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Notes

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NOTES

Bankruptcy—States May Not Suspend Driver's License of Bankrupt Who Fails To Satisfy Accident Judgment Debt

Adolfo Perez was one of 22,000,000 Americans involved in a traffic accident in 1965.[1] Like millions of other drivers, he had no liability insurance[2] and only limited assets. When judgment was entered against him in an Arizona state court, Perez was unable to compensate his injured victim. He sought relief by filing a voluntary petition in bankruptcy. According to section seventeen of the Bankruptcy Act, the discharge Perez received released him "from all of his provable debts."[3] When Arizona nevertheless suspended his license and automobile registration because he had failed to pay the judgment debt, Perez protested that the state had denied him the full benefit of his discharge. The Arizona Motor Vehicle Safety Responsibility Act required the suspension to continue until the judgment debt was satisfied.[4] Furthermore, the Act specifically provided that "[a] discharge in bankruptcy following the rendering of such judgment shall not relieve the judgment debtor from any of the requirements of this article."[5]

Overruling two earlier decisions,[6] the Supreme Court in *Perez v. Campbell*[7] held that this provision of the Arizona statute conflicted with section seventeen of the Bankruptcy Act, making it invalid under the

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[1]NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1966).

[2]See note 53 & accompanying text *infra*.

[3]"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . [are specially enumerated in § 17a]." Bankruptcy Act § 17a, 11 U.S.C. § 35a (1970). A discharge in bankruptcy constitutes a complete and adequate remedy at law in the nature of an affirmative defense to any legal proceedings brought on the debts which were scheduled in the bankruptcy proceedings; a discharge is neither payment nor extinguishment of debts, but is merely a bar to their enforcement by legal proceedings. Helms v. Holmes, 129 F.2d 263 (4th Cir. 1942). *See generally* 1A COLLIER ON BANKRUPTCY ¶17.27 (4th ed. 1971).

Judgments arising from negligent automobile driving are generally dischargeable if provable under § 63 of the Bankruptcy Act, 11 U.S.C. § 103 (1970). They are not exempted from discharge by the "willful and malicious injuries" phrase of § 17a(8), 11 U.S.C. § 35a(8) (1970). This conclusion is based on the dictum in Tinker v. Colwell, 193 U.S. 473, 489 (1904): "One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not . . . be within . . . [the 'willful and malicious' injury exception]." *See also* Lewis v. Roberts, 267 U.S. 467 (1925).

[4]ARIZ. REV. STAT. §§ 28-1162A, -1163A (1956).

[5]*Id.* § 28-1163B.

[6]Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962); Reitz v. Mealey, 314 U.S. 33 (1941).

[7]402 U.S. 637 (1971).

supremacy clause of the Constitution.[8] The decision is a clear warning that the Court will no longer tolerate legislative erosion of the safeguards implicit in the bankruptcy discharge, but the major impact of the decision may be on the present automobile-accident compensation system, already in a state of flux.

Financial responsibility statutes are widespread. All fifty states and the District of Columbia have statutes similar in purpose and statutory design to the Arizona Safety Responsibility Act.[9] In addition, two states have grafted the requirement of compulsory liability insurance to the basic plan,[10] and six others have recently combined compulsory insurance and a partial "no fault" approach to liability.[11] The basic financial responsibility laws allow a motorist to drive without insurance until he is involved in an accident causing personal injury or property damages above a statutory minimum. After an accident he is required to post security, in the form of cash or an insurance policy, sufficient to cover the probable liability arising from the accident. If found liable for the accident, the driver must also show proof of future financial responsibility, normally in the form of a certificate of insurance.[12] Failure to meet these requirements or to satisfy a judgment debt arising from the accident results in the suspension of driving privileges in every jurisdiction.[13]

As the Supreme Court finally acknowledged in *Perez,* the financial responsibility laws were designed primarily to compensate injured parties;[14] their accident-deterrent function was largely a fiction. Unfortunately, even before the *Perez* decision, the laws did not form an adequate accident-compensation system. The plan leaves most motorists free *not* to insure if they so choose. Only those who have an accident that is

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[8]U.S. CONST. art. VI.

[9]Comment, *A Survey of Financial Responsibility Laws and Compenstion of Traffic Victims: A Proposal for Reform,* 21 VAND. L. REV. 1050, 1081-82 (1968).

[10]N.Y. VEH. & TRAF. LAW §§ 310-21 (McKinney 1970); N.C. GEN. STAT. §§ 20-309 to -319 (1965), *as amended,* (Supp. 1969).

[11]Massachusetts was the first state to adopt a compulsory insurance law and has also had a no fault law in effect since January 1, 1971. MASS. GEN. LAWS ch. 90, §§ 34A-N (1970). Five other states have recently enacted some form of no-fault legislation, which is generally to be effective in January, 1972. N.Y. Times, Oct. 3, 1971, § 1, at 81, col. 7.

[12]Comment, *supa* note 9, at 1052-54; *see* UNIFORM VEHICLE CODE ch. 7 (1969 version). Most states based their statute on this CODE.

[13]This provision is basic to every financial responsibility law; it is the ultimate sanction which makes the statute work. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 539 (Appendix C) (1965).

[14]402 U.S. at 644-48.

reported to state authorities are required to insure. Reporting of accidents is everywhere basically a matter of private initiative by the injured party. When there are no assets or insurance to satisfy an eventual judgment, or when some private settlement has been made at the time of the accident, the incentive to report the accident is lacking, and even the motorist who is clearly at fault is never forced to insure.[15] Worst of all, the "first" accident victim has little protection. Since the negligent driver can always elect to bow to the suspension sanction and leave the highway rather than compensate the injured party, the financial responsibility laws carry no guarantee that a judgment against him will ever be satisfied.[16]

Until *Perez* the financial responsibility laws had withstood a wide variety of constitutional attacks,[17] although they had suffered a few isolated defeats.[18] The overwhelming majority of courts have viewed such statutes as a reasonable exercise of the police power and have thus held that they do not violate the equal protection[19] or the due process[20] clauses, the right against self-incrimination,[21] or the prohibition against imprisonment for civil debt;[22] nor are such laws an improper delegation of judicial power[23] or special legislation.[24]

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[15]Most states do have reporting statutes that require motorists involved in accidents causing injury to any person or more than minimal property damage to report to the local police authorities. *E.g.*, N.C. GEN. STAT. § 20-166.1 (1965); UNIFORM VEHICLE CODE §§ 10-106, -107 (1969 version). Nevertheless, in rural and isolated urban areas compliance with the statute depends largely upon the insistence of the injured party. Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 306-07 (1950).

[16]Although the financial responsibility laws may be of no assistance to the judgment creditor in this situation, he may resort to any of the normal remedies for nonpayment of a judgment debt. In most jurisdictions, a judgment creates a lien on the property of the judgment debtor; the victim may therefore obtain a writ of execution and have the property seized and sold to satisfy the judgment. Of course, this remedy is useful only insofar as the debtor has assets to be seized.

[17]*See* Annot., 35 A.L.R.2d 1011 (1954). The validity of the Arizona Motor Vehicle Safety Responsibility Act was upheld in Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963).

[18]Miller v. Anckaitis, 436 F.2d 115 (3d Cir. 1970); People v. Nothaus, 147 Colo. 210, 363 P.2d 180 (1961).

[19]Escobedo v. Department of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); Williams v. Newton, 236 So. 2d 98 (Fla. 1970).

[20]Reitz v. Mealey, 314 U.S. 33 (1941); Escopedo v. Department of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); Williams v. Newton, 236 So. 2d 98 (Fla. 1970).

[21]Surtman v. Secretary of State, 309 Mich. 270, 15 N.W.2d 471, *petition for cert. dismissed per stipulation*, 323 U.S. 806 (1944).

[22]Sullins v. Butler, 175 Tenn. 468, 135 S.W.2d 930 (1940).

[23]Escobedo v. Department of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950).

[24]Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P.481 (1931).

The conflict which the Supreme Court finally recognized as intolerable in *Perez* was that between the Bankruptcy Act and the provisions of the Arizona Motor Vehicle Safety Responsibility Act that deny a judgment debtor the full immunity given him by section seventeen of the Bankruptcy Act. Twice in the past, in construing state provisions almost identical to those in *Perez*, the Court resolved the conflict in favor of the financial responsibility acts. Thirty years ago in *Reitz v. Mealey*,[25] the Court upheld New York's statute,[26] which provided for suspension of the judgment debtor's driving privileges so long as the judgment was not satisfied and also required satisfaction other than by a discharge in bankruptcy. Without denying the bankrupt-appellant's contention that one of the primary purposes of the Bankruptcy Act is to give the honest debtor a fresh start,[27] the Court deferred to the legitimate state interest in highway safety and the protection of the public from the financially irresponsible motorist.[28] Writing for the majority, Justice Roberts conceded that the financial responsibility act conflicted to a certain extent with the discharge provision[29] but reasoned that dilution of the impact of the suspension sanction would emasculate the act:

> The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expediency of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute.[30]

Although Justice Roberts' cavalier characterization of bankruptcy as a "simple expediency" is not necessarily accurate,[31] the problems he forsaw if this door were opened for the judgment debtor now confront those states with financial responsibility plans.

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[25]314 U.S. 33 (1941).

[26]N.Y. VEH. & TRAF. LAW §§ 330-68 (McKinney 1970). The Arizona Motor Vehicle Safety Responsibility Act contains the same basic provisions. ARIZ. REV. STAT. §§ 28-1161 to -1178 (1956), *as amended*, (Supp. 1970).

[27]*E.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). The other major objective is an equal distribution of the debtor's assets among his creditors. *E.g.*, United States v. Embassy Restaurant, Inc., 359 U.S. 29, 31 (1959).

[28]314 U.S. at 36-37. The Court has long recognized the states' high degree of interest in highway safety. *E.g.*, South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938).

[29]314 U.S. at 38.

[30]*Id.* at 37.

[31]*See* text at notes 60-68 *infra*.

More recently the Court in *Kesler v. Department of Public Safety*[32] rejected another constitutional attack, this time against Utah's Motor Vehicle Safety Responsibility Act. Two creditor-control provisions in that Act were even more suspect than those approved in *Reitz*—the power to initiate suspension by requesting the clerk of court to notify the Motor Vehicle Commission of the unsatisfied judgment and the power to revoke and restore the suspension in response to the debtor's degree of cooperation.[33] Again the Court acknowledged the conflict but sustained the state legislation:

> Certainly some inroad is made on the consequences of bankruptcy if the creditor can exert pressure to recoup a discharged debt, or part of it, through the leverage of the State's licensing and registration power. But the exercise of this power is deemed vital to the State's well-being . . . .[34]

Overruling these two decisions, the majority in *Perez v. Campbell* considered the conflict much more elemental. The Court was aided in reaching this decision by a candid construction of the state law by the Arizona Supreme Court, which had repeatedly said that the law's "principal purpose" was "protection of the public . . . from financial hardship" resulting from involvement in traffic accidents with uninsured motorists unable to respond to a judgment.[35] The legislation therefore had little relation to highway safety; the major emphasis was on providing leverage for the collection of damages, even after the judgment debtor had been discharged in bankruptcy.[36] Thus characterized, the law was clearly in conflict with the Bankruptcy Act, which was promulgated at least in part to give the bankrupt an opportunity to start afresh in life, unhampered by existing debt.

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[32]369 U.S. 153 (1962).

[33]Ch. 71, § 12, [1951] Utah Sess. L., codified at UTAH CODE ANN. § 41-12-13 (1970). These powers are effective even after a judgment debtor's discharge in bankruptcy, and state officials must follow the creditor's directions. *Id.* By written request, the creditor places the clerk of court under a duty to notify the Commission of the unsatisfied judgment; upon receiving the notice, the Commission must suspend the registration and license of the debtor. UTAH CODE ANN. § 41-12-14(a). With the creditor's consent, the suspension may be raised, but if the creditor subsequently withdraws his consent, the Commission must reinstate the suspension. *Id.* § 41-12-14(b).

[34]369 U.S. at 171.

[35]Schecter v. Killingsworth, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963); *accord,* Camacho v. Gardner, 104 Ariz. 555, 558, 456 P.2d 925, 928 (1969).

[36]The Colorado Supreme Court had made the same observation ten years ago. People v. Nothaus, 147 Colo. 210, 215-216, 363 P.2d 180, 183 (1961).

Writing for the majority, Justice White relied upon *Gibbons v. Ogden*[37] for his standard in weighing the two laws, primarily to stress that the two earlier decisions on financial responsibility were "aberrational"[38] and to counter in advance the stare decisis argument Justice Blackmun raised in dissent:[39]

> As early as *Gibbons v. Ogden* . . . (1824), Chief Justice Marshall stated the governing principle—that "acts of the State Legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress . . ." are invalid under the Supremacy Clause.[40]

The *Kesler* and *Reitz* decisions "ignored this controlling principle."[41] The Arizona law frustrated the desired operation of the Bankruptcy Act by denying the bankrupt the full benefit of his discharge and is therefore void.[42] Justice White criticized the two earlier decisions for their myopic reliance upon declarations of legislative purpose:

> Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.[43]

Furthermore, concluded the majority, even if the supremacy clause analysis of *Kesler* and *Reitz*—looking to the ostensible purpose rather than to the effect of state laws on federal legislation—is accepted, the Arizona statute must be invalidated because the state's expressed legislative purpose is the protection of "judgment creditors from 'financial hardship' by giving them a powerful weapon with which to force bankrupts to pay their debts despite their discharge."[44]

The majority in *Perez* clearly seems to have the stronger position. There can be no doubt that most preexisting tort judgments are prova-

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[37] 22 U.S. (9 Wheat.) 1 (1824).

[38] 402 U.S. at 651.

[39] "I am not prepared to overrule [*Reitz* and *Kesler*] and to undermine their control over Adolfo Perez' posture here." 402 U.S. at 664. *See also id.* at 667-68.

[40] *Id.* at 649, *quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (emphasis by the *Gibbons* Court).

[41] 402 U.S. at 650.

[42] *Id.* at 651-52.

[43] *Id.* at 652.

[44] *Id.* at 654.

ble[45] as fixed liabilities within the meaning of section sixty-three of the Bankruptcy Act.[46] Furthermore, such a judgment does not fall within one of the classes of debts barred from discharge by section seventeen of the Act if the driver was merely negligent and not "willful and malicious" in his conduct.[47] Since judgment debts are therefore dischargeable, a state cannot create a device for their collection which survives a discharge in bankruptcy. The federal bankruptcy power is "unrestricted and paramount;" the states "may not pass or enforce laws to interfere with . . . the Bankruptcy Act or to provide additional or auxiliary regulations."[48] Under the Arizona statute, the creditor whose judgment claim has been discharged had a powerful ally in the State Highway Department, which would suspend the bankrupt's license until the judgment was paid. The state had given the creditor a remedy which survived bankruptcy and had therefore interferred with the Bankruptcy Act to an intolerable degree. As Justice Douglas, the Court's bankruptcy expert,[49] observed in dissent to the *Reitz* decision thirty years ago, "[i]n practical effect the bankrupt may be in as bad, or even worse, a position than if the state had made it possible for a creditor to attach his future wages. Such a device would clearly contravene the Bankruptcy Act."[50]

The significance of the *Perez* ruling might easily be overlooked because the Supreme Court invalidated only one small sub-section of the Arizona Act, not the entire financial responsibility statute. In the writer's opinion, however, that sub-section was the keystone of a complex accident compensation scheme.[51] By removing it the Supreme Court may have added new impetus to what is developing as the most powerful movement for reform of the automobile insurance laws in forty years.[52] Largely as a result of the free choice and the slippage in acci-

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[45]Lewis v. Roberts, 267 U.S. 467 (1925).

[46]Bankruptcy Act § 63, 11 U.S.C. § 103 (1970).

[47]*Id.* § 17a, 11 U.S.C. § 35a (1970); *see* note 3 *supra.*

[48]International Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929).

[49]"Justice Douglas doubtless brought to the Supreme Court a greater knowledge of the law and practice of bankruptcy than any justice who had preceeded or any who has followed him." Countryman, *Justice Douglas: Expositor of the Bankruptcy Law,* 16 U.C.L.A.L. REV. 773-74 (1969).

[50]314 U.S. at 41-42.

[51]*See* Justice Roberts' reference to the importance of an undiluted suspension sanction in text preceding note 30 *supra.*

[52]Widespread criticism of early state insurance laws resulted in adoption of the original financial responsibility laws almost forty years ago. The first of the financial responsibility statutes was enacted in Connecticut in 1925. Ch. 183, [1925] Conn. Pub. Acts 3956 (now codified at CONN. GEN.

dent reporting under the financial responsibility laws, approximately fifteen percent of all drivers in the United States have no liability insurance.[53] This figure represents seventeen million drivers.[54] A motorist with even moderate assets will normally buy insurance to cover a possible adverse liability judgment, whereas the uninsured usually lack sufficient assets to satisfy even an atypically small adverse liability judgment.[55] They are effectively "judgment proof" in the language of the tort lawyer. As a noted torts authority has said, they are also our worst drivers:

> It is also undoubtedly true that uninsured drivers on the highway are those who tend on the whole to be driving unsafe vehicles, to be the most slipshod, law-violating and reckless, and to cause a disproportionately large percentage of the accients.[56]

When liability fell on an uninsured driver, the plight of the traffic victim in a financial responsibility state was bleak enough before *Perez*.[57] In such a case the only leverage an injured person had was the threat of permanent suspension of the judgment debtor's license and registration if the judgment was not at least partially satisfied. *Perez* effectively undercuts that sanction. As noted above, the uninsured are normally judgment proof and without assets. Faced with a judgment debt which could easily be 25,000 dollars, the debtor now has two choices. If he cannot satisfy the judgment but is nevertheless reluctant to be adjudged a bankrupt, he will lose his driving privilege permanently or at least until

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STAT. ANN. §§ 14-112 to -133 (1970)). The scheme swept through at least thirty states in one wave between 1925 and 1935. Aberg, *Effects of and Problems Arising from Financial Responsibility Laws*, 1943 INS. L.J. 72.

[53]NAT'L UNDERWRITER, Sept. 6, 1968, at 13. But the Department of Transportation estimated that twenty percent of the vehicles in the United States were uninsured as of 1967. W. YOUNG, CASES AND MATERIALS ON THE LAW OF INSURANCE 69 (1971). The great variation between states is seen in the estimate of thirty-five percent uninsured in Texas, Loiseaux, *Innocent Victims 1959*, 38 TEX. L. REV. 154 n.5 (1959), and only one percent uninsured in Massachusetts, Note, *Compensation Problems Created by Financially Irresponsible Motorists*, 66 HARV. L. REV. 1300, 1307 (1953).

[54]In 1970 there were 111,000,000 licensed drivers in the United States. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1971).

[55]Grad, *supra* note 15, at 311.

[56]W. PROSSER, LAW OF TORTS § 85, at 578-79 (3d ed. 1964).

[57]"When there is no insurance, therefore, the present system falls far short of affording compensation even in those cases where there is a theoretical legal right to it." James & Law, *Compensation for Auto Accident Victims: A Story of Too Little & Too Late*, 26 CONN. B.J. 70, 78-79 (1952).

the debt is paid.[58] If he is willing and financially able to file a bankruptcy petition, however, he will recover his license and registration when the discharge is granted. The seventeen million drivers who, like Adolfo Perez, are uninsured and without assets have been given the opportunity for one "free" accident every six years.[59]

This is not to say that the escape from liability offered by the "simple expediency of voluntary bankruptcy"[60] is without expense or limitations. Not only is discharge available to a debtor only once every six years,[61] but, contrary to popular belief, a bankruptcy proceeding is priced beyond the reach of the totally indigent.[62] The debtor must pay a filing fee of fifty dollars before receiving his discharge,[63] and attorney's fees for an uncomplicated voluntary bankruptcy range from 250 to 350 dollars.[64] For these reasons, bankruptcy experts advise that bankruptcy should not be considered unless the debtor owes at least one thousand dollars of "disposable debts."[65] During the bankruptcy proceedings, the debtor must surrender to the trustee in bankruptcy all of his property

[58]Under most financial responsibility laws, the judgment debtor need satisfy the liability judgment against him only up to a stautory limit to avoid suspension of his license; the normal limit is $20,000 for two or more personal injuries and $5,000 property damage. *E.g.*, ARIZ. REV. STAT. § 28-1164 (Supp. 1970); UNIFORM VEHICLE CODE § 7-316 (1969 version).

[59]A discharge is available to a debtor only once every six years. Bankruptcy Act § 11c(5), 11 U.S.C. § 32c(5) (1970).

[60]Reitz v. Mealey, 314 U.S. 33, 37 (1941). *See* text preceding note 30 *supra.*

[61]Bankruptcy Act § 11c(5), 11 U.S.C. § 32c(5) (1970).

[62]There is at least a discernable trend in the lower federal courts toward a sharp reduction in costs for the "poor" bankrupt. In the first ruling on the question of access by indigents to bankruptcy proceedings since the landmark decision of Boddie v. Connecticut, 401 U.S. 371 (1971), it was held that bankruptcy, like divorce in *Boddie*, is a "fundamental" right which cannot be denied an indigent. As applied to indigent bankruptcy petitioners, the statutory requirement of prepayment of a filing fee to obtain a discharge violates the fifth amendment right to due process, including equal protection. *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971). Without benefit of the *Boddie* decision, two other federal courts recently split on the same constitutional question. *In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *cert. denied,* 402 U.S. 966 (1971) (filing-fee requirement not denial of due process); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971) (filing-fee requirement is denial of equal protection).

[63]Bankruptcy Act §§ 40c(1), 48c, 52a, 11 U.S.C. §§ 68c(1), 76c, 80a (1970).

[64]D. COWANS, BANKRUPTCY LAW AND PRACTICE § 59 (1963). This is not an assignment which legal aid lawyers will normally perform for a welfare client. *But see* note 62 *supra.* If this new line of cases is upheld, poverty lawyers may be expected to undertake bankruptcies as they are beginning to handle divorces for indigent clients.

[65]"Disposable debts" are defined as "those the debtor need not pay after bankruptcy either as a matter of law or of practical necessity. . . . [T]his means [the debtor] should enjoy a net gain of at least $1000 in his economic condition by elimination of indebtedness." D. COWANS, *supra* note 64.

except that which is exempted under state statute or under section seventy of the Bankruptcy Act; the proceeds from the liquidation of the bankrupt's estate are distributed among his creditors.[66] It is this writer's contention that the typical uninsured motorist will not have sufficient assets over and above those that are exempt to make this collection and distribution a threat to the debtor's status or a significant benefit to his creditors, including the injured victim.[67] Finally in most jurisdictions the negligent driver will have to carry liability insurance to protect the motoring public in the future, but only for one to three years after the accident.[68]

Hopefully, the states that had relied on a financial responsibility law to protect the driving public from the financially irresponsible motorist will realize that the *Perez* decision has undercut the only sanction in an already imperfect law and will therefore be more open to suggestions for major reform in their insurance law. If new legislation is not enacted, thousands of Americans will be killed and maimed on the highways each year without adequate compensation for their injuries. Even if they are involved in accidents only in proportion to their numbers on the roads, uninsured motorists will be involved in some 2,400,000 accidents resulting in 8,100 deaths and 26,250 permanent disabilities this year and every year in the foreseeable future.[69]

The decision in *Perez v. Campbell* was a sound one from the point of view of bankruptcy law; it protects the discharged debtor from what had become a flagrant erosion of the protection promised him under the Bankruptcy Act. Concomitantly, however, the decision left the individual injured by an uninsured motorist with much less protection and hope for compensation than before. By opening wide the door through which

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[66]Bankruptcy Act §§ 47a, 60, 67, 70, 11 U.S.C. §§ 75a, 96, 107, 110 (1970). *See* cases cited note 27 *supra.*

[67]Eighty-eight percent of all consumer bankruptcy cases are "no assets" or "nominal assets" situations. Countryman, *Chapter XIII Wage Earners' Plans: Past, Present and Future*, 18 CATHOLIC U.L. REV. 275 (1969).

[68]Most financial responsibility laws allow the negligent driver to operate a motor vehicle without proof of financial responsibility three years after the date such proof was first required of him if he has not had another accident during that period. *E.g.*, ARIZ. REV. STAT. § 28-1178 (1956); UNIFORM VEHICLE CODE § 7-335 (1969 version).

[69]There were 54,800 motor vehicle deaths in 1970 and 2,000,000 disabling injuries; 175,000 persons suffered permanent impairments. Total economic loss from the 16,000,000 auto accidents was $13,600,000,000. There have been more than 52,000 deaths per year for the past five years. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 3,5,15,40 (1971).

financially irresponsible motorists may escape liability for their negligence, the Supreme Court may have unwittingly added new momentum to the drive for wholesale reform of our automobile accident compensation system.

THOMAS A. LEMLY

Constitutional Law—Bar Admissions—New Standards for Inquiry into Applicants' Associations and Beliefs†

Bar associations have long conducted inquiries into the associations and beliefs of applicants and excluded those "subversives" likely to be a threat to the judicial system.[1] Since the first amendment applies to the states[2] and protects the rights of belief and association, constitutional problems arise when the state attempts to probe into this area. In February 1971 the United States Supreme Court decided three cases dealing with the power of state bar associations to compel answers to questions about the political associations of bar applicants. In *Baird v. State Bar*[3] and *In re Stolar*[4] questions posed by the Arizona[5] and Ohio[6] bars were held to be overly broad because they touched upon innocent as well as

†The potential effects of the primary cases used here were analyzed while appeals to the Supreme Court were pending in Note, *Attorneys—Admission to the Bar—Consideration of the Constitutionality of Bar Examiners' Inquiries into Political Associations and Beliefs*, 48 N.C.L. REV. 932 (1970). Having come before the highest court, they now deserve further consideration.

[1]Remarks of Hon. Samuel J. Kanner, Chairman of the Florida Board of Bar Examiners, in 54 THE BRIEF 153, 154-55 (1959).

[2]*E.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[3]401 U.S. 1 (1971).

[4]401 U.S. 23 (1971).

[5]Question 25 of the Arizona examination asks: "List all organizations, associations and club [*sic*] (other than bar associations) of which you are or have been a member since attaining the age of sixteen years." Question 27 asks: "Are you now or have you ever been a member of the Communist Party or any organization that advocates the overthrow of the United States by force or violence?" ARIZ. REV. STAT. ANN., S. CT. RULE 28(c), Exhibit A (Supp. 1970-71). Mrs. Baird answered Question 25 satisfactorily but refused to answer Question 27. 401 U.S. at 4-5.

[6]Stolar declined to answer the following questions:

> 12. State whether you have been or presently are . . . (g) a member of any organization which advocates the overthrow of the government of the United States by force . . . .
> 13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member. 7. List the names and address of all clubs, societies or organizations of which you are or have become a member since registering as a law student.

401 U.S. at 27.

illegal membership in organizations. However, in a companion case, *Law Students Civil Rights Research Council, Inc. v. Wadmond*,[7] the Court upheld questions 26.(a) and 26.(b) from the New York examination[8] because they focused on organizational membership which was tantamount to criminal activity and therefore was a legitimate interest of the state. Although the Court recognized the danger of such probes it refused to forbid all questions dealing with political views and associations. The purpose of this note is to analyze the three cases, compare them with the previous law, and evaluate the significance of the holdings.

A comparison of the powers of public employers and bar associations to inquire into the organizational membership of employees and

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[7]401 U.S. 154 (1971). A three-judge United States District Court granted partial relief by eliminating or revising certain questions objected to in Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969).

[8]The questions from the New York examination which are discussed in this note are:

> 26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, *you knew* was advocating or teaching 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? If your answer is in the affirmative, state the facts below.

401 U.S. at 164 (emphasis added).

> 26.(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the *specific intent* to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?

Id. at 165 (emphasis added).

LSCRRC also involved other issues which are outside the scope of this note. Petitioners challenged New York's requirement that applicants possess "the character and general fitness requisite for an attorney and counselor at law." The requirement was affirmed because New York construed it "as encompassing no more than 'dishonorable conduct relevant to the legal profession.'" 401 U.S. at 159, *quoting* Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. at 144 n.20 (S.D.N.Y. 1969).

Petitioners also urged that the requirement of third party affidavits attesting to good moral character violated the right to privacy. The Court rejected this as bordering on the frivolous. 401 U.S. at 160.

In addition petitioners attacked the oath of "belief in the form of and loyalty to the Government of the United States." 401 U.S. at 161. Although the Court recognized that on its face this oath might be construed to violate the permissible scope of inquiry, it upheld the oath since as construed by New York it merely required the applicant to swear that he will support the constitutions of the United States and the state of New York. *Id. See also* Connell v. Higginbotham, 403 U.S. 207 (1971).

Finally, petitioners challenged two questions which asked whether the applicant could take the oath of support for the Constitution without mental reservation. The Court ruled that there could be little doubt of their validity since they were simply supportive of the applicant's good faith while taking the oath; in other words the oath is not pro forma. 401 U.S. at 165-66.

applicants reveals close parallels. Public employers have for two decades been prohibited from excluding from employment those employees who had no knowledge of the illegal goals of organizations to which they belonged.[9] A requirement that teachers list all organizations to which they had belonged in the previous five years has been overturned as having a chilling effect on the exercise of freedom of association by discouraging group membership.[10] The present standards of constitutional inquiry by public employers are set forth in *Keyishian v. Board of Regents*[11] and *Elfbrandt v. Russell*:[12] any imposition of civil disabilities on employees for membership in the Communist Party, even membership with a knowledge of the Party's goals, are now invalid without a showing that the employee had the specific intent to further the illegal goals of the party.[13]

Most of these standards had previously been extended to the bar applicant in a process of gradual evolution. In 1945 the Supreme Court upheld the refusal of a state bar to admit a conscientious objector because he could not truthfully take the oath of support for the state constitution which required male citizens to serve in the militia in the event of peril to the state.[14] Twelve years later the Court, in *Konigsberg v. State Bar (Konigsberg I)*[15], held that without a showing that the applicant had engaged in or supported unlawful activities he could not be excluded from the bar, even though he may have been a member of the Communist Party. A companion case further held that arrests without convictions are not sufficient evidence of bad character to justify denial of admission to the bar.[16] However, in 1961 a second *Konigsberg v. State Bar (Konigsberg II)*[17] allowed the bar to exclude the applicant for refusing to answer a question, although the answer to the question could not be in itself a ground for exclusion. The Court felt that the state's interest in ensuring that its lawyers are dedicated to the law and

[9]Wieman v. Updegraff, 344 U.S. 183 (1952). In question 26. (a) of the New York examination this requirement of scienter is met.

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

[11]385 U.S. 589 (1967).

[12]384 U.S. 11 (1966).

[13]385 U.S. at 609-10; 384 U.S. at 19.

[14]*In re* Summers, 325 U.S. 561 (1945).

[15]353 U.S. 252 (1957).

[16]Schware v. Board of Bar Examiners, 353 U.S. 232, 243-46 (1957).

[17]366 U.S. 36 (1961). The examiners gave Konigsberg a hearing and advised him that refusal to answer would lead to exclusion.

orderly change outweighed the constitutional infringement occasioned by disclosure of past organizational membership, even though the question did not focus on knowing membership with specific intent. Thus, Konigsberg was said to be merely obstructing the examination process rather than exercising his first amendment rights. On another front, a California court had held that a criminal conviction is not a ground for summary exclusion; the conviction which leads to exclusion must be relevant to the practice of law.[18]

The recent cases afforded the Court an opportunity to equalize the standards for public employees and bar applicants. The petitioner in *Baird* answered a question which required her to list all organizations to which she had belonged but refused to answer a second question which required her to state whether she had been a member of the Communist Party or any other organization the goals of which were the violent overthrow of the government.[19] Justice Black's plurality opinion[20] emphasized that since there was no requirement of scienter the second question forced her to guess at the goals of the organizations to which she had belonged.[21] When an individual's first amendment rights are threatened, the state must carry a heavy burden of proof in establishing the necessity of its actions.[22]

The assertion that the state has an interest in the character and competence of its lawyers was inadequate since Mrs. Baird had given sufficient response to other questions to satisfy the state's need.[23] Furthermore, the question she refused to answer was an inquiry into mere beliefs, which are constitutionally immune to inquisitions designed to exclude one from the bar.[24]

Stolar dealt with the rejection of a member of the New York Bar

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[18]Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966). The court also said that a belief that a lawyer has a duty to disobey some unconstitutional laws is not an inference of bad character.

[19]*See* note 5 *supra.*

[20]*Baird* and *Stolar* were both 5-4 decisions with the fifth vote in each case provided by Justice Stewart's separate concurrence. Therefore there was not a majority Court's opinion in either case.

[21]401 U.S. at 5.

[22]*Id.* at 6-7.

[23]*Id.* at 7. Mrs. Baird listed former employers and law professors and also the following organizations to which she had belonged: church choir, Girl Scouts, Girls Athletic Association, Young Republicans, Young Democrats, Stanford Law Association, and Law School Civil Rights Research Council. *Id.* at 7 n.7.

[24]*Id.* at 8. *See also* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

who had applied to the Ohio Bar. Stolar made available to the examiners extensive background information[25] and orally stated that he had never been a member of the Communist Party or the Students for a Democratic Society. He then refused to list all the organizations to which he had belonged and to state whether he had been a member of an organization which had plotted the overthrow of the government. The Court held that the applicant cannot be excluded for beliefs alone, even if he personally entertains beliefs the effectuation of which would be criminally punishable conduct.[26] The required listing of organizations may lead to an intimidating further investigation and have a chilling effect on the potential applicant's activities, thus infringing on the freedom of association.[27] As in *Baird,* Justice Black felt that Stolar had given ample information for the bar to determine his fitness and therefore was not required to answer a question which delved into a protected area.[28]

Justice Stewart's concurring opinions in *Baird* and *Stolar* are particularly significant since his was the deciding vote in each case.[29] Although Justice Black's opinions stressed the concept that when the applicant has furnished sufficient background information the bar has no need or right to inquire into his political beliefs, Justice Stewart's votes were cast because the questions might have led to exclusion for membership without knowledge of the group's illegal goals and without the specific intent to further them.[30]

In *LSCRRC* Justice Stewart wrote for a majority composed of himself and the four dissenters in *Baird and Stolar.*[31] *LSCRRC* involved a group of law students who had not applied for bar admission but sought declaratory and injunctive relief against two questions on the

[25]401 U.S. at 29. Stolar made available to the Ohio Bar the following information which had been furnished to the New York Bar: his law school; every address at which he ever lived; names, addresses, and occupations of his parents; his elementary and high schools; names of nine former employers; his criminal record (two speeding tickets); nine character references; and extensive background about his previous activities such as Boy Scouts, Moot Court, and religious activities.

[26]*Id.* at 28-29.

[27]*Id.* at 28.

[28]*Id.* at 29.

[29]Justice Stewart's opinions are, in effect, the law. The "lowest common denominator" concept calculates the law as the common ground shared by the plurality opinion and any concurring opinions that are necessary to give a majority.

[30]401 U.S. at 9-10; 401 U.S. at 31.

[31]Justice Stewart's views in *Baird* and *Stolar* are expanded in *LSCRRC.* Justices Harlan, White, and Blackmun and Chief Justice Burger dissented in *Baird* and *Stolar* relying primarily on *Konigsberg II.* 366 U.S. 36 (1961) and the idea that the bar should be protected from those who would use the bar to upset the judicial system and society. 401 U.S. at 11; 401 U.S. at 31.

New York examination which inquired into the organizational membership of applicants.[32] The first question required the applicant to affirm or deny his participation in any group which *he knew* advocated the overthrow of the government by force, violence, or any other means. The second question, only to be answered if the first question drew an affirmative response, inquired into the individual's specific intent to pursue the admitted goals. Stewart's views were essentially unchanged from *Baird* and *Stolar,* but here he detected an adherence to constitutionally acceptable guidelines not present in those two cases.[33] Since the state has the right to protect itself from the very real danger of subversive attorneys, it may ask questions of applicants which specifically identify those who pose the danger. Questions which are preliminary to further investigation are permissible as long as exclusion would result only when the investigation revealed that the applicant had actively engaged in subversive activity.[34] There is no requirement that each question reflect these standards, but rather the examination process as a whole must operate within these limits. Since the inquiry stops for those who answer the first question in the negative, there will be no unwarranted further interrogation; therefore there will be no needless intimidation leading to a chilling effect on the activities of law students.[35] In a nutshell, the state may exclude for knowledgeable membership and specific intent to further illegal goals because this protects a legitimate state interest without unnecessarily infringing on the applicant's first amendment rights.

Although the plurality's view in *Baird* and *Stolar* that if the applicant has furnished sufficient information no further inquiry is allowable is not treated in *LSCRRC,* one must conclude that it is not the controlling guideline when the three cases are viewed together. Justice Stewart does not raise this issue in either of his concurring opinions, dwelling instead on knowing membership and specific intent. Since his position is the obvious polestar for lower courts, the sufficient-information standard will probably not play a prominent role in future decision-making. The petitioner in *Konigsberg II*[36] had also furnished other background information while steadfastly refusing to answer the questions posed by the committee. The *Konigsberg II* holding on this point has been af-

[32]See note 8 *supra.*

[33]401 U.S. at 165-66.

[34]*Id.*

[35]*Id.* at 154-59, 166 n.19.

[36]366 U.S. 36 (1961). *See* note 17 & accompanying text *supra.*

firmed; the examining committee, not the applicant, will determine the direction of the inquiry, subject to constitutional guidelines.

Baird, Stolar, and *LSCRRC* have, however, limited the *Konigsberg II* standards of constitutionally permissible inquiry by bar examiners. The *Elfbrandt* and *Keyishian* standards of scienter coupled with specific intent have been applied to inquiries by the bar, extending the same rights to bar applicants that have been enjoyed by public employees.[37] Not only must these requirements be met before the applicant may be excluded, but also, in contrast to *Konigsberg II,* the applicant may refuse to answer without being barred for obstructing the examining process if the standards are not met.[38] Furthermore, since membership in an organization with knowledge of its illegal goals and with the specific intent to further those goals is criminally punishable,[39] the new standards will exclude applicants only when their associations are tantamount to criminal conduct.

The various objections to political inquiry need to be carefully analyzed. One objection raised against all inquiry into organizational membership was that a chilling effect inevitably results from such inquiry.[40] That is, since law students realize that they may be held accountable for their associations, they will be inclined to avoid any potentially damaging associations. This objection is not easily thrust aside. When an applicant gives a positive answer to New York's question 26.(a) and a negative answer to question 26.(b) he has exposed himself to further investigation when, in fact, there may be no constitutional grounds for exclusion. This particular instance may discourage group membership by law students without serving the state's interest since the state has no legitimate interest in the protected activities of applicants. This slight danger is outweighed by the recognized interest of the state in determining the qualifications of its lawyers.[41] Furthermore, the new standards make it clear to law students that they cannot be excluded for associations which are not criminal in nature, and they can plan their activities accordingly. Finally, membership which is reflected by a positive answer to both 26.(a) and 26.(b) is criminal conduct under *Scales v. United States*[42] and deserves no protection from any chilling effect.

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[37]See text accompanying notes 11-13 *supra.*

[38]*See* 401 U.S. at 7; 401 U.S. at 30-31.

[39]Scales v. United States, 367 U.S. 203, 226-27 (1961).

[40]401 U.S. at 167.

[41]*Id.* at 165-66.

[42]367 U.S. 203 (1961); *see* text accompanying note 39 *supra.*

It has also been argued that inquiry into group membership aids in the perpetuation of a homogeneous bar by excluding "subversives" at a time when there is a great need for lawyers who are sympathetic to minority views.[43] The most obvious reply to this objection is simply to ask if the modern bar appears to be homogeneous. The answer has to be "no." With the narrower ground for exclusion indicated by *Baird, Stolar,* and *LSCRRC,* an even less homogeneous bar may be anticipated in the future. Mere political beliefs are protected—it is the participation in an illegal activity which *may* result in denial of admission.[44]

Another argument relied on in *LSCRRC* is that when suitable alternative methods are available there is no legitimate state interest served by inquiry into organizational membership and therefore the first amendment rights of applicants must tip the scales of justice.[45] Alternatives such as the criminal process, contempt powers, and disbarment are sufficient to deal with the conduct of lawyers. Justice Stewart admitted in *LSCRRC* that while this may be "wise" New York had made its decision to conduct another program which is also within permissible limits.[46] It is quite possible that the declaratory nature of the case aroused little sympathy with the Court since petitioners could not show that anyone had ever been unconstitutionally excluded under the program.[47] Furthermore, would the alternative methods urged in *LSCRRC* be sufficient to protect the bar? Certainly recent history shows that the alternatives are less than foolproof.[48] It may be very unwise to force bar associations to rely as best they can on post-admission sanctions. Justice Black argued in dissent in *LSCRRC* that excluding a man from his career is as much of a punishment as depriving him of his property and therefore should require the same level of culpability.[49] He felt that since

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[43]Comment, *Bar Admissions—The Character Investigation as an Unconstitutional Scheme to Promote Conformity: Comment on LSCRRC v. Wadmond,* 23 VAND. L. REV. 131 (1969). Justice Black raises this issue in dissent in LSCRRC. 401 U.S. at 181.

[44]Positive answers to the New York questions will not inevitably lead to exclusion but rather to further investigation where the applicant has a chance to explain the circumstances of his membership. 401 U.S. at 165-66.

[45]401 U.S. at 167.

[46]*Id.*

[47]*Id.* at 165.

[48]For an evaluation of the present practices and recommendations for the future, see *American College of Trial Lawyers Report and Recommendations on Disruption of the Judicial Process,* 16 CATHOLIC LAW. 242, 249-53 (1970).

[49]401 U.S. at 174.

under *Brandenburg v. Ohio*[50] an individual can be punished only when his speech raises an imminent danger of incitement to lawless conduct, the same standard ought to be met before an individual is excluded from the practice of law.[51] *Brandenburg* is distinguishable, however, because it involved a more pure form of speech while the sanctions under *LSCRRC* are directed at specifically illegal activity. The bar associations only attempt to regulate the profession, not to impose punishment. Denial of admission to the bar for subversive activities is no more a penal sanction than denial of admission to a convicted felon would be double jeopardy.

Other writers have pointed out that not all jurisdictions inquire into the activities of bar applicants.[52] In England an applicant must have certificates of good moral character from two United Kingdom residents who have known him for one year.[53] He is ineligible for admission if he is an undischarged bankrupt or has been convicted of an offense that the examiners deem relevant to the profession. Canada's Ontario Province abolished character investigations after finding no relationship between prior conduct and conduct subsequent to admission.[54] Apparently not even all United States jurisdictions inquire into the loyalty of bar applicants beyond the oath of support for the Constitution.[55] Perhaps these are enlightened jurisdictions, but as Justice Stewart noted, while other programs may possess desirable features, the state has the right to conduct its own program within established guidelines.[56]

Baird, Stolar, and *LSCRRC* represent a step forward by the Court because they assure applicants that only activity which could result in criminal punishment is a ground for denial of admission to the bar.

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[50]395 U.S. 444 (1969).

[51]401 U.S. at 183-84.

[52]Comment, 23 VAND. L. REV., *supra* note 43, at 145-46.

[53]Id. at 146 n.97.

[54]Remarks by Richard J. Roberts at the Joint Session of the Section of Legal Education and Admissions to the Bar and National Conference of Bar Examiners in *The Canadian Approach to Legal Education and Admission to the Bar,* 36 B. EXAMINER 6, 34 (1967).

[55]Brown & Fasset, *Loyalty Tests for Admission to the Bar,* 20 U. CHI. L. REV. 480 (1953). *See also* 7 C.J.S. *Attorney and Client* §§ 7(b), 12 (1937). It has not always been thought that character examination was necessary. Under chapter five of the NORTH CAROLINA REVISAL OF 1905 an applicant who demonstrated his competence in the law was entitled to be licensed. Ch. 963, § 3, [1818] N.C. Sess. L. 1436. The North Carolina Supreme Court read this statute as a prohibition against investigations into moral character. *In re* Applicants for License, 143 N.C. 31, 32-36 (1906). Did the threat of Communism contribute to the increasing scope of examination? *See* introductory paragraphs in *Baird,* 401 U.S. at 2-3; and *Stolar,* 401 U.S. at 24-25.

[56]401 U.S. at 167.

There are arguments against any character examination by the bar, as there always are when constitutional rights are limited. However, it is well established that the states may, within limits, ask questions to ascertain the moral fitness of applicants before admitting them to the bar. The state has no right to unlimited inquiry and the applicant has no right to expect to be free from all inquiry. By prohibiting exclusion when there is no showing that an applicant has been a member of an organization with knowledge of its illegal goals and has entertained the specific intent to further those goals, the Court has extended the rights enjoyed by public employees to bar applicants.

DAVID M. RAPP

Constitutional Law—Equal Protection and the "Right" to Housing

In 1950 California voters adopted article XXXIV of the state constitution with the express purpose of bringing decisions of public housing authorities which involved the construction of "low rent housing" under the state's mandatory referendum procedure.[1] Some twenty years later the Supreme Court of the United States, in *James v. Valtierra*,[2] upheld the constitutionality of article XXXIV against the charge that it denied equal protection of the law to persons who though eligible for low-rent housing lived in areas in which the referendums were defeated. More specifically, *James* raised the issue of whether the requirement of a referendum to construct "low rent housing" placed an unduly heavy burden upon low-income persons by singling them out from other classes of citizens eligible for public housing.

The case was first heard on the district level by a three-judge panel

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[1]"No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until" approved by the majority of the voters in the local electorate where it is to be developed, constructed, or acquired. CAL. CONST. art. XXXIV, § 1.

Article XXXIV was a response to the creation of housing authorities in each city and county in California. CAL. HEALTH & SAFETY CODE §§ 34240, 34327 (West 1967). These local bodies were given the power to borrow money and accept grants from the federal government through the United States Housing Act of 1937, 42 U.S.C. §§ 1401-1430 (1970). When the citizen-initiative referendum procedure of article IV, § 1 of the state constitution was held inapplicable to decisions of the local housing authorities in Housing Authority v. Superior Court, 35 Cal. 2d 550, 219 P.2d 457 (1950), the stage was set for the passage of article XXXIV six months later.

[2]402 U.S. 137 (1971).

in *Valtierra v. Housing Authority*.[3] In ruling that article XXXIV was unconstitutional as a denial of equal protection, the panel relied heavily upon the Supreme Court's recent decision in *Hunter v. Erickson*.[4] In *Hunter*, an amendment to the Akron, Ohio city charter that required a referendum on all ordinances which regulated the use of real property on the basis of "race, color, religion, national origin, or ancestry" was declared unconstitutional on equal protection grounds. The amendment, if approved, would have repealed Akron's recently enacted fair housing ordinance. As in *Hunter*, the *Valtierra* panel found that article XXXIV created a "special burden" not ordinarily required and that the impact of that burden fell on minorities.[5]

In reversing the panel and holding article XXXIV constitutional, the Supreme Court, with Justice Black speaking for five justices,[6] offered a three-fold rationale in favor of California's right to impose the referendum restriction upon the state's voluntary participation in a federally financed housing program. First, the majority contended, the district court's reliance on *Hunter* was erroneous. The referendum procedure in *Hunter* denied equal protection in that it made "distinctions based on race," whereas California's referendum procedure could not be shown to be "aimed at a racial minority" and is thus "[racially] neutral on its face."[7] The second prong of the Court's analysis was directed at showing that even though persons desiring public housing were hampered by the mandatory referendum requirement, they were not thereby denied equal protection.[8] In essence, the Court said that legislation that

[3]313 F. Supp. 1 (N.D. Cal. 1970). The district court noted that article XXXIV had impeded the financing of new housing, only 52% of the referendums submitted to the voters having been approved. The court agreed with plaintiffs' argument that article XXXIV was expressly discriminatory because it applied only to "low income persons" and was therefore squarely within Supreme Court decisions "forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective." *Id.* at 4.

[4]393 U.S. 385 (1969).

[5]313 F. Supp. at 5.

[6]Justice Marshall filed a dissenting opinion in which Justice Brennan and Justice Blackmun joined. 402 U.S. at 143. Justice Douglas took no part in the decision.

[7]402 U.S. at 141.

[8]*Id.* at 142. The Court's argument seemed to be premised on the fear of a flood of litigation. Assuming that the mandatory referendum procedure that "disadvantages" low income persons in California denies equal protection, Justice Black foresaw the impossible task of examining entire governmental structures to determine if their specific provisions "disadvantage" (and thus deny equal protection to) any particular group of citizens. *Id.* Consequently, the second argument is basically a distinction between "disadvantage" and "denial of equal protection."

is disadvantageous to a certain group is not necessarily in conflict with the equal protection clause. Finally, the majority emphasized the democratic nature of the referendum procedure. How, the Court seemed to ask, could a procedure which gives everyone a voice in the decision possibly deny equal protection through such a procedure?[9]

THE EQUAL PROTECTION ISSUE

In rejecting the three-judge panel's reading of *Hunter*, the majority adopted a narrow interpretation of the fourteenth amendment. It was content to observe that unlike the statute in *Hunter*, the California referendum provision contained no racial classification. No attempt was made to determine whether any other kind of impermissible classification is made by article XXXIV. Thus the majority stopped short of the central issue which the case raised—whether the poor constitute a minority entitled to special protection under the fourteenth amendment. Instead, the words "low rent housing" were treated, as the dissent pointed out, as a "totally benign, technical economic classification."[10] This interpretation of the equal protection clause not only belied the Court's earlier dictum in *Hunter*[11] but was also contrary to the expansive interpretation given that clause by a series of Supreme Court decisions stretching over three decades.

An understanding of the "new" or expansive concept of equal protection, and the impact of *James* upon this concept, must begin with a brief reference to traditional equal protection standards. The old formula had two ingredients: it required that there be *some* rational nexus between the classification and the purpose of the legislation, and it gave a strong presumption in favor of rationality.[12] Most cases decided under traditional equal protection criteria involved business regulations, the great majority of which were upheld.[13]

Though decided on the basis of state violation of the commerce

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[9]*Id.* at 142-43.

[10]*Id.* at 145 (Marshall, J., dissenting).

[11]393 U.S. at 393.

[12]Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 768 (1969).

[13]Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 721 (1969). *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

power, *Edwards v. California*[14] provides a good starting point for consideration of the Court's new approach to equal protection. Justice Jackson, in a concurring opinion, stated:

> We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere status of being without funds is a neutral fact—constitutionally an irrelevence, like race, creed, or color.[15]

The privileges and immunities clause did not, as Jackson advocated in *Edwards*, become the tool by which the Court would seek to turn indigence into a "neutral fact." The language which the Court eventually seized upon was that found in the equal protection clause. Although the use of equal protection to eliminate discrimination based on poverty has had only limited application, the rationale for applying it has remained similar to that expressed in *Edwards*.[16]

Only a year after *Edwards*, in *Skinner v. Oklahoma*,[17] the traditional equal protection test, based on judicial restraint, was given a sharp new twist, and the concept of "invidious discrimination"[18] began to emerge. The formula seemed rather simple. Whenever legislation is based upon inherently suspect criteria, the burden falls on the state to justify its actions. Lack of substantial justification constitutes invidious discrimination and renders the law unconstitutional.[19] The "invidious discrimination" formula has been the heart of the expansion of the equal protection clause. The concept, as analyzed by Professor Kenneth L. Karst, is based upon three inquiries: (1) Has there been discrimination against a disadvantaged group? (2) Has this disadvantaged group been denied a "basic right"? (3) Is there a "compelling government interest"[20] which overrides the denial of that basic right?[21] Use of the invidious-discrimination formulation of equal protection has led to the

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[14]314 U.S. 160 (1941).

[15]*Id.* at 184.

[16]*See, e.g.*, Douglas v. California, 372 U.S. 353, 358 (1963); Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[17]316 U.S. 535 (1942).

[18]*Id.* at 541.

[19]Karst, *supra* note 13, at 735.

[20]Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[21]For a fuller treatment of the tripartite analysis of the invidious discrimination concept, *see* Karst, *supra* note 13, at 739-46.

recognition of "basic rights" in several areas. *Douglas v. California,*[22] in which the Court held that an indigent defendant has the same right to counsel on appeal as a defendant who can afford an attorney, is an example of the tremendous impact of equal protection in the area of criminal procedure and of cases that recognize that discriminations based on wealth may deny equal protection.[23] In the civil area, *Shapiro v. Thompson*[24] held the right to interstate travel abridged by a Connecticut statute that required a residency of at least one year before a person was eligible for welfare payments. And in the area of voting rights, *Harper v. Virginia Board of Elections,*[25] in which the Court declared a one and one-half dollar poll tax unconstitutional, is one of several cases[26] eliminating property qualifications on equal protection grounds. Other important affected areas include religion,[27] political affiliation,[28] and marriage and procreation.[29]

This development has by no means proceeded in a clear and consistent fashion, as can be seen from the Court's recent decision in *Dandridge v. Williams.*[30] If the decision in *James* can be said to have any recent precedents, surely the *Dandridge* decision must be foremost, although any reference to it in the majority opinion in *James* is strangely missing. At issue in *Dandridge* was the adoption by Maryland of a "maximum grant regulation"[31] for payment of benefits under the Federal Aid to Families with Dependent Children (AFDC) program. Using this standard, an upper limit of 250 dollars a month per family was imposed by the state, regardless of the number of children in the family. In response to an equal protection attack, the Court found the regulation in issue to be in the area of "economics and social welfare" and thus subject only to the traditional "reasonable basis" test.[32] Although recognizing the

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[22]372 U.S. 353 (1963).

[23]*See* Tate v. Short, 401 U.S. 395 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

[24]394 U.S. 618 (1969).

[25]383 U.S. 663 (1966).

[26]*See, e.g.,* Kramer v. Union Free School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969) (per curiam).

[27]Sherbert v. Verner, 374 U.S. 398 (1963).

[28]Williams v. Rhodes, 393 U.S. 23 (1968).

[29]Loving v. Virginia, 388 U.S. 1 (1967); *cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[30]397 U.S. 471 (1970).

[31]*Id.* at 472-76. Because of the nature of the "maximum grant" standard, *Dandridge* is distinguishable from *James. Dandridge* is not a "poverty" case per se because the decision of the state to impose a ceiling on AFDC benefits regardless of actual need discriminates not against indigents generally but against a subclass of indigents—those with large families and thus greater need.

[32]*Id.* at 485.

"dramatically real factual difference"[33] between this case and the earlier business-regulation cases, the Court refused to apply a different standard. The majoity implicitly denied the presence of a "basic right" by noting that its approach would be altered only by state action "affecting freedoms guaranteed by the Bill oif Rights"[34] or "infected with a racially discriminatory purpose or effect such as to make it inherently suspect."[35]

The decision in *Dandridge* is not easily understood in light of *Shapiro* and *Levy v. Louisiana.*[36] *Shapiro,* though decided on the basis of a right of interstate travel, held that a state may not deny welfare payments solely on the basis of how long a person has lived in the state. It would seem just as arbitrary to deny a dependent child payments under AFDC simply because he was born to a large rather than a small family.[37] In *Levy,* the Court reversed Louisiana's denial of wrongful death benefits to children on the sole basis that they were illegitimate. If illegitimacy is not a rational basis for denial of benefits, how can the fact of birth to a large family meet the "reasonable basis" test? The decision in *Dandridge* need not have considered the newer doctrine of equal protection; under traditional equal protection standards, a rational basis for the state regulation was missing.[38] Thus in *Dandridge* and *Levy* there was no need to raise the question of basic rights and its accompanying requirement that the state show a compelling interest. And in *Shapiro* the difficult question of whether denial of welfare payments was

[33]*Id.* The Court admitted that the cases which were relied upon had "in the main involved state regulation of business or industry." It went on to note that "[t]he administration of public welfare assistance, by contrast, involved the most *basic* economic needs of impoverished human beings." *Id.* (emphasis added).

[34]*Id.* at 484.

[35]*Id.* at 485 n.17.

[36]391 U.S. 68 (1968).

[37]In striking down the residency requirement in *Shapiro,* the Court noted that the welfare benefits in question were "the very means to subsist." The AFDC benefits in *Dandridge* were just as essential to subsistence. On this basis Justice Marshall argued that the Court "has already recognized several times that when a benefit, even a 'gratuitous' benefit, is necessary to sustain life, stricter constitutional standards . . . are applied to the deprivation of that benefit." 397 U.S. at 522 (Marshall, J., dissenting). Thus the dissent would place the *Dandridge* case under the new equal protection test or, at the least, require more than the majority's showing of "reasonable basis."

[38]Though Justice Marshall's dissent criticizes the majority opinion for failure to apply the new equal protection test, note 37 *supra,* the thrust of his argument is directed toward the failure of the Maryland regulation to meet the traditional "reasonable basis" test. The state's classification is said to constitute a denial of equal protection without reference to whether a basic right was involved. *Id.* at 517-530.

a denial of a "basic right" to subsistence was avoided by reference to the effect of an already established basic right to interstate travel. A serious problem remains. Why, in *Dandridge*, upon finding a reasonable basis for the state regulation, did the Court limit its consideration of basic rights to guarantees of the Bill of Rights and issues of racial discrimination? The new concept of equal protection is thus weakened by the Courts classification of social welfare problems as "economic" and subject only to the rational-nexus test of traditional equal protection. The denial of welfare benefits, though "economic" on their face, results logically in the denial of such basic human needs as food, clothing, and adequate housing. Of course, determination of the point at which denial of welfare benefits constitutes infringement of other basic rights may involve the Court in a very difficult task. The arduousness of the endeavor, however, should not be grounds for refusing to undertake a resolution of the issue.

An additional factor of considerable importance in recent equal protection cases has been the willingness of the Court to look beyond a legislative enactment which is non-discriminatory on its face to see if its ramifications involve the state or local governmental body in invidious discrimination. On this basis the Court declared unconstitutional a section of the California Constitution which was intended to make possible private discriminations in the sale or rental of housing.[39]

Given this analysis of the development of equal protection, the majority opinion in *James* appears to be inconsistent with previous case law. Justice Black, basically an opponent of the expansive interpretation of the equal protection clause,[40] has breathed new life into the traditional equal protection interpretation. Under that interpretation racial classifications are still "constitutionally suspect"[41] and "bear a far heavier burden of justification"[42] than other classifications. By refusing to extend *Hunter* as the three-judge panel had done, the majority has said that

[39]Reitman v. Mulkey, 387 U.S. 369 (1967). *Accord,* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970). Both cases involved racial discrimination, and in each case the Court found the state or local government to be "significantly involved in private discriminations." *But cf.* Palmer v. Thompson, 403 U.S. 217 (1971).

[40]Justice Black's opposition is perhaps most concisely stated in his dissenting opinion in Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); *accord,* Hunter v. Erickson, 393 U.S. 385, 396 (1969) (dissenting opinion). *But see* Williams v. Rhodes, 393 U.S. 23 (1968); Griffin v. Illinois, 351 U.S. 12 (1956).

[41]Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[42]McLaughlin v. Florida, 379 U.S. 184, 194 (1964).

the burden of justification falls upon the states only in areas of racial classification, and thus by implication other classifications, including those based upon wealth, need only meet the requirement of rationality unless they infringe upon a basic right. This was the thrust of Justice Black's dissent in *Harper v. Virginia Board of Elections*,[43] and it is the heart of his argument in *James*.

The concept of "invidious discrimination" still has a very vague and indefinite meaning for the majority of the Court. Professor Karst's analysis of invidious discrimination as a series of three inquiries was, at least fomally, not a part of the majority's approach. But, in a back-handed manner, the Court did speak to the new concept of equal protection. Especially noteworthy is the statement that "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection."[44] Why is "disadvantage" not synonymous with "denial of equal protection"? Using the Karst approach, the Court might respond that though a disadvantaged group exists, they were not denied a "basic right." And since no basic right is involved, there is no burden of justification upon the state. This may account for Justice Black's opinion in *Williams v. Rhodes*,[45] in which the Court held that Ohio denied equal protection by refusing to place the candidates of the American Independent Party on its ballot. Voting, it appears, is a basic right.

There emerges a dichotomy which requires more explanation than the Court has provided. Racial classifications, whether or not they impinge upon a basic right, require justification. Undoubtedly, the fourteenth amendment was framed with the plight of the recently freed slaves in mind, but the language of that amendment does not indicate that equal protection of the law was intended to mean only protection from racial discrimination. Alexander Bickel concluded his study of the Congressional debates over the fourteenth amendment with the following observation:

> Thus, section 1 of the fourteenth amendment, on its face, deals not only with racial discrimination, but also with discrimination whether or not based on color. *This cannot have been accidental*, since the alternative considered by the Joint Committee, the civil rights formula, did apply only to racial discrimination.[46]

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[43]Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

[44]402 U.S. at 142.

[45]393 U.S. 23 (1968).

[46]Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60 (1955) (emphasis added).

If Professor Bickel's argument is correct and the guarantees of the fourteenth amendment are framed to deal with more than discrimination with regard to race, then the Court in *James* cannot be said to have made a judgment based on a historical understanding of the amendment's intent. Rather, the Court made a judgment that the form of classification based on race is more likely to produce invidious discrimination than any other.

If the foregoing analysis of the Court's approach to the equal protection clause is valid, the problem posed by *James*, when considered beside *Hunter*, is resolved. The classification involved in *Hunter* was racial. Since all racial classifications must bear a heavy burden of justification, such a burden was placed upon the city. It was not met. *James*, on the other hand, did not involve a racial classification. Though the same "right" to housing was involved in both cases, the non-racial character of article XXXIV left it free of the burden of justification. This assumes, of course, that the Court made a determination that the right of low income citizens to federally financed low-rent housing was not a "basic right."

The central issue of *James* should now be apparent: Does the constitutional requirement of a referendum on the issue of "low rent housing" (as opposed to other types of housing) deny to low income persons a fundamental right without a compelling state interest in doing so?[47] Further reduced, the issue is whether or not low-income persons have a "basic" right to low-rent housing.[48] Arguably a holding that recognized a basic right to housing, at least as basic as some of those already held to be so by the Court, could rest upon the ninth amendment[49] or the

[47]By stating the issue in this manner, one of three possible alternatives for application of the "new" equal protection is found to be the most useful. The alternative of wealth as a suspect classification was explicitly rejected by the Court in *James*. By refusing to follow their earlier dicta in *Harper* and *Hunter* the Court found that only racial classifications impose a heavy burden of justification. A second alternative arising from an earlier discussion of *Dandridge*—that even though a particular right in itself is not "basic," the denial of it may nevertheless lead logically to the denial of other rights which are "basic"—has never been considered by the Court. *See* text following note 38 *supra*. Thus, the third alternative—the invidious-discrimination formula—is adopted. This approach is founded upon an inquiry as to whether housing in itself is a basic right.

[48]For instance, the right to interstate travel seems no more "basic" than housing, and yet it has been protected under the equal protection clause. Shapiro v. Thompson, 394 U.S. 618 (1969).

[49]"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. *See* Griswold v. Connecticut, 381 U.S. 479, 488-93 (1965) (Goldberg, J., concurring).

penumbra theory of *Griswold v. Connecticut*.[50] The proposition is put most squarely by the Congress in the Housing Act of 1949:

> The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . .[51]

The issue of whether housing in this instance is a "basic right" was not reached by the Court. But one thing is clear from its decision in *James*. It has retreated from a number of its earlier statements concerning poverty and equal protection, such as "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored,"[52] and "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race."[53] Not only has the Court refused to extend *Hunter*;[54] it has, in *James*, refuted Justice White's assurance in *Hunter* that

> the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.[55]

In short, the Court has added to the phrase "any particular group" the proviso "characterized by race."

THE ISSUE OF PRESUMPTION IN FAVOR OF THE LEGITIMACY OF STATE ACTION

The argument that the California law, in this case, has "denied" nothing is readily apparent. The real effect of article XXXIV is to afford the opportunity for local electorates to refuse to accept low rent housing. The Court's emphasis was thus focused on the "concededly broad power"[56] of the state over its political subdivisions. When asserting a

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[50]381 U.S. 479 (1965).

[51]Act of July 15, 1949, ch. 338, § 2, 63 STAT. 413. The wording is slightly modified in 42 U.S.C. § 1401 (1970).

[52]Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

[53]McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969).

[54]402 U.S. at 141.

[55]393 U.S. at 393.

[56]*See* Comment, *Federal Constitutional Limitations on State Power over Political Subdivisions*, 61 COLUM. L. REV. 704, 711 (1961).

constitutional limitation on this power, "it is logical to place a heavy burden of persuasion on those asserting the limitation."[57] Under this concept the Court can be seen to have applied an approach of self-restraint,[58] except when there has been an infringement of an express constitutional provision.[59]

If the presumption in favor of the legitimacy of state action was implicit in the Court's approval of article XXXIV, explicit was its reliance on the basically democratic nature of referendums to guarantee the fairness of the state's action in making the referendum mandatory on the specific issue of low-rent housing. Whether or not this reliance on the inherent fairness of referendums was justified is a question that deserves serious consideration. The majority argued that "provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[60] To substantiate this assertion the Court pointed to the long use of referendums throughout California history[61] and the requirement of mandatory referendums in other areas.[62] In considering the Court's first justification, it must be noted that most of California's "repeated use of referendums"[63] have been of the citizen-initiative type rather than mandatory. Careful examination of the Court's second justification is even more crucial. The Court listed three other instances in which a referendum is constitutionally mandatory—constitutional amendments,[64] the issuance of long-term bonds,[65] and municipal annexations and incorporations.[66] Of these three, only article XVIII (constitutional amendments) was in existence before article XXXIV. More important is the fact that only the language of article XXXIV—"persons of low income"[67]—refers to a disadvantaged class. For instance, it would be extremely difficult to find a class of persons who would prefer long-term bond financing to other types of financing and thus be disadvantaged by a mandatory referendum before such financing could be carried

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[57] *Id.*
[58] *See* Colegrove v. Green, 328 U.S. 549 (1946).
[59] Gomillion v. Lightfoot, 364 U.S. 339 (1960).
[60] 402 U.S. at 141.
[61] *Id.*
[62] *Id.* at 142.
[63] *Id.* at 141.
[64] CAL. CONST. art. XVIII (as amended 1962).
[65] CAL. CONST. art. XIII, § 40 (added 1970).
[66] CAL. CONST. art. XI, § 2(b) (added 1970).
[67] CAL. CONST. art. XXXIV, § 1.

out.[68] Thus the other areas in which mandatory referendums are provided, with the possible exception of the municipal annexation provision, involve fundamentally different considerations than article XXXIV. Even article XI (municipal annexation) does not make a classification on its face by a reference such as "low rent housing."

On the surface, the referendum procedure guarantees fairness. But one must also consider the necessity of protecting minorities from the possibility that the majority's will may be unjust. Alexis de Tocqueville's warning, issued in 1839, still rings true:

> In my opinion the main evil of the present democratic institutions of the United States does not arise . . . from their weakness, but from their overpowering strength; and I am not so much alarmed at the excessive liberty which reigns in that country, as at the very inadequate securities which exist against tyranny.[69]

The reality which article XXXIV embodies is that the majority, through a locality-by-locality approach, can decide that low-income persons in certain areas will not receive low-rent housing. This power is tantamount to a decision as to where the poor in California may live. As the *Valtierra* panel noted, only fifty-two percent of the referendums submitted under article XXXIV have been approved.[70] Thus, no matter how "democratic" referendums are in theory, the crucial question is whether or not they are "fair." Has the indigent minority been denied the equal protection of the law by the article XXXIV requirement that low income housing proposals be submitted to the whims of the local electorate? Without denying the broad power of the state over its municipalities, this question must also be asked and balanced against the presumption that the state has acted legitimately.

CONCLUSION

James v. Valtierra is the site of two significant collisions. The first is between two concepts of equal protection—traditional and expansive; the second is between the equal protection clause and the broad power

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[68] *Cf.* Gordon v. Lance, 403 U.S. 1 (1971). In this case the Court upheld a West Virginia constitutional provision which required that 60% of the voters in a referendum election approve bonded indebtedness. The majority stated that it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Id.* at 5.

[69] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 256 (1839).

[70] 313 F. Supp. at 3.

of states over their political subdivisions. Avoiding collisions, as any seaman knows, is the essence of good navigation, but to fail to recognize these two "collisions," as the Court has done in *James*, is to make another collision inevitable.[71] Had the Court faced the issues squarely, the result might have been different. Certainly this analysis indicates that housing should be considered as "basic" a right as some of those accorded special status by recent Supreme Court decisions preceding *James*. It should be clear, also, that reliance on the "democratic" nature of referendums is not a sufficient deterrent against state denial of equal protection. One must, however, consider that *James* may be an attempt to return to an earlier understanding of the equal protection clause, in which event an attempt to speak of basic rights, aside from the area of racial discrimination, would be pointless. Furthermore, one must be aware that there are legitimate state interests, namely reduction of the tax base and increased burdens on public facilities, which make low-rent housing less desirable than other types of housing. Yet, in view of the complexity of society's problems as a whole, the economic imperatives demand that housing be the major priority in urban planning. The demand of the equal protection clause seems equally clear—that "the State may . . . [not] disadvantage any particular group by making it more difficult to enact legislation in its behalf."[72] One must conclude that the privilege of all Americans to choose their neighbors, however basic, should not take precedence over the more fundamental right of every citizen to a decent home.

While the equal protection clause, even in its newer manifestations, should *not* be construed as a tool for achieving social egalitarianism, it may yet play a significant role in narrowing the gap between rich and poor. That role—essential to republican government—is to protect minorities from the power of local and state electoral majorities who would use the ballot box to transform their prejudices into law. In their fear of the broader implications of equal protection, the majority in *James v. Valtierra* has retreated from the performance of this essential func-

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[71]Such "collision" may come sooner than expected. In Serrano v. Priest, ___ Cal. 3d ___, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), the Supreme Court of California recently ruled the California School financing scheme, based on property taxes, unconstitutional as a denial of equal protection. In doing so, the court recognized education as a basic right and called for a strict standard of review. *See also* Van Dusartz v. Hatfield, ___ F. Supp. ___ (D. Minn. 1971); Rodriguez v. San Antonio Ind. School Dist., ___ F. Supp. ___ (W.D. Tex. 1971).

[72]Hunter v. Erickson, 393 U.S. 385, 393 (1969).

tion. Hopefully, that retreat is only a temporary regrouping, and *James* may yet be considered as an aberration rather than the initiation of a trend.

JIM D. COOLEY

Constitutional Law—Fighting Words or Free Speech?

During its history of roughly thirty years, the "fighting words" doctrine[1] has been an often cited but seldom controlling limitation in the area of first amendment freedom of speech. In the recent case of *Cohen v. California*,[2] the Supreme Court acknowledged the continuing vitality of the "fighting words" doctrine but rejected the contention of the State of California that it was controlling in that particular case. Paul Robert Cohen was convicted of violating a California statute which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."[3] His arrest resulted from his wearing a jacket inscribed with "Fuck the Draft" plainly visible while walking through the Los Angeles County Courthouse. Cohen claimed that the jacket stated his feelings about the war in Vietnam and the draft and that his expression was constitutionally protected. In affirming Cohen's conviction the California Court of Appeals interpreted "offensive conduct" to mean "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace."[4] The

[1]Under the "fighting words" doctrine inflammatory words that are used in a manner calculated to provoke a breach of the peace are excluded from the first amendment protection generally afforded speech. The term itself comes from the following passage: " 'The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings.' " Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), *quoting* State v. Chaplinsky, 91 N.H. 310, 320, 18 A.2d 754, 762 (1941).

[2]403 U.S. 15 (1971).

[3]CAL. PENAL CODE § 415 (West 1970).

[4]People v. Cohen, 1 Cal. App. 3d 94, 100, 81 Cal. Rptr. 503, 506 (1969) (emphasis by the court). In explaining its interpretation, the court said: "As modified by case law the only 'offensive' conduct prohibited by section 415 is that which incites violence or has a tendency to incite others to violence or a breach of the peace. . . . This standard . . . eliminates prosecutions or convictions for conduct which is *merely offensive*." *Id.* at 102, 81 Cal. Rptr. at 508 (emphasis added). Recent Supreme Court holdings clearly establish that the exercise of constitutional rights may not be impinged upon merely because the exercise in some way offends the sensibilities of some individuals. In Street v. New York, 394 U.S. 576, 592 (1969) (the flag-burning case), the Court said, "It is

court found Cohen's behavior so potentially annoying that "it was certainly foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or to attempt to forceably remove his jacket."[5] The California Supreme Court, by a divided vote, refused to review the case.[6]

In attempting to analyze Cohen's conduct in terms of "speech" and "nonspeech" elements, the California Court of Appeals cited *United States v. O'Brien*,[7] a case in which the defendant had been convicted of burning his selective service card in protest against the Vietnam war but in violation of the Universal Military Training and Service Act.[8] The Supreme Court in *O'Brien* upheld the conviction, saying that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[9] The nonspeech element of Cohen's conduct consisted of marching through a public building with the intent of attracting attention to the message on his jacket. Unlike the nonspeech element of O'Brien's conduct, however, the nonspeech element of Cohen's conduct was unquestionably legal. The California court failed to make this distinction, concluding that the expression was likely to produce violence from viewers and was therefore subject to regulation: "[N]o one has the

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firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." In a case involving the distribution of highly critical leaflets in the home neighborhood of an Austin realtor, the Court said that "so long as the means are peaceful, the communication need not meet standards of acceptability." Organization For a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). On the subject of freedom of assembly, the Court said: "The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people." Coates v. Cincinnati, 402 U.S. 611, 615 (1971). The Court considered, and rejected, the assertion in *Cohen* that California could censor the four-letter word Cohen used on the ground that it was "offensive" to the sensibilities of those who might inadvertantly be exposed to it. 403 U.S. at 22-26.

[5] 1 Cal. App. 3d at 99-100, 81 Cal. Rptr. at 506.

[6] Subsequent to Cohen's conviction and prior to the Supreme Court decision in *Cohen*, the California Supreme Court in *In re Bushman*, 1 Cal. 3d 767, 83 Cal. Rptr. 375, 463 P.2d 727 (1970), construed § 415, under which Cohen was convicted, for the first time. Four dissenting United States Supreme Court justices in *Cohen* thought it proper to remand the *Cohen* case to the California Court of Appeals for reconsideration in light of the *Bushman* decision. The majority saw no substantial difference between the construction of § 415 by the California Supreme Court in *Bushman* and that of the Court of Appeals in *Cohen*.

[7] 391 U.S. 367 (1968).

[8] 50 U.S.C. § 462(b)(3) (1970).

[9] 391 U.S. at 376.

right to express his views by means of printing lewd and vulgar language which is likely to cause others to breach the peace to protect women and children from such exposure."[10]

The Supreme Court quickly disposed of the argument that Cohen's conviction rested on permissible regulation of the nonspeech element of his conduct. The conviction, the Court found, rested clearly on the offensiveness of the *words* Cohen used to convey his message. The qustion left to be resolved, then, was whether the expression could be prohibited because its use was inherently likely to cause a violent reaction from viewers. This was the primary basis on which the California court had affirmed the conviction.

In view of the particular facts involved in *Cohen*, and the Court's reaffirmation of "fighting words" as a viable doctrine of constitutional law, it is instructive to examine *Cohen* in the context of the history of that doctrine. Unlike the epithets hurled in *Chaplinsky v. New Hampshire*,[11] the case in which the "fighting words" concept was given initial explicit recognition by the Supreme Court, Cohen's message lacked any element of personal abuse or immediate likelihood of retaliation. In discounting the inherently provocative nature of the message on Cohen's jacket, the Court pointed out that the message was not " 'directed to the person of the hearer' "[12] and that no individual reasonably would have regarded the words as a direct personal insult. In *Chaplinsky* a Jehovah's Witness was convicted of breaching the peace after calling a city marshal a "damned racketeer" and a "damned Fascist" when the marshall tried to warn him that the crowd to whom he had been speaking was becoming restless. The statute involved forbade addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place" or "call[ing] him by any offense or derisive name."[13] The statute had been interpreted by the New Hampshire Supreme Court as limited to the use in a public place of

[10]1 Cal. App. 3d at 103, 81 Cal. Rptr. at 509.

[11]315 U.S. 568, 569 (1942).

[12]403 U.S. at 20, *quoting* Cantwell v. Connecticut, 310 U.S. 296, 309 (1940). In *Cantwell* a Jehovah's Witness was convicted of breach of the peace after playing a phonograph record attacking the Catholic Church while soliciting contributions from two Catholics. The Court overturned his conviction, noting that although he offended the listeners and aroused their anger, there was "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse."[310] U.S. at 310.

[13]315 U.S. at 569.

words directly tending to cause a breach of the peace by provoking the person addressed to engage in acts of violence.[14] Mr. Justice Murphy, writing for a unanimous Court, said in *Chaplinsky*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[15]

Seven years after the *Chaplinsky* decision, the Court in *Terminiello* v. *Chicago*[16] clarified its position as to the kind of speech which would be excluded from the operation of the doctrine despite the provocative nature of the message. The case dealt with Terminiello's breach-of-the-peace conviction following an inflammatory speech he delivered at a meeting sponsored by the right-wing Christian Veterans of America. *Terminiello* differed from *Chaplinsky* in that Terminiello's speech was delivered in an auditorium and not on a public street.[17] A large, hostile group had gathered in protest outside the auditorium in which Terminiello was speaking, and the police were unable to prevent several disturbances from occurring. The trial court had instructed the jury that any behavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance"[18] violated the ordinance. Seizing upon the trial court's interpretation of the ordinance, the Court reversed Terminiello's conviction on the ground that such an expansive interpretation of the ordinance would render it unconstitutionally broad. Although the argument before the Court had centered on the issue of whether Terminiello's speech contained "fighting words" which carried it outside the scope of first amendment protection, the Court never reached that issue.[19] Nonetheless, the majority opinion em-

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[14]State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941).
[15]315 U.S. at 571-72.
[16]337 U.S. 1 (1949).
[17]*Id.* at 2.
[18]*Id.* at 3.
[19]*Id.*

phasized that it is often the unsettling effect of speech which gives it much of its value. The Court said:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger[20] of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[21]

The majority's opinion in *Terminiello* evoked a strong dissent from Mr. Justice Jackson, who felt that in freedom of speech matters the Court had gone too far in the individual's favor at the expense of the public interest in order. He contended that excessive efforts in that direction were self-defeating: "In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence."[22]

Two years after the *Terminiello* decision was handed down, the Court took a rather drastic turn in the direction Mr. Justice Jackson had favored in that case. *Feiner v. New York*[23] involved a statute which, in effect, forbade incitement of a breach of the peace. Irving Feiner was arrested after making allegedly inflamatory statements to a group of Negroes and whites gathered on a street corner. Among other things, he urged the Negroes to rise up and fight for equal rights. The crowd became restless and there was some milling around. After asking Feiner three times to discontinue his speech, the police arrested him. In contrast

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[20]The "clear and present danger" test was originally enunciated by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." One commentator says, "In limited areas the test may still be alive, but it has been conspicuous by its absence from opinions in the last decade." Kalven, *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 297 (1968). See Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910-912 (1963), for a history of the clear and present danger test.

[21]337 U.S. at 4.

[22]*Id.* at 36-37.

[23]340 U.S. 315 (1951).

to the *Terminiello* situation, no disturbances in fact resulted from Feiner's speaking. Nevertheless, the Supreme Court upheld Feiner's conviction after accepting the state court's findings that the arresting officers were motivated solely by a proper concern for the preservation of order and not simply by a desire to suppress Feiner's views and opinions.

The decision in *Feiner* took the Court quite a distance from the position stated in *Terminiello,* in which the Court had spoken approvingly of a function of free speech as being to invite dispute, create dissatisfaction, and stir people to anger.[24] Of course, the Court was referring to the peaceful dissemination of ideas, but implicit in the Court's language in *Terminiello* is the idea that a speaker should enjoy the protective efforts of the state while he is expressing his ideas, even though they may be unpopular. In *Feiner* the Court balanced the individual's interest in freedom of expression against the societal interest in order. The case was rightly or wrongly decided depending upon how one evaluates the facts.[25] The majority opinion equated Feiner's expression to an incitement to riot. The minority found it to be simply an exercise in soapbox oratory accompanied by the mutterings and unrest which commonly attend the public exposition of unpopular ideas.

Narrowly construed to cover only incitement to riot when the danger is real and imminent, *Feiner* seems to strike a reasonable balance between individual and societal interests. However, if the rationale for suppression to preserve order is applied when the danger is not so real and the disorder not so imminent, "cities and states can with impunity subject all speeches, political and otherwise, on streets or elsewhere, to the supervision and censorship of the local police."[26] Although the Court did not expressly refer to "fighting words" in *Feiner*, clearly the Court balanced the societal interest in order against Feiner's interest in free expression just as it had balanced similar interests in *Chaplinsky*. Since *Feiner* the Court has consistently protected the public expression of ideas despite the fact that disturbances might thereby be engendered.

In *Cox v. Louisiana,*[27] the Court overturned the conviction of Reverend Elton Cox for disturbing the peace in connection with a civil rights march he led in Louisiana. He had urged the marchers to demand service

[24]337 U.S. at 4.

[25]There was a difference of opinion among the Justices as to what "facts" were revealed by the record. 340 U.S. at 321-29 (Black, J., dissenting).

[26]*Id.* at 323.

[27]379 U.S. 536 (1965).

at segregated lunch counters. This exhortation was deemed inflammatory by the local sheriff, who attempted thereafter to break up the demonstration. The trial judge stated that bringing 1,500 Negroes into the business district of Baton Rouge and urging them " 'to descend upon our lunch counters and sit there until they are served' "[28] was an inherent breach of the peace. The Supreme Court, however, found that the evidence showed only that the opinions and ideas peacefully expressed were sufficiently opposed to those of the majority of the community to attract a crowd and necessitate police protection. Quoting an earlier decision, the Court said, " '[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.' "[29] The decision in *Cox* is difficult to reconcile with *Feiner* despite the Court's assertion that "this situation . . . is 'a far cry from the situation in *Feiner* . . . .' "[30] In a racially charged situation, Feiner had made unpopular remarks about the need for Negroes to take action to obtain equal rights, and his conviction for breaching the peace was affirmed. Cox's remarks were made in a much more explosive situation, but the Court overturned his conviction and expressly recognized his right to police protection while expressing his views in a hostile community.[31]

A recent case touching on the "fighting words" doctrine is *Street* v. *New York*.[32] Street was convicted of violating the New York flag—desecration statute after he had burned an American flag to protest the shooting of James Meredith. Street had said at the time, "If they did that to Meredith, we don't need an American flag" and "We don't need no damn flag."[33] The Supreme Court rejected the state's contention that these statements constituted "fighting words." The Court said:

> Nor could such a conviction be justified on the . . . ground mentioned above: the possible tendency of appellant's words to provoke violent retaliation. Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are

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[28] *Id.* at 550.

[29] 379 U.S. at 551, *quoting* Watson v. Memphis, 373 U.S. 526, 535 (1963).

[30] 379 U.S. at 551, *quoting* Edwards v. South Carolina, 372 U.S. 229, 236 (1963).

[31] *Accord,* Edwards v. South Carolina, 372 U.S. 229 (1963).

[32] 394 U.S. 576 (1969).

[33] *Id.* at 579.

likely to provoke the average person to retaliation, and thereby cause a breach of the peace.[34]

In *Chaplinsky* the Court suggested three possible reasons for holding Chaplinsky's words to be outside the protection of the first amendment: (1) they "inflict injury," (2) they "tend to create a breach of the peace," and (3) they "are no essential part of the exposition of ideas."[35] In judging *Cohen* by these standards, it is apparent that only the second could possibly apply. The Court correctly noted that Cohen's message was not directed at anyone; it clearly was not personal abuse hurled at a particular individual. Thus it is impossible to maintain that anyone could be "injured" by Cohen's message in the manner in which one is injured when subjected to personal abuse of such nature as to be akin to a physical assault. Furthermore, the words Cohen used were clearly an "essential part of the exposition of ideas"; there was no exposition of ideas apart from the display of words on Cohen's jacket. While it is clear that Cohen could have utilized a less offensive phrase to convey his message, it is also clear that the words succinctly expressed the idea Cohen sought to convey. The Court noted that "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[36]

To allow the suppression of speech because it may tend to create a breach of the peace is to open the door to censorship of unpopular views by those ready and willing to create a disturbance to silence speakers with whom they disagree.[37] The Court came perilously close to this in *Feiner* but since that holding has consistently held that constitutional rights may not be denied simply because of hostility to their exercise.[38] In *Cohen* there was no evidence that anyone had even threatened a

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[34]*Id.* at 592, *quoting* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

[35]315 U.S. at 571-72. *See* Lowey, *Punishing Flag Desecrators: The Ultimate In Flag Desecration*, 49 N.C.L. REV. 48, 82 (1970), for a discussion of whether flag desecration can constitute "fighting words" for any of these three reasons.

[36]403 U.S. at 26.

[37]This fear is expressed by Mr. Justice Black in Feiner v. New York, 340 U.S. 315, 321 (1951) (dissenting opinion).

[38]*See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965). For a discussion of the need for tolerance of unpopular views, see Pollitt, *Free Speech For Mustangs and Mavericks*, 46 N.C.L. REV. 39 (1967).

disturbance. In reversing the conviction, the Court reiterated that " 'an undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression.' "[39]

What then distinguishes "fighting words" from ordinary words? Fighting words "inflict injury" and "tend to create a breach of the peace." Clearly, the Court in *Chaplinsky* had reference to terms so strongly abusive as to be analogous to a physical assault. In *Cohen* no epithets were employed, and the message was not directed at any particular individual. Thus the message lacked the highly personal nature which characterized the insult in *Chaplinsky*. The highly personal nature of the insult, the degree of abusiveness in the insult, and the immediacy of the probable retaliation distinguish fighting words from other words. It is impossible to list the words which might constitute fighting words when hurled as an insult; they vary with the times and with the local customs of people. In the 1940's "Fascist" was a highly abusive term, and in the 1950's and 1960's "Communist" was often used in name-calling. The determinative factor is the manner in which the words are used. When highly abusive words are used in a manner so provocative as to virtually assure retaliation, the "fighting words" doctrine operates to exclude such expression from first amendment protection. As *Cox*, *Street*, and *Cohen* indicate, the societal interest in order must clearly outweigh the individual interest in expression to justify application of the narrow doctrine of "fighting words."

JOSEPH E. WALL

Constitutional Law—Torts—Defamation and the First Amendment: The Elements and Application of the Reckless-Disregard Test

On June 7, 1971, the United States Supreme Court handed down its latest decision concerning the conflicting interests of state libel law and the first amendment. *Rosenbloom v. Metromedia*[1] was a libel action brought by a distributor of a nudist magazine against a radio station for broadcasting defamatory news bulletins concerning his arrest for

[39]403 U.S. at 23, *quoting* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).

[1]403 U.S. 29 (1971).

selling obscene literature and his lawsuit against the city and police officials and several local news media. The eight justices who considered the case filed five separate opinions. A brief consideration of two cases leading up to this decision will help determine why the Court was so bitterly divided.

In 1964 the Supreme Court held in *New York Times v. Sullivan*[2] that the first amendment precludes recovery by a public official for a defamatory falsehood concerning his official conduct in the absence of a showing that the falsehood was made with knowledge of its falsity or with reckless disregard of whether or not it was false. Finding the case to be a proper one for review of the evidence,[3] the Court held that there was insufficient evidence to support a finding of intentional or reckless falsehood and remanded.

In *Curtis Publishing Co. v. Butts*,[4] a 1967 case, the Court considered the effect of the first amendment upon the right to recover for defamation of one who, although not a public official, is before the public eye by voluntary conduct. Mr. Justice Harlan for the plurality opined that "public figures" can recover upon a showing of highly unreasonable conduct,[5] on which point he felt the evidence sufficient. Chief Justice Warren, whose separate opinion was the lowest common denominator and thus the holding of the Court,[6] thought a finding of intentional or reckless falsehood to be required for public figures as well as public officials. However, he agreed that the evidence was sufficient to support such a finding.

Rosenbloom could have been decided on the ground that plaintiff was a public figure required under *Butts* to prove intentional or reckless falsehood. George Rosenbloom had, after all, voluntarily undertaken to become a distributor of nudist magazines. No doubt he recognized the controversial nature of the magazines. The defendant radio station indeed argued that by so doing the plaintiff had assumed the risk of public exposure and furthermore that his arrest and institution of a novel law-

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[2]376 U.S. 254 (1964).

[3]For a discussion of appellate review of constitutional fact see Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).

[4]388 U.S. 130 (1967).

[5]By "highly unreasonable conduct" Justice Harlan apparently meant gross negligence.

[6]388 U.S. at 162. Three justices held that reckless disregard is required for public figures. Justices Black and Douglas held that there can be no recovery for even intentional falsehoods. Therefore, at least five justices would not allow recovery without a showing of reckless disregard.

suit added to his status as a public figure.[7] However, the Court assumed without discussion that the plaintiff was not a public figure and thus reached the issue of the effect of the first amendment on libel actions brought by private individuals. Mr. Justice Brennan's plurality opinion stated that a private citizen cannot recover for a defamatory falsehood concerning a matter of legitimate public interest in the absence of a showing of intentional or reckless falsehood. Mr. Justice White concurred in the result but limited his opinion to cases involving the conduct of public officials, such as the action by police in arresting Mr. Rosenbloom.[8] Add Mr. Justice Black's absolutist opinion—that the first amendment bars recovery even for intentional falsehoods[9]—and the White opinion as lowest common denomenator becomes the holding of the Court.[10] Justices Harlan, Stewart, and Marshall[11] opined that a private plaintiff can recover for libel upon a showing of ordinary negligence, whether or not a matter of legitimate public interest is involved.

Mr. Justice Brennan took the position that the basis for the *New York Times* rule was protection of first amendment interests, which include not only self-governance but also all matters of legitimate public concern. "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[12] Thus, if *New York Times* is right, the argument continues, so is the position taken by the plurality. Justice Brennan further held that the reckless-disregard standard is required because self-censorship induced by the threat of a libel judgment offends the first amendment, and any standard of protection less than reckless disregard will result in self-censorship.[13] He concluded that there is a constitutional privilege to report on matters of general or public interest, and that the

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[7]Brief for Respondent at 18 n.5.

[8]403 U.S. at 57.

[9]*Id.* at 57.

[10]The White opinion is the lowest common denominator in that at least five justices extend this much protection to *defendants*. With respect to plaintiffs, the Brennan plurality opinion represents the minimum protection that at least five justices are willing to extend.

[11]Mr. Justice Harlan dissented in a separate opinion. *Id.* at 62. Mr. Justice Marshall authored a dissent in which Mr. Justice Stewart concurred. *Id.* at 78.

[12]*Id.* at 43.

[13]Whether self-censorship or exercise of ordinary care is what would result if the negligence standard urged by Justice Harlan were adopted is, of course, unknown. One might feel that there is a substantial risk of self-censorship and that it is better to err in favor of free debate.

privilege may be defeated only by a showing that the publisher acted with reckless disregard of the truth, evidence thereof being reviewable on appeal.

Justices Harlan and Marshall, contrary to Mr. Justice Brennan, held that *New York Times* was based in part upon our history of seditious libel and upon the proposition that when public officials are involved the state interest does not fully apply. In support of this latter proposition, Harlan argued that a public official has access to the media to correct false statements and that he assumes the risk of defamatory publications.[14] Thus, while public officials must prove reckless disregard to recover for libel, public figures (who also have access to the media and assume the risk) need only prove gross negligence because as to them there is no seditious libel consideration. As to private plaintiffs, the state interest fully applies, and ordinary negligence is adequate protection of the constitutional interests involved. Justices Harlan and Marshall both expressed concern that the plurality's ill-defined reckless-disregard standard and insistance upon appellate review of evidence would result in "ad hoc balancing" of the federal and state interests;[15] they forecast as consequences a lack of predictability and undue involvement of the Court in the fact-finding process. Justice Harlan's concern therefore was to discern "generally applicable rules that should balance with fair precision the competing interests at stake."[16] Justices Marshall and Harlan were also offended by the necessity under the plurality view for a judicial determination of what constitutes a matter of legitimate public interest, a determination which they felt to be beyond judicial competency.

Assuming that the plurality view does become law, a plaintiff involved in a public event may nevertheless recover for libel if: (1) the defaming statement is false, and (2) it is knowingly or recklessly uttered. The first element, falsity, is traditionally presumed.[17] There is dictum in another Supreme Court case, *Rosenblatt v. Baer*,[18] however, to support

[14]For a discussion questioning the validity of the access-to-the-media argument, see Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267. As for assumed risk, this is but a legal conclusion that a public figure cannot recover for non-reckless libel, and can in no wise be considered a reason for withholding recovery.

[15]For a discussion of "ad hoc" and "definitional balancing" with respect to the first amendment, see Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 58-80.

[16]403 U.S. at 63 (Harlan, J., dissenting).

[17]Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971).

[18]383 U.S. 75, 84 (1966).

the contention that *New York Times* has shifted the burden to the plaintiff to prove falsity. At least two federal cases have placed the burden on the plaintiff without discussion.[19] The Pennsylvania Supreme Court, on the other hand, recently held that the burden is still on the defendant.[20] The language in *Rosenblatt* was read to mean that if the defendant offers proof of truth, then the plaintiff must overcome that proof. The court reasoned that the presumption of innocence applies to the plaintiff in an action for defamation, thus raising a presumption that a defamatory statement is false, and that placing the burden on the plaintiff would put him in the difficult position of having to prove a negative.

The second essential element required to defeat the defendant's constitutional privilege is that the statement be made with knowledge that it is false or reckless disregard as to whether the statement is false. If falsity is presumed, what happens when it is shown that prior to publication the defendant was in a position to know whether his statements were true or false? For example, if the plaintiff shows that the defendant's correspondent was present when he allegedly led a crowd of people against national guardsmen in order to block integration,[21] would a presumption of falsity create a presumption of intentional falsity?[22] Apparently the answer of the Pennsylvania court is "yes." Thus when the defendant had enough personal knowledge of the plaintiff to know whether his statements about her were true or false, and when falsity was presumed without proof, the defendant was found to have acted with knowledge of falsity.[23] Such a result clearly seems contrary to *New York Times:* "Such a presumption is inconsistent with the federal rule."[24]

When the plaintiff shows that the defendant knew a statement was false, there is no constitutional problem since the first amendment does not protect intentional falsehoods.[25] However, the defendant's knowledge of falsity must exist with respect to the false impression created in the mind of his audience. If he knows that the plaintiff is being sued in civil court, but his publication creates the impression that the plaintiff

[19]Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969); Sellers v. Time Inc., 299 F. Supp. 582 (E.D. Pa. 1969).

[20]Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971).

[21]Associated Press v. Walker, 388 U.S. 130 (1967).

[22]Similarly, presumed falsity would be projected into presumed reckless-disregard.

[23]Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971).

[24]376 U.S. at 283-84.

[25]Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

is subject to criminal charges, his falsehood is intentional only if he knows that he is creating this false impression.[26] Also, knowledge must exist at the time of publication, and failure to retract after notice of falsity will not suffice.[27] Finally, the kind of knowledge required is actual and subjective; the mere fact that there is information in the defendant's files which is contrary to his publication does not constitute such knowledge.[28]

When knowing falsehood is not shown, and the plaintiff relies on reckless disregard, the problem of balancing state and federal interests arises. While the Supreme Court has formulated no comprehensive test of reckless disregard, it has provided some meaningful guidelines. It must be found that the defendant "in fact entertained serious doubts as to the truth of his publication,"[29] that is, that he acted with a "high degree of awareness" of probable falsity.[30] However, in Curtis Publishing Co. v. Butts[31] a nationally famous college football coach was falsely charged with having fixed a football game, and the finding of the requisite degree of awareness was based upon the following criteria: (1) defendant knew that the informant relied upon was on probation in connection with check violations, (2) only a football expert could competently have inferred from the notes taken by the informant upon overhearing the conversation alleged to be a fix that the game was in fact fixed, and (3) Wally Butts and his daughter protested to the defendant prior to publication that the charges were false. The Court emphasized that the defendant had embarked upon a policy of "sophisticated muckraking" to increase circulation and was not reporting "hot news."[32] If *Butts* can be reconciled with the "high degree of awareness" requirement, it can be only by consideration of the two major interests involved, the factors which affect each, and the manner in which they are balanced under the reckless-disregard standard.

The state's interest is in "compensating individuals for actual, measurable harm caused by the [wrongful] conduct of others"[33] and in deterring future wrongful conduct. The greater the harm, the greater the

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[26]Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 459 P.2d 8 (1969).
[27]New York Times v. Sullivan, 376 U.S. 254, 286-87 (1964).
[28]*Id.* at 287.
[29]St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
[30]Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
[31]388 U.S. 130 (1967).
[32]*Id.* at 157-58.
[33]403 U.S. at 66 (Harlan, J., dissenting).

state's interest. In the area of libel, the amount of harm done is generally proportional to the severity of the charges made. The constitutional interest is in promoting "a citizenry informed by a free and unfettered press"[34] with special sensitivity to seditious libel. The three factors which most strongly affect this interest are the proximity to seditious libel, the public need to be informed about a matter, and the possibility of self-censorship resulting from the threat of liability. The reckless-disregard standard should be expected to deal with each of these factors in one way or another.

Since reckless disregard is a subjective standard,[35] the relevant inquiry is what evidence is required to show it, evidence being reviewable on appeal. The plaintiff will generally try to show that facts were known to the defendant which would cause an average man to perceive that there was a substantial risk of falsity. From this the jury may infer that defendant did in fact so perceive. The greater the risk of falsity actually appreciated by the defendant, and the more severe the charges, the more likely a finding of reckless disregard. Also, as the *appreciated risk*[36] increases, the minimum required level of severity decreases until at the point where the appreciated risk approaches one hundred percent—that is, when the defendant has actual knowledge of falsity—the charges need only be severe enough to create some state interest in compensation or deterrence. Conversely, as the severity of the charges increases, the requisite *appreciated risk* decreases.[37] Thus in *Butts*, notwithstanding that

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[34]*Id.* at 78 (Marshall, J., dissenting).

[35]St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968).

[36]The *appreciated risk* is the *actual risk* to the extent that it is perceived by the defendant. The actual risk, on the other hand, is the probability of falsity given the facts known or readily knowable to the defendant. When the risk of falsity is 85% but the evidence does not warrant an inference that this risk was fully perceived by the defendant, then the appreciated risk is somewhat less than 85% (perhaps 65%, for example). But a 25% risk fully perceived constitutes a 25% appreciated risk.

[37]The approximate relationship between appreciated risk and severity (which might range from zero to one, for example) can be expressed symbolically:

$$\text{(appreciated risk) (severity of the charges} + K_1\text{) is greater than } K_1$$

The constant K_1 has a magnitude determined by our concept of how much fault is required to constitute recklessness. When the inequality holds, defendant is reckless (as distinguished from reckless disregard which, as will be shown, is cognizant of other variables.) The above expression was used rather than the simpler formulation

$$\text{(appreciated risk) (severity) is greater than } K_1$$

because it was necessary to show that when appreciated risk approaches 100%, the severity need only be large enough to create some state interest but need not be of the magnitude of K_1 . In other words, the product of appreciated risk and severity simply expresses the amount of harm likely to occur through falsity, which need not be large when we are dealing with intentional falsehood.

the evidence does not seem to support a finding of "a high degree of awareness of probable falsity"—that is, of high *appreciated risk*—the defendant was said to be *reckless*[38] owing to the fact that the charges were severe. Thus the Court was arguably correct in finding that the defendant acted with *reckless disregard*, unless factors which represent the constitutional interest were present in such a magnitude as to make the defendant's conduct *justifiable* in some sense.

Whether a defendant's conduct can be said to be *justifiable*[39] will necessarily depend upon two factors: the magnitude of the constitutional interest in his communication,[40] and the *burden* of verifying his information. Even if there is a very strong public interest in given subject matter,[41] if the defendant's information might easily and quickly be verified, then his *reckless* conduct can hardly be said to be justifiable. On the other hand, when verification would be difficult and expensive, requiring it would have the general effect of depriving the public of communication. When the public need for the information is great, then even conduct of a marginally *reckless* magnitude may be protected as *justifiable*; hence *reckless disregard* is said not to exist. Even when the public interest and burden are great, however, conduct that is of an extremely reckless nature will not be protected. As previously noted,[42] there is some doubt as to the competency of courts to determine the public interest in given subject matter. Apparently, however, the courts do weigh public interest,

[38]For the purposes of this note, "recklessness" and "reckless disregard" are treated as technical terms having different meanings. "Recklessness" considers only appreciated risk and severity, while "reckless disregard" considers these factors plus public or constitutional interest and burden of verification.

[39]"Justifiability" as used in this note is analogous to but distinct from justification concepts in negligence. In negligence, a risk created by the defendant may be justified by the social utility of his conduct if the only alternative to the risk would impose a prohibitive burden on the conduct and hence deprive the public of a valuable social utility. In such a case the defendant is not at fault. Justifiability is analogous in that when the public interest in defendant's publication is great, and the burden of verification is prohibitive, the defendant's conduct may be justifiable (resulting in no liability) notwithstanding the fact that he has acted recklessly. Justifiability is distinct from justification in that with respect to justifiability the defendant is still at fault.

[40]Where seditious libel considerations are present, the constitutional interest in protecting the defendant's communication is greatest for two reasons. Firstly, the public interest in effective self-governance is present. Secondly, there may be an additional constitutional interest involved because of the special sensitivty to seditious libel. And this latter, if present, would not be mitigated by the lack of a substantial burden of verification.

[41]Of course there is no public interest in the dissemination of false statements. When the public interest in a defendant's communication is referred to herein, what is meant is the public interest in dissemination of the statements assuming them to be true.

[42]*See* text following note 16 *supra*.

covertly or overtly, though they tend to be less influenced by it than the other factors already discussed.[43]

Thus in *Butts*, the Court emphasized that the *Saturday Evening Post* had embarked upon a policy of "sophisticated muckraking."[44] The Minnesota Supreme Court read this portion of *Butts* to mean that defendant's publication was serving its own commercial interests (to bolster circulation) rather than the public interest.[45] The Minnesota court also concluded that while *Butts* extended the reckless-disregard standard to public figures, less evidence is required to establish reckless disregard in an action by a public figure than in an action by a public official.[46] Presumably this is because the constitutional interest is greater when an action is brought by a public official because of the proximity to seditious libel. The Court in *Butts* also emphasized that the defendant's

[43]The burden of verification may have a value anywhere from zero (no burden) to infinity (verification impossible). When verification is impossible, the public interest fully applies. When there is no burden (verification might be accomplished quickly and easily), then the public interest does not apply at all because imposition of the burden will not tend to deprive the public of communication. Thus, as the burden increases from zero to infinity, the facor by which the public interest must be multiplied increases from zero to one.

$$\frac{\text{(burden)}}{\text{(burden} + K_2)} \times \text{(public interest)}$$

Since public interest is a means of finding reckless conduct justifiable by increasing the magnitude of recklessness required to establish reckless disregard, it should be added to K_1 on the right-hand side of the inequality set out in note 37 *supra*:

$$\text{(appreciated risk) (severity} + K_1) > K_1 + \left[\frac{\text{(public interest)}}{K_3} \times \frac{\text{(burden)}}{\text{(burden} + K_2)}\right]$$

Public interest is divided by K_3, a constant greater than one, to indicate that courts, feeling incompetent to determine the weight to accord the public interest in a given communication, will not consider public interest to the extent they consider other factors.

Since proximity to seditious libel is a constitutional interest not affected by burden of verification, a variable denoting the value of this interest should be added to the right-hand side of the inequality:

$$\text{(appreciated risk) (severity} + K_1) > K_1 + \left[\frac{\text{(public interest)}}{K_3} \times \frac{\text{(burden)}}{\text{(burden} + K_2)}\right] + \text{(seditious libel)}$$

[44] 388 U.S. at 158.

[45]Rose v. Koch, 278 Minn. 235, 239, 154 N.W.2d 409, 413 (1967).

[46]*Id.* at 262; 154 N.W.2d at 427-28.

publication was not "hot news."[47] The defendant in *Rosenbloom* contended in his brief that the relevance of "hot news" is that requiring verification of each item would deprive the public of the valuable service provided by publishing news as it happens.[48] Finally, the Court in *Butts* noted that elementary and easily taken precautions were open to the defendant but were ignored.[49] All this implies that there was no overwhelming constitutional or public interest which the defendant was serving, and even if there was, it was not fully applicable because the burden of verification was only slight.

Analysis to determine whether the first amendment bars a recovery for libel should determine first whether a matter of public interest (or a public official or figure) was involved and, if so, whether the statement was false (this may depend on who has the burden of proof).[50] If both of these inquires are answered affirmatively, it should then be determined whether the falsehood was intentional. If so, the first amendment privilege is defeated; if not, it must finally be determined whether defendant acted recklessly and, if so, whether his conduct was justifiable. If *unjustifiable recklessness* does appear, the first amendment will not bar recovery.

Certain general conclusions can be drawn from a reading of the cases on reckless disregard—that is, *unjustifiable recklessness*—and explained in terms of the variables discussed above. Whether or not the public interest in the defendant's communication is great. he cannot be considered *reckless* in relying on a third party in the absence of obvious reasons to doubt that person's veracity. He may rely on a news service,[51] or individuals known to have good character,[52] or one whose veracity is unknown,[53] or even on a single source representing only one side of a controversy.[54] In all such cases, it cannot be said that the defendant is taking a meaningful appreciated risk.

On the other hand, where there are obvious reasons for disbelieving statementsof a third party, then a substantial appreciated risk arises and

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[47]388 U.S. at 157.

[48]Brief for Respondent at 31-32.

[49]388 U.S. at 157.

[50]See text at note 19 *supra*.

[51]Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965).

[52]New York Times v. Sullivan, 376 U.S. 254 (1964).

[53]St. Amant v. Thompson, 390 U.S. 727 (1968).

[54]New York Times v. Connor, 365 F.2d 567 (5th Cir. 1966).

the defendant may be found to have been reckless, and justifiability again will depend on the magnitude of the constitutional interests. Thus when the defendant relies on a layman of doubtful veracity to draw inferences of serious misconduct and when it is obvious that those inferences may be competently drawn only by an expert, he has been held reckless.[55] Nor may the defendant rely on an anonymous phone call,[56] since one who will not disclose his identity is inherently unreliable. Nor may he rely on one of good reputation known to be relating hearsay from an unreliable source, when the charges made are improbable and severe.[57] Finally, when the defendant relies solely upon statements made by a prison inmate who with obvious reason to lie (his own freedom) makes severe charges (murder, witness tampering, malicious prosecution), he may be considered reckless. And even when strong constitutional interests exist (self-governance, seditious libel) and means of verification do not, if the defendant also knows that the informant's statements are completely inconsistent with known material facts, the conduct is too reckless to be justifiable.[58]

If the defendant bases an inference on facts known or believed to be true, he will be protected unless the severity and improbability of that inference are of reckless magnitude.[59] Thus the defendant is not reckless in drawing a conclusion of improper conduct from the fact that county paving equipment was seen in use in paving a county official's driveway, and he will not be liable even though he might easily have learned whether the plaintiff official had paid for the service.[60] The defendant may infer from a thorough knowledge of the plaintiff's political philosophy that the plaintiff is a fascist; from the fact that plaintiff's newspaper printed articles which the defendant believes increased the risk of race riots that the plaintiff is a race riot promoter; and from the fact that a

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[55]Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[56]St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (dictum).

[57]Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 160 N.W.2d 1 (1968).

[58]Indianapolis Newspapers, Inc. v. Fields, ___ Ind. ___, 259 N.E.2d 651 (1970), *cert. denied*, 400 U.S. 930 (1970).

[59]Since the manner in which people draw inferences is not always logical, especially if the one inferring is not sophisticated or is influenced by emotion or prejudice, it must appear not only that the inference is illogical but also that the defendant probably did not believe it himself before a meaningful appreciated risk arises on which a finding of reckless disregard can be predicated. Furthermore, there is generally a privilege under state law to express *opinion*, at least when the factual basis for the opinion also appears. Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).

[60]Tagawa v. Maui Publishing Co., 448 P.2d 337 (Hawaii 1968).

cartoon in plaintiff's newspaper depicted a judge and made reference to his Jewish ancestory that the plaintiff is a Jew-baiter.[61] Even when the drawing of the defendant's inference borders on recklessness, when he concludes from a tenuous past relationship that the plaintiff is a colleague of two United States fugitives, if the public interest is great (organized crime), and the burden of verification is difficult, if not prohibitive, the defendant will not be held to have acted with unjustifiable recklessness.[62]

However, if the facts tend to negate rather than support an inference, as when defendant concludes that a murder-suicide was the act of the "happiest mother in town," the inference can be said to be a fabrication which the defendant must have strongly suspected, if not known, to be untrue.[63] And when the defendant's lay opinion is obviously incapable of accurately inferring serious misconduct from a few facts believed to be true and expert opinion is available, the defendant's drawing of those inferences over the plaintiff's protest of falsity will not receive first amendment protection, at least in the absence of strong constitutional interests.[64]

Two lawsuits resulting from the same set of facts and the same publication yielded one United States district court[65] and two circuit court of appeals[66] opinions which are seemingly unreconcilable with the formulation discussed above. The defendant had put together an article concerning the arrest of several "Cosa Nostra big wigs." The article pictured a group of these men at a dinner with two lawyers, Ragano and Wasserman, who had been hired to defend them. Originally the two attorneys were referred to as "mouthpieces," but this reference was deleted or lost in the editing process. The result was that a reader of the article would have the impression that defendant's reference to the pictured group as "hoodlums" included the two attorneys. Ragano brought suit in the Federal District Court for the Middle District of Florida.[67] the trial judge denied the defendant's motion for summary

[61]Tait v. King Broadcasting Co., 1 Wash. App. 250, 460 P.2d 307 (1969). A possible factor in this case is that the plaintiff as a newspaper editor clearly had access to the media.

[62]Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969).

[63]Varnish v. Best Medium Publishing Co., 405 F.2d 609, 610 n.1 (2d Cir. 1968).

[64]Curis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[65]Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969).

[66]Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970).

[67]Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969).

judgment but permitted an interlocutory appeal. The Fifth Circuit affirmed.[68] Both the district and the court of appeals held that there was a genuine issue of fact as to reckless disregard. The D.C. Circuit was in accord and reversed the district court's entry of summary judgment in an action by the other attorney, Wasserman.[69] The basis for the holding was that defendant knew plaintiffs to be lawyers but nevertheless referred to them as "hoodlums." The plaintiffs appear to have little chance of showing that the article was defamatory as a result of anything more than bureaucratic negligence in editing. Perhaps the denial of summary judgment indicated nothing more than that plaintiffs should be given the chance to prove at trial that defendant's reporters realized the defamatory nature of its article. On the other hand, in light of the reviewability of constitutional fact as recognized by Judge Skelly Wright, concurring in *Wasserman*,[70] this seems unlikely. Two other possible justifications present very interesting problems in this area of the law.

One justification for *Ragano* and *Wasserman* is implicit in the statement of District Judge Krentzman:

> [f]ailure to delineate fact from opinion in such characterizations would have a *deterrent effect upon the availability of attorneys to represent persons accused of crime* and could foreseeably result in frustrating the *constitutional rights of an accused to secure services of counsel of his choice*.[71]

Hence, there is a conflict between the first amendment and the sixth amendment. If this is indeed the explanation of *Ragano*, then the implications are highly significant. The courts have not dealt so far with the conflict between fair trial and the *New York Times* doctrine, but it is a problem they will almost certainly have to face.

The second possible explanation for *Ragano* is that there is going to be some erosion of the reckless-disregard standard in certain instances in order to shift the "cost of doing business" to the news industry. Such an inroad on *New York Times* would almost certainly be concerned primarily with situations in which the harm results from faults in the operaton of bureaucracies rather than expressions of points of view. The

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[68]Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970).

[69]Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970).

[70]*Id.* at 922-23.

[71]Ragano v. Time, Inc., 302 F. Supp. 1005, 1009 (M.D. Fla. 1969) (emphasis added).

extent and limits of such a doctrine can only be matters of speculation at this time.

The reckless-disregard standard is very complex and may be difficult to apply.[72] If the Supreme Court decides many of these cases, the complexity of the application of the standard combined with the necessity for constitutional fact-finding may prove to be an unhappy burden on an already greatly overworked Court. Some commentators have suggested that the quality of the Court's work has already begun to suffer.[73] In light of these considerations, perhaps Mr. Justice Harlan's desire to formulate simple rules which can be easily and quickly applied without pulling the Court so far into the fact-finding process can be appreciated.

KENNETH S. CANNADAY

Military Law—Retroactivity of the Service-Connection Test of the Jurisdiction of Courts-Martial

Throughout the history of the United States, the relationship of the nation's military establishment to the civilian government has been a recurring problem. One facet of this relationship that has resulted in significant tension concerns the proper division of jurisdiction between the military and civilian courts. The determination of when a particular defendant is subject to military jurisdiction is difficult because of the inherent stress between constitutional guarantees in the application of military justice.[1] Several constitutional provisions[2] and a myriad of federal statutes[3] deal with the military's jurisdiction over its members. The problem is complicated because these provisions are not always consistent.[4]

The difference between the civilian and military systems of justice lies in the denial to military personnel of some of the protections of the

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[72]*See* note 43 *supra.*

[73]*See* Strong, *The Time Has Come To Talk of a Major Curtailment in the Supreme Cort's Jurisdiction*, 48 N.C.L. REV. 1 (1969), and commentators cited therein.

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[1]Relford v. Commandant, 401 U.S. 355, 362 (1971).

[2]*See, e.g.*, U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2; U.S. CONST. amend. V; U.S. CONST. amend. VI.

[3]The Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ], sets out the general scheme of military justice.

[4]For example, until 1957 precisely how the Bill of Rights applies to servicemen was uncertain. Reid v. Covert, 354 U.S. 1, 37 (1957).

Bill of Rights.[5] Although only the right to a grand jury indictment is specifically denied to servicemen by the Constitution,[6] the military trial procedure that evolved in the early years of the United States was based upon standards enacted by Congress under its article I power to make laws to regulate and control the armed forces and not upon constitutional guarantees.[7] For example, pursuant to this authority Congress formulated a system of military justice that excluded the right to trial by jury.[8] The federal courts traditionally have been hesitant to involve themselves in the developments of the system of military justice primarily because of the differences in the constitutional sources of power of the two systems.[9] Consequently, servicemen are allowed to move from the military to the civilian courts only through a petition for habeas corpus[10] and only after the exhaustion of all military remedies.[11]

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[5]*See* Weiner, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 27-36 (1958). *But see* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

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

[7]U.S. CONST. art. I, § 8. *See* Duke & Vogel, *The Constitution and the Standing Army*, 13 VAND. L. REV. 435, 445-53 (1960).

[8]UCMJ art. 22-29, 10 U.S.C. §§ 822-29 (1970).

[9]Military courts are said to draw their authority from article I rather than article III of the Constitution. Comment, *Civilian Court Review of Court-Martial Adjudications*, 69 COLUM. L. REV. 1259, 1274 (1969). The limited power of the civilian courts to review military affairs was recognized as early as 1858. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858). More recent cases have demonstrated the continuing deference of the civilian courts to the military courts. *See, e.g.*, Fowler v. Wilkinson, 353 U.S. 583, 584 (1956); Swisher v. United States, 237 F. Supp. 921, 928 (W.D. Mo. 1965) aff'd., 354 F.2d 472 (8th Cir. 1966). The UCMJ art. 76, 10 U.S.C. § 876 (1970) states that all court-martial decisions following appeal within the military process are "final and conclusive."

[10]*See* UCMJ art. 76, 10 U.S.C. § 876 (1970). The civilian courts may receive military cases only by a petition for habeas corpus. This petition must allege a failure of military jurisdiction, a defect in the composition of the court-martial, or a defect in the sentencing procedure. Wurfel, *Military Habeas Corpus II*, 49 MICH. L. REV. 699, 713 (1951). Burns v. Wilson, 346 U.S. 137, *reh. denied*, 346 U.S. 844 (1953), allows habeas corpus review of military decisions that fail to give "full and fair consideration" to the assertion of a constitutional right by the defendant. The history of the military appellate procedure demonstrates, however, that such rights are virtually always accorded the "full and fair consideration" required. Between 1953 and 1965 the federal courts did not grant a single petition for habeas corpus based on failure of "full and fair consideration" in the military system. Comment, 69 COLUM. L. REV., *supra* note 9, at 1265. However, some recent cases may portend an expansion in the scope of review on habeas corpus by civilian courts of court-martial decisions. For example, in Allen v. VanCantfort, 446 F.2d 625 (1st Cir. 1971), *noted in* 50 N.C.L. REV. 173 (1971), it was held that federal district courts must review allegations of UCMJ statutory error. For a recent interpretation of the scope of review by the civilian courts, see Everett, *Collateral Attacks on Court-Martial Convictions*, 11 JAG L. REV. 399 (1969).

[11]Everett, *supra* note 10, at 399 & 401 n.16.

It was on such a petition in *O'Callahan v. Parker*[12] that the Supreme Court rejected the military status of the defendant as the jurisdictional test of military courts and adopted in its place the "service-connection" of the crime as the proper jurisdictional test.[13] The Court indicated that unless the crime was service-connected, the defendant could be tried only in civlian courts. However, the opinion was silent as to the possible retroactive application of its principle. Following a year and a half of attempts by lower courts to put legalistic flesh on the jurisdictional skeleton of *O'Callahan*,[14] the Supreme Court in *Relford v. Commandant*[15] granted certiorari[16] to Corporal Isiah Relford's petition for habeas corpus to discuss the "scope and retroactivity of *O'Callahan*." Because it decided that Relford's crimes were service-connected, the Court sustained the military's jurisdiction to try him. More importantly, this outcome negated the necessity to consider the issue of the retroactivity of the *O'Callahan* decision.[17]

The issue of the retroactive application of *O'Callahan* is a problem of significant magnitude in both the military and civilian court systems. A retroactive application of the service-connection test would affect hundreds of thousands of servicemen and ex-servicemen tried by military courts.[18] It could disturb convictions dating from 1916[19] and affect possi-

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[12]395 U.S. 258 (1969).

[13]*Id.* at 272.

[14]*E.g.*, Flemings v. Chafee, 330 F. Supp. 193 (E.D.N.Y. 1971); Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); United States v. King, 40 C.M.R. 1030 (1969).

[15]401 U.S. 355 (1971).

[16]397 U.S. 934 (1970).

[17]401 U.S. at 369.

[18]Brief for Respondent at 28, Relford v. Commandant, 401 U.S. 355 (1971). The administrative effect of complete retroactive application of *O'Callahan* could indeed be staggering. The Judge Advocate General of the United States Army estimates that over 1,300,000 men have been court-martialed in the Army alone since 1951 and that as many as one third of those convictions could be overturned. *Id.* Another estimate sets the number at over 4,000,000 courts-martial in the Army alone since 1917. Thompson v. Parker, 308 F. Supp. 904, 908 (M.D. Pa. 1970). One court observed that the Army, Navy, and Air Force conducted approximately 74,000 courts-martial in fiscal 1968. Mercer v. Dillon, 19 U.S.C.M.A. 264, 268, 41 C.M.R. 264, 268 (1970). The problem would be complicated by staleness of the record in many instances and the impossibility of gathering witnesses and evidence for de novo trials. Brief for Respondent at 29, Relford v. Commandant, 401 U.S. 355 (1971). *See* Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 44 (1969). These problems militate against a retroactive application of *O'Callahan* and persuaded the Court of Military Appeals in *Mercer* and two district courts, *see* note 23 *infra.*, to apply *O'Callahan* prospectively only.

[19]In 1916 Congress passed the Articles of War, which extended military jurisdiction to non-capital civilian crimes committed in peacetime by servicemen. Duke & Vogel, *supra* note 7, at 451.

bly as many as 450,000 petitions for restoration of rank, pay, or benefits and as many as four thousand petitions for release from federal custody.[20]

Although *Relford* failed to solve the dilemma as to whether the service-connection test is to be applied retroactively, the opinion appeared to invite another case in which retroactivity would be "solely dispositive."[21] However, while the Supreme Court awaits another case to work its way through the military system, lower courts are faced with immediate demands for retroactive application of *O'Callahan*.

The Court of Military Appeals, in *Mercer v. Dillon*,[22] held that *O'Callahan* would not apply to cases finalized before June 21, 1969, the date of the *O'Callahan* decision.[23] The *Mercer* court refused to apply *O'Callahan* retroactively for two reasons. First, it stated that *O'Callahan* was not a jurisdictional decision at all but instead was concerned only with the denial of the procedural due process rights to a jury trial and a grand jury indictment.[24] The court's second ground was that *O'Callahan* did not rule on the *existence* of subject matter jurisdiction of the military courts but rather limited the *exercise* of that jurisdiction to crimes that are service-connected.[25]

The principle reason advanced for denying retroactive effect to *O'Callahan* was that *O'Callahan* was concerned primarily with the denial of the defendant's procedural guarantees and not with the jurisdiction of a military court to try him. It was argued that the contention that *O'Callahan* was grounded in jurisdiction is "merely playing with words, and ignores both the rationale . . . and the realistic issue in the case."[26] Thus the issue was said to be simply whether a new trial should be given to those already tried. Under this argument the retroactivity issue would be decided according to the criteria laid down by the Supreme Court when ruling on the retroactive effect of decisions which granted procedural due process rights. Thus, the measure of "reliance

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[20]Brief for Respondent at 28, Relford v. Commandant, 401 U.S. 355 (1971).

[21]401 U.S. at 370.

[22]19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

[23]Two district courts have ruled that *O'Callahan* would be applied only prospectively. *See* Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa. 1970); Gosa v. Mayden, 305 F. Supp. 1186 (N.D. Fla. 1969). One court of appeals distinguished *O'Callahan* on its facts and on the authority of *Relford* did not reach the retroactivity issue. Hemphill v. Moseley, 443 F.2d 322 (10th Cir. 1971).

[24]19 U.S.C.M.A. at 264-68, 41 C.M.R. at 264-68.

[25]*Id.*

[26]Brief for Respondent at 31, Relford v. Commandant, 401 U.S. 355 (1971).

by law enforcement authorities on the old standards and the effect on the administration of justice that the new standards"[27] would likely have led the *Mercer* court to deny retroactive effect to *O'Callahan.*

Evidently the *Mercer* court felt that in *O'Callahan* the Supreme Court did not mean "jurisdiction" when it said "jurisdiction."[28] The *Mercer* court stated that the *O'Callahan* Court had been concerned with the "individual's particular rights in a trial rather than the power of the court-martial to judge him."[29] To assess the validity of this argument it is necessary to consider the nature and extent of military jurisdiction.

The military courts are largely creatures of statute. Thus, they exercise only the limited jurisdiction granted by Congress pursuant to its article I power[30] to establish rules for military courts.[31] Prior to the decision in *O'Callahan*, it was clear that the military had jurisdiction to try any criminal case in which a serviceman was the defendant.[32] Moreover, the Supreme Court had not overruled the military court's exercise of jurisdiction in this area. However, the *O'Callahan* decision held that the military courts had not been granted the power to exercise jurisdiction over servicemen for crimes not "service-connected." Much of the *O'Callahan* opinion was devoted to a justification in terms of due process of its holding, and thus it is not clear from the opinion that the Court relied solely upon jurisdictional doctrine. O'Callahan asserted his right to a civilian trial not because the *military court* failed to try him by an impartial jury but because in this instance the military had no jurisdiction to try him at all.[33] Thus, while it may be true that the lack

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[27]Mercer v. Dillon, 19 U.S.C.M.A. 264, 266, 41 C.M.R. 264, 266. These tests are laid out in Stovall v. Denno, 388 U.S. 293, 297 (1967). *See also* DeStefano v. Woods, 392 U.S. 631 (1968). For the Supreme Court's rationale against retroactive application, *see* Linkletter v. Walker, 381 U.S. 618, 628-29 (1965).

[28]In at least one instance the Court has said "jurisdiction" when it did not mean "jurisdiction." *See* Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 561 (1968). In *Avco* the Court declared that its statement in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962) that a complaint was being dismissed "for lack of jurisdiction under the Norris-LaGuardia Act" had really been intended to mean "only that the Federal District Court lacked the general equity *power* to grant the particular relief." 390 U.S. at 561 (emphasis added).

[29]19 U.S.C.M.A. at 272, 41 C.M.R. at 272 (Ferguson, J., dissenting).

[30]*See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 12, at 34 (2d ed. 1970) [hereinafter cited as WRIGHT].

[31]*See, e.g.*, Fowler v. Wilkinson, 353 U.S. 583, 584 (1956); Swisher v. United States, 237 F. Supp. 921, 928 (W.D. Mo. 1965) *aff'd*, 354 F.2d 472 (8th Cir. 1966).

[32]W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 38-40 (1955).

[33]395 U.S. at 272.

of procedural guarantees precipitated O'Callahan's claim, it was the question of a lack of military jurisdiction that afforded the Court the opportunity to grant relief. It therefore seems that the *O'Callahan* decision turned primarily on whether the defendant was subject to military jurisdiction. That question being resolved negatively, it incidentally followed that he was to be accorded the procedural guarantees of the Constitution. Arguably, then, the criteria for determining the retroactivity of decisions according procedural rights should not apply to the *O'Callahan* situation.

The *Mercer* court's second ground for denying retroactive effect to *O'Callahan* was that "*O'Callahan* did not rule on the existence of subject matter jurisdiction, [but rather] limited the exercise of such jurisdiction . . . ."[34] The *Mercer* majority found authority for this view in an earlier decision by the Air Force Court of Military Review.[35] That decision held that the military does have jurisdiction to try military members for criminal misconduct sanctioned by the Uniform Code of Military Justice and that *O'Callahan* "merely withholds the exercise of jurisdiction"[36] over offenses that are not service-connected. However, after expressing this view of *O'Callahan*, the Court of Military Review grounded its decision in the same procedural and administrative considerations applied by the Supreme Court in its procedural due process decisions.[37]

O'Callahan neither suggested a difference between jurisdiction and the exercise of jurisdiction nor spoke in terms of abstention by military courts. If *O'Callahan* merely ordered the military courts to abstain from exercising jurisdiction, by analogy to the present general rule respecting abstention by federal courts to permit decision by state courts, the military courts would be able to reassume and exercise their jurisdiction if the non-military courts failed to act or acted outside the limits of the Constitution.[38] However the language of *O'Callahan* clearly forbids *any* exercise of military jurisdiction over non-service-connected crimes. The Court laid down a mandate in terms of jurisdiction but justified and

[34]19 U.S.C.M.A. at 265, 41 C.M.R. at 265. *See also* United States v. King, 40 C.M.R. 1030, 1035 (1969).

[35]United States v. King, 40 C.M.R. 1030 (1969).

[36]*Id.* at 1035.

[37]*Id.* at 1034-35.

[38]WRIGHT, § 52, at 198 & n.20. There are limited instances in which the federal courts have been ordered to abstain completely and forfeit all original jurisdiction to state courts. *Id.* at 199.

explained it in terms of procedural due process quarantees. This has opened the possibility for the lower courts to latch onto one or the other of these theories to determine the retroactivity issue. The legal and verbal gymnastics of the *Mercer* court and the Air Force Board of Review evidence concern in military circles regarding the overwhelming deluge of collateral attacks against convictions that will result if *O'Callahan* is applied retroactively.

The specific wording of the *O'Callahan* opinion adds some credence to the belief that the decision was not jurisdictional and therefore should be denied retroactive effect. The *O'Callahan* Court appeared to suggest that the military system of justice is in need of procedural reform because it is "singularly inept in dealing with the nice subtleties of constitutional law."[39] By focusing upon the procedural deficiencies "lurking in military trials"[40] instead of upon the military's lack of jurisdiction to try O'Callahan, the Court did not unmistakably ground its decision in jurisdiction.

There is some authority for the proposition that *O'Callahan* should be applied retroactively. The dissent in *Mercer* felt that "[w]here jurisdiction is lacking there can be no question of prospective or retrospective application, for where a court-martial proceeds without jurisdiction, its action is null and void."[41] The *Mercer* dissent concluded that the court should be "concerned not with an individual's particular rights in a trial, but the power of the court-martial to judge him. *O'Callahan* . . . teaches clearly that such power is lacking . . . ."[42] A New York federal district court in *Flemings v. Chafee*,[43] arguing from the same viewpoint, added that it would observe the "traditional rule" and allow retroactive effect unless specifically told not to do so by the Supreme Court.[44]

Both *Flemings*[45] and the *Mercer* dissent[46] expressed the belief that the retroactivity issue was mooted by a prior determination of a lack of jurisdiction. This view has been concurred in by the author of the Military Justice Act of 1968, Senator Sam J. Ervin. Senator Ervin feels that

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[39]395 U.S. at 265.

[40]*Id.*

[41]19 U.S.C.M.A. at 271, 41 C.M.R. at 271 (Ferguson, J., dissenting).

[42]*Id.* at 273, C.M.R. at 273.

[43]330 F. Supp. 193 (E.D.N.Y. 1971).

[44]*Id.* at 197.

[45]*Id.* at 199.

[46]19 U.S.C.M.A. at 272, 41 C.M.R. at 272.

the effect of *O'Callahan* was to decide that the military never had the power to try a soldier's non-military crimes and that such convictions are invalid.[47]

When the dust of the battle of semantics settles, the ultimate decision to be made is whether the tremendous administrative burdens that would be caused by retroactive application will outweigh the traditional requirement that before the defendant can be legally convicted the court must be one of competent jurisdiction.[48] The retroactivity question arose because of the ambiguities of the *O'Callahan* opinion. The question was left unanswered by the Supreme Court in *Relford*. The lower courts are already in conflict on the question, and it will not be definitively answered until the Supreme Court decides the retroactivity of *O'Callahan*.[49] It is vital that the Court do so and restore the certainty of jurisdiction that is essential to all criminal justice.

LEE AUSTIN PATTERSON II

Torts—Negligence—The Substitute Birth Control Pill

By the turn of the 19th century Thomas Malthus and his disciples were predicting dire consequences for a world rapidly proving too small for its fertile population.[1] These fears are ardently espoused in the 20th century as well by zero population societies urgently crying, "make love not babies—ban the population bomb."[2] With the advent of sophisticated and successful birth control techniques the ills of overpopulation might someday be realistically avoided. Meanwhile, social mores are undergoing change and the law is being challenged to keep pace by reexamining traditional concepts in light of these changes. One such concept is the benefits-of-the-healthy-child rule, which proclaims that the event of childbirth and the happiness of rearing a child always outweigh the financial liability.[3] Recently a Michigan Court of Appeals took issue with this concept.

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[47]*See* Note, *Denial of Military Jurisdiction Over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts*, 64 NW. U.L. REV. 930, 938 (1970).

[48]WRIGHT § 53, at 211.

[49]*See* 401 U.S. at 370.

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[1]R. HEILBRONER, THE WORLDLY PHILOSOPHERS 58-84 (2d rev. ed. 1963).

[2]Friedrich, *Population Explosion: Is Man Really Doomed?*, TIME, Sept. 13, 1971, at 58-59.

[3]46 N.C.L. REV. 948, 949 (1968).

In *Troppi v. Scarf*[4] the defendant pharmacist negligently supplied a tranquilizer, Nardil, instead of the oral contraceptive, Norinyl, called for by prescription. As a result, Mrs. Troppi gave birth to her eighth child. A negligence action to recover the mother's lost wages, medical expenses, pain and suffering, and the cost of rearing another child was dismissed at the trial level for failure to state a cause of action for which relief could be granted. In short, the benefits of an unplanned, healthy child precluded any recovery whatsoever as a matter of law. On appeal, recognizing the highly controversial nature of contraception and childbirth, the court concentrated on the extent to which the defendant might be civilly liable for the consequences of his negligence.[5] The court decided to adopt a flexible benefits rule, one operating on a case-by-case basis that would allow the trier of fact to balance the benefits of a healthy child against all elements of damage, with special consideration for the plaintiff's particular circumstances.[6]

Since chemical birth control is relatively new, it is not surprising that *Troppi* is the first reported decision by a court of review that involves consideration of the ticklish issues in this area. However, similar situations have arisen in the field of sterilization. The first sterilization case, *Christensen v. Thornby*,[7] was brought on grounds of deceit. The court ignored the obvious sterilization purpose of the vasectomy and focused on the plaintiff's stated intention of protecting his wife's health. Since a normal delivery occurred, the court reasoned that without impairment of the wife's health there would be no recovery.[8] Similarly, a Pennsylvania decision, *Shaheen v. Knight*,[9] was an action for breach of contract based on a written guarantee of sterility by vasectomy which failed. The plaintiff sued for the additional expenses of rearing his fifth child, who was conceived after the operation. The court decreed a classic statement of the rigid benefits rule that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."[10]

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[4]31 Mich. App. 240, 187 N.W.2d 511 (1971).

[5]*Id.* at ____, 187 N.W.2d at 513.

[6]*Id.* at ____, 187 N.W.2d at 518-19.

[7]192 Minn. 123, 255 N.W. 620 (1934).

[8]*Id.* at 126, 255 N.W. at 622.

[9]11 Pa. D. & C.2d 41 (Lycoming County C.P. 1957).

[10]*Id.* at 45. For an excellent discussion of the sterilization cases which favors recovery based on medical malpractice and the punitive nature of torts see Note, *Sterilization and Family Planning: The Physician's Civil Liability*, 56 GEO. L.J. 976 (1968).

Significantly, in 1967 a California court reviewed the history of sterilization cases in a landmark decision, *Custodio v. Bauer*,[11] and concluded that even if a normal baby were born, the plaintiffs were entitled to more than nominal damages if the physician negligently performed the sterilization.[12] In yet another negligent sterilization case, *Coleman v. Garrison*,[13] a Delaware court extended this reasoning to allow the jury to weigh the benefits against the economic burden, including the expenses of rearing and educating the unwanted child.[14]

These latter two cases concentrated on the legalistic concept of a negligent tortfeasor who has, at least monetarily, injured the plaintiffs. This element of negligence is also the basis for the *Troppi* decision. Unlike the earlier sterilization cases, *Troppi* was not founded upon breach of warranty or deceit. There was no allegation that the birth control pills were defective, the products liability situation;[15] nor was this the case of the pharmacist who plays "God," doling out or withholding contraceptives at his capricious whim. Nor was the concept of wrongful life—the illegitimate or retarded child asserting as a cause of action that he should not have been born—applicable here.[16] The plaintiffs in the guaranteed-sterilization cases consider the mere birth of a child a breach of contract. Mr. and Mrs. Troppi were seeking compensation not for the birth of a healthy baby but for the tangible monetary expenses incurred as a result of the birth. The child was not merely unwanted or unplanned in the sense that it was, as millions of children were, conceived without due deliberation by the prospective parents; here the parents deliberately planned *not* to have any more children.

In every negligence action certain elements must be proven, and the *Troppi* fact situation provided no exception. First, the plaintiff must establish a certain duty, or standard of care, owed him by the defendant.[17] Because of the responsible role of the pharmacist in society and the great potential for harm inherent in drugs, a high standard of care has been legally established:

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[11]251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

[12]251 Cal. App. 2d at ____, 59 Cal. Rptr. at 477.

[13]281 A.2d 616 (Del. Super. Ct. 1971).

[14]*Id.* at 618.

[15]31 Mich. App. at ____ n.1, 187 N.W.2d at 513 n.1.

[16]For a discussion of the wrongful life doctrine and its limited bearing on the sterilization cases see Note, *Damages—The Not So Blessed "Blessed Event,"* 46 N.C.L. REV. 948, 953-56 (1968).

[17]W. PROSSER, LAW OF TORTS § 30, at 143 (4th ed. 1971) [hereinafter cited as PROSSER].

> In a business so hazardous, having to do so directly and frequently with the health and lives of so great a number of people, the highest degree of care and prudence for the safety of those dealing with such dealer is required.[18]

Next, the plaintiff has to show a specific act of negligence by the defendant or his agent.[19] In *Troppi* the pharmacist, when receiving the doctor's instructions by telephone, wrote the wrong drug name into the prescription and gave Mrs. Troppi tranquilizers instead of birth control pills.[20] When complex chemical compounds are identified by brand names or shortened root words, the competent pharmacist should repeat the prescription to the physician to avoid unprofessional errors.[21]

Third, the plaintiff must show cause-in-fact, that but for the pharmacist's mistake the injury would not have occurred.[22] The court in *Troppi* assumed that the defendant's negligence was a cause in fact in order to consider the trial court's dismissal of the complaint.[23] To complete the proof of negligence proximate cause must also be shown,[24] but the probability of preganancy following the substitution of tranquilizers for birth control pills easily satisfied the foreseeability requirement.[25]

In order to recover damages in a negligence action, the plaintiff must show some injury to person or property.[26] The award of damages for a healthy baby born by normal delivery is clearly the significant issue in *Troppi*. Laying aside temporarily the intangible benefits of parent-

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[18]Smith's Adm'x v. Middleton, 112 Ky. 588, 594-95, 66 S.W. 388, 389 (1902). *See also* 28 C.J.S. *Druggists* § 6 (1941). In North Carolina the pharmacist is held to the same meticulous standard of care. *See* Spry v. Kiser, 179 N.C. 417, 422, 102 S.E. 708, 710-11 (1920).

[19]PROSSER § 30, at 143 & § 56, at 338-39.

[20]The Raleigh News and Observer, Nov. 15, 1971, at 25, col. 1.

[21]For example, in *Troppi* the birth control pill "Norinyl" is norethindrone mestranol, and the similar sounding tranquilizer "Nardil" is phenelzine. MEDICAL ECONOMICS, INC., PHYSICIANS' DESK REFERENCE 1138, 1202 (1968).

[22]PROSSER § 41, at 236.

[23]31 Mich. App. at ____, 187 N.W.2d at 513.

[24]PROSSER § 42, at 244.

[25]The cause-in-fact and proximate cause issues are much more complex if the woman has been taking birth control pills for some time and only one substitute pill or pills for one menstrual cycle were negligently supplied. The evidence must show at what exact point in the woman's menstrual period the pills were taken. Also, if the woman knows or should know how her pills look and the substituted drug is radically different in appearance, the issue of contributory negligence may be raised. A brief illuminating discussion of how birth control pills work and of the difficult issues of proof can be found in Sheppard, *Negligent Interference With Birth Control Practices*, 11 S. TEX. L.J. 229, 252-54 (1969).

[26]PROSSER § 30, at 143.

hood, one can assess the plaintiff's precise measurable damages—the medical and hospital bills and mother's loss of wages. Pain and suffering, although not as easy to evaluate accurately, are a commonplace element of damages for the trier of fact.[27] The economic costs of rearing an eighth child are measurable much the same as child support in a divorce action.[28]

Replying to this assessment of damages, the defendant cited *Restatement of Torts* section 920:

> Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable.[29]

The defendant contends that under section 920 and the benefits rule, whenever a healthy child is born the joys, blessings, companionship, and love of rearing the child always outweigh any possible recovery as a matter of law. The basic flaw in this argument was pointed out by a Florida court which held in *Jackson v. Anderson*[30] that normal birth mitigates damages and does not vitiate liability. Therefore, the negligent defendant may still be liable for damages if in the particular case the benefits of the unwanted child are not greater than the expenses of rearing him. Under the more flexible benefits rule adopted in the *Troppi* decision, the trier of fact must have the power to decide each case in light of such factors as family size, fixed income, marital status, parental age and health, and so on.[31] Of course, the task of balancing the intangible

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[27]31 Mich. App. at ___, 187 N.W.2d at 513. Since childbirth is such a frequent occurrence, the pain and suffering of pregnancy and giving birth are reasonably within the common experience of many women. In the United States, 24.5 women per 1,000 die during childbirth, a further indication of the expectant mother's anxiety during pregnancy. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 55 (92d ed.).

[28]An example of this computation of the cost of a child is Williams v. Williams, 261 N.C. 48, 56-59, 134 S.E.2d 227, 233-35 (1964).

[29]RESTATEMENT OF TORTS § 920 (1939). One legal writer, citing the equitable nature of this section and the differences between the injury and the nature of the benefit (e.g., balancing the loss of the wife's services against the benefits of parenthood), describes section 920 as particularly inappropriate. Sheppard, *supra* note 25, at 238-42.

[30]230 So. 2d 503 (Fla. Dist. Ct. App. 1970).

[31]31 Mich. App. at ___, 187 N.W.2d at 518-19. The court distinguishes the situation of the unmarried coed, to whom the unwanted child would be a burden and a financial millstone, from that of the couple who only wanted to delay conception for an extended honeymoon. A pharamcist's negligence may cost the struggling coed an education and a career. The argument that every plaintiff

blessings of a child against the expenses of rearing him seems difficult and uncertain, but in wrongful death cases juries are normally called upon to do just that.[32]

Perhaps the most appealing argument in the defendant-pharmacist's favor is that, no matter how negligent he was, to force the defendant to pay damages while the parents enjoy the happiness and blessings of rearing a healthy child is against public policy. One legal writer has concluded that to allow recovery for a normal birth would be ethically repugnant to the family unit system and would later prove emotionally traumatic to the unwanted child.[33]

A classic statement by the Pennsylvania Supreme Court clearly set out the limitations of the judicial power to formulate public policy:

> The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.[34]

Contraception, sterilization, and the population explosion are volatile issues with religious and moralistic arguments on both sides. Such controversial issues do not lend themselves to sweeping pronouncements of public policy or "unanimity of opinion."

On the other hand, couples seeking to limit the size of their family have laudable aims; for instance, the husband's income may only be adequate to reasonably support, clothe, feed, and house a certain num-

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should put up the unwanted child for adoption ignores the bonds of affection and obligation formed by childbirth and asks the court to foster a rule which would separate the child from its natural parents.

[32]Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946).

[33]9 UTAH L. REV. 808, 815 (1965). *But see* Sheppard, *supra* note 25, at 244-46. The emotional trauma suffered by a child who discovers that he was once involved in a lawsuit to lessen his economic burden is certainly less than that experienced by the child whose parents put him up for adoption. Every parent who has used birth control pills or has been sterilized or has had an abortion has not wanted children for some reason. The alternative of no recovery whatsoever could only increase, not lessen, the child's "unwantedness."

[34]Mamlin v. Genoe, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941).

ber of children.[35] The couple may have allotted funds for their children's higher education. The new unwanted addition requires a reallottment of family resources to the detriment of the other children. Also, a great disparity in ages between the new arrial and his closest sibling can disrupt the family's life style. The California court in *Custodio v. Bauer*[36] noted that the mother must now "spread her society, comfort, care, protection and support over a larger group"[37] and that recovery is not so much for the unwanted child but "to replenish the family exchequer."[38] Any recovery will inure to the benefit of the family and thus offset the burdens of the unwanted child.

Moreover, the Michigan court in *Troppi* cited state statutes promoting the use of family planning services[39] and concluded that "[w]here the State's advocacy of family planning is so vigorous as to include payments for contraceptives as part of the welfare program, public policy cannot be said to disfavor contraception."[40] Also, the Department of Health, Education, and Welfare has vigorously advocated family planning in several publications.[41] The United States Supreme Court has held that the practice of contraception falls within the constitutionally protected "zone of privacy" inherent in the marital relationship.[42] Today when 8.5 million women use birth control pills specifically to avoid conception,[43] the overriding benefits of parenthood claimed by defendant seem exaggerated. Also, defendant's position overlooks the punitive nature of torts. Theoretically at least, allowing the suit would encourage pharmacists to exercise a greater degree of care.

Therefore, the *Troppi* decision contributes laudably to the merger of judicial and social standards. The defendant by his own act of negligence created a situation, wholly within the foreseeable realm of conse-

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[35]In North Carolina the father has a legal obligation to give his child the advantages as well as the necessities of life commensurate with his financial circumstances and position. Williams v. Williams, 261 N.C. 48, 57, 134 S.E.2d 227, 234 (1964).

[36]251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). *See* text accompanying notes 8-9 *supra*.

[37]*Id.* at ____, 59 Cal. Rptr. at 476.

[38]*Id.* at ____, 59 Cal. Rptr.at 477.

[39]MICH. COMP. LAWS ANN. § 14.7[1] (1969) concerns a family planning service for "medically indigent" women; MICH. COMP. LAWS ANN. § 16.414[2] (Supp. 1971) authorizes the provision of contraceptives for the indigent through the state Department of Social Welfare.

[40]31 Mich. App. at ____, 187 N.W.2d at 517.

[41]*See, e.g.*, HEW, FAMILY PLANNING: ONE LOCAL PUBLIC WELFARE AGENCY'S APPROACH (1966); HEW, REPORT ON FAMILY PLANNING (1966).

[42]Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[43]POPULATION BULLETIN, Dec., 1970, at 21-22.

quences, whereby the plaintiff's financial resources were decreased and his costs of living were increased. Other lesser courts have moved in the same direction. For instance, on very similar facts when dehydrating pills were negligently substituted for birth control pills, a Washington superior court allowed the jury to consider the mother's medical expenses and the aggravation of a pre-existing varicose veins condition.[44] However, the court refused to consider the pain and suffering of a normal pregnancy as compensable. Also, a recent decision in Los Angeles County Superior Court concerning the substitution of sleeping pills for birth control pills by the negligent pharmacist resulted in a 42,000 dollar recovery for the parents.[45]

As the number of women who use chemical contraceptives increases, more courts will be faced with reconsidering the strict benefits rule. The flexible rule of *Troppi*—allowing the jury to weigh all of the claimed benefits against the economic burdens of an unwanted child in each case—is the better reasoned approach in reconciling traditional concepts of tort liability and the changing ethos of the American family. Decisions like *Troppi* provide the courts with an opportunity to narrow the gap between dated judicial standards and modern sociological trends.

THOMAS JOSEPH FARRIS

Torts—Product Liability—Circumstantial Evidence and Proof of Defect

Since the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*,[1] the doctrine of strict liability in tort as a protection for consumers injured by a defective product has met with wide acceptance.[2] The courts have re-examined their traditional rationale for product liability and have decided that the consumer is entitled to maximum protection at the expense of those who market the products.[3] Relying on this premise,

[44]Coloff v. Hi Ho Shopping Center, No. 168070 (Wash. Super. Ct. Pierce County), *cited in* Custodio v. Bauer, 251 Cal. App. 2d 303, ____ n.____, 59 Cal. Rptr. 463, 471 n.10 (1967).

[45]The Charlotte Observer, Nov. 26, 1971, § A, at 1, col. 1.

[1]32 N.J. 358, 161 A.2d 69 (1960).

[2]Bachner v. Pearson, 479 P.2d 319, 325 (Alas. 1970). In W. PROSSER, LAW OF TORTS § 98, at 657-58 (4th ed. 1971) [hereinafter cited as PROSSER], Dean Prosser states that two-thirds of the courts in the United States have accepted the doctrine of strict products liability.

[3]RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* at 350 (1964).

many courts have abandoned a negligence analysis and have imposed liability without fault on those who place a defective product in the hands of a consumer who is injured because of the defect.[4]

The doctrine of strict liability for a seller of a defective product is set out in *Restatement (Second) of Torts* section 402A[5] as follows:

> (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the consumer without substantial change in the condition in which it is sold.
>
> (2) This rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

Pennsylvania has adopted section 402A,[6] and in a recent case, *McCann v. Atlas Supply Co.*,[7] a United States District Court sitting in that state imposed strict liability upon a distributor of automobile tires. In anticipation of a vacation trip, the plaintiff had purchased two new tires from the defendant distributor and at the time of the accident had driven on them less than two thousand miles.[8] The plaintiff was pulling a trailer at a speed of fifty to fifty-five miles per hour when he heard a hissing sound like "air escaping." The car fishtailed, the trailer jacknifed, and the car overturned. The plaintiff jumped from his car and noticed that the left rear tire of the automobile was badly mutilated and was smoking. Shortly thereafter the tire burst into flames; the fire destroyed the tire and, after spreading, severely damaged the car and its contents.[9] At the trial the plaintiff testified that before the fire had started, he had heard a hissing sound from butane storage tanks on the trailer and had immediately turned them off.[10] He did not believe that

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[4]Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967).

[5]RESTATEMENT (SECOND) OF TORTS § 402A (1964).

[6]Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

[7]325 F. Supp. 701 (W.D. Pa. 1971).

[8]*Id.* at 702.

[9]*Id.* at 702-03.

[10]*Id.* at 703.

enough gas had escaped to cause the fire. The testimony disclosed nothing unusual that might have caused damage to the tire. The trip was on paved roads, the trailer was handled properly, and the brakes were operated in approved fashion.

The plaintiff sought recovery under section 402A, contending that the sudden loss of air from the tire was a malfunction of the product and thus evidence of a defect. Because the tire was totally destroyed, the plaintiff relied solely on circumstantial evidence to meet the proof-of-defect requirement of section 402A.

The court, sitting without a jury, found for the plaintiff. It based its decision on a number of Pennsylvania cases which had held that the occurrence of a malfunction alone may be circumstantial evidence of a defect and hence, under section 402A, sufficient to carry the case to a jury. The defendant argued that the tire could have been damaged as a result of striking objects in the road. The court admitted this possibility but stated that the plaintiff was not required to exclude every possible source of sudden deflation other than a defect in the tire itself.[11]

The plaintiff in *McCann* relied upon circumstantial evidence just as plaintiffs have usually done to prove fault in negligence cases.[12] Negligence like any other fact may be proved by circumstantial evidence.[13] In a negligence action against a manufacturer or distributor of a defective product, direct evidence of negligence will often be absent because the plaintiff lacks access to the manufacturing or inspection processes. In such a case the plaintiff must use circumstantial evidence to raise the inference of the defendant's lack of due care and to prove various ingredients of his prima facie case.[14] The plaintiff may also depend upon circumstantial evidence to prove proximate cause,[15] freedom from con-

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[11]*Id.*

[12]Ewer v. Goodyear Tire and Rubber Co., 4 Wash. App. 152, 156, 480 P.2d 260, 264 (1971); PROSSER § 39, at 212.

[13]Forrester v. Fischbach-Moore, Inc., 178 N.W.2d 258 (N.D. 1970); Consalvo v. Grosso, 35 App. Div. 2d 791, 315 N.Y.S.2d 195 (1970). PROSSER § 39, at 212 states, "Circumstantial evidence consists of one fact, or set of facts, from which the fact to be determined may reasonably be inferred. It involves . . . a process of reasoning, or inference, by which a conclusion is drawn." Examples of a plaintiff's circumstantial evidence are the physical results of an automobile collision to raise the inference that the defendant was negligent and the fact that defendant's train passed moments before a prairie fire broke out to raise the inference that defendant's train started the fire. St. Joseph's Bank & Trust Co. v. Putman, ___ Ind. App. ___, 252 N.E.2d 601 (1969); St. Louis & S.F.R.R. v. Shannon, 25 Okla. 754, 108 P.401 (1910).

[14]Consalvo v. Grosso, 35 App. Div. 2d 791, 315 N.Y.S.2d 195 (1970); Carson v. Squirrel Inn Corp., 298 F. Supp. 1040 (D.S.C. 1969).

[15]Papac v. Mays Bros. Logging Co., 1 Wash. App. 33, 459 P.2d 57 (1969).

tributory negligence,[16] and other important facts of the case.[17]

Though under section 402A a plaintiff does not have to prove negligence, he must still prove that the manufacturer, seller, or distributor placed a defective product in his hands and that he was injured by that product.[18] When direct proof is lacking,[19] the plaintiff must rely upon circumstantial evidence to prove the existence of a defect in the product.[20] During the fairly short life of strict product liability,[21] plaintiffs have established distinct patterns in their use of circumstantial evidence to prove their prima facie case of a defective product. There have emerged from the cases five distinct categories of circumstantial evidence that, used in combination with each other or in combination with direct evidence, can raise the necessary inferences required by section 402A to get the plaintiff to the jury.

The first of these types of evidence is expert opinion that the product was defective. Such an opinion may raise an inference that a product was defective despite the absence of any direct proof of a specific defect.[22] In *Elmore v. American Motors Corp.*,[23] the plaintiff introduced no direct evidence of a defective drive shaft on an American Motors automobile but relied instead on the opinion of an expert who had examined the automobile and who testified that the cause of the drive shaft's falling was "either loose fastenings or metal failure and [was not] anything the driver did or normal wear and tear."[24] The court felt that this opinion

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[16]*Id.*

[17]Moore v. State, 186 Neb. 67, 180 N.W.2d 917 (1970) (knowledge of accident); St. Louis & S.F.R.R. v. Shannon, 25 Okla. 754, 108 P. 40 (1910) (origin of fire); Franks v. J.C. Penney Co., 133 Cal. App. 2d 123, 283 P.2d 291 (1955) (length of time dangerous condition existed).

[18]Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 44, 171 N.W.2d 201, 209 (1969); Forry v. Gulf Oil Corp., 428 Pa. 334, 340, 237 A.2d 593, 597 (1968); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 840 (1966).

[19]See PROSSER § 96, at 671 (3rd ed. 1964).

[20]Bollmeier v. Ford Motor Co., ___ Ill. App. ___, 265 N.E.2d 212 (1971) (difficult to determine if damage to steering mechanism existed before accident); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (damage to car so great impossible to determine if parts defective). These cases and *McCann* illustrate a frequent problem in products liability cases. Often, the product is so damaged by the accident that direct evidence of a defect through examination of the product is impossible to produce. This is analagous to the problem of proving a manufacturer's negligence because the plaintiff rarely has access to the manufacturing process to obtain direct evidence.

[21]*Henningsen* was decided in 1960.

[22]Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Bollmeier v. Ford Motor Co., ___ Ill. App. ___, 265 N.E.2d 212 (1970).

[23]70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

[24]*Id.* at 582, 451 P.2d at 86, 75 Cal. Rptr. at 654.

was sufficient to raise the inference that a defect existed prior to the sale of the automobile to the plaintiff.[25]

The plaintiff may also raise the inference of a defect in a product by an expert's answer to a hypothetical question. In *Bollmeier v. Ford Motor Co.*[26] the court stated "it is well established that an expert, if qualified, may give an opinion based on a hypothetical question and without personal knowledge of the facts . . . and that his opinion is a matter of credibility for the jury and may be rebutted by defendant's proof."[27] It has also been held that an expert's testimony as to the existence of a defect does not have to be completely positive or unequivocal in order to support a jury finding of the defect.[28]

A second category of circumstantial evidence by which a plaintiff may prove the existence of a defect is the past history of the product. A plaintiff will frequently rely upon evidence that prior to the event in issue the product in question had shown signs of a defective condition.[29] In *Bollmeier*, the plaintiffs, in attempting to prove a defect in the steering wheel of the car, testified that from the day the car was delivered they had observed a "vibration which could be seen and felt in the steering column and the steering wheel"[30] and that they had returned the car to the dealer several times to have the irregularity corrected. The court sent the case to the jury on circumstantial evidence of past irregularities which, coupled with the occurrence of the accident, raised the inference that the steering column was defective when it left the manufacturer.

It should be noted that the past history of a product may support an inference not only that the product was defective when the event that caused the plaintiff's injury occurred but also that the product was defective when it left the manufacturer. If the product involved was received by the consumer in a sealed container, a trier of fact may infer that the product reached the consumer without substantial change in the condition in which it was sold.[31] However, the history of a product may also destroy an inference that there had been no substantial change in

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[25]*See* Tucker v. Unit Crane & Shovel Corp., ___ Ore. ___, ___, 473 P.2d 862, 863 (1970).

[26]___ Ill. App. ___, 265 N.E.2d 212 (1970).

[27]*Id.* at ___, 265 N.E.2d at 215.

[28]Kridler v. Ford Motor Co., 422 F.2d 1182 (3d Cir. 1970); MacDougall v. Ford Motor Co., 214 Pa. Super. 2d 384, 257 A.2d 676 (1969).

[29]Kridler v. Ford Motor Co., 422 F.2d 1182 (3d Cir. 1970); MacDougall v. Ford Motor Co., 214 Pa. Super. 2d 384, 257 A.2d 676 (1969).

[30]___ Ill. App. at ___, 265 N.E.2d at 215.

[31]Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969) (dictum).

the product since it left the manufacturer. In *Sundet v. Olin Mathieson Chemical Corp.*,[32] for example, the court held that a product liability action was properly dismissed when a cartridge that had exploded came from an unsealed box that contained earmarks of reloaded casings. There was no evidence that the defendant was engaged in the business of reloading casings, and the court therefore felt that the jury could not without additional evidence reasonably infer that the cartridge was defective when it left the defendant's plant.[33]

A third type of circumstantial evidence used to prove a defect involves evidence concerning the circumstances of the accident itself. Even though this testimony does not pinpoint the specific defect, the description of events surrounding an accident which involves a product may raise the inference of a defect.[34] For example, the Pennsylvania Supreme Court,[35] in reversing a verdict against a plaintiff who had been injured when the defendant manufacturer's bottles exploded, said, "Both plaintiff and Leon Dorsey testified that the bottle exploded spontaneously. Their testimony alone, given the fact that an explosion was not a physical impossibility, was sufficient to make the issue a jury question."[36] In *Henningsen* the plaintiff had been injured when her automobile suddenly veered off the road. She alleged that the steering mechanism was defective and that the defendant retailer was therefore liable for injuries caused by the defect. The plaintiff testified that she had heard a loud noise "from the bottom, by the hood." She stated that it had "felt as if something cracked" and the steering wheel had spun in her hands as the car veered off the road.[37] The plaintiff's description of the automobile accident coupled with expert testimony was considered sufficient to make out a prima facie case.

Another type of circumstantial evidence used to raise the inference of a defect is evidence that negates possible causes of the accident aside

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[32]179 Neb. 587, 139 N.W.2d 368 (1966).

[33]*Id.* at 588, 139 N.W.2d at 369.

[34]Henningsen v. Bloomfield Motors Co., 32 N.J. 358, 161 A.2d 69 (1960). For a caustic criticism of the use of this type of circumstantial evidence in *Henningsen*, see Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty*, 33 TENN. L. REV. 323, 326 (1966).

[35]Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 242 A.2d 231 (1968).

[36]*Id.* at 184-85, 242 A.2d at 235; *accord*, Lee v. Crookston Coca-Cola Bottling Co., ___ Minn. ___, 188 N.W.2d 426 (1971).

[37]32 N.J. at 369, 161 A.2d at 75.

from the existence of a defect.[38] However, courts vary in their opinions as to what kinds of circumstantial evidence are required to exclude other causes, and thus the importance of evidence of this type varies from jurisdiction to jurisdiction.[39] In addition, the amount of evidence required to negate other causes will often depend on the type of accident which occurred. For example, in *Franks v. National Dairy Products Corp.*,[40] the court stated that " '[w]hen circumstantial evidence is the only proof, courts have infrequently inferred negligence (here a defect) simply from the accident and proof of careful conduct by the plaintiff, and then only in instances where the accident is the type which, standing alone, points an accusing finger at the maker.' "[41] In *Franks* the spontaneous explosion of a can of margarine had injured the plaintiff. The plaintiff proved the accident and introduced expert testimony to the effect that there were only three possible causes of the explosion other than a defect. Plaintiff then introduced evidence that negated the other three causes and thus raised the inference of the existence of a defect.[42]

A fifth type of circumstantial evidence which plaintiffs use to prove a defect is the occurrence of the accident itself. The fact that an accident occurred will always be part of plaintiff's case and will usually be joined with at least one of the foregoing types of circumstantial evidence or, if possible, with direct evidence. Some jurisdictions, however, have flatly stated that evidence only of the occurrence of an accident in connection with the use of a product will never support an inference of the existence of a defect.[43] However, in *McCann* and other cases the Pennsylvania courts have held that in some situations such evidence alone may raise the inference of a defect.[44] The court in *McCann* stated, "A number of

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[38]Such evidence is often used in conjunction with other types of circumstantial evidence. Rheingold, *Proof of Defect in Products Liability Cases*, 76 CASE & COM. 20, 25, (1971).

[39]*See, e.g.*, Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969) (plaintiff need not "rebut by direct evidence all of the conceivable possibilities"); O'Hara v. General Motors Corp., 35 F. Supp. 319, 321 (E.D. Mich. 1940) (plaintiff must negative "other possible causes of the accident"); Taylor v. Carborundum Co., 107 Ill. App. 2d 12, 19-20, 246 N.E.2d 898, 902 (1969) ("plaintiff . . . is not required . . . to disprove every theory supporting a cause of failure other than the one he alleged").

[40]282 F. Supp. 528 (W.D. Tex. 1968).

[41]*Id.* at 531, quoting Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 854 (5th Cir. 1968).

[42]*Id.* The court felt that it was essential in proving a defect when the product is in the hands of the consumer that the plaintiff negative other possible causes.

[43]Franks v. National Dairy Prod. Corp., 282 F. Supp. 528 (W.D. Tex. 1968); Vandercook & Son, Inc., v. Thorpe, 322 F.2d 638 (5th Cir. 1963); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967); see Freedman, *supra* note 34 at 324.

[44]*E.g.*, Greco v. Buccioni Eng'r Co., 407 F.2d 87 (3d Cir. 1969).

Pennsylvania cases hold that the occurrence of a malfunction may be circumstantial evidence of a defect in a product and hence sufficient to carry the case to a jury on plaintiff's contention that a manufacturer is liable under section 402A."[45]

The types and problems of proof are essentially the same in both strict and negligent product liability cases. The quantum of evidence, whether direct or circumstantial, necessary to sustain a plaintiff's burden of proof in both is also essentially the same: there must be evidence from which reasonable men could conclude that more likely than not the fact to be determined is true.[46] These similarities raise the question of whether an injured plaintiff has benefited from the adoption of section 402A. The plaintiff in *McCann* could as easily have recovered against the manufacturer in a negligence action. Once the plaintiff proved that the product was defective when it left the manufacturer, the inference could be drawn under the doctrine of res ipsa loquitur that the defect was due to the manufacturer's negligence.[47] However, McCann brought his action against a distributor, and in a negligence action it is doubtful that negligence on the part of distributor could be inferred from the defective product.[48] Without evidence of a specific defect that could have been detected by the distributor no inference can be drawn that the distributor was negligent.

In a negligence action against a distributor, a plaintiff must have more than circumstantial evidence of a defective product to raise the inference of negligence under res ipsa loquitur. The plaintiff must prove not only that the product was defective but also that the distributor was negligent in passing the product to the consumer. Under section 402A a plaintiff need not prove fault and therefore can rely solely upon circumstantial evidence to raise inference of a defect and get his case to the jury. Therefore, a consumer who brings a strict liability action against a

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[45]325 F. Supp. at 703.

[46]PROSSER § 103, at 673.

[47]PROSSER § 39, at 214 lists the following conditions as necessary for the application of res ipsa loquitur:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must have been caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

See Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 563 (1969).

[48]PROSSER § 103, at 672 n.3.

distributor of a defective product has an easier burden of proof than one who must sue in negligence. One of the main objectives of section 402A is to provide increased protection for consumers who are injured by defective products.[49] By basing liability on proof of defect and thus making recovery against a distributor of a defective product much more likely than in a negligence action, section 402A has given the consumer increased protection.

CHARLES H. CRANFORD

Torts—Rejection of the Voluntariness Test in Assumption of Risk

The doctrine of assumption of risk in the law of negligence, while still relatively quite young,[1] has for some time been roundly condemned by courts[2] and commentators[3] alike as a judicially created device affording legal insulation to defendants who have concededly breached their duty toward injured plaintiffs. Dissatisfaction with the doctrine has led some jurisdictions to restrict severely the application of assumption of risk and in some areas to wipe it out altogether.[4] As a result of *Hoar v. Sherburne Corp.*,[5] it is arguable that as a practical matter assumption of risk is no longer available as a separate defense to a landowner in a negligence action in Vermont.

In *Hoar*, plaintiff sustained injuries while crossing an access road cutting through property which defendant owned and maintained as a ski resort. At the time of the mishap, plaintiff was returning from defen-

[49]RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* at 350 (1964).

[1]Assumption of risk does not appear to have been recognized as a separate defense to a negligence action before the turn of the nineteenth century. Prosser indicates that Cruden v. Fentham, 170 Eng. Rep. 496 (K.B. 1799), is probably the first distinguishable case. W. PROSSER, LAW OF TORTS § 68 n.9 (4th ed. 1971) [hereinafter cited as PROSSER].

[2]The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.

Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring). Justice Frankfurter concludes that the phrase "assumption of risk" should be discarded. *Id.* at 72. *See* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 96 (1959); cases cited in James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 187 n.11 (1968).

[3]*See, e.g.*, James, *supra* note 2; Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961).

[4]*See* text accompanying note 28 *infra*.

[5]327 F. Supp. 570 (D. Vt. 1971).

dant's ski shop where she had gone for the purpose of buying some "warm-up" pants and on the way to which a sudden snow storm had developed. On the return trip, plaintiff slipped and fell on the path leading across the access road, although she had been looking where she was going and had seen the unsanded ice beneath her feet. At least fifteen minutes had passed from the time the snow storm began to the time of the accident. On these facts, the jury was allowed to find that plaintiff was a business visitor of defendant, that she had carefully conducted herself while walking on an unsafe pathway that was subject to the control of defendant, and that she was entitled to recover damages for the injuries that she had suffered.

Defendant moved for judgment notwithstanding the verdict, contending *inter alia* that plaintiff had assumed the risk as a matter of law. The court denied the motion and in doing so sharply restricted the doctrine of assumption of risk itself, thereby going further than even those recent decisions in other jurisdictions that have extended the duty owed to others by certain owners and occupiers of land.[6] In order to present the court's decision in its proper perspective, and with due credence to the complex issues involved, it will first be necessary to summarize briefly the background of the law in this area.

Assumption of risk as a defense in negligence actions originated in the reluctance of the common law courts to impose burdensome restrictions on expanding industry by way of untrammelled liability during the Industrial Revolution of the late eighteenth century.[7] During these early stages the defense was designed to allow an admittedly negligent employer to escape liability through the use of a pure fiction that held the plaintiff to have "assumed" all risks arising out of the master-servant relationship. Later, this rigid rule was relaxed somewhat, and the employee was held to have assumed only those risks of which he was aware or which were so patent that reasonable men could not differ as to their existence.[8] But in the meantime the rationale of assumption of risk in

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[6] *See* text accompanying notes 25-32 *infra*.

[7] *See, e.g.*, Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-59 (1943). This position had achieved popular and judicial acceptance in response to Priestly v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837), a landmark case from which assumption of risk received its greatest impetus. PROSSER § 68 n.9.

[8] *See, e.g.*, Focht v. Johnson, 51 Wash. 2d 47, 315 P.2d 633 (1957). This case was overruled in Siragusa v. Swedish Hospital, 60 Wash. 2d 310, 373 P.2d 767 (1962), which explicitly held that assumption of risk would no longer be recognized as a defense to an employer in a negligence action. *See* text accompanying notes 28-29 *infra*.

this context had come to be applied to other interpersonal relationships as well, until finally it had become quite thoroughly merged with the law of negligence in general. Ironically, the policy considerations that gave rise to the doctrine in the master-servent area—maximum freedom to expanding industry—steadily subsided with the establishment of industry as a burgeoning stronghold in this country, with the result that we have been left to struggle with a legal defense mechanism whose very *raison d'etre* has now been expressly rejected, as will be seen,[9] by a substantial number of jurisdictions.

As applied today, assumption of risk is subject to so much confusion that not a few learned legal scholars have advocated its abolition.[10] By means of the defense a defendant is effectively insulated from liability potentially arising from his own negligence if he establishes that the plaintiff voluntarily chose to encounter the known risk created by the defendant's negligence. Thus, there are two primary ingredients of the defense, which the defendant has the burden of proving[11] by a greater weight of the evidence: first, the plaintiff's knowledge and appreciation of the risk created by the defendant, and second, the plaintiff's voluntary decision to encounter this risk despite such knowledge.[12] If the plaintiff, with full knowledge and appreciation of all the facts and with no compulsion whatsoever to do so, makes an entirely free and voluntary decision to incur the risk anyway, he is barred on grounds of assumption of risk from recovering for consequential injuries. The same idea is often expressed in the alternative by saying that the decision is not a free and voluntary one when the advantages to be gained by the plaintiff's meeting the risk outweigh the relative disadvantages thereof[13] or when the defendant has not afforded the plaintiff a reasonably safe alternative choice of action.[14] In either event, it is presumed that the plaintiff has

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[9]*See* text accompanying note 29 *infra*.

[10]*See, e.g.*, James, *supra* note 2; Wade, *supra* note 3.

[11]*See* note 23 *infra*.

[12]PROSSER § 68, at 447.

[13]*Id.* at 440.

[14]*Id.* at 451. It should be noted that these alternative expressions of the voluntariness requirement involve two clearly distinguishable concepts. Firstly, the term "voluntary" can be applied to behavior directed to the end which the plaintiff contemplates in choosing whether or not to encounter an unreasonable risk created by the defendant. Attainment of the objectives sought by the plaintiff may be, on balance, so socially important as to compel on policy grounds a holding that the plaintiff's ultimate decision to encounter the risk cannot be legally voluntary. In the converse situation, when the plaintiff's goal is not so vital, the doctrine of assumption of risk may be applied to deny recovery—in other words, the advantages to be gained from meeting a known risk are held

actual knowledge of the negligently created risk.[15]

Assumption of risk is also generally extended to cover situations in which the plaintiff has expressly consented to take his chances with the risk[16] or in which such consent may safely be implied.[17] In such cases, however, a lack of duty on the part of the defendant is the basis for a denial of recovery, and the issue of negligence is never reached at all. Still other courts appear to confuse the distinctions between assumption of risk and contributory negligence[18] by applying either or both to situations in which the plaintiff unreasonably encounters or negligently fails to discover the risk. The net chaos has led some writers to suggest that

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to be outweighed by their corresponding disadvantages. The *Hoar* court rejected this dichotomy in holding that the possible lack of social desirability of the plaintiff's objectives should not limit the defendant's liability. 327 F. Supp. at 577-78.

Secondly, the term "voluntary" can with equal validity be applied to behavior directed to the means by which the plaintiff in fact encounters the unreasonable risk. Courts frequently deny recovery under the guise of assumption of risk because in "voluntarily" choosing to encounter the risk, the plaintiff declined to exploit reasonably safe and convenient alternative means, of which he was aware, of attaining the same objective that was contemplated. In *Hoar* a reasonable alternative route was not available to plaintiff. *Id.* at 571. Thus it might be argued that *Hoar* rejected the voluntariness test only to the extent that voluntariness is used in the sense of "social utility" to the plaintiff, and that consequently the impact of this case is greatly diluted. Arguably, however, voluntariness" and the doctrine of assumption of risk are irrelevant as regards the plaintiff's choice between alternatives, because in this context the issue of the defendant's liability is perfectly amenable to logical resolution in terms of contributory negligence and thus by the *objective* inquiry of whether the plaintiff's choice was unreasonable.

[15]If the plaintiff is to be saddled with constructive knowledge of the risk because of its obvious or apparent nature, this is equivalent to saying that he was contributorily negligent in not in fact discovering the danger. *Cf.* PROSSER § 68, at 447-49.

[16]*Id.* at 442. Indeed, some courts expressly purport to limit application of assumption of risk to situations involving a contractual relation between the parties. *E.g.*, Walsh v. West Coast Mines, 31 Wash. 2d 396, 406, 197 P.2d 233, 238 (1948).

[17]PROSSER § 68 n.29.

[18]*See* note 22 *infra*. Any precise and unequivocal distinction between these two defenses is exceedingly difficult to pinpoint without a thorough analysis of the issues which each raises. It is often said that contributory negligence is measured by the objective standard of the reasonable man as applied to the plaintiff's behavior, while assumption of risk is properly confined to the subjective knowledge and appreciation of the risk which the plaintiff encounters. PROSSER § 68, at 441. That this distinction is not satisfactory for all purposes is evidenced by the fact that contributory negligence may be used in two senses, one employing an objective and the other an ostensibly subjective standards: the defect is apparent, but the plaintiff negligently fails to notice it; and the plaintiff is fully aware of a patently obvious and unreasonable risk yet proceeds to encounter it. It should be noted, however, that even the latter situation does not present a pure application of the subjective standard. Although the plaintiff concededly has actual knowledge of the danger, his conduct in choosing to meet it is nevertheless compared with that of the ordinary reasonable man under like circumstances. This overlapping of contributory negligence and assumption of risk has caused some confusion in the courts. *Id.*

assumption of risk as a separate doctrine is quite dispensable[19] and that the issues traditionally disposed of by that defense are much less confusingly treated under the headings of consent,[20] lack of duty,[21] and contributory negligence.[22]

It appears unlikely, however, that there will be a direct renunciation of the doctrine in the near future, if only for the reason that it provides an attractive and convenient vehicle for the denial of recovery in cases in which a highly intricate network of competing interests would otherwise have to be dealt with and resolved. On the other hand, a growing number of jurisdictions have effectively approached the same result by coming in through the back door, so to speak, in dealing with the scope of liability in negligence cases. Instead of affirmatively restricting the reach of assumption of risk and thereby imposing a greater procedural burden on the defendant,[23] these courts have imposed a broader scope of duty on certain owners and occupiers of land, thereby rendering assumption of risk inappropriate in situations in which it would have traditionally been applied.

In the usual situation, the general rule is that a landowner has no duty to render affirmative precautions, even to the extent of a warning, "against dangers which are known to the [invitee], or so obvious to him

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[19]*See* authorities cited note 3 *supra.*

[20]In the field of intentional torts the plaintiff's consent to the tortious invasion has long been recognized as a defense. Consent has not been an established rubric in the law of negligence, but there is no reason why it cannot exist here too. Consent to what? In both intentional torts and negligence the consent is to the defendant's conduct. In the intentional tort this involves consent to the actual invasion of the plantiff's interest in person or property. In negligence it involves only his agreement to being subjected to a danger of possible invasion. In other words the plaintiff "assumes the risk."

Wade, *supra* note 3, at 7.

[21]The "defendant's duty and the plaintiff's assumption of risk are not correlative and it is misleading to define one in terms of the other." *Id.* at 11.

[22]North Carolina evidently recognizes no separate doctrine of assumption of risk in the absence of an express contractual agreement between the parties, and issues raised both by that defense and contributory negligence are lumped together and treated in terms of the latter. *E.g.*, Jernigan v. Atlantic Coastline R.R., 275 N.C. 277, 167 S.E.2d 269 (1969); Broadaway v. King-Hunter, Inc., 236 N.C. 673, 73 S.E.2d 861 (1953); Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (1951).

[23]It should be emphasized that assumption of risk is a defense which must in all instances be pleaded and proved by the defendant in order to defeat the plaintiff's recovery. PROSSER § 68, at 455. On the other hand, while most courts likewise treat contributory negligence as a defense, there are a few jurisdictions which impose the burden on the plaintiff to plead and prove his freedom from contributory negligence as well as the defendant's negligence in order to state a cause of action. This was the position adopted, for example, in Kotler v. Lalley, 112 Conn. 86, 151 A. 433 (1930), despite a vigorous dissent by Chief Justice Wheeler.

that he may be expected to discover them."[24] Assumption of risk, then, would normally be a perfectly legitimate defense here in the absence of qualifying circumstances. There has been a recent tendency, however, to roll back this general "no-duty" rule with respect to certain classes of landowners on the basis of the anticipatory nature of the harm despite the obviousness of the risk or the plaintiff's knowledge thereof.

There appears to be no difficulty in making an exception to the rule with respect to public utilities and government agencies.[25] The reason generally given for treating these concerns more strictly than other landowners is that the former hold out their services and facilities to members of the public, who are entitled to make use of them and who may reasonably expect and demand to be able to use them in reasonable safety.[26] Neither knowledge nor obviousness of the risk should be a defense here, for the obligations of the public utility and government agency are such that they may not be relieved from responsibility by forcing members of the visiting public to choose between carefully meeting an unreasonable risk which acts as an obstacle to attainment of the proffered right and foregoing that right altogether. It follows that under these circumstances the public utility or government agency should reasonably foresee that such members would choose to encounter known or obvious dangers that they would not otherwise encounter, solely because of their reluctance to give up the public right to which they are entitled.

Similar considerations prevail in the employer-employee relationship, although liability here is couched in terms of abandonment of assumption of risk rather than an extension of duty.[27] It has already been intimated that several jurisdictions have by decision or statute expressly

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[24]RESTATEMENT (SECOND) OF TORTS § 343A(1), Comment *e* (1965). *See* cases cited RESTATEMENT (SECOND) OF TORTS, Appendix § 343A, Comment *e* at 233-34 (1966).

[25]*See, e.g.*, Dierks v. Alaska Air Transport, 109 F. Supp. 695 (D. Alas. 1953); Williamson v. Derry Elec. Co., 89 N.H. 216, 196 A. 265 (1938); Toroian v. Parkview Amusement Co., 331 Mo. 700, 56 S.W.2d 134 (1932).

[26]*See* RESTATEMENT (SECOND) OF TORTS § 343A(1), Comment *a* (1965).

[27]North Carolina adopted this position many years ago. *E.g.*, Sibbert v. Scotland Cotton Mills, 145 N.C. 308, 59 S.E. 79 (1907); Marks v. Harriet Cotton Mills, 135 N.C. 287, 47 S.E. 432 (1904). The North Carolina Supreme Court has occasionally paid lip service to assumption of risk in extending liability to employers, but as often as not it has brought in contributory negligence as well without attempting to distinguish the two and without acknowledging that they may be anything but identical. *See* note 22 *supra*.

eliminated assumption of risk from this area, for reasons such as those persuasively stated in *Siragusa v. Swedish Hospital*:[28]

> The policy reasons which gave rise to the doctrine of assumption of risk in the master-servant area . . . no longer suffice to support the harsh effects upon injured employees who seek redress for their employer's negligence. Public opinion, reflected in workmen's compensation legislation, has dictated a change in the underlying concepts of employers' responsibility. In almost all areas of industrial activity, social insurance has replaced the common law rules of liability and defenses which grew out of the judicial inclination to foster a growing economy. No longer can it be said that a judicially-imposed doctrine of assumption of risk is necessary or desirable to protect expanding industry from being crippled by employers' responsibility for tortious conduct toward their employees.[29]

The rule which has emerged from this metamorphosis of public sentiment is that an employee never assumes risks arising from the employer's negligence but does assume those which remain after due care has been exercised by the employer—in other words, those risks which are inherent in the work and which are contractually borne by the employee.[30] This qualification prevents the employer from being treated as an insurer of his employees' safety, yet leaves the employer liable for his own culpable acts and omissions. This in turn relieves the employees of having to choose between meeting unreasonable risks and forgoing their means of livelihood altogether.

Any tendency toward expanding the duty owed by landowners other than public utilities, government agencies, and employers has understandably been much more sluggish. This is probably a reflection of the general reluctance of the judiciary to break new ground in an area strongly rooted in tradition,[31] but it by no means indicates that such inroads have not in fact been made. The next such extension of duty would logically seem to attach to the commercial landowner who invites

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[28]60 Wash. 2d 310, 373 P.2d 767 (1967); *see, e.g.*, cases cited therein.

[29]*Id.* at 318, 373 P.2d at 773.

[30]*See, e.g.*, Goodwin v. Missouri Pac. R.R., 335 Mo. 398, 406, 72 S.W.2d 988, 991 (1934).

[31]Concepts of property and ownership of land have held a lofty position among English-speaking peoples since feudal times, and it is thus understandable that immediate suspicion and hostility should attach to any attempts of the judiciary to undercut the absolute dominion of the property owner over his land. 2 HARPER & JAMES, THE LAW OF TORTS 1432 (1956). This accounts in large part for the glacial extension of liability into this general area and the resulting inhibition which has persisted to the present day.

members of the public onto his premises in order to have a pecuniary benefit conferred upon him and who in doing so has impliedly established the reasonable safety of these premises. This progressive step, in fact, has recently been taken in several jurisdictions,[32] motivated in large part by the theory that a commercial landowner who has held out defective premises for the public's use should not be heard to complain on grounds of assumption of risk when a member of that public suffers injuries as a result of having chosen to make use of those premises for the very purpose for which they were tendered.

The court in *Hoar* lent its full support to this position by quoting with approval section 343A(1) of the *Restatement (Second) of Torts:* " 'A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.' "[33] In holding that a commercial landowner may be held liable even to an invitee who had knowledge of the risk which caused the injury, the court joined those other jurisdictions which have imposed an active duty on the part of the commercial landowner to provide reasonably safe premises for invitees, which goes beyond the common law obligation to protect against known or foreseeably dangerous conditions that are not known by the invitee or apparent to him.[34]

But *Hoar* goes even further than this. Faced with the argument that the plaintiff in that case voluntarily encountered the risk of the icy path when she was under no compulsion to do so, the court simply rejected the rule which bars a plaintiff from recovery because of assumption of risk where the choice of action has been a free and voluntary one.[35] The duty of the landowner is thus not limited by the fact that the invitee voluntarily and reasonably encounters the known or obvious risk, if it could be anticipated by the landowner that harm arising from that risk would nevertheless occur. Under the facts of the *Hoar* case, it therefore appears that there is no room for assumption of risk by any stretch of the imagination—the voluntariness of the plaintiff's choice of action is immaterial under the new rule, and the fact that the plaintiff had actual

[32]Pribble v. Safeway Stores, Inc., 249 Ore. 184, 437 P.2d 745 (1968); *cf.* Findley v. Lipsitz, 106 Ga. App. 24, 126 S.E.2d 299 (1962).

[33]327 F. Supp. at 577, *quoting* RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

[34]*See* note 32 & accompanying text *supra.*

[35]327 F. Supp. at 577-78.

knowledge of the dangerous condition is equally meaningless in view of the affirmative duty imposed on the defendant to make the premises safe as against known or obvious dangers which may be anticipated to cause harm. Liability may be denied only by a finding that the plaintiff, having discovered the dangerous condition, proceeded to encounter it in an unreasonable manner, which properly gives rise to an issue of contributory negligence and not assumption of risk.[36]

It would appear that the court in *Hoar* has performed an inestimable service to the legal profession in having taken a giant step toward the elimination of much of the confusion surrounding the application of assumption of risk by focusing instead on intelligent consideration of the primary issue in these cases. That issue, simply enough, is whether or not the defendant should be held liable despite the plaintiff's knowledge of the risk he chose to encounter. In dealing with this question, it must be decided whether or not the plaintiff's choice of action under the circumstances was a reasonable one. Another way of putting this is by asking whether or not a duty will be imposed on the defendant to the extent that the plaintiff's choice will be deemed as a matter of law to have been a reasonable one. Sidetracking on the issue of voluntariness by asking whether the advantages gained by the plaintiff's having met the risk negligently created by the defendant outweighed the disadvantages thereof serves only to obscure the determinative question. Perhaps cognizant of this, some courts seem to have gone out of their way in finding a lack of voluntariness on the part of the plaintiff's action in order to permit recovery.[37] Consideration of this question should not be necessary at all if in fact it can be determined that the duty of the defendant shall be extended to protect the plaintiff under the attendant circumstances, as it was so determined in *Hoar*.[38]

It is important to bear in mind, however, that while the duty imposed in *Hoar* affected a commercial landowner under the limiting facts of that case, it is by no means certain that the court would further extend this duty to ordinary landowners should the question arise in the future. Neither can it safely be said that the court's rejection of the voluntariness test under the facts in *Hoar* necessarily eliminates that requirement

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[36] *See* notes 18, 22 *supra*.

[37] *See, e.g.*, Peterson v. W. T. Raleigh Co., 274 Minn. 475, 144 N.W.2d 555 (1966).

[38] "[A]ny general doctrine denying recovery to one who *voluntarily* elects to take a chance is an unwarranted limitation on the landowner's duty." Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 120 (1961) (emphasis by the author).

as to all situations in which assumption of risk may present itself.[39] Still, it undoubtedly appears that this case goes beyond the limitations in this general area imposed by the *Restatement (Second) of Torts*, and in this regard it is in keeping with the recent tendency to extend liability to commercial owners and occupiers of land by virtue of broadening concepts of duty.[40]

Comment *a* to section 343A(1) of the *Restatement* states that that subsection "includes in particular the patrons of a public utility who enter land in its possession seeking its services, to which as members of the public they are entitled,"[41] and it also applies to invitees of a government or of a government agency. Commercial landowners are not mentioned at all in this context, let alone ordinary owners and occupiers of land, and it thus seems that the *Restatement* has taken an overly cautious stand on the extension of duty owed to invitees, a stand which has rightly been disapproved in *Hoar*. This case, then, strikes a balance between the *Restatement* position and the logical end result of the recent liberal expansion with respect to landowners—a sweeping imposition of duty without regard to the specific label which might properly be attached to a given landowner.[42] Other jurisdictions have gone further than *Hoar* in the direction of imposing the same standard of duty on all landowners regardless of classification,[43] but none has taken the bold step of holding that the voluntariness of the plaintiff's choice of action may not be held to negate the effects of the duty so imposed. It is at

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[39]*See* note 14 *supra*.

[40]For excellent discussions of the problems involved in this general area, see Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629 (1952); Keeton, *Assumption of Risk and the Landowner*, 20 TEX. L. REV. 562 (1942).

[41]RESTATEMENT (SECOND) OF TORTS § 343A(1), Comment *a* (1965). "In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated." *Id.* § 343A(2).

[42]Professor James would seem to adhere to the latter position in all instances save those in which there is an express agreement to assume the risk. *See* James, *supra* note 2, at 187-88.

[43]Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), is the landmark case which has broken all precedent in abolishing the arbitrary common law classification of plaintiffs as trespassers, licensees, and invitees usually applied in determining the duty owed by a defendant landowner to the plaintiff. The thrust of the decision is to impose on landowners a single duty of reasonable care in all situations regardless of the plaintiff's status. The plaintiff's particular status is still one factor to be considered in determining the reasonableness of the defendant's conduct, but under *Rowland* it is no longer solely determinative of the standard by which that conduct is measured. *Accord*, Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); *cf.* Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955).

present uncertain where the line may ultimately be drawn with respect to those classes of landowners affected by the rejection of the voluntariness test, if indeed one is drawn at all. Nevertheless, *Hoar's* innovative approach may well prove to be the legal catalyst long needed in this area to remove some of the injustices which result when assumption of risk is mechanically applied to situations in which it is not warranted and in which the plaintiff cannot conscionably be allowed to go uncompensated.[44] If so, the change can only be a beneficial one.

Without specifically so holding, the court in *Hoar* arguably may have done away with assumption of risk in Vermont in all landowner cases by expressly eliminating one of the two primary elements of the defense. The other element—actual or implied knowledge of the risk—has been severely emasculated as well by the aforementioned extension and expansion of duty with respect at least to commercial owners and occupiers of land. Whether or not other jurisdictions will follow the Vermont example in rejecting the voluntariness test in cases raising the issue of assumption of risk remains to be seen, but it is submitted that this is a refreshing approach to the modification of an outdated legal doctrine which has done more harm than good through the years by often denying without just cause the deserved redress of innocent plaintiffs' invaded interests.

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[44] *Cf.* Osborne v. Imperial Irrig. Dist., 8 Cal. App. 2d 622, 47 P.2d 798 (1935).