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Consumer Protection in Service Transactions – Implied Warranties and Strict Liability in Tort

*Michael M. Greenfield**

A pronounced trend of the twentieth century is an increase in the reliance of the consumer on the efforts of others for the goods and services he or she desires.[1] Unfortunately, some goods and services prove to be defective, causing injury to the person or property of the consumer or third persons. With respect to defective goods, the liability of the producer and seller has increased substantially, moving from the position of no liability under the doctrine of *caveat emptor* to the position of liability, first under the doctrines of negligence and then under the doctrines of implied warranty and strict liability in tort.[2] This expansion of liability has yet to occur with respect to defective services. The thesis of this article is that persons providing defective services to consumers should also be subject to the doctrines of implied waranty and strict liability in tort.[3]

The following six hypotheticals illustrate the spectrum of situations in which defective services may exist:

(1) *A* buys a new car from *X Dealer*. The automatic choke on the car is defective, causing the accelerator to stick. The car crashes, resulting in injury to *A*, the car, and its contents.

(2) The automatic choke on *B*'s car wears out. *B* buys a new automatic choke from *Y Auto Repair Shop*, which *Y* installs. The choke proves to be defective, with the same consequences as above.

(3) The automatic choke on *C*'s car wears out. *C* buys a new automatic choke from *Y Auto Repair Shop*, which *Y* installs. The choke is not defective, but *Y* fails to install it properly, with the same consequences as above.

(4) The automatic choke on *D*'s car wears out. *D* buys a new automatic choke from *Z Automotive Parts Co.*, which *Y* installs. *Y* fails to install it properly, with the same consequences as above.

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[1] As used in this article, "consumer" means a natural person who purchases for personal, family, or household use. For the convenience of the reader (and the writer), the pronoun "he" typically will be used to refer to persons of either sex.

[2] For a description of this development, see W. PROSSER, THE LAW OF TORTS § § 96–98 (4th ed. 1971). A leading case applying strict liability to defective goods is Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965), quoted in full note 71 *infra*.

[3] Most cases and commentators considering liability in service transactions have used the word "sale" to refer only to a sale of goods and have used the word "services" to refer to a sale of services. This terminology is grammatically unsound, since services are as subject to being "sold" as are goods. Consequently, as used in this article, the term "sale" refers to both transactions in goods and transactions in services. The distinction, if any, is thus between "goods"' and "services," not between "sales" and "services."

(5) The automatic choke on *E*'s car wears out. *E* buys a new automatic choke from *Y* (or *Z*), which *Y* installs. To install it, *Y* uses a defective tool that emits a spark, resulting in a fire that destroys the car.

(6) The automatic choke on *F*'s car is out of adjustment and is not functioning properly, so *F* takes the car to *Y* for repair. *Y* fails to adjust the choke properly, with the same consequences as in hypothetical (1).

Hypothetical (1) is at the pure-sale-of-goods end of the spectrum. The dealer (and the manufacturer of the car and perhaps the manufacturer of the choke) would be liable for the consumer's loss under the theories of implied warranty of merchantability and strict liability in tort.[4] Hypothetical (6) is at the pure-sale-of-services end of the spectrum and, under present law, the repairman would be liable only if the consumer could prove negligence.[5] In hypotheticals (2)–(5), which may be characterized as hybrid transactions, the repairman undoubtedly would be liable if it were proved he was negligent. In the absence of negligence, however, the cases are not consistent on either the existence or basis of liability.[6]

I. Theories of Liability for Defective Services

A. Express Warranty

Although the primary focus of this article is on the standard of liability imposed *by law* on those who render services, it should be recognized that

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[4] *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (manufacturer liable); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E. 2d 182 (1965) (manufacturer of component part held liable); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (manufacturer liable). *But see* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (manufacturer of component part held not liable under theory of breach of implied warranty); Restatement (Second) of Torts § 402A, Caveat (1965) (question of strict liability for manufacturer of component part left open).

[5] *See, e.g.*, Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir. 1972); Mangiaracina v. Cappuccetti, 6 Conn. Cir. 47, 263 A.2d 710 (1969); Thomson Motor Co. v. Story, 59 Ga. App. 433, 1 S.E.2d 213 (1939); Metrailer v. F & G Merchandising, Inc., 230 So. 2d 395 (La. Ct. App. 1969); Ginoff v. Holeman G.M. Diesel, Inc., 156 Mont. 260, 479 P.2d 263 (1971); Jamison Fertilizer Co. v. White Motor Co., 246 Ore. 610, 425 P.2d 191 (1967); Patten v. Richardson Ford, Inc., 466 S.W.2d 820 (Tex. Civ. App. 1971); Sam White Oldsmobile Co. v. Jones Apothecary, Inc., 337 S.W.2d 834 (Tex. Civ. App. 1960); Myers v. Ravenna Motors, Inc., 2 Wash. App. 613, 468 P.2d 1012 (1970).

[6] *Defective product installed*: Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963) (no liability); Newmark v. Gimbel's, Inc. 54 N.J. 585, 258 A.2d 697 (1969) (strict liability in tort); Cutler v. General Elec. Co., 4 UCC Rep. Serv. 300 (N.Y. Sup. Ct. 1967) (no liability); G.H. Meyers & Co. v. Brent Cross Serv. Co., [1934] 1 K.B. 46 (implied warranty of fitness for purpose).

Defective installation by seller: Hepp Bros. v. Evans, 420 P.2d 477 (Okla. 1966) (implied warranty); Hoover v. Montgomery Ward & Co., 528 P.2d 76 (Ore. 1974) (strict liability inapplicable); Simonz v. Brockman, 249 Wis. 50, 23 N.W.2d 464 (1946) (implied warranty).

Defective installation by independent contractor: Gore v. Sindelar, 48 Ohio L. Abs. 317, 74 N.E.2d 414 (Ct. App. 1947) (no liability).

Defective implement: Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971) (no liability); Numon v. Stevens, 162 Neb. 339, 76 N.W.2d 232 (1956) (implied representation of fitness); Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901) (same); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968) (no liability).

the parties may be free to impose a higher standard of conduct on themselves. If the consumer proves that the person rendering services has expressly warranted a particular result, the court will enforce that warranty.[7] But the consumer may encounter difficulty in convincing the court that an express warranty was made,[8] and it is doubtful whether a significant number of service transactions include an express warranty of particular results.[9]

B. Negligence; Implied Warranty of Workmanlike Performance

Under present law, liability for defective services typically requires a finding of negligence. Thus, negligence usually is a prerequisite to im-

[7] Carter v. West, 280 Ala. 603, 196 So. 2d 718 (1967); Crawford v. Duncan, 61 Cal. App. 647, 215 P. 573 (1923); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1962); B. F. Edington Drilling Co. v. Yearwood, 239 La. 303, 118 So. 2d 419 (1960); Henry Waters Truck & Tractor Co. v. Relan, 277 So. 2d 463 (La. Ct. App. 1973); Sullivan v. O'Conner, 296 N.E.2d 183 (Mass. 1973); Satterlee v. Lawler, 155 Minn. 181, 193 N.W. 118 (1923); Kennedy v. Bowling, 319 Mo. 401, 4 S.W.2d 438 (1928); Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929); J.A. Myers Co. v. Miller, 80 Ohio L. Abs. 357, 159 N.E.2d 372 (Ct. App. 1958); Borland v. Clifford, 71 R.I. 12, 41 A.2d 310 (1945); Manzer v. Barnes, 237 S.W.2d 686 (Tex. Civ. App. 1950); Carpenter v. Moore, 51 Wash. 2d 795, 322 P.2d 125 (1958); Niver v. Nash, 7 Wash. 558, 35 P. 380 (1893); Parker v. Oloxo, Ltd., [1937] 3 All E.R. 524 (K.B.). *See* Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940); Staley v. Jameson, 46 Ind. 159 (1874); Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889); Wilson v. Blair, 65 Mont. 155, 211 P. 289 (1922); Robbins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955).

The UNIFORM COMMERCIAL CODE (1972 version) [hereinafter cited as UCC] defines express warranty as an affirmation of fact that becomes part of the basis of the bargain. UCC § 2–313. Probably because the warranty in service transactions relates not so much to a present fact as to a future state of affairs, courts may be reluctant to use the term "express warranty." Instead, they may utilize a concept of "express contract," Aegis Prods., Inc. v. Arriflex Corp. of America, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966), or a concept of "special contract." Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1961); King v. Ohio Valley Terminix Co., 309 Ky. 35, 214 S.W.2d 993 (1948); Sullivan v. O'Conner, 296 N.E.2d 183 (Mass. 1973); Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); Keating v. Perkins, 240 App. Div. 9, 293 N.Y.S. 197 (1937); Sidney Stevens Implement Co. v. Hintze, 92 Utah 264, 67 P.2d 632 (1937).

[8] *See, e.g.*, Atwood Vacuum Mach. Co. v. Varner Well & Pump Co., 3 Ill. App. 2d 571, 122 N.E.2d 834 (1954), in which the court held that an agreement to provide the tools and personnel necessary "to successfully drill [a] well" was not an express warranty that the driller would successfully produce water; Sullivan v. O'Conner, 296 N.E.2d 183, 185 (Mass. 1973); Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.). In Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973), the court held that a physician's statements that a sterilization operation would be irreversible, that the patient would not be able to bear children, and that she would be able to have intercourse without becoming pregnant were only expressions of opinion and did not constitute an express warranty that the operation would be successful. *See also* State *ex rel.* Corley v. Hines, 203 Miss. 60, 33 So. 2d 317 (1948), holding unreasonable and invalid an agency-imposed regulation requiring insect eradicators to agree to "eradicate," that is, to make an express warranty. The court stated that "an absolute undertaking in any professional service such as this would seem to be beyond the bounds of reason." *Id.* at 70–71, 33 So. 2d at 319.

[9] More common than a warranty of particular results is a warranty to perform in a workmanlike manner. *E.g.*, Kubby v. Crescent Steel, 105 Ariz. 459, 466 P.2d 753 (1970); Smith v. Berwin Builders, Inc., 287 A.2d 693 (Del. Super. Ct. 1972); Smith v. Phillips, 110 N.Y.S.2d 12 (Broome County Ct. 1952); Langley v. Helms, 12 N.C. App. 620, 184 S.E.2d 393 (1971); Diem v. Shushinski, 10 Chest. 42 (Pa. C.P. 1963). A warranty of workmanlike performance is tantamount to a warranty not to be negligent. *See* notes 21–25 *infra* and accompanying text.

posing liability on professionals such as doctors,[10] lawyers,[11] architects,[12] engineers,[13] and accountants,[14] and also nonprofessionals such as repairmen,[15] surveyors,[16] construction contractors[17], product certifiers,[18] and ex-

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[10] *E.g.*, Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Smothers v. Hanks, 34 Iowa 286 (1872); James v. Grigsby, 114 Kan. 627, 220 P. 267 (1923); Viland v. Winslow, 34 Mich. App. 486, 191 N.W.2d 735 (1971); Leighton v. Sargent, 27 N.H. 460 (1853); Yeager v. Dunnavan, 24 Wash. 2d 559, 174 P.2d 755 (1946).

Negligence is also the prevailing standard for others in the health professions. *Dentists:* Phelps v. Donaldson, 243 La. 1118, 150 So. 2d 35 (1963) (dictum); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968); Hill v. Parker, 12 Wash. 2d 517, 122 P.2d 476 (1942); *cf.* Samuels v. Davis, [1943] 2 All E.R. 3 (Ct. App.) (implied warranty of reasonable fitness as to dentures supplied). *Optometrists:* Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968). *Opticians:* Price v. Ga Nun, 11 Misc. 74, 32 N.Y.S. 801 (1895), *aff'd,* 155 N.Y. 670, 49 N.E. 1103 (1898). *Contra,* Gilbert v. Louis Pizitz Dry Goods Co., 237 Ala. 249, 186 So. 179 (1939). *Druggists:* McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965). *Faith healers:* Spead v. Tomlinson, 73 N.H. 46, 59 A. 376 (1904). *Hospitals:* McCoy v. Wesley Hosp. & Nurse Training School, 188 Kan. 325, 362 P.2d 841 (1961). *But see* Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973). As to liability for other defective products supplied, see Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Cutler v. General Elec. Co., 4 UCC REP. SERV. 300 (N.Y. Sup. Ct. 1967); Dorfman v. Austenal, Inc., 3 UCC REP. SERV. 856 (N.Y. Sup. Ct. 1966). *Blood Banks:* See notes 31, 84 *infra.*

[11] *E.g.*, Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971) (dictum); Ramp v. St. Paul Fire & Mar. Ins. Co., 263 La. 724, 269 So. 2d 239 (1972); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889); Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (1938); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954).

[12] La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966); Coombs v. Beede, 89 Me. 187, 36 A. 104 (1896); Chapel v. Clark, 117 Mich. 638, 76 N.W. 62 (1898); Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915); Bloomsburg Mills, Inc. v. Sordoni Constr. Co. 401 Pa. 358, 164 A.2d 201 (1960); Surf Realty Corp. v. Standing, 195 Va. 431, 78 S.E.2d 901 (1953). *Contra,* Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963).

[13] Bonadiman-McCain, Inc. v. Snow, 183 Cal. App. 2d 58, 6 Cal. Rptr. 52 (1960); Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, 168 So. 2d 333 (Fla. Ct. App. 1964), *cert. denied,* 173 So. 2d 146 (Fla. 1965); Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915).

[14] Lindner v. Barlow, Davis & Wood, 210 Cal. App. 2d 660, 27 Cal. Rptr. 101 (1962); City of East Grand Forks v. Steele, 121 Minn. 296, 141 N.W. 181 (1913); Carr v. Lipshie, 8 App. Div. 2d 330, 187 N.Y.S.2d 564 (1959).

[15] Harzfeld's, Inc. v. Otis Elevator Co., 114 F. Supp. 480 (W.D. Mo. 1953); Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967); Mangiaracina v. Cappuccetti, 6 Conn. Cir. 47, 263 A.2d 710 (1969); Spillers v. Montgomery Ward & Co., 282 So. 2d 546 (La. Ct. App. 1973); Metrailer v. F & G Merchandising, Inc., 230 So. 2d 395 (La. Ct. App. 1970); Otis Elevator Co. v. Embert, 198 Md. 585, 84 A.2d 876 (1951); Ginoff v. Holeman G.M. Diesel, Inc., 156 Mont. 260, 479 P.2d 263 (1971); Aegis Prods., Inc. v. Arriflex Corp. of America, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966) (dictum); Coe v. Esau, 377 P.2d 815 (Okla. 1963); Jamison Fertilizer Co. v. White Motor Co., 246 Ore. 610, 425 P.2d 191 (1967) (dictum); Buszta v. Souther, 102 R.I. 609, 232 A.2d 396 (1967); Myers v. Ravenna Motors, Inc., 2 Wash. App. 2d 613, 468 P.2d 1012 (1970); Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973).

[16] Roberts v. Karr, 178 Cal. App. 2d 535, 3 Cal. Rptr. 98 (1960); Charles Carter & Co. v. McGee, 213 So. 2d 89 (La. Ct. App. 1968).

[17] Reliable Elec. Co. v. Clinton Campbell Contractor, Inc., 10 Ariz. App. 371, 459 P.2d 98 (1969) (electrician); *In re* Talbott's Estate, 184 Kan. 501, 337 P.2d 986 (1959) (plumber); Simpson Bros. v. Merrimac Chem. Co., 248 Mass. 346, 142 N.E. 922 (1924) (general contractor); Glens Falls Ins. Co. v. Standard Oil Co., 69 Ohio L. Abs. 588, 127 N.E.2d 46 (Ct. App. 1953) (heating contractor); Brown v. Eakins,

terminators.[19] Although courts usually speak directly in terms of negligence, they occasionally employ other terms. For example, because the actions arise out of a contractual relationship, many courts have found an implied warranty of workmanlike performance[20]. It is apparent from

220 Ore. 122, 348 P.2d 1116 (1960); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950) (general contractor).

[18] Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967); Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969). *See generally* Note, *Liability of Certifiers of Products for Personal Injuries to the User or Consumer,* 56 CORNELL L. REV. 132 (1970). *But see* Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314, 324 (1972) (questioning, in dictum, the correctness of *Hanberry*); Yuhas v. Mudge, 129 N.J. Super. 207, 322 A.2d 824 (Super. Ct. App. Div. 1974) (magazine publisher not liable for defect in inherently dangerous product merely advertised in the magazine); Buszta v. Souther, 102 R.I. 609, 232 A.2d 396 (1967) (auto inspection by state-licensed inspection station; negligence standard).

[19] Hardy v. Carmichael, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (1962); Dupre v. Roane Flying Serv., 196 So. 2d 835 (La. Ct. App. 1967).

Negligence is also a prerequisite to liability for the following persons: *Insurance brokers:* Hardt v. Brink, 192 F. Supp. 879 (W.D. Wash. 1961). *Soil testers:* Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954). *Land brokers:* Page v. Wells, 37 Mich. 415 (1877); Noble v. Libby, 145 Wis. 38, 129 N.W. 791 (1911). *Horse trainers:* Snow v. Wathen, 127 App. Div. 948, 112 N.Y.S. 41 (1908). *Livery stable keepers:* Dam v. Lake Aliso Riding School, 6 Cal. 2d 395, 57 P.2d 1315 (1936); Evans v. Upmier, 235 Iowa 35, 16 N.W.2d 6 (1944); Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1939). *But see* Horne v. Meakin, 115 Mass. 326 (1874). *Installers:* Rotolo v. Stewart, 127 So. 2d 24 (La. Ct. App. 1961); Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 408 P.2d 145 (1965). *Well diggers:* Roscoe Moss Co. v. Jenkins, 55 Cal. App. 2d 369, 130 P.2d 477 (1942). *Detective agencies:* Stewart Warner Corp. v. Burns Int'l Security Serv., 343 F. Supp. 953 (N.D. Ill. 1972) (dictum). *Abstractors:* Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149 (1974). *Printers:* Duenewald Printing Corp. v. G.P. Putnam's Sons, 276 App. Div. 26, 92 N.Y.S.2d 553 (1949), *rev'd,* 301 N.Y. 569, 93 N.E.2d 452 (1950). *House movers:* Hebert v. Pierrotti, 205 So. 2d 888 (La. Ct. App. 1968); Numon v. Stevens, 162 Neb. 339, 76 N.W.2d 232 (1956). *Threshers:* Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901). *Common carriers, with respect to liability for personal injuries:* Herman v. Eastern Airlines, Inc., 149 F. Supp. 417 (E.D.N.Y. 1957); Ness v. West Coast Airlines, Inc., 90 Idaho 111, 410 P.2d 965 (1965); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (dictum). *Innkeepers, with respect to liability for personal injuries:* Brewer v. Roosevelt Motor Lodge, 295 A.2d 647 (Me. 1972); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972). For a description of the liability of carriers and innkeepers for injury to the property of their customers, see notes 78–79 *infra.*

[20] Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d 875 (7th Cir. 1940); General Fireproofing Co. v. L. Wallace & Son, 175 F. 650 (8th Cir.) *cert. denied,* 217 U.S. 607 (1910); Dog River Boat Serv., Inc. v. The Frances D., 192 F. Supp. 759 (S.D. Ala. 1961); Utz v. Moss, 31 Colo. App. 475, 503 P.2d 365 (1972); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970); Kocian v. DeVito, 5 Conn. Cir. 339, 251 A.2d 516 (1968); Fellenbaum v. Markowski, 4 Conn. Cir. 363, 232 A.2d 515 (1967); Premco Drilling, Inc. v. Maillet Bros. Builders, Inc., 3 Conn. Cir. 519, 218 A.2d 542 (1965); Smith v. Berwin Builders, Inc., 287 A.2d 693 (Del. Super. Ct. 1972); Thomson Motor Co. v. Story, 59 Ga. App. 433, 1 S.E.2d 213 (1939); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Markman v. Hoefer, 252 Iowa 118, 106 N.W.2d 59 (1960); Clark v. Canal Automatic Transmission Serv., 216 So. 2d 354 (La. Ct. App. 1968); Morse v. Oates, 11 La. App. 462, 123 So. 439 (1929); George v. Goldman, 333 Mass. 496, 131 N.E.2d 772 (1956); Baerveldt & Honig Constr. Co. v. Szombathy, 365 Mo. 845, 289 S.W.2d 116 (1956); Freeman Contracting Co. v. Lefferdink, 419 S.W.2d 266 (Mo. Ct. App. 1967); Brush v. Miller, 208 S.W.2d 866 (Mo. Ct. App. 1948); John O'Brien Boiler Works Co. v. Sievert, 256 S.W. 555 (Mo. Ct. App. 1923); R. Krevolin & Co. v. Brown, 20 N.J. Super. 85, 89 A.2d 255 (Super. Ct. App. Div. 1952); Benson v. Dorger, 33 Ohio App. 2d 110, 292 N.E.2d 919 (1972); Gore v. Sindelar, 48 Ohio L. Abs. 317, 74 N.E.2d 414 (Ct. App. 1947); Coe v. Esau, 377 P.2d 815 (Okla. 1963) (dictum); Brown v. Eakins, 220 Ore. 122, 348 P.2d 1116 (1960); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Patten v. Richardson

these cases, however, that the implied warranty of workmanlike performance is nothing more than an implied warranty not to be negligent, since the test of liability is whether the defendant failed to exercise that degree of care and skill that a reasonable, prudent, skilled, and qualified person would have exercised under the circumstances.[21] Thus, in permitting recovery for the buckling of a linoleum floor laid by the defendant, the New Mexico Supreme Court stated:

> Of course, the defendant could not be placed in the position of an insurer, but, nevertheless, having undertaken to render services in the practice of a skilled trade, it impliedly warranted that it would exercise such reasonable degree of skill as the nature of the service required. . . . [T]he degree of care necessarily required by one who undertakes to render services to another in the practice of a trade which is a result of acquired learning, or developed through special training and experience, is that which a reasonably prudent man, skilled in such work, would exercise.[22]

Ford, Inc., 466 S.W.2d 820 (Tex. Civ. App. 1971); Manzer v. Barnes, 213 S.W.2d 464 (Tex. Civ. App. 1948); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970); White v. Mitchell, 123 Wash. 630, 213 P. 10 (1923); Schmidt v. Schabow, 265 Wis. 154, 60 N.W.2d 735 (1953); Butler v. Davis, 119 Wis. 166, 96 N.W. 561 (1903). *See* cases cited notes 21–22 *infra*.

Occasionally, an obligation to perform in a workmanlike manner is imposed by statute. For example, California requires registration of persons who repair automobiles and other consumer goods such as televisions, refrigerators, and room air conditioners, and provides as grounds for denial or revocation of the registration "[a]ny willful departure from or disregard of accepted trade standards for good and workmanlike repair in any material respect, which is prejudcial to another without consent of the owner or his duly authorized representative." CAL. BUS. & PROF. CODE §§ 9830, 9841 (a)(7), 9884, 9884.6, 9884.7(1) (g) (West Supp. 1973). At a recent conference of state and local consumer office administrators, it was urged that all states adopt a program of certifying automotive mechanics and licensing repair shops. St. Louis Post-Dispatch, June 20, 1974, at 1D, col. 1. The Utah Legislature is currently considering such legislation.

[21] William Beadenkopf Co. v. Henwood & Nowak, Inc., 14 F.2d 125 (D. Mass. 1926; Union Marine & Gen. Ins. Co. v. American Export Lines, Inc., 274 F. Supp. 123 (S.D.N.Y. 1966); Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967); Kubby v. Crescent Steel, 105 Ariz. 459, 466 P.2d 753 (1970); Shiffers v. Cunningham Shepherd Builders Co., 28 Colo. App. 29, 470 P.2d 593 (1970); Bellman Heating Co. v. Holland, 86 A.2d 526 (D.C. Ct. App. 1952); Hutchison v. Ball 77 Ga. App. 199, 47 S.E.2d 913 (1948); Jose-Balz Co. v. De Witt, 93 Ind. App. 672, 176 N.E. 864 (1931); Gilley v. Farmer, 207 Kan. 536, 485 P.2d 1284 (1971); *In re* Talbott's Estate, 184 Kan. 501, 337 P.2d 986 (1959); Provident Loan Trust Co. v. Walcott, 5 Kan. App. 473, 47 P. 8 (1895); Hebert v. Pierrotti, 205 So. 2d 888 (La. Ct. App. 1968); Cunningham v. Hall, 86 Mass. 268 (1862); Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149 (1974); State *ex. rel.* Cummins Missouri Diesel Sales Corp. v. Eversole, 322 S.W.2d 53 (Mo. Ct. App. 1960); Numon v. Stevens, 162 Neb. 339, 76 N.W.2d 232 (1956); Price v. Ga Nun, 11 Misc. 74, 32 N.Y.S. 801 (1895), *aff'd*, 155 N.Y. 670, 49 N.E. 1103 (1898); Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966); Hubler v. Bachman, 12 Ohio Misc. 22, 230 N.E.2d 461 (C.P. 1967); Cox v. Curnutt, 271 P.2d 342 (Okla. 1954); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950); Myers v. Ravenna Motors, Inc., 2 Wash. App. 2d 3, 468 P.2d 1012 (1970). *Accord,* cases cited note 22 *infra*.

[22] Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 408 P.2d 145, 148 (1965). *Accord,* Reliable Elec. Co. v. Clinton Campbell Contractor, Inc., 10 Ariz. App. 371, 459 P.2d 98 (1969); Roscoe Moss Co. v. Jenkins, 55 Cal. App. 2d 369, 130 P.2d 477 (1942); Shiffers v. Cunningham Shepherd Builders Co., 28 Colo. App. 29, 41, 470 P.2d 593, 598 (1970) ("For construction to be done in a good and workmanlike manner, there is no requirement of perfection; the test is reasonableness in terms of what the workman of average skill and intelligence (the conscientious worker) would ordinarily do."); McCoy v. Wesley Hosp. & Nurse Training School, 188 Kan. 325, 362 P.2d 841 (1961); United States Wind, Engine & Pump Co. v. Manufac-

Other terms for this same standard of liability are "implied warranty of competence and ability ordinarily possessed by those in the profession"[23] and "implied undertaking to use ordinary or reasonable skill and care."[24] It is readily apparent, and recognized by these courts, that the standards imposed by this implied warranty or undertaking are not different from the negligence standard.[25]

Although the implied warranty of workmanlike performance is usually equivalent to the negligence standard, several courts have used it to denote something more than just an obligation not to be negligent. In these cases, however, the courts were confronted with defects in the construction of houses[26] or other structures,[27] situations in which courts are willing to

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turers Automatic Sprinkler Co., 84 Mo. App. 204 (1901); Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901).

In some cases the language is a warranty of workmanlike performance *"so that* the object contracted will properly function and render the service contemplated by the contract." Hunter v. Mayfield, 106 So. 2d 330, 333 (La. Ct. App. 1958) (emphasis added). But this language probably cannot be taken as imposing an implied warranty of fitness; *see* Siegel v. Struble Bros., 150 Pa. Super. 343, 28 A.2d 352 (1942), in which the court said that the contract implied proper performance but the jury found the defendant to be negligent. See also note 33 *infra* and accompanying text.

[23] Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897); Wolfe v. Virusky, 306 F. Supp. 519 (S.D. Ga. 1969); Bonadiman-McCain, Inc. v. Snow, 183 Cal. App. 2d 58, 6 Cal. Rptr. 52 (1960); Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, 168 So. 2d 333 (Fla. Ct. App. 1964), *cert. denied,* 173 So. 2d 146 (Fla. 1965); Scott v. Simpson, 46 Ga. App. 479, 167 S.E. 920 (1933); Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d 79 (La. Ct. App. 1971); Numon v. Stevens, 162 Neb. 339, 76 N.W.2d 232 (1956); Leighton v. Sargent, 27 N.H. 460 (1853); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Surf Realty Corp. v. Standing, 195 Va. 431, 78 S.E.2d 901 (1953).

[24] Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897); Roscoe Moss Co. v. Jenkins, 55 Cal. App. 2d 369, 130 P.2d 477 (1942); Kocian v. DeVito, 5 Conn. Cir. 339, 251 A.2d 516 (1968); McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965); Scott v. Simpson, 46 Ga. App. 479, 167 S.E. 920 (1933); Smothers v. Hanks, 34 Iowa 286 (1872); Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d 79 (La. Ct. App. 1971); Charles Carter & Co. v. McGee, 213 So. 2d 89 (La. Ct. App. 1968); Leighton v. Sargent, 27 N.H. 460 (1853); Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (1938); Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 408 P.2d 145 (1965); Snow v. Wathen, 127 App. Div. 948, 112 N.Y.S. 41 (1908); *cf.* Siegel v. Struble Bros., 150 Pa. Super. 343, 28 A.2d 352 (1942).

[25] "But whether the theory was breach of contract or negligence, defendant's proof would necessarily proceed along the same lines, namely, to establish the failure to use the care, skill and knowledge necessary to do the job in a good and workmanlike manner." Roscoe Moss Co. v. Jenkins, 55 Cal. App. 2d 369, 377, 130 P.2d 477, 481 (1942).

[26] Minemount Realty Co. v. Ballentine, 111 N.J. Eq. 398, 162 A. 594 (1932); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Diem v. Shushinski, 10 Chest. 42 (Pa. C.P. 1963); Padula v. J.J. Deb-Cin Homes, Inc., 298 A.2d 529 (R.I. 1973); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967). *Contra,* Livingston v. Bedford, 284 Ala. 323, 224 So. 2d 873 (1969); Carter v. West, 280 Ala. 603, 196 So. 2d 718 (1967) (dictum). Though speaking in terms of warranty of workmanlike performance, these courts actually were developing an implied warranty of habitability. *See* note 63 *infra.*

[27] Sampson Constr. Co. v. Farmers Coop. Elevator Co., 382 F.2d 645 (10th Cir. 1967); Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d 875 (7th Cir. 1940); Markman v. Hoefer, 252 Iowa 118, 106 N.W.2d 59 (1960); M.K. Smith Corp. v. Ellis, 257 Mass. 269, 153 N.E. 548 (1926); R. Krevolin & Co. v. Brown, 20 N.J. Super. 85, 89 A.2d 255 (Super. Ct. App. Div. 1952); Miller v. Winters, 144 N.Y.S. 351 (Sup. Ct. 1913); Glens Falls Ins. Co. v. Standard Oil Co., 69 Ohio L. Abs. 588, 127 N.E.2d 46 (Ct. App. 1953); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

impose a higher standard of conduct.[28] Conversely, the few courts that have expressly rejected an implied warranty of workmanlike performance actually were rejecting a standard of conduct more stringent than the negligence standard typically contemplated by that warranty.[29]

C. Implied Warranty of Fitness for Particular Purpose; Implied Warranty of Sufficiency of Plans

Implicit in cases applying a negligence standard—at least in those cases denying recovery—is a rejection of any higher standard of conduct, such as implied warranty of fitness for a particular purpose.[30] Courts have expressly considered the theory of implied warranty of fitness in many cases, but most have rejected it.[31] Moreover, of those cases in which

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[28] *Compare* Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897 (1961) (upholding implied warranty of fitness in construction case) *with* Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954) (no warranty in contract for soil test) *and* Allied Properties v. John A. Blume & Associates, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972) (no warranties in contract for engineering services) *and* Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 44 Cal. Rptr. 404 (1965) (no warranty in contract for telephone services). See also notes 37, 41, 58–60, 63 *infra;* W. PROSSER, *supra* note 2, § 104, at 680–82.

[29] *E.g.,* Stewart Warner Corp. v. Burns Int'l Security Serv., Inc., 343 F. Supp. 953 (N.D. Ill. 1972) (refusing to extend implied warranties or strict liability to a transaction for security services). *Accord,* Phoenix Assurance Co. v. Potomac Sand & Gravel Co., 343 F. Supp. 658 (D.D.C. 1972), *aff'd,* 487 F.2d 1213 (D.C. Cir. 1973); Brenham v. Southern Pac. Co., 328 F. Supp. 119 (W.D. La.), *aff'd,* 469 F.2d 1095 (5th Cir. 1971), *cert. denied,* 409 US. 1061 (1972).

[30] *E.g.,* Ginoff v. Holeman G.M. Diesel, Inc., 479 P.2d 263 (Mont. 1971); Davidson v. Edgar, 5 Tex. 492 (1851); *cf.* Mercedes Dusting Serv. v. Evans, 353 S.W.2d 894 (Tex. Civ. App. 1962).

The implied warranty of fitness for a particular purpose typically is associated with the sale of goods. Thus, UCC § 2–315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

[31] *Physicians and dentists:* Carmichael v. Reitz, 17 Cal. App. Ad 958, 95 Cal. Rptr. 381 (1971); Smothers v. Hanks, 34 Iowa 286 (1872); Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971); Phelps v. Donaldson, 243 La. 1118, 150 So. 2d 35 (1963); Viland v. Winslow, 34 Mich. App. 486, 191 N.W.2d 735 (1971); Leighton v. Sargent, 27 N.H. 460 (1853); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968).

Hospitals and blood banks: Heirs of Fruge v. Blood Serv., 506 F.2d 841 (5th Cir. 1975); McDaniel v. Baptist Mem. Hosp., 469 F.2d 230 (6th Cir. 1972); Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972); Mauran v. Mary Fletcher Hosp., 318 F. Supp. 297 (D. Vt. 1970); Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Shepherd v. Alexian Bros. Hosp., Inc., 3 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Ct. App.), *cert. denied,* 211 So. 2d 215 (Fla. 1968); Hoder v. Sayet, 196 So. 2d 205 (Fla. Ct. App. 1967); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Balkowitsch v. Minneapolis War Mem. Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Baptista v. St. Barnabas Med. Center, 109 N.J. Super. 217, 262 A.2d 902 (Super Ct. App. Div.), *aff'd* 57 N.J. 167, 270 A.2d 409 (1970); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Cutler v. General Elec. Co., 4 UCC REP. SERV. 300 (N.Y. Sup. Ct. 1967); Dorfman v. Austenal, Inc., 3 UCC REP. SERV. 856 (N.Y. Sup. Ct. 1966); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

courts purport to apply the theory,[32] most do not really support the proposition that the implied warranty of fitness applies to service transactions. In some of these cases, although the courts have spoken in terms of a warranty of fitness, it is clear that the courts contemplated nothing more

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Other medical professionals: McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965) (pharmacist); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (optometrist).

Architects: La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, 168 So. 2d 333 (Fla. Ct. App. 1964), *cert. denied,* 173 So. 2d 146 (Fla. 1965); Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966) (dictum); Chapel v. Clark, 117 Mich. 638, 76 N.W. 62 (1898); Surf Realty Corp. v. Standing, 195 Va. 431, 78 S.E.2d 901 (1953).

Other professionals: Allied Properties v. John A. Blume & Associates, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972) (engineer); Bonadiman-McCain, Inc. v. Snow, 183 Cal. App. 2d 58, 6 Cal. Rptr. 52 (1960) (engineer); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889) (attorney); Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915) (engineer); Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (1938) (attorney); Carr v. Lipshie, 8 App. Div. 2d 330, 187 N.Y.S.2d 564 (1959) (accountant).

Construction contractors: Interstate Motor Freight System v. Gasoline Equip. Co., 197 Ind. App. 494, 24 N.E.2d 418 (1940); Airco Refrig. Serv., Inc. v. Fink, 242 La. 73, 134 So. 2d 880 (1961) (by implication); Freeman Contracting Co. v. Lefferdink, 419 S.W.2d 266 (Mo. Ct. App. 1967); York Heating & Vent. Co. v. Flannery, 87 Pa. Super. 19 (1926); Victor v. Barzaleski, 19 Pa. D. & C.2d 698, 49 Luz. Leg. Reg. Rep. 155 (C.P. 1959); Our Lady of Victory College & Academy v. Maxwell Steel Co., 278 S.W.2d 321 (Tex. Civ. App. 1955); Sidney Stevens Implement Co. v. Hintze, 92 Utah 264, 67 P.2d 632 (1937); Southgate v. Sanford & Brooks Co., 147 Va. 554, 137 S.E. 485 (1927).

Well diggers: Roscoe Moss Co. v. Jenkins, 55 Cal. App. 2d 369, 130 P.2d 477 (1942); Kocian v. DeVito, 5 Conn. Cir. 339, 251 A.2d 516 (1968); Premco Drilling, Inc. v. Maillet Bros. Builders, Inc., 3 Conn. Cir. 579, 218 A.2d 542 (1965); Atwood Vacuum Mach. Co. v. Varner Well & Pump Co., 3 Ill. App. 2d 571, 122 N.E.2d 834 (1954); Knight v. Johnson, 253 So. 2d 632 (La. Ct. App. 1971); Butler v. Davis, 119 Wis. 166, 96 N.W. 561 (1903).

Repairmen: Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir. 1972); Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967); Aegis Prods., Inc. v. Arriflex Corp. of America, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966); Sam White Oldsmobile v. Jones Apothecary, Inc., 337 S.W.2d 834 (Tex. Civ. App. 1960).

Miscellaneous others: Herman v. Eastern Airlines, Inc., 149 F. Supp. 417 (E.D.N.Y. 1957) (airline); Ness v. West Coast Airlines, Inc., 90 Idaho 111, 410 P.2d 965 (1965) (airline); Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 44 Cal. Rptr. 404 (1965) (telephone company); Canavan v. City of Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920) (water supplier); Duenewald Printing Corp. v. G. P. Putnam's Sons, 276 App. Div. 26, 92 N.Y.S.2d 553 (1949), *rev'd,* 301 N.Y. 569, 93 N.E.2d 452 (1950) (printer); Sanitary Linen Serv. Co. v. Alexander Proudfoot Co., 304 F. Supp. 339 (D. Fla. 1969), *aff'd,* 435 F.2d 292 (5th Cir. 1970) (systems analyst); Hanberry v. Hearst Corp., 376 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969) (product certifier); Smith v. Phillips, 110 N.Y.S.2d 12 (Broome County Ct. 1952) (dictum) (painting contractor); Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954) (soil tester); Page v. Wells, 37 Mich. 415 (1887) (land broker); Noble v. Libby, 145 Wis. 38, 129 N.W. 791 (1911) (land broker).

[32] Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884); General Fireproofing Co. v. L. Wallace & Son, 175 F. 650 (8th Cir.), *cert. denied,* 217 U.S. 607 (1910); Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973); Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Jeffreys v. Hickman, 132 Ill. App. 2d 272, 269 N.E.2d 110 (1971); King v. Ohio Valley Terminix Co., 309 Ky. 35, 214 S.W.2d 993 (1948); Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952); Rinaudo v. Treadwell, 212 La. 510, 32 So. 2d 907 (1947); Dyess v. Weems, 178 So. 2d 785 (La. Ct. App. 1965); Loraso v. Custom Built Homes, Inc., 144 So. 2d 459 (La. Ct. App. 1962); M.K. Smith Corp. v. Ellis, 257 Mass. 269, 153 N.E. 548 (1926); Miller v. Winters, 144 N.Y.S. 351 (Sup. Ct. 1913); Delo Auto Supply, Inc. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950); J. A. Myers Co. v. Miller, 80 Ohio L. Abs. 357, 159 N.E.2d 372 (Ct. App. 1958); McCool v. Hoover Equip. Co., 415 P.2d 954 (Okla. 1966); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951). *See* cases cited notes 33–45, 62–65, 70, 84 *infra.*

than an implied warranty that the performer will not be negligent.[33] In others, negligence was present,[34] so the language of implied warranty of fitness may be viewed as dictum.[35] In still other cases, a finding of no causation may undermine the court's discussion of implied warranty.[36] Furthermore, many opinions that invoked a warranty of fitness were devoted to consideration of chattel leases or other transactions that, although not traditionally viewed as sales of goods, nevertheless entailed more than just the rendition of services.[37] Finally, in some cases the gravamen was installation of a defective product rather than defective installation of a sound product or defective repairs generally.[38] Thus cases in-

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[33] La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d 875 (7th Cir. 1940); Reliable Elec. Co. v. Clinton Campbell Contractor, Inc., 10 Ariz. App. 371, 459 P.2d 98 (1969); Dam v. Lake Aliso Riding School, 6 Cal. 2d 395, 57 P.2d 1315 (1936); Tierstein v. Licht, 174 Cal. App. 2d 835, 345 P.2d 341 (1959); Kuitems v. Covell, 104 Cal. App. 2d 482, 231 P.2d 552 (1951); Kersten v. Young, 50 Cal. App. 2d 1, 125 P.2d 501 (1942); Markman v. Hoefer, 252 Iowa 118, 106 N.W.2d 59 (1960); Evans v. Upmier, 235 Iowa 35, 16 N.W.2d 6 (1944); Usona Mfg. Co. v. Shubert-Christy Corp., 132 S.W.2d 1101 (Mo. Ct. App. 1939); United States Wind, Engine & Pump Co. v. Manufacturers Automatic Sprinkler Co., 84 Mo. App. 204 (1900); Numon v. Stevens, 162 Neb. 339, 76 N.W.2d 232 (1956); Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901); Cox v. Curnutt, 271 P.2d 342, (Okla. 1954); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 164 A.2d 201 (1960); Siegel v. Struble Bros., 150 Pa. Super. 343, 28 A.2d 352 (1942); Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1939); Francis v. Cockrell, [1807] 5 Q.B. 501 (Exch. Ch.).

[34] Sampson Constr. Co. v. Farmers Coop. Elevator Co., 382 F.2d 645 (10th Cir. 1967); United States v. D.C. Loveys Co., 174 F. Supp. 44 (D. Mass. 1959), *aff'd sub nom.* A Belanger & Sons, Inc. v. United States, 275 F.2d 372 (1st Cir. 1960); Springdale Cemetery Ass'n v. Smith, 32 Ill. 252 (1863); Hayes v. Viola, 179 So. 2d 685 (La. Ct. App. 1965); Rotolo v. Stewart, 127 So. 2d 24 (La. Ct. App. 1961); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 164 A.2d 201 (1960).

[35] Pointer v. American Oil Co., 295 F. Supp. 573 (S.D. Ind. 1969); Berhow v. Kroak, 195 N.W.2d 379 (Iowa 1972); Usona Mfg. Co. v. Shubert-Christy Corp., 132 S.W.2d 1101 (Mo. Ct. App. 1939); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951) (ambiguous opinion).

[36] Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316 (1972). *See* Glass v. Wiesner, 172 Kan. 133, 238 P.2d 712 (1951); E. Levy & Co. v. Pierce, 40 So. 2d 818 (La. Ct. App. 1949) (both holding no breach of any warranty).

[37] Thus, in a case involving the construction of a cider tank, the court held that even a contract for work and labor, as opposed to a contract for the sale of goods, implied that the tank would not leak. M.K. Smith Corp. v. Ellis, 257 Mass. 269, 153 N.E. 548 (1926). In Sampson Constr. Co. v. Farmers Coop. Elevator Co., 382 F.2d 645, 647 (10th Cir. 1967), the court, quoting from the trial court opinion, indicated that a contract for an addition to a grain elevator carried with it an implied warranty that "the work and material furnished . . . shall be of proper workmanship and proper material and be reasonably fit for the purpose for which it is intended to be used" and that the finished product "would last and serve such purpose for a reasonable length of time." *Accord,* Kellog Bridge Co. v. Hamilton, 110 U.S. 108 (1884); General Fireproofing Co. v. L. Wallace & Son, 175 F. 650 (8th Cir.), *cert. denied,* 217 U.S. 607 (1910); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897 (1961).

Comment 2 to section 2–318 of the UCC recognizes that warranties may be implied in transactions other than the sale of goods. Cases involving the lease, bailment, or license of chattels are collected in note 62 *infra.* And in Jones v. Keetch, 388 Mich. 164, 200 N.W.2d 227 (1972), the court reasoned that if the lessor of chattels was to be liable for defects, then a motel owner should also be liable for defects in the furniture in the rooms he rents. *Accord,* Schnitzer v. Nixon, 439 F.2d 1940 (4th Cir. 1971).

[38] Gilbert v. Louis Pizitz Dry Goods Co., 237 Ala. 249, 186 So. 179 (1939); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897 (1961); Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); Berry v. G.D. Searle &

voking the implied warranty of fitness in so-called service transactions typically involved the transfer, though not necessarily by means of a sale, of some tangible item to the consumer.[39] These cases, therefore, fall closer to the sale-of-goods end of the spectrum than to the sale-of-services end.

Very few cases have found an implied warranty of reasonable fitness when the transaction was more exclusively a rendition of services or when the defect in a hybrid transaction was in the services aspect of the transaction. An example of such a case is *Miller v. Winters*,[40] in which the plaintiff contracted to design and install a heating system for a house. When the design proved defective, the court held there was an implied warranty that the whole system would be suitable for the purpose for which it was designed.[41] In hybrid cases of sale and installation of a product, a few courts have imposed implied warranties of fitness with respect to the installation as well as to the product, but only when the installer is also the seller.[42] When the installer is an independent con-

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Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971); Young & Marten, Ltd. v. McManus Childs, Ltd., [1968] 2 All E.R. 1169 (H.L.); Samuels v. Davis, [1943] 2 All E.R. 3 (Ct. App.); Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.); Watson v. Buckley, Osborne, Garrett & Co., [1940] 1 All E.R. 174 (K.B.); G. H. Myers & Co. v. Brent Cross Serv. Co., [1934] 1 K.B. 46. See also the impure blood cases collected in note 84 *infra*. In one case, a federal court stated that an implied warranty might be recognized by the Vermont Supreme Court with respect to anesthetic administered by a hospital, but denied liability when the hospital erroneously administered insulin instead of anesthetic, reasoning that there was no breach of warranty. Mauran v. Mary Fletcher Hosp., 318 F. Supp. 297 (D. Vt. 1970). The decision is wrong for three reasons: the insulin was not fit for the purpose for which it was given (anesthetic), so there was a breach of implied warranty of fitness; insulin is not merchantable as an anesthetic, so there was a breach of implied warranty of merchantability; if there was a statement that the patient would be given anesthetic, there was a breach of express warranty.

[39] In addition to the cases cited in notes 37–38 *supra*, *see* Standard Brands Chem. Indus., Inc. v. Pilot Freight Carriers, Inc., 65 Misc. 2d 1029, 319 N.Y.S.2d 457 (Sup. Ct. 1971); Hepp Bros. v Evans, 420 P2d 477 (Okla. 1966); Peterson v. Sinclair Ref. Co., 20 Wis. 2d 576, 123 N.W.2d 479 (1963); Simonz v. Brockman, 249 Wis. 50, 23 N.W.2d 464 (1946); Comment, *Strict Liability of the Bailor, Lessor and Licensor*, 57 MARQ. L. REV. 111 (1973).

[40] 144 N.Y.S. 351 (Sup. Ct. 1913).

[41] There is even greater reason for applying this rule [of fitness for purpose] to one who undertakes to do a specific piece of work and supply the necessary materials for doing it [than to one who manufactures a chattel], for in such a case the undertaker knows what is to be done and the result to be accomplished, and he also knows that the manner and method of accomplishing the desired result is left to his judgment, knowledge, and experience.

Id. at 354. *See* Woodrick v. Smith Gas Serv., 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967); Delo Auto Supply, Inc. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950); Hepp Bros. v. Evans, 420 P.2d 477 (Okla. 1966); Cox v. Curnutt, 271 P.2d 342 (Okla. 1954); J. A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973) (imposing an implied warranty on defendant to develop a reasonably fit testing system.) The court in *Maurer* referred to "implied warranty" as possibly a "semantic step towards a predetermined result" and suggested it might be better to think in terms of the reasonable expectations of the commercial community when there is no express provision for the contingency and no provision is derivable from commercial custom. *Id.* at 595–96. *See also* Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973) (strict liability).

[42] Rotolo v. Stewart, 127 So. 2d 24 (La. Ct. App. 1961) (implied warranty of fitness of dishwasher extends to its installation, so seller liable for breach of warranty, but independent contractor who installed it held liable only for negligence); Kopet v. Klein, 275 Minn. 525, 148 N.W.2d 385 (1967); Hepp Bros. v. Evans, 420 P.2d 477

tractor, however, courts have not imposed any implied warranty of fitness with respect to the installation.[43] Similarly, only a few cases dealing with exclusively service transactions have imposed an implied warranty of fitness. In one, the court held that an agreement to insulate a house against termites carried with it an implied warranty that the house would be free of termites.[44] In two others, courts held persons who provided engineering and architectural services subject to an implied warranty that the services would be reasonably fit for the purpose for which they were rendered.[45] These cases imposing an implied warranty of fitness with respect to defective services are, however, greatly outnumbered by cases holding that no such warranty exists.[46]

In construction contract cases, some courts have spoken of an implied warranty by the person providing the plans that those plans will be sufficient for the purpose in view,[47] a variation of the implied warranty of fitness for a particular purpose. Courts have generally denied the existence of this warranty on the part of architects and engineers, however, holding

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(Okla. 1966) (tile failed to adhere because wrong adhesive was used); Simonz v. Brockman, 249 Wis. 50, 23 N.W.2d 464 (1946) (defective installation of ice cream freezing equipment). *Contra,* Busch v. United Aluminum Metal Prods. Corp., 8 UCC REP. SERV. 335 (N.Y. Sup. Ct. 1970) (fire caused by improper use of adhesive). These cases represent situations analogous to hypothetical (3) in the introduction to this article. *See* Dupre v. Roane Flying Serv., Inc., 196 So. 2d 835 (La. Ct. App. 1967) (seller-applier of herbicide held liable under theory of negligence for excessive ratio of herbicide in the formula, but because of the court's description of the difficulty of avoiding an excessive ratio, the court may be leaning toward a theory of implied warranty); Peterson v. Sinclair Ref. Co., 20 Wis. 2d 576, 123 N.W.2d 479 (1963) (seller of oil and gas liable for defective delivery under theory of implied warranty of safe delivery).

[43] Rotolo v. Stewart, 127 So. 2d 24 (La. Ct. App. 1961); Gore v. Sindelar, 48 Ohio L. Abs. 317, 74 N.E.2d 414 (Ct. App. 1947). These cases represent situations analogous to hypothetical (4) in the introduction to this article.

[44] King v. Ohio Valley Terminix Co., 309 Ky. 35, 214 S.W.2d 993 (1948).

[45] Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951). *Accord,* Jeffreys v. Hickman, 132 Ill. App. 2d 272, 269 N.E.2d 110 (1971) (implied waranty that paint job on car would last for reasonable time); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316 (1972); Debby Junior Coat & Suit Co. v. Wollman Mills, Inc., 207 Misc. 2d 330, 137 N.Y.S.2d 703 (Sup. Ct. 1955); McCool v. Hoover Equip. Co., 415 P.2d 954 (Okla. 1966) (implied warranty of fitness in contract to rechrome crankshafts); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 164 A.2d 201 (1960) (dictum).

[46] *See* cases cited note 31 *supra.*

[47] While [an architect] does not guarantee a perfect plan or a satisfactory result, he does by his contract imply that he enjoys ordinary skill and ability in his profession and that he will exercise these attributes without neglect and with a certain exactness of performance to effectuate work properly done. . . . While an architect is not an absolute insurer of perfect plans, he is called upon to prepare plans and specifications which will give the structure so designed reasonable fitness for its intended purpose, and he impliedly warrants their sufficiency for that purpose.

Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 361–62, 164 A.2d 201, 203 (1960). *Accord,* Broyles v. Brown Eng'r Co., 275 Ala. 35, 40, 151 So. 2d 767, 772 (1963); Miller v. Winters, 144 N.Y.S. 351 (Sup. Ct. 1913); Hill v. Polar Pantries, 219 S.C. 263, 266, 64 S.E.2d 885, 888 (1951); cases cited notes 50–53 *infra. Cf.* Baerveldt & Honig Constr. Co. v. Szombathy, 289 S.W.2d 116 (Mo. 1956), in which the court spoke of an implied warranty of sufficiency of plans, but made it clear that it was contemplating a standard of negligence.

them only to a standard of reasonable care in preparing the plans.[48] If the owner of the property furnishes the plans, there is, of course, no basis for an implied warranty by the contractor that those plans will be sufficient.[49] Indeed, if the owner supplies the plans, many courts have held that *he* impliedly warrants their sufficiency,[50] so that the contractor is entitled to additional compensation for additional work caused by a deficiency in the plans,[51] or is justified in suspending performance,[52] or can recover for the work actually performed even though the building is defective.[53]

D. Implied Warranty of Merchantability

The theory of implied warranty of merchantability also might be utilized in determining liability in service transactions, but courts have

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[48] *E.g.*, Allied Properties v. John A. Blume & Associates, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972); Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, 168 So. 2d 333 (Fla. Ct. App. 1964), *cert. denied*, 173 So. 2d 146 (Fla. 1965); Coombs v. Beede, 89 Me. 187, 36 A. 104 (1896); Chapel v. Clark, 117 Mich. 638, 76 N.W. 62 (1898); Surf Realty Corp. v. Standing, 195 Va. 431, 78 S.E.2d 901 (1953). *Contra*, Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 164 A.2d 201 (1960) (dictum); Hill v. Polar Pantries, 219 S.C. 263, 271, 64 S.E.2d 885 (1951).

[49] *E.g.*, Kurland v. United Pac. Ins. Co., 251 Cal. App. 2d 112, 59 Cal. Rptr. 258 (1967) (plans prepared on behalf of owner by architect and engineer). Nevertheless, the contractor may be under a duty to warn the owner if the contractor knows or should know that the plans will not be sufficient. Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950). *Accord*, RESTATEMENT (SECOND) OF TORTS § 404, comment *a* (1965), which states that, with respect to the making or repairing of a *chattel*, if the owner provides the plans and specifications, then the person rendering services is not liable if the specified design or material is insufficient to make the chattel safe, unless the plans are so obviously bad that a competent contractor would realize that the chattel would be dangerously unsafe. The Restatement takes the same position with respect to persons engaged in construction. *Id.* § 385, comment *a*.

[50] Corporation of the Presiding Bishop v. Cavanaugh, 217 Cal. App. 2d 492, 32 Cal. Rptr. 144 (1963); Reinhardt Constr. Co. v. Mayor & City Council, 157 Md. 420, 146 A. 577 (1929); Alpert v. Commonwealth, 357 Mass. 306, 258 N.E.2d 755 (1970); Rollins Engine Co. v. Eastern Forge Co., 73 N.H. 92, 59 A. 382 (1904); Leininger v. Stearns-Roger Mfg. Co., 17 Utah 2d 37, 404 P.2d 33 (1965); Southgate v. Sanford & Brooks Co., 147 Va. 554, 137 S.E. 485 (1927); Armstrong Constr. Co. v. Thomson, 64 Wash. 2d 191, 390 P.2d 976 (1964); cases cited notes 51–53 *infra*. *Cf. In re* People, 250 N.Y. 410, 165 N.E. 829 (1929) (plaintiff who provided materials for defendant to perform services impliedly warranted that the materials could be worked on in the manner contracted for); Ruberoid Co. v. Scott, 249 S.W.2d 256 (Tex. Civ. App. 1952) (owner expressly guaranteed the sufficiency of the plans).

[51] Montrose Contracting Co. v. County of Westchester, 80 F.2d 841 (2d Cir.), *cert. denied*, 298 U.S. 662 (1936); E. H. Morrill Co. v. State, 65 Cal. App. 2d 787, 423 P.2d 551, 56 Cal. Rptr. 479 (1967); Bentley v. State, 73 Wis. 416, 41 N.W. 338 (1889).

[52] United States v. Spearin, 248 U.S. 132 (1918).

[53] Penn Bridge Co. v. City of New Orleans, 222 F. 737 (5th Cir. 1915); Home Furniture, Inc. v. Brunzell Constr. Co., 84 Nev. 309, 440 P.2d 398 (1968); MacKnight Flintic Stone Co. v. Mayor of New York, 160 N.Y. 72, 54 N.E. 661 (1899). *But see* M.K. Smith Corp. v. Ellis, 257 Mass. 269, 153 N.E. 548 (1926) (builder denied recovery because of breach of implied warranty even though owner specified dimensions and materials to be used in constructing cider tank that ultimately leaked).

For an indication of why courts are more willing to impose this warranty on owners than on architects, engineers, or contractors, see Allied Properties v. John A. Blume & Associates, 25 Cal. App. 3d 848, 857, 102 Cal. Rptr. 259, 265 (1972) (denying any warranty of sufficiency of plans on the part of a marine engineer):

> [T]he rationale is that any additional costs caused by an error in the plans and specifications can be more equitably borne by the owner who receives the benefits than by the contractor. This rationale cannot be readily transferred to a professional who prepares plans for an owner and receives hourly compensation for his services.

given it little attention. This warranty, as applied to a sale of goods, requires that the goods must at least be such as pass without objection in the trade and must be fit for the ordinary purposes for which the goods are used.[54]

If a court views the transaction as primarily a sale of goods, then the addition of some service component will not preclude the implication of a warranty that the goods are merchantable.[55] Most courts are willing to find an implied warranty of merchantability also when a transaction primarily for services also requires the transfer of goods from the person rendering the services to the consumer, and the goods are defective.[56] There are, however, cases to the contrary.[57] In perhaps the leading case extending a warranty of merchantability to a non-sale-of-goods transaction, *Aced v. Hobbs-Sesack Plumbing Co.*,[58] the defendant contracted to install a heating system in a house the plaintiff was building. The pipe used by defendant was defective and leaked. The Supreme Court of California held that the contract was not for the sale of goods, but rather for labor and material. The court indicated that use of the term "mer-

[54] UCC § 2–314. These are only two of the six criteria for determining merchantability. The others require that the goods are of at least fair average quality within the description, are within variations permitted by the agreement, are adequately packaged and labeled as required by the agreement, and are in conformity to any promises or affirmations of fact made on the container or label. The warranty of merchantability may be excluded or modified. UCC § 2–316.

[55] Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); Standard Brands Chem. Indus., Inc. v. Pilot Freight Carriers, Inc., 65 Misc. 2d 1029, 319 N.Y.S.2d 457 (Sup. Ct. 1971); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971); *cf.* Watson v. Buckley, Osborne, Garrett & Co., [1940] 1 All E.R. 174 (K.B.).

In McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1956), the plaintiff sued a druggist for personal injuries resulting from side effects of a prescription drug sold by the druggist. The druggist alleged that the theories of implied warranties of merchantability and fitness were inapplicable because he was engaged in the rendition of services and not the sale of goods. The court found it unnecessary to consider this claim, since it held that there was no implied warranty of fitness because the plaintiff relied on the judgment of his doctor, not the druggist. The court also held there was no implied warranty of merchantability because the drug was not offered for sale to the general public, but only to those who had prescriptions from their doctors — a highly questionable holding.

[56] Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897 (1961); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); Ben Constr. Corp. v. Ventre, 23 App. Div. 2d 44, 257 N.Y.S.2d 988 (1965) (dictum); Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971) (though the court did not view the transaction as primarily for services); Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.); *cf.* Watson v. Buckley, Osborne, Garrett & Co., [1940] 1 All E.R. 174 (K.B.). *See* the chattel lease cases cited note 62 *infra*.

[57] Courts are most unwilling to find implied warranties in contracts for medical services. *E.g.*, White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Ct. App.), *cert. denied*, 211 So. 2d 215 (Fla. 1968); Carter v. Inter-Faith Hosp., 304 N.Y.S.2d 97 (Sup. Ct. 1969); Cutler v. General Elec. Co., 4 UCC REP. SERV. 300 (N.Y. Sup. Ct. 1967); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964). For other situations in which the courts have refused to find an implied warranty of merchantability, see Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963) (hair treatment); Victor v. Barzaleski, 19 Pa. D. & C.2d 698, 49 Luz. Leg. Reg. Rep. 155 (C.P. 1959) (person hired to buy and install heating system); Borland v. Clifford, 71 R.I. 12, 41 A.2d 310 (1945) (house painter).

[58] 5 Cal. 2d 573, 360 P.2d 897 (1961).

chantability" may be inept in this context, but nevertheless "[t]here is no justification for refusing to imply a warranty of suitability for ordinary purposes merely because an article is furnished in connection with a construction contract rather than one of sale."[59] But because the defect was in the pipe and not in the installation, the warranty may extend only to the materials used, and not to the entire system that results from the defendant's services.[60]

At least one court, however, has indicated willingness to extend a warranty of merchantability to a transation not involving the transfer of goods in any respect. In *Buckeye Union Fire Insurance Co. v. Detroit Edison Co.*,[61] plaintiff's building was destroyed by fire. Plaintiff alleged, *inter alia,* that electricity supplied by defendant was not merchantable. After stating that there was no justification for confining implied warranties to transactions in goods, the court held that the warranty of merchantability applied to this sale of services. The court limited its holding, however, to the sale of electricity, which it viewed as an inherently dangerous force, and concluded that plantiff had failed to prove there was a defect in the services provided, and that the defect, if any, caused the injury. Although recovery in this case was denied, the opinion is an example of the application to service transactions of the concept of merchantability, or fitness for ordinary purposes.

The theories of implied warranty of fitness for particular purpose and implied warranty of merchantability have been widely applied by courts in two non-sale-of-goods areas: the lease, bailment, or license of goods; and the sale of new housing. With respect to the lease, bailment, or license of goods, courts have reasoned that the kind of property interest the consumer acquires in the product should not be determinative and have concluded that the policies supporting warranty liability for sellers of goods apply equally to these other suppliers of goods.[62] With respect

[59] *Id.* at 583, 360 P.2d at 902.

[60] *Cf.* Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971), in which the court indicated that the entire system to be constructed should be viewed as a "product" and that the UCC should therefore apply to the entire system. The injury was caused, however, by a defect in a component part of the system, rather than by defective plans or construction.

[61] 38 Mich. App. 325, 196 N.W.2d 316 (1972).

[62] *E.g.,* KPLR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315 (W.D. Ark. 1971), *modified,* 465 F.2d 1382 (8th Cir. 1972); Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970); Holmes Packaging Mach. Corp. v. Bingham, 252 Cal. App. 2d 862, 60 Cal. Rptr. 769 (1967) (dictum); Whitfield v. Cooper, 30 Conn. Supp. 47, 298 A.2d 50 (Super. Ct. 1972); Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970); Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923); Vander Veer v. Tyrrell, 29 App. Div. 2d 255, 287 N.Y.S.2d 228 (1968); Covello v. State, 17 Misc. 2d 637, 187 N.Y.S.2d 396 (Ct. Cl. 1959); White Co. v. Francis, 95 Pa. Super. 315 (1928); Hatten Mach. Co. v. Bruch, 59 Wash. 2d 757, 370 P.2d 600 (1962). For a summary of recent cases, see Comment, *Strict Liability of the Bailor, Lessor and Licensor,* 57 MARQ. L. REV. 111, 115 n.15 (1973). For a discussion of the policies that justify imposition of liability on the supplier, see Part II *infra.*

The *bailee* for hire, on the other hand, is not subject to warranty liability, but rather remains liable only if negligence is proved. *E.g.,* Segura v. United States Aircraft Ins. Group, 246 So. 2d 880 (La. Ct. App. 1971) (burden on bailee to show no negligence); Greenberg v. Shoppers' Garage, Inc., 329 Mass. 31, 105 N.E.2d 839 (1952).

to the sale of new housing, in at least one-third of the states a mass producer of new houses is held to an implied warranty that the houses will be reasonably fit for their ordinary purpose—habitation[63]—for a reasonable period of time.[64] Liability for breach of implied warranty of habitability has also been extended to the lease of housing.[65] These chattel lease and housing cases support the general proposition that implied warran-

[63] Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Pollard v. Saxe & Yolles Dev. Co., 25 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Hanavan v. Dye, 41 Ill. App. 3d 576, 281 N.E.2d 398 (1972); Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972); Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969); Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952); Weeks v. Slavick. Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (lease); Minemount Realty Co. v. Ballentine, 111 N.J. Eq. 398, 162 A. 594 (Ct. Err. & App. 1932) (denying specific performance because house was not reasonably fit for habitation); Hartley v. Ballou, 20 N.C. App. 493, 201 S.E.2d 712 (1974); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Padula v. J.J. Deb-Cin Homes, Inc., 298 A.2d 529 (R.I. 1973); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Waggoner v. Midwestern Dev. Co., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958). The concept has also been recognized by the English courts. Miller v. Cannon Hill Estate, Ltd., [1931] 2 K.B. 113.

The warranty extends to a person buying from a developer rather than a builder. E.g., Pollard v. Saxe & Yolles Dev. Co., 25 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974) (apartment building); Utz v. Moss, 31 Colo. App. 475, 503 P.2d 365 (1972); Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (1971).

See City of Philadelphia v. Page 363 F. Supp. 148 (E.D. Pa. 1973) (renovator subject to warrant of habitability); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971) (remodeler impliedly subject to warranty of habitability). ***But see*** Utz v. Moss, *supra,* (dictum) (no implied warranty in sale of used home).

Most of the states adopting the theory of implied warranty of habitability have done so within the last fifteen years. Only a few courts have expressly rejected it. *E.g.,* Livingston v. Bedford, 284 Ala. 323, 224 So. 2d 873 (1969); Neary v. Posner, 253 Md. 401, 252 A.2d 843 (1969) (change is for the legislature to make); Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

[64] Padula v. J.J. Deb-Cin Homes, Inc., 298 A.2d 529 (R.I. 1973); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967).

Liability may be limited to those who engage in the mass production and sale of housing; *see* Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 234 A.2d 415 (Super. Ct. App. Div. 1967) (warranty of habitability not applicable to isolated leases). ***But see*** Worrell v. Barnes, 87 Nev. 204, 207, 484 P.2d 573, 575 (1971) (dictum); Diem v. Shushinski, 10 Chest. 42 (Pa. C.P. 1963) (warranty applicable to builder who is not in business of producing large volume of housing). And the right to assert the warranty seems to extend only to the first occupant of a new house. Utz v. Moss, 31 Colo. App. 475, 503 P.2d 365 (1972) (dictum); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972); Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (1972). Recovery has been denied the second occupant of a house even though the builder re-acquired the house from the original occupant and sold it to the second occupant. H.B. Bolas Enterprises, Inc. v. Zarlengo, 156 Colo. 530, 400 P.2d 447 (1965). ***But see*** Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (plaintiff was second occupant, purchasing house five years after completion of construction); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (plaintiff leased from original owner; no indication that lessee was first occupant). Probably because of this recent judicial recognition of an implied warranty of habitability, the home building industry is instituting a program of express warranties against major construction defects. The program evidently is to be financed by a system of insurance. St. Louis Post-Dispatch, Aug. 11, 1974, at 18A, col. 1.

[65] *E.g.,* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

ties of fitness and merchantability should not be confined to transactions involving the sale of goods.[66]

Numerous other implied warranties have been invoked or rejected, but they merely represent different ways of phrasing the theories already discussed. The prime example is implied warranty of workmanlike performance.[67] Others include implied warranty of compliance with the local building code,[68] implied warranty of perfect results,[69] and implied warranty of safety.[70]

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[66] City of Philadelphia v. Page, 363 F. Supp. 148, 152 (E.D. Pa. 1973) (extending the warranty of habitability to reconditioned housing):

> This Court sees no difference between the circumstances regarding totally new housing and reconditioned housing. The cases supply no authority for drawing such a distinction, and the distinction between new and used housing should not be deteminative of the existence of an implied warranty of habitability but rather the relative positions of the parties to the sale of the house.

Accord, In re People, 250 N.Y. 410, 165 N.E. 829 (1929). For cases applying strict liability in tort to the sale of new housing, see note 82 *infra*.

See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Miller, *A "Sale of Goods" As a Prerequisite for Warranty Protection*, 24 BUS. LAW 847 (1969); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORD. L. REV. 447 (1971); O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973); Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L. REV. 111 (1972); Note, *Extension of Warranty Concepts to Service-Sales Contracts*, 31 IND. L.J. 367 (1956); Comment, *Torts — Strict Liability for Services*, 4 N. MEX. L. REV. 271 (1974); Note, *Implied Warranties in Service Contracts*, 39 NOTRE DAME LAW. 680 (1964); Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970); Comment, *Professional Negligence*, 121 U. PA. L. REV. 627 (1973).

[67] See text accompanying notes 20–25 *supra*.

[68] Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). This is essentially an implied warranty of habitability. Indeed, in City of Philadelphia v. Page, 363 F. Supp. 148 (E.D. Pa. 1973), the breach of the warranty of habitability consisted of a failure to comply with the local housing code.

[69] The existence of a warranty of perfect results has been rejected by these cases: Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897) (physician); Roscoe Moss Co. v. Jenkins, 55 Cal. App. 2d 369, 130 P.2d 477 (1942) (well digger); Premco Drilling, Inc. v. Maillet Bros. Builders, Inc., 3 Conn. Cir. 519, 218 A.2d 542 (1965) (well digger) (by implication); Atwood Vacuum Mach. Co. v. Varner Well & Pump Co., 3 Ill. App. 2d 571, 122 N.E.2d 834 (1954) (well digger); Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971) (physician); Phelps v. Donaldson, 243 La. 1118, 150 So. 2d 35 (1963) (dentist); Knight v. Johnson, 253 So. 2d 632 (La. Ct. App. 1971) (well digger); Viland v. Winslow, 34 Mich. App. 486, 191 N.W.2d 735 (1971) (periodontist); Freeman Contracting Co. v. Lefferdink, 419 S.W.2d 266 (Mo. Ct. App. 1967) (construction contractor); Leighton v. Sargent, 27 N.H. 460 (1853) (physician); Butler v. Davis, 119 Wis. 166, 96 N.W. 561 (1903) (well digger). The warranty was upheld in Samuels v. Davis, [1943] 2 All E.R. 3 (Ct. App.) (dentist).

[70] "Implied warranty of safety" has been used by litigants or by courts as the equivalent of duty to use reasonable care, implied warranty of fitness, and strict liability in tort. *E.g.*, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) (warranty that stevedore will load cargo in a reasonably safe manner); Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960) (warranty that polio vaccine will not itself cause polio); Berhow v. Kroack, 195 N.W.2d 379 (Iowa 1972) (dictum) (chattel lessor must use reasonable care in supplying chattel that is reasonably safe); Peterson v. Sinclair Ref. Co., 20 Wis. 2d 576, 123 N.W.2d 479 (1963) (warranty of safe delivery of oil and gas). *But see* Phoenix Assurance Co. v. Potomac Sand & Gravel Co., 343 F. Supp. 658 (D.D.C. 1972), *aff'd*, 487 F.2d 1213 (D.C. Cir. 1973) (no implied warranty that the seller's premises will be absolutely safe when buyer picks up goods purchased); Hoder v. Sayet, 196 So. 2d 205 (Fla. Ct. App. 1967) (no warranty by hospital that blood transfused will be safe); Ness v. West Coast Airlines, Inc., 90 Idaho 111, 410 P.2d 965 (1965) (no implied contract of safe transport).

E. Strict Liability in Tort

The theory most favorable to a consumer injured by a defective product is strict liability in tort. Restatement (Second) of Torts section 402A provides that a manufacturer, distributor, or seller of a product that is defective and is thereby rendered unreasonably dangerous is strictly liable for any personal injuries suffered by a user of the product.[71] The theory

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Similarly, in connection with the liability of stable keepers for furnishing horses that cause personal injuries to their riders, the courts typically have spoken in terms of an implied warranty to furnish a reasonably safe animal. Since they require, however, only that the stable keeper use reasonable care in selecting a horse that is reasonably fit, rather than requiring that he absolutely furnish a horse that is reasonably fit, *e.g.*, Evans v. Upmier, 235 Iowa 35, 16 N.W.2d 6 (1944), they actually are invoking only a negligence standard. The stable keeper must use due care to discover dangerous propensities of his animals. Kersten v. Young, 50 Cal. App. 2d 1, 125 P.2d 501 (1942); Evans v. Upmier, *supra*; Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1939); Dam v. Lake Aliso Riding School, 6 Cal. 2d 395, 400, 57 P.2d 1315, 1318 (1936):

> Under this rule the so-called implied warranty is not a warranty in that sense which insures the suitableness of the horse, but is only a contractual obligation assumed against reckless or heedless hiring out of a horse without reasonable care to ascertain the habits of the animal with respect to its safety and suitability for the purpose for which it is hired.

In still other situations, courts have invoked the concept of implied contract when they really were imposing a standard of negligence. *E.g.*, Wolfe v. Virusky, 306 F. Supp. 519 (S.D. Ga. 1969); Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897); Scott v. Simpson, 46 Ga. App. 479, 167 S.E. 920 (1933); McCoy v. Wesley Hosp. & Nurse Training School, 188 Kan. 325, 362 P.2d 841 (1961); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950).

The likeliest reason for resort to theories of contract rather than tort is the typically longer statute of limitations for actions based on written contracts. *E.g.*, CAL. CODE CIV. PRO. §§ 337.1, 340.3 (West Supp. 1974). *See* Wolfe v. Virusky, *supra;* Pollard v. Saxe & Yolles Dev. Co., 32 Cal. App. 3d 341, 108 Cal. Rptr. 174 (1973), *aff'd,* 25 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Scott v. Simpson, *supra*; McCoy v. Wesley Hosp. & Nurse Training School, *supra.* Not all courts, however, recognize the existence of a cause of action in contract when a person performing services is negligent. *E.g.*, Carr v. Lipshie, 8 App. Div. 2d 330, 187 N.Y.S.2d 564 (1959) (accountant is liable only in tort for his negligence unless he has expressly guaranteed a specific result).

Still other implied warranties were invoked in United States v. D.C. Loveys Co., 174 F. Supp. 44 (D. Mass. 1959), *aff'd sub nom.* A. Belanger & Sons, Inc. v. United States, 275 F.2d 372 (1st Cir. 1960) (implied contract duty, rather than implied warranty, of preparation for shipment); Alpert v. Commonwealth, 357 Mass. 306, 258 N.E.2d 755 (1970) (owner who supplies information about subsoil condition impliedly warrants that he is giving all the information he has available); Standard Brands Chem. Indus., Inc. v. Pilot Freight Carriers, Inc., 65 Misc. 2d 1029, 319 N.Y.S.2d 457 (1971) (warranty that goods will be properly prepared for shipment). *But see* Snow's Laundry & Dry Cleaning Co. v. Georgia Power Co., 61 Ga. App. 402, 6 S.E.2d 159 (1939) (no warranty that estimate of cost of service, based only on vendor's opinion, would be accurate); Page v. Wells, 37 Mich. 415 (1877) (land broker does not warrant accuracy of his statements); Wecoline Prods., Inc. v. Carman & Co., 125 N.J.L. 480, 15 A.2d 600 (1940) (in cost-plus contract for processing defendant's goods at plaintiff's plant, no implied warranty that plaintiff would operate his plant in the most efficient manner possible.

[71] RESTATEMENT (SECOND) OF TORTS § 402A (1965):

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

has been widely adopted by the courts to provide relief for persons injured by defective products.[72] Recovery for injuries resulting from defective services would be facilitated if the theory of strict liability in tort were extended to service transactions. For the most part, however, courts have refused to make this extension,[73] even if the person providing services also supplies a defective chattel in connection with those services .[74] For example, one court concluded that "Where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply."[75] Nevertheless, there is some authority for the application of strict liability in tort to service transactions. Historically, courts have imposed strict liability on one who is in control of an ultra-hazardous substance,[76] a theory that has been extended to a situation in which a person used a hazardous substance in performing services for another.[77] In addition, courts have long imposed a form of strict liability on innkeepers[78] and common carriers,[79] holding both liable for injury to goods entrusted to their care.

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[72] The cases are collected in W. PROSSER, *supra* note 2, § 98, (stating that as of 1971, two-thirds of the states embraced the theory).

[73] *E.g.*, La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Stewart Warner Corp. v. Burns Int'l Security Serv., Inc., 343 F. Supp. 953 (N.D. Ill. 1972); Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967); Stuart v. Crestview Mutual Water Co., 34 Cal. App. 3d 803, 110 Cal. Rptr. 543 (1973); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (dictum); Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966) (dictum); Hoover v. Montgomery Ward & Co., 528 P.2d 76 (Ore. 1974); personal injury cases cited notes 74–75, 78 *infra*.

[74] Mauran v. Mary Fletcher Hosp., 318 F. Supp. 297 (D. Vt. 1970); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972); McLeod v. W. S. Merrell Co., 174 So. 2d 736 (Fla. 1965); Cutler v. General Elec. Co., 4 UCC REP. SERV. 300 (N.Y. Sup. Ct. 1967); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950). See defective blood cases cited note 84 *infra*. Most courts refuse to apply strict liability even when the person rendering services causes injury through the use of a defective product. Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968).

Although the person rendering services may not be strictly liable for defective products used or supplied in the rendition of those services, the manufacturer of the defective product may still be strictly liable. *See* Vergott v. Deseret Pharmaceutical Co., *supra;* Carmichael v. Reitz, *supra* (dictum) (drug found not defective); Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960) (implied warranty); McKasson v. Zimmer Mfg. Co., 12 Ill. App. 3d 429, 299 N.E.2d 38 (1973); Magrine v. Krasnica, *supra* (dictum); Dorfman v. Austenal, Inc., 3 UCC REP. SERV. 856 (N.Y. Sup. Ct. 1966) (implied warranty).

[75] Allied Properties v. John A. Blume & Associates, 25 Cal. App. 3d 848, 855, 102 Cal. Rptr. 259, 264 (1972).

[76] *E.g.*, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868). *Cf.* Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 159 A.2d 97 (1960) (enforcement of statutory imposition of strict liability on the owner of an airplane for damage done by the plane or by debris falling from the plane).

[77] Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948) (fumigator).

[78] At common law a hostel keeper was strictly liable for property losses of his guests. *See* Brewer v. Roosevelt Motor Lodge, 295 A.2d 647 (Me. 1972). But statutes have displaced this liability with liability only for negligence if the hotel complies with the statute. Compliance usually requires the hotel to have available for the use of its guests a safe and to post announcements of its availability. *E.g.*, N.Y. GEN. BUS. LAW

More recently, courts have looked to the analogy of sales of goods, rather than the situations that earlier gave rise to strict liability, to determine liability of those who provide services. The foremost extension of strict liability to a non-sale-of-goods transaction has occurred with respect to the lease of chattels. As in the cases upholding the existence of implied warranties in chattel lease transactions,[80] an increasing number of courts reason that a lease of goods is essentially the same as a sale of goods and that the consumer is entitled to the same protection under both types of transactions.[81] Strict liability has also been imposed by a few courts on those who sell new housing.[82] But the most promising line of cases adopting a theory of strict liability deals with the sale of a product and the rendition of related services. Courts in this situation are increasingly willing to adopt a theory of strict liability when the product is defective. Thus, strict liability has been imposed on beauty shop operators who applied defective hair products[83] and on a hospital that supplied impure

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§ 200 (McKinney 1968); Brewer v. Roosevelt Motor Lodge, *supra* (liability only for negligence because of compliance with the statute); DePaemelaere v. Davis, 77 Misc. 2d 1, 351 N.Y.S.2d 808 (N.Y. City Civ. Ct. 1973) (strict liability because of failure to comply with posting provisions of statute); Buck v. Hankin, 217 Pa. Super. 262, 269 A.2d 344 (1970) (same).

Liability for personal injuries caused by intruders or defects in the premises depends on negligence of the hotel. Wagner v. Coronet Hotel, 10 Ariz. App. 296, 458 P.2d 390 (1969) (defective bath mat); Heathcoate v. Bisig, 474 S.W.2d 102 (Ky. 1971) (patron of tavern assaulted by other patrons); Brewer v. Roosevelt Motor Lodge, *supra* (rape by intruder); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972) (exploding water heater).

[79] A common carrier is not held strictly liable for damage to goods entrusted to his care if he can show that the damage was caused by something not within his control, such as act of God, act of public enemy, act of the shipper, act of public authority, or inherent nature or vice of the goods. Marks Mfg. Co. v. New York Cent. R.R., 448 F.2d 68 (6th Cir. 1971) (dictum); Bauer v. Jackson, 15 Cal. App 3d 358, 93 Cal. Rptr. 43 (1971); Napco Chem. Div. v. Blaw-Knox Co., 59 N.J. 274, 281 A.2d 793 (1971); Standard Brands Chem. Indus., Inc., v. Pilot Freight Carriers, Inc., 65 Misc. 2d 1029, 319 N.Y.S.2d 457 (Sup. Ct. 1971). For personal injuries, however, carriers are liable only if they are negligent. *E.g.*, Herman v. Eastern Airlines, Inc., 149 F. Supp. 417 (E.D.N.Y. 1957); Ness v. West Coast Airlines, Inc., 90 Idaho 111, 410 P.2d 965 (1965).

[80] Cases cited note 62 *supra.*

[81] *E.g.*, Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969); Stewart v. Budget Rent-A-Car Corp., 57 Hawaii 71, 470 P.2d 240 (1970); Galluccio v. Hertz Corp., 1 Ill. App. 3d 272, 274 N.E.2d 178 (1971); Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972). *See* Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal Rptr. 473 (1972) (apartment lease, defective couch); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970) (license); Whitfield v. Cooper, 30 Conn. Supp. 47, 298 A.2d 50 (Super. Ct. 1972) (bailment).

[82] Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973); Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (1972). *Contra,* Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972).

[83] Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); Jerry v. Borden Co., 45 App. Div. 2d 344, 358 N.Y.S.2d 426 (1974); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971); Watson v. Buckley, Osborne, Garrett & Co., [1940] 1 All E.R. 174 (K.B.). *Cf.* Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309, N.E.2d 550 (1974) (dictum) (Planned Parenthood Association strictly liable for defects in birth control pills it sold, even though it is engaged primarily in the rendition of services).

blood in the course of rendering medical services.[84] As with the extension of implied warranty of fitness to service transactions, however, in most of the cases imposing strict liability on a person rendering services, the injury was caused by a defect in the product rather than by defective use of a sound product or by defective services. Only a few courts have indicated approval of strict tort liability for defective services.[85]

F. Misrepresentation

Another theory sometimes available in cases of defective services is misrepresentation. Thus, a termite eradicator was held liable for an erroneous termite report under a theory of negligent misrepresentation,[86] as were mistaken surveyors of land and a mistaken product certifier.[87] Each of these cases, however, involved negligent misrepresentation. Indeed, in two old cases involving erroneous information supplied by "land lookers," the courts refused to hold the defendants liable for the falsity of their reports in the absence of negligence, bad faith, or dishonesty.[88]

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[84] Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); *accord,* Reilly v. King County Central Blood Bank, Inc., 6 Wash. App. 172, 492 P.2d 246 (1971) (blood bank); *see* Russell v. Community Blood Bank, 185 So. 2d 749 (Fla. Ct. App. 1966), *aff'd as modified,* 196 So. 2d 115 (Fla. 1967) (blood bank). Most courts that have faced the question, however, refuse to apply strict liability to hospitals that transfuse impure blood. *E.g.,* Evans v. Northern Illinois Blood Bank, Inc., 13 Ill. App. 3d 19, 298 N.E.2d 732 (1973) (blood that is incompatible is not defective, so strict liability does not apply); Brody v. Overlook Hosp., 127 N.J. Super. 331, 317 A.2d 392 (Super. Ct. App. Div. 1974); Baptista v. Saint Barnabas Med. Center, 109 N.J. Super. 217, 262 A.2d 902 (Super. Ct. App. Div.), *aff'd,* 57 N.J. 167, 270 A.2d 409 (1970). "[Strict liability in tort and warranty liability are two names for the same thing]. The governing principles are identic [sic.]. These are two labels for the same legal right and remedy." Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 324, 232 A.2d 879, 884 (Super. Ct. 1967), *set aside,* 53 N.J. 138, 249 A.2d 65 (1969).

Most states have recently enacted statutes precluding the imposition of implied warranties on the provision of blood. *E.g.,* ILL. ANN. STAT. ch. 91, §§ 181–84 (Smith-Hurd Supp. 1974); TENN. CODE ANN. § 47–2–316(5) (Supp. 1974); WASH. REV. CODE ANN. § 70.54.120 (Supp. 1973). Consequently, in cases arising after enactment of these statutes, the courts hold that the legislative intent is to preclude not only implied warranties but also the imposition of strict liability in tort. *E.g.,* Heirs of Fruge v. Blood Serv., 506 F.2d 841 (5th Cir. 1975); McDaniel v. Baptist Mem. Hosp., 469 F.2d 230 (6th Cir. 1972); Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

[85] Johnson v. Sears Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973), in which the court denied a motion to dismiss a complaint alleging strict liability on behalf of a hospital, reasoning that even if strict liability should not apply to professional services, it might still properly apply to nonprofessional or mechanical or administrative services of hospitals; Reliable Elec. Co. v. Clinton Campbell Contractor, Inc., 10 Ariz. App. 371, 459 P.2d 98 (1969), in which, for defective installation of wiring in a kiln, the trial court gave recovery on several theories, including strict liability. The appellate court affirmed, solely on the theory of breach of implied warranty of workmanlike performance, and expressly failed to consider the applicability of strict liability; Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974) (used car dealer should be subject to strict liability in tort for injuries caused by any defective work, repairs, or replacements on car he sells).

[86] Hardy v. Carmichael, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (1962).

[87] Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969). *See* Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149 (1974) (title abstractor); City of East Grand Forks v. Steele, 121 Minn. 296, 141 N.W. 181 (1913) (accountant).

[88] Page v. Wells, 37 Mich. 415 (1877) (a "land looker" was a person who sold descriptions of undeveloped land); Noble v. Libby, 145 Wis. 38, 129 N.W. 791 (1911). *But see* Kasel v. Remington Arms. Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314,

The paucity of cases using a theory of misrepresentation may be explained by the large extent to which that theory overlaps the contract theory of breach of express warranty. Thus, an assurance by a lessor of machinery that the machinery is suitable for the lessee's purpose will likely give rise to an express warranty.[89] A similar overlap may also exist with respect to implied warranties, which frequently are said to arise because the seller holds himself out as, or impliedly represents that he is, qualified to do the particular job. Indeed, in one case the court expressly stated that there was no need to resort to the tort theory of misrepresentation and that the plaintiff could maintain his action on the contract theory of implied warranty of sufficiency of plans.[90]

Fraud and deceit are similar to misrepresentation, but include the element that the defendant knew the representation to be false or at least had no reasonable basis for believing it to be true. Several courts have permitted recovery in service transactions on the theory of fraud, for such facts as a false report of a soil test,[91] a false termite report,[92] and a false representation by a chiropractor that the plaintiff's son did not have an incurable disease.[93] Because of the requirement of fraudulent intent, these theories are not likely to be of much use in the ordinary case of defective services.[94]

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324 (1972) (dictum) (questioning soundness of the court's refusal to impose strict liability in tort on the product certifier in Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969)); Hayes v. Viola, 179 So. 2d 685 (La. Ct. App. 1965) (defective auto repairs; breach of representation that repairman was an expert in repairing foreign sports cars; no express requirement that misrepresentation, if any, be negligent).

[89] Hatten Mach. Co. v. Bruch, 59 Wash. 2d 757, 370 P.2d 600 (1962); *accord,* Sawyer v. Pioneer Leasing Corp., 244 Ark. A43, 428 S.W.2d 46 (1968).

[90] Alpert v. Commonwealth, 357 Mass. 306, 258 N.E.2d 755 (1970); *accord,* Montrose Contracting Co. v. County of Westchester, 80 F.2d 841 (2d Cir.), *cert. denied,* 298 U.S. 662 (1936).

[91] Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954) (defendant had no reasonable ground for believing the report to be true).

[92] Wice v. Schilling, 124 Cal. App. 2d 735, 269 P.2d 231 (1954) (defendant knew statement to be false).

[93] Lake v. Baccus, 59 Ga. App. 656, 2 S.E.2d 121 (1939). *See also* Palmquist v. Mercer, 43 Cal. 2d 92, 272 P.2d 26 (1954) (riding academy's requiring consumer to sign release from liability for personal injuries may be fraudulent); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) (concealment of facts that unsealed irrigation ditch ran under garage and that basement was not waterproofed was tantamount to fraud); Henon v. Vernon, 68 Pa. Super. 608 (1918) (possible liability for collusion between architect and general contractor in changing plans without owner's knowledge). *But see* Spead v. Tomlinson, 73 N.H. 46, 59 A. 376 (1904) (statement by Christian Science healer that he would cure one of appendicitis held not actionable for fraud because no fraudulent intent).

[94] Snow's Laundry & Dry Cleaning Co. v. Georgia Power Co., 61 Ga. App. 402, 6 S.E.2d 159 (1939); Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149 (1974) (refusal to adopt theory of constructive intent to defraud); Spead v. Tomlinson, 73 N.H. 46, 59 A. 376 (1904).

Compare the provisions in the federal legislation regulating the securities industry, prohibiting brokers, dealers, and investment advisors from making false or misleading statements and from engaging in any act or practice that is fraudulent or deceptive. Securities Exchange Act of 1934 §§ 10, 18, 15 U.S.C. §§ 78j, r (1970), and Rules 10b(3), (5) thereunder, 17 C.F.R. §§ 240.10b–3, –5 (1974); Securities Investor Protection Act of 1970 § 7(d), 15 U.S.C. § 780(c) (1970); Investment Advisors Act of 1940 § 206, 15 U.S.C. § 80b–6 (1970).

To recapitulate, the prevailing standard of liability in service transactions is negligence, but courts have imposed a higher standard in a variety of factual situations. In most of the cases imposing a higher standard, however, the defect lay in some tangible item supplied in connection with the defendant's performance of the contract. In some of the hybrid cases, it is impossible to determine from the opinions whether the defect lay in some tangible item or in the services themselves.[95] Nevertheless, in some cases the defect clearly can be attributed to the services,[96] and in a few cases involving only services, courts have recognized the existence, or possible existence, of liability in the absence of negligence.[97]

II. EXTENSION OF WARRANTY OF FITNESS AND STRICT LIABILITY IN TORT TO SERVICE TRANSACTIONS

A. Reasons Given by Courts That Deny Any Extension of Liability

The most commonly mentioned reason for rejecting warranty or strict liability in service transactions is that no sale of goods is involved. Although some courts adopting this reason have explored the grounds for limiting the theories to transactions in goods,[98] a surprisingly large number seem content merely to recite the obvious: a sale of services is not a sale of goods. From this, the courts jump to the conclusion that there is no warranty and no strict liability.[99] For example, in denying liability on the

[95] Vitromar Piece Dye Works v. Lawrence of London, Ltd., 119 Ill. App. 2d 301, 256 N.E.2d 135 (1969) (waterproofing); King v. Ohio Valley Terminix Co., 309 Ky. 35, 214 S.W.2d 993 (1948) (termite treatment); Usona Mfg. Co. v. Shubert-Christy Corp., 132 S.W.2d 1101 (Mo. Ct. App. 1939) (plating); Locks Labs., Inc. Bloomfield Molding Co., 35 N.J. Super. 422, 114 A.2d 457 (Super. Ct. App. Div. 1955) (manufacture of specially designed mold); Debby Junior Coat & Suit Co. v. Wollman Mills, Inc., 207 Misc. 2d 330, 137 N.Y.S.2d 703 (Sup. Ct. 1955) (fabric treatment); McCool v. Hoover Equip. Co., 415 P.2d 954 (Okla. 1966) (plating). This is also true in many of the construction cases.

[96] United States v. D.C. Loveys Co., 174 F. Supp. 44 (D. Mass. 1959), *aff'd sub nom.* A. Belanger & Sons, Inc. v. United States, 275 F.2d 372 (1st Cir. 1960); Woodrick v. Smith Gas Serv., Inc., 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967); Rotolo v. Stewart, 127 So. 2d 24 (La. Ct. App. 1961); Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974); Standard Brands Chem. Indus., Inc. v. Pilot Freight Carriers, Inc., 65 Misc. 2d 1029, 319 N.Y.S.2d 457 (Sup. Ct. 1971); Delo Auto Supply, Inc. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950); Hepp Bros. v. Evans, 420 P.2d 477 (Okla. 1966); Peterson v. Sinclair Ref. Co., 20 Wis. 2d 576, 123 N.W.2d 479 (1963).

[97] Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973); Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Reliable Elec. Co. v. Clinton Campbell Contractor, Inc., 10 Ariz. App. 371, 459 P.2d 98 (1969) (trial court only); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316 (1972); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 164 A.2d 201 (1960) (alternative holding); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

[98] *See, e.g.*, cases cited notes 109–10 *infra*.

[99] Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972); Stewart Warner Corp. v. Burns Int'l Security Serv., Inc., 343 F. Supp. 953 (N.D. Ill. 1972); Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Wagner v. Coronet Hotel, 10 Ariz. App. 296, 458 P.2d 390 (1969); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 44 Cal. Rptr. 404 (1965); Cassina v. Morris M. Taylor & Sons, Inc., 2 UCC REP. SERV. 1148 (Conn. Cir. Ct. 1964); Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963); White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Ct. App.), *cert. denied*, 211 So. 2d 215 (Fla. 1968); Lovett v. Emory Univ., Inc., 166 Ga. App. 277, 156 S.E.2d 923 (1967); Airco Refrig. Serv.,

part of a hospital for transfusing impure blood, a Florida court stated: "It follows, of course, that if there was no sale of blood from the hospital to the patient, but only a service rendered, there could be no implied warranty of fitness or merchantability, and therefore no breach giving rise to a cause of action."[100]

Despite this conclusionary reasoning, there are several areas in which courts now hold that the absence of a sale of goods is an insufficient reason for denying the existence of strict liability and implied warranties. Originally, the providing of food by a restaurant, as opposed to a grocery store, was not viewed as a sale of goods and was not subject to implied warranties or strict liability. Today, however, it is viewed either as a sale of goods or as subject to implied warranties and strict liability even in the absence of a sale of goods.[101] A similar shift has occurred in two other areas, chattel leases and new house sales.[102] Even in situations not falling within these three well-defined exceptions to the requirement of a sale of goods, courts have invoked the theories of implied warranties and strict liability in the absence of a technical sale of goods, though in almost all of these cases the performance of services was accompanied by the transfer to the consumer of a defective chattel.[103] With respect to injuries

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Inc. v. Fink, 242 La. 73, 134 So. 2d 880 (1961); Page v. Wells, 37 Mich. 415 (1877); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Aegis Prods., Inc. v. Arriflex Corp. of America, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966); Cutler v. General Elec. Co., 4 UCC REP. SERV. 300 (N.Y. Sup. Ct. 1967); Dorfman v. Austenal, Inc., 3 UCC REP. SERV. 856 (N.Y. Sup. Ct. 1966); York Heating & Vent. Co. v. Flannery, 87 Pa. Super. 19 (1926); Victor v. Barzaleski, 19 Pa. D. & C.2d 698, 49 Luz. Leg. Rep. 155 (C.P. 1959); Borland v. Clifford, 71 R.I. 12, 41 A.2d 310 (1945); Sam White Oldsmobile v. Jones Apothecary, 337 S.W.2d 834 (Tex. Civ. App. 1960); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956) (dictum); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

One court evidently felt it necessary to note the sale-no sale distinction in a house remodeling case but managed to avoid holding that there was no liability by concluding that the entire gas system to be installed was the relevant "product." The sale of that "product" was the sale of goods and therefore was governed by the Uniform Commercial Code. Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971).

The sale-no sale distinction as a basis for deciding cases has been soundly criticized. *E.g.*, Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction,* 24 HASTINGS L. REV. 111, 131 (1972), in which the authors maintain that it is not the transfer of a chattel to the consumer, but rather the economic gain of the seller, that is the basis for imposing strict liability. That economic gain is as present when a person performing services uses a defective product as it is when a retailer merely sells a defective product. *See* authorities cited note 66 *supra.*

[100] White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19, 21 (Fla. Ct. App.), *cert. denied,* 211 So. 2d 215 (Fla. 1968).

[101] *E.g.,* Levy v. Paul, 207 Va. 100, 147 S.E.2d 722 (1966 (restaurant indistinguishable from grocery store); UCC § 2–314: "Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale"; RESTATEMENT (SECOND) OF TORTS § 402A, comments *b* at 348, *l* at 354 (1965). For a good description of the development of the liability of those providing food services, see Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960).

[102] *See* notes 62–65, 81–82 *supra* and accompanying text.

[103] Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897 (1961); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); *In re* People, 250 N.Y. 410, 165 N.E. 829 (1929); Ben. Constr. Corp. v. Ventre, 23 App. Div. 2d 44, 257 N.Y.S.2d 988 (1965) (dictum); Carpenter v. Best's Apparel, Inc., 4 Wash. App 439, 481 P.2d 924 (1971);

caused by defective goods supplied in connection with the rendition of services, there is absolutely no justification for refusing to apply current theories of products liability. The person rendering services who installs or supplies defective goods in the course of those services occupies precisely the same position as the retailer of goods—namely, a person in the chain of distribution of goods from the manufacturer to the consumer. Indeed, several courts have been struck by the illogic of holding a retailer of goods strictly liable for defective goods while absolving from liability the seller who also installs or applies those defective goods.[104] The same reasoning also applies with respect to injuries caused by defective goods used in the course of performing services, but not transferred to the consumer. Again, the performer is merely part of the conduit by which the goods reach the consumer.[105]

Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.); cases cited notes 62–65, 81–85 *supra*. *Cf.* Ratigan v. United States, 88 F.2d 919 (9th Cir. 1937) (injection of morphine is a "sale" within the meaning of a statute making it a crime to sell morphine).

Cases in which no defective chattel was transferred are Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973) (hospital services); Vitromar Piece Dye Works v. Lawrence of London, Ltd., 119 Ill. App. 2d 301, 256 N.E.2d 135 (1969) (waterproofing fabric); M.K. Smith Corp. v. Ellis, 257 Mass. 269, 153 N.E. 548 (1926) (construction of cider tank); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316 (1972) (electricity); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973) (defectively designed heating system); McCool v. Hoover Equip. Co., 415 P.2d 954 (Okla. 1966) (rechroming crankshafts).

[104] Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897 (1961); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); Levy v. Paul, 207 Va. 100, 147 S.E.2d 722 (1966); Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.); Watson v. Buckley, Osborne, Garrett & Co., [1940] 1 All E.R. 174 (K.B.); G.H. Myers & Co. v. Brent Cross Serv. Co., [1934] 1 K.B. 46. These cases represent situations analogous to hypothetical (2) in the introduction to this article.

Insofar as one justification of strict liability for the retailer is his ability to fix ultimate liability on the manufacturer, this justification is equally applicable to the person performing services who uses a defective product, since he too can fix ultimate liability on the manufacturer. *See* Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L. REV. 111, 132 (1972). Nor should it matter that the service aspects of the transaction "predominate" over the goods aspects of the transaction. Even in this situation, the role of the person performing services is analogous to the role of the retailer. Thus it would seem conceptually unsound to decide a case by determining whether the services or goods aspects of a hybrid transaction predominate. *But see* Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924, 926 (1971) ("we cannot say that either part of the transaction predominated over the other"). The court was forced into this analysis by an earlier decision of the Washington Supreme Court, Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956), holding that a transfusion of blood was not a sale of goods and therefore there could be no warranty liability.

[105] Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Numon v. Stevens, 162 Neb. 339, 76 N.W.2d 232 (1956); Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901). When medical services are involved, however, the use of a defective implement is not held to entail strict liability. *E.g.*, Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 197 (1971); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968). These cases represent situations analogous to hypothetical (5) in the introduction to this article.

For other criticism of these medical services cases, *see, e.g.*, Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L. REV. 111 (1972); Comment, *Silverhart v. Mount Zion Hospital—A Re-examination of the Hospital-Patient Relationship*, 5 SW. U.L. REV. 297 (1973).

Nevertheless, most courts reject warranty and strict liability in predominantly service transactions,[106] frequently stating in conclusory fashion that one who renders services is not an insurer or guarantor of the results of those services. This statement is most commonly found in cases involving professional services,[107] but it also appears in numerous other contexts.[108] Only with respect to professional services have courts actually tried to articulate the relevance of any distinction between goods transactions and service transactions. One court described professional services as experimental in nature and dependent on materials produced by others or on factors beyond the control of the professional,[109] and other courts have stressed the complexity and uncertainty of results in transactions of professional services.[110]

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[106] *See* cases cited notes 31, 73, 99 *supra* and notes 107–08 *infra.*

[107] *Doctors:* Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Smothers v. Hanks, 34 Iowa 286 (1872); Viland v. Winslow, 34 Mich. App. 79, 191 N.W.2d 735 (1971); Leighton v. Sargent, 27 N.H. 460 (1853). *Dentist:* Phelps v. Donaldson, 243 La. 1118, 150 So. 2d 35 (1963). *Attorneys:* Babbitt v. Bumpus, 73 Mich 331, 41 N.W. 417 (1889); Sullivan v. Stout, 1200 N.J.L. 304, 199 A. 1 (1938). *Architect:* Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 164, A.2d 201 (1960). *Engineers:* Bonadiman-McCain, Inc. v. Snow, 183 Cal. App. 2d 56, 6 Cal. Rptr. 52 (1960); Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915). *Hospitals:* Baptista v. Saint Barnabas Med. Center, 109 N.J. Super. 217, 262 A.2d 902 (Super. Ct. App. Div.), *aff'd,* 57 N.J. 167, 270 A.2d 409 (1970) (as to incompatible blood); Dorfman v. Austenal, Inc., 3 UCC REP. SERV. 856 (N.Y. Sup. Ct. 1966) (as to surgical pin).

[108] Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954) (soil tester); Roberts v. Karr, 178 Cal. App. 2d 535, 3 Cal. Rptr. 98 (1960) (surveyor); Global Tank Trailer Sales v. Textilana-Nease, Inc., 209 Kan. 314, 496 P.2d 1292 (1972) (dictum) (chattel bailor); Heathcoate v. Bisig, 474 S.W.2d 102 (Ky. 1971) (dictum) (tavern owner, as to patron injured by other patrons); Otis Elevator Co. v. Embert, 198 Md. 585, 84 A.2d 876 (1951) (maintenance company); Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 408 P.2d 145 (1965) (dictum) (floor layer); Canavan v. City of Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920) (water company); Snow v. Wathen, 127 App. Div. 948, 112 N.Y.S. 41 (1908) (horse trainer); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972) (innkeeper, as to exploding water heater); Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1939) (livery stable).

[109] Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963) (speaking of doctors, lawyers, and architects, but holding an engineer liable). *See also* La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968) (with respect to professional services, there is no mass production of goods and no body of distant consumers whom it would be unfair to require to trace back along the channels of trade to the original manufacturer and pinpoint an act of negligence).

[110] Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065, 1066-67 (E.D. Wis. 1973) (all that a doctor can be expected to provide is adequate treatment commensurate with the state of medical science, *i.e.,* treatment in a non-negligent manner; but there may be a different rule as to mechanical and administrative services of a hospital); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969) (distinguishing nature of services rendered by beauty salon operators from those rendered by doctors and dentists); Baptista v. Saint Barnabas Med. Center, 109 N.J. Super, 217, 262 A.2d 902 (Super. Ct. App. Div.), *aff'd,* 57 N.J. 167, 270 A.2d 409 (1970) (dissenting opinion) (as to doctors, essence of function is to provide opinions and services devoid of certainty or assurance of cures; Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (optometrist's prescribing and fitting glasses is an art with many variables, calling for an exercise of judgment); Note, *Extension of Warranty Concepts to Service-Sales Contracts,* 31 IND. L.J. 367, 375 (1956); Comment, *Professional Negligence,* 121 U. PA. L. REV. 627, 640 (1973) (discussing lack of standards by which to assess exercise of professional judgment).

In medical services cases, it has been suggested that the necessity for the ready availability of the services is a sufficient reason for rejecting strict liability.[111]

> In our judgment, the nature of the services, the utility of and the need for them, involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules of strict liability in tort.[112]

It has also been suggested that imposition of strict liability would deter the development of new medical devices and techniques and new medicines.[113] These arguments, however, are not fully persuasive. First, the production and sale of food and drugs, which are as essential as medical services, are subject to strict liability doctrine.[114] Secondly, special treatment for doctors because of the essential nature of their services can be justified only if the imposition of strict liability would either make doctors unwilling to provide the same range of services they now provide or cause such an increase in the cost of medical services that people now seeking medical services would be deterred from seeking them. Neither assumption has been demonstrated to be true, and it is doubtful whether either assumption has proven true with respect to essential (or even nonessential) goods.

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[111] Heirs of Fruge v. Blood Serv., 365 F. Supp. 1344 (W.D. La. 1973) (dictum), *aff'd*, 506 F.2d 841 (5th Cir. 1975); Shepard v. Alexian Bros. Hosp., Inc. 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973) (dictum); Balkowitsch v. Minneapolis War Mem. Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961). *But see* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer,)* 50 MINN. L. REV. 791, 811–12 (1966), suggesting that the real reason for refusing to impose strict liability in the impure blood cases is the inability to detect the impurity in the blood.

[112] Newmark v. Gimbel's, Inc., 54 N.J. 585, 597, 258 A.2d 697, 703 (1969) (dictum).

[113] Leff, *Medical Devices and Paramedical Personnel: A Preliminary Context for Emerging Problems,* 1967 WASH. U.L.Q. 332, 335; Comment, *Professional Negligence,* 121 U. PA. L. REV. 627, 651 (1973). *But see* Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320, 326 (1960) (this might be a good argument against a warranty of cure, but is not persuasive with respect to a warranty that a vaccine will not cause the very disease it was designed to prevent).

It has also been suggested that increasing the basis of liability will have the undesirable consequences of promoting litigation and creating uncertainty. Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963); Smothers v. Hanks, 34 Iowa 286 (1872); Comment, *Professional Negligence,* 121 U. PA. L. REV. 627, 635 (1973). And, of course, some believe that the task of changing the long-standing law is for the legislature. Thomas v. Cryer, 251 Md. 725, 248 A.2d 795 (1969).

[114] See note 101 *supra;* RESTATEMENT (SECOND) OF TORTS § 402A and comments *d, h, j, k* (1965). *See* Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065, 1067 (E.D. Wis. 1973) (it is in the public interest that mechanical and administrative services of hospitals, performed for both doctors and patients, be performed properly, so strict liability may apply); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code,* 39 FORD. L. REV. 447, 471 (1971) (blood is no more essential than food, which is subject to warranties); Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction,* 24 HASTINGS L. REV. 111, 129–30 (1972): "Actually, no justification exists for insulating certain persons from liability merely because of their occupation. What should be considered is not the work a person does, but the benefits which he receives from the use of certain products and the hardships which he would suffer should strict liability be imposed." Warranty and strict liability now apply also to the sale of new and reconditioned housing, which may be viewed as a necessity. *See* cases cited notes 63, 82, *supra.*

The extension of warranty and strict liability beyond transactions for the sale of goods undercuts the statement that the absence of a sale of goods is sufficient reason for refusing to extend liability to service transactions. Even if courts believe that the nature of medical or other professional services justifies the refusal to apply warranty or strict liability, it does not necessarily follow that nonprofessional services should also be exempt.[115]

B. An Argument for Extension

The reasons commonly given[116] for implying warranties and applying strict liability in tort to transactions in goods also apply to service transactions. Foremost among those reasons are the public interest in the protection of human life, health, and safety; the seller's superior knowledge and opportunity to determine if the goods are defective; the consumer's reliance on the skill, care, and reputation of the seller;[117] the superior ability of the seller to bear the loss caused by defects and to distribute the risk of that loss over all his customers; and the wasteful circuity of action when the consumer is permitted to assert claims in negligence only against those with whom he is in privity.

First, the public interest in life, health, and safety does not depend on the nature of the transaction. This public interest is necessarily as great in service transactions as in goods transactions, because the same harmful effects can result from each.

Secondly, the seller of services stands in the same position with respect to the consumer as does the seller of goods—he is in a far better position than the consumer to determine in advance whether the services are defective and, if they are, to alter them.[118] In several cases, however, courts

[115] *See* Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969). *But see* Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir. 1972) (recognizing a distinction between professional and nonprofessional services but denying the existence of warranty or strict liability under New Jersey law because no product was supplied in the course of performing the services).

[116] For a collection and discussion of the reasons typically given to justify warranty and strict liability in goods cases, see Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[117] The seller, of course, typically encourages this reliance through advertising, packaging, and otherwise promoting his goods. *See* Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970) (consumer's vigilance has been lulled). Underlying the existence of warranties in goods tansactions is some form of reliance by the buyer. Thus, express warranties exist only if the representation is part of the basis of the bargain. UCC § 2–313. The implied warranty of fitness for particular purpose exists only if the seller has reason to know of that purpose and of the buyer's reliance on the expertise of the seller. UCC § 2–315. And the implied warranty of merchantability exists only if the seller deals in goods of the kind sold, UCC § 2–314, so that it may be presumed that the buyer relies on the seller's superior familiarity with the goods and the superior opportunity to determine the quality of the goods.

[118] This reason has been given for adopting an increased basis of liability in the following cases, most of which fall outside the traditional category of sale of goods, but not in the category of exclusively service transactions. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884); Cushing v. Rodman, 65 App. D.C. 258, 82 F.2d 864 (1936); Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973); Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970); Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970); Cliett v.

have cited the defendant's lack of ability to detect the defect as a reason for not imposing liability in the absence of negligence.[119] Even in these cases, however, while the defendant may not have had an absolute ability to detect the defect, his ability to detect defects and prevent injuries was far superior to the plaintiff's.[120]

Thirdly, the consumer's reliance on the seller's skill, care, and reputation may be even greater in service transactions than in goods transactions. Sellers of most kinds of nonprofessional services advertise and otherwise promote their services. Although this promotion may not be as extensive or intensive as the promotion by sellers of goods, it is probably designed more to encourage reliance on the skill and expertise of the advertiser than is the advertising of those who sell goods.[121] Furthermore, since the

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Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla. 1949); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968). *Contra*, Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E. 2d 594, 598 (1966) (since there is a lengthy period of inspection, consideration, and negotiation prior to the purchase of a new house, the builder should not be subject to strict liability); Our Lady of Victory College & Academy v. Maxwell Steel Co., 278 S.W.2d 321 (Tex. Civ. App. 1955) (defendant was to build water tank on existing platform, which ultimately collapsed; no warranty that the existing platform would be suitable for the new tank despite defendant's superior ability to determine its suitability).

[119] *Impure blood:* Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); Hoder v. Sayet, 196 So. 2d 205 (Fla. Ct. App. 1967); Balkowitsch v. Minneapolis War Mem. Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. 1967), *set aside*, 53 N.J. 138, 249 A.2d 65 (1969); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954). *Impure Water:* Canavan v. City of Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920). Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 781 (1950) (contractor has no liability for collapse of building resulting from owner's change in plans unless contractor knew or should have known collapse was likely).

[120] Thus, in the impure blood cases, even if it is impossible to determine the presence of the hepatitis virus, the supplier of blood has superior ability to screen the donors to rule out the possibility of hepatitus. *See* Rostocki v. Southwest Florida Blood Bank, Inc., 276 So. 2d 475 (Fla. 1973); Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. Ct. App. 1966), *aff'd as modified*, 196 So. 2d 115 (Fla. 1967); Baptista v. Saint Barnabas Med. Center, 109 N.J. Super. 217, 262 A.2d 902 (Super. Ct. App. Div.) (dictum), *aff'd* 57 N.J. 167, 270 A.2d 409 (1970). *Cf.* Canavan v. City of Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920) (Elkans, J., dissenting) (while defendant could not control access to its water supply—rivers and reservoir—it purified the water after it left the reservoir, had exclusive control over it after it left the reservoir, and could run tests on it to discover the existence of typhoid).

More importantly, inability to detect defects has been held not to be a defense to strict liability. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963); Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 297 (1970); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A2d. 697 (1969).

In the hybrid transactions, when the defect is in some tangible item installed, applied, or used, the consumer has even less opportunity to discover defects than he does when he buys a product, in which event he may examine it before using it.

[121] For example, in October, 1974, the American Hospital Association ran the following advertisement on national television:

> Lab Technician: "I could help save your life . . . but you'd never know it. When you're a hospital patient you get to know the nurses . . . and the doctors. But me . . . you don't see. I do your lab tests. You don't see the

rendition of services is usually tailored to the particular needs of the consumer, which he communicates to the seller, reliance on the seller is likely to be greater and, indeed, more justified. Typically, the seller of services holds himself out as an expert, and a number of courts have looked to the consumer's justifiable reliance on one who holds himself out as an expert as a reason for imposing liability for defective performance.[122]

Fourthly, the seller of services is, in general, more able than the consumer to bear the loss caused by defective performance and to distribute the risk of that loss over all his customers.[123] Thus, in considering the general concept of distribution of loss, Prosser has stated:

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guys who keep track of your medicine either. Or the person who runs the hospital. But you should know we're here whenever you're a patient. Three of us . . . for every one of you."

Voice Over: "Hospital people know what they're doing. And 32 million lives a year depend on it."

Advertising by persons rendering professional services may be prohibited by standards of professional ethics, *e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2–101; nevertheless, the professional also encourages reliance on his expertise.

[122] Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969) (consumer relies on hairdresser's expertise in *selecting* and *applying* a hair product). *But see* Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 638 (Super. Ct. App. Div. 1969). For cases agreeing with the *Broyles* and *Newmark* position, see Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884); Cushing v. Rodman, 65 App. D.C. 258, 82 F.2d 864 (1936); General Fireproofing Co. v. L. Wallace & Son, 175 F. 650 (8th Cir.), *cert. denied*, 217 U.S. 607 (1910); Kuitems v. Covell, 104 Cal. App. 2d 482, 231 P.2d 552 (1951); Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970); Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla. 1949); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Jeffreys v. Hickman, 132 Ill. App. 2d 272, 269 N.E.2d 110 (1971); Hayes v. Viola, 179 So. 2d 685 (La. Ct. App. 1965); City of East Grand Forks v. Steele, 121 Minn. 296, 141 N.W. 181 (1913); Sartin v. Blackwell, 200 Miss. 579, 28 So. 2d 222 (1946); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Zorinsky v. American Legion, 163 Neb. 212, 79 N.W.2d 172 (1956); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Miller v. Winters, 144 N.Y.S. 351 (Sup. Ct. 1913); Delo Auto Supply, Inc. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950); McCool v. Hoover Equip. Co., 415 P.2d 954 (Okla. 1966); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951); Levy v. Paul, 207 Va. 100, 147 S.E.2d 722 (1966); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1967 (warranties should exist with respect to parts installed in cars and to blood transfusions, because of the reliance factor); Note, *Extension of Warranty Concepts to Service-Sales Contracts*, 31 IND. L.J. 367 (1956).

Conversely, if there has been no reliance, or if the reliance was not justified, courts have been inclined to reject implied warranties. Bronson v. Club Comanche, Inc., 286 F. Supp. 21 (D.V.I. 1968) (if customer knew that a certain kind of fish had a tendency to be poisonous, then no implied warranty by restaurant); McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965); MacKnight Flintic Stone Co. v. Mayor of New York, 160 N.Y. 72, 54 N.E. 661 (1899) (no reliance on builder when owner supplied the plans); Mercedes Dusting Serv., Inc. v. Evans, 353 S.W.2d 894 (Tex. Civ. App. 1962) (no warranty by person repairing airplane because he informed owner he had no expertise since he was only a furniture repairman).

[123] *See* the following cases, in which recovery was permitted for injuries caused by defective goods that were not "sold" to the consumer. Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970) (Jacobson, J., concurring); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972); Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). *But see* Brody v. Overlook Hosp., 127 N.J. Super. 331, 317 A.2d 392 (Super. Ct. App. Div. 1974).

> The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be his.[124]

With respect to defective goods, the draftsmen of section 402A of the Restatement (second) of Torts stated that "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained."[125] Whether public policy demands that the burden of injuries be placed on a seller may depend, in part, on the seller's ability to distribute the cost of injuries, and the size of the business might be relevant to its ability to distribute this cost. Although some service enterprises are quite large, such as nation-wide department store chains that sell repair services independently of their sales of goods, service businesses typically *are* smaller than manufacturing enterprises. In determining the propriety of imposing strict liability on persons selling services, courts seem to be influenced by this disparity in size and seem to view sellers of services as small businesses that are unable to distribute the cost of injuries. Thus, it has been said that persons in at least some service industries do not have the substantial assets, business volume, and area of contacts over which to spread the risk of defects *that a manufacturer or retailer has.*[126] Although this description of persons selling services may be accurate, it overlooks the critical fact that the seller's ability to bear and distribute the loss is still far greater than the consumer's ability.[127] Furthermore, the size of the seller's business should not be critical to the question of imposition of

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[124] W. PROSSER, *supra* note 2, § 75, at 495.

[125] RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* (1965). According to Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1121 (1960), insurance should not be a factor in determining which group should bear the loss, for three reasons: (1) the particular defendant may be uninsured; (2) liability in a particular case may exceed coverage of the insurance policy; (3) competition may not permit some defendants to pass the cost of insurance on to their customers. *See also* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 86, 240 N.Y.S.2d (1963) (dissenting opinion) (airline may not be able to distribute loss because of rate regulation and international competition). *But see* Magrine v. Krasnica, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968) (dissenting opinion); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor J., concurring).

[126] Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968). *Accord,* Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Canavan v. City of Mechanicville, 229 N.Y. 473, 481, 128 N.E. 882, 884 (1920) ("Men will not form corporations which the court will hold obligated, at a risk which may bankrupt and destroy them, to enter into a guaranty or warranty which they cannot fulfill").

[127] Note, *Extension of Warranty Concepts to Service-Sales Contracts,* 31 IND. L.J. 367, 374–75 (1956). *But see* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (dissenting opinion); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super Ct. App. Div. 1968) (insurance does not protect against strict liability [query], so the only way to spread the risk is to raise fees, which are already too high).

strict liability, since the number of injury-producing defects should increase in direct proportion to an increase in his volume.[128] With respect to goods transactions, strict liability applies to the small manufacturer as well as to the large manufacturer. The person performing services will be able to distribute the risk of injuries resulting from defective performance in the same way that the small manufacturer is able to—by procuring insurance.[129]

Finally, the policy of avoiding circuity of action also applies to litigation over defective services, but to a lesser extent than to litigation over defective products. When an injury is caused by a defective product, the person ultimately liable is the manufacturer. Under the privity doctrine, however, the consumer can maintain an action only against the person from whom he purchased the product, usually a retailer. The retailer in turn can sue his supplier, who can in turn sue the manufacturer. The

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[128] If, however, the incidence of defects is greater in service transactions than it is in goods transactions, then imposition of strict liability might have serious, adverse consequences on the ability of service businesses to survive.

The definition of "defect" in service transactions is critical. This problem is treated in Part III *infra.*

[129] A possible consequence of increased reliance on insurance is that insurance companies may impose quality standards as prerequisites to the issuance of liability policies. Imposition of quality standards probably would improve the quality of services but would also tend to restrict entry into the business because of the expense of meeting the quality standards.

With respect to the desirability of placing the burden of injuries on sellers of services, it has also been argued that the noncommercial or nonprofit nature of some service enterprises is a reason for not imposing liability in the absence of negligence. Thus, after describing hospitals as "bourns of mercy" and doctors as "unselfish disciples of relief," one court went on to say:

> The argument that public policy demands that the manufacturer of food, the fabricator of machines, the dispensor of meals,—all of whom are self-seeking profit-making beneficiaries of the purchaser, should be bound by an implied warranty, reasonably cannot urge inclusion in such category a traditional institution of healing and mercy, because it shelves blood for transfusion purposes, where, perhaps, such storage might be the difference between life and death,—and all of which it furnishes at the cost of procuration, preservation, testing and administration,—for a few pieces of silver.

Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 243–44, 364 P.2d 1085, 1087 (1961). *See* Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969) (dictum, as to doctors and dentists); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code,* 39 FORD. L. REV. 447 (1971).

But see Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973); Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Murray, *supra,* at 470 (for-profit blood banks should be subject to warranty liability); Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction,* 24 HASTINGS L. REV. 111, 132 (1972):

> Professionals are not engaged in a charitable enterprise. They derive financial benefit from their work in the same manner as those who render commercial services. In the usual situation, these individuals can spread their losses to the defective product's manufacturer. When this is not possible because of some failing on the [professional's] part, then it seems clear that the [professional], rather than the innocent consumer, should bear the loss.

The noncommercial or nonprofit nature of the enterprise does not affect its ability to bear and distribute the costs of defects in its services. Nor does the noncommercial or nonprofit nature of the enterprise lessen the desirability of placing liability on the enterprise. This battle was fought, and won, in connection with the overthrow of the charitable immunity doctrine. If the charitable nature of an enterprise does not protect it from liability for negligence, neither should it shield the enterprise from strict liability. Cunningham v. MacNeal Mem. Hosp., *supra.*

doctrine of strict liability, which abolishes the privity doctrine, permits the injured consumer to sue all three.

In service transactions, when the defect is in the services rather than any tangible item supplied or used by the performer, the party solely liable is the person rendering the services. Since the consumer is in privity with the only liable party, no circuity of action results. When, however, the injury is caused by the use, application, or installation of a defective product, then the person ultimately liable is the manufacturer,[130] and the policy of avoiding circuity of action is as applicable here as it is in the pure sale-of-goods situation.[131]

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[130] *E.g.*, Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

[131] Moreover, the desirability of avoiding circuity of action, even in goods cases, is not so much an argument for strict liability as it is for eliminating the requirement of privity, which could be done by expanding the tort concept of duty in negligence actions. Yet, while courts were willing to abandon the privity requirement, *see* Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958), they have also imposed strict liability in tort on manufacturers.

In addition to the five principal reasons discussed in the text, other reasons that support strict liability for defective goods also support strict liability for defective services. For example, it has been said that the presence of a product in the market creates an implied representation that the product is safe and suitable for its ordinary uses. W. PROSSER, *supra* note 2, § 97, at 651; RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* at 349–50 (1965); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969). This implication, which arises as a matter of law, however, is more a conclusion that strict liability should exist than a reason for its existence. The conclusion is equally appropriate for service transactions.

Another reason for strict liability is that it may provide incentives to safety. Cushing v. Rodman, 65 App. D.C. 258, 82 F.2d 864 (1936); Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Brody v. Overlook Hosp., 121 N.J. Super. 299, 296 A.2d 668 (Super. Ct. 1972), *rev'd*, 127 N.J. Super. 331, 317 A.2d 392 (Super. Ct. App. Div. 1974); Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637, 644 (Super. Ct. App. Div. 1968) (dissenting opinion) (insurance companies may apply resources to safety goals). Some courts have made the contrary argument that if liability does not depend on the failure to exercise due care, then persons will not exercise even due care. *E.g.*, Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973). This counter-argument has been rejected. *E.g.*, 2 F. HARPER & F. JAMES, THE LAW OF TORTS 772 (1956) (rejecting the analogous notion that availability of insurance will reduce incentives to safety, because misconduct may injure the actor as well as the victim, or at least cause loss of employment; because accidents disrupt normal processes of individual or business life, often destroy property, create bad public relations, and pose a threat of criminal liability; and because producing injuries conflicts with humanitarian impulses); O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 768 (1973); Note, *Domestic Commercial Aircraft Tort Litigation: A Proposal for Absolute Liability of the Carriers*, 23 STAN. L. REV. 569, 581 (1971) (supporting imposition of strict liability and arguing that other incentives to safety are more important than potential liability for negligence, *e.g.*, governmental regulation, public image, and the likelihood that the person causing the injury will also be injured).

Strict liability has also been justified as a proper response to the inequality of bargaining power between the parties. *E.g.*, La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968) (but holding that inequality insufficient to justify strict liability for professional services); Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Jeffreys v. Hickman, 132 Ill. App. 2d 272, 269 N.E.2d 110 (1971); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Rutledge

Despite the applicability to service transactions of the policies behind strict liability for defective goods, there remain several arguments against applying strict liability to persons who render defective services. The most obvious is that its application inevitably will increase prices, which for some services are already beyond the means of many consumers. The question is whether the policy of compensating for loss caused by defective services outweighs a restriction on the availability of services. A similar question is raised in connection with the desirability of strict liability for defective products, but the possibility of a restriction on the use or availability of products has not prevented near-unanimous adoption of strict liability for defective goods. Nor should it preclude adoption of strict liability for defective services. It seems unlikely that increased liability would produce such an increase in cost as to diminish the purchase of services deemed necessary by the consumer.[132]

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v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970). Furthermore, in extending the implied warranty of habitability beyond new housing to reconditioned housing, one court said the relative positions of the parties should govern. City of Philadelphia v. Page, 363 F. Supp. 148 (E.D. Pa. 1973).

On the other hand, some courts have criticized strict liability as being socialistic. Dorfman v. Austenal, Inc., 3 UCC REP. SERV. 856, 857 (N.Y. Sup. Ct. 1966):

> To imply a warranty in these circumstances, where none exists, would truly make the hospital an insurer for blood, medicines or any item used in the treatment of a patient. The Court of Appeals has refused to extend the decisional law to such a socialistic degree.

Finally, strict liability has been justified by the difficulty imposed by a system of liability only for negligence that requires the consumer to trace back along the channels of commerce to pinpoint an act of negligence. Cushing v. Rodman, 65 App. D.C. 158, 82 F.2d 864 (1936); Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970); Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 159 A.2d 97 (1960); Note, *Domestic Commercial Aircraft Tort Litigation: A Proposal for Absolute Liability of the Carriers,* 23 STAN. L. REV. 569 (1971). Because the consumer in a service transaction is in privity with the person ultimately responsible for an injury, this justification for strict liability is not available when the defect is in the services themselves and not a product used, applied, or installed. *See* La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968) (no distant manufacturer for consumer to trace negligence to); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972) (no strict liability in construction of house because not so difficult to find and prove negligence).

[132] For example, a person rendering services to an average of ten people per day for forty-eight weeks per year would have 2400 transactions per year. For the cost of his services to rise two dollars per transaction, his tort liability (or insurance costs) would have to increase almost five thousand dollars per year. Though economists might disagree, it seems unlikely that an increase of two to three dollars per transaction would cause many consumers to forego services they otherwise would purchase.

According to U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 12–13 (1973), of every ten dollars paid for physician's services, only twenty to fifty cents was attributable to malpractice insurance premiums, and only fifty cents of the daily cost of hospital services was attributable to insurance costs. A more recent estimate by Dr. Monroe E. Trout, a drug company executive and member of the HEW Commission, put the costs of insurance in New York at fifty cents per visit to a doctor's office and $2.50 per day in a hospital. Sacramento Bee, Jan. 9, 1975, at A16, col. 4.

Imposition of strict liability may also cause a price increase by increasing the amount of time and materials devoted to each transaction. But a substantial increase in the resources devoted to a transaction should occur only when two factors are both present: a relatively high risk that the failure to devote increased resources to the transaction will make the services defective, and a likelihood that the defect will result in substantial physical or economic loss to the consumer. *See* note 136 *infra.* When that risk is low, the person rendering services probably would rely on his insurance to cover it. On the other hand, when the risk of severe injury is higher, then the greater

Furthermore, if the cost of services is viewed as consisting of the money paid plus the cost of the risk of having to pay for injuries caused by defective services, the imposition of strict liability for defective services might not increase the cost of those services at all. The effect of imposing strict liability would be to put a dollar value on this risk and to increase the initial out-of-pocket cost of the services. The overall cost would remain the same, however, because the risk of paying for injuries would be shifted to the seller. Although the overall cost might remain the same, it must be recognized that the increase in liability would result in a reduced range of choice for the consumer, who would no longer be able to purchase services at a lower initial dollar cost. This reduction of choice may be felt hardest by the low-income consumer, who can least afford the increase in initial out-of-pocket expense.[133] It is this same consumer, however, who also is least able to withstand the consequences of a defect in the services and therefore is most in need of compensation if the services prove to be defective.

The cause of the increase in price to the consumer if strict liability is imposed is the increase in the seller's cost of doing business. This increase in the cost of doing business may also eliminate from the market any sellers who are unable to increase their prices to cover the increased cost. Elimination of sellers woud have the effect of reducing competition among sellers of the particular services in question, perhaps allowing the remaining sellers to increase their prices even more than would be justified by the increased cost of doing business.[134] It might also result in a reduction of the kinds of services available for purchase, if, for example, all sellers of a particular service were unable to meet the increased cost of doing business. Inability to increase prices would occur, however, only if, after the necessary increase were made, there existed a less expensive substitute for the services in question.[135] But if there were a reasonable sub-

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assurance of safety probably justifies the increase in costs caused by the increase in resources devoted to the transaction. Furthermore, even in some instances in which the person performing services would be inclined to increase the resources he otherwise would devote to the transaction, the consumer may agree to forego that increase in resources. See the discussion of assumption of risk in Part III *infra*.

Many consumer goods are already constructed in such a way that repairs are impossible or are priced in such a way that the present expense of repairs causes consumers to discard them and replace them instead of repairing them. An increase in the cost of repairs might result in an increase in the number of these "disposable" goods. For the reasons stated above, the increase in the cost of repairs is unlikely to be large enough to have an appreciable effect on this problem.

For much more thorough discussions of the economic implications of strict liability, see, *e.g.*, Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUDIES 205 (1973) and articles discussed therein; Symposium, 38 U. CHI. L. REV. 1 (1970).

[133] McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 58 (1970).

[134] If a substantial number of sellers of the particular services remain in business, then competition should continue to keep prices down. It is probably important to observe in this context that the service industries are not as concentrated as the goods industries.

[135] *E.g.*, Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1961) (dissenting opinion) (foreign competition also might prevent domestic supplier from increasing prices).

stitute for those services, the consumer would not be harmed by their disappearance.

Another possible consequence of extending strict liability to services is a substantial increase in litigation. Although any extension of liability is likely to increase litigation, there is no reason to expect that the increase resulting from this extension will overwhelm the courts, just as the increase resulting from the adoption of strict liability for defective goods has not done so. The existence of strict liability for defective services also might be used by dissatisfied consumers as an instrument of harassment, but this is unlikely. Insofar as defective services cause physical injuries, the number of complaints to any given seller is unlikely to be very large and, in any event, the gravity of the consequence of the defect far outweighs any nuisance effect that complaints or litigation might have. Even as to complaints that the defective nature of services has merely diminished their value, the increase in harassment probably will be minimal.[136] Just as many retailers repaired or replaced defective goods even before courts held them strictly liable for defects,[137] so many persons rendering services repair or re-perform if their services prove defective.

III. A Theoretical Analysis of Service Transactions and the Application of Strict Liability

The typical judicial response to the suggestion that strict liability should apply to service transactions is that persons rendering services do not guarantee perfect results.[138] As a description of the holdings of past cases,

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[136] The courts are split on the question of whether recovery under the theory of strict tort liability should be limited to physical injuries or should extend to loss of bargain. *Compare* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), *with* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). Recovery for loss of bargain is permitted under theories of implied warranty. UCC § 2-714(2). W. Prosser, *supra* note 2, § 101, at 666–67, suggests that the main reason for excluding loss of bargain from the recoverable damages is the inappropriateness of holding the manufacturer liable for the consumer's loss of bargain with the *retailer,* since the manufacturer may have no control over the terms of the bargain between the consumer and the retailer. In service transactions, on the other hand, the bargain is with the person ultimately liable, the person against whom strict liability is being asserted. Nevertheless, even Professor O'Connell, who suggests a system of liability under which the consumer would not even have to prove that the product (or services) were defective, would limit recovery to personal injuries. His criterion for excluding recovery both for loss of bargain and for injury to property of the consumer is the severity of the social dislocation. O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals,* 59 Va. L. Rev. 749, 773, 821 (1973).

As a practical matter, even if strict liability is held to permit recovery for loss of bargain, in most cases of defective services, the amount of the claim will not justify litigation, and sellers of services (and their insurers) may simply refuse to pay valid claims. This would have at least two consequences. First, the primary impact of the extension of strict liability to service transactions will be on those cases in which the consumer's injury is greatest—personal injury cases. Secondly, the cost of insurance (or liability) would be determined by the relatively few large claims that occur rather than the numerous loss of bargain claims that are likely to exist. Thus the increase in the cost of services resulting from this expansion of liability is likely to be less than might appear at first glance.

[137] *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1119 (1960).

[138] *See* cases cited notes 107–08 *supra.*

this statement is accurate. As a statement of the standard of conduct that ought to be imposed on persons rendering services, however, it is based on the erroneous assumption that extending strict liability to service transactions would necessarily make the seller a guarantor of perfect results in every case. Applying strict liability in tort to service transactions need not and should not result in making persons who render services liable for every failure to attain the goal desired by the consumer, though it would make them liable for most failures.

A. The Nature of Services

The rendition of services has three components: analysis of the problem to ascertain its cause, selection or fabrication of a solution to the problem, and application of the solution.[139] Defects may occur in the performance of each component, and strict liability would apply to defects in each. The key element is the existence of a defect, and the person rendering services would be liable only if there *is* a defect and only if that defect is a cause of the consumer's injury.[140] Thus the critical problem is determining what constitutes a defect. Failure to produce the result desired by the consumer does not necessarily mean that the services are defective.

To the difficult question of whether the services are defective, the doctrine of strict liability for defective goods provides a useful analogy. Under that doctrine, a product is defective if it fails to meet the reasonable expectations of the consumer.[141] Just as the consumer who purchases goods

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[139] *Cf.* Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973) (distinguishing between hospital's professional services and mechanical and administrative services); Comment, *Professional Negligence,* 121 U. PA. L. REV. 627 (1973) (distinguishing between care, mechanical matters, and judgmental matters); RESTATEMENT (SECOND) OF TORTS § 395 (1965) (imposing liability on manufacturers of goods for injuries caused by negligence in manufacture, and comment *f*, at 328, to that section, which lists the components of the manufacturing process requiring the exercise of due care):

> (1) the adoption of a formula or plan which, if properly followed, will produce an article safe for the use for which it is sold, (2) the selection of material and parts to be incorporated in the finished article, (3) the fabrication of the article by every member of the operative staff no matter how high or low his position, (4) the making of such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure the production of a safe article, and (5) the packing of the article so as to be safe for those who must be expected to unpack it.

[140] RESTATEMENT (SECOND) OF TORTS § 402A (1965): "One who sells any product in a *defective condition* . . . is subject to liability for physical harm *thereby caused*. . . ." (emphasis added). *See id.*, comment *g* at 351; Evans v. Northern Illinois Blood Bank, Inc., 13 Ill. App. 3d 19, 298 N.E.2d 732 (1973) (to be defective, transfusion of blood must be of impure blood, not merely incompatible blood) (court failed to consider imposition of strict liability for the defective services of mis-typing the blood); *cf.* Delo Auto Supply, Inc. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950) (implied warranty that repairman would install the proper clutch disc lining).

Professor O'Connell has taken the position that the difficulty and expense of proving that a product is defective has undercut the utility of existing strict liability doctrine. O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals,* 59 VA. L. REV. 749, 759–61 (1973).

[141] *See* D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 115–20 (1974); RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965).

and uses them in their intended manner reasonably expects them not to result in injury to himself or his property, the purchaser of services reasonably expects them not to result in injury to himself or his property. And just as the purchaser of goods reasonably expects them to perform in such a way as to accomplish the purpose for which they are manufactured and for which he purchases them, so the purchaser of services expects those services to be performed in such a way as to accomplish the purpose for which he purchases them. The consumer's reasonable expectations as to quality are the same for services as for goods.

Every jurisdiction embracing strict liability for defective products protects the purchaser's expectation that the product will not cause injury to person or property. Some even protect the purchaser's expectation that the product will perform adequately,[142] and even those that do not protect this expectation under the doctrine of strict liability in tort protect it under the doctrines of implied warranty of merchantability and implied warranty of fitness.[143] Similar protection should be afforded the purchaser of services. Even under the doctrine of strict liability, however, a product that is incapable of being made safe for its ordinary and intended use is classified as not defective, and the manufacturer is not liable for injuries unless he is negligent.[144] In service transactions, too, it is not always possible to attain the consumer's goal, and when this is so, an expectation of perfection is not reasonable.[145] Therefore, if it is impossible to attain the consumer's goal, failure to do so would not mean that the services were defective, and there would be no tort liability in the absence of negligence. If, on the other hand, attainment of the goal is possible, then failure to attain that goal would render the services defective.

B. An Example of the Application of Strict Liability

Application of strict liability to service transactions is most difficult in transactions involving professional services, particularly medical services, because of the typically greater number of variables to consider and the lack of certainty that the solution has been ascertained.[146] Because of the particu-

[142] *E.g.*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

[143] UCC §§ 2–314, 2–315. It should be observed that the fitness required by section 2–315 is *reasonable* fitness, which is something less than perfection.

[144] *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* (1965). *Id.*, comment *j*, precludes imposition of strict liability if adequate directions or warning is given. Closely related to this is the idea of assumption of risk.

The Restatement also requires that the defective condition render the product "unreasonably dangerous" and uses this phrase as a definition of what constitutes a defective product. *Id.*, comment *i*. Several cases, however, have abandoned any additional requirement of "unreasonably dangerous" so long as the product is defective and causes injury. *E.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

[145] Thus, a party to litigation who feels his attorney's efforts failed to produce the desired results would have to show that it was possible for the court to have decided the case a different way and that the reason for its failure to do so was some error on the part of his attorney.

[146] Broyles v. Brown Eng'r Co., 275 Ala. 35, 39, 151 So. 2d 767, 771 (1963) (dictum) (some patients respond to surgery while others in the same age bracket do not respond); cases cited notes 109–10 *supra;* O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals,* 59 VA. L. REV. 749, 790–93 (1973) (suggesting the

lar difficulty in determining the existence of a defect in medical services, they will serve as the primary example for the demonstration of the application of the doctrine of strict liability. I wish to emphasize, however, that this is not a proposal for greater liability for medical services, or even professional services generally, than for other kinds of services. Indeed, the arguably special nature of medical services —including the doctor-patient relationship—may justify a less stringent application of the doctrine of strict liability. On the other hand, if strict liability can reasonably be applied to physicians, then it should be reasonably capable of application to persons rendering other kinds of services, from lawyers and other professionals to such nonprofessionals as auto repairmen, house painters, hair stylists, and health club personnel. Consequently, to augment the discussion of medical services in the text, examples of the application of strict liability to the rendition of other kinds of services are given in the footnotes.

With respect to the first component of services, analysis of the problem to ascertain its cause, a doctor would not be liable for erroneously diagnosing a patient's ailment if the cause of the ailment is incapable of being ascertained under the present state of knowledge in the profession. If, however, the disease is capable of correct diagnosis, even though it is extremely rare and typically overlooked or misdiagnosed, then the doctor would be strictly liable. If the cause *can* be determined, then the consumer's expectation that it *will* be determined is reasonable. As a practical matter, the rarer the disease, the less frequently the doctor will be exposed to the risk of misdiagnosing it. The more common the disease, the likelier it is that the doctor will have been negligent in failing to diagnose it correctly, in which event he is liable under present law. So, on the one hand, the increase in the liability of the doctor would not seem to be substantial, and, on the other hand, those patients injured by the doctor's error would receive compensation.[147]

Applied to the second component of services, selection of solution to the problem, the doctrine of strict liability would impose liability for injuries caused by the selection of a wrong course of treatment. The injury could take the form either of a deterioration of the patient's health or of a failure to cure him. There may be some resistance to the idea that a doctor is liable for mere failure to cure.[148] If, however, the physician fails to select a known treatment for a particular illness, there is no reason why strict liability should not apply. The existence of a known cure for the ailment makes reasonable the consumer's expectation that it will be selected and applied in his case, and the doctor's failure to select the proper

possibility of different treatment of doctors); Comment, *Professional Negligence,* 121 U. PA. L. REV. 627, 640 (1973).

[147] *See* Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974). Similarly, an automobile mechanic would be strictly liable for erroneously concluding that a worn brake lining caused the consumer's car to pull to the left when the brakes were applied, so long as it is possible to ascertain the actual cause, even though in ninety-five percent of the cases the cause is a worn brake lining.

[148] *See, e.g.,* cases cited notes 31, 107 *supra.*

treatment is a defect in the services.[149] On the other hand, if there is no known cure for the ailment, or if the cure is not generally available to members of the profession, the doctor would not be held liable for his selection of a treatment that fails to cure it.[150] The consumer, however, may reasonably expect that a course of treatment selected and administered by a person in the business of providing relief from physical ailments will effect a cure in his particular case. Therefore, the physician's nonliability when there is no known or generally available treatment should be subject to the requirement that the doctor fully inform the patient that there is no known cure and that the proposed course of treatment may not actually provide a cure. In the absence of this disclosure, the doctor's services should be viewed as defective, even though there is no known cure.[151]

With respect to the third component of services, application of the solution, the doctrine of strict liability would impose liability on a doctor who, for example, erroneously injects into a muscle a drug that is supposed to be injected into subcutaneous tissue. Strict liability is especially appropriate for mechanical tasks, which are typically so easily done correctly.[152]

C. Similarity of Goods Transactions and Service Transactions

The manufacture of goods can be analyzed in a similar manner; perceiving the consumer's need is the analysis of the problem, designing the

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[149] Of course, if the doctor is later able to select and apply that treatment, thereby effecting cure, the injury probably will be small.

An example of defect in selection of solution to an automobile problem is Delo Auto Supply, Inc. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950), in which the repairman consulted a trade publication to determine the appropriate size clutch disc lining to install in the consumer's truck. The publication listed the wrong size lining, which the repairman installed, and the clutch failed to work properly. The court held the repairman liable for breach of an implied warranty of fitness. Under the proposed scheme, the mechanic would be liable, even though he was not negligent, under the doctrine of strict liability in tort, as well as breach of implied warranty of fitness.

Obviously, repairs (and some services) cannot be expected to maintain the expected objective forever. Therefore, services would not be defective if they produced the expected goal for a reasonable time. By way of analogy, the implied warranty of habitability requires habitability for a reasonable period of time. Padula v. J.J. Deb-Cin Homes, Inc., 298 A.2d 529 (R.I. 1973). What constitutes a reasonable time would depend on the type of services involved. The entire question of reasonable time may be subsumed under the question of the reasonable expectations of the consumer. *See* note 141 *supra* and accompanying text.

[150] Even if there is a known cure, in some instances the physician should escape liability under the doctrine of assumption of risk.

[151] Even under existing negligence doctrine as applied to medical malpractice cases, courts are requiring a high degree of disclosure by the doctor. *E.g.*, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Tarasoff v. Regents of Univ. of California, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). *See also* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 75 (1973).

[152] Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973); Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 637–40 (1973) (suggesting that a higher standard than negligence is already applied with respect to errors in mechanical matters). *But see* Evans v. Northern Illinois Blood Bank, Inc., 13 Ill. App. 3d 19, 298 N.E.2d 732 (1973) (blood bank not strictly liable for mis-typing blood).

product is the fabrication of the solution, and producing the product is the application of the solution. The second and third components of manufacturing are especially analogous to the rendition of services.[153] Since the manufacturer is strictly liable for defects in these design and production services,[154] as well as for defects in his raw materials, any attempt to distinguish the inherent nature of the sale of goods from the inherent nature of the rendition of services must necessarily fail.[155]

One might, however, attempt to justify different treatment for the two types of transactions by reasoning that a manufacturer who designs a product is fabricating one solution to one problem—the design—which he then applies countless times to produce his output for countless transactions. The person performing services, on the other hand, might be said to analyze each problem independently of every other problem, select an appropriate solution, and apply it to that particular problem.[156] The distinction does not, however, justify an exemption of service personnel from strict liability. At most it supports only a refusal to apply strict liability to injuries caused by defects in analyzing the problem and in selecting solutions to the problem. Strict liability would still apply with respect to defects in the application of the solution to the problem.[157] But the distinction does not justify even this limitation on the applicability of strict liability since many, if not most, service transactions are standardized. The same problems occur frequently, and the proper responses are well known and regularly selected. Liability for negligence will dispose of

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[153] *See* RESTATEMENT (SECOND) OF TORTS § 395, comment *f* (1965), quoted in note 139 *supra*.

A nonmedical example of liability for defects in these components is the home builder who erroneously determines that a particular kind of pipe will perform adequately in a heating system. Under the theories of implied warranty of habitability and strict liability in tort, the builder is liable for this defect without any need for the consumer to prove negligence. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973) (strict liability for injuries caused by non-negligent design of heating system); cases cited notes 63, 82 *supra*.

[154] *E.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970). (licensor); Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[155] Even the Restatement seems to recognize this. In section 404, goods and services are treated similarly. "One who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." RESTATEMENT (SECOND) OF TORTS § 404 (1965). Comment *a* adds:

> One who has a car or other chattel repaired by an independent contractor usually entrusts to the contractor not only the manual labor of doing the repairs and the inspections necessary from time to time, but also the selection of the plan by which repairs are to be made and the materials which are to be used therein. In such a case, the contractor's position is substantially identical with that of a manufacturer of a chattel, and he is required to exercise care in all these particulars . . . .

Although demonstrating the identical positions of manufacturers and repairmen, the Restatement makes both subject to negligence liability but makes only the manufacturer or other seller subject to strict liability.

[156] Newmark v. Gimbel's, Inc., 54 N.J. 585, 596-97, 258 A.2d 697, 702–03 (1969) (dictum).

[157] Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 638–39 (1973).

cases in which the person performing services does not see either the cause of a standard problem or the standard response to that problem. The question is whether the seller or the consumer should bear the risk of injury when the situation is not standard. The same policies that justify placing the risk on the manufacturer of goods also justify placing it on the seller of services. Those policies underlying strict liability are applicable irrespective of the number of times the seller has to analyze and solve problems.

This distinction between goods and services fails for other reasons, too, as can be seen by examining the treatment of the manufacturer who modifies his product to meet the specific needs of one particular buyer, and the treatment of the retailer who selects a product to meet the specific needs of one particular buyer. For a seller to be liable for a defective product under section 402A, he must be in the business of selling that product. A person who makes only isolated or occasional sales, on the other hand, is not subject to the doctrine of strict liability.[158] A person in the business of making a product who modifies that product to meet the needs of one particular buyer is apparently covered by section 402A.[159] Similarly, the person who produces specially manufactured goods is subject to the Uniform Commercial Code's implied warranty of merchantability if he is a merchant with respect to goods of that kind.[160] He is also subject to the Code's implied warranty of fitness if he has reason to know that the purchaser is relying on him to supply a product suitable for the purchaser's purposes.[161] The seller in these examples is in the same position as a person who renders services, and he is subject to both warranty and strict liability,[162] notwithstanding the uniqueness of the specially manufactured or modified product.

Moreover, even with respect to standardized goods, the seller is liable for breach of the implied warranty of fitness if he has reason to know that

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[158] RESTATEMENT (SECOND) OF TORTS § 402A (1) (a), quoted in note 71 *supra*, comment *f* (1965).

[159] *See* May v. Portland Jeep, Inc., 509 P.2d 24 (Ore. 1973) (retail seller of new Jeep who defectively attached roll bar held subject to strict liability for injuries resulting from collapse of roll bar when Jeep overturned).

[160] *E.g.*, Brickman-Joy Corp. v. National Annealing Box Co., 459 F.2d 133 (2d Cir. 1972).

[161] *E.g.*, Aluminum Co. of America v. Electro Flo Corp., 451 F.2d 1115 (10th Cir. 1971); Sperry Rand Corp. v. Industrial Supply Corp., 337 F.2d 363 (5th Cir. 1964); *see* Goldberg v. Ziskin, 12 UCC REP. SERV. 417 (N.Y. Civ. Ct. 1973) (decorator who designed pillows is subject to implied warranty that the pillows will be fit for their intended purpose, but manufacturer not liable because buyer relied only on decorator).

[162] *See* Randall v. Newson [1877] 2 Q.B. 102 (implied warranty); *cf.* Locks Labs., Inc. v. Bloomfield Molding Co., 35 N.J. Super. 422, 114 A.2d 457 (Super. Ct. App. Div. 1955) (implied warranty under Uniform Sales Act). In addition, the construction of houses is not as standardized as stamping out goods. Yet warranties apply there even if the defect is in the services, including the design, rather than the components used in construction. Note 153 *supra*. *See* Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973) (strict liability for non-negligent but nevertheless defective design). Just as implied warranty of habitability applies to persons engaged in the mass production of housing, warranty and strict liability should apply to those engaged in the "mass rendition" of other types of services.

the buyer relies on his judgment in selecting an appropriate product. To supply an appropriate product, of course, the seller must know why the product is needed, or in the terminology utilized above in connection with services, he must know the cause of the consumer's problem. He must also know the solution to the problem. The seller may incur warranty liability for erroneously ascertaining either the cause of the problem or its solution, as the following example illustrates.

> *Consumer* tells *Merchant* he has bugs in his house. He shows *Merchant* a dead insect and asks him for an insecticide that will kill that kind of bug. *Merchant* erroneously determines that the bug is an Argentine ant and sells an insecticide that is perfectly effective against Argentine ants. The insect, however, is actually a termite, and the insecticide is wholly ineffective against termites.

Merchant would be liable for breach of implied warranty of fitness. Similarly, if *Merchant* correctly determines that the insect is a termite, but supplies an insecticide that is ineffective against termites, he would be liable.[163] It should be noted that in each case, the defect lies in the services, not in the goods. If the doctrines of strict liability and implied warranties apply to defects in individualized transactions as well as in standardized transactions, then the seller of services should also be subject to these doctrines.

In some situations, however, the person rendering services probably should be permitted to perform without the risk of liability for non-negligent defects. The vehicle here proposed for achieving this result is assumption of risk. With respect to defective goods, assumption of risk is an affirmative defense to strict liability if the consumer "voluntarily and unreasonably proceed[s] to encounter a known danger."[164] The requirement that the consumer's conduct be unreasonable would preclude resort to this defense in almost every case involving defective services. For example, as developed above, a doctor would be liable for misdiagnosing a rare disease with symptoms indicative also of a common disease. Even if the consumer knew of the remote possibility that he had the rare disease, his acquiescence in receiving treatment for only the common disease could not be said to be unreasonable, just as a consumer's knowledge that a small percentage of a particular product is defective does not make unreasonable his purchase and use of that product without first testing it for defects. Therefore, the victim of the rare disease would not have assumed the risk of misdiagnosis—the risk that he had the rare disease. Similarly, his acquiescence in a course of treatment that might have adverse side effects or that might not cure his disease would not necessarily be unreasonable, so he would not have assumed those risks. Consequently, this

[163] *See* Delo Auto Supply, Inc. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950) (wrong size clutch lining installed).

[164] RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965). *See generally* Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era,* 60 IOWA L. REV. 1 (1974).

version of the defense of assumption of risk would seldom be available to the physician or other person rendering services.[165]

Recognition should be given, therefore, to the consumer's express assumption of risk or waiver of liability, but only in the limited context to be discussed and not when it is used as a general waiver of liability.[166] Under the theory developed above, the person rendering services would be liable for injuries resulting from his failure to attain the desired result whenever it was *possible* to produce the desired result, that is, whenever it was possible to determine the actual cause of the problem, design a solution, and apply that solution. In some cases, of course, though this performance will be possible, it will be extremely difficult or expensive. In these situations the consumer's acquiescence in the diagnosis, selection of solution, or application of solution might not be unreasonable even though he knows of the possibility of error. Thus the Restatement's version of assumption of risk would not apply. Nevertheless, because of the difficulty or expense, it may be desirable to permit the parties to place on the consumer the risk of failure to attain perfection. An assumption of risk should be enforced, therefore, when perfect performance of a particular component of services is highly unlikely. It should also be enforced when the expense of attaining perfect performance is sufficiently great to justify permitting the consumer to select services at a lower price and with a lower likelihood of perfection. The lack of likelihood of perfection and the expense of attaining perfection necessary to justify enforcement of a waiver of liability are questions of degree. Admittedly, this standard for

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[165] The Restatement version of assumption of risk would be applicable to bar recovery for injuries sustained through continued "use" of services after the consumer knew they were defective. For example, a television repairman would not be liable for injuries sustained as a result of defective repairs if the consumer continued to use his television even though, after being repaired, it continuously emitted sparks. *See* UCC § 2–315, comment 13, suggesting that the seller's breach of warranty might not be the *cause* of the injuries when the buyer continues to use goods he knew or should have known were defective.

[166] With respect to sale of goods, express assumptions of risk usually take the form of disclaimers of warranties or limitations of remedies. UCC §§ 2–318, 2–719. They are generally held unenforceable as to liability for personal injuries. *E.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); KAN. STAT. ANN. § 50–639 (Supp. 1973); UCC §§ 2–318, 2–719. They are, however, usually enforced as to liability for commercial loss. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE ch. 12 (1972); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1132 (1960). *But see* KAN. STAT. ANN. § 50–639 (Supp. 1973) (limiting seller's ability to disclaim warranties in consumer transactions).

Under UCC § 2–607(3), if the buyer fails to notify seller of any breach of warranty within a reasonable time after he discovers or should have discovered it, he is barred from recovery for the breach. Comment 4, however, makes it clear that a "reasonable time" is longer in consumer transactions than in commercial transactions, since the requirement of notification "is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." The standard, then, is good faith. *See id.*, comment 5.

Included in the concept of "express" assumption of risk is assumption that can be implied in fact from the conduct of the parties. Thus, if there are present all the requirements for a valid assumption, developed *infra*, except for an express statement by the consumer, "I agree to assume the risk," the conduct of the parties may reveal that the parties did *in fact* agree that the consumer should bear the risk of defect. *See* A. CORBIN, CONTRACTS § 18 (1963).

enforceability is fuzzy, but it is probably incapable of being stated in any more precise way. The determination is primarily one of policy, and it therefore should be viewed as a matter of law.[167] The device would be available primarily in the analysis and selection-of-solution components of service transactions, rather than the application-of-solution component. Since it would be available only when the degree of difficulty or the expense is great, it usually would not be available in transactions involving nonprofessional services. Moreover, even when it is available, it should be enforced only if there is full disclosure and only with respect to the particular risk disclosed. Only when there is full disclosure can it be confidently said that the consumer has consented to an attempted solution of his problem with the understanding that the solution may fail.[168] Even when there is full disclosure, however, the court should enforce the transfer of risk only if it is satisfied that the probability of success was so small or that the expense of success was so great that the policy of compensating for injury should not prevail.[169]

Applying this limitation on the doctrine of strict liability to the first component of services, for example, a doctor could inform the consumer that his symptoms are indicative of disease *A*, but that there is a possibility that the consumer has disease *B*. Assuming, however, that only one case out of twenty with these symptoms is actually disease *B* and that it would be expensive and time consuming, perhaps involving hospitalization, to conduct the tests necessary to rule out disease *B*, the doctor should be able to leave to the consumer the decision whether to undergo further tests or to assume the risk that he actually has rare disease *B*. For the consumer's express assumption of this risk to be valid, the doctor should be required to give very precise information. It should not suffice for the doctor to say, "On the basis of the tests so far, I believe you have disease *A*. It's always possible, however, that you have something else. Shall we proceed with the treatment for disease *A*?" Instead, the doctor should be required to disclose such facts as the likelihood that the patient has something other than disease *A*, the other possible diseases, and the costs of ruling out those possibilities. Moreover, any assumption by the consumer

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[167] *Cf.* UCC § 2–302(1), which declares unenforceable agreements (or parts of agreements) that are unconscionable and specifically provides that unconscionability is a question of law.

[168] It might be suggested that if there is a disclosure, then the consumer's expectation of perfection cannot be reasonable, and, therefore, failure to attain his objective does not render the services defective. With respect to the sale of goods, however, a manufacturer's disclosure that one percent of his products cause injury would not suffice to make the product not defective if it caused injury. The consumer's presumed expectation of perfection is still reasonable. A similar response should prevail with respect to the sale of services. A warning of possible failure should not make the services not-defective if injury ensues.

[169] Evidence that the person performing services would not have performed those services in the absence of an assumption of risk by the consumer should not suffice. If it did, then assumption of risk would rapidly become a boilerplate device for evading strict liability. The court should in every case look behind an agreement to assume the risk of failure to determine whether the situation presents the elements that justify enforcing the assumption.

of the risk that he might have disease *B* should not suffice as an assumption of the risk that he has disease *C*.[170]

With respect to the second component, the selection of a course of treatment, it may be that persons with a particular illness are known to respond to two or more possible courses of treatment, but that no one treatment is effective in all cases. If it is impossible to determine which treatment will be effective in a particular case, then the services would not be defective even if the selected treatment failed to cure. If it is not impossible, but only impracticable, to determine which treatment will be effective, the doctor should be able to shift to the consumer the risk that the treatment selected will not result in cure in his particular case. He should be able to do so, however, only if he informs the consumer of the various alternatives; the probabilities of success and the possible drawbacks of each (such as adverse side effects or aggravation of existing condition); and the monetary and other costs of ascertaining which treatment actually will be effective.[171]

With respect to the third component of services, application of the solution, an agreement to assume the risk of defective execution of the chosen solution would be available only when the solution is of an experimental nature, not yet proved to be possible of execution. And, of course, the assumption of risk would be effective only if it followed a full and

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[170] Similarly, in appropriate circumstances, the auto mechanic should be able to shift the risk to the consumer. But because it probably is easier and relatively less expensive to ascertain the cause of a mechanical difficulty than a physiological ailment, assumption of risk would be available in fewer instances than it would in medical situations.

[171] There may have to be an exception to the requirement of full disclosure in those cases in which disclosure would seriously interfere with the rendition of services. For example, it may be impracticable to determine which of several approaches will cure a patient's severe mental illness. Disclosure that a particular form of therapy may not help the patient may have an extremely adverse effect on the chances of recovery. *Cf.* Canterbury v. Spence, 464 F.2d 772, 779 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972) (disclosure in such a case should still be made to a close relative of the patient); U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 75 (1973) (same).

Since the rationale for recognizing assumption of risk is the extreme difficulty or expense of performing the services, the defense would not generally be available for selection of solution in auto repair cases. Thus, even though upon being given a choice, the consumer tells the mechanic to fashion a less expensive makeshift steering cable instead of installing a new, more expensive steering cable, the mechanic would still be liable if the makeshift cable failed. The defense would be available only if it was impracticable to determine in advance which of two solutions would be effective in the particular case.

Liability for injuries caused by selecting a less expensive but less effective remedy may induce the seller of services to refuse to sell the less expensive remedy. This in turn may induce the consumer in some instances to forego needed repairs and continue to use a product in its broken down condition or perhaps even dispose of the broken down product. *See* note 132 *supra.* As a practical matter, however, the repairman should refuse to select the less expensive remedy only when he believes there is a substantial possibility that the remedy would not be effective for a reasonable time. *See* note 149 *supra.* In this situation, it is arguable that the policy of avoiding the risk of injury (by compensating for injury that actually occurs) outweighs the policy of permitting parties the freedom to contract for less effective repairs and the policy of avoiding an increase in the number of disposable goods. At most, the defense of assumption of risk in this situation should be available only as against the consumer and not against other persons who may be expected to be affected by the product. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Caveat 1, comments *l, o* (1965); UCC § 2–318, Alternatives B, C.

clear disclosure of the probabilities of success and the consequences of failure.[172]

IV. CONCLUSION

An examination of the law's treatment of the consumer during the last hundred years discloses a clear trend toward increased protection of the consumer. Initially, the consumer could recover for injuries caused by defects in goods or services only if he could establish that the seller or manufacturer was negligent. Liability in the absence of negligence was then imposed on manufacturers and sellers for defects in certain kinds of goods, such as food and other products intended for intimate bodily use. This liability has recently been extended to all goods and is now the rule whether the product is acquired by sale, lease, bailment, or license. Liability has also been imposed in non-sale-of-goods transactions for injuries caused by defective goods supplied in the course of rendering services,[173] defective implements used in the course of rendering services,[174] and defective construction of dwellings and other structures.[175] The common element in these cases is a defect in some tangible item used or supplied by the person rendering services. Even though goods are produced only as a result of the rendition of services and even though almost every defect in goods can be traced to some defect in the performance of services, courts remain reluctant to apply the doctrines of warranty and strict liability to defective services. Notwithstanding this reluctance, however, several courts

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[172] This system of strict liability for defective services may have the benefit of improving the quality of services received by the consumer, as well as the benefit of compensating persons injured by defective services. Of course, it may be that imposition of liability in the absence of fault will impair the relationship between the consumer and the person rendering services and that concern for liability will impair the quality of services. *See* Leff, *Medical Devices and Paramedical Personnel: A Preliminary Context for Emerging Problems,* 1967 WASH. U.L.Q. 332, 359; Comment, *Professional Negligence,* 121 U. PA. L. REV. 627, 635 (1973). On the other hand, imposition of strict liability may result in an improvement in the quality of services. The person rendering services may be induced to exercise more than just "due" care. Moreover, only by full disclosure will he be able to shift the risk of injury-producing defect. The proposed system of liability would therefore provide the consumer with more knowledge of the risks involved than he has under present law. When the complexity, imprecision, or impracticability of performing particular services is not sufficient to make enforceable a shifting of the risk, the fear of liability would deter only the person who is unable, or believes he is unable, to perform the services without defect. In that event, it is likely the consumer would go to someone with the requisite ability, and the incidence of injury-producing defects should decline.

[173] *E.g.,* Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (dictum); Newmark v. Gimble's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971). *See* hypothetical (2) in the introduction to this article.

[174] Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Numon v. Stevens, 162 Neb. 339, 76 N.W.2d 232 (1956); Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901). *Contra,* Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Margrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968). *See* hypothetical (5) in the introduction to this article.

[175] Cases cited notes 26–27, 63–72, 82 *supra.*

have reinforced the trend of increased protection for the consumer by imposing liability on sellers of goods who also defectively performed services in connection with those goods. Thus, sellers have been held liable in the absence of negligence for the defective packing,[176] delivery,[177] and installation[178] of goods. Yet, despite the anomaly of imposing strict liability on these sellers while refusing to impose strict liability on the independent contractor whose misconduct is identical to the misconduct of these sellers of goods, [179] only a few courts have embraced the theories of warranty and strict liability for defective services in the absence of a transfer of goods.[180] All courts should now take this next step in the increasing protection of the consumer and apply to sellers of services in consumer transactions the same standards of liability that apply to sellers of goods.

[176] Standard Brands Chem. Indus., Inc. v. Pilot Freight Carriers, Inc., 65 Misc. 2d 1029, 319 N.Y.S.2d 457 (Sup. Ct. 1971).

[177] Peterson v. Sinclair Ref. Co., 20 Wis. 2d 576, 123 N.W.2d 479 (1963). *But see* Phoenix Assurance Co. v. Potomac Sand & Gravel Co., 343 F. Supp. 658, 662 (D.D.C. 1972) (implied warranty of fitness with respect to the goods "does not extend to include a guaranty that the seller's *premises* are fit for receiving the commodity because *tort* law principles adequately provide for those safeguards under the duties which a landowner owes to business invitees, such as the duty to warn against dangerous conditions on the premises.").

[178] Rotolo v. Stewart, 127 So. 2d 24 (La. Ct. App. 1961); Kopet v. Klein, 275 Minn. 525, 148 N.W.2d 385 (1967); Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974); Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 408 P.2d 145 (1965); Hepp Bros. v. Evans, 420 P.2d 477 (Okla. 1966); May v. Portland Jeep, Inc., 509 P.2d 24 (Ore. 1973) (defective installation of roll bar on new car); Simonz v. Brockman, 249 Wis. 50, 23 N.W.2d 464 (1946). *But see* Hoover v. Montgomery Ward & Co., 528 P.2d 76 (Ore. 1974) (defective installation of new tires on consumer's car; no strict liability in tort). *See* hypothetical (3) in the introduction to this article.

[179] Rotolo v. Stewart, 127 So. 2d 24 (La. Ct. App. 1961) (seller of dishwasher held liable for faulty installation under theory of implied warranty, but installer held liable only under theory of negligence). *See* hypothetical (4) in the introduction to this article. There is no basis for distinguishing the seller from the installer. Even the rationale that the manufacturer has only one design to make, whereas the person performing services has a new design for each transaction, does not justify a refusal to hold the installer strictly liable, because strict liability is being imposed on the seller for his services, not his goods.

[180] Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973); Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Jeffreys v. Hickman, 132 Ill. App. 2d 272, 269 N.E.2d 110 (1971); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316 (1972); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951). *See* hypothetical (6) in the introduction to this article.

The Bankrupt's Spouse: The Forgotten Character in The Bankruptcy Drama

*Jonathan M. Landers**

If this year is typical, more than 150,000 Americans will file personal bankruptcy petitions, most of which will be filed by married individuals.[1] The Bankruptcy Act does not authorize a joint bankruptcy petition by a husband and wife; whether one or both spouses elect to file, each must do so individually. Unfortunately, there are no statistics indicating the number of personal bankruptcies in which both spouses file, nor the number in which only one spouse (almost always the wage earner) files. There is, however, some indication that in bankruptcies involving marrieds, it is customary for only one spouse to file.[2] For simplicity's sake, this article shall assume that it is the husband (H) who is filing the bankruptcy petition, and that it is his wife (W) who may or may not file—an assumption accurate in the majority of cases.[3]

The lawyer who counsels a married bankrupt must always consider the impact of the bankruptcy on the bankrupt's spouse. Aside from weighing the effect of the bankruptcy upon the marriage relationship and the emotional health of the parties, the lawyer must also assess its legal impact upon the assets and obligations of the bankrupt's spouse. In this connection, it is necessary to determine whether the other spouse should file. Most how-to-do-it references, with mere superficial treatment of the spouse's dilemma, generally suggest that W should file only if she expects to accumulate assets in the future, is subject to substantial debts, or is likely to react adversely to continued debt collection efforts.[4]

This article will discuss the effect of bankruptcy upon the bankrupt's spouse in two parts: first, the legal effect of bankruptcy upon a spouse who does not file a bankruptcy petition; and second, the bankruptcy treatment of the spouse who files or is forced into an involuntary bankruptcy proceeding. To prevent this article from becoming a de facto study of the whole of bankruptcy law and procedure, the discussion focuses only

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[1] More than eighty percent of persons between twenty and sixty-five are married. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 32 (92d ed. 1971). There is no reason to believe that the percentage of married bankrupts differs markedly from the percentage of married persons in the general population.

[2] *See* D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 57, 244 (1971).

[3] The author does not intend to infer that only husbands should have the privilege of becoming bankrupts.

[4] *See* L. ABRAMSON, BASIC BANKRUPTCY: ALTERNATIVES, PROCEEDINGS AND DISCHARGES (1971); D. GILL & C. BROSNAHAN, PERSONAL BANKRUPTCY AND WAGE EARNER PLANS §§ 3.21–23 (1971). Judge Cowans's treatment of the subject is more comprehensive. D. COWANS, BANKRUPTCY LAW AND PRACTICE §§ 721–29 (1963).

on those areas in which the marital relation of one or both of the bankrupts presents distinctive issues not present in other bankruptcies.

I. The Bankrupt's Spouse as a Nonbankrupt

If *W* is not a bankrupt, property which she regards as hers may be claimed by her husband's trustee and, at the same time, she may find that the bankruptcy has not discharged debts which she thought *H* would pay. At common law, this presented no difficulty because of the prevailing fiction that husband and wife were a unity; thus, the husband, subject to survivorship interests, controlled all of the property of the spouses — the wife could not make contracts or be sued for her debts.[5] The rigors of the common law system have been widely modified, but unfortunately, on an incomplete and inconsistent basis. As a consequence, when vestiges of the common law unity of husband and wife are superimposed upon bankruptcy law concepts, the results are frequently strange.

A. Jointly Held Property

A husband and wife may hold property jointly as tenants by the entirety, as joint tenants with the right of survivorship, and as tenants in common. In dealing with these property interests, the two most important sections of the Bankruptcy Act are sections 70a(3) and 70a(5). Section 70a(5) provides that the bankrupt's property passes to the trustee if it could have been transferred by the bankrupt, levied upon by his creditors, or otherwise seized or impounded. This requires a threshhold determination that the particular interest constitutes "property,"[6] and a further inquiry as to the transferability or leviability of the property under state law. Section 70a(3) gives the trustee powers which the bankrupt might have exercised for his own benefit. By exercising such powers, the trustee may obtain property which he would not otherwise have received under section 70a(5). Both sections 70a(3) and 70a(5) refer to state law, so the trustee's right to property depends on the characteristics such property possesses under state law. For these purposes, therefore, bankruptcy law is no different than state property law, with all the divergence and uncertainty which that may imply.

1. Tenancy by the Entirety in Real Property—At common law, joint ownership of land by husband and wife was effectuated through tenancy by the entirety, an arrangement where husband and wife were seized of the property during their joint lifetimes, with title then vesting in the survivor.

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[5] *See* 1 W. Blackstone, Commentaries 442–44 (Christian, Archbold, & Chitty eds. 1827); 2 *id.* at 433–36.

[6] It is unclear whether the determination that a particular interest is "property" under section 70a(5) is to be made by reference to state or federal law. *See* Commission on the Bankruptcy Laws of the United States, Report of the Commission on Bankruptcy Laws 206 (CCH ed. 1973) [hereinafter cited as Bankruptcy Comm'n Report]; Countryman, *The Use of State Law in Bankruptcy Cases (Part I)*, 47 N.Y.U.L. Rev. 407, 432, 438 (1972). The Supreme Court apparently believes that the appropriate reference is to federal law. *See* Segal v. Rochelle, 382 U.S. 375, 379–81 (1966).

During the joint lifetimes of the spouses, the husband was manager of the property, had exclusive right to the rents and profits, and could alienate his survivorship interest.[7] Although these features have been modified by statutes in a number of states and despite widespread criticism of tenancy by the entirety, almost half the states retain some form of it.[8]

The essential feature of tenancy by the entirety is that the estate cannot be transferred by one spouse acting alone nor can it be levied upon by a creditor of one spouse.[9] Consequently, entirety property is uniformly held not to pass to the trustee under section 70a(5).[10] Moreover, the husband's inability to act alone in a way which would destroy the tenancy prevents his interest from passing to the trustee pursuant to section 70a(3).

Even if *H*'s estate in entirety property does not pass to his bankruptcy trustee, the trustee may nonetheless claim two lesser interests of *H* in the property: his survivorship interest and his life estate in the rents and profits. At common law, *H*'s survivorship interest was both transferable by *H* and reachable by his creditors; consequently, in any state which retains the common law approach, such an interest passes to *H*'s trustee pursuant to section 70a(5).[11] And, although the uncertainty of the value of *H*'s interest will undoubtedly result in a sale at bargain prices—frequently to *H* or *W*—the sale must be held. Some states have enacted statutes which both deny *H* the power to transfer his survivorship interest and deny creditors access to that interest to satisfy their debts.[12] Thus, by making *H*'s survivorship interest nontransferable, in such states *H*'s interest will not be subject to sale by the trustee.

Since *H*'s life estate in the rents and profits of entirety property was both transferable and leviable at common law, it too will pass to the trus-

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[7] *See generally* 2 AMERICAN LAW OF PROPERTY § 6.6b (A.J. Casner ed. 1952); 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 623 (1973).

[8] *See* Craig, AN ANALYSIS OF ESTATES BY THE ENTIRETY IN BANKRUPTCY, 48 AM. BANKR. L.J. 255, 258 (1974).

[9] *See, e.g.*, Harris v. Manufacturers Nat'l Bank, 457 F.2d 631, 634 (6th Cir), *cert. denied*, 409 U.S. 885 (1972); *In re* Estate of Wall, 440 F.2d 215, 218 (D.C. Cir. 1971); 4A R. POWELL, *supra* note 7 ¶ 623, at 697, 700.

[10] *See In re* Bishop, 482 F.2d 381, 383 (4th Cir. 1973); *In re* Wetteroff, 453 F.2d 544, 546 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972); Reid v. Richardson, 304 F.2d 351, 353 (4th Cir. 1962); Fetter v. United States, 269 F.2d 467, 471 (6th Cir. 1959); Blodgett v. United States, 161 F.2d 47, 50 (8th Cir. 1947); Kerin v. Palumbo, 60 F.2d 480 (3d Cir. 1932); *In re* Kline, 370 F. Supp. 152, 154 (W.D. Va. 1973) (dictum); Foland v. Hoffman, 186 Md. 423, 47 A.2d 62, 65–66 (1946); 4A W. COLLIER, BANKRUPTCY ¶ 70.17 (14th ed. 1971); 3 H. REMINGTON, BANKRUPTCY § 1223.01 (1957).

The Bankruptcy Commission has recommended that H's interest in entirety property pass to the trustee and that the trustee be empowered to sell the property and thereby force *W* to accept a monetary satisfaction for her interest. BANKRUPTCY COMM'N REPORT, *supra* note 6, at 207–08.

[11] *See* Hayes v. Schaefer, 399 F.2d 300 (6th Cir. 1968); *In re* Ved Elva, Inc., 260 F. Supp. 978 (D.N.J. 1966); Dvorken v. Barrett, 100 N.J. Super. 306, 241 A.2d 841 (App. Div. 1968); Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. IND. & COM. L. REV. 197, 201–02 (1959).

[12] *See* Craig, *supra* note 8, at 258–59, 295–301.

tee in a common law state,[13] a result which can be extremely burdensome to the bankrupt's spouse and family. For example, if the jointly owned property is a nonexempt family residence, then the present value of *H*'s life estate in the rents and profits would pass to *H*'s trustee under section 70a(5). Although *H* could argue that the concept of a life estate in rents and profits does not apply to nonincome producing property such as a residence, the fact is that *H*'s family could, for *H*'s lifetime, be ousted and replaced by rent paying tenants. Although such a result seems quite harsh and no case has been found requiring such action, such a result is definitely possible.

Some states have abolished the common law right of the husband to control rents and profits.[14] In these states, rents and profits may be held jointly by the spouses as tenants by the entirety, joint tenants, or tenants in common. If the rents and profits are held by the entirety, then such property will not pass to the trustee. If, however, there is a joint tenancy or tenancy in common, the matter is treated the same as any similar tenancy in personal property. Also, a number of states have eliminated the crucial element of indestructibility from tenancy by the entirety so that it can be severed or destroyed by the individual action of one of the tenants.[15] In such a state, tenancy by the entirety is analytically no different from joint tenancy with the right of survivorship.

2. *Joint Tenancy and Tenancy in Common*—In these tenancies, both husband and wife own undivided interests in the entire estate, but the element of indestructibility is lacking. Such tenancies are most commonly connected with holdings in real property.

At common law, *H*'s interest in such tenancies was transferable and reachable by creditors; consequently, *H*'s interest in a common law state will pass to the trustee pursuant to section 70a(5).[16] In addition, if under state law a conveyance by *H* converts a joint tenancy into a tenancy in common without rights of survivorship, the trustee's assumption of *H*'s interest upon his bankruptcy will have the same effect.[17]

Section 70a(5) empowers the trustee to sell *H*'s interest for the benefit of his creditors, and the purchaser becomes a tenant in common with *W*. Although an undivided one-half interest in property owned in common with *W* may be attractive to some purchasers under some circumstances, in most situations the sale of *H*'s interest alone will lessen its realizable value. In this circumstance, maximum realization can be obtained only if *H*'s trustee can force partition of the property incident to the sale. The property can be partitioned in two ways: it can be par-

[13] *See* Stubbs v. Hardee, 461 F.2d 480 (4th Cir. 1972); Dvorken v. Barrett, 100 N.J. Super. 306, 241 A.2d 841 (App. Div. 1968); Huber, *supra* note 11, at 200–01.

[14] *See* 4A R. POWELL, *supra* note 7, ¶ 623.

[15] *E.g.*, Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895).

[16] 4A W. COLLIER, BANKRUPTCY ¶¶ 70.17[9], [10] (14th ed. 1971).

[17] *See* Flynn v. O'Dell, 281 F.2d 810, 817 (7th Cir. 1960); *In re* Victor, 218 F. Supp. 218, 220 (S.D. Ill. 1963); *In re* Blodgett, 115 F. Supp. 33, 35 (E.D. Wis. 1953).

titioned in kind with the trustee selling that portion of the property allocated to *H*'s interest; or, all the property can be sold and partition accomplished by compelling *W* to accept a pro rata share of the sales proceeds in exchange for her interest. Partition by sale is an absolute necessity for the trustee in cases where the property is incapable of partition in kind as, for example, where the property is a family residence, or where *H* has a reversionary interest in the property.

The trustee's ability to obtain either kind of a partition depends on state law. If *H*, as a tenant in common, would have the right to partition, then that right passes to the trustee either incident to the property itself under section 70a(5) or as a power possessed by *H* under section 70a(3).[18] Moreover, if creditors can obtain partition of the property under state law, this power will probably pass to the trustee pursuant to section 70c of the Act.[19]

If the trustee cannot obtain the right to partition under state law, he may seek such authority in the provisions of the Bankruptcy Act. There is little doubt that the congressional bankruptcy power is sufficient to provide adequate constitutional authority for provisions which would supersede state property law regarding the sale of bankrupts' estates,[20] but it is questionable whether the present Bankruptcy Act contains the necessary provisions.

Sections 2a(7) and 70f provide for the liquidation of the bankrupt's estate, and section 47a(1) directs the trustee to reduce the property of the estate to money. Although these general directions regarding the liquidation of property could arguably provide the necessary authority for a sale or partition, there are strong countervailing arguments. Section 70a of the Act, the principal section concerning passage of the bankrupt's property to the trustee, shows considerable deference to state law in determining which property rights and interests pass to the trustee. And, although one can quarrel with such an appoach,[21] both section 70a(3) and 70a(5) are quite explicit in their reference to state law. It would seem an unwar-

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[18] *See In re* Blodgett, 115 F. Supp. 33 (E.D. Wis. 1953); Rouss v. Blackford, 223 Ala. 24, 134 So. 635 (1931); Champion v. Spurck, 302 Ill. 241, 134 N.E. 717 (1922). A number of states have specific statutes authorizing partition actions by tenants in common. *See* 4A R. POWELL, *supra* note 7, ¶ 609 n.4 (citing statutes), ¶ 611 n.7 (citing authorities).

The contrary decisions of Renard v. Butler, 325 Mo. 981, 30 S.W.2d 608 (1930), and Adelson v. McKenna, 55 R.I. 363, 181 A. 799 (1935), are not burdened by any discussion of the trustee's powers under the Bankruptcy Act, and give little indication as to why the trustee cannot sue in partition even though the bankrupt could have done so.

[19] Somewhat surprisingly, the major treatises devote almost no attention to the rights of creditors to partition jointly held property. *See* 4A R. POWELL, *supra* note 7, ¶ 607, at 609–13, 629–30; 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 475 (3d ed. 1939).

[20] *Cf.* Landers, *The Shipowner Becomes a Bankrupt*, 39 U. CHI. L. REV. 490, 500 (1972). The act proposed by the Bankruptcy Commission contains a provision authorizing *H*'s trustee to sell jointly held property and to compel *W* to accept a cash satisfaction for her interest. BANKRUPTCY COMM'N REPORT, *supra* note 6, at 196.

[21] *See* BANKRUPTCY COMM'N REPORT, *supra* note 6 at 194; Countryman, *supra* note 6, at 473–74.

ranted extension of these sections to maintain that once a property interest passes to the trustee, federal law governs the liquidation of that interest. Indeed, section 70a(3) would be largely superfluous if the trustee could claim virtually unlimited authority to liquidate or otherwise affect property which passes under section 70a(5). In addition, state law restrictions on forced sales or partitions of joint interests in property may be an integral part of the property interest itself, thus limiting the interest which passes initially under section 70a(5).[22] Finally, if the trustee could obtain a forced sale or partition of property notwithstanding state law, the trustee should also be able to obtain partition of entirety property notwithstanding state law. But because the cases are uniform in denying a trustee the power to partition entirety property,[23] such an inference is negated. Consequently, the trustee must be limited to whatever right to partition or sell the entirety property as can be derived from state law.[24]

3. W's Dower Interest—At common law, *W* had an inchoate life estate interest in one-third of *H*'s lands and tenants. Prior to 1938, the cases conflicted over the question of whether *H*'s trustee could force *W* to accept monetary satisfaction in lieu of her dower interest.[25] In 1938, section 2a(7) of the Act was amended to empower the trustee to liquidate *H*'s estate and *W*'s concomitant dower interest if, under state law, creditors of *H* can compel *W* to accept monetary satisfaction for her interest. However, if state law does not grant creditors this right, there is no bankruptcy authority which will compel *W* to accept monetary satisfaction and, as demonstrated previously, such authority cannot be found in the general bankruptcy provisions authorizing liquidation of the bankrupt's property.[26] Of course, *W* can consent to the sale free of her dower interest.[27]

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[22] *See* Hull v. Dicks, 235 U.S. 584, 588 (1915); *cf. In re* Clemens, 472 F.2d 939 (6th Cir. 1972); *In re* Waterson, Berlin & Snyder Co., 48 F.2d 704 (2d Cir. 1931); *In re* Tidy House Prods. Co., 79 F. Supp. 674 (S.D. Iowa 1948).

[23] See cases cited notes 9–10 *supra.*

[24] This same result can be reached under the specific language of section 2a(7), which authorizes the liquidation of "all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest . . . ." Taken literally, this would apply to joint interests. *But see In re* Victor, 218 F. Supp. 218, 219–20 (S.D. Ill. 1963). The legislative history makes it clear, however, that this provision of section 2a(7) was directed at the liquidation of dower and curtesy interests and was an attempt to overrule earlier decisions which denied the trustee authority to liquidate such interests. *See* 1 W. COLLIER, BANKRUPTCY ¶ 2.40 (14th ed. 1974). There is no indication that this section was designed to apply to other types of joint interests in property, nor is there any indication that this section was designed to set up a special liquidation rule as to the bankrupt's property jointly held with his spouse which would not apply when the property was jointly held with someone else. Yet that would be the result of applying section 2a(7) to the liquidation of *H*'s interest in property held with *W* as tenants in common.

[25] *See* 1 W. COLLIER, BANKRUPTCY ¶ 2.40, at 262 (14th ed. 1974).

[26] *See* Kelly v. Minor, 252 F. 115 (4th Cir. 1918); *In re* Jones, 86 F. Supp. 605 (E.D. Mich. 1949), *aff'd*, 181 F.2d 191 (6th Cir. 1950); Tapp's Trustee v. Tapp, 232 Ky. 355, 23 S.W.2d 549 (1930); 4 H. REMINGTON, BANKRUPTCY § 1737 (1957). In the *Jones* case, *H* could have compelled the partition of the property under Michigan law since he was in possession of the property. It is not clear why the trustee did not invoke section 70a(3) of the Act to exercise such a power.

[27] *See* 1 W. COLLIER, BANKRUPTCY ¶ 2.45, at 275 (14th ed. 1974); 4 H. REMINGTON, BANKRUPTCY § 1738 (1957).

The matter is somewhat more complex if *W* has released her dower interest to a mortgagee, but has not done so as to all creditors. If the release gives other creditors the power to compel sale under state law, then section 2a(7) applies and the trustee can sell the property, despite *W*'s dower interest.[28] If the release does not give the creditors the power to compel sale, the trustee may contend that he still has the power of sale under section 2a(7) because the mortgagee is himself a creditor. The term "creditor" is defined in section 1(11) to include persons with provable claims. Because the mortgagee probably has a provable claim[29] and because the Supreme Court has made it clear that the definition of creditors is comprehensive and embraces even some persons who do not have provable claims it appears that the mortgagee is a creditor.[30] Thus, under this interpretation, the trustee should be able to invoke the mortgagee's power of sale.

The contrary argument would analogize section 2a(7) to section 70e—a provision permitting the trustee to avoid any transfer which could be avoided by any creditor of the bankrupt having a provable claim. Although the literal language of section 70e would apparently permit the trustee to step into the shoes of secured and lien creditors (assuming their claims are provable), the weight of opinion has rejected such a view on the ground that section 70e was designed to substitute the trustee for general creditors, not to confer upon the trustee the sometimes awesome rights of secured or lien creditors.[31] By analogy, therefore, it could be argued that the purpose of section 2a(7) was to confer upon the trustee the liquidation powers of general creditors, not to give him the special prerogatives of a mortgagee.[32] Arguably, then, the trustee cannot use section 2a(7) to authorize the sale free of *W*'s dower interest.

4. Joint Interests in Personal Property—Husbands and wives may hold personal property as tenants by entirety, tenants in common, or joint tenants with the right of survivorship,[33] and the rights of *H*'s trustee are

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[28] See 4 H. REMINGTON, BANKRUPTCY § 1737, at 478 n.5 (1957) (citing authorities). States differ on *W*'s right to dower if she renounces them in a mortgage. In some states, *W* has a one-third interest in the surplus; in others, *W* has a one-third interest in the whole property subject to the mortgage; and in others, *W* loses her interest. *Id.* § 1739, at 483.

[29] *See, e.g.*, 4A W. COLLIER, BANKRUPTCY ¶ 70.90[1], at 1033–34 (14th ed. 1971); 3 *id.* ¶ 57.07[3.2] (14th ed. 1974). Section 1(28) of the Act defines "secured creditor" as a "creditor" who has security for his claim. This strongly suggests that an individual with security is both a "creditor" and a "secured creditor" under the Act.

[30] American Surety Co. v. Marotta, 287 U.S. 513 (1933).

[31] *See* Kennedy, *The Trustee in Bankruptcy as a Secured Creditor Under the Uniform Commercial Code*, 65 MICH. L. REV. 1419 (1967).

[32] *See* Landers, *supra* note 20, at 524–25; *cf.* D. COWANS, *supra* note 4, § 592 (trustee cannot employ rights of special creditors to invalidate bankrupt's exemptions). *See generally* Kennedy, *Limitations of Exemptions in Bankruptcy*, 45 IOWA L. REV. 441, 457–69 (1960).

[33] At common law, there was considerable uncertainty whether a tenancy by the entirety could be created in personal property. For a general review of the subject of joint interests in personal property, see Townsend, *Creation of Joint Rights Between Husband and Wife in Personal Property: I*, 52 MICH. L. REV. 779 (1954); Townsend, *Creation of Joint Rights Between Husband and Wife in Personal Property: II*, 52 MICH. L. REV. 957 (1954).

[34] *See* Hull v. Dicks, 235 U.S. 584, 588 (1915); *cf. In re Clemens*, 472 F.2d 939

no different than in the case of real property. Since many items of personal property—such as household furniture—are incapable of division, *H*'s interest will have little or no value to a trustee who is not permitted by state law to force a sale of the property. Consequently, such property will frequently be abandoned by the trustee.[34] Separate consideration must be given to two types of personal property—joint bank accounts and joint interests in savings bonds.

(a) Joint Bank Accounts—A joint bank account presents bankruptcy difficulties when, as is usually the case, the entire account may be withdrawn by either spouse without the other's consent. In such situations, it is arguable that *H*'s power to obtain the entire proceeds is sufficient to transfer the entire account to the trustee either as a power under section 70a(3) or as transferable property under section 70a(5). Moreover, when the account arrangement provides for unlimited transfer by either spouse it is likely that the parties regard this as more of a temporary convenience, and not as a long term property arrangement. Furthermore, since each party to a joint account is on notice that the other may take the entire amount, *W* can hardly complain if such a taking results from the compulsion of the Bankruptcy Act.[35]

Despite these arguments, it is clear that the trustee cannot claim the whole account. In this connection, an important distinction must be drawn between *H*'s rights vis-á-vis the bank, and his rights against *W*. Simply because *H* can withdraw the entire deposit does not mean that it is his; the right of withdrawal is simply a convenience arrangement between the joint depositors and the bank. The crucial question is what the respective interests are in the account between *H* and *W* and whether *H*'s interest comes within either section 70a(5) or section 70a(3). In the overwhelming number of states, creditors can levy on joint deposits only to the extent of *H*'s interest, not on the full amount.[36] Moreover, for exampe, if *H* has a fifty percent interest in the deposit and withdraws more, even though the bank is protected against a suit by *W*, *W* can sue *H* on either a conversion or breach of trust theory. It is well established that *H*'s bankruptcy trustee does not obtain interests in property which *H* can obtain only by breaching a contractual agreement, a trust arrangement, or by conversion of property.[37] On these grounds, therefore, the trustee is precluded from claiming that the property is transferable or that the bankrupt had a power which he could have exercised for his benefit. The proper inquiry is into the respective rights of *H* and *W* in the joint bank

[34] BANKRUPTCY R. 608 sets forth the procedures for abandoning property.

[35] *Cf.* Park Enterprises, Inc. v. Trach, 233 Minn. 467, 473, 47 N.W.2d 194, 197 (1951).

[36] Annot., 11 A.L.R.3d 1465, 1473 (1967). *See generally* Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name,* 41 CALIF. L. REV. 596, 617 (1953).

[37] *See* 4A W. COLLIER, BANKRUPTCY ¶¶ 70.17, at 187 n.41d, 70.25 (14th ed. 1971).

account under state law, and *H*'s trustee will obtain only those rights which, under that law, *H* has in the property.[38]

(b) Savings Bonds—To determine the bankruptcy consequences of joint holdings of savings bonds, it is necessary to consider the many federal regulations governing such bonds. For example, federal regulations permit joint ownership only where the names of the two owners are registered in the alternative. Thus, similar to the joint bank account situation, either owner can cash the bonds.[39]

As with other property, the starting point for determining the right of *H*'s trustee to jointly held bonds under section 70a(5) is an inquiry into whether *H*'s interest is transferable or leviable. But because of the many federal statutes relating to bonds, it is unclear whether these issues should be determined by state or by federal law. This question, in turn, depends on whether state or federal law governs the transferability of *H*'s interest outside of the bankruptcy context.[40] The issue, therefore, is whether state or federal law governs the respective rights of a husband and wife in savings bonds. It is clear that federal law governs the respective rights of the government and the bondholder. This principle is based on the need for governmental uniformity in dealing with the bonds and on the federal interest in determining the nature and extent of the liabilities the government has undertaken.[41] Such considerations, however, appear unrelated to the rights of *H* and *W inter se* and to the right of *H*'s creditors to reach such property. Indeed, the Supreme Court has suggested that great deference should be given to state law in the area of family property arrangements, including the rights of creditors to reach such property, and in transactions between private parties which do not directly affect the government.[42] No federal interest in regulating this single type of jointly held property is readily apparent, especially since other similar arrangements are subject to state law, and there is no indication that the purchasers of such bonds do so in the expectation that they will be governed

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[38] *See* Olshan v. East N.Y. Sav. Bank, 28 F. Supp. 727 (E.D.N.Y. 1939); *cf. In re* Wetteroff, 453 F.2d 544 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972) (right of *W* to portion of tax refund from joint return depends on state law). *See also* Macken v. Gass, 23 F. Supp. 320 (W.D.N.Y. 1938) (apparently giving *H*'s trustee judgment for the full amounts in two joint bank accounts).

[39] 31 C.F.R. §§ 315.7(a)(2), 315.60 (1973).

[40] *See* Segal v. Rochelle, 382 U.S. 375, 381 n.6 (1966); 4A W. COLLIER, BANKRUPTCY ¶ 70.15, at 144 n.22 (14th ed. 1971). A recent case appeared to apply federal law, without discussion, to the transferability of a claim under the Truth in Lending Act. Porter v. Household Fin. Co., 4 CCH CONS. CREDIT GUIDE ¶ 98,699 (S.D. Ohio 1974).

[41] *See* Free v. Bland, 369 U.S. 663 (1962); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956) (determination of when bonds overdue determined by federal law); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

This reasoning would apply to the construction of 31 C.F.R. § 315.21(b) (1973), which appears to regulate the interest of the trustee in jointly held bonds. Such a provision governs the rights of the trustee vis-á-vis the government, but should not be determinative under 70a(5).

[42] United States v. Yazell, 382 U.S. 341, 352–56 (1966); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956) (federal law does not determine rights of private parties which do "not touch the rights and duties of the United States"); *cf.* Segal v. Rochelle, 382 U.S. 375, 384 (1966).

by a system of law different from that which governs other forms of personal property.

There is, however, some contrary authority to the above analysis.[43] Several earlier decisions relied upon the Supreme Court's decision in *Clearfield Trust Co. v. United States,*[44] a case broadly read to require federal hegemony in the area of government obligations. This federal superiority would, of course, be applicable to savings bonds as well as to other forms of government obligations. The Supreme Court did, however, retreat significantly from this position in *Bank of America National Trust & Savings Association v. Parnell*[45] and *United States v. Yazell,*[46] both of which presented fact situations in which there were much stronger reasons for applying federal law than in the situation involving the transferability or leviability of savings bonds. In *Parnell,* the Court referred to state law to decide which party had the burden of proof on the issue of whether the holder had acted in good faith in acquiring previously stolen bonds. It is reasonable to conclude that the financial institutions involved in *Parnell* would rely to a much greater degree on the presumed uniformity of federal law than would the purchasers of savings bonds. In *Yazell,* the Court referred to state law to determine a wife's personal liability on a government loan. In that case, the government was an actual party to the transaction and had a strong interest in not being subject to the varying contract and property law of the fifty states. The savings bond situation, which involves the rights of private parties in a situation where national uniformity is neither expected nor desired, is thus a much weaker case for the application of federal law than either *Parnell* or *Yazell,* where the Supreme Court applied state law.

Consequently, it is reasonable to conclude that whatever authority *Clearfield Trust* had in the savings bond area has been significantly eroded by these decisions. Nevertheless, the Sixth Circuit,[47] relying on *Clearfield Trust* and two other decisions rendered prior to *Parnell* and *Yazell,* recently applied federal law to determine the rights of a bankrupt to certain savings bonds. Because its holding is so at variance with *Parnell* and *Yazell,* it seems reasonable to conclude that the Sixth Circuit's

[43] United States v. Stock Yards Bank, 231 F.2d 628 (6th Cir. 1956); Guldager v. United States, 204 F.2d 487 (6th Cir. 1953).

[44] 318 U.S. 363 (1943).

[45] 352 U.S. 29 (1956).

[46] 382 U.S. 341 (1966).

[47] *In re* Hayes, 407 F.2d 1031, 1033 (6th Cir. 1969). Ironically, the court's discussion was limited to a quote from United States v. Stock Yards Bank, 231 F.2d 628 (6th Cir. 1956). Among the cases cited by the *Stock Yards* court and included within that portion quoted was the lower court—and since reversed—decision in the *Parnell* case.

Somewhat surprisingly, the Sixth Circuit did not cite perhaps the strongest available authority, Free v. Bland, 369 U.S. 663 (1962), which held that federal law governed the respective rights in savings bonds of a surviving cotenant and the son of the deceased cotenant. The Court regarded the son's claim as being directly opposed to the federal regulation conferring rights of survivorship. The decision did not indicate that federal law would govern the rights of *H* and *W inter se,* which do not seem to be regulated by a specific regulation.

decision is of limited precedential value and that state law must be looked to in order to resolve the transferability and leviability of savings bonds issues.

Once state law is invoked, two further issues arise. First, the rights of *H* and *W* in the bonds must be determined by looking at the face of the bonds. As already noted, federal regulations permit only a single type of joint holding arrangement, while state law may permit three different arrangements. Thus, it will usually be necessary to determine which type of property interest applies under state law when the ownership rights to jointly held property are uncertain.[48] Second, having identified what type of property arrangement is presumed, the parties may show that such an arrangement does not represent the actual interests in the bonds so that the actual ownership interests may be established.[49] Having done this, it becomes possible to apply the section 70a(5) tests of transferability and leviability to whatever interest *H* has been found to have in the bonds.

The determination of transferability and leviability by state law may lead to radically different results than under federal law. For example, under federal law, the bonds are not transferable and therefore no interest would pass to *H*'s trustee;[50] under state law, however, they may be transferable—at least to the extent that a court of equity would enforce the rights of the transferee.[51] Under federal law, creditors may levy on bonds only to the extent of the actual interest of *H* in the bonds.[52] State law, again, may be different because *H's* creditors may not be able to reach the bonds if it is determined that *H* and *W* held the bonds as tenants by the entirety.[53] In many cases, of course, the result will be the same.

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[48] *See* Guldager v. United States, 204 F.2d 487, 489 (6th Cir. 1953); *cf. In re* Estate of Wall, 440 F.2d 215, 219–20 (D.C. Cir. 1971). *See also* Simon v. Schaetzel, 189 F.2d 597 (10th Cir. 1951) (*H* and *W* each held to have half interest; state law apparently used). For a review of the different presumptions and rules governing the various tenancies in personal property, see Townsend, *Creation of Joint Rights Between Husband and Wife in Personal Property: I,* 52 MICH. L. REV. 779, 796–816 (1954).

[49] This may or may not be difficult. *See In re* Wetteroff, 453 F.2d 544, 547 (8th Cir.), *cert. denied,* 409 U.S. 934 (1972) (testimony that parties engaged in philosophic discussion of intended tenancy for tax refund at time tax return was prepared and signed lacks probative value); *In re* Estate of Wall, 440 F.2d 215, 220–22 (D.C. Cir. 1971); *In re Hayes,* 407 F.2d 1031 (6th Cir. 1969) (*W*'s lack of interest determined on basis of *H*'s conduct); First Nat'l Bank v. Hector Supply Co., 254 So. 2d 777 (Fla. 1971) (remand to determine whether parties intended estate by the entirety in joint account).

[50] 31 C.F.R. § 315.20(a) (1973); *In re* Hayes, 407 F.2d 1031, 1034–35 (6th Cir. 1969).

[51] *See* Segal v. Rochelle, 382 U.S. 375, 384 (1966).

[52] *In re* Hayes, 407 F.2d 1031 (6th Cir. 1969); United States v. Stock Yards Bank, 231 F.2d 628 (6th Cir. 1956).

[53] *See In re* Estate of Wall, 440 F.2d 215 (D.C. Cir. 1971); *In re* Smulyan, 98 F. Supp. 618 (M.D. Pa. 1951) (applying Pennsylvania presumption that a tenancy by the entirety had been created in bonds); First Nat'l Bank v. Hector Supply Co., 254 So. 2d 777 (Fla. 1971); *cf.* Annot., 11 A.L.R.3d 1465, 1472, 1484 (1967). Some cases appear to have applied state law in determining whether savings bonds were exempt. *See* 4A W. COLLIER, BANKRUPTCY ¶ 70.18[8], at 244 n. 43t (14th ed. 1971).

B. Joint Obligations

Section 16 of the Bankruptcy Act explicitly establishes that *H*'s discharge in bankruptcy does not release *W* from liability on joint obligations.[54] Consequently, if one reason *H* filed a bankruptcy petition was to alleviate the pressure of creditors attempting to collect debts, both spouses may, when the same creditors start hounding *W*, find *H*'s discharge to be a pyrrhic victory. The situation may be even worse if the debt is secured by property which *H* and *W* want to keep. The bankruptcy of *H* will, under most security agreements, constitute a default which will allow the creditor to repossess or replevy the property. Thus, *W* may wind up without the property and with a deficiency judgment against her on the debt.

Joint obligations present the most perplexing difficulties for creditors when *H* and *W* own property as tenants by the entirety. To reach entirety property, creditors must obtain a judgment against both *H* and *W*, since individual creditors of *H* or *W* cannot satisfy their claims out of entirety property. Superimposed upon this scheme, bankruptcy has a double-barreled effect in the bankrupt's favor. On one hand, *H*'s discharge in bankruptcy will make it impossible for creditors of *H* and *W* to obtain the necessary judgment against both, and the tenancy will thus be free from the reach of creditors. On the other hand, the entirety property does not pass to *H*'s trustee,[55] and is therefore not available to his creditors in the bankruptcy proceeding. The practical result of the confluence of state law governing tenancy by the entirety, section 70a(5) of the Act, and *H*'s ability to obtain a discharge, will be to immunize entirety properties not only from individual creditors of *H* and *W*, but from joint creditors as well.[56]

The Michigan Supreme Court found such a result so unpalatable that it held, in *Kolakowski v. Cyman*,[57] that *H*'s discharge did not prevent a creditor from obtaining the necessary joint judgment against *H* and *W*. Although the court relied largely on the policy considerations of a Michigan statute intended to enable creditors to reach entirety property for joint debts, the *Kolakowski* court suggested that the suit had a quasi-in rem effect upon the property and was not an attempt to obtain a personal

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[54] *E.g.*, United States v. Rassmussen, 184 F. Supp. 351, 352 (D. Minn. 1960); Investors Homestead Ass'n v. Broero, 216 So. 2d 625, 627 (La. App. 1968). Section 16 has been held not to prevent creditors from obtaining a judgment against *H* and *W* when state law requires that creditors obtain such a judgment to recover against *W*. Harris v. Manufacturers Nat'l Bank, 457 F.2d 631, 635 n.1 (6th Cir.), *cert. denied*, 409 U.S. 885 (1972). Compare United States v. Helz, 314 F.2d 301 (6th Cir. 1963) (under state law, *H*'s bankruptcy prevents creditor from obtaining necessary joint judgment against *H* and *W* on joint obligation).

[55] See note 10 *supra* and accompanying text.

[56] *See* Reid v. Richardson, 304 F.2d 351 (4th Cir. 1962); Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931); *In re* Kline, 370 F. Supp. 152 (W.D. Va. 1973); Ades v. Caplan, 132 Md. 66, 103 A. 94 (1918) (creditor who obtained lien on entirety property within four months of bankruptcy; bankruptcy discharged *H*'s debt and voided lien).

[57] 285 Mich. 585, 281 N.W. 332 (1938). (*Compare Kolakowski* and Edwards & Chamberlin Hardward Co. v. Pethick, 250 Mich. 315, 230 N.W. 186 (1930), *with* the approach taken by the Maryland Supreme Court in Foland v. Hoffman, 186 Md. 423, 47 A.2d 62, 65 (1946).

judgment on the discharge debt in violation of the policy of the Bankruptcy Act. In other words, the Michigan court treated the creditor in much the same way as if he had a security interest in the entire property; in such a case, the discharge would not preclude a secured creditor from proceeding against entirety property. By analogy, the *Kolakowski* court reasoned that creditors without a security interest might have "relied" on the entirety property. The only difficult with this reasoning is that the joint creditor did not have a security interest, and could only reach the property by first obtaining an in personam judgment against *H* and *W*.

In another case, *First National Bank v. Pothuisje*,[58] the Indiana Supreme Court reached the same result as in *Kolakowski* but, in finding the Michigan quasi-in rem approach lacking, constructed its own theory. The court distinguished the separate liability of *H* from the liability of *H* and *W* and as an entity to hold that the obligation of the entity was not discharged and, accordingly, that the bankruptcy discharge did not cover joint debts. In reaching this conclusion, the Indiana court conveniently ignored the conceptual difficulty of whether *H* would continue to be liable for any deficiency on the underlying debt or on other joint obligations if the entirety property proved insufficient. The ability to solve this conceptual difficulty is the strength of the quasi-in rem approach. Furthermore, aside from *Pothuisje,* there is no indication that Indiana law treats the husband and wife as a legal entity, nor does the Bankruptcy Act recognize the husband and wife as an entity for the purpose of a joint bankruptcy petition.[59] In later cases, the Indiana courts quickly undercut the entire rationale of *Pothuisje* by holding that bankruptcy does not discharge *H* from any personal liability if the sale of the entirety property fails to fully satisfy the debt.[60] The Indiana approach must therefore be deemed a failure.

In *Fetter v. United States*,[61] the Sixth Circuit took the opposite view, and freed the entirety property from the claims of the creditors. The court, in rejecting both the Indiana and Michigan approaches, reasoned that since section 17 of the Act grants a discharge of *H*'s provable debts, including both individual and joint liabilities, *H*'s liability had been discharged and the creditor could not obtain the necessary joint judgment. Thirteen years later, continuing attempts to avoid the seemingly incongruous results produced by the *Fetter* decision required the Sixth Circuit to repeat the message for those courts not following *Fetter*.[62]

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[58] 217 Ind. 1, 25 N.E.2d 436 (1940).

[59] The fiction was justifiable under the common law because of the fiction that the husband and wife were a unity.

[60] *See* Tipton v. Perpetual Sav. & Loan Ass'n, 143 Ind. App. 202, 238 N.E.2d 695 (1968); Williams v. Lyddick, 116 Ind. App. 206, 61 N.E.2d 186 (1945); Shabaz v. Lazar, 115 Ind. App. 691, 60 N.E.2d 748 (1945) (rejecting argument that entity of *H* and *W* was not discharged and that creditor could collect debt against entireties property acquired subsequent to bankruptcy).

[61] 269 F.2d 467 (6th Cir. 1959).

[62] Harris v. Manufacturers Nat'l Bank, 457 F.2d 631 (6th Cir.), *cert. denied*, 409 U.S. 885 (1972). In addition to the lower court in *Harris*, those not following *Fetter* included Smith v. Beneficial Finance Co., 139 Ind. App. 653, 218 N.E.2d 921 (1966);

Creditors do, however, have an avenue of redress if they act quickly. For example, the Fourth Circuit affirmed a stay of bankruptcy proceedings so that a creditor could commence an action against *H* and *W* in state court before *H* obtained a discharge.[63] The court relied largely on *Lockwood v. Exchange Bank*,[64] which authorized a similar stay so that a creditor could enforce a claim against exempt property before the bankrupt obtained a discharge. In reaching its conclusion, the court also noted the purpose of the Bankruptcy Act to grant discharges as a sort of quid pro quo for surrendering nonexempt property and pointed out the interaction of the Bankruptcy Act and state law to confer an immunity upon entirety property which would not be conferred by either system. As an alternative to staying bankruptcy proceedings, it may be possible for the creditor to bring *W* into the bankruptcy proceeding. Treatment of this alternative, however, will be postponed for later consideration.

C. Trustee's Rights to Property Held by W

Upon inspection of the bankrupt's assets, the trustee may find a substantial amount of property apparently belongs to *W*, even though she has no apparent independent sources of income or wealth. Because of the obvious opportunities for feigned transactions between husband and wife and the possibility that the husband may be able to minimize the impact of bankruptcy if most of his property is in his wife's name, close scrutiny of such a situation will be required.

It is axiomatic that *W*'s separate property does not pass to the trustee absent some basis for avoiding the transaction in which *W* acquired the property.[65] The trustee may try to avoid the transfer by claiming that *W* is holding the property as trustee or agent for *H* and that the property therefore should pass to *H*'s trustee in bankruptcy.[66] More commonly, the trustee will seek to recover property ostensibly owned by *W* on the ground that she obtained the property from *H* by means of a fraudulent conveyance or preferential transfer.

1. Fraudulent Conveyance—To show that *W* acquired the property by means of a fraudulent conveyance, the trustee must show that there was a transfer of *H*'s nonexempt property to *W* and that the transfer is fraudulent under either section 67d of the Act or under state law, which is in-

Traverse City State Bank v. Conaway, 37 Mich. App. 647, 195 N.W.2d 288 (1972). *See also* Farmington Production Credit Ass'n v. Estes, 504 S.W.2d 149 (Mo. App. 1974).

[63] Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931); Davison v. Virginia Nat'l Bank, 493 F.2d 1220 (4th Cir. 1974); *In re* Saunders, 365 F. Supp. 1351 (W.D. Va. 1973) (holding *Harris* inapplicable); *cf. In re* Bishop, 482 F.2d 381 (4th Cir. 1973).

[64] 190 U.S. 294 (1903).

[65] *See* 4A W. COLLIER, BANKRUPTCY ¶ 70.30 (14th ed. 1971); D. Cowans, *supra* note 4, § 726, at 374 & n.20. In some cases, the court may have to apportion the respective interests of *H* and *W* in property. *In re* Buchholtz, 259 F. Supp. 31 D. Minn. 1966) (tax refund allocated in proportion to amount withheld from wages of *H* and *W*).

[66] *See* 5 H. REMINGTON, BANKRUPTCY § 2153 (1953).

corporated into the Act by section 70e. Section 67d is a slightly modified version of the Uniform Fraudulent Conveyances Act; state law will usually be the Uniform Act or the common law of fraudulent conveyances.

(a) Transfer—Property may pass from husband to wife in a variety of ways, but sections 67d and 70e of the Act invalidate only those which are deemed to be transfers. The term "transfer" is broadly defined in section 1(30) of the Act to include sales and any other direct or indirect mode of disposing of property or of fixing a lien upon property. It is not clear, however, whether this definition applies to sections 67d and 70e. To the extent that section 1(30) is not applicable in cases arising under sections 67d or 70e, state law definitions of "transfer" would apply. Application of state law may be significant since the Uniform Act uses the term "conveyance"—which is defined as a payment, assignment, transfer, lease, mortgage, or pledge of tangible or intangible property, or the creation of any lien or encumbrance—rather than "transfer." Thus, in some instances, the broadness of the federal definition may not be matched by the definition of its state counterpart.

Insofar as section 67d is concerned, "transfer" should be defined in accordance with section 1(30) of the Act. In outlawing certain fraudulent transfers, section 67d makes no reference to state law concepts of invalidity, nor does it incorporate state law in the avoidance provisions. In fact, section 67d was designed specifically to provide a federal fraudulent conveyance law which would exist apart from the vagaries of state law.[67] Hence, there seems to be no basis, either in terms of the purpose of section 67d or its provisions, for imposing a state law definition of "transfer" upon federal fraudulent conveyance law.[68]

Because section 70e uses the term "transfer" before making reference to avoidance under state law, it could be argued that whether a given transaction is a transfer should be determined under federal law, and that state law should determine only whether the transfer is voidable. This would, however, result in the anomaly that a transaction, although not voidable under federal law as reflected in section 67d nor under state law because it was not a transfer, could be avoided under section 70e. Moreover, such a result is contrary to the purpose of section 70e to give the trustee rights that creditors have under state law.[69] Therefore, just as a state concept of transfer should not be imposed on section 67d, a federal concept of transfer should not be imposed on the state law of fraudulent conveyances incorporated by section 70e of the Act.

In most instances, the determination that a transfer has occurred will not be difficult and will be the same under both state and federal law. For

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[67] *See* McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 387–88 (1937).

[68] *See* McKenzie v. Irving Trust Co., 323 U.S. 365, 369–70 (1945); Hoecker v. United Bank, 476 F.2d 838, 842 (10th Cir. 1973) (dissenting opinion).

[69] *See* Hoecker v. United Bank, 334 F. Supp. 1080 (D. Colo. 1971), *aff'd*, 476 F.2d 838 (10th Cir. 1973) (trustee conceded that state law determined whether conveyance was a "transfer").

example, a transfer obviously occurs when the bankrupt sells, gives, or otherwise passes his property to his wife.[70] Similarly, there is a transfer if *H* pays money or gives property to a third party who then gives or furnishes property to *W*, pays one of *W*'s debts, or improves *W*'s property.[71] One case found a transfer when a corporation which was the alter ego of *H* transferred corporate property to *W*.[72] A transfer may also be found even if *W* does not affirmatively receive something as, for example, where the transaction results in the depletion of an asset belonging to *H* or where *H* is deprived of an asset. Examples of such transfers are *W*'s use of income producing property without paying fair rental value for it and *H*'s release of property or contract rights.[73] The theory of these cases is that a deprivation of income to *H* harms creditors by diminishing the available estate in the same way that the outright transfer of money or property reduces the bankrupt estate. The federal definition of transfer will reach even involuntary transfers in judicial proceedings, but there is some question whether the Uniform Act is broad enough to do so.[74] In sum, a transfer takes place in nearly any circumstance where the estate of the bankrupt is diminished to the prejudice of his creditors.[75]

A recent Tenth Circuit case, *Hoecker v. United Bank*,[76] merits special mention because of its potential impact on husband-wife transactions. In *Hoecker*, the trustee attacked the bankrupt's renunciation of his father's will as a fraudulent conveyance under section 67d. The court held that the renunciation was not a transfer on the basis of two Colorado statutes, one providing that a renunciation within six months of the testator's death prevents the estate from ever vesting in the bankrupt, and the other providing that a disclaimer more than six months after the testator's death operates as an assignment. The court thus applied the metaphysical notion that since the renunciation prevented the estate from vesting rather than divesting a vested interest, there was no transfer. Although the court purported to apply federal law to reach this result, the entire discussion turned on the two Colorado statutes and made no reference to the broad transfer definition in section 1(30) of the Act. In contrast, the dissenting

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[70] *See, e.g.*, Britt v. Damson, 334 F.2d 896, 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) ("transfer" resulted from judicial decree of divorce); Barker v. Dunham, 9 Utah 2d 244, 342 P.2d 867 (1959) (transfer of *H*'s interest in joint tenancy to *W*).

[71] *See* Atlas Corp. v. DeVilliers, 447 F.2d 799, 805–06 (10th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); Merriam v. Venida Blouse Corp., 23 F. Supp. 659, 661 (S.D.N.Y. 1938); Alt v. Burt, 242 S.W.2d 974, 981 (Ky. 1951); 4A W. COLLIER, BANKRUPTCY ¶ 70.72, at 808–09 (14th ed. 1971); 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 210, 212 (1940). The trustee may also show that although *W* ostensibly paid for the property, the funds came from *H* and therefore amounted to a fraudulent conveyance. *See* Annot., 35 A.L.R.2d 8, 99 (1954).

[72] Rudin v. Steinbugler, 103 F.2d 323, 325 (2d Cir. 1939).

[73] *See* E.M. Fleischmann Lumber Corp. v. Resources Corp., 33 Del. Ch. 587, 98 A.2d 506 (1953); 1 G. GLENN, *supra* note 71, §§ 213–14.

[74] *See* 4 W. COLLIER, BANKRUPTCY ¶ 67.29, at 479 & n.16 (14th ed. 1971).

[75] *See* 1 G. GLENN, *supra* note 71, §§ 195, 199, 211.

[76] 476 F.2d 838 (10th Cir. 1973). Compare *In re* Kalt's Estate, 16. Cal. 2d 807, 108 P.2d 401 (1940); Bostian v. Milens, 239 Mo. App. 555, 193, S.W.2d 797 (1946).

opinion specifically noted that section 1(30) includes any direct or indirect mode of disposing or parting with an interest in property and claimed that the bankrupt's disclaimer was such a method. Moreover, had the court properly applied the diminution of the estate test, it could have readily found a transfer since the bankrupt's estate had unquestionably been diminished by the renunciation. Although the decision may be correct as an interpretation of Colorado law, the majority's result cannot be justified as a construction of federal law. In fact, this situation is a good example of an instance where the federal concept of "transfer" may be broader than its state counterpart.

A frequently attacked method of transfer occurs when *H* and *W* purchase property as tenants by the entirety, joint tenants, or tenants in common and pay for it with savings accumulated from *H*'s salary and a mortgage to be retired out of *H*'s future salary. In effect, *H* has made a transfer to *W* to the extent that *W* acquires an interest in such property without any monetary contribution.[77] Similarly, if *H*'s salary is used to make improvements upon property held in some form of joint ownership, that is a transfer of *H*'s property to *W*.

The trustee's ability to set aside such transfers is of great importance, since the effect of the restrictions on the trustee's ability to reach and sell jointly held property to realize *H*'s interest has frequently conferred a de facto exemption for such property. Indeed, in states without a homestead exemption, these methods of transfer and co-ownership were often used to secure the family residence from the claims of creditors. However, if the trustee can attack *W*'s interest as a fraudulent transfer and recover it for the benefit of the estate, then a merger of estates occurs and the trustee can sell the property outright.

(b) Property Not Subject to Creditors' Claims—The theory of fraudulent transfer is that it removes property from the bankrupt's estate which would otherwise be available to satisfy the claims of creditors. Thus, voidable transfers should include only those involving the categories of property which would pass to the trustee under section 70a of the Act. Put another way, if the property would not be available to *H*'s creditors, the trustee cannot legitimately object to its transfer by *H*.

The easiest case is when a gift is made to *W* of property which does not belong to *H*.[78] The fact that *H* may have encouraged the gift is irrelevant since his creditors are not deprived of property ever belonging to *H*. In a few cases, the parent of a financially troubled husband has changed the beneficiary of his or her will from *H* to *W*. Although such action might have been motivated by the desire to keep the funds from *H*'s creditors in the event bankruptcy became a reality, the devised property still belonged to *H*'s parent, not to *H*.[79]

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[77] Priebe v. Svehlek, 245 F. Supp. 743, 745 (E.D. Wis. 1965).

[78] Hopper v. Taylor, 266 Ky. 133, 98 S.W.2d 297 (1936); Blossom v. Negus, 182 Mass. 515, 65 N.E. 846 (1903); Annot., 35 A.L.R.2d 8, 38 (1954).

[79] *See, e.g.*, Chapman v. Whitsett, 236 F. 873 (8th Cir. 1916); *cf. In re* Hall, 16 F. Supp. 18 (W.D. Tenn. 1926). It is well established that the bankrupt's expectancy

Frequently, *W* will claim that a transfer of property to her was not a fraudulent conveyance because it involved exempt property. Under the common law rule, it is clear that a transfer of exempt property is not a fraudulent conveyance since it does not deplete that part of the debtor's estate which would be available to creditors. And, although it is difficult to reach this result under the language of either the Uniform Act or section 67d, the same rule has consistently been followed under both.[80]

In a number of cases, *W* has resisted fraudulent transfer allegations by claiming that *H* was simply reconveying property which he had been managing or holding in trust for her. In such cases, however, the obvious opportunities for fraudulent claims and obfuscation of the facts have caused suspicious courts to require *W* to make a strong showing that the property was hers and to controvert any apparent ownership by *H* with tangible evidence. In the great majority of such cases, *W* gave the property to *H* without apparent strings for family or business expenses and without any evidence of a debtor-creditor arrangement or an undertaking by *H* to manage the property for *W*.[81] In such cases, the courts have found that the property belonged to *H* and that the transfer to *W* could therefore be attacked under sections 67d or 70e.

(c) Voidable Transfers: Background and Common Law—The common law of fraudulent conveyances was codified in the Statute of Elizabeth, which declared that any conveyance made with a purpose or intent to delay, hinder, or defraud creditors was void as to creditors of the grantor.[82] Because of the obvious difficulty of proving a specific intent

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in an inheritance does not pass to the trustee even if it can be assigned under state law. *See* Countryman, *supra* note 6, at 444–45.

[80] *See, e.g.*, Phillips v. C. Palomo & Sons, 270 F.2d 791 (5th Cir. 1959); Sisco v. Paulson, 232 Minn. 250, 45 N.W.2d 385 (1950); 4 W. COLLIER, BANKRUPTCY ¶ 67.30, at 490 n.6 (14th ed. 1971) (citing authorities); *cf.* Wylie V. Zimmer, 98 F. Supp. 298 (E.D. Pa. 1951) (transfer of validly created tenancy by entirety not a fraudulent conveyance). Similarly, the fraudulent transfer of a life insurance policy is limited to the cash surrender value of the policy. 4 W. COLLIER, *supra*, ¶ 67.30, at 493 n.13; Riesenfeld, *Life Insurance and Creditors' Remedies in the United States*, 4 U.C.L.A. L. REV. 582, 606–10 (1957).

The Uniform Act outlaws certain "conveyances," which are defined in terms of "property," itself an undefined term. However, the Act does define the term "assets" to exclude exempt property, thus implying that "property" includes exempt property. If so, then a transfer of such property which satisfied the other requirements of the Act would be a fraudulent conveyance.

Section 67d(3) of the Act invalidates "transfers," and "transfer" is defined in section 1(30) in terms of the bankrupt's property. While the term "property" is defined in section 67d(1)(a) to exclude exempt property, that definition is only applicable to section 67d and it is not clear whether it should be read into the definition of transfer in section 1(30) when a fraudulent transfer is involved. If "property" excludes exempt property, then the transfer would not be fraudulent, but if it includes exempt property, then one would have the same situation as under the Uniform Act.

[81] *See* Humes v. Scruggs, 94 U.S. 22 (1876); Henry v. Field, 205 F. Supp. 197, 200–01 (S.D.N.Y. 1962); Alt v. Burt, 242 S.W.2d 974 (Ky. 1951). *See also* Luper v. Ruhl, 148 F. Supp. 888 (S.D. Ohio 1956), *aff'd*, 244 F.2d 957 (6th Cir. 1957) (trustee of bankrupt *W* atttacked conveyance of two lots to *H;* fraudulent conveyance found as to lot used as family residence, but *H* held to be equitable owner of lot developed by him into business property). The inquiry is a factual one and *W* has occasionally won. *E.g.*, Young v. .Evants, 251 F. 282 (5th Cir. 1918); Conron v. Cauchois, 242 F. 909 (2d Cir. 1917).

[82] 13 Eliz., c. 5 (1570).

to delay, hinder, or defraud creditors, the courts developed evidentiary circumstances—the so-called "badges of fraud"—tending to establish the requisite intent. The badges of fraud included: (1) a general conveyance of all the bankrupt's property; (2) the donor's continued use and possession of the conveyed property; (3) a secret transfer; (4) conveying property while a suit against the debtor was pending; (5) lack of consideration, or an inadequate or fictitious price; and (6) insolvency of the transferor in either a balance sheet or equity sense.[83] The "badges of fraud" concept was fundamentally a factual or evidentiary tool: the importance of the badges was that, although a finding of fraudulent intent was still required, the presence of a number of them in a given case was largely dispositive of the intent to defraud issue.[84]

In certain kinds of transactions, the courts abandoned any notion that fraudulent intent had to be established. For example, transactions between husband and wife had such great potential for fraud that such transfers gave rise to presumptions in favor of *H*'s creditors.[85] In some jurisdictions, transfers between husband and wife were presumptively fraudulent; in others, such transfers which were without or for only nominal consideration or were carried out while the husband was insolvent or simply indebted were presumptively fraudulent.[86] In such jurisdictions, once the trustee established sufficient evidence to invoke the presumption of a frauduent conveyance, *W*'s failure to adduce contradicting evidence would be fatal to her case. Of course, the trustee could introduce evidence of the badges of fraud, but where the case was covered by the presumption such evidence was unnecessary. Where the courts did not use the language of presumptions but used a "close scrutiny" test,[87] the badges of fraud were useful to establish intent.

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[83] *See* Douglas-Guardian Warehouse Corp. v. Jones, 405 F.2d 427, 429 (10th Cir. 1969); United States v. Leggett, 292 F.2d 423, 427 (6th Cir.), *cert. denied*, 368 U.S. 914 (1961); United States v. West, 299 F. Supp. 661, 667 n.7 (D. Del. 1969); Twyne's Case, 3 Coke 80lb, 76 Eng. Rep. 809 (S.C. 1601).

[84] United States v. Leggett, 292 F.2d 423 (6th Cir.), *cert. denied*, 368 U.S. 1914 (1961); Midland-Guardian, Inc. v. Carr, 288 F. Supp. 499, 502 (E.D. La. 1968); Springfield Ins. Co. v. Fry, 267 F. Supp. 693, 695 (N.D. Okla. 1967); Gayle v. Jones, 74 F. Supp. 262, 274–75 (W.D. La. 1947); Maxwell v. Adams, 130 Me. 230, 232, 154 A. 904, 906 (1931).

[85] At least one court held that a conveyance by an insolvent spouse was conclusively presumed to be fraudulent. Menick v. Goldy, 131 Cal. App. 2d 542, 280 P.2d 844 (1955).

[86] The cases are frequently not precise as to which transfers between husbands and wives are presumptively fraudulent. *See, e.g.*, Seitz v. Mitchell, 94 U.S. 580, 583 (1876); Allis v. Jones, 403 F.2d 707 (8th Cir. 1968); Harris v. Treadaway, 2 F.2d 557 (5th Cir. 1924); Prosser v. Chapman, 2 F.2d 134 (4th Cir. 1924); Klinger v. Hyman, 223 F. 257 (2d Cir. 1915); Weld v. McKay, 218 F. 807, 809 (7th Cir. 1914); United States v. Mitchell, 271 F. Supp. 858, 863 (N.D. Ill. 1967), *aff'd*, 413 F.2d 181 (7th Cir. 1969); Thompson v. Schiek, 171 Minn. 284, 213 N.W. 911 (1927); People's Sav. & Dime Bank & Trust Co. v. Scott, 303 Pa. 294, 154 A. 489 (1931); V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 154 (1964) (citing authorities); McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 426–28 (1933).

[87] Springfield Ins. Co. v. Fry, 267 F. Supp. 693 (N.D. Okla. 1967); *see* United States v. Hickox, 356 F.2d 969, 974 (5th Cir. 1966); Harding v. Aaronson, 69 F.2d 845, 846 (D.C. Cir. 1934); McKey v. Emanuel, 263 Ill. 276, 104 N.E. 1051 (1914).

(d) Voidable Transfers: Uniform Fraudulent Conveyances Act and Section 67d—Both the Uniform Act and section 67d provide that transfers from *H* to *W* are fraudulent in two situations: first, if the transfer is without fair consideration and by a person who is insolvent or a person who will be rendered insolvent by the conveyance; second, if the transfer is with actual, not merely presumed, fraudulent intent.[88]

The Uniform Act was specifically intended to identify the different categories of fraudulent conveyances. But since it applied to an area of the law already encumbered by presumptions, badges of fraud, and rather strong attitudes about husband-wife conveyances, the effect of the old rules upon the new provisions was uncertain. Because evidence of such matters as consideration and insolvency is more readily available to *W* than to the trustee in bankruptcy, the Act did not solve common law evidentiary problems. Even under the Uniform Act, therefore, husbands and wives are still in good position to feign transactions or obligations. Consequently, notwithstanding the Uniform Act, a number of courts have held that proof that *H* transferred property without apparent consideration shifts the burden of proof to *W* to prove either consideration or the absence of insolvency.[89] Such courts perceived the Uniform Act to be working in tandem with, rather than superseding, the common law. Other courts disagreed, holding that under the Uniform Act the trustee has the burden of proving insolvency and the absence of consideration.[90] These latter courts have failed, however, to realize that their decisions increase the trustee's burden in many cases which had been handled rather easily under the common law rule.[91]

The matter is even more difficult when the trustee attempts to show an intent to defraud. The only difference between the Act's intent standard and that of the common law is that the Uniform Act expressly provides that fraudulent intent is to be specific rather than presumed.

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[88] Both the Uniform Act and section 67d also outlaw transactions without fair consideration by debtors who are engaging in business transactions with unreasonably small capital, or by debtors who expect to incur debts beyond their ability to pay as the debts mature. These have little applicability to husband-wife transfers. *See* 4 W. COLLIER, BANKRUPTCY ¶¶ 67.35, 67.36 (14th ed. 1971).

[89] Feist v. Druckerman, 70 F.2d 333 (2d Cir. 1934) (presumption operates for any voluntary conveyance by a person who is indebted); Elliott v. Elliott, 365 F. Supp. 450 454 (S.D.N.Y. 1973); United States v. West, 299 F. Supp. 661, 665 (D. Del. 1969); Winter v. Welker, 174 F. Supp. 836, 843 (E.D. Pa. 1959); Ferguson v. Jack, 339 Pa. 166, 14 A.2d 74 (1940); 4 W. COLLIER, BANKRUPTCY ¶ 67.33, at 507, 508 & n.13 (14th ed. 1971).

Professor McLaughlin is generally critical of the use of presumption under the Uniform Act. McLaughlin, *supra* note 86, at 424. Despite this, he still recognizes the continuing need for special presumptions in the area of intra-family transactions because of the great propensity for fraud, *See* J. HANNA & J. MCLAUGHLIN, CASES AND MATERIALS ON CREDITORS' RIGHTS 169 (4th ed. 1949).

[90] *See* Nicholson v. Scott, 50 F. Supp. 209 (E.D. Mich. 1943); Camden Sec. Co. v. Nurock, 112 N.J. Eq. 92, 163 A. 547 (Ch. 1932), *aff'd*, 114 N.J. Eq. 18, 168 A. 308 (1933).

[91] In states which have not adopted the Act, satisfactory results seem to be obtained by a combination of hunch and the traditional approach of shifting the burden of proof when several badges of fraud are present. *See, e.g.*, Leonardo v. Leonardo, 251 F.2d 22, 26 (D.C. Cir. 1958); Payne v. Gilmore, 382 P.2d 140 (Okla. 1963); Evans v. Trude, 193 Ore. 648, 240 P.2d 940 (1952).

The courts have differed, however, as to the Act's effect upon the common law presumptions and badges of fraud. The majority view is that the Uniform Act eliminated the use of presumptions, but that the badges of fraud could still be utilized to prove intent.[92] While this approach makes sense in terms of the language of the Uniform Act, many courts have been unable to reconcile the language with the prevalent view that most husband-wife transfers are fraudulent; consequently, many courts have been less than rigorous in requiring proof of actual intent.[93] With these background comments, attention will now be turned to the specific avoidance provisions.

(e) Conveyances by an Insolvent Without Fair Consideration—The Uniform Act and section 67d define fair consideration in terms of present exchange of property, the satisfaction of an antecedent debt, or the securing of a present advance or antecedent debt. Although the application of these concepts does not present distinctive problems in the husband-wife situation, it generally calls for an evaluation of the value of what was given and what was received. The Uniform Act and section 67d(1)(e) require *W* to transfer "property" in exchange for any conveyance by *H*; thus, the consideration furnished by *W* must generally be capable of some sort of monetary valuation. Consequently, services rendered in the home, love and affection,[94] and promises of future support have been held to be inadequate consideration.[95] A number of courts, reflecting the widespread suspicion of husband-wife transfers, place a special burden of proof on *W* in cases where there is no apparent consideration or where the conveyance recites nominal consideration.[96]

The fair consideration requirement is satisfied by *H*'s payment of an antecedent debt.[97] In a few cases where *H* has some sort of business, *W* has claimed that the consideration was fair because the transfers were payments for services rendered or in satisfaction of a preexisting obligation. In all such cases, *W* has been required to make a strong showing that the debt actually existed, that *H* agreed to pay, and, in the case of services, that *W* performed services of the same nature as those which

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[92] *See* Wilson v. Robinson, 83 F.2d 397 (2d Cir.), *appeal dismissed*, 299 U.S. 616 (1936). In cases of a husband-wife transfer with nominal consideration, Pennsylvania still places the burden on the wife to show the fairness of the transaction. *E.g.*, Ferguson v. Jack, 339 Pa. 166, 14 A.2d 74 (1940).

[93] *See* Klein v. Rossi, 251 F. Supp. 1 (E.D.N.Y. 1966); Winter v. Welker, 174 F. Supp. 836, 844 (E.D. Pa. 1959); Iscovitz v. Filderman, 334 Pa. 585, 6 A.2d 270 (1939).

[94] *See* United States v. West, 299 F. Supp. 661, 656–66 (D. Del. 1969); Roddam v. Martin, 285 Ala. 619, 235 So. 2d 654 (1970); Mullins v. Riopel, 322 Mass. 256, 76 N.E.2d 633 (1948); Commonwealth Trust Co. v. Cirigliano, 352 Pa. 108, 41 A.2d 863 (1945); McLaughlin, *supra* note 86, at 418. *Cf.* Robertson v. Schlotzhauer, 243 F. 324, 328–29 (7th Cir. 1917) (following common law rule that marriage constitutes fair consideration); Smith v. Denaburg, 283 Ala. 509, 218 So. 2d 838 (1969) (conveyance pursuant to divorce decree supported by fair consideration).

[95] Springfield Ins. Co. v. Fry, 267 F. Supp. 693, 696 (N.D. Okla. 1967).

[96] *E.g.*, Winter v. Welker, 174 F. Supp. 836, 843 (E.D. Pa. 1959); 4 W. COLLIER, BANKRUPTCY ¶ 67.33, at 507, 508 nn.12 & 13 (14th ed. 1971) (citing authorities).

[97] *See* Meloy v. Kell, 53 S.D. 388, 220 N.W. 863 (1928); McLaughlin, *supra* note 86 at 412.

would be performed by a regular employee. Absent some showing of regular payments or carefully kept records, such claims are likely to be rejected.[98]

The concept of fair consideration must frequently be applied to *H*'s purchase of exempt property. The common law rule was that the purchase of exempt property by an insolvent was not a fraudulent transfer.[99] While this result seems contrary to the purpose of the fraudulent conveyances provisions to prevent depletion of the estate to the detriment of creditors and may be difficult to harmonize with the specific language of the Uniform Act or section 67d,[100] there is virtually unanimous agreement that the common law rule still prevails.[101]

More difficulty is encountered when *H* purchases property and places title in the names of both *H* and *W*. If this results in a joint tenancy or tenancy in common under state law, then *H* has made a transfer to *W* of an interest in the property. Assuming that *W* did not contribute to the purchase money, there would be no consideration for her interest, and the transfer would be fraudulent even though her interest might be exempt from her creditors under state law.[102]

The common law immunity for purchases of exempt property has never been extended to the purchase or improvement of property held in tenancy by the entirety.[103] The theory, while not articulated, appears to be that the purchase of exempt property carries out a statutory policy known to creditors, whereas the immunity of entirety property results from the

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[98] Anderson v. Gray, 284 F. 770, 773 (5th Cir. 1922); Macken v. Gass, 23 F. Supp. 320, 322 (W.D.N.Y. 1938); Alt v. Burt, 242 S.W.2d 974 (Ky. 1951). Some cases reach this result by placing the burden of proof on *W*. *E.g.*, McDonald v. Baldwin, 24 Tenn. App. 670, 148 S.W.2d 385 (1940); First Nat'l Bank v. McClung, 121 W. Va. 36, 1 S.E.2d 249 (1939); McLaughlin, *supra* note 86, at 427. On the other hand, even an unenforceable obligation may constitute fair consideration when the proof is adequate that the obligation exists. See 4 W. COLLIER, BANKRUPTCY ¶¶ 67.34, at 414 & nn.38 & 39, 70.72, at 809–10 n.12 (14th ed. 1971).

[99] *See* Albinak v. Kuhn, 149 F.2d 108, 109 (6th Cir. 1945); *cf.* Childs v. Stees, 293 F. 826 (E.D. Pa. 1923).

[100] Section 67d(1)(a) defines "property" to include only nonexempt property And section 67d(1)(a) defines fair consideration for the debtor's giving up of property as existing when "property" of equivalent value is transferred to the debtor. Since the exempt property is, by definition, not "property," the debtor's exchange of his property for exempt property is without fair consideration.

The Uniform Act does not define "property" but does define "assets" to exclude exempt property. It is therefore not clear whether "property" excludes exempt property. "Fair consideration" is defined in section 3 in terms of exchanges of property, and therefore, if the term "property" includes exempt property, then the purchase of exempt property satisfies the fair consideration requirement. If "property" includes exempt property, however, another constructional problem is created: since the term "conveyance" is defined in section 1 in terms of "property," a transfer of exempt property would appear to be fraudulent. *See* note 80 *supra*.

[101] *See, e.g., In re* Jackson, 472 F.2d 589 (9th Cir. 1973); Wudrick v. Clements, 451 F.2d 988 (9th Cir. 1971); Kleinert v. Lefkowitz, 271 Mich. 79, 259 N.W. 871 (1935) (Uniform Act); Schlecht v. Schlecht, 168 Minn. 168, 209 N.W. 883 (1926) (Uniform Act); Annot., 161 A.L.R. 1287 (1946).

[102] *See* Wikes v. Smith, 465 F.2d 1142 (9th Cir. 1972).

[103] *See, e.g.*, Dunn v. Minnema, 323 Mich. 687, 36 N.W.2d 182 (1949); Taylor v. Kaufhold, 379 Pa. 191, 108 A.2d 713 (1954); 4A W. COLLIER, BANKRUPTCY ¶ 70.17[8], at 188 n.41e–i (14th ed. 1971); *id.* ¶ 70.72, at 812 nn.18 & 19; Annot., 7 A.L.R.2d 1104 (1949).

peculiarities of that tenancy, not from public policy.[104] Consequently, if *H* pays for nonexempt property and title is taken by *H* and *W* as tenants by the entirety, the purchase is without fair consideration and may be invalidated by *H*'s trustee.[105] The ability of the trustee to invalidate such transactions may provide some escape from the widespread view that entirety property does not pass to *H*'s trustee.

Both the Uniform Act and section 67d regard the debtor as insolvent when the present fair salable value of his nonexempt property is less than the amount required to pay his debts. Since both Acts declare a transfer to be fraudulent if the bankrupt is insolvent or if he will be rendered insolvent by the transfer, the fraudulently conveyed property is excluded from the bankrupt's assets for purposes of determining solvency. It is not clear whether property which has been fraudulently, or even preferentially, conveyed in other transactions is also excluded from the bankrupt's assets. This question arises when, for example, a debtor with $100,000 of assets and $60,000 of debts makes transfers of $25,000 each to his wife and two children. The issue is whether the total of the transactions should be excluded from the bankrupt's property for purposes of determining solvency with regard to any of the three transactions.

Section 1(19) of the Bankruptcy Act defines insolvency for the entire Act (other than section 67d) so that property conveyed with intent to defraud creditors is excluded.[106] In sharp contrast to section 1(19), section 67d(1)(d), which defines insolvency for the purpose of determining fraudulent transfers, does not exclude property conveyed with intent to defraud. Reading these sections together, the absence of such an exclusion in section 67d(1)(d) implies that fraudulently conveyed property should be included in the bankrupt's assets to determine solvency in fraudulent conveyance cases. In answer to this argument, it may be countered that the definition of insolvency in section 67d(1)(d) was taken from the Uniform Act and was not coordinated with the definitional provisions in 1(19). The Uniform Act is silent on the issue, thus permitting an interpretation which would exclude such assets and which could be followed in interpreting section 67d(1)(d). The path to such an interpretation, however, may not be too easy since the definitional sections of the Uniform Act may be construed to include assets which have been fraudulently conveyed.[107]

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[104] *See* Bienenfeld, *Creditors v .Tenancies by the Entirety,* 1 WAYNE L. REV. 105, 115–16 (1955).

[105] *See, e.g.,* Glazer v. Beer, 343 Mich. 495, 72 N.W.2d 141 (1955); Bienenfeld, *supra* note 104.

[106] It is unclear whether such a definition excludes property transferred without actual fraudulent intent since section 1(19) has not been coordinated with the avoidability of transfers under sections 67d and 70e. Compare Bankruptcy Act § 3a(1), 11 U.S.C. § 21 (a)(1) (1970).

[107] The Uniform Act defines insolvency in terms of the fair salable value of the debtor's assets; the term "assets" is defined to include any property not exempt from liability for debts. Since property which has been fraudulently conveyed is still reachable for the transferor's debts—albeit, in some cases, after judicial action by creditors —such property may be considered as assets.

As might be expected, there is a dearth of authority on this question. Some commentators suggest that assets fraudulently conveyed should be excluded from the debtor's estate when determining solvency under section 67d because (1) under section 67d(1)(d) such assets are not "his property"; and (2) such property has little or no value.[108] There are three difficulties with these arguments. First, these same commentators state elsewhere that "property" for the purpose of a voidable fraudulent conveyance is the same as property which passes under section 70a of the Act;[109] in this connection, section 70a(4) indicates that property fraudulently conveyed passes to the trustee. Second, to say that the property is not "his property" assumes the conclusion. And, since the draftsmen of section 67d apparently did not intend to depart from the Uniform Act, the absence of the "his property" phrase from the Uniform Act suggests it should not be given undue significance in section 67d.[110] Third, there is no indication in the Uniform Act, or in sections 1(19) and 67d(1)(d) of the Bankruptcy Act, that property preferentially conveyed is excluded from the bankrupt's assets, even though such property would have as little theoretical value as property fraudulently conveyed. As a matter of policy, the arguments for excluding both preferentially and fraudulently conveyed property from the bankrupt's assets may be strong, but it is difficult to reach that result under present provisions.

In determining solvency, it is necessary to determine the present fair salable value of *H*'s nonexempt property, and then compare it with his liabilities. The effect of excluding exempt property from the calculations may be dramatic in states having relatively high exemptions. For example, *H* may be found insolvent under both section 67d and the Uniform Act whenever a substantial portion of his wealth is tied up in homesteads and other exempt property. Moreover, if the exempt property is subject to a mortgage, the mortgage obligation may be included among his liabilities—thus furthering the disparity. The result may be that an individual long considered solvent might be determined to have been insolvent for many years.

It is therefore important to determine what period of limitation will apply to transfers. Section 67d has a one year period of limitations, but the Uniform Act has none. Thus, in Uniform Act cases, the applicable period of limitations may be the state fraud statute, an omnibus statute, or even the equitable doctrine of laches.[111] Thus, where exempt property is excluded in computing solvency, the lengthy periods allowed under

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[108] 4 W. COLLIER, BANKRUPTCY ¶ 67.32 (14th ed. 1971).

[109] *Id.* ¶ 67.30, at 489.

[110] The difference comes about because the Uniform Act uses the term "his assets" and then defines "assets" (*see* note 107 *supra*), whereas section 67d(1)(d) uses the term "property," which is defined to exclude exempt property without any clear indication of what is included. For the purpose of determining what is included as "property," however, it would make sense to look to section 70, which gives the trustee access to property fraudulently conveyed. As a practical matter, then, the difference between "his assets" and "his property" seems insignificant. 4 W. COLLIER, BANKRUPTCY ¶ 67.32, at 500 n.9 (14th ed. 1971).

[111] *See generally* 1 G. GLENN, *supra* note 71, § 88.

state law may permit the trustee to attack transfers made between *H* and *W* years earlier, long before there was any hint of financial embarrassment.

Proving insolvency in a nonbusiness family situation is extremely difficult. Since the spouses do not think of their relationship as a business, record keeping is often nonexistent, and family possessions are often difficult to value fairly. Moreover, the expected inadequacy of records makes the secreting of property easy, especially when the assets can be easily hidden, such as jewelry, or difficult to locate, such as accounts in out-of-state banks or brokerage houses. Although a diligent trustee might uncover such assets, the expenses of a comprehensive and usually futile investigation act as a strong deterrent.[112] To avoid these problems, some courts have sought to avoid these difficulties by placing the burden of proving solvency on *W* where *H* makes a voluntary conveyance while indebted.[113]

(f) Conveyances With Actual Fraudulent Intent — If a transfer cannot be invalidated because made without adequate consideration by an insolvent, it may still be attacked under either section 7 of the Uniform Act or section 67(2)(d) of the Bankruptcy Act as one made with actual fraudulent intent. Most commonly, the trustee will invoke these sections in cases where property is conveyed to *W* without consideration and where *H* is in deep financial trouble but not yet insolvent.[114] Although in most jurisdictions the trustee probably cannot use presumptions to invalidate husband-wife transfers, he can still utilize the badges of fraud. Thus, transfers where some badges of fraud are present and secret transfers made shortly before bankruptcy will often be considered to have been made with actual fraudulent intent. But, since fraudulent intent can rarely be shown by direct testimonial or written evidence, the trier of fact who must determine intent must have considerable latitude to infer fraudulent intent from circumstantial evidence.[115]

2. Voidable Preferences—A voidable preference under section 60 is a transfer by a debtor, of his nonexempt property, made within four months of filing for bankruptcy, while the debtor is insolvent, to or for the benefit of a creditor, on account of an antecedent debt, the effect of which enables the transferee—who must have reasonable cause at the time of the transfer to believe the debtor to be insolvent—to receive a greater percentage of his debt than other creditors of the same class. Most of these

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[112] *See* Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827, 860–61 (1973).

[113] *See, e.g.*, Wilson v. Robinson, 83 F.2d 397 (2d Cir.), *appeal dismissed*, 299 U.S. 616 (1936).

[114] Elliott v. Elliott, 365 F. Supp. 450, 454 (S.D.N.Y. 1973); Klein v. Rossi, 251 F. Supp. 1 (E.D.N.Y. 1966).

[115] See Sahley v. Tipton Co., 264 F. Supp. 653, 657 (D. Del.), *aff'd*, 386 F.2d 450 (4th Cir. 1967); 4 W. COLLIER, BANKRUPTCY ¶ 67.37[3] (14th ed. 1971). In Elliott v. Elliott, 365 F. Supp. 450 (S.D.N.Y. 1973), the transferor simplified the task by testifying that "[my] debts were beginning to pile up against me . . . and I became frightened lest any of my creditors could place themselves in a position where they might reach any interest I would hold in the . . . property." *Id.* at 454.

elements do not present distinctive problems in husband-wife bankruptcies. The term "transfer" is defined in section 1(30) of the Act, and, as in the case of fraudulent conveyances, broadly embraces the bankrupt's attempt to rid himself of property.[116] As in the fraudulent conveyance situation, the transfer must be of *H*'s nonexempt property since general creditors cannot complain of a preferential transfer of property which would not, in any event, become part of the bankrupt's estate.[117] The transfer must be for a bona fide antecedent debt; otherwise, the trustee can, without the burden of proving reasonable knowledge of insolvency or the burden of meeting the four month test, avoid the transfer as a fraudulent conveyance.[118] Finally, to the extent that *W* is a general creditor, the payment must give her a greater share of her debt than other creditors of the same class.[119]

The particular aspects of the voidable preference concept which present distinctive husband-wife problems are the requirements of showing that the transfer was to or for the benefit of *W* as a creditor, establishing the date of transfer, proving that *H* was insolvent on the transfer date, and that *W* had reasonable cause to believe that he was insolvent.

One other element of a voidable preference, although not included within section 60, is crucial to an understanding of the concept. The requirement that the payment be on account of an antecedent debt has been broadly interpreted to require that the transfer deplete or lessen the estate which would otherwise be available to creditors.[120] The depletion concept is especially useful in dealing with cases where, prior to bankruptcy, the bankrupt pays a creditor who has a security interest or lien on the bankrupt's property which is or would be valid in bankruptcy. In such situations, even though all of the requirements for a voidable preference, with the possible exception of the requirement that creditors obtain a greater percentage of their claims than other creditors of the same class, are present, the courts have uniformly held the payments to be nonpreferential.[121] Such decisions have not been based on the notion that the recipient did not receive a greater payment than other creditors of the same class, but rather, on the principle that such payment does not diminish the bankrupt's estate and therefore does not prejudice his creditors.[122] In sum, preference analysis will be aided if inquiry is made

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[116] *See* text accompanying notes 70–75 *supra.*

[117] *See* text accompanying note 80 *supra;* 1A W. COLLIER, BANKRUPTCY ¶ 6.11[3] (14th ed. 1975).

[118] *Cf.* Ortlieb v. Baumer, 6 F. Supp. 58, 60 (S.D.N.Y. 1934).

[119] *See* Palmer v. Radio Corp. of America, 453 F.2d 1133, 1136 (5th Cir. 1971); Kenneally v. First Nat'l Bank, 400 F.2d 838, 845 (8th Cir. 1968), *cert. denied,* 393 U.S. 1063 (1969); Swarts v. Fourth Nat'l Bank, 117 F. 1, 7–8 (8th Cir.), *appeal dismissed,* 187 U.S. 638 (1902); Note, *Class—The Forgotten Element of Section 60(a)(1) of the Bankruptcy Act,* 11 ARIZ. L. REV. 360, 365–67 (1969).

[120] *See* Palmer v. Radio Corp. of America, 453 F.2d 1133, 1135 & n.3, 1136 (5th Cir. 1971); 4 W. COLLIER, BANKRUPTCY ¶ 60.20 (14th ed. 1971).

[121] *See, e.g.,* Small v. Williams, 313 F.2d 39, 44 (4th Cir. 1963); Ricotta v. Burns Coal & Bldg. Supply Co., 264 F.2d 749, 751 (2d Cir. 1959).

as to whether the bankrupt's estate has been depleted by the payment; if so, a preference will probably result.

(a) Transfers to or for the Benefit of a Creditor (W)—Section 60a requires that the transfer be to or for the benefit of a creditor. If *H* pays money directly to *W*, a transfer to *W* has obviously occurred. On the other hand, in the rare case where *W* holds a valid security interest or lien on *H*'s property as security for *H*'s obligation, there would be no preference because the estate would not be depleted. More difficulty is presented, however, when the transfer is to a third party and it is alleged that the transfer was for the benefit of *W*. The transfer need not be directly to *W* for her to receive a preference; all that section 60 requires is that there be a transfer to a third party which benefits a creditor. In many cases, *W* may be jointly obligated on a debt with *H*, or may be a guarantor of or a surety for *H*'s debt. Where *H* makes a payment on such a debt which meets the requirements of section 60, the recipient of the payment has received a preference. At the same time, since *W* is a creditor because of her potential liability on the debt, [123] and since, by releasing *W*'s obligation to pay the debt, the payment is for her benefit, *H*'s payment is also a preference to *W*.[124] In other words, absent *H*'s payment, *W* would have ultimately paid the debt and the bankrupt's estate would not have been depleted.

The matter is more complicated if the joint or guaranteed debt is secured by property. If the property is owned by *H*, it is arguable that *H*'s payment is preferential to *W*. The theory is that, but for the payment, the creditor would have two means of realizing the debt—by liquidating *H*'s property or by recovering from *W*. Since the creditor would have a choice of means, the trustee may invoke by analogy the equitable doctrine of marshaling to require the creditor to pursue *W*. If the trustee could do so in the absence of a prebankruptcy payment, then the effect of *H*'s payment is to deplete his estate, since upon *H*'s failure to pay, the creditor would seek payment from *W*, and *H*'s property would revert to the estate. The courts have not, however, adopted such an analysis. Instead, without indicating why the suggested preference analysis is inapplicable, they

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[123] *See* Landers, *supra* note 20, at 516.

[123] Section 1(11) defines "creditor" to include persons with provable claims. It is presently unclear whether *W* would have a provable claim. *See* Swarts v. Siegel, 117 F. 13, 17–18 (8th Cir.), *appeal dismissed*, 187 U.S. 638 (1902); 3A W. COLLIER, BANKRUPTCY ¶ 63.18 (14th ed. 1972). Regardless of whether *W* has a provable claim, it is clear that she is a "creditor." American Surety Co. v. Marotta, 287 U.S. 513 (1933); 3 W. COLLIER, *supra*, ¶ 60.17, at 836 n.1 (14th ed. 1974) (citing authorities).

[124] Smith v. Tostevin, 247 F. 102 (2d Cir. 1917); Swarts v. Siegel, 117 F. 13 (8th Cir.), *appeal dismissed*, 187 U.S. 638 (1902); 3 W. COLLIER, BANKRUPTCY ¶ 60.17 (14th ed. 1974). If *W* is jointly liable with *H*, and under state law *W* is liable for half the debt, then *H*'s payment of the entire debt should be treated as follows: *W* has received a preference for the one-half of the debt owed by *H*; as to the other half, *W* has received a fraudulent conveyance.

have looked to the law of suretyship and have found the guarantor (*W*) subrogated to the creditor's interest in the security.[125]

The case is easier if the collateral for *H*'s debt is property belonging to *W*. In that case, absent the payment, the creditor could collect the debt from *W* or liquidate her property; *H*'s payment thus absolves *W* of personal liability and releases her property. Therefore, because the estate is depleted to *W's* benefit, the payment will be held to be preferential.[126]

Further complication occurs when the property is exempt. Where *H* simply pays a debt secured by exempt property, the courts have consistently held the payment nonpreferential.[127] This result seems strange since the payments obviously depletes *H*'s estate by removing property from the estate, while replacing it with exempt property which does not pass the trustee. The cases, however, justify this result on two grounds. First, from the secured party's point of view, he gains no further advantage over general creditors since he releases security when the payment is made. Moreover, if the security is adequate, it does not matter to the secured party whether he has cash or security; therefore, even if the debtor appears insolvent, he receives no notice that he will be taking a preference. Second, it is well established that the bankrupt's use of funds to buy exempt property is not a fraudulent conveyance.[128] The payment of an antecedent debt secured by exempt property accomplishes the same result, and it would be anomalous to penalize a creditor for an indirect transfer which the bankrupt could carry out directly.

Another issue arises when the debt is secured by exempt property belonging to *H*, *W* is jointly liable on the debt or is a guarantor, and *H* pays the debt. By releasing exempt property to *H*, the payment benefits him; it also benefits *W* by extinguishing her liability. In such a case, the creditor has three possible courses of action. First, he can accept payment, thus depleting the estate and benefiting both *H* and *W*. Second, the creditor can look to the exempt property so that *W* is released and depletion of the estate is avoided. Third, the creditor can collect from *W*, thus freeing *H*'s exempt property and avoiding any depletion of the estate. Under the second or third courses of action the satisfaction of the debt is not a voidable preference. But if the creditor accepts payment from *H*, the benefit to *W* and the depletion of *H*'s estate make the transfer a preference. Although *W* may have an equitable right of contribution from *H* or lien upon the exempt property on the basis of the suretyship

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[125] *See* Allen v. See, 196 F.2d 608 (10th Cir. 1952); 3A W. COLLIER, BANKRUPTCY ¶ 63.188 n.9 (14th ed. 1972).

[126] Smith v. Tostevin, 247 F. 102 (2d Cir. 1917); *See* San Mateo Feed & Fuel Co. v. Hayward, 149 F.2d 875 (9th Cir. 1945); Marin v. A.Y. McDonald Mfg. Co., 159 Minn. 447, 199 N.W. 176 (1924); *cf.* Schilling v. McAllister Bros., 310 F.2d 123 (2d Cir. 1962) (payment of claim secured by lien on property of third party during reorganization).

[127] *See In re* Driscoll, 142 F. Supp. 300 (S.D. Cal. 1956); 3 W. COLLIER, BANKRUPTCY ¶ 60.22, at 868 n.1 (14th ed. 1974); 4 H. REMINGTON, BANKRUPTCY § 1678 (1957).

[128] *See* text accompanying notes 99–101 *supra*; 1A W. COLLIER, BANKRUPTCY ¶ 6.11[5] (14th ed. 1975).

principle previously discussed, this should not obscure the voidable preference which she has received.

(b) Date of Transfer; Insolvency; Reason to Believe the Debtor is Insolvent—Section 60 avoids preferential transfers made within four months of the filing of the petition for bankruptcy. Although the problem of establishing the date of transfer does not present distinctive legal issues in the husband-wife transfer situation, the obvious opportunities for deceit in family transactions present difficulties in determining the date with precision. Backdating of documents is easily accomplished, and the absence of supporting documentation or disinterested witnesses is commonplace. Moreover, if the subject matter of the transfer consists of money or property which remain in the same physical location before and after the alleged transfer, it may be impossible for the trustee to produce any tangible evidence establishing the exact date of transfer. In this circumstance, there may be some justification for placing the burden of proof upon *W* to establish the date upon which the transfer took place.[129] And, if the transfer requires some form of perfection to be effective against a lien creditor, the date of transfer will be artificially postponed until properly perfected; in some cases, the trustee may be able to take advantage of such notice requirements to attack husband-wife transfers. In the usual case, however, the issue will probably turn on the credibility of *H* and *W*'s account of the transaction.

Once the date of transfer is established, it is necessary to prove that *H* was insolvent on that date. In determining solvency, the calculations will include exempt property and property which has been preferentially conveyed, but will exclude fraudulently conveyed property.[130] In addition, since *H*'s interest in a tenancy by the entirety may have some value, it too should be included,[131] but it is not clear whether *H*'s interest should be the entire property, one-half the property, or a percentage of the property based on the life expectancies of *H* and *W*. The assets will also include items of household furniture and personal articles. It is important to note that the Bankruptcy Act test of fair value contemplates a sale in a reasonable time to a person who does not have a special need for the

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[129] *Cf.* text accompanying notes 86–87 *supra.*

[130] *See* 1 W. COLLIER, BANKRUPTCY ¶ 1.19[2.1], at 107–10 (14th ed. 1974). As previously noted, section 1(19) excludes property conveyed with the intent to defraud, hinder, or delay creditors. It is unclear whether fraudulent transfers by insolvents without consideration are embraced within this exclusion. One can argue that the need to add a provision to the identical language in section 3 to embrace such transfers within the first act of bankruptcy suggests a negative answer. On the other hand, it has been noted that at common law various presumptions were applied in cases of transfers by insolvents without consideration in order to establish the requisite intent. *See* text accompanying note 86 *supra.* The matter presently appears open.

The authors of the Collier treatise suggest that, for determining solvency, the bankrupt's assets include the property preferentially conveyed, but not previous preferences. 1 W. COLLIER, *supra,* at 109. Their reasons are that the old preferences are no longer part of the estate, and that such transfers were valid at common law. The former reason is conclusory, and the latter irrelevant; unfortunately, the authors cite no supporting authority nor statutory basis for such distinction.

[131] *See* Syracuse Eng'r Co. v. Haight, 110 F.2d 468 (2d Cir. 1940).

articles.[132] Consequently, such items as used books, nonexempt clothing and furniture, appliances, tools, and the like will usually have only nominal value.

To establish a preference, the trustee must also prove that the transferee had reasonable cause to believe that the debtor was insolvent on the date of the transfer. The purposes of this requirement are to prevent a mad scramble among creditors to dismember a debtor's estate at precisely the time he needs the most help and to treat all creditors equally;[133] presumably, a creditor will not participate in the scramble if he is unaware of the debtor's plight and will not attempt to frustrate the principle of equal distribution.[134] Construed in light of this purpose, reasonable cause to believe that the debtor is insolvent exists if a reasonable creditor would be sufficiently apprehensive about the debt to demand immediate payment. Clearly, the reasonable cause standard would be met if the creditor had specific information about the debtor's financial and business affairs and, although less clear, rumors and appearances not constituting direct information could be sufficient to bring the creditor within the reasonable cause standard.

Because the inquiry is factual, generalization is difficult. Nevertheless, the majority of decisions hold that the reasonable cause standard, rather than requiring an awareness of specific financial data supporting a belief of insolvency,[135] simply requires that the creditor apprehend that the bankrupt is in financial difficulty. Some decisions emphasize that reasonable cause is satisfied if creditors have information meriting further inquiry, and that such creditors are bound by the information that the inquiry would have disclosed.[136] Other decisions have suggested that persons who have a close relationship with the bankrupt—such as a banker, lawyer, corporate officer, or high ranking employee—are held to a less rigorous reasonable cause standard than trade or personal creditors.[137] On the other hand, the decisions also suggest that a mere suspicion or "gut feeling" that the debtor is insolvent will not satisfy the reasonable cause standard. As might be expected, the most difficult cases involve situations where the creditor has only enough information to make a reasonable person uncomfortable about the status of his debt.[138] Although it is

[132] *See* 1 W. COLLIER, BANKRUPTCY ¶ 1.19[3] (14th ed. 1974).

[133] *See* BANKRUPTCY COMM'N REPORT, *supra* note 6, at 202.

[134] It is questionable whether the reasonable cause requirement really serves the policy of preventing the scramble or promoting equality, since creditors who are vaguely concerned about their debts still have a strong incentive to try to collect; even if a creditor receives a preference, he will only be forced to pay it back.

[135] *See, e.g.*, Kravetz v. Joange Bldg. Corp., 341 F.2d 561 (2d Cir. 1965); Dudley v. Eberly, 201 F. Supp. 728 (D. Ore.), *aff'd*, 314 F.2d 8 (9th Cir. 1962); *In re* Super Value Market, 151 F. Supp. 639 (D. Mass. 1957).

[136] The literally hundreds of cases are reviewed in 3 W. COLLIER, BANKRUPTCY ¶¶ 60.53, 60.54 (14th ed. 1974).

[137] *See* 4 H. REMINGTON, BANKRUPTCY § 1710.8 (1957).

[138] *E.g.*, Grant v. National Bank, 97 U.S. 80 (1877); Yorke v. Thomas Iseri Produce Co., 418 F.2d 811 (7th Cir. 1969); International Minerals & Chem. Corp. v. Moore, 361 F.2d 849 (5th Cir. 1966); Kravets v. Joange Bldg. Corp., 341 F.2d 561 (2d Cir. 1965); McDougal v. Central Union Conference Ass'n, 110 F.2d 939 (10th

arguable that bankruptcy policy requires a broad interpretation of the reasonable cause requirement to forestall precipitate creditor action, the cases have clearly not gone so far.[139]

Applying the reasonable cause standard to husband-wife transfers is especially difficult because of the balance sheet insolvency test. Unlike businesses which must regularly keep financial records, the typical family will never draw up a balance sheet; therefore, proving that *W* had reasonable cause to believe that *H* was insolvent is a difficult evidentiary matter. Moreover, consumer assets do not lend themselves to easy valuation, and the debtor (*H*) himself may honestly have no idea whether or not he is insolvent; in such a case, it will be especially difficult to prove that *W* had reasonable cause to believe he was insolvent. In fact, the typical husband will more likely think of insolvency in terms of an inability to pay current debts than in balance sheet terms.[140] Consequently, the inquiry into whether the bankrupt's wife had reasonable cause to believe *H* to be insolvent is at times quite fanciful.

In the light of the purpose of the reasonable cause provision and the practical difficulty of dealing with the insolvency concept in consumer bankruptcy cases, section 60b should not be construed to require proof that *W* had hard evidence of insolvency. After all, section 60b only requires that the creditor receiving the preference have a reasonable cause to *believe;* it does not require absolute knowledge. The familiar relationship between *H* and *W* suggests that *W* will ordinarily have a general awareness of *H*'s financial status, even though she may not know of all the specifics. Moreover, *W* is in a better position to "plead ignorance" than other creditors, since there is less likely to be objective proof of her state of knowledge. Therefore, if shortly before the petition *H* pays *W* for an antecedent debt—especially one which has been long outstanding—there is a strong inference to be drawn that the payment was related to *H*'s financial predicament. Despite the reasonableness of such an inference, a few recent decisions have gone to great lengths to validate payments by the bankrupt to close relatives who had a strong awareness of

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Cir. 1940); Prudential Ins. Co. v. Nelson, 96 F.2d 487, 491 (6th Cir. 1938); *see* 2 G. GLENN, *supra* note 71, §§ 409, 410.

[139] The Bankruptcy Commission found that the reasonable cause requirement had "more than any other . . . rendered ineffective the preference section of the present Act." BANKRUPTCY COMM'N REPORT, *supra* note 6, at 215. *See also* King, *Proposed Amendments to the Chandler Act,* 45 COM. L.J. 36, 41 (1940). The Commission, however, recommends a two-tier antipreference provision, pursuant to which transfers within three months of bankruptcy could be invalidated without proof of reasonable cause, with insolvency presumed, and transfers between three months and one year of the petition would require proof of reasonable cause to know of insolvency. The Commission found that the present provision had "generated much litigation." BANKRUPTCY COMM'N REPORT, *supra* note 6, at 245 n.144. The new provision requiring reasonable cause in the period between three and twelve months before filing the petition, when the evidence is likely to be even more circumstantial, will likely generate even more litigation.

[140] Perhaps the best indication of the problem is in 1 W. COLLIER, BANKRUPTCY ¶ 1.19[3] (14th ed. 1974), where the valuation of specific kinds of assets is discussed. The entire discussion relates to business properties in business bankruptcies, and pays no attention to insolvency in the consumer situation.

the bankrupt's plight, but who lacked the kind of hard data which would indicate outright insolvency.[141] While these decisions may be socially justifiable on sympathy grounds, there is little in bankruptcy policy or the language of section 60b to commend them.

3. Summary Jurisdiction to Recover Property of the Bankrupt, Preferences, and Fraudulent Conveyances—When *H* becomes a bankrupt, his trustee has several means by which he can claim property also claimed by *W*. For example, the trustee may claim that, because the property actually belongs to *H*, it passes under section 70a of the Act or that the property in *W*'s possesssion was preferentially or fraudulently conveyed. If a preference or fraudulent conveyance of property is claimed, the trustee may try to regain either the property itself or its value. [142]

The bankruptcy court has summary jurisdiction when the property is in actual or constructive possession of the court, or where the adverse party consents to jurisdiction.[143] When the property is in the possession of the bankrupt or is surrendered to the trustee, the court has actual possession.[144] When the property is in the possession of a third party, the court will have constructive possession if it is held by the third party for the bankrupt or if the third party's claim to the property is merely colorable.[145] Although simple to state, these general rules are exceedingly difficult to apply. Moreover, their application may depend in part upon the type of property sought by the trustee—whether tangible or intangible property, or a money judgment. The existence of summary jurisdiction may be of some importance to the parties since litigation in bankruptcy court is considerably less expensive than a plenary action. Moreover, it is widely believed that trustees litigate more successfully in bankrupty court than in other courts.

(a) Tangible or Intangible Property—Although the bankruptcy court has summary jurisdiction over property which is in actual or constructive possession of the bankrupt, there are legions of cases, with widely varying fact situations, in which courts have attempted to apply these elusive concepts. Since any comprehensive examination of these cases is well beyond the scope of this article, the concern here is with peculiar jurisdiction problems raised in the husband-wife situation. It is, of course, very diffi-

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[141] Carroll v. Holliman, 336 F.2d 425 (10th Cir. 1964), *cert. denied,* 380 U.S. 907 (1965) (wife of bankrupt's president "worried for fear" corporation might be insolvent); Holahan v. Gore, 278 F. Supp. 899 (E.D. La. 1968) (son's conveyance of house to father recorded when son's plumbing business was clearly insolvent). *See* 3 W. COLLIER, BANKRUPTCY ¶ 60.54, at 1079–80 nn.21 & 22 (14th ed. 1974).

[142] The trustee's right to seek a remedy in damages rather than recovery of the property itself is somewhat uncertain. *See* 3 W. COLLIER, BANKRUPTCY ¶ 60.59 (14th ed. 1974); 4 *id.* ¶ 67.49 (14th ed. 1971).

[143] *See, e.g.,* Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940); Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432–34 (1924). *See* 2 W. COLLIER, BANKRUPTCY ¶¶ 23.04[2], 23.05–.08 (14th ed. 1975).

[144] *See, e.g., In re* Marschall, 296 F. 685 (5th Cir. 1924); *In re* Ellis, 1 F.2d 341 (W.D.N.Y. 1924).

[145] *See, e.g.,* May v. Henderson, 268 U.S. 111, 115–16 (1925); Mueller v. Nugent, 184 U.S. 1, 14–15 (1902).

cult to apply the concept of possession to the family situation where there may be, in a real sense, no separation of possession between husband and wife.

The approach of most courts to this problem, however, has been relatively pragmatic. A number of decisions make it clear that the possession test is satisfied by the bankrupt's joint possession with someone else.[146] Consequently, if the property at issue is an automobile, household furnishings, clothing, or jewelry which are physically located in the family residence, summary jurisdiction normally exists. If accessible to both *H* and *W*, intangibles such as insurance policies, savings bonds, securities, bank accounts, notes, and obligations are in *H*'s possession and are therefore subject to summary jurisdiction. Examples of such jointly accessible places are a filing cabinet, a safety deposit box, or a dresser drawer.[147] On the other hand, if *W* can identify the property as being in her exclusive control, then that property should be held to be in her possession.[148] For example, if *W* has the only set of car keys or keeps jewelry in a locked box, the property should be held to be in her exclusive possession. Similarly, if the property is investment property in *W*'s name, all of the rentals are paid to her, and she supervises repairs on the property, then such property is not within the summary jurisdiction of the bankruptcy court. The same principle can be applied to bank accounts solely in *W*'s name, safety deposit boxes to which *W* has sole access, and other similar arrangements.

(b) Colorable Claims—Even if the property is in the possession of *W*, the trustee can still assert summary jurisdiction on the ground that *W*'s claim to the property is merely colorable, rather than substantial and adverse.[149] In *Harrison v. Chamberlin*,[150] the Supreme Court announced the test for determining whether a claim is colorable:

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[146] *See* 2 W. COLLIER, BANKRUPTCY ¶ 23.05[2], at 474.2–.4 n.11 (14th ed. 1975); *cf.* Robinson v. Mann, 339 F.2d 547 (5th Cir. 1964) (house apparently inhabited by bankrupt and children who had allegedly received house as fraudulent conveyance); Kendrick v. Watkins, 121 F.2d 287 (4th Cir. 1941); *In re* Shea, 211 F. 365 (W. D. Ky. 1914), *aff'd on other grounds*, 225 F. 358 (6th Cir. 1915) ($234.54 in *W*'s checking account). *But see* Shea v. Lewis, 206 F. 877, 882 (8th Cir. 1913). *See also* Simon v. Schaetzel, 189 F.2d 597 (10th Cir. 1951); *In re* Wetteroff, 324 F. Supp. 1365 (E.D. Mo.), *aff'd*, 453 F.2d 544 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972).

There is a dearth of authority on the related question of summary jurisdiction over community property that is also claimed as *W*'s separate property. Several decisions suggest that *H* has a sufficient possessory interest for the bankruptcy court to exercise jurisdiction. *See* Martoff v. Elliott, 326 F.2d 204, 207 (9th Cir. 1963) (no summary jurisdiction because *W* had management and control by virtue of state court decree); Hannah v. Swift, 61 F.2d 307 (9th Cir. 1932).

[147] *Cf. In re* Lissak, 110 F.2d 370 (2d Cir. 1940) (daughter had possession of policy, but bankrupt retained sufficient interest and control to give the bankruptcy court summary jurisdiction).

[148] *See* Martoff v. Elliott, 326 F.2d 204 (9th Cir. 1963); *In re* Flynn, 300 F. 693 (1st Cir. 1924); *In re* Loveland, 200 F. 136 (1st Cir. 1912); *In re* Markel, 228 F. 926 (N.D. Cal. 1915); *In re* Shea, 211 F. 365 (W.D. Ky. 1914), *aff'd*, 225 F. 358 (6th Cir. 1915).

[149] The court in Shea v. Lewis, 206 F. 877 (8th Cir. 1913), confused the possessory basis for summary jurisdiction with the colorable claim basis. There, *H* and *W* were alleged to be in joint possession of property claimed by trustee, but the court rejected the bankruptcy court's jurisdiction on the ground that *W*'s claim was more than col-

> [An adverse claim] is to be deemed of substantial character when the claimant's contention "discloses a contested matter of right, involving some fair doubt and reasonable room for controversy" . . . in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense.[151]

If taken literally, this test would render the colorable claim basis for summary jurisdiction virtually useless since there are few matters which are so certain that some factual or legal issue cannot be asserted upon which there is not a "fair doubt and reasonable room for controversy." Not surprisingly, therefore, the courts have not literally applied the test.[152]

The essential feature of summary jurisdiction is trial before a referee. Although there are minor procedural differences between bankruptcy proceedings and plenary proceedings in the federal district court, or in state courts with federal-type procedure, the differences have largely been eliminated with the adoption of the bankruptcy rules—which are closely modeled upon the Federal Rules of Civil Procedure. Moreover, while the differences are somewhat greater in the few states which have distinctive procedural systems, the differences are probably not sufficiently great to premise a separate jurisdictional scheme in situations where, absent summary jurisdiction, the trustee would be forced to litigate in such a state. Although the rules cannot alter bankruptcy jurisdiction,[153] they can aid in analyzing the scope of that jurisdiction.[154] Because of the relative similarity in the proceedings, in most instances the only legitimate objection to summary jurisdiction is that the party prefers a factual determination to be made by the federal district or state court judge or jury rather than by a referee. Thus, an appropriate test for determining whether a claim is merely colorable should be whether there are factual issues for resolution by the trier of fact,[155] or solely questions of law.[156] Put another

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orable. The court, however, neglected to consider whether *H* had sufficient possession to provide a basis for summary jurisdiction. *See* cases cited note 146 *supra.*

[150] 271 U.S. 191 (1926).

[151] *Id.* at 195.

[152] *See* American Mannex Corp. v. Huffstutler, 329 F.2d 449 (5th Cir. 1964); Teasdale v. Robinson, 290 F.2d 108 (8th Cir. 1961); Shaw v. Thompson, 184 F.2d 572 (5th Cir. 1950); *In re* Kansas City Journal-Post Co., 144 F.2d 819 (8th Cir. 1944), *cert. dismissed,* 323 U.S. 807 (1945); Rogers v. Raffe, 141 F.2d 374 (2d Cir.), *cert. denied,* 323 U.S. 721 (1944); *In re* Knott, 134 F.2d 833 (6th Cir. 1943); *In re* Schwartz, 35 Am. Bankr. R. (n. s.) 380 (E.D.N.Y. 1937).

[153] BANKRUPTCY R. 928.

[154] *Cf.* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809–11 (2d Cir. 1971); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

[155] *See* Shea v. Lewis, 206 F. 877 (8th Cir. 1913); *In re* Silver, 2 F. Supp. 628 (S.D. Fla. 1933) (trustee's claim controverted by *W*'s "highly improbable" testimony); *In re* Flanigan, 228 F. 339 (E.D. Pa. 1915) (*W*'s claim to have furnished consideration for transfer of insurance policy).

[156] *See In re* Western Rope & Mfg. Co., 298 F. 926 (8th Cir. 1924), *aff'd,* 271 U.S. 191 (1926) (dictum); *In re* Jaybar Realty Corp., 43 F. Supp. 39, 41 (E.D.N.Y.), *aff'd,* 130 F.2d 748 (2d Cir. 1942) (alternative holding). Summary judgment has sometimes been denied if the issues are sufficiently novel, complex, or uncertain. *See* Kennedy v. Silas Masen Co., 334 U.S. 249, 256–57 (1948); J. MOORE, FEDERAL

way, the claim is colorable if summary judgment could be granted against *W*. This standard has two major strengths. First, it is familiar to judges and should be relatively easy to apply. Second, it preserves any legitimate objection *W* can have to trial before the referee since the referee and district and state judges presumably administer the same substantive law and *W* could have no objection to the referee's decision in the first instance.

The application of this test to cases where *W* is holding property claimed by the trustee should not prove difficult. In most cases, *W*'s claims will not rest on legal issues such as construction or application of state property law, but on factual issues involving the transaction in which *W* acquired the property. For example, there are a number of cases in which trustees have claimed bank accounts which wives have amassed out of money given them by their husbands for household expenses. In such cases, the factual issue has invariably been whether *H* made a gift of this money to *W*, or whether *W* held the money for him as a trustee or agent; because of the factual dispute, the issue must be resolved in a plenary action.[157] Similarly, if the question is whether *H* transferred property to *W* or what the source of funds for *W*'s purchase of property is, a plenary trial is required.[158] On the other hand, if the issue is whether a transfer complied with certain state law formalities and the underlying facts are not in dispute, the matter can be resolved in a summary proceeding.[159] Similarly, if the type of property arrangement is undisputed and the issue depends on the legal effect of a type of joint property arrangement, the matter is capable of resolution in a summary proceeding.

(c) Recovery of a Money Judgment—A somewhat different problem than attempting to recover tangible or intangible property is presented when the subject matter of the trustee's claim is money claimed by *W*. Because, especially in a husband-wife situation, it is often difficult to determine who has possession of money, the determination of who has possession for summary jurisdiction purposes will be difficult. To permit the trustee to always assert summary jurisdiction over a simple claim for a money judgment against *W* could lead to summary jurisdiction over any monetary claim against any party. Reluctance by courts to sanction such an expansion of summary jurisdiction is responsible for the large number of cases which hold that such claims must be brought in plenary actions.[160]

PRACTICE ¶ 56.16 (2d ed. 1974); 10 C .WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2732 (1973).

[157] *See* Courtney v. Shea, 225 F. 358, 361 (6th Cir. 1915); *In re* Simon, 197 F. 102 (W.D.N.Y. 1912) (summary jurisdiction stipulated).

[158] *See* Harrison v. Chamberlin, 271 U.S. 191 (1926); *In re* Burofsky, 64 F. Supp. 128 (D. Mass. 1946); *In re* Green, 108 F. 616 (E.D. Pa. 1901).

[159] *See* Alt v. Burt, 181 F.2d 996, 1001 (6th Cir. 1950) (Miller, J., dissenting); *In re* Rock Spring Water Co., 140 F.2d 556 (3d Cir. 1944).

[160] *See In re* Penco Corp., 465 F.2d 693, 696–97 (4th Cir. 1972); *cf.* Suhl v. Bumb, 348 F.2d 869 (9th Cir.), *cert. denied,* 382 U.S. 938 (1965).

In cases where the trustee is alleging a preferential or fraudulent transfer and seeks a money judgment, a plenary suit is usually appropriate. There has been some unfortunate commentary, however, suggesting that *W*'s claim is ipso facto substantial and adverse in *every* preference and fraudulent conveyance case, and should therefore defeat the court's summary jurisdiction.[161] This suggestion is not accurate, however, in a case where the trustee seeks to recover specific property in *W*'s possession as an alleged preference or fraudulent transfer, and *W*'s "defense" is merely colorable in the sense that she could not defeat the trustee's motion for summary judgment. In such a case, *W* should be required to surrender the property in summary proceedings.

D. The Bankrupt's Spouse as a Creditor

Nothing in the Bankruptcy Act prevents *W* from claiming to be a creditor entitled to share with other creditors in her bankrupt husband's estate. Usually, *W*'s claim will be for money or property loaned or for services rendered to the bankrupt. Since such claims fall within the categories of provable claims under sections 63a(1) or 63a(4) of the Act, *W* has a right to share in the estate. Nevertheless, the bankrupt's wife faces both factual and legal obstacles in establishing her claim.

Although one set of disabilities is of only limited importance today, it bears some consideration. Some states still retain vestiges of common law coverture laws, which may restrict *W*'s power to contract with *H* or her ability to bring suit against him.[162] In states restricting *W*'s power to contract, the trustee may resist *W*'s claim by arguing that the reference in sections 63a(1) and 63a(4) to fixed liabilities and contractual claims is to state law; therefore, because *Erie Railroad v. Tompkins*[163] would require a federal bankruptcy court to apply state law, *W*'s claim against *H* would be invalid. This result, however, may be subject to attack because the constitutional bankruptcy power appears broad enough to allow a federal definition of provable claims; therefore, it is doubtful whether the *Erie* principe is applicable. Nevertheless, it appears that section 63a (1) and 63a(4) do not contemplate a federal common law definition, but instead, adopt state law for the characterization of claims.[164] A simpler method exists, however, for concluding that *W*'s claim, if invalid under state law, will not be recognized. Under section 70c, the trustee

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[161] 2 W. COLLIER, BANKRUPTCY ¶ 23.06[9] (14th ed. 1975).

[162] The Equal Rights Amendment, if adopted, would end all of these disabilities. *See* L. KANOWITZ, WOMEN AND THE LAW 55 (3d ed. 1971); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 920–21 (1971).

[163] 304 U.S. 64 (1938).

[164] *See* 3A W. COLLIER, BANKRUPTCY ¶¶ 63.03[3], 63.06[5.2], at 1787 (14th ed. 1972); Countryman, *The Use of State Law in Bankruptcy Cases (Part I)* 47 N.Y.U.L. REV. 408, 412 (1972); Herzog & Zweibel, *The Equitable Subordination of Claims in Bankruptcy*, 15 VAND. L. REV. 83, 88 & n.43 (1961). There is, as might be expected, a sharp difference of opinion on the applicability of the *Erie* doctrine to bankruptcy matters as to which Congress has not adopted state law as the rule of decision. *See* Countryman, *supra*, at 409–11; Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953).

can assert any defenses which the bankrupt has. Numerous decisions make it clear that the trustee can resist claims on such grounds as fraud, duress, estoppel, invalidity, illegality, statute of frauds, and statute of limitations.[165] There is no reason for the lack of capacity defense to be treated differently.

Statutes which disable *W* from suing *H* have presented more difficulty. Since *H* could use such statutes to resist an action by *W*, it may be argued that the trustee can assert them under section 70c. Such a "defense" is not dissimilar from that of statute of limitations or discharge in bankruptcy, since both recognize the existence of an obligation but simply disallow suit to recover it. On the other hand, it may be argued that the purpose of statutes preventing interspousal suits is to prevent the marital discord which they might present, and that such a purpose is not frustrated by permitting *W* to assert a claim in bankruptcy. Such reasoning, however, breaks down if the trustee contests the claim, and the husband-wife confrontation occurs in the bankruptcy court. Nevertheless, most decisions have held *W*'s claim to be provable if the state law simply restricts suits by *W* against *H*.[166]

A further legal issue is whether *W*'s claim ought to be subordinated to those of other creditors. Equity courts have long subordinated the claims of officers, directors, and controlling stockholders of a corporation upon a showing of undercapitalization, mismanagement, or other inequitable conduct.[167] Such cases, however, cannot be directly analogized to the husband-wife situation, where *W* has no obligation to contribute any funds to *H* and certainly has no responsibility to keep his financial affairs in order.[168] Unlike a corporation—where ultimate responsibility for decisions and financial problems rests with the managers and controlling stockholders—*H* is ultimately responsible for his own financial difficulties, even though *W* may have contributed to his predicament through extravagant spending or carelessness. For these reasons, the bankruptcy court has no general power to subordinate *W*'s claim, with one exception —if *W* in some way misleads *H*'s creditors into believing that she will contribute funds to *H* or will subordinate her claims, she may then be estopped from sharing with other creditors equally.[169] Even in this case, the basis for subordination is her conduct vis-á-vis *H*'s creditors, not her responsibility for *H*'s financial plight.

The primary factual problem created by *W*'s assertion of creditor status is in proving that her claim is bona fide. Courts have applied general rules

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[165] *See* 3A W. COLLIER, BANKRUPTCY ¶ 63.07 (14th ed. 1972).

[166] *See, e.g., In re* Domenig, 128 F. 146 (E.D. Pa. 1904).

[167] *See, e.g.,* Pepper v. Litton, 308 U.S. 295 (1939); Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939); *In re* Sales Incentives Corp., 327 F. Supp. 937 (D.R.I. 1971); Herzog & Zweibel, *supra* note 164.

[168] Nor can the husband-wife situation be analogized to the corporate situation, where the debts of controlling shareholders are often treated as equity, *see, e.g.,* Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939); Braddey v. Randolf, 352 F.2d 80 (4th Cir. 1965), because *W* has no duty to adequately capitalize her husband.

[169] See Herzog & Zweibel, *supra* note 164, at 90–93.

of thumb which place the burden on *W* to substantiate the existence of the obligation and to establish that *W*'s advances of loans or services were intended to create a debt rather than a gift.[170] Because of this, great care should be taken by *W* in observing proper formalities in creating the debtor-creditor relation. Without proper documentation, vague accounts of supposed obligations are usually rejected.[171] Perhaps the most striking issue is whether *W*'s claim will be sustained if it rests solely on the testimony of *H* and *W*.[172] Absent some indication that the claim is feigned, however, there is no more reason to reject such claim outright than to reject any other claim which rests solely on the testimony of the interested parties.[173]

E. Examinations of the Bankrupt's Wife

Prior to 1973, section 21a of the Bankruptcy Act permitted a broad-scale inquiry into the acts, conduct, and property of a bankrupt. Section 21a had two specific provisions applicable to *W*: The first proviso limited the scope of *W*'s examination to business transacted by her, and to determining whether she had engaged in business transactions with *H*; the second proviso provided that *W* could be examined notwithstanding any contrary state or federal law. In short, the husband-wife privilege did not apply to bankruptcy examinations.[174] The ability to examine *W* is especially important in cases where *H* has asserted the privilege against self-incrimination and *W* is the only person who can shed light on his affairs.

Section 21a, however, did not govern *W*'s examination in contested or adversary bankruptcy proceedings before the referee, nor did it apply to discovery depositions taken pursuant to the Federal Rules of Civil Procedure. General Order 37 provided that the Federal Rules of Civil Procedure were, in the absence of other provisions, applicable in bankruptcy proceedings. Rule 43 of the Federal Rules of Civil Procedure provided that the admissibility of evidence was to be governed by specific federal statutes, state law, and the federal equity rules, and that in the event of

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[170] *See* 3A W. COLLIER, BANKRUPTCY ¶ 63.06[5.1], at 1785 n.29 (14th ed. 1972) (citing authorities); 2 H. REMINGTON, BANKRUPTCY §§ 978–81, at 458, 460–61, nn.7–9, 13 & 16 (1956). Most of the cases on husband-wife loans and services are cited in 3A W. COLLIER, *supra*, ¶ 63.06 [5.1], at 1787–88 nn.36 & 39. For reasons which are unclear, the last quarter century has produced virtually no reported cases.

In bankruptcy, *W* is in a dilemma because, on the one hand, she is thought to have an obligation to help her husband when the going gets rough, but on the other, her reward for doing so is suspicion when she asserts a bankruptcy claim. *See* Bankruptcy Act §§ 44a, 59e(2), 11 U.S.C. §§ 72(a), 95(e) (2) (1970); BANKRUPTCY R. 207(d); 3A W. COLLIER, *supra*, ¶ 63.06[5.1], at 1784.1 to 1785.

[171] *See* Giffin v. Vought, 175 F.2d 186 (2d Cir. 1949); Fishman v. Davis, 112 F.2d 432 (10th Cir. 1940); *In re* Worley, 251 F. Supp. 725 (W.D. Va. 1966); *cf.* Lindner v. Kilsheimer, 289 F.2d 340 (2d Cir. 1961); Maners v. Ahlfeldt, 59 F.2d 938 (8th Cir. 1932).

[172] *See* 2 H. REMINGTON, BANKRUPTCY § 978, at 461 n.18 (1956).

[173] *See In re* Domenig, 128 F. 146 (E.D. Pa. 1904).

[174] General Order 22 provided that the examination before the referee was to be conducted in accordance with the Federal Rules of Civil Procedure, unless they were inconsistent with the Act. The spousal provisions of section 21a would thus supersede any contrary provision which might be applied pursuant to the rules of procedure.

conflict between these sources, the rule allowing admissibility was to prevail. In cases of doubt, referees usually admitted evidence according to the more liberal policy which prevails in nonjury trials. In depositions, rule 26(a) of the Federal Rules of Civil Procedure provided a standard of relevance and privilege, but it was unclear whether the husband-wife privilege was applicable in such a situation or whether the second proviso of section 21a limited its availability.

In 1973, Bankruptcy Rule 205 altered both the scope and anti-privilege provisions of section 21a and the treatment of evidence in contested and adversary proceedings. Rule 205(d) permits an examination into the acts, conduct, property, or dischargeability of the bankrupt, thereby eliminating the previous restrictions on the scope of *W*'s examination. The rule's draftsmen rejected the argument that a special limitation on *W*'s testimony was warranted; hence, she may be examined on the same matters as can any other witness.[175]

Unfortunately, however, the rule's treatment of the anti-privilege provision of section 21a and the evidence provisions of General Order 37 is not so simple. Rule 205 does not contain the anti-privilege provision of section 21a on the ground that no such special provision was necessary.[176] This is understandable since the Bankruptcy Rules contain an evidence provision, rule 917, which provides that the Federal Rules of Evidence apply in bankruptcy cases. Under the version of the Federal Rules of Evidence then in existence, there was no husband-wife privilege,[177] and consequently, no change from the specific anti-privilege provision of section 21a would have been apparent. To complete the picture, the General Orders were repealed, leaving rule 917 and the Federal Rules of Evidence, if adopted, as the exclusive regulator of the law of evidence in bankruptcy proceedings.

There is one complication: Prior to the effective date of the Bankruptcy Rules, Congress passed legislation delaying indefinitely the effective date of the Federal Rules of Evidence.[178] Nevertheless, when the Bankruptcy Rules became effective they contained rule 917, with its adoption of the Evidence Rules, and were thus in the posture of adopting rules which did not exist.

With the Bankruptcy Rules in existence, and the Evidence Rules on the shelf, the question of what provisions governed the evidentiary questions in section 21a examinations or during the trial of a contested or adversary proceeding returned in limbo. The uncertainty was somewhat relieved in early 1975 by congressional enactment of the Federal Rules of Evidence as positive law, and the signing of the legislation by the President.[179] This has, however, created a problem because this new

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[175] *See* BANKRUPTCY R. 205, Advisory Committee's Note.

[176] *Id.*

[177] RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (proposed), Rules 501, 505 (Nov. 20, 1972).

[178] Pub. L. No. 93-12, (March 30, 1973).

[179] Pub. L. No. 93-595 (Jan. 2, 1975).

version of the Evidence Rules provides that: "Except as otherwise required by . . . Act of Congress . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[180] Since the Bankruptcy Rules were enacted with the reference to the Federal Rules of Evidence, the first question is what Federal Rules of Evidence govern in bankruptcy: those promulgated by the Court, rejected by Congress, and arguably resuscitated by the Bankruptcy Rules, or the new version recently enacted into positive law?

Technically, the Federal Evidence Rules did not exist at the time the Bankruptcy Rules became effective, since they had been rejected by Congress. Yet, to be effective, the Bankruptcy Rules must have had the acquiescence of Congress. It may thus be argued that the draftsmen of rule 917, the Supreme Court, and the Congress intended to approve the limited use of Federal Evidence Rules for bankruptcy proceedings, and impliedly adopted the promulgated (and rejected) version of the rules by reference.

This argument finds little support. It appears that the draftsmen of rule 917 and the Supreme Court intended to approve the use of the Federal Rules of Evidence in bankruptcy proceedings with the aim of securing uniformity in federal evidence law, and to build upon the substantial body of evidence law which might be expected to be amassed in ordinary civil cases. There was never any indication of a desire for a separate and comprehensive code of evidence applicable only in bankruptcy.[181] On the congressional level, it is hard to imagine that a Congress which rejected the Federal Rules of Evidence by staggering majorities would give tacit approval to the same rules only a few months later.[182] Perhaps the best posture, therefore, would be to conclude that no one intended the Evidence Rules to govern in bankruptcy proceedings and to proceed from that point.

In this posture, it seems likely that the present version of the Evidence Rules will govern in bankruptcy although this results in the Bankruptcy Rules adopting provisions which did not exist when the rules were promul-

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[180] *Id.* Rule 501.

[181] *See* BANKRUPTCY R. 917, Advisory Committee's Note; COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED BANKRUPTCY RULES AND OFFICIAL FORMS UNDER CHAPTERS I TO VII OF THE BANKRUPTCY ACT XLII (1971).

[182] When the Federal Rules of Evidence were first considered by Congress, different versions of a bill delaying their effective date were approved in the House by a vote of 399 to 1, and in the Senate the bill was unopposed. The House deliberations are at 119 CONG. REC. 1721–23 (daily ed. Mar. 14, 1973); those of the Senate are at 119 CONG. REC. 2241–42 (daily ed. Feb. 7, 1973). The delaying statute was enacted on March 30, 1973. See note 178 *supra*. The Bankruptcy Rules were approved on April 24, 1973 and sent to Congress on or before May 1, 1973. Congress then had six months to consider the Rules. 28 U.S.C. § 2075 (1970). Thus, the Bankruptcy Rules were before Congress at about the same time the Evidence Rules were rejected, and for six months thereafter. Although it appears that the Bankruptcy Rules were considered by committees, there is no indication that formal congressional action to delay the Bankruptcy Rules was ever seriously contemplated.

gated.[183] If one can cast such jurisprudential niceties aside, one approach under the newly enacted Rules of Evidence is to say that in examinations of a bankrupt's spouse pursuant to rule 205, the court must apply the anti-privilege provisions of section 21a as a specific "Act of Congress." The difficulty with this argument is that section 2075 of the Judicial Code provides that once the rules are effective, "all laws in conflict with such rules shall be of no further force and effect." And, while the draftsmen of the rules have not provided a specific listing of the sections superseded, there is considerable evidence that section 21a was one of them.[184]

Under the present scheme, then, the courts will have to fashion rules of privilege which govern in bankruptcy proceedings. Evidence Rule 501 requires the federal courts to develop a common law of privileges, which would presumably include a decision whether to recognize the husband-wife privilege. Regardless of how the provision should be generally interpreted in federal cases, however, there are strong reasons for the bankruptcy court to continue to apply the anti-privilege provisions of old section 21a when the bankrupt's spouse is examined pursuant to rule 205. The draftsmen of the Bankruptcy Rules indicated no dissatisfaction with the anti-privilege provisions of section 21a, nor did they suggest a need for change or reconsideration. Indeed, what they did was to approve the Evidence Rules which at that time contained no husband-wife privilege. In view of the obvious effect of the husband-wife privilege to curtail the information available to those investigating the affairs of the bankrupt, and the absence of any data suggesting a desire to change the governing provisions, such a privilege should not be recognized in bankruptcy.

If no husband-wife privilege is applicable when the trustee examines *W* pursuant to rule 205(d) (as was the case under section 21a), the question remains to what extent *W* may assert an evidentiary privilege under state law when her testimony is sought at a trial in contested or adversary proceedings in bankruptcy, or in discovery depositions pursuant to the Bankruptcy Rules. These questions would have been resolved by the specific anti-privilege provisions of the unenacted version of the Evidence Rules.

As to the discovery deposition, it is doubtful that *W* can assert a privilege during discovery if she cannot assert it during investigatory proceedings in the bankruptcy court. The purpose of discovery is to enable the parties to prepare adequately for the actual trial, and this purpose would not be served by keeping certain allegedy privileged matters immune from discovery until the trial. Moreover, the purpose of the husband-wife privilege

[183] It may be presumed that absent some viable rules of evidence, the draftsmen would have intended the "old law" to apply. However, to reach that result involves a fair effort at legal gymnastics. Professor Moore has reached this same conclusion, but he is also in a quandary about justifying it. *See* 5 J. MOORE, FEDERAL PRACTICE § 43.01.1 (2d ed. 1974). One commentator "presumed" that the necessary changes in the Bankruptcy Rules would be made if the Evidence Rules were not adopted. Troost, *Trial Practice Under the New Bankruptcy Rules,* 47 AM. BANKR. L.J. 111, 122 (1973).

[184] *See* 28 U.S.C. § 2075 (1970). Further evidence of the superseder is found in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 179, at XXXIII–XXXIV app. II, at 385.

is hardly realized if *W* can keep the information to herself during discovery and then be required to disgorge it during the trial. Hence, *W*'s ability to assert the privilege in discovery will depend on her ability to to assert it at trial.[185]

Whether the husband-wife privilege can be asserted at trial will also be up to the court under the elastic provisions of the present Evidence Rules. It is doubtful that section 21a itself was designed to govern the taking of evidence in a contested proceeding. The language of that section appears to be addressed only to the examination of persons having knowledge of the bankrupt's affairs, and even the now moribund General Orders specified different procedures for examination under section 21a and the trial of proceedings under the Act.[186]

As a matter of policy, it is hard to see a rationale for allowing *W* to assert the privilege in adversary and contested proceedings, but to give the trustee access to the information in examinations pursuant to rule 205. The purpose of the privilege is to protect the confidentiality of husband-wife communications, and such a purpose appears largely frustrated once the confidentiality of the communication has been breached at the rule 205 examination. Indeed, to allow *W* to remain silent at trial is to keep evidence from the court to serve no apparent purpose of policy. Consequently, *W* should be required to testify fully notwithstanding any contrary state privilege.[187]

II. The Bankrupt's Spouse as a Bankrupt

A. W Becomes a Bankrupt

The Bankruptcy Act does not authorize joint petitions by *H* and *W*, so that *W* must file separately if she is to file at all. Today, *W*'s inability at common law to file a bankruptcy petition is of largely historical interest[188] since section 4 of the Act authorizes "any person" to become a bankrupt, and section 1(23) specifically defines "person" to include women. Thus, any woman can become a bankrupt, assuming she meets the requirement of owing debts.[189] Only in those states which have not yet abrogated the common law rule of coverture—which immunized married women from any separate liability for their debts[190]—is there any question whether a woman may become a bankrupt. But since the overwhelming majority of states no longer have coverture, the issue is largely resolved.

If *W* is unwilling to file a voluntary petition, creditors may still try to force her into bankruptcy by filing an involuntary petition. Section 4b of

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[185] *Cf.* United States v. Reynolds, 345 U.S. 1, 6 (1953); *see* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2016, at 122 & n.55 (1970); 4 J. Moore, *supra* note 184, ¶ 26.60[1], at 26–227.

[186] *Compare* General Order in Bankruptcy 22 *with* General Order in Bankruptcy 37.

[187] Research disclosed no cases which indicate whether the spousal privilege is recognized in proceedings under the Act.

[188] *See* Zollman, *Persons of Abnormal Status As Bankrupts*, 10 Colum. L. Rev. 221, 228 (1910).

[189] 1 W. Collier, Bankruptcy ¶ 4.03, at 583 (14th ed. 1974).

[190] *Id.* ¶ 4.11; 1 H. Remington, Bankruptcy § 72 (1950).

the Act provides that any natural person owing debts of one thousand dollars or more may be adjudicated an involuntary bankrupt—women can clearly be so adjudicated.[191] Creditors may wish to file a petition if, for example, a substantial portion of the family assets is in *W*'s name. The difficuty of untangling intrafamily transactions by attacking them as preferential or fraudulent tends to make *W*'s bankruptcy followed by a consolidation of *H*'s and *W*'s estates particularly attractive to some creditors. In cases where *W* is liable as joint obligor or guarantor, creditors may hope that *W*'s bankruptcy will short-circuit years of litigation, while enabling them to reach her assets to satisfy their claims.

For *W* to become an involuntary bankrupt, three creditors to whom *W* owes five hundred dollars or more must join in the petition. But if *W* has fewer than twelve creditors, filing by one creditor is sufficient. And, although *H* and his trustee are probably not includable in the statutorily required number of creditors,[192] *H*'s trustee is not disqualified from acting as a petitioning creditor.[193] The petition must allege an act of bankruptcy[194] within the four months prior to its filing. Generally, the petitioners will allege a fraudulent or preferential transfer by *W* since these acts are most likely to have occurred. In this connection, however, it must be remembered that a fraudulent conveyance or preference from *H* to *W* is not an act of bankruptcy on the part of *W*. In many cases, it may be impossible to identify an act of bankruptcy which *W* has committed, especially in light of the rule that the act must be alleged with particularity.[195] Consequently, forcing *W* into an involuntary bankruptcy proceeding may be extremely difficult.

If *W* files a voluntary petition or is adjudicated an involuntary bankrupt, the case will proceed as does any other bankruptcy. *W*'s trustee will have to marshal and liquidate her property—including any rights against *H*—and distribute the proceeds to creditors. As a matter of practice, however, courts have adopted procedures to deal with the simultaneous bankruptcy of husband and wife. Rule 117, for example, authorizes the appointment of a common trustee in such cases, on the theory that it will result in economies of effort and expense. The common trustee must, however, keep the estates separate. And if any conflict of interest arises, such as claims between the estates, the court will have to appoint separate trustees or take other action to protect each estate.[196]

B. Consolidation of Assets and Liabilitiies

Bankruptcy Rule 117 recognizes a distinction between joint administration of two bankrupt estates and the consolidation of assets and liabili-

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[191] *See, e.g.*, McDonald v. Tefft-Weller Co., 128 F. 381 (5th Cir. 1904) (*W* liable for debts in suit in equity).

[192] Bankruptcy Act § 59e(2), 11 U.S.C. § 95(e)(2) (1970).

[193] *See* 3 W. COLLIER, BANKRUPTCY ¶ 59.07[1] (14th ed. 1974).

[194] Bankruptcy Act § 3a, 11 U.S.C. § 21(a) (1970).

[195] BANKRUPTCY R. 104(c).

[196] *See* BANKRUPTCY R. 117(b); *cf.* Larkin v. Welch, 86 F.2d 442 (7th Cir. 1936), *cert. denied*, 300 U.S. 680 (1937).

ties of two bankrupt estates.[197] If the estates are jointly administered, each creditor continues to have a claim against each individual bankrupt and the assets of that bankrupt. In contrast, if the estates are consolidated, all of the assets of *H* and *W* are placed in a single fund, all inter-spousal claims are eliminated, and the creditors' claims are against the "consolidated fund;" thus, consoldation may result in a substantial difference in creditors' recovery. For example, assume *H* has five thousand dollars in assets and ninety thousand dollars in liabilities, and *W* has ten thousand dollars in assets and twenty thousand dollars in liabilities (of which ten thousand dollars are joint). In a separate proceeding, each of *W*'s creditors would receive fifty percent of their claims, but in a consolidated proceeding, each would receive only fifteen percent.[198]

Although there have been literally tens of thousands of simultaneous filings of bankruptcy petitions by husbands and wives, there has been virtually no consideration of the circumstances under which consolidation might be ordered. The likely explanation is that the overwhelming number of cases involve such meager assets that the question of consolidation makes little practical difference to creditors. Moreover, if most of the creditors are creditors of both *H* and *W*, it is of little importance whether they must file their claims in two separate proceedings or in a single consolidated proceeding; indeed, joint creditors may be better off in separate proceedings since they may have two opportunities for recovery. Nevertheless, consolidation can make a difference, and the dearth of cases is perhaps explainable only by the fact that most decisions are unreported decisions of bankruptcy judges.

Most of the existing doctrine examining the consolidation of separate bankrupt estates involves corporations, subsidiaries, and related companies. The few cases which have ordered consolidation have done so on one or more of the following grounds: (1) operation of the separate units as a joint enterprise, usually under the direction of a dominating individual or group of individuals; (2) commingling of assets, payments by some companies of the obligations of others, and guarantees by some companies of the debts of others; (3) inadequate record keeping of the separate assets and liabilities of the respective concerns; and (4) no in-

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[197] BANKRUPTCY R. 117(b), *Advisory Committee's Note.*

[198] These figures do not consider administration expenses and the possible effect of priority claims. In addition, the example assumes that joint creditors could assert only one claim in a consolidated proceeding. *Cf. In re* Flora Mir Candy Corp., 432 F.2d 1060, 1061 (2d Cir. 1970); Chemical Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845, 846 (2d Cir. 1966). This premise may be open to question since joint creditors could assert claims in both *H*'s and *W*'s bankruptcy proceedings if separate, and it is not clear why they should be treated differently in a consolidated proceeding.

Actually, even if joint creditors can assert two claims, they may still be worse off in a consolidated proceeding. In the textual example, a joint creditor with a claim of one thousand dollars would receive five hundred dollars in *W*'s proceeding and fifty-six dollars in *H*'s. In the consolidated proceeding, the creditor would receive $273, or less than half the amount recoverable in the separate proceedings.

creditors.[207] Finally, in the famous case of *Moore v. Bay*,[208] where the Supreme Court dealt with the trustee's avoidance, under section 70e, of a transfer which a creditor of the bankrupt could have avoided, the Court held that the transfer was completely avoided, rather than being limited to the amount of the claim of the creditor whose rights the trustee was asserting, and that the creditor had no special claim or priority on the assets realized. By analogy, once the entirety property is brought into the estate, it should be fully available to all creditors, with joint creditors having no special claim or priority. Because the reasoning above is premised not on the presence of joint creditors, but on the inapplicability of the policy behind the entirety arrangement when both *H* and *W* are bankrupt, the property should pass to the trustee even in situations where no joint creditors exist.

Courts which have not adopted reasoning which would pass entirety property to the separate estates of *H* and *W* have instead decided to consolidate their estates. The consolidation effects a merger of the interests of *H* and *W* so that the property passes to the trustee under section 70a(5). Indeed, it has been suggested that consolidation creates a new entity of *H* and *W*, an entity which happens to correspond with the entity which held the property in tenancy by the entirety.[209]

A strong argument can be made, however, that the trustee of the consolidated estate obtains no greater right to the property than would the trustees of *H* and *W* separately. The Bankruptcy Act does not authorize joint petitions, and absent consolidation, the trustee of *H* and *W* obtain only that property of *H* and *W* which passes under section 70a of the Act. By definition, in cases which have found that property of *H* and *W* passes ipso facto because of the consolidation, the property does not pass when *H* and *W* are adjudicated bankrupt—since this would make the consolidation irrelevant—but rather at the time of the consolidation. But there is nothing in the Bankruptcy Act to suggest that section 70a again becomes operative when a consolidation occurs to pass property to the trustee which had not previously passed when *H* and *W* filed their respective petitions.[210] Moreover, there is absolutely no support in the Act for the notion that *H* and *W* constitute an entity which is somehow treated separately from the two as individuals. In fact, even in community property

[207] *See* Kennedy, *supra* note 32, at 458–60. Section 5g of the Act provides that in bankruptcies of partners and partnerships, the assets of the partners are paid first to their creditors, while the assets of the partnership are used to pay its creditors. This is not, however, authority for distinguishing between joint and individual creditors of the same bankrupt. Indeed, it supports the conclusion in the text that the Act provides comprehensively for the treatment and classification of creditors, and that any additional categorization is unauthorized.

[208] 284 U.S. 4 (1931).

[209] *See* First Nat'l Bank v. Pothuisje, 217 Ind. 1, 25 N.E.2d 436, 439–40 (1940); Dickey v. Thompson, 323 Mo. 107, 18 S.W.2d 388, 394 (1929).

[210] In fact, the last paragraph of section 70a may suggest the contrary. That paragraph gives *H*'s trustee any entirety property which becomes transferable within six months after bankruptcy. The implication of this provision is that the trustee's rights otherwise are determined on the date of the petition. *Cf.* Klebanoff v. Mutual Life Ins. Co., 362 F.2d 975 (2d Cir. 1966).

spouse in jointly held property from overindulgence and overcommitment by the other spouse. But when *W* becomes bankrupt, she has indebted herself and is not forfeiting her property because of the debts of another. Moreover, the purpose of bankruptcy is to require each spouse to surrender all non-exempt property for the benefit of creditors in exchange for a discharge.[204] When *W* is allowed to retain her interest in nonexempt property, she has received an advantage without apparent justification.

In recognition of the crucial distinction between entirety property and exempt property, some courts hav been willing to stay bankruptcy proceedings so that joint creditors can obtain a joint judgment in a state court enforceable against entirety property.[205] The only problem with such an approach is that it gives joint creditors an advantage over individual creditors of one of the spouses. Although it may be argued that such an advantage merely reflects state policy to protect the entirety property from creditors of only one spouse, and not to set aside such property for one class of creditor, it still undermines the bankruptcy policy of equal treatment of general creditors. Moreover, even if the state policy were directed toward giving joint creditors a special priority, section 67c reflects a strong bankruptcy policy to prevent states from setting up specialized distribution schemes apart from bankruptcy. This bankruptcy policy is equally applicable to any attempted distinction—based on state law—between joint and individual creditors. Therefore, any system where joint creditors obtain an advantage over individual creditors is not supported by a discernible state policy and is contrary to the spirit of the Bankruptcy Act.

Once the jointly held property becomes part of the spouses' estates, the issue is whether individual creditors can share in that property. Again, an affirmative answer is warranted.[206] The purpose of the entirety arrangement is to protect the property from being taken by the creditors of one spouse; this purpose is not infringed where the property is being taken to satisfy joint debts of the spouses. Moreover, the Bankruptcy Act is very explicit in setting up priorities—nowhere in the Act is there any suggestion that some general creditors should gain priority over other general

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[204] *Cf.* Reid v. Richardson, 304 F.2d 351 (4th Cir. 1962); Roberts v. Henry V. Dick & Co., 275 F.2d 943 (4th Cir. 1960).

[205] *See* Dickey v. Thompson, 323 Mo. 107, 18 S.W.2d 388 (1929); Wharton v. Citizens' Bank, 223 Mo. App. 236, 15 S.W.2d 860, 863 (1929); *cf. In re* Saunders, 365 F. Supp. 1351 (W.D. Va. 1973); Smith v. Beneficial Fin. Co., 139 Ind. App. 653, 218 N.E.2d 921 (1966) (allowing joint creditors to reach entirety property after bankruptcy of *H* and *W*). Professor Kennedy has analyzed the somewhat analogous problem of permitting creditors who can reach property that is otherwise exempt to pursue such property outside the bankruptcy proceeding. His conclusions are similar to those herein. Kennedy, *supra* note 32, at 462–69.

[206] *See In re* Carpenter, 5 F. Supp. 101 (M.D. Pa. 1933) (court implies all creditors receive same treatment). *But see* Reid v. Richardson, 304 F.2d 351, 355 (4th Cir. 1962) (dictum) (entirety property "may be sold to satisfy the claims of all creditors holding joint obligations of the bankrupts"); Roberts v. Henry V. Dick & Co., 275 F.2d 943, 945 (4th Cir. 1960). The lower court in *Reid* was more explicit in suggesting that only joint creditors could participate in entirety property. *In re* Reid, 198 F. Supp. 689, 691 (W.D. Va. 1961). For a different approach, see Bienenfeld, *supra* note 104, at 114 (all creditors share but joint creditors should have priority).

jority of cases requiring consolidation on husband-wife bankruptcies involved situations where petitions were filed by both spouses, and the trustee was trying to reach entirety property held by them.[201] Because the courts in those cases believed that consolidation was the only way for the trustee to reach the entirety property, these cases are not really controlling or applicable in situations where there is competition among creditors who are either urging consolidation or separation to increase the assets available to satisfy their claims. Nevertheless, consolidation is desirable in nearly all husband-wife bankruptcies.

C. Jointly Held Property

1. Entirety Property—We have already seen that property held by the entirety does not become part of the bankrupt's estate when only one spouse is bankrupt. The same result will probably obtain even when *H* and *W* are both bankrupt in separate proceedings.[202] In such a case, the trustee of each spouse would simply obtain property which passes under section 70a, and the entirety property would presumably be excluded.

Nevertheless, there are several theories upon which the trustee can attempt to reach such property. First, it is arguable that under section 70a(3) the trustee of each spouse obtains the powers of the bankrupt, including the power to consent to a sale by the remaining spouse. The "consideration" for the trustee of one spouse to exercise such power of consent would be an agreement by the trustee of the other spouse to divide the proceeds. Alternatively, it may be argued that the property passes to *H*'s trustee under section 70a(5), which refers to property which could "by any means be conveyed."[203] When *H* and *W* are both bankrupt the property may be conveyed jointly by the trustees acting together. It is crucial that both *H* and *W* are bankrupt at the same time only because the two trustees will gladly cooperate in effecting the sale; where only one spouse is bankrupt, the same rights may pass to the trustee, but are worthless because of *W*'s unwillingness to agree to the sale.

Allowing the trustees to sell makes sense in terms of policy because a tenancy by the entirety is not an exemption and is not intended to immunize the property from creditors. To the extent any policy is discernible —and it is arguable that tenancy by the entirety is simply a remnant from a feudal era—it appears directed toward protecting the interest of one

[201] *See, e.g., In re* Reid, 198 F. Supp. 689 (W.D. Va. 1961), *aff'd*, 304 F.2d 351 (4th Cir. 1962); *In re* Pennell, 15 F. Supp. 743 (W.D. Pa. 1935); *cf. In re* Kline, 370 F. Supp. 152 (W.D. Va. 1973).

[202] *See* Dickey v. Thompson, 323 Mo. 107, 18 S.W.2d 388 (1929); Note, *The Effect of Bankruptcy on Estates by Entireties*, 89 U. PA. L. REV. 1073, 1075 n.17 (1941).

[203] *See In re* Ved Elva, Inc., 260 F. Supp. 978 (D.N.J. 1966); *In re* Pennell, 15 F. Supp. 743 (W.D. Pa. 1935); *In re* Carpenter, 5 F. Supp. 101 (M.D. Pa. 1933); 43 HARV. L. REV. 312 (1929). *But see* Echelbarger v. First Nat'l Bank, 211 Ind. 199, 5 N.E.2d 966 (1937); Smith v. Beneficial Fin. Co., 139 Ind. App. 653, 218 N.E.2d 921 (1966); Shipman v. Fitzpatrick, 350 Mo. 118, 164 S.W. 2d 912 (1942); Note, *The Effect of Bankruptcy on Estates by Entireties*, 89 U. PA. L. REV. 1073, 1075 (1941).

Under the textual theories suggesting that the property passes upon the bankruptcy of *H* and *W*, it makes no difference whether the petitions are filed simultaneously, so long as both estates are still open.

dication that creditors relied on one or the other company except insofar as debts were secured by assets of one company.[199]

In-depth analysis of those cases would not be particularly pertinent to the husband-wife situation since it is likely that under their guidelines, virtually all husband-wife cases would be consolidated. For many purposes, such as joint purchases, *H* and *W* are a single entity; and, unlike the case of distinct corporations, one cannot even say that separate activities or operations are usual or customary. Moreover, commingling of assets is commonplace in many families, and husbands and wives typically purchase items jointly which are only to be used by one spouse, or conversely, purchase items separately for joint use or the use of the nonpurchaser. The decision as to which member of the family purchases a given item may occasionally be dictated by convenience or estate planning purposes, but most couples never consider the question. Joint record keeping is commonplace and is encouraged by joint checking, savings, and brokerage accounts. Finally, creditors dealing with *H* and *W* ordinarily anticipate that bills will be paid out of family assets. Both societal and practical considerations dictate a great amount of joint activities in almost all marriages, and this seems to accord with the expectations of creditors. The frequent simultaneous filing of bankruptcy petitions by *H* and *W* is strong evidence of a practical recognition that their problems are joint in nature. The kind of separate operations which are considered "business as usual" for distinct corporate entities are simply unrealistic to expect from husbands and wives. Because of these factors, consolidation should be the rule rather than the exception in husband-wife bankruptcies.

To resist consolidation, creditors should be required to show that *H* and *W* kept their activities separate. Such a showing would require identification of the assets each spouse brought to the marriage, identification of the earnings or other income of each spouse, and tracing of those funds to personal expenditures by each spouse, expenditures required of each spouse to support the family, and family assets purchased with each spouse's funds. Such a process is precisely the kind which occurs in the case of two completely separate business entities.

The few decided cases which address the consolidation question are generally in accord with the view that husband-wife bankruptcies should ordinarily be consolidated, although none of the cases contains any analysis of the consolidation problem or the factors to consider.[200] The ma-

[199] *See* Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941); Soviero v. Franklin Nat'l Bank, 328 F.2d 446 (2d Cir. 1964); Maule Indus. v. Gerstel, 232 F.2d 294, 297 (5th Cir. 1956); Stone v. Eacho, 127 F.2d 284 (4th Cir.), *cert. denied*, 317 U.S. 635 (1942); *In re* Seatrade Corp., 255 F. Supp. 696 (S.D.N.Y.), *aff'd sub nom.* Chemical Bank N.Y. Trust Co. v Kheel, 369 F.2d 845 (2d Cir. 1966). When these factors are absent, however, consolidation should not be directed. *See In re* Flora Mir Candy Corp., 432 F.2d 1060 (2d Cir. 1970).

[200] *See* Roberts v. Henry V. Dick & Co., 275 F.2d 943 (4th Cir. 1960); *In re* Hallenbeck, 211 F. Supp. 604 (W.D. Va. 1962), *rev'd on other grounds*, 323 F.2d 566 (4th Cir. 1963); *In re* Reid, 198 F. Supp. 689, 691 (W.D. Va. 1961), *aff'd*, 304 F.2d 351 (4th Cir. 1962); *In re* Pennell, 15 F. Supp. 743 (W.D. Pa. 1935); *In re* Utz, 7 F. Supp. 612 (D. Md. 1934). *But cf. In re* Black, 145 F. Supp. 689, 692 (E.D. Va. 1956).

states, where there is certainly some factual and legal basis for the notion that there are three entities—*H*, *W*, and the community—the courts have rejected such a view and have held the community subsumed within *H*'s bankruptcy.[211] The conclusion therefore seems inescapable that the trustee of the consolidated estate can obtain only those property rights which separate trustees of *H* and *W* could have obtained.[212]

Those cases which have ordered consolidation because of the presence of property held in tenancy by the entirety have thus made two errors. First, by deciding the consolidation issue by the presence of entirety property, they have failed to focus on what factors should be considered in ordering consolidation. Second, they have permitted the trustee of a consolidated estate to do things that it is not clear that the trustees of the spouses' individual estates could have done.

2. Other Joint Interests—We have already noted that *H*'s interest in property held as a joint tenant or tenant in common can be reached by *H*'s trustee when he alone is bankrupt. In some cases, however, there are limitations on the trustee's powers to partition or sell jointly held property. The issue is whether the bankruptcy of both *H* and *W* changes this situation.

As in the case of entirety property, a strong argument can be made that the trustees of *H* and *W*, working together, can accomplish what the individual trustee of *H* cannot accomplish. Under state law, it is clear that the undivided interests in *H* and *W* pass to their trustees under section 70a(5), thus exhausting their rights in the property. If the two trustees wish to sell the property jointly, then *H* and *W* who have no retained interest in it can hardly object. This case is much stronger than in the entirety property situation, where it is at least arguable that no individual interest passes to the trustees of *H* and *W;* in the case of a joint tenancy or tenancy in common, the interest of each spouse passes to his or her trustee. In fact, since the respective interests of *H* and *W* pass to their trustees, they may have a strong interest in a joint sale in cases where the result will be to obtain a larger price and thereby discharge claims which would otherwise be nondischargeable under section 17a of the Act.

D. W's Discharge

There are two basic exceptions to a bankrupt's ability to have his debts discharged in bankruptcy. Section 14c of the Act denies a discharge to persons granted a discharge within the last six years or who have engaged in specified acts or practices, such as the commission of certain bankruptcy offenses, the destruction of books and records, the concealment, destruc-

[211] *See* Wikes v. Smith, 465 F.2d 1142, 1148 (9th Cir. 1972); Hannah v. Swift, 61 F.2d 307 (9th Cir. 1932); 4A W. COLLIER, BANKRUPTCY ¶ 70.17[11] (14th ed. 1971).

[212] *See* Roberts v. Henry V. Dick & Co., 275 F.2d 943, 944 (4th Cir. 1960); *cf. In re* Pennell, 15 F. Supp. 743 (W.D. Pa. 1935). *Contra,* Shipman v. Fitzpatrick, 350 Mo. 118, 164 S.W.2d 912 (1942); Farmington Prod. Credit Ass'n v. Estes, 504 S.W.2d 149 (Mo. App. 1973); Bienenfeld, *supra* note 104, at 114. In *In re* Reid, 198 F. Supp. 689, 691 (W.D. Va. 1961), *aff'd,* 304 F.2d 351 (4th Cir. 1962), the court assumed consolidation was necessary to reach entirety property. But the court relied on *Roberts,* which held to the contrary.

tion, or transfer of property to defraud creditors, or the failure to explain asset losses. Section 17a of the Act provides that even if the bankrupt receives a discharge, certain debts are nondischargeable. The most important of these nondischargeable debts are tax claims for the previous three years, liabilities for obtaining property or credit by false representations or false financial statement, alimony and support claims, and liabilities for certain willful and intentional torts. Although most of these grounds for denying the discharge of *W*, or for denying the dischargeability of certain of her debts, are not particularly pertinent to the husband-wife relationship, two of them warrant some specific attention.

1. Fraudulent Transfers—Section 14c(4) denies a discharge to a bankrupt who has fraudulently transferred property with the intent to hinder, delay, or defraud creditors. At the outset, it should be noted that this ground of nondischarge requires specific fraudulent intent, rather than presumed or implied intent. Assuming, however, that this requirement can be satisfied, two questions arise. First, can *W* be denied a discharge if she is the recipient of the fraudulent conveyance? Under the language of section 14c(4), which denies a discharge if "the bankrupt has . . . transferred, removed, destroyed, or concealed . . . any of his property" the answer is negative because *W* has not made a transfer, and the property is not hers. Second, can *W* be denied discharge if she has made a fraudulent transfer of her property to *H*, and the estates have been consolidated? All inter-spouse claims are eliminated in consolidation, so *W*'s trustee in a consolidated proceeding would not have a fraudulent conveyance claim against *H*. Nevertheless, it still appears that *W* can be denied discharge, since section 14c(4) is addressed to the making of the conveyance and not to whether the trustee can recover it. The purpose of consolidation is not to abrogate the claim of *W*'s trustee to recover property fraudulently conveyed. Rather, consolidation results from a recognition both of the joint nature of the estates and the resulting unfairness to creditors when such estates are kept separate. Consequently, *W* may still be denied a discharge on this ground.

2. False Representation or False Financial Statement—Section 14c(3) denies discharge to a person engaged in a business who makes, publishes, causes to make, or causes to publish "in any manner whatsoever" a materially false statement. The same language about making or publishing false financial statements is contained in section 17a(2) to deny the dischargeability of particular debts. Such broad language could embrace a wife who signed such a statement—but who did not otherwise participate in the underlying transaction—simply because her signature constituted part of the overall process by which the statement was "published." In such case, *W* may argue that she signed the statement merely because the creditor insisted, that she either signed on the faith of *H* or was not actually aware of the financial situation, and assumed that the statement was accurate. Neither section 14c(3) nor section 17a(2) appears, however, to require any intention to defraud or mislead. Therefore,

if these sections are taken literally, a wife who signs a false financial statement may find that she is barred from either a discharge or the dischargeability of a particular debt solely on the basis of *H*'s actions.

W may escape such a result in two ways. First, she may argue that because these sections are punitive in nature, they require a showing of fraudulent intent.[213] Alternatively, *W* may rely on the well-established doctrine that a creditor may not assert the false financial statement as a basis for denial of a discharge or the dischargeability of particular debts if the creditor has not relied on the statement.[214] Nonreliance can be established by evidence of the creditor's reliance on a course of dealing between the parties, his telling the debtor not to bother listing all his assets or debts, or the presence of sufficient information in the statement to warn the creditor of the debtor's precarious financial predicament.[215] By analogy, *W* may argue that, where she has had no role in negotiating the loan or filing out the financial statement, the creditor was relying on her, not for the accuracy of the statement, but simply as an additional obligor. To meet this defense, the creditor may have to demonstrate specific reliance on *W* as an attestor of the statement rather than as a signatory.

III. CONCLUSION

The Bankruptcy Act treats a husband and wife as it treats two strangers. When one spouse becomes a bankrupt, the other may be a claimant of the estate, a defendant in an action to recover the bankrupt's alleged property, or both. When bankruptcy doctrine interacts with various property law arrangements, the results range from the expected to the absurd. While one might have expected the Bankruptcy Commission to consider the unique problems present in the husband-wife situation, there are only a few provisions in the proposed statute designed to do away with some of the previous limitations on the rights of the trustee of one spouse to joint property. Thus, many of the difficulties noted in this article are likely to continue. Moreover, further complications will develop as the tendency of both spouses to be employed continues, and the difficulty of sorting out separate property when only one spouse is a bankrupt becomes more acute.

Perhaps the only conclusion is that although all potential bankrupts require counseling and prefiling analysis, the need is even more evident in the husband-wife situation. The lawyer must make some estimate of the likely sequence of events if one or both spouses file, and also may have to make an educated guess as to the willingness of trustees to litigate the kinds of questions discussed in this article. A mistake or miscalculation can be very costly indeed.

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[213] *See In re* Dye, 330 F. Supp. 895 (W.D. La. 1971); 1A W. COLLIER, BANKRUPTCY ¶ 17.16, at 1635 (14th ed. 1975); *cf.* INT. REV. CODE OF 1954, § 6013(e) (relieving innocent spouse of liability for additional amounts due on joint return).

[214] *See In re* Andrews, No. 71–1029–B (E.D. Mich. 1972) (referee's opinion); Sweet v. Ritter Fin. Co., 263 F. Supp. 540 (D. Va. 1967).

[215] *See, e.g.*, Shuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 STAN. L. REV. 735, 742–52 (1971).

Modernizing State Water Rights Laws: Some Suggestions for New Directions

*Ronald B. Robie**

> [L]aws and legal institutions should be reexamined in the light of contemporary water problems. Many water laws, both statutory and judge-made, have their origin in the 19th century and were fashioned to meet social needs of that era. Many of these laws do not work well in solving problems of today and the emerging problems of tomorrow. . . . In particular, there is need to modernize laws dealing with ground water.[1]
>
> I would like to see some willingness to discuss the need to modernize water codes to reflect the changing requirement and tastes of our accelerating society. Our state water laws have put us in good stead and I support them with all the vigor that I can bring to bear, but realistically I can recognize that our laws in this area have to adjust to the times just as they are adjusting in other areas.[2]

As these quotations indicate, significant voices have recently called for "modernization" of state water rights laws and institutions to meet contemporary problems and social needs. It is the purpose of this article to examine several areas of water rights laws which need modernization and to suggest some institutional changes to implement modernized legal concepts. The suggestions are neither exhaustive nor original but reflect the practical experience of a state water rights administrator.[3]

The most recent authoritative statement recognizing the need for water law reform is the 1973 report of the National Water Commission.[4] Relying upon several legal studies prepared for it,[5] the Commission recom-

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[1] NATIONAL WATER COMMISSION, NEW DIRECTIONS IN U.S. WATER POLICY 10 (1973) [hereinafter cited as NWC SUMMARY]. This publication contains the summary, conclusions and recommendations from the Commission's full final report, NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE (1973) [hereinafter cited as NWC FINAL REPORT].

[2] Statement of former Congressman Wayne Aspinall, Chairman of the House Committee on Interior and Insular Affairs, Third Western Interstate Water Conference, Water and Western Destiny 77 (1969).

[3] Some further thoughts of the author on this general topic are found in Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 ECOLOGY L.Q. 695 (1972). *See* Ohrenschall & Imhoff, *Water Law's Double Environment: How Water Law Doctrines Impede The Attainment of Environmental Enhancement Goals*, 5 LAND & WATER L. REV. 259 (1970).

[4] NWC FINAL REPORT, *supra* note 1.

[5] E. CLYDE & D. JENSEN, ADMINISTRATIVE ALLOCATION OF WATER (1971); C. CORKER, GROUNDWATER LAW, MANAGEMENT AND ADMINISTRATION (1971); C. DAVIS, RIPARIAN WATER LAW—A FUNCTIONAL ANALYSIS (1971); R. DEWSNUP, PUBLIC ACCESS RIGHTS IN WATERS AND SHORELANDS (1971); R. DEWSNUP, LEGAL PROTECTION OF INSTREAM WATER VALUES (1971); R. DEWSNUP & C. MEYERS, IMPROVEMENT OF STATE WATER RIGHT RECORDS (1971); W. HILLHOUSE & J. DEWEERTD, LEGAL DEVICES FOR ACCOMODATING WATER RESOURCES DEVELOPMENT AND ENVIRONMENTAL VALUES (1971); C. MEYERS, FUNCTIONAL ANALYSIS OF APPROPRIATION LAW (1971); C. MEYERS & R. POSNER, MARKET TRANSFERS OF WATER RIGHTS (1971); F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW (1971).

mended a number of specific changes in state laws designed to increase the extent to which environmental and social concerns are expressed in water rights administration. In addition to the Commission's recommendations, recent legislation in Florida[6] and Alaska[7] provides insight into possible institutional approaches to modernizing state water rights law.

Although a detailed discussion of the various water rights doctrines[8] is beyond the scope of this article, a brief summary of the major doctrines will help set the stage for discussion of and recommendations for changes in state water laws and water administration.

Public regulation of water rights is most extensive in the western United States where water is scarce.[9] For allocation of surface waters, most western states follow the doctrine of prior appropriation.[10] The principal function of the doctrine of appropriative rights is to ration a scarce resource and promote uses of water.[11] Under this doctrine, the first person to divert and subject water to beneficial use gains priority; hence, the familiar "first in time, first in right" rule.[12] Appropriative rights are not based upon the ownership of land adjacent to a stream,[13] but generally

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[6] FLA. STAT. ANN. §§ 373.013 *et seq.* (1974). This law is based upon the Model Water Code prepared by Professor Frank Maloney and others of the University of Florida School of Law. The Model Water Code with commentary is primarily designed for eastern riparian states and can be found in F. MALONEY, R. AUSNESS & J. MORRIS, A MODEL WATER CODE (1972) [hereinafter cited as MODEL CODE]. For a perceptive and critical analysis of the Model Code, see Trelease, *The Model Water Code, the Wise Administrator and the Goddam Bureaucrat,* 14 NATURAL RESOURCES J. 207 (1974).

[7] ALASKA STAT. §§ 46.15.030 *et seq.* (1971). Professor Frank J. Trelease of the University of Wyoming School of Law is the principal author of this statute, which has more detailed procedures than most state laws. It is primarily designed to be useful to western prior appropriation states. See F. TRELEASE, A WATER CODE FOR ALASKA (1962); Trelease, *Alaska's New Water Use Act,* 2 LAND & WATER L. REV. 1 (1967).

[8] For a comprehensive summary of state water rights laws, see A SUMMARY-DIGEST OF STATE WATER LAWS (R. Dewsnup & D. Jensen eds. 1973) [hereinafter cited as SUMMARY-DIGEST]. This summary includes a short bibliography of materials on each state's laws. W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971), is also very useful.

[9] H. THOMAS, WATER LAWS AND CONCEPTS 4–5 (U.S. Geological Survey Circular 629 (1970)). *See* C. MURRAY & E. REEVES, ESTIMATED USE OF WATER IN THE UNITED STATES IN 1970 (U.S. Geological Survey Circular 676 (1972)); C. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF APPROPRIATION LAW 4 (1971).

[10] Several western states reject riparian rights completely and recognize only appropriative rights. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882) (the so-called "Colorado doctrine"). These states include Alaska, Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, and Wyoming. F. TRELEASE, WATER LAW 11 (2d ed. 1974). California recognizes both appropriative and riparian rights. Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886). Other western states, while following the appropriative system, recognize certain old riparian rights. C. MEYERS, *supra* note 9, at 6; SUMMARY-DIGEST, *supra* note 8, at 5. Hawaii has rules based on old Hawaii customs. Of eastern states, only Mississippi follows the appropriation doctrine. *See* F. TRELEASE, *supra,* at 11–13, 332.

[11] C. MEYERS, *supra* note 9, at 13. But "[t]he procedures for obtaining a permit are not identical in all states . . . and a person seeking a permit must carefully check and follow the practices of the particular state." F. TRELEASE, WATER LAW 136 (2d ed. 1974).

[12] Irwin v. Phillips, 5 Cal. 140, 147 (1855); Coffin v. Left Hand Ditch Co., 6 Colo. 433 (1882). Both C. MEYERS, *supra* note 9, and SUMMARY-DIGEST, *supra* note 8, include summaries of the doctrine.

[13] Irwin v. Phillips, 5 Cal. 140, 146 (1855).

pass with the land of the owner.[14] Consistent with the basis of the doctrine, such rights can be lost by abandonment or forfeiture.[15] Although the doctrine was originally based on custom and common law,[16] in most western states it has been codified by statute.[17] Western states generally provide an administrative procedure for obtaining appropriative rights;[18] this administrative task is usually assigned to a "state engineer"[19] who keeps records of water use, receives and considers applications to appropriate, supervises the distribution of water through the use of "watermasters," and participates in judicial adjudication of water rights and enforcement of water right permits.[20] The application of the doctrine is remarkably uniform among western states.[21]

In the eastern United States, where water is more plentiful,[22] most states follow the riparian rights doctrine.[23] Under this doctrine, which is based on English law, water rights arise out of ownership of land adjacent to the stream or upon which the stream flows.[24] Under the rigid English rule, the owner of riparian land is entitled to have the stream flow in its natural state, and the owner can use the water only to the extent that it is passed on to the downstream user undiminished in quantity and quality.[25] In the United States, however, riparian owners are generally entitled to make reasonable use of the water even though the use results in some diminution in the quantity and quality of the water. Although riparian rights are generally private rights, certain public rights of navigation and fishing exist in navigable waters.[26]

Until the last few years, the application of the riparian doctrine in the eastern United States did not involve public regulation or administration[27] because supply usually exceeded demand. Recently, however, several eastern states have adopted comprehensive legislation regulating

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[14] W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 126 (1956).

[15] SUMMARY-DIGEST, *supra* note 8, at 41–42.

[16] C. MEYERS, *supra* note 9, at 4, 10.

[17] *See* SUMMARY-DIGEST, *supra* note 8; F. TRELEASE, WATER LAW 11 (2d ed. 1974).

[18] Among the western states, only Colorado and Hawaii do not provide a state agency for processing of applications to appropriate. SUMMARY-DIGEST, *supra* note 8, at 14; F. TRELEASE, WATER LAW 136 (2d ed. 1974). The Colorado judicial system is quite similar, however, to the California administrative system from a procedural standpoint.

[19] SUMMARY-DIGEST, *supra* note 8, at 14. California, however, utilizes a five member, full time board for this function. CAL. WATER CODE § 175 (West Supp. 1974).

[20] SUMMARY-DIGEST, *supra* note 8, at 14.

[21] C. MEYERS, *supra* note 9, at 4. E. CLYDE & D. JENSEN, *supra* note 5, discusses the early development of appropriative rights and the emphasis on economic development.

[22] A. PIPER, HAS THE UNITED STATES ENOUGH WATER 10–13 (U.S. Geological Survey Water Supply Paper 1797 (1965)).

[23] See C. DAVIS, *supra* note 5, for a good review of the riparian rights doctrine.

[24] SUMMARY-DIGEST, *supra* note 8 at 3.

[25] C. DAVIS, *supra* note 5, at 13–15.

[26] SUMMARY-DIGEST, *supra* note 8, at 4.

[27] *Id.* at 17.

water use without regulating traditional riparian rights.[28] In addition, many states have adopted permit systems.[29] Finally, the Model Water Code,[30] which was adopted in Florida, is an example of an attempt to provide a uniform permit system for riparian jurisdictions.

Although underground waters[31] are significant sources of water,[32] they have been given less attention by state legislatures than surface waters. The English rule was that the land owner owned all water within or under the land and could exercise "absolute" ownership of the water even to the extent of damaging others.[33] In the United States, the English rule was gradually abandoned and supplanted by a variety of other rules. In some states, for example, the appropriation doctrine is applied to ground water.[34] In others, the English doctrine has been modified to limit a landowner to reasonable use in recognition of the effect of one's use on other pumpers in a common basin.[35] California has adopted a rule that the right of each user is "correlative" to others in the basin.[36] Frequently, widely divergent rules apply to surface and ground waters in a single state, and in only a few states does the same administrative agency administer both kinds of rights.[37]

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[28] *Id.* New York is the best example.

[29] These states include: Delaware, Florida, Iowa, Kentucky, Maryland, Minnesota, New Jersey, North Carolina, and Wisconsin. F. TRELEASE, WATER LAW 12 (2d ed. 1974).

[30] MODEL CODE, *supra* note 6. The National Water Commission recommended establishment of a permit system for all riparian jurisdictions. NWC SUMMARY, *supra* note 1, at 123–24.

[31] In general, most underground water falls into one of two categories: water in underground streams and percolating waters. Waters are generally presumed to be percolating. SUMMARY-DIGEST, *supra* note 8 at 7. The former are governed in many states by surface water rules, while the latter are subject to unique groundwater rules. C. CORKER, *supra* note 5, provides a comprehensive summary of the physical and legal aspects of groundwater.

[32] In 1960, groundwater supplied a little less than one-fifth of the nation's water. Its greatest use is in the semi-arid West. U.S. GEOLOGICAL SURVEY, A PRIMER ON GROUNDWATER 22–23 (1963).

[33] Acton v. Blundell, 12 Mees. & W. 324, 152 Eng. Rep. 1223 (1943). *See* C. CORKER, *supra* note 5, at ii–v, 102–04. This rule is followed in Connecticut, Maine, Massachusetts, Mississippi, New Jersey, Ohio, Rhode Island, Texas, Vermont, and Wisconsin. F. TRELEASE, WATER LAW 12 (2d ed 1974).

[34] Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. F. TRELEASE, WATER LAW 13 (2d ed. 1974).

[35] These states include Alabama, Arizona, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, Tennessee, Virginia, and West Virginia. In some of these states, however, the decisions are not clear or are based on dicta. *Id.* at 12–13.

[36] Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 (1903). This rule is not applied to basins where there is an overdraft. In such cases, the doctrine of "mutual prescription" applies. Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17, 29 (1949), *cert. denied*, 339 U.S. 937 (1950). *See* W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 426–507 (1956); Kreiger & Banks, *Ground Water Basin Management*, 50 CALIF. L. REV. 56 (1962); Reis, *A Review and Revitalization: Concepts of Ground Water Production and Management—The California Experience*, 7 NATURAL RESOURCES J. 53 (1967). Arkansas and Nebraska also follow this doctrine. F. TRELEASE, WATER LAW 13 (2d ed. 1974).

[37] Alaska, Kansas, Montana, North Dakota, and Utah have laws which apply the same law and procedures to both surface streams and groundwaters. All are appropriation states. F. TRELEASE, WATER LAW 13, 475 (2d ed. 1974).

I. The Direction of Change

There is no question that old age alone does not necessarily sap a law of its vitality or effectiveness.[38] Underlying all of the comments in this article on modernizing the law is the notion that water is a public resource. Therefore, the traditional conception that a water right is a property right subject to minimal governmental regulation must be changed so that a right to use water is created by the state acting in the public interest to further broad social and economic objectives of the community as a whole.[39]

Two of the most important community objectives are effective management of the total water resource[40] and protection and enhancement of the environment.[41] Meeting these objectives will necessarily require changes in both the law and existing institutions. As an example, in a traditional water right proceeding in a prior appropriation state such as California,[42] applicant *A* may wish to divert or store water from a stream for a private purpose such as operating a farm or factory.[43] *A* has de-

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[38] Witness the experience with the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.* (1970), and the so-called "Refuse Act," 33 U.S.C. § 407 (1970), which became an extraordinarily viable water pollution tool nearly three-quarters of a century after its enactment. *See* United States v. Pennsylvania Indus. Chem. Co., 411 U.S. 655 (1973); Casto, *The Use of the Corps of Engineers Permit Authority as a Tool for Defending the Environment,* 11 Natural Resources J. 1 (1971).

[39] Commentators are not in agreement as to the extent to which modernization can be accomplished within the traditional framework of law and institutions. For example, Professor Trelease suggests gradual change:

> While some new procedures and remedies have been added, the law's response to the environmental movement has been the adaptation and extension of traditional doctrines and tools of water law that *always carried within them the seeds of such growth.* . . . [W]ater law has always moved, albeit haltingly, toward the goal of obtaining from the resource, the "maximum social satisfactions." . . . New values are ascribed to a variable, but the formula is essentially unchanged.

F. Trelease, Water Law 18–19 (2d ed. 1974) (emphasis added). But he nevertheless concludes that "western states . . . have much to do to put their water laws in order for today and for the future. Eastern states have further to go." *Id.*

The National Water Commission and the Model Water Code suggest less gradual change in laws and more fundamental changes in administration of water rights laws.

[40] On this point, the National Water Commission found that "certain legal reforms at the State level are necessary in order to realize optimum use of water resources in the public interest." NWC Summary, *supra* note 1, at 119. Many of the specific recommendations are discussed in the sections that follow.

[41] For example, the Environmental Quality Improvement Act of 1970 provides, in part, "[t]here is a national policy for the environment which provides for the enhancement of environmental quality. . . . The primary responsibility for implementing this policy rests with State and local governments." 42 U.S.C. §§ 4371 (b)(1), (2) (1970). *See* the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970), and various state environmental policy acts note 50 *infra.*

[42] The provisions of California law are found in Cal. Water Code §§ 1000 *et seq.* (West 1971), and the administrative regulations are found in 23 Cal. Admin. Code §§ 650 *et seq.* (1974).

[43] In California, eighty-five percent of the water used is for irrigation. Irrigation uses are significant in most of the western states. The term "private purpose" as used in this article includes municipal developments and is intended to differentiate these from "public uses" which are noneconomic uses such as fish and wildlife and recreation uses. Summary–Digest, *supra* note 8, at 19, comments that "water use for fish, wildlife, recreation, esthetic, scenic, and environmental values . . . are viewed as public, rather than private rights." *See* E. Clyde & D. Jensen, *supra* note 5, at 6 for a similar interpretation of private use.

signed his project to serve *his* needs, which means that only those uses to which he will put the water will be included in the project's proposed operation and the project will be designed to be the most economical means of meeting *A*'s needs.[44] After the application is filed and notice to the public is given, protests to the application can be made. Historically, virtually the only ground for protest was interference with prior vested rights,[45] and normally if terms and conditions could be devised to permit *A* to appropriate without interfering with the uses of the protestants, the permit would be issued. Occaionally, a state or local agency such as a fish and game department[46] would protest that the diversion would interfere with fish or wildlife resources. More often than not, however, these protests would receive little attention from state water administrators. Most statutes require an application to be in the public interest,[47] but this is traditionally a narrow concept. After the project is constructed, it would usually be up to *A*, in a private legal action, to protect his right against infringement by others. In short, the traditional role of states in allocating water resources has generally been quite passive.[48]

Modernization of water rights institutions will mean more extensive state involvement and *discretion* in the allocation of water. Before discussing specific areas of needed reform, three general principles which underlie these suggested changes will be analyzed.

A. Water Rights Laws Must Recognize Modern Public Needs and Social Goals

Foremost among the many public and social goals is the preservation and enhancement of the environment. In its report, the National Water

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[44] For example, special releases or bypasses of water for enhancement of fisheries may be desirable as part of the project but would have the effect of *reducing* the quantity of water available to the applicant and generally would not be proposed by the applicant.

[45] E. CLYDE & D. JENSEN, *supra* note 5, at 3–6.

[46] For example, in California, with regard to each water rights application, the State Department of Fish and Game is required to advise the State Water Resources Control Board of the "amounts of water required for the preservation and enhancement of fish and wildlife resources." CAL. WATER CODE § 1243 (West Supp. 1974).

[47] *E.g.*, ALASKA STAT. § 46.15.080 (1971); CAL. WATER CODE §§ 1253, 1255 (West 1971).

[48] One commentator has noted that "[m]uch of the prior law arose from cases involving conflicts between private persons, where the rights of one party were measured against the rights of the other, and judgments were rendered accordingly. The public interest often was not represented at all." SUMMARY-DIGEST, *supra* note 8, at 2.

A classic example of a narrow construction of public interest is the decision of the California Water Rights Board, over the objections of that state's Department of Fish and Game, to allow the damming of all the flows of the San Joaquin River by the U.S. Bureau of Reclamation and the consequent total destruction of the anadromous fishery. State Water Rights Board, Decision 935 (Jan. 2, 1959).

On the other hand, there are a few contrary examples. For example, an early decision of the California State Engineer denied an application to divert which would have impaired a stream, "[t]he most beneficial purpose . . . [of which was] that of a mountain brook to delight the eyes and ears of the summer home owners and visitors who spend from a few minutes to several months each during the vacation period. . . . This is strictly a recreational area and the value of the various uses of water from the standpoint of public interest must be gauged accordingly." California State Engineer (Division of Water Resources, Department of Public Works) Decisions 438 (Jan. 16, 1939).

Commission concluded that "[t]he people of the United States give far greater weight to environmental and esthetic values than they did when the nation was young and less settled."[49] These values include recognition of noneconomic uses of water such as maintenance of minimum flows for fishing, recreation, boating, and esthetic enjoyment.

Today, thirteen states have environmental quality acts[50] requiring environmental impact statements and analysis. Although the scope of such laws varies[51] and not all apply to activities of private persons,[52] most are based upon the National Environmental Policy Act of 1969[53] (NEPA), and many have been interpreted in a manner consistent with cases interpreting NEPA.[54]

Environmental impact analysis has been applied to the administration of water rights in several states. For example, in *Stempel v. Department of Water Resources*,[55] the Supreme Court of Washington interpreted that state's Environmental Policy Act[56] to require the controlling state agency "to consider the total environmental and ecological factors to the fullest in deciding major [water rights] matters."[57] The court held that "[e]nvironmental protection has thus become a mandate to every state and local agency and department"[58] and that the law requires that "presently

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[49] NWC SUMMARY, *supra* note 1, at 5.

[50] California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina, South Dakota, Virginia, Washington, and Wisconsin. Michigan, New Jersey, and Texas have *administratively* prescribed environmental quality policies and procedures. Arizona, Delaware, Nevada, Georgia, Nebraska, and New Jersey have special or limited environmental impact statement provisions. For detailed information, see U.S. COUNCIL ON ENVIRONMENTAL QUALITY, FIFTH ANNUAL REPORT, 421–26 (1974) [hereinafter cited as CEQ 1974 REPORT]. New Mexico's law was repealed in 1974. See Comment, *The Rise and Demise of the New Mexico Environmental Quality Act, "Little NEPA,"* 14 NATURAL RESOURCES J. 401 (1974).

[51] For analyses of the various laws see Hagman, *NEPA's Progeny Inhabit the States —Were the Genes Defective?*, URBAN L. ANN. 3 (1973); Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENV. L. RPTR. 50090 (1973).

[52] *See* CEQ 1974 REPORT, *supra* note 50, at 403–05.

[53] *Id.* at 402.

[54] *See* F. ANDERSON, NEPA IN THE COURTS (1973). California's Environmental Quality Act is the leading example. The principal case is Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 705 (1972). *See* Kane, *Friends of Mammoth: The Expanding Scope of Environmental Law in California*, 48 L.A. BAR ASS'N BULL. 81 (1973); Robie, *California's Environmental Quality Act: A Substantive Right to a Better Environment?*, 49 L.A. BAR ASS'N BULL. 17 (1973); Seneker, *The Legislative Response to Friends of Mammoth. Developers Chase the Will-of-the-Wisp*, 48 CAL. S.B.J. 126 (1973); Winters, *Environmentally Sensitive Land Use Regulation in California*, 10 SAN DIEGO L. REV. 693 (1973); Comment, *Aftermammoth: Friends of Mammoth and the Amended California Environmental Quality Act*, 3 ECOLOGY L.Q. 349 (1973); Note, 8 LAND & WATER L. REV. 565 (1973); Comment, *Friends of Mammoth: Vox Populi or Judicial Social Engineering?*, 1 PEPPERDINE L. REV. 137 (1973); Comment, *Friends of Mammoth and the California EQA*, U. PA. L. REV. 1404 (1973); Comment, *California Environmental Quality Act: The Legislative and Judicial Response to the Environmental Crisis*, 5 U.W.L.A.L. REV. 21 (1973).

[55] 82 Wash. 2d 109, 508 P.2d 166 (1973).

[56] WASH. REV. CODE ANN. § 43.21c (Supp. 1973). For a commentary on the Act, see Roe & Lean, *The State Environmental Policy Act of 1971 and its 1973 Amendments*, 49 WASH. L. REV. 509 (1974).

[57] 508 P.2d at 171.

[58] *Id.*

unquantified environmental amenities and values . . . be given appropriate consideration in decision making along with economic and technical considerations."[59] The grafting of such environmental concepts onto traditional state water rights laws represents a significant "modernization" of traditional water rights doctrines.

B. Water Rights Administration Must Involve Planning for the Total Water Resource

The basic mechanism for broadening the administrative mechanism is the preparation of an environmental impact statement.[60] In addition to requiring consideration of environmental factors, environmental impact statements usually require consideration of alternatives to the proposed diversion. For example, some alternatives to surface diversion from stream *X* may include: (a) no diversion at all due to increased conservation of existing supplies, elimination of waste, or reuse of reclaimed wastewater by the applicant; (b) diversion from stream *Y* instead or, perhaps a combination of diversion from both streams *X* and *Y*; or (c) use of groundwater instead of surface water, or use of both sources. Only if the state administrative agency can consider the total water resource picture and require implementation of a full range of alternatives to a proposed project can modern public goals be met.

C. The System Must Maximize Water Conservation

The water supplies of the nation are exhaustible.[61] In most areas of the country the "easy" water projects have been built, and newer projects

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[59] *Id.* at 172. Washington's Water Resources Act also provides environmental bases for water rights administration. *See* Comment, *Toward the Maximization of a Resource: The 1971 Washington Resources Act,* 9 GONZAGA L. REV. 759 (1974).

[60] The elements of such a statement under federal law are:

> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (1970). Unfortunately, the impact statement process has resulted in statements of varying quality and often, except for highly controversial projects, the statements do not provide the depth or scope of analysis which the text assumes. The federal Council on Environmental Quality has recognized that

> implementation of the state programs has moved slowly, and the visible benefits are still limited. . . . [T]he state impact statement process has great potential . . . . Integration of a state EIS process into a state's decision-making will take some time. Apart from the problem of resource constraints, many states have no tradition of providing detailed documentation and analysis to assist decision-making.

CEQ 1974 REPORT, *supra* note 50, at 402. The National Water Commission was also concerned about inadequate reports and recommended, for example, that an "environmental advocate" be created to assure Congress that environmental matters are brought to its attention before it acts on a project. Also, a Board of Review was proposed to examine each development agency's compliance with environmental requirements. NWC SUMMARY, *supra* note 1, at 107. Similar devices may be needed at the state level.

[61] *See* NWC SUMMARY, *supra* note 1, at 12–13. The Commission was concerned about planning for water use which is based upon a continuation of present policies

often involve greater environmental impact, such as accelerated reduction of natural stream systems for floating, boating, and fishing. The more that existing water supplies can be stretched through more efficient use, reuse, and reduction of waste, the more likely it will be that modern social and environmental goals can be met. As the National Water Commission pointed out:

> It is likely in the future that there will be increasing demand for non-commercial uses of water for recreation, esthetics, and preservation of the balance of nature. At the same time, however, there may be an increased demand for water-related services sold in the marketplace, such as electric power.[62] These demands are not altogether incompatible: Good planning and imaginative design often can allow for economic growth while preserving or even enhancing environmental quality. . . .[63]

As to the need for conservation, the Commission stated that "it is necessary to increase efficiency and reduce waste in a wide range of economic activity, for example in the production and consumption of energy, foodstuffs, and many consumer goods."[64]

II. Changes in Laws to Recognize Modern Values

A. Maintenance of Minimum Streamflows

In order to protect fishery resources, provide esthetic enjoyment, and offer recreational opportunities, it is often necessary to maintain minimum streamflows which are, in effect, appropriated in place for such purposes or withdrawn from appropriation by others. In this regard, the National Water Commission has noted that under the appropriation law of western states:

> Instream values are . . . heavily discounted; water has been diverted from streams to such an extent that instream values which would have been protected frequently have been impaired, and sometimes destroyed. The riparian system of the Eastern States does give some protection to instream values principally at the behest of those persons who own land along the stream or lake; thus the law has operated primarily in favor of private landowners with no public rights of either access or use.[65]

The principal drawback of existing laws with regard to appropriations in place is the requirement that the appropriated water be physically diverted and put to a "beneficial use."[66] To maintain a stream in its nat-

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which it said would possibly lead to "astronomical estimates of future water requirements." The Commission also pointed out that water "requirements" of society are not the same as water "demands" and are indeed much less than the "demands." *Id.* at 10, 12.

[62] Since the Commission's report was written, the need for water for energy-related uses such as power plant cooling and energy production has greatly accelerated. *See* G. Davis & L. Wood, Water Demands For Expanding Energy Development (U.S. Geological Survey Circular 703 (1974)).

[63] NWC Summary, *supra* note 1, at 7–8.

[64] *Id.* at 8.

[65] *Id.* at 63.

[66] R. Dewsnup, Legal Protection of Instream Water Values 1, 10 (1971). The general rule was followed in California Water Rights Board Decision 1030 (1961),

ural condition requires, however, that such diversion must be limited. A very few states have departed from the traditional rule and permit appropriation without any diversion.[67] In 1973, for example, the Colorado Legislature authorized the state (but not private parties) to appropriate minimum flows "to preserve the natural environment to a reasonable degree."[68] Some state water right laws provide a slightly different procedure and authorize the *withdrawal* of water from appropriation to satisfy instream uses. For example, the Model Water Code provides for establishment of the "minimum flow for a given watercourse [which] shall be the limit at which further withdrawals would be harmful to the sources and ecology of the area."[69] This law provides a type of "environ-

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but in a recent decision, the Board's successor, the State Water Reources Control Board, issued a water right license without a physical diversion for grazing of stock on pasture watered by overflow. The Board said:

> Perhaps the best definition of an appropriation of water is that expressed in *McDonald* v. *Bear River & Auburn Water & Mining Co.*, 13 Cal. 220, where the court said that an appropriation of water is "the intent to take, *accompanied by some open, physical demonstration of the intent*, and for some valuable use." (Emphasis added.) This language was quoted and relied upon in *Hunter* v. *U.S.*, 388 F. 2d 148, where the Ninth Circuit Court of Appeals held that a right to appropriate water had been acquired by watering livestock directly from natural springs by a person entitled to occupy the surrounding land and who had openly used the land for grazing cattle for many years.
>
> In *Tartar* v. *The Spring Creek Mining Co.*, 5 Cal. 395, the right of the owner of a mill to appropriate the flow of a stream which operated the mill wheel in the stream channel on public land as against a later upstream appropriator was recognized.
>
> Consistent with these court decisions, the Board has accepted and approved applications to appropriate water by the owners of land bordering a stream for the purpose of allowing livestock to drink directly from the stream without any artificial regulation of the flow. It has been assumed that ownership of the land with the consequent right of access to the water supplies the necessary possessory right and that the watering of cattle supplies the necessary "open, physical demonstration of intent" to entitle the owner to apply for an appropriation of the water.
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> There is no apparent difference in principle between watering livestock in the natural channel of a stream by the owner or rightful possessor of adjacent land and such person grazing livestock on the land which, as the result of natural overflow from the stream, produces the pasture on which the livestock feed. In both cases the appropriation is dependent upon a right to possess the land and any water incident to the land and in both cases there is a similar open, physical demonstration of intent to appropriate the water for a valuable use.

Calif. State Water Resources Control Bd., Order WR–74–25 (1974).

[67] *See, e.g., In re* Donald E. Bevan, Department of Ecology, Washington Pollution Control Hearinngs Board (June 6, 1962).

[68] COLO. REV. STAT. ANN. § 148–121–3(7) (Supp. 1973). This statute was designed to reverse the rule of Colorado River Water Conservation District v. Rocky Mountain Power Co., 158 Colo. 331, 406 P.2d 798 (1965). For an analysis of Colorado water law see Carlson, *Report to Governor John A. Love on Certain Colorado Water Law Problems*, 50 DENVER L.J. 293 (1973).

[69] MODEL CODE, *supra* note 6, § 107. The earliest statutory reservation was in Oregon in 1915. See F. TRELEASE, WATER LAW 61 (2d ed. 1974) for a discussion of that and subsequent Oregon enactments. The National Water Commission recommended enactment of such statutes. The Commission said:

> Public rights should be secured through State Legislation authorizing administrative withdrawal or public reservation of sufficient unappropriated water needed for minimum streamflows in order to maintain scenic values, water quality, fishery resources, and the natural stream environment in those watercourses, or parts thereof, that have primary value for these purposes.

NWC SUMMARY, *supra* note 1, at 120–22.

mental zoning" through such reservations because permits issued in such a jurisdiction must preserve the minimum flows.[70]

Still other states have enacted wild and scenic rivers statutes which limit the range of uses to which a stream may be put. For example, on streams so designated under California law,

> no dam, reservoir, or other water impoundment facility, other than temporary flood storage facilities . . . shall be constructed on or directly affecting any [wild and scenic] river . . . nor shall any water diversion facility be constructed on any such river unless and until the secretary determines that such facility is needed to supply domestic water to the residents of the county or counties through which the river flows, and unless and until the secretary determines that facility will not adversely affect its freeflowing condition or natural character.[71]

These statutes are directed toward dams or other structures on the streams and do not always insure minimum flows since diversions may still be made by gravity diversion or pumping.

Some states (such as California) authorize retention of water in the source for purposes of fishery protection and recreation on a case-by-case basis when considering new applications to appropriate.[72] This process is less desirable than that of the Model Water Code for two reasons. First, the Code's reservation device provides advance notice of a contemplated appropriation, while the case-by-case procedure does not allow a determination until a project has been fully planned and a specific applicant is before the appropriate administrative agency. Second, the extent of the reservation on a case-by-case basis will necessarily be determined by weighing the utility of the specific project against the value of the instream use instead of basing such reservation on general public policy. It is difficult for noneconomic uses based on such policy to be broadly considered.

Another California statute provides a different approach:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.[73]

In a recent opinion, the California Attorney General[74] interpreted this statute literally. Thus, every appropriation is subject to a condition that sufficient water to meet the needs of existing or *future* fisheries must be

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[70] MODEL CODE, *supra* note 6, § 107(6). See also WASH. REV. CODE ANN. § 90.54.020(3) (Supp. 1973).

[71] CAL. PUB. RES. CODE § 5093.55 (West 1973).

[72] CAL. WATER CODE §§ 1243, 1243.5 (West 1974). It is important to note that reservoir recreation is not the same as instream uses. Hence, the conclusion of the National Water Commission that "[t]he Nation should match its program of reservoir construction with a program of stream protection for the purpose of obtaining an effective mix of water-based recreational opportunity." NWC SUMMARY, *supra* note 1, at 100.

[73] CAL. FISH & GAME CODE § 5937 (West 1971).

[74] 57 OP. CAL. ATT'Y GEN. 577 (1974).

reserved for that purpose.[75] Although useful, this provision provides no definite standard and may be difficult to enforce after diversions have been made and costly investments undertaken. Moreover, recapture of water under this provision would not be easy.

Many states now recognize, under a variety of theories, the right of the public to float and boat upon most surface waters, including those in which the title to the underlying bed is privately owned.[76] To grant such public use rights without giving the public the ability to retain the water in place would render the new public rights useless. As a general rule, any imposition of a reservation of water will not affect existing rights. In streams already highly developed, there may be little, if any, unappropriated water left to reserve. Thus, efforts must be made to make such reservations through purchase or condemnation of existing rights.

The reservation concept necessarily concerns the natural flow in a stream (including upstream return flows). Especially in the West, many streams virtually dry up in the late summer and fall and even reservation of all the water in the stream may be insufficient to maintain fishery resources or to permit recreation. To overcome this difficulty in California, the State Water Resources Control Board, which administers a permit program for appropriation of surface waters, has required an applicant seeking a permit to divert and store water to release a portion of the *stored water* during certain times of the year to protect and enhance instream uses when natural flows are low.[77] The required release of the water, which would otherwise be used by the applicant for his own purposes, is a reasonable condition for the privilege of diverting a public resource.[78]

In a recent California water rights adjudication,[79] the federal government filed claims to minimum flows for instream uses based upon the

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[75] At the writing of this article, the California State Water Resources Control Board has proposed including this statute as a term in each water rights permit issued. Proposed 23 CAL. ADMIN. CODE § 762.5 (1974).

[76] People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). *See* R. DEWSNUP, PUBLIC ACCESS RIGHTS IN WATERS AND SHORELANDS (1971); F. TRELEASE, WATER LAW 402 (2d ed. 1974); Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams,* 7 NATURAL RESOURCES J. 1 (1967). The National Water Commission supported these developments and recommended that "[s]tate legislatures can and should liberalize their tests of navigability for purposes of the public trust, thus bringing more waters (as distinguished from shorelands) within the ambit of public use." NWC SUMMARY, *supra* note 1, at 122.

[77] For examples of exercise of this authority, see California Water Rights Board Decision 1400 (1972); California Water Rights Board Decision 1379 (1971); California Water Rights Board Decision 1030 (1961).

[78] *See* Comment, *Allocation of Water From Federal Reclamation Projects: Can The State Decide?,* 4 ECOLOGY L.Q. 343 (1974); Note, *The Delta Water Rights Decision,* 2 ECOLOGY L.Q. 733 (1972).

[79] Claim No. 1 of United States Forest Service *in re* Determination of the Rights of the Various Claimants to the Water of Scott River Stream System in Siskiyou County, California, filed January 3, 1975. In its claim, the federal government stated:

> The United States also claims all water necessary to maintain natural unregulated lake levels and an undetermined amount of instream flow for non-

federal "reservation doctrine.[80] Traditionally, such claims have been limited to water for consumptive uses. The recognition of federal reserved rights to instream flows will be particularly significant since these rights are superior to state water rights created after the date of the federal reservation.[81] Especially in some water-short western states, it is possible that such claims may be exercised by the displacement of existing state created water rights for consumptive uses.

B. Provision for Public Access to Water Resources

It is important that in appropriate cases the public have access to both waters reserved in place for instream uses and to waters appropriated by others. In the latter case, this amounts to multiple use of the water resource and meets modern social needs for recreation. States have the authority to require public access to appropriated water and should provide such access to water which is located on private lands.

In California, for example, the legislature has acted to protect the public right to access by providing:

> The owner of a dam shall accord to the public for the purpose of fishing, the right to access to the waters impounded by the dam during the open season for the taking of fish in such stream or river, subject to the regulations of the [Fish and Game] Commission.[82]

In addition to situations covered by the above statute, the California State Water Resources Control Board has required public access to *offstream* recreational reservoirs created in subdivisions.[83] The objective of provid-

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consumptive uses such as recreation; the development, conservation and management of resident migratory wildlife and wildlife resources, (the term wildlife and wildlife resources includes birds, fishes, mammals, shellfish, crustacean and other aquatic organisms and all types of insects and aquatic and riparian vegetation upon which wildlife is dependent); wilderness preservation; ecosystem maintenance; preservation of educational, historic, scientific, scenic, aesthetic and other similar public values; fish culture conservation, and habitat protection and management.

[80] Arizona v. California, 373 U.S. 546 (1963).

> The reserved rights doctrine as it applies to withdrawals of land for purposes other than Indian Reservations . . . permits the creation of a water right by mere reservation of land for Federal use and without contemporaneous initiation of a water use. Many reservations were made between 70 and 100 years ago, but water has yet to be diverted on the reserved land . . . . Minimum flows may be established using unappropriated water to protect instream values in waters on Federal lands.

NWC SUMMARY, *supra* note 1, at 159. The National Water Commission recommended modification of the doctrine. *Id.* at 159–63.

[81] NWC SUMMARY, *supra* note 1, at 159. A recent case recognized a reserved right for instream uses. Soderman v. Kackley, Case No. 1329 (Caribou County, Idaho Dist. Ct., Jan 8, 1975).

[82] CAL. FISH & GAME CODE § 5943 (West 1973).

[83] California Water Rights Board Decision 1378 (1971). Although the requirement of access in this particular case was reversed for lack of substantial evidence upon judicial review, the Californiia Court of Appeals upheld the authority of the Board to impose such conditions when justified. Bank of America v. State Water Resources Control Bd., 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974). *See* 23 CAL. ADMIN. CODE 657.1 (1974), which limits the quantity of water which can be appropriated for a subdivision in the absence of public access. With regard to such conditions, the National Water Commission concluded that it did

> not believe that every private water development should necessarily be made available for public recreation use. Many privately owned water facilities will

ing access can be acomplished independent of the provisions of water rights law. California law, for example, requires that new subdivisions provide access to natural bodies of water to which they are adjacent.[84]

C. The Concept of the "Public Interest" Must be Broadened

Generally, the process of considering an application to appropriate water includes determination by the state water rights administrator that there is unappropriated water available and the proposed use is reasonable and beneficial and an inquiry into what condition or terms should be placed upon the diversion in the public interest. Many state statutes provide that the administrator may not approve an application unless it is in the public interest or must deny an application not in the public interest.[85]

The enactment of state environmental quality statutes (all of which have been passed since 1970) has broadened the law applicable to defining the public interest in many states. In states without such laws, similar provisions should be inserted into the state's water rights laws. Once the scope of the public interest is broadened, the key to implementation of the expanded public interest is active use of administrative discretion in implementing new policies and programs. Specific examples of areas in which state water rights administrators should move are discussed below. To date, most public interest statutes have not been broadly interpreted, and the reaction of state water rights administrators to environmental policy acts has, at times, been hostile.[86]

D. States Should Develop a Broadly Based Water Resources Plan to Guide in the Allocation of Water Resources

Traditionally, an application for a water right has involved a project developed primarily by the applicant and considered by the administrative

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> have only nominal value for public recreation purposes or there may be adequate alternatives available. However, when privately owned water developments have exceptional recreational potential, a strong case can be made for provision of public access for recreation or for public purchase and development for that purpose.

NWC SUMMARY, *supra* note 1, at 120. The Commission made several specific recommendations following this conclusion. *Id.* at 122.

[84] CAL. BUS. & PROF. CODE §§ 11610.5, 11610.7 (West 1974).

[85] The California statutes are as follows:

§ 1253.

The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.

§ 1255.

The board shall reject an application when in its judgment the proposed application would not best conserve the public interest. CAL. WATER CODE §§ 1253, 1255 (West 1974). *See* Bank of America v. State Water Resources Control Bd., 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974); Johnson Rancho County Water Dist. v. State Water Rights Bd., 235 Cal. App. 2d 863, 45 Cal. Rptr. 589 (1965); MODEL CODE, *supra* note 6, at 179. The National Water Commission recognized that "not all water decisions should or will be made solely upon economic grounds. The ultimate test must be the public interest." NWC SUMMARY, *supra* note 1, at 9.

[86] Comment, *The Rise and Demise of the New Mexico Environmental Quality Act, "Little NEPA,"* 14 NATURAL RESOURCES J .401, 405 (1974).

agency without particular reference to other sources of water available to the applicant or to broad considerations of state policy, although some exceptions can be found. For example, in the late 1950's, California's Department of Water Resources developed a bold water plan[87] designed "to guide and coordinate the planning and construction by all agencies of works required for the control, protection, conservation, and distribution of California water resources for the benefit of all areas of the State and for all beneficial purposes."[88] The plan included an evaluation of the water supply available to California and the requirements of each area of the state, including a description of areas where water was plentiful and where it was deficient. The plan also suggested the manner in which waters of the state should be distributed. Unfortunately, at the time the plan was created, it defined the objectives of future development of water resources in the state "[i]n terms of *potential physical accomplishments,* which may be used to measure the merits of *projects proposed for construction by an agency.*"[89] Little consideration was given to conservation, reuse, or other water management concepts in which structural components are only incidental.

The California Legislature adopted the plan and required the State Water Resources Control Board, in acting on applications to appropriate water, to consider it.[90] More than a decade after adoption of the plan, the law was broadened to provide that water quality control plans established as part of the state's water quality control program[91] would become part of the California Water Plan.[92] Because the basic plan was prepared by the Department of Water Resources but the water quality plans are within the jurisdiction of another state agency, the State Water Resources Control Board, California is in the curious situation of having a plan jointly prepared by two agencies pursuant to different statutory requirements. Thus, the water quality provisions have not been integrated into the original plan, which has proven to be more a giant map of potential water development projects than a comprehensive program of water conservation and development.

As flawed as the California experience may be, the establishment of a planning process and the development of an overall plan to guide the state water rights administrator in the allocation of water is essential. The Model Water Code, for example, provides for the development of a

[87] CALIFORNIA DEP'T OF WATER RESOURCES, THE CALIFORNIA WATER PLAN (Bulletin 3) (1957).

[88] *Id.* at vi.

[89] *Id.* (emphasis supplied).

[90] CAL. WATER CODE §§1004–07 (West 1971) (adoption by legislature); *id.* § 1256 (West 1974) (consideration by State Water Resources Control Board). *See* Johnson Rancho County Water Dist. v. State Water Rights Bd., 235 Cal. App. 2d 863, 45 Cal. Rptr. 589 (1965).

[91] These plans consist of a designation of beneficial uses of specific waters, water quality objectives to protect these uses, and a plan of implementation. CAL. WATER CODE §§ 13240–47, 13170 (West 1974).

[92] *Id.* § 13141 (West 1971).

"State Water Use Plan" which includes determination of minimum streamflows and lake levels, provisions for the attainment of both adequate water quality and maximum beneficial use of water for purposes of irrigation, domestic, municipal, and industrial uses, as well as uses of water for protection of the environment.[93] Although several other state laws provide for comprehensive planning,[94] the Model Water Code provisions synthesize the best features of these laws and optimize the plan's usefulness since the agency administering water rights also develops the plan. Such a planning program should be established in every state.

E. There Should be a Single Legal System for Surface and Underground Water

Because the legal systems governing surface waters and groundwater have developed independently of each other in most jurisdictions, most states have different legal principles for each kind of water.[95] The exceptions include several prior appropriation states which have adopted the prior appropriation doctrine for groundwater.[96] Among riparian states, Florida, for example, has enacted the Model Water Code.[97]

The continued separate treatment of surface water and groundwater is illogical and prevents the implementation by the state administrative agency of a water plan incorporating all possible sources of available water supply. Commenting on this problem, a consultant to the National Water Commission noted:

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[93] MODEL CODE, *supra* note 6, at 9 .

[94] States utilizing comprehensive planning include Texas, Connecticut, Delaware, Kansas, and Oregon. *See* commentary in Model Water Code. MODEL CODE, *supra* note 6, at 103–10. The State Water Use Plan in the Model Code provides as follows:

> (1) The state board shall proceed as rapidly as possible to study existing resources of the state; means and methods of conserving and augmenting such water resources; existing and contemplated needs and uses of water for protection of the environment, procreation of fish and wildlife, recreational use, improvement of water quality, irrigation, mining, power development, and domestic, municipal, and industrial uses, and all other related subjects including drainage, reclamation, flood-plain zoning, and selection of reservoir sites.
>
> The state board shall progressively formulate an integrated, coordinated program for the use and development of the waters of the state based on the above studies. This program, with such amendments, supplements, and additions as may be necessary later, shall be known as the State Water Use Plan.
>
> (2) The plan shall be directed toward the achievement of the following objectives:
>
> (a) the attainment of maximum reasonable-beneficial use of water for such purposes as those referred to in subsection (1) above;
>
> (b) the proper economic development of the waters of the state;
>
> (c) the control of the waters of the state for such public purposes as navigation, drainage, sanitation, and flood control;
>
> (d) the attainment of adequate water quality as expressed in the state water quality plan; and
>
> (e) the implementation of water resources policies expressed in section 1.02 of this code.

Id. at 103–04.

[95] *See* notes 34–37 *supra.*

[96] See note 37 *supra.*

[97] The Code provides a single integrated system of allocating both surface and groundwater.

> Goals cannot be markedly different for groundwater and surface water For most purposes, water is interchangeable regardless of source. Most human consumption of water, and products produced by water, takes place above ground. . . . Surface water and groundwater may be diverted from the same source, except for a slight difference in the chosen point of diversion. *Physical, and not legal* considerations, should dictate choice of the point of diversion. When physical consideration must be subordinated, the law is wrong and should be modified.[98]

The National Water Commission has recommended a single legal system for surface water and groundwater[99] and such a procedure is provided for in the Model Water Code.[100] The Commission, however, recognized "that the states have different legal systems and doctrines, and that *no single uniform statute will serve all states equally well.*"[101] It is not necessary, for example, that all states adopt the prior appropriation doctrine for all its waters but rather that each have a single uniform procedure so that both surface water and groundwater can be considered in administering the water rights system.

F. A Full Environmental Analysis Should be Part of Every State's Water Rights Law

The environmental impact statement is an extremely useful procedural method of bringing before the state administrative agency all the environmental problems of a proposed water diversion. Most importantly, a proper environmental impact statement requires a full discussion of alternatives to the proposed action, including the alternative of not undertaking the activity.[102] As to a proposed surface diversion, for example, an environmental impact statement should include a discussion of such alternatives as water conservation by the applicant, water reclamation, or use of groundwater. A requirement in each state water rights law or in a "little NEPA" that such matters be considered in acting upon applications to appropriate water would dramatically broaden the scope of the traditional water rights administrative proceeding. As a result, the state water right agency would no longer consider only the private property aspects of the application nor would the agency be limited to consideration of the applicant's project in a vacuum.

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[98] C. CORKER, *supra* note 5, at xxi–xxii (emphasis added).

[99] The Commission recommends that

> [s]tate laws should recognize and take account of the substantial interrelation of surface water and groundwater. Rights in both sources of supply should be integrated, and uses should be administered and managed conjunctively. There should not be separate codifications of surface water law and groundwater; the law of waters should be a single, integrated body of jurisprudence.

NWC SUMMARY, *supra* note 1, at 109.

[100] MODEL CODE, *supra* note 6 at 5, 23.

[101] NWC SUMMARY, *supra* note 1, at 119 (emphasis added).

[102] For a discussion of the importance of this concept, see F. ANDERSON, NEPA IN THE COURTS 217–23 (1973).

G. Water Rights Should be Sufficiently Flexible to Provide for Changing Public Values and Conditions

It is readily acknowledged that early water rights laws which did not provide for consideration of environmental values were reflections of different social values and public concerns at the time.[103] Because society's values constantly change, it is likely that future social values and public concerns may be different from those of today.

One of the principal barriers to reserving water for instream uses for fish and wildlife is the fact that uses in existence for many years have ripened into vested rights and instream reservations may be made only by providing compensation for those rights. It is important to avoid a recurrence of this condition in the future.

A number of different devices can be utilized by states to prevent this problem. The Model Water Code, for example, seeks to solve the problem by providing for limited duration permits.[104] Under the Code, the basic permit duration is twenty years; in the case of a municipality or other government body where a longer period is required to provide for the retirement of bonds for the construction of water works or waste disposal facilities, a permit duration of up to fifty years is authorized.[105] The concept of limited duration permits has also been incorporated in the Federal Power Act.[106] Such permits can, of course, be renewed.[107]

California law establishes several different procedures to provide flexibility. The first is the concept of "reservation of jurisdiction,"[108] which is most often utilized when it is necessary to make further studies to determine physical facts upon which final permit terms and conditions can be based. An example of this is providing for additional studies to deter-

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[103] NWC SUMMARY, *supra* note 1, at 5 ,119.

[104] MODEL CODE, *supra* note 6, at 189–91. The Model Code also provides broad administrative discretion to adjust rights among users in times of shortage. *Id.* at 26–28. This feature is particularly objectionable to Professor Trelease. Trelease, *supra* note 6, at 211–17.

[105] MODEL CODE, *supra* note 6, at 189–90.

[106] 16 U.S.C. § 799 (1970) (FPA permit duration is fifty years).

[107] MODEL CODE, *supra* note 6, at 191; 16 U.S.C. §§ 807(b), 808 (1970).

[108] CAL. WATER CODE § 1394 (West 1971), provides as follows:

> The board may reserve jurisdiction in whole or in part to amend, revise, supplement, or delete terms and conditions in a permit . . .
>
> (a) If the board finds that sufficient information is not available to finally determine the terms and conditions which will reasonably protect vested rights without resulting in waste of water or which will best develop, conserve, and utilize in the public interest the water sought to be appropriated, and that a period of actual operation will be necessary in order to secure the required information.
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> . . . .
>
> Jurisdiction shall be reserved under this section for no longer period of time than the board finds to be reasonably necessary, and in no case shall such jurisdiction be exercised after the issuance of the license. Such reserved jurisdiction shall be exercised only after notice to the parties and a hearing. The board's decision or order reserving jurisdiction and the board's decision or order in the exercise of its reserved jurisdiction shall both be subject to reconsideration by the board and judicial review as authorized in this part.

mine the minimum flows necessary to protect and enhance fish and wildlife.[109]

Several California statutes also authorize modification of permit terms after use is commenced to prevent waste or unreasonable use or method of use of water,[110] or to meet later established water quality objectives[111] or minimum flow requirements for fish.[112] These provisions, while useful in clear cut cases, may still be difficult to implement when subsequent modification results in changed permit terms which significantly reduce the amount of water available to an existing user. A preferred method would be to utilize a combination of both the California modification provisions and limited duration permits.

III. Suggested Changes in Administrative Procedures

A. Administrative Procedures Should Provide for Optimum Allocation of the Total Water Resource

Assuming state water law requires complete analysis of alternatives and environmental impacts and incorporates a general requirement

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[109] The National Water Commission emphasized the need for better data:

> Much of the controversy over fish and wildlife problems associated with proposed water projects and water-related activities stems from insufficient knowledge about the prospects for damage from such projects and activities. Too little is known. Fish and wildlife interests are understandably reluctant to endorse project plans when there is doubt about the impact of the proposed project upon fish and wildlife values. Where such doubts exist, it is the natural inclination of fish and wildlife interests to resolve the uncertainties in favor of opposition to projects. An obvious way to reduce doubts and permit everyone to proceed with greater assurance and certainty is to gain additional knowledge. This can best be done through carefully designed research into the impact of projects and water-related activities upon fish and wildlife values.

NWC Summary, *supra* note 1, at 102. The author's experience confirms the Commission's observation. For an example of reservation of jurisdiction, see California State Water Resources Control Bd. Decision 1400 (1972).

[110] Cal. Water Code § 100 (West 1971) is implemented by the State Water Resources Control Board by the following standard permit term:

> All rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable methods of use, or unreasonable method of diversion of said water.
>
> This continuing authority of the board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

23 Cal. Admin. Code § 761(a) (1974).

[111] Cal. Water Code § 1258 (West 1974).

[112] Cal. Fish & Game Code § 5937 (West 1971).

that terms and conditions be placed on permits to further the public interest, the agency administering water rights must then creatively, and with broad discretion, exercise this authority to produce the optimum use of the total water resource. An example of optimum use is the conjunctive use of surface water and groundwater. Consider the following hypothetical example. An applicant for a water right permit proposes a large dam which will inundate significant instream recreational and fishery sources, a project typical of those located on many western streams. With an irregular flow pattern in the stream, a large reservoir is needed to provide a relatively small safe yield.[113] It is not unusual to require a multiple purpose reservoir with a capacity of two million acre-feet to provide a safe yield of a mere 200,000 acre-feet. This means that, although in many years the full yield may be available from the stream, carryover storage from wet to dry years must be undertaken to assure the full yield if several dry years occur consecutively.

Assuming such a proposed reservoir with a capacity ten times larger than the annual yield, what possible alternatives are there to the construction of a project of this size? One alternative would be to obtain the necessary 200,000 acre-feet from a smaller dam with a groundwater source being used as the rest of the regulation needed to carry over dry periods. In areas where such groundwater supplies would be used, the groundwater reservoir could be replenished by the spreading of excess surface waters in those years when they are abundant. Of course, economics and other factors are involved, but these circumstances do exist in some areas of the United States today, although not as the result of a controlled management system. The dam owner, for example, may be the federal government who is serving one set of customers, while the groundwater users may be local farmers. The recharge may or may not be a planned effort.[114]

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[113] The safe yield is the maximum dependable draft which can be made continuously upon a source of water supply (surface water or groundwater) during a period of years during which the probable driest period or period of greatest deficiency in water supply is likely to occur. Dependability is relative and is a function of storage provided and drought probability. AMERICAN SOCIETY OF CIVIL ENGINEERS, NOMENCLATURE FOR HYDRAULICS 494–95 (1962).

[114] In a partial effort to coordinate a new surface diversion with groundwater uses, the California State Water Resources Control Board limited the use of new supplies in a specific case to the existing service area of the applicant until groundwater overdrafts were eliminated. State Water Resources Control Bd. Decision 1407 (1972).

California has had good experience with groundwater management districts. The National Water Commission recommended that other states undertake similar and more comprehensive efforts. The Commission recommended that the states

> adopt legislation authorizing the establishment of water management agencies with powers to manage surface water and groundwater supplies conjunctively; to issue revenue bonds and collect pump taxes and diversion charges; to buy and sell water and water rights and real property necessary for recharge programs; to store water in aquifers; to create salt water barriers and reclaim and retreat water; to extract water; to sue in its own name and as representatives of its members for the protection of the aquifers from damage, and to be sued for damages caused by its operations, such as surface subsidence.

NWC SUMMARY, *supra* note 1, at 110. The Model Water Code authorizes the formation of management districts with groundwater management authority. MODEL CODE *supra* note 6, at 15–23, 37–38.

To implement a comprehensive management program as part of a water rights system, the state water rights agency might approve an application for only a portion of the storage requested and authorize only the construction of a small dam which would maximize the preservation of in-stream values. The agency would then issue a permit for the groundwater supplies which would be drawn upon during times of surface water shortage and replenished in years of high stream flow. Such an administrative order would be possible *only* if the state agency has jurisdiction over both surface waters and groundwaters and would be very difficult to implement unless the same legal principles applied to both surface water and groundwater diversions.

In the hypothetical example, the state water rights agency would have to pass upon the reliability of criteria utilized by the applicant to develop the safe yield.[115] If, for example, the criteria used were based upon an unreasonably conservative period of dry years, a large dam would result. Decisions as to the criteria for determining safe yield and reservoir operations have traditionally been made by the applicant and are not generally reviewed by the state water rights administrator, but there is no logical reason for this practice. The state water rights administrator should be willing to exercise his authority to examine and evaluate such project assumptions for consistency with state policy and competing demands on the water resource.[116]

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[115] In reality, this puts the water rights administrator in the middle of the project planning process. Unless state laws clearly provide mechanisms for the process, conflict between project developers and water rights administrators can result. For an early recognition of this fact vis-a-vis the California State Water Project, *see* UNIVERSITY OF CALIFORNIA WATER RESOURCES CENTER, WATER RESOURCES ECONOMIC CONFERENCE 28 (1963).

[116] To exercise such authority most effectively, the legislature should provide policy guidance to the state water rights administrator. Professor Teclaff has noted, in studies of water rights systems around the world, a trend toward extending administrative conrol over all uses and particularly

> a tendency to set flexible limits to such control. . . . In these instances, a general framework is provided within which the administration is left a great deal of latitude to fit individual interests into the larger scheme and to coordinate individual needs with the public or general interest. . . .
>
> With the extension of management to almost all waters and with the tightening of administrative control over the exercise of water rights in the name of the public interest, the role of the administration itself is changing.
>
> . . . .
>
> The public is being associated more fully in all stages of water resources management, to the extent of being the final arbiter of plans and projects. Counterbalancing this public involvement in the administrative process, however, the administration is given more discretion in controlling water use by individuals and a wider control over all types of waters.

Teclaff, *The Influence of Recent Trends in Water Legislation on the Structure and Functions of Water Administration,* 9 LAND & WATER L. REV. 15–16, 18–19 (1974). The National Water Commission concurs in this trend and supports the author's suggestion with the recommendation that

> [w]here surface and ground water supplies are interrelated and where it is hydrologically indicated, maximum use of the combined resource should be accomplished by laws and regulations authorizing *or requiring users to substitute one source of supply for the other.*

NWC SUMMARY, *supra* note 1, at 109 (emphasis added).

B. The Water Rights Administrator Must Assure that the Water Appropriated is Used to its Maximum Efficiency

One of the traditional weaknesses of water rights determinations, even where there is a permit system, is the lack of consideration of water conservation and maximization of user efficiency. Several legal devices are useful in this regard. In some states there is an administrative[117] or statutory provision[118] setting forth the "duty of water;" that is, a statement of the quantity of water which is reasonable for each type of use. Unfortunately, few of these are of recent origin and modern techniques such as drip irrigation—which results in far less water use than flood irrigation—are seldom required by state water rights administrators. The state administrative agency should have an up to date analysis of *quantities* of water for each use as well as analyses of reasonable *methods* of diversion. New permits should limit quantities to the minimum which is reasonable under modern concepts. If the state utilizes limited duration permits, review of these factors can be made upon renewal of the permit.

With regard to municipal and industrial water use, two aspects of water *pricing* have an impact on water conservation and efficiency of use. First, pricing based on quantities used rather than flat rates results in reduced water use; hence, users should be metered. Universal metering has recently been recommended for New York City,[119] and a California

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[117] For an example of an administrative provision, see 23 CAL. ADMIN. CODE §§ 657, 657.1 (1974).

[118] For example, Oklahoma, California, South Dakota, and Idaho have such statutes. F. TRELEASE, WATER LAW 66 (2d ed. 1974). In this regard, the National Water Commission commented:

> Various measures can be taken to achieve physical savings of water, measures referred to generically as water-saving practices. In the arid and semi-arid regions of the West, the greatest opportunity for water saving lies in irrigation, which accounts for more than 80 percent of total water consumption. *In most Western States, water administrators have the power to prevent wasteful means of diversion and excessive application of water under a rule providing that beneficial use is the measure and limit of a water right. More vigorous exercise of this power would accomplish water savings.* And more stringent definition of beneficial use would also help. By State legislation, or preferably under administrative authority, *standards of beneficial use should be set, taking into account climatic, soil, and crop conditions. Similar standards on permissible water tranportation losses should also be promulgated and enforced.*
>
> Savings in agricultural water use in the West will depend in part on modifications of State law to provide incentives for irrigators to conserve water. For example, a change from gravity-flow or surface-flooding irrigation to sprinkler irrigation often would reduce consumptive use, but as the law now stands in some States the water saved may go to other users. Hence, there is no incentive to conserve or stretch water supplies. Changing the law to create rights in salvaged water in favor of those who salvage it would encourage water-saving practices. Such laws should of course protect the rights of other users whose supply depends upon return flow.
>
> It is also possible to save water in municipal and industrial use in many ways. Although the saveable quantities may not be potentially as large as in the case of crop irrigation, the cost savings by deferring new water supply projects could be impressive.

NWC SUMMARY, *supra* note 1, at 43 (emphasis added).

[119] TEMPORARY STATE COMM'N ON THE WATER SUPPLY NEEDS OF SOUTHEASTERN NEW YORK, WATER FOR TOMORROW 29–31 (1973).

[120] ARTHUR D. LITTLE, INC., A STUDY OF THE PROPOSED REQUIREMENT FOR MANDATORY WATER METERING FOR MUNICIPALITIES OR FOR COMMUNITY DOMESTIC WA-

study[120] has shown that significant quantities of water can be saved by metering in the semi-arid West.[121] In addition to water savings, benefits are derived from reducing the need for sewage treatment capacity since reduction in use result in reductions in discharged waste.

Second, utilities frequently base their rate schedule on formulas that reduce the unit price as quantities used increase. For example, the monthly price of one thousand gallons might be fifty-three cents for the first 3,750 gallons but only twenty-six cents for the second 3,750 gallons.[122] Also, rates usually do not vary with the season of the year or time of day, but a recent study[123] has shown that a price schedule with higher charges during times of greater demand results in reductions in peak demands. The effect of the water saved is to postpone the need for additional supplies for a community. A blanket rule requiring meters or a certain type of pricing in all cases would not be appropriate. For example, in the California study where entire communities are not metered, the cost of metering would be significant.[124] Yet, if the environmental or economic costs of developing new supplies were high enough, even very large expenditures for meters might be justified.

The critical question posed by this discussion is: Should the state water rights agency have discretion broad enough to impose terms and conditions mandating metering or specific pricing policies? This writer believes that the answer must be "yes." Although pricing and metering decisions have historically been made exclusively by the utility or irrigation district, the administrator of a modern water rights law may be thwarted in carrying out modernized policies unless has has such discretion. Suppose, for example, that an applicant proposes to construct a large dam on the last whitewater boating stream in the state. Suppose also that a dam half the

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TER SYSTEMS 1 (1974) [hereinafter cited as METERING STUDY]. The National Water Commission recommended that "meters to measure individual water use should be installed by water supply agencies in urban areas." NWC SUMMARY, *supra* note 1, at 126.

[121] METERING STUDY, *supra* note 120, at 1, 32, 34.

[122] This is the July, 1972 rate in Oakland, California, which is served by the East Bay Municipal Utility District. The rate further declines to nineteen cents per one thousand gallons for quantities in excess of 100,000 gallons. American Water Works Ass'n, 16 Willing Water 15 (1972).

[123] Sewell & Roueche, *Peak Load Pricing and Urban Water Management: Victoria, B.C., A Case Study,* 14 NATURAL RESOURCES J. 383, 400 (1974). With regard to pricing generally, see UNIVERSITY OF CALIFORNIA WATER RESOURCES CENTER, WATER PRICING POLICY CONFERENCE PROCEEDINGS (1968). The National Water Commission recommended that municipal rate structures be developed to encourage "intelligent, rather than excessive, water use." NWC SUMMARY, *supra* note 1, at 126. The Commission, however, also recommended that "[i]rrigation water rate structures should be designed to encourage efficient, rather than excessive, water use." *Id.* For a detailed discussion of per capita water use in California for municipal and industrial purposes and factors known to influence such use including metering and pricing, see CALIFORNIA DEP'T OF WATER RESOURCES, MUNICIPAL AND INDUSTRIAL WATER USE (Bulletin 166-1) (1968). For a recent report on the extent to which better irrigation practices and pricing can effect water use for irrigation, see ADVISORY COMMITTEE IN IRRIGATION EFFICIENCY—WELLTON-MOHAWK IRRIGATION AND DRAINAGE DISTRICT, SPECIAL REPORT ON MEASURES FOR REDUCING RETURN FLOWS FROM THE WELTON-MOHAWK IRRIGATION AND DRAINAGE DISTRICT (1974). *See* R. DAVIS & S. HANKE, PRICING AND EFFICIENCY IN WATER RESOURCE MANAGEMENT (1971).

[124] METERING STUDY, *supra* note 120, at 40.

proposed size would save the most important part of the natural stream but even with conjunctive use of nearby groundwater, would not meet the applicant's needs. The state could approve the entire project and lose the instream use or approve a limited project which produces an inadequate supply. Another possibility would be to couple such approval of the smaller project with pricing or metering restrictions which would conserve enough water to both meet the needs of the applicant and carry out the law's policies with regard to environmental factors. Although the applicant could and might institute such procedures on its own, their imposition as part of a comprehensive action by the state administrator in allocating resources will more likely result in full consideration of all factors, economic and environmental.

Some writers oppose the granting of additional discretionary authority to state water rights administrators. Professor Trelease, for example, would leave matters to the marketplace. He states that "[i]n the eyes of many, water is our most precious resource and the proper solution to the problems of water resources law is to put all water use in the hands of the Wise Administrator.[125] Referring to that provision of the Model Water Code which authorizes an administrative allocation of shortages of supply between competing uses, Professor Trelease predicts that the tough decisions involving analysis of the public interest will be made, not by the Wise Administrator, but rather by the "Goddam Bureaucrat." He puts it this way:

> The Wise Administrator, as everyone knows, is the man in a government office who protects "the public interest" (read *my* interests) from actions which would adversely affect those interests, when the public is (I am) otherwise unable to influence the course of those actions. The other fellow [Goddam Bureaucrat] is as easy to spot; he is the man in government who makes decisions for me that I would rather, and could better, make for myself.[126]

While some guidelines may be placed in statutes to guide the discretion of the state water rights administrator,[127] admittedly they must be generalized in view of the wide variety of factual circumstances the adminis-

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[125] Trelease, *supra* note 6, at 207.

[126] *Id.*

[127] For example, the Alaska Water Code requires consideration of the following factors in determining the "public interest:"

> (1) the benefit to the applicant resulting from the proposed appropriation;
> (2) the effect of the economic activity resulting from the proposed appropriation;
> (3) the effect on fish and game resources and on public recreational opportunities;
> (4) the effect on public health;
> (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
> (6) harm to other persons resulting from the proposed appropriation;
> (7) the intent and ability of the applicant to complete the appropriation; and
> (8) the effect upon access to navigable or public waters.

ALASKA STAT. § 46.15.080(b) (1971).

trator faces. The discretion of the administrator cannot be exercised in an arbitrary manner and should be exercised pursuant to extensive and explicit procedural regulations[128] which provide full opportunity for notice, hearing, and judicial review.

The marketplace does resolve some problems. For example, an economically more valuable use such as power production may take place through the purchase of agricultural water rights, or a user who hits hard times may abandon or forfeit his right. But few free market devices exist to assure protection of environmental values such as instream uses which are essentially noneconomic in nature.

The National Water Commission, whose study is the most thorough analysis of state water rights laws to date, has made it clear that the traditional water rights doctrines *have not* met the changing needs of an environmentally aware society. In the absence of the ability to draft specific legislative solutions to each problem, state legislatures should create an administrative process capable of implementing broad statutory policies with the responsibility for discretionary actions lodged in an administrator.

IV. Conclusion

This article has set forth a few examples of instances where state water laws can be "modernized" through establishment of comprehensive planning, provisions for regulation of the total water resource, and recognition of environmental and other noneconomic values. Inevitably, if laws are to be broadened, new administrative procedures need to be established to implement modern water rights laws. Until a more workable alternative is provided, this means granting greater discretion to the state water rights agency.[129]

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[128] Some commentators suggest that the legislature enact detailed policies. E. Clyde & D. Jensen, *supra* note 5, at 43.

[129] Old concepts die hard, particularly those based upon property concepts, but as former California Chief Justice Roger Traynor has observed with respect to the role of courts in such situations:

> Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values. And in those cases where there is no stare decisis to cast its light or shadow, the courts must hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will best meet those tests. The task is not easy—human relations are infinitely complex, and subtlety and depth of spirit must enter into their regulation.

Traynor, *Law and Social Change in a Democratic Society,* 1956 U. Ill. L.F. 230, 232.

Regulation, Competition, and Your Local Power Company

In 1944, the Federal Power Commission instituted an investigation into the rates and charges of Pennsylvania Water & Power Company (Penn Water), a utility corporation engaged in the interstate sale of electricity for resale.[1] The FPC subsequently ordered Penn Water to reduce its rates,[2] basing its decision to a large degree on a contractual relationship between Penn Water and Consolidated Gas, Electric Light & Power Co. (Consolidated), under which the operation of the two companies were integrated.[3]

Penn Water subsequently sought declaratory relief from the terms of its contract. On appeal, the Fourth Circuit[4] carefully examined the contract, which granted Consolidated the right (1) to purchase Penn Water's electric power output not disposed of under existing contracts, (2) to veto Penn Water's contracts and sales to new customers, (3) to prevent new plant expansion by Penn Water, and (4) to sell Penn Water feedback power,[5] thus preventing it from purchasing such power from Consolidated's competitors.[6] On the basis of such provisions, the court held that the contract violated section 1 of the Sherman Act[7] and section 3 of the Clayton Act:[8]

> [T]he effect of the contract was to divide between two large power companies a trade territory wherein they would otherwise have been competitors; and to give one of them the power to fix prices for the other and to forbid plant expansion by the other. . . .[9]

The court therefore rescinded the contract, but avoided a confrontation with the FPC by recognizing the Commission's authority to order the

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[1] The Mayor and City Council of Baltimore and the Maryland Public Service Commission requested the investigation to determine if the rates Penn Water was charging Consolidated Gas, Electric Light & Power Co. for electric power were too high. A rate reduction would, in turn, allow the Maryland interests to reduce Consolidated's rates to its Maryland customers.

[2] Pennsylvania Water & Power Co., 8 F.P.C. 1 (1949).

[3] The FPC found that the integrated nature of the companies fostered economy, efficiency, and utilization of hydroelectric capabilities as encouraged by the Federal Power Act. Based upon its authority under the Act, the Commission left the integrated operations of the companies in full effect. *Id.* at 70, 75.

[4] Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950).

[5] Feedback power is power purchased by a company to supplement its energy supply during periods of low output.

[6] Penn Water's willingness to enter into such a contract can perhaps be explained by the fact that the two companies were under common ownership when the contract was made.

[7] Sherman Act § 1, 15 U.S.C. § 1 (1970).

[8] Clayton Act § 3, 15 U.S.C. § 14 (1970).

[9] 184 F.2d at 558. The court noted several areas where, but for the contract, Penn Water and Consolidated would be potential competitors. Both companies, for example, could have sold wholesale electricity to Potomac Electric, Metropolitan Edison Co., Pennsylvaia Fuel & Light Co., as well as others.

continued integration of the companies "by some method that would meet with the approval of . . . regulatory authority and . . . not offend . . . the anti-trust laws. . . ."[10]

Based upon the Fourth Circuit's decision, Penn Water filed an action to set aside the FPC rate order on the grounds that (1) the order required the performance of an illegal contract and (2) the FPC had based its findings upon the illegal contract. The District of Columbia Circuit refused to set aside the order, however, finding that the FPC had acted within its authority in requiring the companies to continue their integrated operations.[11]

On certiorari, the United States Supreme Court sidestepped the apparent conflict between the circuit court opinions regarding the FPC's authority to compel parties to perform contracts which violate the antitrust laws, and held that the Fourth Circuit's decision severed and invalidated only those portions of the contract subjecting Penn Water to the managerial control of Consolidated while leaving the remainder of the contract intact.[12] Concluding that the FPC order was based upon regulatory authority and not upon private contract,[13] the Court held that if Penn Water wished to discontinue its contractual relationship with Consolidated, it could do so only with the approval of the FPC and upon a showing that such action would be in the public interest.[14]

The Penn Water litigation illustrates the clash of two prevalent economic control policies within the American economic system—competition and governmental regulation. Although the competitive enterprise system has been generally accepted in this country as the scheme most conducive to the realization of the nation's economic, social, and political objectives,[15] regulation has been adopted in some instances where it appears that the competitive system is incapable of attaining these desired

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[10] *Id.* at 568.

[11] Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 234–38 (D.C. Cir. 1951), *aff'd,* 343 U.S. 414 (1952).

[12] Pennsylvania Water & Power Co. v. FPC, 343 U.S. 414 (1952). The Court noted, however, that

> [i]t is true that Penn Water must continue to do some of the things it used to do in compliance with the Penn Water-Consolidated contract. For under the present schedules prescribed by the Commission's order Penn Water must continue to buy, sell, and transmit power in the same coordinated manner in which it and Consolidated have been functioning for more than twenty years.

Id. at 421–22.

[13] *Id.*

[14] *Id.* at 423.

[15] In Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958), the Court expressed this view as follows:

> [T]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

The competitive norm has been set aside, however, in limited situations in order to achieve other goals. Prominent examples are the patent laws, 35 U.S.C. §§ 1 *et seq.* (1970); antitrust exemptions for labor unions, 15 U.S.C. § 17 (1970); and natural monopoly regulated industries.

objectives. Using the electric utilities industry as an illustrative case, this Note will analyze the proper interface between government regulation and antitrust policy. To do so, this Note will provide a broad overview of the history and present day functioning of the electric power industry. It will then analyze the use of regulation and antitrust policy as economic control devices in the electric utilities industry for the purpose of ultimately suggesting the proper relationship between them.

I. HISTORICAL BACKGROUND

Electricity's first commercial use was for limited street lighting in large metropolitan areas. Rather than creating a single electric company, most city governments, in order to stimulate competitive prices, granted licenses to many different companies.[16] This competitive environment, however, was shortlived. The suppliers of electricity soon recognized the waste involved in stringing power lines side by side along the same street and in building several generating units when only one was needed to serve the local population. Thus, because "the invisible hand of competition was powerless to check the tendency for economies of scale to lead to monopoly,"[17] the electric power industry went through a period of consolidation and merger.[18]

Responding to the growth of natural monopoly,[19] legislators resorted to government regulation as a substitute for competition.[20] It was "assumed that an industry had to be either monopolistic or competitive, that there was nothing in between,"[21] and that the government must "either

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[16] R. HELLMAN, GOVERNMENT COMPETITION IN THE ELECTRIC UTILITY INDUSTRY 8–9 (1972).

[17] Nelson, *Pricing and Resource Allocation in the Public Utility Sector*, in UTILITY REGULATION 61 (W. Shepherd & T. Gies eds. 1966). Two economic factors caused the tendency toward natural monopoly in the electric utilities industry. First, the unit cost of electricity decreases as unit consumption increases. *Id.* at 64. Thus, the central concern for a public utility is to decrease total unit cost while increasing production within a particular geographical area. This relationship is, of course, the result of large plant investments, together with payroll and other expenses which do not increase in proportion to the expansion in kilowatt hour output. As fixed expenses are spread over more kilowatt hours, the cost per kilowatt hour decreases. R. CAYWOOD, ELECTRIC UTILITY RATE ECONOMICS 15–16 (1956).

Second, the quality of service which an electric company can provide will increase as unit consumption increases. Gies, *The Need for New Concepts in Public Utility Regulation*, in UTILITY REGULATION 90 (W. Shepherd & T. Gies eds. 1966). Thus a large company can spread its business risks over a much larger area, providing the consumer with greater reliability and consistency of service than can a smaller enterprise.

[18] Chicago is a typical example of this consolidation process. From 1882 to 1905 the city granted twenty-nine licenses, while towns absorbed by Chicago granted eighteen more. By 1897, Commonwealth Edison had become the largest licensee, absorbing twenty-three of its competitors. R. HELLMAN, *supra* note 16, at 9.

[19] A natural monopoly results when, due to the structure of an industry, or political or social factors, competition is inadequate to prevent the concentration of economic wealth and power.

[20] One purpose of regulation is to replace competition in a monopoly environment where competition has broken down. Regulation proponents believed that the results of competition could be imposed upon natural monopolies through regulation, while allowing them to enjoy the scale advantages of their status. *See* R. HELLMAN, *supra* note 16, at 7.

[21] Nelson, *supra* note 17, at 61.

regulate firms *as monopolies,* or else use the antitrust laws to break them up or force them to act *like competitors. . . .*"[22] In 1907, New York and Wisconsin created the first regulatory commissions to control electric utilities.[23] Today, state regulatory commissions with jurisdiction over the rates and charges of electric utilities exist in forty-six states.[24] With the enactment of the Federal Water Power Act[25] in 1920, the federal government also entered into the regulation of electric utilities.

In contrast to its small, localized beginning, the electric power industry is now the nation's largest single industry,[26] with approximately 3500 power companies operating in the Unted States.[27] About four hundred of these are privately owned and are responsible for producing 77.7 percent of the nation's electricity; the rest are either municipally, cooperatively, or federally owned.[28]

II. Nature of the Electric Utilities Industry Today

Critical to an analysis of the proper roles that competition and regulation should play in the electric utilities industry is an understanding of several facets of the industry: (1) the various markets within which power companies participate and compete; (2) distinctions among the products produced, purchased, and sold within the industry; (3) the vast interconnection system existing among the nation's power companies; and (4) the existence of competition within the industry's present regulatory control structure.

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[22] *Id.* at 62. The same commentator noted that "[regulation] emerged as a sort of consolation prize after losses to all concerned from attempts to stimulate competition." *Id.* at 61.

[23] *See* R. Hellman, *supra* note 16, at 5.

[24] Federal Power Comm'n, Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities 3 (1973) [hereinafter cited as Commission Jurisdiction].

[25] Federal Water Power Act § 30, ch. 285, 41 Stat. 1077 (1920), *as amended* 16 U.S.C. §§ 791–823 (1970). For a concise history of the establishment of the Federal Power Commission, see C. Hawkins, The Field Price Regulation of Natural Gas 5–6 (1969).

[26] *Hearings on S. 334 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess., pt. 2, at 620 (1970).

The electric utilities industry is sixty percent larger than its nearest rival, the petroleum industry, in terms of capital assets. L. Metcalf & V. Reinemer, Overcharge 7 (1967). Privately owned electric utilities attract twelve percent of all money invested in the United States. *Id* at 10. The industry is also the nation's leading issuer of securities. Report of the Association of the Bar of the City of New York Special Committee on Electric Power and the Environment, Electricity and the Environment 23 (1972) [hereinafter cited as Electricity and the Environment].

In 1969, the estimated annual revenue of the electric utilities industry was twenty billion dollars. *Hearings on S. 607 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations,* 91st Cong., 1st Sess., pt. 2, at 311 (1969) [hereinafter cited as *Hearings on S. 607*]. It is estimated that by 1980 total annual revenues of the industry will reach thirty billion dollars. Electricity and the Environment, *supra,* at 23.

[27] Electricity and the Environment, *supra* note 26, at 23–24.

[28] *Id.* In 1972, these companies produced 1.751 trillion kilowatt hours of electricity. Federal Power Comm'n, Statistics of Publicly Owned Electric Utilities in the United States VIII (1972).

A. Markets

Almost all electric power companies are vertically integrated.[29] That is, they perform functions at all levels of the industry, including the generation of electricity, transmission of power to market areas, and ultimate distribution of the electricity to the consumer. Thus, today's large, privately owned electric utility operates in three distinct markets: (1) the local retail distribution market, where the company is generally the exclusive supplier of electricity,[30] (2) the wholesale market, where the utility purchases and sells electricity for resale to other utilities, and (3) the transmission market, where the utility wheels power for other companies. The wholesale and transmission markets are innovations resulting from the ability of companies under modern technology to buy and sell electricity among themselves by transmitting the electricity over great distances.[31] Unlike the retail market, where the customer must buy power from the company having control over the geographic market, the wholesale and transmission markets allow the purchasing utility to shop around for the best price among competing companies.[32]

B. Products

Because electricity cannot be stored or held for future use, its generation must be geared directly to consumption.[33] Insufficient power in the dis-

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[29] *Hearings on S. 607, supra* note 26, at 302.

[30] Each utility operates under a public certificate of convenience. UTAH CODE ANN. § 54-4-25 (1974), for example, provides:

> No . . . electric corporation . . . shall henceforth establish or begin construction or operation . . . without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction. . . .

Municipals and cooperatives may, however, operate within the exclusive geographic area of the large privately owned company, but they are like small, isolated islands surrounded by the private company. This isolation, in turn, causes the small companies to rely heavily upon the larger privately owned utilities, which has given rise to numerous regulatory and legal actions. Often, the only way a municipal or cooperative can gain access to federally produced power, for example, is for the private company controlling the transmission facilities in the area to "wheel" or transmit the power to them. The Federal Power Act gives the FPC authority to compel the private companies to interconect with and wheel power to the smaller companies when it is in the regional public interest to do so. 16 U.S.C. § 824a (1970). *See* Florida Power Corp. v. FPC, 425 F.2d 1196 (5th Cir. 1970), *rev'd on other grounds*, 402 U.S. 515 (1971); New England Power Co. v. FPC, 349 F.2d 258 (1st Cir. 1956).

For a comprehensive overview of the problem of the small, isolated company, see Gainesville Util. Dep't v. Florida Power Corp., 402 U.S. 515 (1971).

[31]

> In the early 1950's, the maximum voltage carried on transmission lines was about 287,000 volts. This is now up to 375,000 volts, and firm plans have been made for 500,000 volt lines. Electric equipment manufacturers are even experimenting with 750,000 volt and one-million volt lines.

P. GARFIELD & W. LOVEJOY, PUBLIC UTILITY ECONOMICS 471 (1964). Large amounts of electricity can be transferred with great efficiency and economy because the larger the transmission line the cheaper transmission per unit becomes. Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 73, 74 (1972).

[32] These differences between markets are important when applying antitrust policies to the industry. *See, e.g.*, notes 110–14 *infra* and accompanying text.

[33]

> The demand upon an electric utility for electric power fluctuates significantly from hour to hour, day by day, and season to season. For this reason, generating facilities cannot be maintained on the basis of constant demand.

Gainesville Util. Dep't v. Florida Power Corp., 402 U.S. 515, 517–18 (1971).

tribution system causes brownouts and power failure, while too much power causes waste, leakage, blowouts, and excess expense. The power company must therefore maintain at all times a "base load"[34] level equal to the amount of power below which demand never falls. In addition to base load, a company must maintain capacity "to peak" the system so that the varying needs placed upon the system can be met.[35] The company must also maintain enough "reserve power" capacity to meet emergency situations, such as equipment failure or overhaul.[36] Finally, many companies utilize "economy power"—power which can be purchased from another source at less expense than if it were internally produced.[37] It is clear, therefore, that electric utilities operate in a market containing four distinct products—base load power, peaking power, reserve power, and economy power.[38] Although these products are not identifiable to the retail consumer, they are important in defining the relevant product markets existing within the power industry, a definition vital to analysis of competition's role in the system.[39]

C. Interconnections

The cost of producing electricity varies greatly depending upon the type of generation, the proximity and type of fuel used, the size of the generating unit, customer density, utility ownership, the manner in which the company supplies its reserve requirements, and the availability of economy power.[40] Since a large part of the power generated in the State of Washington is hydroelectric, for example, it is only necessary to run more water through the turbine to meet peak demand. In New York, however, electric utilities can meet peak demand only by the more expensive method of maintaining extra generator capacity.[41]

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[34] *See* Meeks, *supra* note 31, at 64, 70.

[35] Peaking power is that amount of power above base load required to meet fluctuating demands. *Id.* at 71.

[36] Gainesville Util. Dep't v. Florida Power Corp., 402 U.S. 515, 519 (1971). As a general rule, the amount of reserve power a company maintains is roughly equal to the capacity sufficient to replace its largest single generating unit. *Id.*

[37] Meeks, *supra* note 31, at 83 n.87. Utah Power & Light, for example, purchased twelve percent of its power from outside sources in 1973. Most of this was low cost hydro power which enabled the company to replace high cost steam energy. UTAH POWER & LIGHT CO., ANNUAL REPORT TO STOCKHOLDERS 2 (1973) [hereinafter cited as REPORT TO STOCKHOLDERS].

[38] Meeks, *supra* note 31, at 83.

[39] *See* notes 112–14 *infra* and accompanying text.

[40] *See* Meeks, supra note 31, at 71–73; L. METCALF & V. REINEMER, *supra* note 26, at 15–16. For example, electricity is produced by a variety of methods, such as falling water, burning coal, natural gas and oil, or nuclear reaction. *See* ELECTRICITY AND THE ENVIRONMENT, *supra* note 26, at 18–19. A number of other methods are currently being developed including geothermal generation, wind generation, coal gasification, solar power, and even garbage burning. REPORT TO STOCKHOLDERS, *supra* note 37, at 13–14.

[41] In 1973, the average cost of five hundred kilowatt hours (kwh) of electricity for a residential user was $6.54 in Washington and $17.16 in New York. FEDERAL POWER COMM'N, TYPICAL ELECTRIC BILLS XII (1973). A comparison of private companies with publicly owned companies for the same year also shows substantial variation in cost. The cost of five hundred kwh from private companies to residential users throughout the country ranged from a high of $19.77 to a low of $7.08, while pub-

Interconnections — transmission lines connecting two utilities[42] — have been effectively used by private utilities to hold down costs and obtain greater efficiency.[43] The Northwest, for example, has excess generating capacity during the summer months due to high water levels, while at the same time southern California and Arizona are in need of peaking power. Using interconnections, Arizona and southern California are able to purchase large amounts of power from the Northwest at relatively inexpensive rates.[44] In the winter months, the Northwest experiences its peak requirements because of heating demands, yet its generating capacity is limited because of low water levels. The Southwest, meanwhile, has excess power due to its moderate temperatures. Thus, the Northwest may purchase economy power during those months from the Southwest.

In addition to providing peaking and economy power, interconnection agreements allow smaller electric companies to utilize the "scale advantages of larger generating units without suffering the full disadvantages of reserve deficiencies or unneeded idle plant."[45] Because small companies usually do not have great enough demand within their service areas to benefit from scale advantages "without creating an immense amount of excess capacity for their own needs,"[46] they often interconnect with other companies to share the expense and capacity of large generating units.[47] Assume, for example, that each of four companies has a peak load of five hundred megawatts (mw). Because the largest generating unit of each company is two hundred mw, it is necessary for each company to maintain an additional two hundred mw unit of reserve capacity in case

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licly owned companies supplied the same amount of power for a high of $15.34 to a low of $5.25. *Id.* at IX–X.

[42] Gainesville Util. Dep't v. Florida Power Corp., 402 U.S. 515, 519 (1971).

[43] In 1967, ninety-seven percent of the electric industry's generating capacity was interconnected into several large regional power pools. L. METCALF & V. REINEMER, *supra* note 26, at 6. One example of such a regional power pool is the Western Systems Coordinating Council, which includes power companies in British Columbia, Washington, Oregon, Montana, Idaho, California, Nevada, Arizona, New Mexico, Colorado, Wyoming, Utah, and parts of Nebraska and South Dakota. For a map showing the boundaries of the Western Systems Coordinating Council and examples of power exchange diagrams for the area see Case No. 6978, Utah Power & Light Co., exhibits 87, 88 (Pub. Serv. Comm'n of Utah, August 13, 1974).

[44] L. METCALF & V. REINEMER, *supra* note 26, at 6. Of course, the actual electricity generated in the Northwest may not arrive in the Southwest. Power sent on its way may be traded by intermediate companies many times, and power from other sources put in its place. This is of little consequence, however, since the practical result is that indicated in the text. The power may also come "from a plant in another time zone to the west where the day's peak demand has not been reached, or one to the east where the peak has passed." *Id.* at 8.

For an account of the activities of Utah Power & Light Co. in the transmission of electricity for or by others, see UTAH POWER & LIGHT CO., ANNUAL REPORT TO THE UTAH PUBLIC SERVICE COMMISSION 425–26 (1973).

[45] Case No. 6978, Utah Power & Light Co., Exhibit 76 at 8 (Pub. Serv. Comm'n of Utah, August 13, 1974) (testimony of James R. Nelson). As the size of the generating unit increases, the unit investment required to produce a kilowatt of electricity will decrease, thus providing an incentive for companies to provide as much of their base power as possible from large units. *See* R. CAYWOOD, *supra* note 17, at 15.

[46] Meeks, *supra* note 31, at 74–75.

the largest generating unit were to fail.[48] If these four companies were to interconnect, it would be possible to provide reserve capacity of two hundred mw if each company maintained only fifty mw of reserve instead of the two hundred mw required in the isolated system. Thus, six hundred mw of capacity would be saved and the required capacity would be reduced almost twenty-two percent.[49]

Because of the numerous advantages which pooling, interconnection, and coordination provide for the local power company, a strong movement exists in the industry "toward much more closely integrated systems."[50] Such a movement, of course, has a substantial impact upon current regulatory jurisdiction and practice and upon the feasibility of competition as an economic control device in the industry.[51]

D. Competition

In addition to competition in the transmission and wholesale markets, some types of competition are still important at the retail level of the industry.[52] Natural gas, for example, provides a reasonable alternative to electricity in home heating, cooking, and water heating. Electric utilities also compete with each other to attract large businesses and industries to locate within their service areas. Furthermore, large industries may find it profitable to generate their own power if they find the rates or services of the local power company to be unsatisfactory.[53] Finally, public threats

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[47] An excellent example of this concept is Utah Power & Light Company's recently completed Huntington plant. The unit was originally planned to have a capacity of 330,000 kilowatts and was to be built at a cost of three hundred dollars per kilowatt of capacity. A larger unit would have been more efficient, but Utah did not need more capacity at the time. Although extra capacity could have been added at great expense, the company had no way to recover this expense for several years. On the other hand, if the company delayed construction until the need existed for a larger and more efficient unit, its reserve capacity would have to be used to meet current demands, necessitating the acquisition of new reserve capacity to cover the risks of equipment failure. To solve the problem Utah Power & Light entered into an agreement with the Arizona Public Service Company which was in need of power. The Arizona Company agreed to purchase 100,000 kilowatts of capacity for two years, thus making it possible for Utah Power & Light to increase the plant's size to 430,000 kilowatts. The cost of providing the extra 100,000 kilowatts was only one hundred dollars per kilowatt of capacity, or only about one-third of the cost for the original planned capacity of the generating unit. Case No. 6978, Utah Power & Light Co., Report and Order 8 (Pub. Serv. Comm'n of Utah, August 13, 1974).

[48] *See* discussion in note 36 *supra*.

[49] *See* Gainesville Util. Dep't v. Florida Power Corp., 402 U.S. 515, 519 n.3 (1971).

[50] *Hearings on S. 607, supra* note 26, at 314.

[51] *See* text acompanying notes 115–17, *infra*.

[52] A power company faces five basic types of competition at the retail level. Customers may generate their own power, they may seek substitute service such as natural gas, they may locate in an area offering low cost power, they may adopt a municipal utility, and they may cut back on power usage. *See* R. CAYWOOD, *supra* note 17, at 5. For examples of how this competition works in practice, see Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971); REPORT TO STOCKHOLDERS, *supra* note 37, at 6–7.

[53] An interesting attempt to set up a private generating station was recently made by the Cottonwood Mall Shopping Center in Salt Lake City, Utah. UTAH CODE ANN. § 54–2–1(20) (1974) provides that a land owner may generate electricity solely for his own use or that of his tenants without becoming a public utility so long as the activity is confined to his property and not offered for sale to the public. Utah Power & Light Co. entered into a contract to furnish power to J.C. Penney Co., a Mall ten-

to turn to municipal ownership is a continuing source of worry for large investor-owned utilities.[54]

III. GOVERNMENT REGULATION OF ELECTRIC UTILITIES

A. Background

Most public utilities originated as private undertakings. But when they began to gain market power and attain monopoly positions

> the special public interest emerged and became legally recognized as the basis of public regulation. This process transformed these companies from their private status "to public service corporations, subject to governmental regulation."[55]

Today, government regulation usually expresses itself in typically imprecise rate fixing statutes, which, without specifying any particular method or yardstick for determining rates, normally provide only that rates must be reasonable. For example, the Utah statute provides:

> All charges made, demanded or received by any public utility . . . for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, *shall be just and reasonable.*[56]

The imprecision of most such statutes has led to much debate as to what constitutes "reasonable rates." In *Smyth v. Ames,* [57] the United States Supreme Court sanctioned the use of the "fair value method" for determining reasonable rates: "We hold . . . that the basis of all calculations as to the reasonableness of rates to be charged . . . must be the fair value of the property being used by [the utility] for the convenience of the public."[58] Consequently, most state regulatory commissions have adopted the

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ant, and sued for an easement to run its lines into the Mall. Cottonwood brought an action in federal court alleging that the utility was seeking to monopolize the market for electricity and had interfered with a contract between J.C. Penney Co. and the Mall. The Tenth Circuit upheld a summary judgment in favor of Utah Power & Light Co. on the ground that Cottonwood was supplying electricity for the beneficial use of the public because a Mall is open to and used by the public. Also, the court found that one of the stores in the Mall area was purchasing its space and, therefore, was not a tenant of the Mall. Since Cottonwood was not a pubic utility authorized to sell electricity to the public it was held to have no legal basis from which to challenge Utah Power & Light's activities. Cottonwood Mall Shopping Center v. Utah Power & Light Co., 440 F.2d 36 (10th Cir. 1971).

[54] Municipal power companies have proven their worth in reducing rates and have also provided many cities with an important source of revenue. *See* L. METCALF & V. REINEMER, *supra* note 26, at 11–12.

[55] J. BUER, UPDATING PUBLIC UTILITY REGULATION 14 (1966).

Although not in the context of electric utility rates, the United States Supreme Court in 1876 upheld the right of states to fix rates as a legitimate exercise of the police power in protecting the public interest. Munn v. Illinois, 94 U.S. 113 (1876). *Munn* involved the right of the Illinois Legislature to fix rates charged by grain elevators. The Court recognized an inherent public interest in the business and held that when a person dedicates his property to a public use, he surrenders some of his power over the property.

[56] UTAH CODE ANN. § 54–3–1 (1974) (emphasis added).

[57] 169 U.S. 466 (1898).

[58] *Id.* at 546

fair value method as the basis for fixing rates. The concept is easy to grasp:

> Because competition cannot determine the price paid for electricity, the companies are allowed to earn a percentage of their investment. If the company has an investment or rate base of $300 million and the commission decides that 6% is a fair rate of return, the company is entitled to make $300 x .06, or $18 million.[59]

In addition to its investment, utilities incur operating expenses, depreciation charges, and taxes which are recovered and added to return on investment to obtain net operating income.[60]

Although the regulation concept seems simple, controversies often arise over what method should be used to determine the rate base, what constitutes a proper rate of return, which expenses are properly included within operating costs, and what is the proper treatment of depreciation and taxes.[61] Manipulation of any one of these factors can have a drastic effect upon the profit posture of a company. For example, if the rate of return were changed from six percent in the example above to 6½ percent the company could receive $1.5 million of extra revenue.

In *FPC v. Hope Natural Gas Co.*,[62] the Supreme Court overruled *Smyth* and took a more passive role in rate regulation by refusing to bind the FPC (and, by implication, state regulatory commissions) to any particular rate determination formula. It did not, however, leave regulatory commissions without guidelines. The Court emphasized the cost of money, the balancing of investor and consumer interests, returns commensurate with other enterprises, returns sufficient to assure financial integrity and attract capital, and adequate return to investors as key considerations in determining what is a reasonable rate.[63]

B. Practical Criticisms of Regulation

The current system of state and federal regulation can be criticized on many grounds, the most basic of which is its ineffectiveness: "[M]any of the most time-consuming and expensive controversies in regulatory annals have little economic or social significance—other than as tribal rites

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[59] L. METCALF & V. REINEMER, *supra* note 26, at 31.

[60] If these costs were forty-two million dollars (a reasonable figure for the size of company used in the example) then net operating income would be sixty million dollars. *Id.* at 31–32.

[61] *See* J. BUER, *supra* note 55, ch. 1 for an overview of these problems.

[62] 320 U.S. 591 (1944). The Court held that "the commission was not bound to the use of any formulas in determining rates." *Id.* at 602. Further, the value of property could only be determined from "the purpose for which a valuation is being made." *Id.* at 601 n.9. The Court concluded that it "is the result reached, not the method employed, which is controlling." *Id.* at 602.

[63] Most state regulatory agencies and the FPC have adopted the original cost method as the best means of arriving at the rate base. COMMISSION JURISDICTION, *supra* note 24, at 21. Under this system, the rate base is equal to the original cost to the company of all property dedicated to the public use minus depreciation on that property. FPC v. Hope Natural Gas Co., 320 U.S. 591, 596 (1944). A minority of state commissions use the cost which the company would be required to expend to replace its equipment and property minus depreciation. This would roughly equal the current value of the property. *See* McCradle v. Indianapolis Water Co., 272 U.S. 400, 404

which lend legitimacy to conduct that otherwise might be viewed as anti-social behavior."[64]

This ineffectiveness is largely attributable to the lack of resources available to most agencies.[65]The Utah Public Service Commission, for example, is typical of commissions existing in other states.[66] The Commission consists of three commissioners who have no full time legal counsel to assist them, but must seek legal aid from the Attorney General on a case by case basis.[67] The Commission has no economists, no auditors, no hearing examiners or administrative law judges, no rate analysts, no public utilities specialists, no environmental specialists, and no public relations specialists. With the help of two engineers, three accountants, and a small administrative and secretarial staff,[68] the commissioners are expected to regulate effectively 381 public service companies in the State of Utah.[69] In addition, the lack of resources and the heavy workload place most commissions at a disadvantage in dealing with utilities which have all the

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(1926). The reproduction cost method will produce, at least theoretically, a much higher rate base than will the original cost method because reproduction cost produces a higher valuation of the property. In Michigan, for example, where the regulatory commission has adopted the original cost method, Michigan Bell sought to obtain a valuation based on a form of reproduction cost. For five different valuations the company's method produced a higher rate base than that computed by the commission. In 1960, the company's reproduction cost valuation was only 2.2 percent higher than the commission's, as compared to a 21.7 percent difference in 1950. *See* Troxel, *Telephone Regulation in Michigan,* in UTILITY REGULATION 163–65 (W. Shepherd & T. Gies eds. 1966). The fact that reproduction cost produces a higher rate base does not, however, automatically mean that those states using that method have higher rates. *See* FEDERAL POWER COMM'N, TYPICAL ELECTRIC BILLS (1973).

[64] Cramton, *The Effectiveness of Economic Regulation,* in UTILITY REGULATION 251 (W. Shepherd & T. Gies eds. 1966). In a comparative study of rate levels in regulated and nonregulated states early in this century, it was concluded that regulation of utility rates was of little consequence. Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity,* 5 J. LAW & ECON. 1 (1962).

[65] *See Hearings on S. 607 supra* note 26, pt. 1, at 21, 89.

[66] *See* COMMISSION JURISDICTION, *supra* note 24, at 122–23.

[67] *Id.* at 13.

[68] *Id.* at 131–34.

[69] Those companies include two privately owned electric utilities, thirteen rural electric cooperatives, five privately owned gas companies, seventeen telephone companies, nine railroads, fifty-six bus companies, 217 trucking companies, thirty-four air transport companies, one telegraph company, one steam heating company, twenty-five water companies, and one sewage company. *Id.* at 122–23.

Consequently, state regulation of utility companies is almost totally ineffective. *Hearings on S. 607, supra* note 26, at 324. The FPC suffers from many of the same problems as the state commissions, including "inadequate staff, insufficient funds, limited information, disclosure procedures, archaic processing methods, ineffective regulatory administration, impotent regulatory authority, ambiguous rate objectives, jurisdictional gaps and inadequate legislation. . . ." *Id.* The growing tendency toward integrating local operations into large regional power pools and the inability of separate states to control wealthy power companies operating in regional pools have been largely responsible for the present regulatory impotency.

Nuclear power brings a number of additional agencies into the regulatory framework, such as the Atomic Energy Commission and the Environmental Protection Agency. Also, the cost factors involved in nuclear power production are somewhat different. A nuclear generation plant is more expensive to build than other types of plants and public resistance is higher. The cost of producing a kilowatt, however, is much less—one-third of a cent with nuclear generation as compared to 1.8 cents with coal or oil. U.S. NEWS & WORLD REPORT, Sept. 30, 1974, at 83–84, 96.

information and technical assistance necessary to present a persuasive case favorable to the industry.[70]

Furthermore, although most regulatory commissions are charged with a duty to represent the public interest in fixing utility rates,[71] they often develop, as a result of their long association with the utilities and subjection to their lobbying efforts, a sympathetic viewpoint toward the companies they are supposedly regulating.[72] As a result, in many instances the policy commitments of the commissions and the regulated utilities are one and the same. Rather than taking an active role in investigating utility practices and initiating rate proceedings when it is in the public interest to do so, most commissions settle into the passive role of acting as the referee in a conflict between opposing parties,[73] and the consumer is left without an advocate.

Another serious problem with the regulatory system is commonly denoted as "regulatory lag." Because of the time consuming processes most commissions follow,[74] a large rate case will often take months or even years to complete. Since costs incurred by the utility are not subject to scrutiny and adjustment until a rate proceeding is instituted and resolved,[75] there is a large gap between regulatory policy and economic reality. For example, when costs decreased in the generation and transmission of electricity in the 1960's, regulatory lag resulted in higher profits for utilities because the rates remained at levels set during a period of higher costs.[76] Due to high inflation, regulatory lag is currently operating to the disadvantage of the utilities, a condition which has evoked an unprecedented number of rate cases.[77]

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[70] *See Hearings on S. 607, supra* note 26, pt. 1, at 22–23. In many states, private utilities are still able to finance their side of a rate hearing from consumer paid operating expenses. FEDERAL POWER COMM'N, STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE UNITED STATES 501–27 (line 125) (1972).

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> The sole purpose of a regulatory commission is to protect the interests of the consuming public. The only reason a commission is concerned with whether a utility earns a reasonable return on its property, or has the ability to attract necessary capital from investors, is simply to assure that the utility remains strong enough to render adequate service to the consuming public.

Hearings on S. 607, supra note 26, pt. 2, at 220 (testimony of George I. Bloom, second vice-president of the National Association of Regulatory Utility Commissioners).

[72] *Id.* pt. 1, at 21.

[73] *Id.* pt. 2, at 377.

[74] A recent rate case involving Utah Power & Light Co. is illustrative of the great amount of time consumed in the regulatory process. In one phase of the case, hearings lasted from January 24, 1974, to April 18, 1974. The transcript of testimony covered 1,511 pages, and ninety-one exhibits were filed. In addition, the Public Service Commission was asked to consider numerous briefs and motions. Case No. 6978, Utah Power & Light Co., Report and Order (Pub. Serv. Comm'n of Utah, August 13, 1974).

[75] Even when a rate order is issued, it is generally only effective from the date of its issuance. A utility is allowed to keep any excess profits earned during the period before and during the rate proceedings. L. METCALF & V. REINEMER, *supra* note 26, at 36–37.

[76] Shepherd, *Utility Growth and Profits Under Regulation,* in UTILITY REGULATION 31 (W. Shepherd & T. Gies eds. 1966).

[77] BUSINESS WEEK, Sept. 14, 1974, at 138. In 1973, more than $1.1 billion in rate increases were granted by state regulatory agencies to electric companies, a record

C. Theoretical Criticisms of Regulation

The failure of regulation as a substitute for competition is not wholly attributable to the inadequacies of regulatory commissions. The underlying theory of regulation itself is of questionable validity. In a competitive environment, a company has great incentive to hold down costs and to operate as efficiently as possible. The company with the highest degree of efficiency will generally be able to offer its product or service for the lowest price, and in turn, the lowest price will generally produce the highest volume and profits. Regulation has turned this concept upside down. Since electric utility earnings are dependent upon the amount of their investment or rate base, power companies have been eager investors; the more money a company pours into its rate base the higher its earnings will be.[78]

This "spend money to make money" concept has been especially evident in the electric utilities industry. Since improved technology,[79] economies of scale, usage, and load factors have tended to reduce generation and transmission costs in the industry, electric utilities have been pushed to invest more and more money in capital expenditures in order to avoid rate reductions due to the reduced costs.

Because the regulatory incentive to spend money will continue as long as the cost of capital to the utility is less than its permitted rate of return,[80] utilities have little incentive to economize. Several years ago, for example, several companies which supplied electric utilities with electrical equipment were found guilty of price fixing and overpricing their equipment by hundreds of millions of dollars. Despite this, the overcharges had caused little concern to the utilities because the costs became a part of their rate base, allowing them to profit along with the equipment suppliers.[81] Presently, regulatory lag may be the only incentive for electric utilities to improve technology or to take advantage of economies of

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high. U.S. NEWS & WORLD REPORT, Sept. 30, 1974, at 83. Although lag, in the past, meant higher profits for the companies, lag now cuts into profits. Consequently, many utilities are now seeking legislative authority to put proposed rate increases into effect immediately, subject to rollback if they are found to be unreasonable in subsequent hearings. BUSINESS WEEK, Sept. 14, 1974, at 138. As profits have fallen in recent months utilities have suffered from a consequent inability to attract capital, which may have serious effects upon the financial integrity of the industry.

[78] Shepherd, *supra* note 76, at 31–34.

[79] Coal generation offers a good example of the economy produced by improved technology: "As recently as 1947, about 1.28 pounds of coal were required to generate one kilowatt-hour of electricity. By 1961, this figure had fallen to 0.863 of a pound." P. GARFIELD & W. LOVEJOY, PUBLIC UTILITY ECONOMICS 471 (1964).

[80] Shepherd, *supra* note 76, at 3.
The average interest rate for utilities has remained almost constant during the last thirty years. In 1938, it was 4.1 percent compared to 4.0 percent in 1967. *Hearings* on *S. 607*, *supra* note 26, at 213–15.

[81] The court permitted the electric utilities to recover treble damages, but the FPC ordered that the money recovered be used to reduce the rate base in the year of recovery. FPC Accounting Release AR–1 (Dec. 30, 1961). For an excellent, detailed review of the history of the cases, see C. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES (1973).

scale.[82] If that is the case, regulation may stimulate economy and technological progress only when it does not work.

Furthermore, because of its complex nature, the electric power industry tends to defy effective regulation. There is no realistic standard by which resource allocation, price, quality, or material progress can be judged. So many variables directly affect profits that it is virtually impossible for regulatory commissions to realistically fix rates.[83] Even if rates are based upon specific data, the commission has no control over company management which furnishes the data upon which the commission relies. Consequently, utilities can manipulate their rate base by accounting practices, spending, or by reducing one or more aspects of their service, such as peak load capacity, constancy of current, promptness of repairs, or speed of installation service.[84] When a commission takes aim at one factor, the utility may compensate by manipulating others.[85] In short, the inability of regulators to force electric utilities to operate at a specified output, price, and cost make effective regulation impossible.[86]

IV. Antitrust Policy and Electric Utilities

State and federal regulatory control over electric utilities has not completely supplanted competition and antitrust policy as economic controls in the electric utilities industry.[87] On the contrary, regulated industries are subject to antitrust laws, except where Congress has expressly provided otherwise.[88] Since Congress has never expressly exempted the

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[82] The current regulatory system operates to deprive the utilities of any gains resulting from increased efficiency. Shepherd, *supra* note 76, at 30–31.

[83] Stigler & Friedland, *supra* note 64, at 11–12.

[84] *Id.*

[85] Under current regulatory practice

> the Commission will proudly win each battlefield that its protagonist has abandoned except for a squad of lawyers. Since a regulatory body cannot effectively control the daily detail of business operations, it cannot deal with variables whose effect is of the same order of magnitude in their effects on profits as the variables upon which it does have some influence.

Id. at 12

[86]

> Thus was born the grand, mysterious, unfathomable hocus-pocus—the process by which the parties (including, sometimes, the commission itself) present elaborate estimates of reproduction cost under various assumed conditions and price levels, of investment, of depreciation (both accounting and observed), of intangibles—all attested to by qualified engineers, accountants, financiers and other experts, and all of the estimates on the same items differing widely in amount—the whole then being taken under consideration (after examination, cross examinations and the submission of briefs and statements by seasoned attorneys), finally to emerge in a finding of fair value by the commission. The finding—a wondrous thing—bears only one relation to the evidence or any combinations of the evidences—it is somewhere inside the outermost figures. It is "found" by the exercise of judgment—unguided, nonfunctional, inscrutable. It represents no "theory." It serves no purpose—except to defy explanation and hence to be impervious to attack on appeal.

Lewis, *Emphasis and Misemphasis in Regulatory Policy*, in Utility Regulation 234 (W. Shepherd & T. Gies eds. 1966).

[87] *See, e.g.*, text acompanying notes 52–54 *supra*.

[88] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). In Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552, 560 (4th Cir. 1950), the court noted:

electric utilities industry from the Sherman and Clayton Acts, antitrust policy has continued to have a background effect on the industry.[89]

Application of the antitrust laws to electric utilities, however, has been limited by two court created doctrines: the primary jurisdiction doctrine and the state action doctrine. The primary jurisdiction doctrine is based upon the premise that regulatory agencies have developed unique expertise in dealing with utility practices and problems. Thus, because these agencies have continuing jurisdiction over utilities, courts should, as a matter of discretion, refer alleged antitrust violations to the agency or at least defer action until the agency has had an opportunity to act.[90] The state action doctrine originated in *Parker v. Brown*,[91] where the Supreme Court held that federal antitrust laws were not applicable to state action. The underlying rationale is that when a state grants monopoly powers to a private business, the activities of the private business are really the activities of the state itself and are thus exempt from the antitrust laws.[92]

Both doctrines are based upon the assumption that the goals of regulation and antitrust are inconsistent and mutually exclusive. Most cases where the antitrust laws are invoked to control electric utility activity, however, arise in areas where the utility is in actual competition with some other enterprise. The following cases are typical. The *Penn Water*

> In short, the grant of monopolistic privileges, subject to regulation by governmental body, does not carry an exemption, unless one be expressly granted, from the anti-trust laws, or deprive the courts of jurisdiction to enforce them.

The Supreme Court recently affirmed this principle in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *See* notes 103–107 *infra* and accompanying text.

[89] This effect has been evident in a number of joint actions by municipal and cooperative utilities to secure membership in joint ventures and regional power pools dominated by large investor-owned utilities. Many regulating commissions also consider antitrust implications in their deliberations. *See* R. HELLMAN, *supra* note 16, at 40–44; *Hearings on S. 607, supra* note 26, pt. 1, at 37–46.

[90] The Supreme Court has explained the doctrine as follows:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574–75 (1952).

[91] 317 U.S. 341 (1943).

[92] *Id.* at 350–52. *Parker* involved a plan by the California legislature to allow growers of grapes to join together to withhold grapes from the market in order to stabilize prices and conserve the state's agricultural wealth. The Court admitted that the plan would violate the Sherman Act if instituted by private parties, but found that since the state created and enforced the plan, it was beyond the reach of the Sherman Act. The Court did, however, enter one caveat—the state could not authorize violations of the Sherman Act nor declare violations of the Act legal. The source of the conduct may be determined by analyzing the origin of the conduct and how it is carried out. This simple doctrine, however, has been stretched far beyond the plain meaning of its language. *See, e.g.*, Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971), where the court held that the state inaction implied state action.

cases[93] involved two competitors in the wholesale electricity market who were prevented by contract from competing—an arrangement clearly constituting an unreasonable restraint of trade.[94] In *Washington Gas Light Co. v. Virginia Electric & Power Co.*,[95] Virginia Electric was accused of illegally using its monopoly power to prevent customers from dealing with the gas utility for their home heating, cooking, and water heating needs. Finally, in *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*,[96] the Cooperative had executed a contract requiring fourteen other cooperatives to purchase power exclusively from it. Despite the fact that competition was involved in each of these cases, the courts failed to consider its use as a control device over unwarranted restraints of trade. The courts made no inquiry into whether the alleged restraints were actual or imagined, nor did they examine the effects of the alleged antitrust violations. Instead, the courts relied upon the primary jurisdiction and state action doctrines to shift responsibility to the appropriate regulatory authorities, apparently on the assumption that as long as the activity is regulated, it is adequately controlled. This attitude is exemplified in *Pennsylvania Water & Power Co. v. FPC*,[97] where the Supreme Court stated: "To the extent that Penn Water is being controlled, it is by the Commission, acting under statutory authority, not by Consolidated acting under the authority of private contract terms 'legalized' by the Commission."[98]

For an analysis and history of the *Parker* doctrine see Simmons & Furnaciari, *State Regulations as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 1974 U. CIN. L. REV. 61.

[93] See notes 1–14 *supra* and accompanying text.

[94] *See* discussion in note 9 *supra*.

[95] 438 F.2d 248 (4th Cir. 1971). The Fourth Circuit went to great lengths to avoid consideration of the alleged antitrust violations. In fact, the State Corporation Commission had neither reviewed nor sanctioned defendant's anticompetitive activities. The court nevertheless held that the lack of action on the part of the Commission implied its consent to the anti-competitive practices, and that it was therefore state action. The court concluded that defendant's "promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these practices exempt from application of the laws of antitrust under the *Parker* doctrine." *Id.* at 252. *See also* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971).

[96] 394 F.2d 672 (5th Cir. 1968). The Fifth Circuit invoked the state action doctrine to avoid consideration of antitrust claims against Alabama Cooperative. The court held that since the Rural Electrification Act provides federal encouragement for rural cooperatives, Alabama Cooperative was an instrumentality of the United States government. Consequently its activities were exempt from the antitrust laws. *Id.* at 677.

[97] 343 U.S. 414 (1952).

[98] *Id.* at 422. In his dissenting opinion, Justice Douglas took issue with this reasoning:

> The Commision has accordingly approved the unholy alliance. It has allowed Consolidated to continue to manage Penn Water as though the latter were its alter ego. It is therefore disingenuous for the Court to say that hereafter Penn Water is subject to control by the Commission, not by Consolidated. . . . No matter how vehement our denial, the truth is that the Commission has laced Penn Water to Consolidated under a management contract that leaves Pen Water no initiative. . . . I know of no power in the Commission that authorizes it to place one company on the back of another company, to merge and consolidate companies as it chooses, or to give the management of one company a veto power over the management of a competitor. Those

Notwithstanding these limitations upon the reach of antitrust law into the electric utility industry, the following two cases are illustrative of the current judicial trend to apply the antitrust laws to large electric utilities. *Gulf States Utilities Co. v. FPC*[99] involved a challenge to a bond issue proposed by Gulf and two other privately owned utilities.[100] Louisiana Electric alleged that the privately owned utilities had engaged in anticompetitive practices and that to allow the bond issue would be to finance illegal activities detrimental to the public interest. The FPC held that the alleged anticompetitive practices were irrelevant to the bond issue request. On appeal, the Supreme Court held that the FPC had, in approving the bond issue, improperly failed to consider antitrust policy. The Court stated:

> The [Federal Power] Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry. Indeed, *within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated.*[101]

The recognition by the Court that certain types of competition can exist in a natural monopoly industry and that such competition should be protected by the antitrust laws represents a giant step forward in setting the bounds of regulation and competition. The Court further defined the FPC's role in antitrust enforcement:

> Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against competitive practices that might later be the subject of antitrust proceedings.[102]

In the second case, *Otter Tail Power Co. v. United States,*[103] the government brought antitrust charges under section 2 of the Sherman Act against Otter Tail, a privately owned electric utility controlling approximately ninety-one percent of the retail electricity market in its service area. The government claimed that Otter Tail had violated section 2 by (1) refusing to sell electricity at wholesale to cities within its service area, (2) refusing to wheel Bureau of Reclamation power to the cities, (3) instituting litigation designed to prevent the cities from bonding their municipal sys-

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> are practices which the Sherman Act condemns, and which nothing in the Federal Power Act sanctions.

Id. at 425–26 (Douglas, J., dissenting).

[99] 411 U.S. 747 (1973).

[100] Louisiana Electric brought the action under 16 U.S.C. § 824c (1970), which provides:

> No public utility shall issue any security . . . unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issues. . . . The Commission shall make such order only if it finds that such issue . . . is for some lawful objective . . . and . . . is reasonably necessary or appropriate for such purposes.

[101] 411 U.S. at 759 (emphasis added).

[102] *Id.* at 760.

[103] 410 U.S. 366 (1973).

tems, and (4) using restrictive contract provisions as the basis for its actions. In finding antitrust violations, the Court stated: "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws."[104] The Court further noted that the Federal Power Act was designed to stimulate competition and that it was not "intended to be a substitute for or immunize Otter Tail from antitrust regulation."[105] Thus disposing of Otter Tail's defenses,[106] the Court then applied the traditional "attempt to monopolize" formula of section 2 of the Sherman Act.[107]

Otter Tail and Gulf States, in erasing the notion that electric utilities are immune from antitrust policy, have established that (1) electric utilities are clearly subject to the antitrust laws; (2) federal courts have primary jurisdiction in antitrust proceedings involving electric utilities;[108] (3) when anticompetitive practices ripen into antitrust violations, the courts are to exercise their jurisdiction and enforce the antitrust laws against the utility involved; (4) the FPC should consider antitrust policy in its decisions and preserve competition when possible; (5) the FPC should be the "first line of defense" against anticompetitive practices;[109] and (6) deference should be shown to regulation only in those areas where natural monopoly renders competition ineffective. In addition, these cases indicate a new willingness on the part of the Court to reject assumptions of the mutual incompatibility of regulation and competition and to reconcile the objectives of these policies where feasible.

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[104] 410 U.S. at 372. The FPC had acted in 1968 to prevent the anticompetitive behavior by ordering Otter Tail to interconnect with the smaller utilities. This order was unsuccessfully appealed in Otter Tail Power Co. v. FPC, 429 F.2d 232 (8th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971). Notwithstanding the FPC action, the Justice Department brought suit under the antitrust laws. The fact that the Supreme Court granted certiorari after the administrative action indicates a weakening of the primary jurisdiction doctrine.

[105] 410 U.S. at 374–75.

[106] Otter Tail had relied upon its contract with the Bureau of Reclamation and cooperatives which purported to relieve it of the duty to wheel power for municipalities. The Court held that the contract was no defense, since "government contracting officers do not have the power to grant immunity from the Sherman Act." *Id.* at 378–79.

[107] Generally, in order to fall within section 2, the monopolist must have both the power and the intent to monopolize. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). In *Otter Tail,* the Court found that "Otter Tail had 'a strategic dominance in the transmission of power in most of its service area' and . . . it used this dominance to foreclose potential entrants into the retail area . . . ." 410 U.S. at 377.

[108] Comment, *Otter Tail and its Import for Regulated Utilities,* 1973 WAKE FOR. L. REV. 407.

[109] The FPC has moved in the direction of accepting its role as a first line of defense against anticompetitive behavior. It has asserted its authority to compel nondiscriminatory admission into regional power pools and joint ventures and has helped to open the way for municipals and cooperatives to join in multi-utility nuclear projects. It has also required companies within its jurisdiction to sell and wheel electricity to customer companies, regardless of their size or ownership. This has helped to assure the availability of wholesale power and has prevented the large privately owned companies from using their power and wealth against smaller competitors. R. HELLMAN, *supra* note 16, at 40–44.

V. SOME SUGGESTIONS FOR A CLARIFIED APPROACH

Since competition, as an economic control, is clearly superior to regulation in terms of its ability to achieve optimum allocation of resources, the following suggestions should be considered in integrating antitrust policy with government regulation of the electric utilities industry.

The regulation of electric utilities evolved in an era when power companies were primarily local suppliers of retail electricity. The local distribution system was at that time and remains today a prime example of a natural monopoly.[110] Too often, however, it has been assumed that since electric utilities are granted a geographic retail monopoly, competition is not feasible in other markets and levels of the utility's business.[111] When courts and agencies view the electric utility business as a single integrated operation from generation to consumption, they fall into the error of applying a single set of economic principles to very distinct functions within the system.

In fact, privately owned electric utilities operate at different levels and in distinct markets. Four distinct products are produced[112] at the generation level which have created active markets bearing little resemblance to the local retail market. In these wholesale markets, utilities should be free to shop for their power needs without anticompetitive restraint. One commentator claims that "[c]ompetition in generation should operate as well as in other basic production industries, and perhaps better since the product is fungible and the demand is large and fragmented."[113] Regulation should not impede the antitrust laws from protecting this full competition at the generation level, a desired objective because it encourages electric utilities to utilize economies of scale, thereby increasing efficiency and facilitating proper resource allocation. Competition would encourage the construction of larger and more efficient units with a view toward regional or national markets rather than less efficient, localized markets. Such competition would also serve as a natural check on prices and would encourage innovation and economy.[114]

Presently, "monopoly over transmission by vertically integrated systems presents the most serious obstacle to potential competition."[115] Large

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[110] *See* Meeks, *supra* note 31, at 74.

[111] Some argue that since generation must be tied directly to consumption, the system must necessarily be viewed, synchronized ,and treated as a single process or operation. This argument ignores the economic realities of the industry. The market operates at different levels with different functions and provides distinct products. Certainly, the need for coordination between output and consumption cannot be denied, but modern technology facilitates coordination without treating the process as a single operation. The need for vertical integration may have been necessary during the industry's developing stages, but today's sophisticated industry can no longer justify such restraints on trade. *See generally* United States v. Jerrold Elec. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

[112] See notes 33–39 *supra* and accompanying text.

[113] Meeks, *supra* note 31, at 83.

[114] *Id.* at 84. If the vertically integrated structure of the electric utility industry becomes a means of spreading monopoly to competitive areas, it may be necessary to cut through this structure by court, legislative, or administrative action.

[115] *Id.* at 87.

investor-owned utilities control most of the long distance transmission facilities in the industry today. By refusing to wheel power or by refusing to interconnect with smaller systems in their service areas, the large companies can effectively deny their smaller competitors the opportunity to take advantage of pooling agreements, wholesale power, and scale advantages.[116] The Sherman Act, by forbidding the use of monopoly power in one market to foreclose competition in another market,[117] provides a direct remedy against such use of the transmission monopoly and should therefore be applied to break up such unreasonable restraints of trade.

Despite the presence of natural monopoly, certain types of competition still exist at the retail level.[118] Where such competition exists, regulation should not be used as a shield for anticompetitive activities, but should rather defer to antitrust policy for purposes of protecting such competition.

Commissions and courts have too often lost sight of economic objectives and assumed that the goal of regulation was to prevent competition. Such assumptions can only lead to the abuse of monopoly power to the detriment of the public. Courts should assume jurisdiction over antitrust violations, and the antitrust laws should be applied wherever potential or actual competition is feasible. Competition should be placed in its proper role as the best control over our economy, with exceptions being tolerated only when necessity dictates. The goal of competition and regulation should be the same—economy and efficiency in resource allocation—and should be harmonized toward accomplishment of results beneficial to society.[119] Commissions and courts should focus upon these goals as they relate to particular conduct so that the proper tool may be chosen in every circumstance.

J. BRENT GARFIELD

[116] "Refusal to wheel power over transmission lines forces wholesale customers within an integrated system's territory to look to that system for their power." *Id.* at 86.

[117] *See, e.g.,* Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[118] *See* notes 52–54 *supra* and accompanying text.

[119] For a discussion of some of the complementary purposes of antitrust laws and regulation see Turner, *The Scope of Antitrust and Other Economic Regulatory Policies,* 82 HARV. L. REV. 1207 (1969).

Defamation—Constitutional Standards and Utah Law

The law of defamation has been radically changed in recent years by the United States Supreme Court.[1] This Note will analyze the constitutional standards pertaining to personal defamation, will examine Utah civil and criminal defamation law in light of those standards, and will suggest areas where Utah law is constitutionally deficient or otherwise inadequate.[2] Although few Utah cases have dealt with the constitutional standards enunciated by the Supreme Court, the impact of those standards on the common law of libel and slander will also be briefly discussed.

I. The Evolution of a Constitutional Standard: *New York Times* and its Progeny

Over the last decade, the Supreme Court has struggled "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."[3] This struggle began with *New York Times Co. v. Sullivan*[4], where a police commissioner proved that defamatory statements in a *Times* advertisement endorsing civil rights demonstrators referred to him. Many of the statements constituted libel per se[5] under Alabama law. Nevertheless, concluding that to hold the defendant liable would violate "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[6] the Supreme Court held that a public official

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[1] Gertz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974); Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S 254 (1964).

[2] The common law history of slander and libel, treated extensively in Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546 (1903), is considered only to the extent necessary to analyze a particular case or statute.

[3] Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3000 (1974).

[4] 376 U.S. 254 (1964).

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> [L]ibel "per se" is libel the defamatory meaning, or implication, of which is apparent on the face of the publication itself, so that it is conveyed to any reader entirely ignorant of the facts without resort to any other source. This is the case, for example, where the plaintiff is called in so many words a thief, a liar, or a bastard.

Prosser, *Libel Per Quod*, 46 Va. L. Rev. 839, 840 (1960).

> Statements not defamatory on their face may still be actionable if extrinsic facts can be shown which demonstrate their injurious implication (*per quod*). For example, the untrue statement that *X* is the father of three children is defamatory if it can be shown that *X* has never been married.

1 A. Hanson, Libel and Related Torts ¶ 15 (1969).

The above rules apply only to libel. A statement is slanderous per se only if it accuses the plaintiff of (1) a crime involving moral turpitude; (2) unchastity (applicable only if plaintiff is a woman); (3) affliction with a loathsome disease; or (4) unfitness for his business, profession, employment, or office. *Id.* ¶ 16.

When a statement is defamatory per se, damages are presumed and the plaintiff may recover without proof of any specific damages. Hales v. Commercial Bank, 114 Utah 186, 197 P.2d 910 (1948). Recently, however, this rule was limited by requiring proof of damages unless the plaintiff is able to show that the defendant was motivated by actual malice. Gertz v. Robert Welch, Inc., 94 C. Ct. 2997, 3011–12 (1974).

[6] 376 U.S. at 270.

cannot recover for defamation relating to his official conduct unless he is able to prove that the statement was made with actual knowledge that, or reckless disregard of whether, the publication was false.[7] Known as the "actual malice" test,[8] this rule was extended in *Curtis Publishing Co. v. Butts*[9] to cover defamatory statements about public figures, and more recently, in *Rosenbloom v. Metromedia, Inc.*,[10] to defamations involving any person associated with a public issue.[11] Although courts have had difficulty discerning which defamations relate to a public official's "official conduct,"[12] they have experienced even more difficulty in determining

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[7] *Id.* at 279–80.

[8] The "actual malice" test is demanding enough to deny the plaintiff recovery in almost every case. A showing that the defendant has been negligent will not suffice to meet the actual malice test, Garrison v. Louisiana, 379 U.S. 64, 79 (1964), nor will a showing that the defendant was motivated by hostility, vindictiveness, or spite. Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967). A defendant's failure to investigate before publishing the defamation is also insufficient to show actual malice. Rather, the publisher must act with a "high degree of awareness . . . of probable falsity." St. Amant v. Thompson, 390 U.S. 727, 731 (1968), *quoting* Garrison v. Louisiana, 379 U.S. 64, 74 (1964). *See* Comment, *Calculated Misstatements of Fact Not Protected by First Amendment Guarantees of Free Speech and Press,* 1969 UTAH L. REV. 118.

Of the several hundred reported decisions applying the *Times* actual malice standard in libel cases, this writer has found only eight in which the plaintiff has finally recovered. In three cases, the plaintiff was able to show that the defendant knew the defamation was false. Sas Jaworsky v. Padfield, 211 So. 2d 122 (La. Ct. App. 1968); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed,* 393 U.S. 1046 (1969); Fox v. Kahn, 421 Pa. 563, 221 A.2d 181, *cert. denied,* 385 U.S. 935 (1966). In three others, the plaintiff demonstrated that the defendant acted in reckless disregard of whether the statement was false. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Snowden v. Pearl River Broadcasting Corp., 251 So. 2d 405 (La. Ct. App.), *cert. denied,* 259 La. 887, 253 So. 2d 217 (1971); Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 160 N.W.2d 1 (1968). Two cases held that a jury finding of actual malice could be sustained on either of the above grounds. Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969); Dalton v. Meister, 52 Wis. 2d 173, 188 N.W.2d 494 (1971), *cert. denied,* 405 U.S. 934 (1972).

Occasionally, a plaintiff may escape application of the actual malice rule because the defendant is held to have waived the constitutional defense by failing to raise it at trial. Flannery v. Allyn, 75 Ill. App. 2d 365, 221 N.E.2d 89 (1966), *cert. denied,* 388 U.S. 912 (1967); *see also* Rowden v. Amick, 434 S.W.2d 550 (Mo. 1968). In *Rowden,* the Supreme Court of Missouri stated that the constitutional issue of actual malice could not be raised for the first time on appeal, but held that it lacked jurisdiction. On transfer to the Kansas City Court of Appeals, that court permitted the constitutional issue to be raised. Rowden v. Amick, 446 S.W.2d 849 (Mo. Ct. App. 1969). Furthermore, even though the plaintiff has a heavy burden of proof in cases where he must show actual malice, courts have been reluctant to grant summary judgment for the defendant. *See, e.g.,* Windsor Lake, Inc. v. Wrok, 94 Ill. App. 2d 403, 236 N.E.2d 913 (1968); Coursey v. Greater Niles Township Publishing Corp., 82 Ill. App. 2d 76, 227 N.E.2d 164 (1967), *aff'd,* 40 Ill. 2d 257, 239 N.E.2d 837 (1968); Arber v. Stahlin, 382 Mich. 300, 170 N.W.2d 45, *cert. denied,* 397 U.S. 924 (1969).

[9] 388 U.S. 130 (1967).

[10] 403 U.S. 29 (1971).

[11] "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." *Id.* at 43.

[12] *E.g.,* Ocala Star-Banner Co. v. Damron, 221 So. 2d 459 (Fla. Ct. App. 1969), *rev'd,* 401 U.S. 295 (1971). In *Damron,* a newspaper article falsely stated that the plaintiff, a city mayor and candidate for county tax assessor, had been indicted for perjury. In fact, the plaintiff's brother had been indicted. The lower court held that the *Times* standard was inapplicable in cases of mistaken identity because the article did not relate to the plaintiff's official conduct, or even refer to the plaintiff's position as an officer or candidate for office. 221 So. 2d at 461. The Supreme Court reversed, hold-

when a particular defamation involves a public issue.[13] Recently, however, the Supreme Court abandoned the *Rosenbloom* extension and limited the actual malice rule to cases involving public officials or public figures.[14]

The most significant extension of the actual malice rule occurred in *Gertz v. Robert Welch, Inc.*,[15] where the defendant, Robert Welch, Inc., published an article referring to attorney Gertz as a "Leninist" and a "communist-fronter," and portraying him as the architect of an alleged "frame-up" which resulted in the conviction of a Chicago policeman for murder. Because these statements were found to constitute libel per se,[16] the only issue at trial was the measure of damages. Anticipating *Rosenbloom,* however, the district court entered judgment n.o.v. upon a determination that the *Times* rule should apply where a public issue was involved.[17] The Seventh Circuit Court of Appeals affirmed,[18] but the Supreme Court, discarding the *Rosenbloom* public issue doctrine, reversed, holding that "states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[19] This holding abolishes libel and slander per se recoveries unless the plaintiff meets the high burden of proof required by *Times*.[20]

The *Gertz* holding most directly affects the traditional damage remedies in defamation actions. At common law, three kinds of damages are available to compensate a defamation victim. When a statement is defamatory per se, general damages, including compensation for emotional distress,[21] are presumed to result and the plaintiff may recover

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ing that "a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office' for purposes of applying the *New York Times* rule. . . ." 401 U.S. at 300.

[13] *E.g.,* Francis v. Lake Charles Am. Press, 262 La. 875, 265 So. 2d 206 (1972), *appeal dismissed,* 410 U.S. 901 (1973), where the court initially held that the signing of an appearance bond in a misdemeanor case was an event of such significant public concern as to require application of the *Times* standard, but reversed itself on rehearing.

The following trilogy of cases involving the question whether the divorce of a wealthy socialite is a significant public issue is another example of judicial confusion over the *Rosenbloom* extension of the *Times* standard. Firestone v. Time, Inc., 231 So. 2d 862 (Fla. Dist. Ct. App. 1970); Time, Inc., v. Firestone, 254 So. 2d 386 (Fla. Dist. Ct App 1971), *rev'd,* 271 So 2d 745 (Fla. 1972).

[14] Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3010 (1974). Another case which may seem weakened by *Gertz* is Time, Inc. v. Hill, 385 U.S. 374 (1967), where the Supreme Court held that there could be no recovery under a state right to privacy statute where a magazine had fictionalized an incident of public interest in the plaintiff's life, in the absence of a showing that the defendant was motivated by actual malice. *Hill* is distinguishabe from other cases applying the *Times* rule, however, because it was not a defamation case. Furthermore, the Supreme Court has recently cited its holding in *Hill* with approval. Cantrell v. Forest City Publishing Co., 95 S. Ct. 465 (1974).

[15] 94 S. Ct. 2997 (1974).

[16] See discussion in note 5 *supra.*

[17] Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970).

[18] Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).

[19] Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3011 (1974).

[20] See discussion in note 8 *supra.*

[21] RESTATEMENT OF TORTS § 623 (1938).

without proof of actual loss.[22] Special damages, which must be proven at trial,[23] are awarded for specific monetary or pecuniary losses attributable to the lowered reputation of the plaintiff. Punitive or exemplary damages may be awarded where the plaintiff proves that the defendant was motivated by actual malice.[24] Although common law definitions of "actual malice" are significantly milder than the *Times* rule,[25] under *Gertz,* a plaintiff cannot recover punitive damages without a showing of actual malice as defined in *Times. Gertz* also requires a showing of *Times*-defined actual malice before general or presumed damages may be recovered.[26] Thus, where the plaintiff is unable to make the showing required in *Times,* he may now recover only for "actual injury."[27]

The Court's justification for these sweeping modifications of the common law is that presumed or general damages, as well as punitive damages, encourage juries to punish unpopular opinion rather than to compensate the plaintiff for his actual loss.[28] The term "actual injury," as defined by the *Gertz* Court, however, is not limited to special damages, but includes elements traditionally classified as general damages, such as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[29] The Court in *Gertz* indicated that "all awards must be supported by competent evidence concerning the injury."[30] Once such evidence is received, however, juries are still free to punish unpopular opinion, since "there need be no evidence which assigns an actual dollar value to the injury."[31] The specific kinds of evidence which will be sufficient to support a large award must be left for future cases to decide.

II. Defamation in Utah

A. The Statutory Framework for Civil Libel: The Utah Statutes

On their face, sections 45–2–1 to –10 of the Utah Code Annotated,[32] the Utah statutes dealing with civil defamation, appear to apply only to

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[22] 1 A. Hanson, *supra* note 5, at ¶ 161.

[23] *Id.* ¶ 162.

[24] Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966); 1 A. Hanson, *supra* note 5, at ¶ 163.

[25] *See, e.g.,* Reynolds v. Pegler, 223 F.2d 429 (2d Cir.), *cert. denied,* 350 U.S. 846 (1955) (actual malice may be inferred from the violence and vituperation apparent on the face of the libel); Shapiro v. Health Ins. Plan, 7 N.Y.2d 56, 163 N.E.2d 333, 194 N.Y.S.2d 509 (1959) (actual malice is the same as personal spite, ill will, culpable recklessness, or negligence); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958) (actual malice is found where the defendant is motivated by spite, hatred, or ill will). For a case comparing common law actual malice with actual malice as defined in *Times,* see Cantrell v. Forest City Publishing Co., 95 S. Ct. 465 (1974).

[26] 94 S. Ct. at 3012.

[27] *Id.*

[28] *Id.*

[29] *Id.; see* Fenstermaker v. Tribune Publishing Co., 13 Utah 532, 541, 45 P. 1097, 1099 (1896).

[30] 94 S. Ct. at 3012.

[31] *Id.*

[32] Utah Code Ann. §§ 45–2–1 to –10 (1970).

newspaper publishing and media broadcasting.[33] Despite such an appearance, however, federal and state courts have applied the statutory definitions of libel[34] and privileged publication [35] found in sections 45–2–2 and 45–2–3 in situations other than newspaper publishing and media broadcasting. It therefore appears that courts often view these statutes as a codification of the common law of civil defamation, not to be limited to media publications.

A Utah statute defines "libel" as

> a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby expose him to public hatred, contempt or ridicule.[36]

There are two serious deficiencies with this definition. First, the statute creates a cause of action against a defendant who "blacken[s] the memory of one who is dead." In fact, however, at common law "there is no protection for the memory of the dead, and no case can be found granting recovery therefore [sic], even where the state libel statute includes it in the definition of libel."[37] In other states with similar statutes, the cases deny recovery on either of two grounds: (1) that a cause of action for libel is personal to the party injured;[38] or (2) that the statute providing for liability fail to designate the person to whom the right to sue is given.[39] For these reasons, although there are no Utah cases dealing with this issue, it appears that Utah courts would also refuse to grant recovery

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[33] UTAH CODE ANN. §§ 45–2–1 to –10 (1970) are part of title 45, "Newspapers and Radio Broadcasting." This fact has engendered great confusion in the case law. *See* text accompanying notes 86–98 *infra.*

[34] *See, e.g.,* Derounian v. Stokes, 168 F.2d 305 (10th Cir. 1948) (libel appearing in book).

[35] *See, e.g.,* Reliance Ins. Co. v. Hollins, 16 Utah 2d 44, 395 P.2d 537 (1964) (libel appearing in court pleadings); Carter v. Jackson, 10 Utah 2d 284, 351 P.2d 957 (1960) (slander occurring at city council meeting).

[36] UTAH CODE ANN. § 45–2–2 (1970). Since there is no statute in Utah defining slander, mass media broadcasts are arguably actionable only as libel. Despite the lack of a statute, one Utah case seems to suggest that such defamatory broadcasts are actionable as slander. Demman v. Star Broadcasting Co., 28 Utah 2d 50, 497 P.2d 1378 (1972). The court referred in the course of its opinion to the "alleged slanderous dialogue." *Id.* The appellant did not allege slander expressly, however, and only characterized the case as one of "libel and slander." Brief for Appellant at 1, Demman v. Star Broadcasting Co., 28 Utah 2d 50, 497 P.2d 1378 (1972).

The common law rule is that a defamatory broadcast is libel if the defamatory statement is read from a script and slander if given extemporaneously. *Compare* Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949), *with* Hartmann v. Winchell, 296 296, 73 N.E.2d 30 (1947). *See* Annot., A.L.R.2d 794 (1951). The distinction is crucial only where the plaintiff alleges that the statement is libelous or slanderous per se, and then only if he meets the *Times* test of showing actual malice. The plaintiff would probably prefer to bring his action as libel, since only four categories of slander are actionable per se. See note 5 *supra.*

[37] 1 A. HANSON, *supra* note 5, at ¶ 33. The Hanson work was published in 1969, but cases after that date do not contradict the quoted statement. It is sometimes held, however, that a cause of action does not abate on the death of the plaintiff. Moore v. Washington, 34 App. Div. 2d 903, 311 N.Y.S.2d 310 (1970). *Contra,* Hayes v. Rodgers, 447 S.W.2d 597 (Ky. 1969).

[38] *See* Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W.2d 246 (1942).

[39] Turner v. Crime Detective, 34 F. Supp. 8 (N.D. Okla. 1940).

in this situation. Thus, the misleading language in the statute should be deleted.

Second, the statutory definition of libel may be constitutionally deficient because it fails to allow truth as an absolute defense. To "publish the natural defects of [a person] clearly import[s] the publication of the truth,"[40] yet the Utah statute makes such publication actionable as libel. Although the Utah Supreme Court has held that truth is an absolute defense to an action for libel,[41] neither the statutory language nor the Utah Constitution[42] makes this clear. Furthermore, in one case the Utah Supreme Court stated in dictum that truth may not be a defense, where the defendant had violated a confidential relationship, thereby damaging the plaintiff through defamation.[43] Although such a position may be a defensible exception to the rule that truth is an absolute defense, it is nevertheless contrary to the United States Supreme Court's edict in *Garrison v. Louisiana*[44] that truth is a constitutionally required defense to a defamation action involving public officials.[45]

Sections 5 through 10 of the Utah defamation statutes deal with media broadcast defamation. To recover against the owner or operator of a radio or television station for a defamatory statement, section 5 requires a plaintiff to show that the defendant owner or operator was motivated by actual malice. Since the statute was enacted prior to the *Times* decision, the statutory "actual malice" test is arguably less stringent than the rule in *Times*[46] with respect to plaintiffs who are neither public officials nor public figures. Under the statutes, however, no recovery is allowed against owners or operators of broadcasting stations for defamatory broadcasts "by or on behalf of any candidate for public office."[47]

The Utah Supreme Court has construed section 5 only once. In *Demman v. Star Broadcasting Co.*,[48] the defendant radio station permitted defamatory statements from a telephone caller to be broadcast about the plaintiff, a candidate for county commissioner. The station was equipped

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[40] Derounian v. Stokes, 168 F.2d 305, 309 (10th Cir. 1948) (Phillips, J., dissenting).

[41] Williams v. Standard-Examiner Publishing Co., 83 Utah 31, 59, 27 P.2d 1, 17 (1953).

[42] UTAH CONST. art. 1, § 15 provides that "[i]n all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, *and was published with good motives, and for justifiable ends,* the party shall be acquitted . . . ." (emphasis added).

[43] Berry v. Moench, 8 Utah 2d 191, 196, 331 P.2d 814, 816–17 (1958).

[44] 379 U. S. 64 (1964).

[45] *Id.* at 73. Recently, the Supreme Court stated in dicta that "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." Cox Broading Corp. v. Cohn, 43 U.S.L.W. 4343, 4350 (U.S. March 3, 1975). Justice Powell, in a concurring opinion, expressed the view that truth should be a constitutionally required defense in all cases. *Id.* at 4352–53 (Powell, J., concurring).

[46] See note 25 *supra* and accompanying text.

[47] UTAH CODE ANN. § 45–2–5 (1970).

[48] 28 Utah 2d 50, 497 P.2d 1378 (1972).

with a delay device which could have prevented transmission of the defamatory statements, but the announcer failed to use it. Since the plaintiff was a "public official,"[49] he was required to show that the defendant was motivated by actual malice as defined in *Times*. The court disposed of the case on alternative grounds, holding (1) that the plaintiff had failed to show actual malice[50] and (2) that he was precluded from recovery by the language in section 5 denying recovery for defamatory statements "by or on behalf of any candidate for public office." The latter holding is a misreading of the statute, since the defamatory statements were not uttered *by or on behalf of* any candidate.[51] The case, however, should signal future plaintiffs that section 5 will be liberally construed in favor of media broadcasters.

Section 6[52] permits the owner of a broadcasting station to compel submission of a copy of any proposed broadcast prior to the time of transmission. But since the statute does not require submission, an owner who does not make such a request cannot be guilty of actual malice as defined in *Times,* at least not on that basis alone, since his action would undoubtedly be characterized as a "mere failure to investigate."[53]

Section 7[54] provides that a plaintiff may not recover for defamation against the owner or operator of a radio or television broadcasting station

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[49] In Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971), the Supreme Court held that candidates for public office are "public officials."

[50] *Contra,* Snowden v. Pearl River Broadcasting Corp., 251 So. 2d 405 (La. Ct. App.), *cert. denied,* 259 La. 887 253 So. 2d 217 (1971). The facts in *Snowden* are strikingly similar to those in *Demman,* except that in *Snowden* the radio station had no device for delaying the broadcast. The Snowden court held that "a radio station, having invited the public to speak freely through its facilities on a matter of public interest, is impressed with the duty of preventing such persons from making defamatory statements over the air." 251 So. 2d at 410.

The Supreme Court has stated that, in determining whether the defendant is motivated by actual malice, "[t]he finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story . . . is based wholly on an unverified anonymous telephone call." St. Amant v. Thompson, 390 U.S. 727, 732 (1968). This rationale would seem applicable to the situation in *Demman.*

[51] Demman v. Star Broadcasting Co., 28 Utah 2d 50, 55, 497 P.2d 1378, 1381 (1972) (Ellett, J., dissenting).

[52] UTAH CODE ANN. § 45–2–6 (1970) provides:

> Any person, firm, or corporation owning or operating a radio or television broadcasting station shall have the right, but shall not be compelled to require the submission and permanent filing, in such station, of a copy of the complete address, script, or other form of expression, intended to be broadcast over such station before the time of the intended broadcast thereof.

[53] St. Amant v. Thompson, 390 U.S. 727, 733 (1968).

[54] UTAH CODE ANN. § 45–2–7 (1970) provides:

> Nothing in this act contained shall be construed to relieve any person broadcasting over a radio or television station from liability under the law of libel, slander, or defamation. Nor shall anything in this act be construed to relieve any person, firm, or corporation from liability under the law of libel, slander, or defamation on account of any broadcast prepared or made by any such person, firm, or corporation or by any officer or employee thereof in the course of his employment. In no event, however, shall any such person, firm, or corporation be liable for any damages for any defamatory statement or act published or uttered in or as a part of a visual or sound broadcast unless it shall be alleged and proved by the complaining party that such person, firm, or corporation has failed to exercise due care to prevent the publication

or network unless he proves that the owner or operator failed to exercise due care to prevent publication of the defamatory statement. If the failure to prevent publication is the result of compliance with a federal statute or regulation, the owner or operator is deemed to have met the due care requirement. Under one federal statute,[55] for example, if a broadcasting station permits its facilities to be used by any legally qualified political candidate, it is required to make its facilities available on an equal-time basis to all qualified political candidates for the same office. In addition, under this federal statute the broadcasting stations have no power of censorship over the statements broadcast. This rule was formerly held to give no immunity to broadcasting stations from suits for defamation.[56] More recently, however, courts have construed this provision to grant broadcasting stations an implied immunity from such suits.[57] Section 7 codifies this construction and prevents liability.

Section 8[58] restricts liability to the owner of a broadcasting station originating a defamatory broadcast, where the defamation is simultaneously broadcast through several broadcasting outlets. At common law, a defamed party was permitted as many actions as there were publications,[59] although the resulting multiplicity of suits has been strongly criticized.[60] Since radio and television broadcasts may be nationwide, to allow multiple suits would permit a vindictive plaintiff to harass the defendants.[61] Section 8, by preventing multiple suits when the defamatory broadcasts are all within the state, represents a partial solution to this problem. In a conflict of laws setting, however, a Utah broadcaster might not be protected. If a foreign court obtains jurisdiction over a Utah defendant broadcaster and renders judgment for the plaintiff, the Utah courts will be required to enforce the judgment under the full faith and credit clause.[62]

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or utterance of such statement or act in such broadcast. Bona fide compliance with any federal law or the regulation of any federal regulatory agency shall be deemed to constitute such due care as hereinabove mentioned.

[55] 47 U.S.C. § 315 (1970).

[56] *See, e.g.,* Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), where a radio station was unable to use the noncensorship defense under the Federal Radio Act of 1927, 44 Stat. 1162. The Federal Radio Act was the predecessor of the Federal Communications Act and contained an identical censorship provision.

[57] Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958), *aff'd,* 274 F.2d 705 (6th Cir.), *cert. denied,* 363 U.S. 830 (1960); Farmer's Union v WDAY, Inc., 89 N.W.2d 102 (N.D. 1958), *aff'd,* 360 U.S. 525 (1959).

[58] UTAH CODE ANN. § 45–2–8 (1970) provides:

> In any case where liability shall exist on account of any broadcast where two or more broadcasting or television stations were connected together simultaneously or by transcription, film, metal tape, or other approved or adapted use for joint operation, in the making of such broadcast, such liability shall be confined and limited solely to the person, firm, or corporation owning or operating the radio or television station which originated such broadcast.

[59] RESTATEMENT OF TORTS § 578, comment b (1938).

[60] *See, e.g.,* Note, *The Single Publication Rule in Libel: A Fiction Misapplied,* 62 HARV. L. REV. 1041, 1042 (1949); Note, *Conflict of Law Problems in Multi-State Libel,* 15 U. CHI. L. REV. 164, 167 (1948).

[61] *See* Note, *Multi-State Libel and Conflict of Laws,* 35 VA. L. REV. 627 (1949).

[62] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1970).

The legislature repealed section 9,[63] a retraction statute designed to protect radio and television broadcasters, in 1953. That section was modeled after section 1,[64] which limits recovery against newspaper publishers to actual damages if the newspaper published the defamatory statement in good faith due to mistake or misapprehension of the facts, and subsequently published an appropriate retraction. The term "actual damages" in section 1 is not defined and has not been construed by the Utah Supreme Court, but in other retraction statutes, the term has usually been construed to mean that the plaintiff may recover all but punitive damages,[65] a definition roughly equivalent to the *Gertz* formulation of "actual injury."[66]

It is not clear why the legislature repealed section 9. Without empirical research, it is difficult to know whether a radio or television retraction would be as effective as one published in a newspaper. Assuming it is, then broadcasters should be able to shield themselves from punitive damages to the same extent as newspaper publishers because, to allow punitive damages against a broadcaster who has made a good faith effort to retract a defamation, could arguably violate the equal protection clause under the rationale that "[i]t is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others."[67]

B. Absolute Privilege to Defame.

Almost all Utah defamation cases have involved some consideration whether the alleged defamation was absolutely or conditionally privileged. If a communication is absolutely privileged, the plaintiff has no cause of

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[63] Law of May 10, 1949, ch. 76 § 5, [1949]Laws of Utah (repealed 1953).

[64] UTAH CODE ANN. § 45–2–1 (1970) provides:

> If it shall appear on the trial of an action brought for the publication of any alleged libel in any newspaper published in this state that the alleged libel was published in good faith, that the publication thereof was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published in the same type and in the same position on the same page as was the article complained of as libelous, in the next regular issue of such newspaper, or in case of a daily paper within three days, after service upon the publisher of such newspaper, at the principal office of its publication by the party aggrieved, of a written notice specifying the statement alleged to be erroneous, or, in case such notice is not served in the issue or within the time above specified after the filing of the complaint and service of the summons in said action, then the plaintiff shall recover only actual damages; provided, that if such libel was published in a Sunday edition, the publication of the retraction must have been in a Sunday edition within two weeks after the times above specified; provided further, that this section shall not apply in the case of any libel against any candidate for a public office at any election or primary, or any avowed candidate for nomination to any office before any political convention, unless the retraction of the charge was made editorially in a conspicuous manner at least five days before the holding of such election, primary, or political convention in case such libelous article was published in a daily paper, or if published in a weekly paper, at least three days before the holding thereof, which editorial retraction shall be in lieu of any other retraction herein provided for.

[65] *See, e.g.,* Miami Herald Publishing Co. v. Brown, 66 So. 2d 679 (Fla. 1953); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956).

[66] *See* text accompanying notes 27–29 *supra.*

[67] Park v. Detroit Free Press Co., 72 Mich. 560, 564, 40 N.W. 731, 734 (1888).

action, even if the statement is both false and malicious.[68] Section 3 of the Utah defamation statutes outlines five situations in which a defamation "shall not be considered as libelous per se."[69]

If a statement is made "in the proper discharge of official duty,"[70] it is absolutely privileged.[71] Although an absolute privilege may also arise if the defamation is published in any legislative, judicial, or other official proceeding, and bears some reasonable relationship to the proceeding,[72] the Utah Supreme Court intimated in *Dodge v. Henriod*[73] that "official duty" immunity may only shield a defendant from actions where special damages are not pleaded. In *Dodge,* a Utah Supreme Court justice had allegedly defamed the plaintiff in the course of a judicial opinion. The court held that the plaintiff had no cause of action because section 3(2) declared such statements "not to be libelous per se."[74] Arguably, therefore, the plaintiff would have prevailed had he pleaded special damages.[75] If this is true, then *Dodge* is in sharp conflict with an earlier decision, *Carter v. Jackson,*[76] where the Utah Supreme Court held that section 3(2) conferred an absolute privilege. Although *Carter* is in accord with the common law rule,[77] *Dodge* is consistent with the express language of the statute, which appears to supplant the common law rule.

Sound public policy supports the view that public officials should be absolutely immune from liability for defamation related to the subject and occurring in the course of official proceedings.[78] Other states' statutes

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[68] Williams v. Standard-Examiner Publishing Co., 83 Utah 31, 59, 27 P.2d 1, 13–14 (1933) (dictum).

[69] UTAH CODE ANN. § 45–2–3 (1970) is almost identical to section 10, which provides similar privileges with respect to media broadcasts. The latter statute has not been construed by the Utah Supreme Court, but it is likely that the court would construe the two statutes in a similar manner.

Since *Gertz, no* defamation is actionable per se unless the defendant is guilty of actual malice. Thus, damages are not presumed, but must be proven.

[70] UTAH CODE ANN. § 45–2–3(1) (1970).

[71] Carter v. Jackson, 10 Utah 2d 284, 351 P.2d 957 (1960) (dictum).

[72] UTAH CODE ANN. § 45–2–3(2) (1970), *construed in* Carter v. Jackson, 10 Utah 2d 284, 351 P.2d 957 (1960).

[73] 21 Utah 2d 277, 444 P.2d 753 (1968).

[74] *Id.* at 278, 444 P.2d at 754.

[75] That the court has rejected an absolute privilege may be inferred from the concurring opinion, which insists that the privilege ought to be absolute. *Id.* at 279, 444 P.2d at 754 (Ellett, J., concurring).

[76] 10 Utah 2d 284, 351 P.2d 957 (1960).

[77] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Steinpreis v. Shook, 377 F.2d 282 (4th Cir. 1967).

[78] The rationale for the common law rule is that

> [p]ublic servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended, in some reasonable degree, to those who act improperly, or exceed the authority given.
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> . . .
>
> On this basis judges always have ben accorded complete immunity for their judicial acts within the jurisdiction of courts of justice, even when their conduct is corrupt, or malicious and intended to do injury.

W. PROSSER, LAW OF TORTS, § 132, at 987 (4th ed. 1971).

In Utah, in contexts other than defamation, the absolute immunity of a judge depends only on whether the court had jurisdiction and whether the judge was acting in a judicial rather than a ministerial capacity. Allen v. Holbrook, 103 Utah 319, 331,

similar to Utah's are clearly worded to effect this result.[79] The Utah Legislature should, therefore, act at the earliest opportunity to resolve the ambiguity in the cases and the statute in favor of the common law rule granting absolute immunity.

The Utah Supreme Court has articulated several other common law rules granting absolute immunity in situations where a defamation is related to a judicial proceeding, but not "made in" a proceeding so as to be protected by section 3(2). For example, an attorney who, in connection with a legal proceeding, publishes a slanderous statement only to his client is absolutely protected because of the attorney-client relationship.[80] Similarly, pleadings in a judicial proceeding are also protected by such a privilege.[81] On the other hand, in *Knight v. Patterson,*[82] the court held that a defamatory statement by an attorney to opposing council in connection with a lawsuit is only conditionally privileged.[83]

The uncertainty as to when a privilege exists, and whether it is absolute or conditional, has recently led the Utah Supreme Court to adopt a new rule concerning defamations related to judicial proceedings. In *Wright v. Lawson,*[84] the court held that defamatory statements having a "sufficient" relationship to the subject matter of a judicial proceeding are absolutely privileged. Since the court established no criteria for determining "sufficiency," the rule is vague, and will still require that the issue of privilege arising in the context of judicial proceedings be resolved on a case by case basis. With the exception of *Knight,* prior cases dealing with this issue[85] can be read to hold the alleged defamation sufficiently related to the judicial proceeding to be entitled to an absolute privilege. Thus, these cases probably still retain their vitality.

C. Conditional Privileges to Defame

Sections 3(3) to 3(5) outline three situations in which defamations are conditionally privileged—that is, the privilege is lost if the defamation is published with actual malice. Since section 4 provides that "malice is not inferred from the communication or publication" itself, the plaintiff

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135 P.2d 242, 247, *modified,* 103 Utah 599, 139 P.2d 233 (1943). It is anomalous that in a defamation context, a judge is afforded no protection if the plaintiff can prove special damages.

There is no persuasive reason for distinguishing between judges and other public officials in applying the common law rule affording absolute immunity.

[79] *See, e.g.,* IDAHO CODE § 6–710 (Supp. 1974); N. D. CENT. CODE § 14–02–05 (1971), *predecessor statute construed in* Stafney v. Standard Oil Co., 71 N.D. 170, 299 N.W. 582 (1941); S.D. COMPILED LAWS ANN. § 20–11–5 (Supp. 1974), *predecessor statute construed in* Hackworth v. Larson, 83 S.D. 674, 165 N.W.2d 705 (1969).

[80] Beezley v. Hansen, 4 Utah 2d 64, 286 P.2d 1057 (1955).

[81] Reliance Ins. Co. v. Hollins, 16 Utah 2d 44, 395 P.2d 537 (1964).

[82] 20 Utah 2d 242, 436 P.2d 801 (1968).

[83] An earlier case strongly suggests, however, that the privilege should be absolute. Western States Title Ins. Co. v. Warnock, 18 Utah 2d 70, 73, 415 P.2d 316, 318 (1966). For a discussion of what constitutes a conditional privilege, see text accompanying note 86 *infra.*

[84] No. 13719 (Utah, Jan. 10, 1975).

[85] Reliance Ins. Co. v. Hollins, 16 Utah 2d 44, 395 P.2d 537 (1964); Beezley v. Hansen, 4 Utah 2d 64, 286 P.2d 1057 (1955).

must show that the defendant was "motivated by spite, hatred or ill will"[86] to overcome the privilege.

Two of the conditional privileges [87] are clearly designed to give limited protection to newspapers[88] from liability for "fair and true" reports of official or public proceedings or actions.[89] The third conditional privilege, however, appears to apply more broadly than just to newspaper publishing or media broadcasting. It provides:

> A privileged publication which shall not be considered as libelous per se, is one made:
>
> . . .
>
> (3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.[90]

This statute appears to be a codification of the common law articulated in *Spielburg v. A. Kuhn & Brothers*.[91] But because it appears in title 45, "Newspapers and Radio Broadcasting," the Utah Supreme Court has been reluctant to rely on it in contexts other than newspaper defamation.[92] The result has been the development of several different common law standards as to when a conditional privilege arises. For example, the court has often relied on section 594 of the Restatement of Torts,[93] which is similar to the rule provided in title 45, or has occasionally relied on a similar penal code provision[94] relating to conditional privileges.[95] Unfortunately, the Restatement rule and the statutory rule can lead to different results. The statutory conditional privilege can be overcome only by showing of actual malice;[96] the Restatement privilege may be over-

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[86] *See* Berry v. Moench, 8 Utah 2d 191, 201, 331 P.2d 814, 820 (1958).

[87] UTAH CODE ANN. §§ 45–2–3(4), –3(5) (1970).

[88] *See also* UTAH CODE ANN. §§ 45–2–10(3), –10(4) (1970), conferring a similar conditional privilege on media broadcasters.

[89] Thus, for example, the defendant newspapers would probably have been shielded from liability on this basis in Dodge v. Henriod, 21 Utah 2d 277, 444 P.2d 753 (1968), had not the court held for the defendants on other grounds.

[90] UTAH CODE ANN. § 45–2–3(3) (1970).

[91] 39 Utah 276, 280, 116 P. 1027, 1029 (1911).

[92] *See, e.g.*, Coombs v. Montgomery Ward & Co., 119 Utah 407, 414, 228 P.2d 572, 575 (1951).

[93] The Restatement provides:

> An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that
>
> (a) facts exist which affect a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

RESTATEMENT OF TORTS § 594 (1938).

[94] UTAH CODE ANN. § 76–9–506 (Supp. 1973).

[95] Hales v. Commercial Bank, 114 Utah 186, 197 P.2d 910 (1948).

[96] Compare sections 3(3) and 3(4) with the Justice Crockett's discussion of actual malice in Berry v. Moench, 8 Utah 2d 191, 201, 331 P.2d 814, 820 (1958). For a discussion of the difference between statutory and *Times*-defined actual malice, see note 25 *supra* and accompanying text.

come without such a showing.[97] Since it cannot be predicted which of the two rules the court will apply in a particular case, it is suggested that the legislature make clear that section 3(3) is intended to apply to the law of defamation generally, and is not limited to newspaper defamation alone.[98]

D. Criminal Defamation in Utah

The theory behind criminal libel actions at common law was that the government had an interest in punishing utterances which had the potential of breaching the peace.[99] Today, however, the emphasis in most state statutes, including Utah's, is "no longer on the effect of the public peace but on the tendency of the publication to damage the individual."[100] Since this is precisely the emphasis of civil defamation statutes,[101] it has been suggested that the law of criminal defamation should be abandoned.[102]

In Utah, there have been only two prosecutions for criminal defamation in the state's history;[103] both were seventy-five years ago. Recently, however, the Utah Legislature lent new vitality to the state's criminal defamation statutes by redefining the offense.[104] The new definition incorporates the *Times* test of actual malice by requiring that the defendant know the publication to be false. Unfortunately, the legislature also reenacted the older law,[105] thus leaving a considerable overlap between the two statutes. The newer statute permits conviction where the defendant (1) knowingly communicates to any person (2) information which he knows to be false and (3) which he knows will tend to expose another person to public hatred, contempt, or ridicule.[106] The standard for con-

[97] In Berry v. Moench, 8 Utah 2d 191, 198–201, 331 P.2d 814, 818–20 (1958), the court held that the plaintiff had failed to show actual malice but that the conditional privilege could nevertheless be overcome if the defendant had abused the privilege in any of four ways: (1) lack of good faith and reasonable care to ascertain the truth of the defamation; (2) failure to publish the defamation fairly; (3) failure to publish the defamation only to such persons as are necessary to the purpose for which the conditional privilege exists; and (4) failure to publish only such defamatory material as is necessary to that purpose.

[98] It is questionable whether section 3(3) was intended to apply to newspaper defamation at all. Perhaps it is significant that the Utah Legislature, in amending what is now title 45 to allow media broadcasters the same defamation privileges afforded to newspapers, left out this provision.

[99] De Libellie Famosis, 77 Eng. Rep. 250 (1609).

[100] Kelly, *Criminal Libel and Free Speech,* 6 U. KAN L. REV. 295, 320 (1958).

[101] *Compare* UTAH CODE ANN. §§ 76–9–501 to –509 (Supp. 1973) (criminal defamation) *with id.* §§ 45–2–1– to –10 (1970) (civil defamation).

[102] Leflar, *The Social Utility of the Criminal Law of Defamation,* 34 TEX. L. REV. 984, 1034–35 (1956). The Pennsylvania Supreme Court recently overturned that state's criminal defamation statute, but not on the ground that the policies underlying civil and criminal defamation are identical. Rather, the court held, *inter alia,* that the state's criminal defamation statute failed to allow for truth as an absolute defense, and was therefore unconstitutional. Commonwealth v. Armao, 446 Pa. 325, 286 A.2d 626 (1972).

[103] People v. Glassman, 12 Utah 238, 42 P. 956 (1895); People v. Ritchie, 12 Utah 180, 42 P. 209 (1895).

[104] UTAH CODE ANN. § 76–9–404 (Supp. 1973).

[105] *Id.* §§ 76–9–501 to –509.

[106] *Id.* § 76–9–404.

viction under the older statute requires that the defendant "intentionally and with malicious intent to injure another, [publish or procure] to be published any libel."[107] Although it would appear easier to convict a defendant under the older statute,[108] the older statute prescribes the harsher penalty.[109] This anomalous result is unjustified and should be corrected.

III. Conclusion

This Note has demonstrated the need for a new legislative and judicial look at Utah's law of personal defamation. Three changes in the current Utah law are especially important. First, the law should make clear that public officials are absolutely imune from liability for defamations occurring in the course of their official conduct. Second, a single standard for determining when a conditional privilege to defame arises should be articulated and adhered to by the Utah courts. In the alternative, the Utah Legislature should make clear that the standard codified in section 3(3) applies in contexts other than newspaper defamation. Finally, it is suggested that the criminal defamation statutes be repealed. Since the interest these statutes protect is identical to the civil statutes' protection of individuals from defamation, the criminal statutes are unnecessary. If retained, however, there should be only one standard for conviction of criminal defamation. Adopting these suggestions would lend some cerainty to what is now a confusing area of the Utah law.

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[107] *Id.* § 76–9–502.

[108] Under the older statute, Utah Code Ann. §§ 76–9–501, –502 (Supp. 1973), the defendant can be convicted upon a mere showing that he acted maliciously in the common law sense — that is, guilty of hatred, ill will, or spite. *See* note 25 *supra* and acompanying text. Under the newer statute, Utah Code Ann. § 76–9–404 (Supp. 1973), the defendant can be convicted only if it is demonstrated that he *knew* the defamation was false.

[109] The crime under section 76–9–404 is a Class B misdemeanor; under section 76–9–502 it is a Class A misdemeanor.

Nickol v. United States: District Courts Prohibited from Entering Summary Judgment When Reviewing Administrative Record

In an action instituted by the Bureau of Land Management to contest the validity of a mining claim held by the defendants, a Department of Interior hearing examiner held the claim invalid. The Board of Land Appeals affirmed the hearing examiner's decision and the defendants appealed to federal district court.[1] Reasoning that the only issue before it was whether substantial evidence appeared in the record to support the findings of the Board, the district court concluded that such evidence existed and entered summary judgment for the United States.[2] In *Nickol v. United States,*[3] the Tenth Circuit reversed, holding summary judgment inappropriate when the hearing record contained conflicting factual testimony and when the existence of substantial evidence to support the administrative agency's ruling was in issue.[4] The court also required the lower court to indicate how it reached its conclusion so that there would be an adequate basis for appellate review.[5]

I

A. Substantial Evidence

In 1912, the United States Supreme Court held that an order issued by the Interstate Commerce Commission "when supported by evidence is accepted as final."[6] This standard of review—now known as the substantial evidence test—has become the dominant standard for judicial review of administrative findings of fact,[7] and is now codified in section 706(2)(E) of title 5 of the United States Code.[8]

Both courts and administrative law experts have concluded that the substantial evidence issue is a question of law[9] and is therefore an appro-

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[1] Brief for Appellants at 2, Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974).

[2] Nickol v. United States, 501 F.2d 1389, 1390 (10th Cir. 1974).

[3] *Id.*

[4] *Id.* at 1391.

[5] *Id.* at 1392.

[6] ICC v. Union Pac. RR., 222 U.S. 541, 547 (1912).

[7] W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 379 (6th ed. 1974).

[8] This section of the Administrative Procedure Act provides:

> The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> . . . .
>
> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . .

Administrative Procedure Act § 7, 5 U.S.C. § 706(2)(E) (1970).

[9] *E.g.,* Beane v. Richardson, 457 F.2d 758, 759 (9th Cir.), *cert. denied,* 409 U.S. 859 (1972); Dredge Corp. v. Penny, 338 F.2d 456, 462 (9th Cir. 1964), *rev'd on*

priate matter for resolution by a reviewing court.[10] The resolution of factual questions, on the other hand, is solely within the power of the administrative agencies.[11]

The basic question underlying the substantial evidence test is what kind of evidence will adequately support an agency decision.[12] In *Consolidated Edison Co. v. NLRB*,[13] the Supreme Court articulated the classic definition of substantial evidence: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [14] Judge Skelly Wright [15] has characterized the standard required by the substantial evidence test even more liberally: "Exercising review under it, a court cannot disturb a factfinder's weighings of conflicting evidence merely because these seem 'clearly erroneous'; only those determinations which are patently unreasonable can be upset." [16]

In deciding whether there is substantial evidence, the *whole* hearing record must be reviewed to determine whether the evidence maintains its probative force when viewed beside other, conflicting evidence.[17] The review, however, is *limited* to the record; that is, the reviewing court must base its determinations upon the facts found by the agency and may not engage in new fact-finding.[18] De novo review is authorized only "where there are inadequate factfinding procedures in an adjudicatory proceeding,

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other grounds, 398 F.2d 719 (9th Cir. 1968); Adams v. United States, 318 F.2d 861, 867 (9th Cir. 1963); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546 (1965); *Cf.* W. GELLHORN & C. BYSE, *supra* note 7 at 379–81. *See* Huckabee v. Richardson, 468 F.2d 1380 (4th Cir. 1972); Panagopoulos v. Immigration & Naturalization Serv., 434 F.2d 602 (1st Cir. 1970); Kokkinis v. District Director of Immigration & Naturalization Serv., 429 F.2d 938 (2d Cir. 1970).

[10] Section 706 provides that "the reviewing court shall decide all relevant *questions of law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1970) (emphasis added).

[11] L. JAFFE, *supra* note 9, at 546. *Cf.* W. GELLHORN & C. BYSE, *supra* note 7, at 143–45.

[12] Numerous courts have dealt with this question. *E.g.*, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); International Ass'n of Mach. v. NLRB, 110 F.2d 29, 35 (D.C. Cir. 1939), *aff'd*, 311 U.S. 72 (1940); NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938); *In re* Stork Rest., Inc., v. Boland, 282 N.Y. 256, 26 N.E.2d 247, 255 (1940).

[13] 305 U.S. 197 (1938).

[14] *Id.* at 229. The evidence must be such as would convince a reasonable mind, although it need not be persuasive to all other minds. International Ass'n of Mach. v. NLRB, 110 F.2d 29, 35 (D.C. Cir. 1939), *aff'd*, 311 U.S. 72 (1940).

[15] Circuit Judge, United States Court of Appeals, District of Columbia Circuit.

[16] Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 391 (1974).

[17] *E.g.*, Beane v. Richardson, 457 F.2d 758, 759 (9th Cir.), *cert. denied*, 409 U.S. 859 (1972); Dredge Corp. v. Penny, 338 F.2d 456, 462 (9th Cir. 1964), *rev'd on other grounds*, 398 F.2d 791 (9th Cir. 1968); *In re* Stork Rest., Inc. v. Boland, 282 N.Y. 256, 26 N.E.2d 247, 255 (1940).

[18] *E.g.*, Huckabee v. Richardson, 468 F.2d 1380, 1381 (4th Cir. 1972); Domanski v. Celebrezze, 323 F.2d 882, 885 (6th Cir. 1963), *cert. denied*, 376 U.S. 958 (1964); Todaro v. Pederson, 205 F. Supp. 612, 613 (N.D. Ohio 1961), *aff'd mem.*, 305 F.2d 377 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962).

or when judicial proceedings are brought to enforce certain administrative actions." [19]

If supported by substantial evidence, an agency's findings of fact are conclusive and the reviewing court is bound to respect them. For example, the court must respect reasonable inferences which an agency draws from the evidence, even though the court itself would have reached different conclusions.[20] The reviewing court must also respect reasonable agency evaluations of the credibility of witnesses.[21]

B. Summary Judgment

The purpose of the summary judgment procedure is widely agreed upon:

> A summary judgment is a judgment in bar that results from an application of substantive law to facts that are established beyond reasonable controversy. The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute, and, if not, to render judgment in accordance with the law as applied to the established facts, otherwise to deny the motion for summary judgment and allow the action to proceed to a trial of the disputed facts.[22]

A motion for summary judgment presents the court with two preliminary issues. The first is whether there is any real disagreement between the parties as to the existence or nonexistence of facts. If disagreement exists, facts are in issue and a second question arises: will judicial resolution of the disputed facts affect the outcome of the litigation. Factual disputes which cannot properly be litigated or which would not affect the outcome of the litigation will not merit sending a case to trial.[23]

In appeals to determine whether administrative decisions were supported by substantial evidence, many federal district courts have granted summary judgments.[24] The rationale for granting summary judgment in

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[19] Camp v. Pitts, 411 U.S. 138, 142 (1973).

[20] *E.g.*, Console v. Federal Maritime Comm'n, 383 U.S. 607, 626 (1966); NLRB v. Chef Nathan Sez Eat Here, Inc., 434 F.2d 126 (3d Cir. 1970); Fairbank v. Hardin, 429 F.2d 264, 267 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970).

[21] *E.g.*, Kokkinis v. District Director of Immigration and Naturalization Serv., 429 F.2d 938, 942 (2d Cir. 1970); Todaro v. Pederson, 205 F. Supp. 612, 615 (N.D. Ohio 1961), *aff'd mem.*, 305 F.2d 377 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962).

[22] 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 56.11, at 2143 (2d ed. 1974).

[23] This second question is usually framed in terms of whether or not the facts in dispute are material. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2725, at 506 (1973).

[24] *E.g.*, Beane v. Richardson, 457 F.2d 758 (9th Cir.), *cert. denied*, 409 U.S. 859 (1972); Moseley v. Hickel, 442 F.2d 1030 (9th Cir. 1971); Jones v. Finch, 416 F.2d 89 (10th Cir. 1969); Henrikson v. Udall, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966); Sainberg v. Morton, 363 F. Supp. 1259 (D. Ariz. 1973); Denison v. Udall, 248 F. Supp. 942 (D. Ariz. 1965).

There are a number of cases involving review of administrative actions in which the use of summary judgment has been denied. These cases, however, are distinguishable because they did not involve substantial evidence review and consequently no record was available to the reviewing court as was before the district court in *Nickol*. *E.g.*, Booth v. United States, 436 F.2d 474 (Ct. Cl. 1971); Zucker v. Baer, 262 F. Supp. 528, 530 (S.D.N.Y. 1967); Zucker v. Baer, 247 Supp. 790, 792 (S.D.N.Y. 1965).

such cases is that "[a] judicial determination of whether a finding of fact is supported by substantial evidence presents only an issue of law." [25] Therefore, because legal issues do not preclude granting summary judgment,[26] the court need only review the administrative record [27] to make its evidentiary determination. Consistent with these principles, the Tenth Circuit, in *Jones v. Finch*,[28] stated that

> a motion for summary judgment is merely a procedure to invoke exercise of the court's power . . . to enter its judgment upon the "pleadings and transcript of the record." Thus, there is no frustration of congressional policy that the parties be afforded an evidentiary review of the case.[29]

C. Citizens to Preserve Overton Park, Inc. v. Volpe

Although the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe* [30] did not involve summary judgment or substantial evidence review, the *Nickol* court, as well as many other courts and commentators,[31] have looked to it as expanding the scope of judicial review of administrative agency decisions. Some familiarity with this case is therefore essential to understanding the *Nickol* holding.

Overton Park involved review of a decision by the Secretary of Transportation to allow the use of federal funds for the construction of a highway through a public park. Both the district court and the Sixth Circuit found that the Secretary had been granted broad statutory discretion in the matter of allocating highway funds and that formal findings of fact by him were unnecessary. Because of this, both courts concluded that their powers of review were limited and therefore granted summary judgment in favor of the Secretary on the basis of affidavits submitted by the parties.[32]

Although agreeing that no formal findings by the Secretary were necessary, the Supreme Court nevertheless required him to submit the whole administrative record for review. In the event that the record proved inadequate, the Court directed the district court to either take testimony from the administrative officials who made the decision or

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[25] Dredge Corp. v. Penny, 338 F.2d 456, 462 (9th Cir. 1964), *rev'd on other grounds*, 398 F.2d 791 (9th Cir. 1968).

[26] 10 C. WRIGHT & A. MILLER, *supra* note 23, § 2725, at 500–01.

[27] Other materials besides those expressly mentioned in rule 56 of the Federal Rules of Civil Procedure may be considered on a summary judgment motion. *Id.* § 2723, at 492. For cases in which the administrative record was used to support the motion for summary judgment, see cases cited note 24 *supra*.

[28] 416 F.2d 89 (10th Cir. 1969).

[29] *Id.* at 90.

[30] 401 U.S. 402 (1971).

[31] For discussions of how *Overton Park* expanded judicial review, see *Project: Federal Administrative Law Developments*—1971, 1972 DUKE L.J. 115, 317; Note, *Administrative Law—Extending the Authority of the Judiciary to Review Administrative Agency Decisions—Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), 1972 WIS. L. REV. 613.

[32] 401 U.S. at 409.

require the Secretary to prepare formal findings.[33] This evidentiary material was to be used by the reviewing court to determine whether the Secretary's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" pursuant to section 706(2)(A). The Supreme Court held that this standard of review—known as the "arbitrary, capricious" test—required the reviewing court to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[34]

The Court expressly rejected the contention that the substantial evidence test of section 706(2)(E) was applicable, stating that "the basic requirement for substantial-evidence review" was a record produced at an adjudicatory hearing which was "to be the basis of agency action." [35] Since, in *Overton Park,* the Secretary was not required to hold an adjudicatory hearing, there was no adequate record for substantial evidence review.

II

In *Nickol,* the court characterized the issue as whether summary judgment is appropriate in an appeal from an administrative decision contesting the existence of substantial evidence when the administrative record contained conflicting factual testimony.[36] The court conceded that the appropriate standard of judicial review was the substantial evidence rule of section 706(2)(E) and that the lower court's review was to be confined solely to the facts set forth in the agency record.[37]

The court reasoned that the substantial evidence test required the reviewing court to examine the facts in the record to determine whether that provided a sufficient evidentiary basis to support the administrative agency's conclusion. The court characterized this process as "fact-finding" and rejected the contention that substantial evidence review involved only a question of law. After establishing the reviewing court's role as fact finder, the Tenth Circuit found that a substantial factual controversy, in the form of conflicting testimony,[38] existed in the administrative record. Because it saw genuine issues as to material facts, the court held that the district court was precluded from granting summary judgment, and was required to engage in

> evaluation of testimony, resolution of conflicts, and a general examination of facts which would occur had the matter been "tried" in that court. The statutory standards and presumptions are different in degree only because the case has already been "tried" before someone else.[39]

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[33] *Id.* at 420.
[34] *Id.* at 416.
[35] *Id.* at 414–15.
[36] 501 F.2d at 1390.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 1391.

To support this holding, the court cited *Overton Park* as mandating a careful and searching inquiry into the facts by the reviewing court.[40]

In addition to the summary judgment issue, the *Nickol* court dealt with a second issue. The district court concluded that there was substantial evidence in the record to support the administrative determination and issued a brief order granting summary judgment.[41] The Tenth Circuit held that this procedure gave no indication of the basis of the district court's conclusion, thus preventing any "meaningful review" of the lower court's action. To facilitate appellate review, the *Nickol* court instructed the lower court to identify the facts which offered adequate support for the administrative decision.[42]

III

Summary judgment has been granted in many cases in which the substantial evidence test was applied.[43] Moreover, two leading treatises on civil procedure have singled out "substantial evidence" cases as particularly appropriate for summary judgment.[44] The broadly phrased *Nickol* holding [45] is a radical departure from this authority.[46] Even though the holding is premised on poor logic, its potential for upsetting the traditional scope of judicial review and for causing judicial inefficiency in the administrative law area is nonetheless great.

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[40] *Id.* at 1391–92.

[41] The district court's order read:

> This matter coming on for consideration upon the defendant's Motion [*sic*] for summary judgment, and the Court concluding that the only issue is whether there is evidence in the record before the Secretary to support his decision on an issue of fact, and the Court concluding that there is such evidence to support his decision;
>
> Now, Therefore,
>
> IT IS BY THE COURT ORDERED that Summary Judgment is granted in favor of the defendants and the action is dismissed.

Id. at 1390.

[42] *Id.* at 1391–92. It is unclear from reading *Nickol* whether the court's *primary* concern was the failure of the district court to write an opinion or its granting of summary judgment where the administrative record contained conflicting testimony. In any event, the Tenth Circuit formulated holdings on both issues.

[43] *See* cases cited note 24 *supra.*

[44] 6 J. MOORE, *supra* note 22, ¶ 56.17, at 2437; 10 C. WRIGHT & A. MILLER, *supra* note 23, § 2733, at 618.

[45] The *Nickol* holding reads:

> Thus we hold that where the determination under 5 U.S.C. § 706 (2) (E), and the issue of whether or not the determination is "unsupported by substantial evidence," and where there is "substantial controversy" as to the material facts," the district court is precluded from entering a Fed.R.Civ.P. 56 type of "summary judgment."

501 F.2d at 1391.

[46] In Heber Valley Milk Co. v. Butz, 503 F.2d 96 (10th Cir. 1974), the Tenth Circuit acknowledged that *Nickol* was a significant departure from past precedent but nevertheless relied on *Nickol* to reverse a lower court's grant of summary judgment, stating:

> In reversing we are aware that the trial court in granting the summary judgment was following procedures which were often used in a proceeding of this type. However, *Nickol,* which was decided only recently and long after the trial court acted in the present case, has changed all that.

Id. at 98.

A. Fact-finding

The *Nickol* court's statement that substantial evidence review requires a court to engage in "fact-finding" is misleading. Under section 706(2)(E), a reviewing court must confine its review to the administrative record; new facts found outside the record may not be introduced. The Tenth Circuit acknowledged these restrictions, but reasoned that the reviewing court must find facts within the record to support its conclusions.[47] Of course, a court must find evidence in the record sufficient to convince a reasonable mind that the conclusion drawn by the agency was supported by the facts. This type of "fact-finding," however, does not preclude the granting of summary judgment since the record before the reviewing court contains all the facts which the court may consider. A trial thus serves no useful purpose with respect to the court's role as "fact-finder."

Similarly, the presence of conflicting testimony in the record does not provide a reasonable basis for denying summary judgment. One of the basic premises of substantial evidence review is that the agency's resolutions of factual conflicts must be upheld if they are reasonable.[48] Under section 706(2)(E) the district court's sole function is to review the facts as established by the agency to determine if they provide sufficient evidentiary support for the agency's conclusion. Thus, the Tenth Circuit's statement that the district court must resolve factual conflicts as though the case had been "tried" before it is clearly wrong.

The law-fact distinction is complex and an unending source of confusion to both the courts and commentators.[49] Despite this, it is clear that Congress has designated the administrative agency as the sole fact finder in the agency-court partnership, and has restricted the scope of judicial review solely to legal questions. Since the agency is the sole fact finder, the *Nickol* court's refusal to characterize the substantial evidence inquiry as a legal question suggests a logical absurdity—that the question of substantial evidence is for the administrative agency to determine. The *Nickol* opinion, however, clearly indicates that no such result was intended. The only other plausible conclusion to be drawn from the *Nickol* logic is that the court intended to broaden the traditional scope of judicial review to include the resolution of questions of fact.

In denying the petition for rehearing, the court refused to accept appellees' argument that the *Nickol* decision raised serious questions regarding the proper scope of judicial review in cases involving administrative agency decisions.[50] Nevertheless, the court's opinion clearly suggests

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[47] 501 F.2d at 1390.

[48] *See* cases cited note 9 *supra.*

[49] Two cases which extensively discuss the law-fact distinction are NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961), and Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir.), *cert. denied,* 305 U.S. 613 (1938). An in-depth analysis of the problem is found in L. JAFFE, *supra* note 9, at 546–49.

[50] Nickol v. United States, 501 F.2d 1389 (10th Cir.), *rehearing denied,* 501 F.2d 1392 (10th Cir. 1974).

a radical departure from the traditional scope of judicial review. First, the court stated that judicial review of administrative rulings involved fact-finding [51] requiring the reviewing court to resolve factual controversies as though the matter had acually been tried before it.[52] Second, because the existence of legal questions does not preclude granting summary judgment, the court's denial of summary judgment further supported the court's position that factual questions must be resolved by the reviewing court. Finally, the court concluded that the question of substantial evidence was not necessarily a "legal issue." [53]

Although the Tenth Circuit reasoned that the reviewing court is to resolve factual controversies as though the matter had been tried before it, it is apparent that the court intended that such fact-finding be confined to the administrative record. The implications of the court's opinion, however, dictate a broader scope of review than allowed by the traditional approach and can only confuse district courts as to their proper role in reviewing administrative decisions.

Perhaps the emphasis on fact-finding can partly be explained as a directive to the lower court to identify the evidentiary basis upon which it made its decision. The Tenth Circuit was properly concerned about the district court's failure to explain how it determined the existence of substantial evidence in the administrative record adequate to support the agency's action. Rather than articulating a blanket prohibition on the use of summary judgment in cases of this nature, however, the court should have confined its holding to requiring the district court to write a supporting opinion when granting a motion for summary judgment.[54]

B. Overton Park

The court's use of the *Overton Park* opinion also raises important questions as to the proper scope of judicial review in administrative law cases. The court's use of *Overton Park* clearly indicates that it interpreted that decision as requiring a more active role for the reviewing court in evaluating agency fact-finding than had previously been authorized under the substantial evidence test. In fact, the *Nickol* court considered the *Overton Park* decision "a significant procedural indication of the *nature* of the

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[51] *Id.* at 1390.

[52] *Id.* at 1391.

[53] *Id.*

[54] Another possible explanation for the circuit court's emphasis on fact-finding might be found in appellant's claim that the district court had granted summary judgment without ever opening and examining the record upon which the Department of the Interior held the mining claim invalid. Brief for Appellants at 1, Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974). However, this explanation is undercut by the Tenth Circuit's subsequent opinion in Heber Valley Milk Co. v. Butz, 503 F.2d 96 (10th Cir. 1974). Apparently unaware of the issue raised by appellents' brief in *Nickol*, the court in *Heber Valley* stated that the district judge in *Nickol* examined the administrative record before granting summary judgment. The court therefore adhered to the rule and reasoning of *Nickol*. *Id.* at 97. Thus, the Tenth Circuit put to rest any doubt as to the applicability of the *Nickol* rule even in cases where the district court makes full review of the administrative record.

statutory review to be here applied." [55] In support of this interpretation, the court relied upon such language from *Overton Park* as the statement that the "inquiry into the *facts* is to be searching and careful."[56] Although *Overton Park* did, in some respects, expand judicial review of administrative rulings, the expansion was not directly related to a reviewing court's authority to disturb an agency's resolution of factual controversies.

Overton Park expanded judicial review of administrative rulings in two significant, but separate, directions. First, the opinion required the district court to decide if the Secretary had acted outside his statutory authority in allocating highway funds.[57] Determinations as to statutory authority "involve questions of law and therefore . . . permit a much more substantial judicial scrutiny of the agency's decisions" than is appropriate when the court is only reviewing the agency's factual decisions.[58] In placing emphasis on this type of determination, the Supreme Court marked the way for more active judicial review of agency decisions.

Second, the Supreme Court narrowly construed the application of section 701(a)(2), which precludes judicial review of those administrative actions committed to agency discretion.[59] The Court stated that this exception was a narrow one, only "applicable in those rare instances where . . . 'there is no law to apply.' " The Court found law to apply in section 4(f) of the Department of Transportation Act and section 138 of the Federal-Aid Highway Act.[60] One commentator has suggested that cases in which there is no law to apply will be so rare that the real impact of *Overton Park* is to "require judicial review in all cases where Congress has not explicitly prohibited it."[61]

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[55] 501 F.2d at 1391 (emphasis added).

[56] *Id., quoting* from *Overton Park,* 401 U.S. at 416 (emphasis added by Tenth Circuit).

[57] The Court construed the Secretary's authority under section 4(f) of the Department of Transportation Act and section 138 of the Federal-Aid Highway Act very narrowly:

> [T]he very existence of the statutes indicates that protection of parkland was to be given paramount importance. . . . If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

401 U.S. at 412–13. Judicial determinations of whether an agency is acting outside its statutory authority are authorized by section 706(2)(C), which provides:

> The reviewing court shall—
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> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> . . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

Administrative Procedure Act § 7, 5 U.S.C. § 706(2)(C) (1970).

[58] See *Project, supra* note 31, at 322.

[59] This section of the Administrative Procedure Act provides for judicial review of administrative actions "except to the extent that . . . agency action is committed to agency discretion by law." Administrative Procedure Act § 7, 5 U.S.C. § 701(a)(2) (1970).

[60] 401 U.S. at 410–11.

[61] McCabe, *Recent Developments in Judicial Review of Administrative Actions: A Developmental Note,* 24 AD. L. REV. 67, 95 (1972).

Neither of these expansions, however, affects the nature of judicial review of administrative factual determination in the manner implied by *Nickol.* After delineating the limited scope of the Secretary's authority and holding that his decision was not exempt from judicial review, the *Overton Park* Court stated that the district court was to use the "arbitrary, capricious" test [62] in passing on the agency's factual decisions. One court has stated that under both the "arbitrary, capricious" test and the "substantial evidence" test the object of review is to determine whether a reasoned conclusion from the record as a whole could support the premise on which the . . . action rests." [63] Judge Skelly Wright, rather than focusing on apparent similarities between the two tests, has attempted to distinguish them. Because the Secretary's ruling in *Overton Park* was explicitly exempt from substantial evidence review, Judge Wright has concluded that the Court meant to apply a less exacting formula of review under the "arbitrary, capricious" test.[64] In formulating a less demanding standard of review than substantial evidence, Judge Wright has reasoned that "[i]f weighings on conflicting evidence need be only 'reasonable' to pass the substantial evidence test, it follows that they can be less than reasonable and still survive the 'arbitrary, capricious' test."[65] This distinction may or may not be of practical significance, but it is clear that review under the "arbitrary, capricious" test is at least as limited as that under the substantial evidence test. The Supreme Court in *Overton Park* made this clear: "Although this inquiry into the facts [under the 'arbitrary, capricious' test] is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." [66]

The *Overton Park* opinion therefore should not be used indiscriminately as authority for expanding the scope of judicial review in administrative law cases. In *Nickol,* both the standard of review and the nature of the administrative record to be submitted to the reviewing court were well established under the substantial evidence test. The issues of whether the agency involved had exceeded its statutory authority, or whether the decision of that agency was reviewable by the district court, were not involved. In short, because *Overton Park* addressed different issues than those raised in *Nickol,* it was inapplicable to the *Nickol* fact situation.

C. Policy Considerations

Although great attention has been focused on the distinction between fact and law, it is more meaningful to look at the policies underlying the summary judgment procedure to determine its applicability in adminis-

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[62] See text accompanying note 34 *supra.*

[63] City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972).

[64] Wright, *supra* note 16, at 391.

[65] *Id.* at 392.

[66] 401 U.S. at 416.

trative law cases subject to substantial evidence review. Summary judgment is a procedural device designed to provide "speedy adjudication in cases that present no genuine issues of material fact." [67] Where no facts are in controversy, the court can immediately resolve the legal issues and thus conserve judicial time and energy. Against the policy favoring increased judicial efficiency must be weighed the possibility of depriving a litigant his day in court. Courts have emphasized that affidavits are no substitute for the cross examination procedure afforded litigants at a hearing.[68] In administrative law cases like *Nickol,* however, the parties are not entitled to a second fact hearing in the reviewing court, so this criticism does not apply. In short, in such cases the advantage of summary judgment can be retained without fear of incurring the disadvantage.

A second policy consideration strongly indicates that *Nickol* was wrongly decided. The rationale behind establishing administrative agencies is that

> [c]oncentration of expertise in given areas should result in more informed and responsible decisions in those areas. To ask courts to attempt to make such decisions on the basis of their limited knowledge vis-a-vis that of an agency in a given area would seem to be a mistake, sacrificing expert and informed judgment for an individual court's notion of desirability in a particular instance.[69]

Although *Nickol* does not expressly authorize reviewing courts to substitute their judgment for that of the agency, it nevertheless suggests that district judges are to resolve factual controversies in administrative law cases in the same manner as they resolve such controversies in ordinary trials. The wholesale disallowance of summary judgment where there is conflicting testimony in the record requires judges to hold a hearing and necessarily raises the question of what should be undertaken at such a hearing other than a review of the administrative record (which could be done by the court when passing on the motion for summary judgment). Such a practice obviously runs counter to the policy of allowing administrative agencies to make factual determinations within their unique areas of expertise.

The *Nickol* court's unfortunate play on the words "fact-finding" has prevented the use of summary judgment in cases where it is logically demanded,[70] thus impeding both administrative and judicial efficiency.[71]

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[67] 10 C. WRIGHT & A. MILLER, *supra* note 23, § 2723, at 487.

[68] E.g., Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944).

[69] *Project, supra* note 31, at 323–24.

[70] The Tenth Circuit has shown no inclination to back away from the *Nickol* holding. In *Heber Valley Milk Co. v. Butz,* the court relied on both the rule and reasoning of *Nickol* to reverse the district court's grant of summary judgment in a case involving substantial evidence review. 503 F.2d 96, 97 (10th Cir. 1974).

[71] The court may in its discretion deny the motion for summary judgment even when the moving party has discharged his burden of proof that there is no genuine issue of material fact. There are cases, however, where the exercise of this discretion should be limited. One example of such a case is when the action has been brought for purposes of frustrating the exercise of first amendment rights. 10 C. WRIGHT & A. MILLER, *supra* note 23, § 2728, at 554. The policy reasons discused in this Comment

Worse, the whole thrust of the opinion tends to encourage judges to disregard the expertise of administrative agencies, depart from the established guidelines of the substantial evidence test, and undertake judicial review destructive of the congressional purpose behind establishing administrative agencies.

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suggests that administrative law cases involving application of the substantial evidence test may be another kind of case where the court ought to be reluctant to exercise its discretionary authority to deny the motion.

Duncan v. General Motors Corp.: Equal Protection and the Wife's Right to Recover for Loss of Consortium

In 1971, the driver of an automobile was rendered a paraplegic when his vehicle collided with a truck tractor on an Oklahoma highway. His wife instituted a diversity action against the manufacturer of the automobile, alleging that it contained a defectively manufactured braking mechanism. She claimed that defendant had breached an implied warranty and requested damages for loss of consortium.[1] The district court granted defendant's motion to dismiss on the ground that Oklahoma recognized no cause of action for loss of consortium for the wife. On appeal, in *Duncan v. General Motors Corp.*,[2] the Tenth Circuit reversed, holding the Oklahoma common law, which denied a wife the right to sue for loss of consortium, violated the equal protection clause of the fourteenth amendment.[3]

I

A. Common Law Consortium

At early common law, a wife was denied the right to recover for loss of consortium resulting from physical injury to her husband[4] on the ground that she was legally and socially inferior to her husband; thus, she was not entitled to her husband's services.[5] Although the husband could bring an action against a tortfeasor at common law for loss of his wife's services,[6] the wife's cause of action was barred since she sustained

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[1] Consortium is defined as the "[c]onjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation." BLACK'S LAW DICTIONARY 382 (rev. 4th ed. 1968). *See, e.g.*, Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950) ("There is more to *consortium* than the mere services of the spouse. Beyond that there are the so-called sentimental elements to which the wife has a right for which there should be a remedy."); Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169, 172 (N.D. Ill. 1967) ("benefits peculiar to the conjugal relationship were contained as well [as loss of services]. These included certain sentimental values such as loss of love, affection, society and companionship, as well as loss of sexual relations."); Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582, 583–84 (1911) (consortium is "expressed in the terms of affection, solace, comfort, companionship, and society" as well as service).

[2] 499 F.2d 835 (10th Cir. 1974).

[3] *Id.* at 838.

[4] Leaphart & McCann, *Consortium: An Action for the Wife*, 34 MONT. L. REV. 75, 77–80 (1973); Note, *The Development of the Wife's Cause of Action for Loss of* Consortium, 14 CATHOLIC LAW. 246, 248 (1968) [hereinafter cited as *Wife's Cause of Action*]. *See* Spero, *Wife's Action for Loss of Consortium*, 17 CLEV.-MAR. L. REV. 462 (1968).

[5] *Wife's Cause of Action, supra* note 4, at 248; Comment, *Wife Has Right of Action Against Tortfeasor for Loss of Consortium*, 2 CUMBERLAND-SAMFORD L. REV. 464, 465–66 (1971) [hereinafter cited as *Wife Has Right of Action Against Tortfeasor*]. *See* Leaphart & McCann, *supra* note 4, at 76–77.

[6] Leaphart & McCann, *supra* note 4, at 78–79; Spero, *supra* note 4, at 462; *Wife Has Right of Action Against Tortfeasor, supra* note 5, at 466.

only a loss of society "which the law cannot estimate or remedy."[7] Even after the passage of the Married Women's Acts,[8] which recognized the wife's legal existence apart from that of her husband, most courts continued to preclude the wife from recovering for loss of consortium resulting from injuries suffered by her husband.[9]

Nearly half of the states still refuse a right of action to the wife,[10] basing their decisions on such grounds as deferral to legislative action,[11] the be-

[7] Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861).

[8] *E.g.*, OKLA. STAT. ANN. tit. 32, § 15 (1958, *as amended* (Cum. Supp. 1974–75): Woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone: Provided, that this Chapter, shall not confer upon the wife a right to vote or hold office, except as otherwise provided by law.

This statute has been construed as not providing a wife with a cause of action for loss of consortium. In Howard v. Verdigris Valley Elec. Cooperative, 201 Okla. 504, 207 P.2d 784 (1949), the court held

> that whatever additional rights may have been extended to women generally under the so-called emancipation statutes, or married women's acts, such statutes do not confer a new right upon the wife which permits recovery for loss allegedly resulting from negligent injuries to her husband, since no new cause of action was created thereby.

207 P.2d at 787. *Accord,* Karriman v. Orthopedic Clinic, 488 P.2d 1250, 1251 (Okla. 1971); Nelson v. A.M. Lockett & Co., 206 Okla. 334, 243 P.2d 719, 721 (1952).

Courts from other states have construed their married women's acts as removing procedural disabilities encountered by women, but as creating no new substantive rights. *See, e.g.,* State Farm Mutual Auto Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36, 41–42 (1963) (dictum); Nash v. Mobile & O.R.R., 149 Miss. 823, 116 So. 100, 102 (1928); Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579, 581–82 (1960). *See also* Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71, 73 (D. Mont. 1961) (married women's act granted property rights to the wife equal to those enjoyed by the husband); Cravens v. Louisville & N.R.R., 195 Ky. 257, 242 S.W. 628, 632 (1922) (only effect of married women's act was to allow a married woman to sue in her own name and hold property in her own name).

[9] *E.g.,* Miskunas v. Union Carbide Corp., 399 F.2d 847, 851 (7th Cir. 1968), *cert. denied,* 393 U.S. 1066 (1969); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100, 1101 (1937); Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330, 331–32 (1956); McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299, 300–01 (1949); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631, 632 (1912); Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579, 581 (1960); Howard v. Verdigris Valley Elec. Cooperative, 207 P.2d 784, 787 (Okla. 1949).

Only intentional interference with the marital relationship gave a cause of action to the wife. *E.g.,* Parker v .Newman, 200 Ala. 103, 75 So. 479 (1917); Nolin v. Pearson, 191 Mass. 283, 77 N.E. 890 (1906); Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1933).

[10] For a list of cases in those jurisdictions which allow or refuse to allow the wife to recover for the loss of consortium, see the appendix in Leaphart & McCann, *supra* note 4, at 89.

Utah does not recognize an action for loss of consortuim for either the wife or the husband. In Black v. United States, 263 F. Supp. 470 (D. Utah 1967), the federal district court refused to allow a Utah husband to recover for negligent injury to his wife. The court found that the Utah Supreme Court had never confronted an action for the loss of consortium, and therefore based its decision upon the statutory language of UTAH CODE ANN. § 30–2–4 (1969), which, in part, provides:

> There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical treatment and other expenses paid or assumed by the husband.

In Corbride v. M. Morrin & Son, Inc., 19 Utah 2d 409, 410-11, 432 P.2d 41, 41–42 (1967), the Utah Supreme Court also relied upon section 30–2–4 to deny recovery to

lief that any damages suffered by the wife are too remote and conjectural,[12] the fear of double recovery,[13] the absence of an action for the husband in that jurisdiction,[14] and the recognition of legitimate distinctions between men and women which justify the discrimination.[15] The first major departure from this common law restriction occurred in *Hitaffer v. Argonne Co.*,[16] where the District of Columbia Circuit, in allowing a wife's action for loss of consortium, specifically rejected the argument that damages suffered by a wife for loss of consortium are more remote and conjectural than those suffered by her husband. The court also stressed the fact that proper jury instructions can preclude double recovery.[17]

B. Equal Protection and Sex Classifications

The Supreme Court has traditionally applied the "rational basis" test to determine the validity of sex-based classifications under the equal protection clause.[18] Under this test, courts presume the validity of the classi-

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a husband for wages lost after he terminated his employment to care for his children while his wife recovered from injuries allegedly suffered because of the negligence of a third party. The only other case in which the right to recover for loss of consortium has been considered by the Utah Supreme Court is Ellis v. Hathaway, 27 Utah 2d 143, 493 P.2d 985 (1972). In denying recovery to a wife for "loss of support, companionship, love, and affection," the court held:

> The wife has no basis for her action. At common law she could not sue for loss of consortium, and under the Married Women's Act no cause of action was given to her for negligent injury to her husband. Our statute placed husband and wife on equal basis by saying: ". . . There shall be no right of recovery by the husband on acount of personal injury or wrong to his wife . . ."

Id. at 144, 493 P.2d at 986.

[11] *E.g.*, Miskunas v. Union Carbide Corp., 399 F.2d 847, 851 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); Potter v. Schafter, 161 Me. 340, 211 A.2d 891, 892–93 (1965); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570, 572 (1962); Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605, 608–9 (1962).

[12] *E.g.*, Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330, 331 (1956); McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299, 301 (1949); Feneff v. N.Y. Cent. & H.R.R., 203 Mass 278, 89 N.E. 436, 437 (1909); Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307, 310 (1925).

[13] *E.g.*, Deshotel v. Atchison T. & S.F. Ry., 50 Cal. 2d 664, 328 P.2d 449, 451 (1958); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100, 1101 (1937).

[14] *See, e.g.*, Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 SE.2d 611, 613–14 (1945); *cf.* Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N.E. 389 (1910).

[15] *E.g.*, Miskunas v. Union Carbide Corp., 399 F.2d 847, 850 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166, 168 (1966), *cert. denied*, 386 U.S. 970 (1967).

[16] 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

[17] *Id.* at 814–15. On the double recovery issue the court stated that "if the wife is allowed to sue, there could be a double recovery in regard to the element of *consortium*, if the husband's recovery is not taken into account in measuring the wife's damages . . . ." *Id.* at 814.

[18] *E.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948) (Michigan statute forbidding females to act as bartenders who were not wives or daughters of male owners of liquor establishments held not unconstitutional under the fourteenth amendment); Muller v. Oregon, 208 U.S. 412 (1908) (Oregon statute which limited the hours a female could work in one day to ten hours upheld as permissible under the fourteenth amendment); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (Supreme Court of Illinois held not to have violated the fourteenth amendment in refusing to grant a license to a woman to practice law).

fication in question and require the party attacking the classification to show that no rational basis exists between the legislative or common law classification and a legitimate state interest.[19] Prior to its decision in *Reed v. Reed,*[20] the Supreme Court had never struck down a legal classification based upon sex,[21] since the rational basis presumption so strongly favored the state interest. In *Reed,* however, the Court held that a state statutory preference favoring Idaho males over equally qualified females as administrators of decedents' estates was an unjustifiable distinction based upon sex.[22] Had the Court applied the traditional rational basis test, it would have had little difficulty finding a "rational basis" for the state-imposed preference for male administrators based upon the need for administrative convenience.[23] The Court in *Reed,* however, indicated that it would no longer uphold classifications based solely upon sex unless the state can show a "fair and substantial relation to the object of the legislation."[24] Furthermore, since the *Reed* Court denied a rational basis presumption,[25] more than a cursory examination of the facts is now required to determine the validity or invalidity of sex classifications.[26]

Another more recent Supreme Court decision raises the question whether sex, as a distinguishing criterion, is inherently suspect. In the past

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[19] *See, e.g.,* Jefferson v. Hackney, 406 U.S. 535, 546–47 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[20] 404 U.S. 71 (1971).

[21] Note, *Supreme Court Plurality Declares Sex a Suspect Classification,* 48 TUL. L. REV. 710, 713 (1974); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1083 (1969).

[22] IDAHO CODE § 15–314 (1948) provided: "Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood." In striking down the sex-based distinction in *Reed,* the Court stated:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

404 U.S. at 76-77.

[23] *See* cases cited notes 18–19 *supra.*

[24] 404 U.S. at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[25] The Court demanded a more thorough analysis of the state interest involved than normally required under the rational basis analysis:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether 15–314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not.

404 U.S. at 76.

[26] *See, e.g.,* Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1300 (8th Cir. 1973); Eslinger v. Thomas, 476 F.2d 225, 230–31 (4th Cir. 1973); Green v. Waterford Bd. of Educ., 473 F.2d 629, 633–34 (2d Cir. 1973); Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972) (dictum); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 29–33 (1972); *cf.* Police Dep't. v. Mosley, 408 U.S. 92, 95 (1972).

the Court has subjected certain "suspect" classifications, such as race[27] and national origin,[28] to a "strict scrutiny" test, requiring the state to sustain the burden of proving that the distinctions drawn were compelled by overriding state interests.[29] The Court recently applied this strict scrutiny standard to a sex-based classification in *Frontiero v. Richardson.*[30] In *Frontiero,* a military servicewoman alleged a due process violation under the fifth amendment because, in order to qualify for military dependent allowances under the federal statutes,[31] she was required to substantiate that her husband was dependent upon her for more than one-half of his support. Servicemen, on the other hand, were allowed to declare their wives as dependents without demonstrating any degree of support contributed to them. In holding that the statute violated due process, four of the Supreme Court justices labelled the sex-based classification inherently suspect and therefore subject to strict judicial scrutiny.[32] Justice Brennan, announcing the judgment of the Court, stated:

> [C]lassifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.[33]

In determining whether sex classifications are now inherently suspect, however, *Frontiero* is of questionable precedential value for the proposition that all sex classifications are now suspect, since it was only a plurality decision.[34]

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[27] *E.g.,* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[28] *E.g.,* Oyama v. California, 332 U.S. 633, 644–46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[29] *E.g., In re* Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 642–43 (1973); Loving v. Virginia, 388 U.S. 1, 9 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[30] 411 U.S. 677 (1973).

[31] 37 U.S.C. §§ 401, 403 (1970); 10 U.S.C. § 1072 (1970). The relevant provision of section 401(3) defined "dependent," in part, as "his spouse," but provided that "a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support." Sections 1072(2)(A) and (C) defined "dependent" as "the wife" of a "member or former member of a uniformed service" or "the husband, if he is in fact dependent on the member or former member for over one-half his support."

[32] Justices Douglas, White, and Marshall joined in Justice Brennan's opinion treating sex-based classifications as "suspect." 411 U.S. at 688. Justices Stewart, Powell, Blackmun, and Chief Justice Burger concurred in the result, but not in the view that sex-based classifications are "suspect." *Id.* at 691–92. Justice Rehnquist dissented. *Id.*

[33] *Id. at* 688. Although *Frontiero* was a fifth amendment due process case, courts have subsequently cited it as authority for fourteenth amendment equal protection issues. *E.g.,* Johnston v. Hodges, 372 F. Supp. 1015, 1018 (E.D. Ky. 1974); Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27, 35–36 (N.D. Miss. 1973).

[34] In the past, the Supreme Court has made it clear that plurality decisions like *Frontiero,* while binding on the parties before the Court, are not determinative of the legal principles for which the opinions seemingly stand. In United States v. Pink, 315 U.S. 203 (1942), the Court stated:

> Nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy . . . the lack of an agreement by a

C. Equal Protection and the Loss of Consortium

Few federal or state court cases involving the denial of a wife's action for loss of consortium have been challenged on equal protection grounds.[35] Of those which have, only five have concluded that the classification violates the fourteenth amendment.[36] The courts in four of these cases gave little indication of the rationale for their opinions beyond the general theory that the seemingly arbitrary barrier to the wife's action for damages was repugnant to the concept of equal protection.[37]

In *Karczewski v. Baltimore & O.R.R.*,[38] however, the court's analysis demonstrated a careful application of the rational basis test. In that case, the court searched for possible state purposes which would support the legal distinction between husbands and wives in the common law action for loss of consortium.[39] Unable to justify the distinction, the court held

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majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases.

Id. at 216. *Accord*, Hertz v. Woodman, 218 U.S. 205, 213–14 (1910); Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1868).

Recognizing the limitations stemming from a plurality decision in which a majority of the Court did not join, most courts considering the equal protection question in sex classification cases subsequent to *Frontiero* have carefully limited that decision to its facts, have refused to hold sex-based classifications suspect, or have otherwise substantiated their decision to treat sex-based classification as suspect. *E.g.*, Hutchinson v. Lake Oswego School Dist., 374 F. Supp. 1056, 1061 (D. Ore. 1974) (court referred to the limited application of the Frontiero decision as a plurality decision and applied the *Reed* test in striking down the challenged classification); National Organization for Women v. Goodman, 374 F. Supp. 247, 249 (S.D.N.Y. 1974) (court held *Frontiero*, as a plurality decision, was not binding); Pendrell v. Chatham College, 370 F. Supp. 494, 500 (W.D. Pa. 1974) (careful citation of *Frontiero* as a plurality decision only, but viewed by the court as an invitation for lower courts to hold sex-based classifications suspect); Wiesenfeld v. HEW, 367 F. Supp. 981, 987–91 (D.N.J. 1973) (court was "persuaded by the opinion of Mr. Justice Brennan in *Frontiero* that sex is 'inherently suspect,'" but carefully evaluated the precedential value of *Frontiero* as a plurality decision); Ballard v. Laird, 360 F. Supp. 643, 647–48 (S.D. Cal. 1973), *U.S. appeal pending sub nom.* Schlesinger v. Ballard, 415 U.S. 912 (1974) (*Frontiero* cited as authority for the proposition that military provisions denying benefits on the basis of sex are a violation of due process under the fifth amendment); Aiello v. Hansen, 359 F. Supp. 792, 796 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 94 S. Ct. 2485 (1974) (court refused to apply *Frontiero* as mandating that sex-based classifications are suspect, since there was no clear majority in that case).

[35] See cases cited notes 36, 40 *infra* and accompanying text.

[36] Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169, 175–80 (N.D. Ill. 1967); Owen v. Illinois Baking Corp., 260 F. Supp. 820, 821–22 (W.D. Mich. 1966); Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Umpleby v. Dorsey, 10 Ohio Misc. 288, 227 N.E.2d 274, 274–76 (1967); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398, 401 (1965).

In two recent cases, state courts have granted recovery to the wife for loss of consortium on the basis of state constitutional provisions. Schreiner v. Fruit, 519 P.2d 462, 465 n.16 (Alas. 1974), *quoting* ALAS. CONST. art. I, § 3 ("'No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin.'"); Hopkins v. Blanco, 320 A.2d 139, 140 (Pa. 1974), *quoting* PA. CONST. art I, § 27 ("'Equality of rights under the law shall not be denied or abridged in the Commonweath of Pennsylvania because of the sex of the individual.'").

[37] Owen v. Illinois Baking Corp., 260 F. Supp. 820, 821–22 (W.D. Mich. 1966); Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Umpleby v. Dorsey, 10 Ohio Misc. 288, 227 N.E.2d 274, 274–76 (1967); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398, 401 (1965).

[38] 274 F. Supp. 169 (N.D. Ill. 1967).

the discrimination invidious, and a violation of the fourteenth amendment.[40]

II

In *Duncan*,[41] the Tenth Circuit cited *Reed* for the proposition that, under the traditional rational basis test, discrimination between the sexes will be upheld unless the discrimination is "patently arbitrary and not rationally related to a legitimate governmental interest."[42] The court questioned, however, the rational basis test's applicability in light of the *Frontiero* decision and by implication concluded that the standard now applicable to sex-based classifications is the strict scrutiny test.[43] The only argument in support of the consortium double standard which the court referred to was the fear of double recovery should the wife be allowed to recover. The court dismissed this argument, observing that it "has often

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[39] Judge Marovitz observed that "all of the cases cited by the defendant involve state use of the police power to apply classification to certain activities of women which related to their special status as wives and mothers in the community, and which recognize that they are not generally as physically strong as males." *Id.* at 179. Applying that rationale to the case before it, the court observed that "none of those considerations are present in the instant case," and further concluded that no other state purposes were apparent to support sex-based classifications in consortium actions. *Id.*

[40] *Id.* at 179–80. In contrast, the court in Miskunas v. Union Carbide Corp. 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969), applied the traditional rational basis test and found that "Indiana could infer that more often in a wife's suit than a husband's, the jury would award her duplicating damages for some of the same elements of injury." *Id.* at 850. The court noted that 87.8 percent of all men are employed, while only 34.4 percent of all wives are employed. The court concluded that the state may have been concerned with the possibility of double recovery from husbands collecting for their loss of earnings and wives recovering for the same injury sustained by their husbands. The court reasoned that, because more husbands are employed than wives, the state may have justifiably felt the chances for double recovery were much greater when the wife was allowed to recover for loss of consortium. *Id.*

In Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied*, 386 U.S. 978 (1967), the court upheld the denial of a wife's cause of action for loss of consortium: "[I]t is our view that many and obvious differences between what, by legal logic, is recoverable by the male spouse for injury, on the one hand, and the female spouse on the other, may be conceived of." 406 S.W.2d at 168–69. None of the differences were listed by the court.

[41] Prior to *Duncan*, the Tenth Circuit had considered questions relating to consortium on three different occasions. All of the cases presented questions which permitted the court to avoid a constitutional determination of the validity of the consortium double standard; in two of the cases, the court based its holding upon a statutory provision requiring compensation for disabling injuries to be paid to the injured employees exclusively. Anderson v. Burlington N. Inc., 469 F.2d 288, 290 (10th Cir. 1972) (Federal Employers' Liability Act held exclusive as to the railroad's liability and, therefore, wife excluded from common law recovery based upon consortium theory); Lunow v. Fairchance Lumber Co., 389 F.2d 212, 214 (10th Cir.), *cert. denied*, 392 U.S. 908 (1968) (workmen's compensation benefits held "exclusive of all common law liability" so that a wife was excluded from recovering for loss of consortium due to the negligent injury of her husband). In Criqui v. Blaw-Knox Co., 318 F.2d 811 (10th Cir. 1963), the court disallowed a wife's action for loss of consortium since neither the Kansas Legislature nor the state courts had spoken on the matter.

[42] 499 F.2d at 838.

[43] *Id.* The fact that *Frontiero* was a plurality decision seemingly did not affect the Tenth Circuit's apparent decision to apply a stricter judicial standard for reviewing sex-based classifications.

been rejected where considered in a constitutional context."[44] The court pointed to the defendant's failure to offer any other justification for the sex classification and concluded that there was no apparent rationale "to support such dissimilar treatment."[45] Without analyzing any of the other arguments usually relied upon to support a state's double standard consortium doctrine, the court concluded that the sex-based classification in consortium actions "fails to meet both the criteria of the traditional rational basis test and the demands of strict judicial scrutiny."[46]

Because of its holding that the refusal to allow a wife to recover for loss of consortium was unconstitutional, the *Duncan* court did not decide whether a recent amendment to the married women's rights statute in Oklahoma allowing women to sue for loss of consortium should be applied retroactively.[47]

III

The result reached in *Duncan* was correct. Nevertheless, the court's opinion in that case is subject to criticism on several grounds. First, because only a relatively small number of courts have decided the consortium issue on constitutional grounds,[48] there is a great need for carefully written opinions with concrete supporting arguments. In *Duncan,* the court's abbreviated treatment of this important issue weakens the effectiveness of the decision as precedent.[49] Second, although most courts avoid basing their decisions on constitutional grounds whenever other avenues of decision are available,[50] the *Duncan* court failed to analyze the efficacy of applying the recent amendment of the Oklahoma married

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[44] *Id.* The court also noted that the Oklahoma Legislature had not been persuaded by the double recovery argument, since it amended the married women's rights statute to allow the wife to recover for loss of consortium. *Id.*

[45] *Id.*

[46] *Id.*

[47] OKLA. STAT. ANN. tit. 32 § 15 (Supp. 1974–75) provides:

> Woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, her own medical expenses, *and by reason of loss of consortium,* she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone.

(Emphasis added).

The court noted that "[t]he effective date of this amended statute was . . . four days after appellant filed suit and approximately two years after her husband was injured." 499 F.2d at 837 n.1. Arguably, the court intended to dispose of the statute's retroactive application as a procedural statute by reference to its effective date.

[48] Cases cited note 36 *supra.*

[49] *Duncan* could be criticized for its abbreviated analysis in much the same way that Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966), was criticized by the *Karczewski* court. In *Karczewski,* the court stated that "we think that the *Owen* case, in and of itself, is not of great precedential weight on the issue, since . . . it did not actually analyze the problem, but essentially stated a conclusion." 274 F. Supp. at 171.

[50] *See, e.g.,* Alexander v. Louisiana, 405 U.S. 625, 633 (1972); Calhoun v. Cook, 487 F.2d 680, 683 (5th Cir. 1973); Mengelkoch v. Industrial Welfare Comm'n, 442 F.2d 1119, 1125 (9th Cir. 1971).

women's act retroactively.[51] Retroactive application of that amendment would have enabled the court to grant recovery without considering the equal protection argument and without determining that sex-based classifications are suspect. Third, in holding that sex-based classifications are suspect, the *Duncan* court relied upon the language of *Frontiero,* even though only four of the eight justices in that case agreed that sex classifications are suspect.[52] The *Duncan* court failed not only to recognize the limited precedential value of the *Frontiero* decision, but also failed to consider in any detail the desirability of treating classifications based upon sex as suspect.[53]

The decision in *Duncan* also raises a question as to the court's understanding of the rational basis test in light of the *Reed* decision. The court's perfunctory citation of *Reed* as authority for the test requiring only the establishment of a tenuous rational foundation for state policies ignores the language in that case which transformed normally superficial evaluations of sex-based classifications into intensive investigations of the facts surrounding each allegation of discrimination. Rational basis analysis under the *Reed* decision requires an investigation into the classifications drawn and the state purpose fostered by such classifications. Nothing in the *Duncan* decision evidenced an awareness by the court that the state, subsequent to *Reed,* no longer enjoys a presumption of the validity of its sex-based classifications under the rational basis test. Furthermore, the Tenth Circuit's holding that the classification in *Duncan* was invalid fails to provide useful standards for future application of the rational basis test, assuming that test is still applicable in such circumstances.

The court's unwillingness to avoid the constitutional issue, its refusal to follow a rational basis analysis, and its strong reliance on *Frontiero* suggest that the court's concern was not so much in following judicial precedent as it was to support the position that sex-based classifications are inherently suspect so that strict judicial scrutiny is required. The *Duncan* court's summary rejection of Oklahoma's common law practice without allowing the defendant to attempt on remand[54] to justify the sex-based classification under the rational basis analysis also indicates that the Tenth Circuit is now requiring strict scrutiny of sex-based classifications.

Even if the court had used the new rational basis test suggested in *Reed,* however, it could have disposed of the discriminatory aspects of the Oklahoma consortium rule by disclosing the fallacies underlying the argu-

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[51] *See* note 47 *supra* and accompanying text.

[52] See notes 32, 34 *supra* and accompanying text.

[53] That the appellee did not argue that *Frontiero,* as a plurality decision, was not binding on the court, may account in part for the court's failure to take note of that issue. Brief for Appellee at 8, 9, Duncan v. General Motors Corp., 499 F.2d 835 (10th Cir. 1974).

[54] Neither appellant's nor appellee's brief referred to the rational basis analysis and the arguments traditionally relied upon to support state action. The court could have therefore remanded the case, since these arguments were not developed before the court.

ments used to support the denial of recovery for the wife.[55] The argument that a wife cannot recover because the damage elements are intangible is clearly invalid under an equal protection argument, since the intangible losses suffered are not peculiar to the husband only.[56] Both husbands and wives incur losses when, because of incapacitating injuries, their spouses are unable to provide the marital aid, companionship, and affection which form the basis for recovery of damages for loss of consortium. Although difficult to measure monetarily, once such damages are assessed for the benefit of the husband, compensation for the wife, who is also deprived of her right to the aid and affection of her husband, should be compelled.[57]

The apprehension of double recovery if the wife is allowed to recover for loss of consortium is also without logical foundation. Modern statutes permitting married women to sue in their own names[58] make double recovery possible in those jurisdictions in which the husband enjoys the right to recover for negligent injuries to his wife, and the wife is allowed to recover for her own injuries. The potential for double recovery where wives are awarded damages for the loss of consortium does not substantially exceed the same probability where husbands are allowed to recover.[59] Furthermore, double recovery is easily avoided by carefully instructing the jury as to the nature of the injury upon which the wife's recovery is based. The courts can effectively draw a distinction between damages to be recovered for pain, suffering, and monetary loss by the one negligently injured, and the recovery by the spouse for the loss of the intangible elements of marital fellowship.[60] In addition, courts could, by requiring the wife's action for loss of consortium to be joined with her husband's action,[61] supervise the allotment of damages to prevent any possibility of double recovery.

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[55] *See* notes 11–15 *supra* and acompanying text.

[56] *See* discussion in note 1 *supra.*

[57] The *Duncan* court recognized this fact:

> The intangible segments of the elements comprising the cause of action for loss of consortium are equally precious to both husband and wife. Both have equal rights in the marriage relation, and both should receive equal protection under the law.

499 F.2d at 838. *See also* Hitaffer v .Argonne Co., 183 F.2d 811, 819 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950); Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169, 179 (N.D. Ill. 1967); Deems v Western Md. Ry., 247 Md. 95, 231 A.2d 514, 522 (1967); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669, 680 (1959).

[58] See note 8 *supra* and accompanying text.

[59] *Contra,* Miskunas v. Union Carbide Corp., 399 F.2d 847, 850 (7th Cir. 1968), *cert. denied,* 393 U.S. 1066 (1969).

[60] The court in *Karczewski* disposed of the problem of double recovery by reasoning that "double recovery can be avoided by deducting from the wife's damages, any amount recovered by the husband for loss of earning power." 274 F. Supp. at 173. *See also* Cooney v. Moomaw, 109 F. Supp. 448, 450–51 (D. Neb. 1953); Yonner v. Adams, 53 Del. 229, 167 A.2d 717, 728–29 (1961); Acuff v. Schmidt, 248 Iowa 272, 78 N.W.2d 480, 485 (1956).

[61] *See, e.g.* Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514, 525 (1967); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1, 8 (1965); Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137, 145 (1967).

Other reasons for upholding the legitimacy of sex-based classifications are inapplicable to the action for the loss of consortium. In prohibiting the wife from recovering for the loss of consortium, neither the wife nor the state gain any advantage. Moreover, unlike some legitimate sex-based classifications, the discrimination in consortium actions is not founded upon the desire to protect women who, in most instances, lack the physical strength of men.[62] Finally, the constitutional attack on the dichotomous consortium doctrine requires the judiciary to confront the issue, rather than deferring to the legislature the task of modifying long standing common law precedent.

IV

The traditional arguments for distinguishing on the basis of sex in consortium actions have been greatly weakened by the apparent shift in the attitude of the Supreme Court towards sex-based classifications. Since *Reed* and *Frontiero* have shifted away from the presumptive validity of such classifications, the already tenuous common law arguments supporting the discriminatory consortium doctrine should be disposed of by those courts considering the issue in the future. The *Duncan* decision may set in motion subsequent judicial action which will invalidate the sexual distinctions in consortium actions on an equal protection basis.[63] The analysis in *Duncan,* however, does little to clarify the meaning of current equal protection tests utilized by the Supreme Court for sex-based classifications.

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[62] *See* discussion in note 39 *supra.*

[63] As of this writing, the *Duncan* decision is the only recorded federal case since *Reed* and *Frontiero* in which the sex-based classification in the common law action for loss of consortium was attacked on equal protection grounds.

Albertson's, Inc. v. Amalgamated Sugar Co.— Preclusion of a Class Action by Speculation

Plaintiffs, wholesale purchasers of large quantities of sugar,[1] brought a class action against two refiners and sellers of beet sugar, claiming that the defendants had conspired to restrain trade, attempted to monopolize, and engaged in an illegal tying arrangement in violation of sections 1 and 2 of the Sherman Act,[2] and that defendants' pricing system amounted to price discrimination in violation of section 1 of the Robinson-Patman Act.[3]

The basis for plaintiffs' price discrimination claim was defendants' "distant base point" pricing system under which the price of sugar had two components: a "base price" equal to the price charged by the nearest cane sugar refiner, C & H,[4] and a "freight prepay" equal to the freight rate from C & H's plant, the distant base point, to the purchaser.[5] Because the distance from C & H's plant to the purchasers within the complaint area [6] was always greater than the distances from defendants' plants to the purchasers, the freight prepay always exceeded actual freight charges. Plaintiffs claimed that all class members, purchasers of sugar from defendants within the five state complaint area from 1967 to 1970, were

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[1] The named plaintiffs in the case were Albertson's, Inc., a retail grocery chain, Spudnut Industries, Inc., a manufacturer of doughnuts and pastries, and Fisher Baking Company, Inc., a food processor. All three named plaintiffs bought large quantities of sugar from defendants either for resale or for use in goods they were producing for sale. Albertson's, Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43, 46 (D. Utah 1973), *aff'd*, 503 F.2d 459 (10th Cir. 1974).

[2] 15 U.S.C. §§ 1, 2 (1970).

[3] Section 1 of the Robinson-Patman Act, 15 U.S.C. § 13a (1970), provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

[4] California and Hawaiian Sugar Company (C & H) is the nearest cane sugar producer to the complaint area. C & H maintains a refining plant in Crockett, California, which is used as the distant base point for defendants' pricing system. 503 F.2d at 462.

[5] Both defendants in *Albertson's* have their principal place of business in Utah, but maintain sugar beet processing plants in Utah, Idaho, Washington, and Oregon. The same distant base point, Crockett, California, is used by all defendants' processing plants. Brief for Appellants at 2–3, Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459 (10th Cir. 1974).

[6] The complaint area defined by plaintiffs consisted of the states of Utah, Idaho, Washington, western Wyoming, and all but the extreme southern portion of Oregon. 62 F.R.D. at 47.

thus required to pay excessive amounts for sugar to enable defendants to compete in distant markets.[7] The district court allowed the class action as to plaintiffs' attempt to monopolize and conspiracy to restrain trade claims, but refused to allow the class action as to the tying arrangement and price discrimination claims.[8]

In *Albertson's, Inc. v. Amalgamated Sugar Co.*,[9] the Tenth Circuit affirmed, holding that plaintiffs' tying arrangement and price discrimination claims could not be maintained as a class action because, if plaintiffs prevailed and defendants were forced to charge actual freight rates, some members of the class would be placed in a subordinate competitive position to other class members. Because this created a possible conflict of interest within the class, the court said, the class action failed under subsections (a)(3) and (4) of rule 23 of the Federal Rules of Civil Procedure.[10]

I

The party bringing a class action has the burden of showing that the rule 23 requirements have been met.[11] The plaintiff must show that the four requirements of section 23(a) are satisfied [12] and that the action falls within one of the three categories enumerated in section 23(b).[13] Subsections 23(a)(3) and (4), read together, prohibit conflicts of interest within the class.[14] They provide:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[15]

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[7] C & H, the chief competitor of defendants within the complaint area, charged a base price plus actual freight from its sugar cane processing plant in Crockett, California to its purchasers. Those purchasers situated nearer to the plant in Crockett could buy their sugar cheaper than their more distant neighbors because the freight rates for shipping the sugar to them are less. In order to compete with the cane producers in markets situated closer to the cane processing plants than to beet processing plants, defendants charged purchasers who were near to them significantly more for "freight prepay" than actual freight costs, a situation commonly called "phantom freight." This cushion allowed them to absorb losses incurred by selling to distantly located purchasers who paid much less than the actual freight cost. 62 F.R.D. at 48.

[8] *Id.* at 52, 54, 58.

[9] 503 F.2d 459 (10th Cir. 1974).

[10] FED. R. CIV. P. 23(a)(3)-(4).

[11] *E.g.*, Rossin v. Southern Union Gas Co., 472 F.2d 707 (10th Cir. 1973; Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969).

[12] Subsections (1) and (2) of section 23(a) require that the class be so numerous that joinder of all members is impracticable and that there be questions of law or fact common to the class. The requirements of subsections (3) and (4) are set out in the text accompanying note 15 *infra.*

[13] Section (b) of rule 23 deals primarily with considerations of judicial economy and demands that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

[14] See Note, *Class Actions: Defining the Typical and Representative Plaintiff under Subsections (a) (3) and (4) of Federal Rule 23,* 1973 B.U.L. REV. 406, 418.

[15] FED. R. CIV. P. 23(a)(1)-(2).

The purpose of these subsections is to ensure that the rights of class members who are not active parties to the litigation are protected.[16]

Before the promulgation of the Federal Rules of Civil Procedure, the Supreme Court formulated the due process requirements for class actions in *Hansberry v. Lee*.[17] According to the *Hansberry* court,

> there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.[18]

In *Hansberry*, a group of about five hundred land owners had signed an agreement containing covenants prohibiting the sale of their land to blacks. When some of the land owners subsequently sold their property to blacks, other parties to the agreement brought a class action to enforce the restrictive covenants. The Court held that, because some class members opposed the covenants (and were, in fact, defendants in the action), a conflict of interest existed which precluded class action treatment of the claim.[19] Subsection (a)(3) and (4) have generally been construed by courts as incorporating the *Hansberry* prohibition of class actions where the interests of the class members are in conflict.[20]

Courts have taken different, even conflicting, views of the degree of conflict of interest that will preclude a class action. Some courts, for example, pay little attention to potential economic conflicts of interest within a class. One in the series of opinions by the Second Circuit in *Eisen v. Carlisle & Jacquelin* [21] illustrates this approach. In *Eisen*, the plaintiffs, who represented a class of almost four million odd lot buyers and sellers on the New York Stock Exchange, brought an action against two brokerage firms, alleging that they had conspired to monopolize odd lot trading and had set the odd lot differential at an excessive amount in violation of the Sherman Act. Because the potential claims were between twenty and sixty million dollars, a successful suit could have forced the two defendants into bankruptcy. Therefore, it was possible that a significant portion of the class had a stronger economic interest in the continued operation of the two firms than in bringing the class action. In reversing the district court's order denying the class action, the court failed to mention the potential economic conflict of interest between class members, indicating instead

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[16] *E.g.*, William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp., 49 F.R.D. 35, 40 (C.D. Pa. 1969); *see* Schy v. Susquehanna Corp., 419 F.2d 1112, 1116–17 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); City of Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972).

[17] 311 U.S. 32 (1940).

[18] *Id.* at 42.

[19] *Id.* at 44.

[20] Cases cited note 16 *supra*.

[21] 391 F.2d 555 (2d Cir. 1968). *Eisen* was eventually decided by the Supreme Court. The basis for the decision was not conflict within the class, but lack of individual notice to absent class members by the representative plaintiff. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974).

that its main concern was in affording small claimants a forum in which to seek redress for large scale antitrust violations.[22]

In *Jacobi v. Bache & Co.*,[23] the court limited the conflict of interest rule by requiring that the conflict go to "the heart of the controversy." In *Jacobi*, the plaintiffs, a group of securities representatives brought an antitrust class action, alleging that defendants had conspired not to pay commissions to them. The money that should have gone to pay the commissions went instead into designated profit sharing plans and pension funds. Because some plaintiffs within the class participated in the pension funds and profit sharing plans, defendants contended that a sufficient conflict of interest existed to preclude class action treatment of the claim. Responding to this contention, the court stated that "not every difference in view creates the antagonism which will defeat the bringing of a class action for the antagonism must relate to the subject matter of the suit." [24] The court explained that the subject matter of an antitrust suit is the "restoration of competition to the industry involved" [25] and apparently assumed that all would benefit from such a result. On this basis, the court held that "the fact that some members of the class may differ as to the desirability of a particular remedy for the antitrust violation, *or even desire the maintenance of the status quo,* does not preclude their inclusion within the class bringing the action." [26]

One commentator has summarized the liberal approach to the conflict of interest question as follows:

> A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights. Some landowners might have preferred to see their water or air polluted by a factory which employed them but equity recognized the right to bring class actions to stop the pollution; some shareholders are the defendants accused of improprieties yet they sue themselves when a class action is brought; and some negroes may want segregated schools but they are represented as a class in suits by others who do not. The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether

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[22] 391 F.2d at 560. Not all courts agree as to the purpose of rule 23. Some, as in *Eisen*, emphasize the view that rule 23 provides small claimants with a method of redress for claims too small to otherwise warrant attention. Others emphasize economies of time, effort, and expense of litigation. Because these two sometimes conflicting purposes both figure prominently in class action determination, there are a number of cases with similar fact patterns but conflicting results. *See* Note, *Rule 23 and Class Action Development*, 12 WASHBURN L.J. 343 (1973).

[23] 1972 CCH Trade Cas. ¶ 73980 (S.D.N.Y. Feb. 8, 1972).

[24] *Id.* at 92,090.

[25] *Id.*

[26] *Id.* (emphasis added). The *Jacobi* court pushed the "subject matter of the suit" approach to its outer limits. It could be argued that those within any given class would benefit to some extent from the correction of an illegal system affecting them. However, those within the class wishing to maintain the status quo because they are benefitting from it more than they would from the change or "remedy" sought by the representative plaintiff have a conflict of interest that in practice cannot be so easily separated from the subject matter of the suit.

there is reason to believe that a *substantial portion* of the class would agree with their representatives were they given a choice.[27]

Other courts have been less liberal than the *Eisen* and *Jacobi* courts to class action plaintiffs in applying subsections 23(a)(3) and (4). For example, in *William Goldman Theatres, Inc. v. Paramount Film Distribution Corp.*,[28] the plaintiff, who operated three first run motion picture theatres in Philadelphia, alleged that defendants, motion picture distributors, had violated federal antitrust laws by discriminating in favor of some theater owners to the detriment of Goldman and others. The *Goldman* court reasoned that the theatre owners benefitting economically from the continued operation of defendants' allegedly illegal practices had interests sufficiently in conflict with those of plaintiff to prevent a class action. The court emphasized that "[i]ndeed, this rule has been applied specifically where it appeared merely that many members of the alleged class had not objected to the complained of conduct and had accepted its benefits." [29]

The court in *City of Chicago v. General Motors Corp.*[30] applied a similarly rigorous conflict of interest standard. The city of Chicago alleged that vehicles manufactured by General Motors substantially contributed to air pollution and created a hazard to the health and welfare of city residents. Plaintiffs sought an injunction ordering, among other things, that defendants equip their motor vehicles with tamper-proof emission control devices. The *Chicago* court denied class action treatment of the claim because auto dealers, service stations, and others within the city "would be adversely affected by some of the relief plaintiff seeks," [31] thus creating a conflict of interest within the class.

Chicago and *Goldman*, which apply a rigorous conflict of interest standard, and *Jacobi* and *Eisen,* which apply a less stringent standard, are distinguishable. Trial judges have broad discretionary powers in applying subsections (a) (3) and (4) to specific fact situations and in determining whether those standards are met.[32] This flexibility, combined with differing judicial viewpoints as to the desirability of class actions,[33] may account for the varying standards evident in those cases.

II

In *Albertson's,* the Tenth Circuit characterized the issue as whether the class action failed under subsections (a)(3) and (4) of rule 23 because

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[27] Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 BUFF. L. REV. 433, 460 (1969) (emphasis added).

[28] 49 F.R.D. 35 (E.D. Pa. 1969).

[29] *Id.* at 40.

[30] 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd,* 467 F.2d 1262 (7th Cir. 1972).

[31] *Id.* at 288.

[32] Wilcox v. Commerce Bank, 474 F.2d 336, 347–48 (10th Cir. 1973).

[33] See note 22 *supra.*

of a conflict of interest within the class.[34] The plaintiffs advanced three arguments in support of their contention that there was no conflict of interest: (1) if the action succeeded, all sugar prices in the complaint area would be either lower or remain the same, thus benefitting all class members to some degree; (2) if the action succeeded, the practical effect of the suit on competition between class members would be the same whether brought as a class action or by one plaintiff;[35] and (3) those class members whose freight rates would be significantly different under an f.o.b. pricing system were not in competition with each other.[36]

The Tenth Circuit agreed that "the mere fact that the various members of the class will benefit unevenly is not such conflict as will preclude the maintenance of a class action," [37] but maintained that *Albertson's* went "beyond a mere disparity in benefit." [38] The court reasoned that because sugar is fungible, any difference in delivered price charged to competing purchasers for resale would probably result in the lower priced sugar dominating the market. Thus, under some form of f.o.b. pricing system—where actual, rather than distant base point freight rates were added to the base price—those purchasers located closer to defendants' processing plants would have a competitive advantage over purchasers located further away. The court concluded that if the distant base point pricing system were declared invalid, relative competitive positions within the class would be seriously altered. Emphasizing that the requirement of adequate representation must be stringently applied,[39] the court denied class action treatment for the claims against defendants' pricing system.

III

In *Albertson's,* the Tenth Circuit relied on *Hansberry v. Lee* [40] and *Schy v. Susquehanna Corp.*[41] to support its holding on the conflict of interest issue.[42] In *Hansberry,* the plaintiffs attempted to represent a class that included the defendants in the action.[43] Where a party bringing a class action seeks to represent those against whom the suit is brought, the conflict is obvious. In *Schy,* the plaintiff, one of over nine thousand stockholders of a corporation, alleged that the corporation had issued a false and misleading proxy statement in order to gain approval of a proposed new issue of preferred stock. With full knowledge of the pending

[34] 503 F.2d at 463.

[35] Defendants' main concern was with damages. If the suit were to succeed *as a class action,* all members of the class damaged by the illegal pricing system would have to be compensated. Brief for Appellants at 14.

[36] 503 F.2d at 464.

[37] *Id.*

[38] *Id.* at 463.

[39] *Id.* at 464.

[40] 311 U.S. 32 (1940).

[41] 419 F.2d 1112 (7th Cir. 1970).

[42] 503 F.2d at 463.

[43] See text accompanying note 19 *supra.*

suit brought by the plaintiff to stop the proposed issue, over eighty percent of the stockholders voted to approve the corporate action; less than one percent voted against it. The *Schy* plaintiff was attempting to represent stockholders who had overwhelmingly voted their dissent from his cause; the conflict was clear.

The language of the Tenth Circuit's opinion suggests that it *intended* to follow *Hansberry* and *Schy*. The court made it clear that it had no doubt that "the effects of abrogation of the defendants' base point pricing method would indeed have far-reaching and diverse impact on the defendants' hundreds of purchasers of beet sugar in the complaint area." [44] On this basis, the court reasoned that "if the defendants' present system of pricing is outlawed, 'the competitive position of a distant competitor *will be substantially changed* vis-a-vis his more local competitor.' " [45] The Tenth Circuit was thus convinced that a very real conflict would arise between *Albertson's* class members if defendants' pricing system were abolished. The court's readiness to disallow the class action is puzzling in light of past Tenth Circuit statements regarding class actions. For example, in *Esplin v. Hirschi,*[46] the court stated that

> [t]he interests of justice require that in a doubtful case, such as was presented here when considered by the trial court, any error, if there is to be one, should be committed in favor of allowing the class action.[47]

This statement seems to require substantial grounds for finding adverse interest among class members, but the *Albertson's* opinion is disappointing precisely because the court failed to follow this standard. The finding of conflict among the plaintiff class was based on little more than speculation.[48]

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[44] 503 F.2d at 464. The court seemed to assume (with reference to the cited statements) that an abrogation of the defendants' pricing system would necessarily result in its replacement by an f.o.b. system. Another system might well be adopted, however. See S. OPPENHEIM & G. WESTON, PRICE AND SERVICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 813–14 (1974). The record does not support a finding that defendants would be compelled to adopt an f.o.b. pricing system. They might, for example, adopt an area wide uniform price which, of course, would not differentiate among customers in the complaint area. The court based its finding of conflict within the *Albertson's* class upon a *speculative* finding that an f.o.b. pricing system was the only alternative to defendants' distant base point system.

[45] 503 F.2d at 464 (emphasis added).

[46] 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

[47] *Id.* at 101. Most courts require that a finding of adverse interest among class members be founded upon more than mere speculation. *E.g., In re* Goldchip Funding Co., [1973–1974 Transger Binder] CCH FED. SEC. L. REP. 94,382, at 95,322 n.1 (M.D. Pa. 1974); Herbst v. Able, 47 F.R.D. 11, 15 (S.D.N.Y. 1969).

[48] A class action is seldom a simple matter to litigate and many courts dislike trying them. For example, the following interchange between the *Albertson's* trial judge and counsel illustrates this point:

> THE COURT: "Mr. Kirkham, we come back — I hate class action cases. I want to tell you very frankly. And you will have every prisoner bringing them now. You've got everybody whoever contends that there was a violation of the Equal Opportunity Act — they're all bringing class action cases and —
> MR. KIRKHAM: "All right. Now, then —

A price differential between two sugar purchasers within a class will disrupt their competitive relationship only if they are in actual competition with each other. Instead of determining whether such a competitive relationship existed within the class, the *Albertson's* court merely assumed that outlawing defendants' pricing system would significantly affect competition.

Evidence introduced at trial renders this conclusion questionable. Defendants introduced an exhibit purporting to show the differences between prices charged under distant base point pricing and those that would be charged under an f.o.b. system. The court noted that the most drastic change from one pricing system to the other was sixty-nine cents per hundredweight between purchasers in Salem, Oregon and those in Yakima, Washington. It is unreasonable to assume that a consumer in Salem, Oregon would drive 350 miles to shop in Yakima, Washington merely to save seven cents on a ten pound bag of sugar. Sugar retailers located far enough apart to have significantly different freight rates from defendants' sugar plants would probably never be in serious competition with each other for the retail market.

Class members engaged in some sugar consumptive industry, such as candy manufacturing, however, might compete for sales at the wholesale level. Such goods could find their way into competition some distance from their point of manufacture. Thus, under an f.o.b. pricing system, the manufacturer located closer to the sugar processing plant would have a competitive advantage over a more distantly located competitor. Whether such situations exist or whether cost differentials in sugar consumptive industries would be of sufficient magnitude to disrupt competitive business patterns is unclear. In *Albertson's,* plaintiffs' evidence indicated that no such disruption would result;[49] defendants apparently introduced no evidence on the question.

If conflicts of interest existed within the *Albertson's* class, the defendants, who had two years of discovery, would probably have discovered and revealed them to the court. The *Albertson's* court, however, placed

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THE COURT: "— many of them you can get rid of, but I have had a few sent back to me, saying 'direct a hearing,' even involving some prisoner who complains about some little matter that doesn't amount to anything." Tr., III-89.

THE COURT: "Isn't that true in every class action case?

"If you are correct, then let's do away with the class actions, and in that, I will join with you. I mean, I would be very happy to do away with them . . . ." Tr. III-72.

Brief for Appellant at 22. The Tenth Circuit, however, has not evidenced a hostile attitude toward class actions; instead they indicate that such actions are specifically encouraged. See Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969), where the court reversed a district court order denying class action treatment in a securities fraud suit. See also Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970), where the court affirmed a trial court determination that various service station owners could proceed as a class against a trading stamp company in a price discrimination case. The Tenth Circuit's harsh treatment of the class action in *Albertson's* is puzzling in light of its previously expressed position.

[49] Brief for Appellants at 19–21. *See* note 44 *supra.*

the burden upon plaintiffs to show that no potential conflicts existed among any of the class members. Few plaintiffs seeking to represent a class would be able to prove that there are no potential conflicts of interest among any of the hundreds or even thousands of class members. For this reason, the Tenth Circuit should have remanded the case to the district court for further hearings to determine the existence or nonexistence of the alleged conflict. As it stands, the decision leaves substantial doubt as to the existence of any conflict among the class members, and suggests that a class action will be denied where there is any indication of a conflict of interest within the class.

The *Albertson's* decision, though consistent with the stern conflict of interest rules of cases such as *Chicago* and *Goldman,* is easily distinguishable from *Schy* and *Hansberry,* the cases the Tenth Circuit professed to follow. In *Hansberry* and *Schy* the conflict within the class was substantial and obvious; *in Albertson's,* the existence of the conflict was highly questionable. *Albertson's* is also a substantial departure from the Tenth Circuit's own pronouncement in *Hirschi* that in doubtful cases class actions will be allowed.[50]

The Tenth Circuit's concern with the rights of absent class members who would be bound by a class judgment is laudable. The potential for abuse of the class action device requires that courts cautiously examine claims brought under rule 23 to insure that representative plaintiffs' interests do not conflict with those of other members of the class.[51] In *Albertson's,* however, the court's failure to require an actual determination of conflict within the class resulted in a premature denial of the class action claim.

Properly used, class actions can achieve justice in situations where it would not otherwise be obtainable.[52] Courts should proceed cautiously when examining such a claim to ensure that no action is precluded because there is a mere possibility that the interests of class members are in conflict. If cases such as *Chicago, Goldman,* and *Albertson's* are followed, few plaintiffs will be able to bear the burden of the class action.

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[50] See text accompanying note 47 *supra.*

[51] The Supreme Court, recognizing the potential for abuse inherent in the class action, has in recent decisions severely restricted the class action. In Zahn v. International Paper Co., 414 U.S. 291 (1974), the Court held that each individual plaintiff within the class must meet the ten thousand dollar amount in controversy requirement for federal diversity jurisdiction. In Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974), the Court held that all of the potential thousands of members of a class must receive actual notice of the suit before the action can proceed. *See* Comment, *Eisen v. Carlisle & Jacquelin — Fluid Class Recovery and Notice Requirements in Rule 23 (b)(3) Class Actions — A Strict Approach,* 1973 UTAH L. REV. 489; 27 U. MIAMI L. REV. 243 (1972). It is possible that the *Albertson's* court was merely following the lead of the Supreme Court in imposing heavy burdens on class action plaintiffs to assure that the device will not be abused.

[52] It is often impossible for a plaintiff with a small claim to bring suit because of the expense involved. The class action has proved itself an effective device to remedy this injustice in many situations. Becker, *Introduction: Use and Abuse of Class Actions Under Amended Rule 23,* 68 NW. U.L. REV. 991, 993 (1974).

A Doctor's Duty to Inform — *Holland v. Sisters of Saint Joseph of Peace*

Plaintiff suffered from a large cancerous tumor and was treated with frequent, heavy doses of radiation. The plaintiff's doctor had warned her that the proposed treatment presented possible, though probably inconsequential, danger to healthy tissue. When plaintiff experienced serious complications from the radiation treatment, she sued, contending that the doctor had negligently treated her with excessive radiation doses, and that if she had been properly informed of the risk of the radiation, she would have chosen alternative treatment. The trial court instructed the jury that the doctor's duty to disclose was to be determined by the medical standard in the community. On appeal from a verdict for the defendant, the Oregon Supreme Court reversed, in *Holland v. Sisters of Saint Joseph of Peace*,[1] holding that the physician's legal duty to disclose is to be determined by what a "reasonable" patient would consider a "material" risk. When a doctor fails to inform a patient of a "material" risk, the court held, he is liable for failure to obtain informed consent.

I

A. Informed Consent—A Negligence Action

The doctrine of informed consent is founded on the principle that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." [2] This right is tempered by the standard of disclosure for which a physician will be held legally responsible. Courts initially treated the duty of informed consent as a basis for alleging a technical battery; that is, an uninformed consent was considered to be no consent at all.[3] Under this approach, the plaintiff had only to show a "nonconsensual" touching by the physician to establish tortious conduct, and could recover compensatory and punitive [4] damages even if the treatment or operation were successful. Expert testimony was not essential to prove the nonconsensual touching.[5]

Although a battery action is still uniformly recognized as appropriate in cases in which a physician performs a procedure substantially different from the one consented to,[6] the modern view is that the breach of the

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[1] 522 P.2d 208 (Ore. 1974).

[2] Schloendorff v. Society of the New York Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

[3] *See* W. PROSSER, THE LAW OF TORTS 165 (4th ed. 1971).

[4] *See* Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74, 82 (1965), *modified*, 2 Ariz. App. 607, 411 P.2d 45 (1966). *See generally* W. PROSSER, *supra* note 3, at 36; RESTATEMENT (SECOND) OF TORTS § 18, comment (1965).

[5] Cobbs v. Grant, 8 Cal. 3d 229, 240, 502 P.2d 1, 8, 104 Cal. Rptr. 505, 512 (1972). Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1399–1400 n.18 (1967) [hereinafter cited as *Informed Consent*].

[6] Canterbury v. Spence, 464 F.2d 772, 793 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 239, 502 P.2d 1, 7, 104 Cal. Rptr. 505,

duty to disclose is grounded in negligence.[7] Thus, failure to disclose is merely another form of malpractice and most courts now focus on the physician's duty to disclose as measured by a negligence standard of conduct.[8] Except in certain privileged situations,[9] a physician has the duty to disclose the general nature of the proposed treatment, alternative treatment, the probability of success, probable consequences and side effects, and the possibility that unforeseen conditions may necessitate a change in procedure.[10]

Because the battery theory relies on the legal fiction that the physician is acting with intent to injure his patient, most courts prefer the negligence theory because it grants more recognition to the fact that the physician is generally acting in good faith for the patient's welfare.[11] Also, from the doctor's point of view, the negligence theory is preferable since malpractice insurance usually does not cover intentional torts.[12] Use of the battery theory, however, favors the injured patient, since under the negligence theory the plaintiff has the burden to establish the scope of the duty to disclose, the physician's breach of that duty, causation, and damages.

B. The Standard of Care in Informed Consent Cases

Generally, courts following the negligence-malpractice approach to informed consent apply the traditional professional standard in determining negligence.[13] Most adherents of this view reason that a doctor is

511 (1972); *accord,* W. PROSSER, *supra* note 3, at 104–05; RESTATEMENT (SECOND) OF TORTS § 15, comment *a* (1965).

[7] Cobbs v. Grant, 8 Cal. 3d 229, 240, 502 P.2d 1, 8, 104 Cal. Rptr. 505, 512 (1972); Downer v. Vielleux, 322 A.2d 82, 89 (Me. 1974); Wilkinson v. Vesey, 295 A.2d 676, 686 (R.I. 1972); Trogun v. Fruchtman, 58 Wis. 2d 569, 207 N.W.2d 297, 313 (1973). W. PROSSER, *supra* note 3, at 165, notes that the first case to hold that the informed consent action is grounded in negligence was Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960).

[8] *See* Canterbury v. Spence, 464 F.2d 772, 783 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Comment, *Informed Consent after Cobbs—Has the Patient Been Forgotten?,* 10 SAN DIEGO L. REV. 913, 921 (1973) [hereinafter cited as *Has the Patient Been Forgotten*].

[9] See text accompanying notes 20–25 *infra.*

[10] 2 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 22.01 (1973).

[11] Trogun v. Fruchtman 58 Wis. 2d 596, 207 N.W.2d 297, 313 (1973). *But see Has the Patient Been Forgotten, supra* note 8, at 919. The cases sometimes speak in terms of maliciousness associated with battery, and thus confuse motive with intent. The invasion of another's protected interest need only be intentional, not necessarily hostile, in order to produce battery liability. *Accord,* W. PROSSER, *supra* note 3, § 8, at 31, 36.

[12] In regard to malpractice insurance, one commentator has stated:

> Battery might be viewed as a criminal act which would negate the insurer's liability since most malpractice policies have clauses specifically disclaiming liability for criminal acts. . . . However, some policies specifically itemize assault and battery as a contingency insured against. . . . Conditions in the policy will determine coverage . . . but where a narrow construction of the policy would prevent recovery, some courts have reasoned that, since a doctor would not operate without consent, failure to get that consent is a "mere oversight" and hence malpractice. . . . Not all courts will strain to effectuate insurance coverage.

Informed Consent, supra note 5, at 1400 n.18.

[13] *Cf.* Canterbury v. Spence, 464 F.2d 772, 783 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972). (Although the *Canterbury* court did not apply the professional standard, it noted that the majority of courts do.)

required to disclose only those risks which a reasonable practitioner in the doctor's specialty and community would disclose.[14] As in any other malpractice action, the plaintiff has the burden of proving that the doctor's failure to disclose breaches a medical standard, as established by expert testimony.[15] Scholars and courts, however, have criticized this view on three grounds: doubt as to whether a community standard of disclosure exists, skepticism regarding the so-called "conspiracy of silence" among doctors, and concern that physicians will have too much discretion.[16]

A growing minority view measures the doctor's duty to disclose by the materiality of the risk based on a "reasonable patient" standard.[17] Under this test, the physician must disclose all the risks and feasible alternatives which would materially affect the reasonable patient's decision whether to undergo the treatment. Adopting this standard, one court reasoned that "[r]espect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves." [18] The major significance of setting a legal, rather than a medical standard, is that it is possible for a jury to determine a breach of duty without expert testimony.[19]

C. Affirmative Defenses and Privileges Available to the Doctor

Regardless of the standard used, the courts have recognized several privileges and affirmative defenses to the general rule of disclosure. A physician need not disclose risks or alternatives (1) when the patient

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[14] *E.g.*, Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333, 339 (1961); Roberts v. Young, 369 Mich. 133, 119 N.W.2d 627, 630 (1963); ZeBarth v. Swedish Hosp. Medical Center, 81 Wash. 2d 12, 499 P.2d 1, 8 (1972). Several courts require the community standard of disclosure, although a few have stated the duty to be that which a reasonable doctor would disclose under the circumstances or that which is consistent with good medical practice. *E.g.*, Karp v. Cooley, 493 F.2d 408, 420 (5th Cir.), *rehearing denied*, 496 F.2d 878 (5th Cir.), *cert. denied*, 95 S. Ct. 79 (1974); Ohligschlager v. Proctor Community Hosp., 283 N.E.2d 86, 89–90 (Ill. 1972).

[15] 2 D. LOUISELL & H. WILLIAMS, *supra* note 10, at ¶ 22.03. The requirement of expert testimony arises from the view that disclosure involves a professional judgment based on a regard for the patient's well being. Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965). Nonetheless, some cases have held that the plaintiff need not produce expert testimony when the physician has disclosed no risks at all. This is the rule in Colorado and Kansas. Annot., 52 A.L.R. 3d 1084, 1096–97 (1973). Once proof of nondisclosure is established, the burden shifts to the physician to show that his silence was in conformity with community medical standards. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862, 865 (1971).

[16] Cobbs v. Grant, 8 Cal. 3d 229, 238, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972). *See Informed Consent, supra* note 5, at 1404–06.

[17] *E.g.*, Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515–16 (1972); Getchell v. Mansfield, 260 Ore. 174, 489 P.2d 953, 955–56 (1971); Cooper v. Roberts, 220 Pa. Super. 260, 286 A.2d 647, 650–51 (1971).

[18] Canterbury v. Spence, 464 F.2d 772, 784 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[19] *See Informed Consent, supra* note 5, at 1410–11. The reasonable patient test does not, however, totally obviate the need for expert testimony. The plaintiff may still need an expert to establish that the doctor knew or should have known of the specific risk or alternative, and that the alternative was feasible. Downer v. Veilleux, 322 A.2d 82, 92 (Me. 1974). Moreover, the plaintiff may need medical evidence to

is unconscious or an emergency situation exists,[20] (2) when the doctor feels disclosure would be adverse to the patient's well being,[21] (3) when the doctor validly assumes that the patient knows of the risks involved,[22] or (4) when the patient has requested not to be informed.[23] Two other important defenses are that the physician need not disclose risks which are immaterial,[24] or alternatives which are not feasible.[25] To invoke these

establish that a particular risk is "material." *Cf.* Getchell v. Mansfield, 260 Ore. 174, 489 P.2d 953, 957 (1971). In order to prove the effect or materiality of nondisclosure on a patient's decision, for example, data such as the statistical frequency of the occurrence of the risk as well as expected severity and duration of the possible injury (as balanced against the risk of alternative treatment or nontreatment) may be essential. Following this rationale, the North Carolina Supreme Court held that the defendant doctor did not have a duty to disclose a risk which occurred in only one of every 250–500 cases. Starnes v. Taylor, 272 N.C. 386, 158 S.E. 2d 339, 344 (1968). Unfortunately, however, many courts have exhibited confusion in setting guidelines for materiality. *See* Waltz & Scheuneman, *Informed Consent to Therapy,* 64 NW. U.L. REV. 628, 638 n.37 (1970):

> In some of the few cases in which the physician has prevailed, it is difficult to determine whether the court is deciding on the basis that the risk was not material, that the physician need not have known of it and thus could not have disclosed it or that even if the risk had been disclosed, the patient had consented to the procedure.

Riedinger v. Colburn, 361 F. Supp. 1073, 1077 (D. Idaho 1973), avoided the question of materiality altogether, holding that the risk at issue occurred so infrequently that the doctor had no duty to know of it.

[20] The exception for emergency situations was recognized even in the early battery action cases. Mohr v. Williams, 95 Minn. 261, 104 N.W. 12, 15 (1905). *See* W. PROSSER, *supra* note 3, § 18, at 103.

[21] In cases where the issue is the therapeutic validity of nondisclosure, some courts have recognized the need for limiting the physician's discretion. Canterbury v. Spence, 464 F.2d 772, 789 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972). The burden is usually placed on the physician to prove the soundness of his judgment, although some courts hold that if the doctor in good faith believes that nondisclosure is in the patient's best interest, he can avoid liability by disclosing the risks to a close relative such as a spouse.

> Admittedly it is difficult to find a sufficient juridical basis upon which to justify this advice. One spouse is hardly the natural guardian of the other, in the sense that a parent is the natural guardian of his child. . . . [Disclosure to a relative] at least helps negate an assumption that the physician is usurping the function of decision.

2 D. LOUISELL & H. WILLIAMS, *supra* note 10, at ¶ 22.09. *See also* Lester v. Aetna Casualty & Surety Co., 240 F.2d 676, 679 (5th Cir. 1957); *Informed Consent, supra* note 5, at 1409–10.

[22] *See* Canterbury v. Spence, 464 F.2d 772, 788 (D.C., Cir.), *cert. denied,* 409 U.S. 1064 (1972); Holt v. Nelson, 11 Wash. App. 230, 523 P.2d 211, 219 (1974). To succeed in this defense, the physician must show that his assumption was valid in light of the degree of sophistication of a reasonable patient, taking into account the particular patient's circumstances. *See* Comment, *Informed Consent as a Theory of Medical Liability,* 1970 WIS. L. REV. 879, 893–94. Thus, a physician may have to disclose the risks more fully to a patient from a low socio-economic status than to a patient-nurse.

A corollary defense is that the doctor need not disclose risks which he has no duty to know. *E.g.,* Riedinger v. Colburn, 361 F. Supp. 1073, 1077 (D. Idaho 1973) (holding that the doctor had no duty to know of the risk of vocal cord paralysis when no reported cases appeared in medical literature).

[23] For a discussion of the problems associated with this defense, see Kessenick & Mankin, *Medical Malpractice: The Right to be Informed,* 8 U. SAN FRAN. L. REV. 261, 278–79 (1973). Since this defense is apparently based on a notion of waiver, some theoretical problems arise since a valid waiver must be voluntary and intelligent. Unless a patient "knows" the risk, there is a question as to whether the waiver can be knowledgeable. *Id.*

[24] *See* Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Holt v. Nelson, 11 Wash. App. 230, 523 P.2d 211, 219 (1974).

latter defenses, the physician must generally present medical evidence to prove that his judgment was sound. The plaintiff, however, usually has the "risk of nonpersuasion," [26] and must present his own medical testimony to establish the risks inherent in a particular treatment and the feasibility of alternative treatment.[27]

Finally, a physician need not disclose the risks of an improperly performed procedure.[28] In *Mull v. Emory University, Inc.*,[29] for example, the defendant doctor, while denying his own liability for nondisclosure, admitted that a technician had improperly injected a chemical into the patient during a liver function test. The court held that the doctor was under no obligation to disclose possible adverse effects of the technician's negligence. Cases where nondisclosure of the risks of improper treatment is an issue should probably be brought under ordinary malpractice theory rather than informed consent theory.

D. Causation

As in any negligence action, once the plaintiff has established that a duty to disclose exists, he must prove that the defendant's breach of the duty was the factual cause of the injury. In short, he must show that if the risk or alternative treatment had been disclosed he would not have submitted to the proposed procedure,[30] and that the undisclosed risk did in fact develop.[31] Therefore, if plaintiff suffered injury from a forewarned risk, it is legally irrelevant that he would have refused treatment if advised of some other undisclosed risk which did not develop.[32]

Initially, courts assumed that resolution of the causation issue turned on a subjective test of the plaintiff's credibility.[33] But in *Canterbury v. Spence*,[34] as in many recent decisions rejecting this approach, the court reasoned that

> a technique which ties the factual conclusion on causation simply to the assessment of the patient's credibility is unsatisfactory. . . . [W]hen causality is explored at a post-injury trial with a professedly uninformed

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[25] *See* Downer v. Veilleux, 322 A.2d 82, 93 (Me. 1974).

[26] *See id.* at 92–93.

[27] *See id.* at 92. *But see* Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972), where the court held that, once the plaintiff has shown that the physician failed to disclose, the burden is on the physician to justify the nondisclosure.

[28] 2 D. LOUISELL & H. WILLIAMS, *supra* note 10, at ¶ 22.05.

[29] 114 Ga. App. 63, 150 S.E. 2d 276 (1966).

[30] Canterbury v. Spence, 464 F. 2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[31] *Id.*; Funke v. Fieldman, 212 Kan. 524, 512 P.2d 539, 548–49 (1973); Downer v. Veilleux, 322 A.2d 82, 92 (Me. 1974).

[32] Downer v. Veilleux, 322 A.2d 82, 92 (Me. 1974). *Cf.* Waltz & Scheuneman, *supra* note 19, at 639.

[33] *See* Canterbury v. Spence, 464 F.2d 772, 790–91 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[34] 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

> patient . . . [plaintiff's testimony] hardly represents more than a guess, perhaps tinged by the circumstance that the uncommunicated hazard has in fact materialized.[35]

Cases rejecting the subjective approach propose an objective standard requiring plaintiff to show that adequate disclosure would have caused a "reasonable man" to forego the procedure.[36] The credibility of the plaintiff's testimony is thus relevant, but not conclusive.

II

The *Holland* court applied the "reasonable patient" standard, holding that a physician must disclose all material risks and feasible alternatives, and that failure to do so "renders the physician liable in damages for any injury proximately resulting from the treatment." [37] The court noted that the "materiality of the risk is 'the keystone of the physician's duty to disclose.' " [38] In discussing materiality, the court noted that

> [a] risk is thus material when a reasonable person in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to undergo the proposed therapy.[39]

In developing this test, the court concluded that both the likelihood of injury and the seriousness of the risk determine materiality.[40] Thus, where "a serious injury might occur from a given method of treatment, the physician must inform the patient of all but extremely remote risks." [41]

In *Holland,* the plaintiff alleged that the doctor did not warn her that there was a greater likelihood of complications from large doses of radiation than from smaller doses. The doctor admitted that he did not warn plaintiff of this fact, but testified that, as he viewed the patient's condition, the alternative of smaller doses was not feasible. Contrary evidence produced by the plaintiff prompted the Oregon Supreme Court to hold that an instruction on informed consent was warranted, but that the trial court's instruction using the medical standard in the community as the test for disclosure was erroneous.[42]

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[35] *Id.* at 790.

[36] *Id.* Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 11–12, 104 Cal. Rptr. 505, 515–16 (1972). *See also* Downer v. Veilleux, 322 A.2d 82, 92 (Me. 1974).

[37] 522 P.2d at 210 n.1.

[38] *Id.* at 211, *quoting* Getchell v. Mansfield, 260 Ore. 174, 181, 489 P.2d 953, 956 (1971), which cites Waltz & Scheuneman, *supra* note 19, at 638.

[39] 522 P.2d at 211–12, *quoting* Waltz & Scheuneman, *supra* note 19, at 640.

[40] 522 P.2d at 212.

[41] *Id.*

[42] The erroneous instruction read in part:

> I instruct you it's a question for you to determine whether Doctor McMahan explained those risks and advised of those feasible alternative courses of treatment which a reasonably prudent and skillful physician specializing in radiology would have explained under the same or similar circumstances.

Id. at 211.

III

The informed consent doctrine is often misunderstood and therefore, often misapplied. To avoid misapplication, courts should carefully spell out the elements of the informed consent doctrine and clearly distinguish it from an ordinary malpractice action. If the elements of negligent performance and negligent disclosure are confused, a plaintiff might recover under a hybrid form of malpractice where he could not clearly establish liability under either of the separate claims. This potential existed in *Holland,* where the plaintiff's expert testified that the injury was caused by *excessive* radiation.[43] If the excessive radiation was itself malpractice, the informed consent issue should not have been considered, since a physician need not disclose risks of injury from an improperly performed procedure.[44] Plaintiff's expert, however, apparently failed to convince the jury that the only proper course of treatment, as determined by medical standards,[45] was lesser doses of radiation over a longer period. The Oregon Supreme Court's analysis, by failing to clearly articulate the various elements of the reasonable patient test, adds to the confusion between the informed consent and traditional malpractice theories and fails to force the informed consent plaintiff to prove his case.

A. Feasible Alternative Treatment

Where a plaintiff claims that full disclosure of risks would have prompted him to forego treatment altogether, the medical feasibility of alternative treatment is not in issue. In most cases of serious illness, however, the plaintiff's condition will be such that a "reasonable patient" would opt for some form of treatment. In such cases, the question is whether the disclosure of the risks inherent in the treatment undertaken would have caused the patient to choose a medically feasible alternative. To determine this issue, the plaintiff must bear the threshhold burden of showing that the alternative was feasible in his particular case;[46] as in *Holland,* the defendant will usually claim that his treatment was the only medically feasible alternative. The *Holland* court's failure to consider the fundamental feasibility issue [47] amounts to a failure to consider one of the elements of the informed consent doctrine.

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[43] *Id.*

[44] See text accompanying notes 28–29 *supra.*

[45] *See* W. PROSSER, *supra* note 3, § 32, at 161.

[46] *See* Downer v. Veilleux, 322 A.2d 82, 92 (Me. 1974); Getchell v. Mansfield, 260 Ore. 174, 489 P.2d 953, 956 (1971).

[47] The dissent agreed that the lower court's instruction set an incorrect standard, but argued that there was no prejudicial error since the plaintiff failed to meet the threshhold requirement of establishing a feasible alternative. The dissenting judge disagreed with what he felt was the majority's assumption that the alternative treatment was proper and feasible. He argued that since the jury cannot be expected to recognize the propriety of differing treatments, the plaintiff has the burden of proving that the medical profession recognizes the alternative method as feasible. Unless the alternative is feasible, it need not be explained; according to the dissent, this was a question of fact which the jury impliedly resolved in favor of the defendant doctor. 522 P.2d at 212 (Holman, J., dissenting).

In *Holland,* there was conflicting testimony on the feasibility issue;[48] therefore, the jury should have been instructed that an explicit finding of medical feasibility was necessary to a finding of liability based on lack of informed consent. If the jury found that the alternative was not feasible, it should then have been instructed that the physician could be held liable for nondisclosure of risks only if disclosure would have caused the reasonable patient to refuse any treatment. On the other hand, if, as the Oregon court assumed, the *Holland* jury found that the alternative was feasible, it should have been instructed that the defendant could be liable only if the omitted disclosure was "material" and only if a reasonable person in plaintiff's position would have chosen the feasible alternative treatment.

B. Defining Materiality

Although the reasonable patient standard set by the *Holland* court seems to impose an objective test, the court also stated that "[a] very small chance of serious harm may well be significant to the patient." [49] By so stating, the court seemed to imply that the doctor must know and consider the particular patient's subjective fears and anxieties. A doctor's fiduciary responsibility often puts him in a position to know a patient's peculiar mental and emotional sensitivities. Where the physician is or should be aware of such "subjective" problems, it may be reasonable to require the physician to disclose even remote risks. In other situations, however, a doctor cannot be expected to know of each patient's fears. Although the Oregon court failed to clarify its guidelines, fairness requires that the materiality test be strictly objective. If the patient claims that the existence of special circumstances required the physician to take his subjective state of mind into account, it must be his burden to prove that the defendant knew or should have known of such circumstances.

The *Holland* court set another guideline for disclosure which is more difficult to correlate with the objective materiality test. Since "a serious injury might occur from a given method of treatment," the court noted that "the physician must inform of all but extremely remote risks." [50] The court gave no indication, however, of what constitutes an "extremely remote risk," [51] but seemed to indicate that, as a matter of law, any serious risk is material. The problem with this standard is that the physician must literally "parade the horribles" before the patient to insulate himself from liability. Thus, despite the well-established precept that a doctor is not an insurer of successful results,[52] application of this standard of dis-

[48] *Id.* at 211.

[49] *Id.* at 212.

[50] *Id.*

[51] In Starnes v. Taylor, 272 N.C. 386, 158 S.E.2d 339 (1968), the court held that the doctor did not have a duty to disclose a risk which occurred in only one out of every 250–500 cases. The risk at issue was perforation of the esophagus, a serious injury. It is unclear whether disclosure of such a risk would be required under the Oregon court's standard of "extremely remote."

[52] *See* Marsh v. Pemberton, 10 Utah 2d 40, 43, 347 P.2d 1108, 1110, (1959); W. PROSSER, *supra* note 3, § 32, at 162.

closure could make him an insurer against any undisclosed serious risk which does in fact develop. Although this is a workable test for full disclosure, it is not the objective test for materiality that the court ostensibly set.

C. Requiring Causation

Under the reasonable patient test it is not necessary for the plaintiff to produce expert medical testimony to establish a causal connection between the breach of the duty to disclose and the injury.[53] It is essential, of course, that the plaintiff somehow prove that the physician's failure to disclose "caused" him to undergo treatment he would otherwise have refused. The *Holland* opinion not only failed to discuss the causality issue, but also approved an instruction which automatically predicates liability on the occurrence of the undisclosed risk without requiring a finding of causality.[54] The court may have erroneously considered the doctrine of informed consent to be similar to that of *res ipsa loquiter* in terms of causation.[55] Under informed consent, however, causation cannot simply be assumed. Moreover, it is not enough for the plaintiff to prove that the treatment caused the injury since, under an informed consent theory, that is not the causation issue. If the jury finds that a reasonable man in the patient's situation would have undergone the treatment notwithstanding the risk, the patient should not be compensated for his injury under an informed consent instruction. In such a situation, the patient should recover only under a traditional malpractice theory.

IV

Since the major reason for requiring a duty to disclose is a judicial recognition of the patient's right of self-determination, the scope of disclosure should be measured by the patient's need for information in order to make an intelligent decision. To allow physicians to set their own standard in this area would be an abrogation of the patient's fundamental right of choice. Unless the physician is claiming a privilege based on medical judgment, risk disclosure should not be determined by medical standards, but rather by the legal standard of due care. It is essential, however, that the legal standard be one of reasonableness and not strict liability.

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[53] *Cf.* text accompanying note 19 *supra;* Downer v. Veilleux, 322 A.2d 82, 91 (Me. 1974).

[54] The proposed instruction read in part:

> Failure of the physician to obtain consent from the patient by discussing with the patient the matters that I have just explained to you renders the physician *liable in damages for any injury proximately resulting from the treatment.*

522 P.2d at 210 n.1 (emphasis added).

[55] The two doctrines are briefly discussed in U.S. DEP'T OF HEALTH, EDUC., & WELFARE, MEDICAL MALPRACTICE, REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 28–29 (1973).

The doctor-patient relationship is a fiduciary one which should require the physician to be held to a high standard in his duty to disclose. The doctrine of informed consent may, however, provide an easily abused means for holding a physician liable in circumstances where it is impossible to prove negligence in the treatment itself.[56] To insure fairness and prevent abuse, it is imperative that courts dealing with the issue specify the threshhold determinations—feasibility of alternatives and materiality of risks—and then require a finding of causal connection, based on a reasonable patient standard, between the breach of the duty to inform and the patient's injury.

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[56] *See id.* at 29:

> [T]here is some evidence that courts are beginning to apply the doctrine [of informed consent] unevenly in order to hold a physician liable when the patient's injury is severe but he lacks sufficient evidence to prove the physician was negligent.

The Justice of the Peace System under Constitutional Attack — *Gordon v. Justice Court*

Gordon and Arguijo were charged with misdemeanors punishable by fine or imprisonment and were brought before different nonattorney justice court judges to stand trial.[1] Both defendants sought extraordinary pretrial relief on behalf of themselves and all others similarly situated, contending that it was unconstitutional to compel them to stand trial on criminal charges before nonattorney judges.[2] The superior court sustained the state's demurrer without leave to amend, and defendants appealed. In *Gordon v. Justice Court*,[3] the California Supreme Court reversed, holding that whenever a defendant is charged with an offense carrying a possible jail term, due process requires an attorney judge to preside unless the defendant waives the requirement.[4]

I

A. The Justice of the Peace—An American Judicial Tradition

Originating in England, the justice of the peace concept has played a significant role in American judicial history and is firmly entrenched in most state judicial systems.[5] The idea of a respected layman dispensing common sense justice in a simple and accessible court was very appealing during the rural era of America.[6] Indeed, during the early development of state judicial systems, every state utilized lay judges at some level in the judicial hierarchy.[7] The traditional justifications for using nonattorney judges in justice courts were that they provided a convenient means of administering justice in outlying areas where cases were usually minor and, although the case load did not warrant a permanent court of

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[1] Gordon was charged with disturbing the peace and failure to disperse. CAL. PENAL CODE §§ 415, 416 (West 1970). Arguijo was charged with driving under the influence of alcohol. CAL. VEHICLE CODE § 23102(a) (West Supp. 1974).

[2] The California Legislature has authority to establish the jurisdiction of justice courts and the qualifications of the judges. CAL. PENAL CODE § 1425 (West 1970) provides that justice courts have jurisdiction over misdeameanors punishable by a fine of one thousand dollars or less or a maximum term of one year in county jail, or both. CAL. GOV'T CODE § 71601 (West 1964) requires that a justice court judge either be a member of the state bar, pass a qualifying examination, or be an incumbent who has retained his position continuously since the Reorganization Act of 1950 became operative.

[3] 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*, 43 U.S.L.W. 3453 (U.S. Feb. 18, 1975).

[4] The court also questioned, without deciding, whether due process considerations would permit a nonattorney justice court judge to preside at felony preliminary examinations, which also involve a potential loss of freedom. *Id.* at 326 n.2, 525 P.2d at 74 n.2, 115 Cal. Rptr. at 634 n.2.

[5] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 129 (1967) [hereinafter cited as CRIME COMMISSION]; Ewing, *Justice of the Peace — Bedrock of Democracy*, 21 TENN. L. REV. 484 (1950); Smith, *The Justice of the Peace System in the United States*, 15 CALIF. L. REV. 118 (1927).

[6] Ewing, *supra* note 5, at 494–96; Smith, *supra* note 5, at 118.

[7] Ewing, *supra* note 5, at 496; Smith, *supra* note 5, at 118.

general jurisdiction, an official was needed to issue warrants, preside at preliminary examinations, settle minor civil matters, and try cases involving minor criminal infractions. As cities and case loads have grown, justice of the peace courts have also helped to relieve the burden on courts of general jurisdiction. Recognizing this justification, the United States Supreme Court recently stated:

> [I]n this day of increasing burdens on state judiciaries, these courts are designed, in the interest of both defendant and the State, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available . . . .[8]

For well over fifty years, however, legal scholars have attacked justice of the peace courts.[9] These attacks have been aimed at three aspects common to most justice of the peace systems. First, justices of the peace usually need not be attorneys. Therefore, it is argued, the quality and consistency of justice depends upon a person with little understanding of the law.[10] Second, justices of the peace have been and are still commonly compensated through a fee system based on the volume of cases handled.[11] Critics argue that this creates an incentive to handle cases as rapidly as possible, without a proper dedication to justice.[12] Third, justices of the peace depend upon plaintiffs, prosecutors, and police for business. It is argued that this naturally creates a bias against defendants, both civil and criminal.[13] Responding to these and other problems, some states have discarded their justice of the peace courts;[14] most states, however, still cling to them.[15]

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[8] Colten v. Kentucky, 407 U.S. 104, 114 (1972).

[9] *See, e.g.*, Keebler, *Our Justice of the Peace Courts — A Problem in Justice*, 9 TENN. L. REV. 1 (1930); Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 327 (1913); Comment, *Constitutional Challenge to the Justice of the Peace Courts in Mississippi*, 44 MISS. L.J. 996 (1973) [hereinafter cited as *Constitutional Challenge*].

[10] Keebler, *supra* note 9, at 12; *Constitutional Challenge*, *supra* note 9, at 1006.

[11] In Tumey v. Ohio, 273 U.S. 510 (1927), the Supreme Court held a fee system unconstitutional where the justice of the peace was paid nothing unless the defendant was convicted. Three years after *Tumey*, one commentator claimed that the justices of the peace were skirting this holding. Keebler, *supra* note 9, at 17. In 1967, a Presidential commmission reported that a majority of states utilizing justices of the peace used some fee system for their compensation and that forty years after *Tumey*, three states were still using an unconstitutional fee system. CRIME COMMISSION, *supra* note 5, at 129.

[12] *See* Keebler, *supra* note 9, at 13–14; *Constitutional Challenge*, *supra* note 9, at 1008.

[13] "A justice who regularly rules for the defendant is likely to find that he does not receive cases or fees." CRIME COMMISSION, *supra* note 5, at 129. See Keebler, *supra* note 9, at 13–14; *Constitutional Challenge*, *supra* note 9, at 997–98.

[14] Nordberg, *Farewell to Illinois J.P.'s*, 40 CHI.-KENT L. REV. 23 (1963); Vandlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389 (1964).

[15] The President's Commission on Law Enforcement reported that

> [t]he rural counterpart of the lower criminal court is the justice of the peace, who continues to exercise at least some criminal jurisdiction in 35 states. . . . In more than 30 states justices of the peace are not required to be lawyers, and the incompetence with which many perform their judicial functions has been long reported.
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> . . . .

B. Nonattorney Judges and the Requirements of Federal Due Process

In *Argersinger v. Hamlin*,[16] the United States Supreme Court held that an accused has a right to legal counsel in any trial involving possible imprisonment. This recent extension of the accused's constitutional rights has given credence to a constitutional argument that federal due process prohibits a lay judge from presiding over a criminal proceeding involving the possibility of imprisonment. The argument is that if the accused is entitled to counsel who can make complex legal arguments, he should be entitled to a judge who can understand those arguments. Thus far, however, the Supreme Court has not accepted this extension of the *Argersinger* rationale.[17]

Although the Supreme Court has traditionally been reticent to establish the standards that state court judges must meet,[18] in *Colten v. Kentucky*,[19] the Court considered the constitutionality of the Kentucky justice of the peace system. In *Colten*, the defendant had been assessed a ten dollar fine by a nonattorney judge for a misdemeanor. On appeal, he was automatically granted a trial de novo. The superior court also found him guilty but increased the fine to fifty dollars. Appealing to the United States Supreme Court, the defendant argued that Kentucky's two-tier system had placed him in double jeopardy, and that it was a violation of due process to force a criminal defendant to "endure a trial in an inferior court with less-than-adequate protections in order to secure a trial comporting completely with constitutional guarantees." [20] The Court recognized that a problem existed with untrained judges, but held that Kentucky had satisfied due process by guaranteeing a right to trial de novo. The Court stated:

> Depending upon the jurisdiction and offense charged, many such systems provide as complete protection for a criminal defendant's constitutional rights as do courts empowered to try more serious crimes. Others, however, lack some of the safeguards provided in more serious

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Careful consideration should be given to total abolition of these offices.

. . . .

The Commission recommends:

The States and Federal Government should enact legislation to abolish or overhaul the justice of the peace and U.S. commissioner systems.

CRIME COMMISSION, *supra* note 5, at 129–30.

[16] 407 U.S. 25 (1972).

[17] See notes 19–23 *infra* and accompanying text. Other courts which have considered this issue have concluded that due process does not require a justice of the peace to be an attorney. Melikian v. Avent, 300 F. Supp. 516 (N.D. Miss. 1969); Crouch v. Justice of the Peace Court, 7 Ariz. App. 460, 440 P.2d 1000 (1968); *cf.* City of Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969).

[18] The United States Supreme Court has held that judges are disqualified by a pecuniary interest in the outcome, Tumey v. Ohio, 273 U.S. 510 (1927); that the judge must not be coerced or have an interest other than the pursuit of justice, Adams v. United States, 317 U.S. 269 (1943); and that a person cannot be a judge in his own case or if he has an interest in the outcome, *In re* Murchison, 349 U.S. 133 (1955). However, the Court has never defined any other minimum qualifications than that the judge must be fair and impartial. *Id.*

[19] 407 U.S. 104 (1972) (decided the same day as *Argersinger*).

[20] *Id.* at 118.

> criminal cases. . . . Some, including Kentucky, do not record proceedings *and the judges may not be trained for their positions either by experience or schooling.*[21]
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> . . . .
>
> We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available.[22]

By so holding, the Supreme Court implicitly approved a system utilizing nonattorney judges.[23]

II

In *Gordon,* the California Supreme Court recognized that compelling justifications once existed for utilizing nonattorney judges in inferior courts.[24] The court concluded, however, that these reasons no longer existed in California, but had been replaced by a due process policy more sensitively concerned with assuring the accused his fundamental right to a fair trial. Because of the expanded legal and constitutional defenses available even to one accused only of a misdemeanor, the court reasoned that there was a "reasonable likelihood" that an accused's opportunity for a fair trial would be "substantially diminished" [25] when a nonattorney judge presided in a case involving the possibility of imprisonment.[26]

The court recognized that complex legal and constitutional issues could have been involved in the misdemeanor cases before it. Defendant Gordon was charged with disturbing the peace following a political demonstration and important first amendment rights might have been at issue. Defendant Arguijo, charged with drunken driving, had evidentiary

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[21] *Id.* at 113–14 (emphasis added).

[22] *Id.* at 118.

[23] Although the nonattorney judge issue was not raised in *Colten,* the trial de novo rationale used by the Court supports the conclusion that nonattorney justice court judges are not unconstitutional.

[24] For example, the lack of attorneys in rural areas, difficult travel conditions which made it extremely difficult for urban judges to adequately serve rural areas, and the fact that criminal trials were once less complex.

[25] 12 Cal. 3d at 329, 525 P.2d at 76, 115 Cal. Rptr. at 636.

[26] The court limited its holding to situations where imprisonment is a possible punishment, stating that a nonattorney judge is permissible in civil cases and in criminal cases where only a fine is involved. 12 Cal. 3d at 333, 525 P.2d at 79, 115 Cal. Rptr. at 639.

The narrow distinction between imprisonment and a fine ignores reality in many cases where an individual might reasonably prefer imprisonment to the imposition of a fine. Since any criminal sanction is repugnant to most individuals, they will naturally avoid it, but once found guilty, an individual might reasonably prefer ten days in jail to a one thousand dollar fine. The fifth and fourteenth amendments guarantee that property, as well as life and liberty, may not be taken without due process of law.

In his concurring opinion in Argersinger v. Hamlin, 407 U.S. 25, 44 (1972), Justice Powell argued that the extension of the right to counsel in any case where the accused might be imprisoned was but a foreshadowing of a holding, in an appropriate case, that the right to counsel must be observed in any criminal trial no matter what sanction might be imposed. It can similarly be argued that the holding of the California Supreme Court in the instant case foreshadows a holding that an attorney judge must preside over any criminal trial.

defenses available to challenge the accuracy of the apparatus used to measure his blood alcohol level and the qualifications of the person analyzing the blood sample. Because the California qualification requirements for a justice court judge did not guarantee that he would have the necessary expertise to consider and adequately resolve the complex questions which might face him in a criminal proceeding, the court was "not convinced that a non-attorney judge [would] be able to perform [his] critical duties satisfactorily." [27]

The California court gave great weight to the argument that the right to counsel in criminal proceedings, guaranteed by both the federal [28] and the California [29] constitutions, also requires a right to a legally trained judge:

> Since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process.[30]

The court rejected the state's argument that the right to appeal is sufficient to guarantee due process, reasoning that because the justice court is not one of record and thus any appeal would be based on the nonattorney judge's statement of the case, and because appeal entails great expense and delay, such a right did not cure the system's constitutional infirmities.[31]

III

The *Gordon* court's holding that nonattorney judges cannot preside at criminal trials where imprisonment is a possible penalty is a positive refinement of California's legal system. The decision, however, should not be read as indicating that all justice of the peace systems violate federal due process or that, because a right to counsel is required by due process, a right to trail by an attorney judge is compelled. Rather, due process requires a balancing of interests within each state to determine if the justice of the peace system still serves a useful purpose.

A. Due Process—The Right to Appeal

In *Colten,* the United States Supreme Court held that the Kentucky justice of the peace system, which guarantees an absolute right to a trial

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[27] 12 Cal. 3d at 331, 525 P.2d at 77, 115 Cal. Rptr. at 637.

[28] U.S. CONST. amend. VI (made applicable to the states by the fourteenth amendment); Argersinger v. Hamlin, 407 U.S. 25 (1972).

[29] CAL. CONST. art. I, § 13 provides that

> [i]n criminal prosecutions, in any court whatever, the party accused shall have the right . . . to have the assistance of counsel for his defense . . . and to be personally present with counsel.

In re Johnson, 42 Cal. Rptr. 228, 398 P.2d 420 (1965) interpreted a previous similar provision to guarantee the right to counsel in misdemeanor as well as felony cases in California.

[30] 12 Cal. 3d at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638.

[31] *Id.* at 331, 525 P.2d at 77, 115 Cal. Rptr. at 637.

de novo if the defendant is dissatisfied with his treatment in the justice court,[32] does not violate federal due process.[33] In California, however, the *Gordon* court did not feel that the right to appeal from a justice court ruling [34] was a sufficient guarantee of due process.

Because the burdens of trial de novo are at least as great on a defendant as those of an appeal (even though trial de novo obviates the need for an inferior court record), the differences between the Kentucky and California systems are not great. It appears, therefore, that the United States Supreme Court and the California Supreme Court disagree over the question whether a right to appeal or to a new trial in a court with an attorney judge will satisfy due process. Because of this basic disagreement, it is reasonable to conclude that the United States Supreme Court would not have found California's system to be a violation of *federal* due process.

States have a great deal of latitude in administering their court systems based on their own policy considerations.[35] Thus, despite the *Gordon* holding, it is not unreasonable from a federal due process standpoint for a state to handle the bulk of its minor criminal cases through an inferior court system, where the constitutional guarantees are more relaxed, so long as there is a right to an appeal or a trial de novo as a safeguard to ensure due process.

B. The Right to Counsel and the Right to an Attorney Judge

In holding that nonattorney judges cannot preside over criminal trials in which imprisonment is a possible penalty, the *Gordon* court relied primarily on the argument that, since due process entitles a defendant facing possible imprisonment to counsel, he should also be entitled to a "judge qualified to comprehend and utilize counsel's legal arguments."[36] On its face, this argument is logically compelling. Nevertheless, in *Ditty v. Hampton*,[37] this same argument was asserted by the defendant and rejected by the Kentucky Court of Appeals. In *Ditty*, the defendant argued that it was a denial of both due process and equal protection to allow a nonattorney judge to preside over his misdemeanor charges.[38] In

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[32] KY. REV. STAT. ANN., Rules of Criminal Procedure, § 12.06 (1969).

[33] See notes 21–22 *supra* and accompanying text.

[34] CAL. PENAL CODE § 1466 (West 1970).

[35] In Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), the Court stated that a state

> is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.

[36] 12 Cal. 3d at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638.

[37] 490 S.W.2d 772 (Ky. 1972), *appeal dismissed*, 414 U.S. 885 (1973) (the appeal was dismissed because the appellant died).

[38] The due process argument was successful in the intermediate state court, which held that due process required that a judge presiding over *any* criminal trial must be a person learned and trained in the law. The circuit court also held that there was a denial of equal protection in the statutory scheme which required attorney judges in

rejecting defendant's argument, the court pointed out the different roles that judges and counsel play in the judicial process: an accused needs counsel to defend him because the government hires counsel to prosecute him,[39] while the judge's function is neither to prosecute nor to defend, but to decide the case fairly and impartially. The court further reasoned that

> there has never been any thought that a right to be tried by a lawyer judge grows out of the right to be defended by a lawyer. Due process, as regards the *tribunal* hearing the case, usually has been considered to require only that the tribunal be *fair and impartial.*[40]

The *Ditty* court also relied on *Morrissey v. Brewer,*[41] where the Supreme Court "held that in a parole-revocation proceeding, due process required only a 'neutral and detached' hearing body, members of which need not be judicial officers or lawyers." [42]

The reasoning of the *Ditty* court is unsatisfactory for two reasons. First, in determining specific due process questions it is not helpful merely to say that a judge must be "fair" when the whole question of due process turns on a determination whether the nonattorney judge is *capable* of being "fair" in a given set of circumstances. Second, the court's reliance on *Morrissey* is misplaced since even the right to counsel has not been extended to parole revocation proceedings.[43]

Despite the poor reasoning in *Ditty,* there are good reasons why due process may demand the right to counsel and at the same time not require an attorney judge. Counsel protects the individual, who may not be knowledgeable about the law, from facing the power of the state unaided. Although an accused may have need for counsel in a misdemeanor trial because he does not fully understand his rights and defenses, a justice of the peace, who constantly tries the same types of cases, is likely to be familiar with and competent to handle the recurring issues adequately.[44] Furthermore, trial before a nonattorney judge does not have the element of finality that trial without counsel does. That is, there are no alternatives which will provide the protection a right to counsel gives; on the other hand, where a right to appeal or to a trial de novo from the justice court exists, errors by the judge can be corrected on ap-

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the police courts of larger cities but permitted nonattorney judges in the police courts of smaller cities. *Id.* at 773.

[39] *Id.* at 775.

[40] *Id.* at 774.

[41] 408 U.S. 471 (1972).

[42] 490 S.W.2d at 775.

[43] In Morrissey v. Brewer, 408 U.S. 471, 487–90 (1972), although the Court did not reach the question whether the right to counsel extends to parole revocation hearings, it did specify the minimum requirements and did not include the right to counsel among them.

[44] Knowledge of the law does not necessarily require a law degree and admission to a state bar association. Other government officials in the legislative and executive branches deal constantly with complex legal questions; no one would suggest they must all be attorneys.

peal.[45] The ability to appeal to a court which has attorney judges thus ultimately provides a defendant with the basic protection he needs.

Thus, although the *Gordon* decision certainly increases the probability that due process will be served in the first instance, the "right to counsel" analogy does not require such a decision. Furthermore, although the Supreme Court has been quite silent regarding the required qualifications for judges in criminal proceedings, the *Colten* decision implies that the Supreme Court does not find the use of nonattorney justices of the peace so shocking or offensive to "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[46]

C. Due Process—A Question of Balancing Competing Policies

When applying the broad restraints of due process, a court must inquire into the nature of the demands being made upon individual freedom and the social needs which justify such demands.[47] Where a fundamental right is jeopardized, due process requires strict procedural safeguards. Long ago, however, the Supreme Court stated that

> [t]he due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings.[48]

More recently the Court said that "[v]indication of Constitutional rights under the Due Process Clause does not demand uniformity of procedure by the forty-eight States. Each state is free to devise its own way of securing essential justice . . . ." [49] Thus, the United States Supreme Court recognizes that there is a limit to the protection that a state can realistically offer and that often there is more than one way to satisfy due process. Due process questions, therefore, involve balancing the competing interests of the individual and the state, so that the result will be fundamentally fair to both. Naturally, a court must weigh the costs which society will bear in extending different degrees of protection under due process to an individual. If the costs are high in relation to the benefit conferred upon the individual, due process may not require extensive protection. Since the Supreme Court has apparently determined that justice of the peace systems do not necessarily violate federal due process, the balancing

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[45] "We have said time and time again that the Fourteenth Amendment does not 'insure uniformity of judicial decisions . . . [or] immunity from judicial error . . . .'" Beck v. Washington, 369 U.S. 541, 555 (1962).

[46] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[47] Frank v. Maryland, 359 U.S. 360, 363 (1959).

[48] Ownbey v. Morgan, 256 U.S. 94, 110–11 (1921).

[49] Hysler v. Florida, 315 U.S. 411, 416–17 (1942).

determination of whether, or how, to upgrade such systems is properly left to the individual states.

The court's holding in *Gordon* reflects a determination that the interests of California have shifted toward expanding the due process rights of individuals. The requirement imposed by the California Supreme Court is probably a beneficial refinement of California's judicial system. Although there is no guarantee that an attorney is more able than an experienced layman, the specialized training which an attorney receives and the comprehensive examination he must pass in order to become a member of the state bar probably increase the likelihood that a defendant will obtain a fair trial in his court. Due process does not, however, require such a refinement in all states.

The arguments which the California Supreme Court found convincing may be less persuasive in other states where circumstances are different. In Utah, for example, the 1970 census revealed that Utah had a population of 1,059,273 people spread disproportionately over 82,096 square miles. Over seventy-seven percent of the population resided in four contiguous counties which comprised less than five percent of the land area. The remainder of the population was spread over twenty-five counties.[50] The fifth and sixth judicial districts of the state covered ten counties which contained less than six percent of the population but over forty percent of the land area. The population in the fifth and sixth districts has not increased significantly since 1966, when a study indicated that neither the fifth nor the sixth district had a case load that would justify the full time services of a single judge.[51] The same study concluded that justices of the peace were still necessary in rural areas because

> [m]any counties do not have sufficient legal business or law trained personnel to justify city courts even at the county seats. Motorists, particularly tourists, either state residents or non-residents, could be subjected to considerable inconvenience if ready access to a method of adjudicating traffic violations were not available. An equally substantial burden would be imposed upon law enforcement personnel if judicial officials were not readily available, *particularly in view of the broadened constitutional protections being developed by the United States Supreme Court.*[52]

The study indicated that seventy-three percent or more of the cases handled by Utah justices of the peace were traffic cases and approximately nineteen percent were criminal cases.[53] In the period from 1963 to 1966 the four district judges of the three southern districts averaged over sixty-one percent of the total mileage travelled by all district judges in the State of Utah; yet, primarily because of the travel requirements,[54] these

[50] THE WORLD ALMANAC 218 (1974).

[51] J. Anderson & W. Lockhart, Utah Courts Today, Report to the Judiciary Committee of the Legislative Council of the State of Utah 56 (1966).

[52] *Id.* at 33 (emphasis added).

[53] *Id.* at 36.

[54] *Id.* at 46.

same judges handled a much smaller caseload than judges in the urban areas. In addition, Utah's rural areas have very few attorneys. For example, only forty-eight of the state's 1,561 active resident members of the Utah State Bar practice in the eleven counties comprising the fifth and sixth districts.[55] In short, the compelling reasons which the California Supreme Court discussed as justifications for previously permitting nonattorney judges to sit in criminal imprisonment trials have not yet disappeared in Utah.[56]

IV

That justice of peace courts continue to survive suggests that viable alternatives are difficult to find and that other problems continue to demand higher priority. The California Supreme Court correctly recognized the valuable contribution which nonattorney judges have made in California.[57] There is no doubt that throughout the country a great number of dedicated persons continue to provide valuable service to their states by serving in this capacity.

As our society progresses and the quality of justice is further refined, most scholarly opinion [58] indicates that nonattorney judges will eventually be eliminated from our judicial systems. The nature of the problem and the competing interests to be weighed, however, suggest that the elimination should be handled on a state-by-state basis. Depending upon the circumstances and the judicial systems, it would not be unreasonable for many states to conclude, as some have done, that due process does not presently demand that attorney judges preside over all criminal trials where imprisonment might result.

ROBERT A. KIMSEY

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[55] Utah State Bar (1974 membership list).

[56] This does not imply that Utah does not share the problems encountered in the justice of the peace systems of other states. *See* J. Anderson & W. Lockhart, *supra* note 51, at 24–32. A recent case in the Utah Third District Court has challenged the constitutionality of the use of nonattorney judges in cases involving a possible jail sentence. Shelmidine v. Jones, Civil No. 224948 (Utah 3d Dist. Ct., filed Jan. 14, 1975).

The Salt Lake County Attorney has indicated that there is reason to believe that the Third District Court may adopt the rationale of the California Supreme Court in *Gordon*. Salt Lake Tribune, Feb. 1, 1975, at B–3, col. 1–3. The Salt Lake County Attorney also reports that he is supporting a proposed bill in the state legislature that would give county governments the option of establishing county courts, requiring an attorney judge, as an alternative to justices of the peace. *Id.*

[57] Gordon v. Justice Court, 12 Cal. 3d 323, 333, 525 P.2d 72, 79, 115 Cal. Rptr. 632, 639 (1974).

[58] See note 9 *supra* and accompanying text.

State v. One (1) Porsche 2-Door: A Judicial Standard for Forfeiture of Conveyances for Simple Possession of Marijuana

Two Utah Highway Patrolmen stopped a 1972 Porsche automobile and arrested the driver for speeding, possession of a controlled substance, and driving while under the influence of alcohol. In a routine search of the vehicle, the patrolmen discovered quantities of marijuana and amphetamine drugs.[1] The state sought forfeiture of the vehicle for unlawfully facilitating the possession of marijuana.[2] The Utah Supreme Court, in *State v. One (1) Porsche 2-Door,*[3] upheld the district court's denial of forfeiture on the ground that forfeiture of a ten thousand dollar automobile for a misdemeanor would be a penalty disproportionate to the seriousness of the crime.[4]

I

A. Common Law Doctrines of Forfeiture

At common law, an object causing death was forfeited to the Crown as deodand.[5] Deodand was premised upon the Judeo-Christian belief that the object, not its owner, was guilty of causing the death.[6] The object "expiated" the crime by its forfeiture to the king, who gave the value of the

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[1] The district judge admitted one ounce of marijuana into evidence, although "the one ounce of marijuana which was tested had no relationship whatsoever to the total quantities of illicit drugs found in the car." State v. One (1) Porsche 2-Door, 526 P.2d 917, 921 (Utah 1974) (Crockett, J., dissenting). By restricting the amount to one ounce, the court was able to limit its consideration to "possession." The amount of a particular drug admissible in evidence often determines whether the controlled substance is transported for distribution or merely incidental to simple possession. *See* State v. One 1972 Chevrolet Auto., No. 13898 (Utah, filed Nov. 26, 1974). *Cf.* State v. One (1) Porsche 2-Door, *supra* at 918. For a discussion of the potential impact of the *Chevrolet* case on the Utah forfeiture statute see note 57 *infra.*

[2] The definition of "possession" is sufficiently broad to justify the criminal conviction of any number of persons in a conveyance where a controlled substance is present. UTAH CODE ANN. § 58–37–2(26) (1974) ("The word 'possession' . . . is intended to include individual, joint or group possession or use of controlled substances."). Forfeiture may, therefore, become a penalty imposed on one person for the criminal conduct of other persons in the conveyance.

[3] 526 P.2d 917 (Utah 1974).

[4] District Judge Sheya stated:

> [T]he punishment should fit the crime. Forfeiture of the automobile in question here of the approximate value of ten thousand dollars for a misdemeanor in possessing an ounce of marijuana appears to this Court to be entirely and wholly out of proportion to the seriousness of the crime.

State v. One (1) Porsche 2-Door, No. 3338 (Grand County Dist. Ct., Sept. 28, 1973). Possession of marijuana is a misdemeanor punishable by a fine of up to $299 and/or six months in the county jail. UTAH CODE ANN. § 58–37–8(2)(b)(i) (1974).

[5] 1 W. BLACKSTONE, COMMENTARIES *300–02. *See* Finkelstein, *THE GORING OX: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty,* 46 TEMP. L.Q. 169, 185–86 (1973). For an historical discussion of the doctrine of deodand, see O. HOLMES, THE COMMON LAW 24–25 (1938). Deodand is defined as, "[a]ny personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown . . . ." BLACK'S LAW DICTIONARY 523 (rev. 4th ed. 1968).

[6] *See Exodus* 21:28. *Cf.* 1 W. BLACKSTONE, COMMENTARIES *300.

object to the Church for the benefit of the decedent's estate. Gradually, punitive and revenue-producing purposes supplanted the expiatory function of deodand.[7]

Also at common law, convicted felons forfeited their property to the Crown, thereby imposing an additional penalty for the crime upon the individual as well as upon his heirs.[8] Because the felon was deemed to have breached the king's peace, the king was not required to respect the wrongdoer's property rights.[9] Through such forfeiture, title to all real and personal property of the felon vested in the Crown.

In the United States, the federal and state governments have the power to declare the forfeiture of a felon's property,[10] but the doctrine has never been fully accepted, as evidenced by federal and state law limiting the power.[11]

B. The Development of Statutory Forfeiture

In a recent opinion,[12] the Supreme Court reviewed the development of statutory forfeiture, which was initially enforced in England against objects used in violation of customs and revenue statutes.[13] Although statutory forfeiture combined the elements of deodand and forfeiture of a felon's property,[14] it was primarily enforced as an in rem proceeding in the Court of Exchequer to forfeit the property of felons.[15] In this country, after the adoption of the Constitution, federal forfeiture statutes were enacted to control the slave trade and to enforce customs laws.[16] Since that

[7] *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974). *Cf.* 1 W. BLACKSTONE, COMMENTARIES *302.

[8] 4 W. BLACKSTONE, COMMENTARIES *381–88. American courts have long distinguished between deodand and taking of a felon's property. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–83 (1974); The Palmyra, 25 U.S. (12 Wheat.) 1, 14–15 (1827); Farley v. $168,400.97, 55 N.J. 31, 36–38, 259 A.2d 201, 203–04 (1969). Abhorence of imposing a forfeiture upon an individual's heirs led to a constitutional limitation on this penalty. U.S. CONST. art. III, § 3, cl. 2. *See* Wallach v. Van Riswich, 92 U.S. 202, 210 (1875).

[9] 4 W. BLACKSTONE, COMMENTARIES *382; 1 *id.* at *299.

[10] For a brief discussion of how states dealt with the forfeiture of a felon's property in the nineteenth and early twentieth centuries, see 1 W. BLACKSTONE, COMMENTARIES *302 n.58 (W. Lewis ed. 1922). *See, e.g.*, Ballard v. Board of Trustees, 313 N.E.2d 351, 355–56 (Ind. 1974); Leonard v. City of Seattle, 81 Wash. 2d 479, 484–85, 503 P.2d 741, 745–46 (1972).

[11] *E.g.*, U.S. CONST. art. III, § 3, cl. 2; 18 U.S.C. § 3563 (1970); Act of April 30, 1790, ch. 9, § 24, 1 Stat. 117; IND. CONST. art. I, § 30; WASH. CONST. art. I, § 15.

[12] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[13] *Id.* at 683. *See* 3 W. BLACKSTONE, COMMENTARIES *261–62.

[14] English statutory forfeiture is "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

[15] *See* C.J. Hendry Co. v. Moore, 318 U.S. 133, 137–38 (1943). Parliament adopted the in rem proceeding from the Court of Exchequer "to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice." 3 W. BLACKSTONE, COMMENTARIES *262.

[16] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 & nn.21–23 (1974). The use of forfeiture to enforce liquor laws during Prohibition presents an interesting historical and legal parallel to the present use of forfeiture statutes to control narcotics violations. *See, e.g.*, Van Oster v. Kansas, 272 U.S. 465 (1926); Commonwealth v. Bowers, 304 Pa. 253, 155 A. 605 (1931); State v. One Pontiac Coach

time, statutory forfeiture has continually expanded into other areas within the police power of both federal and state governments.[17]

In American courts, statutory forfeiture is a civil in rem proceeding [18] that retains the punitive elements of deodand:[19] (1) the object, not the person, is the guilty party;[20] (2) the object is forfeited regardless of the acquittal or criminal conviction of the party;[21] and (3) the innocence of the owner of the forfeited object is no defense to forfeiture.[22] Despite frequent due process attacks, state interest in preventing criminal activity has consistently served to uphold the validity of forfeiture statutes.[23]

Auto., 55 S.D. 8, 224 N.W. 176 (1929); General Motors Acceptance Corp. v. State, 118 Tex. 189, 12 S.W.2d 968 (1929).

[17] *See, e.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974); 19 U.S.C. § 1497 (1970) (forfeiture of objects brought illegally into the United States), *construed in* One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972); INT. REV. CODE OF 1954, § 5872 (forfeiture of firearms); UTAH CODE ANN. § 76-27-15 (1953) (forfeiture of gambling money and property). For an excellent discussion of the development of federal forfeiture statutes see Note, *Forfeiture of Property Used in Illegal Acts,* 38 NOTRE DAME LAW. 727 (1963). For an excellent discussion of the flexibility of statutory forfeiture to extend into economic and social areas as the sovereign's interests expand see Finkelstein, *supra* note 5, at 213, 250. For an exposition of the jurisprudential theory underlying the evolutionary process of common law doctrines, such as deodand, see O. HOLMES, THE COMMON LAW 5 (1938).

[18] Important procedural consequences attach to forfeiture as a civil in rem proceeding: (a) There is no presumption of innocence. *E.g.,* DiGiacomo v. United States, 346 F. Supp. 1009, 1011 & n.4 (D. Del. 1972). (b) Forfeiture is subject to the rules of civil procedure. *E.g.,* Sensenbrenner v. Crosby, 37 Ohio St. 2d 43, 45–46, 306 N.E.2d 413, 415 (1974). (c) Forfeiture requires proof only by a preponderance of the evidence. *E.g.,* One 1961 Lincoln Continental Sedan v. United States, 360 F.2d 467, 469 (8th Cir. 1966); Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 659, 284 A.2d 203, 205 (1971). (d) Collateral estoppel does not preclude litigation in the civil action on the basis of the court's disposition in the criminal action. *E.g.,* One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 235 (1972); United States v. One (1) 1969 Buick Riviera Auto., 493 F.2d 553, 554 (5th Cir. 1974). *But see* People v. One 1964 Chevrolet Corvette Convertible, 274 Cal. App. 2d 720, 79 Cal. Rptr. 447 (Ct. App. 1969).

[19] *See* J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510–11 (1921); Finkelstein, *supra* note 5, at 213–27.

[20] *See, e.g.,* Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931); Utah Liquor Control Comm'n v. Wooras, 97 Utah 351, 358, 93 P.2d 455, 458–59 (1939).

[21] *See, e.g.,* One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972); United States v. The Ruth Mildred, 286 U.S. 67 (1932); State v. Meyers, 328 S.W.2d 321, 325 (Tex. Civ. App. 1959). *Contra,* State v. LaBella, 88 N.J. Super. 330, 340–41, 212 A.2d 192, 198 (1965).

[22] *E.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683–84 (1974); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510–11 (1921); State v. Greer, 263 Md. 692, 694, 284 A.2d 233, 235 (1971). *But see* United States v. United States Coin & Currency, 401 U.S. 715, 717–22 (1971).

[23] *See, e.g.,* Kutner Buick, Inc. v. Strelecki, 111 N.J. Super. 89, 101–02, 267 A.2d 549, 555 (1970); State v. Richards, 157 Tex. 166, 172, 301 S.W.2d 597, 602 (1957). Despite the due process issues, courts have uniformly upheld deodand-type forfeiture statutes on the basis of legal and historical precedent. *E.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974); United States v. One 1969 Plymouth Fury Auto., 476 F.2d 960, 961 (5th Cir. 1973); Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 658–59, 284 A.2d 203, 204–05 (1971).

C. *Limiting the Scope of Statutory Forfeiture*

In *United States v. United States Coin & Currency,*[24] the defendant was convicted for violation of federal revenue and gambling laws. The United States Supreme Court vacated and remanded the conviction on the ground that filing the returns required under federal revenue law violated the defendant's fifth amendment privilege against self-incrimination. Despite this, the government subsequently sought forfeiture of $8,674 in the defendant's possession at the time of his arrest that was allegedly used in the gambling operations. The Seventh Circuit denied forfeiture on the ground that the defendant could not be punished indirectly under the forfeiture statute when he could not be punished directly under the revenue laws.[25]

The government argued that forfeiture was "formally civil in nature," and that, therefore, the owner's guilt was irrelevant to the forfeiture action.[26] Disagreeing with this contention, the Supreme Court held that "[w]hen the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." [27] Subsequent federal and state court rulings have relied upon two aspects of the *Coin & Currency* decision: forfeiture statutes (1) may be unconstitutionally broad in their application to innocent parties [28] and (2) should be interpreted to require significant involvement in a criminal enterprise.[29]

D. *Forfeiture of Innocent Party's Property: Deodand Revived*

In *Calero-Toledo v. Pearson Yacht Leasing Co.,*[30] the Supreme Court rejected the argument that *Coin & Currency* had held forfeiture statutes unconstitutional sub silentio.[31] In *Calero-Toledo,* Puerto Rico deprived an innocent owner of a yacht that he had leased to an individual who had taken marijuana on board.[32] The Court held, *inter alia,* that because

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[24] 401 U.S. 715 (1971).

[25] United States v. United States Coin & Currency, 393 F.2d 499, 500 (7th Cir. 1968), *aff'd,* 401 U.S. 715 (1971). For another case relying on the same rationale, *see* United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558, 566 (E.D. La. 1974).

[26] *See* 401 U.S. at 718–19.

[27] *Id.* at 721–22.

[28] *E.g.,* United States v. One 1971 Ford Truck, 346 F. Supp. 613, 618–19 (C.D. Cal. 1972). *Cf.* Bramble v. Kleindienst, 357 F. Supp. 1028, 1034 (D. Colo. 1973), *aff'd sub nom.* Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974). *Contra,* United States v. One 1967 Ford Mustang, 457 F.2d 931, 932 & n.1 (9th Cir.), *cert. denied sub nom.* Bank of America Nat'l Trust & Sav. Ass'n v. United States, 409 U.S. 850 (1972).

[29] *E.g.,* Suhomlin v. United States, 345 F. Supp. 650, 654 (D. Md. 1972). *Cf. In re* Barret, 476 F.2d 14, 17 n.6 (7th Cir. 1973); Bramble v Kleindienst, 357 F. Supp. 1025, 1028 (D. Colo. 1973), *aff'd sub nom.* Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974).

[30] 416 U.S. 663 (1974).

[31] *Id.* at 680.

[32] Although there was no evidence that the yacht "had been notoriously used in smuggling drugs," Puerto Rico granted forfeiture, and the United States Supreme

seizure of the yacht occurred under "extraordinary" circumstances the lack of preseizure notice and hearing was not a denial of due process nor was it a violation of due process to deprive the innocent owner of his property.[33]

To support its holding, the Supreme Court listed the following reasons: (1) the Puerto Rico forfeiture statute serves "significant governmental purposes" by controlling the illicit use of the property and by enforcing the criminal law;[34] (2) preseizure notice and hearing would defeat the interests served by the forfeiture statute since the conveyance could be moved rapidly out of the jurisdiction; and (3) government officials, rather than interested parties, initiate the seizure.[35]

To further support its holding, the *Calero-Toledo* Court distinguished *Coin & Currency* on the ground that *Coin & Currency* "did not overrule prior decisions that sustained application to innocents of forfeiture statutes, like the Puerto Rican statutes, not limited in application to persons 'significantly involved in a criminal enterprise.' " [36] Consequently, the *Calero-Toledo* decision requires careful scrutiny of forfeiture statutes to determine whether criminal conduct is a prerequisite to forfeiture or is irrelevant to the forfeiture proceeding. *Calero-Toledo* thus upheld the validity of forfeiture statutes even when applied to the property of innocent owners. Application of forfeiture statutes to an innocent party's property was justified by the Court on the grounds that such statutes "further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents," [37] and that they foster "the purposes served by the underlying criminal statutes." [38]

Court affirmed, on the basis of one marijuana cigarette. *Id.* at 693 (Douglas, J., dissenting).

[33] The Court thus brought the forfeiture proceeding within the "extraordinary situations" exception to the preseizure notice and hearing requirement of Fuentes v. Shevin, 407 U.S. 67, 90–92 (1972). Arguably, *Calero-Toledo* must have relied more heavily upon the "governmental interests" involved since the requirement of prompt action, foreclosing due process considerations, was weak in view of the two month period that elapsed between discovery of the marijuana and seizure of the yacht. *See* 416 U.S. at 692 (Douglas, J., dissenting). Other courts have also relied upon "governmental interests" to overcome due process objections to forfeiture statutes. *See, e.g.,* United States v. One 1967 Porsche, 492 F.2d 893, 895 (9th Cir. 1974); State v. One 1970 2-Door Sedan Rambler, 191 Neb. 462, 465, 215 N.W.2d 849, 851 (1974).

[34] The criminal justice system (including the "penalty" of forfeiture) may not be the most efficient or socially desirable method of controlling simple possession of marijuana. *See* NATIONAL COMM'N ON MARIJUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE 243–46, 250–52 (Second Report 1973); Rosenthal, *Proposals for Dangerous Drug Legislation,* in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 80, 126, 129–31 (1967).

[35] 416 U.S. at 679–80.

[36] *Id.* at 688.

[37] *Id.* at 686.

[38] *Id.* at 687.

[39] 526 P.2d 917 (Utah 1974).

[40] UTAH CODE ANN. § 58–37–13(1) (1974) provides:

> The following shall be subject to forfeiture and no property right shall exist in them:

II

The Utah Supreme Court, in *State v. One (1) Porsche 2-Door,*[39] held that the forfeiture provision of the Utah Controlled Substances Act (UCSA)[40] was either "invalid or inapplicable" under the facts of the case.[41] To reach its conclusion, the court relied upon four basic premises: (1) forfeiture of a ten thousand dollar Porsche for facilitating the possession of marijuana would be "unconscionable" and would lead to the harsh result of imposing "an additional fine or penalty" for the misdemeanor of possessing marijuana;[42] (2) because the statutory language, the legislative intent, and principles of statutory construction limit forfeiture to "*transportation* to *accomplish* possession," [43] the Utah forfeiture statute prohibits trafficking of drugs rather than mere possession for personal use; (3) strict application of the forfeiture statute would lead to "absurd results" by allowing the forfeiture of any conveyance in any situation in which an individual possesses marijuana in a vehicle;[44] and (4) the legislative exceptions protecting innocent parties' interests "devour" the statute since an individual trafficking in drugs can avoid the penalty aspect of forfeiture by merely renting, leasing, or borrowing the conveyance in which he transports the drug.[45] The dissent reasoned that forfeiture in the *Porsche* case should have been ordered to avoid equal protection objections to the statute and to comport with the *Calero-Toledo* decision.[46]

. . . .

(e) All conveyances including aircraft, vehicles or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property described in (1) (a) or (1) (b) of this section . . . .

The passage of the federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* (1970), stimulated states to adopt uniform acts in conformity to the federal plan. *See* Rosenthal, *Dangerous Drug Legislation in the United States: Recommendations and Comments,* 45 TEXAS L. REV. 1037, 1062, 1173 (1967). The federal legislation has had great impact upon drug legislation in Utah, including the forfeiture provision. UTAH H.R. JOUR., 39th Sess. 831 (1971), and remarks of Mr. Jay V. Barney on S.B. No. 101 (recorded proceedings, March 10, 1971). The federal act and the New Jersey Controlled Substances Act formed the basis of the UCSA since the Criminal Code Revision Committee received both bills while the UCSA was being drafted. Interview with Jay V. Barney, Criminal Code Revision Comm., in Salt Lake City, Nov. 11, 1974. Implementation of forfeiture under the federal and New Jersey acts may provide guidelines to the implementation of the Utah forfeiture provision. For analysis of the impact of the Uniform Controlled Substances Act on state narcotics legislation see Comment, *The Uniform Alabama Controlled Substances Act: An Appraisal,* 24 ALA. L. REV. 491 (1972); Comment, *The Uniform Controlled Dangerous Substances Act: An Expositive Review,* 32 LA. L. REV. 56 (1971).

[41] 526 P.2d at 917.

[42] *Id.* at 918.

[43] *Id.* at 919.

[44] *Id.*

[45] *Id.* at 920.

[46] The equal protection issue arises when an individual using an "old beat-up inexpensive car" forfeits his vehicle while the more prosperous pusher does not forfeit his "fine new expensive car." *Id.* at 922 (Crockett, J., dissenting). *See* Commonwealth v. One 1970, 2 Dr. H.T. Lincoln Auto., 212 Va. 597, 600, 186 S.E.2d 279, 281 (1972). In his dissent, Justice Crockett listed other grounds in support of granting forfeiture. First, the quantity of drugs seized is irrelevant so long as "some substantial and identifiable amount of marijuana" is discovered. 526 P.2d at 922. Second,

Although the Utah Supreme Court indicated that the forfeiture statute was either unconstitutional or inapplicable in the *Porsche* case, the court, by implicitly establishing general guidelines within which the forfeiture provision could properly be applied, apparently held the statute to be merely inapplicable. Possible guidelines to be drawn from the opinion are: (a) a reasonable relation must exist between the value of the conveyance forfeited and the crime; (b) to conform to the legislative intent behind the statute, "transportation" of controlled substances, rather than mere possession, is required;[47] and (c) no forfeiture will be imposed where it leads to "absurd results."

III

The Utah Supreme Court reached an equitable result by refusing to allow forfeiture of the defendant's ten thousand dollar Porsche, and the court should be commended for its refusal to impose an "additional fine or penalty" on essentially criminal conduct.[48] Despite the court's correct conclusion, the reasonable relation standard enunciated in *Porsche* is vague in determining when forfeiture is "unconscionable," and thus needs further judicial clarification. In addition, the court, in concluding that the legislative intent of the UCSA was aimed only at *"transportation* to *accomplish* possession," [49]ignored the plain meaning of the language of the statute, the precedential weight of *Calero-Toledo,* and principles of statutory construction. Furthermore, the "absurd results" test of *Porsche* fails to defer to legislative judgment, which until now has considered absurd or inequitable results to be irrelevant to forfeiture. Finally, the court's criticism of the exceptions to the forfeiture statute ignores the tacit acceptance of such exceptions in both *Coin & Currency* and *Calero-Toledo.*

A. The Reasonable Relation Standard

In announcing its reasonable relation standard,[50] the *Porsche* court failed to state exactly to what the value of the conveyance must reason-

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the court lacks judicial discretion to mitigate the imposition of this harsh penalty since forfeiture, as a legislative act, "is the mandate of the people." *Id.* Third, the clear statutory language allows a criminal action in addition to the civil forfeiture. *Id.* at 921.

[47] As the Commissioners on Uniform State Laws originally drafted the forfeiture provision, the thrust was directed at the transportation of drugs and not merely at possession. *See* UNIFORM CONTROLLED SUBSTANCES ACT § 505 (Commissioners' Note). The Utah Legislature, however, significantly altered the Uniform Act by providing that facilitation of "possession" is itself a ground for forfeiture. UTAH CODE ANN. § 58–37–13(1)(e) (1974).

[48] *See* State v. LaBella, 88 N.J. Super. 330, 340–41, 212 A.2d 192, 198 (1965); Finkelstein, *supra* note 5, at 213–27.

[49] 526 P.2d at 919.

[50] *Id.* at 918. The district court fined Price, the owner and driver of the Porsche, two hundred dollars in the criminal action. State v. Baranovic, No. CU1773 (Moab City Ct., June 12, 1973). The criminal fine of two hundred dollars in addition to the loss of a ten thousand dollar Porsche clearly falls within the United States Supreme Court's statement that "the forfeiture is clearly a penalty for the criminal offense and

ably relate. For example, it is unclear whether it must reasonably relate to the severity of the crime, to the felony-misdemeanor distinction, or to the social danger of the crime. Furthermore, the court did not indicate the weight to be given each factor in formulating an enforceable legal standard. As such, the present *Porsche* standard is subject to three basic criticisms.

First, the reasonable relation standard is vague, and the court provided little guidance as to its proper application. The court may require that the value of the conveyance bear a reasonable relation to the amount of the criminal fine. If so, only those vehicles whose value does not grossly exceed the $299 criminal fine could be forfeited for facilitating the possession of marijuana. Under another interpretation, however, forfeiture may depend upon a felony-misdemeanor distinction, and forfeiture for misdemeanor drug offenses would be eliminated as being "unconscionably harsh," but forfeiture would be allowed where a felony had been committed.[51] Under this construction, the conveyance must be forfeited regardless of value if the criminal offense is a felony.[52] Under another interpretation of the standard, the court may have intended that a reasonable relation exist between the social danger of the criminal offense and the forfeiture penalty. Therefore, forfeiture would be permissible only for the commission of offenses deemed sufficiently dangerous to warrant such a harsh measure. This social danger standard is vague, but may take into consideration the social [53] and enforcement costs [54] of continued punish-

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can result in even greater punishment than the criminal prosecution." One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965) (dictum).

[51] The felony-misdemeanor distinction would establish a clear legal standard that could conserve judicial and enforcement efforts. The Salt Lake County Attorney, in effect, established this felony-misdemeanor distinction as the legal standard for forfeiture when he restricted the enforcement of the statute to transportation for distribution. Letter from Carl Nemelka, Salt Lake County Attorney, to All Salt Lake County Enforcement Personnel, Apr. 5, 1974, on file in the Salt Lake County Attorney's Office.

[52] If the courts adopted the felony-misdemeanor distinction as the basis of a legal standard, forfeiture would be presumptively reasonable for a felony and presumptively unreasonable for a misdemeanor.

[53] *See* Rosenthal, *Two Problems and a Lesson for the Draftsman of Drug Crimes Legislation,* 24 Sw. L.J. 407, 416–17 (1970); Rosenthal, *A Plea for Amelioration of the Marihuana Laws,* 47 TEXAS L. REV. 1359, 1369–70 (1969). For possible overcriminalization effects in Utah by strictly enforcing marijuana laws see GOVERNOR'S CITIZEN ADVISORY COMM. ON DRUGS, ADVISORY COMM. REPORT ON DRUG ABUSE: SUMMATIONS AND RECOMMENDATIONS 15–17 (1969) [hereinafter cited as ADVISORY COMM. REPORT].

[54] *See* State v. One (1) Porsche 2-Door, 526 P.2d 917, 920 (Utah 1974) (Justice Henriod quoting the findings of a California legislative committee); Kaplan, *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County,* 15 U.C.L.A.L. REV. 1499, 1503 (1968). *See generally* J. KAPLAN, MARIJUANA—THE NEW PROHIBITION 21–51 (1970). The numerous opportunities for forfeiture for mere possession of marijuana and the enforcement officials' desire to fully implement this statute led to a policy statement from the Salt Lake County Attorney's Office limiting forfeiture to offenders who were known to have transported controlled substances for distribution and to have made at least two sales. Letter from Carl Nemelka, Salt Lake County Attorney, to All Salt Lake County Enforcement Personnel, Apr. 5, 1974, on file in the Salt Lake County Attorney's Office; Interview with Gregory L. Bown, Deputy Salt Lake County Attorney, in Salt Lake City, Nov. 12, 1974 [hereinafter cited as Bown Interview].

ment for simple possession of marijuana.[55] Such a standard, however, fails to clarify whether simple possession of any controlled substance will ever justify forfeiture, what type of socially dangerous conduct the court requires, or, if possession will justify forfeiture, what amount of marijuana or other drug is sufficient to constitute socially dangerous conduct.[56]

Second, the *Porsche* court's standard, if it means that the value of the forfeited vehicle can be no more than the criminal fine, may violate equal protection by depriving a defendant of an inexpensive automobile while protecting another defendant's expensive vehicle.[57] The forfeiture of a conveyance based upon a felony-misdemeanor distinction may raise the same equal protection issue by denying forfeiture of conveyances valued at less than the $299 misdemeanor fine while allowing forfeiture of felons' conveyances worth much more. If such an equal protection challenge to the application of the forfeiture statute is raised, the state will be required either to demonstrate a rational basis for the distinction or withstand strict judicial scrutiny by demonstrating a compelling state interest.[58]

Third, the court's standard ignores the precedential weight of *Calero-Toledo,* which justified statutory forfeiture on the ground that such statutes serve the purposes of the "underlying criminal statutes" and that they further "legitimate governmental interests." [59] Future judicial development of the forfeiture standard should weigh the equal protection issues that will confront the court unless it clearly defines the parameters of the present *Porsche* standard.

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[55] *See Hearings Before a Subcomm. of the House Comm. on Government Operations,* 90th Cong., 2d Sess. 28–29 (1968) (suggesting a shift from a "strictly punitive to a public health approach to enforcement of marihuana laws"); Rosenthal, *A Plea for Amelioration of the Marihuana Laws,* 47 TEXAS L. REV. 1359, 1364–66 & nn.17 & 21 (1969); Comment, *Possession of Marihuana in Texas,* 13 S. TEX. L.J. 194, 199 (1971).

[56] Possession of any quantity of a controlled substance may be sufficient to justify forfeiture under the Uniform Controlled Substances Act. *See, e.g.,* State v. Grijalva, 85 N.M. 127, 130, 509 P.2d 894, 897 (1973). *Cf.* State v. Winters, 16 Utah 2d 139, 142–43, 396 P.2d 872, 875 (1964).

[57] In State v. One 1972 Chevrolet Auto., No. 13898 (Utah, filed Nov. 26, 1974), the court will be faced with the forfeiture of an automobile valued at $1,325.00 which was unlawfully transporting over two pounds of marijuana. The *Chevrolet* case may be distinguishable from *Porsche* on the basis of the amount of marijuana admitted into evidence and the reliance upon "transportation" of a controlled substance. The criminal defendant, however, was convicted of simple possession of marijuana and fined two hundred dollars, which is identical to the disposition of the criminal case in *Porsche.* The court should avoid relying upon the value of the automobile forfeited in analyzing the *Chevrolet* case, since a reasonable relation standard on that basis may violate equal protection.

[58] Whether judicial review will be based on an analysis of the statute's rational basis or on a strict scrutiny basis will depend upon whether the court treats a difference in the value of the vehicles forfeited under the statute as a suspect classification—wealth. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Courts, however, have upheld forfeiture statutes as being within the permissible legislative exercise of the police power. *See, e.g.,* Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 662, 284 A.2d 203, 206–07 (1971); State v. Richards, 157 Tex. 166, 171–72, 301 S.W.2d 597, 602 (1957). *But see* State v. One (1) Certain 1969 Ford Van, 191 N.W.2d 662, 666 (Iowa 1971).

[59] 416 U.S. at 687–88.

B. Judicial Interpretation of the Forfeiture Provision

By ostensibly relying upon the language of the forfeiture statute, legislative intent, and principles of statutory construction, the court strained to eliminate "possession" from the statute and to deny forfeiture for mere possession of marijuana.[60] However, closer analysis of these three factors—the language of the statute, legislative intent, and principles of statutory construction—indicates that the court's conclusion that the forfeiture provision only proscribes "transportation" may have been incorrect.

Although the court's interpretation may be consistent with the practical application of the statute,[61] may conform to the statutory language in a majority of jurisdictions,[62] and recognizes that "transportation" is the crux of the drug problem,[63] the court gave inadequate treatment to the

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[60] 526 P.2d at 919.

[61] To limit the number of forfeiture cases and to comply with what appears to be the legislative policy, the Salt Lake County Attorney's Office had, prior to the *Porsche* decision, restricted forfeiture to those cases involving transportation for distribution. Letter from Carl Nemelka, Salt Lake County Attorney, to All Salt Lake County Enforcement Personnel, Apr. 5, 1974, on file in the Salt Lake County Attorney's Office. Grand County, however, has relied upon facilitating "possession" of marijuana as grounds for forfeiture in all seventeen forfeiture cases in that county and the *Porsche* decision will require a change in enforcement. Interview with Harry E. Snow, Grand County Attorney, in Moab, Nov. 8, 1974 [hereinafter cited as Snow Interview].

[62] By judicially implementing certain procedural devices or by legislatively limiting the scope of forfeiture to "transportation," conveyances used to facilitate the "possession" of marijuana are exempt from forfeiture in a majority of jurisdictions. Legislative devices for mitigating forfeiture under the Uniform Controlled Substances Act include:

(a) No statutory forfeiture provision for conveyances, as in California, Colorado, Connecticut, Delaware, Indiana, Missouri, Montana, New Hampshire, and Virginia. Minnesota imposes forfeiture only on those cars valued at more than $100. MINN. STAT. ANN. §§ 152.19(1), (4) (Supp. 1974).

(b) Specific exemption of any forfeiture for marijuana offenses. KY. REV. STAT. ANN. § 218A.270(1)(d)(4) (1973); ME. REV. STAT. ANN. tit. 22, § 2383(1) (Supp. 1974–75). New Mexico and New York exempt misdemeanor offenses from forfeiture and in both states mere possession of marijuana is a misdemeanor. N.M. STAT. ANN. § 54–11–33(F)(3) (Supp. 1973) (possession of marijuana is a misdemeanor under N.M. STAT. ANN. § 54–11–23 (Supp. 1973)); N.Y. PUB. HEALTH § 3388(2) (McKinney Supp. 1974–75) (possession of less than twenty-five marijuana cigarettes is a misdemeanor under N.Y. PENAL § 220.03 (McKinney Supp. 1974–75)).

(c) Presumption of owner's innocence unless the state bears its burden of proving consent to an illegal use in a specified number of instances. MASS. ANN. LAWS ch. 94C, § 47(c)(3) (Supp. 1973).

(d) Weight categories within which an individual can possess marijuana in his car for personal use. MASS. ANN. LAWS ch. 94C, § 47(c)(4) (Supp. 1973) (less than ten pounds of marijuana); N.H. REV. STAT. ANN. § 318–B:26(I)(c) (Supp. 1973) (less than one pound of marijuana precludes criminal penalty); S.C. CODE ANN. § 32–1510.64:1(1) (Supp. 1973) (less than one pound of marijuana).

(e) Forfeiture provision requires forfeiture for "transportation" and does not include "possession." *E.g.*, ARK. STAT. ANN. § 82–2629(a)(4) (Supp. 1973); MICH. STAT. ANN. § 18.1070(55)(1)(d) (Supp. 1974); N.D. CENT. CODE § 19–03.1–36(1)(d) (Supp. 1973).

[63] *See* Rosenthal, *Two Problems and a Lesson for the Draftsman of Drug Crimes Legislation*, 24 Sw. L.J. 407, 410–14 (1970). The Model Rules for Law Enforcement, in discussing forfeiture of vehicles for narcotics violations, state:

> Statutes authorizing forfeiture of vehicles in narcotics offenses are typically very broad. The Model Rule proposes, as an alternative position, that police should seize vehicles only where a substantial amount of narcotics or drugs is

Utah forfeiture statute's prohibition against "facilitating" possession.[64] "Facilitating" possession more properly applies to the object than to its owner or to the criminal defendant, so the court was arguably wrong in construing forfeiture as an additional penalty on the defendant. The vehicle is forfeited for facilitating the transportation or possession of any controlled substance under a deodand theory, regardless of the disposition of the criminal action against the defendant.

The court stated "that the *primary* and *sole purpose* of the statute *and the intent of the legislature* were directed exclusively toward the *transportation* of a controlled substance for distribution . . . ." [65] Such an interpretation is consistent with the contemporaneous legislative reduction of the criminal penalty for simple possession of marijuana from a felony to a misdemeanor.[66] Based upon these considerations,[67] the court's interpretation may be correct as to the Utah Legislature's intent and may be consistent with the trend in most jurisdictions.[68] Such interpretation, however, is contrary to the holding in *Calero-Toledo*.

> involved, or where the owner of the vehicle is a significant drug violator. This approach would exclude . . . a mere user of narcotics. But dealers and pushers would be subject to seizure for forfeiture proceedings. The effect of the Rule should be to lighten the administrative burden on the police while effectuating the statutory purpose of impeding the traffic in drugs.

PROJECT ON LAW ENFORCEMENT POLICY AND RULEMAKING, SEARCHES, SEIZURES, AND INVENTORIES OF MOTOR VEHICLES 59 (Commentary (Rule 601(A)) 1974).

[64] There are three elements indicating the Utah Legislature's intention to impose forfeiture for mere possession: (a) The Utah statute, in the disjunctive, requires forfeiture of conveyances that have facilitated "the transportation . . . possession, *or* concealment" of controlled substances. UTAH CODE ANN. § 58–37–13(1)(e) (1974) (emphasis added). (b) The Utah statute provides that "no property right shall exist" in the conveyances, thereby vesting ownership in the state upon commission of the unlawful act. *Id.* § 58–37–13(1). (c) Criminal penalties imposed under the UCSA do not preclude the imposition of other civil or administrative penalties. *Id.* § 58–37–8(8).

During the drafting of the UCSA, forfeiture of a conveyance for mere possession of marijuana would have been permissible to control what was considered, at that time, to be a spread of marijuana abuse. Interview with Jay V. Barney, Criminal Code Revision Comm., in Salt Lake City, Nov. 11, 1974.

[65] 526 P.2d at 918–19. The court's interpretation of the forfeiture provision is particularly important in limiting the scope of this penalty since the legislative record lacks any debate on forfeiture either for "transportation" or for mere "possession." UTAH H.R. JOUR., 39th Sess. 831 (1971), and remarks of Mr. Jay V. Barney on S.B. No. 101 (recorded proceedings, March 10, 1971); UTAH S. JOUR., 39th Sess. 740 (1971), and remarks of Mr. Jay V. Barney on S.B. No. 101 (recorded proceedings, March 1, 1971).

[66] The Governor's Citizen Advisory Committee on Drugs characterized Utah as "one of the more progressive states when it made certain violations involving the use of marijuana misdemeanors." ADVISORY COMM. REPORT, *supra* note 53, at 26.

[67] In addition, the majority opinion recognized that forfeiture, from a practical viewpoint, is expensive and lacks a deterrent effect. 526 P.2d at 920 (Justice Henriod quoting the California Legislature's findings on the expense and deterrent effect of forfeiture). *See, e.g.*, NEW YORK STATE TEMPORARY COMM'N TO EVALUATE THE DRUG LAWS, INTERIM REPORT ON THE PROPOSED NEW YORK STATE CONTROLLED SUBSTANCES ACT AND REVISION OF ARTICLE 220 OF THE PENAL LAW 72–73 (1972) [hereinafter cited as NEW YORK STATE REPORT]. *But see* ADVISORY COMM. REPORT, *supra* note 53, at 30–31.

[68] *See* note 62 *supra*.

Although *Calero-Toledo* and *Porsche* reached different conclusions, the forfeiture statutes involved in both cases are identical.[69] Both the Utah and Puerto Rico statutes forfeit "[a]ll conveyances . . . used or intended for use, to transport, or in any manner facilitate the transportation . . . possession, or concealment" of controlled substances,[70] and, by providing that "no property right shall exist in them,"[71] vest title in the government at the moment a criminal act is committed. Because the Puerto Rico forfeiture statute does not exempt any innocent party, forfeiture depends upon the factual determination whether the conveyance "facilitates" the "possession" of a controlled substance.[72] Although the Utah forfeiture provision provides three exceptions for innocent parties,[73] none were applicable in the *Porsche* case. Thus, because the Utah statute resembles

[69] The two statutes differ significantly, however, in their treatment of innocent parties. The similarity of the two statutes can be explained wih reference to their common source. UNIFORM CONTROLLED SUBSTANCES ACT § 505.

[70] UTAH CODE ANN. § 58–37–13(1)(e) (1974), *accord,* P.R. LAWS ANN. tit. 24, § 2512(a)(4) (Supp. 1973). Of the forty states that have adopted the Uniform Controlled Substances Act, seven have established facilitating "possession" as grounds for forfeiture. IDAHO CODE § 37–2744(a)(4) (Supp. 1973); MD. ANN. CODE art. 27, § 297(a)(4) (Supp. 1973); N.Y. PUB. HEALTH § 3388(1)(c)(2) (McKinney Supp. 1974–75); PA. STAT. ANN. tit. 35, § 780–128(a)(4) (Supp. 1974–75); S.D. COMPILED LAWS ANN. § 39–17–129(4) (Supp. 1974); UTAH CODE ANN. § 58–37–13(1)(e) (1974); VT. STAT. ANN. tit. 18, § 4227 (Supp. 1974).

Of the nine states that have adopted the Uniform Narcotic Drug Act, only Arizona allows forfeiture for unlawful possession. ARIZ. REV. STAT. ANN. § 36–1041 (1956).

[71] UTAH CODE ANN. § 58–37–13(1) (1974), *accord,* P.R. LAWS ANN. tit. 24, § 2512(a) (Supp. 1973). Only seven other states and the federal government have adopted this provision. 21 U.S.C. § 881(a) (1970); ME. REV. STAT. ANN. tit. 22, § 2387(1) (Supp. 1974–75); MD. ANN. CODE art. 27, § 297(a) (Supp. 1973); MASS. ANN. LAWS ch. 94C, § 47(a) (Supp. 1973); N.J. STAT. ANN. § 24:21–35(b) (Supp. 1974–75); PA. STAT. ANN. tit. 35, § 780–128(a) (Supp. 1974–75); S.D. COMPILED LAWS ANN. § 39–17–129 (Supp. 1974); VT. STAT. ANN. tit. 18, § 4227 (Supp. 1974).

The provision that "no property right shall exist in them" is designed to subject the conveyance to forfeiture at the time of the offense rather than at the time of the seizure. *See* Hemenway & Moser Co. v. Funk, 100 Utah 72, 81, 106 P.2d 779, 783 (1940). Vesting title automatically in the state serves two functions:

(a) It avoids constitutional issues of search and seizure since the state owns the conveyance at the time it is seized and searched. *See, e.g.,* United States v. One Ford Coupe Auto., 272 U.S. 321, 325 (1926); United States v. $1,058.00 in United States Currency, 323 F.2d 211, 213 (3d Cir. 1963). *Cf.* Dodge v. United States, 272 U.S. 530 (1926). *Contra,* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965).

(b) It passes superior title to the state over subsequent transfers. United States v. Stowell, 133 U.S. 1, 19 (1890). *See, e.g.,* Fell v. Armour, 355 F. Supp. 1319, 1325–27 (M.D. Tenn. 1972); Farley v. $168,400.97, 55 N.J. 31, 40–43, 259 A.2d 201, 204 (1969); Note, *Forfeiture of Property Used in Illegal Acts,* 38 NOTRE DAME LAW. 727, 732–35 (1963). *Cf. In re* Barret, 476 F.2d 14, 16 n.5 (7th Cir. 1973) (dictum).

[72] *See, e.g.,* State v. One 1967 Ford Mustang, 266 Md. 275, 277–78, 292 A.2d 64, 66 (1972).

[73] The forfeiture statute exempts common carriers and owners who have not participated in the unlawful activity from the forfeiture statute and protects the interests of security holders. UTAH CODE ANN. §§ 58–37–13(1)(e)(i)–(iii) (1974). There have been no decisions in Utah under the common carrier exception. A conveyance is remitted to the owner who can establish that he had no knowledge of the illegal use. The State Department of Finance protects the security holder's interest by either selling the car at public auction and reimbursing the security holder from the proceeds, or paying the security holder for his interest from the Automobile Forfeiture Suspense Fund *prior* to the public auction. Interview with Kenneth Hanson, State Dep't of Finance, in Salt Lake City, Oct. 31, 1974. The second practice sets the minimum bid at the public auction as the value of the security holder's interest. If no

the common law doctrine of deodand,[74] *Calero-Toledo* applies to the *Porsche* facts. Despite the strong precedential value of *Calero-Toledo,* the Utah Supreme Court failed to harmonize the *Porsche* decision with or distinguish it from *Calero-Toledo.*

The court relied upon principles of statutory construction,[75] such as the "reason, spirit, and sense of the legislation," [76] but failed to consider the impact of common law forfeiture doctrines on modern statutory forfeiture. The *Porsche* court thus refused to apply the statute where the result would be "ridiculous," [77] and interposed equity to avoid the harsh penalty.[78] The "reason, spirit, and sense" of the common law doctrines is to foreclose judicial discretion to mitigate the harshness of forfeiture. The "reason, spirit, and sense" of deodand-type forfeiture statutes, such as the Utah statute, similarly forecloses judicial discretion. Thus, courts have frequently reached "ridiculous" conclusions under modern forfeiture statutes because they defer to the legislative judgment without considering the individual merits of a case.[79] Thus, the *Porsche* court, while purporting to look at the spirit behind the statute, completely failed to do so.

C. Application of the Forfeiture Statute and Absurd Results

The court suggested several instances in which forfeiture would reach "absurd results." [80] Although the court's hypothetical fact situations are flavored with *reductio ad absurdum* reasoning,[81] several courts have

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bid begins at that level, the state may be the unwilling owner for value of an unwanted car.

In the absence of legislative exceptions, the innocent party's interest can be forfeited. *See, e.g.,* Associates Inv. Co. v. United States, 220 F.2d 885, 887 (5th Cir. 1955); United States v. One 1940 Packard Coupe, 36 F. Supp. 788, 790 (D. Mass. 1941); Comment, *Debtor and Creditor—Forfeiture of Innocent Lienor's Interest Where Automobile Used in Violation of Narcotics Law,* 44 IOWA L. REV. 598 (1959).

[74] Criminal penalties may be imposed regardless of other civil or administrative sanctions. UTAH CODE ANN. § 58–37–8(8) (1974).

[75] For example, the court stated that "[t]he statute must be examined in the light of its purpose and/or intent of the legislature." 526 P.2d at 918.

[76] *Id.* at 919 (quoting Masich v. United States Smelting, Ref. & Mining Co., 113 Utah 101, 191 P.2d 612 (1948)).

[77] 526 P.2d at 919.

[78] *Id.* at 918 n.2. The court cited UTAH CODE ANN. § 68–3–2 (1961) which states:

> The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

[79] *See* note 82 *infra* and accompanying text.

[80] 526 P.2d at 919.

[81] The court reasoned:

> Under this statute he could have his car taken from him if he were taking his six-year old to school and happened to have a marijuana cigarette in his pocket,—or under such circumstances he was rushing his pregnant wife to the hospital,—or if he were driving the Porsche out of a burning garage,—or trying to escape from a highwayman or a flood or anything else.

Id.

reached such "absurd results." [82] In a situation even more absurd than forfeiture of a Porsche for one ounce of marijuana, the *Calero-Toledo* Court upheld forfeiture of an innocent lessor's yacht upon evidence of "one marijuana cigarette." [83] Absurd results are reached by strict adherence to the statutory forfeiture language without considering the mitigating circumstances involved in individual cases.[84] The *Porsche* decision, by analyzing the mitigating circumstances to arrive at an equitable result, represents an attempt to overcome the "absurd results" which could follow from strict application of the forfeiture statute.

Juries and courts have traditionally mitigated harsh penalties in two ways: courts have narrowly defined the statute to avoid enforcing the harsh penalty,[85] and juries have refused to impose forfeiture.[86] The *Porsche* decision is consistent with those cases attaining an equitable result by narrowly defining the forfeiture statute.[87]

Although the *Porsche* decision arguably does not contradict the *Calero-Toledo* decision, since the Utah Supreme Court apparently relied upon the inapplicability, rather than the unconstitutionality, of the forfeiture statute, this is too fine a distinction, particularly in view of the similarity of the facts, identical statutory language, and harshness of the penalty in both cases. The *Calero-Toledo* decision upheld forfeiture on the basis of legal and historical precedent, based upon deodand, that recognizes forfeiture as a civil in rem proceeding against the offending object,[88] and the state's "significant governmental interests" in enforcing its narcotics laws.[89] The Court did not deny forfeiture of the yacht on the basis of the

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[82] Associates Inv. Co. v. United States, 220 F.2d 885 (5th Cir. 1955) (two partially smoked marijuana cigarettes); State v. One 1970 2-Door Sedan Rambler, 191 Neb. 462, 465, 215 N.W.2d 849, 851 (1974) (dissenting opinion) (two ounces of marijuana).

[83] 416 U.S. at 693 (Douglas, J., dissenting).

[84] *See, e.g.,* Kutner Buick, Inc. v. Strelecki, 111 N.J. Super. 89, 99, 267 A.2d 549, 556 (1970); Commonwealth v. One 1970, 2 Dr. H.T. Lincoln Auto., 212 Va. 597, 599, 186 S.E.2d 279, 281 (1972) (argument against harsh forfeiture is "more properly addressed to legislative bodies than to courts").

[85] Courts have mitigated the harshness of the forfeiture penalty for a misdemeanor. *See, e.g.,* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700–01 & n.9 (1965); Commonwealth v. One 1959 Chevrolet Impala Coupe, 201 Pa. Super. 145, 149, 191 A.2d 717, 719 (1963). Deodand-type forfeiture statutes have long been criticized:

> But would it not be much better that a law should be abolished, the policy of which has long ceased, and at which the understandings of mankind so strongly revolt, that juries are inclined to trifle with their oaths, and judges to encourage ridiculous distinctions, which tend to bring the general administration of justice into contempt?

1 W. BLACKSTONE, COMMENTARIES *302 n.57 (W. Lewis ed. 1922).

[86] *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 n.27 (1974); 1 W. BLACKSTONE, COMMENTARIES *302; Comment, *The Uniform Controlled Dangerous Substances Act: An Expositive Review,* 32 LA. L. REV. 56, 71 (1971). *Cf.* 4 W. BLACKSTONE, COMMENTARIES *387.

[87] The Utah Supreme Court has consistently applied a narrow construction to forfeiture statutes to avoid imposing this penalty. *E.g.,* Liquor Control Comm'n v. One 1968 Buick Riviera, 30 Utah 2d 61, 513 P.2d 427 (1973), *accord,* Liquor Control Comm'n v. One 1965 Ford Convertible, 30 Utah 2d 65, 513 P.2d 429 (1973).

[88] See notes 5–7 *supra* and accompanying text.

[89] 416 U.S. at 688.

"absurd result" arising from the application of the ancient institution of deodand. On the contrary, the Court reaffirmed the appropriateness of applying deodand to protect governmental interests. In reaching its conclusion, the *Porsche* court disregarded both the holding and rationale of *Calero-Toledo.*

D. Validity of Mitigating Exceptions to Forfeiture

In holding that forfeiture statutes apply only to parties "significantly involved in a criminal enterprise," [90] the *Coin & Currency* Court did not attack the validity of the forfeiture statute there involved on the basis of the exceptions for innocent parties;[91] on the contrary, the Court specifically relied upon the exceptions to find a congressional intent to allow mitigation of forfeiture.[92] Under the rationale of the *Coin & Currency* holding, the federal and Utah forfeiture statutes, which provide for mitigating exceptions, may require significant involvement in criminal activity and may allow the innocence of the owner as a complete defense.[93] Since these exceptions were "unimportant" in *Calero-Toledo* [94] and because the Court allowed forfeiture regardless of criminal conduct,[95] the *Coin & Currency* decision may have been undermined. The United States Supreme Court, however, has not directly resolved the issue of the validity of these exceptions, although the *Coin & Currency* decision presumed their validity and the *Calero-Toledo* decision upheld forfeiture of an innocent party's interests in the absence of such exceptions.

In *Porsche,* the court raised the issue of whether these exceptions should be allowed to thwart the forfeiture statute's objective of controlling the trafficking of drugs. The Utah Legislature may have originally enacted these exceptions to avoid the due process issues which accompany the

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[90] 401 U.S. at 721–22.

[91] The Court instead relied upon the remission statute to reach its conclusion. 401 U.S. at 721 & n.8. See 19 U.S.C. § 1618 (1970); INT. REV. CODE OF 1954, § 7327. For an historical discussion of the development of the remission statutes, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 n.27 (1974).

[92] 401 U.S. at 721–22.

[93] The *Porsche* decision did not directly deal with the criminal conduct, but implied that it may be irrelevant. 526 P.2d at 917. There is a need for clarification in this area, however, due to the variation in application of the statute from county to county. In Salt Lake County, forfeiture has been granted regardless of the criminal action (Bown Interview, *supra* note 54), while in Grand County a criminal conviction is required before forfeiture is granted (Snow Interview, *supra* note 61). *See* Comment, *Vehicle Forfeiture in Arizona: Burrage and the Extension of the Quasi-Criminal Doctrine,* 1972 LAW & THE SOCIAL ORDER 476.

[94] 416 U.S. at 686–87 n.25.

[95] The United States Supreme Court failed to state whether a federal statute, identical to Utah's in protecting innocent parties, would require criminal involvement or whether the Court will forfeit property regardless of the innocence of the party, unless judicial remission is sought. In *Calero-Toledo,* the Court stated that "[b]ut for unimportant differences, P.R. Laws Ann., Tit. 24, § 2512(a) (Supp. 1973) is modeled after 21 U.S.C. § 881(a)." *Id.* The major difference between the two statutes, which will apply equally to the Utah statute, is that the federal statute exempts innocent parties while the Puerto Rico forfeiture statute does not. *Compare* 21 U.S.C. §§ 881(a)(4)(A)–(B) (1970) *with* P.R. LAWS ANN. tit. 24, § 2512(a)(4) (Supp. 1974–75) *and* UTAH CODE ANN. §§ 58–37–13(1)(e)(i)–(iii) (1974).

harsh penalty of forfeiture against an innocent party's property.[96] Under *Calero-Toledo* reasoning, the Uniform Controlled Substances Act will "further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." [97] The inclusion or exclusion of innocent parties has not been held a direct constitutional impediment to the enforcement of forfeiture statutes.[98]

The Utah Supreme Court, in formulating a workable legal standard within the general guidelines it has set down, may either invalidate the exceptions as the United States Supreme Court tacitly did in *Calero-Toledo,* or extend constitutional protection to forfeiture proceedings where the exceptions imply the requirement of criminal conduct as in *Coin & Currency.*[99]

IV

Despite the court's difficulties in formulating a legal standard for forfeiture, the *Porsche* decision reached a result that limits the imposition of forfeiture as a "penalty" for simple possession of marijuana.[100] Instead

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[96] Although the Utah Legislature did not directly deal with the due process issue created by the forfeiture provision, other courts have recognized that the purposes of the statute are not fulfilled by forfeiting the property of innocent parties. *See, e.g.,* State v. One (1) Certain 1969 Ford Van, 191 N.W.2d 662, 666 (Iowa 1971).

[97] 416 U.S. at 686. There have been a few successful attacks on the constitutionality of forfeiture statutes. *E.g.,* United States v. United States Coin & Currency, 401 U.S. 715 (1971) (privilege against self-incrimination); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (search and seizure); One 1970 Chevrolet Motor Vehicle v. County of Nye, 518 P.2d 38, 39 (Nev. 1974) (search and seizure) (dictum). *Cf.* DiGiacomo v. United States, 346 F. Supp. 1009, 1011 & n.6 (D. Del. 1972). *But see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (due process); One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 235–36 (1972) (double jeopardy); Van Oster v. Kansas, 272 U.S. 465 (1926) (equal protection). For a discussion of several possible constitutional grounds of attack on forfeiture statutes, see Comment, *Marihuana: The Legislative Cauldron, A Pot Full of Trouble,* 1 SETON HALL L. REV. 41, 47–57 (1970).

[98] *See, e.g.,* People v. One 1964 Chevrolet Corvette Convertible, 274 Cal. App. 2d 720, 725, 79 Cal. Rptr. 447, 451 (Ct. App. 1969).

[99] *See, e.g.,* United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558, 567–68 (E.D. La. 1974). *Cf.* United States v. One 1967 Porsche, 492 F.2d 893 (9th Cir. 1974). *But see* Bramble v. Richardson, 498 F.2d 968, 973 (10th Cir. 1974).

[100] Although the purpose of the UCSA is to control the "transportation, sale, receipt, possession, or concealment" of all controlled substances, reliance upon marijuana offenses is undermining the objective of the forfeiture statute. Of the fifty-one vehicles forfeited under the UCSA, only eight have involved a controlled substance other than marijuana. The following breakdown illustrates how the forfeiture provision has been implemented to control the flow of controlled substances:

(a) Salt Lake County: fourteen forfeitures for marijuana offenses, three forfeitures for amphetamine offenses, two forfeitures for methamphetamine offenses, and two forfeitures for LSD offenses.

(b) Grand County: seventeen forfeitures for marijuana offenses.

(c) Davis County: five forfeitures for marijuana offenses, one forfeiture where drug not indicated.

(d) Box Elder County: one forfeiture for an LSD offense.

(e) Iron County, Wasatch County, Utah County, Sanpete County, San Juan County, Weber County: one forfeiture in each county for marijuana offenses.

Cases listed on State Dep't of Finance, Report of Vehicles Forfeited Under the Controlled Substances Act, October, 1974. It appears that the forfeiture statute is not

of deferring to a legislative policy which some courts have criticized,[101] the court imposed a judicial standard upon forfeiture that requires a reasonable relation to exist before forfeiture will be justified. The court, however, may have difficulty in formulating its reasonable relation standard in light of the continued vitality of deodand-type forfeiture doctrines enunciated in *Calero-Toledo*. *Calero-Toledo,* however, may be distinguished from *Porsche* as a preseizure notice and hearing case that did not challenge the inherent validity of forfeiture statutes either on their face or as applied. The Utah Supreme Court's narrow interpretation of the forfeiture statute may also be a distinction that allows the court to require a higher standard for forfeiture without directly challenging the legislative judgment to proscribe "possession" or without contradicting the long development of common law forfeiture doctrines.

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fulfilling its purpose to control drug trafficking, but in most cases is used to forfeit a conveyance for a marijuana offense.

[101] *See, e.g.,* One 1958 Plymouth Sedan v. United States, 380 U.S. 693, 700–02 (1965); Kutner Buick, Inc. v. Strelecki, 111 N.J. Super. 89, 99, 267 A.2d 549, 556 (1970). The implementation of the forfeiture provision may also be criticized because of its two potential abuses: (a) The county attorney may use forfeiture of the car in the civil action as a plea bargaining device to strengthen a weak criminal case. Bown Interview, *supra* note 54; Snow Interview, *supra* note 61. (b) There may be unwarranted delay in disposition of the conveyance, thereby depriving an individual of his vehicle for an extended period of time without compensation. The average time between seizure and forfeiture under the UCSA is four and one-half months in Salt Lake County, three months in Davis County, and three and one-half months in Grand County. Cases listed on State Dep't of Finance, Report of Vehicles Forfeited Under the Controlled Substances Act, October, 1974. This may not be an unreasonable length of time in Utah, but in larger states unwarranted delays are a basic reason for legislative exemption of forfeiture for marijuana possession offenses. *See* NEW YORK STATE REPORT, *supra* note 67, at 74. In the *Porsche* case, however, the Porsche was in the state's custody from March 19, 1973 until some time after September 18, 1974, when the Utah Supreme Court handed down its decision. Loss of the vehicle for this extended period of time penalizes the individual by depriving him of his property.

Cattle Feeders Tax Committee v. Shultz: The Tenth Circuit Refuses to Bypass the Anti-Injunction Act in the Prepaid Feed Controversy

Plaintiffs, two organizations that solicit investments from the public to be used in the purchase of cattle and feed,[1] brought an action to enjoin United States Treasury officials from enforcing Revenue Ruling 73–530 and to obtain a judgment declaring the ruling invalid. Revenue Ruling 73–530 affects farmers [2] who file income tax returns on a cash receipts and disbursements basis and deduct as an ordinary business expense the cost of livestock feed consumed in years other than the taxable year.[3] The trial court permanently enjoined enforcement of the ruling,[4] but the Tenth Circuit, in *Cattle Feeders Tax Committee v. Shultz,*[5] held that since no special circumstances prevented application of the Anti-Injunction Act, the plaintiffs were barred from suing to protect the interests of the investing public.[6]

I

A. The Anti-Injunction Act

The Anti-Injunction Act provides:

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[1] Cattle Feeders Tax Committee, an unincorporated association whose members sponsor and form limited partnerships, and Western Heritage Land & Cattle Co., a partnership doing business in Oklahoma as the sponsor and general partner of limited partnerships, are engaged principally in purchasing, grazing, feeding, and marketing cattle.

[2] An investor in a partnership that raises cattle may be engaged in "the business of farming." Treas. Reg. § 1.175–3 (1957). Partnerships or corporations may be "farmers" for taxation purposes. Treas. Reg. § 1.161–4(d) (1957). The taxpaying "farmer" has the option of using either the cash or accrual basis as a method of accounting. Treas. Reg. § 1.471–6(a) (1958). In Hi-Plains Enterprises, Inc. v. Commissioner, 496 F.2d 520 (10th Cir. 1974), a Kansas corporation engaged in the business of feeding cattle for market filed its income tax return on a cash method of accounting. The Commissioner concluded that the taxpayer was not a "farmer" and that its business income should be determined on an accrual basis. The court, however, held that a corporate taxpayer operating feed lots on its lands for its cattle and for the cattle of those customers who utilized the taxpayer's services and feed lots to fatten cattle was a "farmer" for income tax accounting purposes and was entitled to file its income tax return on a cash method of accounting. *See* Tim W. Lillie, 45 T.C. 54 (1965).

[3] Cattle feed is generally purchased in the late months of the year but not used until the following taxable year. There is no income during the year in which the purchases are made, but investors who use the cash basis method of accounting can deduct, as an expense, the full amount of their proportionate share of the feed costs when paid. Cattle Feeders Tax Comm. v. Shultz, 504 F.2d 462, 463 (10th Cir. 1974).

[4] The district court

> found that the income distortion test provision of Rev. Rul. 73-530 may reasonably be expected to result in disallowance of income tax deductions for prepaid feed to be used by farmers, resulting in a destruction of the incentive for investment in the cattle-feeding industry, thereby causing irreparable injury to the appellees' businesses by depriving them of investment capital.

504 F.2d at 463–64. After an evidentiary hearing on a application for a temporary injunction, the district court found that the government could not ultimately prevail and issued a permanent injunction.

[5] 504 F.2d 462 (10th Cir. 1974).

[6] *Id.* at 463.

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.[7]

The Act's purpose is to prevent courts from interfering with the tax collection process upon which the government depends "and to require that the legal right to the disputed sums be determined in a suit for refund."[8] In the years immediately following passage of the Act, some courts applied it literally,[9] relying primarily upon the theory that other adequate remedies were available to the taxpayer.[10] For example, the taxpayer could either challenge the tax assessment in the tax court or pay the tax and sue for a refund.

Not all courts, however, have applied a strict construction of the Anti-Injunction Act. In *Concentrate Manufacturing Corp. v. Higgins*,[11] for example, the court stated that the statute might be bypassed if the taxpayer were "put to the direst necessity and [could] make out a case of gross and indisputable oppression without adequate remedy at law." [12] Under this theory, exceptions have evolved allowing the grant of an injunction if special and extraordinary circumstances can be shown.[13] In *Miller v. Standard Nut Margarine Co.*,[14] for example, the plaintiff sought to enjoin the assessment of an excise tax on his margarine. Plaintiff claimed that if it were compelled to pay and then sue for a refund it would be financially ruined, because the tax per pound of margarine was more than

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[7] INT. REV. CODE OF 1954, § 7421(a).

[8] Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962). *See also* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932); State R.R. Tax Cases, 92 U.S. 575, 613 (1875); Cadwalader v. Sturgess, 297 F. 73, 75 (3d Cir. 1924). In discussing the Anti-Injunction Act, one commentator noted that before its passage the courts applied the traditional equitable standards for granting injunctive relief in tax suits: threatened irreparable injury to the plaintiff caused by a wrongful act of the defendant and the lack of an adequate legal remedy, noting that "[i]n the absence of any pertinent legislative history, it is impossible to determine with certainty the congressional intent behind the 1867 statute. However, the courts sensibly have inferred that Congress wished to assure a steady flow of tax revenue and to prevent recalcitrant taxpayers from crippling the operations of government." 62 GEO. L.J. 1019, 1022 (1974).

[9] *See* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 511 (1932) (Stone, J., dissenting).

[10] Cadwalader v. Sturgess, 297 F. 73, 75 (3d Cir. 1924).

[11] 90 F.2d 439 (2d Cir. 1937).

[12] *Id.* at 441.

[13] *See* Dodge v. Brady, 240 U.S. 122 (1916); Dodge v. Osborn, 240 U.S. 118 (1916). Five basic categories for bypassing the statute were developed by the courts under the special and extraordinary circumstances rule: (1) suits to enjoin collection of taxes which were not due from the plaintiff but which were due from others, *e.g.*, Raffaele v. Granger, 196 F.2d 620 (3d Cir. 1952); (2) cases in which the plaintiff proved that the taxes sought to be collected were "probably" not validly due, *e.g.*, Midwest Haulers, Inc. v. Brady, 128 F.2d 496 (6th Cir. 1942); (3) cases in which the tax was shown to be a penalty, *e.g.*, Lipke v. Lederer, 259 U.S. 557 (1922); Hill v. Wallace, 259 U.S. 44 (1922); (4) cases based on tax assessment fradulently obtained through the tax collector's use of coercion, *e.g.*, Mitsukiyo Yoshimura v. Alsup, 167 F.2d 104 (9th Cir. 1948); and (5) cases in which it was definitely shown that it was not proper to levy the tax on the commodity in question, *e.g.*, Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932).

[14] 284 U.S. 498 (1932).

three times the net profit per pound before taxes.[15] The Supreme Court affirmed the injunction decree because the plaintiff had established, in addition to the illegality of the tax, the existence of "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence." [16] Proof of certain financial ruin if the tax were collected, in conjunction with the absence of an adequate remedy at law, was sufficient to satisfy the extraordinary circumstances requirement.[17]

For thirty years, *Standard Nut Margarine* served as a basis for decisions in taxpayer suits seeking injunctive relief.[18] In 1962, however, the Supreme Court, while purporting to follow *Standard Nut Margarine,* established far more stringent standards for granting an injunction in tax cases. In *Enochs v. Williams Packing & Navigation Co.*,[19] a corporation, seeking to enjoin the collection of social security and unemployment taxes, attempted to establish a basis for equitable jurisdiction by claiming that it would be thrown into bankruptcy if required to pay the entire assessment. The Court found that the Anti-Injunction Act, section 7421(a), was applicable,[20] and concluded that to successfully restrain assessment or collection of federal taxes the plaintiff must show, not only the existence of equity jurisdiction, but also that under no circumstances could the government ultimately prevail.[21] Explaining how this requirement was to be met, the Court said:

> [W]hether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. *Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained.* Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than good faith on the part of the Government would unduly interfere with . . . [the] objective of the Act.[22]

Since *Williams Packing,* taxpayers have had greater difficulty establishing grounds for injunctive or declaratory relief from tax assessments or

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[15] *Id.* at 505.

[16] *Id.* at 509.

[17] *Id.* at 510–11. Discussing the enforcement of the tax, the Court said:

> It requires no elaboration of the facts found to show that the enforcement of the [Oleomargarine] Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, § 3224 [the predecessor of § 7421] does not apply.

Id.

[18] *See, e.g.,* Smith v. Flinn, 261 F.2d 781, 784 (8th Cir. 1958); Sturgeon v. Schuster, 158 F.2d 811, 813 (10th Cir. 1947); Midwest Haulers, Inc. v. Brady, 128 F.2d 496, 499 (6th Cir. 1942); Bushmiaer v. United States, 146 F. Supp. 329, 331 (W. D. Ark. 1956).

[19] 370 U.S. 1 (1962).

[20] The only remaining remedy for the corporation, therefore, would be to pay the assessment for a calendar quarter and then sue to obtain a refund. *Id.* at 5.

[21] *Id.* at 7.

[22] *Id.* at 7–8 (emphasis added).

collections.[23] Two recent Supreme Court decisions illustrate the taxpayer's problem in attempting to meet the requirements of *Williams Packing*. In both *Bob Jones University v. Simon* [24] and *Alexander v. "Americans United," Inc.* [25] the Internal Revenue Service had revoked plaintiffs' tax exempt status. In both cases, the Court found that, although irreparable injury might result to the organizations through their loss of contributions while they awaited an adequate remedy at law,[26] the degree of harm was not a factor in determining whether the Act applied.[27] Since the plaintiffs failed to show with sufficient certainty that the government could not prevail, the *Williams Packing* requirement had not been met and the Act applied to prevent the issuance of an injunction.[28]

Williams Packing thus established two requirements that the taxpayer must meet in order to enjoin the Commissioner from assessing or collecting a tax: the taxpayer must produce convincing evidence of irreparable injury [29] and he must show that the government has no chance of prevailing on the merits.

B. The Validity of Revenue Ruling 73–530

Revenue Ruling 73–530 [30] requires a cash basis taxpayer to meet three tests before he is allowed an immediate deduction for prepaid

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[23] *See, e.g.,* Wahler v. Church, 260 F. Supp. 307 (E.D.N.Y. 1966); Liguori v. United States, 246 F. Supp. 530 (E.D.N.Y. 1965; Mulcahy v. United States, 237 F. Supp. 656 (S.D. Tex. 1964).

[24] 416 U.S. 725 (1974). Bob Jones University, a private institution, was notified by the Internal Revenue Service that its exempt status under section 501(c)(3) was being revoked because of its racially discriminatory admission practices. *Id.* at 735.

[25] 416 U.S. 752 (1974). The IRS revoked the tax exempt status of "Americans United" on the grounds that it had violated the lobbying proscriptions of INT. REV. CODE OF 1954, §§ 501(c)(3), 170(c)(2)(D). *Id.* at 755.

[26] In *Bob Jones,* the Court discussed the legal remedies:

> This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different. If, as alleged in its complaint, petitioner will have taxable income upon the withdrawal of its § 501(c)(3) status, it may in accordance with prescribed procedures petition the Tax Court to review the assessment of income taxes. Alternatively, petitioner may pay income taxes, or in their absence, an installment of FICA or FUTA taxes, exhaust the Service's internal refund procedures, and then bring suit for a refund. These review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status and withdrawal of assurance of deductibility.

416 U.S. at 746.

[27] *Id.* Alexander v. "Americans United," Inc., 416 U.S. 752, 762 (1974).

[28] In *Bob Jones,* the Court referred to the *Williams Packing* decision as the

> capstone to judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose.

416 U.S. at 742.

[29] It is difficult to harmonize this requirement with the Court's conclusion in *Bob Jones* that degree of harm is not a factor in determining the Act's applicabiliy. In essence, the Court's conclusion makes the first requirement of *Williams Packing* meaningless and places all the weight on the second criterion. *See* text accompanying notes 59–60 *infra.*

[30] Rev. Rul. 73–530 was originally issued as TIR–1261 and was set for publication in 1973 INT. REV. BULL. No. 49. On Dec. 3, 1973, in TIR–1266, the Treasury an-

cattle feed. First, the expenditure must be a payment for the purchase of feed and not a deposit; second, the prepayment must be made for a business purpose and not merely for tax avoidance; and third, the deduction must not result in a material distortion of income. The ruling provides that even if the first two requirements are met, failure to satisfy the no "material distortion of income" test will limit the deduction to the taxable year in which the feed is consumed.

Although farmers can choose either the cash or accrual method of accounting,[31] most elect the cash method.[32] As a rule, the cash basis taxpayer deducts expenditures in the taxable year in which they are actually made.[33] If an expenditure creates an asset with a useful life extending substantially beyond the end of the taxable year, however, the taxpayer may not fully deduct the expenditure during the year when made.[34] For example, the cash basis taxpayer will be required to allocate insurance expense where the insurance coverage is for more than one year.[35]

Although farmers are generally subject to the same rules as other taxpayers, Congress has granted them some preferential tax treatment.[36] For instance, farmers are allowed to deduct certain expenditures that other taxpayers would be required to capitalize.[37] Despite the fact that the Treasury apparently permits this tax benefit with respect to prepaid feed

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nounced that because of the suit filed in the Oklahoma District Court, publication of the Ruling in the Bulletin was being delayed. TIR–1266 stated, however, that despite the delay the IRS would continue to maintain its interpretation of the law as set forth in the ruling.

[31] INT. REV. CODE OF 1954, § 446(c).

[32] Farmers often elect the cash basis because (1) it usually permits greater latitude in deferring tax liability, (2) it is more simple than the accrual method, and (3) tax liability is incurred at the time that the taxpayer is selling his product so that he has cash with which to pay taxes. Since the farmer normally has to pay a large percentage of his cash receipts for inventory, the accrual method would present a cash flow problem to the small farmer or rancher.

[33] Treas. Reg. § 1.446–1(c)(1)(i) (1957).

[34] Treas. Reg. § 1.446–1(a)(1) (1957).

[35] In Commissioner v. Boylston Market Ass'n, 131 F.2d 966 (1st Cir. 1942), the court concluded that an expenditure for fire insurance policies covering three or more years could not be fully deducted in the year in which the payment was made, even though the taxpayer kept his books on a cash receipts and disbursements method. The payments had to be prorated because the life of the asset extended beyond the taxable year.

[36] For example, INT. REV. CODE OF 1954, § 175 allows a farmer to deduct soil or water conservation expenses which do not give rise to a deduction for depreciation and which are not otherwise deductible. The amount of the deduction is limited to twenty-five percent of the taxpayer's annual gross income from farming. Any excess may be carried over and deducted in succeeding taxable years. The method described in section 175 is available only to a taxpayer who is engaged in "the business of farming." Special inventory methods may also be available to the farmer on the accrual basis of accounting. Treas. Reg. § 1.471–6(a) (1958).

[37] For example, fertilizer costs, where the benefit of the fertilizer will last substantially more than one year, would ordinarily be capitalized but a special election allows the farmer to treat such costs as currently deductible expenses. INT. REV. CODE OF 1954, § 180.

expenses,[38] cash basis farmers have encountered problems in taking immediate deductions for prepaid feed. The question of the proper tax treatment of prepaid feed expenditures first arose in 1943, when the Deputy Commissioner stated:

> In the case of a taxpayer on the cash receipts and disbursements basis, the amounts expended for feed should be deducted as an expense in the year in which the feed is paid for, irrespective of the fact that it may not be consumed until the following year.[39]

Despite this pronouncement, when certain cash basis poultry raisers attemped to deduct prepaid feed expenditures in the year when made, the IRS opposed the deduction. In *Ernst v. Commissioner,*[40] the taxpayer had made payments in December of each of the taxable years to a grain dealer who thus became obligated to deliver feed during the succeeding months according to the taxpayer's needs. The IRS apparently believed that the practice of deducting feed expenditures in advance of consumption created a tax loophole and challenged the deduction. The Tax Court ruled in favor of the taxpayer even though, at the time the deduction was taken, the seller did not have the feed on hand, the price for the feed had not yet been fixed, the seller did not request or require advance payments, and the taxpayer had not yet acquired the poultry.[41] In disposing of the Commissioner's contention that the deduction permitted the taxpayer to "distort income," the court said:

> In our opinion the allowance of the deductions taken by petitioner in the taxable years would more clearly reflect his income than their disallowance, and no provision of [section 461] justifies [the government] in disallowing such deductions.[42]

A similar situation arose with regard to deductions of prepaid cattle feed expenses in *Cravens v. Commissioner,*[43] where the Tenth Circuit reversed the Tax Court's finding that the taxpayer's payments were a deposit rather than a payment for purchase. The court held that, since there was a binding contract for the delivery of feed, the danger of a feed shortage indicated a valid business purpose for the advance payment, the taxpayer would be allowed to deduct the feed expense when paid.[44] In *Cravens,* the Tenth Circuit set out the basic guidelines for the deducti-

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[38] Treas. Reg. § 1.162–12(a) (1958) provides that "[t]he purchase of feed and other costs connected with raising livestock may be treated as expense deductions insofar as such costs represent actual outlay."

[39] Letter Ruling, T. Mooney, Deputy Comm'r, Dec. 16, 1943 (published in full at 66,149 P–H FED. TAX SERV., 1944).

[40] 32 T.C. 181 (1959).

[41] *Id.* at 183–85.

[42] *Id.* at 186–87. Section 461, formerly INT. REV. CODE OF 1939, § 43, provides that "[t]he amount of any deduction . . . shall be taken for the taxable year which is the proper taxable year under the method of accounting used in computing taxable income."

[43] 272 F.2d 895 (10th Cir. 1959), *rev'g* R.D. Cravens, 30 T.C. 903 (1958).

[44] *Id.* at 899.

bility of prepaid feed: (1) there must be a "business purpose" for the purchase; (2) the payment must constitute a "business expense;" and (3) the payment must be pursuant to a binding contract for delivery of feed and not a mere "deposit." [45] Responding to the Commissioner's argument that the deduction for prepaid feed distorts income, the *Cravens* court cited *Security Flour Mills Co. v. Commissioner* [46] to support the idea that cash receipts and cash payments

> should not be taken out of the annual accounting system and, for the benefit of the Government or the taxpayer, treated on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or to the taxpayer.[47]

Finally, the court noted that if each prepaid feed transaction were analyzed to determine whether the deduction would result in a distortion of income, section 461 would be "given a meaning which Congress did not intend."[48]

Most cases have followed the approach of *Ernst* and *Cravens* by permitting deductions regardless of the possible "distortive" effect upon income if the taxpayer can demonstrate that his payment was made pursuant to a binding contract.[49] In Revenue Ruling 73–530, however, the IRS has attempted to engraft two new tests onto the *Ernst* and *Cravens* rule: a business purpose test and a material distortion of income test.[50] In light of past decisions rejecting the Commissioner's use of these two tests, the validity of Revenue Ruling 73–530 is suspect.

II

The Tenth Circuit's decision in *Cattle Feeders* does not reflect the current controversy over prepaid feed. The court refused to examine the validity of the revenue ruling, and relied instead upon the interpretation of the Anti-Injunction Act developed in *Williams Packing, "Americans United"*, and *Bob Jones University*. Plaintiffs attempted to satisfy the dual criteria of *Williams Packing* by arguing first that they would be irreparably injured by the ruling with no adequate remedy at law, because the disallowance of income tax deductions for prepaid feed would destroy the incentive for investment in the cattle feeding industry so

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[45] *Id.* at 898–99.

[46] 321 U.S. 281 (1944).

[47] 272 F.2d at 900.

[48] *Id.* at 901.

[49] *See, e.g.*, Shippy v. United States, 308 F.2d 743 (8th Cir. 1962) (prepaid feed expense disallowed); Tim W. Lillie, 45 T.C. 54 (1965), *aff'd per curiam*, 370 F.2d 562 (9th Cir. 1966) (Tax Court disallowed the prepaid feed deduction on the grounds that it included a prepayment for future services and that substantial refunds were made).

[50] Klein, *Treasury's Prepaid Feed Ruling: Tough New Tests and Retroactivity Raise Questions*, 40 J. TAX. 96 (1974).

that they would be deprived of investment capital.[51] Second, they claimed that, in light of Income Tax Regulation section 1.471–6(a), which permits the farmer to decide whether to use the cash or inventory method of accounting, and Income Tax Regulation section 1.162–12(a), which provides that the "purchase of feed and other costs connected with raising livestock may be treated as expense deductions insofar as such costs represent actual outlay," [52] the government could not prevail on the merits.

The court concluded, however, that plaintiffs had not met either of the *Williams Packing* standards.[53] Addressing the second criterion first, the court reasoned that even though the farmer may decide which type of accounting method to use and may compute taxable income under the method he regularly uses in computing his income,[54] sections 446(b) and 471 require that the computation be made on a basis which clearly reflects income.[55] Furthermore, the court stated that sections 446 and 461(a) appeared implicitly to permit the Commissioner to adjust a taxpayer's method of computing income so that it would clearly reflect income.[56] In light of these provisions, the court concluded that it could not hold that the Commissioner's action in promulgating the revenue ruling was "plainly without any legal basis or that it [the government] cannot ultimately prevail under any circumstances." [57] The court summarily dismissed plaintiffs' irreparable injury argument, reasoning that degree of harm is not a factor in determining the applicability of the Anti-Injunction Act and that, in any event, an investor in plaintiffs' businesses could litigate the validity of the ruling in the Tax Court after assessment, or in a suit for refund in the district court.[58]

III

The Tenth Circuit's refusal to grant an injunction in *Cattle Feeders* is in line with the current reluctance of the Supreme Court as expressed in *"Americans United"* and *Bob Jones University* to grant injunctive relief in tax cases. It is possible, however, especially in light of past deci-

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[51] Cattle Feeders Tax Comm. v. Shultz, 504 F.2d 462 (10th Cir. 1974).

[53] *Id.* at 464.

[55] *Id.* at 465.

[54] *Id.* at 465–66; INT. REV. CODE OF 1954, § 446(a).

[55] INT. REV. CODE OF 1954, § 446(b) provides that "if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income." Section 471 provides:

> Whenever in the opinion of the Secretary or his delegate the use of inventories is necessary in order to clearly determine the income of any taxpayer, inventories shall be taken by such taxpayer on such basis as the Secretary or his delegate may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

Id. § 471.

[56] 504 F.2d at 465–66.

[57] *Id.* at 466.

[58] *Id.*

sions on deductibility of prepaid feed expenses, that the court could have bypassed the Anti-Injunction Act by adhering to the *Williams Packing* rule. The court could have reasoned that: (1) to disallow a farmer's income tax deductions for prepaid feed expenses would seriously discourage investment in the cattle feeding industry and cause irreparable injury to the parties for which no adequate remedy at law existed; and (2) in light of past cases on prepaid feed deductions, the government could not have prevailed in enforcing Revenue Ruling 73–530. By so reasoning, the court could have held the Anti-Injunction Act inapplicable.

A. The Williams Packing Criteria

The two requirements of *Williams Packing* are difficult for the taxpayer to meet, particularly when the court, as in *Cattle Feeders,* is unwilling to admit that the taxpayer's case fulfills the easier of the two requirements—irreparable injury with no adequate remedy at law. In *Cattle Feeders,* the trial court held that plaintiffs were threatened with irreparable harm, but the Tenth Circuit, stating that harm was not a factor in determining the application of the Anti-Injunction Act,[59] gave little weight to the trial court's determination.

Under *Williams Packing,* the degree of harm to the taxpayer is a crucial factor in establishing equity jurisdiction. In *Cattle Feeders,* the plaintiffs faced an IRS ruling that could have brought about financial ruin for their businesses. Because they were forced to pursue their legal remedies by litigating the assessment in the Tax Court or suing for a refund in the district court, the plaintiffs were faced with severe investment losses. Moreover, even without a tax assessment, the chilling effect of the Commissioner's ruling could be devastating to the taxpayers' businesses; an investor seeking tax sheltered investments would be reluctant to choose cattle feeding unless he was willing to litigate the prepaid feed issue.[60] The Tenth Circuit's failure to evaluate these considerations eliminated the first criterion of *Williams Packing* for all practical purposes, so that *Cattle Feeders* stands for the proposition that no amount or kind of harm to a taxpayer will be sufficient to invoke equity jurisdiction.

The second criterion of *Williams Packing*—that the parties show that the government cannot ultimately prevail—is nearly impossible to satisfy, particularly if it is interpreted strictly. Strict interpretation and literal application of the Anti-Injunction Act means that no injunctive relief will ever be granted in taxpayer suits. This interpretation clearly departs from previous judicial treatment of the Act. *Williams Packing* itself supports

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[59] *Id.; see* text accompanying notes 27–29 *supra.*

[60] Farming and ranching operations offer opportunities for a tax sheltered investment because of the special accounting methods which farmers may use and the favorable capital gains treatment for which they may qualify. The maximum benefits of such an investment will usually accrue to the individual taxpayer who has substantial nonfarm sources of income, putting him in a high tax bracket. He can benefit both by deferring his tax liability and by taking advantage of capital gains rates or tax credits. See Allington, *Farming as a Tax Shelter,* 14 S.D.L. REV. 181 (1969).

the proposition that injunctions may issue in certain circumstances.[61] Criticizing strict interpretation of this criterion, one commentator stated that "[t]he standard thus adopted is more appropriate to summary judgment than to injunctive relief and misreads the clear intention of the *Nut Margarine* decision to allow the courts to exercise equity jurisdiction." [62] It is illogical for courts to acknowledge a special circumstances rule and then make the benefits of the rule completely unavailable.

Assuming that the courts will not make the *Williams Packing* criteria impossible to meet, *Cattle Feeders* raises the question whether the government could have prevailed in enforcing Revenue Ruling 73–530. If the court had interpreted the ruling in light of previous decisions on prepaid feed, it could easily have concluded that the plaintiffs had fulfilled the three criteria of 73–530. The first requirement—that the prepaid expense must be a payment rather than a mere deposit—was easily met by the plaintiffs. Although the business purpose test may have been more difficult to meet, previous applications of this test have given businessmen a great deal of leeway. The final requirement of "no material distortion of income" could also have been satisfied; courts have previously held that farmers do not materially distort their income by deducting prepaid feed, and since the plaintiffs are "farmers" they comply with the third requirement of the ruling.

The court, could have thus concluded that in light of past decisions such as *Ernst* and *Cravens,* the government could not have prevailed in enforcing Revenue Ruling 73–530 against the plaintiffs. The conclusion that the government might prevail, since the Commissioner has the discretion to require a change in accounting methods which more clearly "reflects income," leaves the door open for IRS interpretations which are contrary to past precedent in the prepaid feed area.

B. The Business Purpose and "No Material Distortion of Income" Tests of Revenue Ruling 73–530

1. The Business Purpose Test—Although *Ernst* and *Cravens* indicated that the farmer's prepaid feed expense must have a valid business purpose, courts have deferred to the taxpayer's business judgment as long as the expenditure is "appropriate and helpful to the taxpayer's business." [63] Protection against feed shortages and price hikes, for example, has been held to be a sufficient business purpose to permit advance deductibility, even when tax saving motives may have influenced the taxpayer's feed purchases.[64]

The business purpose test of Revenue Ruling 73–530 [65] is more stringent than that previously applied by courts in prepaid feed cases and,

[61] See text accompanying notes 19–29 *supra.*

[62] 40 BROOKLYN L. REV. 489, 505 (1973).

[63] Cravens v. Commissioner, 272 F.2d 895, 899 (10th Cir. 1959).

[64] Mann v. Commissioner, 483 F.2d 673, 680 (8th Cir. 1973).

[65] One part of Rev. Rul. 73–530 which conforms with *Ernst* and *Cravens* provides that there is a "business purpose" if there is a reasonable expectation by the taxpayer

as a result, could restrict cattle feeding investment. By requiring that a prepayment "must be made for a valid business purpose and not merely for tax avoidance," the ruling undermines the position that "tax motive is unimportant if [the] taxpayer does that which the law permits." [66] The business purpose test could prove difficult to meet in cases similar to *Cattle Feeders,* where the tax aspects of the investment are significant. As one commentator has remarked:

> [T]he business purpose test will have its principal adverse effect on the publicly syndicated cattle feeding limited partnerships . . . since the SEC prospectus or other offering circular will usually emphasize the anticipated tax shelter aspects of the investment.[67]

Furthermore, the frequently suggested motive of obtaining price protection may be held insufficient to establish a valid business purpose:

> [T]he Service might well attempt to use hindsight against the taxpayer in the event of a subsequent price decline, whereas the fact that prices subsequently rise is not necessarily conclusive of a business motivation for a prepayment at the time it is made.[68]

2. The "No Material Distortion of Income" Test—The most controversial aspect of 73–530 is its requirement that the deduction of prepaid feed expenses must not result in a material distortion of income. The ruling fails to define exactly what "material distortion of income" means,[69] but concludes that no distortion of income would result if the taxpayer deducted the expense when the livestock consumed the feed. This conclusion implies that deductions such as those used in *Cattle Feeders* do distort income.

Whether the taxpayer's deduction for prepaid feed, based upon the cash method of accounting, actually "distorts income" is questionable. Since the farmer-taxpayer is permitted by regulation to take the deduction when paid,[70] it seems inconsistent to conclude that by deducting such expenses, the taxpayer is "distorting income." Assuming, however, that the taxpayer's method of accounting is distortive of income and that the Commissioner has the discretion to change the method used, that

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of receiving some business benefit as a result of the payment. Examples of business benefits include fixing maximum prices, securing an assured feed supply, or securing preferential treatment in anticipation of feed shortages.

[66] Shippy v. United States, 308 F.2d 743, 747 (8th Cir. 1962). Other courts have quoted *Shippy* or have expressed a similar point of view. *See, e.g.,* Gregory v. Helvering, 293 U.S. 465, 469 (1935); Mann v. Commissioner, 483 F.2d 673, 680 (8th Cir. 1973); Cravens v. Commissioner, 272 F.2d 895, 898 (10th Cir. 1959); Diamond A Cattle Co. v. Commissioner, 233 F.2d 739, 742 (10th Cir. 1956).

[67] Klein, *supra* note 50, at 98.

[68] *Id.*

[69] Rev. Rul. 73–530 sets out certain factors to consider in deciding whether there is a "material distortion of income":

> [T]he customary business practice of the taxpayer in conducting his livestock operations, the amount of the expenditure in relation to past purchases, the time of the year the expenditure was made, and the materiality of the expenditure in relation to the taxpayer's income for the year.

[70] Treas. Reg. § 1.162–12 (1958).

discretion must be exercised reasonably. Under section 446(b), the Commissioner has the power to order a change in the method of accounting. As one commentator has pointed out, to disallow the deduction when paid and to allow it when the feed is consumed would not change the taxpayer's method of accounting:

> [T]he consequence prescribed by the Ruling for failure to meet the material-distortion-of-income test, i.e., deducting the particular feed purchase involved over the period in which it is consumed rather than the year in which paid, would not constitute a change of accounting method under any usual definition of that term.
>
> An accounting method . . . implies consistency of treatment of a particular item from year to year. The Ruling would not require that a taxpayer change his method of accounting for feed purchases from the cash method to a consumption method. It would merely require that a particular prepaid feed expenditure which does not pass all of the tests laid down by the Ruling be accounted for in a manner inconsistent with the taxpayer's established cash method.[71]

Thus, in disallowing the deduction when the expenses are paid and in allowing the deduction when the feed is consumed, the Commissioner actually imposes a new hybrid method of accounting on the taxpayer.[72] The Supreme Court strongly criticized this practice in *Security Flour Mills,* expressing the opinion that section 461 was not meant to give the Commissioner the discretion to require "a divided and inconsistent method of accounting not properly . . . denominated either a cash or an accrual system." [73]

Even if the Commissioner's proposed hybrid-cash-consumption method were acceptable on a theoretical level, when applied in this case it is no less distortive of income—assuming that "distortion" means a failure to match expenses against related income—than is the method which it supplants. To "clearly reflect income" the proposed method should match the feed expense with the sale of the livestock rather than with the consumption of the feed. Requiring an inventory of feed costs as part of the cost of livestock, however, would be contrary to Treasury Regulation section 1.471–6(a), which permits the farmer to use either an inventory or a cash method of accounting.[74] The ruling, therefore, is an attempt to "force an *ad hoc* treatment of a particular item in a manner inconsistent with a taxpayer's established accounting method—not impose an ac-

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[71] Klein, *supra* note 50, at 99.

[72] Pinney and Olsen refer to the method of accounting proposed by the Service as a "curious hybrid which is certainly a 'transactional' accounting method as opposed to any of the acceptable methods of accounting mentioned in the statutes or the regulations." Pinney & Olsen, *Farmers' Prepaid Feed Expenses,* 25 TAX LAW. 537, 548 (1972).

[73] 321 U.S. at 287.

[74] Treas. Reg. § 1.471–6(a) (1958) provides:
A farmer may make his return upon an inventory method instead of the cash receipts and disbursements method. It is optional with the taxpayer which of these methods of accounting is used . . . .

counting method change." [75] Because the courts have opposed such treatment,[76] it should have been questioned in *Cattle Feeders*.

Thus although Revenue Ruling 73–530 purports to solve what the IRS views as a problem of material distortion of income resulting from deductions of prepaid feed expenses, it is no solution at all. Case law in the area of prepaid feed indicates that the court could have granted an injunction in *Cattle Feeders* and still remained consistent with the *Williams Packing* criteria. By refusing to bypass the Anti-Injunction Act, the court has left standing a revenue ruling which could have serious repercussions in the cattle feeding industry.

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[75] Klein, *supra* note 50, at 99.

[76] Security Flour Mills Co. v. Commissioner, 321 U.S. 281, 287 (1944); Mann v. Commissioner, 483 F.2d 673, 681 (8th Cir. 1973); Cravens v. Commissioner, 272 F.2d 895, 900–01 (10th Cir. 1959).

A Review of Recent Utah Supreme Court Decisions

I. Civil Procedure

Pendent State Claims Must Accompany Federal Claims

In *Belliston v. Texaco, Inc.*,[1] a group of Texaco service station dealers sued Texaco, Inc. in state district court for price discrimination under the Utah Unfair Practices Act.[2] In an earlier federal court suit, plaintiffs had obtained substantial recovery on the trial level for Sherman and Robinson-Patman Act violations involving the same price discrimination claims asserted in the subsequent state suit. The Tenth Circuit, however, reversed the Sherman Act claim on the merits and the Robinson-Patman Act price discrimination claim for lack of jurisdiction.[3] In the state suit, the trial court granted summary judgment for defendant on the ground of res judicata. The Utah Supreme Court affirmed, holding that, despite the federal court's lack of jurisdiction, the federal price discrimination claim was "substantial" as defined in *United Mine Workers v. Gibbs*,[4] and that therefore the state claim arising from the same facts could have been raised and litigated in the federal court under the doctrine of pendent jurisdiction and the permissive joinder provisions of rule 18 of the Federal Rules of Civil Procedure.[5] The court held that because res judicata applies to issues that could have been litigated as well as to those actually adjudicated, plaintiffs were precluded from bringing their state claim.

The doctrine of res judicata, which bars relitigation of law suits that have been finally decided, is based on the policies of repose and judicial economy.[6] The general rule in the United States[7] and in Utah,[8] however,

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[1] 521 P.2d 379 (Utah 1974).

[2] Utah Code Ann. § 13–5–3 (1973).

[3] Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972).

[4] 383 U.S. 715 (1966). In *Gibbs*, the landmark case on pendent jurisdiction, the federal claim had failed on the merits, but the district court decided for the plaintiff on the pendent state claim. The Supreme Court upheld the district court's retention of jurisdiction of the state claim after dismissal of the federal claim, characterizing arguments that the state claim should have been dismissed with the federal as an "unnecessarily grudging" approach to the concept of federal judicial power. *Id.* at 725. The Supreme Court, however, reversed the state claim on the merits.

[5] Fed. R. Civ. P. 18(a) allows permissive joinder of any claims a plaintiff has against a defendant. The Utah Supreme Court did not cite rule 18 in its opinion, but it is nevertheless essential to the concept of pendent jurisdiction.

[6] *E.g.*, Schroeder v. 171.43 Acres of Land, 318 F.2d 311, 314 (8th Cir. 1963); Stella v. Graham-Paige Motors Corp., 259 F.2d 476, 481–82 (2d Cir. 1958).

[7] Costello v. United States, 365 U.S. 265, 285–88 (1961); Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968); Clegg v. United States, 112 F.2d 886 (10th Cir. 1940); *see* Fed. R. Civ. P. 41(b).

[8] McCarthy v. State, 1 Utah 2d 205, 265 P.2d 387 (1953); Hutton v. Dodge, 58 Utah 228, 198 P. 165 (1921) *see* Utah R. Civ. P. 41(b). Both *McCarthy* and *Hutton* explicitly state that a judgment becomes res judicata only when the court has acquired jurisdiction over the subject matter and the parties. 1 Utah 2d at 207, 265 P.2d at 389; 58 Utah at 234, 198 P. at 167. In *Hutton*, the court stated that the

is that a decision not based on the merits of a case is not res judicata except as to the issues actually decided. Pendent jurisdiction, based on considerations of judicial economy, convenience, and fairness to litigants,[9] allows a federal court to extend its jurisdiction from a federal claim to a state claim "arising from a common nucleus of operative fact."[10] Because the central question is jurisdiction over the alleged federal claim to which the state claim is pendent, it cannot "extend" such jurisdiction to the state claim.[11]

The *Belliston* decision is subject to criticism on several grounds. For example, the court erred in not considering the statement in *Gibbs,* the case it ostensibly relied on, that subject matter jurisdiction of the federal court over the federal claim is an essential element of pendent jurisdiction,[12] and that, even when the substantiality test is met, the doctrine of pendent federal jurisdiction is a matter of judicial discretion rather than of plaintiff's right.[13] Because, due to the lack of jurisdiction, the plaintiff in the federal court had no federal price discrimination claim, a state price discrimination claim could not have been pendent to it. It is true that because the federal district court erred in hearing the Robinson-Patman Act claim, it could conceivably have compounded its error by also hearing the state claim.[14] It is further possible that in the interests of judicial economy the Tenth Circuit might have upheld recovery on the state claim.[15] But a judicial mistake by the federal district court should not be seized upon to deny a plaintiff his day in court on a state claim.[16] By deciding *Belliston* as it did, the Utah Supreme Court has served notice

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doctrine is "so eminently logical and just, it is difficult to conceive how it can be seriously questioned." *Id* at 236, 198 P. at 168.

[9] United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Belliston v. Texaco, Inc., 521 P.2d 379, 381 (Utah 1974).

[10] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[11] Farrugia v. Askew, 371 F. Supp. 736, 740 (N.D. Fla. 1973); Forman v. Community Services, Inc., 366 F. Supp. 1117, 1132 (S.D.N.Y. 1973). *See* Kavit v. A. L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974); Almenares v. Wyman, 453 F.2d 1075, 1084 (2d Cir. 1971), *cert. denied,* 405 U.S. 944 (1972); Young v. Harder, 361 F. Supp. 64, 73–74 (D. Kan. 1973).

[12] "The federal claim must have substance sufficient to confer subject matter jurisdiction on the court." 383 U.S. at 725.

[13] *Id.* at 725–26.

[14] The Utah federal district court has allowed pendent state claims to accompany federal claims. In Anderson v. Reynolds, 342 F. Supp. 101 (D. Utah 1972), *aff'd,* 476 F.2d 665 (10th Cir. 1973), the court examined pendent state claims for false arrest and defamation in connection with a federal claim under the Civil Rights Act of 1871, even though the state claims had not been specifically pleaded.

[15] Although the Utah Supreme Court specifically declined to pursue the question, instead basing its holding on pendent jurisdiction grounds, it indicated that there was diversity of citizenship between the parties. Thus, there were possible jurisdictional grounds upon which to hear the state claim, if both the grounds and the claim had been pleaded. The failure of plaintiffs to plead and prove diversity was apparently the reason for the court's failure to pursue the question. The other possible ground for pendent jurisdiction was the Sherman Act violation claims. All agreed, however, that the Robinson-Patman Act price discrimination and the Sherman Act allegations did not derive from the same nucleus of operative fact.

[16] This is especially true when, as in this case, plaintiffs had once litigated and won on the merits on the same claim, but on appeal were denied recovery on jurisdictional grounds.

that, at least as to pendent state claims, the federal rule allowing permissive joinder of claims is now mandatory, even though the federal court has no jurisdiction over the primary claim.[17]

II. COMMERCIAL LAW

Sale on Approval and Article 9 Priority Problem

In *Valley Bank & Trust Co. v. Gerber*,[18] Jensen Interiors placed certain furnishings[19] in the Gerber's home "on approval."[20] The parties orally agreed that if the Gerbers approved the goods, they would pay approximately seven thousand dollars down and five thousand dollars in subsequent installments. One month later, the Gerbers pledged the furnishings as collateral for an eleven thousand dollar loan from South Davis Security Bank. The next day, South Davis Bank filed its security agreement with the Secretary of State[21] and the Gerbers made the seven thousand dollar down payment to Jensen Interiors. Three weeks later, in fulfillment of the installment agreement, the Gerbers granted Jensen Interiors a purchase money security interest in the furnishings for the amount of the unpaid balance. Jensen Interiors then, by a contract containing a "no encumbrance clause," assigned the installment agreement to Valley Bank. Shortly thereafter, the Gerbers defaulted on their payments to Valley Bank and filed for bankruptcy. Valley Bank then sued Jensen Interiors,[22] claiming that the prior perfected security interest held by South Davis Bank constituted a breach of the warranty against encumbrances. On appeal from the trial court's decision in favor of Valley Bank, the Utah Supreme Court affirmed, holding that Jensen Interiors had violated the warranty against encumbrances contained in the assignment contract.

Under the Utah Uniform Commercial Code, a security interest generally has priority over a conflicting security interest in the same collateral if it was perfected first.[23] An absolute prerequisite for perfection, how-

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[17] This is true for state claims subsequently brought in federal courts on diversity of citizenship grounds as well as actions brought in state courts because of the principle that federal courts will apply state law in deciding state claims.

[18] 526 P.2d 1121 (Utah 1974).

[19] Jensen Interiors delivered and installed furniture, custom carpeting, draperies, and wallpaper, valued at approximately twelve thousand dollars in the Gerber's home.

[20] Under UTAH CODE ANN. § 70A–2–326 (1968), "sales on approval" occur when goods may be returned by the buyer even though they conform to the contract.

[21] If a security interest has attached under UTAH CODE ANN. § 70A–9–204 (1968), the filing of a financing statement under *id.* § 70A–9–302 with the Secretary of State will perfect the interest for priority purposes. In addition, under *id.* § 70A–9–402(1), the security agreement may be filed in place of a financing statement if it contains the information required in a financing statement and is signed by both parties. Filing is not required for perfection, however, when, as Jensen Interiors did, the secured party obtains a purchase money security interest in consumer goods. *See id.* §§ 70A–9–107,–302(1)(d). A security interest, even if it is a purchase money security interest in consumer goods, does not become perfected until it attaches. *Id.* § 70A–9–303(1).

[22] Valley Bank also joined South Davis Security Bank and the Gerbers as defendants.

[23] UTAH CODE ANN. § 70A–9–312(5)(b) (1968). This section governs general priority problems in those cases in which both interests were not perfected by filing. If

ever, is that the security interest attach;[24] that is, there must be a security agreement, valuable consideration must be exchanged, and the debtor must have rights in the collateral.[25] At the time goods purchased "on approval" are accepted, the buyer has sufficient rights in the collateral to cause a security interest in the goods to attach, provided the other elements are present. The acceptance need not be express; it is implied if the buyer fails to notify the seller within a reasonable time of his election to return the goods.[26]

Because the Gerbers failed to "seasonably" return the goods to Jensen Interiors,[27] the *Gerber* court held that they had accepted the goods from Jensen Interiors prior to signing the security agreement with South Davis Bank. Nevertheless, because Jensen Interiors did not have a perfected security interest until it obtained a security agreement from the Gerbers, the court properly held that South Davis Bank's security interest had priority. Consequently, by assigning its junior security interest to Valley Bank, Jensen Interiors clearly violated the warranty against encumbrances.

The *Gerber* case clearly demonstrates what can happen to a business that fails to take proper precautions to perfect its security interests under article 9. In order to have protected itself as much as possible, Jensen Interiors, in making the "sale on approval," should have drafted and executed a security agreement at the time it gave the Gerbers possession of the consumer goods.[28] Then, when all the events necessary for attach-

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both interests are perfected by filing, the priorities are determined by the order of filing.

Furthermore, *id.* § 70A–9–302(1) provides that with specifically enumerated exceptions, a financing statement must be filed with the Secretary of State to perfect the security interest. A purchase money security interest in consumer goods constitutes such an exception. *Id.* § 70A–9–302(1) (d).

[24] *Id.* § 70A–9–303(1).

[25] *Id.* § 70A–9–204. If a sale has been consummated, the buyer has rights in the goods sufficient to permit attachment of the security interest. It is uncertain, however, whether possession with an option to buy—holding goods on approval—creates similar rights. *Cf.* Cain v. Country Club Delicatessen, Inc., 25 Conn. Supp. 327, 330, 203 A.2d 441, 444 (Super. Ct. 1964).

[26] Acceptance in sales "on approval" is defined in UTAH CODE ANN. § 70A–2–327(1)(b) (1968). See also *id.* § 70A–1–204 for a definition of "seasonably" as used in defining acceptance.

[27] The court stressed that many of the goods had been custom made and that the goods had been in the Gerbers' home for a month prior to the Gerbers' signing the South Davis Bank security agreement. 526 P.2d at 1125.

[28] UTAH CODE ANN. § 70A–9–107 (1968) provides that a security interest is a purchase money security interest if it is taken or retained by the seller of the collateral to secure all or part of its price. It is also clear that Jensen Interiors could have made the security agreement prior to attachment of the interest. *Id.* § 70A–9–204. Furthermore, Jensen Interiors could have filed notice of their agreement prior to the interest's attachment. *Id.* § 70A–9–303. Although this would have had no immediate effect upon perfection, it would have served as notice to future creditors of the debtor so that they would not accept the furnishings as collateral. On the other hand, Jensen Interiors need not have filed at all to perfect its purchase money security interest in the consumer goods. See *id.* § 70A–9–302(1) (d). Thus, South Davis Security Bank, in loaning on the security of the goods, ran the risk of taking a security interest junior to Jensen Interior's interest.

ment had occurred,[29] the security interest would have perfected automatically because a purchase money security interest in consumer goods need not be filed to be perfected.[30] Thus, when the buyer accepts the goods, as the buyers impliedly did in *Gerber* before the other security interest came into existence, the purchase money security interest will automatically perfect and will have priority over all subsequent interests in the goods.[31] Had this been done by Jensen Interiors, its security interest would have had priority and there would have been no encumbrances on the collateral when the installment agreement was later assigned.

Such a procedure is advisable for all merchants who make credit sales "on approval." Although sales "on approval" are designed to give the buyer greater discretion in accepting the goods, both buyer's and seller's interests may be protected by a properly drafted security agreement entered into before or at the time the buyer takes possession of the goods.

III. CONSTITUTIONAL LAW

A. The Constitutionality of the Utah Juvenile Certification Statute

In *In re Salas,*[32] the defendant appealed a juvenile court order certifying him to be tried as an adult in the district court on felony charges. On appeal, Salas argued that, because the Utah certification statute[33] provides no standards to guide the juvenile court judge in his decision whether to certify a juvenile to stand trial as an adult,[34] it is unconstitutionally vague. Salas also contended that the state had presented no "clear and convincing evidence" to support the certification order,[35] that he was not accorded the statutorily required "full investigation,"[36] and that the juvenile court judge's oral statement of the reasons for the certification

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[29] If the requirements of section 70A–9–204 are not met, the purchase money security interest does not attach and therefore cannot become a perfected interest. In *Gerber,* the most difficult problem is whether the debtor has sufficient rights in the property (when holding it prior to approval) to permit immediate attachment of the purchase money security interest upon delivery of the goods. This question, which has not been addressed by the courts or commentators, is crucial in sales "on approval." Consequently, while understandable, it is unfortunate that the Utah Supreme Court did not address the issue.

[30] See note 23 *supra.*

[31] Under UTAH CODE ANN. § 70A–9–312(4) (1968), a purchase money security interest in collateral other than inventory has priority over conflicting security interests if the interest was perfected at the time the debtor received possession of the collateral or within ten days thereafter.

[32] 520 P.2d 874 (Utah 1974).

[33] UTAH CODE ANN. § 55–10–86 (Supp. 1973).

[34] 520 P.2d at 875.

[35] Salas reasoned that implicit within the standard of "best interests of the child or public" is the need for proof by the state that rehabilitation could not be accomplished through juvenile facilities. Since Salas had never been placed in an industrial school, he argued that rehabilitative prognosis was limited. *Id.* at 876. Such reasoning is supported by *In re Whittington,* 17 Ohio App. 2d 164, 245 N.E.2d 364, 366, 372 (1969), *on remand from* 391 U.S. 341 (1968); and 16 D.C. CODE ANN. § 2316(d) (1973).

[36] The defendant argued that the testimony of probation workers and social workers given in the lower court evidenced a lack of familiarity with Salas personally, a heavy reliance upon the defendant's age, and uncertainty in concluding that the juvenile facilities would not be beneficial for the youthful offender. Brief for Appellant at 6–7, *In re* Salas, 520 P.2d 874 (Utah 1974).

did not sufficiently indicate that the statutory requirements had been met. The Utah Supreme Court held that the standard was sufficiently specific to guide a judge's discretion when considered in light of the Juvenile Court Act[37] and the broad range of factors to be considered in determining the "best interests" of a child or of society.[38] The court also held that the juvenile court's broad discretion should not be restricted by requiring the state to prove by "clear and convincing evidence" that the juvenile rehabilitation facilities were not capable of benefitting the juvenile,[39] and that an oral statement setting forth the "reasons and matters" the juvenile judge considered in making the discretionary determination "had sufficient specificity to permit meaningful review."[40]

In *Kent v. United States,*[41] the landmark case on juvenile certification, the United States Supreme Court upheld the constitutionality of the District of Columbia certification statute. In so doing, the Court pointed out that the statute provided no standards for deciding the waiver issue[42] and set out criteria which should be considered in a waiver proceeding.[43] Several state courts, both before and after *Kent,* have upheld the constitutionality of certification statutes similar to Utah's on the theory that it is impractical, undesirable, or impossible to lend greater guidance to the juvenile court's discretion in waiver proceedings.[44] Contrary to the Utah Supreme Court's handling of the issue, some courts, like *Kent,* have provided criteria for determining whether to waive jurisdiction.[45] The Michigan Supreme Court went even further and held a "best interest" certification statute unconstitutional because it lacked standards and thus constituted an improper delegation of legislative power to the juvenile court.[46]

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[37] UTAH CODE ANN. § 55–10–63 (Supp. 1973 declares that the purpose of the Act is to secure for each child such care and guidance to develop him into a "responsible citizen" and still protect society against juvenile violence. For an overview of the Act see Winters, *The Utah Juvenile Court Act of 1965,* 9 UTAH L. REV. 509 (1965).

[38] 520 P.2d at 875.

[39] *Id.* at 876. The court also feared that the "clear and convincing evidence" test disregards the Act's purpose of protecting society.

[40] *Id.*

[41] 383 U.S. 541 (1966).

[42]

> [The statute] states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the Juvenile Court's decision as to waiver.

Id. at 547.

[43] Some of the suggested criteria were the likelihood of rehabilitation, the nature of the offense, and the maturity of the individual. *Id.* at 567.

[44] People v. Shipp, 59 Cal. 2d 845, 382 P.2d 577, 31 Cal. Rptr. 457 (1963) (concerning a waiver statute for juveniles from eighteen to twenty years of age); State v. Owens, 197 Kan. 212, 416 P.2d 259, 271 (1966); State v. Doyal, 59 N.M. 454, 286 P.2d 306, 310 (1955); Lewis v. State, 478 P.2d 168, 171 (Nev. 1970); *In re* F.R.W., 61 Wis. 2d 193, 212 N.W.2d 130 (1973).

[45] Summers v. State, 230 N.E.2d 320, 325 (Ind. 1967); Wikulovsky v. State, 54 Wis. 2d 699, 196 N.W.2d 748, 752 (1972). On the other hand, some state statutes provide particular criteria to be considered by the judge. *E.g.,* TEX. REV. CIV. STAT. art. 2338–1, §§ 6(c)–(j) (1971).

[46] People v. Fields, 388 Mich. 66, 199 N.W.2d 217 (1972). The court stated:

> Absent carefully defined standards in the statute itself . . . [there was no way

Although *Kent* upheld the broad discretion granted to the juvenile courts by the waiver statutes, it also recognized that the proceedings constituted a "critical stage" in the proceedings against the individual.[47] Therefore, the Court stated that the latitude of the discretion was not absolute; although the juvenile proceedings are civil in nature, the waiver process requires procedural regularity sufficient to satisfy requirements of due process.[48] Under the *Kent* decision, there is still a need for a hearing, effective counsel, and "a statement of the reasons motivating the waiver including . . . a statement of the relevant facts."[49]

The *Salas* court recognized a vast amount of discretion in the Utah juvenile courts. The opinion is a vote of confidence for the juvenile system, despite the growing national skepticism of the benefits derived from treating juvenile proceedings as "civil" in nature.[50] Such a grant of discretion should be carefully examined in light of the critical nature of a waiver proceeding which most juvenile court personnel regard as the most severe sanction the juvenile process may impose.[51] In upholding the statute, the court refused to require more specific criteria for the exercise of this discretion at such a critical stage. The only means of checking the exercise of that discretion is by an appeal claiming abuse of discretion. The outcome of such an appeal in any particular case is unpredictable because the outer limits of the juvenile judge's discretion have not been adequately defined or, as the *Salas* court determined, are not definable. Furthermore, the holding that an oral statement by the juvenile judge is sufficient to form a record to review the exercise of such an indefinable discretion makes the certification question even more difficult to answer.[52]

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of predicting which standard a judge would apply] . . . . He might use the standard contended for by the prosecutor—"the child's welfare and the best interest of the state." This standard is so vague and subject to so many possible interpretations as to be no standard at all. He might formulate his own standard . . . . 199 N.W.2d at 221–22.

[47] 383 U.S. at 561.

[48] *Id.*

[49] *Id.* In discussing the form of the statement, the court stated:
We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of "full investigation" has been met; and that the quesion has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.
Id.; see also Haziel v. United States, 404 F.2d 1275, 1280 (D.C. Cir. 1968).

[50] *E.g., In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIMES 1–19 (1967).

[51] The stage is critical because it exposes the juvenile to the possibility of severe punishment and the loss of both the confidentiality of juvenile proceedings and the chances for rehabilitation outside the prison environment. The youth acquires a public arrest record and might be subjected to the sexual and physical abuse of adult penal life. Schornhurst, *The Waiver of Juvenile Jurisdiction: Kent Revisited,* 43 IND. L.J. 583, 587 (1968).

[52] As an example, in Lewis v. State, 478 P.2d 168 (Nev. 1970), the Nevada Supreme Court accepted the certifying judge's somewhat opaque oral statement as a sufficient record to permit meaningful review.

B. Utah Guest Statute Not a Denial of Equal Protection

In *Cannon v. Oviatt,*[53] two automobile guests sued their hosts for injuries sustained in automobile accidents, and at the same time challenged the Utah guest statute[54] on equal protection grounds. The trial court upheld the statute and denied plaintiffs recovery. Affirming the trial court decision, the Utah Supreme Court distinguished *Brown v. Merlo,*[55] in which the California Supreme Court held a similar statute unconstitutional because it arbitrarily denied recovery to one class of persons, and held that the Utah guest statute is constitutional.

Two reasons are usually offered in support of guest statutes: they encourage hospitality and they prevent collusion between guest and host to defraud the host's insurance company. Although several states' guest statutes have been constitutionally challenged, they have generally been upheld.[56] In 1973, however, the California Supreme Court struck down its guest provision,[57] holding that there was no rational basis for denying an automobile guest recovery for injuries resulting from the simple negligence of his host, while at the same time allowing other gratuitous invitees or bailees, guests in boats or planes, guests who were not yet in the car, or guests injured while on private roads to recover against their hosts. The court also condemned the statute as overinclusive with respect to its purpose of barring collusive suits.

Under the equal protection clause, the United States Supreme Court has repeatedly held that statutory schemes may treat classes of citizens differently if the statutory classifications are rationally related to a constitutionally permissible state purpose.[58] The Utah Supreme Court has followed the same principle.[59] In applying this test in *Cannon,* the Utah

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[53] 520 P.2d 883 (Utah 1974).

[54] UTAH CODE ANN. § 41–9–1 (1970) provides:

> Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the state of Utah, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle . . . Nothing in this section shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability or injury to or death of such guest proximately resulting from the intoxication or willful misconduct of such owner, driver or person responsible for the operation of such vehicle . . . .

For a discussion of the insurance industry's involvement in the enactment of the Utah guest statute see 5 UTAH L. REV. 257, 258 n.10 (1956).

[55] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[56] *E.g.,* Silver v. Silver, 280 U.S. 117 (1929); Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939); Vogts v. Guerette, 142 Colo. 527, 351 P.2d 851 (1960).

[57] Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[58] *E.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[59] *E.g.,* Townsend v. Board of Review of Indus. Comm'n, 27 Utah 2d 94, 493 P.2d 614 (1972). The classic definition of the test is found in Rinaldi v. Yeager, 384 U.S. 305 (1966):

> The Equal Protection Clause . . . imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." . . . But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are

court did not suggest that the Brown opinion was lacking in logic, but reasoned that its rationale did not apply in Utah because of pertinent differences between Utah and California tort law.[60] The court reasoned that the guest statute is merely a legislative imposition of the same standard of care which the courts have held to be owed to other "guests" such as licensees on one's property; thus, since there was no "classification," the statute was immune from equal protection attack. Nevertheless, observing that the automobile has often been the subject of specific legislation, the court stated: "The presence of the guest in this area would itself create a basis for a distinct classification from other guests."[61] The court also took exception to the California court's "social engineering" of tort doctrine to disturb the constitutionality of an act valid at its creation.[62] Finally, in his concurring opinion, Justice Crockett gave an additional reason for upholding the statute:

> Inasmuch as it came into being as an expression of the will of the people through legislative enactment, if there is to be any such substantial and important change in the law it should be by that same process, and not by judicial pronouncement.[63]

By concluding that automobile guests were treated no differently than other types of guests, the Utah court begged the issue at hand, assuming without explicit justification that the discriminatory treatment of other types of guests did not violate equal protection. That is, the court upheld one classification by reference to similar classifications that may suffer from the same constitutional deficiencies.

The court's inclination to defer to the legislature for correction of possible inequities similarly circumvents the constitutional issue. It is for the court to decide whether a statutory classification is rationally related to a legitimate state purpose. Rather than address that question in depth, the court accepted uncritically the standard rationale for the statute — that it protects hospitality and prevents collusive suits. Regardless of the outcome, the court should have carefully examined the two basic issues raised by plaintiffs' equal protection argument: (1) whether protection of hospitality and prevention of collusive lawsuits are legitimate state purposes, and (2) whether denial of recovery to all automobile guests for their hosts' simple negligence is a rational means of accomplishing those purposes.

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drawn have "some relevance to the purpose for which the classification is made."

Id. at 308–09 (citation omitted).

[60] "Brown v. Merlo is a logical consequence in that jurisdiction stemming from their prior determination to abandon the traditional tort doctrine that the status of a person determined the duty owed to him." 520 P.2d at 886.

[61] *Id.* at 888 (dictum).

[62] Brown v. Merlo, in effect, elevated this device for social engineering to the level of a constitutional doctrine. . . . Through this process of social engineering a legislative enactment in the area of economics and social welfare was thrust into conflict with the modified tort doctrine promulgated by the court.

Id. at 886–87.

[63] *Id.* at 890 (Crockett, J., concurring).

IV. Criminal Procedure

A. Discovery Depositions Not Available to Criminal Defendants under Utah Rules of Civil Procedure 81(e)

In *State v. Nielsen*,[64] a criminal defendant sought to take the depositions of prospective witnesses[65] and to require them to produce information in their possession which was pertinent to the charges against him.[66] The defendant claimed a right to discovery under rule 81(e) of the Utah Rules of Civil Procedure, which provides that the rules of civil procedure shall govern any aspect of criminal proceedings where there is no other applicable or contrary statute or rule.[67] The state obtained an order from the trial court permanently staying the defendant from taking the depositions.

On appeal, the Utah Supreme Court affirmed, holding that the defendant had no right to take the depositions because prior statutes allowing conditional examination of witnesses[68] limited the application of rule 81(e).[69] The court reasoned that blanket allowance of depositions under rule 30[70] in criminal trials would "present grave constitutional problems" by threatening to violate a defendant's right to remain silent.[71] The court thus concluded that civil discovery rules were inapplicable to criminal cases,[72] and that until the statutory barriers were removed, the court

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[64] 522 P.2d 1366 (Utah 1974).

[65] The depositions were sought pursuant to Utah R. Civ. P. 30(a), which allows a party to take the testimony of any person, including a party, by deposition upon oral examination, and to compel the attendance of witnesses by subpoena as provided in Utah R. Civ. P. 45.

[66] Defendant sought a subpoena duces tecum under Utah R. Civ. P. 30(b)(1) and Utah R. Civ. P. 26(b)(1).

[67] This rule, adopted by the Utah Supreme Court in 1972, provides:

> These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

Utah R. Civ. P. 81(e).

[68] The court reached this conclusion by broadly reading two statutes in the Code of Criminal Procedure. Utah Code Ann. § 77-46-1 (Supp. 1973) states that

> [w]hen a defendant has been held to answer a charge for a public offense or malfeasance in office he may, either before or after an indictment or information, have witnesses examined conditionally on his behalf as prescribed in this chapter, and not otherwise.

Utah Code Ann. § 77-46-2 (1953) provides:

> When a material witness for the defendant is about to leave the state, or is so ill or infirmed as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

[69] The defendant did not seek the depositions to preserve testimony, but to discover facts pertinent to his defense. Brief for Defendant at 3, State v. Nielsen, 522 P.2d 1366 (Utah 1974).

[70] The language of Utah R. Civ. P. 30(a), which the court emphasized, allows any party to take the testimony "of any person, *including a party*, by deposition upon oral examination." (Emphasis added).

[71] 522 P.2d at 1367.

[72] *Id.* at 1367 & n.1. The Utah cases cited by the majority in support of this conclusion, Redmond v. City Court of Salt Lake County, 17 Utah 2d 95, 404 P.2d 964 (1965), and State v. Lack, 118 Utah 128, 221 P.2d 852 (1950), do not support the court's conclusion. Instead, they stand for the proposition that a decision to compel the prosecution to disclose information is within the trial court's discretion.

"would be without power to provide for discovery proceedings by court rule."[73] The dissent argued that the prior Utah statutes had a much narrower application[74] and that to allow liberal discovery in criminal proceedings would be consistent with the spirit of rule 81(e) and with the national trend toward liberalizing discovery in criminal cases.[75]

Historically, a criminal defendant's right to a witness's deposition has been much more restricted than that of the civil litigant.[76] Much of this restrictiveness derives from the fear[77] that allowing a defendant unlimited discovery before trial would result in perjury, intimidation of witnesses, destruction of informant confidentiality, and an upsetting of the adversarial balance[78] in favor of the defendant.[79] Generally, however, the defendant may take a witness's deposition for purposes of preserving material testimony.[80] Commentators have argued that the reasons for this exception — to facilitate discovery of truth and to guarantee a fair trial

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[73] 522 P.2d at 1367.

[74] Justice Crockett reasoned that the statutes "apply *only* to special situations for the taking and perpetuation of the testimony of witnesses where there is 'reasonable grounds for apprehending' that they will not be able to attend trial; and . . . *they do not apply to any other circumstances.*" *Id.* at 1368 (Crockett, J., dissenting) (emphasis in original).

[75] *Id.* at 1369 & nn.6–8.

[76] United States v. Simon, 262 F. Supp. 64, 73 (S.D.N.Y. 1966), *rev'd on other grounds*, 373 F.2d 649 (2d Cir.), *vacated on other grounds sub nom.* Simon v. Wharton, 389 U.S. 425 (1967); C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 241 (West 1969); Comment, *Depositions as a Means of Criminal Discovery*, 7 U. SAN FRAN. L. REV. 245, 245–46 & n.2 (1973).

[77] Justice Traynor has characterized the reluctance to expand the scope of criminal discovery as an "adrenal reaction." Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

[78] In Utah, this "balance" may be more heavily weighted in the prosecution's favor because of three recently enacted amendments to the Utah Code of Criminal Procedure. UTAH CODE ANN. §§ 77–45–19 to –21 (Supp. 1973). These amendments greatly expand the investigatory powers of the attorney general and the county attorney, and allow prosecutors to (1) compel witness testimony under oath before a court reporter and require production of documents and things, (2) obtain a court order permitting the interrogation to be conducted before a closed court, in secret, and to the exclusion of all persons except attorneys representing the state, certain staff members, and the witnesses's attorney, and (3) grant immunity from prosecution. The statutes, however, do not grant defense attorneys comparable "investigatory" powers.

It is arguable that these statutes reflect a legislative intent to weight the adversarial balance more in favor of the prosecution. Section 77–45–19 specifically provides:

> [I]n order to protect the public health, safety, and morals, it is necessary to grant subpoena powers in aid of criminal investigations conducted by the attorney general, district attorneys and county attorneys, and to provide a method of *keeping information gained from investigations secret* both to protect the innocent and *to prevent criminal suspects from having access to information prior to prosecution* to the detriment of the *proper* enforcement of the criminal laws of this state . . . .

Id. § 77–45–19 (emphasis added). Since these amendments significantly expand the prosecutor's investigatory powers, expanding defense discovery may be necessary to maintain the adversarial "balance."

[79] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). *See* State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953); Remarks of Stephen E. Kaufman, "Discovery in Criminal Cases," a panel discussion before the Judicial Conference of the Second Judicial Circuit, Sept. 8, 1967, in 44 F.R.D. 481, 485–86 (1967).

[80] *See, e.g.*, United States v. Birrell, 276 F. Supp. 798, 822–23 (S.D.N.Y. 1967).

— also justify a general expansion of criminal discovery.[81] Although most states that have granted defendants the right to depose witnesses before trial have specifically limited the right to situations where it is necessary to preserve testimony,[82] others have granted a more liberal discovery right.[83] In addition, as much of the fear about criminal discovery has been shown to be unfounded,[84] reformers have pressed for liberalizing criminal discovery standards, modeling their plans after the voluntary civil discovery rules.[85]

Utah's statutes on conditional examination of witnesses[86] reinforce a defendant's right to a fair trial by allowing the accused to obtain evidence which would otherwise be unavailable, while also supporting an accused's right to a complete and adequate defense.[87] Unfortunately, in *Nielson,* the court has now interpreted these statutes as the *exclusive* vehicles available to defendants for compelling the production of evidence from witnesses before trial.[88] By so doing, the court has seriously limited a defendant's ability to gain knowledge of the case against him and to prepare an adequate defense, and has rejected the apparent intent behind rule 81(e) — to expand the application of civil procedure rules to criminal proceedings.[89] Although defensible,[90] the court's interpretation is an un-

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[81] See generally, United States v. Projansky, 44 F.R.D. 550, 555–57 (S.D.N.Y. 1968); Brenen. *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1968 WASH. U.L.Q. 279, 290–95; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960). The philosophy of these commentators is aptly articulated by Justice Traynor, who writes:

> The plea for the adversary system is that it elicits a reasonable approximation of the truth. . . . Such reasoning is hardly realistic unless the evidence is accessible in advance to the adversaries so that each can prepare accordingly in the light of such evidence.

Traynor, *supra* note 77, at 228.

[82] *See, e.g.,* ALASKA R. CRIM. P. 15(a); CAL PENAL CODE § 1335 (West 1970); MONT. REV. CODES ANN. § 95–1802 (1969); N.M.R. CRIM. P. 29(a); WYO. R. CRIM. P. 17.

[83] *See, e.g.,* N.D.R. CRIM. P. 15(a) & (h) (when in the interest of justice or by agreement); TEX. CODE CRIM. PRO. art. 39.02 (Supp. 1974–75) (upon showing of good reason); VT. R. CRIM. P. 15(a) (unlimited discovery); *cf.* FED. R. CRIM. P., Proposed Amendments, 15(a), 15 CRIM. L. RPTR. 3001, 3004 (1974) (when in the interest of justice).

[84] *See* Langrock, *Vermont's Experiment in Criminal Discovery,* 53 A.B.A.J. 732, 733–34 (1967).

[85] *See* UNIFORM RULES OF CRIMINAL PROCEDURE, Proposed Final Draft, Rule 431 (1974) (permitting depositions to be taken for discovery purposes without court approval).

[86] UTAH CODE ANN. §§ 77–46–1 *et seq.* (1953), *as amended,* (Supp. 1973).

[87] The importance of a complete and adequate defense has been stressed in Powell v. Alabama, 287 U.S. 45, 71 (1932) (effective aid in preparation and trial of case); State v. Lopez, 3 Ariz. App. 200, 412 P.2d 882, 886 (1966) (right to effective assistance of counsel); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937, 949 (1959) (counsel's duty to carefully investigate all possible defenses of fact and law).

[88] The court did not consider the possible use of other modes of discovery in criminal proceedings, such as the subpoena duces tecum, interrogatories, physical and mental examination of persons, discovery and production of documents and things, and admission of facts. See UTAH R. CIV. P. 33–36.

[89] In most cases, criminal rules of discovery are more restrictive than the civil rules. *Compare* FED. R. CIV. P. 30(a) with FED. R. CRIM. P. 15(a). In Utah, however, rule 81(e) has made the two procedures identical, except where specific criminal procedure rules conflict with the civil rules.

reasonably restrictive view of a defendant's right to a fair trial.[91] Moreover, a trial court's broad power under the civil rules to protect against discovery of privileged evidence[92] vitiates the argument that broader discovery could infringe fifth amendment rights against self-incrimination.[93]

B. Failure to Order Prosecutorial Disclosure of Witness Statements Not Error

In *State v. Dowell*,[94] defendants attacked their convictions, claiming they were denied a fair trial because the trial court refused to compel the prosecution to disclose statements made by witnesses to investigating officers.[95] Defendants were unable to identify the witnesses whose statements were sought or to explain the materiality of their statements to the question of guilt or punishment.[96] Therefore, applying the test of *Moore v. Illinois*,[97] the Utah Supreme Court affirmed the trial court's refusal to

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[90] The California courts have interpreted their statutes on conditional examination of witnesses, CAL. PENAL CODE §§ 1335–45 (West 1970), as not granting the defendant an inherent right to depose witnesses. *See, e.g.*, People v. Bowen, 22 Cal. App. 3d 267, 99 Cal. Rptr. 498, 504 (1971); Everett v. Gordon, 266 Cal. App. 2d 667, 72 Cal. Rptr. 379, 381 (1968) (holding that the statutory right was exclusive). California does not have a rule similar to rule 81(e).

[91] Expressing this view in dissent, Justice Crockett stated:

> The interaction of these provisions should therefore be considered in the light of the time-honored and fundamental rule: that when one is charged with a crime he should not be subjected to unfavorable rigidities in the interpretation of the law but he should be entitled to have it applied in the light most favorable to his interests. Consistent with this, it would seem that if a man is entitled to the advantages of the deposition and discovery procedure in a civil case involving money or property, he ought, a fortiori, to have it in a criminal one where the even more precious things of liberty and reputation are at stake.

522 P.2d at 1369 (Crockett, J., dissenting).

[92] UTAH R. CIV. P. 26(b) (discovery limited to matters *not privileged*); *id.* 26(c) (protective orders and judicial relief).

[93] Neither the court nor the parties addressed the problem of possible infringement of the right to a speedy trial through expanded criminal discovery. See U.S. CONST. amend. VI; UTAH CONST. art. I, § 12. *But see* State v. Mathis, 7 Utah 2d 100, 319 P.2d 134, 136 (1957) ("speedy trial" is a flexible term to be applied in accordance with practical exigencies).

[94] 30 Utah 2d 323, 517 P.2d 1016 (1974).

[95] Defendants sought the statements to aid in preparation for their defense of self-defense. In addition to claiming certain instructional errors, defendants claimed error in the court's denial of access to their presentence reports and in the court's reliance on the reports in determining their sentences. *Id.* at 327, 517 P.2d at 1018. Relying on State v. Doremus, 29 Utah 2d 373, 510 P.2d 529 (1973), the court held that disclosure of presentence reports was in "the sound discretion of the trial court." 30 Utah 2d at 327, 517 P.2d at 1019. At least one federal court, however, has found a constitutional right to disclosure of presentence reports where the trial judge relies on the report in determining sentence. United States v. Picard, 465 F.2d 215, 219–21 (1st Cir. 1972). *See* United States v. O'Shea, 479 F.2d 313, 314 (1st Cir. 1973). *Contra*, United States v. Gardner, 480 F.2d 929, 932(10th Cir. 1973); United States v. Jones, 473 F.2d 293, 296 (5th Cir.), *cert. denied*, 411 U.S. 984 (1973); United States v. Frontero, 452 F.2d 406, 410 (5th Cir. 1971). FED. R. CRIM. P. 32(c) permits, but does not require, disclosure of the report. Compare the proposed amendment to FED. R. CRIM. P. 32(c) (3) (A), which requires disclosure upon request

> unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation . . . or other information which, if disclosed, might result in harm . . . to defendant or other persons . . . .

15 CRIM. L. RPTR. 3001, 3007 (1974).

[96] 30 Utah 2d at 326, 517 P.2d at 1017.

[97] 408 U.S. 786 (1972).

compel production of the evidence because the defense had not established the materiality of the statements.

Over the past forty years, several United States Supreme Court cases have addressed the question whether a prosecutor may withhold or suppress evidence relevant or crucial to a defendant's case,[98] but it was not until the Court's decision in *Brady v. Maryland*[99] that it was held that a defendant has a due process right to receive evidence in the prosecutor's hands which is favorable and material to the issue of guilt or punishment.[100] Then, in *Moore v. Illinois*,[101] the Court clarified its *Brady* decision by recognizing that in prosecutorial nondisclosure cases due process violations should be determined in light of the following factors: (1) suppression by the prosecution after a request from the defendant; (2) the favorable character of the evidence for the defense; and (3) the materiality of the evidence.[102] The Court did not, however, define "materiality,"[103] or decide who determines materiality.[104]

Since *Brady*, three tests for "material" evidence have been advanced: (1) any evidence which may be helpful to the defense;[105] (2) evidence which could raise a reasonable doubt in the jury's mind;[106] and (3) evidence which would bring about a different result.[107] Although the need

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[98] Napue v. Illinois, 360 U.S. 264, 269–72 (1959) (evidence known to prosecution relevant to credibility of witness); Alcorta v. Texas, 355 U.S. 28, 31–32 (1957) (perjury of witness known to prosecution); Pyle v. Kansas, 317 U.S. 213, 216 (1942) (deliberate suppression of evidence favorable to the accused); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (prosecutorial presentation of testimony known to be perjured).

[99] 373 U.S. 83 (1963).

[100] We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87.

[101] 408 U.S. 786 (1972).

[102] *Id.* at 794.

[103] Inability to agree on whether the evidence in question was material was one of the points dividing the majority and dissenting opinions. *Compare id.* at 796–97 *with id.* at 806 (Marshall, J., concurring and dissenting in part).

[104] The alternatives most often debated include (1) absolute discretion of the defense attorney, (2) *in camera* judicial inspection, and (3) prosecutorial control. The last alternative, which is most often relied on in decisions, provides the accused the least amount of protection. *See* Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 120–21 (1972) [hereinafter cited as *Prosecutor's Duty to Disclose*].

[105] Moore v. Illinois, 408 U.S. 786, 809 (1972) (Marshall, J., concurring and dissenting in part); Giles v. Maryland, 386 U.S. 66, 101–02 (1967) (Fortas, J., concurring); *Prosecutor's Duty to Disclose, supra* note 104, at 120–21.

[106] *E.g.*, United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972); see also Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure*, 59 IOWA L. REV. 433 (1973) [hereinafter cited as *Materiality and Defense Requests*].

[107] Giles v. Maryland, 386 U.S. 66, 116–17 (1967) (Harlan, J., dissenting); Napue v. Illinois, 360 U.S. 264, 272 (1959). The "outcome determinative" test has been criticized because it forces a court to engage in a speculative determination of guilt or innocence and because the test does not adequately consider the value of the undisclosed evidence to the defense in preparing for cross examination or in uncovering additional evidence. *Prosecutor's Duty to Disclose, supra* note 104, at 129, 135–40.

for uniformity[108] in federal courts has been partially satisfied by rule and statute,[109] federal laws have only "persuasive value" in state courts.[110] Nevertheless, many states have followed the federal example,[111] while others have gone beyond the federal model, providing a defendant with automatic access to the prosecution's evidence.[112] Moreover, there is a growing movement toward uniform automatic disclosure rules.[113] But for states without disclosure statutes, like Utah, the constitutional dimensions of a defendant's right to evidence remain unsettled.

In *Dowell,* the court looked to the circumstances surrounding the request for disclosure and, without defining materiality, concluded that the materiality test had not been satisfied. Although it is unclear which test of materiality the court used, it is probable that the court used the "outcome determinative" or "reasonabe doubt" test rather than the more liberal "aid to the defense" test. The court emphasized that none of the witnesses observed the events prior to the assault on which defendants based their claim of self-defense;[114] hence, their statements could not have supported defendants' claim. The court, however, failed to discuss the possibility that defense counsel might have been able to use the statements to impeach the witnesses' credibility on cross examination, or to discover additional evidence. Thus, although the result in *Dowell* might have been the same regardless which test of materiality was used, by leaving the definition of materiality to future litigation,[115] the *Dowell* court bypassed an opportunity to illuminate the scope of disclosure rights and obligations.

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[108] For an excellent examination of the disparate judicial standards of "materiality" and the importance of a well framed request in obtaining disclosure, see *Materiality and Defense Requests, supra* note 106.

[109] FED. R. CRIM. P., Proposed Amendments, 16, 15 CRIM. L. RPTR. 3001, 3005–06 (1974); Jencks Act, 18 U.S.C. § 3500 (1970) (providing for disclosure of government witness statements held by the prosecution after trial testimony of the witness).

[110] The Jencks Act is not cast in constitutional terms and has not been extended to state criminal trials. United States v. Augenblick, 393 U.S. 348, 356 (1969). *But see* People v. Sumner, 43 Ill. 2d 228, 252 N.E.2d 534, 538 (1969) (Jencks rule specifically adopted by the court).

[111] *E.g.,* COLO. R. CRIM. P. 16(b), *as amended* July 30, 1970; HAWAII R. CRIM. P. 17(h); N.M.R. CRIM. P. 28, especially 28(c); WYO. R. CRIM. P. 18, esp. 18(c)(1).

[112] *E.g.,* ALASKA R. CRIM. P. 16(b); ARIZ. R. CRIM. P. 15.1, esp. 15.1 (a) (3); FLA. R. CRIM. P. 3.220(a); VT. R. CRIM. P. 16(a); WIS. STAT. ANN. § 971.23 (1971).

[113] *See* UNIFORM RULES OF CRIMINAL PROCEDURE, Proposed Final Draft, Rules 421–23 (1974); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, §§ 2.1–.6 (1969).

[114] 30 Utah 2d at 326, 517 P.2d at 1018.

[115] Uncertainty about the definition of "materiality" is detrimental to the prosecutor as well as to the defendant:

> [T]he lack of a precise definition [of materiality] results in diverse interpretations by the courts; more importantly, the absence of a workable standard greatly handicaps the prosecutor in his attempts to comply with *Brady.*

Materiality and Defense Requests, supra note 106, at 441.

C. *State is Liable for Hospitalization Costs of Criminally Accused Incompetent*

In *Ollerton v. Diamenti*,[116] defendant had been charged with assault with intent to commit murder, but before trial was found insane and thus incompetent to stand trial. Because of his insanity, defendant was committed to the state mental hospital pursuant to secion 77–48–5 of the Utah Code.[117] Plaintiff, a representative of the hospital, brought an action against the guardian of defendant's estate to recover the costs of his care and treatment.[118] The Utah Supreme Court affirmed the trial court's holding that defendant's estate was not liable, reasoning that because commitment to the state hospital upon a finding of incompetence to stand trial is sanctioned by the criminal procedure code,[119] it is within the administration of the criminal law; thus, the state is liable for the hospitalization and treatment costs.[120]

Courts in other states which have considered the problem have concluded that the estate of a criminally accused incompetent should pay the costs of care and treatment, reasoning that such an individual's status is virtually the same as one who is committed under an involuntary civil commitment procedure.[121] This conclusion has been upheld over due process,[122] equal protection,[123] and ex post facto[124] challenges. The rationale of these cases appears to be that the hospitalization of the accused incompetent is not a function of the criminal justice system, so that the determination of who bears the burden of costs is governed by the civil code.[125]

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[116] 521 P.2d 899 (Utah 1974).

[117] UTAH CODE ANN. § 77–48–1 (1953) provides that "[n]o person while insane shall be tried, adjudged to punishment or punished for a public offense." *Id.* § 77–48–5, *as amended*, (Supp. 1973) provides that an accused who is found insane shall be committed to the state hospital until he becomes sane, and that

> [u]pon filing of the complaint as herein provided all proceedings against the accused . . . if in the judgment of the court it is deemed to be in the furtherance of justice, shall be ordered and suspended until the proceedings for the purpose of determining his insanity are dismissed or the accused shall have become sane.

[118] Plaintiff claimed that defendant's estate was liable under *id.* § 64–7–18 (1968), which provides that

> [t]he provisions herein made for the support of the mentally ill at public expense shall not release the estate of such persons from liability for their care and treatment, and the division of mental health is authorized and empowered to collect from the estate of such persons any sums paid by the state in their behalf.

[119] *Id.* § 77–1–1 *et seq.* (1953).

[120] 521 P.2d at 900.

[121] State v. Burnell, 165 Colo. 205, 439 P.2d 38, *appeal dismissed*, 393 U.S. 13 (1968); State v. Kosiorek, 5 Conn. Cir. 542, 259 A.2d 151 (1969); *In re* Estate of Schneider, 50 Ill. 2d 152, 277 N.E.2d 870 (1971); Department of Mental Health v. Pauling, 47 Ill. 2d 269, 265 N.E.2d 159 (1970); Briskman v. Central State Hosp., 264 S.W.2d 270 (Ky. 1954); *see* Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 379 P.2d 22, 28 Cal. Rptr. 718 (1963).

[122] State v. Kosiorek, 5 Conn. Cir. 542, 259 A.2d 151, 153 (1969).

[123] Department of Mental Health v. Pauling, 47 Ill. 2d 269, 265 N.E.2d 159, 161 (1970).

[124] State v. Kosiorek, 5 Conn. Cir. 542, 259 A.2d 151, 154 (1969).

[125] In *Ollerton*, the plaintiff argued that Utah should follow the same procedure, applying the cost allocation statute, UTAH CODE ANN. § 64–1–18 (1968), to commitments for incompetency to stand trial. Brief for Appellant at 4–7, Olerton v. Diamenti, 521 P.2d 899 (Utah 1974).

The *Ollerton* court, however, did not make such fine distinctions. Instead, the court relied upon section 64–7–54[126] to hold that all commitments pursuant to title 77, chapter 48 of the Utah Code are "criminal" — and the state must pay the costs of the commitment — while all commitments under title 64[127] of the Utah Code are "civil" — thus, the burden of care and treatment is upon the individual's estate,[128] unless he is impecunious.[129]

There are several problems with the court's analysis. First, section 64–7–54 refers only to the *method* of commitment and care under the criminal code, and does not specifically address the question of allocation of expenses. Second, there is nothing in the language of sections 64–7–6 and 64–7–18 — which provide generally that the estates of incompetents shall bear the cost of their commitment — that would support the *Ollerton* court's distinction between civil and criminal commitment.[130] Third, even though defendant had not been convicted of a crime and was therefore presumptively innocent, the court reasoned that the hospitalization of the defendant was "a consequence of his committing a crime."[131] Finally, the *Ollerton* court employed the wrong definition of "insanity" — rather than using the definition applicable where a defendant claims insanity at the time of trial, the court employed the definition applicable where the defendant claims insanity at the time of the crime.[132] By so doing, the

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[126] Nothing contained in this act shall be construed to alter or change the *method* presently employed for the commitment and care of the criminally insane as provided in chapter 48 of Title 77, Utah Code Annotated 1953.
UTAH CODE ANN. § 64–7–54 (1968) (emphasis added).

[127] Title 64, chapter 7, which is entitled "Utah State Hospital and Other Mental Health Facilities," contains provisions for both voluntary and involuntary civil commitments. *Id.* § 64–7–1 *et. seq.*

[128] *Id.* § 64–7–6 provides that
[t]he division shall estimate and determine as nearly as may be the actual expense per annum of keeping and taking care of a patient in the hospital and such amount or portion thereof shall be assessed to and paid by the applicant, patient, spouse, parents, child or children who are of sufficient financial ability to do so, or by the guardian of the patient who has funds of the patient that may be used for such purpose.

[129] *Id.* § 64–7–20 provides:
If such person is indigent, the county shall be entitled to receive from the state a sum equal to the amount allowed by the state for the cost of care and treatment of indigent patients in the hospital.

[130] In his dissent, Justice Crockett stated that "[s]ection 64–7–6 . . . deals with the subject of the costs of maintenance of patients in the state hospital in direct, general and all inclusive language, and makes no exception." 521 P.2d at 902 (Crockett, J., dissenting).

[131] 521 P.2d at 900.

[132] For its definition of the term "insane," the court cited State v. Poulson, 14 Utah 2d 213, 215, 381 P.2d 93, 94, *cert. denied*, 375 U.S. 898 (1963):
The term "insane" . . . means such a perverted and deranged condition of a person's mental facilities as to render him either incapable of distinguishing between right and wrong, or incapable of knowing the nature of the act he is committing; and where he is conscious of the nature of the act he is committing and able to distinguish between right and wrong and knows that the act is wrong, yet his will, that is, the governing power of his mind, has been so completely destroyed that his actions are not subject to it, but are beyond his control.
The *Poulson* definition, however, applies to the situation in which the defendant claims insanity at the time of the crime, not incompetency at the time of the trial.

opinion evidences a basic misunderstanding of the nature of the proceedings by which an individual who is mentally incapable of aiding in his own defense is hospitalized until he regains his sanity.

The *Ollerton* court's tortured statutory interpretation may reflect a judicial reaction to the harshness of a law by which a criminal defendant, who is incompetent to stand trial, may be confined in a mental hospital for his entire life without a judicial determination of guilt or innocence.[133] The court was apparently unwilling to exacerbate that harshness by taxing the individual's personal estate for the expenses of confinement. To the extent the decision represents an awareness of the need to now fully consider the rights of persons involuntarily committed to mental institutions, the decision is a positive step forward.[134]

D. Applicability of the Penalties of the Criminal Code to Convictions Obtained Prior to the Effective Date of the Code

In *State v. Saxton,*[135] the defendant had been convicted of issuing an insufficient funds check.[136] Both the offense and the conviction took place in 1971, prior to the effective date of the revised Utah criminal code.[137] Saxton failed to appear for sentencing in 1971 and was not located and

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In contrast to the definition cited by the court, the generally accepted definition of insanity at the time of trial includes the following elements: the defendant must be unable to (1) understand the nature of the criminal proceedings, (2) understand the nature of the charge against him, and (3) cooperate with counsel. Dusky v. United States, 362 U.S. 402 (1960) (per curiam); People v. Mitchell, 19 Ill. App. 3d 197, 311 N.E.2d 223, 225 (1974).

[133] Other methods to overcome this harshness are employed in neighboring states. In Colorado, if it appears to a court that the defendant will never regain competency, civil commitment proceedings are instituted. *See* Parks v. Denver Dist. Court, 503 P.2d 1029, 1032 (Colo. 1972). In Idaho, a defendant can request a special post-commitment hearing on the sufficiency of the indictment, and, if it is founnd deficient, the defendant will be released. IDAHO CODE § 18–212 (Supp. 1974).

[134] The long range effects of the decision may go well beyond the actual holding. In recent revaluations of mental health law, courts are beginning to use such cases as *In re* Gault, 387 U.S. 1 (1967), and *In re* Winship, 397 U.S. 358 (1970), as constitutional authority for protecting individuals subject to involuntary commitment to mental health institutions. See B. ENNIS, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED (1973). The central theme of this movement is that, because civil involuntary commitment proceedings are largely indistinguishable from criminal proceedings, they must include the constitutional safeguards provided in criminal trials. *Id.* The *Ollerton* court's reaction to the injustice, when linked with this trend in mental health law, suggests that the court may be forced to recognize three types of commitment in the future: civil (under UTAH CODE ANN. §§ 64–7–1 *et seq.* (1968)), criminal (limited to defendants found not guilty by reason of insanity and state prison inmates who become insane while imprisoned), and quasi-criminal (linking involuntary civil commitment with commitment for incompetency to stand trial). This latter classification would encompass a recognition by the court that involuntary civil commitment differs little from commitment for incompetency to stand trial, since both may result in involuntary and potentially lifetime loss of liberty without a determination of criminality. This development would force the court to reevaluate *Ollerton,* and to tax the state for costs of hospitalization in cases of involuntary civil commitment as well as in cases of incompetency to stand trial.

[135] 30 Utah 2d 456, 519 P.2d 1340 (1974).

[136] Defendant was convicted under Law of May 11, 1965, ch. 161, § 1, [1965] Laws of Utah 586 (repealed 1973).

[137] The Utah Penal Code, UTAH CODE ANN. §§ 76–1–101 *et seq.* (1953), was completely repealed in 1973 by the Utah Legislature. The revised code became effective July 1, 1973. *Id.* § 76–1–102 (Supp. 1973).

returned to Utah for sentencing until 1973, when the penalty for the offense had been reduced from five years to one year under the provisions of the revised criminal code.[138] The trial court nevertheless imposed a prison sentence of an indeterminate term not to exceed five years.

On appeal, the Utah Supreme Court held that, on the basis of two prior cases, the saving clause[139] of the new criminal code did not permit the trial court to impose a sentence under the prior code provisions. In both prior cases, *Belt v. Turner*[140] and *State v. Tapp*,[141] the court held that the imposition of punishment was governed by the code in effect at the time of sentencing, regardless of the provisions in effect at the time of conviction. In neither *Belt* nor *Tapp* was there a specific statutory saving clause indicating the intent of the legislature with regard to a change in punishment before sentencing.[142] Relying on *Belt* and *Tapp*, the *Saxton* court held that the "non-statutory" law of Utah included the principle enunciated in those cases.[143] Thus, because the saving clause of the crimi-

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[138] *Id.* §§ 76–6–505, 76–3–204.

[139] *Id.* § 76–1–103 provides:

> (1) The provisions of this code shall govern the construction of, the punishment for, and the defense against any offense defined in this code or, except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code; provided such offense was committed after the effective date of this code.
>
> (2) Any offense committed prior to the effective date of this code shall be governed by the law, statutory and non-statutory, existing at the time of commission thereof, *except that a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date.* An offense under the laws of this state shall be deemed to have been committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

(Emphasis added).

[140] 25 Utah 2d 230, 479 P.2d 791 (1971). In *Belt*, the defendant was convicted of issuing a fraudulent check for ten dollars. The statutory penalty for the offense at the time of conviction was a term of up to five years in the state penitentiary. Law of May 11, 1965, ch. 161, § 1, [1965] Laws of Utah 586. The penalty was reduced to a maximum of six months in the county jail prior to the imposition of sentence. Law of Jan. 30, 1969, ch. 239, §1, [1969] Laws of Utah 987 (repealed 1973).

[141] 26 Utah 2d 392, 490 P.2d 334 (1971). In *Tapp*, the defendant was convicted of possession of marijuana in violation of Law of March 12, 1953, ch. 94, § 2, [1953] Laws of Utah 255. At the time of the commission of the offense the statutory penalty was a term of up to five years in the state penitentiary. Law of March, 1957, ch. 116, § 1 [1957] Laws of Utah 271. Before trial, however, the legislature reduced the penalty to a maximum of six months in the county jail. Law of March 12, 1969, ch. 179, § 13, [1969] Laws of Utah 677.

[142] Although neither *Belt* nor *Tapp* involved a specific statutory saving clause, in both cases the state argued that sentencing under prior statutes was preserved by UTAH CODE ANN. § 68–3–5 (1961), which provides:

> The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed.

In both cases, however, the court held that this general language did not affect a situation in which sentencing had not taken place at the time of the repeal of a statute, because no "penalty had been incurred" until sentence had been pronounced. Thus, both *Belt* and *Tapp* should be limited in application to situations where there is no specific statutory saving clause affecting the imposition of a sentence. *See* Brief for Respondent at 3–7, State v. Tapp, 26 Utah 2d 392, 490 P.2d 334 (1971); Brief for Respondent at 2–4, Belt v. Turner, 25 Utah 2d 230, 479 P.2d 791 (1971).

[143] Broadly stated, this principle allows a defendant to benefit from a reduction in statutory penalty prior to the time of sentencing. Neither *Belt* nor *Tapp*, however, address the question of whether or not a trial court may impose a longer sentence for an offense if the statutory penalty is increased prior to sentencing.

nal code requires application of prior "non-statutory"[144] law to offenses committed prior to the effective date of the revised code, the court held that Saxton was entitled to resentencing in accordance with the reduced penalty.[145]

In reaching this conclusion, the court seems to have overlooked three considerations which militate against such a holding.[146] First, in light of the context of the entire saving clause, the apparent intent of the legislature was to make the sentencing provisions of the code applicable only to offenses committed after the effective date of the code.[147] Under general rules of statutory interpretation, legislative intent, as determined from the background and legislative history of a statute, will govern the interpretation of an ambiguous statute.[148] Because the principal source of the saving clause in the revised Utah criminal code is the Model Penal Code,[149] the Model Code offers guidance in determining the intent of the legislature in enacting the saving clause. Under the Model Code, imposition of a sentence under the terms of the Code is discretionary with the trial court if the offense was committed prior to the effective date of the Code.[150] The saving clause of the revised criminal code also contains

[144] See note 139 *supra*. The intent of the legislature in including the phrase "statutory and non-statutory" in the language of the act is unclear.

[145] 30 Utah 2d at 460, 519 P.2d at 1342.

[146] The state did not specifically assert any of these three considerations. Rather, the state's brief concentrated on arguing that the statute was clear in its application of prior law, and that prior cases such as *Belt* and *Tapp* were not controlling because of the lack of a specific saving clause in either case. Brief for Respondent at 4–8, State v. Saxton, 30 Utah 2d 456, 519 P.2d 1340 (1974).

[147] See note 139 *supra*. Subsection (1) of the saving clause is a clear indication of the intent of the legislature in regard to the applicability of the code to prior offenses.

[148] *E.g.*, Grant v. Utah State Land Bd., 26 Utah 2d 100, 485 P.2d 1035 (1971); Peay v. Board of Educ., 14 Utah 2d 63, 377 P.2d 490 (1962); Western Auto Transp., Inc. v. Reese, 104 Utah 393, 140 P.2d 348 (1943).

[149] J. BARNEY, UTAH CRIMINAL CODE COMMENTARY 135 (1973). Professor Barney states that the Model Penal Code was the principal source behind UTAH CODE ANN. § 76–1–103 (Supp. 1973). MODEL PENAL CODE § 1.01 (Tent. Draft No. 2, 1954) provides:

> (2) Except as provided in paragraphs (3) and (4) of this section, the Code does not apply to offenses committed prior to its effective date and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this Code were not in force. For the purposes of this section, an offense was committed prior to the effective date of the Code if any of the essential elements of the offense occurred prior thereto.
>
> (3) In any case pending on or after the effective date of the Code, involving an offense committed prior to such date:
>
> (a) Procedural provisions of the Code shall govern, insofar as they are justly applicable and their application does not introduce confusion or delay;
>
> (b) Provisions of the Code according a defense or mitigation shall apply, with the consent of the defendant;
>
> (c) The Court, with the consent of the defendant, may impose sentence under the provisions of the Code applicable to the offense and the offender.

The language adopted in Utah differs widely from the language of the Model Penal Code, but it appears that the intent of both the Utah version and the Model Penal Code is to limit the applicability of the code to offenses committed after the effective date of the code.

[150] MODEL PENAL CODE § 1.01 (Tent. Draft No. 2, 1954) closely defines the applicability of the Code to offenses committed prior to the Code's effective date, and does not give the defendant any right to benefit from a legislative reduction of the penalty for an offense.

a specific exception to the general rule of applicability: "a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date."[151] In *Saxton,* the court has enlarged this statutory exception so that the new code's limitations on punishment are also available when only the sentencing takes place after the effective date.[152]

Second, under general principles of Utah law, an interpretation of a statute should give effect, if possible, to all parts of the statute.[153] In this case, however, the court apparently disregarded the references to punishment in subsection (1) and the reference to limitations on punishment in subsection (2) of the saving clause.[154] Because the only language the court relied on was the phrase "non-statutory law," the court has rendered the other language in the saving clause meaningless.

The third factor which militates against the *Saxton* holding rests on public policy. In *Saxton,* sentencing was delayed solely because the defendant voluntarily left the state and failed to appear at the time of sentencing, yet the court rewarded this behavior by allowing the defendant to receive the benefits of a change in statutory punishment. Other defendants who voluntarily appeared for sentencing prior to the effective date of the revised code will be required to serve the longer term imposed under prior law.[155] Thus, the defendant is being rewarded for his ability to elude Utah authorities until the statutory penalty for the offense was reduced.

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[151] UTAH CODE ANN. § 76–1–103(2) (Supp. 1973).

[152] Ordinarily, the listing of exceptions to the applicability of a statute is indicative of legislative intent not to permit other exceptions, and usually no other exceptions to the statute will be inferred. *E.g.,* Colman v. Utah State Land Bd., 17 Utah 2d 14, 21, 403 P.2d 781, 785 (1965) (Callister, J., dissenting); Broadbent v. Gibson, 105 Utah 53, 140 P.2d 939, 945 (1943).

[153] *E.g.,* Horman v. Liquor Control Comm'n, 21 Utah 2d 294, 445 P.2d 4 (1968); Metropolitan Water Dist. v. Salt Lake City, 14 Utah 2d 171, 380 P.2d 721 (1963); Peay v. Board of Educ., 14 Utah 2d 63, 377 P.2d 490 (1962); Glenn v. Ferrell, 5 Utah 2d 439, 304 P.2d 380 (1956); Western Auto Transp., Inc. v. Reese, 104 Utah 393, 140 P.2d 348 (1943).

[154] The language of the saving clause, UTAH CODE ANN. § 76–1–103 (Supp. 1973), indicates that the punishment for an offense is governed by the new provisions provided the offense was committed after the effective date of the code, which was July 1, 1973. The court's holding conflicts with this clause because the punishment specified in the code was applied to an offense committed prior to the effective date but for which sentencing was not made until after the effective date. *Id.* § 76–1–103(2) specifically covers offenses committed prior to the effective date of the code, and indicates that prior law shall govern such offenses, except that defenses or limitations on punishment under the code will apply to a defendant tried or retried after the effective date. The court's holding also conflicts with this provision because the limitation on punishment under the new code was applied to a defendant neither tried nor retried after the effective date.

[155] For example, in State v. Dolan, 28 Utah 2d 331, 502 P.2d 549 (1972), the defendant was convicted of writing insufficient funds checks, was convicted of the offense in 1972, and was then sentenced to serve a term of up to five years in the Utah State Penitentiary. Brief for Appellant at 3, State v. Dolan, *supra.* This conviction was obtained over eight months *after* the conviction in *Saxton* and involved an identical offense. The defendant in *Saxton* was thus able to obtain a lesser punishment than the defendant in *Dolan* simply by eluding authorities for two years.

V. EVIDENCE

Parent's Testimony of Child's Illegitimacy Not Admissible in Utah

In *Lopes v. Lopes*,[156] Theodore Lopes filed a divorce action against his wife of six months, Shanna Lopes. Mrs. Lopes was pregnant at the time the divorce action was filed, and in her answer and counterclaim sought custody of the child, together with sixty-five dollars per month child support. The child was born shortly thereafter.[157] Later, Mrs. Lopes altered her demands, seeking no child support from Mr. Lopes and asking the court to award him no visitation rights; Mr. Lopes, however, sought to have support obligations imposed upon himself. At trial, Mrs. Lopes testified over objection that Mr. Lopes was not the father of the child born during their marriage,[158] and, on the basis of her testimony, the court ruled that Mrs. Lopes had established "by a preponderance of the evidence" that Mr. Lopes was not the child's father;[159] therefore, he could not visit the child or contribute to its support. The Utah Supreme Court reversed the lower court, holding that the proper standard of proof was "beyond a reasonable doubt" rather than "by a preponderance of the evidence,"[160] and that under Lord Mansfield's Rule the testimony of Mrs. Lopes was not admissible in evidence because its effect was to bastardize a child born during wedlock.[161]

At common law, it was presumed that any child born during a lawful marriage was the issue of the husband and the wife.[162] The only evidence that would rebut this presumption and thereby illegitimize a child was evidence that the husband was impotent or did not have access to the wife at the time of conception.[163] Prior to 1777, the common law also allowed a parent, in a filiation proceeding,[164] to rebut the presumption of legitimacy by testifying that the child born during wedlock was not the offspring of the husband and wife, so long as the parent was not the sole witness used to establish the child's illegitimacy. In 1777, however, Lord Mansfield declared that "the law of England is clear that the declaration

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[156] 30 Utah 2d 393, 518 P.2d 687 (1974).

[157] The child was born approximately eight months and one week after Mr. and Mrs. Lopes were married. Brief for Respondent at 2, Lopes v. Lopes, 30 Utah 2d 393, 518 P.2d 687 (1974).

[158] 30 Utah 2d at 394, 518 P.2d at 688.

[159] The briefs of the parties indicate that Mrs. Lopes testified that the child showed no negroid characteristics. Mr. Lopes is black and Mrs. Lopes is white. Brief for Respondent at 3, Lopes v. Lopes, 30 Utah 2d 393, 518 P.2d 687 (1974).

[160] Both parties, on appeal, conceded that the lower court had applied the incorrect standard of proof. 30 Utah 2d at 395, 518 P.2d at 688. In Holder v. Holder, 9 Utah 2d 163, 340 P.2d 761 (1959), the court held that the standard of proof of illegitimacy was "beyond a reasonable doubt." *Id.* at 166, 340 P.2d at 763.

[161] 30 Utah 2d at 395, 518 P.2d at 689.

[162] This presumption of legitimacy has been adopted in full force by all American jurisdictions. 10 AM. JUR. 2d *Bastards* § 11 (1963). The Utah Supreme Court has characterized this presumption as "one of the strongest known to the law." Holder v. Holder, 9 Utah 2d 163, 165, 340 P.2d 761, 763 (1959).

[163] 10 AM. JUR. 2d *Bastards* § 11 (1963).

[164] This was a proceeding to charge a husband with the support of his bastard children. BLACK'S LAW DICTIONARY 756 (rev. 4th ed. 1968).

of a father or mother cannot be admitted to bastardize the issue born after marriage."[165] This doctrine became known as Lord Mansfield's Rule.[166] Despite the fact that it was enunciated after the Declaration of Independence, American courts readily adopted Lord Mansfield's Rule and applied it in any situation where the testimony of a parent might bastardize a child born during lawful wedlock.[167] A number of modern courts and commentators, however, have been extremely critical of the rule on both historical and equitable grounds, and a definite trend away from its application has begun.[168] Courts joining this trend have rejected the rule on public policy grounds,[169] and "general evidence" statutes have made the rule obsolete.[170]

In *Lopes,* the Utah Supreme Court declared its support of Lord Mansfield's Rule,[171] reasoning that justice would not allow parents to illegitimize their children while attempting to scandalize each other,[172] and that the rule was necessary to insure the integrity of the family unit for the protection of the child.[173] The court also held that rule 7 of the Utah Rules of Evidence[174] — a general evidence rule providing for the admission of all evidence not excluded by other rules or statutes — did not overrule Lord Mansfield's Rule because the Rules of Evidence are only general guidelines which do not prevent the court from utilizing common law rules when necessary to prevent distortion of justice.[175]

Lord Mansfield's Rule may have been based on public policies that were valid in eighteenth century England, where illegitimate children were subject to substantial legal and social disabilities,[176] but because the

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[165] Goodright v. Moss, 98 Eng. Rep. 1257 (K.B. 1777).

[166] For a complete discussion of the historical development of Lord Mansfield's Rule see VII J. WIGMORE, EVIDENCE § 2063 (3d ed. 1940).

[167] See 24 U. MIAMI L. REV. 414, 420–21 (1970).

[168] *Id.* at 422.

[169] *E.g.,* Vasquez v. Esquibel, 141 Colo. 5, 346 P.2d 293 (1959); *In re* L——, 499 S.W.2d 490 (Mo. 1973); Melvin v. Kazhe, 83 N.M. 356, 492 P.2d 138 (1971); State v. Schimschal, 73 Wash. 2d 141, 437 P.2d 169 (1968).

[170] State v. Schimschal, 73 Wash. 2d 141, 437 P.2d 169 (1968). For an example of a "general evidence" statute, see UTAH R. EVID. 7, Note 174 *infra.*

[171] A careful reading of the Utah Supreme Court's decision in *Holder,* together with the dissenting opinion of Justice Crockett in Hughes v. McCormick, 17 Utah 2d 372, 412 P.2d 613 (1966), indicates that the court has for many years tacitly considered Lord Mansfield's Rule effective in Utah as an integral part of the presumption of legitimacy.

[172] 30 Utah 2d at 396, 518 P.2d at 689.

[173] *Id.*

[174] Rule 7 provides:

> Except as otherwise provided in these Rules or the statutes of this state, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not produce any object or writing, and (f) all relevant evidence is admissible.

UTAH R. EVID. 7.

[175] 30 Utah 2d at 396 n.6, 518 P.2d at 689–90 n.6.

[176] See Holder v. Holder, 9 Utah 2d 163, 164, 340 P.2d 761, 762, (1959); Note, *Non-Access and Pennsylvania,* 29 U. PITT. L. REV. 559, 561–63 (1968).

plight of the bastard child has been recognized and substantially mitigated by the modern legal system,[177] the application of the rule in *Lopes* is difficult to justify. Moreover, the interests of a child in situations like *Lopes* can probably best be served and protected by a court that has all pertinent evidence before it. Similarly, the clear implication of rule 7 of the Utah Rules of Evidence is that a court should have before it the relevant testimony of all competent witnesses, including the parents of children whose legitimacy is in question. The court's position that the integrity and solidarity of a family must be protected through the application of Lord Mansfield's Rule is untenable because, like the situation in *Lopes,* the family unit the court seeks to protect is often already racked by serious strife.

The Utah Supreme Court's decision to follow Lord Mansfield's Rule may, in complex fact situations, produce the anomalous result that the very evidence needed by a court to prevent injustice will be excluded.

VI. Professional Malpractice

Liability of Accountants and Attorneys to Third Parties for Negligence

In *Milliner v. Elmer Fox & Co.,*[178] the plaintiff charged a corporation's accountants and lawyers with negligence[179] in preparing reports and other documents for filing with the Securities and Exchange Commission, and sought damages for the loss he sustained in purchasing stock of that corporation in reliance upon those reports and documents. The trial court dismissed the complaint for failure to state a cause of action. On appeal, the Utah Supreme Court affirmed, holding that (1) the accountants were not liable because a future purchaser of stock in a corporation "belongs to an unlimited class of equity holders who could not be reasonably foreseen as a third party who would be expected to rely on a financial statement prepared by an accountant for the corporation";[180] (2) the complaint failed to allege negligence on the part of the lawyers; and (3) the antifraud provision of the Utah Uniform Securities Act[181] does not create a private remedy.

In the leading case on accountants' liability to third parties for negligence, *Ultramares Corp. v. Touche,*[182] the New York Court of Appeals

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[177] *See* Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy,* 44 Texas L. Rev. 829 (1966).

[178] 529 P.2d 806 (Utah 1974).

[179] The complaint also alleged gross negligence, Brief for Appellants at 5, 8, Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974), but the court apparently disregarded the allegation or failed to recognize a distinction between simple and gross negligence in cases of accountants' liability to third parties. See note 186 *infra* and accompanying text.

[180] 529 P.2d at 808.

[181] Utah Code Ann. § 61-1-1 (1968) provides:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

refused to hold accountants liable to a third party who extended credit in reliance upon erroneous financial reports prepared by the accountants. The court feared that if an accountant's duty of care extended beyond the bounds of privity, "a thoughtless slip or blunder" could expose him to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[183] Since *Ultramares,* a split of authority has developed on the issue of accountants' liability for negligence to persons not in privity. Some courts have denied recovery,[184] while others have permitted recovery in limited instances where the accountants knew that the third party intended to rely on the financial reports in granting credit.[185] The New York court has also held that an accountant may be liable to this limited class of third parties if he is grossly negligent.[186]

A similar split of authority exists on the issue of lawyers' liability to third parties for negligence. Most courts have held that an attorney is liable for negligence only to his client.[187] Other courts, most notably in California, have held lawyers liable to limited classes of third parties not in privity, including intended beneficiaries of negligently prepared wills[188] and clients of a collection agency employing the negligent lawyer.[189] In determining whether the lawyer's duty extends to third parties, the California court has employed a balancing test based on public policy, considering factors such as

> the extent to which the transaction was intended to affect the plaintiff, the forseeability of harm to him, the degree of certainty that the

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(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

[183] 255 N.Y. 170, 174 N.E. 441 (1931).

[183] *Id.* at 179, 174 N.E. at 444.

[184] Stephens Indus., Inc. v. Haskins & Sells, 438 F.2d 357 (10th Cir. 1971) (applying Colorado law); O'Connor v. Ludlam, 92 F.2d 50 (2d Cir.), *cert. denied,* 302 U.S. 758 (1937) (applying New York law) (dictum); Investment Corp. v. Buchman, 208 So. 2d 291 (Fla. App.), *cert. dismissed,* 216 So. 2d 748 (Fla. 1968); Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919).

[185] Rhode Island Hosp. Trust Nat'l Bank v. Swartz, 455 F.2d 847 (4th Cir. 1972) (applying Rhode Island law); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Shatterproof Glass Corp. v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971); *see* RESTATEMENT OF TORTS § 552 (1938); *cf.* C.I.T. Financial Corp. v. Glover, 224 F.2d 44 (2d Cir. 1955) (applying New York law) (dictum).

[186] Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20 (Sup. Ct. 1954), *aff'd,* 285 App. Div. 867, 137 N.Y.S.2d 829 (1955); State St. Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938).

[187] *E.g.,* Savings Bank v. Ward, 100 U.S. 195 (1879); Joffe v. Rubenstein, 24 App. Div. 2d 752, 263 N.Y.S.2d 867 (1965), *appeal dismissed,* 21 N.Y.2d 721, 234 N.E.2d 706, 287 N.Y.S.2d 685 (1968); Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App. 1968).

[188] Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied,* 368 U.S. 897 (1961) (dictum); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1966); *see* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (negligent notary public).

[189] Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).

At least two decisions have also indicated that third parties may be entitled to recover under a theory of third party beneficiary contract. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied,* 386 U.S. 987 (1961) (dictum); Woodfork v. Sanders, 248 So. 2d 419 (La. App.), *cert. denied,* 259 La. 759, 252 So. 2d 455 (1971) (dictum).

> plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[190]

The issue of accountants' and lawyers' liability to third parties for negligence was one of first impression for the Utah Supreme Court.[191] The court indicated that an accountant could be held liable even in the absene of privity "when in preparing his report the accountant knew that a particular party or parties would rely on the report for a particular purpose," but refused to extend liability in *Milliner* on the grounds that a future stock purchaser "belongs to an unlimited class of equity holders" whose reliance upon the reports could not reasonably be foreseen.[192] Although this conclusion is supported by the cases,[193] the court failed to develop its reasoning fully.[194] Furthermore, it failed to discuss the issue raised by plaintiff whether an acountant could be liable to a third party for gross, as distinguished from simple, negligence.[195]

Distinguishing the attorney-client relationship from the accountant-client relationship,[196] the court stated that ordinarily a lawyer is not expected to investigate the truth or falsity of information supplied by his client, "unless facts and circumstances of the particular legal problem would indicate otherwise or his employment would require his investigation."[197] In this case, the court did not further articulate the scope of a lawyer's duty to persons not in privity, but merely concluded that there was no breach of any duty.[198] As the California opinions demonstrate, defining the scope of a lawyer's duty involves careful balancing of public policy factors.[199] By failing to discuss a lawyer's duty to third persons, the Utah court missed an opportunity to educate the bar so that future litigation of the question could be avoided.

Section 61–1–1 of the Utah Code makes it "unawful" for any person, in connection with the offer, sale, or purchase of any security . . . to engage in any act, practice, or course of business which operates . . . as a

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[190] Donald v. Garry, 19 Cal. App. 3d 769, 772–73, 97 Cal. Rptr. 191, 192 (1971), *quoting* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); *accord,* Costello v. Wells Fargo Bank, 258 Cal. App. 2d 90, 65 Cal. Rptr. 612 (1968); (dictum); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied,* 368 U.S. 987 (1961) (dictum).

[191] Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah 1974).

[192] *Id.* at 808.

[193] See notes 182–86 *supra.* Although this position is supported by the vast majority of courts, commentators in recent years have criticized the favored position of the defendant-professional in negligence suits. *E.g.,* Comment, *Professional Negligence,* 121 U. PA. L. REV. 627, 690 (1973). At least one authority has advocated strict liability in all services. Greenfield, *Consumer Protection in Service Transactions,* 1974 UTAH L. REV. 661.

[194] Indeed, much of the court's reasoning throughout the opinion can only be deduced by reading the lawyer-respondent's brief.

[195] See note 186 *supra* and accompanying text.

[196] 529 P.2d at 808.

[197] *Id.*

[198] "[T]he plaintiffs fail[ed] to allege acts or omissions . . . which would tend to show negligence." *Id.*

[199] See note 190 *supra* and accompanying text.

fraud . . . upon any person."[200] This language is strikingly similar to that of rule 10b–5,[201] under which federal courts have implied private remedies.[202] Although plaintiffs sought to imply a private remedy under section 61–1–1 by analogy to the federal law, the court refused to do so, deferring instead to the legislature to create a private remedy.[203] The court did not discuss the lawyer's argument that section 61–1–22,[204] which explicitly creates a private remedy against a *seller* for violations of the Act, impliedly precludes the granting of any other private remedies.[205]

VII. PROPERTY

Priority under the Utah Recording Statutes

Wilson v. Schneiter's Riverside Golf Course[206] involved conflicting installment land contracts and the Utah recording statutes.[207] In 1962,

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[200] UTAH CODE ANN. § 61–1–1 (1968), quoted in note 181 *supra.*

[201] SEC Rule 10b–5, 17 C.F.R. § 240.10b–5 (1973), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

[202] For a review of cases discussing the issue whether a private right of action exists under rule 10b–5, see Stewart v. Bennett, 359 F. Supp. 878 (D. Mass. 1973).

[203] 529 P.2d at 808.

[204] UTAH CODE ANN. § 61–1–22 (1968).

[205] Brief for Lawyer-Respondents at 14, Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974).

[206] 523 P.2d 1226 (Utah 1974).

[207] The pertinent provisions of the Utah recording statutes are: UTAH CODE ANN. § 57–1–1 (1974):

> The term "conveyance" as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned, except wills, and leases for a term not exceeding one year.

Id. § 57–1–6:

> Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice. . . .

Id. § 57–1–6.:

> A certificate of the acknowledgment of any conveyance, or of the proof of the execution thereof as provided in this title, signed and certified by the officer taking the same as provided in this title, shall entitle such conveyance, with the certificate or certificates aforesaid, to be recorded in the office of the recorder of the county in which the real estate is situated.

Id. § 57–3–2:

> Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified, in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the office of the county recorder shall, from the time of filing the same with the recorder for

defendant purchased real estate by real estate installment contract. In March, 1965, plaintiff entered a similar real estate contract with the same vendor for a tract of land, 2.39 acres of which overlapped the land described in defendant's contract. In April, 1965, plaintiff recorded a notice of the purchase, signed and acknowledged by him.[208] In November, 1965, defendant learned of plaintiff's interest, paid the balance due on its contract, and recorded the deed. Plaintiff learned in 1970 of defendant's claim of ownership. He continued payments[209] and in 1972 paid the balance on his contract and obtained and recorded the deed.

In plaintiff's action to quiet title, the trial court found for defendant, holding that plaintiff was not a bona fide purchaser for value because he did not complete the payments required by his contract until after he had learned of defendant's claim and recordation of deed.[210] On appeal, the Utah Supreme Court reversed, reasoning that the defendant and plaintiff should be on equal footing as to notice, since both paid off the purchase price of their land only after the other had recorded.[211] Relying on section 57–3–2[212] of the Utah recording statutes, which provides that the recording of an instrument affecting real estate imparts notice of that instrument to all persons, the court held that because plaintiff recorded his notice of purchase prior to defendant's recordation of its deed, defendant was the subsequent purchaser.

In relying on section 57–3–2, the Utah court overlooked a possibly more pertinent provision of the recording statutes. Section 57–3–3[213] provides that a second purchaser for a valuable consideration prevails over the first taker only if, at the time of payment, the second has no notice, actual or constructive, of the claim of the first, and the second taker records first.[214] Thus, the *Wilson* court should have considered

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record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgages and lien holders shall be deemed to purchase and take with notice.

Id. § 57–3–3:

Every conveyance of real estate hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.

[208] 523 P.2d at 1226.

[209] Plaintiff first learned of defendant's claim in July, 1970, at which time $24,000 was still owed of the original purchase price of $29,769. *Id.* at 1228.

[210] *Id.* at 1227.

[211] Actual notice to defendant was not found by the trial court, but the Utah Supreme Court said that defendant's agent had actual notice prior to completing payment under the contract. *Id.* at 127. *Compare* Brief for Respondent at 2, Wilson v. Schneiter's Riverside Golf Course, 523 P.2d 1226 (Utah 1974), *with* Brief for Appellants at 2, Wilson v. Schneiter's Riverside Golf Course, 523 P.2d 1226 (Utah 1974).

On petition for rehearing, respondent claimed the court erred in finding defendant had actual notice of plaintiff's claim when defendant paid the balance of his contract. Respondent's Petition for Rehearing at 1, Wilson v. Schneiter's Riverside Golf Course, 523 P.2d 1226 (Utah 1974).

[212] See note 207 *supra*.

[213] *Id.*

[214] There are three general types of recording statutes:

(a) Notice: An unrecorded conveyance or other instrument is invalid as against a subsequent bona fide purchaser . . . for value and without notice.

whether the one-sixth payment made by plaintiff prior to defendant's recordation of deed constituted valuable consideration and whether the notice recorded by plaintiff was sufficient under the Utah statutes.

In his dissenting opinion, Justice Ellett strongly criticized the majority's failure to determine who is a bona fide purchaser under the Utah recording statutes.[215] It is questionable whether plaintiff could qualify as a purchaser "in good faith and for a valuable consideration"[216] except as to payments made before the recordation of defendant's deed. The weight of authority[217] suggests that "purchaser" means one who has paid in full, although part payment may be given *pro tanto* protection.

Although the court in *Wilson* stated that it would not consider the sufficiency of the notice recorded by plaintiff,[218] since it was not an issue in the lower court, the opinion's reasoning seems to indicate that the court regarded the purchase notice as recordable. Such a conclusion is essential because the result of the case turns upon plaintiff's recordation of a notice of the installment contract. The authority cited by the court,[219] however, does not directly support its apparent holding that plaintiff's notice was sufficient. In *Daniel v. Kensington Homes, Inc.*,[220] where a recorded option agreement relating to land was binding against a subsequent purchaser, the court suggested that when a "proper agreement" respecting property is recorded, it has the same effect as the recording of a deed.[221] The Utah court, however, gave no reasons in *Wilson* for considering notice of an installment contract a "proper agreement."

The resolution of *Wilson* should have been based on a determination of what constitutes "notice" and "consideration" under the Utah recording statutes. Because such determinations were not made, the opinion leaves several unanswered questions. The court seems to suggest that a party to an installment land contract may protect himself from conflicting claims by recording "something" and "making some sort of payment," without specifying what or how much.

(b) Race: No conveyance or other instrument is valid as against . . . purchasers for a valuable consideration but from the time of recordation.
(c) Race-Notice: An unrecorded conveyance or other instrument is invalid as against a subsequent bona fide purchaser for value without notice . . . who first records.

C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 324 (2d ed. 1971). The Utah act falls into the third category.

[215] 523 P.2d at 1227 (Ellett, J., dissenting).

[216] UTAH CODE ANN. § 57-3-3 (1974); note 207 *supra*.

[217] *See, e.g.*, Westpark, Inc. v. Seaton Land Co., 225 Md. 433, 171 A.2d 736, 743 (1961). *See also* Davis v .Ward, 109 Cal. 186, 41 P. 1010, 1011 (1895); Pender v. Bird, 119 Utah 91, 225 P.2d 1057, 1059 (1950).

[218] 523 P.2d at 1227.

[219] Daniel v. Kensington Homes, Inc., 232 Md. 1, 192 A.2d 114 (1963). *See also* Davis v. Ward, 109 Cal. 186, 41 P. 1010 (1895), where a record of a mortgage which failed by mistake to describe land intended was held not to be constructive notice; Beard v. Morgan, 143 Neb. 503, 10 N.W.2d 253, 258 (1943), where knowledge of another party's contract to purchase the same real property prevents a second party from being a bona fide purchaser; 8 G. THOMPSON, REAL PROPERTY 415–25 (1963).

[220] 232 Md. 1, 192 A.2d 114 (1963).

[221] 192 A.2d at 121.

VIII. Securities Law

Scienter and Reliance Must be Proven Before Rescision Will Be Granted Under the Utah Uniform Securities Act

In *S & F Supply Co. v. Hunter*,[222] plaintiff's brought an action against a licensed securities broker, alleging fraud and breach of a contract under which the broker had agreed to purchase ten thousand shares of stock. Defendant had obtained the stock from Zions First National Bank—an intervening plaintiff who was holding the stock as collateral on a loan to the plaintiffs—but did not pay for it. The defendant counterclaimed against both S & F Supply and the bank under the Utah Uniform Securities Act,[223] seeking recision of the contract on the ground that he had been fraudulently induced into entering into the agreement.[224] The Utah Supreme Court affirmed the district court's denial of defendant's counterclaim, holding that the defendant had not shown that the plaintiffs were sufficiently blameworthy or that defendant had sufficiently relied on the "untrue statement of a material fact" to mandate recision of the contract.

Federal and state securities laws were enacted to protect the investing public through maintenance of a high level of integrity in the securities markets.[225] Securities laws also seek to elminate the necessity for buyers of securities to prove the seller's intent to defraud as a condition precedent to obtaining recision.[226] Congress, in establishing federal securities regulations, intended to "throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance."[227] As a result of this congressional mandate, federal securities laws are viewed in the light most favorable to the investor. In interpreting section 12(2) of the Securities Act,[228] for example, numerous courts have decided that an action to rescind a con-

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[222] 527 P.2d 217 (Utah 1974).

[223] Utah Code Ann. §§ 61-1-1 *et seq.* (1968).

[224] Defendant's counterclaim was based on the Utah equivalent to section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77(l)(2) (1970). The Utah Act provides:

> (1) Any person who
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> . . . .
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> (b) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six per cent per year from the date of disposition.

Utah Code Ann. § 61-1-22 [(1)] (b) (1968).

[225] See I L. Loss, Securities Regulation 178 (1961).

[226] *See* Ellis v. Carter, 291 F.2d 270, 274 (9th Cir. 1961).

[227] H.R. Rep. No. 85, 73d Cong., 1st Sess. 9–10 (1933).

[228] 15 U.S.C. § 77(l)(2) (1970).

tract for the sale of securities does not require proof of reliance or scienter.[229] Under the securities laws, courts have gradually begun to impose strict liability on the seller of securities for his and his agent's acts and omissions,[230] and have rejected the notion that the buyer of securities still has the common law obligation to show that he used "reasonable prudence" in purchasing securities.[231]

The *Hunter* court's holding that "some form of the traditional scienter requirement is preserved"[232] in the securities laws, and that a buyer cannot "naively or blindly purchase stocks without concern for the truth or reasonableness of representation made,"[233] directly contravenes the policies and trends in both state and federal securities laws. The court recognized that the Utah Uniform Securities Act was "sufficiently identical with . . . Sec. 12(2) of the Federal Securities Act of 1933 that we regard adjudications on those statutes as helpful to us,"[234] but in the next paragraph held that the seller must have an intent to defraud (or at least a high degree of blameworthiness) and that the buyer must rely on the misrepresentations before rescision would be allowed under the Utah statute. On the scienter issue, the court stated that under federal and state law the seller has the burden to show that he "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission"[235] but ignored recent case law that holds the seller liable even though he acted in good faith and did not directly or indirectly induce acts constituting a violation of the securities laws. [236] The court apparently confused "reliance" with "materiality," reasoning that because the test of materiality is "whether a reasonable man would attach importance [to the misrepresentation] in determining his choice of action in the transaction in question,"[237] it logically follows that misrepresentations must be "relied upon" before they can be deemed "material."[238] In addition to this perplexing analysis of materiality, the court also intimated that a higher duty of care should be placed on the defendant because he is a securities broker[239]—a requirement contrary to existing federal law.[240]

[229] *See, e.g.*, Woodward v. Wright, 266 F.2d 108, 116 (10th Cir. 1959) (action to rescind contract for sale of an undivided interest in oil and gas rights); Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1219 (D. Md. 1968), *modified*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 94 S. Ct. 1623 (1974) (action to rescind purchase of oil and gas rights).

[230] *See* Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1222 (D. Md. 1968), *modified*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 94 S. Ct. 1623 (1974).

[231] *Id.* at 1220–21.

[232] 527 P.2d at 221.

[233] *Id.*

[234] *Id.* at 220 n.3.

[235] UTAH CODE ANN. § 61–1–22 [(1)] (b) (1968).

[236] *See, e.g.*, Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1222 (D. Md. 1968), *modified*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 94 S. Ct. 1623 (1974).

[237] 527 P.2d at 221. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

[238] 527 P.2d at 221.

[239] *Id.* at 222.

[240] Most courts refuse to apply the "higher duty of care" standard that is typical in professional malpractice actions. The courts seem to conclude that the integrity

The result of *Hunter* will be that defrauded buyers, when given a choice, will bring their actions under the federal securities laws in federal court to avoid the ambiguities inherent in the court's interpretation of the Utah Uniform Securities Act.[241] By failing to recognize the policies underlying the Utah Uniform Securities Act, the Utah Supreme Court has drawn away from prevailing trend in securities law.[242]

IX. TAXATION

A. State Tax Commission Has Power To Determine Exempt Status of Property

In *Baker v. Tax Commission,*[243] the Salt Lake County Assessor had assessed taxes on certain eleemosynary properties[244] which had formerly been tax exempt.[245] Following the assessor's decision to tax the properties, the owners of the properties petitioned the Salt Lake County Board of Equalization,[246] in an attempt to have the taxes nullified. After the board granted only some of the appeals,[247] those property owners who were denied relief appealed to the State Tax Commission for review of the board's decision.[248] While those appeals were pending, the assessor gained

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of the market can best be protected by applying a form of strict liability on the seller of securities. See cases cited note 229 *supra.*

[241] This trend has already begun. See Kerbs v. Fall River Indus., Inc., 502 F.2d 731 (10th Cir. 1974), a Utah fraud case brought under the federal securities laws so that the buyer could avail himself of the broad interpretations given those laws by federal courts. In *Kerbs,* one defendant was found liable on the theory that one who aids and abets a fraudulent scheme in the purchase or sale of securities may be held accountable even though his assistance consists of mere silence or inaction. *Id.* at 740. In *Hunter,* Zions First National Bank could have fallen within this broad scheme of liability.

[242] One of the purposes of the Uniform Securities Act was to make state and federal securities laws uniform, in addition to granting state relief where previously a buyer could only obtain relief under the federal securities laws. UTAH CODE ANN. § 61-1-27 (1968).

[243] 520 P.2d 203 (Utah 1974).

[244] The properties involved belonged to various organizations, including the Lutheran, Episcopal, Mormon, and Evangelical churches, as well as the Y.M.C.A., the Masonic Temple, the Ladies Literary Club, and others. *Id.* at 204.

[245] The tax involved was the ad valorem property tax for 1972. The assessor's decision to tax the properties was based on his conclusion that they fell outside the exemption provided by the Utah Constitution. Brief for Plaintiff at 2, Baker v. Tax Commission, 520 P.2d 203 (Utah 1974). The relevant constitutional language is: "The property of the state, counties, cities, towns . . . *lots with the buildings thereon used exclusively for either religious worship or charitable purposes* . . . shall be exempt from taxation." UTAH CONST. art. XIII, § 2 (emphasis added).

[246] The Utah Constitution orders the etsablishment of County Boards of Equalization and prescribes their duties:

> In each county of this State there shall be a County Board of Equalization consisting of the Board of County Commissioners of said county. The County Boards of Equalization *shall adjust and equalize the valuation and assessment* of the real and personal property within their respective counties, subject to such regulation and control by the State Tax Commission as may be prescribed by law.

UTAH CONST. art. XIII, § 11 (emphasis added).

[247] Brief for Defendant at 2, Baker v. Tax Commission, 520 P.2d 203 (Utah 1974).

[248] The relevant statutory language in effect at the time of the hearing before the Tax Commission was:

a hearing before the commission, where he argued that neither the board nor the commission had authority or jurisdiction to decide whether property used for religious or charitable purposes is tax exempt.[249] From the commission's decision that it and the board did have such authority, the assessor appealed directly to the Utah Supreme Court,[250] arguing (1) that the board's authority does not extend to matters of exemption, but is limited to adjusting and equalizing taxes already assessed;[251] and (2) that the Tax Commission's power of review likewise does not extend to cases involving exemption.[252] Rather than engaging in pinpoint construction of the applicable statutory and constitutional provisions, the supreme court rejected the assessor's restrictive reading of powers granted to the Board of Equalization[253] and the Tax Commission.[254] Relying generally on the structure of appellate administrative procedure[255] and on *County Board of Equalization v. State Tax Commission,*[256] the court held: "[T]he Commission does have the power to remove from the assessment rolls property which it finds to be constitutionally or statutorily exempt from taxation . . . ."[257]

In *County Board of Equalization,* whose facts and issues are similar to those in *Baker,* the Tax Commission had cancelled an assessment ordered

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> Any person aggrieved and dissatisfied with the decision of the county board of equalization in relation to the assessment of any property in which he has an interest may appeal from such decision to the state tax commission . . . .

UTAH CODE ANN. § 59–7–10 (1953), *as amended, id.* (1974). In the interim between the hearing and the instant decision, the section was amended to read:

> Any person aggrieved and dissatisfied with the decision of the county board of equalization in relation to the assessment of any property *or the determination of any exemption* in which he has an interest may appeal . . . .

UTAH CODE ANN. § 59–7–10 (1974), *amending id.* (1953) (emphasis added).

[249] For a thorough overview of state and federal constitutional issues involved in the taxation of properties owned by religious and charitable groups, see Walz v. Tax Commission, 397 U.S. 664 (1970); Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore. 1972), *appeal dismissed,* 409 U.S. 1099 (1973); Korbel, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?,* 53 A.B.A.J. 1018 (1967); Warren, Krattenmaker & Snyder, *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut,* 4 CONN. L. REV. 181 (1971); Note, *Constitutionality of Tax Benefits Accorded Religion,* 49 COLUM L. REV. 968 (1949); Note, *Religion in Politics and the Income Tax Exemption,* 42 FORD. L. REV. 397 (1973).

[250] UTAH CODE ANN. § 59–5–76 (1974) provides, upon writ of certiorari, for original jurisdiction of the Utah Supreme Court to review decisions of the Utah State Tax Commission.

[251] Brief for Plaintiff at 7–9. The assessor also contended that the appeals from the board's decision were not filed in a timely fashion, and that therefore the commission had no authority to decide them. *Id.* at 18fff19. The court satisfactorily rejected this argument. 520 P.2d at 205.

[252] Brief for Plaintiff at 13–16.

[253] See note 246 *supra* and UTAH CODE ANN. § 59–7–2 (1974).

[254] UTAH CODE ANN. § 59–7–10 (1974). See note 248 *supra.*

[255] In the majority opinion, Justice Ellett wrote: "The fact that administrative appeals are provided by law compels one to believe that the judgment of the Commission is superior to that of the Board and that of the Board is superior to that of the Assessor." 520 P.2d at 206. Justice Tuckett, however, wrote, in reference to the constitutional language quoted at note 246 *supra*: "The words 'adjust and equalize' are not synonymous with cancel." 520 P.2d at 208 (Tuckett, J., dissenting).

[256] 88 Utah 219, 50 P.2d 418 (1935).

[257] 520 P.2d at 206.

by the County Assessor and Board of Equalization. Apparently ignoring the same constitutional and statutory language that were relied upon by the assessor in *Baker,* the unanimous *County Board of Equalization* court wrote:

> Since the [Tax] [C]ommission has general supervision over the tax laws of the state . . . and has the power on appeal to make such correction or change in the order of the county board of equalization as it may deem proper, it must necessarily follow that it is authorized to cancel, vacate, or change an assessment when, upon a proper showing, it has been determined that the assessment should be so cancelled, vacated, or changed.[258]

Like the *County Board of Equalization* court, the court in *Baker* failed to consider directly the difficult and perhaps contradictory constitutional and statutory provisions.[259] Had the court done so, it might have concluded, as the assessor argued, that: (1) to equalize and to exempt are not the same, but are separate and distinct functions; (2) the board has constitutional power only to equalize by raising and lowering assessments; and (3) the board has no constitutional power to exempt property from taxation.[260] Instead, the court simply followed the precedent of a case similarly deficient in statutory interpretation.[261]

Another shortcoming of *Baker* is its failure to consider the argument raised by the assessor that only the courts have authority to determine which properties are constitutionally tax exempt.[262] Because the holding in *County Board of Equalization* did not extend to cases of constitutional exemption, the issue had not been settled prior to the *Baker* decision. The court ignored the question, however, extending *County Board of Equalization* rule beyond its original scope.

Despite these technical weaknesses, the result reached in *Baker* is defensible if one assumes, as the court apparently did, that one purpose of the applicable constitutional and legislative enactments is to expedite matters involving property tax questions. From this standpoint, the court apparently arrived at the most equitable and expedient conclusion. Had the court found for the assessor, the only remedy available to the aggrieved property owner would have been to pay the taxes under protest and then shoulder the burden of initiating judicial proceedings to have their money returned, on a showing that the assessment had been illegally made.[263] Though unsatisfying from the standpoint of statutory interpretation, the court's decision that the Tax Commission has authority to determine exemptions furthers both the smooth functioning of government and the interests of aggrieved taxpayers.

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[258] 88 Utah at 226–27, 50 P.2d at 422.

[259] See notes 246, 248, 255 *supra* and UTAH CODE ANN. § 59–7–2 (1974).

[260] Brief for Plaintiff at 9.

[261] See text accompanying note 258 *supra.*

[262] Brief for Plaintiff at 17.

[263] UTAH CODE ANN. § 59–11–11 (1974).

B. Tax Sale of Property Subsequent to Acquisition by City

In *Huntington City v. Peterson*,[264] the city brought an action to quiet title to a forty acre tract of land near the city limits. Huntington City had received a warranty deed to the property on April 7, 1959 and recorded it in May. Because the city was tax exempt, it was under no obligation to pay property taxes after the purchase date.[265] Prior to the conveyance, however, a statutory lien on the property was created on the first day in January,[266] although assessment was not required until April 15. At that time, the county assessor was required by law to assess the property to the person who owned it on the first day of January.[267] Accordingly, Emery County assessed the property to the grantor[268] of the tract to the city, and when the taxes were not paid, the county made a preliminary sale of the property to the defendant.[269] Four years later, a tax deed was duly executed and delivered to the defendant, who immediately recorded it.[270]

The trial court concluded that, because the defendant had been in possession for the requisite four years following conveyance of the title to her, she was entitled to the property.[271] On appeal, the Utah Supreme Court reversed, holding that the city's claim was not barred by the four year statute of limitations,[272] and that a tax lien was not effective until levy and assessment.[273] Therefore, since there was no showing that the property was assessed before the city's purchase, plaintiff, a tax exempt entity, owed no tax and was entitled to the property.

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[264] 30 Utah 2d 408, 518 P.2d 1246 (1974).

[265] UTAH CONST. art. 13, § 2; UTAH CODE ANN. § 59–2–1 (1974).

[266] UTAH CODE ANN. § 59–10–3 (1974).

[267] *Id.* § 59–5–4.

[268] The *Huntington City* court incorrectly noted that the property was assessed to the "grantee of the deed to the city." 30 Utah 2d at 410, 518 P.2d at 1248. *See* Brief for Appellant at 2 and Brief for Respondent at 2, Huntington City v. Peterson, 30 Utah 2d 408, 518 P.2d 1246 (1974).

[269] UTAH CODE ANN. §§ 59–10–29, –33 (1974) provide for such a preliminary tax sale upon proper notice to the owner.

[270] The defendant also paid all property taxes from 1964 through 1971, when the suit was initiated. 30 Utah 2d at 413, 518 P.2d at 1249–50 (Henriod, J. dissenting). All necessary statutory requirements for a valid tax title appear to have been followed, although no notice was ever given directly to the city concerning the purported tax delinquencies. *Id.* at 410, 413, 518 P.2d at 1248, 1250.

[271] *Id.* at 411, 518 P.2d at 1248. The trial court's conclusion was based on UTAH CODE ANN. § 78–12–5.2 (Supp. 1973), which provides that

> [n]o action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale . . . .

[272] 30 Utah 2d at 411, 518 P.2d at 1248. Since the trial court "did not find that the plaintiff had not been in possession during the four years prior to suit," the Utah Supreme Court relied on the latter part of UTAH CODE ANN. § 78–12–5.2 (Supp. 1973), which states:

> Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense.

[273] 30 Utah 2d at 410, 518 P.2d at 1248. As the dissent correctly notes, the majority cited no authority to support its conclusion that a tax lien cannot become effective until levy and assessment. *Id.* at 414, 518 P.2d at 1250 (Henriod, J., dissenting).

Cases involving a transfer of property after the statutory lien date, but before assessment and levy, usually arise in the context of eminent domain.[274] The prevailing view in these cases is that where taxes become a lien prior to passage of title, the owner on the lien date bears responsibility for payment regardless of conveyance to a tax exempt entity.[275] Other jurisdictions, like Utah, hold that the lien is ineffective until levy is made and that if title passes to a tax exempt public organization before levy, the property is not subject to taxation for the entire year.[276] Cases reflecting the majority view are largely based on careful statutory construction, while opinions to the contrary are usually older decisions, some of which fail to deal directly with the statutory language. *Huntington City* falls into the latter category.[277]

In *Huntington City,* the court relied primarily on *Utah Parks Co. v. Iron County,*[278] where, under an almost identical fact situation, the court held that no tax was due on the property even though a taxable entity owned it on January first. There the court determined that the controlling issue was the effect of converting the property from a taxable to a nontaxable status,[279] rather than the effect of the statutory lien that attaches on January first.[280] Relying on this case to circumvent the statutory issue, the court in *Huntington City* was thus able to conclude that, since no valid lien existed on the property, the tax sale was invalid.[281]

The failure of the court to directly consider the statutory question in both *Utah Parks* and *Huntington City* might be attributed to the court's reliance on the dictum in the early case of *Gillmor v. Dale,* [282] where

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[274] *E.g.,* City of Long Beach v. Aistrup, 164 Cal. App. 2d 41, 330 P.2d 282 (1958); White v. Kelley, 215 Tenn. 576, 387 S.W.2d 821 (1965).

[275] City of Long Beach v. Aistrup, 164 Cal. App. 2d 41, 330 P.2d 282, 288 (1958). In White v. Kelley, 215 Tenn. 576, 387 S.W.2d 821, 825 (1965), the court cited Magruder v. Supplee, 316 U.S. 394, 398 (1942), for the general rule that

> [w]here the date fixed by the statute for determination of the taxable status of property falls before the actual assessment, one owning property on such date may not escape liability for taxation by selling the property before completion of the assessment rolls.

[276] *E.g.,* City of Laurel v. Weems, 100 Miss. 335, 56 So. 451 (1911); City of Portland v. Multnomah County, 135 Ore. 469, 296 P. 48 (1931); State v. Snohomish County, 71 Wash. 320, 128 P. 667 (1912). Although some courts would uphold the minority rule with respect to governmental entities, they refuse to apply it where property is transferred to a church corporation before the assessment or levy date. *See, e.g.,* Board of Comm'rs v. Central Baptist Church, 136 Okla. 99, 276 P. 726, 727–28 (1929).

[277] 30 Utah 2d at 415–18, 518 P.2d at 1250–53 (Henriod, J., dissenting). Justice Henriod, in a strong dissent, emphasized the significance of statutory lien provisions on the case and felt that the city should have taken the property subject to the tax lien. *Id.* at 416, 518 P.2d at 1252.

[278] 14 Utah 2d 178, 180–81, 380 P.2d 924, 925–26 (1963).

[279] *Id.* at 181, 380 P.2d at 926.

[280] It is significant that Justice Callister, who wrote the opinion in *Utah Parks,* joined Justice Henriod in the dissenting opinion in *Huntington City,* in which both justices retreated from the position in *Utah Parks* and strongly urged that the literal language of the statute be followed.

[281] *See* 30 Utah 2d at 413–14, 518 P.2d at 1250 (Henriod, J., dissenting).

[282] 27 Utah 372, 377, 75 P. 932, 934 (1904). In *Utah Parks,* the court accepted the fifty-nine year old *Gillmor* dictum without noting whether or not section 59–5–4 — which directs that the owner on January first be liable for the tax — was applicable

the court noted that until levy and assessment, there is no lien on real property.[283] In contrast to *Utah Parks* and *Huntington City,* however, section 59–5–4 of the Utah Code indicates that the *owner* of the property on the first day of January should be liable for ad valorem property taxes for the entire year.[284] The court's recurrent emphasis on Gillmor, as well as its failure to deal with section 59–5–4 in *Huntington City,* permitted the court to destroy the defendant's interest in the property, and to avoid relevant issues such as bona fide purchaser and breach of warranty of title. Consequently, by judicially eliminating the statutory lien, *Huntington City* prevents a buyer from acquiring a valid tax title where a tax exempt entity purchases otherwise taxable property after creation of a statutory lien, but before the assessment date.

X. TRUSTS

"Issue" Does Not Include Adopted Children

In *Makoff v. Makoff,*[285] the trustees of an inter vivos trust sought to determine whether an adopted child of the settlor's son was entitled to share in the trust as the "issue" of his adoptive father. In 1956, the settlor created a trust naming himself and his two sons as trustees for the benefit of the "issue" of the settlor's sons. Upon the settlor's death, income and corpus were to be distributed each year to the issue of each of the settlor's named sons "upon the principle of representation." At the time the trust instrument was drawn up, plaintiff, one of the named sons, was living with his first wife and their natural children, but when the settlor died, he was divorced. He later remarried and legally adopted his second wife's natural child. The trial court held that the adopted child did not take under the trust. On appeal, the Utah Supreme Court affirmed, declaring that when the settlor employed the term "issue" in the trust deed, "he did not intend to include adopted children as beneficiaries of his largess."[286]

In a 1938 case construing the term "issue," *In re Harrington's Estate,*[287] the Utah court held that for purposes of intestate succession, "issue" did

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to the new set of facts. 14 Utah 2d at 181, 380 P.2d at 925. Although the court in *Huntington City* did not cite *Gillmor* for the proposition that there can be no lien on real property before assessment and levy, the court apparently followed *Gillmor* again. 30 Utah 2d at 410, 518 P.2d at 1248. *See* Brief for Appellant at 4, Huntington City v. Peterson, 30 Utah 2d 408, 578 P.2d 1246 (1974).

[283] The *Huntington City* court further misinterpreted *Gillmor* when it noted that *Gillmor* held that when land is disconnected from a municipality after the lien date but before levy, no tax lien can exist upon it. 30 Utah 2d at 412, 518 P.2d at 1249. The precise holding in *Gillmor* was that a municipality was not constitutionally authorized to levy a tax on property outside its corporate limits and that any levy upon such property is without authority and void. 27 Utah at 378, 75 P. at 934. *See* Huntington City v. Peterson, 30 Utah 2d 408, 417, 518 P.2d 1246, 1252 (1974) (Henriod, J., dissenting).

[284] UTAH CODE ANN. § 59–5–4 (1974).

[285] 528 P.2d 797 (Utah 1974).

[286] *Id.* at 799.

[287] 96 Utah 252, 85 P.2d 630 (1938).

[288] 7 Utah 2d 405, 326 P.2d 400 (1958).

[289] The court has drawn a distinction between inheriting from the *relatives* of the adoptive parents and inheriting from the *adoptive parents themselves. See In re*

not include an adopted child of a deceased son. Twenty years later, in *In re Smith's Estate,*[288] the court reaffirmed this position, holding that adopted children could not inherit from the relatives of the adoptive parents.[289] Although the court in *Smith's Estate* recognized that the "relationship of an adopted child to the adopting parents' family [should] be . . . reexamined in the light of 'modern thinking,' "[290] it refused to overrule the previous decisions, deferring to the legislature to amend the statutes if necessary.[291] In 1971, the Utah Legislature amended the law of inheritance to provide in certain sections that "issue shall include adopted children."[292]

Recognizing the amendments to the statute, the *Makoff* court nevertheless declared that they had no bearing on the question whether "issue" in this trust instrument included an adopted child because the trust had to be interpreted as of its creation in 1956.[293] Thus, the court concluded the settlor must have relied upon the "natural meaning" of the word "issue," and did not intend that an adopted child partake in the trust benefits.[294]

Although it is not clear from the court's opinion, if the trust had been established subsequent to the 1971 amendments, the "natural meaning" of the term "issue" would presumably have included adopted children.[295] Despite the clarification of the state's public policy concerning equal treatment of adopted children by the 1971 amendments, it should be noted[296] that even prior to the amendments, Utah statutes provided that an adopted child was to "be regarded and treated in all respects as the child of the person adopting [with] all the rights of that relation."[297] To interpret this provision as applying only to the parties to the adoption contract is much too restricted,[298] as is the rationale that adoptive parents may adopt an heir for themselves but may not impose one on their relatives.[299] The presumption that an adopted child is an imposition, while a natural

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Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946), where the court granted the adopted child the right to inherit from his adoptive parents.

[290] 7 Utah 2d at 406, 326 P.2d at 400.

[291] The court was referring to UTAH CODE ANN. §§ 78–30–9, –10 (1953), which provide that upon the order of adoption

> the child shall thenceforth be regarded and treated in all respects as the child of the person adopting. . . . After adoption the two shall sustain the legal relation of parent and child, and have all the rights . . . of that relation.

[292] *E.g.,* UTAH CODE ANN. § 74–4–5(10) (Supp. 1973).

[293] 528 P.2d at 799.

[294] *Id.*

[295] The respondents argued that the 1971 amendments should have no impact upon whether an adopted child is considered "issue" for the purposes of an inter vivos trust because the amendments relate to intestate succession, not to adoption or "its effect upon the status of the parties to the adoption proceedings." Brief for Defendants-Respondents at 7, Makoff v. Makoff, 528 P.2d 797 (Utah 1974).

[296] See 528 P.2d at 799–801 (Crockett, J., dissenting).

[297] UTAH CODE ANN. §§ 78–30–9, –10 (1953).

[298] See *In re* Smith's Estate, 7 Utah 2d 405, 326 P.2d 400, 402 (Crockett, J., dissenting).

[299] *Id.*

one is not, is unfounded,[300] yet the court's decision in *Makoff* carries these underlying themes.

Although the court's attempt to determine the intention of the settlor is consistent with general rules of construction for interpreting trust instruments, at least one commentator takes the position that "[i]n most cases involving the rights of adoptees it is reasonable to assume that the transferor formed no actual intention on the point."[301] The *Makoff* decision implies that, in the absence of a specific provision to the contrary, a trust instrument created prior to 1971 providing benefits for "issue" will not include adopted children. The court, however, provided no guidance for interpretation of trusts created after 1971.

[300] In some cases it may be more difficult to adopt a child than to have one naturally. Rarely would someone adopt just to "impose" a relative on another.

[301] Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 975 (1965).

BOOKS RECEIVED

TAXATION

A PRACTICAL GUIDE TO TAX PLANNING. Sidney Kess & James E. Cheeks. Washington, D.C.: Tax Management Inc. 1974. Pp. xviii, 394. $25.00 (paperbound). This relatively concise, yet comprehensive sourcebook of tax saving methods will be of great value to the nontax specialist who occasionally needs to advise clients on tax planning matters. It covers both year-round and year-end income tax planning for both businesses and individuals, and, to a lesser extent, estate planning techniques. The text's comprehensiveness necessarily dictates rather superficial treatment of each of the many tax saving plans available; state and local tax laws are not considered, and there is an apparently intentional omission of technical, legal analysis. For more detailed treatment the reader is referred to applicable Internal Revenue Code provisions and to the various Tax Management Portfolios printed by the same publisher. Hence, to gain maximum use from this volume, one must also subscribe to the Tax Management Portfolios. A valuable feature of the book is the series of checklists, by which one can quickly determine whether all possibilities have been considered. Another feature of value in today's economy is the emphasis on planning techniques designed to minimize the adverse effects of inflation, such as LIFO accounting. Especially when coupled with the Tax Management Portfolios, this volume can save many hours of research and worry for one seeking to minimize his client's tax problems.

NEW 1974 TAX-SAVING PLANS FOR SELF-EMPLOYED. Commerce Clearing House, Inc. Chicago: Commerce Clearing House, Inc. 1974. Pp. 32. $1.50 (paperbound). The Employee Retirement Income Security Act of 1974 significantly broadened the scope of income tax advantages of qualified retirement plans for self-employed persons. Directed to self-employed persons, this publication does not offer the text of the new law or references to any other explanations of it, but does provide a concise explanation of the law's substance and practical ramifications. Included in the discussion are topics such as how to get retirement tax benefits, where to invest retirement savings, allowable deductions, taxation of retirement benefits, retirement plans for professional corporations, and individual retirement plans.

TAX MANAGEMENT PORTFOLIOS. Leonard C. Silverstein, Ed. Washington, D.C.: Bureau of National Affairs. 1974. Each of these portfolios treats a specific tax topic in depth, providing detailed legal analysis, working papers to aid in practical applications, and an extensive list of references related to the topic discussed. Portfolios recently received by the *Utah Law Review* include:

ACCOUNTING METHODS—ADOPTION AND CHANGES. 303 Pp. iv, 65.

CONTROLLED FOREIGN CORPORATIONS—SECTION 963. 105–3rd. Pp. iv, 162.

ESTATE PLANNING AND SUBCHAPTER S. 305. Pp. iv, 43.

FOREIGN PARTNERS, PARTNERSHIPS, TRUSTS, ESTATES AND BENEFICIARIES. 197–3rd. Pp. vii, 192.

LICENSING AND TECHNICAL ASSISTANCE ABROAD. 44–4th. Pp. iv, 67.

SECURITIES TRADING—OPTIONS, SHORT SALES, WASH SALES. 184–2nd. Pp. iv, 71.

SMALL BUSINESS STOCK. 980–2nd. Pp. v, 58.

STOCK SALES SUBJECT TO SECTION 304. 83–3rd. Pp. iv, 57.

TRANSFERS OF FRANCHISES, TRADEMARKS AND TRADE NAMES—SECTION 1253. 304. 83–3rd. Pp. iv, 48.

U.S. TAX TREATMENT OF FOREIGN LOSSES. 306. Pp. iv, 69.

MISCELLANEOUS

AUTOMOBILE INSURANCE AND NO-FAULT LAW. John R. Fonseca, Alphonse M. Squillante & M.G. Woodroof. Rochester, New York: The Lawyers Co-operative Publishing Co. 1974. Pp. 580. $35.00. In this book, the authors have attempted to provide a short, basic survey of the principles and practices of automobile insurance law for members of the legal profession. Although the book is a useful quick reference tool, the authors were unable to overcome their bias in favor of the traditional tort litigation system of accident reparations—a bias which diminishes the value of some portions of an otherwise valuable and concise work. The excellent index and cross references to the *American Law Reports* system of annotations are particularly useful to the practitioner or law student.

CONSTITUTIONAL RIGHTS OF THE ACCUSED—TRIAL RIGHTS. Joseph G. Cook. Rochester, New York: The Lawyers Co-operative Publishing Co. 1974. Pp. ix, 426. $35.00. *Trial Rights* represents Professor Cook's systematic analysis of federal constitutional trial rights of the accused. The treatise comprehensively collates and discusses compulsory process, right of confrontation, right to counsel, identifications, self-incrimination, confessions, public trial, and trial by jury. This volume, together with Professor Cook's earlier volume on *Pretrial Rights* and his forthcoming *Post-Trial Rights,* offers much assistance to the practicing criminal lawyer in the area of constitutional rights.

FEDERAL TRIAL HANDBOOK. Robert S. Hunter. Rochester, New York: The Lawyers Co-operative Publishing Co. 1972. Pp. xxxix, 869. $40.00. Designed for use in the federal courtroom, this compact reference volume contains answers to many of the questions that arise during the course of a trial. A table of contents and index provide quick access to material on questions of procedure, evidence, role of judge and jury, motions, interrogation of witnesses, opening and closing arguments, and other matters. Subject matter discussion is supplemented by citation of authority, cross references to other sections of the book, and annotations. New developments within the scope of this work will be accommodated in pocket parts. The author, a former Illinois judge, has put together a reference volume that should prove invaluable to litigator and judge alike.

1974 GUIDEBOOK TO LABOR RELATIONS. Commerce Clearing House, Inc. Chicago: Commerce Clearing House, Inc. 1974. Pp. 392. $8.50 (paperbound). In this annual update, Commerce Clearing House offers a basic outline on fundamental concepts of labor law. Rather than directly citing cases, the outline simply sets forth basic hornbook law, referring the reader to sections of CCH LABOR LAW REPORTER for more detailed treatment. Because the Guidebook serves both as a basic hornbook on labor law and as a comprehensive index to CCH LABOR LAW REPORTER, it is a valuable reference aid.

HEROIN ADDICTION IN BRITAIN: WHAT AMERICANS CAN LEARN FROM THE ENGLISH EXPERIENCE. Horace Freeland Judson. New York: Harcourt Brace Jovanovich, Inc. 1974. Pp. xii, 200. $6.95. The enormity of the social costs of heroin addiction in the United States mandates a practical solution. In quest of that solution, this book provides a careful analysis of the successes and failures of the controversial British heroin maintenance program, coupled with a history of the concern expressed over its attempted application on a test basic in America. The author does not venture a conclusion about the potential success of such a program in the United States, but rather stresses the differences in the scope of the problem in the two countries. These differences include not only the greater number of American addicts, but also the variation in life styles and the greater degree of stigmatization accorded the use of heroin in the United States.

STORIES OF GREAT CRIMES & TRIALS. New York: American Heritage Publishing Co. (Oliver Jensen, ed). 1974. Pp. 382. $17.50. All the color and intrigue of America's most fascinating crimes and trials is found in this American Heritage anthology, a collection of thirty-five stories from past issues of the *American Heritage* magazine. Included in this diverse collection are the trials of Aaron Burr, Lizzie Borden, John Brown, and Dred Scott, the Teapot Dome and Black Sox

scandals, the assassination of Abraham Lincoln, and the life and times of "Bluebeard" Hoch and Jesse James. Beautifully illustrated, this book offers many hours of pleasant reading.

THE LAW IN AMERICA: A HISTORY. Bernard Schwartz. New York: McGraw-Hill Book Co. 1974. Pp. xiii, 382. $12.50. The history of the law and legal institutions in America, from the issues that confronted the Framers of the Constitution to the lawmakers of modern America, is the topic of Mr. Schwartz's perceptive and interesting account. Mr. Schwartz focuses initially upon the influence of the English common law and the continental civil law on the formation of a uniquely American system of law. He then analyzes the social and economic forces that shaped property, contract, tort, and corporation law by examining the issues that faced the United States Supreme Court under Chief Justice Marshall as well as the issues facing the Court today. The thread that binds legal institutions to society's demands in different periods of history provides a captivating account for lawyer and nonlawyer alike. Underlying the history of American law and legal institutions is a theory of law and order in which law must fulfill a society's demands in order to remain viable. Mr. Schwartz challenges present legal institutions to maintain the law's vitality in American society by responding appropriately to society's needs.

THE PRICE OF PERFECT JUSTICE. Macklin Fleming. New York: Basic Books, Inc. 1974. Pp. x, 196. $10.00. The American system of justice is often criticized because it occasionally allows a patently guilty person to go free because of a technical flaw in the criminal proceeding, and because the cost of judicial resolution of a controversy, in terms of both time and money, can be devasting. In this book, the author, a justice of the Court of Appeals of California, asserts that our judicial system, through its quest for perfection, is annihilating substantial justice. Simply stated, the author suggests a reexamination of the "perfect justice" ideal in light of the costs society must pay to achieve it. Unfortunately, the author's treatment of the problem is not as stimulating as the problem itself. The author suggests that a cost-benefit analysis be applied to the justice system, but overemphasizes the negative aspects of the system, to the exclusion of its positive side.

THE SATURDAY NIGHT SPECIAL. Robert Sherrill. Baltimore: Penguin Books, Inc. 1975. Pp. xiii, 336. $2.75 (Paperbound). The Saturday Night Special is the inexpensive, usually illegal, easily concealed handgun that is responsible for many of the crimes in the United States. Mr. Sherrill uses this common handgun as the springboard for an analysis of the development of the use of guns in the United States, beginning with the wild west shoot-outs and ending with the notion of machismo and the desire for protection, both of which prompt many gun sales

today. Sherrill makes a disturbing inquiry into the type of society that would allow the gun problem to proliferate to its current levels, and painfully describes the frustration felt by many advocates of gun control when confronted with congressional refusal to adopt meaningful gun control legislation. This book probes into the American concept of the "right to bear arms" and into the lobbies which seek to "preserve" that volatile right, and likely will cause tremors in many of the groups characterized by Mr. Sherrill as the "Riflemen on the Right."

THE YOUNGEST MINORITY—LAWYERS IN DEFENSE OF CHILDREN. Sanford N. Katz, Ed. Washington, D.C.: American Bar Association. 1974. Pp. 350. This collection of articles reprinted from the *Family Law Quarterly* deals with particular legal problems affecting children, especially the discriminations and injustices resulting from "obsolete laws enacted for societies and times very different from ours." In suggesting means to eliminate many injustices to children, the articles argue that the "best interests of the child" should be the guiding principle upon which laws affecting children are framed.

TWENTY AGAINST THE UNDERWORLD. Thomas E. Dewey (Edited by Rodney Campbell). Garden City, New York: Doubleday & Co. 1974. Pp. xv, 504. $12.50. In this, the first of a two volume autobiography, Thomas E. Dewey invites the reader to wander through the memories of his early life. Covering the years before his active campaign for the presidency, the book details the back stage drama of the years in which Dewey headed the special prosecutor team that systematically and successfully brought numerous leaders of organized crime to trial. The transcripts from some of those trials are included in the text and offer special insight into the talents of Dewey as a prosecutor. But the remainder of the text, dictated by Dewey shortly before his death in 1971, apparently needed more editing skill than Mr. Campbell was able to render—leaving the narrative choppy and difficult to follow.

WATER POLICIES FOR THE FUTURE. National Water Commission. Port Washington, New York: Water Information Center, Inc. 1973. Pp. xxvii, 580. $17.50. Of all the natural resources vital to man's existence, water is perhaps the most basic. As in the case with most critical resources, the finite nature of the water supply raises concern as the demand for it increases. Accordingly, Congress established the National Water Commission in 1968 to review water development problems and opportunities for the nation as a whole. *Water Policies for the Future*—the final report of the Commission—examines virtually the entire range of water resources problems and offers comprehensive, long range policy suggestions for improving water programs and organizational arrangements. The illustrated, hard cover edition by the

Water Information Center is a valuable addition to any natural resources library.

"WHAT THE HELL IS JUSTICE?". Paul Hoffman. Chicago: Playboy Press. 1974. Pp. viii, 248. $8.95. This book does not answer the question its title poses, but it does provide insight into the life of one Jack Evseroff, criminal lawyer. Mr. Evseroff is not a superstar lawyer, and the book makes clear that he does not operate in a Perry Mason courtroom, where everything runs as planned and the true criminal admits to his guilt while being cross-examined. The book gives an interesting account of the typical criminal lawyer's daily tribulations and presents some very insightful observations on plea bargaining, the art of cross-examination, the problem of charging a fair fee, and the wheeling and dealing that takes place behind the scenes.

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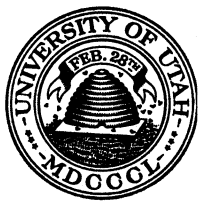

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FINANCING LEGAL EDUCATION

A recent workshop on law school financing, which included participants from the ABA, the law schools, and private organizations, concluded that law schools are in serious financial difficulties. Among the suggestions were the following:[1]

- The costs of running a major law school are directly related to the quality and diversity of its program. Law schools offering a wide range of courses, new programs such as clinical work or law firm management, a low student–teacher ratio, and scholarships to assure a wide mix of students, are having difficulty balancing budgets, while less ambitious schools may break even.
- Law schools are least supported from the Univerity's own financial resources.
- Unlike the medical schools, which receive greater support for their programs because society sees in doctors a benefit to society, the law schools somehow do not relate to many people even though the role of social engineer performed by the lawyer is extremely significant.
- The public and Bar's general attitude is that law schools are well off, when exactly the opposite is true. Traditionally, Deans are the only people trying to raise money and they are inherently suspect. Local Bar associations should organize efforts to raise money to meet the critical financial needs of law schools.
- Law schools are still growing, and the growth rate of the cost of running law schools is going to continue to rise for the foreseeable future, and probably at a higher rate than can be anticipated for the growth of law school income.
- Despite cost–benefit analyses of law school operations, faculty salaries are a potential pressure point as the apparently ever widening disparity between what practitioners are making and what law professors earn continues. Salary difficulties are only one problem. There is also the woefully inadequate clerical and secretarial services made available to law professors.

In short, the UTAH LAW REVIEW urges practitioners and other citizens to support your local law school as a sound investment in the future of the legal profession and of society.

[1] 4 COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, No. 3 (1971).