non-college context.

On the evenings of both March 29 and 30, 1969, demonstrations took place on the campus of Central Missouri State College. During these incidents, six hundred dollars of damage was done to college property, a public highway was blocked, traffic was halted, and cars were rocked and their occupants forced out into the street.[4] On the basis of acts committed during these incidents, two students, Alfredo Esteban and Steve C. Robards, were suspended from school for two semesters after they were orally advised of the charges against them and were given an informal conference with the Dean of Men. Alleging a denial of due process, Esteban and Robards sought an injunction against their dismissal in federal district court. The district court directed the school to grant the plaintiffs a new hearing at which certain procedural rights were to be accorded, including the right to notice of charges, the right to rudimentary discovery, the right to presence of counsel, the right to confront adverse witnesses, the right to call friendly witnesses, and the right to record the proceedings.[5]

At the new hearing granted by the university, Esteban and Robards

York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967); Connelly v. University of Vt. and State Agricultural College, 244 F. Supp. 156 (D. Vt. 1965); Due v. Florida A.&M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

[3] 415 F.2d 1077 (8th Cir. 1969). The opinion of the court was written by then Circuit Judge Blackmun, whose future decisions may be of considerably more moment. On May 12, 1970, Judge Blackmun was unanimously confirmed by the United States Senate to a seat on the United States Supreme Court. A strong dissent was registered by Judge Lay both on the merits and on the procedural issue of whether a federal court should merely review a disciplinary proceeding by a state college rather than grant a trial de novo.

[4] Esteban v. Central Mo. State College, 415 F.2d 1077, 1079 (8th Cir. 1969).

[5] Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967).

were given a full measure of procedural guarantees and were again suspended for two semesters. These suspensions were upheld by the district court[6] and, subsequently, by the Eighth Circuit.[7]

THE REGULATIONS

The following regulations of the college were quoted by the Eighth Circuit as pertinent to the suspension of Robards and Esteban:

> All students are expected to conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College.
>
> When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE.
>
> Conduct unbefitting a student which reflects adversely upon himself or the institution will result in disciplinary action.
>
> Mass Gatherings—Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called "spectators" get drawn into a fracas and by their very presence contribute to the dimensions of the problems. It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd.[8]

The principles of due process contained in the fourteenth amendment require that before a state may fairly punish an individual, it must give adequate notice of the conduct that is prohibited.[9] A statute that does not properly describe illegal conduct is unconstitutionally vague.[10] If men of common intelligence must guess at the meaning of a statute or if they could reasonably differ as to its application, it must fail for vagueness.[11] When preferred freedoms such as speech, press, religion, and assembly are involved, the standard is more demanding:

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[6] Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968).

[7] Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969).

[8] 415 F.2d at 1079.

[9] Niemotko v. Maryland, 340 U.S. 268 (1951). *See generally* Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MT. L. REV. 275 (1957); Note, *Uncertainty In College Disciplinary Regulations*, 29 OHIO ST. L.J. 1023 (1968).

[10] Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968).

[11] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

> [S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.[12]

Do the regulations in *Esteban* exhibit sufficient specificity to avoid the constitutional prohibition against vagueness? The first of the college rules under which Esteban and Robards were disciplined prohibited any mass gathering "which might be considered as unruly or unlawful." By definition, an "illegal gathering" must amount to conduct punishable under a properly explicit statute or state regulation; otherwise, the standard pertaining to vagueness is not satisfied. Whether a crowd is "unruly" is a question on which reasonable men could differ. Are spectators "unruly" if, at a sporting event, they boo the referee? Are the participants in a raucous fraternity party or an audience that hurls marshmellows at an unpopular speaker "unruly"? These questions are difficult, and answers are not likely to be uniform. The phrase "might be considered" in the regulation would further reduce expected uniformity of opinion because the inclusion of such language introduces additional elements of subjectivity.

The second regulation in issue in *Esteban* required students to "conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College." Are the social customs to which the regulation refers those accepted by the campus radicals, the "straight" students, the average Missouri citizen, or the faculty wives' association? Is it "befitting" a student to vociferously demand constitutional freedoms, or is it "unbefitting" to refrain from such actions? There is surely a quantum of vagueness and uncertainty in this regulation.

The court found no merit in the defendant's attack on the vagueness of the regulations, said that the regulations were not hard to understand, and expressed confidence that college students could find certainty in them.[13] The court further indicated that even if the rules were somewhat broad, they were still valid because "flexibility and reasonable breadth"[14] in student regulations are not constitutionally fatal. The court joined in the opinion of those "qualified and experienced" in the field of education who have felt it preferable for codes of student behavior to be general

[12] Smith v. California, 361 U.S. 147, 151 (1959).
[13] 415 F.2d at 1088.
[14] *Id.*

rather than specific, and it cited as authority three articles—all written by and for college administrators.[15] It is not particularly startling that such individuals would prefer broad, general rules; for the writing of new codes would probably be their task, and any code with specific regulations would sharply curtail their discretion in matters of student discipline. The court failed to note that others "qualified" in the field of education[16]—such as the American Association of University Professors, the National Student Association, and the American Associations of Colleges—and some "experienced" in the field of law—such as Professors Wright,[17] Linde,[18] and Van Alstyne[19]—have argued that specificity[20] in student rules is preferred, if not required.

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[15] *Id.*

[16] *Joint Statement on Rights and Freedoms of Students*, AM. ASS'N. OF UNIV. PROFESSORS BULL. (Summer 1968). The following organizations have approved the Joint Statement: U.S. National Student Association, Association of American Colleges, American Association of University Professors, National Association of Student Personnel Administrators, National Association of Women Deans and Counselors, American Association for Higher Education, Jesuit Education Association, American College Personnel Association, Executive Committee, College and University Department, National Catholic Education Association, Commission on Student Personnel, American Association of Junior Colleges. It is interesting to note that one authority on this point cited by the court (415 F.2d at 1088) is taken from a publication of the American College Personnel Association, one of the groups that has adopted the Joint Statement.

[17] Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1064 (1969).

[18] Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40 (1966).

[19] Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 592 (1968).

[20] Support for the proposition that student disciplinary rules should be specific rather than general is found in the nature of a second act that the college, sustained by the court, found sufficiently culpable to punish. This act was the writing of a letter by Robards to a Missouri state legislator that contained the following language:

> I assure you, I do not stand alone in my disgust with this institution. From suppression of speech and expression to ridiculous, trivial regulations this college has done more to discourage democratic belief than any of the world's tyrants. . . . My comrades and I plan on turning this school into a Berkeley if something isn't done.

415 F.2d at 1081.

In this letter the court could find no expression of a grievance (*id.* at 1084) although the language in the second sentence about suppression of speech and trivial regulations certainly has a grievance-like ring. The court also found a flat threat contained in the seemingly-ambiguous third sentence (*id.*). Even assuming that the court was correct in asserting that correspondence to a state legislator is punishable if it either contains a veiled threat or does not with sufficient specificity articulate a grievance, the court by its approach dealt in reality with whether these acts could be punished at all rather than with whether they could be punished under the regulations involved in the case. A student would have to be almost

In addition to cases dealing with "vagueness" in governmental laws and rules, a second line of precedent involves the doctrine of unconstitutional conditions.[21] The courts have made it abundantly clear that the constitutional guarantees of freedom of speech,[22] assembly,[23] and press[24] operate with full vigor on college campuses. While a state is not required to provide subsidized higher education for its citizens,[25] it may not condition the enjoyment of such a privilege on the surrender of preferred constitutional rights, at least in the absence of a compelling state interest.[26] What must be settled is whether the constitutional guarantee of freedom of assembly extends to "unruly or unlawful" mass gatherings. It is fairly easy to maintain that it does not extend to unlawful gatherings,[27] but it is extremely difficult to say that the guarantee does not

clairvoyant to anticipate that writing such a letter could be punished under either pertinent regulation. Perhaps a student should be expected to realize that politically sensitive school administrators might consider any complaint lodged with state legislators to be inherently "conduct unbefitting."

[21] Robards was on disciplinary probation at the time of the incident, a fact on which the court placed great emphasis. (415 F.2d at 1079, 1088). Although generally a college may not place unconstitutional conditions on the enjoyment of state-granted educational privileges, can such conditions be imposed pursuant to college disciplinary action by analogy to the case of a citizen who can be constitutionally deprived of certain fundamental rights while on probation or parole? Cooper v. United States, 91 F.2d 195 (5th Cir. 1937) (probationer is not a free man but is subject to such restrictions as a court may impose); Adamo v. McCorkle, 26 N.J. Super. 562, 98 A.2d 597 (1953) (right to travel may be restricted). Although there appear to be no cases involving this question, two distinctions between the situations seem to compel a negative response. First, state and federal courts are constitutionally established and invested with the full authority of the state or federal government to completely deprive an individual of his liberty in appropriate circumstances, a power which college disciplinary bodies do not possess. Second, state and federal courts must strictly observe the full range of procedural rights accorded by the Constitution and can punish only under laws drawn to satisfy constitutional specifications, limitations that do not all obtain on campus.

[22] Bartels v. Iowa, 262 U.S. 404 (1923).

[23] Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967).

[24] Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967). *See generally* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), for a discussion of first-amendment rights in the educational context.

[25] Hamilton v. Regents of Univ. of Calif., 293 U.S. 245 (1934); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 156 (5th Cir. 1961).

[26] Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968).

[27] In a context such as this one, stating that certain conduct is constitutionally protected means that the interest of the state is not sufficiently compelling to justify limitation of preferred freedoms, of which assembly is one. The state has an interest in the preservation of order on the campus, which can in some cases be of such importance that freedoms may be abridged. But at least one case, Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851

extend to "unruly" assemblies. In both *Edwards v. South Carolina*[28] and *Cox v. Louisiana*,[29] the crowds were dancing, clapping and singing loudly. Although in both situations the deportment of the crowds could reasonably be described as unruly, the Supreme Court held that the congregations involved were constitutionally protected by the right to freely assemble.[30] So, if indeed there is a constitutional right to participate in an unruly mass gathering, a statute promulgated in the non-academic world abridging that freedom would be fatally contrary to the demands of the Constitution. If the first amendment applies with full vigor on the campus, as the courts maintain,[31] a similar rule issued by a state college or university should also be void.

A final notion, perhaps not yet raised to the level of a constitutional doctrine, related to the rule-making power of a state university is that the school may discipline a student only for conduct that interferes with the institution's primary function—namely, "imparting and expanding the boundaries of knowledge."[32] This concept represents the furtherest departure to date from the once-popular idea that the school stands *in loco parentis* to the student and has despotic power to regulate every phase of his life.[33] The primary-function theory holds, for example, that while a school may validly punish a student for plagiarism, an offense not punishable by general society but clearly a danger to the institution's teaching function, it should leave to the civil authorities such serious, but educationally unrelated, offenses as reckless driving or shoplifting. This principle has been widely accepted by legal scholars,[34] but it has accrued

(1948), has held that anticipation of violence is not sufficient justification for preventing assemblies.

[28] 372 U.S. 229 (1963).

[29] 379 U.S. 536 (1965).

[30] *See also* Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

[31] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[32] Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23, 38 (1966).

[33] North v. Board of Trustees of the Univ. of Ill., 137 Ill. 296, 27 N.E. 54 (1891); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).

[34] McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558, 561-63 (1968); Sherry, *Governance of the University: Rights, Rules, and Responsibilities*, 54 CALIF. L. REV. 23, 38 (1966); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 3 LAW IN TRANS. Q. 1, 28-33 (1965); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 336 (1968).

only a small following among the courts.[35] It is interesting to note that the trial court that decided *Esteban* accepted this idea.[36] Despite its lack of universal acceptance, the primary-function principles serves as both an analytical tool and, perhaps, a preview of a soon-to-be-established rule of law. When the two regulations involved in *Esteban* are measured by this principle, the rule governing mass gatherings would be easily acceptable (assuming that it was not too vague) because colleges and universities have every right to suppress or prevent riots and disturbances that might interfere with the orderly pursuit of learning. The "conduct-befitting" rule, however, can only be tested by resorting to the particular factual situation so that it can be ascertained whether the school had any valid interest in the conduct that it sought to punish.

THE CULPABLE ACTS[37]

Robards

On the first night of disturbances, Robards was present as a spectator at the scene for thirty minutes; on the second, he was present for one hour, again as an observer. On both occasions he talked with other students in the crowd, and on the second night he discussed with others what was taking place and expressed his disgust with the college. He also *observed* some of the illegal acts of the crowd.[38] As a consequence of these acts, Robards was cited for "contributing to and participating in an unruly and unlawful mass gathering."[39]

One procedural right on which the courts have uniformly insisted for students appearing before college disciplinary boards is that they cannot be punished in the absence of "substantial evidence."[40] In light of this guarantee, how could the Eighth Circuit conclude that there was substantial evidence of participation by Robards in the crowd's unlawful acts when it was shown that he did nothing but stand in the crowd and

[35] Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 871, 57 Cal. Rptr. 463, 472 (1st Dist. Ct. App. 1967).

[36] 290 F. Supp. 622, 629 (1968).

[37] Space limitations prohibit a thorough discussion of all acts charged against Robards and Esteban, but all acts not analyzed in the text will be mentioned in the notes.

[38] 415 F.2d at 1080.

[39] *Id.* at 1082.

[40] Jones v. State Bd. of Educ., 279 F. Supp. 190, 200 (M.D. Tenn. 1968); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967). *See also General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968).

converse with his schoolmates? Cases cited by the court itself clearly establish the principle that a citizen may *not* be criminally punished for mere presence in a crowd that committed unlawful acts.[41] In *Rollins v. Shannon*[42] a district court stated unequivocally that "it is clear that mere presence at an unlawful assembly does not render one liable to arrest and prosecution. . . . One must intend to and in fact participate."[43] And in *Scoggin v. Lincoln University*[44] this same principle of "mere presence" was applied to a case involving a college demonstration. The court refused to uphold the expulsion of a student by the university because, while he had been active in organizing the incident and had been present throughout the violence that resulted, it was not shown that he had participated in any illegal activity.[45]

Choosing not to rely on decisions directly in point, the Eight Circuit in *Esteban* looked to cases from the nonacademic world for a principle that could be applied to campus activity.[46] The court adopted the "rational-connection" principle that was first announced in *Tot v. United States*[47] in 1943 and approved as late as May, 1969, in *Leary v. United States*[48] to uphold Robards' suspension. This test is stated in *United States v. Romano*[49] in the following manner: "Such a legislative determination would not be sustained if there was 'no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection . . . in common experience.' "[50] By adopting this test, the court in *Esteban* raised for itself the problem of deciding whether the fact of mere presence in a crowd is connected in common experience to actual participation in punishable activity. Does common experience indicate that each individual in a crowd of several hundred is guilty of every illegal act of the crowd? The court asserted that Robards "[m]ay not have stopped any automobile,

[41] Barr v. Columbia, 378 U.S. 146, 150 (1964); Rollins v. Shannon, 292 F. Supp. 580, 590 (E.D. Mo. 1968).

[42] 292 F. Supp. 580 (E.D. Mo. 1968).

[43] *Id.* at 590.

[44] 291 F. Supp. 161 (W.D. Mo. 1968).

[45] *Id.*

[46] While refusing to apply such fundamental principles as "void-for-vagueness" (see discussion pp. 945-48 *supra*) and "unconstitutional conditions" (see pp. 948-49 *supra*), the court unquestioningly applied a severely criticized doctrine of secondary importance.

[47] 319 U.S. 463 (1943).

[48] 395 U.S. 6 (1969).

[49] 382 U.S. 136 (1965).

[50] *Id.* at 139.

or rocked it or forced out its occupants or damaged property, but these incidents took place and were caused by the mob and he was a part of the mob."[51] Since in deciding whether the requisite "rationality" is present, subjective factors are probably determinative, it is impossible to say that the court was wrong. But even if its conclusion was correct, the result would seem to make every casual bystander guilty of any illegal act of that amorphous and ill-defined entity, the crowd. The court's rationale would force an individual contemplating attendance at a gathering to accurately forecast the presence or absence of violence in order to avoid punishment.[52] *Rollins v. Shannon*[53] and other cases establish the proposition that this result could not obtain outside the college environment, and *Scoggin v. Lincoln University*[54] indicates that it should not apply to activities related to the campus.

Esteban

On the first evening of disturbances, Esteban left his dormitory about the time that the disruptions were subsiding and proceeded to within a short distance of the intersection that had been the center of the violence. There he encountered Dr. Meverden, a faculty member who was seeking to disperse the remaining students. Meverden twice asked Esteban to return to his dormitory; twice Esteban refused, insisting that he was breaking no law and that he "had a right to be out there."[55] Esteban argued with Meverden, questioned his authority, and said that there were no rules limiting the time men could stay outside the dormitories. Shortly thereafter, at the encouragement of other students present, Esteban did return to the dormitory.[56] At the college disciplinary proceeding, Esteban was charged, *inter alia*, with "contributing to and participation in an unruly and unlawful mass gathering . . . in that . . . [he] . . . did resist the efforts of one Dr. M. L. Meverden in dispersing said mass gathering. . . ."[57]

[51] 415 F.2d at 1085. Judge Lay's dissenting opinion stated categorically that "there is no evidence whatsoever to show that Robards was a 'participant' in any unlawful disturbance or illegal demonstration." *Id.* at 1093.

[52] *Id.* at 1080. The dissent in *Esteban* strongly supported the idea that a student should not be forced to take this risk. The dissenting judge also seemed to feel that the chilling effect of this result on the exercise of first-amendment freedoms was not properly considered by the majority. *Id.* at 1094-96.

[53] 292 F. Supp. 580 (E.D. Mo. 1698).

[54] 291 F. Supp. 161 (W.D. Mo. 1968).

[55] 415 F.2d at 1080.

[56] *Id.*

[57] *Id.* at 1081.

In considering the events that the Eighth Circuit found sufficient to warrant Esteban's suspension, it is important to note not only that there was no proof that Esteban took part in any of the illegal acts committed by members of the crowd but also that the facts established that he did not leave his dormitory until "about the time the 'disturbance' had subsided."[58] Yet he too was charged with "contributing to and participating in an unruly and unlawful mass gathering."[59] If it offends due process to discipline an individual who was merely present in a crowd when illegal acts were committed, a fortiori punitive action taken against a student who did not arrive at the scene until the disruption was almost over is similarly offensive.

The charge against Esteban was couched in terms seeming to indicate that it was the order-keeping function of the university upon which he encroached. But this position is clearly untenable because Esteban did eventually comply with Meverden's request that he return to his dormitory, thereby satisfying the university's interest in preventing further violence. Perhaps Esteban was really punished for his tardiness in returning. But Esteban had been in the dormitory until the disturbance had almost ended, and he may not have known that any illegal acts were committed. Moreover, it is unclear whether Esteban recognized Meverden as a member of the faculty or whether Meverden identified himself. It would seem that if such identity was not established, Esteban could not have been punished whether he complied promptly, slowly, or not at all with Meverden's instructions. These two factors would seem to provide abundant justification for Esteban's less-than-precipitous return to his dormitory.

A second possible basis for the charge is that Esteban was punished for failing to comply with a directive of an administrator. The opinion of the court is full of language supporting the idea that defiance of college authority is an offense in itself.[60] Apart from situations on the college campus, the proposition has been established that an individual may not be punished for failure to obey an official of the state unless the official's directive is supported by a valid statute.[61] In *Shuttlesworth v. Birmingham*,[62] the Supreme Court of the United States said, "Our decision makes

[58] *Id.* at 1080.
[59] *Id.* at 1081.
[60] *Id.* at 1084, 1088 and 1089. The dissent agreed. *Id.* at 1092.
[61] Cox v. Louisiana, 379 U.S. 536, 579 (1965) (opinion dissenting in part and concurring in part).
[62] 382 U.S. 87 (1965).

it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense."[63] Therefore, it would appear that if Esteban's conduct were not punishable under a valid statute or university regulation, his defiance of proper authority could not, by itself, be punished.

One final possibility on which Esteban's suspension may have rested is that mere disrespect for a member of the faculty or representative of the administration is an offense in itself. At least one court has accepted this principle.[64] Others have not.[65] Perhaps the question that should be asked is what interest a school has in protecting the personal dignity of an individual faculty member. In a context such as the one in *Esteban*, in which the teaching functions of the school were not at stake, the university should have small or no interest,[66] especially since sanctions for disrespect cannot, standing alone, possibly confer respect.[67]

CONCLUSION

This note has shown that the standard of vagueness applied by the Eighth Circuit in *Esteban* to test a state college's regulations is not as strict as that normally applied to the ordinary criminal statute. It has also been suggested that the court failed to take proper notice of the doctrine of "unconstitutional conditions" and that the court found punishable some acts that would not have been punishable if committed away from the campus. These results occurred despite the fact that a generous measure of procedural fairness was given both students.

The relaxing of constitutional standards applicable to substantive regulations of state universities and colleges may seduce an unwary court into an almost cavalier attitude toward student rules, a trap that may have ensnared the Eighth Circuit. After asserting that the pertinent rules were not vague[68] and that vagueness is not a fatal flaw,[69] the court said, "the college's regulations, per se, do not appear to us to constitute the

[63] *Id.* at 91.

[64] Jones v. State Bd. of Educ., 279 F. Supp. 190, 195 (M.D. Tenn. 1968). The dissent in *Esteban* subscribed to this position. 415 F.2d at 1092.

[65] Breen v. Kahl, 296 F. Supp. 702, 708 (W.D. Wis. 1969); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 618 (M.D. Ala. 1967).

[66] *See* text at note 31 *supra.*

[67] Esteban was also disciplined for refusing to identify himself to Dr. Meverden and for threatening and using obscene language toward a resident advisor of his dormitory. 415 F.2d at 1081-82.

[68] See text at note 13 *supra.*

[69] See text at note 14 *supra.*

fulcrum of the plaintiff's discomforture. The charges against Esteban and Robards did not even refer to the regulations."[70] It is somewhat disturbing to find that an individual can be deprived of a college education on the basis of vague rules, but it is much more upsetting to discover that he may be deprived of it on the basis of some previously undefined common law rule governing the behavior of students. The federal and state courts have written numerous opinions concerning the procedural rules to be applied in college disciplinary proceedings; it is clear that they are concerned that students not be arbitrarily denied the advantages of a public college education. However, unfairness may not be purged from student disciplinary action without the strict application of accepted constitutional standards to the substantive rules. Professor Wright was very close to the heart of the matter when he said:

> If rules of this generality are permissible then students have gained something, but not very much, from the decisions requiring procedural safeguards to be observed. It will do a student very little good to be given every protection of procedural due process ever thought of anywhere if, in the end, he may be expelled because the tribunal is free to apply a subjective judgment about what is acceptable conduct. This would be neither fair nor reasonable.[71]

J. CLINTON EUDY

Corporations—Recovery of Indemnity by Passively Negligent Directors

The exact nature of the legal relationship of corporate directors to the corporation or its stockholders has long been a source of much confusion. Various legal theories have been developed:

> The position of directors has been variously designated and described. Thus, they have been called agents; and they certainly are for some purposes agents of the corporation. They have also been called "managing partners;" but as they are obviously not partners at all, the phrase is helpful only by analogy. Again, they have been called "trustees." But a trustee is one who holds the title to property for the benefit of another, and as directors are not invested with the title to corporate property, the inaccuracy of the appellation is apparent. The truth is that the status of director and corporation is a

[70] 415 F.2d at 1088.
[71] Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1065 (1969).

> distinct legal relationship. It resembles in some respects those of agent and principal, of managing and dormant partners, of trustee and *cestui que trust*; but it is different from each.[1]

In *DePinto v. Landoe*[2] the Court of Appeals for the Ninth Circuit applied alternate legal theories to the issue of whether a passively negligent corporate director could recover indemnity from a director who is guilty of malfeasance.

In *Landoe*, the plaintiff and two of the defendants were directors of United Security Life Insurance Co. (United).[3] When United was in the twilight of its productive life, the defendants formed American Security Investment Co. and transferred 314,794.19 dollars of United's assets (consisting of cash, promissory notes, and mortgages)[4] to American in exchange for worthless American stock.[5] At the same meeting in which the defendants voted to authorize transfer of United's assets, DePinto was present only to offer his resignation from the board of United prior to the vote.[6] In a derivative suit[7] brought by United's stockholders, the claim against DePinto was severed[8] from the claims against the other directors. Judgment for the value of the transferred assets was entered against him. In *DePinto v. Provident Security Life Insurance Co.*,[9] the Ninth Circuit found sufficient evidence to support a finding of negligence and breach of fiduciary duty by DePinto and affirmed the judgment against him. DePinto's cross-complaint against his fellow directors for the amount of the judgment was dismissed by the district court,[10] and the appeal in *Landoe* followed.

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[1] 2 A. MACHEN, A TREATISE ON THE MODERN LAW OF CORPORATIONS § 1399 (1908).

[2] 411 F.2d 297 (9th Cir. 1969).

[3] Of the three defendants, Sabo and Pegram were directors of United, and Landoe was a director of American Security Development Co. The claim against Sabo and Pegram arose out of their alleged breach of fiduciary duty. The claim against Landoe was grounded in conspiracy to commit fraud; it is peripheral to this note and will not be considered further.

[4] DePinto v. Provident Security Life Ins. Co., 374 F.2d 37, 47 n.7 (9th Cir. 1967).

[5] *Id.* at 43.

[6] *Id.* at 42.

[7] DePinto v. Provident Security Life Ins. Co., 374 F.2d 37 (9th Cir. 1967).

[8] The claim against DePinto was severed because it was uncomplicated by allegations of fraudulent transfer. The claim against him was based solely on his alleged failure to exercise the required standard of fiduciary care.

[9] 374 F.2d 37 (9th Cir. 1967). For the fifteen months prior to the final meeting of the board, DePinto attended none of the board meetings but perfunctorily signed the minutes of those meetings. Twice during the period, he signed minutes stating falsely that he was present. *Id.* at 41.

[10] DePinto v. Landoe, 411 F.2d 297, 299 (9th Cir. 1969).

The Ninth Circuit in *Landoe* based the first of its alternative theories on analogy to the law of trusts to reach the conclusion that DePinto could recover indemnity from his fellow directors. Concluding that Arizona law, which accepted the analogy, controlled,[11] the court held that DePinto's right to obtain indemnity arose out of his "consensual relationship"[12] with the corporation. He therefore became subrogated to the claims of United against his co-directors.

Although in a number of cases courts have designated corporate directors as "trustees" either for the corporation or for its stockholders,[13] analogy to the law of trusts is not without conceptual difficulties. A trustee holds title to the trust property;[14] a corporate director does not hold title to the assets of the corporation. Beneficiaries of a trust are liable to third persons for costs incurred in administration of the trust;[15] stockholders of a corporation are not personally liable for operating expenses of the corporation. It must be concluded, therefore, that directors of corporations should be treated as constructive trustees[16] or as trustees for limited purposes[17] only when some policy of the law justifies such treatment. In deciding *Landoe*, however, the court failed to evaluate the policies that would justify indemnifying the director who was passively negligent.[18]

The court in *Landoe* could have based its decision solely on the analogy that it found to the law of trusts. However, analyzing the case in terms of agency, the court found an alternative theory for allowing recovery of indemnity.[19] Under the second theory used by the court,

[11] *Id.* at 300, *citing* Kenton v. Wood, 56 Ariz. 325, 107 P.2d 380 (1940); Steinfield v. Neilson, 15 Ariz. 424, 139 P. 879 (1913); Hatch v. Emery, 1 Ariz. App. 142, 400 P.2d 349 (1965).

[12] 411 F.2d at 300.

[13] *Cf.* Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941); Saracco Tank & Welding Co. v. Platz, 65 Cal. App. 2d 306, 150 P.2d 918 (1944); Tuttle v. Junior Bldg. Corp., 228 N.C. 507, 46 S.E.2d 313 (1948). *Contra,* RESTATEMENT (SECOND) OF TRUSTS § 16A (1959).

[14] RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

[15] *Id.* § 274.

[16] Bainbridge v. Stoner, 16 Cal. 2d 423, 429, 106 P.2d 423, 427 (1940).

[17] "[Corporate directors are] trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith." Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 649, 15 S.W. 448, 453 (1891). "One who is a director for a corporation acts in a fiduciary capacity, and the law does not allow him to secure any personal advantage as against the corporation or its stockholders." Bainbridge v. Stoner, 16 Cal. 2d 423, 427, 106 P.2d 423, 426 (1940).

[18] See p. 960 *infra.*

[19] However, if we are mistaken in this analysis [analogy to the law of trusts], and DePinto should, under Arizona law, be regarded as a tort-feasor with respect to the breach of his fiduciary duty, we are nevertheless of the

DePinto was treated as an agent of the corporation, and his breach of fiduciary duty brought about his liability in tort.[20] The court allowed him to recover indemnity because it held that the breach of his duty had been passive in nature while the defendants had been guilty of malfeasance.

The use of the theory of agency in the case is as plagued by conceptual difficulties as is the analogy to the law of trusts.[21] A true agent, unlike a corporate director, acts on behalf of and subject to the control of his principal at all times.[22] Furthermore, either party can terminate the agency relationship at any time.[23] Analyzing the case in terms of agency also raises two other difficult problems. A principal as the plaintiff in a tort action against an agent must prove an actual monetary loss to recover damages,[24] and he must prove that the loss was the proximate result of the defendant's breach of a fiduciary duty.[25]

Although DePinto had violated his fiduciary duty to United,[26] the court in *Landoe* found that his actions had been "inactive in nature, different in character, and prior in time"[27] to those of the defendants and that he could, therefore, properly cross-complain for indemnity. Cited as controlling on the issue of indemnity was *Busy Bee Buffet, Inc. v.*

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view that, under the particular circumstances of the case, his status as a tort-feasor does not bar him from obtaining indemnity.
411 F.2d at 300.

[20] *Accord,* Baltimore & O.R.R. v. Foar, 84 F.2d 67 (7th Cir. 1936); Etheredge v. Barrow, 102 So. 2d 660 (Fla. Dist. Ct. App. 1958).

[21] RESTATEMENT (SECOND) OF AGENCY § 14C (1958): "Neither the board of directors nor an individual director of a business is, as such, an agent of the corporation or of its members."

[22] *Id.* § 1. A board of directors is not subject to stockholders' control except with regard to the appointment and removal of its members. The stockholders cannot otherwise interfere, and the board of directors is entitled to use its own business judgment in managing the affairs of the corporation. *Id.* § 14C, comment *a;* Note, *Position of Corporate Director as Sui Generis,* 35 MINN. L. REV. 564, 565-66 (1951).

[23] RESTATEMENT (SECOND) OF AGENCY § 119 (1958). Except under certain extreme circumstances, members of a corporate board of directors can be displaced only by the stockholders' refusal to re-elect them. *Id.* § 14C, comment *a;* Note, *Position of Corporate Director as Sui Generis, supra* note 22, at 565-66.

[24] Eccles v. Sylvester, 131 Colo. 296, 281 P.2d 1006 (1955). *Contra,* Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 P. 496 (1913) (president of a corporation must account for secret profits that he obtained).

[25] N. LATTIN, THE LAW OF CORPORATIONS 245 (1959); Note, *Corporations—Liability of Corporate Directors for Failure to Exercise Reasonable Diligence and Due Care,* 71 DICK. L. REV. 668, 673-74 (1967). See Barnes v. Andrews, 298 F. 614, 616-17 (S.D.N.Y. 1924) for an example of an insuperable burden of proof.

[26] DePinto v. Provident Security Life Ins. Co., 374 F.2d 37 (9th Cir. 1967).

[27] DePinto v. Landoe, 411 F.2d 297, 301 (9th Cir. 1969).

Ferrell,[28] in which an invitee sued Busy Bee for injuries sustained when he fell through a trap door on the premises of the corporation. Busy Bee filed a cross-complaint for indemnity against its co-tenant, who had negligently left the trap door in a dangerous position. The court held that since the corporation's negligence had been passive, indemnity would be allowed; no injury would have occurred but for the active negligence of the co-tenant.[29]

The court's reliance on *Busy Bee* was misplaced. That case should have no effect on *Landoe* because the standard of care imposed in *Busy Bee* is not logically applicable to the situation involving negligence by a corporate director in carrying out his duties. Busy Bee recovered because the active negligence of the co-tenant caused the breach by the corporation of its duty to maintain a safe passage for invitees. The duty of DePinto, a corporate director, was to manage the assets of the corporation; he breached his fiduciary duty by failing to attempt to prevent the transfer of United's assets to American.[30] The standard of care required of Busy Bee was that it use *ordinary care* to prevent dangerous conditions on its premises. Directors of corporations, on the other hand, are fiduciaries required to exert the *utmost care and good faith* to protect the assets of the corporation.[31] Since only ordinary care was required of Busy Bee, it could recover indemnity because its negligence was passive when compared to the active negligence of its co-tenant. According to this logic, if the standard of care for a corporate director is higher than ordinary care, then not only would he be liable to the injured party for either active or passive negligence, as was Busy Bee, but he would also

[28] 82 Ariz. 192, 310 P.2d 817 (1957).
[29] *Id.* at 197, 310 P.2d at 820-21.
[30] 411 F.2d at 300.
[31] Norway-Pleasant Tel. Co. v. Tuntland, 68 S.D. 441, 3 N.W.2d 882 (1942). In Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968), the court applied different standards of care to various defendants based on the relationship of each particular one to the corporation. For example, the court applied a stricter standard of care to an attorney-director who helped prepare the corporation's registration statement than to a director who had no part in preparing the statement. Folk, *Civil Liabilities Under the Federal Securities Acts: The BarChris Case*, 55 VA. L. REV. 1, 42 (1969). Since *BarChris* arose out of violations of the Securities Act of 1933, the Act should govern the standard of care to be applied. The standard imposed by the Act is that "required of a prudent man in the management of his own property." 15 U.S.C. § 77(k)(c) (1964). This standard is equivalent to the high degree of care required by common law for fiduciaries. RESTATEMENT (SECOND) OF TRUSTS § 174 (1959); Folk, *supra* at 117. Thus, although the court in *BarChris* applied variable standards, it is clear that the Act requires a minimum standard of care that is equivalent to the high standard required of fiduciaries.

be unable to recover indemnity. Thus, active and passive negligence, which might be unequal under the standard of *Busy Bee*, should be found to be equal under the fiduciary standard with the result that the passive wrongdoer would not recover indemnity.

The decision in *Landoe*, if sound at all, could better have been based on equitable considerations that the court failed to enumerate. Whether to allow the equitable remedy of subrogation[32] should have been dependent upon the court's policy toward allowing indemnity for a corporate director who is passively negligent. In favor of allowing indemnity are: (1) the unfairness of permitting liability to fall on the director charged with passive negligence rather than the ones who are guilty of malfeasance and (2) the possible discouragement of some persons from assuming the responsibilities of corporate directors unless liability is limited to cases of malfeasance.[33] Militating against indemnity is the policy of protecting corporate stockholders. If the court had disallowed indemnity for the director who had been passively negligent, the effect would have been to encourage a higher standard of care of corporate directors and thus possibly to provide more protection for stockholders.

In deciding whether the court that decided *Landoe* reached the right result, it is necessary to consider how the above policies apply to the various relationships between co-directors. A paradigm used by Professor Scott in analyzing trusts is valuable in this analysis:

> Where there are two trustees and a breach of trust is committed by one of them, the other is liable if he is himself guilty of a violation of duty to the beneficiaries. This is the case (1) where he participates in the breach of trust . . . (3) where by his failure to exercise reasonable care he has enabled his co-trustee to commit the breach of trust; (4) where he approves or acquiesces in or conceals the breach of trust. . . .[34]

Under Professor Scott's first category, a corporate director who participates in the breach of trust should be equally liable with the other participating directors. In *Knox Glass Bottle Co. v. Underwood*,[35] the

[32] Subrogation is "founded on principles of justice and equity, and . . . [i]t rests on the principle that substantial justice should be attained regardless of form." Castleman Constr. Co. v. Pennington, — Tenn. —, —, 432 S.W.2d 669, 674 (1968); *accord*, South Shore Nat'l Bank v. Donner, 104 N.J. Super. 169, 249 A.2d 25 (1969).

[33] Note, *Position of Corporate Directors as Sui Generis*, *supra* note 22.

[34] 3 A. Scott, Trusts § 224 (1967).

[35] 228 Miss. 699, 89 So. 2d 799 (1956).

defendant-directors and their friends leased equipment to Knox at exorbitant rates. The directors were found jointly and severally liable for each other's gains and for the gains of their friends.[36] Joint participation represents the strongest case for joint and several liability among corporate directors, and, conversely, the weakest case for indemnity.

A trustee or director may be liable if, as in Professor Scott's fourth illustration pertaining to trustees, he approves, acquiesces in, or conceals the breach of trust even though he receives no benefit from the transaction. It is arguable that the facts of *Landoe* fall within this classification. Since DePinto's resignation from the board of United was tendered at the same meeting in which the resolution in question was passed, it is clear not only that he had actual knowledge of the intended transaction, but also that he was in a position to resist if he had not resigned.[37] His resignation, therefore, might be termed acquiescence or approval of the transaction. This situation represents a somewhat stronger case for indemnity due to a difference in the degree of fault between the director who was passively negligent and those who were guilty of malfeasance.

By analogy to Professor Scott's category number three, a director is liable if his failure to exercise reasonable care enables a co-director to commit a breach of trust. In *Allied Freightways, Inc. v. Cholfin*,[38] the wife of the corporation's president, who was a completely innocent and passive director, was unable to avoid liability for the wrongful conduct of the other corporate directors. In *Globus v. Law Research Service, Inc.*,[39] a cross-complaint for indemnity by a passively negligent underwriter against " 'active' wrongdoers" was denied.[40] Although *Landoe* was based on state law and *Globus* was based on federal securities regulations, the Ninth Circuit in deciding *Landoe* should have examined the policy considerations that were stated in *Globus*:

> This court believes that it would be against the public policy embodied in the federal securities legislation to permit [cross-complainant] which has been found guilty of misconduct in violation of the public interest involving actual knowledge of false and misleading statements or omissions and wanton indifference to . . . the rights of others, to

[36] *Id.* at 769-70, 89 So. 2d at 824. *See* Beard v. Achenbach Mem. Hosp. Ass'n, 170 F.2d 859 (10th Cir. 1948); McGinnis v. Corporation Funding & Fin. Co., 8 F.2d 532 (M.D. Pa. 1925).

[37] 374 F.2d at 37.

[38] 325 Mass. 630, 91 N.E.2d 765 (1950).

[39] 287 F. Supp. 188 (S.D.N.Y. 1968), *rev'd on other grounds*, 418 F.2d 1276 (2d Cir. 1969).

[40] *Id.* at 198-99.

> enforce its indemnification agreement. The purpose of the federal securities acts is to insure that the public investor . . . will obtain the benefit of a thorough investigation of the facts . . . not only by the issuer but also by the underwriter so that prospective investors will have access to the truth.[41]

Globus, far from being established law, is a landmark case indicating a trend toward protection of stockholders.[42] The court that decided *Globus* limited its holding to "circumstances where [the cross-complainant for indemnity] has been found guilty of misconduct evincing actual knowledge or reckless disregard of the falsity of the offering circular."[43] Since the cross-claimant in *Landoe* had knowledge of the intended transactions,[44] the case appears to be analogous to the limited factual pattern of *Globus*. *Globus* might be distinguished because the issue in that case involved indemnity for underwriters. However, the court in *Globus* found no significance in the distinction between underwriters and corporate directors.[45] The policies that affect directors were found to be equally applicable to underwriters: "If an underwriter were to be permitted to escape liability for its own misconduct by obtaining indemnity from the issuers, it would have less of an incentive to conduct a thorough investigation and to be truthful. . . ."[46]

In *Landoe*, the court, relying on the distinction between active and passive wrongdoers and on an analogy to the law of trusts, allowed the passive wrongdoer to recover indemnity. But the court entirely failed to consider the policy of protecting stockholders of corporations. That policy, which led to denial of indemnity for underwriters in *Globus*, is no less operative in the case of corporate directors. A stricter standard of care for corporate directors to promote greater protection of shareholders is necessary because of the enormous growth in number and size of corporations.[47] In huge, diversified corporations, most shareholders are completely unable to exert any control; and vigilance on the part of the directors in protecting the interests of all owners of stock becomes crucial.

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[41] *Id.* at 199.

[42] Knox, *Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in Light of BarChris and Globus*, 24 BUS. LAWYER 681, 692 (1969).

[43] 287 F. Supp. at 199.

[44] See p. 961 *supra*.

[45] Knox, *supra* note 42, at 690.

[46] 287 F. Supp. at 199.

[47] Snow, *Liability of Directors and Officers of Corporations*, 17 DEFENSE LAW J. 521 (1968).

Denial of indemnity should tend to motivate each director to police the actions of the other directors out of self-interest. In an age of supercorporations, the policy favoring a knowing, passive director over a knowing, active one weighs lightly in comparison to the policy of protecting shareholders. For this reason, the court in *Landoe* reached a questionable result by allowing recovery of indemnification by the passive corporate director.

RICHARD L. GRIER

Federal Jurisdiction—Suits by a State as Parens Patriae

Although the right of a state to bring suit in a federal court was expressly provided for in the Constitution,[1] a state, in order to have standing, must have a sufficient interest in the outcome of the litigation.[2] Basically, the types of cases in which a state has capacity to sue have been classified as proprietary suits[3] and *parens patriae* suits.[4] Suing in each capacity, the State of Hawaii recently filed an antitrust action, *Hawaii v. Standard Oil Co.*,[5] in a United States district court against three oil companies and an asphalt company. Realizing the importance of its de-

[1] U.S. CONST. art. III, § 2, extends the judicial power of the United States to cases "between a State and Citizens of another State," and provides that in cases "in which a State shall be a Party, the supreme Court shall have original Jurisdiction." Suits by one state against another are within the original and exclusive jurisdiction of the Supreme Court. 28 U.S.C. § 1251(a)(1) (1964). Suits by a state against the citizens of another state are in the original, but not the exclusive, jurisdiction of the Supreme Court. 28 U.S.C. § 1251(b)(3) (1964).

Concepts of justiciability presumably apply equally to suits brought originally in the Supreme Court and in a lower federal court; however, it may well be that the Supreme Court, conscious of its caseload (*e.g.*, Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 396 (1938)), would apply different standards of justiciability when jurisdiction by a lower court is available. *But see* Georgia v. Pennsylvania R.R., 324 U.S. 439, 451-52 (1945).

[2] *E.g.*, Florida v. Anderson, 91 U.S. 667, 675-76 (1875). It is difficult to determine from the cases to what extent standing is grounded in constitutional mandate and to what extent in judicial policy. Clear-cut rules in the area are difficult to find because "[t]his complicated speciality of federal jurisdiction . . . is in any event more or less determined by the specific circumstances of individual situations . . . ." United States *ex rel.* Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953).

[3] *E.g.*, Virginia v. West Virginia, 246 U.S. 565 (1918) (suit on a debt).

[4] *E.g.*, Missouri v. Illinois, 180 U.S. 208 (1901) (suit to enjoin the discharge of sewage into interstate river).

[5] 301 F. Supp. 982 (D. Hawaii 1969). Hawaii sued under sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2 (1964) and section 4 of the Clayton Act, 15 U.S.C. § 15 (1964).

cision to deny the defendants' motion to dismiss,[6] the trial court certified the case to the court of appeals.[7]

In order to sue in a proprietary capacity, a state must be in the same position as a private litigant. It is established that a state is a "person" within the meaning of the antitrust laws,[8] and states have been allowed to sue in many cases to protect their proprietary rights.[9] Hawaii clearly had proprietary standing in the instant case because it was a purchaser of the allegedly over-priced petroleum products.[10]

Much more difficult, however, is Hawaii's claimed right to sue on behalf of its citizens as *parens patriae.* The right of a state to bring suit as *parens patriae* was first articulated in 1901 by the Supreme Court's decision in *Missouri v. Illinois.*[11] Missouri, solicitous of the well-being of its citizens, sought to enjoin Illinois from dumping sewage into the Mississippi River. Granting Missouri the requested relief, the Court noted that although previous state-initiated actions had involved disputes over boundaries or proprietary interests, "[s]uch cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy . . . ."[12] For when "[s]uits brought by individuals . . . would be wholly inadequate and disproportionate . . . ,"[13] the state is the proper party to protect the "[h]ealth and comfort of its inhabitants."[14] Thus the state, as *parens patriae,* is able to fill the vacuum created by the inability of private citizens to redress adequately their possible injuries.[15]

Following the decision in *Missouri v. Illinois,* Georgia was permitted

[6] 301 F. Supp. at 988.

[7] Hawaii v. Standard Oil Co., 301 F. Supp. 980, 981 (D. Hawaii 1969).

[8] Georgia v. Evans, 316 U.S. 159 (1942).

[9] *E.g.,* South Dakota v. North Carolina, 192 U.S. 286 (1904) (suit on bonds of one state that were owned by another state).

[10] For discussion of standing requirements in private antitrust actions, *see* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act,* 64 COLUM. L. REV. 570 (1964); Note, *Antitrust—Clayton Act § 4—Standing—Antitrust Violator May Be Liable for Damages Resulting from Over-Charges in Sales by Non-Conspiring Competitors,* 82 HARV. L. REV. 1374 (1969).

[11] 180 U.S. 208 (1901).

[12] *Id.* at 241.

[13] *Id.*

[14] *Id. See also In re* Debs, 158 U.S. 564, 584 (1895): "The obligations which [the federal government] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

[15] *But cf.* Massachusetts v. Mellon, 262 U.S. 447 (1923), in which it appears no one had standing to raise the constitutionality of a federal appropriation. *Quaere* to what extent Flast v. Cohen, 392 U.S. 83 (1968), changes this.

to go to court to protect the forests, vegetable life, and health of a five-county area from sulphurous fumes emitted by a private industry in Tennessee.[16] Describing the suit as based on the state's "*quasi*-sovereign"[17] rights over the ultimate disposition of its natural resources, Justice Holmes said that "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."[18] By these oft-quoted words, he shifted the emphasis from the inadequacy of private remedies to the inherent power of the state as sovereign and intimated that the state has interests beyond—and perhaps in spite of[19]—the aggregate interests of its citizens.

In 1923, Pennsylvania and Ohio were allowed to sue "as representatives of the consuming public"[20] to strike down a West Virginia statute requiring a locally preferential distribution of privately-owned natural gas. There was concern that residents of Pennsylvania and Ohio would be denied fuel. It was noted that "private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the state's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream."[21] The Court then added, "This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law."[22]

In its suit in *Standard Oil*, Hawaii relied heavily on *Georgia v. Pennsylvania Railroad*,[23] in which Georgia was allowed to bring suit as

[16] Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).
[17] *Id.* at 237.
[18] *Id.*
[19] *Id.* at 239: "Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine." *See also* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 678-80 (1959) for a discussion of the right of individuals and minority groups in the state bringing suit to intervene because their interests differ from those of the state.
[20] Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923).
[21] *Id.* at 592.
[22] *Id.*
[23] 324 U.S. 439 (1945). The complaint by Georgia alleged that the rates were fixed so as

> (a) to deny to many of Georgia's products equal access with those of other States to the national market;
> (b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

parens patriae against twenty out-of-state railroad companies for rate discrimination allegedly violative of antitrust acts. The Supreme Court in that case found that discriminatory rates "stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets."[24] To deny Georgia the right to sue "would whittle the concept of justiciability down to the stature of minor or conventional controversies."[25]

It has been suggested that *Pennsylvania Railroad* departed from previous *parens patriae* cases because it dealt with the protection of a state's economic resources rather than its natural resources.[26] Such an analysis, however, does not seem to be accurate. To begin with, previous *parens patriae* cases did not deal exclusively with the protection of natural resources.[27] Moreover, the proper concern in *parens patriae* cases is not only with the particular subject matter of the controversy, but also with whether an adequate remedy exists for the people whom the state represents.[28] *Pennsylvania Railroad* has timely importance because in it the Court acknowledged the role of a state in protecting its citizens from higher prices. In a highly organized and interdependent society, the consumer ultimately bears the burden of higher prices, but usually is unable to remedy his plight. He often must rely on the state to take the proper measures that will ensure his economic security.

Pennsylvania Railroad is equally significant because the state as the plaintiff in that case was permitted to take advantage of a federally-created right in the capacity of *parens patriae*. It would not have been exceptional for the Court to find that Congress did not intend in federal statutes to give the states causes of action as *parens patriae*, as it would

(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and

(d) to hold the Georgia economy in a state of arrested development.

Id. at 444.

[24] *Id.* at 450.

[25] *Id.* at 451.

[26] 93 U. PA. L. REV. 442, 444 (1945); 32 VA. L. REV. 157, 159 (1945).

[27] In Pennsylvania v. West Virginia, 262 U.S. 553 (1923), natural gas was not dealt with as a natural resource, but as an article of interstate commerce vital to the citizens of two states.

[28] The Court in Missouri v. Illinois, 180 U.S. 208 (1901), was concerned not only with the status of the states' rivers, but also with protecting citizens who could not adequately protect themselves from diseases caused by the dumping of sewage.

have been if the Court had held that a state could not protect its proprietary interests in the same manner as a private citizen. Implicit in the Court's opinion is the requirement of express Congressional intent in order to deny a *parens patriae* suit to states even if a proprietary suit is appropriate.[29] While arguably limited to the antitrust laws, the holding may have ramifications in other federally regulated areas. For example, it has been suggested that a state might sue as *parens patriae* to enjoin the construction of a nuclear power plant sanctioned by the Atomic Energy Commission.[30]

Because *Pennsylvania Railroad* and *Standard Oil* are substantially related,[31] Hawaii should have little difficulty in being upheld in its attempt to bring suit as *parens patriae*. However, there are boundaries to the concept. The trial court in *Standard Oil* set forth two primary requirements for a *parens patriae* suit: that a substantial portion of the inhabitants of the state be adversely affected, and that the state have a direct interest of its own concerning the matter in controversy.[32]

The first test is conceptually difficult because the extent of harm[33] that must be shown and the number of people[34] who must be affected are matters of degree.[35] The court, however, had little trouble with the first requirement because of the great importance to, and pervasive use of, petroleum products by citizens of Hawaii.[36]

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[29] "[W]e find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. . . . There is no apparent reason why [*parens patriae*] suits should be excluded from the antitrust acts." 324 U.S. 439, 447.

[30] Telephone interview with Mr. Jean A. Benoy, Deputy Attorney General of North Carolina, March 17, 1970. Another suggested example would be a suit to enjoin termination by the Interstate Commerce Commission of train service to parts of a state.

[31] In both cases suit was brought under antitrust acts. See note 5 *supra*.

[32] 301 F. Supp. at 986-87.

[33] *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[34] *See, e.g.*, Kansas v. Colorado, 185 U.S. 125 (1902).

[35] Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 675 (1959).

[36] 301 F. Supp. at 987: "[T]here is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products . . . ."

Plaintiff's fourth amended complaint alleged injury to the state because:

(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;

(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

The requirement that the state have a direct interest of its own is made difficult by the corollary that a suit by a state must not be a guise to enforce the rights of individuals[37] or small groups of citizens.[38] In *Oklahoma v. Atchison, Topeka & Santa Fe Railway*,[39] a case factually similar to *Pennsylvania Railroad* and *Standard Oil*,[40] the Supreme Court refused to allow Oklahoma to bring suit to protect its citizens and economy from alleged excessive railroad rates. The Court reasoned that in reality the state was enforcing the rights of individual shippers rather than the rights of its citizens in general.

When the Court decided *Pennsylvania Railroad* thirty-four years later, it expressly affirmed the rule in *Atchison* and distinguished the factual similarity in a conclusory manner.[41] Similarly, the court in *Standard Oil* made only slight mention of *Atchison*.[42] This result is perhaps explained by the conceptual change that has occurred concerning the role of standing in the antitrust field.[43] Standing is a concept tied closely to the substantive right claimed. As a policy matter, a major function of a private antitrust suit, whether brought by a state or a

(d) the full and complete utilization of the natural wealth of the State has been prevented;
(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;
(g) the Hawaii economy has been held in a state of arrested development.

Id. at 983-84. Compare this complaint with the one in Georgia v. Pennsylvania R.R,. 324 U.S. 439 (1945), reprinted in part in note 23 *supra*.

[37] New Hampshire v. Louisiana, 108 U.S. 76 (1883) (citizen assigned bond to state and state sued upon it).

[38] North Dakota v. Minnesota, 263 U.S. 365, 374-76 (1923) (farmers).

[39] 220 U.S. 277 (1911).

[40] Note Oklahoma's allegations and compare them with those in *Pennsylvania Railroad*, note 23 *supra*, and *Standard Oil*, note 36 *infra*. The state alleged that it had

about two million inhabitants, is developing and building towns, villages and individual farmhouses, and that lime, cement, plaster, brick and stone are very essential to its growth; that at this time in the State of Oklahoma there are very large and extensive petroleum oil wells, and the manufacture or refining of the same is an industry continually growing in said State; that the transportation rates on crude and refined oil, lime, cement, plaster, brick and stone are very important and essential to the development of said State; and, that the violation by said respondent of the said conditions of said grant is a menace to the future of said State.

220 U.S. at 283-84.

[41] 324 U.S. at 451-52.

[42] 301 F. Supp. at 986.

[43] See p. 966 *supra*.

citizen, is that it "supplements government enforcement of the antitrust laws."[44] Recent decisions on the issue of standing have been consistent with this policy.[45] Although under an expansive doctrine of standing the possibility of a treble-damage windfall may attract suits with little merit, such a risk may be justified by improving the enforcement of antitrust laws. Moreover, the fear of sham suits would be less applicable when states are involved, for, despite the potential for harassment because of concentration of power and resources, state officials hopefully are invested with better judgment and are checked by political processes.

Any ultimate reconciliation of *Atchison* and *Pennsylvania Railroad*[46] must answer an important question lurking beneath the concept of *parens patriae*: Whether a state has standing to seek redress when private parties, more directly concerned, can also bring suit. In both of these cases private parties could have sued to enjoin the alleged discriminations in rate that the states, as *parens patriae*, attempted to enjoin.[47] *Atchison* intimated that if an acceptable private remedy exists, a state may not sue. *Pennsylvania Railroad*, however, indicated that a state may sue as *parens patriae* if it has a legitimate interest in the controversy, notwithstanding the availability of a private remedy.

Because Hawaii's complaint in *Standard Oil* was for monetary damages as well as injunctive relief, the issue is more clearly delineated than in *Pennsylvania Railroad* or *Atchison*, in which only injunctive relief was sought. In reaching the same result as reached in *Pennsylvania Railroad*, the court in *Standard Oil* distinguished the possible claims of individual citizens, for which the state cannot recover, from the claims of the state.[48] Such a solution is logical but begs the difficult question of just what are the damages to the state, or, rather, what

[44] United States v. Borden Co., 347 U.S. 514, 518 (1954).

[45] *E.g.*, Radovich v. National Football League, 352 U.S. 445 (1957).

[46] One possible explanation of the practical inconsistency of the two cases is that the Supreme Court in *Pennsylvania Railroad* perceived a distinction that the Court may have overlooked when it decided *Atchison*—the distinction between one state suing another state and a state suing a citizen of another state. When one state sues another state, the policy underlying the eleventh amendment buttresses the case for finding lack of standing since it is more likely that in actuality an individual is suing under the guise of the state. The main case relied upon in *Atchison* was Louisiana v. Texas, 176 U.S. 1 (1900), a suit between two states. *See generally* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 677 (1959).

[47] Georgia alleged that the rate-fixing practices "give manufacturers, sellers and other shippers in the North an advantage over manufacturers, shippers and others in Georgia." Georgia v. Pennsylvania R.R., 324 U.S. 439, 444 (1945).

[48] 301 F. Supp. at 986.

are the state's interests "independent of and behind the titles of its citizens."[49] The court's failure to answer this question exposes an anomalous situation: The court as a matter of law has concluded, for purposes of standing, that independent interests of the state are present; however, the court lends no aid as to the identity of these interests for purposes of damages. Apparently the State of Hawaii also found this problem troublesome, for after twice fully briefing and arguing the *parens patriae* issue, she had not alleged the precise extent of her monetary damages.[50]

A recent suit brought by North Carolina may help bring about a solution.[51] Relying largely on *Standard Oil*, North Carolina has filed suit against five drug companies for excessively priced drugs. Two types of monetary relief are being sought: 200,000 dollars for loss of tax revenue from the sale of taxed commodities that would have been purchased but for the over-priced and untaxed drugs; and twenty million dollars for general economic injury caused by the diversion of money by the drug companies from the state's economy.

Despite the problem of damages, the concept of *parens patriae* has great potential in the area of consumer protection. California, for instance, recently filed an antitrust action against automobile manufacturers for conspiracy to suppress the development of anti-pollution devices on automobiles.[52] Cases such as those brought by California, North Carolina, and Hawaii should not be dismissed for lack of standing. The *parens patriae* concept, while not denying private substantive rights, gives the public a voice in matters of utmost importance to society.

WILLIAM MACNIDER TROTT

Income Tax—Charitable Contributions under the Tax Reform Act of 1969

In a message to Congress on April 22, 1969, President Nixon emphasized the need for tax reform in order to "lighten the burden on those who pay too much, and increase the taxes on those who pay too little."[1]

[49] Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907).
[50] 301 F. Supp. at 984.
[51] Telephone interview with Mr. Jean A. Benoy, Deputy Attorney General of North Carolina, March 17, 1970.
[52] Telephone interview with Mr. Benoy, note 51 *supra*.

[1] *Hearings on H.R. 13270 Before the House Committee on Ways and Means*, 91st Cong., 1st Sess. 5047 (1969) [hereinafter cited as *1969 Hearings*].

After eight months, Congress finally passed the Tax Reform Act of 1969, which was signed by the President on December 30, 1969, and became Public Law 91-172.[2] One of the most important changes proposed by both the President[3] and the Treasury[4] pertained to charitable deductions. Many of their recommendations[5] regarding reform in this area were adopted and appear in the final version of the Act. This note will point out the major changes in the law of charitable deductions and analyze specifically the tax consequences of the Act for the individual taxpayer who makes a charitable contribution of appreciated property.

The most apparent change in the area of charitable deductions is the provision by which the maximum limitation for deductions from an individual's income for gifts to public charities is increased from thirty per cent to fifty per cent of adjusted gross income. Section 170(b)(1) of the Internal Revenue Code, as amended, states that "[i]n the case of an individual . . . any charitable contribution to [public charities] shall be allowed [as a deduction against ordinary income] to the extent that the aggregate of such contributions does not exceed fifty per cent of the taxpayer's contribution base for the taxable year."[6] The term "contribution base" is defined as "adjusted gross income (computed without regard to any net operating loss carryback to the taxable year under section 172)."[7] Under the old law, charitable contributions had to be made to certain specific organizations in order to qualify for the thirty-per-cent maximum limitation. These same organizations are now included in the definition of "public charities" under the new provisions;[8] in addition, three new types of foundations[9] have been included.

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[2] 83 Stat. 487 (1969).

[3] *1969 Hearings* at 5048.

[4] *Id.* at 5510.

[5] *Id.* Generally the reforms proposed in this area by the Treasury were an increase in the maximum limitation on deductions to increase the incentive for charitable contributions and an elimination of double deductions, especially as a result of gifts of appreciated property.

[6] INT. REV. CODE of 1954, as amended by Pub. L. No. 91-172 § 201, 83 Stat. 487 (1969), § 170(b)(1) [hereinafter INT. REV. CODE of 1954 (as amended 1969)]. For a definition of "charitable contribution" see *id.* § 170(c).

[7] *Id.* § 170(b)(1)(F).

[8] *Id.* § 170(b)(1)(A).

[9] *Id.* at (vii) states that "a private foundation described in subparagraph (E)" is included in the definition of "public charities." Subparagraph (E) defines these foundations as (1) private operating foundations, (2) private nonoperating foundations that distribute the contributions that they receive to public charities or make other qualifying distributions within two-and-one-half months after their taxable year's end, and (3) community foundations that pool all contributions into a common fund and allow the contributor to designate the charity

As under the old law, deductions for contributions to qualifying organizations not included in the definition of "public charities" are restricted to a maximum of twenty per cent of the contribution base.[10] Furthermore, deductions for such gifts can be taken into account only after deductions for gifts to "public charities" which qualify for the maximum fifty-per-cent limitation.[11] Thus, the effect of these provisions is that deductions for gifts made to non-public charities cannot exceed twenty per cent of the contribution base *or* the difference between the total amount of contributions made to public charities and fifty per cent of the contribution base, whichever amount is less.[12] For example, if the contribution base were 100,000 dollars, gifts to public charities were 40,000 dollars, and gifts to non-public charities were 20,000 dollars, only 10,000 dollars of this latter amount would be deductible.

Under the new law, a taxpayer is still allowed to carry over to the next five succeeding years any "excess"[13] contribution made to public charities; but he may do so only to the extent that the maximum allowable deduction is not used in the year to which the carryover is made.[14] For example, if a taxpayer had a contribution base of 100,000 dollars in each of five successive years and if, in the first year, he gave 100,000 dollars to a public charity, he could deduct 50,000 dollars in that year. If, in the second year, he gave 30,000 dollars to a public charity, he could deduct this additional gift plus 20,000 dollars of the excess 50,000 dollars from the previous year. If, in the third year, he gave 20,000 dollars

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that is the recipient. (The income from the common pool must be distributed within two-and-one-half months after the taxable year in which it was realized, and the corpus attributable to any donor's contribution must be distributed to a charity not later than one year after the donor's death or after his surviving spouse's death if she has the right to designate the recipients of the corpus.)

[10] (B) OTHER CONTRIBUTIONS.—Any charitable contribution other than a charitable contribution to which subparagraph (A) applies shall be allowed to the extent that the aggregate of such contributions does not exceed the lesser of—

(i) 20 percent of the taxpayer's contribution base for the taxable year, or

(ii) the excess of 50 percent of the taxpayer's contribution base for the taxable year over the amount of charitable contributions allowable under subparagraph (A) (determined without regard to subparagraph (D)).

Id. § 170(b)(1)(B).

[11] *Id.*

[12] *See* CCH 1970 STAND. FED. TAX REP. ¶ 1271 (4th Extra Ed. No. 3).

[13] The term "excess" contributions refers to the amount of contributions made by a taxpayer in one taxable year that exceeds the maximum allowable deduction for that year.

[14] INT. REV. CODE of 1954 (as amended 1969), § 170(d)(1).

to a public charity, he could deduct this gift plus the remaining excess of 30,000 dollars from the first year. Thus, in three years he would be able to obtain a full deduction for the gift of 100,000 dollars made in the first year. In the case of excess contributions, when the recipients are non-public charities that are subject to the twenty-per-cent limitation, the rule under the old law continues to apply: no carryover of excess contributions is allowed.[15]

Although it did not apply to many taxpayers, there was a special provision in the old law,[16] often referred to as the "Philadelphia-nun" provision, whereby a taxpayer's charitable contributions could qualify for an unlimited deduction if certain requirements were met. New provisions[17] will result in the elimination of this unlimited deduction by 1975. At that time the maximum allowable deduction for gifts to charities will be fifty per cent of the taxpayer's contribution base even though the old "Philadelphia-nun" requirements are met. The phasing out of the unlimited deduction will take place gradually over a five-year period, with an eighty-per-cent maximum deduction allowed in 1970. There will be an annual decrease of six per cent thereafter until 1975.[18]

In contrast to the Act's liberalizing effect on the percentage limitations, the new provisions of section 170(f)[19] reduce the allowable deduction for gifts of income and remainder interests in trusts;[20] and no deduction is allowed for gifts made for less than the entire interest in the property given.[21] Thus a deduction is no longer allowed for the rent-free use of property by a charity.[22] An exception to this provision is made for gifts of a remainder interest in a personal residence or farm.[23] While such gifts are still deductible, they are subject to special valuation provisions.[24]

The provisions of the Act that probably will have the greatest limiting effect and also cause the most confusion are those dealing with contribu-

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[15] *Id.*

[16] INT. REV. CODE of 1954, § 170(b)(1)(C). This section was completely changed by the 1969 Act.

[17] INT. REV. CODE of 1954 (as amended 1969), § 170(b)(1)(C).

[18] *Id.* § 170(f)(6).

[19] *Id.* § 170(f).

[20] *Id.* at (f)(2).

[21] *Id.* at (f)(3). This section applies to all charitable gifts made after July 31, 1969.

[22] *Id.* The Act does not, however, require the taxpayer to include the rental value of the property in his income.

[23] *Id.* § 170(f)(3)(B)(i). *See* CCH 1970 STAND. FED. TAX REP. ¶ 1281 (4th Extra Ed. No. 3); P-H 1970 FED. TAXES ¶ 114 (Rep. Bull. 1, 1970).

[24] INT. REV. CODE of 1954 (as amended 1969), § 170(f)(4).

tions of appreciated property.[25] Under the old rules, the deduction for such gifts was generally measured by the fair market value of the property given.[26] This method for determining the amount of the deduction often made it possible for the taxpayer to realize a greater tax advantage from a gift of appreciated property than he could have obtained from a cash contribution because it allowed a deduction for income or gain that had not been recognized for tax purposes. For example, if a taxpayer donated to a public charity stock that had cost him 5,000 dollars but that had a fair market value of 10,000 dollars, he would be allowed a charitable deduction of 10,000 dollars without having to treat the gain of 5,000 dollars as income or capital gain for tax purposes. If he sold the stock and donated the proceeds, he would still have received a deduction of 10,000 dollars; but he would have had to recognize a capital gain of 5,000 dollars for tax purposes. The 1969 Act is aimed at equalizing the consequences of cash gifts and gifts of appreciated property by eliminating the double tax benefit of the latter, but it is doubtful that the new law will have such an effect.

As discussed above, the Act generally provides that contributions to public charities may be deducted to the extent that the aggregate of such gifts does not exceed fifty per cent of the taxpayer's contribution base for the taxable year. Deductions for contributions of "capital gain property" and "ordinary income property," however, are now subject to special limitations.[27] For purposes of the section of the Act dealing with charitable deductions, "capital gain property" is defined as any capital asset on which a long-term capital gain would have been realized if the taxpayer had sold the asset for its fair market value on the date of the contribution.[28] As a consequence of these new special-limitation rules, if a taxpayer donates "capital gain property" to a public charity, he is still able to claim a deduction for the full fair market value; and he is not subject to any capital gains tax on his paper profit.[29] The aggregate of such deductions, however, is limited to a maximum of thirty per cent of his contribution base rather than to the fifty-per-cent maximum that applies to gifts of cash or non-appreciated property. Furthermore, the

[25] *Id.* §§ 170(b)(1)(D), 170(e)(1).
[26] Treas. Reg. § 1.170-1(c) (1958).
[27] INT. REV. CODE of 1954 (as amended 1969), §§ 170(b)(1)(D), 170(e)(1).
[28] *Id.* § 170(b)(1)(D)(iv). For a definition of "ordinary income property" see p. 977 *infra*.
[29] "Paper profit" refers to the inherent gain that would be recognized for tax purposes and would represent long-term capital gain had the property been sold instead of having been given to charity.

deductions for gifts of "capital gain property" are computed after all other contributions are taken into consideration.[30] For example, a taxpayer may have a contribution base of 10,000 dollars and give 4,000 dollars in cash and 2,000 dollars in appreciated stocks to a public charity. Since his maximum deduction is 5,000 dollars (50 per cent of 10,000 dollars) and since the cash gift must be considered first, the deduction for the gift of stock is limited to 1,000 dollars in the current taxable year. Gifts of "capital gain property," however, may be carried over for up to five years, but they retain their original status and are deductible in any one taxable year only to a maximum of thirty per cent of the donor's contribution base.[31]

There are two situations in which the thirty-per-cent limitation does not apply to contributions of "capital gain property." If such property is given to a "non-public" charity[32] or if *tangible* personal property is given to a public charity for purposes other than for use in its principal charitable function,[33] a special provision takes effect.[34] Under this provision, the allowable deduction is the fair market value of the gift reduced by one half of the amount of the gain that would have been recognized if the property had been sold by the taxpayer at its fair market value on the date of the contribution. The deductions under this special provision are also subject to the appropriate maximum limitations—fifty per cent of the contribution base for gifts of tangible personal property to a "public charity"[35] and twenty per cent when the donee is a "non-public" charity.[36]

Furthermore, the Conference Committee Report states that when a taxpayer "makes a contribution to a public charity of [capital gain] property . . . the taxpayer may deduct such contributions of property under

[30] INT. REV. CODE of 1954 (as amended 1969), § 170(b)(1)(D)(i) provides:
> In the case of charitable contributions of capital gain property to which subsection (e)(1)(B) does not apply, the total amount of contributions of such property which may be taken into account under subsection (a) for any taxable year shall not exceed 30 percent of the taxpayer's contribution base for such year. For purposes of this subsection, contributions of capital gain property to which this paragraph applies shall be taken into account after all other charitable contributions.

[31] *Id.* § 170(b)(1)(D)(ii). See text preceding note 14 *supra.*

[32] *Id.* § 170(e)(1)(B)(ii).

[33] *Id.* § 170(e)(1)(B)(i). Intangible personal property is not included under this provision as is erroneously stated in CCH 1970 STAND. FED. TAX REP. ¶ 1277 (4th Extra Ed. No. 3). This error was corrected *id.* [Green ¶ 1854-56] at 21,997.

[34] INT. REV. CODE of 1954 (as amended 1969), § 170(e)(1).

[35] *Id.* § 170(b)(1)(A).

[36] *See* note 10 *supra.*

the 50 per cent limitation if he *elects to take the unrealized appreciation into account for tax purposes.*"[37] This does not mean, however, that the gain must be recognized and capital gains tax paid on it. Presumably, to "take . . . into account for tax purposes" means that the deduction is limited according to the provisions of subsection 170(e)(1).[38] While the precise manner and time of making the election must await delineation by the Treasury, it is clear that the function of subsection 170(b)(1)(D)(iii)[39] is to provide such an election. If the taxpayer does elect under subsection (b)(1)(D)(iii) to "take the unrealized appreciation into account for tax purposes" in accordance with subsection (e)(1), a deduction qualifying for the fifty-per-cent limitation is allowed in the amount of the fair market value of the property reduced by one half of the gain that would have been realized if the property had been sold for its fair market value on the date of the contribution.[40] Thus, under this provision, if a gift of stock (which had been held for six months or more) with a basis of 100 dollars and a fair market value of 200 dollars was given to a "public charity," the allowable deduction would be 150 dollars; and this total amount would qualify for the maximum limitation of fifty per cent of the taxpayer's contribution base.[41] And election to "take the unrealized appreciation into account" is probably to the taxpayer's advantage if the appreciation is nominal or if a large immediate deduction is needed.[42]

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[37] H.R. REP. No. 91-782, 91st Cong., 1st Sess. 292 (1969) (emphasis added).

[38] *See* note 39 *infra.*

[39] (iii) At the election of the taxpayer (made at such time and in such manner as the Secretary or his delegate prescribes by regulations), subsection (e)(1) shall apply to all contributions of capital gain property (to which subsection (e)(1)(B) does not otherwise apply) made by the taxpayer during the taxable year. If such an election is made, clauses (i) [which limits deductions of capital gain property to 30 percent] and (ii) [which permits a carryover of such gifts] shall not apply to contributions of capital gain property made during the taxable year . . . .

INT. REV. CODE of 1954 (as amended 1969), § 170(b)(1)(D)(iii).

[40] (1) GENERAL RULE.—The amount of any charitable contribution of property otherwise taken into account under this section [in this case by the election under (b)(1)(D)(iii)] shall be reduced by . . . 50 percent . . . of the amount of gain which would have been long-term capital gain if the property contributed had been sold by the taxpayer at its fair market price (determined at the time of such contribution).

Id. § 170(e)(1).

[41] In applying the fifty-per-cent carryover for any year in which this selection is made, the taxpayer must remember that contributions of "capital gain property" in any prior year for which an election was not made must be reduced as if they were subject to the reduced-contribution rule when they were made. *See* INT. REV. CODE of 1954 (as amended 1969), § 170(b)(1)(D)(iii).

[42] 33 & 34 AM. JUR. *Federal Taxation* 63 (Special Supp. 1970).

In the case of contributions of "ordinary income property," the new Act imposes the most stringent restrictions of all. While the maximum fifty-per-cent limitation applies, the provision applicable to such gifts states that "the amount of any charitable contribution of property . . . shall be reduced by . . . the amount of gain which would not have been long-term capital gain if the property contributed had been sold by the taxpayer at its fair market value."[43] This provision thus permits a deduction for gifts of "ordinary income property" only to the extent of the taxpayer's basis in the property. "Ordinary income property" is not specifically defined in the Act; but it is clear that the term applies to any property that, if sold by the taxpayer on the date of the contribution at its fair market value, would have resulted in ordinary income to him. The Senate and House Committee Reports[44] indicate that "ordinary income property" includes inventory; "section 306 stock;"[45] works of art, books, letters, and memorandums that are given by the person who created them; and stock held for less than six months.

Since "inventory" is included in this definition and since contributions of inventory are deductible only to the extent of basis, the question arises whether Revenue Rulings 55-138[46] and 55-531,[47] as embodied in subsection 1.170-1(c) of the Treasury Regulations,[48] still apply. These rulings hold, in effect, that when inventory is given, the cost of the property, or its inventory value, must be eliminated from the taxpayer's beginning inventory account. There does not seem to be any inconsistency between the new Act and these two rulings, and there appears to be no reason why they should not still apply. Thus, a taxpayer will be limited, under the Act, to the amount of his basis when he claims a deduction for a gift of inventory; and, under the Treasury's rulings, he will still have to remove the value of the property given to charity from his beginning inventory account. If the law was otherwise, he would receive a double tax benefit because he would be allowed a charitable deduction for an item that, in effect, would have cost him nothing.[49]

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[43] INT. REV. CODE of 1954 (as amended 1969), § 170(e)(1)(A).

[44] S. REP. No. 91-552, 91st Cong., 1st Sess. 81 (1969); H.R. REP. No. 91-413 (Part 1), 91st Cong., 1st Sess. 55 (1969).

[45] For a definition of "Section 306 stock," see INT. REV. CODE of 1954 (as amended 1969), § 306(c); see generally B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 8.03 (2d ed. 1966).

[46] Rev. Rul. 55-138, 1955-1 CUM. BULL. 223.

[47] Rev. Rul. 55-531, 1955-2 CUM. BULL. 520.

[48] Treas. Reg. § 1.170-1(c) (1958).

[49] If the regulation did not require that the value of the donated inventory item be removed from the beginning inventory account, the result would be an inflated

It should be noted that the definition of "ordinary income property" includes that portion of a gift of *depreciable* real or tangible personal property used in a taxpayer's trade or business that would have been subject to the depreciation recapture rules[50] if the property had been sold at its fair market value at the date of contribution. Any gain above this amount is treated as "capital gain property" and is subject to the provisions of the Act applicable to such property.[51]

In addition to the provisions discussed above regarding gifts to charitable organizations, the 1969 Act also provides specifically for the adjustment of basis in bargain sales to charitable organizations.[52] Under the old law, if a taxpayer sold property with a basis of 12,000 dollars and a fair market value of 20,000 dollars to a charity for the amount of his basis, he recognized no gain and was allowed a charitable deduction of 8,000 dollars. If he had sold the property to the charity for 14,000 dollars, he would have had a 2,000 dollars gain, which would have been recognized for tax purposes, and a charitable deduction of 6,000 dollars. In other words, all of his basis was offset against the proceeds of the sale to determine his gain, and the amount of the fair market value of the property in excess of the proceeds from the sale was treated as a charitable contribution. Under the new law, the basis must be allocated between the portion "sold" and the portion "given" to the charity.[53] In the first of the two examples immediately above, the taxpayer would, under the Act, be required to allocate sixty per cent of his basis (7,200 dollars) to the portion "sold" and forty per cent (4,800 dollars) to the portion "given" to the charity. Thus, the taxpayer would be required to include 4,800 dollars (12,000 dollars [total basis] — 7,200 dollars [basis allocated to portion "sold"] = 4,800 dollars) as a gain from the sale of a capital asset in his tax return; and, as under prior law, he would be allowed a

cost-of-goods-sold figure that would reduce the net profit on which income tax is computed.

[50] See INT. REV. CODE of 1954 (as amended 1969), §§ 617(d)(1) (mining property), 1245(a), 1250(a), 1251(c), 1252(a).

[51] *Id.* § 170(e)(1). *See* 2 CCH 1970 STAND. FED. TAX REP [Green ¶ 1854-56] at 21,998; P-H 1970 FED. TAXES ¶ 113 (Rep. Bull. 1, 1970).

[52] (b) BARGAIN SALE TO A CHARITABLE ORGANIZATION.—If a deduction is allowable under section 170 (relating to charitable contributions) by reason of a sale, then the adjusted basis for determining the gain from such sale shall be that portion of the adjusted basis which bears the same ratio to the adjusted basis as the amount realized bears to the fair market value of the property.

INT. REV. CODE of 1954 (as amended 1969), § 1011(b). This section applies to all such sales made after December 19, 1969.

[53] *See* H.R. REP. No. 91-413 (Part 1), 91st Cong., 1st Sess. 55-56 (1969).

deduction of 8,000 dollars.[54] Furthermore, since this contribution is one of appreciated property, it would appear that all of the rules applicable to such contributions must be considered.[55]

An overall view of the provisions of the 1969 Act relating to charitable deductions seems to indicate that the new law will have little economic effect on the individual taxpayer. It is doubtful that the increase in the maximum limitation will be a greater incentive for charitable contributions since very few individuals contribute the maximum deductible amount to charity each year. Furthermore, because of the five-year carryover provisions, which also applied under the old law, most taxpayers could deduct the entire amount of their charitable contributions anyway. While the new provisions eliminate most of the tax advantages previously available for taxpayers making charitable contributions of "ordinary income property," many of the double tax savings still remain for gifts of "capital gain property." Thus, even though many of the rules governing charitable deductions have been tightened, the individual taxpayer, by carefully following the new rules discussed in this note, can still enjoy significant tax benefits through the use of charitable contributions.

TURNER VANN ADAMS

Income Tax—Problems of a Corporate Executor in the Administration of Successive Estates

The gain or loss from the sale or exchange of property is determined, for tax purposes, by the relation of the "amount realized" to the adjusted basis of the property.[1] The method used to compute the basis for the capital gains of property acquired from a decedent is defined by section 1014 of the Internal Revenue Code of 1954 to be "the fair market value of the property at the date of the decedent's death . . . ."[2] In *Manufacturers Hanover Trust Co. v. United States*[3] the United States Court of Claims applied section 1014 in a case involving successive deaths.

The plaintiff, a corporate executor, brought an action for refund of federal income taxes paid by the estate. The plaintiff was the executor of

[54] *Id.*
[55] P.H. 1970 FED. TAXES ¶ 115 (Rep. Bull. 1, 1970).

[1] INT. REV. CODE of 1954, § 1001.
[2] *Id.* § 1014(a).
[3] 410 F.2d 767 (Ct. Cl. 1969).

the estate of a woman who had died testate in 1957 and who had left her husband as her sole residuary legatee. Her estate included securities having at her death a fair market value of approximately 65,000 dollars. The executor had not distributed the estate prior to the husband's death in 1964, and at his death the fair market value of these securities was almost 160,000 dollars. The plaintiff was also appointed executor of the husband's estate. Shortly after the death of the husband, the executor sold the securities for 160,700 dollars and with that money purchased United States Treasury notes. In July, 1965, the executor sold the notes and distributed the proceeds to the beneficiaries of the husband's estate.

As executor of the wife's estate, the plaintiff filed a fiduciary tax return for the year 1964 reporting that the wife's estate had realized a long-term capital gain from the sale of the securities. This gain was based on the difference between the sale price in 1964 and the fair market value of the securities at the wife's death in 1957, which resulted in a taxable capital gain of almost 95,000 dollars. In December, 1964, the plaintiff filed an amended tax return for the wife's estate claiming that, instead of the long-term capital gain, the estate had realized only a short-term capital gain representing the difference between the sale price in 1964 and the fair market value of the securities at the husband's death in 1964: a gain of approximately one thousand dollars. The plaintiff's claim for refund was disallowed and his suit followed.

The Court of Claims granted the government's motion for summary judgment.[4] The majority reasoned as follows: the plaintiff was acting solely in the capacity as executor of the wife's estate when he sold the securities in 1964 even though his action was taken after the husband's death. Each estate was a separate entity for tax purposes, and no merger of the two estates was accomplished although the plaintiff was acting at the time as executor of both estates. Since the plaintiff failed to show anything in New York law requiring a different result, the wife's estate had realized a long-term taxable capital gain on the difference between the sale price and the fair market value at the wife's death.[5]

The dissent relied on *Brewster v. Gage*,[6] a decision by the Supreme Court in 1930. The plaintiff in *Brewster* was one of the residuary legatees of the estate of his father, who had died in 1918. The father's stocks, the personal property in question, had been distributed in 1920, and the plain-

[4] *Id.* at 770.
[5] *Id.* at 768-70.
[6] 280 U.S. 327 (1930).

tiff had sold some of them in 1920, 1921, and 1922. The Commissioner of Internal Revenue contended that the values of the stocks at the testator's death, rather than at the date of distribution, should have been used to determine capital gains and assessed a deficiency.[7] The district court agreed with the plaintiff's contention that the proper time for determining basis for gains was the date of distribution,[8] but the Court of Appeals for the Second Circuit reversed[9] and held that the date of death was determinative. The Supreme Court affirmed this judgment.[10]

The Supreme Court in *Brewster* relied on basic principles of property law in reaching its decision. Under one of these principles, title to devised real property, both legal and equitable, passes immediately to the devisee; but the legal title to bequeathed personal property passes to the executor. The Court stated that "immediately upon the death of the owner there vests in each of [the legatees] the right to his distributive share of so much as shall remain after proper administration"[11] and that "there vests in the . . . executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others . . . ."[12] The Court emphasized the significance of the date of death of the testator and relegated the date of distribution to secondary importance: "[T]he decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of death."[13] The Court concluded that at the testator's death the legatee received an economic interest in the property even though the executor held the legal title and that from the date of death the legatee would be enriched or suffer loss with every increase or decline in the value of the property.[14]

The dissenting judge applied these principles to the facts before the court in *Manufacturers Hanover Trust* and reached a result favorable to the taxpayer. His position was based on the rationale that the basis used in the determination of capital gains should relate to the beneficial

[7] *Id.* at 333.
[8] Brewster v. Gage, 25 F.2d 915 (W.D.N.Y. 1927).
[9] Brewster v. Gage, 30 F.2d 604 (2d Cir. 1929).
[10] 280 U.S. at 337.
[11] *Id.* at 334.
[12] *Id.*
[13] *Id.*
[14] *Id.*

interest in the property. Since at the wife's death the husband acquired a beneficial interest in the property, his basis should have been the fair market value at that date. At the husband's death his legatees (the children) received a stepped-up basis: the fair market value of the property at his death rather than its lesser value at the time that he acquired it. The sale by the executor could only be made for the legatees, the beneficial owners. By focusing on the beneficial interest, the dissenting judge concluded that the only gain realized was the difference between the sale price and the fair market value of the securities on the date of the husband's death.[15]

Section 1014(b)(1) of the Code, which provides that a decedent's estate shall be considered to have acquired property from the decedent for the purpose of applying the general rule[16] for determining basis, does not require a result different from the position taken by the dissent. The estate is a taxable entity, and specific provisions in the Code provide for the taxation of capital gains realized by it.[17] Section 1014(b)(1) allows the estate a stepped-up basis at the death of the decedent. This provision does not preclude the courts from looking at the beneficial interest to compute the basis for capital gains; *Brewster*, in fact, held that they must.

Moreover, courts have focused on the holder of the equitable title in other areas of tax law. An example can be found in the determination of what constitutes a depreciable interest. The basis used to determine depreciation is the same as the basis used in computing capital gains.[18] A case in which the depreciable-interest concept is illustrated is *Helvering v. F. & R. Lazarus & Co.*[19] In that case a bank held the legal title to three buildings used by the taxpayer in his business. The Commissioner disallowed a depreciation deduction on the ground that the deduction followed the legal title. The Supreme Court ruled against the Commissioner. It concluded that since the instrument conveying legal title to the bank was merely a security agreement, the taxpayer, being the equitable owner, should be allowed the depreciation deduction. The Court in *Lazarus* emphasized the "equitable nature of [tax] proceedings" and the concern of tax courts with "substance and realties" rather than formal

[15] 410 F.2d at 770-73 (dissenting opinion).
[16] INT. REV. CODE of 1954, § 1014(a).
[17] *Id.* §§ 641(b), 1202. The majority relied on the separate-entity theory in *Manufacturers Hanover Trust.* 410 F.2d at 770.
[18] *Id.* § 167(g).
[19] 308 U.S. 252 (1939).

documents.[20] In defining depreciable interest, the Court of Appeals for the Ninth Circuit has said:

> It is not the physical property itself, nor the title thereto, which alone entitles the owner to claim depreciation. The statutory allowance is available to him whose interest in the wasting asset is such that he would suffer an economic loss resulting from the deterioration and physical exhaustion . . . .[21]

Clearly equitable ownership was critical in the court's determination of the depreciable interest.

The rationale of the dissent would be equally applicable in determining capital losses and would produce a result different from that which would be reached by using the rationale of the majority. If the securities in *Manufacturers Hanover Trust* had decreased in value between the wife's and the husband's death and then had further declined after the death of the husband, the basis used in determining the loss would, under the view of the dissent, still be the fair market value on the date of the husband's death. In a declining market, the difference between the two computations would be significant if the property was, as in *Manufacturers Hanover Trust*, held over a long period and then sold immediately after the second death.

The validity of the dissent's rationale can be illustrated by posing a situation in which there are multiple legatees. If, in the principal case, the husband had shared the securities with his two children, his portion that was sold by the executor after his death would have received the stepped-up basis while the basis of the children's shares would have remained the fair market value at the time of their mother's death. This difference would have occurred even if the securities had at all times been treated as an entity by the executor, had been acquired from the same decedent, and had been sold simultaneously.

The most serious objection to the view of the majority is that its focus is primarily on the date of distribution and on the status of the plaintiff as executor of the wife's estate on the date of sale. If the securities had been distributed to the husband and had not been sold or exchanged prior to his death, his estate and his legatees would have received a stepped-up basis at his death. If the securities had been distributed to his estate after his death but before sale, an identical result would have followed.

[20] *Id.* at 255.

[21] Commissioner v. Moore, 207 F.2d 265, 268 (9th Cir. 1953).

The only difference between the latter situations and the actual facts of the case is that the date of distribution occurred both after the husband's death and the executor's sale. *Brewster* held that the decree of distribution gives no new rights and should not be considered in determining basis. By concentrating on the status of the plaintiff as executor of the wife's estate at the time of sale and on the date of distribution, the majority in *Manufacturers Hanover Trust* put form before substance.[22]

The result reached in *Manufacturers Hanover Trust* represents a trap for the unwary. A long period of administration is not unusual, and the conclusion reached by the majority would, *mutatis mutandis*, be equally applicable to a shorter period of administration. The use of a single corporate executor for sucessive estates is not an unusual practice. The likelihood of a corporate executor's serving successive estates has in fact, been greatly increased in North Carolina due to the significant and continuing expansion of the state's larger banks, which now offer trust services that were not available in the past. Executors should be aware when administering successive estates that utmost care should be taken in the choice of dates for the distribution and sale of estate property.

LANNY B. BRIDGERS

Insurance—Liability of Insurers under the Omnibus Clause to Protect Emergency Drivers—The North Carolina Situation

The general effect of an omnibus clause in an automobile liability insurance policy is that one using the automobile with the permission of the named insured becomes an additional insured under the policy.[1] Not only does coverage under the omnibus clause provide the driver with a right against the insurer for indemnification for liability arising out of his use of the vehicle,[2] but such coverage also guarantees at least minimal recovery to an innocent third party who suffers personal injury or prop-

[22] The inequitable result reached by the majority is even more apparent upon consideration of the estate-tax consequences. The fair market value of the securities at the date of the husband's death was used to compute the estate tax on his estate.

[1] 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4354 (1962) [hereinafter cited as APPLEMAN]; 7 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE §§ 315.5, .8 (3d ed. 1966) [hereinafter cited as BLASHFIELD].

[2] 7 APPLEMAN § 4354; 7 BLASHFIELD § 315.5. The liability of the insurer is still controlled by the limits of coverage of the policy. 7 APPLEMAN § 4371.

erty damage due to the driver's fault.[3] The importance of protection for the injured third party is clearly evident when it is realized that the driver may be judgment-proof.

In *Whelchel v. Sommer*,[4] the owner's wife took his car without his knowledge. While she was driving, the vehicle went into a skid. The wife, suffering from a heart condition, became hysterical and allegedly passed out. Unable to drive, she was transferred to another car to be taken home. At no time did she give anyone permission to drive the car. However, one of her passengers decided to return the car to the owner's home because it was feared that the vehicle would be stolen or vandalized if left unattended in the immediate vicinity. An accident ensued in which the driver was killed and the appellant in the case was injured. The appellant, after obtaining a judgment against the decedent's estate that was unsatisfied, brought an action against the owner's insurance company for garnishment under the omnibus clause. Judgment was rendered for the insurer by the federal trial court on the basis that the decedent did not have permission to drive the car, and this judgment was affirmed on appeal.

Traditionally, permission of the named insured has been the key in bringing the omnibus clause into effect, and litigation involving whether there is coverage under such a provision is generally "permission-oriented."[5] A typical policy may read:

> Persons Insured:
> (1) the named insured . . .
> (2) any other person using such automobile with the *permission* of the named insured. . . .[6]

There is general agreement today that permission may be expressed or implied;[7] that is, when express permission cannot be found, the court

[3] "[S]uit may . . . be brought against the insured by a third person, injured by the conduct of the automobile, by garnishment or otherwise." 7 APPLEMAN § 4371.

[4] 413 F.2d 521 (8th Cir. 1969).

[5] For a discussion of the major issues which "dominate the history of litigation . . . with reference to the omnibus provision," see Note, *The Omnibus Clause and Extension of Coverage by the Court*, 45 N.D.L. REV. 505 (1969).

[6] McLendon, *Coverage Disputes: Basis of Defenses* in NORTH CAROLINA BAR ASSOCIATION FOUNDATION, INSTITUTE ON LIABILITY INSURANCE LITIGATION III-1, III-12 (1968) [hereinafter cited as McLendon] (emphasis added).

[7] 7 APPLEMAN § 4365; 7 BLASHFIELD § 315.10. North Carolina makes this provision by statute. N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1969).

may look to see if the insured had impliedly consented to the driver's use of the vehicle. In making this determination, the facts and circumstances of each case are considered.[8] However, judicial decisions have developed certain rules regarding the particular facts and circumstances that will justify a finding of implied permission. Three factors are generally required to coexist: (1) a history of frequent past use by the permittee, (2) knowledge by the named insured of such use, and (3) acquiescence on the part of the named insured.[9] If no permission is found, the court will generally stop its inquiry and hold that the driver is not an additional insured. On such a finding, the injured party may be without a satisfactory remedy since the insurer is absolved from liability.

In *Whelchel,* as permission in the traditional sense could not be established, the appellant argued that the court should extend "implied permission" to cover the decedent on the basis of emergency—*i.e.*, that the court should find a constructive consent in that operation of the vehicle was under such circumstances that the named insured under the policy would have granted his permission had he been in a position to do do. As to "[t]he question of whether an 'emergency' can create implied permission of the named insured to drive his insured automobile,"[10] the Court of Appeals for the Eighth Circuit recognized that the issue was one of first impression under Missouri law[11] and that very few other courts had previously considered it.[12] Under the dictate of *Erie,*[13] the court found that the closest analogy to the question before it was the approach taken by the Missouri courts in cases presenting the traditional issue of implied permission. Finding that Missouri had adopted a strict position

[8] 7 BLASHFIELD § 315.10.

[9] Note, *The Omnibus Clause and Extension of Coverage by the Court, supra* note 5, at 519. Implied permission may also arise from the relationship of the parties or from certain conduct on the part of the named insured, but such permission is not germane to this note. *Id.* at 518-21.

[10] Whelchel v. Sommer, 413 F.2d 521, 526 (8th Cir. 1969).

[11] The case was in the federal courts on removal from a Missouri court on the basis of diversity of citizenship. The parties agreed that Missouri law was controlling. *Id.* at 524.

[12] Perhaps the most analogous case in which liability for the insurer has been found is *Coons v. Massachusetts Bonding & Ins. Co.*, 12 App. Div. 2d 701, 207 N.Y.S.2d 819 (1960), *aff'd*, 9 N.Y.2d 994, 176 N.E.2d 515, 218 N.Y.S.2d 66 (1961). In this case the insured stopped his automobile in the middle of a busy street and walked away. A passenger attempted to move the vehicle and had an accident. Though the court mentioned the foreseeable "emergency," the decision appears to be based on permission implied from the conduct of the insured. See note 9 *supra.*

[13] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

in that regard, the court felt compelled to hold that state law would not have recognized implied permission based on emergency. However, the court added:

> . . . [W]e cannot escape the conclusion that a beneficial purpose would have been served if the Missouri Supreme Court could have rendered a definitive decision on a question that deeply involves matters of local law and policy.[14]

This question of "local law and policy" suggests that *Whelchel*, though far removed from the local forum, calls for a searching inquiry as to what should constitute permission in North Carolina. For the sake of discussion, let us imagine a clear situation of emergency arising in this state.[15] Insured, driving alone, stops to pick up a hitchhiker. While stopped, insured slumps over the wheel unconscious. As no help is immediately available, the hitchhiker takes the wheel to drive to the hospital. Is the hitchhiker an additional insured? Under North Carolina case law, the answer is no. Clearly there has been no express permission.

> Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference.[16]

It also appears that there is no implied permission on these facts. Though not spelling out the elements mentioned earlier,[17] North Carolina has followed the traditional approach.

> . . . [I]mplied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying consent.[18]

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[14] 413 F.2d at 527.

[15] As the court in *Whelchel* refused to accept appellant's argument regarding emergency, it was unnecessary for it to determine if the facts of the case actually constituted such an emergency that the omnibus clause would be brought into effect. A significant difficulty in expanding implied permission to cover the "emergency operator" is the determination of what circumstances in fact constitute an emergency. Inquiring of the trier of fact whether a reasonable man would have granted his permission if he had known of the circumstances and had been in a position to consent may provide a solution.

[16] Hawley v. Indemnity Ins. Co. of North America, 257 N.C. 381, 384, 126 S.E.2d 161, 164 (1962).

[17] See text preceding note 9 *supra*.

[18] Hawley v. Indemnity Ins. Co. of North America, 257 N.C. 381, 384, 126 S.E.2d 161, 164-65 (1962).

Should an accident occur under circumstances similar to those in our hypothetical fact-situation, the result might be to leave injured third persons without redress. Is such an outcome warranted on the sole grounds that the insured was unable to expressly consent and that, since the parties were strangers, no "course of conduct" can be established? The expressed public policy of the state would decry such a result.

> The primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway.[19]

Yet, for "claims or causes of action" arising before July 6, 1967,[20] it is apparent that there would be no liability for the insurer.

In 1967, North Carolina General Statutes, section 20-279.21 was amended to read:

> (b) Such owner's policy of liability insurance:
>
> . . . .
>
> (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, *or any other persons in lawful possession. . . .*[21]

The addition of the italicized language would appear to provide coverage to the hitchhiker in our hypothetical situation as the use of the conjunction "or" seems to indicate that "lawful possession" is something different from "using . . . with . . . express or implied permission." However, this interpretation ultimately depends upon a similar construction of the words "lawful possession" by the North Carolina courts, and to this date no litigation involving the issue has been before the supreme court or the court of appeals.[22]

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[19] Allstate Ins. Co. v. Hale, 270 N.C. 195, 200, 154 S.E.2d 79, 84 (1967).

[20] Ch. 1162, § 4, [1967] N.C. Sess. L. 1795 provides: "[N.C. GEN. STAT. § 20-279.21(b)(2) (amendment ratified July 6, 1967)] shall be in full force and effect from and after its ratification, but shall not affect any claims or causes of action arising before ratification."

[21] N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1969) (emphasis added). Since coverage under the omnibus clause of "persons in lawful possession" of the named insured's vehicle is based upon the public policy of providing minimum protection for third persons, the courts might well limit the insurer's liability under the clause to the statutory minimums in the absence of an express provision to the contrary in the insurance policy.

[22] Though this language was included in an earlier statute (Ch. 1006, § 4(2)(b),

The preamble to the session law through which this statutory addition was enacted[23] also appears to support the conclusion that it was intended to expand the scope of the omnibus clause beyond the traditional coverage of drivers with the "permission" of the named insured.

> . . . .
>
> WHEREAS, many innocent and blameless citizens who are victims of serious personal injuries and property loss are unable to receive any compensation whatsoever because of difficulty of proof under the terms of liability insurance policies, and it is difficult and often impossible for injured parties and operators to prove that one lawfully in possession of a vehicle had the express or implied permission of the owner to drive on the very trip and occasion of the collision; and
>
> WHEREAS, liability coverage under the laws of North Carolina is provided for an operator of a vehicle who has the "express or implied permission" of the titled owner but does not extend to persons *otherwise lawfully in possession of vehicles* . . . .[24]

Section two of the same session law reads: "It shall be a defense to any action that the operator of a motor vehicle was not in lawful possession on the occasion complained of."[25] Mr. L. P. McLendon, Jr., a member of the Senate Insurance Committee when the law was considered and passed, has pointed out that the effect of the second section is to shift the burden of proof to the insurer to show that the operator was not in lawful possession.[26] *Quaere* whether the insurer can meet this burden by simply showing that the operator had neither the express nor the implied permission of the insured. If so, it would appear that the sole effect of the statutory addition is to ease the plaintiff's "difficulty of proof" by shifting the burden on the issue of permission and that, in fact, coverage under the omnibus clause is not extended beyond the operator's having permission.

Since such a construction is possible, it is necessary for us to consider where the "emergency operator" and the person that he injures stand if they must fall back upon actual permission, express or implied.

[1947] N.C. Sess. L. 1414 (repealed 1953)), the cases indicate that there has been no judicial determination of the meaning of "lawful possession."

[23] Ch. 1162, [1967] N.C. Sess. L. 1794.

[24] *Id.* at 1795 (emphasis added).

[25] *Id.*

[26] McLendon at III-13.

A consideration of the circumstances that gave rise to the 1967 amendment may be helpful to the litigant. Mr. McLendon has attributed the legislation to confusion existing from court decisions dealing with the omnibus clause.[27] This confusion arose in an attempt by the supreme court to settle on one of three approaches taken by other jurisdictions in interpreting such clauses. Relying on *Hawley v. Indemnity Insurance Co. of North America*,[28] Mr. McLendon has summarized the three approaches as follows:

> (1) *Strict Rule*— . . . [A]ny deviation from the time, place or purpose specified by the person granting permission is sufficient to take the permittee outside the coverage of the omnibus clause.
> (2) *Moderate Rule*— . . . [A] material deviation from the permission granted constitutes a use without permission, but a slight deviation is not sufficient to exclude the permittee from coverage.
> (3) *Liberal Rule*— . . . [I]f the permittee has permission to use the auto in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties at the time of the bailment, is a permissive use within the terms of the clause.[29]

In *Hawley*, the supreme court derived a legislative intention to confine construction of omnibus clauses at least to the moderate rule.[30] The rationale was that since the Motor Vehicle Safety and Responsibility Act of 1947[31] had extended coverage to one "using or responsible for the use of the motor vehicle with the permission, expressed or implied, of the named insured, *or any other person in lawful possession*,"[32] the deletion in 1953 of the italicized phrase[33] indicated a legislative desire to narrow the statute. Mr. McLendon has criticized this interpretation and has pointed out that the legislature modeled the language of the 1953 enactment[34] deleting the phrase in question on a provision in the Uniform Motor Vehicle Safety Responsibility Act of 1952,[35] which has been held

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[27] *Id.*

[28] 257 N.C. 381, 126 S.E.2d 161 (1962), *noted in* Note, *Automobile Insurance—Permissive User Under the Omnibus Clause*, 41 N.C.L. REV. 232 (1963). Mr. McLendon also relied upon this case note.

[29] McLendon at III-14.

[30] 257 N.C. at 387, 126 S.E.2d at 167.

[31] Ch. 1006, §§ 1-59, [1947] N.C. Sess. L. 1412-32 (repealed 1953).

[32] *Id.* § 4(2)(b) at 1414 (emphasis added).

[33] Ch. 1300, § 21(b)(2), [1953] N.C. Sess. L. 1271.

[34] N.C. GEN. STAT. § 20-279.21(b)(2) (1965), *as amended*, N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1969).

[35] The pertinent provision in uniform legislation today can be found in NATIONAL

to encompass the liberal rule in other jurisdictions.[36] "Importantly," he has stated, "the Court noted that the omnibus clause as contained in the [1947 act] was broad enough to embrace the liberal rule."[37] Though Mr. McLendon did not say that the purpose of reinsertion of the phrase "in lawful possession" by the 1967 General Assembly was to enact the liberal rule, the quotation above would indicate his opinion that there was intent by the legislature to allow the courts to adopt it.

Significant in this legislative history is that the rules in question as well as the supreme court's opinion in *Hawley* are not concerned with what *constitutes* initial permission. Rather the focus is on the *scope of such permission* and the consequences for deviation from it.[38] Therefore, any attempt to determine specific legislative intent to either expand or restrict what constitutes initial permission would be futile, for it is implicit that this question was not considered by the legislature. However, continuing to be aware that "[a] compulsory motor vehicle insurance act is a remedial statute and will be liberally construed so that the beneficial purpose intended by its enactment . . . may be accomplished,"[39] the courts should realize that the specific attempt to liberalize the applicability of the statute in those cases involving a permissive user is some indication of the feeling of the legislature about application of the statute generally. As the 1967 amendment clearly provides the opportunity for adoption of the liberal rule in North Carolina as to the scope of permission once granted, it appears permissible for the courts to similarly liberalize the view of what constitutes initial permission so that the emergency operator will be covered by insurance and persons or property injured by his driving will be afforded some protection.[40] Even under the traditional interpretation of implied permission, the supreme court has recognized that "the purpose of the use . . . [has] bearing on

COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE & MODEL TRAFFIC ORDINANCE § 7-324(b)(2) (rev. ed. 1968).

[36] McLendon at III-13.

[37] *Id.*

[38] For a discussion of problems regarding the scope of permission in North Carolina see Note, *Automobile Insurance—Permissive User Under the Omnibus Clause*, 41 N.C.L. REV. 232 (1963).

[39] Moore v. Hartford Fire Ins. Co. Group, 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967).

[40] It is difficult for this writer to comprehend why the emergency operator (who is perhaps performing a service for the insured and who may possibly have the insured in the automobile at the time of the accident) should not be provided coverage if coverage is provided to one who has initial permission regardless of the extent of his later deviation. *Liberal Rule* in text at note 29 *supra.*

the critical question of the owner's implied permission for the actual use."[41]

Whether the courts interpret "lawful possession" to cover the emergency operator or whether he is found to have "permission" because of the existing emergency, it is evident that coverage must be provided under the statute if more than lip service is paid to the public policy underlying compulsory liability insurance in North Carolina. Arguably, the more desirable approach is to give "lawful possession" a meaning independent of permission, for the former appears to describe the emergency situation more accurately. Indeed, "lawful possession" can even be extended beyond the emergency situation so that anyone other than a thief becomes an insured. Such a far-reaching interpretation would still fall short of the ultimate remedial goal of providing partial redress to *every* innocent victim of a negligent driver.[42]

JAMES LEE DAVIS

Labor Law—Duty to Bargain in Good Faith—Boulwarism Within the Totality-of-Circumstances Rule

In 1947, following a series of setbacks in negotiations with the three major unions representing its employees,[1] General Electric introduced a new approach into its technique of collective bargaining. This approach, labelled "Boulwarism" after its supposed progenitor,[2] was designed to instill in the employees of GE the idea that the company, without prodding by the representatives of the employees, would do what was "right" and would give each employee the benefits to which he was entitled, but no more.[3] The implementation of Boulwarism was two-pronged. First, by means of extensive investigation into the various economic factors in-

[41] Bailey v. General Ins. Co. of America, 265 N.C. 675, 678, 144 S.E.2d 898, 900 (1965).

[42] See text preceding notes 19 & 24 *supra*.

[1] Note, *Labor Law: General Electric's "Overall Approach" to Bargaining Held a Violation of Good Faith*, 1965 DUKE L.J. 661 n.1. See Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653, 662-63 & n.35 (1966).

[2] Lemuel R. Boulware, then vice-president of GE, designed the new technique in the late 1940's. R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, LABOR RELATIONS LAW 718 (4th ed. 1968). The most detailed history of Boulwarism is contained in H. NORTHRUP, BOULWARISM (1964).

[3] Note, *Labor Law—Collective Bargaining—General Electric's Firm Offer Approach Held Bad Faith*, 40 N.Y.U.L. REV. 798 (1965). GE developed an almost paternalistic attitude toward its employees. *See* Cooper, *supra* note 1, at 660.

volved, the company would arrive at what it felt to be a fair offer. This offer would be presented to the union representatives at the time for renegotiation of the employment contracts. The company would not consider changing its offer unless bargainers for the union could prove to the company that the proposal was based on a misapprehension of the relevant facts. Thus was the "firm, fair offer" conceived.[4] Second, an extensive communications campaign would be waged to convince the employees and the public that GE had made its best offer first, that the offer was fair for all concerned, and that the offer was not subject to change.[5]

Boulwarism was so successful initially that the first year in which GE employed it, "The [union] was so dumbfounded . . . that its representatives asked for an adjournment and accepted the company's offer the next day."[6] Abandoning altogether the "auction" method of bargaining, GE continued to use the Boulware technique unimpededly until the contract negotiations of the summer and fall of 1960.[7] At that time, prototypic Boulwarism alone proved to be ineffective to force capitulation by the union representatives; GE was forced to engage in activities—including unilateral offers to employees[8] and direct negotiations with locals[9]—that were outside the theory of Boulwarism.[10]

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[4] Comment, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. U.L. REV. 40, 66 (1968). Perhaps the most important facet of the "firm, fair offer" relating to its legality is that it is not completely unalterable. See Dierks Forests, Inc., 148 N.L.R.B. 923 (1964) ("hard bargaining" by an employer is not in itself unlawful).

[5] 38 TEMP. L.Q. 353 (1965). GE was attempting to apply its successful product-marketing techniques to its relations with its employees. *See* Cooper, *supra* note 1, at 660.

[6] Cooper, *supra* note 1, at 661 n.29, *citing* HENDERSON, CREATIVE COLLECTIVE BARGAINING 52-53 (Healy ed. 1965).

[7] Comment, *"Boulwareism": Legality and Effect*, 76 HARV. L. REV. 807, 809 (1963). In the 1966 negotiations, the major union with which GE was bargaining tried another method of combating Boulwarism instead of striking—co-ordinated bargaining. Under this approach, other unions with which GE dealt were brought in for joint negotiations so that a united front might be presented. GE refused to join in joint negotiations. See R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, *supra* note 2, at 718-19; Note, *Labor Law—The Legality of Co-ordinated Bargaining*, 47 N.C.L. REV. 946 (1969).

[8] General Elec. Co., 150 N.L.R.B. 192, 214-15 (1964). GE unilaterally offered an accident and life insurance policy to all its employees. This action was held by the Labor Board to be a violation of GE's duty to bargain in good faith. *Id.* at 193. *See* NLRB v. Katz, 369 U.S. 736 (1962).

[9] 150 N.L.R.B. at 193. The Board held GE's action in dealing with locals when the parent international union was the recognized bargaining agent to be a violation of the company's duty to bargain in good faith. *Id. See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960).

[10] The Board found one other specific violation of the duty to bargain in good

Under the contract that was operative prior to 1960, the earliest date that either party could compel the beginning of formal negotiations was August 16, 1960, forty-five days before the end of the contract.[11] In the latter part of 1959, the company began its publicity campaign by advising employees of the need for GE to remain competitive through low operating costs.[12] Then, after negotiations had started, the employees were bombarded with over one hundred written communications[13] bruiting the virtues of their company's "firm, fair offer" and disparaging the representatives of the IUE (International Union of Electrical, Radio, and Machine Workers).

During the period of informal negotiations, the company informed the union that it was going to institute contributory group-life and accident-insurance plans for all employees, but that, if the union objected, the plan would be instituted only for unrepresented employees. Despite protests by the union that such a plan should be negotiated before being implemented, the company instituted it for the unrepresented employees in July, 1960.[14] Once the formal bargaining began, the company consistently refused to furnish the union the information, including wage costs, used in computing its offer. When pressed for such information, GE's representatives would only state enigmatically that they bargained in terms of the "level of benefits" rather than costs.[15]

As the bargaining progressed, GE continually refused to make mean-

faith—GE's refusal to supply information to the union regarding the cost-basis for its "firm, fair offer." 150 N.L.R.B. at 193. The reason that such a refusal is unlawful is that it forces the representatives of the union to rebut proposals by the company without having any information on which to base their rebuttal. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Fitzgerald Mills Corp., 313 F.2d 260 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963).

[11] NLRB v. General Elec. Co., 418 F.2d 736, 741 (2d Cir. 1969).

[12] *Id.* at 741-42.

[13] *Id.* at 759 n.14. *See* Comment, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 Nw. U.L. REV. 40, 67-71 (1968) (pointing out the massive size of GE's campaign and examining effects of the campaign on GE's eventual bargaining position).

[14] 418 F.2d at 742. This action was held by the court to constitute in itself a violation of section 8(a)(5) of the National Labor Relations Act. (This section is described in note 25 *infra*.) *Id.* at 746-49. *See* Equitable Life Ins. Co., 133 N.L.R.B. 1675 (1961). *See also* cases cited note 8 *supra*.

[15] 418 F.2d at 742-43. An employer's failure to disclose "relevant" information in support of his claimed inability to meet union demands is a violation of section 8(a)(5). NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Furthermore, there is a presumption that information relating to wages is relevant. NLRB v. Fitzgerald Mills Corp., 313 F.2d 260 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963). In *General Electric*, the second circuit held that GE's failure to furnish relevant information was a violation of section 8(a)(5). 418 F.2d at 749-53.

ingful concessions to the union.[16] It was not until August 29, 1960, that GE completely revealed its own proposals.[17] Despite the IUE's admonitions that GE should not publicize its "firm, fair offer" until the IUE representatives had an opportunity to examine it, GE refused to delay releasing its prepared publicity beyond the time of the formal presentation of its offer on the next day.[18] With only three scheduled meetings left before the end of the existing contract, it was evident that GE would not make any significant changes in its offer; for when asked about the possible institution of a local-option plan to divert proposed wage increases to supplement unemployment compensation, the company's negotiator replied that "[a]fter all our month [*sic*] of bargaining and after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no."[19]

On September 29, 1960, with a strike imminent, GE refused the union's request to maintain the status quo under the old contract until a new one could be signed.[20] On the same day, GE authorized its employee-relations manager for the Schenectady plant to offer almost all of the terms of the "firm, fair offer" to the local IUE unit for local approval. The manager did so. Throughout the ensuing strike, the company continued to deal with local officials directly.[21] The strike was unsuccessful; on October 22, the IUE was forced to capitulate. Without having seen the complete contract, the union signed a short-form memorandum of agreement.[22]

In 1964, the NLRB reviewed GE's conduct in the 1960 negotiations.[23] Among other violations of the National Labor Relations Act (NLRA),[24]

[16] 418 F.2d at 742-43.
[17] *Id.* at 742.
[18] *Id.* at 742-43.
[19] *Id.* at 745.
[20] *Id.*
[21] *Id.* GE's dealings with locals were found by the court to constitute a specific violation of section 8(a)(5) of the National Labor Relations Act. *Id.* at 753-56. *See* cases cited note 9 *supra*. *See also* J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).
[22] 418 F.2d at 745-46.
[23] General Elec. Co., 150 N.L.R.B. 192 (1964).
[24] In addition to the three specific violations of the duty to bargain in good faith (see notes 8-10 *supra*), the Board also found GE guilty of violations of sections 8(a)(1) [61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964) (unlawful to interfere with or restrain employees' exercise of the right to bargain collectively)] and 8(a)(3) [61 Stat. 141-42 (1947), 29 U.S.C. § 158(a)(3) (1964) (unlawful to discriminate in employment opportunities against employees exercising collective-bargaining rights)] of the National Labor Relations Act [*formerly*, Labor Management Relations Act, 61 Stat. 136-62 (1947), 29 U.S.C. §§ 141-87 (1964)]. See 150 N.L.R.B. at 193, 284.

the Board found GE guilty under section 8(a)(5) of an over-all failure to bargain in good faith[25] with the IUE. In *NLRB v. General Electric Co.*,[26] a 1969 decision, the Second Circuit Court of Appeals affirmed the Board's decision. Judge Kaufman, writing for a two-judge majority,[27] reaffirmed the Board's use of the "totality-of-circumstances"[28] approach to determining good faith: "[G]ood faith—or lack of it—must in the absence of a per se violation depend upon a factual determination based on the overall conduct of the party charged."[29] He made clear that the determination of subjective good faith could not be made to fit a uniform rubric, but would have to be resolved through a case-by-case examination of the facts.

In an opinion concurring and dissenting, Judge Friendly disagreed with the majority's analysis of GE's conduct.[30] He suggested that since the parties had "sat down together"[31] and had not engaged in any "proscribed tactics"[32] in bargaining, the majority's finding of an over-all failure to bargain in good faith contravened the language and policy of section 8(d) of the NLRA.[33] He insisted that when the Board relies on

[25] 150 N.L.R.B. at 196. Section 8(a)(5) [61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964)] provides that it is an unfair labor practice for an employer to refuse to "bargain collectively" with his employees' representatives. Section 8(d) [61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964)] defines "bargain collectively" as follows:

> For the purposes of this section [8 of the NLRA], to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

[26] 418 F.2d 736 (2d Cir. 1969).

[27] *Id.* Judge Kaufman was joined in his opinion by Judge Waterman. Judge Friendly dissented from the portion of the majority opinion finding GE guilty of an over-all refusal to bargain in good faith.

[28] *Id.* at 756. See General Elec. Co., 150 N.L.R.B. 192, 196 (1964). *See also* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

[29] 418 F.2d at 756.

[30] *Id.* at 764-74 (concurring and dissenting opinion).

[31] *Id.* at 767. This reference by Judge Friendly apparently was to GE's compliance with the *procedures* required by section 8(d) (see note 25 *supra*). See Comment, *"Boulwareism": Legality and Effect*, 76 HARV. L. REV. 807, 810-11 (1963).

[32] 418 F.2d at 767. Judge Friendly alluded to the fact that GE had not committed a per se violation of the NLRA. *But see id.* at 762; NLRB v. Katz, 369 U.S. 736 (1962).

[33] 418 F.2d at 765. See generally Cox, *supra* note 28, at 1403-12, tracing the

the "totality of circumstances" in finding a violation of section 8(a)(5), a more stringent test than the subjective absence of good faith should be required: ". . . I have no difficulty with the Board's making a finding of bad faith based on an entire course of conduct so long as the standard of bad faith is, in Judge Magruder's well-known phrase, a 'desire not to reach an agreement with the Union.' "[34] Judge Friendly came to the conclusion that GE had sought to reach *some* agreement with the union and was, therefore, not guilty of bad-faith bargaining.[35]

The flaw in Judge Friendly's approach, the majority pointed out,[36] is that it is easily susceptible of reduction to the absurdity wherein a company could escape the prohibitions of section 8(a)(5) merely by demonstrating a desire to sign a contract with the terms to be supplied by the company itself. Such a result would permit bad-faith bargainers to avoid the sanctions of the NLRA merely by meeting a prescribed form of bargaining. Since "good faith," absent facts warranting a finding of per se bad faith,[37] necessarily involves a determination of the state of mind of the particular bargainers,[38] the majority was correct in concluding that a court best proceeds on a case-by-case examination of the facts surrounding the negotiations and should leave to the Board's discretion the application of the "totality-of-circumstances" doctrine.[39]

Since the majority relied on the totality of GE's conduct in reaching

history and policies relating to section 8(d); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959).

[34] 418 F.2d at 767, *citing* NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953). *But see* 418 F.2d at 761, in which Judge Kaufman pointed out that Judge Magruder's language was not intended to be converted into a simplistic test of good faith; United Steelworkers v. NLRB, 390 F.2d 846 (D.C. Cir. 1967).

[35] 418 F.2d at 774.

[36] *Id.* at 761.

[37] Certain actions of employers have been held to be inherently indicative of bad-faith opposition to collective bargaining. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962) (unilateral wage increases while bargaining was in process held to be a violation of section 8(a)(5)). Thus, in cases involving per se bad faith, the actual state of mind of the employer is irrelevant because his unlawful act renders a good-faith intent objectively impossible. *See generally* Cox, *supra* note 28, at 1422-28; Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956).

[38] See Comment, *"Boulwareism": Legality and Effect*, 76 HARV. L. REV. 807, 810-14 (1963).

[39] 418 F.2d at 756. Since the only way that the state of mind of an employer can be determined is through an evaluation of the objective manifestations of his intent through the totality of his actions, it is useless to try to segment a defendant's conduct and make rules for each separate act. Indeed, it is clear that often, when a defendant's state of mind is in issue, the sum of his acts may be illegal although each individual act is not. *See, e.g.*, Daniel Constr. Co. v. NLRB, 341 F.2d 805, 811 (4th Cir. 1965), *cert. denied*, 382 U.S. 831 (1965). *See also* Cooper, *supra* note 1, at 672-73.

a decision, it is still unclear whether "pure" Boulwarism constitutes bad-faith bargaining.[40] However, in at least two respects, Judge Kaufman went farther than did the majority of the NLRB toward declaring prototypic Boulwarism a violation of section 8(a)(5): he indicated that GE's failure to make meaningful concessions changed the context in which the company's other conduct would be viewed,[41] and he held that using evidence of GE's publicity campaign did not contravene section 8(c)[42] of the NLRA.[43]

The Board in its decision of the case did not directly address the issue of GE's refusal to make concessions and the effect of that refusal on the legality of GE's "firm, fair offer." However, a majority of the Board indicated a preference for an "auction" type of bargaining: "This 'bargaining' approach [Boulwarism] undoubtedly eliminates the 'ask-and-bid' or 'auction' form of bargaining, but in the process, devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning."[44] Judge Kaufman did not opt for this subtler approach to the issue of lack of concessions and the validity of various forms of bargaining.[45] Rather, he stated that "while the absence of concessions would not prove bad faith, their presence would, as GE claims, raise a

[40] *See* address by Frank W. McCullock, Chairman of the NLRB, 43d Annual Conference of Tex. Indus., Oct. 28, 1965, in 60 L.R.R.M. 44 (1965):

> . . . [T]he Board held in all the circumstances of that case [*General Electric*] that the company failed to meet the law's requirements of good faith bargaining.
>
> . . .
>
> . . . The Board simply applied accepted principles to a unique bargaining situation, which I do not know to have been duplicated in any other company. . . .

Id. at 47. *But see* Note, *Labor Law: General Electric's "Overall Approach" to Bargaining Held a Violation of Good Faith*, 1965 DUKE L.J. 661; Note, *Labor Law—Collective Bargaining—General Electric's Firm Offer Approach Held Bad Faith*, 40 N.Y.U.L. REV. 798 (1965); 38 TEMP. L.Q. 353 (1965) (concluding that the Board had found that Boulwarism alone was an unlawful method of bargaining).

[41] 418 F.2d at 758-59.

[42] 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1964):

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

[43] 418 F.2d at 760. See discussion p. 1000 *infra*.

[44] General Elec. Co., 150 N.L.R.B. 192, 195 (1964) (footnote omitted).

[45] *But see* remarks by Phillip D. Moore, Manager of Employee Relations Service of GE, 58 L.R.R.M. 33 (1965) (concluding that the Board in its decision specifically held that the absence of concessions is evidence of a lack of good faith).

strong inference of good faith."[46] If concessions raise an inference of good faith, then, logically, concession-making forms of bargaining will, under a given set of facts, fare better in court than bargaining in which the best offer is made first. Thus, the context in which a tribunal may view the facts surrounding employment-contract negotiations is substantially altered by Judge Kaufman's determination. Two questions thus emerge. First, has the court disregarded section 8(d)?[47] Second, does the encouragement of concessions do any more than make the parties go through a period of haggling before they tender their "real" offer?

In defining the obligation to bargain collectively, section 8(d) states that "such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."[48] In interpreting this language, the Supreme Court has held that the Board may not compel concessions either directly or *indirectly*.[49] Clearly Judge Kaufman's opinion at least indirectly would compel GE to make concessions in bargaining, and this fact was one basis for Judge Friendly's dissent.[50] Judge Friendly's view was that, instead of telling the parties *how* to bargain,[51] the Board must limit its functions to escorting the parties to the bargaining table, to making sure that they meet at reasonable times and make memoranda of any agreements reached,[52] and to assuring that there are no per se violations of the duty to bargain.[53] Such an approach ignores the intentions of the parties and precludes the Board from ever examining the negotiators' state of mind. But this restrictive interpretation was repudiated in the very case that Judge Friendly cited[54] as his authority—*NLRB v. Insurance Agents' International Union*.[55] Since a

[46] 418 F.2d at 758. *See* NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943); Marcus, *The Employer's Duty to Bargain: Counterproposal v. Concession*, 17 LAB. L.J. 541 (1966); Comment, *Collective Bargaining, Boulwareism, and the Fluctuating Duty to Concede*, 61 NW. U.L. REV. 427 (1966).

[47] For the language of section 8(d) see note 25 *supra*.

[48] 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

[49] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

[50] *See* 418 F.2d at 765-66 (concurring and dissenting opinion).

[51] *See id.* at 769.

[52] *Cf.* California Girl, Inc., 129 N.L.R.B. 209, 219 (1960) (there must be a potentiality of the parties' yielding).

[53] See material cited note 37 *supra*. *But see* Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 290-91 (1964) (concluding that Boulwarism inevitably results in the employer's total unilateral control over "distributive power").

[54] 418 F.2d at 765.

[55] 361 U.S. 477 (1960), *aff'g* 260 F.2d 736 (D.C. Cir. 1958). The Supreme Court emphasized that its holding in the case was not intended to remove the Board's power to examine the good faith of the parties through their over-all conduct. *Id.* at 498 (dictum).

factual determination of the parties' state of mind is extremely difficult to make and since concessions are indeed relevant to a state of open-mindedness in bargaining, the provision of section 8(d) relating to concessions should be limited to its precise language: no concessions shall be *required.* To deny evidence concerning concessions or the lack of them would only inhibit the Board in performing its duty to seek industrial peace through enforcing collective bargaining.[56]

If evidence of concessions raises an inference of good-faith bargaining, what is to prevent GE from entering negotiations, haggling with the IUE for a few meetings, making a few planned concessions, and then resorting to its normal bargaining techniques? The prevention of this possibility was, arguably, the very purpose behind the passage of section 8(d); the Supreme Court has recognized that "it is now apparent from the statute [8(d)] that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."[57] There appears to be an adequate check against such a superficial use of concession-making by virtue of the fact that the Board may declare mere surface bargaining to be indicative of a lack of good faith.[58] Although the Board might be unable always to ferret out those parties who lack good faith this risk is worth the "vitalizing" effect that encouragement of concessions should have on the negotiations of the parties.[59]

The Board's use of evidence of GE's publicity campaign in finding bad-faith bargaining provided the issue that split the court three ways. The court was forced to make a determination of the scope of an employer's free speech under section 8(c) of the NLRA.[60] Unlike the majority of the Board, Judge Kaufman addressed himself directly to whether section 8(c)[61] precluded use of the evidence. He concluded that Congress, in passing the statute, had intended to exclude only "irrelevant"

[56] *See* 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964).

[57] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952). *Cf.* Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964).

[58] *See, e.g.,* H. K. Porter Co., 153 N.L.R.B. 1370 (1965), *enforced,* 363 F.2d 272 (D.C. Cir. 1966), *rev'd on other grounds,* 38 U.S.L.W. 4177 (U.S. Mar. 2, 1970).

[59] It does not seem unreasonable to suggest that parties will be more willing to listen to each other when each knows that there is some possibility for a change in the other's position. *See* California Girl, Inc., 129 N.L.R.B. 209, 219 (1960).

[60] Judge Waterman's concurring opinion, explicitly adopting Judge Kaufman's opinion, took up only the issue of GE's communications to its employees. 418 F.2d at 763-64.

[61] See note 42 *supra* for the text of section 8(c).

speech from the Board's consideration: "The evil at which the section was aimed was the alleged practice of the Board in inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer."[62] He insisted that Congress could not have intended to bar the Board's examination of all communications that do not contain a threat or a promise of benefit; otherwise section 8(c) would destroy the Board's purview over sections of the NLRA predicated on evaluation of motive and intent.[63]

Although Judge Kaufman's reasoning seems to contradict the express language of section 8(c), his viewpoints, arguably, have a rational basis. Congress probably passed the section to achieve a more equitable balance between the free-speech rights of employers and the rights of employees to organize and bargain than had existed under the doctrine of *NLRB v. Virginia Electric and Power Co.*[64] To permit this balance to be struck formalistically so that the rights of employees are subverted would be an unintended paradox.

Judge Waterman went the step beyond the determination that section 8(c) was intended only to balance the interests of the parties: he actually balanced the interests involved in the case.[65] He found that GE's publicity campaign had had two deleterious effects on its employees' rights: it cemented the company to its original position so that there was no effective bargaining possible,[66] and it fixed the idea in the minds of the employees that the company, rather than the union, was their proper representative.[67] As to the employer's rights to exercise freedom of speech, Judge

[62] *Id.* at 760; Linn v. United Plant Guard Workers of America, 383 U.S. 53, 62 (1966) (concurring opinion).

[63] 418 F.2d at 761-62. In addition to section 8(a)(5), section 8(a)(1) also requires examination of an employer's intent in cases in which there appears to be a conflict with section 8(c). *See* Southwire Co. v. NLRB, 383 F.2d 235 (5th Cir. 1967); Comment, *"Boulwareism": Legality and Effect*, 76 HARV. L. REV. 807, 814-15 (1963). *See generally* Pokempner, *Employer Free Speech Under the National Labor Relations Act*, 25 MD. L. REV. 111 (1965).

[64] 314 U.S. 469 (1941). The Board in this case was given broad discretion to examine an employer's speech as an incident of his total course of conduct. The Board's use of this broad discretion to examine employers' speech that was unrelated to bargaining was criticized by the Senate committee that drafted section 8(c). S. REP. No. 105, 80th Cong., 1st Sess. 23-24 (1947). *See*, Comment, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. U.L. REV. 40, 44-47 (1968).

[65] 418 F.2d at 764 (concurring opinion).

[66] *Id.* This result may, in fact, be the single feature of GE's communications program that made it illegitimate. *See* Procter and Gamble Mfg. Co., 160 N.L.R.B. 334 (1966).

[67] 418 F.2d at 764. This argument (that GE was attempting to replace the union as the representative of the employees) can be extended even farther than

Waterman saw no value in the company's publicizing that its offer was virtually unalterable.[68] Thus, he concluded that evidence of GE's communications program was properly admitted in the action before the Board.

Judge Friendly felt that "GE's communications [fitted] snugly under the phrase 'views, argument, or opinion' in § 8(c)."[69] He argued that Judge Kaufman had misinterpreted the reasons why Congress passed the statute, that Congress had struck a constitutionally-permissible balance in favor of protecting employers' speech, and that the court was bound by that determination.[70] He concluded that since GE's "views" contained neither a threat of reprisal or force nor a promise of benefit, evidence of GE's publicity campaign could not be considered.[71]

The three judges' debate on the proper interpretation and application of section 8(c) points to the problem that is the heart of the issue of the legality of Boulwarism: the Board and the courts are forced to reconcile two sections of the NLRA—8(a)(5) and 8(c)—that are, under the facts of many cases, contradictory. Section 8(a)(5) must depend for its enforcement upon the ability of the Board to determine the employer's state of mind. Such a determination is not difficult when the employer completely disregards the procedures prescribed by section 8(d),[72] when he commits an act that can be said to be inherently indicative of bad faith,[73] or when he adamantly refuses to bargain with a union.[74] But when an employer meets the formal procedures that are required in collective bargaining and disguises his performance in the negotiations through hard bargaining so that the Board is unable clearly to perceive his bad faith, then determination of his state of mind is very difficult. When the employer carefully follows a "legal" *form* of bargaining, he

Judge Waterman did to provide a basis for finding that GE violated section 8(a)(5): GE refused to recognize the IUE as the representative of its employees; therefore, since it is logically impossible for GE to bargain with a union that it fails to recognize, GE could not have been bargaining in good faith "with the representatives of [its] employees." 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964). *See* Cooper, *supra* note 1, at 675.

[68] 418 F.2d at 764. Judge Waterman seemed to feel that disparagement of union officials and massive communication of the benefits of the company's offer were not evidence of bad faith. Rather, it was the communication of "firmness for firmness' sake" that threw the balance against the speech. *Id.*

[69] *Id.* at 770.

[70] *Id.* at 771-73.

[71] *See id.* at 771.

[72] *See, e.g.*, H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

[73] *See, e.g.*, NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960).

[74] *See, e.g.*, NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 268 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963).

may be able to avoid the sanctions of section 8(a)(5) and still communicate his bad-faith intentions to his employees if section 8(c) precludes any evidence of such communications. Thus, if he is able to persuade the courts to adhere strictly to the language of section 8(c), he has safely avoided the duty imposed by the NLRA to bargain in good faith. If he cannot persuade a court to preclude use of this evidence at the hearing of an 8(a)(5) charge, he will have to rely solely on his "hard bargaining" at the negotiations; and this alternative is less likely to bring about capitulation of the union and more likely to effectuate the policies of the NLRA. Judges Kaufman and Waterman, by consciously balancing the interests of the parties, have adopted the only feasible method for protecting the policies embodied by the Act.

KENNETH B. HIPP

Medical Problems in the Law—Automobiles—Reporting Patients for Review of Drivers' Licenses

A person licensed to drive a motor vehicle by the State of North Carolina may lose this privilege[1] if he is adjudged incompetent, is admitted as an inpatient to an institution for the treatment of the mentally ill, or enters an institution for the treatment of alcoholism or drug addiction.[2]

[1] "A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute." Underwood v. Howland, 274 N.C. 473, 476, 164 S.E.2d 2, 5 (1968), *quoting from In re* Wright, 228 N.C. 584, 589, 46 S.E.2d 696, 699-700 (1948).

[2] N.C. GEN. STAT. § 20-17.1 (Supp. 1969) in pertinent part provides:

(a) The Commissioner, upon receipt of notice that any person has been legally adjudged incompetent or has been admitted as an inpatient to an institution for the treatment of the mentally ill or has entered an institution for the treatment of alcoholism or drug addiction shall forthwith make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle. Unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons and property, he shall revoke such person's driving privilege. No driving privilege revoked hereunder shall be restored unless and until the Commissioner is satisfied that the person is competent to operate a motor vehicle with safety to persons and property.

. . . .

(c) The person in charge of every institution of any nature for the care and treatment of the mentally ill, the care and treatment of alcoholics or habitual users of narcotic drugs shall forthwith report to the Commissioner in sufficient detail for accurate identification the admission of every person.

. . . .

(e) Notwithstanding the provisions of G.S. 8-53, G.S. 8-53.2, G.S. 122-8.1

Those in charge of institutions treating these conditions are required to report admissions to the Commissioner of Motor Vehicles.[3] The original legislation in this area of reporting and revocation was enacted in 1947,[4] and was substantially amended and put in its present form in North Carolina General Statutes, section 20-17.1, in 1969. There was little compliance with the provisions of the former statute concerning reporting, and no significant increase in reporting has been noted under the current enactment.[5] The latest amendment has accomplished desirable changes in the law; some additional improvements should be considered. These include amendments to effect a more equal application of the statute and to establish a discretionary system of reporting in certain situations.

The original legislation required that the Commissioner "forthwith revoke [the] license" upon receipt of notice of admission to an appropriate institution or of adjudication of incompetency unless the individual had since been adjudged competent or discharged with a certificate of competency.[6] The present law, however, requires the Commissioner, upon receiving notice, to inquire into the facts for the purpose of determining driving competency. Unless he is satisfied that a person is competent to drive with safety, the Commissioner is required to revoke the license.[7] Thus, the Commissioner is now vested with some discretion; before the amendment in 1969, he had none. This element of discretion is important for purposes of judicial review since the right of appeal to the courts is not available if the revocation or cancellation of the license is mandatory.[8]

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and G.S. 122-8.2, the person or persons in charge of any institution as set out in subparagraph (c) hereinabove shall furnish such information as may be required for the effective enforcement of this section. Information furnished to the Department of Motor Vehicles as provided herein shall be confidential and the Commissioner of Motor Vehicles shall be subject to the same penalties and is granted the same protection as is the Department, institution or individual furnishing such information. No criminal or civil action may be brought against any person or agency who shall provide or submit to the Commissioner of Motor Vehicles or his authorized agents the information as required herein.

(f) Revocations under this section may be reviewed as provided in G.S. 20-9(g)(4).

[3] *Id.* § 20-17.1(c).

[4] Ch. 1006, § 9,[1947] N.C. Sess. L. 1417.

[5] Interview with Edward H. Wade, Director, Driver License Div., N.C. Dep't of Motor Vehicles, in Raleigh, N.C., Mar. 4, 1970. Mr. Wade estimated that no more than ten per cent of reportable admissions are actually reported.

[6] Ch. 1006, § 9(a), [1947] N.C. Sess. L. 1417.

[7] N.C. GEN. STAT. § 20-17.1(a) (Supp. 1969).

[8] N.C. GEN. STAT. § 20-25 (1965) provides in part: "Any person denied a

The new statute, unlike the former, also provides for an elaborate administrative review of revocations[9] before a board consisting primarily of medical specialists.[10] Another improvement of the current enactment is that it grants immunity to all those persons reporting the required information;[11] the former statute did not. Indeed, the argument might have been made before the latest amendment, that physicians were not allowed to disclose admissions to institutions because such action would have involved divulgence of information "acquired in attending a patient."[12]

It is elementary that regulation of the operation of motor vehicles is a valid exercise of a state's police power in the furtherance of the safety and welfare of its citizens.[13] Still, there are constitutional questions to consider. Since the present statute does not require summary revocation by the Commissioner and any loss of license is reviewable both administratively and judicially, this legislation should satisfy the requirements of due process of the fourteenth amendment.[14] Whether the demands of the equal protection clause are likewise met is not as clear.

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license or whose license has been cancelled, suspended or revoked by the Department, *except where such cancellation is mandatory under the provisions of this article,* shall have a right to file a petition . . . for a hearing . . . in the superior court . . . ." (emphasis added). *See* Carmichael v. Scheidt, 249 N.C. 472, 476, 106 S.E.2d 685, 688 (1959); Fox v. Scheidt, 241 N.C. 31, 34, 84 S.E.2d 259, 261 (1954).

[9] N.C. GEN. STAT. § 20-17.1(f) (Supp. 1969).

[10] N.C. GEN. STAT. § 20-9(g)(4) (Supp. 1969).

[11] *Id.* § 20-17.1(e).

[12] N.C. GEN. STAT. § 8-53 (1969) provides:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the court, either at the trial or prior thereto, may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

Query whether this prohibition applied to the reporting of patients admitted for treatment. In any case, reporting is now required "[n]otwithstanding the provisions of G.S. 8-53." N.C. GEN. STAT. § 20-17.1(e) (Supp. 1969).

[13] *See* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[14] In addition, the procedures adopted by the Department of Motor Vehicles for the initial review of the records of reported drivers generally reflect a presumption of competency to drive unless a reasonable ground exists for concluding otherwise. For example, if a person reported as an alcoholic patient has no history of having driven after consuming alcoholic beverages, no medical evaluation is required upon his release. On the other hand, if the patient's driving record shows evidence of his having driven after consumption of alcoholic beverages, a medical evaluation is required upon his release, and the Commissioner is furnished with a copy of the patient's medical summary. Interview with Edward H. Wade, *supra* note 5.

The classification made by the statute must be reasonable to satisfy the constitutional mandate of equal protection.[15] Thus, the legislation should equally affect "all persons who are similarly situated with respect to the purpose of the law."[16] The obvious purpose of section 20-17.1 is to promote highway safety by removing drivers who are unsafe. Therefore, the statute's scheme of classification should be expected reasonably to contribute to these objectives, and there should be no unreasonable exclusions from its application.

It cannot be denied that a considerably high percentage of fatal automobile accidents and traffic violations involve drinking drivers[17] and the mentally ill.[18] It is also fairly well established that the alcoholic, and not the social drinker, is the major problem.[19] The drug addict, too, is a hazardous user of the highways.[20]

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[15] "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[16] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

[17] J. WALLER, GUIDE FOR THE IDENTIFICATION, EVALUATION AND REGULATION OF PERSONS WITH MEDICAL HANDICAPS TO DRIVING 3, 23 (1967) [hereinafter cited as WALLER] (indicating that alcohol is involved in fifty to seventy-five per cent of all severe and fatal traffic accidents); Univ. of N.C. News Bureau, News Release No. 1515, Nov. 10, 1969 ("Seventy-eight percent of the automobile drivers killed in single-car vehicle crashes in North Carolina during September and October were under the influence of alcohol according to figures released . . . by the State Medical Examiner."); AMA Committee on Medical Aspects of Automobile Injuries and Deaths, *Medical Guide for Physicians in Determining Fitness to Drive a Motor Vehicle*, 169 J.A.M.A. 1195 (1959); Borkenstein, *Alcohol and Traffic Safety*, in LAW, MEDICINE, SCIENCE—AND JUSTICE 382, 398-99 (L. Bear ed. 1964); Waller, King, Nielson & Turkel, *Alcohol and other Factors in California Highway Fatalities*, 14 J. FOR. SCI. 429, 442 (1969).

[18] WALLER 3, 25-28; Brandaleone, Blaney, Irwin, Kuhn, Miller, Penalver, Seth, Sim & Friedman, *Recommendations for Medical Standards for Motor Vehicle Drivers*, 26 IND. MED. & SURG. 25, 30 (1957) (The authors list the following as probable non-acceptable conditions for one who drives: psychosis; moderate severe chronic psychoneurosis; severe transient psychoneurosis (situational); marked character, behavioral or personality disorder that prevents good adjustment, such as antisocial tendencies, overt homosexuality, chronic alcoholism, or drug addiction; marked mental deficiency; and perversion.); Crancer & Quiring, *The Mentally Ill as Motor Vehicle Operators*, 126 AM. J. PSY. 807, 807-09 (1969).

[19] *E.g.*, WALLER 23.

[20] Conclusive research on this point is lacking. One survey showed that persons convicted for illegal possession or use of drugs were not involved in more accidents than non-drug users of the same age; however, the drug users had nearly twice as many traffic violations. WALLER 28-29. It is important to differentiate between "users" and "addicts." Those truly addicted are thought by medical personnel to be greater than average accident risks. *Id.* *See* Brandaleone, *supra* note 18.

But neither can it be doubted that many persons whose mental and physical condition does not warrant revocation of their licenses are required by the statute to be reported. Thus, if the Commissioner was under the obligation to revoke the license of everyone reported, the statute would be open to attack for overbreadth. The 1969 amendment should avoid the weakness of overinclusiveness because it vests the Commissioner with discretion not to revoke as well as providing for an opportunity of administrative and judicial review if the Commissioner decides upon revocation. At the same time, many drivers whose records should be reviewed will avoid scrutinization simply because they have not been adjudged incompetent or have not been admitted to institutions for treatment of alcoholism or drug addiction.

Does the omission of this latter group render the statute unconstitutional as a denial of equal protection? In *Buck v. Bell*[21] the United States Supreme Court upheld a Virginia statute requiring sterilization by salpingectomy of certain mental inmates found afflicted with an hereditary form of insanity or imbecility. To the argument that the statute applied only to the small number of persons within institutions and not to the multitudes outside, the Court replied: "But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."[22]

The North Carolina reporting statute could not feasibly be made to apply to persons who have not sought treatment. However, section 20-17.1 does not apply to many persons who *do* seek treatment because it does not require physicians to report those persons who undergo treatment for alcoholism, drug addiction, or mental problems privately in the doctors' own offices. In all likelihood, those individuals who would escape detection through operation of the statute by seeking such treatment are not among the lower income classes. If this probability can be demonstrated, an argument can be made that there is discrimination in favor of the wealthy.[23] This discrimination is not of much significance, however,

[21] 274 U.S. 200 (1927).

[22] *Id.* at 208. In Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542 (1942), the Court approved *Buck* but struck down the Oklahoma Habitual Criminal Sterilization Act because that law unreasonably excepted prisoners convicted of embezzlement while applying to those convicted of larceny.

[23] *Cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

if it can be authoritatively said that institutionalized patients are in much greater need of treatment that those treated outside institutions.

Excluding the possibility of an attack on the statute on the theory of discrimination based upon individual wealth, an argument under the equal protection clause that persons being treated privately by physicians are excluded from the reporting provisions is almost certain to fail. In addition to the strong barrier that *Buck* poses to such an argument is the familiar rule in equal-protection cases that a state need not attempt to solve all of the problems of the same kind within reach of its police powers while eradicating some of them.[24] Nevertheless, since the risk to highway safety presented by non-institutionalized patients may be comparable to the risk presented by those confined for treatment, the statute should be amended to require reporting by doctors of all persons being treated for the conditions set out in the present law. A possible constitutional attack on the present reporting provisions is colorable at best,[25] and the statute could readily be expanded to apply to an even greater number of persons.

Some members of the medical profession have raised objections to the statute's provisions for reporting.[26] The required disclosures interfere with the physician-patient relationship and force the doctor to become, in effect, an agent of the state. However, the only rational objection is that the therapeutic relationship may be impaired, not that breach-of-confidence actions by patients will be asserted against physicians who obey the law. Immunity is specifically granted by the statute,[27] and the legal requirement of disclosure is a traditional defense to such suits.[28]

Mandatory reporting by physicians of information acquired in the course of treatment is hardly a novel concept. Many states require doctors and other persons to report the discovery of various conditions and

[24] *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[25] The patient's right to privacy in his relationship with his physician probably is not a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Griswold v. Connecticut, 381 U.S. 479, 485 (1965). Confidential communications between a physician and patient were not privileged at common law. State v. Martin, 182 N.C. 846, 849-50, 109 S.E. 74, 76 (1921); C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 10 (1958). Only about two-thirds of the states have conferred the privilege by statute. R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION 15-16 (1966).

[26] N.C. Neuropsychiatric Ass'n, Newsletter, Nov. 1969.

[27] N.C. GEN. STAT. § 20-17.1(e) (Supp. 1969).

[28] Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943, 954 (1959).

diseases.[29] North Carolina requires reporting of venereal disease,[30] inflammation of the eyes of newborn infants,[31] and certain other diseases designated by the State Board of Health to be reportable.[32] Thus, there is ample precedent for mandatory reporting under the statute. There is no conflict with medical ethics:

> A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.[33]

To the extent that the requirement of disclosure interferes with treatment and thus is detrimental to the patient, a valid objection is raised. Due to the unique intimacy between doctor and patient attained in psychiatric treatment, the confidential relationship is an especially essential element of the practice of psychiatry.[34] The success of therapy in psychiatric and related treatment may be jeopardized by mandatory disclosures of the sort required by the North Carolina statute; this danger must be weighed heavily against the social value of reporting. However, patients treated outside institutions are not reportable under the present law; so many psychiatric patients are not affected. If amendment of the law to make the reporting requirements applicable to the non-institutionalized patient is envisioned, perhaps consideration should also be given to softening the requirements concerning all those being treated by psychiatrists. For example, equally satisfactory traffic-safety results might be obtained by requiring psychiatrists to report only those patients that they determine under broad statutory guidelines to be hazardous drivers.

Another valid objection to the statute is that some unsafe drivers,

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[29] *E.g.*, D.C. CODE ANN. § 6-202 (1967) (eye inflammation in newborn children); MINN. STATS. § 144.68 (Supp. 1969) (malignant disease); R.I. GEN. LAWS ANN. § 23-5-4 (hearing defects in children), § 23-5-5 (occupational diseases), § 23-11-6 (venereal diseases) (1968); S.D. COMPILED LAWS ANN. § 26-10-10 (1967) (child abuse). For a more complete list of applicable statutes, see Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943, 953-54 (1959).

[30] N.C. GEN. STAT. § 130-95 (1964).

[31] *Id.* § 130-107.

[32] *Id.* § 130-81.

[33] AMA, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 9, at 55 (1969) (Principles of Medical Ethics).

[34] J. ROBITSCHER, PURSUIT OF AGREEMENT, PSYCHIATRY & THE LAW 230 (1966); R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION 40-44 (1966).

fearing loss of driving privileges, may possibly be discouraged from seeking necessary treatment. It is conceivable that the driver posing the highest risk to society, who faces almost certain loss of his license if reported, might forego treatment, continue to drive as his condition worsens, and eventually kill himself and others. If he had sought treatment, he might have improved or been cured. This assumption may be purely speculative and is founded on the presumption that the patient avoiding treatment because of the law is aware of its existence. In fact, the general public probably is not aware of the law. Nevertheless, the risk that some, and perhaps many, drivers with reportable problems will be discouraged from seeking needed medical help must be weighed in any evaluation of section 20-17.1.

In conclusion, the statute appears to be a valid exercise of the power of the state to protect the motoring public, pedestrians, and the affected individuals. However, to avoid possible constitutional defects and to achieve fully the policy behind the legislation, the present law may need to be broadened to require reporting of *all* patients possessing the enumerated characteristics whether they are institutionalized or not. Moreover, it would be desirable for some concessions to be made in the area of psychiatric treatment. Finally, in view of the present reporting rate, the appropriate penalty provisions[35] should be utilized to bring about full compliance.

JAMES E. CLINE

Poverty Law—Is a Search Warrant Required for Home Visitation by Welfare Officials?

> The fact that public assistance is a statutory right means, therefore, that it is subject to conditions imposed by the Legislature. . . . It means that the Legislature may require that the applicant waive his right to privacy to permit a thorough investigation of his eligibility for public assistance. It means that the applicant must open his home to admit representatives of the Welfare Department to enter and to observe. . . . [I]f he refuses to submit and refuses to permit such infringement upon his right to privacy, then he may not exercise his right to receive public assistance.[1]

[35] N.C. GEN. STAT. § 20-35 (1965) provides that it is a misdemeanor to violate any of the article's provisions, which is punishable by a fine up to five-hundred dollars or by imprisonment for not more than six months.

[1] Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV.

The foregoing remarks were made by a high-ranking official in the New York City Department of Social Services and represent the widely-held theory that public assistance is a "gratuity" furnished by the state and thus may be made subject to whatever conditions the state sees fit to impose. This idea has recently been successfully challenged in *James v. Goldberg*[2]—a case adding to the slowly rising reservoir of case law defining the rights of welfare recipients.

Mrs. James, a resident of the city of New York and a recipient of payments under Aid to Families with Dependent Children (AFDC),[3] received a letter from her caseworker requesting an appointment to visit her at her home. She replied that under no circumstances could the caseworker make a home visit. The caseworker explained that the law required home visits[4] and that refusal by Mrs. James to permit them would result in the termination of her AFDC benefits. At a subsequent hearing, the Department of Social Services' review officer upheld the caseworker's decision to terminate benefits. Mrs. James then commenced a suit in which she sought to prevent the termination of the benefits on the grounds that such action constituted a violation of her fourth-amendment right to be secure from unreasonable searches of her home and of her fourth- and ninth-amendment rights to privacy.

In opposition to the plaintiff's application for relief, the Department urged that home visits by caseworkers were not searches since the purposes for them were to verify eligibility for public assistance and to offer the recipient professional counseling.[5] The department pointed out that caseworkers were instructed not to enter homes without permission or under false pretenses and not to look into closets or drawers.[6] In rejecting these arguments, the three-judge district court relied on recent Supreme Court decisions establishing that an individual's right to privacy is within the scope of the protection of the fourth amendment.[7] Un-

1184, 1203 (1965) (quoting the then Deputy Commissioner of the New York City Department of Social Services).

[2] 303 F. Supp. 935 (S.D.N.Y. 1969), *prob. juris. noted sub nom.*, Wyman v. James 38 U.S.L.W. 3319 (U.S. Feb. 24, 1970).

[3] 42 U.S.C. § 601-10 (Supp. III, 1965-67). The Aid to Families with Dependent Children program provides aid to 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) (Supp. III 1965-67).

[4] *See* N.Y. Soc. Welfare Law § 134 (McKinney Supp. 1970).

[5] 303 F. Supp. at 939.

[6] *Id.* at 940.

[7] *Id.* at 940-42. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967). *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

doubtedly an influential factor was the New York law providing that if a caseworker visited a home and found any evidence of fraud, he would be obligated to report what he observed[8] even though the visit was not for that purpose. The court was compelled to recognize the paradoxical nature of a caseworker's job—that his duties are dichotomous. He is trained to give professional counseling; yet he must also serve as an informer. The court therefore concluded that all home visits "may appropriately be considered searches for evidence of welfare fraud or other criminal activity."[9]

The constitutionality of home visits by caseworkers to provide counseling has never before been questioned. Traditionally caseworkers have had ready access to recipients' homes. In a recent study of the attitudes of recipients of AFDC in Wisconsin toward unannounced visits by caseworkers, those receiving payments were asked the following question: "Should a welfare client have the right to refuse access to his home to a caseworker who calls unannounced?" Less than twenty-eight per cent of those questioned answered this question affirmatively.[10] However, the study did not cover the situation that was perhaps the most significant fact in *James*—the caseworker's being refused admittance *after having made an appointment* with the welfare client.

On the other hand, welfare searches (as distinguished from counseling visits) have long been under attack by civil libertarians although only one case was found in which the question has been litigated. In *Parrish v. Civil Service Commission*,[11] early-morning mass raids, primarily for the purpose[12] of securing proof of welfare ineligibility in order to reduce the number of persons on public assistance, had been made on the homes of recipients of AFDC. No search warrants had been obtained, but each home had been searched thoroughly. On appeal from denial of a petition for reinstatement brought by a caseworker who had refused to participate and had been dismissed, the Supreme Court of California held that the raids were unconstitutional.[13] Despite the court's condemnation of the mass raids, there was no suggestion that all searches by welfare officials are illegal. The court's repudiation was, in fact,

[8] *See* note 33 *infra* and accompanying text.

[9] 303 F. Supp. at 944.

[10] Handler & Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 11 (table 6) (1969).

[11] 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

[12] Evidently another purpose was to counter local criticism of the AFDC program by exhibiting the infrequency of fraud.

[13] 66 Cal. 2d 623, 425 P.2d at 225, 57 Cal. Rptr. at 625.

limited to mass raids conducted at a time "inconvenient" for the recipient.[14] If the decision in *Parrish* is strictly interpreted, it is not authority against a warrantless search of a welfare recipient's home made at a reasonable hour.

Although *Parrish* is the only reported decision prior to *James* in which a court has dealt directly with the merits of searches of the homes of those receiving welfare payments, there have occasionally been other instances of formal complaints filed in court concerning the issue. For example, in a case from the District of Columbia,[15] a welfare recipient sought a declaratory judgment and injunctive relief against allegedly unlawful and harassing searches and surveillance by investigators of the District Department of Public Welfare. The recipient averred that the Department had threatened to terminate her assistance payments unless she allowed the searches. Denial of relief by the district court was affirmed on the ground that administrative remedies had not been exhausted.[16] Undoubtedly, the infrequency of similar challenges[17] is evidence of the understandable reluctance of welfare recipients to dispute the authority of those upon whom they are totally dependent for support.

An analogous situation arising from the actions of other administrative agencies led to the first serious constitutional challenge of civil searches in the federal courts. In *Frank v. Maryland*,[18] the Supreme Court upheld the conviction in state court of a homeowner who had refused to permit a municipal health inspector to enter his premises without a search warrant. The Court's rationale was that "[n]o evidence for criminal prosecution is sought to be seized."[19] This decision was overruled in *Camara v. Municipal Court*.[20] A lessee had refused to allow a warrantless inspection

[14] Perhaps the court in *Parrish* would have been willing to hold all searches by welfare officials illegal had they not been compelled to distinguish the facts of *Parrish* from those of Frank v. Maryland, 359 U.S. 360 (1959), in which the Supreme Court had upheld a warrantless health inspection. The court in *Parrish* stated that "[t]he great gulf which separates an 'orderly' afternoon visit from the searches conducted shortly after dawn in the present case would itself suffice to deprive defendant of any support from the *Frank* opinion." *Id.* at 267, 425 P.2d at 228, 57 Cal. Rptr. at 628. *Frank* has since been overruled in Camara v. United States, 387 U.S. 523 (1967).

[15] Smith v. Board of Comm'rs, 380 F.2d 632 (D.C. Cir. 1967), *noted in* 9 WELFARE L. BULL. 4 (1967).

[16] 380 F.2d at 633.

[17] Bradley v. Gingsberg, Civ. No. 3047 (S.D.N.Y., filed August 10, 1967), *noted in* 10 WELFARE L. BULL. 8 (1967), is another example of a suit complaining of searches brought by a welfare recipient.

[18] 359 U.S. 360 (1959).

[19] *Id.* at 366.

[20] 387 U.S. 523 (1967).

of his apartment by housing inspectors. Although the inspection could not have resulted in criminal prosecution, the Court struck down the civil-criminal distinction that it had articlulated in *Frank* and held that a citizen has the right to keep his private premises free from being entered for administrative safety and health inspections without the authority of a warrant.

Although in *Camara* the Court was concerned with inspections by a city's building investigators and limited its decision to "administrative searches of the kind at issue here,"[21] the rationale of the holding[22] should extend to administrative visits to the homes of welfare recipients. The majority in *James* relied in part on *Camara* in reaching its decision.[23] Before *Camara,* if the immediate purpose of the search was to determine eligibility for welfare rather than to initiate criminal prosecution, the proposition that the search required no warrant was at least colorably supportable. An argument for this proposition after the decision in *Camara* is indeed difficult to accept. There is a less demanding public interest in searches of welfare recipients' homes than in health and safety inspections because of the unavailability of equally effective substitutes for the latter. To inspect a home for building-code violations requires access into the home; to ascertain eligibility for welfare or to provide counseling does not.[24]

Nevertheless, Judge McLean, dissenting in *James,* voiced his fear that extending the fourth amendment to require warrants for counseling visits would hobble caseworkers in their attempts to carry out the aims of the AFDC program:

> We are concerned here with a program of public assistance to dependent children who are to be cared for in their homes. . . . It is essential that the welfare workers who administer this program enter the

[21] *Id.* at 534.

[22] [W]e hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . . .

Id.

[23] 303 F. Supp. at 941.

[24] One AFDC supervisor stated that although refusals to allow entrance into the home for counseling were rare, the department's policy was to honor the refusal. Implicit in this policy is the recognition that home visits are not imperative in the AFDC program. Interview with Ann De Main, Supervisor of AFDC program, Durham County, North Carolina, in Durham, Feb. 9, 1970.

> children's home to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law.[25]

But this language indicates that Judge McLean overlooked the fact that a visit by a caseworker may be for any one of three often-overlapping purposes. First, the purpose of the visit may be the one to which Judge McLean addresses himself—to provide social services. Second, the visit may be to determine welfare eligibility. Finally, it may be for the sole purpose of searchng for evidence of welfare fraud.

In *James*, all of these categories were lumped together as "searches" for which a warrant must be obtained if consent is not given. The court stated that "for [a] search of private property in a particular case, application may be made to an appropriate judicial officer who, utilizing the standard of 'probable cause,' will test the particular decision to search against the constitutional mandate of reasonableness."[26] The court intimated that *Camara*, which provides a relaxed standard of probable cause for administrative searches, should provide guidelines for the issuance of a warrant to welfare officials. The Supreme Court in *Camara* emphasized that " 'a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of a crime.' "[27]

The approach to probable cause in *Camara* leaves much to be desired, especially when the standard of that decision is applied to visits to recipients by welfare officials. The criteria suggested by the Supreme Court that might constitute probable cause for health and safety inspections (such as the length of the interval between inspections or the general condition of the area)[28] would not be helpful in legitimizing official visits to welfare recipients. And unless judicial approval is to be a "rubber stamp," an allegation that the visit is merely to provide professional guidance for the recipient should not demonstrate sufficient

[25] 303 F. Supp. at 946 (dissenting opinion).

[26] 303 F. Supp. at 943-44.

[27] 387 U.S. at 538, *quoting from* Justice Douglas' dissenting opinion in Frank v. Maryland, 359 U.S. 360, 383 (1959).

[28] The court in Camara stated that

> [s]uch standards [of probable cause] which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the conditions of the entire area, but they will not necessarily depend upon specific knowledge of the conditions of the particular building.

387 U.S. at 538.

cause for a warrant under even a relaxed standard.[29] Rightly understood, the practical thrust of *James* is that if the recipient does not wish to have counseling done within his home, it cannot be forced upon him even though the visit purports to be for the sole purpose of benefitting his children.

If the court's decision in *James* does mean that social services may no longer be forced upon a recipient in his home, what will its effect be? Under New York's policy, home visits to recipients of AFDC are to be made once every three months.[30] Although heavy case loads perhaps dictate this small number of visits, the amount of benefit derived from four visits a year is likely minimal. The recent study in Wisconsin mentioned earlier revealed that visits of caseworkers to recipients of AFDC amounted to a thirty-minute chat every three months.[31] The authors of the report reached the following conclusion:

> Our overall finding was that very little social service activity goes on. This follows from the pattern of caseworker visits. Since the caseworkers visit the clients so infrequently and for such short periods of time, *there is of necessity very little supportive service work or regulation of client's lives.*[32]

Thus the decision in *James* may not have so drastic an effect on the AFDC program as the dissenting judge anticipated.

The question remains whether the standard of probable cause enunciated in *Camara* is applicable to visits of caseworkers for the purposes of either determining eligibility or searching for evidence of welfare fraud. As a practical matter, the two purposes may be indistinguishable: in either instance the informatoin sought can be used not only to terminate welfare assistance but also to initiate criminal prosecution based on fraudulent misrepresentation.[33] These relatively severe consequences

[29] Judge McLean attacked the majority opinion in *James* on this point: "If . . . the welfare worker can obtain a warrant merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality." 303 F. Supp. at 946 (dissenting opinion).

[30] *Id.* at 938.

[31] Handler & Hollingsworth, *supra* note 10, at 8.

[32] *Id.* at 10 (emphasis added).

[33] N.Y. Soc. WELFARE LAW § 145 (McKinney 1966) provides in part:

> Any person who by means of a false statement or representation, or by a deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York,

weigh heavily against relaxing the standard of probable cause for obtaining a warrant for these purposes; the same degree of justification should be shown to the issuing magistrate as the police officer must show before he initiates his search for evidence of a crime.[34] This conclusion does not mean that welfare eligibility cannot be checked: "[L]ess drastic means may be suggested for achieving the same basic purposes for which the City and State urge home visits are designed."[35]

The consent of the recipient eliminates the requirement of a warrant for welfare officials to enter his home.[36] Does a citizen who accepts public assistance impliedly consent to a search of his home in order for the caseworker to review his continuing eligibility? After *James*, this question must be answered in the negative.[37] But if the recipient *expressly* agrees to the visit, will the courts show the same reluctance to find legally effective consent as they have in scrutinizing police searches? Consent to a search in criminal cases, to be legally effective, must be

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in which case he shall be punished in accordance with the penalties fixed by such law . . . . *Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official* [emphasis added].

[34] A representative definition of probable cause is:

Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Bringar v. United States, 338 U.S. 160, 175-76 (1949).

[35] 303 F. Supp. at 943. The court deciding *James* suggested some alternatives to home visits:

Proof of actual residence may be ascertained . . . by the submission of a duly-executed lease upon the premises in question. Family composition may be verified by the submission . . . of birth certificates. The physical well-being of the child could be safeguarded by making available facilities for periodic medical examinations rather than by requiring routine home visits by caseworkers . . . . Information regarding goods or services which the recipient may need in the management of her home can equally be obtained in the offices of the Department should the recipient wish to make her needs known there rather than in the convenience of her home. The regularity of school attendance, academic achievement . . . can more accurately reflect the effects of a child's home environment than an interview with his or her parents in the home.

Id.

The objection may be raised that home visits are necessary to discover the presence of persons residing in the home who owe a legally enforceable duty of support to the recipient or to discover possession of unreported gifts of personal property. The answer is that visits for such purposes can be made by obtaining a search warrant based on the requisite probable cause.

[36] *Cf.* Calhoun v. United States, 172 F.2d 457 (5th Cir. 1949).

[37] 303 F. Supp. at 945; *accord*, Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

given as an "understanding and intentional waiver of a constitutional right."[38] The burden on the government of demonstrating the voluntariness of the consent is heavier when the person whose home was searched is illiterate.[39] Professor Jacobus tenBroek has observed that recipients of AFDC payments in California are "[o]nly slightly educated —a third of them have not passed beyond grammar school and they average a ninth grade education . . . ."[40] Perhaps any waiver to a search that is given by a recipient with so little education is prima facie ineffective.

The disparity of position between the caseworker and the welfare recipient makes it unlikely that any consent given is wholly without compulsion. To be effective, consent cannot have been granted in "submission to authority."[41]

> [C]aseworkers . . . represent . . . authority to the recipient, authority whose mere presence constitutes coercion to some degree and whose request to enter, however politely phrased, is in the nature of an order. Even more important, the readily available means by which authority may be exerted is sharp in her mind. She is almost certain to feel that refusal to consent will bear adversely on her aid grant and thus deprive her and her children of their only source of support.[42]

In *Parrish*, the California Supreme Court relied on this inherent coercion to nullify the recipients' consent to pre-dawn searches.[43]

Since the recipient of welfare payments now has the right to demand a search warrant before a welfare official can visit him in his private residence, the only procedure likely to assure that consent to the visitation is freely given is for the official to advise the recipient of his fourth-amendment rights. Especially should the official advise the recipient that his refusal to consent to a visit will in no way affect his welfare payments. This method, which would be similar to the *Miranda* warnings,[44] may not be an ideal solution, but informed, reliable consent is necessary if caseworkers are ever to be able to visit welfare recipients in their homes.

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[38] Johnson v. United States, 333 U.S. 10, 13 (1948).

[39] Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

[40] tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, 670 (1965).

[41] Johnson v. United States, 333 U.S. 10 (1948); *accord*, Pekar v. United States, 315 F.2d 319, 324 (5th Cir. 1963), in which the court stated that if "superior authority had any place in the obtaining of the consent [to search], the consent is no consent at all . . . ."

[42] tenBroek, *supra* note 41, at 669-70.

[43] 66 Cal. 2d at 270, 425 P.2d at 229, 57 Cal. Rptr. at 629.

[44] The warnings to be given to a person under custodial interrogation may be found in Miranda v. Arizonia, 384 U.S. 436, 444 (1965).

The decision in *James* will no doubt be subjected to much criticism, but in view of the dual nature of a public caseworker's duties, the court, in requiring warrants for all home visits, reached a very practical solution.

> To attempt to draw a distinction regarding the applicability of the [Fourth] Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment.[45]

Although intrusion into a welfare recipient's home is motivated by the highest public purpose, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[46]

F. FINCHER JARRELL

Uniform Commercial Code—Checks—Cash Deduction from Check Prior to Deposit as Final Payment under Article Four

The Supreme Court of Appeals of Virginia in *Kirby v. First & Merchants National Bank*[1] recently applied Article Four of the UNIFORM COMMERCIAL CODE[2] to reach a result that may be surprising to bankers in the states that have adopted the U.C.C.[3] The court held that the bank had made a final cash payment under section 4-213(1)(a)[4] of the U.C.C. when it permitted a customer to make a cash deduction from a check that was being deposited.[5]

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[45] 303 F. Supp. at 942.

[46] Olmstead v. United States, 277 U.S. 438, 479 (1928) (dissenting opinion of Justice Brandeis).

[1] 210 Va. 88, 168 S.E.2d 273 (1969).

[2] The UNIFORM COMMERCIAL CODE [hereinafter cited as U.C.C.] has been codified in VA. CODE ANN. §§ 8.1-.10 (1965). References *infra* will be to the Code as adopted in Virginia, but the number 8 will be omitted.

[3] Every state except Louisiana has now adopted the U.C.C. The U.C.C. is found in N.C. GEN. STAT. ch. 25 (1965). For a basic study of Article 4 as adopted in North Carolina, see Davis, *Article Four: Bank Deposits and Collections*, 44 N.C.L. REV. 627 (1966).

[4] § 4-213(1)(a) provides:

> (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
>
> (a) paid the item in cash;

[5] 210 Va. at —, 168 S.E.2d at 276.

The transaction involved in *Kirby* is a common one. Mrs. Kirby, the defendant-payee, handed to plaintiff's teller a check made out to and endorsed by her for 2500 dollars. The check had been drawn on the First and Merchants National Bank by a local engineering firm. The defendant, who had an account at First and Merchants, gave the teller a deposit slip on which 2300 dollars had been entered in the "currency" column. The teller then gave Mrs. Kirby 200 dollars in cash, and on January 3, the next business day, the bank credited the defendant's account with 2300 dollars. On January 4 the bank discovered that the check was drawn against insufficient funds and a day later telephoned the defendant to inform her that the check had been dishonored and to request reimbursement.[6] The defendant failed to cover the check, and on January 10 the bank charged her account with 2500 dollars. This action created an overdraft of 543.47 dollars. The bank instituted suit to recover the amount of the overdraft.

In reversing a decision in favor of the bank, the supreme court held that the transaction was a final payment in cash of the entire check and rejected the bank's contention that "under the terms of its contract with Mrs. Kirby, the settlement was provisional and therefore subject to revocation whether or not the check was paid in cash on December 30."[7] The court further found that even if payment had not been in cash, the bank had no right to charge the item back to Mrs. Kirby's account[8] since the bank neither returned the item nor sent written notice of dishonor before the midnight deadline.[9]

In concluding that final payment in cash had been made, the court relied heavily on the testimony of a bank officer who stated that the bank "cashed" the check for 2500 dollars.[10] Documentary evidence of the manner in which the deposit slip had been made out and of the procedures employed to record the transaction was also examined by the court:

> The deposit of cash is evidenced by the word "currency" before 2,300.00 on the deposit ticket and by the words "Cash for Dep." on the back of the check. The Bank's ledger, which shows a credit of $2300 to Mrs. Kirby's account rather than a credit of $2500 and a debit

[6] *Id.* at —, 168 S.E.2d at 274-75.
[7] *Id.* at —, 168 S.E.2d at 277.
[8] *Id.*
[9] U.C.C. § 4-104(h) defines "midnight deadline" as "midnight on its next banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later."
[10] 210 Va. at —, 168 S.E.2d 275.

> of $200, is consistent with a cashing of the Neuse check and a depositing of part of the proceeds.[11]

Section 4-213(1) of the U.C.C. deals with those events that will make final the payment of an item by a payor bank.

> The concept of final payment is central to the scheme of Article 4 because the time of final payment of a check or similar item is the starting point for determining the rights and obligations of a number of parties in relation to an item.[12]

Subsection (1)(a) is at least one provision within section 4-213 in which there seems to be little room for confusion. An actual over-the-counter payment of an overdraft relieves the payee of any liability to the bank despite subsequent dishonor.[13]

The transaction in *Kirby* did not, however, readily conform to this provision since only a fraction of the face amount of the check was cashed and paid directly to the customer. Concededly, an argument can be made that there is a sound rational basis to the court's decision to treat the transaction as if the entire check had been cashed and then a portion of the proceeds deposited. Since the depository bank was also the payor bank,[14] little time would have been required for it to ascertain whether the check had been drawn against sufficient funds.[15] Furthermore, in light of the large number of checks handled daily by banks[16] and the need for prompt finalization of such transactions, it may not be surprising that a court

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[11] *Id.* at —, 168 S.E.2d at 275-76.

[12] Comment, *Bank Procedures and the U.C.C.—When is a Check Finally Paid?* 9 B.C. IND. & COM. L. REV. 957 (1968). See also Love, *How the Adoption of the Uniform Commercial Code Would Affect the Law of Bank Deposits and Collections in Oregon*, 32 ORE. L. REV. 288, 295-96 (1953).

[13] This provision conforms to prior case law. See, *e.g.*, National Bank v. Bank of Magdalena, 21 N.M. 653, 157 P. 498 (1916); Cherokee Nat'l Bank v. Union Trust Co., 33 Okla. 342, 125 P. 464 (1912); Fidelity & Cas. Co. v. Planenscheck, 200 Wis. 304, 227 N.W. 387 (1929). See also Morris, *The Law of Overdrafts*, 16 CLEV.-MAR. L. REV. 574, 579 (1967).

[14] U.C.C. § 4-105 provides in part:

(a) "Depository bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;

(b) "Payor bank" means a bank by which an item is payable as drawn or accepted;

[15] U.C.C. § 3-506(2) permits deferred payment without dishonor so long as payment is made "before the close of business on the day of presentment."

[16] Malcolm, *How Bank Collection Works—Article 4 of the Uniform Commercial Code*, 11 How. L.J. 71, 74 (1965) (stating that fifty-million items are handled every day by banks).

should be inclined to declare a payment final at the earliest reasonable time. However, the court in deciding *Kirby* did not give adequate consideration to the probability that the bank allowed the customer to deduct cash from her deposit solely as a convenience to her.

After deciding the issue of whether there had been a cash payment in favor of the customer, the court considered arguendo the bank's contention that its contract with Mrs. Kirby made settlement of the check provisional. The relevant portions of the contract provided:

> All items are credited subject to final payment and to receipt of proceeds of final payment in cash or solvent credits by this bank at its own office . . . . This bank may charge back, at any time prior to midnight on its business day next following the day of receipt, any item drawn on this bank which is ascertained to be drawn against insufficient funds or otherwise not good or payable. An item received after this bank's regular closing hour shall be deemed received the next business day.[17]

That transactions are provisional until final payment is expressly recognized by the U.C.C.[18] The charge-back provision included in the contract is not in derogation of the applicable Code provisions. Section 4-212(3) provides that:

> [A] depository bank which is also the payor bank may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (Section 4-301).

Section 4-301(2) provides:

> If a demand item is received by a payor for credit on its books it may return such item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified . . . .[19]

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[17] 210 Va. at —, 168 S.E.2d at 277 n.6.

[18] *See, e.g.*, U.C.C. § 4-212, Comment 1. "Deferred posting" has been in use for many years. See Leary, *Deferred Posting and Delayed Returns—The Current Check Collection Problem*, 62 HARV. L. REV. 905 (1949).

[19] U.C.C. § 4-301(2) applies the rules of deferred posting to situations in which the depository bank is also the payor bank and thus is a departure from prior case law. *See, e.g.*, Cohen v. First Nat'l Bank, 22 Ariz. 394, 198 P. 122 (1921); W.A. White Brokerage Co. v. Cooperman, 207 Minn. 239, 290 N.W. 790 (1940). For an excellent discussion of § 4-301, see Love, *How the Adoption of the Uniform Commercial Code Would Affect the Law of Bank Deposits and Collections in Oregon*, 32 ORE. L. REV. 288, 314-16 (1953).

The "time limit" is "midnight of the banking day of receipt" and the "manner specified" is either returning the item or sending written notice of dishonor or nonpayment.[20] Thus under the U.C.C. the settlement remains provisional until the expiration of the midnight deadline or the prior occurrence of one of the two specified events.

Applying these provisions to the action taken by First and Merchants, it is obvious that the bank's procedure did not comply with the Code. The court stated that "even if the Bank's settlement for the Neuse check had been provisional, the Bank had the right to charge that item back to Mrs. Kirby's account only if it complied with U.C.C. §§ 4-212(3) and 4-301."[21] The failure of a bank to send timely and proper notice would result in the loss of the provisional status of the payment of checks, the court said.

Many banks in North Carolina employ a different method of recording the type of deposit made in *Kirby*. Insisting that they will not accept a deposit slip made out in the form Mrs. Kirby used, they require that the total amount of the check be entered in the "checks" column and that cash deductions be indicated within the column by the words "less cash."[22] These banks operate under the theory that allowing such simultaneous withdrawals is a service to the customer to save him the time and effort of having to deposit the full amount and then draw a check for the cash needed.[23] This practice may be preferable to the one permitted by First and Merchants in *Kirby*, but, arguably, even the type of transaction commonly used in North Carolina could be construed as a final cash payment because the end result is the same regardless of the manner in which the deposit is recorded. Courts should, however, treat the split-deposit transactions that are common in North Carolina as though the bank had provisionally accepted the check and then granted immediate right of withdrawal. Since the bank requires the total amount of the check to be entered in the "checks" column and allows the practice to prevent inconvenience to its customers, the intention of the bank to provisionally accept the item should be recognized.[24]

The court in *Kirby* made no reference to sections that allow alteration

[20] U.C.C. § 4-301(1)(a)-(b).

[21] 210 Va. at —, 168 S.E.2d at 277.

[22] This type of deposit will be hereinafter referred to as a "split-deposit."

[23] 210 Va. at —, 168 S.E.2d at 278 (dissenting opinion giving other means by which a cash withdrawal can be effected).

[24] For a decision reaching a result contrary to *Kirby*, see Citizens State Bank v. Pritchett, 123 Colo. 497, 231 P.2d 462 (1951). The result was based in part on the theory that the transaction was a service to the customer.

of the U.C.C. by agreement.[25] While its drafters recognized the need for some degree of flexibility in the future use of Article 4 of the U.C.C., they were faced at the outset with the basic problem of

> whether the Article should consist of a set of rules cast in a rigid form in order to protect customers of the banks, with only limited variation of the provisions thereof by agreement or action permitted, or whether the Article should consist of basic mechanical bank collection rules, a statement of permissive bank collection practices and, in addition, a section or sections permitting liberal variation of the provisions of the Article by agreement . . . .[26]

The decision was in favor of flexible rules, and, in light of the ever changing nature of bank-collection practices, this policy seems wise.[27] The central provision to achieve flexibility is subsection 4-103(1), which states that "the effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care . . . ."[28]

Section 4-103 provides three methods by which the Code provisions may be varied. The first is the "ordinary" agreement,[29] which is frequently contained on the signature card signed by the customer when opening an account in a bank. The second method is through general banking usage, provided for in subsection (3). The third is the provision for novel banking procedures found in subsection (4), which states that "[t]he specification or approval of certain procedures by the Article does not constitute disapproval of other procedures which may be reasonable under the circumstances."

Any attempt of a bank to alter Section 4-213(1)(a) by adopting the policy that items paid in cash are provisionally accepted would fall within subsection (4) since such a position would probably be regarded as novel in any region of the country. It is improbable that the courts would countenance this sort of procedure since the result would be a sub-

[25] For a general discussion of alteration by agreement, see J. CLARKE, H. BAILEY & R. YOUNG, JR., BANK DEPOSITS AND COLLECTIONS 28-46 (1963) [hereinafter cited as CLARKE]; Leary, *Check Handling Under Article Four of the Uniform Commercial Code*, 49 MARQ. L. REV. 331, 341-49 (1965).

[26] CLARKE at 28-29.

[27] *See* Malcolm, *Article 4—A Battle With Complexity*, 1952 WIS. L. REV. 265, 276.

[28] At least one author has serious doubts as to whether freedom to vary by agreement is effective as a "preservative of flexibility." *Id.* at 269-70.

[29] CLARKE at 31.

stantial loss of protection to the customer as well as a reduction in the speed and efficiency of the banking process.[30]

In regard to split-deposits, however, banks should be able to stipulate in a contract with its customers that such items are accepted provisionally, at least with repect to those not drawn on the contracting bank. In order to avoid the classification of split-deposits as final cash payments, they should be deemed deposits of checks with immediate right of withdrawal. Thus banks contracting for provisional acceptance of split-deposits to provide greater convenience for customers would be protected by the U.C.C.'s rules governing provisional settlement. Assuming that a bank does make such a specific contract, it may still be desirable to include in the agreement a term modifying the U.C.C.'s requirements for notice.[31] Under the Code, notice must be sent to the customer before the midnight deadline. According to Professor Clarke, there is little doubt that agreements reasonably extending the time limitation are permissible.[32] There would seem to be no reason under the Code why methods for sending notice could not also be reasonably varied.

Officials of three banks in North Carolina who were interviewed said that none of the banks have made any effort through "ordinary agreement" to vary any of the U.C.C.'s requirements for notice. One official stated that in the event of dishonor of a deposited check, his policy is to telephone the depositor-payee, as was done in *Kirby*. According to this official, if the customer fails to resolve the matter quickly, a more formal written notice is given. The official of the second bank stated that upon dishonor of a check, written notice is sent in every case. The third bank apparently sends written notice only when the item dishonored is unusually large; for smaller items, the only notice given the depositor is provided on the regular monthly statement.

Clearly the methods employed by the first and third banks do not fulfill the strict requirements of section 4-301(1) of the U.C.C. For either bank to overcome a depositor's claim that insufficient notice was given, it would be forced to show alteration of the requirements either by general banking usage or novel banking procedure since no use has been made of a contract modifying the U.C.C. In order to establish the existence of general banking usage, the burden "would be on the party seeking the

[30] *Id.* at 40.

[31] For a comparison of requirements for notice under the traditional negotiable instruments law and the U.C.C., see, C. FUNK, BANKS AND THE UNIFORM COMMERCIAL CODE, 169-76 (1964).

[32] CLARKE at 44.

benefit thereof."[33] Comment 4 to section 4-103 sets forth general guidelines and suggestions for defining the term "general banking usage":

> The term "general banking usage" . . . should be taken to mean a general usage common to banks in the area concerned . . . . Where the adjective "general" is used, the intention is to require a usage broader than a mere practice between two or three banks but it is not intended to require anything as broad as a country-wide usage.

It would seem easier and perhaps more effective for a bank to argue that the Code's provisions for notice had been validly altered by novel banking procedure, defined by subsection 4-103(4). As long as the depositor received actual notice of the dishonor within a reasonable time, neither banking efficiency nor protection for the customer would be adversely affected.

In order to avoid the necessity of making arguments based on general banking usage or novel banking procedure during litigation, banks should consider revision of their contracts with customers. An agreement extending the time and method of sending notice would have to fall within the boundaries of reasonableness and good faith; arguably a term that specifically provides for some form of actual notice within a reasonable time would meet this test.[34] The contract should also specifically provide that split-deposits (or deposits that are split in substance, if not in form, as in *Kirby*) are only accepted subject to provisional settlement to increase the likelihood that courts will not interpret such deposits as final cash payments.

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[33] *Id.* at 39.

[34] On the question of what courts would likely uphold as a reasonable time, notice of a dishonored item made by regular bank statement, which might take thirty days or more to reach the customer, undoubtedly will not prove acceptable. Actual notice of dishonor—either orally or in writing—within five days probably is reasonable.