CONSTITUTIONAL LAW—FREEDOM OF SPEECH—RESTRICTIONS ON DISSEMINATION OF INFORMATION IN CRIMINAL TRIAL—*Hamilton v. Municipal Court for the Berkeley-Albany Judicial District. 76 Cal. Rptr. 168 (March 20, 1969)*—In November of 1966, a "sit-in" demonstration was held at the University of California—Berkeley to protest the presence on the campus of recruiters for the United States Armed Forces. The four defendants in the instant case were a part of a group of ten persons arrested on November 30, 1966, and charged with misdemeanors.[1] The "sit-in" and the subsequent arrests of the demonstrators touched off a "student strike" at the Berkeley campus, and the controversy was the subject of intensive local press coverage[2] and considerable national attention.[3] A pre-trial hearing was held on December 16, 1966, and Judge Brunn of the Municipal Court for the Berkeley—Albany Judicial District, fearing that the widespread publicity would affect the parties' right to a fair trial, issued an order restricting the dissemination of information concerning the trial.[4] On January 13, 1967, three days before the trial was to begin, the defendants held a press conference in front of the Municipal Court Building. In their prepared statement[5] the defendants attacked the pre-trial order on the grounds that it prohibited them from neutralizing the largely condemnatory publicity that had followed their arrest.[6] As a result of the press release the defendants were charged on the same day with criminal con-

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[1] CAL. PEN. CODE SEC. 372 (committing a publice nuisance); CAL. PEN. CODE SEC. 602(l) (unlawful occupation of real property or structures).

[2] *Berkeley Daily Gazette*, editorial: "If the provocateurs must be arrested twice a day and hauled off to Santa Rita, then that is what should be done. The nonstudent radicals must be stopped and stopped now. They must not be allowed to continue to mislead and agitate the campus."

Berkeley Daily Gazette, Chancellor Roger W. Heynes: "Outsiders came on campus with the intention of breaking campus rules and they did so. In addition, state laws were violated and arrests were made. . . . The University must have the authority to protect itself from such illegal intrusions to insure its operation and integrity."

Oakland Tribune, Governor—Elect Reagan: [defendants are] "middle aged juvenile delinquents hanging around the University."

See generally, Defendants Petition for a Writ of *Certiorari* in the Supreme Court of the United States, at iv, and newspaper clippings filled with the Court.

[3] E.g., N.Y. Times, Dec. 1, 1966, at 29, col. 2. N.Y. Times, Dec. 2, 1966, at 1, col. 3. N.Y. Times, Dec. 3, 1966, at 33 col. 3.

[4] To assure a fair trial in this case it is essential to keep pre-trial publicity to an absolute minimum. Therefore, and in accordance with the discussion between the court and counsel in the presence of the defendants in open court this day.

A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy.

B. This order shall apply inter alia to the parties and their counsel, to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations.

The court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and spirit of this order. The court will entertain motions for any further orders that may be necessary or desirable in this matter. See 76 Cal. Reptr. at 169-70; Defendants Petition for a Writ of Certiorari in the Supreme Court, Exhibit C at xiv.

[5] *Id.*, Exhibit D at xv.

[6] *Supra*, note 2.

tempt for wilful disobedience of the pre-trial order.[7] They were convicted on January 16, 1967, of the original misdemeanor charges, and while an appeal from these charges was pending a writ of prohibition in the Superior Court of Alameda County was sought to prevent prosecution under the contempt charges. The instant case is an appeal from the denial of the writ of prohibition by the Superior Court.

The unique posture of this case—that the defendants should attack an order issued for their own protection—does not detract from the constitutional issues presented. Judge Draper in his dissent from the majority in *Hamilton* reasoned:

> However provocative the words of defendants, they can be punished only if the order is valid. Disagreement with the words spoken does not warrant limiting the freedom to speak them. Unpleasant as it is to me to deprive defendants of the limited martyrdom for which they seemed so anxious, I would reverse. . . .[8]

Judge Brunn's order applied *inter alia*, to "the parties and their counsel, to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students. . . ." It prohibited these persons from releasing to the press, either directly or indirectly, information relating to any issue likely to be involved in the trial.[9] In upholding the validity of the pre-trial order the Court of Appeal relies exclusively on *Sheppard v. Maxwell*.[10] Justice Clark, speaking for the majority, directed trial court judges to prohibit the type of pre-trial publicity that became the ground for reversal in *Sheppard*:

> But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their process from prejudicial outside interferences.[11]

In maintaining that Judge Brunn's order complies with the mandate of *Sheppard* the Court of Appeal upheld sweeping restrictions on the speech of great numbers of persons, including those not parties to the action. That some amount of restriction on first amendment guarantees is necessary to insure the integrity of the judicial system is clear. The extent of those restrictions is, however, far from clear, and the instant case illustrates the need for the Supreme Court to give more definitive guidelines to trial judges, who are charged with maintaining the delicate balance between the often opposing rights of free speech and fair trial.

Drafting a pre-trial order restricting dissemination of information to the news media is difficult. The trial judge is faced with the *Scylla* that language too general will be attacked on the grounds of overbreadth and vagueness, and the *Charybdis* that language too specific will be taken as approval to release anything not specifically proscribed in the text of the order. However difficult the task, Judge Brunn may arguably have exceeded his authority by issuing an order that draws too many people within its ambit. In rejecting the contention that the order was invalid because it applied to the Regents of the University and the Associated Students, the *Hamilton* court relies on the much quoted phrase of Justice Clark's

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[7] CAL. PEN. CODE Sec. 166(4).

[8] 76 Cal. Rptr. at 173.

[9] Note that certain facts were specifically exempted from the general restriction, particularly the date and place of the trial, the names of the parties and counsel, the contents of the complaint, and the plea of the defendants, *supra*, note 4.

[10] 384 U.S. 333 (1966).

[11] *Id.* at 363.

opinion in *Sheppard*—"Neither prosecutors, counsel for defense, the accused, *witnesses*, court staff, nor enforcement officers coming under the judisdiction of the court should be permitted to frustrate its function"[12] (emphasis added). Judge Salsman writing for the majority in the instant case conceded that the University was *not* a party to the proceeding, but concluded that since "it [the University] was the party said to have been directly offended by the conduct of the defendants, and agents and officers of the University might well have been witnesses at the trial,"[13] they thus were proper objects of a pre-trial publicity order within the meaning of *Sheppard*. Similarly the inclusion of the students was justified on the grounds they were "potential witnesses."

A pre-trial order much like the order in *Hamilton* was issued by a judge in the Twentieth Judicial District Court for the State of Colorado in a case involving the brutal murder of a coed on the campus of the University of Colorado in August of 1966.[14] Here the order extended to local law enforcement officers as well as University officials and employees, but did not go so far as to enjoin the students. The Medina Committee[15] cited the order as what it believed to be a clear violation of first amendment guarantees, and commented further on the potential dangers fostered by such an order:

> That such orders could be used to cover up incompetence, venality, and a deliberate but covert desire to impede or frustrate criminal procedures against guilty politicians or those involved in racial disputes and other violence seems to us to be apparent on the face of the matter.[16]

Undoubtedly Judge Brunn had no such motives when he issued the order, yet to maintain that such an order "complies with the mandate of *Sheppard*"[17] creates a dangerous precedent and underscores the need for the Supreme Court to define the limits of its directives to trial judges.

An argument parallel to the criticism of the inclusion of students and University officials in the order can be made against the restrictions imposed on all law enforcement agencies. In this respect Judge Brunn's order contradicts the findings of

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[12] *Id.*

[13] 76 Cal. Rptr. at 172.

[14] THIS MATTER coming before the Court upon the motion of the District Attorney, the Defendant not appearing in person but by and through his attorney, Rupert M. Ryan, who expressly waived the presence of the Defendant, and the District Attorney's Office being present by Rex H. Scott and Joseph C. French, and the Court having considered the motion,

IT IS ORDERED that the People's Motion Be Granted To Prohibit Extra-judicial Statements From Officers of Boulder County Sheriff's Office, City of Boulder Police Department, City of Longmont Police Department, Adams County Sheriff's Office, All Those Witnesses Listed With the People's Information Heretofore Filed, and University of Colorado Officials and Employees save and excluding, however, that . . . [certain named attorneys be allowed to speak with all witnesses for purposes of preparing the case].

IT IS THEREFORE ORDERED that any person within the above described categories is hereby prohibited from revealing to any person, corporation or partnership including all news media with the exception as to those people above described any statements concerning any knowledge as to the facts in the above captioned case. *People of the State of Colorado v. Joseph Dyre Morse*, Criminal Action No. 4090, quoted in *Final Report: Freedom of the Press and Fair Trial*, 43-44. Judge Harold R. Medina, Chairman [hereafter referred to as the Medina Committee].

[15] *Interim Report: Radio Television and the Administration of Justice: A Documented Survey of Materials.* Medina Committee Report, *supra* note 13.

[16] *Id. Final Report: Freedom of the Press and Fair Trial* at 44.

[17] 76 Cal. Rptr. at 172.

Medina Committee and the Reardon Report,[18] both of which were charged with solving the conflict between fair trial and free press in the criminal context. Specifically, the Reardon Report, although proposing restraints on police officers, is extremely hesitant to recommend sweeping restrictions in recognition of the argument that such limitations are unwise if not unconstitutional.[19] Rather the Committee carefully designed its proposals so as not to prohibit disclosures of matter which did not present substantial dangers of potential prejudice.[20] In the instant case no attempt was made to limit restrictions to specific matters that might be prejudicial. Instead, Judge Brunn's order banned dissemination of information concerning "any issue likely to be involved" in the trial, and the decision in the Court of Appeal made no indication that any such limitations may have been proper. In defense of the *Hamilton* court the issue of whether and to what extent press statements of police officers may be proscribed by judicial order is only indirectly raised by defendants appeal of their contempt conviction. The Court of Appeal does however conclude, without qualification, that the pre-trial order does not go further than the permissible limits of *Sheppard*. That the instructions in *Sheppard* may so easily be used to uphold an order that at best is of questionable constitutional validity lends support to the argument that a more definitive standard to guide trial judges is needed.

Criticism of the pervasiveness of Judge Brunn's order may also be extended to include the applicability of the order to the defendants. Without considering the extent of the restrictions discussed above, some restraints may justifiably be imposed upon police and prosecutors while at the same time excluding the defendant from like restraints. The rationale for such a notion stems from the fact that defendants in the criminal context are in a much more vulnerable position than government officials. The latter may defend themselves from allegations of misconduct made by the defendant in the press after the completion of the trial and their forced silence will not be construed as an admission of guilt.[21] The *Hamilton* court's suggested recourse for the defendant is considerably less adequate: "The order does not prohibit the defendants from describing the charges against them and unequivocally asserting their own innocence."[22] Declaration of innocence no matter how unqualified is to be expected in most cases and without detailed explanation it is relatively unconvincing to the public. The following are two of many examples where a declaration of innocence and even subsequent acquittal might not compensate the defendant for damages to his reputation: (1) in the area of civil rights where the arrest of the defendants may have resulted from an attempt to exercise constitutionally protected rights, or (2) in the area of religious objections to military service where the defendant is motivated by the dictates of his conscience.[23] Presumably extrajudicial statements by defendants in defense of their conduct in each of these situations would violate the pre-trial publicity order in *Hamilton* and subject defendants to contempt charges.

Of greater magnitude than the possible damages to a defendants reputation is

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[18] *American Bar Association's Advisory Committee's Report on Fair Trial and Free Press*, Paul C. Reardon, Chairman (hereafter referred to as the Reardon Report).

[19] *Id.* at 78.

[20] *Id.* at 78; *id.* at 5.

[21] 80 HARV. L. REV. 185 (1966).

[22] 76 Cal. Rptr. at 171.

[23] See Defendant's Petition for a Writ of Certiorari in the United States Supreme Court at 25.

the potential danger that pre-trial orders of the type in *Hamilton* may be used to minimize public debate. Defendants in the instant case contend that:

> If a court can cut off public debate on any "issues" surrounding a case before it, it can, clearly, cut off public debate on the most important and vexing questions in the nation and in the community where the trial occurs.[24]

In this respect the language of the pre-trial order is again inconsistent with the proposals of the various committees that have made exhaustive studies of the fair trial versus free press issue.[25] The Reardon Report for example refrained from recommending any general restrictions on persons who were not either counsel or law enforcement officers. Their justification for so doing is as follows:

> The reason lay in the lack of any widely demonstrated need for such a general prohibition on private persons—although problems have arisen in specific cases—as well as in the serious constitutional questions that might be raised.[26]

The most the Committee would recommend was to caution the defendant against making extrajudicial statements, and then only when it is "wholly appropriate" and only "*during the course of an ongoing trial.*"[27] Admittedly the inquiries of all the committees have centered around the more sensational crimes such as murder and rape that may become the objects of widespread publicity.[28] However, the hesitation of the Reardon Committee to recommend sweeping restrictions on extrajudicial statements takes on greater not less significance when the issues, as in the instant case, are closely related to national controversies, as opposed to the guilt or innocence of an accused murderer.

Whether or not the actions of the defendants are to be condoned, one point remains clear. The *Hamilton* court has relied exclusively on the dictum of *Sheppard v. Maxwell* to uphold a pre-trial order drafted in the broadest terms and drawing within its ambit great numbers of persons including those not parties to the action. By maintaining unequivocally that such an order "complies with the mandate of *Sheppard*"[29] the court has created the dangerous possibility that the freedom of speech of defendants and others may be restricted by the simple expedient of accusing someone of a crime. When an order of this type is issued in a case involving controversial political issues there arises the further possibility that the order may be used as a vehicle for restricting public debate. It is the belief of the authors of the Reardon Report that there can be an accommodation between the guarantees of the first and sixth amendments through the adoption of limitations of the release of information *that are carefully defined as to content and timing.*[30] This conclusion and similar conclusions of a number of authorities followed the adjudication of *Sheppard v. Maxwell* and are the product of one of the most searching debates in recent legal history.[31] The findings of the Reardon Committee are in many respects

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[24] *Id.* at 16.

[25] *See generally,* The Reardon Report, The Medina Committee Report, and the *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue,* Irving R. Kaufman, Chairman, 45 Federal Rules Decisions 391 (1969).

[26] Reardon Report, *supra* note 16, at 142.

[27] *Id.*

[28] *Supra* note 24.

[29] 76 Cal. Rptr. at 172.

[30] Reardon Report, *supra* note 16, at 1.

[31] 45 Federal Rules Decision at 397.

inconsistent with the analysis of the pre-trial order in *Hamilton*, despite the fact that both rely extensively, and arguably correctly, on the *Sheppard* opinion. This inconsistency, considered in light of the potential dangers involved if the *Hamilton* interpretation is followed, emphasizes the need for the Supreme Court to review the mandate to trial judges handed down in *Sheppard*. Defendants filed for a writ of *certiorari* in the Supreme Court of the United States on August 12, 1969. *Certiorari* should be granted.

John H. Lahey

DEFAMATION—"PUBLIC EVENT" INTERPRETATION OF NEW YORK TIMES V. SULLIVAN AS APPLIED TO A CANDIDATE FOR PUBLIC OFFICE—*Roy v. Monitor-Patriot Co., 254 A.2d 832 (N. H. Sup. Ct. 1969)*—The executrix of the estate of Alphonse Roy brought a libel action against Monitor-Patriot Co. and North American Newspaper Alliance, Inc.[1] The complaint alleged that two newspapers[2] belonging to *Monitor* had printed a column libeling Alphonse Roy while he was campaigning for the Democratic nomination for the United States Senate. The column alleged to contain the libel was Drew Pearson's syndicated column *D.C. Merry-Go-Round* which, among other accusations, described Roy as a "former small-time bootlegger."[3]

Since Roy was a candidate for the United States Senate, the law applied in the case was that the publications about Roy could come under the same constitutional protections applicable to public officials.[4] Accordingly, the trial court instructed the jury if they found that the bootlegger publication would not be relevant to Roy's fitness for public office "but was rather a bringing forward of plaintiff's long-forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector,"[5] not subject to first amendment protection, and the jury should consider the claim against both defendants under the law relating to private libels. The jury returned a verdict for the plaintiff, thereby indicating they had found the publications to be in the private sector.[6] On appeal to the New Hampshire Supreme Court defendant's main contention was that the publication could not be found to be purely private defamation exempt from the constitutional protections of the *New York Times* rule. This rule has generally been used to permit recovery only on proof that the publication was knowingly false or published with reckless disregard of the truth.[7] The New Hampshire Supreme Court, after

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[1] Hereinafter referred to as *Monitor.*

[2] The article was printed in two local newspapers, the Concord Daily Monitor and the New Hampshire Patriot.

[3] The article in relevant part reads as follows:

> One of [Democratic candidate for U.S. Senate] Hill's primary opponents, Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.
>
> *Curious Call*
>
> To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U.S. Marshall, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

[4] Roy v. Monitor-Patriot Co., 254 A.2d 832, 833 (N.H. Sup. Ct. 1969).

[5] *Id.*

[6] *Id.*

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

disposing of the defendant's other contentions,[8] affirmed the holding of the trial court.

Both the trial court in its instructions to the jury and the New Hampshire Supreme Court in its decision relied on language from *Garrison v. Louisiana*[9] to distinguish a public from a private libel. The courts, however, have quoted this language out of context. The United States Supreme Court in *Garrison* stated this principle to support its conclusion that Louisiana's criminal libel statute[10] was unconstitutional because if there was a showing of malice in the sense of ill will, the defense of truth was never available.[11] *Garrison* was in no way intended to limit the *New York Times* rule as the New Hampshire Court is apparently attempting to do. Conversely, the United States Supreme Court expanded *New York Times* by holding that the first amendment protection was also applicable to criticism "which might touch on an official's fitness for office. . . ." even if the criticism is also personally defamatory.[12]

Although the result in *Roy* cannot be supported by the precedent that the Court cited, the result finds support in other case law. The New Hampshire Supreme Court's approach is a logical extension of the "public event" doctrine[13] espoused by many commentators in response to the result reached in *Time, Inc. v. Hill*.[14] While this "doctrine" is merely an effort on the part of some legal writers to harmonize the various "public" defamation cases, and to develop a somewhat more consistent legal principle, the cases support, at least indirectly, this idea. It has been presented as a more equitable way to protect the individual's right to privacy while not infringing upon the legitimate public right to be informed.

The "public event" interpretation of *New York Times* yields the following rule:

> No publisher of material the subject matter of which is a 'public event' that is, of legitimate public concern, may be required to respond in damages because of factual misstatement there, unless such misstatement was made with knowledge of its falsity, or with reckless disregard of the truth.[15]

This distinction would replace both the "public official" and "official conduct" criteria of the orthodox *New York Times* rule in determining the expanse of the first amendment's protection in the defamation area.

Several courts have already been using this criteria, at least impliedly, in the area of *New York Times* dealing with what has been termed "public figures."[16] This

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[8] The defendant's also contended that "the Court's charge was so complicated, confused and misleading that the jury probably could not have understood or followed it." The New Hampshire Supreme Court found that the record would not sustain this contention. The court also rejected the contention that there was error in the court's charge relating to private libels. *Id.* at 834-35.

[9] The court in Roy stated that if the publication would not be relevant to Roy's fitness for public office "but was rather a bringing forward of the plaintiff's long-forgotten misconduct in which the public had no interest, than it would be a private matter in the private sector;" this quote is taken from Garrison v. Louisiana, 379 U.S 64, 72 (1964).

[10] LA. REV. STAT. § 14:47-49 (1950).

[11] 379 U.S. at 72.

[12] *Id.* at 77.

[13] *See generally* Bertelsman, *The First Amendment and Protection of Reputation and Privacy—New York Times Co. v. Sullivan and How it Grew*, 56 KY. L.J. 718, 747-51 (1968).

[14] 385 U.S. 374 (1966).

[15] *Bertelsman, supra* note 13, at 748.

[16] *See* Henry v. Collins, 380 U.S. 356 (1965); Gilligan v. King, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (1965); Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965) (policemen involved

classification includes celebrities whose actions, in the court's opinion, are of public concern,[17] but who can hardly be classed as "public officials." The courts have thus far referred to this class of persons as "public figures,"[18] but in defining who is to be a "public figure" the courts have always included, if only indirectly, some element of public concern. By including this public concern element, the courts are using the "public event" modification of *New York Times*. This "public event" test also simplifies the orthodox *New York Times* rule by determining which activity of the included persons is not exempt from first amendment protection. Only those activities which are the subject of *legitimate* public interest would be protected.[19] Thus, the "public event" test combines the elements of "public officials" and "public figures" along with the elements of "official conduct" into a single workable rule to determine if the information is of legitimate public concern. Rather than straining to force individual situations into the molds of "public official" and "official conduct" the courts now can look to the ultimate question that was used to formulate these molds and directly determine whether the publication is to be protected.

While the courts in the past have more or less rigidly adhered to the "public official" doctrine when dealing with candidates for public office, the "public event" approach can logically be extended to this area, as is shown by the result in *Roy*. By using the "public event" approach a jury could decide the relevancy of the published comment without resorting to the vague distinctions arising from the "public official" label. The courts themselves have been far from clear on who can be a "public official." It has been applied to everyone from a candidate for the office of President of the United States[20] to an officeholder's partner in law practice.[21] It seems that the courts have some ulterior goal in mind when they determine who is to be a "public official." This ulterior goal may have been the reason for apply-

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in civil rights controversies held subject to *New York Times*). *See also*, Thompson v. St. Amant, 250 La. 405, 196 So. 2d 255 (1967) (deputy sheriff); *Cf.* Tucker v. Kilgore, 388 S.W.2d 112 (Ky. 1964) (policeman involved in minor fracus); Coursey v. Greater Niles Township Publishing Corp., 82 Ill. App. 2d 76, 227 N.E.2d 164 (1967) (village patrolman); McNabb v. Tennesseean Newspapers, Inc., 55 Tenn. App. 380, 400 S.W. 2d 871 (1965) (election official); News-Journal Co. v. Gallagher, 233 A.2d 166 (Del. 1967) (political committeeman); Duffy v. Kipers, 26 App. Div. 2d 127, 271 N.Y.S.2d 338 (1966) (deputy town clerk); Silbowitz v. Lepper, 55 Misc. 2d 433, 285 N.Y.S.2d 456 (1967) (branch post office supervisor); Zeck v. Spiro, 52 Misc. 2d 629, 276 N.Y.S.2d 395 (1966); Krutech v. Schimmel, 26 App. Div. 2d 1052. 272 N.Y.S.2d 261 (1966) (attorney or auditor retained by local administration).

[17] *See e.g.*, Cepeda v. Cowles Magazine and Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968), *cert. denied*, 393 U.S. 840 (1968); *see also* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543 (1966).

[18] This term was first used in Curtis Publishing Co. v. Butts (and Associated Press v. Walker), 388 U.S. 130 (1967). The two cases were decided together to consider the impact of *New York Times* on ". . . persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest." *Id.* at 134.

[19] "It is very well settled that the constitutional guaranty of freedom of speech and of the press does not confer upon a newspaper, or anyone else, the privilege of publishing defamation merely because it has 'news' value, and the public would like to read it." W. PROSSER, LAW OF TORTS 812 (3d ed. 1964). *Cf.* Rosenblatt v. Baer, 383 U.S. 75, 86-7, note 13 "A conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation." *See* Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 657, 662 (1966); Pedrick, *Freedom of the Press and the Lay of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 592-93 (1964).

[20] Goldwater v. Ginzburg, 261 F. Supp. 784 (S.D.N.Y. 1966).

[21] Gilberg v. Goffi, 21 App. Div. 2d 517, 251, N.Y.S.2d 823 (1964).

ing *New York Times* to a person not in public life, but who merely is "a participant in public debate on an issue of grave public concern."[22]

The result reached in *Roy* is a good example of the benefit of the "public event" approach to *New York Times*. If the jury were to apply the sterile classification of a "public official" to Alphonse Roy he would no doubt fall into that category.[23] Then, by again following the rigid confines of *New York Times*, coupled with the loose interpretation of "official conduct" in *Garrison*,[24] Roy would be foreclosed from recovery unless he could show that the falsehood was uttered in actual malice. The "public event" approach, on the other hand, has allowed the jury to avoid this rigid and often-times confusing classification, and has allowed it to look at all of the facts and circumstances surrounding the events to determine whether they are the subject of legitimate public concern. It is true that even the "public event" approach will require drawing many fine distinctions (leading to possible contentions that jury charges are too confusing, as was the case in Roy), but this seems to be a superior alternative to allowing the private life of public persons to be irrelevantly drawn into the public arena.[25] The jury in cases such as *Roy* can now use the "public event" test to determine the expanse of *New York Times* rather than attempting to comprehend the formal labels previously attached to the public defamation issue.[26]

Mark D. Senff

CONSTITUTIONAL LAW—ESTABLISHMENT OF RELIGION—USE OF PUBLIC PROPERTY FOR RELIGIOUS PURPOSES—*Lowe v. City of Eugene*, —— *Ore.* ——, *459 P.2d 222 (1969)*—Eugene Sand & Gravel, Inc. of Eugene, Oregon erected a 51' concrete tapered cross in November, 1964. The cross was placed on public property, located on a butte just north of and conspicuously overlooking the city. Another local company donated and installed lighting fixtures in order that the structure could be clearly illuminated at night during the Christmas and Easter seasons for the benefit of the people in the town below. A dispute arose, however, over the use of public property for this purpose. It was further complicated when the city, though not compensatorily involved, nevertheless granted building and lighting permits for the structure. These were issued after the cross had been raised without any official permission to do so. Plaintiff-respondents, citizens of Eugene, represent a broad spectrum of religious interests.[1] They sought a declaratory judgment that the cross while it stood on the butte was in direct contravention of both the state and federal constitutions. The latter contention, of primary interest here, was rooted in the first and the fourteenth amendment to the U.S. Constitution.[2] De-

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[22] Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964).

[23] Numerous cases have held candidates for public office to be "public officials," *see e.g.*, Goldwater v. Ginzburg, *supra* note 20, and Dyer v. Davis, 189 S. 2d 678 (La. Ct. App. 1966).

[24] *See* notes 9 and 12, *supra*, and accompanying text.

[25] For a more extensive and general discussion of the "public event" doctrine see *Bertelsman*, *supra* note 13.

[26] *Certiorari* has been granted in the instant case, and a decision is pending.

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[1] "The classification of the Plaintiffs included one Jew and three Humanists who denominated themselves as non-Christians, two Congregationalists, an Episcopalian, and a Bahai, who denominated themselves as Christian, along with two Unitarians." Brief for Appellant at 24, Lowe v. City fo Eugene, 451 F.2d 117 (1969).

[2] First amendment reads: "Congress shall make no law respecting an establishment of reli-

fendant-appellants to the action included not only the companies who had participated in the erection and maintenance of the cross but also the city of Eugene for its challenged involvement.

The trial court, concentrating on the charter of the city and the statutes of Oregon, held that no specific authority to permit the cross to be placed on public property had been conferred upon the city. Beyond this conclusion it felt it was not required to go. Therefore the constitutional implications were not considered. Judgment was for the plaintiffs, and a decree to have the cross removed was rendered. On appeal the Oregon Supreme Court initially reversed the trial court. It felt that the constitutional issues should be decided but that no infringement of rights had occurred. Subsequently, however, the supreme court granted a petition for rehearing submitted by the plaintiff-respondents. On October 1, 1969, upon rehearing the initial majority opinion was withdrawn and the opinion of the dissent was substituted as the new majority view on the issue.[3]

Therefore, the cross on public property was held to be inconsistent with the first amendment, specifically the establishment clause, as applied to state action by the fourteenth amendment. Justice Goodwin, the author of the accepted majority view, acknowledged that the cross was a very popular structure with the people of Eugene and local government was the instrument by which this majority will was implemented. Yet, in noting that evidence was sufficient to classify this as a religious activity, he stated, "It was to prevent this very kind of response to majority pressure . . . that the establishment clause of the First Amendment was written into our federal constitution."[4] Furthermore, this is not to be considered a case of *de minimis non curat lex.* "The cross does not occupy a large tract of land, but it is permanent and it is conspicuous . . . . [t]he city's participation in the display has placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display."[5]

The proper relationship between government and many religious organizations in the U.S. has been a continuing source of controversy and tension since this country's inception. The first amendment was intended in part to spare the young federation of states from the strife which had oppressed Europe for centuries, where governments had supported one religious belief to the exclusion of the rest.[6] While many people during the period prior to the Constitutional Convention were thinking in terms of continuing with the institution of an established church for the various states, wiser minds prevailed.[7] The movement for religious liberty culminated with the insertion of two clauses into the Bill of Rights: one prohibiting Congress from passing any act respecting an establishment of religion and one prohibiting Congress from interfering with the free exercise of an individual's religious beliefs.[8] Yet guidelines were needed which could effectively delineate this separation between two spheres of social organization. The need remains today since the conflicts, though taking different shapes, still persist to test the nature and extent of these basic rights of the individual. To the plaintiffs in *Lowe* this meant that their

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gion, or prohibiting the free exercise thereof. . . ." Fourteenth amendment reads: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] Lowe v. City of Eugene, — Ore. — 459 P.2d 222 (1969).

[4] Lowe v. City of Eugene, — Ore. — 451 P.2d 117, 124 (1969).

[5] *Id.*

[6] Everson v. Board of Education, 330 U.S. 1, 9 (1947).

[7] *Id.* at 12.

[8] *See* note 2, *supra.*

local government could not permit the permanent religious structure, inaposite to their own beliefs, to remain on city property. The line was drawn between church and state at this point. Where *Lowe* fits in the context of United States Supreme Court pronouncements on the subject is to be considered next. For this two factors are significant: (1) the distinction between the secular and the religious and the consequences of such a classification; (2) the use of public property for religious purposes ranging from the permissible to the prohibited.

In attempting to separate that which is secular from that which is religious, the overiding benchmark principle which lies at the foundation of the distinction is the Supreme Court's concept of neutrality. Accordingly, the first amendment's establishment and free exercise clauses are construed to require the government to be strictly neutral both among various beliefs and between belief and unbelief. This was certainly the emphasis in *School District of Abington Township, Pennsylvania v. Schempp*.[9] There the Court was faced with possible state action requiring the application of the fourteenth amendment in the protection of first amendment rights.[10] A Pennsylvania statute provided the conflict with the establishment clause. The act authorized a practice of daily Bible reading in the public schools without comment, followed by an in-unison recitation of the Lord's prayer by all students present. Provision was made for the use of the Catholic Douay version of the Bible for anyone not desiring to use the King James version. Furthermore, the practice was not compulsory, in the sense that any student could be excused from participating if he had a written note from his parents.

Justice Clark, in noting the developments of the Supreme Court's approach to these problems, reemphasized that as between the separate religions and between believers and unbelievers, the government must remain neutral.

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.[11]

Yet neutrality in many ways is an elusive concept which requires the task of further measuring and defining its extent. It is conceivable that being neutral and taking no action might actually result in unequal treatment. The majority attempted to guard against this in *Schempp* by providing guidelines in deciding the case. Here then the distinction between secular and religious comes into focus. The test as stated in *Schempp* is: "what are the purpose and the primary effect of the enactment? . . . there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion."[12] By this standard the practices of the relevant school districts were held to be invalid. The strict neutrality of government had been violated by the Bible readings and prayer recitations. These were considered to be essentially religious activities which had the principal effect of furthering the interests of the churches. The argument that to so exclude the readings is not neu-

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[9] 374 U.S. 203 (1963).

[10] Cantwell v. Connecticut, 310 U.S. 296 (1940), held that the fourteenth amendment incorporated and applied against the states the same prohibition found in the first amendment which is applicable to Congress.

[11] School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 222 (1963).

[12] *Id.*

trality but actually partiality toward the "religion of secularism" was specifically rejected by the Court.[13] Justice Clark noted that such would be the case if the government was openly hostile to religion, but that nothing in the opinion prevents objectively teaching religion as part of the curriculum.[14] *Schempp* is a significant case in determining the context of the *Lowe* decision. Both the defendant-appellant and the plaintiff-respondent felt that the cross on the hilltop had to be justified, if at all, in terms of the guidelines of *Schempp*.

The appellant contended that the cross had a primary secular purpose and that it was not being used as a religious symbol. On the contrary, the cross represented not only a sign of good will to all but also served as the central fixture for Christmas decorations. The secular effort of the latter is measured in terms of trade brought to the city during the holiday season due to the attractive display. Furthermore, an attempt was made to minimize any religious connotatons which the structure might provoke. In this manner it was argued that the cross was not a Latin religious type but instead was a very modern ornamental war memorial cross with many pleasing and legitimate aesthetic values as a work of art. On the other hand, the respondents stress the cross's highly religious symbolic qualities to interject a primary religious purpose tending toward the advancement of religion. The outcome of this issue as a matter of fact in the trial court goes far in justifying the result in *Lowe* in terms of the *Schempp* test. There, again, the cross was determined to be primarily a religious symbol.

It can be observed by the cases decided under the first amendment that in this area of church-state relations it is necessary to justify practices on the basis of a secular purpose and effect. *Everson v. Board of Education* involved the reimbursement to needy parents for their transportation costs incurred by sending their children to school on city buses.[15] The reimbursements covered not only the costs to parents of public school children but also parents of parochial school students. In other words, the practice, grounded in welfare considerations, made no distinction between a student who attended public school or church school. The Court held that this did not involve a violation of the first amendment as incorporated by the fourteenth. It expressly rejected the notion that a state cannot tax one person in order to reimburse another for payments made in transporting children to parochial schools.[16] Rather the Court concluded that the state law was passed pursuant to a public need. The purpose of the legislation was to encourage the students of less fortunate parents to ride in city buses while traveling to and from school. The alternative would have meant subjecting the student to many of the dangers inherent in walking or hitchiking to school. The powers of a state to provide for the welfare of its citizens had a significant impact on the result, notwithstanding that this involved the use of a tax in an incidental support of church school students. It was the secular rationale and effect of the state legislation which the Court cited as its basis in finding no violation of the principle of neutrality in governmental relations with religion.

The same considerations influenced the Supreme Court in *McGowan v. Maryland*.[17] There the issue of the constitutionality of Sunday closing laws was adjudicated. It was argued that such statutes respected an establishment of religion in providing the various religious organizations with people to fill their churches.

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[13] *Id.* at 225.

[14] *Id.* at 225.

[15] 330 U.S. 1 (1947).

[16] *Id.*

[17] 366 U.S. 420 (1961).

The Court in reviewing the background of such statutes concluded that, while originally they may have had a religious basis, today strong secular reasons exist for maintaining one day as a uniform day of rest for everyone. The acts were upheld due to the presence of primarily secular objectives, even though these reasons possibly coincide with sectarian objectives as well. By the same token, though *Everson* and *McGowan* could point to discernible secular ends and effects to bridge establishment tests, the state supreme court in *Lowe* accepted the finding below that the cross was primarily religious in nature. Even noting the trend toward secularization of many previously religious symbols, such as the star or the dove, the state court held this has not yet eroded the symbolic effect of the cross. The sign of the cross still denotes the Christian religion, and the purpose of this structure is not significantly secular. By the standard of *Schempp*, therefore, the cross was not constitutionally permissible as long as it was located on the butte.

This brings yet another factor operating in *Lowe* into focus, one which made the considerations of secular purpose and effect relevant—the degree of governmental involvement in the venture. It was argued that public property was being used to serve religious ends and that consequently, such an involvement by the state is prohibited by the first amendment.[18] The use to which public property is put has been a recurring problem facing the Supreme Court in establishment cases. The *Schempp* test itself was a product of a series of decisions which had to cope with religious practices in public schools. *McCollum v. Board of Education* involved a program by which religious instruction was provided in the public schools.[19] Religious teachers were brought in each day at the expense of a Council on Religious Education composed of members of the Jewish, Catholic and Protestant beliefs. The school was not required to financially support the program in any manner. However, it did provide the facilities and did supply the pupils. Those who did not wish to participate were required to continue regular studies in another part of the building. The Supreme Court held the program to be in violation of the establishment clause, rejecting the contention that to so hold would be government hostility toward religion. Again, the use of public facilities was critical. "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory machinery."[20]

Whether to prohibit the use of public property for religious purposes, however, is in many respects a consideration of degree. Carried to an extreme, it would very much indicate a hostility to religion to the extent that freedom to exercise one's religious belief would be encroached. Such was the pattern in the Supreme Court pronouncements involving the accessibility of public parks for various religious groups. In *Niemotko v. Maryland* the appellants were members of the Jehovah's Witnesses religious sect and had been refused permits to hold religious services in a city park.[21] The local government, it was found, had no reason for not issuing the permits other than its general disapproval with the beliefs of the appellants. The Supreme Court ruled that this was discriminatory action and consequently a denial of equal protection of the laws as relates to appellant.[22] The Court did not, however, consider the

[18] Appellee's Petition for Rehearing at 7, Lowe v. City of Eugene, —— Ore. ——, 459 P.2d 222 (1969).

[19] 333 U.S. 203 (1948).

[20] *Id.* at 212.

[21] 340 U.S. 268 (1951).

[22] *Id.*

ability of public officials to refuse access of public parks to religious groups altogether. In that case such use was available to any other religious organizations desiring to use the park, and therefore, it was not necessary to decide the issue. The decision serves as a good example, though, of the use of public property by a religious group which does not in itself violate the first amendment as an establishment of religion. The significance here lies in detecting the outside poles of a continuum by which the use of public property is measured. On the one hand, to prevent some religious groups and not others from using city property is prohibited by the Constitution, which guarantees freedom of belief and expression to all groups alike.[23] Yet on the other hand, to permit public school facilities to be used for religious indoctrination is an establishment of religion in violation of the first amendment.[24]

The limits along this line might be further clarified by *Zorach v. Clauson*.[25] Here the New York City public schools had a program of religious instruction available to its students. Seemingly, this could be disposed by *McCollum v. Board of Education*,[26] except for the fact that the instruction was not furnished in the public buildings themselves. Instead, the practice of "released time" had been instituted differently, whereby students would leave the school premises to go to religious centers for the instruction. No public expenditures were made in support of the program. It was argued that this should not be treated any differently than *McCollum* since the weight and influence of the school is put behind a program for religious instruction.[27] The Court, however, viewed the lack of any public facility connected with the religious program as being a significant distinction. To hold otherwise would be an unwarranted extension of *McCollum*, according to the majority.[28]

From this it can be seen that the degree of usage of public facilities by religious organizations can have a relevant effect on whether the Supreme Court views the case as striking towards an establishment of religion. Where *Lowe* falls on this consideration of degree denotes its significance as a delineator. Ultimately the weight was struck in favor of viewing the use of public property here as an establishment of religion. It was argued and accepted by the dissent, however, that the cross should be treated in the same manner as the religious services in public parks. "If a city can validly permit groups to hold religious services in parks, why can it not validly permit persons to erect a religious symbol, a cross, in a park?"[29] However, to the majority of the state court this argument was not convincing. There does seem to be a distinction between a religious group such as the Jehovah's Witnesses holding a service in a park, as would a Protestant group hold a sunrise service on Easter, and the continued presence of a 51' cross on a bluff overlooking an entire city. With the former, the use of the property is only a temporary inconvenience at best which will eventually conclude and disperse peacefully. The offense to another individual is minor when balanced against the right of the religious sect to hold meetings and propagate its views. The cross, though, has a different effect. The offense to a Jew or a Humanist, such as the plaintiffs in *Lowe*, is much greater when one considers the effect of continually viewing an object foreign to their faith that was placed on city property. The appearance of government acquiescence in its presence

[23] *See* Fowler v. Rhode Island, 345 U.S. 67 (1953).

[24] McCollum v. Board of Education, 333 U.S. 203 (1948).

[25] 343 U.S. 306 (1952).

[26] McCollum v. Board of Education, 333 U.S. 203 (1948).

[27] Zorbach v. Clauson, 343 U.S. 306, 315 (1952).

[28] *Id.*

[29] Lowe v. City of Eugene, 451 P.2d 117, 123 (1969).

and approval of one belief over another is heightened when the object is 51' high and permanent for all to see. This decision, therefore, serves to further delineate that use of public property by religious groups which is perfectly permissible from that use which comes in direct conflict with constitutional guarantees.

Finally, though the Supreme Court pronouncements establish the most authoritative guidelines in the area, two state court decisions are important if merely because of their very similar factual situations. The majority in *Lowe* before the rehearing of arguments at least felt these cases were determinative of the result. On closer observation, however, there are significant differences. *State ex Rel. Singelmann v. Morrison* involved a statue placed on property owned by the City of New Orleans.[30] The likeness was of a nun of the Roman Catholic Church, dressed in a habit with hands posed in a posture of prayer. The Louisiana appellate court refused to have the statue removed. It was held unobjectionable in an establishment of religion context because the statue was a memorial to a woman who had performed many meritorious deeds not only for her church but for the city as well. It is in this regard, however, that this case and *Lowe* might be distinguishable. The nun was a public as well as a religious figure. Should one be prevented from paying tribute to a person who contributed much to society generally simply because that person is also a church leader? It would seem that the consequence would be a hostility toward religion and therefore in contradicition to the principle of neutrality expressed in *Schempp*.[31] *Lowe* on the other hand involves an object—a cross which by itself has no human features, nor has it committed commendable deeds. Rather it acts as a symbol for something other than its basic physical structure. Consequently, whether it symbolizes a sectarian or a secular aspect of society becomes more crucial in a first amendment context, than a statue which transcends both spheres.

Paul v. Dade County involved just such a symbol and the state court even felt that religion could be its object.[32] There the local chamber of commerce had placed a large cross, composed of a string of lights, on the side of the courthouse. The cross was a temporary one and was removed after the Christmas season. The state court held that even though the cross could symbolize religion, it nevertheless had a secular purpose as a major decoration scheme for the holiday season. It, therefore, was unobjectionable. It is arguable, that following *Schempp*, if the cross symbolizes religion and has the effect of advancing it, that this cross too is objectionable. However, given that *Paul* is correctly decided, there still remains a basic distinction between it and *Lowe* . . . the fact that one cross is temporary and the other is permanent. Whether this is a distinction which merits a different result is questionable. Yet the latter is certainly a harder case to pass the "strictures of the Establishment Clause." The continued presence of the permanent structure is a lasting reminder of an unwarranted tie between government and religion.

To conclude then, the use of public property for religious activities has been a burning issue whether it has involved religious instruction, religious services, or in this case, a religious monument. *Lowe* appraised the constitutional context and held that a permanent cross remains a symbol of the Christian religion and is not a proper object to be found on public grounds.

F. Ramsey Coates

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[30] 57 So.2d 238 (1952).

[31] School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 222 (1963).

[32] 202 S.2d 833.

CONTRACTS—MINOR'S MISREPRESENTATION OF MAJORITY ESTOPS THE DEFENSE OF INCAPACITY—*Haydocy Pontiac, Inc. v. Lee, 19 Ohio App.2d 217, 250 N.E.2d 898 (1969)*—On August 22, 1967, Jennifer J. Lee purchased a 1964 Plymouth Fury automobile from Haydocy Pontiac, Inc. The total purchase price of the automobile including insurance and finance charges was $2,016.36. Miss Lee paid for the car by trading in an automobile valued at $150.00 and signing a note and chattel mortgage for the balance. After taking delivery of the car, Miss Lee permitted John L. Roberts to take possession of it. Mr. Roberts subsequently delivered the automobile to Consolidated Holdings, Inc., which was doing business under the name of "Motorland Do-It-Yourself." Consolidated Holdings, Inc. went into receivership with the car still in its possession.

Miss Lee failed to make any payments on the balance owed, and Haydocy Pontiac, Inc. filed suit against her to regain possession of the car or alternatively, to recover a judgment in the sum of $2,016.36. Miss Lee filed an answer asserting as an affirmative defense that she was a minor, 20 years old, at the time of the purchase, and that since attaining the age of majority she had ratified neither the agreement, nor the note and chattel mortgage. Miss Lee lost possession of the car to the repair shop, and neither she nor Haydocy Pontiac, Inc. had been successful in recovering it. The facts were undisputed that Miss Lee was a minor when she purchased the car, and that she never ratified the contract upon reaching majority. It was also undisputed that she falsely represented herself to be 21 years old when she made the purchase.

The action in the Franklin County Municipal Court resulted in a judgment for the defendant.[1] The court's decision was based on the fact that Miss Lee was a minor when she entered into the contract and that she had repudiated it since reaching majority. Haydocy Pontiac, Inc. on appeal claimed that the decision and judgment were contrary to law and against the weight of the evidence. Specifically, the appellant claimed that Miss Lee could not disaffirm the contract without first returning the automobile and transferring the certificate of title which had been made out in her name. On reversing the decision, the court of appeals held that an infant who disaffirms a contract upon reaching majority, and who cannot restore the consideration received, must account for its value not exceeding the purchase price. The rule is applicable only where the minor has induced the contract by falsely representing his majority, and when the seller is free from bad faith or fraud.[2]

The *Haydocy* decision is the product of a thoughtful reexamination of a minor's capacity to contract. The decision alters the path by which a minor may be held accountable for his contractual obligations. The court held that one who fraudulently induces a contract by misrepresenting his majority can be held liable the same as an adult. The decision departs from the established rule in Ohio by removing the defense of incapacity to contract, thus enlarging the rights of a defrauded seller. The decision did not, however, affect the law regarding a minor's contractual obligations absent misrepresentation or in contracts for necessaries.

The Ohio Supreme Court established the existing law with regard to an infant's obligation on a fraudulently induced contract in *Mestetzko v. Elf Motor Co.*[3] Under this case, a minor who misrepresents his majority may repudiate his contract on reaching majority and sue to recover all money paid. If, however, he does not return the consideration received, the seller may counterclaim as damages the fair

[1] *See* Haydocy Pontiac, Inc. v. Lee, 19 Ohio App. 2d 217, 250 N.E.2d 898 (1969).

[2] *Id.* at 220.

[3] 119 Ohio St. 575, 165 N.E. 93 (1929).

market value of the property, not to exceed the purchase price. Where the minor restores the consideration, the seller may counterclaim for deterioration of its value by use and abuse.[4]

The holding in *Mestetzko* is purportedly identical to the decision of the United States Supreme Court in *Myers v. Hurley Motor Co.*[5] A close examination of the *Myers* case, however, indicates the decisions are not identical. In *Myers* the Court based its decision on the equity maxim that "seeking equity, he must do equity."[6] Although the suit was for money had and received, the Supreme Court said this was a substitute for an equity action making equity principles applicable. Because of this the defendant, Hurley Motor Co., could rely on any affirmative defense showing that the plaintiff should not equitably recover, in whole or in part. A successful defense gave the defendant relief only by way of recoupment and did not entitle him to recover affirmatively against the plaintiff.[7]

The doctrine of recoupment permits the defendant in a contract action to offer equitable defenses in mitigation of damages. Its use is limited to a total or partial failure of the consideration, or for acts of nonfeasance or misfeasance by the plaintiff which sprang from the same transaction that created the plaintiff's cause of action. The purpose of recoupment is only to defeat or abate the plaintiff's damages and it does not allow an affirmative recovery for the defendant in that action.[8]

In *Mestetzko* the Ohio Supreme Court clearly stated that it adopted the *Myers* rule as the proper principle of law.[9] The court, however, failed to adopt that principle into the syllabus, which, in Ohio is the law of the case.[10] The syllabus did not limit the defendant to recoupment only. Rather, the proper measure of damages is the fair market value not exceeding the purchase price. Because of the syllabus rule, an Ohio defendant can counterclaim and receive an affirmative judgment against the plaintiff. In *Haydocy* the court of appeals also noted this conflict in *Mestetzko*, and it too interpreted the syllabus to mean the purchase price and not the value of the plaintiff's claim to be the proper measure of damages.[11] Thus, the measure of damages in *Myers* and *Mestetzko* are not the same.

Although *Haydocy* did not alter the existing measure of damages, it did change the procedure by which a defrauded seller may recover damages. Under *Mestetzko*, before the seller could recover damages he was required to wait until the infant reached majority, repudiated the contract, and sued to regain the full amount paid.[12] This meant the seller's right to collect damages depended upon the infant's election to recover the money he paid. If the infant opted not to recover his money, the seller could only regain possession of the property. Under the fact pattern in *Haydocy*, the seller lost everything, unless he could prove that the infant ratified the contract after reaching majority. The court in *Haydocy* concluded there was no compelling reason to require a seller to wait until the infant sued before he could recover damages,[13] and thus, held the seller could properly commence an action against the infant for the purchase price.

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[4] *Id.* at 576, 165 N.E. at 93.

[5] 273 U.S. 18 (1927).

[6] *Id.* at 27.

[7] *Id.* at 24, 27.

[8] Winder v. Caldwell, 55 U.S. (14 How.) 434, 443-44 (1852).

[9] Mestetzko v. Elf Motor Co., 119 Ohio St. 575, 585, 165 N.E. 93, 96 (1929).

[10] Merrick v. Ditzler, 91 Ohio St. 256, 264, 110 N.E. 493, 495 (1915).

[11] Haydocy Pontiac, Inc. v. Lee, 19 Ohio App. 2d 217, 220, 250 N.E.2d 898, 900 (1969)

[12] Mestetzko v. Elf Motor Co., 119 Ohio St. 575, 576, 165 N.E. 93 (1929).

[13] Haydocy Pontiac, Inc., v. Lee, 19 Ohio App. 2d 217, 220, 250 N.E.2d 898, 900 (1969).

Another change brought about by the *Haydocy* decision was the determination that a minor is estopped from pleading his infancy as an affirmative defense, where he induced the contract by falsely representing that he was of age.[14] Because of the confusing *Mestetzko* opinion, the question of the applicability of estoppel *in pais* has not been previously decided with finality in Ohio. In *Myers* the United States Supreme Court explicitly stated the basis for its decision did not rest on an estoppel theory.[15] The Court took this position to conform with its earler decision in *Sims v. Everhardt*.[16] In *Sims* the Court said estoppel cannot be invoked against one who entered into a contract during minority. A fraudulent representation of capacity is not the equivalent of actual capacity.[17]

The result of the *Myers* case stemmed from the fact that defendant, Hurley Motor Co., had an affirmative defense to the suit. Reasoning that the plaintiff tortiously injured the defendant in the transaction, the Court concluded the defendant could diminish or defeat any recovery against himself, but because this was an affirmative defense only, the defendant was barred from receiving a judgment in excess of the plaintiff's claim.[18] Applying this standard to the rule announced in the *Mestetzko* syllabus indicates the Ohio rule rests on a different theory, thus giving different remedies to defendants similiarly situated.

Because of the conflict between the opinion in *Mestetzko* and its syllabus, the Ohio Supreme Court did not explicitly bar estoppel *in pais* as was done in the *Myers* case. By subjecting minors to liability up to the purchase price of their contracts if they cannot return the consideration, the Ohio rule goes beyond the recoupment theory of *Myers*. The counterclaim is not limited to only abating or defeating the infant's claim; rather, it holds the infant to his contract under an equitable doctrine.

Haydocy does not profess to overrule *Mestetzko*. It does, however, create new legal obligations for minors by authorizing the defrauded seller to initiate an action for damages. All contracts entered into by a minor other than those for necessaries or those otherwise given legal recognition are still avoidable by him and may be disaffirmed on reaching majority.[19] This means that an infant in Ohio still has the right to sue under the *Mestetzko* rule and recover all money paid less any award from a successful counterclaim.

The significance of *Haydocy* lies in its determination of how a defrauded seller may recover damages from one who as a minor induced a contract by falsely stating he was of age, and also what legal tools are available in such a situation. Because the decision recognizes estoppel *in pais* as a legitimate tool, the decision probably also indirectly benefits emancipated minors. By recognizing estoppel, the court imputed adult capacity to a minor in this situation. This can be used to help build a foundation that will hasten the time when those persons presently labeled emancipated minors will be legally recognized as adults. Judge Strausbaug correctly noted in *Haydocy* that:

> At a time when we see young persons between 18 and 21 years of age demanding and assuming more responsibilities in their daily lives . . . it seems timely to re-examine the case law pertaining to contractual rights and responsibilities of infants to see if the law . . . should be redefined.[20]

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[14] *Id.* at 220-21, 250 N.E.2d at 900.

[15] Myers v. Hurley Motor Co., 273 U.S. 18, 26 (1927).

[16] 102 U.S. 300 (1880).

[17] *Id.* at 313.

[18] Myers v. Hurley Motor Co., 273 U.S. 18, 27 (1927).

[19] Mestetzko v. Elf Motor Co., 119 Ohio St. 575, 581, 165 N.E. 93, 95 (1929).

[20] Haydocy Pontiac, Inc. v. Lee, 19 Ohio App. 2d 217, 220, 250 N.E.2d 898, 900 (1969).

It is unfortunate that the decision's impact is limited to the situation where a minor misrepresents his age. It is time for the Ohio courts to reconsider the whole area of capacity of infants and bestow full contractual rights on emancipated minors,[21] especially in light of the fact that the court in *Haydocy* had to rely on the mistake of the syllabus to reach what it considered to be the most socially desirable result. Today, society no longer feels the need to protect *the young adult* from his own inopportune bargains. As a practical matter young people frequently engage in commercial transactions by soliciting an adult co-signer. This is done only to comply with an outdated legal form and not because there is a felt need to protect the young person. Minors between the ages of 18 and 21 years old ought to be accorded a full share of the society in which they live.

Robert C. Barbour

STATE SECURITIES REGULATION—THE NEW OHIO TAKE-OVER BID STATUTE—*Section 1707.041*—Section 1707.041 of the Ohio Revised Code, which became effective on October 9, 1969, requires a public announcement and a fair, full, and effective disclosure to shareholders in regard to take-over bids. The statute also enumerates certain procedural steps which must be followed if a take-over bid is to be attempted.[1] Take-over bids have been called a financial power play whereby aggressive outside interests move to acquire control of a corporation in a matter of a short time through the purchase of the necessary shares of its capital stock pursuant to a public offer.[2] The take-over bid, with its element of surprise, has become a powerful weapon in the acquisition of corporations in the past decade. Offerors can often gain control of a firm which has previously refused to merge. Unlike the proxy contests or other conventional forms of acquisition, a tender offer[3] is relatively quick, and involves minimal, nonrecoverable expenses.[4]

The need for regulation, due to the increasing use of the cash take-over bid, was recognized first by Congress with passage of the Williams Bill in 1968, which amends Section 14 of the Securities Exchange Act of 1934, to regulate the use of the cash tender offer by requiring offerors to register with the Securities Exchange Commission and to disclose certain facts.[5] Then when Northwest Industries almost took over B. F. Goodrich, the Ohio based rubber company, Ohio's machinery for state regulation was started. While not the first state to do so, Ohio is one of the leaders in state regulation of take-over bids. Ohio's act is aimed directly at the surprise element of the bids by requiring effective disclosure of a pending cash or stock tender offer. The quickness and surprise, so necessary in a successful take-over bid, are hindered by the various delay provisions of Section 1707.041.

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[21] *See generally*, Edge, *Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1966) for an exhaustive study of a minor's contractual rights and responsibilities along with recommendtions for needed reform.

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[1] OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1969).

[2] Schmults and Kelly, *Cash Take-Over Bids—Defensive Tactics*, 13 PRACTISING LAW INSTITUTE 155 (1968).

[3] The words tender offer and take-over bids are generally used interchangably.

[4] *See* Israels, *The Framework*, 13 PRACTISING LAW INSTITUTE 13, 20 (1968).

[5] Stock tender offers were considered a sale within the meaning of section 2(3) of the Securities Exchange Act of 1933, 48 *Stat.* 74 (1933), *as amended*, 15 U.S.C. § 77b (3) (1964), and thus required registration pursuant to 15 U.S.C. § 77e (1964).

That section applies to any person who makes, or in any way participates or aids in making, a take-over bid for the securities of a corporation organized under the laws of Ohio or having its principal place of business and substantial assets within this state. Either the acquisition or the offer to acquire, if after said acquisition the offeror would be a record or beneficial owner of more than ten per cent of any class of the issued and outstanding equity securities of such corporation, is considered a take-over bid. Exempted from these regulations by definition are: (1) bids made by a securities dealer for his own account in the ordinary course of business; (2) good faith offers for the sole account of the offeror and not for purpose of avoiding the provisions of this act, to acquire equity securities and not involving a public offering within the meaning of the Securities Exchange Act of 1934; (3) good faith offers for the sole account of the offeror and not for the purpose of avoiding the provisions of this act, to acquire equity securities from not more than fifty persons; and (4) tender offers to which the target company consents.[6]

A unique and potentially harsh provision included in this act states that any offeror who owns five percent or more of the outstanding equity securities, any of which were purchased within one year before the proposed bid, and who at that time failed to publicly announce his intention to gain control of the target company, or otherwise failed to make fair, full, and effective disclosure of such intention to the persons from whom he acquired such securities, will not be allowed to make the offer.[7] It would appear that an offeror who owns at least five percent of the target company's stock, and who purchased only a single share within the preceding year and who at that time failed to announce his intention to take over the company, would be precluded from making an offer. The problem is that the offeror might not have had the intention to take over the company when he purchased the stock. It seems quite inequitable to punish an offeror simply because at the time he purchased the shares he had no intention of taking over the target company.

Take-over bids are prohibited unless at least twenty days prior to the offer, the offeror publicly announces the terms of the proposed take-over bid and files with the Division of Securities and the target company copies of certain information required by the statute. This information must include copies of all prospectuses, brochures, advertisements or other matters by means of which the offeror proposes to disclose to the offerees all information material to a decision to accept or reject the offer; the identity and background of all persons on whose behalf the take-over bid is made; the source and amount of funds to be used to acquire any equity security, including statements describing any securities offered in exchange for the securities of the company; a statement of any plans or proposals the offeror may effect upon taking control such as a merger, liquidation, or other major changes; complete information on the organization and operations of the offeror; and such other documents which may be required by the regulations of the Division of Securities to insure effective disclosure.[8]

Upon receipt of the filing, the Division of Securities becomes responsible for determining whether the information filed and the means of transmitting it to the shareholders of the target company are sufficient to meet the requirements of a fair, full, and effective disclosure required so that shareholders of the target company can make an intelligent decision as whether to sell or not.

Within ten days after filing, either the Division of Securities or the target company may request a hearing to determine if a fair, full, and effective disclosure has

[6] OHIO REV. CODE ANN. § 1707.041 (A) (1). (Page Supp. 1969).

[7] *Id.* § 1707.041 (B) (2).

[8] *Id.* § 1707.041 (B).

been made. If no hearing is requested, or if the Division of Securities finds that no cause for a hearing exists, or if the Division adjudicates, that the offeror proposes to make a fair, full, and effective disclosure, the offer can be made.[9]

Besides this basic procedure, the act imposes many other conditions. Subsection (C), which was heavily argued over in the Legislature, is most important. This provision was intended to protect Ohio shareholders from being excluded from tender offers because of the provisions of the new statute. The provision states:

> . . . no offeror shall make a take-over bid which is not made to all holders residing in this state of the equity security that is the subject of such take-over bid, or which is not made to such holders on the same terms as such take-over bid is made to holders of such equity security not residing in this state.[10]

This extra-territorial regulation, based on the state's regulation of commerce power, may raise some constitutional questions. One answer, given by Arthur I. Vorys before the Thirteenth Annual Institute on Corporate Legal Problems, was as follows:

> Personally, I doubt whether the constitutional issue will be tested. Section 1707.19 of the securities law provides for revocation of a dealer's Ohio license if he violates any of Ohio's securities laws. An out-of-state dealer, licensed in Ohio, who particiapates in a take-over bid for an Ohio or Ohio-based corporation will, pursuant to the definition of "Offeror" mentioned a moment ago, would be required to comply with the new law or risk losing his Ohio license. This, it seems to me, is the real deterrent to discrimination against Ohio shareholders by any out-of-state take-over bidder making a bid for an Ohio or Ohio-based corporation but excepting from his offer all shares held by Ohio residents.[11]

Another condition of subsection (C) requires that if the terms of a take-over bid are changed prior to its expiration by increasing the consideration offered, the offeror must pay the increased consideration for all equity securities taken up whether they were deposited or taken up before or after the change in the terms of the take-over bid. A final condition is that if the offer is for less than all the outstanding equity securities of a class, and if a greater number is deposited within ten days, the offeror must take up the securities pro rata from all of the shares tendered. A possible explanation for this clause is to avoid having shareholders rush to accept an offer without first making an intelligent decision, but it may also penalize an aggressive stockholder who wants to sell his shares on an "all or nothing" basis.

Other subsections list certain areas in which the procedures may vary. If the offeror or the target company is a banking corporation, a building and loan association, or a public utility, subject to state regulation, the Division of Securities upon receipt of the filing required by subsection (B) must furnish a copy to the regulatory body having jurisdiction over the offeror or the target company.[12] If the bank, building and loan association, or public utility is subject to federal regulation, the take-over bid is subject to approval by the appropriate federal agency,[13] and the Ohio statute does not apply. If the offeror or the target company is an insurance

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[9] *Id.* § 1707.041 (B) (1).

[10] *Id.* § 1707.041 (C).

[11] Address by Arthur I. Vorys, Thirteenth Annual Institute on Corporate Legal Problems.

[12] *Id.* § 1707.041 (D).

[13] *Id.* § 1707.041 (H).

company subject to state regulation, the Superintendent of Insurance is substituted for the Division of Securities.[14]

The stated purpose of the act is to protect shareholders of Ohio corporations. With the requirements of a fair, full, and effective disclosure, shareholders should be able to evaluate the adequacy of the offer and should, therefore, be able to make an intelligent decision. One wonders, however, if the real purpose is not to shield the management of Ohio corporations from take-over bids. When one considers the inordinate delay provisions, the restrictions on who can make a bid, the restrictions on when a bid can be made, and the powerful control over the bid exercised by the Division of Securities, valuable time is available for the management to organize defensive tactics, such as raising the annual dividend rate, communicating to stockholders, purchasing the corporation's own shares, instituting suits under the antitrust laws, providing for staggered terms of the directors, or attempting a defensive merger in order to defeat a take-over bid.[15] The question to be decided is whether it is desirable to almost completely eliminate the use of the take-over bid in Ohio in order to gain the statute's desired goals. A strong argument can be made that take-over bids are beneficial since shareholders often receive more for their shares than they are presently worth to them. Also, some companies, because of poor management and ineffective operations, need to be taken over by aggressive management. The potential threat of a take-over attempt often keeps management active and more receptive to the stockholders' desires. Finally, some attempted take-overs have led to corporate reform of previously unprofitable and vulnerable companies.

Now, however, it appears that the Division of Securities is armed with the powers, if used effectively, to strike an equilibrium so that Ohio will not become a haven for management seeking a free hand, while still protecting the interests of Ohio shareholders. The Division is empowered pursuant to subsection (F) to prescribe reasonable rules and regulations defining fraudulent, evasive, or grossly unfair practices in connection with take-over bids.[16] By promulgating such rules the Division of Securities could bring about basic fairness on both sides of this hotly contested issue. The Legislature has given the Division of Securities a powerful tool, which, if used wisely will benefit all. We can only wait and see to determine if that tool is used or misused. If used properly this act will be a welcome addition to Ohio's security laws.

John W. Hilbert II

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[14] *Id.* § 1707.041 (G).

[15] For a discussion of defensive tactics, *see* Schmults and Kelly, *supra* note 2.

[16] OHIO REV. CODE ANN. § 1707.041 (F). (Page Supp. 1969).