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Recent Cases

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RECENT CASES

Attorneys—Interstate Legal Services and the Unauthorized Practice of Law

Plaintiff, a New York attorney, rendered legal services to the defendants, New Jersey residents, in negotiating extensions of credit and the compromise of claims[1] held by New York and New Jersey creditors.[2] In consideration for these services, plaintiff received promissory notes secured by mortgages which this action was brought to foreclose, the plaintiff alleging default in payment. At the conclusion of the plaintiff's case, the New Jersey Superior Court, Chancery Division, granted the defendants' motion for dismissal[3] on the ground that the legal services rendered in negotiating with the New Jersey creditors constituted the illegal practice of law in that state, and, since the New Jersey and New York transactions were interrelated, the illegality of the New Jersey facet rendered the whole contract void.[4] On appeal to the Supreme Court of New Jersey, held, *reversed.* The public interest demands that an attorney admitted to practice in only one state should be permitted to render legal services in another in a matter involving interrelated transactions in both states provided the transactions in the state where the attorney is not admitted to practice are substantial and the employment of counsel in both states would be inefficient or impractical. *Appell v. Reiner,* 204 A.2d 146 (N.J. 1964).

Although our integrated national economy increasingly presents legal problems requiring the performance of legal services which constitute the practice of law in more than one state, an attorney seeking

1. The indebtedness was partially that of the defendants, husband and wife, and partially that of Reintex, Inc., a New Jersey corporation. However, the defendants were apparently personally liable for the corporate debts as the corporation was "to all intents and purposes the alter ego of [the defendant husband]," and "the various individual and collective debts and obligations of defendants and Reintex, Inc. were so interwined as to constitute an inseparable unit. . . ." Appell v. Reiner, 204 A.2d 146-47 (N.J. 1964).

2. The indebtedness to one New York creditor constituted more than 50% of the total obligations. The balance of the creditors were located in New Jersey. *Ibid.*

3. 81 N.J. Super. 229, 195 A.2d 310 (1963).

4. "Since the contract between plaintiff and defendants is entire and not severable, it follows that when part of it is illegal and in violation of the statute the entire contract is illegal, void and unenforceable. . . . I am satisfied that the agreement upon which plaintiff bases his claim is illegal and contrary to the public policy of this State." *Id.* at 241, 195 A.2d at 317.

to render such services finds in each of the states differing regulations with which he must first comply.[5] This situation arises primarily because the practice of law in each state is controlled and regulated by means of state statutes and rules of court.[6] This local regulation has been held proper even though the legal services rendered within the state related exclusively to matters in interstate commerce.[7] The scope of the state's regulatory power, however, does not affect any right to practice accorded by federal law, such as a license to practice before a federal agency,[8] even though that right may be exercised within the geographical boundaries of the state and be questioned in an action brought in a state court to enforce the right to payment for services rendered.[9] This responsibility for the competence and fitness of persons admitted to its bar which is vested in the state has resulted in the variety of local requirements which the non-resident attorney must satisfy before rendering legal services which constitute the practice of law in that particular state.[10] By comity an attorney is usually given the right to try a particular case in a foreign jurisdiction.[11] An attorney admitted to practice in one state has no right to be admitted on motion as an attorney in other states; however, the courts of most jurisdictions have followed the practice of admitting

5. 7 C.J.S. *Attorney And Client* § 15 (1937). The attorney's status in a state to whose bar he has not been admitted is generally described in terms such as the following: "The prohibition [from practicing law without having satisfied the applicable statutory requisites] applies to every person who has not been admitted to our courts in accordance with the provisions of our statute. It in effect divides persons into two classes: First, those who have been so admitted; and second, those who have not. The language of the prohibition is broad enough to include all not embraced in the first class." Browne v. Phelps, 211 Mass. 376, 380, 97 N.E. 762, 763 (1912). See also Emery v. Hovey, 84 N.H. 499, 153 Atl. 322 (1931); Harriman v. Strahan, 47 Wyo. 208, 33 P.2d 1067 (1912); Annot., 4 A.L.R. 1087 (1919).

6. 7 C.J.S. *Attorney And Client* § 14 (1937).

7. "It will be presumed . . . that the contracts sued upon involved interstate commerce, and that such commerce is protected by the Federal Constitution from interference by the states. Granting that to be so, such protection does not include the right to dictate who shall prosecute or defend such contracts as an attorney. . . ." *In re* Morse, 98 Vt. 85, 92, 126 Atl. 550, 552 (1924). See also *In re* Lockwood, 154 U.S. 116 (1894).

8. In Sperry v. Florida, 373 U.S. 379 (1963), the Supreme Court held a patent practitioner not subject to state regulations and observed: "[S]ince patent practitioners are authorized to practice only before the Patent Office, the state maintains control over the practice of law within its borders, except to the limited extent necessary for the accomplishment of the federal objectives." *Id.* at 402.

9. De Pass v. B. Harris Wool Co., 346 Mo. 1038, 144 S.W.2d 146 (1940).

10. See note 5 *supra*. In Harriman v. Strahan, *supra* note 5, the court gave the following as the reason for these local requirements: "[E]ven if we could properly draw a dividing line between those who have been admitted to practice somewhere and those who have not, it would still be inadvisable and contrary to the public interests to have in a state a body of men engaged in the practice of law, who are not amenable to the same disciplinary measures as men who have been regularly admitted." *Id.* at 213, 33 P.2d at 1069.

11. 7 C.J.S. *Attorney And Client* § 15 (1937).

attorneys, without examination, on the production of a certificate of admission by the highest court of another jurisdiction and proof of practice therein for a prescribed time.[12] A few jurisdictions impose the more restrictive requirement of requiring the non-resident attorney, although admitted to his local bar, to associate himself with a resident attorney for the trial of cases or file a written appointment of a resident attorney on whom service may be had.[13] Rules of the Kansas Supreme Court imposing this requirement were upheld by the Supreme Court as "not beyond the allowable range of state action under the Fourteenth Amendment."[14] A person who engages in the practice of law in a state without first having been admitted as an attorney therein is engaged in the unauthorized or illegal practice of law and is subject to a variety of legal sanctions.[15] At one time the state's power to regulate the practice of law within its boundaries was held to be subject to virtually no federal constitutional limitations.[16] However, this position has given way in more recent years to that of requiring that the qualifications exacted of those desiring to practice law in a state "have a rational connection with the applicant's fitness or capacity to practice law" in order to bring them within the reasonable discretion allowed the state under the due process and equal protection clauses of the fourteenth amendment.[17] In two recent decisions,[18] the Supreme Court has stressed the idea that the public interest should be the primary criterion applied in determining what constitutes the unlawful practice of law.[19]

12. *Ibid.*

13. Anderson v. Collin, 27 Idaho 334, 149 P.2d 286 (1915); Felton v. Rubbow, 163 Kan. 82, 179 P.2d 935 (1947); *In re* Greenberg, 15 N.J. 132, 104 Atl. 46 (1886); Application of New York County Lawyers' Ass'n., 207 Misc. 698, 139 N.Y.S.2d 714 (1955); *In re* Byrne, 17 Pa. Dist. 427 (1908).

14. The Rules of Court of the Supreme Court of Kansas were upheld as constitutional even as applied to an attorney, who, through a resident of Missouri, had been admitted to the Kansas bar, and maintained an office in Kansas. Martin v. Walton, 368 U.S. 25 (1961). The opinion of the Kansas Supreme Court contains an extensive discussion of the reasons on which the challenged rules were founded. Martin v. Walton, 187 Kan. 473, 482-83, 357 P.2d 782, 783-84 (1960).

15. A complete summary and discussion of the various sanctions imposed for the unauthorized practice of law is to be found in HICKS & KATZ, UNAUTHORIZED PRACTICE OF LAW 118-21 (1934).

16. In *In re* Lockwood, *supra* note 7, the Supreme Court upheld a Virginia rule excluding women from the practice of law within the state and employed the following language in support of its decision: "[T]he right to control and regulate the granting of license to practice law in the courts of a State is one of those powers that was not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license." *Id.* at 117-18.

17. Schwere v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957).

18. Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1963); N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

19. For example, in Brotherhood of R.R. Trainmen v. Virginia, *supra* note 18,

The Supreme Court of New Jersey, by its decision in *Appell v. Reiner*,[20] emphasized the idea that the public interest should control the applicability of a state's rules governing the practice of law within its boundaries, and created an exception to a well-established New Jersey rule by holding that a non-resident attorney may, under certain circumstances, render legal services constituting the practice of law in New Jersey without first meeting that state's requirements for admission to its bar.[21] The court first concluded that the legal services rendered by the plaintiff constituted the practice of law in both New York and New Jersey.[22] This decision that New Jersey practice was involved would normally have compelled the conclusion that these services could have been legally performed only by New Jersey counsel.[23] The facts of this case, however, were regarded as presenting one of the "unusual situations in which strict adherence to such a thesis is not in the public interest."[24] Three factors were emphasized by the court as making this departure from the prevailing rule in the public interest. First, the services to be performed did not involve any participation by the plaintiff in a court proceeding.[25] Presumably, were a court proceeding involved, the need for local counsel fully familiar with local practice and procedure would be accentuated. Second, the New Jersey transactions and the New York transactions involved in the matter were regarded as so closely interrelated as to render separate handling "grossly impractical and inefficient."[26] Third, the retention of a second counsel would in all probability have greatly increased the financial burden on the client.[27] The dissenting opinion regarded the matter in which the services were rendered as "primarily a New Jersey one" and the New York facet as "simply an incidental

the Supreme Court held: "In the present case the state again has failed to show any appreciable public interest in preventing the Brotherhood from carrying ont its plan to recommend the lawyers it selects to represent injured workers." *Id.* at 8.

20. *Supra* note 1.

21. "We nevertheless recognize that there are unusual situations in which a strict adherence [to the prevailing rule] . . . is not in the public interest. . . . This is such a situation." *Id.* at 148.

22. *Id.* at 147. The court's decision on this issue distinguished the instant case from the situation in which the legal services rendered in the local jurisdiction are so minor or incidental to a total problem in the foreign jurisdiction that, by comity, they may be performed by the non-resideut attorney. See, *e.g.*, Brooks v. Volunteer Harbor No. 4, 233 Mass. 168, 123 N.E. 511 (1919); Harriman v. Strahan, *supra* note 5, at 213, 33 P.2d at 1069. This principle was advanced by the dissenters in the instant case. *Supra* note 1, at 149.

23. *Id.* at 148.

24. *Ibid.*

25. *Ibid.*

26. *Ibid.* "It is self-evident that many difficulties and conflicts would have been encountered in the solution of the tangled and interwoven elements of defendants' financial dilemma had the New Jersey facets been under the control of New Jersey counsel and the New York problems under the supervision of New York counsel." *Ibid.*

27. "This additional financial burden is, if possible, to be avoided." *Ibid.*

part of the over-all problem,"[28] and held that all the legal services ought to have been performed by a New Jersey attorney.[29]

The decision in the instant case proposes one answer to a problem that in all probability will frequently recur as the bar, which is organized and regulated on an intrastate basis, is called upon to handle the growing number of interrelated interstate matters which our national economy is likely to produce. It is significant that in the northeastern manufacturing and financial centers where such matters are most likely to arise, the individual state barriers to interstate practice are most substantial.[30] In evaluating any proposed solution to the problem of handling integrated interstate matters requiring legal services which constitute the practice of law in more than one state, two countervailing interests appear to be of primary concern. First, the state is charged with the responsibility for setting standards for admissions to the practice of law that assure the competence and fitness of persons practicing law within its boundaries and before its courts.[31] It has been suggested that were an attorney, by virtue of his admission to the bar of one state, permitted to practice in other states, he would be practicing law in an atmosphere essentially unregulated and uncontrolled.[32] Second, the legal profession has a responsibility to the public to handle legal problems adequately and at a reasonable cost.[33] The New Jersey Supreme Court appears to have balanced these considerations wisely and, accordingly, has

28. *Id.* at 148-49.

29. *Ibid.*

30. Three of the five states requiring the non-resident attorney, though admitted to the local bar, to associate local counsel for the trial of cases are located in this area of the country. See note 13 *supra* and accompanying text.

31. See notes 6-10 *supra.*

32. The lower court observed in support of its holding that the services rendered by the plaintiff in New Jersey constituted the illegal practice of law as follows: "If attorneys from foreign jurisdictions were able to practice law in New Jersey, they would, in effect be holding themselves out as attorneys with the privileges attendant thereto, although they would not be subject to the control of our Supreme Court and our ethics and grievance committees. Thus, they would be permitted to practice law in an uncontrolled atmosphere. Hence, in attempting to define the outer limits of what constitutes the practice of law in New Jersey, the definition adopted should be one sufficiently broad to permit the vigorous enforcement of the strong policy of judicial control over members of the bar for the protection of the public interest." Appell v. Reiner, 81 N.J. Super. 229, 237-38, 195 A.2d 311, 315 (1963). See also Harriman v. Strahan, *supra* note 5. The attorney so practicing would not be without some control. He would still be liable to the client for negligence in rendering the services in the foreign jurisdiction. Degen v. Steinbrink, 202 App. Div. 477, 195 N.Y.S. 810 (1922). Also, there are cases in which an attorney has been reprimanded by his state bar for unethical and unprofessional conduct in a foreign jurisdiction. See, *e.g.*, *In re* Kent, 39 N.J. 114, 187 A.2d 718 (1963).

33. "The development of modern civilization calls, of necessity, for specialization. Yet, with specialization it is essential that those who enter a profession, military or civilian, must eternally keep before their eyes the practical relationship of their own

reached the proper decision in the instant case. In applying the New Jersey rules governing the practice of law to the problem of interstate legal services, the court places the emphasis on the public interest which the recent Supreme Court decisions seem to require.[34] However, it is submitted that the decision by itself fails to provide a satisfactory guide to the attorney who is performing or considering the performance of legal services in connection with an interstate matter. It would confront such an attorney with the resolution of the following difficult issues:

1. Whether the matter will require or is likely to require participation in a court proceeding.
2. Whether the various transactions or facets of the total problem are sufficiently "inseparable" to make their handling by members of different bars "grossly inefficient and impractical."
3. Whether the transactions in the state to whose bar the attorney is admitted are "substantial" or merely minor and incidental to a problem basically founded in another jurisdiction.

To reach even an abstract decision based upon such general standards would be difficult, and it must be remembered that the actual decision is made in the context of substantial sanctions for engaging in the unauthorized practice of law.[35] However, the general standards and philosophy proposed by the court in the instant case—that local barriers to the interstate practice of law must be evaluated in the context of the public interest in receiving such services—are capable of refinement as they are applied to a greater variety of factual contexts.

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profession to the rights, the hopes and the needs of the whole body of citizens who make up the nation." President Roosevelt, Address to the United States Military Academy, New York Times, June 13, 1935, p. 15, col. 5, quoted in, CHEATHAM, LEGAL PROFESSION 464 (2d ed. 1955).

34. See notes 18 & 19 *supra*.

35. See note 15 *supra*.

Conflict of Laws—New York Public Policy Permits Enforcement of Foreign Gambling Obligation

Defendant, a resident of New York, took 6,000 dollars in cash with him to Puerto Rico to risk in a gambling casino there. After he had lost this amount, the plaintiff casino lent him an additional 12,000 dollars, evidenced by a check and thirteen "I.O.U.'s," which he also lost. The loans were valid and enforceable in Puerto Rico where the plaintiff, a Delaware corporation, had a gambling license. When the defendant refused to repay the loans the casino sued him in New York. The trial court, sitting without a jury, gave judgment for the plaintiff,[1] but the Appellate Division reversed, holding that the public policy of New York will not permit a suit in its courts on a gambling obligation which arose in a professional gambling house, even though the obligation is legal and enforceable where the debt arose.[2] On appeal to the New York Court of Appeals, *held,* reversed. The New York public policy against gambling is not strong enough to forbid enforcement in New York of gambling obligations entered into in another jurisdiction and legally enforceable there. *Intercontinental Hotels Corp. v. Golden,* 15 N.Y.2d 9, 254 N.Y.S.2d 527 (1964).

Under the general rules of conflict of laws a contract valid by the law applicable in the contracting state will be enforced in the courts of another state or country without regard to whether it would have been valid by the law of the forum.[3] There is an exception to this general rule when the enforcement of a contract, valid and enforceable under foreign law would seriously contravene the sound public policy of the forum, or would unduly prejudice the rights of its citizens.[4] Wagering and gambling contracts are condemned in most states,[5] and in the states in which they are prohibited, the question has frequently arisen whether enforcement of a foreign gambling contract, valid by the law governing it at its inception, should be denied on the ground that its enforcement would violate the strong public policy of the forum.[6] Gambling was neither illegal nor considered immoral at common law.[7] In England the Gambling Act of 1710[8] made all bills

1. Intercontinental Hotels Corp. v. Golden, 36 Misc. 2d 786, 233 N.Y.S.2d 96 (Sup. Ct. 1962).

2. Intercontinental Hotels Corp. v. Golden, 18 App. Div. 2d 45, 238 N.Y.S.2d 33 (1963).

3. EHRENZWEIG, CONFLICT OF LAWS § 181 (1962).

4. GOODRICH, CONFLICT OF LAWS 198 (4th ed. 1964).

5. LEFLAR, CONFLICT OF LAWS § 48 (1959).

6. Gambling cases in the conflicts law are collected in Annot., 173 A.L.R. 695 (1948); Annot., 64 L.R.A. 160 (1904).

7. EHRENZWEIG, *op. cit. supra* note 3, § 181.

or notes void where any part of the consideration therefor was money won or loaned in a gambling transaction, but the English cases involving gambling transactions in a foreign country where gambling was legal have drawn a distinction between recovery on a check and recovery for money won or loaned. Recovery has been denied on a check drawn in France on an English bank as a part of a gambling transaction on the ground that the making of the check was an English transaction to be governed by English law, and therefore void under the Gaming Act.[9] The English courts, however, have allowed recovery on separate counts for money loaned for the purpose of gambling.[10] This distinction has not been followed by the courts of this country.[11] Most of the American cases denying recovery have rested on the repugnance of gambling obligations to the strong public policy of the forum.[12]

The initial difficulty in this type of case is that public policy is such a general term that one can gather from it almost anything he pleases. Therefore, to determine whether a transaction is repugnant to the public policy of the forum, it is necessary to determine what that public policy is.[13] The Supreme Court, speaking of public policy in its local sense, has said that the public policy of a state is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts.[14] In the conflict of laws, however, public policy has a narrower meaning. Mr. Justice Cardozo, in an often quoted opinion, said that if the otherwise appropriate foreign law is to be refused enforcement on public policy grounds, it must "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[15] In

8. 1710, 9 Anne c. 14.

9. Robinson v. Bland, 1 W. Bl. 234, 96 Eng. Rep. 129 (1760), criticized in Cohen, *On the Law of Securities Given Abroad for Gaming Debts*, 28 L.Q. REV. 127 (1912); *accord*, Moulis v. Owen, [1907] 1 K.B. 746, criticized in Cohen *supra* and Dicey, Note, 23 L.Q. REV. 249 (1907).

10. Robinson v. Bland, *supra* note 9; *accord*, Soxby v. Fulton, [1909] 2 K.B. 208; Societe Anonyme Des Grands Establissments De Touquet Paris-Plage v. Baumgart, 96 L.J.K.B. (n.s.) 789 (1927).

11. However, one case followed part of the English viewpoint in holding New York law applicable to a check drawn in Florida on a New York bank in payment of a gambling debt. Thuna v. Wolf, 132 Misc. 56, 228 N.Y. Supp. 658 (Sup. Ct. 1928). This case favorably cites Moulis v. Owen, *supra* note 9.

12. See 15 U. MIAMI L. REV. 327-28 (1961); See note 6 *supra*.

13. See Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 31 (1939); Lawson, *Enforcement of Contract Valid Where Made, But Contrary to the Public Policy of the State of the Forum*, 54 CENT. L.J. 223 (1902).

14. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). In speaking of public policy in its local law sense it is not improper to give it a narrow and specialized meaning since it concerns local internal affairs. Mertz v. Mertz, 271 N.Y. 466, 474, 3 N.E.2d 597, 600 (1936) (dissenting opinion).

15. Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918). This

contrast to this restrictive view, the Connecticut Supreme Court, though recognizing the modern trend toward enforcement of gambling contracts when made in another state where gambling is legal, refused to enforce a gambling contract lawfully entered into in Rhode Island.[16] A further question which must be considered is whether a state's refusal to entertain a cause of action recognized by another state, territory or possession violates the national conflict of laws rule expressed in the full faith and credit clause of the Constitution and implementing statutory provisions.[17] There are two competing policies, that of federal unity and harmony and that of local public policy.[18] In *Hughes v. Fetter*,[19] the Supreme Court refused to allow the alleged public policy of Wisconsin to defeat a wrongful death action based on an Illinois statute. The "strong unifying principle embodied in the Full Faith and Credit Clause looking toward the maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states"[20] required the Wisconsin public policy to give way. The Court made the further statement "that full faith and credit does not automatically compel a forum state to

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is probably the best test to be found. There is such a variety of circumstances where the public policy problem arises that generalities are inescapable. The *Restatement* takes the view that no action can be maintained on a contract valid by the *lex loci contractus* when it is "contrary to the strong public policy of the forum." RESTATEMENT (SECOND), CONFLICT OF LAWS § 612 (1958).

16. Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947). This contract involved betting on horse races. The court found betting on horse races is a criminal offence in Connecticut, and contracts to do so are void. These rules are police regulations designed to advance the public and governmental interests in the morality of the citizenery. This, the court held, was a strong enough public policy to deny enforcement.

17. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved and the Effect thereof."

Congress has implemented this section of the Constitution by providing that "the Acts of the legislature of any State, Territory, or Possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territorities and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken. 28 U.S.C. § 1738 (1958). In a case such as the instant case of Intercontinental Hotels Corp. v. Colden, 15 N.Y.2d 9, 254 N.Y.S.2d 527 (1964), there would be a further problem of whether Puerto Rico which is technically neither a state, territory or possession would fall within the coverage of the full faith and credit clause. There are no cases on this point but it seems clear that the Constitution and the Code would apply to statutes of Puerto Rico. See Mora v. Torres, 113 F. Supp. 309, *aff'd*, 206 F.2d 377 (1953); Stern, *Notes on the History of Puerto Rico's Commonwealth Status*, 30 REV. JUR. U.P.R. 33 (1961); Summer, *The Status of Public Acts in Sister States*, 3 U.C.L.A.L. REV. 1 (1956).

18. Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1012-15 (1956).

19. 341 U.S. 609 (1951).

20. *Id.* at 612.

subordinate its own statutory policy to a conflicting act of another state; rather, it is for this Court to choose in each case between the competing public policies involved."[21] No cases have been found where the Court has upheld the refusal to apply a sister state's public act on the ground of public policy where the full faith and credit issue was properly raised and where there was legislative jurisdiction in the sister state.[22] However, the Court has reversed several cases in which full faith and credit was denied because of public policy reasons.[23] Moreover, the Court has clearly indicated that the applicability of the public policy exception is restricted under the full faith and credit clause.[24] The cases of *First Nat'l Bank v. United Air Lines*[25] and *Hughes v. Fetter*[26] show that the Court will closely supervise the use of the public policy doctrine. This close supervision is necessary because without it the constitutional duty under the full faith and credit clause could be evaded.

In the instant case, the court said that to deny enforcement of this claim there would have to be a "clear showing" that its enforcement would "offend our sense of justice or menace the public welfare."[27] An examination of past New York cases discloses that "even in Victorian times," New York had no "strong public policy" against enforcement of gambling contracts valid by the law governing it at its inception.[28] To determine the public policy of the forum the court looked not only to the statutes and the Constitution, but also to the "prevailing social and moral attitudes of the community" and concluded that a "licensed gambling transaction" is "morally acceptable."[29] The Puerto Rican law which allows the enforcement of gambling transactions leaves it within the discretion of the court to reduce or even to decline to enforce gambling transactions if the losses are "in an amount which may exceed the customs of a good family man."[30] The majority reasoned that to refuse enforcement of this valid Puerto Rican transaction might make New York a sanctuary for those seeking to avoid their legal obligations.[31] The court further pointed out that the refusal of the courts of other states to enforce

21. *Id.* at 611.
22. Sumner, *supra* note 17, at 24.
23. Paulsen & Sovern, *supra* note 18, at 1013-14.
24. Huntington v. Attrill, 146 U.S. 657, 673-74 (1896). See also Loucks v. Standard Oil Co., *supra* note 15.
25. 342 U.S. 396 (1952).
26. 341 U.S. 609 (1951).
27. Intercontinental Hotels Corp. v. Golden, *supra* note 17, at 529, quoting Louchs v. Standard Oil Co., *supra* note 15, at 110, 120 N.E. at 201.
28. *Id.* at 530.
29. *Id.* at 531.
30. P.R. LAWS ANN. tit. 31, § 4777 (1955).
31. See GOODRICH, *op. cit. supra* note 4, at 198.

Nevada gambling debts is irrelevant since the Nevada courts refuse to enforce gambling debts made there even though gambling is legal.[32] The dissenting opinion argued that the enforcement of this Puerto Rican obligation violates not one but two well defined public policies of New York: First, that the operation of a gambling house "was an indictable public nuisance at common law and . . . professional gamblers are outlaws in New York;"[33] and, second, that the state courts have from earliest times refused to enforce gambling transactions.[34] The fact that New York has amended its constitution to allow bingo games and pari-mutuel betting[35] does not indicate a change of public policy, the dissent argued, because there are "important differences between those two forms of gambling and the operation of gambling houses."[36]

In a conflict of laws case the plaintiff seeks only to give legal effect to acts done elsewhere and in accordance with the law there prevailing. There is much to be said for enforcing obligations deliberately and legally entered into because people normally intend to be bound by their agreements,[37] and it would seem that the law should encourage enforcement of these moral obligations. It is, however, well known that people desire to take chances and will often gamble away their life's earnings in an attempt to turn chance into fortune.[38] While recognizing the danger of underworld control of gambling, with all the ramifications affecting numerous and legitimate business enterprises,[39] courts often overlook the deep-rooted and built-in compulsions which encourage Americans to gamble and which comprise a continuing market upon which the gambling racketeer depends.[40]

32. 15 N.Y.2d at 16, 254, N.Y.S.2d at 532. See, *e.g.*, Hamilton v. Abadjian, 30 Cal. 2d 49, 179 P.2d 804 (1947) (refusal by a California court to enforce a Nevada gambling contract as a mere application of Nevada law); West Indies v. First Nat'l Bank, 67 Nev. 13, 214 P.2d 144 (1950).

33. 15 N.Y.2d at 18-19, 254 N.Y.S.2d at 534.

34. *Ibid.*

35. N.Y. CONST., art. I, § 9.

36. 15 N.Y.2d at 18-19, 254 N.Y.S.2d at 534. The dissenters do not explain these widely recognized differences, but merely conclude that the fact that in 24 states pari-mutuel betting is legal and in 11 states bingo is legalized is sufficient evidence of the differences.

37. See GOODRICH, *op. cit. supra* note 4, at 200. A basic underlying policy, common to all nations, is that the law should attempt to let the parties do as they intended, so long as they do not injure third parties.

38. For a short discussion of the pernicious consequences of gambling and its demoralizing effect upon the individual involved and the society, see Cooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898).

39. See *Hearings Before the Senate Committee on the Judiciary on the Attorney-General's Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess., 1653 (1961); KENNEDY, THE ENEMY WITHIN, 263-65 (1960); Siberling, *The Federal Attack on Organized Crime*, 8 CRIME AND DELIN. 365 (1962).

40. Block, *The Gambling Business: An American Paradox*, 8 CRIME AND DELIN. 355, 358 (1962).

Where to draw the line between governmentally sanctioned forms of gambling and illegal forms is a difficult and subtle problem, and often the basis for determining it is without sufficient rational support. The Puerto Rican law allows many forms of gambling, but all are subject to governmental regulation and control. As a further protection for the gambler the Puerto Rican law leaves within the discretion of the court the extent to which a gambling obligation shall be enforced.[41] Thus, when a foreign court is asked to enforce a Puerto Rican gambling contract it can refuse to do so if it feels that the individual's loss has been too great. The decision in the instant case recognizes that even though a gambling contract made in New York would not be enforced by the New York courts, it does not necessarily follow that a legally enforceable foreign contract is against the strong public policy of New York. Public policy should not be determined by mere reference to the laws of the forum alone. It is found in the prevailing social and moral attitudes of the community which are reflected not only by the decisions of the courts, but also by such actions as the legalization of pari-mutuel betting and bingo games and, in some areas, organized movements for legalized off-track betting. Newspapers print odds on horse races, boxing matches, football games, the world series as well as the names of the winners of the Irish Sweepstakes. The courts should look to all of these factors in determining the public policy of the forum. It is true that this method will be more difficult and time consuming than looking only to statutes and court decisions, but it will result in more equitable decisions. Certainly, the public policy doctrine serves a useful purpose in our society, but it should be used with caution and a foreign obligation should be enforced unless it "violates the strongest moral convictions or appears profoundly unjust."[42] Today it would seem that there are few causes of action legally enforceable in one state, territory or possession that would be so far outside the social, economic and moral standards of another state as to be violative of its strong public policy.

41. See note 27 *supra* and accompanying text.

42. Paulsen & Sovern, *supra* note 18, at 1012. See also LEFLAR, *op. cit. supra* note 5, § 48.

Conscientious Objectors—Universal Military Training and Service Act—Supreme Court Test of "Belief In A Relation to A Supreme Being"

Three men who claimed exemption from military service as conscientious objectors under section 6(j) of the Universal Military Training and Service Act[1] had their claims denied because the religious beliefs upon which they were based did not include a "belief in a relation to a Supreme Being" as required by this section. Convictions followed for refusal to submit to draft induction. These men were not members of an organized religious sect, followed no ritual, knew no catechism, acknowledged no scripture, did not worship in a church or temple, and followed no priests. Their religious beliefs were not based upon an orthodox conception of a Supreme Being; the objections to military service were grounded solely upon their sincere and meaningful internally derived beliefs in opposition to war.[2] On appeal,

1. 62 Stat. 613 (1948), as amended, 50 U.S.C. App. § 456(j) (1958): "(j) Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by *reason of religious training and belief*, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's *belief in a relation to a Supreme Being* involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. . . . (Emphasis added.)

2. Daniel Andrew Seeger submitted U.S. Selective Service Form No. 150, Special Form for Conscientious Objector (Revised Feb. 9, 1959). He altered Series I—Claim for Exemption, in the following manner: "(B) I am, by reason of my 'religious' belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces." (This statement contains the quotation marks placed around the word "religious" and has the words "training and" deleted from their place immediately preceding "belief").

He answered the questions in Series II—Religious Training and Belief in the following manner:

"1. Do you believe in a Supreme Being? ☐Yes ☐No"

"Of course, the existence of God cannot be proved or disproven and the essence of his nature cannot be determined. I prefer to admit this and leave the question open rather than answer 'yes' or 'no.'

"However, skepticism or disbelief in the existence of God does not necessarily mean lack of faith in anything whatsoever. The martyrdom of Socrates is sufficient proof that irony and skepticism may be consistent with positive faith."

. . .

"2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation."

"This brings me to what I believe to be the most ironic result of our commitment to violence—the tremendous spiritual price that man pays for his willingness to resort to the mass destruction of human life to perpetrate his 'ideals.'"

. . .

"4. Give the name and present address of the individual upon whom you rely most for religious guidance."

two convictions were reversed[3] and the third upheld.[4] On writ of *certiorari* from the United States Courts of Appeal for the Second and Ninth Circuits, *held*, exemptions granted. For purposes of the Univer-

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"I rely on no particular person for religious guidance. I resolve spiritual and ethical problems by reading relevant essays or books, by discussion and debate with colleagues, and ultimately, by *following the dictates of my conscience.*" (Emphasis added.) Brief for Respondent, pp. 10-12, United States v. Seeger, 380 U.S. 163 (1965).

Arno Sascha Jakobson "believed in a 'Supreme Being' who was 'Creator of Man' in the sense of being 'ultimately responsible for the existence of' man of which 'the existence of man is the *result.*'" 380 U.S. at 167. He defined religion "as the sum and essence of one's basic attitudes to the fundamental problems of human existence. He recognizes an ultimate cause or creator of all existence which he terms 'Godness.' The central problem of religion is acceptance or rejection of the order of the universe. He adopted acceptance, which he defined as "total affirmation of the basic blessedness of the fact of being—of goodness and 'yesness.' The taking of human life is incompatible with acceptance, which sees in all humanity 'Godness'—the quality of having been created by the Ultimate Cause." United States v. Jakobson, 325 F.2d 409, 412-13 (2d Cir. 1963). "His 'most important religious law' was that 'no man ought ever to wilfully sacrifice another man's life as a means to any other end.'" 380 U.S. at 168.

Forest Britt Peter answered the first question of Series II, *supra*, "by saying that it depended on the definition . . . ." *Id.* at 169. "'I suppose you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use.'" Peter v. United States, 324 F.2d 173, 177 (9th Cir. 1963).

He then referred to a separate sheet of paper on which he had answered the remaining Series II questions:

"Series II.—Religious Training and Beliefs

"2. Since human life is for me a final value, I consider it a violation of moral law to take human life. I think I have reached this conviction out of my reading of . . . writings . . . .

"I consider this belief to be superior to my obligation to the state.

"In so far as this conviction is religious, it has been best described by Rev. John Haynes Holmes as follows: 'Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best.'

"3. I would say that the source of my conviction concerning the sacredness of human life and the human spirit has been my experience and study in our democratic American culture, with its values derived from the western religious and philosophical tradition. . . . I feel that I have learned the values of this tradion through personal reading and meditation rather than through experiences in any organized groups.

"6. The use of violence (physical force) comprises the ends one seeks in action. I consider war to be the greatest example of this. The use of non-violence in the freeing of India and the Montgomery bus strike is an example of the kind of force I do believe in." *Id.* at 174 n.2.

3. In United States v. Seeger, 326 F.2d 846 (2d Cir. 1963), the conviction was reversed on the grounds that the Supreme Being requirement distinguished between "internally derived and externally compelled beliefs" and was, therefore, an "impermissible classification" under the due process clause of the fifth amendment.

In United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963), the conviction was reversed and the indictment dismissed because the court could not determine whether the Selective Service Appeal Board refused the conscientious objector exemption because Jakobson's beliefs failed to come within the statutory definition or whether he lacked sincerity.

4. In Peter v. United States, 324 F.2d 173 (9th Cir. 1963), the conviction was upheld because Peter's beliefs were a "merely personal moral code" and thus expressly excluded from the exemption under the language of the statute.

sal Military Training and Service Act, the test of "belief in a relation to a Supreme Being" is whether a given sincere and meaningful belief occupies a place in the life of its possessor which is parallel to that filled by an orthodox belief in God. *United States v. Seeger*, 380 U.S. 163 (1965).

Reasonable restraints subordinating socially deviant religious practices to the criminal laws of society[5] have traditionally been held constitutional as falling within the police powers of our government and not violative of the first amendment.[6] Similarly, freedom in the practice of religion has been considered subordinate to the nation's paramount duty of survival.[7] Recognition of war[8] as well as peace exists in the Constitution, and the duty to take up arms in defense of the nation prevails over personal religious scruples.[9] Thus, the war

5. Baxley v. United States, 134 F.2d 937 (4th Cir. 1943). An example of the rationale of this principle is found in Davis v. Beason, 133 U.S. 333, 342-45 (1890): "With man's relations to his Maker and the obligations . . . they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country . . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."

6. Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878); *cf.* Gitlow v. New York, 268 U.S. 652 (1925). Distinction has been made between religious beliefs and religious practices. In Reynolds v. United States, *supra* at 166-67, the Court said: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . To permit [the law to be excused because of practices incident to religious beliefs] . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *But cf.* Sherbert v. Verner, 374 U.S. 398 (1963).

7. Selective Draft Law Cases, 245 U.S. 366 (1918). For the limits to which this principle has been carried, see United States v. Macintosh, 283 U.S. 605, 625 (1931); United States v. Schwimmer, 279 U.S. 644, 650 (1929), both of which were overruled on different grounds by Girouard v. United States, 328 U.S. 61 (1946).

8. U.S. CONST. art. I, § 8: "Congress shall have Power . . .
To declare War . . . and make Rules concerning Captures on Land and Water;
To raise and support Armies . . .
To provide and maintain a Navy . . .
To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

9. "We are a Christian people . . . according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

power clause of the Constitution[10] has been held to support the requirement of universal military service through conscription[11] over objections varying from an illegal delegation of federal power[12] to involuntary servitude.[13] While there is no constitutional right to military exemption because of religious beliefs,[14] legislative grace has historically recognized an exemption from military service for those who, by reason of their religious beliefs, are opposed to participation in war.[15] These exemptions have been sustained over objections that they constitute an "establishment of religion" and violate the due process clause.[16] While it has been stated that this exemption does not exist for those who put their private judgment as to participation in a particular war above the judgment of the nation,[17] it does exist for an individual whose religion authorizes theocratic wars as opposed to those of a national nature.[18]

The present statutory language granting an exemption to conscientious objectors by reason of "religious training and . . . belief in a relation to a Supreme Being" was enacted in 1948.[19] While the expression "religious training and belief" existed in the 1940 Draft Act,[20] the legislative definition did not come for another eight years[21] during which time two judicial definitions had been established. In defining this term, Congress adopted the language of two court opinions. The first clause of the definition[22] is found in the nearly

United States v. Macintosh, 283 U.S. 605, 625 (1931), overruled on different grounds in Girouard v. United States, 328 U.S. 61 (1946).

10. U.S. CONST. art. I, § 8. See pertinent text quoted *supra* note 8.

11. United States v. Macintosh, *supra* note 9, at 622; Selective Draft Law Cases, *supra* note 7. *But see* Freeman, *Exemption from Civil Responsibilities*, 20 OHIO ST. L.J. 437 (1959), where it is contended that the right to exercise religion is absolute and thus a fortiori there is a right to exemption from military duty.

12. Selective Draft Law Cases, *supra* note 7, at 389.

13. *Id.* at 390.

14. Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); United States v. Macintosh, *supra* note 9; United States v. Schwimmer, *supra* note 7; George v. United States, 196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); United States v. Kime, 188 F.2d 677 (7th Cir. 1951).

15. For a historical outline of conscientious objector provisions, see Conklin, *Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 256-76 (1963); Donnici, *Governmental Encouragement of Religious Ideology: A Study of the Current Conscientious Objector Exemption From Military Service*, 13 J. PUB. L. 16, 25-38 (1964).

16. Selective Draft Law Cases, *supra* note 7, at 389-90.

17. United States v. Macintosh, *supra* note 9; United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

18. Sicurella v. United States, 348 U.S. 385 (1955); Taffs v. United States, 208 F.2d 329 (8th Cir.), *cert. denied*, 347 U.S. 928 (1954).

19. Universal Military Training and Service Act § 6(j), 62 Stat. 613 (1948), as amended, 50 U.S.C. App. § 456(j) (1958). See pertinent text quoted *supra* note 1.

20. Selective Training and Service Act of 1940, ch. 720, § 51(g), 54 Stat. 889 (1940).

21. Act of June 24, 1948, ch. 625, § 6, 62 Stat. 609.

22. See note 1 *supra*.

identical language of Mr. Justice Hughes in *United States v. Macintosh*:[23] "The essense of religion is belief in a relation to God involving duties superior to those arising from any human relation." The distinction between a moralistic philosophy and a religious belief, as indicated by the Senate Report accompanying the amendment containing the definition,[24] was drawn from *Berman v. United States*,[25] where it was held that "religious training and belief" meant a belief "recognizing responsibility to an authority higher and beyond any worldly one."[26] Under this definition the court refused to include within the meaning of the expression a philosophy to which the individual's conscience required adherence since the philosophy did not include the historical concept of a deity.[27] The court reasoned that to allow such a philosophy to qualify for the exemption would require that all individuals holding sincere beliefs of opposition to war, no matter from whatever source derived, be given equal treatment, and that if this should happen, the phrase "religious training and belief" would have no meaning whatsoever. The statutory distinction between internally derived and externally compelled beliefs was not considered arbitrary since its basis was supported by reasonable policy and administrative convenience.[28] Moreover, this distinction was held constitutional in *George v. United States*,[29] where it was reasoned that since

23. *Supra* note 9, at 633-34 (dissenting opinion).

24. S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948):

"(j) Conscientious objectors.—This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 Act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant service or to both combatant and noncombatant military service. (See Berman v. United States, 156 F.2d 377, *cert. denied*, 329 U.S. 795 . . .)"

25. 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

26. *Id.* at 380.

27. "[T]he expression 'by reason of religious training and belief' . . . was written . . . [to distinguish] between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one. . . . [T]here are those who have a philosophy in life, and who live up to it. . . . However, no matter how pure and admirable this standard may be, and no matter how devotedly . . . [it is adhered to], philosophy and morals and social policy without the concepts of deity cannot be said to be religion in the sense of the term as it is used in the statute." *Id.* at 380-81; *accord*, Clark v. United States, 236 F.2d 13 (9th Cir. 1956).

28. United States v. Bendik, 200 F.2d 249 (2d Cir. 1955).

29. *Supra* note 14. In defining "religious training and belief" the court stated: "It is couched in terms of the relationship of the individual to a Supreme Being, and comports with the standard or accepted understanding of the meaning of 'Religion' in American Society. . . . So catholic a definition cannot be considered restrictive because it may not be broad enough to include, and actually excludes certain political, sociological, moral or philosophical theories unrelated to religion." *Id.* at 450, 452. See also Clark v. United States, *supra* note 27; United States v. DeLime, 223 F.2d 96 (3d Cir. 1955); Bradley v. United States, 218 F.2d 657 (9th Cir. 1954). *But see* United States v. Horst, Crim. No. 36,149, E.D. Mich., Dec. 12, 1957, where it was held that "love of humanity" is a concept which qualifies as a "Supreme Being."

the right to military exemption is statutory, "whatever the Government . . . may take away altogether, it may grant only on certain conditions . . . [and] whatever the Government may forbid altogether, it may condition even unreasonably."[30]

The reasoning in the present decision is derived from the other pre-1948 judicial definition of "religious training and belief" found in *United States v. Kauten*.[31] Judge Hand's opinion recognized that in today's skeptical generation conscience and its dictates can substitute for the traditional commandments of God.[32] He argued that no reasonable distinction exists between an individual's response to an inward compulsion and the teachings of a recognized religious sect insofar as these things influence one's feelings concerning the duties owed his fellow men. Conscience and religious impulse occupy equal positions in the lives of their holders. Since the statute's basis for exemption is a conscientious objection to war under any circumstances, as distinguished from an opinion that a particular war is inexpedient, both beliefs qualify for the exemption. The circuit court opinion in the *Seeger*[33] case followed this view and said, "[whether] . . . obeying dictates of his conscience or imperatives of an absolute morality, it is impossible to say with assurance that one is not bowing to 'external commands' in virtually the same sense as is the objector who defers to the will of a supernatural power."[34]

In recent decisions, the Supreme Court[35] indicated their acceptance of the *Kauten*[36] definition and reasoning by repudiating the principles upon which *Berman*[37] *and George*[38] were based. These decisions held that the right to withhold a privilege does not confer a concurrent

30. *Supra* note 14, at 450.

31. *Supra* note 17.

32. "[T]he provisions of the present statute . . . take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of the exemption." *Id.* at 708; *accord,* United States *ex rel.* Reel v. Badt, 152 F.2d 627 (2d Cir. 1945); United States *ex rel.* Brandon v. Downer, 139 F.2d 761 (2d Cir. 1944); United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943).

33. United States v. Seeger, *supra* note 3.

34. *Id.* at 853.

35. Concerning the treatment of religion see Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231-32 (1948) (Frankfurter, J., concurring); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). For the necessity of granting privileges on constitutional conditions, see Speiser v. Randall, 357 U.S. 513 (1958). In American Communications Association v. Douds, 339 U.S. 382, 417 (1950), the Court said: "This is . . . not . . . [to say that] Congress, in affording a facility can subject it to any condition it pleases. *It cannot.* Congress may withhold all sorts of facilities . . . but if it affords them *it cannot make them available in an arbitrary way* . . . ." (Emphasis added.)

36. See notes 31-34 *supra* and accompanying text.

37. Berman v. United States, *supra* note 25.

38. George v. United States, *supra* note 14.

right to grant the privilege on unconstitutional conditions,[39] and recognized that the government penalized the free exercise of religion when it indirectly exerted pressure to forego its practice by disqualifying an individual for a benefit because of his religion.[40] Dictum in *Torcaso v. Watkins*,[41] explicitly repudiated preferential governmental treatment for religion vis-a-vis non-religious or mere ideological expression when it stated:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded upon different beliefs.[42]

Thus, until the present decision, *Berman*[43] stood as the law for conscientious objectors although the Supreme Court was repeatedly reiterating Thomas Jefferson's words that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "[44]

In the instant decision, the Court traced the history of section 6(j) and its predecessors,[45] and concluded that by using the expression "Supreme Being" rather than the designation "God," Congress meant to embrace all religions and exclude essentially political, sociological, or philosophical views.[46] The exclusion of the latter views was considered a valid policy decision of Congress which cannot be overridden by the individual's opinion so as to allow him to be a law unto himself.[47] The Court reasoned that by using the words "religious training and belief" in the 1940 statute, Congress recognized that opposition to war, as well as religion, was based upon individual thinking and not membership in any religious sect.[48] With over 250

39. Speiser v. Randall, *supra* note 35.

40. Sherbert v. Verner, *supra* note 6. In this case South Carolina's unemployment compensation statute declared any claimant who, without good cause, refused to accept suitable work when offered was ineligible for such benefits. Claimant, a Seventh-Day Adventist, refused to accept work on Saturday and applied for unemployment compensation. The Court held that there was no compelling state interest which allowed the state to infringe the free exercise of religion by denying the claimant her compensation benefits.

41. *Supra* note 35. This case held that a public office could not be denied to an atheist merely because he refused to take an oath declaring his belief in God; such an oath would unconstitutionally invade his freedom of belief and religion.

42. *Id.* at 495.

43. *Supra* note 25.

44. Everson v. Board of Educ., *supra* note 35, at 16. See also cases cited in note 35 *supra*.

45. 380 U.S. at 169-72

46. *Id.* at 165.

47. *Id.* at 173.

48. *Id.* at 172

sects in the United States,[49] Congress was faced with the difficult problem of including this vast myriad of religious beliefs within the exemption without choosing among them. Thus, an orthodox belief in God could not have been intended when this expression was used; rather, "Supreme Being" refers to the broader concept of a power or being "to which all else is subordinate or upon which all else is ultimately dependent."[50] While none of the objectors involved claimed to be atheists, neither did they claim to have monotheistic beliefs. Their beliefs were theistic, which the Court defined as "the belief in the existence of god or gods . . . . Belief in superhuman powers or spiritual agencies in one or many gods."[51] Since such beliefs recognize a power, being, or faith to which all else is subordinate or upon which all else is ultimately dependent, the three objectors were entitled to the exemption.

The Senate Report[52] indicated that the present law was intended to "re-enact 'substantially the same provisions as were found' in the 1940 Act" which referred to " 'religious training and belief' without more."[53] This explicit statement was considered better evidence of congressional intent than the quotation from *Berman*,[54] which the Court believed was used to show what a religious belief was *not*, rather than what it was, and, on this point *Berman*[55] and *Kauten*[56] were in accord. The first clause of the definition was traced to Mr. Justice Hughes, and it was the Court's belief that his opinion in *Macintosh*[57] supports the present interpretation. The Court insisted that the test presented—whether the claimed belief occupies in the mind of its possessor the same place that an orthodox belief in God occupies in the mind of one who clearly qualifies for the exemption—is objective[58] when applied by the trier of fact in determining whether or not the beliefs are religious. After this question has been determined the sincerity of the belief must be ascertained. Mr. Justice Douglas' concurring opinion[59] recognized the necessity of the present strained interpretation of the statute to avoid any constitutional problems involved with the free exercise clause of the first amendment and the due process clause of the fifth amendment. His opinion indicated that only the present interpretation of this section of the statute would

49. *Id.* at 174.
50. *Id.* at 176.
51. *Id.* at 174.
52. S. REP. No. 1268, *supra* note 24.
53. 380 U.S. at 176.
54. See S. REP. No. 1268, *supra* note 24, where the relevant portions are quoted.
55. *Supra* note 25.
56. *Supra* note 17.
57. *Supra* note 9 (dissenting opinion).
58. 380 U.S. at 184.
59. *Id.* at 188-93.

allow such non-theistic religions as Hinduism and Buddhism to qualify for the exemption.

This opinion, which reads "like a short course in theology,"[60] demonstrates governmental recognition of the "broad spectrum of religious beliefs among us" and "the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated."[61] Unless the Court was to retreat from its recent pronouncements, the broad definition given religion in the instant decision was the only alternative to declaring the statute unconstitutional. Clearly, the *Berman*[62] view aided "all religions as against non-believers" and aided "religions based on a belief in the existence of God as against those religions founded on different beliefs."[63] This decision effectuates the views of Mr. Justice Stewart when he stated: "In short . . . our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for the majority, however large—but for each of us."[64] The Court has recognized in the present decision that a transcendental principle can guide the actions of an individual in the same manner as do the traditional commandments of God. Thus, any binding acknowledgment of a Supreme Being, principle, or moral demand which transcends personal judgment concerning an individual's relations with his fellow man will qualify as a "belief in a relation to a Supreme Being." It has been suggested that conscientious objectors can be classified into three categories:[65] religious, moral or ethical, and sociological or political. The religious objector's opposition to war is absolute and based upon a spiritual doctrine or quotations from notable religious leaders. The moral or ethical objector bases his absolute opposition to war on his love of humanity or a principle which prohibits him from using violence against his fellow man. The political or sociological objector is not a pacifist—he possesses no absolute revulsion to war in general—but believes that a particular war or war in general is inexpedient and wishes to place his individual opinion above the judgment of the state.

Prior to the instant decision the religious objector qualified for the exemption by virtue of the express language of the statute. Now, however, the moral or ethical objector is entitled to exemption also if his belief is based on a transcendental principle which guides his actions and which he recognizes as binding upon all men although no

60. N.Y. Times, Mar. 9, 1965, p. 1, col. 7.
61. N.Y. Times, Mar. 10, 1965, p. 15, col. 1.
62. Berman v. United States, *supra* note 25.
63. Torcaso v. Watkins, *supra* note 35, at 495.
64. Sherbert v. Verner, *supra* note 6, at 416 (concurring opinion).
65. Donnici, *supra* note 15, at 36, 37; Mittlebeeler, *Law and the Conscientious Objector*, 20 ORE. L. REV. 301, 306-15 (1941).

others may recognize it as binding upon themselves. The Court has recognized that conscience guides his actions and substitutes for the belief in God which guides the actions of the religious objector. Both classes of objectors share common beliefs in that they possess a sincere absolute hatred of war and violence and detest the use of force and the bearing of arms. The only distinguishing characteristic is the derivation of their beliefs—one is derived from a Supreme Being and the other is an inward compnlsion. The political objector still will not qualify for an exemption, because, while he may believe that war is improper, his beliefs are not based upon a transcendental principle which he believes should guide all men.[66] He derives his views from his relations with his fellow man and wishes to place his individual judgment above that of the duly-ordained policy making body of government. With such a compelling state interest involved in military service, his opinion is rightly overridden by the needs of the nation.[67] It is believed that only these latter beliefs will now be classified as "essentially political, sociological, or philosophical views or a merely personal moral code."[68] It is interesting to note that the Court painstakingly avoided making any pronouncements concerning atheists.[69] Under the interpretation just presented it appears that an atheistic objector may or may not qualify for the exemption depending upon the origin and scope of his beliefs. If they are traced to a transcendental principle, they will qualify him for the exemption as a moral or ethical objector. The true atheist, however, will refuse to recognize such a transcendental principle which parallels a belief in God, and his views will be classified as a mere personal code of morality or as "essentially political, sociological, or philosophical . . . ."

66. If the political objector's views are more than this, he may qualify as a moral or ethical objector.

67. *Cf.* Sherbert v. Verner, *supra* note 64 at 406.

68. See note 1 *supra.*

69. Throughout the opinion the Court stresses the requirement of religion as a basis for claiming the exemption. The Court indicates that precluding non-religious beliefs from the exemption is a valid policy decision of Congress which cannot be overridden by individual judgment. 380 U.S. at 173. The Court, *id.* at 173-74, explicitly states that this decision does not deal with the question of atheists since none of the parties claim to be same. Mr. Justice Douglas in a note to his concurring opinion indicates that the atheist problem is quite different from the pressent issue and refers to Torcaso v. Watkins, *supra* note 35, for the possible basis of such a decision. *Id.* at 193 n.2.

Constitutional Law—Abatement of Convictions Occurring Prior to Passage of Civil Rights Act of 1964

The United States Supreme Court granted *certiorari* in and consolidated for argument two "sit-in" cases involving convictions for violations of trespass laws of Arkansas and South Carolina. In each case the petitioners sought the service of food at a business establishment open to the public. When they were denied service and ordered to leave, the petitioners refused to do so. They were then charged and convicted under state statutes that prohibited persons from remaining on the premises of a business establishment after having been requested to leave.[1] On appeal, the state supreme courts affirmed the convictions.[2] The petitioners asserted both in the state courts and before the United States Supreme Court a denial of their rights, privileges and immunities as protected by the fourteenth amendment. Before the Supreme Court, the petitioners also claimed that the Civil Rights Act of 1964,[3] which was enacted subsequent to their convictions and the affirmances thereof in the state courts, abated their convictions. The Supreme Court *held,* four justices dissenting, although the conduct in question occurred prior to the passage of the Civil Rights Act of 1964, its enactment abated the convictions. *Hamm v. City of Rock Hill,* 379 U.S. 306 (1964).

It is an established tenet of the common law that the repeal of a penal statute pending prosecution thereunder prevents further prosecution.[4] Although in applying the common law rule, courts seldom

1. ARK. STAT. ANN. § 41-1433 (Supp. 1963); S.C. CODE ANN. § 16-388 (1962).

2. Lupper v. Arkansas, 236 Ark. 596, 367 S.W.2d 750 (1963); Rock Hill v. Hamm, 241 S.C. 420, 128 S.E.2d 907 (1962).

3. 78 Stat. 241 (1964), 42 U.S.C.A. § 2000a-1 (1964).

4. The initial exposition of this rule appeared in HALE'S PLEAS OF THE CROWN. Hale commenting on a statute says "It is observable . . . that when an offense is made treason or felony by an act of parliament, then those acts are repealed, the offense committed before such repeal, and the proceedings thereupon are discharged by such repeal . . . unless a special clause in the act of repeal be made enabling such proceedings. . . ." 1 HALE, PLEAS OF THE CROWN 291 (Wilson ed. 1778). Hale cites no authority for this statement and research has failed to discover a case prior to his remark. See Levitt, *Repeal of Penal Statutes and Effect on Pending Prosecutions,* 9 A.B.A.J. 715-16 (1923).

It was not until 1764, over a century after Hale's treatise, that this view was expressed by the judiciary. Miller's Case, I Wm. Bl. 451, 96 Eng. Rep. 259 (1764). The judicial decisions of the next century and a half gave effect to the rule and it became established doctrine of the English common law.

The earliest United States decision expounding the doctrine was United States v. The Schooner Peggy. 5 U.S. (1 Cranch) 103 (1801). This was a suit in admiralty to condemn a schooner as a prize. Pending appeal, a treaty was signed with France making provision for the return of captured vessels. The Court, in an opinion by

state the theory upon which the rule is based, an analysis of the cases reveal the courts variously expressing one or more of four reasons to justify its application. One is the absence of a law to be enforced.[5] The idea seems to be that the law is eradicated, and nothing can be done to prosecute offenses under a non-existent law. A second reason is the absence of an offense to be punished.[6] The predominant view here is that the repeal of a criminal statute expresses the legislative will that the acts which were offenses while the statute was in force are no longer regarded as criminal.[7] A third basis given by some courts is the release of the offender's guilt.[8] These courts employ one of three ideas: (1) the legislative action repealing the statute is presumed to be a specific pardon for the past offense;[9] or (2) the legislative action is a general pardon extended to all those being prosecuted for the specific conduct forbidden by the repealed statute;[10] or (3) the legislative action simply erases the guilt of the accused.[11] The final reason espoused in support of the common law rule is that the law which gave the court jurisdiction is no longer in force, and therefore the court no longer has power to proceed.[12]

Legislatures have employed various techniques designed to avoid

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Chief Justice Marshall, held that the Peggy was to be released, as the power of the Court to continue had been removed.

The common law rule is applicable where at the time of the repeal of the statute the defendant has been indicted, Commonwealth v. Marshall, 28 Mass. 350 (1831); where he has been indicted, but not tried, State v. Cress, 49 N.C. 421 (1857); where he has been convicted but had not filed appeal, State v. Nutt, 61 N.C. 20 (1866); where after conviction, an appeal has been filed but not argued, United States v. Tynen, 78 U.S. (11 Wall.) 88 (1870); and where an appeal has been argued but the judgment has not been affirmed, Keller v. State, 12 Md. 322 (1858).

5. "It scarcely requires an examination of the authorities to establish a principle so plain upon reason as that life cannot be taken under color of the law after the only law under which it is authorized to be taken has been abrogated by the law-making power." Hartung v. People, 22 N.Y. 95 (1860).

6. Levitt, *supra* note 4, at 717-18.

7. "The general rule is that the unqualified repeal of a criminal statute expresses the legislative will that acts which were offenses under it done while the statute was in force shall no longer be regarded as criminal, and shall not be punished under the repealed statute." Vincenti v. United States, 272 Fed. 114 (4th Cir. 1921). See also Anonymous, 1 Fed. Cas. 1012 (No. 475) (D.D.C. 1872). Another idea is that the act ceases to exist. United States v. Findlay, 25 Fed. Cas. 1085 (No. 15099) (D.W.D. Pa. 1869); Howard v. State, 5 Ind. 183 (1854). A third idea is that the acts are discharged. This means that the acts still exist, but that the consequences are no longer cognizable by the court. United States v. Tynen, *supra* note 4.

8. Levitt, *supra* note 5, at 718-19.

9. Yeaton v. United States, 9 U.S. (5 Cranch) 281 (1823); Speckert v. Louisville, 78 Ky. 287 (1879); Keller v. State, 12 Md. 322 (1858).

10. United States v. Tynen, *supra* note 4.

11. Day v. Clinton, 6 Ill. App. 476 (1880).

12. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); Commonwealth v. Marshall, 28 Mass. (11 Pick.) 350 (1831); State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); State v. Mansel, 52 S.C. 468, 30 S.E. 481 (1898). See also Levitt, *supra* note 4, at 719-20.

the common law effect. One form of legislative dissent is a general savings statute that preserves pending prosecutions under any repealed statute.[13] In 1871 Congress enacted a federal savings statute.[14] This statute has been interpreted as furnishing a rule of construction to be read into subsequent repealing statutes, when not otherwise provided therein, so as to give effect to the intent of Congress.[15] The most noted exception to the application of the Federal Savings Statute occurred when the twenty-first amendment repealed the eighteenth amendment and the National Prohibition Act passed thereunder. In *United States v. Chambers*,[16] the defendant was indicted, but was not brought to trial until after ratification of the amendment. The Court held that all proceedings pending under the prohibition laws on the date of ratification were automatically terminated.[17] The inoperativeness of the Federal Savings Statute was not questioned, since Congress has no power to qualify the effect of a constitutional amendment.[18] In *Bell v. Maryland*,[19] a recent Supreme Court decision, the petitioners were convicted under Maryland criminal trespass laws[20] as a result of "sit-in" demonstrations. Subsequent to affirmance by the state court of appeals,[21] Maryland enacted a statute[22] abolishing the crime. On *certiorari*, the United States Supreme Court vacated the judgments and remanded the case to the state court. The Court reasoned that a state's abatement policy was for the state to determine.[23]

In the instant decision the Court for the first time applied the

13. Another form of legislative dissent is the inclusion of a clause within the repealing statute itself that preserves pending prosecutions.

14. "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." 61 Stat. 635 (1947), 1 U.S.C. 109 (1958).

15. Great No. Ry. v. United States, 208 U.S. 452 (1908); United States v. Reisinger, 128 U.S. 398 (1888); United States v. McNair, 180 F.2d 273 (9th Cir. 1950); United States v. Carter, 171 F.2d 530 (5th Cir. 1948); United States v. Spagnuolo, 168 F.2d 768 (2d Cir. 1948); NLRB v. National Garment Co., 166 F.2d 233 (8th Cir. 1948); NLRB v. Mylan-Sparta Co., 166 F.2d 485 (6th Cir. 1948); Business Men's Life Ins. Co. v. Banker's Life Co., 163 F. Supp. 274 (D. Mont. 1958).

16. 291 U.S. 608 (1934).

17. *Ibid.* Although *Chambers* left unanswered whether its rule would apply where judgment was rendered prior to ratification, and *certiorari* sought thereafter, the rule was extended in a per curiam decision shortly after *Chambers*. Massey v. United States, 291 U.S. 608 (1934).

18. Chambers v. United States, *supra* note 16, at 612. See 32 MICH. L. REV. 700 (1934); 12 N.C.L. REV. 260, 263 (1934); 1 U. CHI. L. REV. 808, 809 (1934).

19. 378 U.S. 226 (1964), *convictions aff'd on remand*, 236 Md. 356, 204 A.2d 54 (1964). In this, the instant case, rehearing was granted and argument deferred awaiting the outcome of similar issues now pending before the United States Supreme Court.

20. MD. ANN. CODE art. 27, § 577 (1957).

21. Bell v. Maryland, 277 Md. 302, 176 A.2d 771 (1962).

22. MD. ANN. CODE art. 49B, § 11 (Supp. 1963).

23. *Supra* note 19, at 237.

common law rule of abatement to a state prosecution, and held that the state prosecution under state law was abated by the enactment of a federal statute. This result was reached by a four step reasoning process. First, the Court found that the facilities at which the petitioners sought service were within the purview of the Civil Rights Act of 1964.[24] Second, the Court determined that if the conduct of the petitioners had occurred subsequent to the passage of the act, it could not have been the subject of prosecution. The act established as a federal statutory right the enjoyment of service at a place of public accommodation.[25] The Court also interpreted the act as immunizing from prosecution non-violent attempts to exercise the rights granted by the act.[26] In the third step, the Court, relying on the common law rule of abatement, hypothesized that if federal judgments rather than state judgments had been rendered but had not become final before passage of the act, they would have been abated.[27] It is irrelevant, the Court stated, that Congress made no allusion in the act to the problem of pending prosecutions.[28] The common law principle of abatement does not depend on imputing to Congress a specific intent in any particular statute. Instead the principle permits an imputation of general intent to avoid vindictive punishment.[29] Nor is the imputation of a congressional intent barred by the Federal Savings Statute.[30] This statute, the Court declared, was enacted to preserve prosecutions from "technical" abatement,[31] as where a new statute with more severe penalties under the common law would abate pending prosecutions. In contrast, the statute is inoperative where, as here, an act substitutes a right for a crime.[32] To support this view the Court cited the *Chambers* case.[33] Since the provisions of the act would have abated a comparable federal prosecution, the Court concluded that the same rule, through the conduit of the supremacy clause, would abate state prosecutions.[34] The Court added that if the principle of abatement were not applicable, the Court would have to decide whether the fourteenth amendment prohibits criminal trespass convictions that

24. Hamm v. Rock Hill, 379 U.S. 306, 309-10 (1964); 78 Stat. 241 (1964), 42 U.S.C.A. § 2000a, 2000a (b)(2), (c) (1964).

25. 379 U.S. at 310-12; 78 Stat. 241 (1964), 42 U.S.C. § 2000a, 2000a-1 (1964).

26. 379 U.S. at 311; 78 Stat. 241 (1964), 42 U.S.C.A. § 2000a, 2000a-2 (1964) provides, "No person shall . . . punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title."

27. 379 U.S. at 312-14.

28. *Id.* at 313.

29. *Ibid.*

30. *Id.* at 314.

31. *Ibid.*

32. *Ibid.*

33. *Supra* note 16.

34. 379 U.S. at 314-15.

enforce racial discrimination. The Court stated that since this question is subject to doubt, and having found that the Civil Rights Act extends to pending prosecutions, it preferred to avoid the constitutional decision.[35] Mr. Justice Douglas, whom Mr. Justice Goldberg joined concurring, added his belief that the Civil Rights Act not only removed a burden from interstate commerce, but enforced the fourteenth amendment right to be free from racial discrimination in a place of public accommodation. He felt that Congress obviously intended that state prosecutions for a "crime" that was but a constitutional right should halt.[36] Mr. Justice Black, dissenting, rejected the Court's interpretation that the act protected extra-legal assertations of a claimed right,[37] and found no indication that Congress intended to compel states to abate prosecutions of lawless conduct occurring prior to the act.[38] Admitting that the common law rule of abatement might once have been applicable, he asserted that the Federal Savings Statute presently preserved prosecutions pending at the time of repeal.[39] Since the *Chambers* case[40] involved a repeal by constitutional amendment, obviously superseding an act of Congress, Mr. Justice Black declared that the Court's reliance on this exception to the savings statute was without foundation.[41] Mr. Justice Harlan agreed with the Court that the savings statute was inoperative but only because there was no repeal of a federal statute.[42] However, he refused to accept the extension of the federal criminal abatement doctrine to state prosecutions.[43] Mr. Justice Stewart and Mr. Justice White in separate opinions admonished the Court for imputing to the silence of Congress an intent to abate the pending prosecutions.[44]

It is submitted that the instant decision is unwise. Since the trespasses here were non-violent, by persons believing that their conduct was morally justified, and since Congress has made similar future conduct lawful, it appears that the infliction of punishment would be only vindictive. The decision of the Court to establish retroactively rights in this particular situation is nobly motivated. However, it appears a more closely reasoned analysis of the controlling law would require affirmance of the convictions. The supremacy clause requires subordination of state laws where it is necessary

35. *Id.* at 316.
36. *Id.* at 317-18.
37. *Id.* at 318.
38. *Id.* at 319.
39. *Ibid.*
40. *Supra* note 16.
41. 379 U.S. at 320.
42. *Id.* at 322 n. 1.
43. *Id.* at 324.
44. *Id.* at 326-28.

to carry out a federal purpose. The purpose of the Civil Rights Act is satisfied by prospective application. All Justices agree that if Congress expressly sought to abate the prosecutions, it could have done so. Since the abatement of these prosecutions in light of the many demonstrators who have been punished prior to 1964 cannot be said to be necessary for the purpose of the Civil Rights Act of 1964, the supremacy clause requires abatement only if Congress so directed. Since Congress did not expressly require abatement, intent to abate the prosecutions must be inferred. The crux of the Court's decision is the third step of its reasoning,[45] where it seeks to impute congressional intent. This reasoning appears unsound because the imputation of congressional intent to abate the prosecutions is precluded by the Federal Savings Statute. The common presumption of abatement has been reversed by the adoption of the savings statute reflecting a congressional policy favoring the preservation of prosecutions. The silence of Congress in view of its own savings statute indicates a conclusion opposite to that reached by the Court. Nor can the *Chambers* case,[46] relied upon by the Court, provide an exception to the savings statute. The repeal in that case was by constitutional amendment, obviously superior to a statute which expresses only congressional intent. The Court's declaration that the savings statute is meant to obviate only "technical" abatement is not supported by the language of the statute.[47] The statute expresses a purpose that is broad and clear—to prevent courts from imputing to Congress an intent to abate prosecutions. There is no reason for limiting the savings statute to mere technical abatement. The adoption of the savings statute reflects a rejection of the common law rule. The passage of the Civil Rights Act cannot change the fact that the conduct of the petitioners was criminal at the time it was performed. Of course, it is axiomatic that a penal law presupposes a duty to society to be obedient. Though subsequent legislation may revoke this duty as to future conduct, it cannot alter the fact that when the defendant did the act the duty did exist. A subsequent statute cannot change the fact that the defendants did the act, nor the fact that a second

45. See text accompanying notes 27-33 *supra*.

46. *Supra* note 16.

47. "The repeal of any statute shall not have the effect to . . . extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide . . . ." 61 Stat. 635 (1947), 1 U.S.C. 109 (1958). Though the preponderance of cases decided under the Federal Savings Statute involve a "technical" abatement, there is no indication that the purpose of the statute is limited to this situation. In fact United States v. Reisinger, 128 U.S. 398 (1888), a case decided only a few years after the enactment of the savings statute, involved an "actual" repeal. In the instant case, Mr. Justice Black stated that the majority's restriction of the statute to mere technical repeals is not supported by the language of the statute, it's legislative history, or the subsequent decisions under it. 397 U.S. at 314.

legal relation—liability to punishment—was created.[48] The instant decision requires that Congress hereafter express statute by statute its desire to preserve convictions pending at the time of repeal, and this is a burden it renounced in 1871.

Perhaps the most intriguing aspect of the decision is the inconsistency between the dismissal of the charges and the philosophical basis of the civil disobedience[49] doctrine as practiced by the civil rights demonstrators. One tenet of this doctrine is an assertion of the moral right to defy a law that in conscience is evil. Accompanying this concept is a willingness to accept the punishment for defiance of the law.[50] Although the petitioners sought the instant results, the decision deprived them of the punishment that is the justifying component of the right to be intentionally disobedient. Functionally the decision adds to the civil disobedience movement the demand that if defiance brings about change then those who violated the formerly valid law are immune from the penalties of lawlessness. This not only encourages further acts of civil disobedience but strips from the doctrine the dignifying image of willingness to accept punishment. Further, this protection from prosecution afforded the proponents of civil disobedience is a disregard of the fundamental concept that no society can give its citizens the right to break the law. There can be no law to which obedience is optional. If a government accepts the right of citizens to violate the law, it recognizes that no law exists. Extra-legal redress of grievances is the only means available to the people of some countries because of their inability to establish forums of rational judgment. Our problem is more sophisticated. The advancement of our society is a result of and dependent upon the utilization of the established forums for the resolution of grievances. Although the existence of civil disobedience is symptomatic of the ill of racial discrimination, this imperfection does not justify impairing the process of law which has facilitated our progress.

48. Levitt, *supra* note 4, at 717.

49. "[C]ivil disobedience is a course of legally unauthorized conduct engaged in by relatively homogeneous groups for the redress of grievances. It is conduct outside the framework of rules provided by established society, believed by the group to be necessary and desirable but by the society to be detrimental to its established institutions." Riehm, *Civil Disobedience—A Definition*, 3 A. CRIM. L.Q. 11, 12 (1964).

50. Brownell, *Civil Disobedience—The Lawyer's Challenge*, 3 A. CRIM. L.Q. 27, 28 (1964).

Escheats—Disputes Between States Concerning Unclaimed Corporate Obligations

The State of Texas, invoking the original jurisdiction of the United States Supreme Court,[1] sued New Jersey, Pennsylvania, and the Sun Oil Company, a New Jersey corporation, for a declaration of its right to escheat intangible property consisting of debts[2] owed by Sun to persons in and out of Texas who had failed to appear to claim them. Florida, asserting its own claim to the property, was allowed to intervene in the proceeding. A special master made recommendations concerning the disposition of the property and further recommended to the Court that in all such cases a single rule of escheat be followed.[3] Approving the recommendations of the special master, the Supreme Court *held*, that each item of property in question was subject to escheat only by the state of the last known address of the creditor, as shown by the corporation's books and records. In cases in which the address of the creditor was unknown, the state of corporate domicile could escheat, provided that another state could later escheat by proving that the last known address of the creditor was within its borders. The state of incorporation may also escheat if the creditor's state has no statute empowering it to take the funds, but the latter state may subsequently claim the property if it passes enabling legislation. *Texas v. New Jersey*, 379 U.S. 674 (1965).

This decision by the Supreme Court marks the third stage in the development of the law of escheat of intangible property held by debtor corporations domiciled in one state and owed to creditors who are residents of other states. The steadily increasing costs of state government have led the states to seek new sources of revenue. A number of states have statutes designed to allow the state to seize unclaimed corporate obligations.[4] Serious conflict of laws problems

1. U.S. CONST. art. III, § 2; 28 U.S.C. § 1251(a) (1958).

2. The debts consisted of uncashed checks payable to employees for wages and reimbursable expenses, uncashed checks payable to suppliers for goods and services, uncashed checks payable to lessors of oil and gas producing land as royalty paymeuts, unclaimed "mineral proceeds," uncashed checks payable to shareholders for dividends on common stock, unclaimed refunds of payroll deductions owing to former employees, uncashed checks payable to various small creditors for minor obligations, undelivered fractional stock certificates resulting from stock dividends.

3. For a more complete discussion of the facts of this case, see text accompanying note 20 *infra*.

4. *E.g.*, CAL. CIV. PROC. CODE §§ 1500-27; FLA. STAT. ANN. §§ 717.01-30 (Supp. 1964); N.J. STAT. ANN. §§ 2A:37-11 to -44 (1952); PA. STAT. ANN. tit. 27, §§ 241-301 (1958); TEX. REV. CIV. STAT. art. 3272a (Supp. 1964). For an analysis of various state statutes and a discussion of escheat from the viewpoint of the corporate counsel, see Ely, *Escheats: Perils and Precautions*, 15 BUS. LAW. 791 (1960); McBride, *Unclaimed Dividends, Escheat Statutes, and the Corporation Lawyer*, 14 BUS. LAW. 1062 (1959).

have arisen where states have attempted to employ their statutes to seize property owed to their residents by out-of-state corporations or owed by their corporations to residents of other states.[5] The first stage in the Supreme Court's development of the law in this area is illustrated by the 1947 case of *Connecticut Mutual Life Insurance Co. v. Moore*.[6] In this case, various insurance companies appealed from a decision by the New York Court of Appeals[7] which upheld the constitutionality of a New York statute[8] under which the state was allowed to seize the unclaimed proceeds of certain policies. The insurance companies were all incorporated outside New York, but the policies had been issued to persons who had been residents of the state at the time of issue. The Supreme Court affirmed the New York court, holding that the state had sufficient "contacts" with the transactions at issue to take custody of the proceeds. The Court, however, expressly reserved the question of whether New York might take these moneys if the owners or beneficiaries were not residents at the time the policies matured. This reservation was in effect a modification of the holding of the New York court which had not interpreted the statute as so limiting the power of the state.[9] In a customarily articulate dissent, Mr. Justice Frankfurter argued that the case should be analyzed as one between various states with competing claims to the policy proceeds and not as one between New York and the insurance companies. The Court had occasion in 1950 to consider the problem further in *Standard Oil Co. v. New Jersey*.[10] In this case Standard Oil, a firm incorporated in New Jersey, was sued by that state to escheat unclaimed corporate dividends and shares of corporate stock. The Supreme Court of New Jersey held that the property was escheatable to the state under its statute,[11] and the company appealed on the ground that the statute was unconsti-

5. See also CHEATHAM, GOODRICH, GRISWOLD, & REESE, CONFLICTS OF LAWS 730-32 (4th ed. 1957); 62 COLUM. L. REV. 708 (1962); 65 HARV. L. REV. 1408 (1952); 17 VAND. L. REV. 1354 (1964).

6. 333 U.S. 541 (1947). Compare Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944); Security Sav. Bank v. California, 263 U.S. 282 (1923).

7. 297 N.Y. 1, 74 N.E.2d 24 (1947).

8. N.Y. ANAND. PROP. LAW §§ 700, 703.

9. The insurance companies initiated the proceeding in the state courts as a suit for declaratory judgment as to the constitutionality of the New York statute. Connecticut Mut. Life Ins. Co. v. Moore, 271 App. Div. 1002, 69 N.Y.S.2d 323, *affirming* 187 Misc. 1004, 65 N.Y.S.2d 143 (Sup. Ct. 1946). It was apparently not known by the Supreme Court whether the owners and beneficiaries of the policies still lived in the state. One of the grounds for Mr. Justice Frankfurter's dissent was his belief that the judgment was hypothetical and therefore established dangerous precedent. 333 U.S. at 541, 554.

10. 341 U.S. 428 (1950).

11. N.J. REV. STAT. §§ 2:53-16, 17 (1937); Standard Oil Co. v. New Jersey, 5 N.J. 281, 74 A.2d 565 (1950).

tutional.[12] The majority, through Mr. Justice Reed, held that even though the unclaimed property was not kept at the New Jersey office, and even though the owners' whereabouts were completely unknown, the state had by service of process seized the res, *i.e.*, the debts, and was therefore exercising rightful jurisdiction over them. In answer to the argument raised by the company to the effect that the judgment would not protect it from future liability to the owners or to other states which might have claims to the property, the Court said that the company could not be subjected to further liability because the judgment had been rendered in connection with the res, that the debts had thereby been taken from the company by the state, and that the judgment was entitled to full faith and credit in any other jurisdiction.[13] The Court carefully noted, however, that no other state had asserted a claim to the property in that proceeding, and stated that the determination of the merits of New Jersey's claim in contrast to the claims of other states would have to await presentation of the other claims before the Court. Again Mr. Justice Frankfurter dissented, and following the rationale of the majority, suggested that one state having a claim to uncollected corporate obligations might foreclose the claims of other states if it could effect service of process on the debtor corporation before its sister states could act. In short, he deplored a rule of law that would make the rights of various states dependent upon a "race of diligence."

In 1961, the Court reached the second stage in *Western Union Telegraph Co. v. Pennsylvania.*[14] This case involved money which had been paid to the Western Union Co., a New York corporation, in Pennsylvania by purchasers of telegraphic money orders for money to be transmitted to payees in Pennsylvania and other states. In numerous instances the company was unable either to deliver the money orders or to return the funds to the senders. The proceeds of many transactions had therefore accumulated, and the State of Pennsylvania sought to escheat all of them under its escheat statute.[15] Western Union showed that New York was asserting a claim to certain of the same funds, and argued that a judgment by the Pennsylvania court would not bar New York from escheating the same property since New York could not be made a party to the Pennsylvania proceeding. The Court voted unanimously to reverse the decision of the Supreme Court of Pennsylvania which had upheld

12. The primary constitutional objection set forth was that the state court judgment amounted to a deprivation of the company's property without due process of law in violation of the fourteenth amendment because it did not protect the company from later liability to the owners or to other states.

13. U.S. CONST. art. IV, § 1.

14. 368 U.S. 71 (1961).

15. PA. STAT. ANN. tit. 27, § 333 (1958).

the power of the state to escheat.[16] The majority opinion was based solely on the ground that the Pennsylvania court's decision worked a denial of due process against the company because it did not protect the company from the possibility of multiple liability. The Court thereby recognized, through Mr. Justice Black's opinion, the same basic principle for which Mr. Justice Frankfurter had contended in the earlier cases; namely, that in these circumstances the real adversary parties were states with competing claims to the abandoned property. An attempt was made to distinguish *Connecticut Mutual*[17] and *Standard Oil*[18] rather than to disapprove them. The unfortunate language of the *Standard Oil* case that the full faith and credit clause would protect the debtor corporation from multiple liability was largely sidestepped by the Court as it pointed out that in that case there had been no actual claims by other states, and that the Court in that case had alluded to the possibility that such competing claims could yet be brought before it. The opinion in the instant case noted that a real controversy between states was in the offing, although, of course, no state but Pennsylvania was actually before the Court. The Court added, however, that in some of the earlier cases it would have been easy to detect other states' interests in the abandoned property in issue. Despite the Court's efforts to reconcile its prior decisions, it is clear that *Western Union*[19] signalled a very real change in its attitude toward the overall problem. There is in this case an express recognition by the Court that a debtor corporation whose obligations are held by creditors in states outside the debtor's state of incorporation may well be faced with multiple claims by the various interested states if the creditors fail to collect their money. The Court stated that the proper procedure in such circumstances was for those states to invoke the original jurisdiction of the Court under article III, section 2 of the Constitution. The *Western Union* decision was a significant contribution to stability in what was becoming an increasingly serious conflict of laws problem, but it failed to provide a substantive rule for the determination of future cases, choosing rather to rely upon case by case analysis.

The principal case results from the Court's further reflection on the subject, and its apparent realization that it had indeed created for itself an excessive burden in the *Western Union* holding. In this case, the Sun Oil Company, a New Jersey corporation, owed some 26,461 dollars to approximately 1730 small creditors who had failed to

16. Western Union Tel. Co. v. Pennsylvania, 400 Pa. 337, 162 A.2d 617 (1960).
17. *Supra* note 6.
18. *Supra* note 10.
19. *Supra* note 14.

collect over periods ranging from seven to forty years.[20] Some of the creditors were last known to reside in Texas and other states, but the addresses of others were unknown. The obligations were either recorded on the books of Sun in its two Texas offices or were owed to people whose last known addresses were in Texas or both. Texas argued that the "most significant contacts" theory should control the disposition of the funds. It further contended that the debts should be treated as situated in Texas, and reasoned that if this were done, it would have the most significant contacts with the transactions. New Jersey asserted its right to the property as the state of incorporation of the debtor. Pennsylvania argued that it should be allowed to escheat the funds on the ground that Sun maintained its principal place of business in that state. Florida claimed certain of the funds on the ground that some of the creditors had their last known address in that state. The Court rejected three of these arguments and adopted the fourth with modifications. The Texas contention was rejected because it was decided that, while the "most significant contacts" theory was followed in private litigation involving conflicts problems, in cases between states it would serve to "leave in permanent turmoil a question which should be settled once and for all by a clear rule which will govern all types of intangible obligations like these . . . ."[21] The Court pointed out that the rule contended for by Texas would leave each case to be decided on its own facts, and that the necessity for this was precisely what the Court was striving to obviate. The argument of New Jersey was likewise found to be unacceptable. The Court conceded that a rule based on this argument would have clarity and ease of application, but felt that these virtues could be achieved in another way which would give proper weight to factors more compelling than the place of incorporation. The fact that Sun maintained its principal offices in Pennsylvania was one such factor, but Pennsylvania's claim was also rejected. The Court felt that since the obligations amounted to a liability to Sun, there was little to be said for making them an asset to the state where it happened to maintain its principal offices. Perhaps more persuasive to the Court was its realization that the determination in future cases of just which state is the place of a corporation's main business activity would itself raise the very uncertainty which the Court was attempting to put to rest. Florida, asserting the one argument which could possibly be relevant for it in this case, caught and held the ear of the Court. Escheat by the state of the last known address of the creditor provides a rule which "leaves no legal issue

20. *Supra* note 2.
21. Texas v. New Jersey, 379 U.S. 674, 678 (1965).

to be decided."[22] Moreover, since the debt is the property of the creditor rather than the debtor corporation, the Court found an inherent fairness in allowing the state of his last known address to escheat. The Court analogized to cases which held that intangible property is subject to death taxes by the state of the owner's domocile.[23] It emphasized that it was interested in the last known address of the creditor as recorded on the books of the debtor corporation, and not in "technical legal concepts of residence and domicile . . . ."[24] It also recognized that cases may arise in which the creditor will have a listed address in a state different from the one in which he lived when the obligation arose or where the escheat proceedings were commenced. But, the Court said, these errors, "if indeed they could be called errors, probably will tend to a large extent to cancel each other out."[25] In cases in which the state of last known address has no statute empowering it to escheat unclaimed corporate obligations, the state of incorporation of the debtor will be allowed to escheat subject to the condition that should the state of the creditor's address later pass enabling legislation, it will then be able to escheat the property from the other state. Similarly, if the creditor has no listed address the state of incorporation may escheat, but if a state is later able to prove that the creditor had his last known address within its borders it may take the property. Mr. Justice Stewart dissented, contending that only the state of the debtor's incorporation should be allowed to escheat.

This decision by the Supreme Court falls within the category of situations in which the establishment of a clear and easily applied rule appears to be the most important consideration. It had previously been suggested that proper handling of the problem might call for a rule based on considerations other than those which usually control in cases involving conflict of laws questions,[26] and the very rule adopted by the Court had been suggested as being preferable to other alternatives.[27] Nevertheless, it is difficult to conclude that the chosen rule is clearly better in every respect than those that were rejected. It is on balance a good rule, however, and should generally prove capable of easy application by administrative

22. *Id.* at 681.

23. Here the Court cited the following cases: Baldwin v. Missouri, 281 U.S. 586 (1930); Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930); Blodgett v. Silberman, 277 U.S. 1 (1928). *But cf.*, Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936); Schoener v. Continental Motors Corp., 362 Mich. 303, 106 N.W.2d 774 (1961). The Court went on to point out, however, that in garnishment cases suit may be brought against a debtor's obligor wherever he may be found. 379 U.S. at 681.

24. *Supra* note 21, at 681.

25. *Ibid.*

26. CHEATHAM, GOODRICH, GRISWOLD, & REESE, *op. cit. supra* note 5, at 730.

27. 17 VAND. L. REV. 1354, 1360 (1964).

procedures without the necessity for resorting to litigation. In this the Court accomplished what it set out to do.[28] It is therefore likely that any by-passing of traditional legal analysis which may seem apparent will be more than compensated for by the fact that the successful state will be able to preserve more of the proceeds it is entitled to escheat because it will be saved the expense of litigating its claim in court. In addition, since the creditors of corporations will, in the aggregate, probably represent a larger number of states than will the debtor corporations based on their state of incorporation, application of the rule will bring about a broader and fairer distribution of the funds held as unclaimed corporate obligations.[29]

28. The Court has added emphasis to its decision by rendering a "final decree" subsequent to its regular opinion. Texas v. New Jersey, 380 U.S. 518 (1965). The decree is in harmony with the earlier opinion, but is more precisely drawn. It expressly makes the rule of the case applicable in connection with statutes which empower the state to take "custody" of unclaimed corporate obligations as well as those which empower the state to "escheat" such property. The tenor of the opinion and the decree clearly is that the Court desires and expects to be relieved of the burden of deciding future disputes between states concerning unclaimed corporate obligations.

29. The rule announced in the principal case will of course apply only in cases involving claims by various states of the union to property owned by citizens of this country. A somewhat related but considerably more complex problem is presented when the government of one nation seizes property belonging to a citizen of another nation. See Santovincenzo v. Egan, 284 U.S. 30 (1931); Direction Der Disconto-Gesellschaft v. United States Steel Corp., 267 U.S. 22 (1925); RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 190-97 (Proposed Official Draft 1962).

Labor Law—Failure To Bargain—Employer Required To Bargain With Respect to His Proposal To Contract Out Work

Defendant corporation operated a manufacturing plant where the plaintiff union was the exclusive bargaining representative for a unit of the company's maintenance employees. Shortly before the expiration of the collective bargaining agreement,[1] the company notified the union that since it had determined that substantial savings could be effected by contracting out[2] the work to an independent contractor,[3] it had reached a definite decision to replace the employees of the union. The company pointed out "since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless."[4] The union filed unfair labor practices against the company, alleging violations of sections 8(a)(1), 8(a)(3), 8(a)(5).[5] The trial examiner's recommendation that the complaint be dismissed was accepted by the Board.[6] Upon reconsideration,[7] the Board recognized that the company acted from an economic rather than an anti-union motivation, but found that the company's failure to negotiate concerning the contracting out of its maintenance work constituted a violation of section 8(a)(5) of the act. The Board also ordered the company to reinstate the employees with back pay. On appeal, the Court of Appeals for the District of Columbia granted the Board's petition for enforcement.[8] On *certiorari* to the United States Supreme Court,

1. Efforts by the union to have a bargaining session on the proposed modifications met with no success until only four days before the expiration date of the existing agreement.

2. "Contracting out" has no *precise* meaning. See Brief for Respondent, pp. 13-17, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). See also Lunden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LAB. REV. 579 (1961).

3. The independent contractor was primarily to furnish labor as the company normally purchased tools, supplies and equipment.

4. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

5. "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in § 7." National Labor Relations Act § 8(a)(1), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1958); "(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." National Labor Relations Act § 8(a)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958), as amended, 29 U.S.C. § 431 (Supp. V, 1963): "(5) to refuse to bargain collectively with the representatives of his employees . . . ." National Labor Relations Act § 8(a)(5), 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(5) (1958).

6. 130 N.L.R.B. 1558 (1961).

7. The court observed that this ruling was based upon a similar decision in Town & Country Mfg. Co., 136 N.L.R.B. 1022, *enforced*, 316 F.2d 846 (5th Cir. 1963).

8. 322 F.2d 411 (D.C. Cir. 1963).

held, an employer is required to bargain with representatives of the union with respect to his proposal to contract out work now performed by these employees in order to effect economic savings; and that the NLRB has authority to order the company to resume the subcontracted operation and reinstate the displaced employees with back pay. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964).

Subcontracting or "contracting out" refers to a managerial decision to have all or a portion of its plant operation or production which could be or has been performed by the existing bargaining unit performed by an outside firm. It has been held by the NLRB that the contracting out of work may become an unfair labor practice under sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act. A clear example of a section 8(a)(3) violation would be the discharge of certain employees in the process of contracting out if the discharges were traceable to union activity. Under 8(a)(5), that section with which the instant case is primarily concerned, the employer has a statutory duty to bargain with the authorized employee representative about wages, hours and conditions of employment including changes thereof; and, therefore, when the employer contracts out work in order to avoid this obligation or in absence of contractual permission makes unilateral changes, he has violated the act. In essence, the employer has two duties: first, to refrain from discriminating against employees in the bargaining unit and, secondly, to bargain over decisions substantially affecting the wages, hours, and conditions of employment of those in the bargaining unit including contracting out decisions. To phrase it another way: to bargain as to the decision and as to the effect of the decision upon employees represented by the collective bargaining agent. It appears that collective bargaining concerning subcontracting or "contracting out" is, in fact, a routine matter throughout American industry.[9] The alleged violation of failure to bargain in this area can arise in many ways. Among the more frequent factual situations concerning "contracting out" are the following: (1) where work that *could* have been performed at the plant is sent out for performance at another location, (2) where work that *is* being performed at the plant is sent out for performance at another location, (3) where a subcontractor with more advanced equipment and knowledge performs the work within the plant, (4) where existing jobs are jeopardized by mechinization or by plant consolidations or mergers, and (5) where an employer decides to sell his product

9. A Labor Department study analyzed 1,687 bargaining agreements covering nearly 50% of the work force under such agreements and found that approximately 25% contained some type of limitation on subcontracting. See Lunden, *supra* note 2, at 581, discussing BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, SUBCONTRACTING CLAUSES IN MAJOR COLLECTIVE BARGAINING AGREEMENTS (Bulletin No. 1304, 1961).

through independent distributors rather than through a sales force of his own. In *Timken Roller Bearings Co.*,[10] a 1946 decision, the employer argued that the "continuance of a practice of sub-contracting certain production and maintenance work to private contractors . . ."[11] was not a matter about which it was required to bargain. The Board held to the contrary and affirmed the Trial Examiner's decision which read in part:

> [I]t seems apparent that the respondent's system of subcontracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work, and hence more and more jobs, from the unit.[12]

Similar holdings and observations have been made in subsequent decisions dealing with an employer's violation of his duty to bargain when he unilaterally contracts out his employees' jobs without bargaining.[13] Two more recent decisions clearly support the holding in the instant case that "contracting out" is a mandatory subject of bargaining. In *Local 24, Teamsters Union v. Oliver*,[14] a case distinguished from the instant case only that in *Oliver* the work of the employees was let out piecemeal, whereas in the instant case the contracting out was of the work of the entire unit, the conclusion was reached that such a matter was a subject of mandatory bargaining under section 8(d). In *Town & Country Mfg. Co.*,[15] the majority observed that the Supreme Court's decision in *Railroad Telegraphers*[16] foreclosed any discretion of the Board to find that an employer's decision to contract out is, or is not, a mandatory subject of bargaining. The *Town & Country* decision is also very important since the Board held that contracting out is a mandatory subject of bargaining, *notwithstanding an employer's valid economic motivations.* The instant case relied upon this reasoning. A similar decision was reached in the *Hawaii Meat*[17] case. This view was rejected by the Eighth Circuit in the *Adams Dairy*[18] case—the case which constituted the "alleged

10. 70 N.L.R.B. 500 (1946), *rev'd on other grounds,* 161 F.2d 949 (6th Cir. 1947).
11. *Id.* at 511.
12. *Id.* at 518.
13. Smith's Van & Transport Co., 126 N.L.R.B. 1059 (1960); Brown-Dunkin Co., 125 N.L.R.B. 1379 (1959), *enforced,* 287 F.2d 17 (10th Cir. 1961); Shamrock Dairy, Inc., 119 N.L.R.B. 998 (1957), *enforced,* 280 F.2d 665 (D.C. Cir. 1960), *cert. denied,* 364 U.S. 892 (1960).
14. 358 U.S. 283 (1959).
15. *Supra* note 7.
16. *Ibid.* Order of Railroad Telegraphers v. Chicago N.W.R. Co., 362 U.S. 330 (1960).
17. Hawaii Meat Co., 139 N.L.R.B. 966 (1962).
18. NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963). The *Adams* case has recently been remanded to the 8th Circuit for reconsideration in light of *Fibreboard.* 85 Sup. Ct. 613 (1965).

conflict among the Courts of Appeal"[19] and prompted the Supreme Court to grant *certiorari* in the instant case. The Eighth Circuit held that a company was not guilty of an unfair labor practice by contracting out work when there was no anti-union motivation but instead a legitimate business purpose. It should also be mentioned that the Board's remedial order requiring the company to resume its maintenance operations and reinstate employees with partial back pay is supported by prior decisions.[20] Section 10(c) of the act has been held to give wide discretion to the Board "to mould remedies suited to practical needs."[21] That the policy followed by the Board in the instant case was not unusual was pointed out in *Herman Sausage Co.*,[22] "It is the Board's customary policy to direct a respondent-employer to restore the status quo where he has taken unlawful unilateral action to the detriment of his employees."[23] It should be noted that very recent decisions of the NLRB have shed additional light on the Board's *Fibreboard* doctrine.[24] A parallel factual situation, differing from the instant case only in the degree of work taken away from the bargaining unit, was present in the case of *Textile Workers v. Darlington Mfg. Co.*,[25] There the Supreme Court held that while an employer has the absolute right completely to terminate his business for *any* reason, he does not have a similar right to close part of his business, to shift work to another plant, or to open a new plant to replace a closed plant, if the action is motivated by a desire to prevent unionization. The rationale behind all decisions calling for negotiations in these situations is that such an action constitutes a change in terms and conditions of employment which an employer can not unilaterally make without first bargaining with the union. The decided cases all place an emphasis on the fact that the collective bargaining machinery must be utilized and that unilateral action, if allowed, would run directly counter to the purposes and policies of the act. A question now seemingly answered is whether or not "contracting out" is a matter about which employers are required to bargain. As early as 1941, the NLRB held that an employer is

19. 379 U.S. at 644.

20. *E.g.*, NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); NLRB v. Mackay Radio & Television Co., 304 U.S. 333 (1938).

21. 344 U.S. at 351-52. National Labor Relations Act § 10(c), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(c) (1958), provides that upon finding an unfair labor practice the Board "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

22. 122 N.L.R.B. 168 (1958), *enforced*, 275 F.2d 299 (5th Cir. 1960).

23. *Id.* at 172.

24. See notes 39-40 *infra*.

25. 152 N.L.R.B. No. 96 (1965).

obliged to bargain with his employee's representative about transferring work from one plant to another[26]—an action that certainly seems analagous to "contracting out." The Board has consistently followed that decision.[27]

The Court in the instant case advanced several major reasons for its decision that "contracting out" of plant maintenance work is covered by the phrase "terms and conditions of employment" within the scope of section 8(d) and therefore, that the company's unilateral conduct in this case constituted a refusal to bargain which was a violation of section 8(a)(5). The Court did not rely upon precedent in reaching its decision, although it did cite with approval the *Timken* and *Oliver*[28] cases, and stated that it agreed with the holding in these cases that "such a matter is a subject of mandatory bargaining."[29] One of the Court's strongest points was that "the inclusion of 'contracting out' within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act."[30] The Court viewed the company's action of unilaterally contracting out the work as having the result of frustrating the purpose of the act; that such disputes should be submitted "to the mediatory influence of negotiations."[31] The Court placed as much emphasis on a related point—that "the conclusion that 'contracting out' is a statutory subject of collective bargaining is further reinforced by industrial practices in this country."[32] While recognizing that this is not a finally determinative factor, the Court felt it significant that experience showed that such a subject had been frequently and successfully dealt with by the collective bargaining process. It was pointed out in the instant case that such matters as "reducing the work force, decreasing the fringe benefits, and eliminating overtime payments"[33] have by prior practice and decisions been recognized as subjects "peculiarly suitable for resolution within the collective bargaining framework."[34] Since the Court recognized that the Company's decision to subcontract or "contract out" the maintenance work was motivated by the savings in cost that it could achieve by "reducing

26. Gerity Whitaker Co., 33 N.L.R.B. 393 (1941), *enforced in pertinent respects*, 137 F.2d 198 (6th Cir. 1942), *cert. denied*, 318 U.S. 763 (1943).

27. See Rapid Bindery, Inc., 127 N.L.R.B. 212 (1960), *enforced in part*, 293 F.2d 170 (2d Cir. 1961); California Footwear Co., 114 N.L.R.B. 765 (1955), *enforced in pertinent respects*, 246 F.2d 886 (9th Cir. 1957); Bickford Shoes, Inc., 109 N.L.R.B. 1346 (1954); Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953).

28. *Supra* notes 12 & 16.

29. 379 U.S. at 213.

30. *Id.* at 210-11.

31. *Id.* at 211.

32. *Ibid.*

33. *Id.* at 213.

34. *Id.* at 214.

the work force," it further reasoned that these matters were therefore clearly subject to the bargaining process. In short, the company replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. The opinion dealt briefly with the somewhat secondary question of whether the Board was empowered under section 10(c) to order the resumption of maintenance operations and employees' reinstatement with back pay. The Court felt that the Board's order restoring the status quo was an effective manner of promoting the purposes of the act. It also stated that there was no evidence that the remedial decision would work an undue burden on the company.

Mr. Justice Stewart, in a concurring opinion, joined by Mr. Justice Douglas and Mr. Justice Harlan, spoke of the opinion as having "implications of such disturbing breadth."[35] The main argument of the concurring opinion is that:

> There are passages in the Court's opinion today which suggest just such an expansive interpretation, for the Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining.[36]

The concurring justices would prefer a narrower view of "conditions of employment" for they feel that (1) the statutory purpose is to delineate a limited class of issues which are to be subjects of mandatory bargaining, and (2) there is a possibility that many managerial decisions that may have only remote effect on the question of job security may be interpreted as being subject to mandatory bargaining. The concurring Justices stated that they "do not believe that an employer's subcontracting practices are, as a general matter, in themselves conditions of employment."[37] This view is the crux of the conflict between the Court's opinion and that of the concurring opinion.

Within a few months of the *Fibreboard* decision, the NLRB handed down several decisions whose effect was to clarify and emphasize the limitations of the doctrine, and to dispel the fear of the dissenters. In the *Westinghouse Electric Corp.*[38] case, involving the unilateral letting of over 8,000 outside contracts, the Board set out a number of criteria for determining whether an employer must bargain about a decision to subcontract. The Board observed that such a unilateral act would be upheld where these tests are met: the contracting out procedure must follow traditional methods of company operation; it cannot significantly differ in kind or degree from the company's established subcontracting practice; recurring and economic considera-

35. *Id.* at 218 (concurring opinion).
36. *Id.* at 221.
37. *Id.* at 224.
38. 150 N.L.R.B. No. 136 (1965).

tions must furnish the sole motivation; it can have no demonstrable adverse effect on the employees in the unit; and the union must have an opportunity to bargain at general negotiating meetings about the proposed changes. These tests, as applied in recent cases,[39] call for strict limitations on the *Fibreboard* doctrine. It is also important to note that the Board has referred to specific management right contract clauses as reasons for clearing employers of charges of contracting out violations.[40] In one of these cases, the clause gave the company an unrestricted power to "alter, rearrange or change, extend, limit or curtail its operations or any part thereof."[41]

The instant case clearly settles any doubts that "contracting out" is a matter about which an employer must bargain. The Court's opinion carefully presented the rationale behind its decision—bargaining on such "conditions of employment" effectuates the purpose of the act in submitting these disputes to the "mediatory influence of negotiation."[42] The decision seems correct, for if the position of the company was sustained, it would mean that an employer could almost unilaterally eliminate some or all of his employees' jobs by contracting out their work and lawfully refusing to even discuss with the union any proposals which would strengthen its members' job security by restricting management's right to contract out their work. If the collective bargaining process is to meet its goal of reconciling the conflicts between labor and management, the act must be held to require bargaining on such matters as what jobs will be available to the employees under such an agreement.

The reasoning behind the concurring opinion presented a valid argument, "it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining."[43] Justices Stewart, Douglas and Harlan, however, failed to specify the "passages in the Court's opinion . . . which . . . seem to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory bargaining."[44] It is unusual that such an implication was drawn in light of the Court's observation that "our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex

39. Empire Terminal Warehouse Co., 151 N.L.R.B. No. 125 (1965); General Tube Co., 151 N.L.R.B. No. 89 (1965); Allied Chemical Corp., 151 N.L.R.B. No. 76 (1965); American Oil Co., 151 N.L.R.B. No. 45 (1965); Fofnir Bearing Co., 151 N.L.R.B. No. 40 (1965); Superior Coach Corp., 151 N.L.R.B. No. 24 (1965).

40. International Shoe Co., 151 N.L.R.B. No. 78 (1965); Ador Corp., 150 N.L.R.B. No. 161 (1965); General Motors Corp., 149 N.L.R.B. No. 40 (1964); Shell Oil Co., 149 N.L.R.B. No. 26 (1964).

41. Kennecott Copper Corp., 148 N.L.R.B. No. 169 (1964).

42. 379 U.S. at 211.

43. *Id.* at 223 (concurring opinion).

44. *Id.* at 221.

economy."[45] While the concurring opinion correctly sensed that the decision in the instant case favored a liberal concept of what constitutes "conditions of employment," their apprehensions as to the broad implications of the decision do not seem to be warranted on the face of the Court's opinion, and particularly in light of recent decisions that adopt a more restrictive view of *Fibreboard*.[46] An important secondary aspect of the instant case is the impact it may have on an arbitrator's decision as to the right of a company to "contract out" during the life of an agreement. While this is a complex question, the answer seems to be that the decision of the arbitrator should be no different after *Fibreboard* than before, assuming identical facts. This answer is largely due to the fact that the decision did not change existing law, for as it has been pointed out above, the law prior to *Fibreboard* was that "contracting out" was a subject for mandatory bargaining.[47]

Fibreboard will be a landmark decision in labor relations. It clearly evidences a tendency to recognize the importance of job security in our age of large unemployment and ever increasing mechanization. The importance of this decision may well center in the liberal language the Court used in expanding their view of "conditions of employment." While it appears that the principle of the "entering wedge"[48] may take on added importance as labor gains an increased voice on traditional management decisions, fears that every managerial decision affecting job security is a subject for mandatory bargaining do not seem justified on the face of the opinion, particularly if the *Westinghouse* test[49] continues to be applied as it recently has been. It would appear that "contracting out" may be upheld where the Board studies the past history of "contracting out" in the particular concern and the presence or absence of specific management right clauses in the collective bargaining agreements. When the Board looks to the adverse effect or substantial detriment to employees in the unit, it is submitted that the Board is moving, perhaps unwisely and unjustifiably, into the role of determining what is good or bad for employees, employers, and particularly unions.

45. *Id.* at 215.

46. See text accompanying notes 38-41 *supra.*

47. Feller & Fairweather. *The Fibreboard Decision and Subcontracting: Two Views,* 19 ARB. J. (n.s.) 70 (1964). This article contains an excellent and complete discussion of this limited aspcet of the instant case.

48. "It seems probable that once a union has successfully asserted its voice within one of the broad categories of management authority, it is a somewhat simpler matter for it to spread its penetration within that category, among the several managerial areas comprising it . . . . This is the principle of the 'entering wedge' . . . it provides a beachhead from which further penetration may be carried to related activities." CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 46-47 (1948).

49. See text accompanying notes 38-41 *supra.*

Professions—Canon Twenty of the Canons of Professional Ethics Interpreted To Ban Statements to News Media

Defendant was convicted of first degree murder and sentenced to life imprisonment. He contends, inter alia, that his motions for mistrial should have been granted because improper and prejudicial stories appeared in local newspapers while the jury was being drawn. On October 7, 1963, the day on which the first juror was accepted, the *Paterson Evening News* published an article saying that the "state is seeking the death sentence for the construction worker accused of brutally beating to death his estranged wife, Carol . . . ." The story, after referring to the wife's flight from her apartment, closely pursued by the defendant, and the alleged fatal beating in an alleyway, continued "Van Duyne was nabbed in a phone booth by police a short time later. Police quoted him as saying, 'You've got me for murder. I don't desire to tell you anything.'" An article in the *Paterson Morning Call* on October 8 added that "According to police, Van Duyne had been arrested at least 10 times and had once threatened to 'kill a cop.' Authorities reported after his arrest that Van Duyne beat up a man during the summer in 1962 and then threatened Detective William Toomey with a gun."[1] On October 9, and on October 11, similar stories appeared. After publication of each article defendant moved for a mistrial, but his motion was refused in each case. In response to the first motion, however, the court permitted counsel to re-open voir dire to examine the jurors already chosen as to the effect of the articles and ordered immediate sequestration of jurors as they were accepted. In addition, the court advised counsel that a liberal examination of prospective jurors would be permitted to determine the effect, if any, of the articles. On appeal to the Supreme Court of New Jersey, *held,* affirmed. Independent examination of the record revealed that it did not contain sufficient evidence that the newspaper articles prevented a fair trial or that they so infected the minds of the jurors as to leave them biased against the defendant. *State v. Van Duyne,* 43 N.J. 369, 204 A.2d 841 (1964).

Of more significance, however, is Judge Francis' dictum interpreting Canon Five[2] and particularly Canon Twenty[3] of the Canons of

1. None of these accusations were proved in the trial.

2. Canon V reads: "It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

Professional Ethics to ban statements to news media by prosecutors, assistant prosecutors, their lawyer staff members and defense attorneys as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is "open and shut" against the defendant, or with reference to the defendant's prior criminal record either of convictions or arrests. Further, as concerns prosecutor's detectives and members of local police departments who are not members of the bar, statements of the type described constitute conduct unbecoming a police officer. As such they warrant discipline at the hands of the proper authorities.[4]

Although New Jersey is the first state to interpret Canon Twenty to ban such disclosures to the press, a substantial body of legal opinion has accumulated supporting a move to limit the amount of preverdict information available to the public.[5] However, the proper balance between the concept of "fair trial,"[6] requiring disinterested jurors, and "free press,"[7] requiring minimum censorship and maximum access, has proved difficult to define. Although rumblings from the

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. He should avoid oppression and injustice of any kind whatsoever. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is a public wrong."

3. Canon XX reads: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is improfessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement."

4. State v. Van Duyne, 43 N.J. 369, 204 A.2d 841, 852 (1964).

5. See generally THAYER, LEGAL CONTROL OF THE PRESS § 79 (1962); PHILLIPS & McCOY, CONDUCT OF JUDGES AND LAWYERS 177-87 (1952) (includes a good bibliography which is still fairly current).

6. The constitutional right to a fair trial must be granted by state and federal courts alike. Moore v. Dempsey, 261 U.S. 86 (1923); Colon v. Grieco, 226 F. Supp. 414 (D.N.Y. 1964); Commonwealth v. Jackson, 193 Pa. Super. 631, 165 A.2d 392 (1960). Exactly what coustitntes a fair trial under the federal constitntion has never been entirely settled. Not all the provisions of amendments five through eight are applicable to the states through the due process clause of the fourteenth amendment. See discussion in Adamson v. California, 332 U.S. 46 (1947), *reaffirming* Palko v. Connecticut, 302 U.S. 319 (1937) and Twining v. New Jersey, 211 U.S. 78 (1908). Still some federal requirements such as freedom from mob domination have been definitely imposed on the states as requirements for fair trial. Moore v. Dempsey, *supra*. Thus the states are free to work out their own method of criminal administration, but once this has been done its functioning must conform to due process requirements of the fourteenth amendment. *Ibid.* Consequently, when a state constitution such as that of New Jersey provides for a jury trial, the state must insure the fair administration of that system. N.J. CONST. art. I, § 10.

7. The first amendment's prohibition against limiting free speech is applicable with equal force to the states through the 14th amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1925). Also, each state constitution with the exception of those of Massachusetts, New Hampshire, South Carolina, Vermont and West Virginia guarantees the right of free speech and provides that there shall be responsibility for its abuse.

United States Supreme Court suggest less reluctance now than before to reverse on due process grounds a conviction wrought from an inflamed community,[8] the Court has been unable to articulate a constitutional standard[9] whose application would define with adequate precision the due process limits of pre-trial publicity. A second limiting tool is the use by state courts of "contempt by publication"[10] to control undesirable pre-verdict publicity. This tool, however, is dependent upon the criteria laid down by the Supreme Court, that out-of-court publications can be punished summarily only when they constitute a "clear and present danger" to an impartial judgment of pending cases.[11] In no case has the Court found "clear and present" danger adequate to warrant punishment.[12] Thus, news media representatives have acquired a virtual immunity[13] from contempt

8. *Compare* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950), *with* Irwin v. Dowd, 366 U.S. 717 (1961) (concurring opinion), *and* Rideau v. Louisiana 373 U.S. 723 (1963) (dissenting opinion). For an excellent annotation concerning federal decisions involving criminal prosecutions and the concept of a fair trial in the face of extensive pre-trial publicity, see 10 L. Ed. 2d 1242 (1963).

9. The probable position of the Court was stated by Justice Frankfurter as follows, "This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. This Court has not yet decided that while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade." Irwin v. Dowd, *supra* note 8, at 730.

Ad hoc determinations are generally made in such cases. Most recently where "any subsequent court proceeding in a community so pervasively exposed to such a spectacle [televised confession] could be but a hollow formality" the Court reversed. Rideau v. Louisiana, *supra* note 8, at 726. See also Note, *Constitutional Law: A Changing View Toward Trial By Newspaper*, 16 OKLA. L. REV. 337 (1963).

10. This is the American analogue to the English system of punishing publishers of unauthorized pre-verdict stories with the court's power of contempt. For a description of the English system, see Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935). For a good historical description of the American system see Forer, *A Free Press and A Fair Trial*, 39 A.B.A.J. 800 (1953).

11. A case may be "pending" from the time of the issuance of a warrant for arrest (in a criminal case) or the filing of a complaint (in a civil case) until the final disposition of a case on appeal. "The decisive consideration is whether the judge or jury is or presently will be pondering a decision that comment seeks to affect." Pennekamp v. Florida, 328 U.S. 331, 369 (1946).

12. See, *e.g.*, Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, *supra* note 11.

13. The construction given "clear and present danger" in *Craig* suggests that state courts would be entirely prevented from using their contempt power for this purpose. See Craig v. Harney, *supra* note 12, at 391 (dissenting opinion).

Federal courts, except for misbehavior of its officers or disobedience to its lawful command, can punish summarily only for "misbehavior of any person in its presence, *or so near thereto as to obstruct the administration of justice . . .*" 18 U.S.C. § 401 (1958) (Emphasis added). The italicized phrase was interpreted literally for some 70 years after passage of the original act. Then in Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918), the phrase was given a causal rather than geographical construction; that is, punishment was permitted for out-of-court comment whose effect was felt in court. Finally in Nye v. United States, 313 U.S. 33 (1941), the Supreme Court restored the literal (geographical) meaning of the phrase.

prosecution for their reportorial zeal which might legally be limited in other ways. Nonetheless, the attempted use of this power suggests a need, felt by the judiciary, that some sanction be made available. In addition to state and federal courts, both the legal and journalistic professional associations have commented on the advisability of controlling the content of pre-verdict publicity. From the formulation of the *Canons of Professional Ethics*, including Canons Five and Twenty, to the 1923 adoption by the American Society of Newspaper Editors of the *Canons of Journalism*[14] and most recently to the New York County Lawyers Association Conference on Fair Trial–Free Press,[15] the conclusion has been uniformally publicized that something should be done voluntarily by the parties involved[16] to control the pernicious effects of pre-verdict publicity. The question uniformally asked is the following: "Cannot lawyers and journalists now develop a co-operative program together which will obviate the necessity for a solution by legislative fiat or by judicial decree?"[17] To date no workable, voluntary system has been put into effect.

In addition to the two methods of retrospective control already mentioned,[18] there are two systems of prospective control[19] which seem more workable. Neither of these operates by requiring the mass media to select for publication information already within its grasp. Rather, both attempt to control by limiting the media's access to crucial information. Thus, they differ only in their methods of limiting access. By utilizing selective disclosure to the press, both systems largely eliminate the criticism of vague standards justifiably leveled at the retrospective controls. By virtue of their objective rules, these methods relieve the would-be publisher from the burden of guessing in advance what publications will or will not bring down the wrath of the courts. Instead, these methods allow the media to publish everything they acquire without fear of sanction. This method also satisfies the aggressive nature of newsmen by obviating the necessity for them to adopt a second, less aggressive set of behavioral standards when dealing with a newsworthy lawsuit. In addition, the prospective

14. Conference, *Fair Trial–Free Press*, 10 BAR BULL. 170, 202 (1953).

15. Conference, *supra* note 14.

16. See generally Otterbourg, *Fair Trial and Free Press: A Subject Vital to the Existence of Democracy*, 39 A.B.A.J. 978 (1953).

17. *Id.* at 979.

18. Retrospective control is meant to include all systems which determine on an *ad hoo* basis which disclosures were wrong after they have been made.

The two control methods already discussed and discarded because of the Supreme Court's interpretation limiting their usefulness are: that which sanctions by reversing convictions on due process grounds and that which has criminal sanetions meted out through the court's contempt power.

19. Prospective control is meant to include those systems capable of defining a violation with a degree of accuracy that will generally provide predictability prior to the actual disclosure by the prospective violator.

methods operate in the public interest not only by promoting a more rational atmosphere in which to hold judicial proceedings, but by funneling only accurate information to the public's media and eventually to the public. Thus, the public gains confidence and respect for the judicial system as well as for the informational value of the news media.[20] Lastly, the system of controlling access to the news by specific rules can more clearly define what is and what is not within the limits of fairness for purposes of a trial. Were either the due process or contempt method used the courts would have to allow a certain latitude in publication which, in the interests of fairness in imposing sanctions, would probably allow information to have been published that should not have been and that could have been effectively screened out by a rule oriented system. Thus, a stronger showing of unfairness, reflecting more substantial unfairness in fact, would be necessary to justify sanctioning an indiscreet publication under retrospective systems of control than would be necessary under prospective systems.[21]

One type of rule-oriented system was first instituted by District Attorney Frank S. Hogan of New York County[22] and, most recently, another more sophisticated version was adopted by United States Attorney General Nicholas Katzenbach.[23] Each sets out in rule form what can be said to the press by the legal or enforcement personnel in the rule-maker's department. Characteristic of both systems are those advantages inherent in any method of control which limits disclosure rather than publication. Also, among the disclosure-limiting methods, this type of system has an enforcement advantage unavailable to others by virtue of the fact that it is instituted by the organization that does the disclosing. Consequently, the threat of punishment provides a more effective deterrent for indiscreet disclosures. Its major

20. Note, too, that such a system would mitigate the adversarial nature of the relationship existing between the judiciary and press and could, thereby, foster mutual respect and confidence.

21. As a corollary, note that judicial attitudes play considerably less part in a rule-based system than a contempt proceeding.

22. 12 BAR BULL. 17 (1954). Hogan's rules so far as the writer can determine merely prohibited the prosecution from commenting on what, if any, confessions were obtained. Still they were criticized heavily in New York papers as being a "blackout" and an "iron curtain of censorship." *Id.* at 17. Hogan defended his rules in a public letter claiming that any other practice destroys the presumption of innocence theoretically present in every criminal case. *Id.* at 18. Indeed, sometimes alleged confessions weren't even introduced at the trial. See Shephard v. Florida, 340 U.S. 890 (1950) (conviction reversed).

23. Katzenbach, galvanized into action by the Warren Commission's *Report on the Assassination of President John F. Kennedy*, formulated the following rules for use by federal law enforcement agencies operating under Justice Department control—(1) the Department will supply: (a) defendant's name, age, address, employment, marital status and other general background information (b) the substance or text of the complaint, indictment or information (c) identity of the investigative and arresting agency and

draw-back is in not limiting the scope of comment allowed to the defense attorneys. They can just as easily utilize the press unjustly in the defendant's favor as the prosecution can to prejudice the public against the accused. Considering all factors, however, such methods constitute a step in the right direction by being more definitive and providing more conveniently applied measures to control public consumption of pre-verdict criminal news.

The second new type of control mechanism that limits access of the press to information is the one announced by the instant case. By using the *Canons of Professional Ethics* as a vehicle for enforcement, the system discourages defense counsel as well as prosecution attorneys from using the newspapers to try their case. But, as a corollary, the vague threat of Bar Association censure is less threatening than the more particular fear of censure created by a highly structured employer's tribunal when the wrongdoer-employee violates a rule laid down by that employer. Further, the system as proposed by the instant case is relatively inflexible since it needs a decision from the state's highest tribunal each time a change in the rules is required. Also, since the state cannot appeal an acquittal, this inflexibility could allow a loophole which would operate for the unjust benefit of the accused by permitting defense counsel more latitude with the press than is justified. It is submitted, however, that since these rules are laid down as prospective rulings in dictum, a number of cases sufficiently relevant to justify review of the press-disclosure rules would come before any supreme court in which new rules could be set forth. To the extent that a court is able to review its rulings on the subject at reasonable intervals and articulate new prospective rulings when necessary, the system will avoid the evils of retrospectivity inherent in both "due process" and "contempt" methods of control.[24] Another difficulty with the New Jersey system is that its practical effect on police officers is dependent on the willingness of the police department to punish them for conduct unbecoming an officer as defined in the instant case. To speculate on the departments propensity to punish its own pursuant to rules established by an external body

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the length of investigation preceding arrest (d) circumstances immediately surrounding the arrest—time, place, resistance, pursuit, possession and use of weapons, and items seized at time of arrest (e) photos if a "valid law enforcement function is thereby served." It will not pose its prisoners for photographers nor will it prevent or discourage picture taking. (2) the Department should be as circumspect as possible in the disclosure of criminal records and as such will not volunteer any such information. If asked it will only relate federal convictions and records. (3) No such confessions—or even that a fact that a confession has been made—should be provided by the Justice Department." (4) the Department should not give out information on investigative procedures, *e.g.*, ballistics, fingerprints, etc. New York Times, April 17, 1965, p. 1, col. 3.

24. See notes 9 & 10 *supra* and accompanying text.

would be fruitless, except to say that were the rule formally adopted by the police department or originally articulated by it, this would be less of a problem. Were the legislature[25] to have formulated the rules set out by the New Jersey court there would probably be no material difference in their effect. In fact, having a court impose rules on law enforcement agents and lawyers, both of whom are intimately connected with the courts, seems particularly appropriate. In the last analysis, although the New Jersey standard is as yet imprecise, it does avoid the vagueness problems inherent in the older retrospective methods while retaining the long-needed purifying effect of a news control system.

Taxation—Corporate Income Taxation—Merger Results In Loss of Non-Recognition Treatment for Section 355 Spin-off

On January 30, 1957, American Crayon Company, an Ohio corporation, was merged into Joseph Dixon Crucible Company, a New Jersey corporation. Both companies manufactured and sold school and stationery supplies. On January 2, 1957, American had formed a subsidiary corporation, Kroma, Inc., to assume an American-owned warehouse rental operation unwanted by Dixon. In exchange for the land and building, American took all of Kroma's stock which it then distributed share for share to its own stockholders. Thereafter, Kroma continued unchanged the rental operation of the American warehouse. After the merger Dixon continued substantially unchanged the operation of the American manufacturing facility. The Commissioner of Internal Revenue, determining that the Kroma stock distribution constituted dividend income to American shareholders, assessed a deficiency against Curtis, one of American's stockholders and a recipient of the Kroma stock. Paying under protest, Curtis brought suit for refund[1] in the federal district court, contending that the transaction was a non-taxable spin-off under section 355 of the Internal Revenue Code of 1954. Holding that American, having disappeared in the merger, could not have been engaged in a trade or business immedi-

25. To date no legislature has attempted to formulate a code for use by the press and lawyers.

1. A secondary issue, concerning the taxability of Dixon debt certificates received by American shareholders pursuant to the merger agreement, will not be considered in this comment.

ately after the distribution of Kroma stock, the district court found section 355(b)(1)(A)[2] of the Code unsatisfied, and thus denied refund.[3] On appeal to the Sixth Circuit, *held*, affirmed on the same grounds. Section 355's non-recognition of gain or loss arising from a spin-off is an exception to the statute's general taxation of corporate distributions as dividends; legislative history and judicial doctrine warrant its strict construction. *Curtis v. United States*, 336 F.2d 714 (6th Cir. 1964).

The tax history of divisive reorganizations has been a turbulent one.[4] The Revenue Act of 1924 first provided non-recognition of gain or loss arising from spin-offs if the spinning-off corporation, or its stockholders through distribution of the new corporation's stock as part of the reorganization plan, controlled the spun-off corporation immediately after the transfer of property.[5] The statute had no business-purpose or continued-existence restrictions; literal compliance with its terms could result in tax-free treatment for a transaction otherwise endowed with all the charactistics of an ordinary dividend, *i.e.*, the withdrawal and economic realization of earnings and profits without loss of control. In 1935, *Gregory v. Helvering*[6] presented the Supreme Court with precisely that problem. Liquid assets were transferred to a newly-created corporation, the stock in which was distributed to the sole shareholder of the transferring corporation. Immediately thereafter the taxpayer liquidated the new corporation, received its assets, converted them to cash, and then claimed capital gain treatment for the transaction. The court held that lack of business purpose other than tax avoidance violated legislative intent, and allowed the Commissioner's taxation of the transaction as a dividend. However, an aroused Congress had reacted quickly to the Board of Tax Appeals decision, which had been in favor of the taxpayer, by eliminating[7] the

2. INT. REV. CODE OF 1954, § 355(b)(1): "Subsection (a) [conferring non-recognition of gain or loss] shall apply only if . . . (A) the distributing corporation, and the controlled corporation . . . is engaged immediately after the distribution in the active conduct of a trade or business. . . ."

3. Curtis v. United States, 215 F. Supp. 885 (N.D. Ohio 1963).

4. Three types have been favored, from time to time, with non-recognition provisions in the federal tax laws. These are: (1) *spin-off*—one corporation distributes to some or all of its shareholders the stock of a subsidiary corporation; (2) *split-off*—the shareholders of the parent surrender part of their stock in the parent for shares in the subsidiary; and (3) *split-up*—the parent corporation liquidates, distributing its stock in two or more subsidiaries. Prior to the 1954 Code, these types of reorganization were accorded diverse tax treatment. A concise summary of historical provisions may be found in BITTKER, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 321-28 (1959, Supp. 1964).

5. Revenue Act of 1924, ch. 234, § 203(c), 43 Stat. 256.

6. 293 U.S. 465 (1935).

7. Revenue Act of 1934, ch. 277, § 112, 48 Stat. 704. See also H.R. REP. No. 704, 73d Cong., 2d Sess. (1934).

provision in its entirety, thus leaving all spin-offs taxable as dividends. In 1951 repeated legislative efforts to reinstate the tax-free spin-off resulted in Congress's addition of section 112(b)(11) to the Internal Revenue Code of 1939.[8] The new section's language incorporated the continued-existence restriction as a safeguard to complement the *Gregory* doctrine. Finally, the Internal Revenue Code of 1954, here under judicial construction, provides more numerous restrictions and applies them alike to spin-offs, split-offs, and split-ups. In brief, before bestowing tax-free treatment the Code requires the following conditions to be satisfied: (1) the transaction must not be used principally to distribute earnings and profits;[9] (2) the distributing corporation must have 80 per cent control of the corporation whose shares are being distributed;[10] (3) enough shares to constitute 80 per cent control must be distributed;[11] (4) the two corporations must each have a separate trade or business that has actively been conducted over the five years preceding distribution;[12] and (5) each corporation must immediately after the distribution be engaged in the active conduct of a trade or business.[13] Though one of original impression for the judiciary, the question of whether under the 1954 Code spin-off of an unwanted business prior to merger should be accorded tax-free status has confronted the Treasury Department several times. Its position has consistently been that a pre-arranged disposition of the stock in either corporation is evidence that the spin-off transaction is a device for the distribution of earnings and profits.[14] Even though tax-free, a prearranged exchange of stock pursuant to merger plans has been ruled by the Treasury to be fatal to the tax-free status of a spin-off.[15]

In the instant case, the Sixth Circuit set forth the statutory definition of dividend, section 355's exemption therefrom, and the Senate Finance Committee's report on the 1951 amendment reinstating tax-free treatment of spin-offs. The court emphasized that the legislature intended both corporations, the parent as well as the subsidiary, to continue in business after the spin-off. It then reasoned that the

8. Int. Rev. Code of 1939, § 112(b)(11), added by ch. 521, § 317, 65 Stat. 493 (1951).

9. INT. REV. CODE OF 1954, § 355(a)(1)(B).

10. INT. REV. CODE OF 1954, § 355(a)(1)(A).

11. INT. REV. CODE OF 1954, § 355(a)(1)(D).

12. INT. REV. CODE OF 1954, § 355(b)(2).

13. INT. REV. CODE OF 1954, § 355(b)(1).

14. Treas. Reg. § 1.355-2(b)(1) (1955): "If, pursuant to an arrangement negotiated or agreed upon prior to the distribution of stock . . . , stock or securities of either corporation are sold or exchanged after the distribution, such sale or exchange will be evidence that the transaction was used principally as a device. . . ."

15. Rev. Rul. 58-68, 1958-1 CUM. BULL. 183. See also Rev. Rul. 55-103, 1955-1 CUM. BULL. 31, where spin-off of an unwanted business prior to the shareholders' outright sale of a corporation was ruled to be a "device."

parent, American, lost both its corporate identity and its corporate existence by merging; therefore, it was no longer engaged in the active conduct of a trade or business because it was no longer in being at all. The taxpayer pointed out that Dixon conducted American's business after the merger with the same assets as had American before the merger. But the court treated as farfetched the taxpayer's contention that this should fulfill the continued-existence requirement; although the business was continued, the legislative requirement that the parent corporation continue it was not met.[16]

There were available two alternative approaches that the court might have taken. The one it chose is the more literal and technical of the two. Yet, undoubtedly, there is ample basis for it in the language of the Code, especially under the judicial notion of construing exceptions strictly. The court's holding does present this intriguing speculation, however: had Dixon been merged into American, rather than American into Dixon, a transaction with the same economic effect on the business and on the shareholders, would the test of section 355(b) have been met? Certainly the distributing corporation, albeit expanded in size of business and number of stockholders, is continuing the active conduct of a trade or business in its own name. On the other hand, does a merger so change the character of the surviving corporation that, regardless of its name, it cannot be said to be the same corporation that originally spun-off the unwanted business? To pose these questions is to recognize the second approach available to the court: It might have considered the substance of the transaction rather than the form, and therefore considered whether Congress intended to exempt some merger-spin-off transactions from recognition of gain while not so exempting others of identical economic character. It might have undertaken the following analysis.

In the eyes of state corporation law, constituent corporations, by merging, become one corporate entity possessed of the rights and duties of its predecessors.[17] Thus there is a continuing corporation in both legal and economic reality sufficient to satisfy section 355(b). Congress seeks not to impede corporate reorganization by imposing tax barriers where the reorganization is designed to fulfill a legitimate business purpose.[18] This attitude underlies all the Code provisions[19]

16. Curtis v. United States, *supra* note 3, at 719.

17. LATTIN, CORPORATIONS 537 (1959). The statutory provision in the instant case is found in OHIO REV. CODE ANN. § 1701.81(A)(2),(4) (Baldwin 1955).

18. The Senate Finance Committee Report relied on in part by the court in the instant case reemphasizes congressional policy: "[Y]our committee believes that it is economically unsound to impede spin-offs which break up businesses into a greater number of enterprises, when undertaken for legitimate business purposes." S. REP. No. 781, 82d Cong., 1st Sess. 58 (1951).

19. For the various reorganizations accorded special tax treatment see INT. REV. CODE OF 1954, § 368.

for non-recognition of gain or loss in cases of corporate reorganization. Thus, where merger, or other sheltered reorganization, *e.g.*, consolidation,[20] is the reason for spin-off, the distributing corporation will necessarily undergo a change of form—but a change of form not to be directly impeded by tax barriers. It would not be wise, therefore, to impede the change indirectly by taxing an *otherwise* non-taxable spin-off. But is the Kroma spin-off otherwise non-taxable? The control requirements and the separate business requirements of section 355 are met.[21] However, section 355(a)(1)(B) poses another problem similar to the one already considered. That section reads:

> the transaction [must not have been] used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both (but the mere fact that subsequent to the distribution stock or securities in one or more of such corporations are sold or *exchanged by* all or some of *the distributees* (other than pursuant to an arrangement negotiated or agreed upon *prior to such distribution*) shall not be construed to mean that the transaction was used principally as such a device). [Emphasis added.]

Apparently a pre-arranged sale or exchange of the distributing corporation's stock by the distributees is to be construed as a "device." Whether the exchange is to be construed conclusively, or merely as a presumption, the statute leaves unsaid.[22] American's shareholders, the Kroma distributees, did exchange American's stock for Dixon's pursuant to a pre-arranged plan, although the exchange was one favored by congressional economic policy. Once again, however, it may be observed that had Dixon been merged into American, rather than American into Dixon, the problem would not have arisen. Dixon shareholders, not parties to the spin-off transaction, would have exchanged their Dixon shares for American shares, while the American shareholders, the Kroma distributees, could have retained their original holdings intact. Thus the exchange that actually took place should not be construed conclusively to be a "device." Rather, the question is whether the spin-off transaction resulted in a bail-out of earnings and profits. Was there actual withdrawal and economic realization of earnings and profits without loss of control, or was there a mere continuation of the business under modified corporate

20. Consolidation, *i.e.*, two corporations combining to form a third and new corporation, is here mentioned because, under the court's reasoning in the instant case, the consolidating corporations would cease to exist, thus rendering pre-consolidation spin-offs taxable.

21. The distributing corporation, American, owned 100% of the subsidiary's stock and distributed it all.

22. The Treasury position that the exchange is merely evidence has been previously mentioned. See note 14 *supra*.

form? If the latter, the spin-off should be granted non-recognition of gain under section 355.

The foregoing analysis indicates the problems arising under section 355. To claim its benefit, corporations must avoid wrong-way merger or consolidation if there is an unwanted business to be divided off from one of the parties to the combinational reorganization. If the judicial doctrine of strict construction of exceptions to general taxation statutes is not to be severely stretched, as the court in the instant case was unwilling to do, and if congressional encouragement of reorganization pursuant to legitimate business ends is to be effective, the statute should be amended so as to prevent the uneven treatment here illustrated. In the instant case, the transaction apparently involved no bail-out of earnings and profits, and yet it was taxed as if it did. It is not inconceivable that recipients of stock in a spun-off corporation would have to liquidate the spun-off business, probably at a loss in the absence of a ready buyer, in order to pay their taxes on the "dividend." Thus the economic continuity sought by Congress is disrupted, possible hardship imposed, and flexibility of business form denied.

Taxation—Federal Income Tax—Election of Installment Basis of Reporting Gain Through an Amended Return

Petitioners, husband and wife, owned a thirty-five acre tract of land on which they lived and operated an airport and relay facilities. In 1958, petitioners sold the tract to a church for 181,600 dollars, payable 1000 dollars down and the balance in monthly annual installments. Petitioners received 2600 dollars in 1958 from this sale and mistakenly[1] reported this amount as gross business income on their 1958 joint return. The actual sale was not reported in this return[2] and upon audit of petitioners' 1958 return and examination of petitioners' books, the Commissioner determined that petitioners had realized from the

1. The 1958 return was filed by Opal Reaver due to the illness of her husband at that time. Her husband had consulted a certified public accountant at the time of the sale and had been advised to report profits from the transaction on the installment basis. Opal, however, had no knowledge of this conversation and was ignorant of the installment provision of § 453(b) of the Code. The $2600 received from the sale in 1958 was merely recorded as receipts of the airport operation, designated as being received from the church, and was included in the summary of gross receipts from the airport operations.

2. See note 1 *supra*.

sale a capital gain of 79,499.37 dollars in 1958 and, accordingly, assessed a deficiency against them. Petitioners then filed an amended return in which they specifically reported the sale of the thirty-five acre tract as a capital transaction, computed the gross profit thereon, and elected to account for the gain on the installment basis under section 453(b) of the Internal Revenue Code of 1954.[3] Upon the Commissioner's refusal to allow petitioners' election of the installment basis, appeal was taken to the Tax Court of the United States. *Held,* reversed. When the taxpayer, through honest mistake or omission, has failed to elect the installment basis of reporting gain from the sale of land in the year of sale and has made no other election, he may, through an amended return, elect the installment basis of reporting the gain. *John P. Reaver,* 42 T.C. 72 (1964).

Section 453(b) of the Internal Revenue Code of 1954 provides that an individual who sells real property may elect to report as income in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when the payment is completed, bears to the contract price.[4] Neither the Code nor the regulations specifically provide when or in what form the election must be made.[5] It is generally established that once a taxpayer has made an election, he must stand by it;[6] however, the difficult problem is to determine what action by the taxpayer constitutes a binding election. For instance, if a taxpayer realizes income which qualifies for the installment basis treatment and he files a return in which he fails to make a positive election of the installment basis, either by mistakenly characterizing such income or by failing to report it altogether, has he made a binding election? Earlier Tax Court cases have held that a taxpayer was bound by his failure to take positive action, upholding the Commissioner's position that a taxpayer who failed to report profits on the installment basis on a timely filed return for the year of the sale forfeited his rights to elect the installment basis.[7] More recently the Tax Court has not adhered to the Commissioner's view and has ruled that a taxpayer may elect the installment basis later than the year of the sale when there was a good faith mistake or omission and the taxpayer had not

3. Under this section a taxpayer who sells or otherwise disposes of real property may return as income in any taxable year that proportion of the installment payments actually received in the year in which the gross profit, realized or to be realized when the payment is completed, bears to the total contract price. INT. REV. CODE OF 1954, § 453(b) (formerly Int. Rev. Code of 1939, § 44(b)).

4. INT. REV. CODE OF 1954, § 453(b) (formerly Int. Rev. Code of 1939 § 44(b)).

5. Treas. Regs. § 1.453-8(b)(1) (1958).

6. Pacific Nat'l Co. v. Welch, 304 U.S. 191 (1938); Jacobs v. Commissioner, 224 F.2d 412 (9th Cir. 1955), *affirming* 21 T.C. 165 (1953).

7. W. A. Ireland, 32 T.C. 994 (1959); Cedar Valley Distillery, Inc., 16 T.C. 870 (1951); W. T. Thrift, Sr., 15 T.C. 366 (1950); Sarah Briarly, 29 B.T.A. 256 (1933).

previously made a positive election to report on another basis.[8] Two circuit courts have considered the question and neither has approved the Commissioner's rule.[9] The most recent of these cases, *Baca v. Commissioner*,[10] further extended the Tax Court's "good faith" rule.[11] In *Baca* the taxpayer had realized income from the sale of property in 1953 and had failed to report it until 1957, at which time she elected the installment basis. The Commissioner found the taxpayer negligent in delaying to file a return and refused to allow the election. The Tax Court affirmed,[12] noting that "where benefits are sought by taxpayers, meticulous compliance with all named conditions is required."[13] The court further noted that it could hardly be said that there was any "non-negligent good faith omission . . ."[14] by the taxpayer, apparently attempting to distinguish the *Baca* case from *Hornberger v. Commissioner*,[15] decided by the Fifth Circuit. The court of appeals reversed,[16] pointing out that the penalty which results from denying a negligent taxpayer the right to elect the installment basis was beyond the statutory power of the Commissioner.[17] The prevailing case law thus indicates that where a taxpayer has either mistakenly characterized or failed to report installment income in the year of the sale, he has not made an election, and even if negligent in his omission he is not precluded from subsequently electing the installment basis in an amended return.

The rationale of the instant case is consistent with that of recent Tax Court decisions construing section 453(b),[18] as well as with the reasoning expounded in the decisions of the courts of appeal.[19] Observing that neither the Code nor the regulations contain specific reporting requirements which must be met by the taxpayer in order to enjoy the benefits of section 453(b), the court further noted that there is nothing in the legislative history of this section which indicates that

8. Nathan C. Spivey, 40 T.C. 1051 (1963); Jack Farber, 36 T.C. 1142, *aff'd*, 312 F.2d 729 (2d Cir.), *cert. denied*, 374 U.S. 828 (1963); John F. Bayley, 35 T.C. 288 (1960).

9. Baca v. Commissioner, 326 F.2d 189 (5th Cir.), *reversing* 38 T.C. 609 (1962); Hornberger v. Commissioner, 289 F.2d 602 (5th Cir. 1961); Scales v. Commissioner, 211 F.2d 133 (6th Cir.), *reversing* 18 T.C. 1263 (1952); United States v. Eversman, 133 F.2d 261 (6th Cir. 1943).

10. 326 F.2d 189 (5th Cir. 1964).

11. See authorities cited note 8 *supra*. The Tax Court's emphasis on the taxpayer's good faith is implicit in the language used in these cases. The court stated more specifically that it felt good faith was required in Baca v. Commissioner, *supra* note 9.

12. 38 T.C. 609.

13. *Id.* at 613.

14. *Id.* at 615.

15. 289 F.2d 602 (5th Cir. 1961).

16. Baca v. Commissioner, *supra* note 9.

17. *Id.* at 191.

18. See authorities cited note 8 *supra*.

19. See authorities cited note 9 *supra*.

the taxpayer may not elect the installment basis on an amended return.[20] The court stated that the Secretary of the Treasury could easily provide in his regulations that the election must be made on a timely filed return. The court also took cognizance of the fact that the regulations governing election of the installment basis by dealers in personal property were amended in 1963 so as to require that the dealer elect in a timely filed return.[21] While admitting that there may be more reason for the specific requirement in the case of dealers, the court felt that omission of a similar requirement for section 453(b) could hardly be due to the Secretary's oversight.[22] The court did not think that the taxpayers, by reporting as gross business income in 1958 all of the income derived from the sale in that year, had made an election between reporting the gain all in one year and reporting on the installment basis.[23] Having made no conscious election, the rule of the *Pacific National* case,[24] that once a taxpayer makes an election he is bound thereby, was inapplicable. Thus, the taxpayers were not precluded from electing the installment method on an amended return.[25] The taxpayers had not adopted any position inconsistent with the installment basis, they had reported the entire proceeds from the sale actually received in 1958, and they had included all of the information required by the regulations governing section 453(b) in their amended return. Hence, said the court, the taxpayers merely made an honest mistake, and having rectified it at the earliest opportunity, there was no valid reason for denying them the privilege of electing the installment basis on their amended return.[26]

The decision in the instant case follows the current trend of decisions and, equally important, is demonstrative of equitable tax law administration. From the jurisprudential viewpoint, procedural tax rules are not desirable when they result in unfairness to the taxpayer. So long as a taxpayer is reporting income honestly, it would seem to make little difference whether the income is reported on an original return or, because of the taxpayer's mistake or omission, it must be reported on an amended return. The burden should, however, be on the taxpayer to show his good faith. Sound tax administration is intended to be a fair implementation of congressional tax policy. Congress, having made no specific statutory provision for a timely election under section 453(b), has delegated to the Treasury

20. 42 T.C. at 79-80.
21. *Id.* at 80-81.
22. *Id.* at 81.
23. *Ibid.*
24. Pacific Nat'l Co. v. Welch, *supra* note 6.
25. 42 T.C. at 81.
26. *Id.* at 82.

Department the duty of promulgating such a requirement if the Department deems it necessary from the standpoint of sound tax administration. It seems obvious that if the efficient administration of the provisions of the section were hampered by a taxpayer's being permitted to elect on an amended return, the Treasury, through its regulations, could easily require that the election be made on a timely filed return.

So long as the taxpayer's installment basis election via an amended return does not result in inconvenience to the government, it seems imprudent for the Commissioner to impose upon the taxpayer a requirement which he could easily have spelled out but has failed to do so. If the taxpayer has made no positive election of another basis of reporting his income, and his failure to elect the installment basis is not based on negligence, permitting him to elect the installment basis on an amended return grants him no more than that to which he is entitled under the statute.

Taxation–Federal Income Tax–Section 212(3) Extended to Attorney's Fees Arising Out of Divorce Settlement

The plaintiff taxpayer paid attorney's fees in excess of 10,000 dollars arising out of an uncontested divorce and separation from his former wife. Evidence established that at least seventy percent of the bill represented the fee properly allocable to services and advice directed to minimizing possible tax consequences to the plaintiff flowing from the divorce and separation settlement.[1] Plaintiff contended that the portion of his attorney's fees pertaining solely to services and advice regarding tax matters was an allowable deduction from his gross income under section 212(3) as "ordinary and necessary expenses paid . . . in connection with the determination, collection, or refund of any tax."[2] The Government opposed the deduction, contending

1. The attorney concentrated on making certain that the support payments to be made would be alimony taxable to the wife and hence deductible by plaintiff. INT. REV. CODE OF 1954, § 71(a), provides that alimony payments made under specified conditions are to be included in the wife's gross income, whereas, § 215(a) provides that the husband is allowed a deduction for amounts which are includible under § 71 in the gross income of his wife. INT. REV. CODE OF 1954, §§ 71(a), 215(a).

2. INT. REV. CODE OF 1954, § 212(3). The section in full provides: "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—(1) for the production or collection

that section 212(3) is limited to tax controversies, thus not encompassing plaintiff's uncontested divorce settlement. The Court of Claims *held,* an individual taxpayer is entitled to deduct as legal expenses under section 212(3) the portion of his attorney's fees allocable to tax counseling arising out of a divorce and separation. Thus, deduction for fees of tax counsel is not restricted to fees incurred in connection with contested tax controversies. *Carpenter v. United States,* 338 F.2d 366 (Ct. Cl. 1964).

Section 212(3) was first introduced in the 1954 Code. Previously, the Internal Revenue Code permitted individuals to deduct non-trade or business expenses incurred "for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."[3] In 1952, the Supreme Court handed down a decision which prompted the inclusion of section 212(3). In *Lykes v. United States,*[4] the Court held that legal fees paid in connection with litigation of gift tax liability, unlike a contest over the income tax or estate tax, did not fall within either of the sections quoted above. Section 212(3) of the 1954 Code was designed to change the rule in the *Lykes* case,[5] so that an individual could deduct all ordinary and necessary expenses paid in connection with the determination, collection, or refund of *any* tax.[6] The Commissioners and the courts began allowing deductions for attorney's fees, but only in actual controversies involving tax liability or for tax advice in the preparation of returns.[7] *Davis v. United States*[8] changed this. In *Davis,* the Court of Claims held, on facts substantially identical to those in the present case, that "fees paid by plaintiff for consultation and advice in tax matters arising in connection with

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of income; (2) for the management, conservation, or maintenance of property held for the production of income; or (3) in connection with the determination, collection, or refund of any tax." INT. REV. CODE OF 1954, § 212.

3. Revenue Act of 1942, ch. 619, § 23(a)(2), 56 Stat. 819. This is substantially the same as INT. REV. CODE OF 1954, § 212(1)-(2).

4. 343 U.S. 118 (1952).

5. Committee reports support this conclusion. "Existing law allows an individual to deduct expenses connected with earning income or managing and maintaining income-producing property. Under the regulations costs incurred in connection with contests over certain tax liabilities, such as income and estate taxes, have been allowed, but these costs have been disallowed where the contest involved gift-tax liability. A new provision added by your committee allows a deduction for expenses connected with determination, collection, or refund of any tax liability." H.R. REP. No. 1337, 83d Cong., 2d Sess. 29 (1954).

6. INT. REV. CODE OF 1954, § 212(3). "Paragraph (3) is new and is designed to permit the deduction by an individual of legal and other expenses paid or incurred in connection with a contested tax liability, whether the contest be Federal, State, or municipal taxes, or whether the tax be income estate, gift, property, and so forth." *Supra* note 5.

7. See 42 B.U.L. REV. 547 (1962).

8. 287 F.2d 168 (Ct. Cl. 1961).

a settlement agreement are properly deductible from gross income"[9] under section 212(3). On *certiorari,* the Government did not contest the taxpayer's deduction of his own attorney's fees in the settlement, and the Supreme Court refrained from commenting on the question.[10]

In the present case, the Government contended that a deduction for fees of tax counsel under section 212(3) is restricted to proceedings involving tax controversies. The taxpayer and the court felt that section 212(3) was not so limited. The Government cited reports of House and Senate committees which made frequent use of the term, "contested tax liability," in reference to section 212(3).[11] The court, however, applied the "plain meaning rule" to section 212(3) and the regulations in reaching its conclusion. Section 212(3) allows a deduction for legal expenses "in connection with the determination, collection, or refund of any tax."[12] The court stated that, "this language is clearly not limited in meaning to any contested tax controversy, as construed by defendant."[13] In referring to the Treasury Regulations, which provide that "expenses paid or incurred by a taxpayer for tax counsel . . . are deductible,"[14] the court stated, "the language of the . . . regulation . . . is sufficiently clear by itself to allow the deduction sought here."[15] The court also cited *Davis* as controlling in this case.[16] The court pointed out that the taxpayer should not be restricted to the deduction of expenses for tax counsel which are incurred solely for the purpose of discovering the tax consequences of past transactions or contesting tax liabilities already accrued. By obtaining the services of tax counsel the taxpayer seeks to avoid tax contests, not to create them, and in this he serves both his own interest and that of the government.

If the instant case is followed by other courts, the question arises as to how far the decision will be extended. Three stages of tax counseling should be considered when construing section 212(3):

9. *Id.* at 171.

10. United States v. Davis, 370 U.S. 65 (1962).

11. See note 5 *supra* and the anthority cited therein. Accordingly, any expenses incurred in *contesting* any liability collected as a tax or as part of a tax will be deductible. *Ibid.*

12. INT. REV. CODE OF 1954, § 212(3).

13. 338 F.2d at 369.

14. Treas. Reg. § 1.212-1(2)(1) (1957). The paragraph in full provides: "Expenses paid or incurred by an individual in connection with the determination, collection, or refund of any tax, whether the taxing authority be Federal, State, or municipal, and whether the tax be income, estate, gift, property, or any other tax, are deductible. Thus, expenses paid or incurred by a taxpayer for tax counsel or expenses paid or incurred in connection with the preparation of his tax returns or in connection with any proceedings involved in determining the extent of tax liability or in contesting his tax liability are deductible."

15. 338 F.2d at 368.

16. *Ibid.*

(1) tax counseling which takes place after the occurrence of the transactions or events, (2) tax counseling which contemplates immediate and certain occurrence of the event, and (3) tax counseling where the taxable events are uncertain and in futuro. The dissent would limit application of section 212(3) to the first stage, thus authorizing a deduction only for tax counsel employed in connection with the preparation or consideration of tax returns or with tax proceedings since these are based on past or settled events.[17] Since the plaintiff employed tax counsel before the events had been settled, *i.e.*, before the divorce, separation, and alimony decree, the dissent maintained that a 212(3) deduction was not allowable. The majority adopted a broader meaning, but the question becomes how much broader. If limited to a strict interpretation upon its own facts, the result would be that an individual taxpayer is entitled to deduct as legal expenses under section 212(3) that portion of his attorney's fees allocable to tax counseling in divorce and separation settlements. If, on the other hand, the court's reasoning is broadly interpreted, the decision will have significant and far-reaching implications in a most important area of tax law. It may be argued that the court intended that expenses incurred by a taxpayer for tax counsel are deductible under any situation, thereby encompassing all three stages mentioned above. This would encompass all planning which includes an effort to miminize federal income, estate, or gift taxes, as well as state and local taxes. Therefore, expenses incurred in all general tax planning of holdings, estates, and marital and family obligations which were heretofore barred from deduction under section 262 as personal living expenses,[18] would be deductible. However, a limiting factor is indicated in the court's opinion. The court pointed out that plaintiff employed tax counsel to minimize two tax consequences to plaintiff arising out of the property settlement attendant to the divorce. These tax consequences concerned the tax year when the divorce settlement was concluded, and plaintiff's future annual payments to his wife as alimony. The court stated, "these tax consequences were the result of the same transaction, which had to be considered in toto in 1957 when plaintiff employed tax counsel."[19] Thus, it may be

17. "I interpret it, however, not as authorizing the deduction of expenses paid for *any* tax counsel, but only for tax counsel employed in connection with the preparation or consideration of tax returns or with tax proceedings, *i.e.*, tax advice given after the critical events have taken place or been settled. Tax counsel designed to help plan future transactions or arrangements is not covered." *Supra* note 13, at 371 (dissenting opinion).

18. INT. REV. CODE OF 1954, § 262. "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." See United States v. Gilmore, 372 U.S. 39 (1963).

19. 338 F.2d at 370.

argued that the court's reasoning encompasses the first and second stages only; that is, tax counseling concerning past or settled events, and tax counseling which contemplates the immediate and certain occurrence of future events. It is apparent that allocation will become the key to successful use of a deduction under 212(3). If the tax counseling contemplates immediate and certain occurrence of the event, and if the event does in fact occur, the taxpayer, upon receiving a bill from an attorney, should simply allocate the fee pertaining to services and advice on tax matters and include this in his income tax deductions. So long as the allocation is reasonable under the circumstances and made in good faith, the taxpayer's determination should withstand attack.

Torts—Compensation and Liability Insurer's Liability for Negligent Performance of Voluntary Inspections

Actions for wrongful death and personal injuries suffered when a construction hoist fell with the plaintiffs and plaintiffs' decedents aboard were consolidated for trial in Illinois Superior Court, Cook County.[1] American Mutual Liability Insurance Company, the compensation and liability insurer for the general contractor who owned and operated the defective hoist, was joined as defendant in the suit on the ground that it was negligent in its voluntary inspections of the hoist.[2] The court ruled that the insurer's voluntary inspections of the hoist had given rise to a duty to use reasonable care to discover defects, and the jury found that breach of this duty proximately caused plaintiffs' injuries.[3] The appellate court reversed,[4] holding that liability for a voluntary undertaking is imposed only when active negligence is shown,[5] and further, that no liability could be imposed

1. Dieringer, Henry W., J. (no opinion published). The accident occurred in Duval County, Florida.

2. The general contractor was immune from tort liability under Florida's Workmen's Compensation Act, FLA. STAT. ANN. §§ 440.01-.57 (Supp. 1964). American was sued as third party tortfeasor. The plaintiffs were employees of the general contractor and of various subcontractors. Their right of action against a third party tortfeasor is preserved by FLA. STAT. ANN. § 440.39(1) (Supp. 1964).

3. Judgments against the insurer totaled $1,569,400. Judgments were entered in the trial court for the other two defendants, the designer and manufacturer of the safety device on the hoist, and the manufacturer of the cable which broke. These judgments were affirmed on appeal.

4. Nelson v. Union Wire Rope Corp., 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963).

5. *Id.* at 122, 187 N.E.2d at 447. The appellate court treated plaintiff's cause of

unless it was shown that either the injured parties or the general contractor relied upon the insurer's voluntary inspections.[6] The Illinois Supreme Court, three justices dissenting, *held*, reversed. A compensation and liability insurer who undertakes voluntary inspections of property of the insured and fails to use reasonable care to discover defects in such property is liable for injuries to any persons it could reasonably have foreseen might be injured as a result of its negligent inspections, regardless of any reliance upon the insurer's inspections.[7] *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769 (Ill. 1964).

That liability can arise from negligent performance of a voluntary undertaking is well established.[8] This principle is typically applied in those cases in which a truck driver fails to use reasonable care in signaling the car behind to pass,[9] or in which a party voluntarily undertakes to protect certain persons,[10] or to aid an injured person,[11] and fails to use reasonable care. One eminent authority indicates that in most cases imposing liability for negligent performance of a voluntary undertaking, the defendant has in some way worsened the situation, either by increasing the danger or by subjecting the plaintiff to a present danger by causing him to rely on the defendant's negligent acts or misrepresentations.[12] In at least one line of cases, however, more than just a duty to refrain from making the situation worse was imposed: landlords have been held liable for not using care in volun-

action against the insurer as solely for nonfeasance. It apparently meant by "active negligence" acts which worsen the situation as distinct from mere failure to use care to discover defects.

6. *Id.* at 125, 187 N.E.2d at 453.

7. The court's statement that reliance upon the inspections was not essential for the insurer's liability can, however, be construed as mere dictum, in view of the court's tentative recognition that, even if reliance was required, there was adequate evidence of it in this case. Nelson v. Union Wire Rope Corp., 199 N.E.2d 769, 780 (Ill. 1964).

Mr. Chief Justice Klingbiel's lengthy opinion in this case dealt with two other issues, both of which involved construction of the Florida Workmen's Compensation Act: (1) whether the insurer could claim the immunity that the act granted the general contractor, and (2) whether it could claim immunity on the ground that it was a subcontractor. The court answered these two questions in the negative. They are not dealt with in this comment.

8. See, *e.g.*, notes 9, 10, 11, 13, 15, 17 *infra* and the cases cited therein. See also 38 AM. JUR. *Negligence* § 17 (1941); 86 C.J.S. *Torts* § 6 n.46 (1954) and accompanying text; PROSSER, TORTS § 54, at 339-43 (3d ed. 1964); RESTATEMENT, TORTS §§ 323, 325 (1934).

9. Petroleum Carrier Corp. v. Carter, 233 F.2d 402 (5th Cir. 1956); Haralson v. Jones Truck Lines, 233 Ark. 813, 270 S.W.2d 892 (1954); Thelen v. Spilman, 251 Minn. 89, 86 N.W.2d 700 (1957).

10. Perrone v. Pennsylvania R.R., 136 F.2d 941 (2d Cir. 1943); Conowingo Power v. Maryland, 120 F.2d 870 (4th Cir. 1941); Will v. Southern Pac. Co., 18 Cal. 2d 468, 116 P.2d 44 (1941).

11. Slater v. Illinois Cent. R.R., 209 Fed. 480 (M.D. Tenn. 1911); Yazoo & Mississippi Valley R.R. v. Leflar, 168 Miss. 255, 150 So. 220 (1933); Bascho v. Pennsylvania R.R., 3 N.J. Super. 86, 65 A.2d 613 (1949).

12. PROSSER, *op. cit. supra* note 8, § 54, at 342.

tarily making repairs for their tenants, even though the landlord's acts did not increase the danger and the plaintiff did not rely upon the landlord's acts.[13] In spite of the many cases in the field of tort liability for voluntary undertakings, the question of just when a duty of care arises and of what it consists have never been adequately defined.[14]

The instant case is the most recent in a long line of decisions holding insurers who undertake voluntary inspections and fail to use reasonable care to discover defects liable for injuries arising from these defects. The leading case is *Van Winkle v. American Steam Boiler Co.*,[15] in which an insurer was held liable for injuries resulting from a boiler explosion on the ground that the insurer's repeated voluntary inspections of the boiler and its participation in the boiler's maintenance gave rise to a duty to use reasonable care to discover the defects which led to the explosion.[16] While numerous cases[17] have reached similar results, another line of decisions[18] has refrained from imposing such liability on the ground that no duty to use reasonable care to discover defects arose out of the insurer's voluntary, limited inspections. These two lines of cases should be read in the light of the common law rule which imposes upon employers a duty to provide reasonably safe working conditions for their employees.[19] This duty extends to employees of independent contractors working on the

13. Bartlett v. Taylor, 351 Mo. 1060, 174 S.W.2d 849 (1943); Freddi-Gail Inc. v. Royal Holding Corp., 45 N.J. Super. 471, 133 A.2d 362 (1957); Conner v. Farmers & Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963).

14. The American Law Institute has attempted to define the duty owed by a voluntary actor in the following sections: "(1) One who gratuitously renders services to another, otherwise than by taking charge of him when helpless, is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise with reasonable care such competence and skill as he possesses or leads the other reasonably to believe that he possesses. . . ." RESTATEMENT, TORTS § 323 (1934).

"One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking (a) to refrain from himself taking the necessary steps to secure his safety or from securing the then available protective action by third persons . . . is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking." RESTATEMENT, TORTS § 325 (1934).

15. 52 N.J.L. 240, 19 Atl. 472 (1890).

16. *Id.* at 245-47, 19 Atl. at 474-75.

17. See, *e.g.*, Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co., 201 Fed. 617 (7th Cir. 1912); Smith v. Employers' Ins. Co., 102 N.H. 530, 163 A.2d 564 (1960); Bollin v. Elevator Constr. & Repair Co., 361 Pa. 7, 63 A.2d 19 (1949); Sheridan v. Aetna Cas. & Sur. Co., 3 Wash. 2d 423, 100 P.2d 1024 (1940).

18. Zamecki v. Hardford Acc. & Indem. Co., 202 Md. 54, 95 A.2d 302 (1953); Viducich v. Greater New York Mut. Ins. Co., 80 N.J. Super. 15, 192 A.2d 596 (1963); See also Ulwelling v. Crown Coach Corp., 206 Cal. App. 2d 96, 23 Cal. Rptr. 631 (1962).

19. McBeath v. Rawle, 192 Ill. 626, 61 N.E. 847 (1901) (employer held liable for injuries resulting from faulty scaffolding).

premises;[20] it includes the affirmative duty of reasonable inspections,[21] and there is no indication that workmen's compensation acts were in any way intended to abrogate this duty.[22] A comparison of the two lines of insurer inspection cases indicates that, in the cases following *Van Winkle*, the insurer had openly undertaken such extensive inspections as would reasonably have indicated to the insured employer the insurer's intention to undertake primary inspection duties; in the cases which refused to impose liability on the insurer, the insurer's inspections were so limited in scope as to indicate that the duty to inspect for hazardous defects remained solely with the insured employer, and that such a duty had not been undertaken by the insurer.[23]

In holding the insurer in the instant case liable for plaintiffs' injuries, the Illinois Supreme Court relied upon: (1) the line of insurer inspection cases following *Van Winkle*,[24] and (2) a literal application of the rule announced in section 323 of the *Restatement*.[25] The court thereby arrived at the unique rule that an insurer will be liable for its negligent failure to discover hazards in the course of its voluntary and limited inspections, *regardless of whether there was reliance on such inspections*.[26] Applying section 323 of the *Restatement*, which imposes upon the voluntary actor the duty to use reasonable care to exercise the skill which he possesses, the court apparently reasoned that since reliance is not expressly required for liability under this section, such a requirement should not be read into it.[27] Similarly, since the insurer inspection cases cited by the court did not expressly mention the element of reliance, the majority of the court interpreted these cases as upholding its decision.[28] The majority also emphasized that in the instant case a safety engineer employed by the insurer had made periodic inspections of the construction site for more than a year prior to the accident; that results of the inspections were reported to the insured general contractor with specific recommendations for safety improvements and that failure to comply with these recommendations

20. Dobbie v. Pacific & Elec. Co., 95 Cal. App. 781, 273 Pac. 630 (1928); Stevens v. United States Gas & Elec. Co., 73 N.H. 159, 60 Atl. 848 (1905).

21. Simone v. Kirk, 173 N.Y. 7, 65 N.E. 739 (1902); White v. Consol. Freight Lines, 192 Wash. 146, 73 P.2d 358 (1937).

22. See note 42 *infra* and accompanying text.

23. See 199 N.E.2d at 796-97 (Schaefer, J., dissenting).

24. See notes 15 & 17 *supra* and accompanying text.

25. See note 14 *supra*. The Illinois court relied heavily on the *Restatement* since the substantive law of Florida, situs of the occurrence, was controlling, and the Florida Supreme Court has stated that it will adhere to the *Restatement of Torts*. 199 N.E.2d at 774.

26. 199 N.E.2d at 780.

27. *Ibid.*

28. *Ibid.*

could have led to cancellation of the general contractor's policy.[29] Significantly, the evidentiary value of such facts lies mainly in their tendency to show that the general contractor relied upon the insurer's inspections. If, as the majority stated, such reliance was not necessary for the insurer's liability, one might well ask why emphasis was placed upon these particular facts. Having found a duty of care owed by the insurer to the plaintiffs, the court then found that there was adequate evidence to uphold the jury verdict that the insurer had breached this duty,[30] and that this breach was a proximate cause of the plaintiffs' injuries.[31] Justice Schaefer, dissenting, disagreed as to the holdings of the insurer inspection cases cited in the majority opinion. He felt that the duty to inspect with care should be placed on the insurer only when the insurer has taken over inspection duties, or when there has been reliance upon the insurer's voluntary inspections.[32]

It is submitted that, although the instant case may have been well decided on its particular facts, the majority's statement that reliance upon the insurer's inspections was not essential for the plaintiffs' recovery will tend to confuse this area of the law. For the following reasons, it is urged that reasonable reliance upon a compensation insurer's voluntary inspections is essential for recovery in a negligence action against the insurer—not direct reliance by the plaintiff, but what may be called "derivative reliance;" that is, reliance by the employer or other person on whom the primary duty of inspection rests, and through him, by the plaintiff.

First, it is axiomatic that tort liability for negligence is based upon the breach of a recognized legal duty owed by the defendant to the plaintiff—most often stated as the duty to exercise reasonable care under the circumstances.[33] This duty is required of the voluntary actor just as surely as performance is required of the person under a contractual obligation.[34] The determinative issue in the *Nelson* case is, of course, whether the insurer's duty to exercise reasonable care necessarily included the duty to make complete inspections ordinarily required of the general contractor who owned and operated the hoist. Foreseeability of risk is perhaps the most important element in de-

29. *Id.* at 777-78.

30. *Id.* at 784.

31. *Ibid.*

32. *Id.* at 797 (dissenting opinion).

33. See, *e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). See generally Green, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934); Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12-16 (1953).

34. See note 8 *supra*.

termining when a duty arises.[35] Indeed, the court recognized that the insurer's duty to inspect with care arose only as "to such persons as defendant could reasonably have foreseen would be endangered as the result of negligent performance."[36] It is contended that this statement sharply conflicts with the same court's statement that reliance upon the insurer's inspections was not essential for the plaintiff's recovery. If there had been no reasonable reliance upon the insurer's inspections by the general contractor (and through it, by the plaintiffs), it is difficult to understand why the insurer should reasonably have foreseen that its failure to inspect the hoist fully would have endangered the plaintiffs, since the primary duty to inspect the hoist would have remained with, and presumably have been fulfilled by, the general contractor. Thus, it is equally difficult to understand why a duty to inspect with care should be imposed upon the insurer in such a situation.

Second, in cases that have imposed liability for misfeasance of voluntary undertakings, there was almost invariably a direct and immediate relationship between the voluntary actor and the injured party, by which the injured party's reliance was an obvious and uncontroverted fact. The comment following section 323 of the *Restatement*, dealing with misfeasance of the voluntary actor, states that the situation to which section 323 is most applicable is where the actor voluntarily takes a friend for an automobile ride.[37] In such a case, the passenger's reliance upon the driver is undoubted. This is not the situation in the instant case, where the primary duty to inspect the defective hoist, and thus the injured parties' primary reliance, was on a third party, the general contractor, as long as the contractor did not reasonably rely upon the insurer to perform its inspection duties.

Third, the majority's conclusion in the *Nelson* case that, under the *Restatement* view,[38] reliance upon a voluntary undertaking is not essential for liability for *misfeasance* of such undertaking leads to some strange results when read in the light of section 325[39] of the *Restatement*, which expressly requires reliance for recovery for the *nonfeasance* of a voluntary undertaking. Adherence to the Illinois Supreme Court's rule dictates that, even though the general contractor in the instant case had never deviated from its own inspection duties

35. Palsgraf v. Long Island R.R., *supra* note 33. "The *Restatement of Torts* . . . accepted the view of the Palsgraf Case, that there is no duty, and hence no negligence, and so never any liability to the unforeseeable plaintiff." PROSSER, *op. cit. supra* note 8, § 50, at 294. *But see* PROSSER, supra note 33, at 16-19.

36. 199 N.E.2d at 779.

37. RESTATEMENT, TORTS § 323(a) (1934).

38. See note 14 *supra*.

39. *Ibid.*

in reliance upon the insurer's inspections, the insurer can be held fully liable for injuries caused by defects in the hoist if it made only cursory inspections of the hoist, but it would not be liable had it overlooked the hoist altogether in the course of its safety inspections. To avoid this anomaly, it is urged again that the duty of care owed by a voluntary actor is subject to the condition that his voluntary acts were reasonably relied upon. With this important condition in mind, it is submitted that for alleged negligent performance of a voluntary undertaking (to which section 323 applies) there should be imposed a rebuttable presumption that the voluntary undertaking was relied upon by the injured party, thus placing the burden of proving that there was no reliance upon the voluntary actor. Conversely, when complete failure to perform a voluntary undertaking is alleged (to which section 325 applies), the presumption should be that there was no reliance upon the undertaking, thus placing the burden of proving that there was reliance on the injured party. Under both sections, however, it is contended that reasonable reliance upon the voluntary acts, whether direct or derivative, should be essential for recovery. It should be noted that cases may arise involving some special relationship between the parties, as possibly in the case of repairs by landlords in landlord-tenant cases,[40] in which public policy factors dictate that the presumption of reliance under section 323 should be conclusive. Nevertheless, it is urged that the above construction of the *Restatement* presents guidelines which can aid courts in attaining fair and just results in the great majority of negligence cases involving voluntary actors, particularly in those involving insurers which have undertaken voluntary inspections.

Fourth, there is a compelling public policy argument against the "all or nothing rule"[41] announced in the instant case. It is contended that such a rule will hinder the main object and legislative policy behind workmen's compensation acts. These acts were passed primarily to protect the employee from the hazards incident to his occupation.[42] The pooling nature of insurance has enabled compensation insurance companies, which are intimately connected with the carrying out of workmen's compensation acts, to make available to employers expert safety engineering service, including supplementary safety inspections.[43] The great effectiveness of such voluntary safety service is manifest.[44] Thus, through compensation insurance

40. See note 13 *supra*.

41. See 199 N.E.2d at 797 (Schaefer, J., dissenting).

42. 8 APPLEMAN, INSURANCE § 4624 (1962).

43. See Hemry, *Workmen's Compensation and the Insurance Carrier*, 370 INS. L.J. 752 (1953).

44. "The accident rate in American industries has been reduced to one third of the rate 25 years ago, and the severity rate has been reduced nearly as much. While

companies, the net effect of workmen's compensation acts has been not only to compensate for injuries, but to avoid them. It seems clear that any supplementary inspections, whether extensive or merely cursory, can only benefit employees. It seems equally clear that the high standard of care demanded by the Illinois Supreme Court for voluntary, supplementary inspections, regardless of whether there is any reliance upon them, will discourage insurers from making such inspections. Thus, on the final ground that the employee is better off when injuries are avoided than when receiving benefits for them, it is contended that the "all or nothing rule" should not be followed.

Torts—Negligence—Imputed Contributory Negligence

Plaintiff, a passenger in an automobile solely owned and operated by her husband, was injured when that automobile collided with one operated by the defendant. At the time of the accident, plaintiff and her husband were en route to his place of employment; it was their intention, upon arriving there, for her to drive the car to her own place of employment. At trial evidence was produced from which a jury could have found either or both of the drivers negligent. The trial judge held, as a matter of law, that the plaintiff and her husband were engaged in a "joint enterprise," and he charged the jury that if they found plaintiff's husband to be guilty of contributory negligence, then the husband's contributory negligence should be imputed to plaintiff to bar her recovery. On appeal, *held,* reversed. The relationship between plaintiff and her husband was not one of "joint enterprise," and, moreover, the doctrine of imputed contributory negligence should be abolished in all instances where there is not a business relationship between the passenger and the driver of a motor vehicle. *Clemens v. O'Brien,* 85 N.J. Super. 404, 204 A.2d 895 (1964).

The imputation of a driver's contributory negligence to his passenger rests on the agency principle of respondeat superior: it is reasoned that since a master is liable to third parties for the negligence of his servants, a servant's contributory negligence should be imputed to the master in an action by the master against a third party. Further, since vicarious liability exists between joint adventurers and partners, the doctrine of imputed contributory negligence has been extended to

many factors have combined to bring about this improvement in safety in American industry, insurance carriers have made a very substantial contribution." *Ibid.*

the joint adventure and partnership relationships.[1] Thus whether a passenger will be held contributorily negligent depends upon the actual relationship between the driver and the passenger, and upon whether the particular court views that relationship as an agency relationship. In the ordinary commercial relationships of master-servant, employer-employee, joint adventurers, and partners, the courts have been almost unanimous in upholding the doctrine of imputed contributory negligence.[2] However, there has not been uniformity in the treatment of those cases in which the relationship between driver and passenger is purely social, such as that between husband and wife, or between friends going to an athletic event. A number of courts have held that whenever the passenger-plaintiff is the owner or co-owner of the vehicle there is a rebuttable presumption that the passenger has such a right to control the actions of the driver as to make the driver his servant, thus warranting the imputation of contributory negligence (hereafter referred to as the passenger-owner rule).[3] In several comparatively recent cases, however, the imputation of contributory negligence has been denied on the ground that in reality the passenger-owner has no *actual* control over the vehicle and therefore the relationship is one of bailor-bailee rather than master-servant.[4] Another doctrine often used to effect the imputation of contributory negligence in cases involving social relationships is the so-called "joint enterprise" rule. Courts employing this doctrine have drawn an analogy to the mutual agency and liability which exists among persons temporarily combined for conducting a specific enterprise for profit, *i.e.*, a joint adventure, and have held that whenever the driver

1. See 2 HARPER & JAMES, TORTS, §§ 23.1-23.8 (1956); PROSSER, TORTS §§ 68-73 (3d ed. 1964); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156 (1951); Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 CORNELL L.Q. 320 (1930). The forerunner of the modern doctrine of imputed contributory negligence is the English case of Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849). In that case, which was a suit by the representative of a passenger in an omnibus against a negligent third party, it was held for the first time that a passenger was so identified with the driver of the omnibus that the latter's contributory negligence would bar recovery. It has become thoroughly settled in both England and the United States that a passenger in a common carrier can recover against a negligent third party in spite of the concurring negligence of the driver. The doctrine of imputed contributory negligence is, however, a partial revival of the *Thorogood* case. Weintraub, *supra* at 321-22.

2. Lessler, *supra* note 1, at 168; RESTATEMENT, TORTS § 486 (1934).

3. Ross v. Burgan, 163 Ohio St. 211, 126 N.E.2d 592 (1955).

4. "[W]hat control or right of control has a passenger, even though he may be [an owner of the vehicle], as the car speeds down the highway. . . . Any attempted exercise of the right of control by wresting the wheel from the driver would be foolhardy. . . . The plain fact of the matter is that there is no 'right of control' in the passenger, and it is pure legal fiction to assert that such exists simply because (the passenger has legal title to the car)." Sherman v. Korff, 353 Mich. 387, 395, 91 N.W.2d 485, 486-87 (1958).

and passenger have a common purpose at the time of the accident and an equal right to control the vehicle, each is charged with the negligence of the other.[5] In applying this doctrine courts have found a common purpose in such activities as a husband and wife driving to an immigration office to secure permission for relatives to enter the United States,[6] but have denied a common purpose because the driver and passenger had different destinations.[7] In recent years several courts have limited the joint enterprise doctrine to situations where there is a common *commercial* purpose between the driver and the passenger.[8] It should be noted that under the passenger-owner rule and the joint enterprise doctrine the driver's contributory negligence is imputed to the passenger although the passenger would not be held liable to the third party for the driver's negligence (*e.g.*, where husband-owner is being driven by his wife on a purely social mission). In recognition of this type of situation the *Restatement of Torts* requires that the driver's contributory negligence not be imputed to the passenger unless the passenger would be liable to the third party for the driver's negligence. This is the so-called "both-ways" test[9] and has been widely adopted.[10] It has also been suggested that the doctrine of imputed contributory negligence be abandoned altogether and that a passenger be held contributorily negligent only if he was actually negligent, *i.e.*, the passenger could have prevented the accident but negligently failed to do so.[11]

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5. Yanco v. Thon, 108 N.J.L. 235, 157 Atl. 101 (1931). It should be noted that many courts tend to de-emphasize the "right to control" requirement.

6. Fisch v. Waters, 136 N.J.L. 651, 57 A.2d 471 (1948).

7. Buss v. Robison, 255 S.W.2d 339 (Tex. Civ. App. 1952).

8. Edlebeck v. Hooten, 20 Wis. 2d 83, 121 N.W.2d 240 (1963). The original RESTATEMENT OF TORTS seemed to favor this view, see § 491, comment *a*; and the proposed RESTATEMENT (SECOND) definitely adheres to the requirement of common financial interest. RESTATEMENT (SECOND), TORTS § 491, comment *c* at 58 (Tent. Draft No. 9, 1963).

9. RESTATEMENT, TORTS § 485 (1934): The proposed *Restatement* has abandoned the "both ways" test and restricted the doctrine of imputed contributory negligence to the master-servant, § 486, and the joint enterprise (§ 491, common *pecuniary* interest between driver and passenger required) relationships. It is stated that this change was made "because imputed contributory negligence has been very much cut down, and has now disappeared from a good many areas." RESTATEMENT (SECOND), TORTS § 485, note to institute at 51 (Tent. Draft No. 9, 1963).

10. 2 HARPER & JAMES, *op. cit. supra* note 1, at 1273.

11. Jenks v. Veeder Construction Co., 177 Misc. 240, 30 N.Y.S.2d 278 (Sup. Ct. 1941). "The rule to be desired is that each person be held responsible for his own negligence; and such personal negligence alone should determine whether the injured person is entitled to recover damages. The relationship or status of the driver of a car should be considered merely as one of the circumstances in determining the personal contributory negligence, if any, of a passenger. No negligence of a driver should be imputed to a passenger in an action by the latter against a third party solely because of the status or relationship between the two. The right of a third party to bar a recovery by such a passenger should depend solely upon the conduct of the passenger

The defendant in the instant case asserted that the driver and the plaintiff were engaged in a joint enterprise; therefore, the driver's contributory negligence should be imputed to the plaintiff. The appellate court held, however, that the public policy of New Jersey is to broaden the social burden of accident-caused loss, and that the merits of the joint enterprise doctrine do not justify frustrating that policy by charging innocent social passengers[12] with responsibility for their driver's negligence. In so holding, the court pointed out that while the basis of the doctrine of imputed contributory negligence is an alleged "mutual agency" between driver and passenger, the fact that a third party cannot bring an action against a social passenger on the grounds of agency proves that no true agency exists between drivers and social passengers.[13] The court also pointed out that the "right to control" requirement of the joint enterprise rule is irrelevant since a driver is not an agent of a social passenger, and therefore the passenger should not be held contributorily negligent unless he breached his duty to control the driver.[14] Finally, the court noted that the legal concept of a true joint adventurer is a spurious basis for the "mutual agency" generally theorized to support the joint enterprise rule in social-relationship automobile accident cases because a joint adventurer is, by definition, an association for commercial, not social, purposes.[15] The court also refused to impute the driver's contributory negligence to the plaintiff on the alternative ground that a traditional joint enterprise did not exist because the plaintiff's and the driver's separate destinations militated against a "common purpose," and because there was no evidence that the plaintiff had a right to control the movement of the automobile.[16]

It is generally accepted in American tort law that responsibility should be based on personal fault; therefore, since the doctrine of imputed contributory negligence denies a faultless passenger recovery from a negligent third party, it is submitted that the doctrine

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in the actual control of the car or his failure to exercise that control or take such other action as was reasonably required and warranted by the circumstances. In other words, the question of the passenger's right to recover should be made dependeut upon the presence or absence of his own personal contributory negligence." Lessler, *supra* note 1, at 175.

12. The court expressly withholds decision on the imputation of negligence in situations wherein the driver and passenger stand at the time of the aceident in the actual relationship of employer-eınployee, or where they are business partuers or co-joint adventurers, Clemens v. O'Brien, 85 N.J. Super. 404, 412, 204 A.2d 895, 899 (1964). By "social passenger" it is meant the situation wherein there is no commercial relationship between the driver and passenger.

13. *Id.* at 412-413, 204 A.2d at 899-900.

14. *Id.* at 413, 204 A.2d at 900.

15. *Ibid.*

16. *Id.* at 411, 204 A.2d at 899.

should be carefully analyzed to determine whether it is justified by public policy.[17] As noted above, imputed contributory negligence is founded upon the doctrine of respondeat superior. While the respondeat superior doctrine can be justified as a proper shifting of the risk of conducting a business with servants to the more financially responsible, although personally faultless, master, it does not follow that public policy also justifies the imputation of a servant's contributory negligence to the master to bar the master's recovery from a third party tortfeasor. There is no more reason for denying a master-passenger recovery for his personal injuries than there is for denying a regular passenger such recovery.[18] The public policy of allowing an innocent third party to recover against a master for the torts of his servants simply does not justify exonerating the third party from responsibility for his own negligence. This is equally true in the partnership and joint adventure relationships. The third party cannot be heard to complain since the fact that the passenger happened to be a master, partner, or joint adventurer is purely fortuitous. Abolishing the doctrine of imputed contributory negligence is also in line with the realities of insurance law since drivers are usually fully covered for liability to third parties, but passengers often are not covered for their own personal injuries.[19] Further, the whole policy of respondeat superior is to broaden the base of liability for accident-caused injury,[20] but the doctrine of imputed contributory negligence contracts rather than expands that base. But even if the doctrine of imputed contributory negligence is recognized, it should be, as it was in the instant case, limited to instances where there is a commercial relationship between the driver and his passenger. The public policy underlying respondeat superior, the basis of the doctrine of imputed contributory negligence, is the placing of the risks of conducting business on the more financially responsible business itself.[21] But when two persons are driving to the supermarket there

17. It should be noted that some writers have proposed that the concept of liability based on fault be abandoned. BATY, VICARIOUS LIABILITY (1916); GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958).

18. "Courts seem unaware that the policies involved in granting or denying the defensive plea may be different from those controlling the responsibility in damages of a master for the conduct of his servant, and that the latter are probably concerned simply with providing a financially responsible defendant." Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831, 833 (1932).

19. Nearly all states have financial responsibility laws which make liability insurance compulsory, but no such laws require the carrying of personal insurance. 11 DE PAUL L. REV. 125, 126 (1962).

20. See Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584 (1929); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934).

21. See Douglas, *supra* note 20, at 585-88, 592-94; Morris, *supra* note 20, at 341. It should be noted that other theories have been used to justify the doctrine of

surely is no "business" being conducted, and therefore the public policy of respondeat superior cannot properly be used as a basis for depriving the passenger of his right to recover from a negligent third party. Even assuming, however, that imputed contributory negligence in social relationships can be justified, the current standards for determining when to impute contributory negligence should be re-examined. Under the joint enterprise rule in those courts which do not require a common commercial purpose, for example, contributory negligence would be imputed if a husband and wife are both going to the supermarket, but not if the husband was driving his wife to the supermarket on his way to a ball game; it is difficult to understand why a distinction should be made between these two situations. Further, under the passenger-owner rule it is reasoned that the driver is the agent of the owner since the owner has the "right to control" the driver. But, since accidents usually occur so quickly that the passenger-owner has no opportunity to exercise his "right to control," the existence of a "right to control" is a tenuous ground for imputing contributory negligence.

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respondeat superior. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 383, 441 (1894).