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Bankruptcy - Tax Liens - 1966 Amendment to Section 17a(1) of the Bankruptcy Act Construed to Prevent Attachment of Lien to Assets Acquired after the Filing of a Petition in Bankruptcy

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RECENT DEVELOPMENTS

BANKRUPTCY — TAX LIENS — 1966 AMENDMENT TO SECTION 17a(1) OF THE BANKRUPTCY ACT CONSTRUED TO PREVENT ATTACHMENT OF LIEN TO ASSETS ACQUIRED AFTER THE FILING OF A PETITION IN BANKRUPTCY.

In re Carlson (C.D. Cal. 1968)

In re Braund (C.D. Cal. 1968)

The bankrupt, Braund,[1] was indebted to the federal government for unpaid income taxes for the taxable years 1953 through 1960 and a deficiency was assessed and tax liens filed in various public places.[2] Braund filed a petition in bankruptcy in October 1966 and was granted a discharge in December of that year. In May 1967 the Internal Revenue Service issued notices of levy against certain life insurance companies demanding that property acquired by the bankrupt after the discharge, namely, the increase in the loan values of the policies held by the bankrupt, be paid on account of the tax liabilities as property subject to the liens.[3] The bankrupt sought to have the levy set aside and received an order from the federal court referee declaring that those tax liens of the United States which arose for taxes which became legally due and owing 3 years before the filing of a petition in bankruptcy, do not extend to property acquired or income earned subsequent to that filing.

In the second case, the bankrupt, Carlson, was indebted under a sales and use tax to the Board of Equalization of the State of California for a tax liability which arose more than 3 years before the filing of his petition in bankruptcy. This liability, similar to Braund's, was secured by liens recorded in various public places.[4] Since the assets owned by the bankrupt at the time of the filing were insufficient to pay the tax liability in full, the Board sought to levy upon his salary which had been earned after the filing of the petition. Thereafter, the bankrupt sought and received an order from the referee enjoining the Board from levying on this after-acquired property.

In separate review proceedings before different judges, the United States District Court for the Central District of California affirmed the

1. There were actually two bankrupts and two cases. While Walter and Virginia Braund filed joint tax returns, they filed separate bankruptcy petitions. Both cases are hereinafter treated as one.

2. The federal tax lien arises when an assessment is made and perfects against most interests when notice of the lien is filed. INT. REV. CODE of 1954, §§ 6321–23.

3. It was undisputed that the tax lien had attached to certain property owned by the bankrupt as of the date of filing. The parties stipulated, however, that the proceeds realized from the sale of the property would be insufficient to satisfy the total debt. *In re* Braund, 289 F. Supp. 604, 605 (C.D. Cal. 1968), *appeal docketed,* No. 23,707, 9th Cir., Dec. 26, 1968.

4. Under § 67c(1)(B) of the Bankruptcy Act, 11 U.S.C. § 107(c)(1)(B) (Supp. III, 1968), the validity of a statutory lien is determined by local lien law. *See* 4 W. COLLIER, BANKRUPTCY ¶ 67.24, at 312 (14th ed. 1967).

respective referee's orders, *holding* that government tax liens, arising from taxes which became legally due and owing more than 3 years prior to the date of his filing in bankruptcy, do not extend or attach to any property acquired or earned by the bankrupt subsequent to his filing. *In re Carlson,* 292 F. Supp. 778 (C.D. Cal. 1968), *appeal docketed,* No. 23,580, 9th Cir., Nov. 19, 1968; *In re Braund,* 289 F. Supp. 604 (C.D. Cal. 1968), *appeal docketed,* No. 23,707, 9th Cir., Dec. 26, 1968.

Prior to the 1966 amendment to section 17a(1) of the Bankruptcy Act,[5] tax debts were not dischargeable in bankruptcy and tax liens attached not only to property owned by the taxpayer at the time of their perfection[6] but also to property which the taxpayer later acquired.[7] In 1966, as part of a general reform of the Bankruptcy Act, section 17a(1) was amended to read:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy . . . *And provided further,* That a discharge in bankruptcy shall not release or affect any tax lien . . . .[8]

Though amended section 17a(1) differs significantly from the old section, both courts were principally concerned with only one revision, namely, the proviso that the discharge shall not "release or affect" any tax lien.[9] The precise issue before both courts was whether the effect of the second proviso would be to allow the government to attach property acquired by the bankrupt after his filing in bankruptcy in order to satisfy any unpaid tax liabilities.[10] The government contended that the liens continued to be effective after the discharge in bankruptcy and therefore could attach to after-acquired property.[11] The bankrupts, on the other

5. Section 17a(1) of the Bankruptcy Act previously read:
A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality . . . . Act of July 12, 1960, Pub. L. No. 86-621, § 2, 74 Stat. 409.

6. *See* note 2 *supra.*

7. Glass City Bank v. United States, 326 U.S. 265 (1945).

8. 11 U.S.C. § 35(a)(1) (Supp. III, 1968).

9. Since all parties stipulated that the tax deficiencies in question became "legally due and owing" 3 years prior to the filing in bankruptcy, this issue was not before the court. However, since the phrase "legally due and owing" is not defined in the Bankruptcy Act, it may well be a disputed question in subsequent litigation. One commentator suggests any one of three dates could be utilized to fix the liability: (1) the end of the calendar or fiscal year, (2) the date the return is filed, or (3) the date an assessment is made. 1 W. COLLIER, *supra* note 4, ¶ 17.14, at 1615. It was recently held that the date of assessment was the time when taxes are legally due and owing. *In re* Nigro Freight Lines, Inc., 42 REF. J. 28 (D. Conn. 1968).

10. *In re* Carlson, 292 F. Supp. 778, 780 (C.D. Cal. 1968), *appeal docketed,* No. 23,580, 9th Cir., Nov. 19, 1968; *In re* Braund, 289 F. Supp. 604, 607 (C.D. Cal. 1968), *appeal docketed,* No. 23,707, 9th Cir., Dec. 26, 1968.

11. It was argued that any other construction would overrule Glass City Bank v. United States, 326 U.S. 265 (1945), by "affecting" the defined nature of a tax lien. *See* Brief for Appellant at 10, *In re* Braund, 289 F. Supp. 604 (C.D. Cal. 1968), *appeal docketed,* No. 23,707, 9th Cir., Dec. 26, 1968.

hand, took the position that the liens applied only to property belonging to them as of the date of the filing of the petition in bankruptcy, and therefore were incapable of affecting after-acquired property.

Though both Judge Hill and Judge Hauk treated their respective cases as ones of first impression, their approaches to the problem did not differ materially.[12] Initially, both courts attempted to resolve the issue by looking to the language of the statute itself. The *Braund* court candidly concluded that the language of section 17a(1) was imprecise, unclear, and seemingly contradictory.[13] It reasoned that upon the granting of a discharge the amendment appears to relieve the taxpayer of his stale tax liabilities; however, if that discharge does not "affect" the tax lien secured thereon, which would appear to be the meaning of the second proviso, the taxpayer is not relieved of his stale claims since under prior law the lien has the power to attach to after-acquired property.[14] This apparent internal inconsistency motivated the *Braund* court, following the general rule of statutory interpretation,[15] to turn to the amendment's legislative history to ascertain its meaning. Although the *Carlson* court found the meaning of the amendment to be clear and in support of the bankrupt's position,[16] it likewise considered it wise, though not necessary, to examine the legislative history of the enactment.[17]

An examination of the legislative history of the amendment provided support for both sides of the controversy. The governments' position that the tax liens were effective against after-acquired property was buttressed by statements made on the Senate floor by Senator Ervin who initiated consideration of the bill amending section 17a(1).[18] Senator Ervin stated:

> [T]his bill seeks . . . to strike a balance between the demands for rehabilitation of the bankrupt and the just claims of the Federal Government. It would provide that tax claims originating within 3 years prior to the bankruptcy remain just as valid as they are under existing law. It provides where the Internal Revenue Service has filed a lien, and thus given the general public which deals with the prospective bankrupt knowledge of the Federal Government's claim, that those taxes — regardless of how long they antedated the bankruptcy — are still valid. Other tax claims which originated prior to 3 years before bankruptcy and which have not been reduced to a lien, are discharged . . . .[19]

12. Judge Hill in *Braund* was aware of Judge Hauk's oral decision in *Carlson* and also knew that the same result had been reached in United States v. Sanabria, No. 67-C-505 (N.D. Ill., May 23, 1968), an unreported case. 289 F. Supp. at 606 n.2.

13. 289 F. Supp. at 606.

14. *See* p. 324 & note 7 *supra.*

15. De Sloovere, *Textual Interpretation of Statutes,* 11 N.Y.U.L.Q. 538, 558 (1934); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,* 3 VAND. L. REV. 395, 400 (1950); Mac Callum, *Legislative Intent,* 75 YALE L.J. 754, 758-760 (1966).

16. 292 F. Supp. at 780-81.

17. *Ex parte* Collett, 337 U.S. 55 (1948) (there is no need to refer to legislative history where the statutory language is clear).

18. H.R. REP. No. 3438, 89th Cong., 2d Sess. (1966).

19. 112 CONG. REC. 13,810 (1966).

Moreover, Senator Ervin later had a prepared statement printed in the *Record:* "One point which I would like to make clear is that this bill *does not affect taxes,* if the tax has been reduced to a tax lien and made part of the public record."[20] It thus seems clear that Senator Ervin was proposing only a limited change in the law — that tax claims which become legally due and owing 3 years before the filing in bankruptcy would be discharged only where the government had not filed a lien which would afford the general public notice of the claim. The position that the dischargeability of tax claims should depend on whether notice of the claim is given to the general public would, however, appear to lack cogency. The fact that third parties have knowledge of the debt would seem irrelevant where the only parties concerned with the issue of dischargeability are the taxpayer and the government.

Both the *Braund* and *Carlson* courts, on the other hand, found language which supported the bankrupts' contention that the second proviso was inserted only to make it clear that where a lien had attached to certain property, the discharge in bankruptcy would not affect the right of the government to proceed against that property already subject to the lien.[21] Therefore, while the tax lien would be effective against that property owned as of the date of filing, it could not affect after-acquired property. This construction is supported by the House and the Senate Judiciary Committee Reports on the new bill wherein it is stated:

> While, under this bill, unsecured tax claims due and owing more than 3 years prior to bankruptcy would be dischargeable, there is no intention to place any time limit on otherwise valid tax liens. As with other secured claims like mortgages and conditional sales contracts, the purpose of the lien is to give the creditor a property interest which is *indefeasible* in bankruptcy. Thus, *to the extent that the tax authorities may satisfy their claims out of the security they hold, They will be unaffected by the discharge* regardless of the fact that the underlying debt may include taxes for years prior to the 3-year period preceding bankruptcy. The second proviso to section 17a(1) proposed by section 2 of this bill emphasizes this legislative intent.[22]

Confronted with legislative history which supported two inconsistent positions, both courts, in making their final determination of the proper construction of amended section 17a(1), adopted the bankrupts' contentions for two reasons: (1) remarks made in the course of Senate debate are not entitled to carry the same weight as carefully considered commit-

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20. 112 CONG. REC. 13,819 (1966) (emphasis added).

21. *In re* Carlson, 292 F. Supp. 778, 781 (C.D. Cal. 1968), *appeal docketed,* No. 23,580, 9th Cir., Nov. 19, 1968; *In re* Braund, 289 F. Supp. 604, 608 (C.D. Cal. 1968), *appeal docketed,* No. 23,707, 9th Cir., Dec. 26, 1968.

22. H.R. REP. No. 687, 89th Cong., 1st Sess. 3 (1965); S. REP. No. 1158, 89th Cong., 2d Sess. (1966), 2 U.S. CODE CONG. & AD. NEWS 2468, 2470 (1966) (emphasis added).

tee reports[23] and, more importantly, (2) the effectuation of the general purpose of the Bankruptcy Act to rehabilitate the bankrupt.[24]

In examining the purpose of the Bankruptcy Act the committee reports focused on the flaws in the existing law with an eye toward remedying the situation with the new amendment. It was not disputed that the nondischargeability of tax claims prevented the bankrupt from making a fresh start unburdened by what very well might be the largest claim against his estate. Moreover, such nondischargeability discriminated against the private individual or unincorporated small businessman. While a corporate bankrupt theoretically was not discharged, it normally dissolved upon bankruptcy, the practical effect of which was to relieve the corporation of the burden of unsatisfied tax claims.[25] However, since the unincorporated bankrupt did not have the ability to dissolve after bankruptcy, the dischargeability of his tax debts was dependent upon the "purely fortuitous circumstance" of whether the taxing authority had yet noticed a lien.[26] Therefore, by construing the statute to prevent the governments' tax lien from affecting after-acquired property both the *Braund* and *Carlson* courts sought to interpret the new amendment in such a way as to cure the evils recognized by the committees and, at the same time, further the general purposes of the Bankruptcy Act. To hold that the lien had continued vitality to attach to after-acquired property while the underlying debt was discharged would have imposed an "unwarranted limitation" upon the remedy created by Congress.[27]

The complex legislative history of the amendment provides a possible explanation why the amendment appears to grant dischargeability of tax claims with one hand and revoke that same grant by preserving lien status with the other hand.[28] The amendment had been passed by the House four times[29] and had been the focus of seven favorable House and Senate reports before receiving the status of law.[30] In examining

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23. *See* United States v. UAW, 352 U.S. 567, 585 (1957) (language used by a Senator during oral argument is not always accurate or exact and therefore may not reflect the true statutory intent); Gan Seow Tung v. Carusi, 83 F. Supp. 480, 481 (S.D. Cal. 1947) (while such statements may be considered, they are held to be a highly doubtful aid to statutory construction); Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620, 623 (6th Cir.), *cert. denied,* 308 U.S. 557 (1939).

Noticeably absent from either case was a judgment as to the weight to be accorded the Senator's prepared statement.

24. S. REP. No. 999, 89th Cong., 2d Sess. (1966), 2 U.S. CODE CONG. & AD. NEWS 2442, 2450 (1966).

25. S. REP. No. 1158, 89th Cong., 2d Sess. (1966), 2 U.S. CODE CONG. & AD. NEWS 2468, 2469 (1966).

26. *In re* Braund, 289 F. Supp. 604, 607 (C.D. Cal. 1968), *appeal docketed,* No. 23,707, 9th Cir., Dec. 26, 1968.

27. *In re* Carlson, 292 F. Supp. 778, 784 (C.D. Cal. 1968), *appeal docketed,* No. 23,580, 9th Cir., Nov. 19, 1968.

28. *See* 1 W. COLLIER, *supra* note 4, ¶ 17.14, at 1617.

29. August 25, 1959, August 7, 1961, July 3, 1963, and August 2, 1965. After approval by the Senate Judiciary Committee it was referred to the Senate Finance Committee where it remained until reported out to the 89th Congress.

30. S. REP. No. 1158, 89th Cong., 2d Sess. (1966); S. REP. No. 998, 89th Cong., 2d Sess. (1966); S. REP. No. 996, 89th Cong., 2d Sess. (1966); S. REP. No. 114,

this complex course of events, one commentator has argued that this resulted in placing the second proviso in an improper section — that it rightfully belongs in section 64a where section 17a(1) is incorporated by necessary implication.[31] To interpret the second proviso to read, as the *Braund* and *Carlson* courts in effect do, that a discharge does not affect a lien on property owned as of the date of filing is basically "nonsensical" and uninforming[32] because a discharge in bankruptcy is always prospective in nature; it serves to keep after-acquired assets unencumbered so the bankrupt may make a fresh start.[33] However, except where a state statute exempts property, a discharge in bankruptcy never relieves the bankrupt's existing property from liability.[34] If, however, the second proviso is read in conjunction with section 64a(4), the words take on meaning. Prior to the 1966 amendments to section 64a(4), unsecured tax claims were given unlimited priority over general unsecured creditors.[35] One of the amendments to that section limited this priority treatment to those tax claims "which are not released by discharge."[36] Since section 17a(1), also amended in 1966, specifically enumerates those tax claims which are not released by discharge,[37] it is necessary to refer to section 17a(1) to determine what particular tax claims are entitled to priority under section 64a(4). If the claim is discharged pursuant to section 17a(1) — *i.e.,* is outside the 3-year period and not included within one of the five exceptions — it is not entitled to priority under section 64a(4). Therefore, the combined effect of the 1966 amendments to section 17a(1) and section 64a(4) is to deny priority to certain tax claims. However, to

89th Cong., 1st Sess. (1965); H.R. REP. No. 687, 89th Cong., 1st Sess. (1965); H.R. REP. No. 537, 87th Cong., 1st Sess. (1961); H.R. REP. No. 735, 86th Cong., 1st Sess. (1959). *See also* S. REP. No. 999, 89th Cong., 2d Sess. (1966) (Finance Comm.). *See* Kennedy, *The Bankruptcy Amendments of 1966,* 1 GA. L. REV. 149, 171–72 (1967). For a history, resumé of changes, and comparative legislation concerning the amendment, see 1 W. COLLIER, *supra* note 4, ¶ 17.01, at 1575–80.

31. Marsh, *Triumph or Tragedy? The Bankruptcy Act Amendments of 1966,* 42 WASH. L. REV. 681, 712 (1967).

32. *Id.*

33. One exception to the prospective nature of a discharge is property which vests in the bankrupt within 6 months after bankruptcy by bequest, devise, or inheritance. Bankruptcy Act § 70, 11 U.S.C. § 110 (Supp. III, 1968).

34. W. COLLIER, BANKRUPTCY MANUAL ¶ 17.11, at 219.1 (2d ed. 1968).

35. Section 64 of the Bankruptcy Act, 11 U.S.C. § 104 (1964) provided:

(a) The debts to have priority, in advance of the payment of dividends to [general] creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . . .

Act of Sept. 25, 1962, Pub. L. No. 87–681, § 8, 76 Stat. 571.

36. 11 U.S.C. § 104 (Supp. III, 1968).

37. [A] discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United

the extent that the taxing authority has reduced its tax *claims* to a tax *lien,* it becomes a secured creditor and rightfully should share in any bankruptcy distribution prior to those unsecured creditors given priority under section 64a(4). Congress, by means of the second proviso, intended to specifically negate any possibility that those tax *claims* reduced to *liens* would lose their priority status as had tax claims which had been discharged. In this way the second proviso serves a useful purpose. By restating the existing law, Congress made it clear that tax *liens* would not be "affected."[38]

The most significant ramification of the courts' interpretation of section 17a(1) would appear to be a more complete reformation of the bankrupt. As a practical matter, however, this new opportunity for reformation may be severely restricted. It has been posited that such a court interpretation will cause the taxing authority, the IRS in most cases, to be less sympathetic in arranging deferred payment plans for a tax liability older than 3 years, or arranging any plan to extend payment of recent claims over 3 years.[39] If, due to the courts' decision, that policy is in fact pursued, the taxpayer may not receive the benefits which the courts believe Congress meant to confer.

In conclusion, it is evident that the reasoning employed by both the *Braund* and *Carlson* courts was properly guided by a desire to effectuate the general purposes of the Bankruptcy Act. Viewed in this light, the interpretation afforded the second proviso to section 17a(1) appears valid. The decision does little, however, to relieve the literal inconsistency which appears within the section. It is suggested that Congress should cure the problem, as proposed by one commentator,[40] by placing the second proviso in section 64a where it will serve a useful purpose.

Gilbert Newman

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — NEW JERSEY HOMICIDE STATUTE PRECLUDING DEATH PENALTY ON PLEA OF NON VULT DOES NOT VIOLATE RIGHTS GUARANTEED BY THE FIFTH OR SIXTH AMENDMENT.

State v. Forcella (N.J. 1968)

Petitioners Forcella and Funicello were indicted for murder, pleaded not guilty, and were convicted by a jury without recommendation for life

States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title.
11 U.S.C. § 35(a)(1) (Supp. III, 1968).

38. Marsh, *supra* note 31, at 712.

39. *See* H.R. REP. No. 687, 89th Cong., 1st Sess. 5–7 (1965) (letter from Stanley S. Surrey, Assistant Secretary of the Treasury); S. REP. No. 999, 89th Cong., 2d Sess. (1966), 2 U.S. CODE CONG. & AD. NEWS 2452–53 (1966) (letter from Henry H. Fowler, Secretary of the Treasury). *See also* Marsh, *supra* note 31, at 713.

40. Marsh, *supra* note 31.

imprisonment. Their convictions and sentences were affirmed by the Supreme Court of New Jersey on direct appeal.[1] Petitioners Ornes and Perez were also indicted for murder and pleaded not guilty. Each case was governed by the New Jersey homicide statute which provides for a maximum sentence of life imprisonment where a defendant pleads non vult to a murder indictment,[2] but allows capital punishment to be imposed where the indictment is defended before a jury.[3] The matters were consolidated for review when petitioners Forcella and Funicello, seeking post-conviction relief, and Ornes and Perez, by way of a pre-trial motion, challenged the death penalty provision of the New Jersey statute, arguing that the Supreme Court of the United States in *United States v. Jackson*[4] had held that this procedure unconstitutionally burdens the assertion of the fifth amendment guarantee against self-incrimination and the sixth amendment right to trial by jury. The Supreme Court of New Jersey affirmed the death sentences in the Forcella and Funicello matters and denied Ornes' and Perez' motion, *holding* that the New Jersey capital punishment procedure was clearly distinguishable from that involved in *Jackson* in that (1) the New Jersey statute does not bear upon the sixth amendment right to trial by jury because all jury waivers are disallowed in murder trials; (2) waiver of the fifth amendment right against self-incrimination is in no way improperly induced by provision for a non vult plea since the acceptance of such plea depends entirely on the discretion of the trial judge; and (3) the statute does not "needlessly" impose a penalty on the exercise of the right against self-incrimination. *State v. Forcella,* 52 N.J. 263, 245 A.2d 181 (1968), *petition for cert. filed,* No. 947 Misc., U.S., Oct. 1, 1968.

In recent years, the United States Supreme Court has developed the rule that certain procedural alternatives cannot be so structured that the effect of choosing between them is to penalize the assertion of constitutionally guaranteed rights or to coerce their waiver.[5] This approach has

1. State v. Funicello, 49 N.J. 553, 231 A.2d 579 (1967), *cert. denied,* 390 U.S. 911 (1968); State v. Forcella, 35 N.J. 168, 171 A.2d 649 (1961), *cert. denied,* 369 U.S. 866 (1962).

2. N.J. REV. STAT. § 2A:113-3 (1953) provides:

> In no case shall the *plea of guilty* be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.
>
> Nothing herein contained shall prevent the accused from *pleading non vult* or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree. (emphasis added)

The plea of non vult or nolo contendere has the equivalent effect of a plea of guilty in the case in which it is entered. *In re* 17 Club, 26 N.J. Super. 43, 44, 97 A.2d 171, 172 (1953).

3. N.J. REV. STAT. § 2A:113-4 (1953) provides in pertinent part:

> Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall . . . recommend life imprisonment, in which case this and no greater punishment shall be imposed.
>
> Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

See State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963), *cert. denied,* 377 U.S. 1000 (1964).

4. 390 U.S. 570 (1968).

5. Nieves v. United States, 280 F. Supp. 994, 1001 (S.D.N.Y. 1968).

been judicially applied where both fifth and sixth amendment rights have been in issue. For example, in *Griffin v. California*[6] it was held that the fifth amendment prohibited comment by the prosecution on an accused's failure to testify, as well as instructions by the court that silence is some evidence of guilt. Such comment was considered "a penalty imposed . . . for exercising a constitutional privilege . . . [which] cuts down on the privilege by making it costly."[7] Similarly, the choice presented to policemen[8] and to a lawyer[9] of waiving the right against self-incrimination or forfeiting their livelihoods has been held to be constitutionally defective. In *Spillers v. State*,[10] the Nevada supreme court held that the sixth amendment right to trial by jury was burdened by the Nevada rape statute[11] which provided that only a jury could impose the death penalty for a conviction of rape. The Nevada court reasoned that such a procedure compelled a defendant to pay a "terrible price" for exercising his right to trial by jury — "the possibility of death."[12]

Against this background the United States Supreme Court faced the problem presented in *United States v. Jackson*.[13] The defendant in *Jackson*, indicted for violation of the Federal Kidnaping Act,[14] faced the following three alternatives:

(1) *Plead guilty*[15] — the effect being an automatic waiver of the right to a jury trial and the possibility of a sentence for a term of years or, at most, life;

(2) *Plead not guilty and waive his right to a jury trial*[16] — and defend the case before a judge which could result in acquittal, or if found guilty, imprisonment for a term of years or for life;

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6. 380 U.S. 609 (1965).
7. *Id.* at 614.
8. Garrity v. New Jersey, 385 U.S. 493 (1967).
9. Spevack v. Klein, 385 U.S. 493 (1967).
10. ___ Nev. ___, 436 P.2d 18 (1968).
11. Law of March 24, 1909, ch. CCXXIX, § 44, [1909] Stat. of Nev. 325.
12. ___ Nev. at ___, 436 P.2d at 22. *See also* Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968), where it was held that the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–34 (1964), which required a juvenile offender to waive a jury trial before he could obtain the benefits of a juvenile proceeding, unconstitutionally penalized the exercise of the right to trial by jury; United States v. Jackson, 262 F. Supp. 716 (D.C. Conn. 1967), *rev'd on other grounds*, 390 U.S. 570 (1968); *cf.* Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966), *aff'd*, 381 F.2d 636 (4th Cir. 1967). *But see* McDowell v. United States, 274 F. Supp. 426 (E.D. Tenn. 1967); Laboy v. New Jersey, 266 F. Supp. 581 (D.C.N.J. 1967); Robinson v. United States, 264 F. Supp. 146 (W.D. Ky. 1967).
13. 390 U.S. 570 (1968). For discussions of *Jackson*, see 35 BROOKLYN L. REV. 122 (1968); 82 HARV. L. REV. 156 (1968); 22 SW. L.J. 544 (1968).
14. 18 U.S.C. § 1201 (1964). Subsection (a) provides:
> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

15. This right, however, is not absolute. FED. R. CRIM. P. 11 provides that the court "may refuse to accept a plea of guilty . . . ." For an interpretation of this rule, see Lynch v. Overholser, 369 U.S. 705, 719 (1962).
16. FED. R. CRIM. P. 23(a) provides: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

(3) *Plead not guilty and assert his right to a jury trial* — in which event he could be acquitted by the jury, or if found guilty, face either imprisonment for a term of years or life, or death if the jury so recommended.[17]

Since a defendant could avoid imposition of the death penalty by choosing either of the first two alternatives, Mr. Justice Stewart, writing for the majority, framed the issue as whether the Constitution permitted the establishment of a death penalty "applicable only to those defendants who assert the right to contest their guilt before a jury."[18] The "inevitable effect" of such a procedure, the Court held, was "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."[19]

Although the Court admitted that the procedure in the Kidnaping Act operated to ameliorate the severity of punishment[20] and that such a congressional objective was valid, this could not be accomplished by means that "needlessly" chilled the exercise of fundamental rights.[21] Since there are other alternatives to obviate the burden on constitutional rights, such as the practice in the State of Washington to allow the issue of punishment to be decided by the jury in *every* capital case regardless of how guilt had been determined,[22] the Court reasoned that the effect of the federal procedure was "unnecessary and therefore excessive," and constituted a penalty for the assertion of constitutional rights.[23] The "primary evil" of the Act, the Court concluded, was not that it necessarily "coerce[d]" guilty pleas and jury waivers, but simply that it "needlessly *encourage*[*d*]" them.[24]

Once it determined that the federal procedure was unconstitutional, the Court then faced the problem of what course of action to take to eliminate the constitutional defect. The district court quashed defendant's conviction in deciding that the constitutional defect rendered the entire Act invalid.[25] The Supreme Court reversed, however, finding that since the capital punishment provision of the Act had been added by Congress as an afterthought,[26] it was severable without frustrating the primary congressional purpose of punishing interstate kidnapers. The defendant's conviction was therefore upheld, but his sentence was reduced to life imprisonment.

In the instant case the New Jersey supreme court considered the question of whether the holding of *Jackson* prohibited the death penalty

17. *See* note 14 *supra.*
18. 390 U.S. at 581.
19. *Id.*
20. United States v. Curry, 358 F.2d 904, 913–14 (2d Cir. 1965).
21. 390 U.S. at 582.
22. WASH. REV. CODE §§ 9.48.030, 10.49.010 (1961).
23. 390 U.S. at 582–83.
24. *Id.* at 583.
25. United States v. Jackson, 262 F. Supp. 716 (D.C. Conn. 1967), *rev'd on other grounds,* 390 U.S. 570 (1968). For comment on the lower court opinion, see 22 RUTGERS L. REV. 167 (1967).
26. The original Federal Kidnaping Act, 47 Stat. 271 (1932), contained no capital punishment provision. The Act was amended in 1934, 48 Stat. 301, to provide for imposition of the death penalty and to employ substantially the same language as presently appears in 18 U.S.C. § 1201(a) (1964).

procedure of the New Jersey homicide statute. Under the statute, a murder defendant faced two alternatives:

(1) *Plead not guilty* — which would automatically result in a jury trial, at which he could be acquitted, be found guilty of a lesser offense, or be convicted of first degree murder and face the death penalty unless the jury recommended leniency;[27]

(2) *Plead non vult* — and if the plea were accepted by the court, expose himself to a maximum sentence of life imprisonment.[28]

Although it appeared that the court confronted a *Jackson*-type procedure, Chief Justice Weintraub, writing for the majority, characterized *Jackson* as a situation where a defendant subjected himself to the risk of death if tried by a jury, but no more than life imprisonment if tried by a judge. Hence a federal defendant who pleaded not guilty could be subject to the death penalty only if he insisted on a jury trial. The New Jersey procedure, on the other hand, foreclosed the possibility of a homicide defendant being tried before a judge because a court rule required all not guilty pleas to be tried before a jury.[29] Therefore, Chief Justice Weintraub concluded that in New Jersey "there is no pressure *on one who stands trial* to forego his right to a jury."[30]

Having distinguished the sixth amendment challenge, the court then *separately* decided whether New Jersey's provision for a non vult plea unconstitutionally induced the waiver of the fifth amendment right against self-incrimination. Two lines of reasoning were utilized in holding that it did not. The first was that the state procedure was distinguishable from the federal procedure at issue in *Jackson*. The court decided that the fifth amendment distinction rested on the federal defendant's " 'right', in a realistic sense, to plead guilty,"[31] while a New Jersey defendant had no such right under the statute.[32] Nor did the state defendant have a right

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27. *See* note 3 *supra*.

28. *See* note 2 *supra*.

29. N.J. REV. RULE 3:7-1(a) provides, *inter alia*, that "in murder cases a jury may not be waived."

30. 52 N.J. at 270, 245 A.2d at 184 (emphasis added). The court attempted to clarify this distinction by setting out the following hypothetical:

> [I]f a statute provided that the death penalty may be imposed when guilt is found either by judge or by jury, but that life imprisonment is the maximum penalty upon a plea of guilty, it could not be said *the right to jury trial* is burdened. Such a statute would no more burden that right than it would burden any other Sixth Amendment right relating to the mode or manner of a trial of a contested issue . . . . Rather it is the right *to defend* which the hypothetical statute would involve, and that would bring into view the Fifth Amendment privilege against compulsory self-incrimination rather than the Sixth Amendment jury right.

Id. at 271–72, 245 A.2d at 185.

31. 52 N.J. at 279, 245 A.2d at 189. The New Jersey court recognized, however, that the federal defendant's right was not absolute because the trial judge could refuse to accept it, but felt that the plea would not be refused if the defendant was competent and his guilty plea was consonant with the facts. The court read *Jackson* as indicating that the federal trial court could not have refused the plea because it thought that capital punishment might be warranted. *Id.* at 279 n.8, 245 A.2d at 189–90 n.8.

32. The New Jersey statute distinguishes guilty pleas and pleas of non vult, although they are, in practical effect, equivalent. N.J. REV. STAT. § 2A:113-3 (1953). *See* note 2 *supra*.

to plead non vult, since the acceptance of the plea is within the discretion of the trial judge.[33]

Secondly, non vult pleas were characterized by the court as not "needless" in light of the standards established by *Jackson*. In considering those standards, Chief Justice Weintraub emphasized the Supreme Court's use of the words "needless" and "unnecessary" to illustrate a fundamental difference between the fifth and sixth amendment problems:

> As to the Sixth Amendment right of jury trial, the burden of the federal statute could only be "needless," for it can serve no legitimate end to make the penalty turn on whether the accused defended before a jury or before a judge alone. But when the focus is upon the Fifth Amendment, *i.e.*, the impact upon the *right to defend*, other values come into play and may demonstrate that the incidental impact upon that right is not "needless" or "unnecessary" or "excessive."[34]

An examination of the legislative history of the New Jersey statute showed that the only alternative available to the court would be to eliminate the subsequently enacted non vult procedure and therefore require that all defendants submit to a trial by jury. Since the Supreme Court in *Jackson* had stated that such a requirement would be "cruel" and would "rob the criminal process of much of its flexibility,"[35] the *Forcella* majority concluded that the non vult plea was not "needless" because

> our statute was not designed to coerce non vult pleas; it was intended to operate . . . to the benefit of defendants as a group. The purpose is humane, and so is its overall impact. The alternative would be "cruel" . . . for it would require *all* defendants to undergo a trial and to do so at the risk of life.[36]

As a further ground for upholding the non vult procedure, the majority noted that there is "respectable support" for plea bargaining[37] and that

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33. 52 N.J. at 279–80, 245 A.2d at 190. *See* State v. Belton, 48 N.J. 432, 226 A.2d 425 (1967); State v. Sullivan, 43 N.J. 209, 203 A.2d 177 (1964), *cert. denied*, 382 U.S. 990 (1966). *See also In re* Waiver of Death Penalty, 45 N.J. 501, 213 A.2d 20 (1965), where the court held that the prosecutor has the discretion not to seek the death penalty, and if he so decides and the court approves, the death penalty cannot be returned by the jury.

34. 52 N.J. at 274, 245 A.2d at 186.

35. 390 U.S. at 584.

36. 52 N.J. at 280, 245 A.2d at 190.

37. *See* Barber v. Gladden, 220 F. Supp. 308, 314 (D. Ore. 1963), *aff'd*, 327 F.2d 101 (9th Cir. 1963), *cert. denied*, 377 U.S. 971 (1964); State v. Taylor, 40 N.J. 440, 455, 231 A.2d 212, 221 (1967); Commonwealth v. Maroney, 423 Pa. 337, 345–50, 223 A.2d 699, 703–06 (1966); TASK FORCE REPORT: THE COURTS 9–11 (The President's Commission on Law Enforcement and Administration of Justice, 1967); STANDARDS RELATING TO PLEAS OF GUILTY §§ 3.1–3.4 (A.B.A. Project on Minimum Standards for Criminal Justice, Tent. Draft 1967); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 432 (1960); Newman, *Pleading Guilty for Consideration: A Study of Bargained Justice*, 46 J. CRIM. L., C. & P.S. 780 (1956); Polstein, *How To "Settle" A Criminal Case*, 8 PRAC. LAW. 35, 37 (1962); Note, *Guilty Plea Bargaining: Compromise By Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 881, 899 (1965). *But see* Folberg, *The "Bargained For" Guilty Plea — An Evaluation*, 4 CRIM. L. BULL. 201, 210–11 (1968).

sentencing judges give great weight to guilty pleas because one who confesses is considered a better prospect for rehabilitation.[38]

By deciding as it did, then, the New Jersey supreme court not only upheld the non vult procedure but also preserved the death penalty provision of the homicide statute. The majority recognized, however, that their reading of the *Jackson* decision might be incorrect, and therefore felt constrained to emphasize that if *Jackson* should be held to apply, all New Jersey defendants to murder indictments would be forced to go to trial and face the possibility of the jury returning a verdict of guilty without a recommendation of life imprisonment.[39] Moreover, the court added, the sequence of events and enactments that led to the present statutes dictates this result, for nowhere in the legislative history[40] of either the murder statute or the non vult provision is there anything to indicate an intent on the part of the legislature that "the death penalty should fall if the introduction of the non vult plea created a constitutional impasse."[41]

Justices Jacobs and Hall in dissent found that the New Jersey procedure, in operative effect, places an even greater burden on a defendant's constitutional rights than the federal procedure. They noted that a New Jersey defendant can avoid the death penalty only by tendering a plea of non vult and that such a plea results in a waiver of *both* the right against self-incrimination and the right to trial by jury. In contrast, under the federal procedure a defendant could avoid the death penalty without forfeiting the right against self-incrimination by simply choosing to defend before a judge.[42]

An analysis of the Supreme Court's decision in *Jackson* and that of the New Jersey court in *Forcella* raises a number of points of divergence. First, the two courts seemed to approach the problem differently. Mr. Justice Stewart clearly defined the issue in *Jackson* to be whether it is constitutionally permissible to establish a capital punishment provision "applicable only to those defendants who assert the right to contest their guilt before a jury."[43] The *Forcella* court, on the other hand, concentrated primarily on distinguishing the federal and the state procedures, and as a result never reached the issue as it was framed by the Supreme Court. Had the New Jersey court done so, it would have been apparent that the two procedures are constitutionally indistinguishable. The death penalty provisions of the New Jersey homicide statute apply only to those defendants convicted of murder before a jury. This is the exact procedure

38. State v. Ivan, 33 N.J. 197, 203, 162 A.2d 851, 854 (1960). *See* Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

39. 52 N.J. at 280–81, 245 A.2d at 190–92.

40. *See* State v. Sullivan, 43 N.J. 209, 241–47, 203 A.2d 177, 194–97 (1964), *cert. denied*, 382 U.S. 990 (1966).

41. 52 N.J. at 283, 245 A.2d at 191.

42. *Id.* at 298, 245 A.2d at 199.

43. 390 U.S. at 581.

that the *Jackson* Court found constitutionally defective. The "inevitable effect" of such a procedure, *Jackson* declared, was "to discourage assertion" of the right against self-incrimination *and* "to deter exercise" of the right to trial by jury.[44] Since the federal and the state procedures are indistinguishable, the "inevitable *effect*" of the New Jersey scheme must therefore be the same.

Moreover, since the *Jackson* Court defined the issue and framed its holding in terms of *both* fifth and sixth amendment rights, it is apparent that the *Forcella* court's treatment of the effect of the New Jersey procedure on each right *separately* was improper. As a result of this separate treatment, the New Jersey court's distinctions become illusory. The sixth amendment distinction is premised on a court rule barring jury waivers in all murder cases.[45] It is true, as the *Forcella* court argues, that a New Jersey defendant has no option to defend the issue of guilt before a judge as did a defendant tried under the Federal Kidnaping Act. However, this fact does not eliminate the sixth amendment issue, because when a defendant's plea of non vult is accepted *both* his right against self-incrimination and his right to a jury trial are necessarily waived. The dissent in *Forcella* appears to have reached the heart of the matter by pointing out that a New Jersey defendant's plight is even more desperate than was the federal defendant's — for the latter at least had the option of avoiding the threat of death without incriminating himself.[46] No such middle ground is available in New Jersey; the price of avoiding death is the waiver of *all* rights, including the right to a jury trial.

The *Forcella* court's fifth amendment distinctions fail to recognize the operative effect of a non vult plea as equivalent to that of a guilty plea and for this reason are also in direct conflict with the rationale of the *Jackson* Court. Chief Justice Weintraub also emphasized that acceptance or rejection of a non vult plea does not improperly induce waiver of fifth amendment rights since such is entirely within the discretion of the trial judge. The possibility that some pleas may be rejected, however, does not curtail the primary evil of the non vult procedure — the needless encouragement of guilty pleas and jury waivers.[47] Additionally, the fact that the New Jersey statute was designed to benefit defendants rather than to coerce non vult pleas should not be accorded special significance in the realm of constitutionally guaranteed rights. Concededly, a legislative objective to benefit defendants is laudatory, but *Jackson* held that such benefits cannot be offered by means that needlessly chill the assertion of fundamental rights.[48]

Ultimately, the conclusion of the *Forcella* majority was that the New Jersey procedure was not "needless" according to its understanding of the standards enunciated in *Jackson*. Chief Justice Weintraub felt that the only *judicial* course of action open to the New Jersey supreme court under

44. *Id.*
45. N.J. REV. RULE 3:7-1(a). *See* note 29 *supra.*
46. 52 N.J. at 298, 245 A.2d at 199.
47. 390 U.S. at 583.
48. *Id.* at 582.

the legislative history of its homicide statute was to require all defendants to undergo trial at the risk of their lives. Since the *Jackson* Court had characterized such a remedy as "cruel" and one that robs the criminal process of needed flexibility,[49] Justice Weintraub concluded that the non vult procedure could not be considered constitutionally "needless" or "unnecessary" or "excessive."[50] This reasoning, however, does not comport with a proper analysis of *Jackson.* In order to establish a standard to determine whether the federal procedure was needless, the *Jackson* Court looked to other *statutory* alternatives available, and cited with favor a procedure which allows the issue of punishment to be decided by a jury in every capital case, regardless of how guilt had been determined.[51] Since this other constitutionally acceptable procedure existed, Mr. Justice Stewart concluded that the federal scheme was needless. The *Forcella* majority, on the other hand, did not look to other *statutory* alternatives as the criterion for judging the threshold constitutional question of needlessness, but looked only to the language in *Jackson* which pertained to the "cruelty" of a given *judicial* remedy. Since none was available other than requiring every defendant to stand trial, the court considered its procedure to be constitutional. In effect, the New Jersey court incorrectly reasoned that because there was only a cruel judicial remedy available, there was no impermissible burden on constitutional rights. There is no doubt that Chief Justice Weintraub faced a dilemma — either to contravene legislative intent by striking the death penalty from the homicide statute or uphold an unconstitutional procedure. The former should have been chosen because, as the dissent pointed out,[52] such a result would be in line with the growing public disapproval of capital punishment[53] and recent Supreme Court decisions.[54] Furthermore, the elimination of the death penalty would have the collateral effect of compelling the legislature to restudy the New Jersey homicide procedure with an eye towards

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49. *Id.* at 584.

50. 52 N.J. at 274, 245 A.2d at 190.

51. WASH. REV. CODE §§ 9.48.030, 10.49.010 (1956).

52. 52 N.J. at 300–01, 245 A.2d at 201.

53. In 1960, approximately 51 percent of the American public favored capital punishment, while 36 percent opposed it and 13 percent were undecided. By 1966, the trend had reversed, with only 42 percent in favor of capital punishment, and 47 percent opposed, the remaining 11 percent being undecided. Witherspoon v. Illinois, 391 U.S. 510, 520, n.16 (1968). *See generally* Balogh & Green, *Capital Punishment: Some Reflections,* 30 FED. PROBATION 24 (1966); Sellin, *Capital Punishment,* 8 CRIM. L.Q. 36 (1965).

54. *See, e.g.,* Witherspoon v. Illinois, 391 U.S. 510 (1968), *noted in* 37 FORDHAM L. REV. 129 (1968), 82 HARV. L. REV. 162 (1968), 14 N.Y.L.F. 373 (1968), 21 VAND. L. REV. 864 (1968), 14 VILL. L. REV. 125 (1968), *and* 3 U. SAN FRAN. L. REV. 864 (1968), where the Supreme Court declared invalid an Illinois statute which provided for the exclusion in murder trials of any juror who stated that he had conscientious scruples against capital punishment or was opposed to it; Pope v. United States, 392 U.S. 651 (1968), where in a per curiam opinion, the Court struck down the death penalty clause of the Federal Bank Robbery Act, 18 U.S.C. § 2113 (1964), for the same reasons expressed in *Jackson* but without reference to the severability of the capital punishment clause.

more modern policies and procedures.[55] This effect would also be consonant with the ultimate aim implicit in *Jackson, i.e.,* that the final cure must come from the legislature.

In conclusion, it is submitted that the New Jersey supreme court improperly applied *United States v. Jackson* and consequently upheld a constitutionally defective procedure. The net result of the *Forcella* decision is that it leaves the constitutionality of the New Jersey non vult plea in doubt. The New Jersey supreme court was presented with the opportunity to apply the Supreme Court's decision in *Jackson* as it was meant to be applied.[56] In this respect they failed, and, as the dissent noted:

> [A] most unfortunate aspect of the majority opinion, which disserves the public greatly, is that it reaches out to sanction completely the *status quo* thereby jeopardizing impending murder proceedings and lending itself to legislative inaction in a field which cries out for early action.[57]

Warren W. Faulk

CONSTITUTIONAL LAW — EQUAL PROTECTION — PRISON ADMINISTRATION — STATE PRISON INMATE'S CLAIM OF WRONGFUL DENIAL OF PAROLE HEARING STATES A VALID CAUSE OF ACTION IN A FEDERAL DISTRICT COURT UNDER THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

United States ex rel. Campbell v. Pate (7th Cir. 1968)

Appellant Campbell, an inmate in an Illinois state penitentiary, sued for declaratory and injunctive relief under the Civil Rights Act of 1871[1]

55. 52 N.J. at 301, 245 A.2d at 201.

56. Recently, three other state supreme courts have considered the application of *United States v. Jackson* to their respective capital punishment practices. North Carolina, in State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968), found that its statutes were distinguishable from the federal scheme on grounds similar to those expressed in *Forcella,* and therefore upheld the procedures involved. In State v. Harper, ... S.C. ....., 162 S.E.2d 712 (1968), the Supreme Court of South Carolina held that its capital punishment provisions, which were identical to those at issue in *Peele,* were condemned by the *Jackson* holding and therefore ruled that in the future the choice between imprisonment and the death penalty must be left to the jury in every case, regardless of how guilt had been determined. *Id.* at ....., 162 S.E.2d at 715. The third decision, by the Mississippi supreme court in King v. Cook, 211 So. 2d 517 (Miss. 1968), although deciding that the *Jackson* rule should not be applied retrospectively, noted that the case law of Mississippi provides a procedure whereby the issue of punishment can be submitted to the jury even where the defendant pleads guilty. *See* Yates v. State, 253 Miss. 424, 175 So. 2d 617, *cert. denied,* 382 U.S. 931 (1965); Yates v. State, 251 Miss. 376, 169 So. 2d 792 (1964); Dickerson v. State, 202 Miss. 804, 32 So. 2d 881 (1947).

57. 52 N.J. at 301, 245 A.2d at 201.

1. 42 U.S.C. § 1983 (1964) provides:

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

seeking to have his proposed hearing before the parole board reinstated. The appellant claimed that the hearing was unfairly postponed after prison guards allegedly found in appellant's cell five medicine bottles which prison authorities claimed, without analyzing the bottles' contents, contained an illegal compound. Campbell insisted the bottles contained a soft drink powder, Tang, available to prisoners. He argued that the warden's assumption that the powder was an illegal compound was unfounded and therefore the postponement of the hearing, and thus the opportunity for parole, constituted cruel and unusual punishment in violation of the eighth amendment.[2]

The district court dismissed the action for failure to state a claim upon which relief could be granted. On appeal, the United States Court of Appeals for the Seventh Circuit reversed, *holding* that when the state penal system has adopted a rule which has the effect of denying or postponing a parole hearing as punishment for an offense, that rule cannot be so capriciously or unreliably applied without violating the appellant's right to equal protection of the law.[3] *United States ex rel. Campbell v. Pate,* 401 F.2d 55 (7th Cir. 1968).

Both state and federal courts have been reluctant to interfere with either the administration of state penitentiaries or the treatment of inmates.[4] The rationale traditionally espoused by state courts to support this policy was that the convicted criminal not only forfeited his liberty but also his personal rights, *i.e.,* by incarceration an inmate became a "slave" of the state.[5] As late as 1950, the majority of federal courts maintained the general position that it was not their function to supervise the treatment and discipline of prisoners[6] and that the regulation of state prisons was a state administrative function not reviewable by the federal courts.[7] Intervention was strictly limited to review of complaints of illegal imprisonment under writs of habeas corpus.[8]

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2. Brief for Appellant at 12, United States *ex rel.* Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968).

3. U.S. CONST. amend. XIV, § 1.

4. *See* Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985 (1962).

5. People v. Russell, 245 Ill. 268, 91 N.E. 1075 (1910); Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

6. *E.g.,* Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957) (denial of access to legal books); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied,* 349 U.S. 940 (1955) (denial of correspondence with court); United States *ex rel.* Wagner v. Ragen, 213 F.2d 294 (7th Cir.), *cert. denied,* 348 U.S. 846 (1954) (denial of use of the mails); United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953) (claim of racial discrimination); Nichols v. McGee, 169 F. Supp. 721 (N.D. Cal.), *appeal dismissed,* 361 U.S. 6 (1959) (claim of racial discrimination).

7. This view is supported by the Federal Prisons and Prisoners Act, 18 U.S.C. § 4001 (1964), which withdraws federal prison administration from the courts and places it within the authority of the Attorney General. *See* Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966).

8. Stroud v. Swope, 187 F.2d 850, 851 (9th Cir. 1951); Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944); Platek v. Adherhold, 73 F.2d 173 (5th Cir. 1934). Article I, section 9 of the Constitution specifically guarantees the availability of habeas corpus in times of peace.

As early as 1944, at least one federal court had adopted a more liberal view with respect to intervention. In *Coffin v. Reichard,*[9] the sixth circuit took specific issue with the prevailing state court rationale that prisoners surrendered their rights as well as their liberty[10] when it stated that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[11] More recently, other federal courts have indicated a willingness to inquire into the internal affairs of state penitentiaries where, under exceptional circumstances, constitutional guarantees were alleged to have been violated.[12] It should be noted that due to procedural limitations imposed by the Supreme Court on habeas corpus proceedings,[13] actions by inmates concerning their treatment and the administration of state prisons are presently brought under the Civil Rights Act of 1871.[14] However, increased federal intervention appears to be based more on a change in judicial attitude and philosophy rather than on a change in procedure.[15]

The adoption of a more liberal position by federal courts raises the threshold problem of the extent to which federal courts should intervene into the administration of state penitentiaries and treatment of prisoners. As one court has stated, a middle ground must be found between leaving inmates to the mercy of state prison officials and the complete judicial operation of prisons.[16]

The Civil Rights Act of 1871 under which inmate Campbell brought his action[17] protects the constitutional rights of individuals from persons acting under color of state sovereign authority,[18] and it has generally been

9. 143 F.2d 443 (6th Cir. 1944).

10. *See* cases cited note 5 *supra.*

11. 143 F.2d at 445.

12. *See, e.g.,* Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964); Knight v. Ragen, 337 F.2d 425 (7th Cir. 1964); Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957).

13. In Johnson v. Dye, 338 U.S. 864, *rev'g* 175 F.2d 250 (3d Cir. 1949), the Supreme Court held that an inmate must exhaust state remedies before bringing an action under a writ of habeas corpus.

14. 42 U.S.C. § 1983 (1964), *quoted in* note 1 *supra.*

15. *See* Comment, *Prisoner's Remedies For Mistreatment,* 59 YALE L.J. 800, 808 (1950).

16. United States *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953).

17. District courts have original jurisdiction under 28 U.S.C. § 1343 which provides in part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

Also, there is no need to exhaust state remedies before bringing the action in district court. *E.g.,* Monroe v. Pape, 365 U.S. 167, 183 (1960); York v. Story, 324 F.2d 450, 452 (9th Cir. 1963); Talley v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1965).

18. 42 U.S.C. § 1983 (1964), *quoted in* note 1 *supra.*

held that the broad jurisdiction of the Civil Rights Act encompasses the protection of state prison inmates.[19] The problem confronting the court in *Campbell* was to determine what constitutional rights are protected under the Civil Rights Act and what action adversely affecting those rights is therefore reviewable by federal courts. More specifically, the issue was whether the 11-month delay of the parole hearing, because the prison warden had determined without any scientific proof or analysis that the appellant possessed an illegal compound, deprived the appellant of any right, privilege, or immunity guaranteed by the Civil Rights Act. Such a determination is difficult because the areas and degrees of intervention by federal courts have varied greatly in these cases.[20] One federal court frankly admitted that it was unable to discover any common thread running through the cases in which federal courts had thus far intervened.[21] However, it would appear that where there is a *specific* constitutional prohibition against certain action, such as the first or eighth amendment, federal courts have been more inclined to find a cause of action under the Civil Rights Act than if reliance is placed on a *general* constitutional protection such as equal protection or due process. Therefore, claims of extreme and unwarranted denial of religious freedoms have usually been heard by federal courts.[22] The federal judiciary has also been willing to examine and intervene where the complaint alleges a violation of the eighth amendment's proscription of cruel and unusual punishment[23] as well as to guarantee inmates the right to competent medical care and facilities.[24] In addition, most courts have agreed that the inmates' access to state and federal courts should be vigorously protected.[25] Surprisingly, federal courts have not as yet accorded the right to be free from racial segregation the same protection as religion, access to courts, or freedom from cruel and unusual punishment.[26]

Petitioner Campbell, obviously cognizant of the areas into which the federal courts had intervened, alleged a violation of the eighth amendment.

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19. *E.g.,* Cooper v. Pate, 378 U.S. 546 (1964); Brown v. Brown, 368 F.2d 992 (9th Cir. 1966); Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963); United States *ex rel.* Diamond v. Social Serv. Dep't, 263 F. Supp. 971 (E.D. Pa. 1967). *But see* United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965).

20. For a thorough study of prisoner's rights up to this time, see Comment, *The Rights of Prisoners While Incarcerated,* 15 BUFFALO L. REV. 397 (1965).

21. Pierce v. La Vallee, 293 F.2d 233, 235 (2d Cir. 1961).

22. *E.g.,* Cooper v. Pate, 378 U.S. 546 (1964); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961). The primary difficulty is in regard to protecting the religious rights of minor sects, especially the militant Black Muslims. *Compare* Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied,* 376 U.S. 932 (1964) *with* Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

23. *E.g.,* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); *see* Gordon v. Garrson, 77 F. Supp. 477 (E.D. Ill. 1948).

24. *E.g.,* Elsberry v. Haynes, 256 F. Supp. 738 (W.D. Okla. 1966); McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955).

25. *E.g.,* Jenks v. Henys, 378 F.2d 334 (9th Cir. 1967); Kirby v. Thomas, 336 F.2d 462 (6th Cir. 1964).

26. *E.g.,* United States v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953); Nichols v. McGee, 169 F. Supp. 721 (N.D. Cal.), *appeal dismissed,* 361 U.S. 6 (1959). *But see* Bolden v. Pegelow, 329 F.2d 95 (4th Cir. 1964).

However, the seventh circuit rejected the claim that the warden's decision to postpone Campbell's hearing for parole amounted to cruel and unusual punishment or a violation of any other of the inmate's constitutional rights which federal courts had thus far protected, but rather held that the inmate's right to equal protection of the law had been violated. The court reasoned that the warden's decision, which had the effect of postponing the parole hearing, was too capriciously or unreliably determined, *i.e.*, lacked a rational basis.[27]

The *Campbell* decision is significant in that it appears to be the first time under the Civil Rights Act that a federal court has actually guaranteed state prison inmates equal protection of the law,[28] as well as the first time that intervention has reached, at least to a limited degree, into the internal decision-making process of a state prison official.[29] Previously, federal courts had never intervened into the actual administrative process of a prison but had limited their intervention to instances where the treatment of prisoners was involved.[30] By holding that an inmate has a right to equal protection of the law, the court in *Campbell* has taken an important step toward further protecting the constitutional rights of state prisoners which have not been necessarily taken away by their confinement.

The court, however, limited this forward step by refusing to base its decision on due process.[31] The adoption of equal protection and the specific rejection of due process enabled the court to make a subtle but far-reaching distinction between these closely related concepts. The seventh circuit appears to have reasoned that since the State of Illinois had a rational system of classification to determine when a prisoner was eligible for his parole hearing[32] and since all prisoners were classified according to that system, to so capriciously and arbitrarily reclassify the petitioner would be to deny him equal protection of the law. Thus, it was the petitioner's right to be reasonably classified, as were the other prisoners, that

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27. The court in a brief, but unanimous decision stated: "We think that the relevant facts which trigger the operation of the rule must not be so capriciously or unreliably determined that, in effect, the inmate is deprived of equal protection of the laws." United States *ex rel.* Campbell v. Pate, 401 F.2d 55, 57 (7th Cir. 1968).

28. Although a federal district court in Arkansas based its decision primarily on a violation of cruel and unusual punishment by state prison authorities, the court said:

> Although persons convicted of crimes lose many of the rights and privileges of law abiding citizens, it is established by now that they do not lose all of their civil rights, and that the Due Process and Equal Protection Clauses of the 14th Amendment follow them into the prison and protect them there from unconstitutional administrative action on the part of prison authorities carried out under color of State law, custom, or usage.

Talley v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1965).

29. In Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967), the court intervened into the internal decision-making process of state prison officials but only because the inmate's privilege to the writ of habeas corpus had been violated by the internal administrative procedure of the state prison. The action was not brought under the Civil Rights Act and did not involve the question of whether the internal administration of a state prison must conform to federal standards of equal protection.

30. *See* cases cited in notes 22, 23, 24, and 25 *supra.*

31. 401 F.2d at 57.

32. For a description of the classification system, see People v. Kinney, 30 Ill. 2d 201, 195 N.E.2d 651 (1964).

the court seems to indicate was being denied by the warden's actions. However, the court's brief and cryptic discussion of its use of the equal protection doctrine necessarily raises some doubt as to whether this is the exact basis for its adoption of this concept.

There are two possible explanations why the court in *Campbell* was careful to exclude due process as a possible ground for its decision. First, the use of the equal protection theory obviates the necessity of federal court interference with the internal decision-making process of state prison officials beyond guaranteeing that the administrators reach any decisions concerning the inmates in a uniform manner — even if the process flagrantly violates due process — thereby avoiding the danger of complete judicial operation of prisons. Secondly, the Supreme Court has defined equal protection in more concrete terms than it has the due process clause.[33] By specifically limiting its holding to an equal protection rationale, the court may have been attempting to prevent a deluge of actions concerning the internal administration of state prisons which could be brought by prisoners under the more vague concept of due process. Additionally, it would appear that the court was concerned with the practical ramifications of holding due process applicable to prisons for fear that its opinion would be read as a stepping-stone toward allowing all the specific guarantees which due process encompasses in other situations,[34] to be applied to the prison situation.

However, the acknowledgment that prisoners have a right to equal protection of the law while not according them the rights of due process raises several problems. The Supreme Court has indicated that since both the due process and equal protection clauses stem from the ideal of fairness, they are not completely separable or mutually exclusive.[35] If courts grant an inmate the right to equal protection of the law, it is difficult to conceive a persuasive *legal* rationale for not likewise granting due process. Once due process is granted, however, the further problem arises as to how the courts will translate this concept into the prison. Although it is arguable that all the specific guarantees applicable in other situations will now be extended to include the inmate, it is unlikely that the courts are ready to take such a far-reaching step but rather will attempt to define due process as it relates to the unique situation of prison administration. For

33. *E.g.*, Reynolds v. Sims, 377 U.S. 533, *rehearing denied*, 379 U.S. 870 (1964); Shelley v. Kramer, 334 U.S. 1 (1948); Missouri v. Lewis, 101 U.S. 22 (1879); Avins, *The Equal "Protection" Of The Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964).

34. Some of the specific guarantees which due process has been held to encompass in other situations include: Pointer v. Texas, 380 U.S. 400 (1964) (right of accused to confront witnesses in federal and state "proceedings"); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in criminal prosecution); Irvin v. Dowd, 366 U.S. 717 (1961) (right of criminally accused to fair hearing); Cole v. Arkansas, 333 U.S. 196 (1947) (right of accused to notice and to defend in criminal proceedings); Twining v. New Jersey, 211 U.S. 78 (1908) (right of notice and opportunity to be heard in criminal and civil trials).

35. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

example, the courts may well be satisfied that due process has been met if they are convinced that decisions which affect prisoners are made on a rational basis. In the instant case this could have been satisfied if the warden had been able to submit to the court an affidavit that the compound was in fact an illegal one. Moreover, the courts could further limit due process by defining it to apply to only those situations where the inmates are adversely affected to a *substantial* degree by prison officials. Not every administrative decision affecting the inmates need be consonant with due process of law.

From the complaint in the instant case, it appears that the warden's decision to reduce the petitioner's classification, which substantially and adversely affected his status, was not made on a rational basis and hence petitioner's rights, whether couched in terms of equal protection or due process, were violated. Since the purpose of our prison system is to rehabilitate and return these inmates to society, the federal courts should not be reluctant to protect more completely the constitutional rights of state prison inmates and to subject the internal decision-making process of prison officials to the federal standards of both equal protection and due process.[36] In *Campbell,* the seventh circuit has taken a very important, if limited, step toward providing this protection.

Carl D. Buchholz III

TAXATION — MULTIPLE ACCUMULATIVE TRUSTS — CREATION OF 20 SIMILAR TRUSTS FROM SAME GRANTORS TO SAME BENEFICIARIES FOR THE PRINCIPAL PURPOSE OF TAX AVOIDANCE HELD VALID UNDER SECTION 641 OF THE INTERNAL REVENUE CODE.

Estelle Morris Trusts (T.C. 1968)

In 1953 the grantors executed 10 irrevocable[1] declarations of trust which directed the trustee, subject to certain discretionary provisions,[2] to accumulate[3] the income from the trust for the life of each of two primary beneficiaries and to distribute the principal and accumulated income upon

36. Comment, *supra* note 20.

1. If the grantor has the power to revoke a trust, the income earned from the trust will be taxed to the grantor, whether or not he exercises his option to revoke. INT. REV. CODE of 1954, § 676(a).

2. The declarations of trust included an emergency clause which gave the trustee the power to distribute income and principal to either beneficiary upon a showing that he was unable to maintain his accustomed standard of living.

3. If the income earned from a trust is currently distributed (simple trust), rather than accumulated for a certain period of years (complex trust), the beneficiary will be taxed on the current income whether or not the income is actually distributed. INT. REV. CODE of 1954, § 652(a).

their deaths to other trusts to be created for their surviving issue.[4] The 10 declarations were similar in form except for differing periods of income accumulation and distribution, and differing termination dates. Although the trust property under each declaration was pooled for administrative convenience, each trust declaration was administered separately and acquired separate investments.[5]

In 1966, the Commissioner of Internal Revenue assessed deficiencies against the trusts for the years 1961 through 1965, alleging that only one, or at most two, trusts were created by the 10 instruments, and that the attempted creation of 20 trusts and the filing of 20 separate income tax returns each year was done primarily for tax avoidance purposes. Petitioner trustee challenged the deficiencies, claiming that 20 separate trusts were created by the 10 instruments, and that the primary purpose for creating the trusts was not tax avoidance. It was further argued that even if the primary purpose was tax avoidance, the trusts could nonetheless be taxed as separate legal entities absent a Code provision prohibiting separate taxation of multiple trusts.

The Tax Court found for the petitioner, *holding* that (1) each trust declaration created two separate trusts; (2) the grantors created 20 rather than two trusts principally for tax avoidance reasons; and (3) even though tax avoidance motive was present, each of the 20 trusts qualified as a separate taxable entity under section 641(a) of the Internal Revenue Code.[6] *Estelle Morris Trusts,* 51 T.C. No. 4 (Oct. 9, 1968).

Initially, under the Revenue Act of 1916,[7] Congress declared that income from trusts if accumulated rather than currently distributed to the beneficiary would be taxable to the trust as a separate legal entity in like manner as the income tax on individuals. Since a trust is taxed as a separate entity, it is highly advantageous to divide income-producing property and place it into several trusts. By this method of "bracket-splitting," each trust pays taxes at lower rates applicable to its proportionate share of the split income rather than one trust paying the higher

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4. The trust declaration contained a clause whereby each trust would accumulate its income for at least 10 years, even if both primary beneficiaries died prior to that time. The purpose of this clause was to avoid falling within the "Clifford" rule, whereby a grantor will be taxed on current trust income if he has some reversionary interest which, as of the inception of the trust, may take effect within 10 years from the trust's formation. INT. REV. CODE of 1954, § 673.

5. The 20 Morris trusts were combined with multiple accumulative trusts similarly created by two other families, and together they purchased approximately 700 or 800 acres of property which they then subdivided and listed separately by tract for each trust estate.

6. Section 641 provides in relevant part:

> (a) APPLICATION OF TAX. — The taxes imposed by this chapter on individuals shall apply to the taxable income of estates or of any kind of property held in trust, including—
>
> (1) . . . income accumulated or held for future distribution under the terms of the will or trust . . . .

INT. REV. CODE of 1954, § 641(a)(1).

7. Revenue Act of 1916, ch. 463, § 2(h), 39 Stat. 756.

tax rate applicable to the entire income of an undivided res.[8] Thus the use of multiple trusts, particularly in a family context, has the special advantage of substantially reducing income tax liability by spreading the income among several taxable entities.

Evidence of the widespread use of multiple trusts for tax avoidance reasons was revealed in a Message from the President to Congress in 1937.[9] At that time the only action taken by Congress was to lower the trust exemption, similar to an individual's personal exemption of $600,[10] from $1000 to $100.[11] Subsequently, the drafters of the Internal Revenue Code of 1954 incorporated the "5-year throwback" rule[12] which restricted the manipulation of income distribution to the beneficiary by providing that in any year in which the amount distributed to the beneficiary exceeds the net income for that year, the part which represents the excess over current income is "thrown back" to each of 5 preceding years in inverse order and taxed to the beneficiary as if the income had been distributed in those years.[13] While the "throwback" rule placed some restrictions on trust distributions, it had little, if any, effect on the formation of multiple trusts.[14] Finally, in 1957, a House Advisory Group proposed an amendment[15] to section 641 which essentially would have taxed as one the combined income of multiple trusts when the beneficiaries were substantially the same.[16] This amendment, however, failed to reach the Senate floor for a vote, and since that time no new congressional action has been taken to restrict the formation of multiple trusts.

In the instant case the court was faced with two issues: whether one or many trusts was created by the trust instrument and, if multiple trusts were created for tax avoidance reasons, whether such trusts should be separately taxed or taxed as one entity. Prior to the *Morris* case, courts confronted with similar multiple trust situations based their decisions solely on a determination of the number of trusts actually created without considering the effect of tax avoidance.[17] The usual rule applicable to

8. *See* Note, *Multiple Trusts and the Minimization of Federal Taxes,* 40 COLUM. L. REV. 309, 310 (1940).

9. H.R. MISC. DOC. No. 260, 75th Cong., 1st Sess. 4 (1937).

10. INT. REV. CODE of 1954, § 151.

11. INT. REV. CODE of 1954, § 642(b).

12. INT. REV. CODE of 1954, § 666.

13. Treas. Reg. § 1.666(a)-1(a) (1960).

14. Since the "throwback" rule effectively acts to discourage the trustee from accumulating income for a few years, only to distribute it in a year when the taxpayer is in a favorable low tax bracket, it has been suggested that the rule actually encourages the creation of multiple trusts. By creating enough trusts, the trustee could accumulate most of the income and pay out the accumulation to the beneficiary in a steady flow without the beneficiary being taxed on the accumulated income. *See* Friedman & Wheeler, *Effective Use of Multiple Trusts,* N.Y.U. 16TH INST. ON FED. TAX. 967 (1958).

15. H.R. 3041, 86th Cong., 1st Sess. (1959).

16. *See Hearings on Estates, Trusts, Beneficiaries, and Decedents Before House Comm. on Ways and Means,* 85th Cong., 2d Sess., pt. 3, at 2757 (1958). For a detailed analysis of this proposed legislation, see Tomlinson, *Critical Analysis of Proposed Law on Multiple Trust Taxation,* 96 TR. & EST. 1180 (1957).

17. Comment, *Taxation of Multiple Trusts,* 24 U. CHI. L. REV. 156, 161 (1956). *But see* p. 352 *infra.*

such a determination is that the number of trusts created is governed by the intent of the grantor measured by all the circumstances.[18] One criterion often used in determining intent is whether singular or plural terms were used in the trust instrument. Courts have often concluded that the use of singular terms evidences the creation of only one trust,[19] whereas the use of plural terms signifies the creation of multiple trusts.[20] Also, when the beneficiaries are different in each trust, or when the number of contested trusts are few (*e.g.*, three or four), the different criteria have generally been weighed in favor of the taxpayer.[21] When, however, the beneficiaries in each trust are the same and the number of trusts is large, some courts have applied a test of "special or close scrutiny"[22] and have refused to recognize the existence of more than one trust when any slight factor may be detrimental to the taxpayer's position.

In the instant case the Commissioner argued that the use of such terms as "this trust" and "the trust estate" in the instruments was controlling and determinative of the grantor's intent to establish only one trust.[23] The trustee, on the other hand, contended that the singular terms used in the instrument made reference only to the administration of the combined trust assets and, as such, were not unusual when viewed in the totality of the trust terms. On the basis of the general rule set forth in *United States Trust Co. v. Commissioner*,[24] the court first stated that two or more trusts may be created by one instrument in an undivided res by the same grantor for different beneficiaries.[25] Upon this premise the court reasoned that the occasional use of singular terms in the instrument is "not inconsistent with the creation of separate trusts if read in the context of the whole instrument, particularly in light of the authority

18. United States Trust Co. v. Commissioner, 296 U.S. 481 (1936); McHarg v. Fitzpatrick, 210 F.2d 792 (2d Cir. 1954); Fidelity Union Trust Co. v. Kelly, 102 F.2d 333 (3d Cir. 1939); Huntington Nat'l Bank v. Commissioner, 90 F.2d 876 (6th Cir. 1937).

19. In Marian Neal Trusts, 40 B.T.A. 1033, 1037 (1939), the Tax Court stated: "While terminology alone is not conclusive, the frequent references to a single trust require that indications of a contrary intention should be clear." *See also* McGinley v. Commissioner, 80 F.2d 692 (9th Cir. 1935); Fiduciary Trust Co. v. United States, 36 F. Supp. 653 (S.D.N.Y. 1940). *Contra,* Kohtz Family Trust, 5 T.C. 554 (1945).

20. *E.g.*, MacManus v. Commissioner, 131 F.2d 670 (6th Cir. 1942); Fidelity Union Trust Co. v. Kelly, 102 F.2d 333 (3d Cir. 1939); Union Trust Co. v. Commissioner, 84 F.2d 386 (3d Cir. 1936).

21. *See* cases cited note 20 *supra* and note 25 *infra.*

22. Boyce v. United States, 190 F. Supp. 950 (W.D. La.), *aff'd per curiam,* 296 F.2d 731 (5th Cir. 1961); Sence v. United States, 394 F.2d 842 (Ct. Cl. 1968).

23. The trust instrument, in pertinent part, reads as follows:

> (A) DESIGNATION OF PROPERTY
>
> The Trustee shall apportion *the Trust Estate* into two (2) equal shares . . . .
>
> (E) POWERS OF THE TRUSTEE
>
> [F]or the sake of convenience in acquiring, holding, and managing such shares, the Trustee shall not be required to partition any property of *this Trust* received by him . . . . [emphasis added].

Estelle Morris Trusts, 51 T.C. No. 4, at 2885-86 (Oct. 9, 1968).

24. 296 U.S. 481 (1936).

25. *See* Fiduciary Trust Co. v. United States, 36 F. Supp. 653 (S.D.N.Y. 1940); Leonard Marx, 39 B.T.A. 537 (1939). *See also* Kohtz Family Trust, 5 T.C. 554 (1945).

given the trustee to combine the assets for administrative convenience."[26] In the instant case, the meticulous administration of each trust as a separate entity was an overriding consideration in the Tax Court's application of the "close scrutiny" test. The court stated that the use of separate income and expense accounts, different termination dates, different periods of income accumulation and distribution, 10 separate checking accounts, and the filing of 20 separate income tax returns, one for each trust, could only lead to the conclusion that, even under "close scrutiny," 20 separate trusts existed.[27]

The finding of separate trusts in the *Morris* case is indicative of the inadequacy of the "close scrutiny" test and represents the first time that a court has unequivocally allowed multiple trusts to be taxed separately after having found that the primary purpose for creating the trusts was tax avoidance.[28] In so holding, the court weighed heavily the fact that Congress had been inactive in passing legislation to limit the use of multiple trusts when it had full knowledge of the existing tax loophole,[29] and on this basis construed the Code provisions literally in favor of the petitioner.[30]

Congress' failure to act, however, should not have led the court to its conclusion that the legislature had given implied approval to the use of multiple trusts as a means of tax avoidance. Other reasons for congressional inactivity are apparent. First, there are many valid non-tax reasons for creating multiple trusts and, as several authors have suggested,[31] it is for these reasons that Congress has indicated a desire not to eliminate separate taxation. It seems clear that multiple trusts are useful and perhaps necessary to serve different investment needs where the nature of the assets requires different trusts and different trustees in order to make sound business investments. Multiple trusts are also used to designate different remaindermen and to recognize different uses for the trust income — *e.g.*, one trust for living expenses and another to finance the beneficiary's education. Moreover, the legislative history of

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26. 51 T.C. No. 4, at 2897.

27. *Id.* at 2902–03.

28. *See* Brief for Respondent at 83–84, Estelle Morris Trusts, 51 T.C. No. 4 (Oct. 9, 1968). The court found that the grantor wished to subdivide and develop certain land and was aware that in so doing, the value of the property would be greatly enhanced. It was primarily for this reason that the grantor created multiple trusts to purchase the property and thus spread capital gains received from sale of the subdivided property res to many separate taxable entities. Furthermore, since the trusts were used to buy and sell other real estate, the creation of a large number of trusts, each making only a few sales, would prevent the possibility of a single trust being considered to be in the business of buying and selling real estate and therefore each trust could receive capital gains treatment from its own separate sales. (Under INT. REV. CODE of 1954, § 1221(a), real property used in the taxpayer's business is not a capital asset, and gains from the sale of such property are not accorded capital gains treatment.)

29. *See* note 16 *supra*.

30. 51 T.C. No. 4, at 2901; *cf.* Commissioner v. Brown, 380 U.S. 563, 565–66, 579 (1965); American Auto. Ass'n v. United States, 367 U.S. 687, 694–97 (1961).

31. Friedman & Wheeler, *supra* note 14; Soter, *Federal Taxation Aspects of Multiple-Accumulation Trusts*, 31 U. CINN. L. REV. 351 (1962).

the rejected proposals[32] suggests that Congress' failure to change the law was a result of its inability to reach an agreement as to what was the appropriate method of eliminating the loophole rather than an implicit approval of stockpiling trusts within section 641 in order to avoid individual tax liability.

The Commissioner also argued that, notwithstanding the lack of a specific Code section prohibiting the use of multiple trusts for tax avoidance reasons, the court could have used a "substance versus form" approach to determine that, apart from anticipated tax benefits, the trusts were without substance. In the landmark case of *Gregory v. Helvering*,[33] the Supreme Court held that a corporate reorganization, used solely to liquidate and distribute a parent corporation's assets at a tax saving to the shareholders, lacked a valid "business purpose," and thus the entire distribution was treated as a taxable dividend. Likewise, in *Knetsch v. United States*[34] and *Weller v. Commissioner*,[35] interest expense deductions were disallowed on notes used to purchase annuities which had a lower rate of return than the interest-bearing notes themselves. In both cases it was held that the transactions lacked "economic reality."

The *Morris* court rejected a "business purpose" or "economic reality" approach as inapposite since allowance of the tax benefits in *Gregory, Knetsch,* and *Weller* would have frustrated the legislative purposes of the controlling statutes[36] and, unlike the instant case, those cases did not involve a "history of detailed consideration by the Congress of the specific problem presented."[37] Assuming that legislative purpose is frustrated when a sham transaction results in tax-free consequences, it may be argued that in the instant case there is no tax-free consequence and the legislative purpose of section 641 is not frustrated by separate taxation — whether separate or combined, the income from each trust will nonetheless be taxed under section 641. This argument, however, fails to consider the fact that a lessening of tax liability through means such as bracket-splitting equally frustrates the legislative purpose of the section.

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32. The House Advisory Group suggested combining trust income where the beneficiaries were substantially the same. *See* note 16 *supra.* This bill met opposition in the House because it did not distinguish between trusts created for tax reasons and non-tax reasons. As a result of this disagreement the House finally passed a substitute bill which merely changed the "throwback" rule from 5 to 10 years. *See* H.R. 9662, 86th Cong., 2d Sess. § 113 (1960). The Senate Finance Committee then reinstated the House Advisory Group Proposal, S. REP. No. 1616, 86th Cong., 2d Sess. (1960), but this Bill was never brought to a vote during the session because of the various differences in opinion as to the proper approach to taxing the trusts.

33. 293 U.S. 465 (1935).

34. 364 U.S. 361 (1960).

35. 270 F.2d 294 (3d Cir. 1959), *cert. denied,* 364 U.S. 908 (1960).

36. In *Gregory,* the Court held that the formation of a subsidiary for the sole purpose of spinning-off the parent's assets to accomplish a tax saving was not a "reorganization" pursuant to section 112(g) of the Revenue Act of 1928. In *Knetsch* and *Weller,* the courts stated that while interest paid on indebtedness is deductible as an abstract principle, the substance of the transaction negated a showing of actual "indebtedness" pursuant to section 163 of the Internal Revenue Code of 1954.

37. 51 T.C. No. 4, at 2901.

The "Clifford" rules[38] are a clear example of congressional disapproval of bracket-splitting when the donor does not make a true disposition of property through the use of a trust but instead retains control over the trust property and merely sets up the trust to reduce his personal income tax liability.[39]

The Tax Court reasoned that if one trust could be taxed separately pursuant to the Code, then the separate taxation of 20 trusts was merely a quantitative rather than a qualitative difference.[40] However, as can be readily ascertained from the facts of the *Morris* case, a distinction can validly be made between the creation of many trusts for estate planning purposes and the creation of many trusts solely to avoid income tax liability. The usual purpose for creating a trust is to enable the grantor to make a gift of property and yet still restrict the powers of the beneficiary to manage and dispose of the trust estate.[41] While the creation of one trust as opposed to no trusts admittedly splits income and generally results in a tax saving, this result arises merely as a consequence of the grantor's intent to make a gift. Where, however, one trust is split into many trusts, property disposition is no longer the grantor's intent (assuming that, as in the instant case, all the trusts are substantially identical) and the allowance of the tax saving under section 641 would no longer reflect legislative approval of the many legitimate non-tax reasons for creating multiple trusts. Certainly if the grantor had established only one trust, there could be no logical argument for disallowing separate taxation of the trust on the basis that the grantor's taxes would be reduced since the Code's authorization is clear. However, where 20 trusts are created instead of one, the court should then determine whether the additional trusts foster the purpose of creating trusts, *i.e.,* property dispositions. Since the creation of the 20 trusts in the present case serves no valid purpose other than tax avoidance, the formality of the separate trusts should be pierced and ignored for income tax purposes.[42]

In refusing to apply a "business purpose" or "economic reality" test, the *Morris* court also stated that these tests have never been applied to the area of trusts because " 'business purpose' is often absent in donative dispositions of property through the device of the family trust."[43] It should be noted, however, that the court in the *Weller* case stated that "the principle laid down in the *Gregory* case is not limited to corporate

38. INT. REV. CODE of 1954, §§ 671–78.

39. Treas. Reg. § 1.671–2(b) (1960) states that the principle underlying the "Clifford" rules is that "income of a trust over which the grantor or another person has retained substantial dominion or control should be taxed to the grantor or other person rather than to the trust which receives the income . . . ."

40. 51 T.C. No. 4, at 2899.

41. 1 A. SCOTT, LAW OF TRUSTS § 2.3, at 37–8 (3d ed. 1967).

42. *See* Comment, *Taxation of Multiple Trusts,* 24 U. CHI. L. REV. 156, 166 (1956), where the author suggests a "trust purpose" doctrine to be used as a test to determine whether there is a non-tax purpose for creating several entities rather than one.

43. 51 T.C. No. 4, at 2902.

reorganizations, but rather applies to the federal taxing statutes generally."[44] Although the *Gregory* rule has yet to be applied to multiple trusts, it has found application in the areas of inter-family gifts,[45], partnerships,[46] and corporate distributions and reorganizations.[47] The *Gregory* doctrine has also been applied to multiple corporations where the primary purpose in setting up multiple corporations, rather than one, is to take advantage of additional surtax exemptions and accumulated earnings credits.[48] A still broader statutory incorporation of *Gregory* is found in section 269 which disallows corporate deductions, credits, or allowances resulting from corporate acquisitions made principally for tax avoidance reasons.[49]

While concededly an argument may be made that the "business purpose" test may be more properly associated with transactions entered into for profit, a similar doctrine, usually called the "consolidation" theory,[50] could be used in the donative trust area. Under this theory, courts would tax together all trust income from trusts created by the same grantor to the same beneficiary where, as in the instant case, the primary purpose is tax avoidance rather than property planning.[51] The consolidation ap-

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44. Weller v. Commissioner, 270 F.2d 294, 297 (3d Cir. 1959), *cert. denied*, 364 U.S. 908 (1960).

45. *See, e.g.*, Gouldman v. Commissioner, 165 F.2d 686 (4th Cir. 1948).

46. *See, e.g.*, Commissioner v. Culbertson, 337 U.S. 733 (1949); Kocin v. United States, 187 F.2d 707 (2d Cir. 1951); Barrett v. Commissioner, 185 F.2d 150 (1st Cir. 1950).

47. *See, e.g.*, Minnesota Tea Co. v. Helvering, 302 U.S. 609 (1938); Shaffer Terminals, Inc., 16 T.C. 356 (1951), *aff'd per curiam*, 194 F.2d 539 (9th Cir. 1952).

48. *E.g.*, Shaw Constr. Co. v. Commissioner, 323 F.2d 316 (9th Cir. 1963); James Realty Co. v. United States, 280 F.2d 394 (8th Cir. 1960).

See also INT. REV. CODE of 1954, § 1551(a) which states:

IN GENERAL. — If —

. . . .

(2) any corporation transfers, directly or indirectly, after June 12, 1963, all or part of its property (other than money) to a transferee corporation . . .

. . . .

and the transferee corporation was created for the purpose of acquiring such property or was not actively engaged in business at the time of such acquisition . . . the Secretary or his delegate may . . . disallow the surtax exemption . . . or the $100,000 accumulated earnings credit . . . .

49. INT. REV. CODE of 1954, § 269, provides in relevant part:

(a) If—

. . . .

(2) any corporation acquires . . . property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation . . .

and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary or his delegate may disallow such deduction, credit, or other allowance.

Treas. Reg. 1.269-2(b) (1962) states that the purpose of this section is to prevent distortion of the taxpayer's liability through the use of a sham transaction, and expressly cites *Gregory* as a judicial recognition of the invalidity of a sham transaction.

50. For an extensive discussion of this theory, see Ervin, *Multiple Accumulative Trusts and Related Problems Under the Income Tax*, 29 S. CAL. L. REV. 402 (1956); Gordon, *Multiple Trusts: The Consolidation Approach*, 4 WAYNE L. REV. 25 (1957).

51. Other tests which have been suggested to limit the use of multiple trusts are an indefinite throwback and a surtax on accumulations similar to the surtax on corporate earnings. *See* Gordon, *supra* note 50. Both of these tests, however, fail to

proach is a workable substitute for the "business purpose" test in the field of trusts but has yet to be applied by the courts. The Commissioner relied on *Boyce v. United States*[52] and *Sence v. United States*[53] in arguing that a similar approach had been already adopted in multiple trust cases. The *Morris* court, however, distinguished *Boyce* and *Sence* as holding only that under "close scrutiny" one trust was created. An analysis of those cases,[54] however, suggests that the "close scrutiny" test served as a fictional basis of decision. The language in *Sence* is illustrative and suggests the merit of the Commissioner's position that the court indeed consolidated income after finding separate, distinct multiple trusts:

> Accordingly for income tax purposes, all these substantially identical trusts created, as part of a family arrangement, primarily for the benefit of the same beneficiary should be treated as consolidated into one and the tax computed on the basis of their consolidated incomes and with only one exemption.[55]

Although the court in the instant case squarely faced the issue of the tax consequences of multiple trusts, it failed to draw an analogy between the area of trusts and other areas of the Code where a transaction is judged by its substance rather than its form. The use of the consolidation theory, it is suggested, would more properly enable courts to recognize the existence of multiple trusts and then determine their substantive validity for income tax purposes. In any event, it is hoped that the impact of the *Morris* case will stimulate congressional response by way of corrective legislation.

Alan R. Gordon

TORTS — COMPARATIVE NEGLIGENCE — COMPARATIVE NEGLIGENCE STATUTE NEGATES THE DOCTRINE OF LAST CLEAR CHANCE AS AN ABSOLUTE RULE OF LAW.

Cushman v. Perkins (Maine 1968)

Plaintiff, whose car was blocking a highway exit ramp following an accident, was injured when the car was struck from behind by the defendant. The trial judge, pursuant to Maine's comparative negligence

distinguish multiple trusts created for tax purposes and those created for non-tax reasons and thus have failed to receive much support.

52. 190 F. Supp. 950 (W.D. La.), *aff'd per curiam*, 296 F.2d 731 (5th Cir. 1961).

53. 394 F.2d 842 (Ct. Cl. 1968).

54. In *Sence*, for example, the court concluded that 19 multiple trusts were created solely for tax avoidance and thus taxed them together. Similarly, in *Boyce*, the court held that the creation of 90 trusts to the same beneficiary was a mockery of the tax laws and applied a "close scrutiny" test in order to tax them together.

55. 394 F.2d 842, 852 (Ct. Cl. 1968).

statute[1] instructed the jury as to the apportionment of the respective parties' negligence and as to the law regarding the doctrine of last clear chance. The jury returned a verdict for the plaintiff from which the defendant appealed on the ground, *inter alia,* that the common law doctrine of last clear chance was inapplicable in a jurisdiction which had enacted a comparative negligence statute. The Supreme Judicial Court of Maine reversed and remanded, *holding* that when the doctrine of contributory negligence was repealed through the action of the Maine legislature, the doctrine of last clear chance as an absolute rule of law was similarly abolished, but the component elements of the doctrine are still viable to the extent that the jury should utilize them in their determination of the apportionment of damages. *Cushman v. Perkins,* 245 A.2d 846 (Me. 1968).

Under the common law, the jury in negligence actions is compelled to burden either the plaintiff or the defendant with the entire loss of plaintiff's injury. In order to exercise some control over this "all or nothing" approach and to insure rational and consistent decisions, the courts developed several rules which, based upon the factual findings of the jury, impose liability upon one of the parties as a matter of law. Two of these rules are the doctrines of contributory negligence and last clear chance. The former doctrine has the effect of barring completely an injured plaintiff's recovery where he contributed to his own injury,[2] whereas the latter permits a negligent plaintiff to recover where he could not have extricated himself from, or was unaware of, his perilous situation and the defendant, had he been using reasonable care, had the last clear opportunity to avoid the harm.[3] The rules of contributory negligence and

1. ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1968) provides:

> Where any person suffers death or damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> . . .
>
> Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.
>
> If such claimant is found by the jury to be equally at fault, the claimant shall not recover.

2. Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809); F. HARPER & F. JAMES, THE LAW OF TORTS § 22.1 (1956).

3. This doctrine was first enunciated in Davies v. Mann, 156 Eng. Rep. 588 (Ex. 1842). *See* RESTATEMENT (SECOND) OF TORTS §§ 479–80 (1965).

The type of situation which will trigger the application of last clear chance varies among the jurisdictions. Generally, the situations will be limited to one of the following:

(1) where plaintiff is helpless and defendant discovers the situation,

(2) where defendant could have discovered plaintiff's peril by using reasonable care,

(3) where plaintiff was not helpless but was unaware of the danger which defendant had discovered, or

(4) where defendant's antecedent negligence has rendered him unable to take advantage of the last clear chance.

W. PROSSER, LAW OF TORTS § 65 (3d ed. 1964); Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 473 & nn.38–41 (1953).

last clear chance have been adopted by virtually every American jurisdiction.

At times courts[4] and juries[5] have expressed dissatisfaction with this "all or nothing" approach to recovery. Some legislatures have responded to this discontent by enacting comparative negligence statutes which, in contrast to the inflexible common law rules, permit the jury to apportion the damages between the two wrongdoers according to their respective negligence.[6] While this form of damage apportionment has been widely adopted in both England[7] and Canada,[8] it has been slow to gain acceptance in the United States.[9] At present, only seven states,[10] including Maine,

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4. *E.g.*, Cushman v. Perkins, 245 A.2d 846, 848 (Me. 1968). An instance in which a judge made a direct plea to the legislature to enact a comparative negligence statute is found in Connolly v. Steakley, 197 So. 2d 524 (Fla. 1967) (concurring opinion), *noted in* 20 U. FLA. L. REV. 245 (1967).

5. Juries have a tendency to favor the injured plaintiff and in many instances have reduced plaintiff's recovery rather than return a verdict of contributory negligence. Eldredge, *Contributory Negligence: An Outmoded Defense That Should Be Abolished*, 43 A.B.A.J. 52, 53 (1957); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 716 (1938); Prosser, *supra* note 3, at 469; Comment, *Torts — Comparative Negligence — Evaluation*, 1 VILL. L. REV. 115, 121 (1956).

6. For a comprehensive history of comparative negligence, see Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 304 (1950).

7. The Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28. *See* Williams, *The Law Reform (Contributory Negligence) Act, 1945*, 9 MOD. L. REV. 105 (1946).

8. Bowker, *Ten More Years Under the Contributory Negligence Acts*, 2 U.B.C.L. REV. 198 (1965); MacIntyre, *Last Clear Chance after Thirty Years Under the Apportionment Statutes*, 33 CAN. B. REV. 257 (1955).

9. Comparative negligence, as a common law form of apportionment, has been rejected by most states. W. PROSSER, *supra* note 3, at 445; Annot., 114 A.L.R. 830 (1938). Comparative negligence statutes were first enacted in the areas of admiralty (*e.g.*, 46 U.S.C. § 688 (1964)) and labor law (*e.g.*, Federal Employers' Liability Act, 45 U.S.C. § 53 (1964), and various state acts enacted to prevent railroad workers from being denied recovery because of their contributory negligence). For a complete discussion of these statutes, see MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940); Mole & Wilson, *supra* note 6; Pound, *Comparative Negligence*, 13 NACCA L.J. 195 (1954); Prosser, *supra* note 3, at 475–80; Turk, *supra* note 6, at 231–38, 305–38.

10. Arkansas: ARK. STAT. ANN. §§ 27-1730.1–2 (Supp. 1962); Georgia: GA. CODE ANN. § 105-603 (1968); Maine: ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1968); Mississippi: MISS. CODE ANN. § 1454 (1942); Nebraska: NEB. REV. STAT. § 25-1151 (1964); South Dakota: S.D. CODE § 47.0304-1 (Supp. 1960); Wisconsin: WIS. STAT. ANN. § 331.045 (1958).

Generally, the applicability of the statute will be limited to one of the following three situations:

(1) where plaintiff's negligence is slight in comparison to defendant's (Nebraska and South Dakota),

(2) where plaintiff's negligence must be less than defendant's (Arkansas, Georgia and Wisconsin), or

(3) where the amount of negligence of either party is irrelevant (Maine and Mississippi).

For a comparison of these various statutes, see Prosser, *supra* note 3, at 484–94; Comment, *Comparative Negligence: Some New Problems for the Maine Courts*, 18 U. ME. L. REV. 65 (1966); Comment, *Tort — Comparative Negligence Statute*, 18 VAND. L. REV. 327 (1964).

have enacted comparative negligence statutes which apply to all types of negligence cases.

All comparative negligence statutes, either expressly or impliedly, overrule the defense of contributory negligence.[11] However, one of the recurring problems faced by courts in jurisdictions which have adopted this new approach to recovery is whether the companion doctrine of last clear chance survives the enactment of the comparative negligence statute. In the absence of a clear legislative mandate,[12] the resolution of this issue will depend upon the position which the court adopts regarding the purpose of the last clear chance doctrine. If the court takes the position that the doctrine is a rule judicially developed to mitigate the often unfair results of contributory negligence, then, since a comparative negligence statute is specifically designed to remedy this problem, last clear chance will be rejected. If, on the other hand, the court views the doctrine as a substantive element in determining the person who is at *fault* or the person who *caused* the accident, then the doctrine will still be applied. The *Cushman* decision is significant because, in contrast to the majority of courts, it adopts the former rationale and rejects the doctrine of last clear chance as an absolute rule of law.[13]

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11. The Maine statute expressly eliminates contributory negligence as a defense and predicates the application of the statute on the ability of the defense to be raised were it not for the statute. ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1968).

12. One of the few legislatures which has spoken on the issue of last clear chance is found in the report of the Law Review Committee which proposed the apportionment law in England. It concluded that last clear chance would not be affected by the statute since it was a rule of causation. Williams, *supra* note 7, at 126. *But see* note 26 *infra*.

13. Of the seven American jurisdictions which have comparative negligence statutes, only Maine and Wisconsin completely abolished last clear chance. However, two of the states have modified its application. The following is a short summary of the status of the doctrine in the various states.

Arkansas: Although there have been no cases which have decided the issue, it would appear from a reading of the statute in light of preceding statutes that last clear chance is still a viable doctrine. Under the first comparative negligence statute enacted in Arkansas, No. 191, [1955] Ark. Acts 443 (repealed 1957), contributory negligence was expressly eliminated as a defense in all negligence cases and the statute specifically prohibited the application of the doctrine of last clear chance. Garner, *Comparative Negligence and Discovered Peril,* 10 ARK. L. REV. 72 (1955–56). However, the comparative negligence statutes which superseded the 1955 Act differed in two major respects: (1) the statute was applicable only when plaintiff's negligence was of a lesser degree than defendant's and (2) no mention was made of the doctrine of last clear chance. ARK. STAT. ANN. § 27–1730.1–2 (1962); No. 296, [1957] Ark. Acts 874 (repealed 1961). Such an obvious omission would seem to indicate that last clear chance would still be applied.

Georgia: The doctrine of last clear chance has consistently been held to be compatible with Georgia's comparative negligence statute. Lovett v. Sandersville R.R., 72 Ga. App. 692, 697–98, 34 S.E.2d 664, 667 (1945); *accord,* Mixon v. Atlantic Coast Line R.R., 380 F.2d 553 (5th Cir. 1967); Grayson v. Yarbrough, 103 Ga. App. 243, 119 S.E.2d 41 (1961); Southland Butane Gas Co. v. Blackwell, 91 Ga. App. 277, 85 S.E.2d 542 (1954). Although *Blackwell* was reversed on other grounds by the Georgia supreme court, Justice Mobley, in a dissenting opinion, reiterated the validity of last clear chance. Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 670, 88 S.E.2d 6, 10 (1955). *Contra,* Smith v. American Oil Co., 77 Ga. App. 463, 49 S.E.2d 90 (1948) (the right to, as well as the amount of recovery, are questions of fact to be decided by the jury). For a general discussion, see Comment, *Doctrine of Last Clear Chance in Georgia,* 13 GA. B.J. 104 (1950).

Mississippi: The doctrine of last clear chance is available but has limited application. Defendant must actually have discovered plaintiff's peril and then have

The adherence to the fault and causation rationales of last clear chance by the majority of courts is a product of the doctrine's historical development. The rule was enunciated when the concept of negligence, which predicated liability on fault, was emerging. Although there was some language in the early cases which intimated that last clear chance was an expression of this fault concept,[14] the courts primarily couched their discussion of the doctrine in terms of proximate causation.[15] These courts reasoned that since the defendant was the last wrongdoer, his act broke the causative chain of events set off by plaintiff's negligence and became a supervening cause directly leading to the final injury.[16] Plaintiff's negligent act was considered a remote cause of the injury, one which only created the condition under which the defendant committed his negligent act.[17] This view has been widely adopted in the United States[18] where last clear chance is considered "no more than a logically necessary deduction from the principles of proximate cause."[19]

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failed to act as a reasonable man. New Orleans & Northeastern R.R. v. Burney, 248 Miss. 290, 159 So. 2d 85, 91-92 (1963). Significantly, Mississippi courts have infrequently utilized the doctrine after the state's comparative negligence statute was enacted in 1910. This led the Court of Appeals for the Fifth Circuit to conclude that "[t]he doctrine of discovered peril or last clear chance . . . loses most of its meaning and importance in Mississippi. This explains why most of the cases applying the doctrine are old cases." Illinois Central R.R. v. Underwood, 235 F.2d 868, 874 n.13 (5th Cir. 1956). For a general discussion, see Price, *Applicability of Last Clear Chance Doctrine in Mississippi,* 29 MISS. L.J. 248 (1958).

Nebraska: Last clear chance still exists but in a modified form. *See* note 23 *infra.*

South Dakota: It has been held that last clear chance is compatible with the comparative negligence statute where it was certainly the last clear chance. Where plaintiff's negligent act creating the peril occurs almost simultaneously with the happening of the accident, the application of the doctrine is inappropriate. Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960), *noted in* 6 S.D.L. REV. 96 (1961); *accord,* Rumbolz v. Wipf, ... S.D. ....., 145 N.W.2d 520 (1966).

Wisconsin: Last clear chance was abolished prior to the enactment of the comparative negligence statute. Switzer v. Detroit Inv. Co., 188 Wis. 330, 206 N.W. 407 (1925).

For a general discussion of the viability of last clear chance following the enactment of these statutes, see Comment, *The Validity of Retaining the Last Clear Chance Doctrine in a State Having a Comparative Negligence Statute,* 1 GA. ST. B.J. 500 (1965).

14. A good discussion of the fault rationale of last clear chance is found in Bohlen, *Contributory Negligence,* 21 HARV. L. REV. 233 (1908); MacIntyre, *supra* note 9; Philbrick, *Loss Apportionment in Negligence Cases,* 99 U. PA. L. REV. 572, 589, 604-05 (1951).

15. Green, *Contributory Negligence and Proximate Cause,* 6 N.C.L. REV. 1, 23-26 (1927); James, *supra* note 5; Annot., 92 A.L.R. 47, 48-54, 51-54 n.8 (1934).

16. James, *supra* note 5, at 707; Williams, *supra* note 7, at 113.

17. MacIntyre, *supra* note 9, at 1234 & n.16. Professor MacIntyre states the various modes of expression used by the courts to describe this rationale of causation.

18. American cases adopting this rationale have been extensively collected and discussed. Prosser, *supra* note 3; Annot., 59 A.L.R.2d 1262 (1958); Comment, *The Validity of Retaining the Last Clear Chance Doctrine in a State Having a Comparative Negligence Statute,* 1 GA. ST. B.J. 500 (1965); Comment, *Comparative Negligence: Some New Problems for the Maine Courts,* 18 U. ME. L. REV. 65 (1966).

19. James, *supra* note 5, at 707.

In those jurisdictions which have enacted comparative negligence statutes, the use of the causation rationale has resulted in a retention of the doctrine of last clear chance.[20] These courts reason that since the defendant's last clear chance released the plaintiff from all liability stemming from his own negligence, the plaintiff has not contributed to his own injury. Since under this analysis there is only one negligent party, the court never reaches the question of apportionment of damages between two wrongdoers under the comparative negligence statute.

While this position would at first blush appear logically valid, it is unsound because it fails to differentiate between the actual cause of the harm — causation in fact — and the proximate cause. The actual part of the harm is the event or events which were factors in bringing about the harm — a "but for" test of causation.[21] This is the only type of causation which is significant under a comparative negligence statute since it is essential to determine only that both parties actually, but not necessarily proximately, caused the harm in order for apportionment of damages to be appropriate. On the other hand, the proximate cause of the harm involves the very different question of who should be held accountable for the accident, a question which involves, in addition to the issue of actual causation, policy issues of allocating moral and social responsibility.[22] Since a comparative negligence statute represents a basic change in policy concerning the allocation of liability, though not affecting the determination of the actual causes of an injury, a corresponding change in what is considered the proximate cause should result. This change has not been made by those courts which consider the last human wrongdoer as the sole proximate cause of the harm even though the comparative negligence statute clearly permits apportionment of damages between the two wrongful parties.[23]

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20. *See* note 13 *supra.*

21. W. PROSSER, *supra* note 3, at 240–45.

22. It is sometimes said to be a question of whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy . . . . *This is not a question of causation, or even a question of fact, but is quite far removed from both* . . . .

Id. at 282 (emphasis added).

23. The Nebraska supreme court has attempted to redefine the doctrine of last clear chance in light of the policies implicit in Nebraska's comparative negligence statute by limiting the application of the doctrine to situations where (1) the defendant's last clear chance was the actual cause of the injury, (2) the plaintiff's precedent negligence was not an active or a contributing factor to the accident, and (3) it neither induced nor invited defendant's negligent act. Whitehouse v. Thompson, 150 Neb. 370, 34 N.W.2d 385 (1948); *see* Bezdek v. Patrick, 170 Neb. 522, 103 N.W.2d 318 (1960); Malcolm v. Dox, 168 Neb. 539, 100 N.W.2d 538 (1960); Donald v. Heller, 143 Neb. 600, 10 N.W.2d 447 (1943). On the other hand, where the plaintiff's negligence was continuous and active up to the moment of the accident and in fact contributed to the injury, then the apportionment of damages becomes proper and the fact that defendant had the last clear chance becomes an element to be weighed by the jury in determining the damages. Benedict v. Andersen, 162 Neb. 735, 77 N.W.2d 320 (1956); Portis v. Chicago, M., St. P. & P. R.R., 158 Neb. 28, 62 N.W.2d 323 (1954); Bush v. James, 152 Neb. 189, 40 N.W.2d 667 (1950); Trumbley v. Moore, 151 Neb. 780, 39 N.W.2d 613 (1949); Folken v. Petersen, 140 Neb. 800,

The problem is not that the courts have failed to recognize that there can be more than one wrongdoer. There was never any doubt that a negligent plaintiff, even though not the last wrongdoer, could still be one of the actual causes of his injury.[24] The real crux of the problem is that many courts, adhering to precedent, continue to regard the defendant's last clear chance in terms of the old common law concept of proximate cause under the guise of ascertaining the "actual" wrongdoer. In such a situation, the court is then led to disregard, as a matter of law, the essential issue under a comparative negligence statute — that even though the defendant had the last clear chance to avoid the harm and was the last human wrongdoer, the plaintiff was in fact one of the *actual* causes of the injury.[25] If analyzed in this light, apportionment of damages is clearly applicable in this situation.

The Supreme Judicial Court of Maine acknowledged this change of basic policy under the comparative negligence statute and responded by rejecting the doctrine of last clear chance because it supports the concept of the sole wrongdoer which is diametrically opposed to the very premise of comparative negligence.[26] The *Cushman* court reasoned that since a

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1 N.W.2d 916 (1942). *See also* Roby v. Auker, 149 Neb. 734, 32 N.W.2d 491 (1948) (last clear chance is still applicable if merely the consequences or peril resulting from the plaintiff's prior but completed negligent conduct continues up to the time of the accident). For a general discussion, see Johnson, *Comparative Negligence — The Nebraska View,* 36 NEB. L. REV. 240, 247–55 (1957).

24. For example, in O'Brien v. McGlinchy, 68 Me. 522 (1878), which established the doctrine of last clear chance in Maine, the parents of a child permitted him to walk in the street where he was struck by a horse-drawn wagon. The *O'Brien* court clearly indicated that both the actions of the parents and the driver of the wagon were, in fact, the two actual causes of the accident but that a choice, predicated on certain policies, had to be made as to who would bear the total liability, *i.e.,* whose actions would be designated the sole proximate cause of the harm.

25. Professor Prosser has demonstrated the logical inconsistency inherent in this line of reasoning by applying the general rule to a situation involving three parties. As between the two wrongdoers, only one would be declared the sole proximate cause of the injury and would be fully liable. On the other hand, in a suit instituted by the injured third party, both wrongful parties would be held liable for contribution. Although not adopted by any jurisdiction, Prosser suggests that the inconsistency could be resolved by denying the plaintiff who was an active cause of the accident the benefits of a full recovery to the extent that the injured third party could recover from him. Prosser, *supra* note 3, at 468.

26. Several legal commentators have acknowledged this change. James, *supra* note 5; Lowndes, *Contributory Negligence,* 22 GEO. L.J. 674, 702–05 (1934); MacIntyre, *supra* note 9; Prosser, *supra* note 3; Comment, *Comparative Negligence: Some New Problems for the Maine Courts,* 18 U. ME. L. REV. 65 (1966).

Florida took the same position in Loftin v. Nolin, 86 So. 2d 161 (Fla. 1956), where the court abolished last clear chance in cases applying Florida's comparative negligence statute, which is limited to negligence suits against railroads. FLA. STAT. ANN. § 768.06 (1964). Citing no precedent, the court relied solely on the persuasive arguments of many of the authors referred to in this Note.

It would appear that the courts of England have also recognized this change in basic policy. In Davies v. Swan Motor Co., [1949] 2 K.B. 291, Lord Denning, recognizing that the doctrine of last clear chance had lost most of its vitality as a rule of law prior to the enactment of the Law Reform (Contributory Negligence) Act of 1945, 8 & 9 Geo. 6, c. 28, suggested that it should be eliminated from English law as a practical test of causation in light of the statute. This was contrary to the opinion of the Law Review Committee, *see* note 12 *supra,* and Lord Justices Evershed

Maine jury is not faced with making an "all or nothing" decision as to whether plaintiff may recover, there was no longer any need to place a judicial limitation on the jury for his protection. Therefore, there was no "reason or justification" for retaining the doctrine of last clear chance.

Although the court found that the doctrine of last clear chance lost all vitality as an absolute rule of law, the component elements of the doctrine, such as "the degree of plaintiff's negligence, its remoteness in time, the efficiency of its causation, the degree of defendant's negligence, the efficiency of its causation, defendant's awareness of plaintiff's peril, defendant's opportunity to avoid doing damage and his failure to do so — [*remained*] *as factors to be considered by the jury in measuring and comparing the parties' relative fault.*"[27] The court has, in effect, transformed the doctrine of last clear chance from an absolute rule of law and limitation on liability into an issue of fact for the jury to consider in apportioning the damages.

The *Cushman* rationale appears valid both in terms of legal reasoning and in the implementation of legislative intent. By freeing the lower courts and juries from the limitation of last clear chance, the court has applied the statute in a manner which best effectuates the underlying change in policy. It is the legislative intent that the jury apportion the damages between two negligent parties on the basis of the facts of each case, not on the basis of judicially created legal formulae which were designed not to apportion damages but rather to place liability on one party.[28] The net result of this decision therefore is not to alter the old rules of causation but rather to put the effects of these rules into the hands of the jury. Although many courts are tied by precedent to the causation approach to last clear chance, as more states enact comparative negligence statutes, the courts should adopt the *Cushman* approach and consider the problem in light of the underlying policy of comparative negligence.

Andrew Silverman

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and Bucknill who held that the statute had no effect on the doctrine. In Harvey v. Road Haulage Executive, [1952] 1 K.B. 120, Lord Denning again pronounced the doctrine obsolete and in recent cases no mention of the doctrine has been made even though the factual situation appeared to justify its application. This would seem to indicate that the doctrine is no longer viable. *E.g.*, Miraflores v. Livanos, [1967] 1 A.C. 826, 848–49.

It is interesting to note that in civil law jurisdictions, where a comparative negligence rule is applied, neither the doctrine of contributory negligence nor last clear chance has developed. MacIntyre, *supra* note 9, at 1236–41; Mole & Wilson, *supra* note 6, at 337–38; Turk, *supra* note 6, at 207.

27. 245 A.2d at 850–51 (emphasis added).

28. The legislative history indicates that the Maine legislators reached the conclusion that since there could be two wrongdoers, it was unfair, arbitrary, and unrealistic to burden one of the parties with the entire loss. MAINE, LEGISLATIVE RECORD, vol. 2, 2409–16 (1965).

TORTS — NEGLIGENCE — LANDOWNERS' LIABILITY — COMMON LAW DISTINCTIONS BETWEEN LICENSEE, INVITEE, AND TRESPASSER ARE ABOLISHED IN CALIFORNIA AND REPLACED BY A STANDARD OF ORDINARY CARE.

Rowland v. Christian (Cal. 1968)

Plaintiff, a social guest in defendant's apartment, was injured as a result of a defective water faucet and brought an action for personal injuries in the Superior Court of San Francisco, alleging that defendant knew of the defect in the faucet and that plaintiff was going to use it, yet failed to warn him of its dangerous condition. Defendant moved for summary judgment on the ground that plaintiff, as a social guest, was owed no duty by defendant except to refrain from wilful or wanton injury. The trial court granted defendant's motion, holding that the affidavits showed that plaintiff was a licensee who, with respect to defective conditions, was bound to take the premises as he found them. On the same basis, the court of appeals affirmed.[1] On appeal, the Supreme Court of California reversed and, although it could have reached the same result within traditional rules, *held* that the common law distinctions between invitee, licensee, and trespasser are abolished in California, and that the proper test to be applied in determining a landowner's liability is in accordance with section 1714 of the California Civil Code.[2] Under this statute, the new test of liability is whether one in the management of his property has acted as a reasonable man in view of the probability of injury to others and, although the plaintiff's status as a trespasser, licensee, or invitee may, under the circumstances, have some bearing on the question of liability, such status is no longer determinative. *Rowland v. Christian,* 69 Cal. 2d 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

In light of the high regard placed on private property rights by early English and American thought,[3] the common law courts developed rules designed to limit a landowner's liability for negligence.[4] Entrants onto land were segregated into three distinct categories, with a different duty of care owed by the occupier to each entrant depending on his status.[5] Generally, a landowner owed no duty to a trespasser[6] or

1. Rowland v. Christian, 255 Cal. App. 2d 516, 63 Cal. Rptr. 98 (1967).

2. Cal. Civ. Code § 1714 (West 1954) provides: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

3. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1432 (1956).

4. Southcote v. Stanley, 156 Eng. Rep. 1195 (1856). *See also* F. HARPER & F. JAMES, *supra* note 3.

5. F. HARPER, LAW OF TORTS §§ 88–89 (1953); Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers,* 69 L.Q. REV. 182 (1953).

6. Sheehan v. St. Paul & Duluth Ry., 76 F. 201 (7th Cir. 1896); McPheters v. Loomis, 125 Conn. 526, 7 A.2d 437 (1939); Augusta Ry. v. Andrews, 89 Ga. 653, 16 S.E. 203 (1892); Palmer v. Gordon, 173 Mass. 410, 53 N.E. 909 (1899); Magar v. Hammond, 183 N.Y. 387, 76 N.E. 474 (1906); Eldredge, *Tort Liability to Trespassers,*

licensee[7] except to refrain from wilful injury, and owed to the invitee[8] a duty to inspect the premises to make them safe.[9]

Recently, however, in response to changing social mores, the courts have created exceptions to these restricted rules. A landowner is now bound to exercise due care to a child trespasser if the child has entered the land due to an "attractive nuisance,"[10] or an "artificial condition,"[11] or if the child is considered "foreseeable."[12] The duty is extended to an adult trespasser if he is a "frequent trespasser on a limited area"[13] or a "discovered trespasser."[14] With respect to a licensee, the landowner owes a duty when he is carrying on "active operations"[15] or when he knows of a "concealed danger"[16] on the premises and fails to warn of its presence. Although the duty owed an invitee has not changed,[17] the number of

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12 TEMP. L.Q. 32 (1937); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144 (1953); Note, *Landowners' Liability in New Jersey: The Limitation of Traditional Immunities,* 12 RUTGERS L. REV. 599 (1947).

7. Ford v. United States, 200 F.2d 272 (10th Cir. 1952); Rosenberger v. Consolidated Coal Co., 318 Ill. App. 8, 47 N.E.2d 491 (1943); Steinmeyer v. McPherson, 171 Kan. 275, 232 P.2d 236 (1951); Brauner v. Leutz, 293 Ky. 406, 169 S.W.2d 4 (1943); Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right,* 69 U. PA. L. REV. 142, 237, 340 (1921); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees,* 63 YALE L.J. 605 (1954); Marsh, *supra* note 5, at 359; Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573 (1942).

8. Traditionally, the invitee has been defined as one who enters the premises for the economic benefit of the landower. *E.g.,* Brown v. Davenport Holding Co., 134 Neb. 455, 279 N.W. 161 (1938); Snyder v. I. Jay Realty Co., 30 N.J. 303, 153 A.2d 1 (1959). Presently, however, the definition has been expanded in some jurisdictions by the "invitation test." Under this test, one who is invited onto the premises with assurance that the land has been made safe for his reception is given the status of an invitee. Guilford v. Yale Univ., 128 Conn. 449, 23 A.2d 917 (1942); Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 (1944); McKinnon v. Washington Fed. Sav. & Loan Ass'n, 68 Wash. 2d 640, 414 P.2d 773 (1966), *noted in* 42 WASH. L. REV. 299 (1966).

9. Indermaur v. Dames, L.R. 1 C.P. 274 (1866), *aff'd,* L.R. 2 C.P. 311 (1867), which has been accepted in all common law jurisdictions. W. PROSSER, THE LAW OF TORTS 395 (3d ed. 1964). *See also* RESTATEMENT OF TORTS § 332 (1938); James, *supra* note 7; Prosser, *supra* note 7.

10. McGill v. United States, 200 F.2d 873 (3d Cir. 1953); Strang v. South Jersey Broadcasting Co., 9 N.J. 38, 86 A.2d 777 (1952); Thompson v. Reading Co., 343 Pa. 585, 23 A.2d 729 (1942).

11. RESTATEMENT (SECOND) OF TORTS § 339 (1965).

12. Hocking v. Duluth, Missabe & Iron Range Ry., 263 Minn. 483, 117 N.W.2d 304 (1962); Meagher v. Hirt, 232 Minn. 336, 45 N.W.2d 563 (1951); Nichols v. Consolidated Dairies, 125 Mont. 460, 239 P.2d 740 (1952). *See also* Eldredge, *supra* note 6; Hudson, *The Turntable Cases in the Federal Courts,* 36 HARV. L. REV. 826 (1923).

13. Southern Ry. v. Campbell, 309 F.2d 569 (5th Cir. 1962); Louisville & Nashville R.R. v. Spoonamore's Adm'r, 278 Ky. 673, 129 S.W.2d 175 (1939); Cheslock v. Pittsburgh Rys., 363 Pa. 157, 69 A.2d 108 (1949). *Contra,* Jackson v. Pennsylvania R.R., 176 Md. 1, 3 A.2d 719 (1939).

14. Denver & Rio Grande Western R.R. v. Clint, 235 F.2d 445 (10th Cir. 1956); Averch v. Johnston, 90 Colo. App. 321, 9 P.2d 291 (1932); McVicar v. W.R. Arthur & Co., 312 S.W.2d 805 (Mo. 1958).

15. Louisville & Nashville R.R. v. Blevins, 293 S.W.2d 246 (Ky. Ct. App. 1956); While v. Burkeybile, 386 S.W.2d 418 (Mo. Ct. App. 1965); Anderson v. Welty, 334 S.W.2d 132 (Mo. 1960); Slobodzian v. Beighley, 401 Pa. 520, 164 A.2d 923 (1960). This position is also adopted by RESTATEMENT (SECOND) OF TORTS § 341 (1965).

16. Hansen v. Richey, 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (1965); Yazzolino v. Jones, 153 Cal. App. 2d 626, 315 P.2d 107 (1957); Newman v. Fox West Coast Theatres, 86 Cal. App. 2d 428, 194 P.2d 706 (1948).

17. Indermaur v. Dames, L.R. 1 C.P. 274 (1866), *aff'd,* L.R. 2 C.P. 311 (1867).

entrants included within that status has grown in jurisdictions which have adopted the liberal "invitation test."[18]

The instant decision is the first case to abolish completely the common law distinctions, characterizing them as "unrealistic, arbitrary, and inelastic,"[19] and to announce in their place a standard of the "reasonable property owner." By its decision, the court attempts to eliminate the confusion and inconsistency which have plagued the courts for many years as a result of having to ascertain the status of the entrant and to distinguish different duties owed. This two-step process has led to curious results. For example, a man who purchased a drink in a tavern and was injured by a fall into a concealed trap was allowed recovery since, as an invitee, he was owed a duty of reasonable care;[20] however, on similar facts, another who was treated to a drink by an associate was denied recovery because, having personally conferred no pecuniary benefit on the owner, he was characterized as a licensee.[21]

The court also recognized inconsistency in the theory used by most courts to classify one as an invitee or licensee. The general theory is that if a landowner receives economic benefit as a result of the entrant's presence, he should assume a greater burden,[22] and, conversely, if one enters the owner's premises for his own benefit, it is said that he receives the use of the premises as a gift and consequently has no right to demand that they be made safe for his reception.[23] This benefit-duty theory has often been overlooked where the plaintiff entered the premises in performance of a public duty. For example, firemen, on burning premises clearly for the benefit of the landowner and not for their own benefit, have usually been classified as licensees[24] and as such have been denied recovery when injured as a result of an unsafe condition.[25] The *Rowland* court, by designating the "reasonable man in view of the probability of injury to others" as the test of duty, has also solved the anomaly of not imposing duty when benefit is conferred. Although in similar circumstances liability may be denied under the rule of the instant case, the basis of decision will not be that firemen are licensees, but rather that the landowner has not acted unreasonably under the circumstances.

Another problem resolved by the instant decision is that of ascertaining the injured party's status *at the time of injury,* since in some cases an act by either the entrant or the occupier may cause the entrant's original status

18. *See* note 8 *supra.*

19. 69 Cal. 2d at 98, 443 P. 2d at 567, 70 Cal. Rptr. at 103.

20. Braun v. Vallade, 33 Cal. App. 279, 164 P. 904 (1917).

21. Kneuser v. Belasco-Blackwood Co., 22 Cal. App. 205, 133 P. 989 (1913).

22. W. PROSSER, *supra* note 9, at 395. The economic benefit test has been expanded by the "invitation test." *See* note 8 *supra.*

23. W. PROSSER, *supra* note 9, at 385.

24. Roberts v. Rosenblatt, 146 Conn. 110, 148 A.2d 142 (1959); Krauth v. Geller, 54 N.J. Super. 442, 149 A.2d 271 (1959).

25. It should be noted, however, that some recent cases have recognized that firemen may be classified as invitees. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); *see* Cameron v. Abatiell, Vt., 241 A.2d 310 (1968).

to change. The problem is well illustrated by an English case[26] where a canvasser who originally came upon the premises without the owner's consent was classified as a trespasser; once given permission his status changed to a licensee; and when he transacted business with the occupier he was ultimately an invitee. Even when a canvasser does business with the occupier, the instant case recognizes no sound justification for distinguishing the occupier's duty to him upon arrival and upon departure. Under the more flexible reasonable care standard, liability would turn not on the characterization of the status of the entrant at time of injury, but on whether a reasonable man would have foreseen his injury and used reasonable care to prevent it.

In considering what should be the correct test of liability, the court analyzed the historical justifications for limiting the extent of a landowner's liability and recognized that not only was confusion inherent in the correct application of the common law rules, but also that results based on property rights are not compatible with an expanding regard for the integrity of the person. The *Rowland* court concluded, therefore, that as a matter of policy the factors which should today determine liability are "the closeness of connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance . . . ."[27]

In support of its decision, the court noted the analogous area of admiralty law where the Supreme Court, in *Kermarec v. Compagnie Generale Transatlantique,*[28] held that the distinctions between invitee and licensee are inapplicable to the law of admiralty.[29] In *Kermarec,* the Court observed that the common law distinctions originated in a legal system in which an individual's social status depended upon his estate in real property and that such a legal system was alien to the sea, and "[f]or the admiralty law . . . to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality."[30]

As further support, the *Rowland* court broadly observed that the common law distinctions have been repudiated by statute in England, the jurisdiction of their birth.[31] The court, however, has gone beyond the English Occupiers' Liability Act[32] since that Act merely abrogated the distinction between invitee and licensee and was silent with respect to the status of trespasser. It should also be noted that much of the encouragement for passage of a statutory standard of negligence in England was due to the decline of jury trials in the English courts.[33] Moreover, an

26. Dunster v. Abbot, [1953] 2 All E.R. 1572 (C.A.).
27. 69 Cal. 2d at 99, 443 P.2d at 567, 70 Cal. Rptr. at 103.
28. 358 U.S. 625 (1958).
29. *Id.* at 631.
30. *Id.*
31. 69 Cal. 2d at 100, 443 P.2d at 568, 70 Cal. Rptr. at 104.
32. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).
33. A committee was appointed to study the problem and report to the legislature. For the text of that report, see LAW REFORM COMMITTEE, THIRD REPORT, CMD No. 9305 (1954).

examination of the few English cases decided under the statute reveals that: (1) "control," by the occupier of the hazard causing injury is now necessary for the imposition of liability;[34] (2) a mere "warning" is sufficient to discharge the landowner's duty of reasonable care;[35] and (3) the entrant's contributory negligence is becoming less of a factor in cases where the occupier has failed to exercise his statutory duty of due care.[36] For these reasons, *inter alia,* the English statute has received criticism almost from its enactment.[37]

The law of bailments is another analogous area of negligence law where some courts[38] have abolished common law distinctions. At common law, the duty owed by a bailee to bailor was determined by whether the bailment was considered "gratuitous,"[39] "mutual"[40] or for the "sole benefit" of the bailor.[41] The duty of care owed by a bailee was determined by a sliding scale with the greatest duty owed when the relationship created was for the sole benefit of the bailee. The theory of bailments, therefore, is analogous to that underlying the common law rules of landowners' liability, in that, as does the bailee, the landowner owes his greatest duty of care when he receives pecuniary or other benefit from the relationship. In abolishing the common law bailment distinctions, the Supreme Court of Minnesota, in the landmark case of *Peet v. Roth Hotel,*[42] reasoned that the degree of care to be exercised by a bailee should be commensurate with the risk involved and until a more satisfactory criterion can be formulated, that of "ordinary care should be followed in every case . . . ."[43] Cases subsequent to the Minnesota decision indicate that the abolition of the common law degrees of care has resulted in no increase in bailees' liability, and that the determining factor under the reasonable care test is not whether the bailee benefited, but whether he exercised due care in relation to the foreseeability of damage.[44] Under the instant decision, economic benefit will also no longer be a determining factor.

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34. *See* Wheat v. Lacon & Co., [1966] 1 All E.R. 582 (H.L.); Kearney v. Eric Waller, Ltd., [1965] 3 All E.R. 352 (Q.B.).

35. *See* Roles v. Nathan, [1963] 2 All E.R. 908 (C.A.).

36. *See* Braithwaite v. South Durham Steel Co., [1958] 3 All E.R. 161 (York Ass.).

37. Odgers, *Occupiers' Liability: A Further Comment,* 1957 CAMB. L.J. 39; Payne, *The Occupiers' Liability Act,* 21 MOD. L. REV. 359 (1958).

38. Kubli v. First Nat'l Bank, 191 Iowa 194, 200 N.W. 434 (1924); Peet v. Roth Hotel Co., 191 Minn. 151, 253 N.W. 546 (1934); Gabark v. Newman, 155 Neb. 188, 51 N.W.2d 315 (1952).

39. This is a bailment for the sole benefit of the bailee. Peters v. Thompson, 42 So. 2d 91 (Fla. 1949); Industrial Lumber Co. v. Strickland, 71 Ga. App. 298, 30 S.E.2d 792 (1944); Lowney v. Knott, 83 R.I. 505, 120 A.2d 552 (1956).

40. Home Ins. Co. v. Board of County Comm'rs, 86 Ohio App. 91, 97 N.E.2d 231 (1949); Miller v. Hand Ford Sales, Inc., 216 Ore. 567, 340 P.2d 181 (1959).

41. Hargis v. Spencer, 254 Ky. 297, 71 S.W.2d 666 (1934); Curlee Clothing Co. v. Robinson, 130 Okla. 41, 265 P. 108 (1928).

42. 191 Minn. 151, 253 N.W. 546 (1934).

43. *Id.* at 153, 253 N.W. at 548.

44. Wallinga v. Johnson, 269 Minn. 436, 131 N.W.2d 216 (1964); Zanker v. Cedar Flying Serv., Inc., 214 Minn. 242, 7 N.W.2d 775 (1943); Dennis v. Coleman's Parking & Greasing Stations, Inc., 211 Minn. 597, 2 N.W.2d 233 (1942).

Although the court's aim in the instant case in attempting to eliminate the confusion that has been produced by the common law distinctions is commendable, Justice Burke notes in dissent[45] that the former rules have served as a workable approach to the problem of deciding a landowner's liability and provided a stability highly prized in the law. Implicit in Justice Burke's position is that the aim of a legal system is certainty and control; however, such an argument fails to recognize that the price often paid for certainty is the arbitrary operation of the common law rules in borderline cases. One commentator,[46] in surveying the history of the common law distinctions, has offered rebuttal to Justice Burke's stability argument by noting that by determining liability solely by the extension of legal doctrine "[i]t [is] easy to fall into one of the common fallacies of legal reasoning, namely, that if liability cannot be established by a certain legal principle it cannot be established at all."[47] From this it may be inferred that an ultimate determination of liability based on general principles of negligence will eliminate the mechanical jurisprudence that has forced courts to reach results within a strained construction of traditional rules. In accordance with this conclusion, the court points out that other jurisdictions, by further stretching the common law rules, have reached the same result as the instant case,[48] but explains that to accept such an approach would only add to the existing confusion.

The dissent also argues that the failure of the majority to indicate what effect status will have on deciding liability in future cases "appears to open the door to potentially unlimited liability . . . ."[49] However, it is implicit in the majority's caveat that status will have *some* effect on liability that the relationship of the parties may still be important for determining reasonable care under the circumstances. Whether the importance of the relationship between the landowner and one entering his premises should be reflected in different legal categories with varying degrees of duty, or should merely be taken into account among other factors in applying a broader standard of reasonable care, seems to be primarily a question of social policy. Under this rationale, the *Rowland* case may result in a change in degree of duty owed as well as in the method of determining liability.

Although the court cites the lead of England and admiralty in support of abolishing the common law classifications, neither the English statute[50] nor the *Kermarec*[51] decision included the trespasser within a class to whom a duty of reasonable care was owed. It is this further step by the *Rowland* court which may be subject to some question. The reasons given

45. 69 Cal. 2d at 102, 443 P.2d at 569, 70 Cal. Rptr. at 106.
46. Marsh, *supra* note 5.
47. *Id.* at 186.
48. 69 Cal. 2d at 101, 443 P.2d at 569, 70 Cal. Rptr. at 105.
49. *Id.* at 102, 443 P.2d at 569, 70 Cal. Rptr. at 105.
50. Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).
51. 358 U.S. 625 (1958).

at common law for holding that a landowner owed no duty to a trespasser was that in a civilization based on private land ownership, it is socially desirable to allow a man to use his land as he sees fit without imposing upon him the burden of anticipating unexpected entries onto his land by uninvited visitors.[52] It was also said that since a trespasser entered without permission he was a wrongdoer and as such should not profit from his own wrongdoing.[53] Based on these considerations, a landowner was not obliged to take special precautions and consequently a trespasser assumed the risks that he might encounter.[54] Exceptions to this rule have developed, however, due to a belief that regard for safety is of more social importance than a landowner's free and unrestricted use of his land.[55] Each exception is premised on foreseeability[56] on the theory that if a landowner can foresee harm, it is not an undue burden to impose on him the duty to exercise reasonable care. It appears that the existing exceptions to a landowner's immunity from liability to trespassers are sufficient in that the traditional rights of the property owner are balanced against the foreseeability of harm to the person. In the instant case the court not only sees an increased regard for human safety, but makes personal rights the *dominant* consideration in the determination of liability. This judgment is expressed in the majority's statement that "[a] man's life or limb does not become less worthy of protection . . . because he has come upon the land of another without permission . . . ."[57] Some difficulty remains, however, when the emphasis is focused on the landowner rather than on the entrant, for, as the dissent asks, "[w]ho can doubt that the . . . department store . . . owes a greater duty of care to one whom it has invited to enter its premises as a prospective customer . . . than it owes to a trespasser seeking to enter after the close of business hours . . . ."[58]

Although in many situations application of the tests of the instant case will reach the same results as under the common law status rules, the dissent has, as previously noted, expressed a fear of opening the door to unlimited liability. The majority's position, however, leaves future courts greater latitude to allow juries to decide cases by applying a reasonableness standard, while judges may still exercise their traditional jury controls of summary judgment, directed verdict, and judgment notwithstanding the verdict to effectively contain the jury within proper confines. Also, in the cases where there may be increased liability, the majority has justified the result by pointing to the prevalance of homeowner's insurance.

52. W. PROSSER, *supra* note 9, at 365-68.

53. *Id.* at 366.

54. Eldredge, *supra* note 6; Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort,* 21 MICH. L. REV. 495 (1923); James, *supra* note 6.

55. W. PROSSER, *supra* note 9, at 368. See p. 361 *supra* for the exceptions.

56. Hocking v. Duluth, Missabe & Iron Range Ry., 263 Minn. 483, 117 N.W.2d 304 (1962); Meagher v. Hirt, 232 Minn. 336, 45 N.W.2d 563 (1951); Nichols v. Consolidated Dairies, 125 Mont. 460, 239 P.2d 740 (1952).

57. 69 Cal. 2d at 100, 443 P.2d at 568, 70 Cal. Rptr. at 104.

58. *Id.* at 101, 443 P.2d at 569, 70 Cal. Rptr. at 105.

As one practical result of the instant case, it appears that some cases which were previously dismissed on summary judgment motions will now go to the jury, and it seems likely, therefore, that there will be an increase in liability.[59] Furthermore, there will in all likelihood be an increase in personal injury litigation.

Since status will still have some effect on the reasonableness of the landowner's acts, California courts will still be forced to make some determination of status. It is therefore possible to foresee that an entirely new body of case law will develop with as many refinements and narrow distinctions as the old rules. Not surprisingly, it was this possibility that caused one member of England's Law Reform Committee to dissent from recommending the adoption of statutory negligence as the English standard in landowner liability cases.[60]

In final analysis, the *Rowland* court has effected an exemplary change in the law by abolishing the common law distinctions and has provided the flexibility so vitally needed in this area. The statutory definition of negligence adopted has decreased the legal importance of determining an entrant's initial status and his status at time of injury and of ascertaining the duty owed to persons of that status. The California courts will also be relieved from the task of finding qualifications and exceptions to the old rules — a burden which has plagued courts for many years. The common law system of classification has produced little more than confusion, conflict, and exceptions to the rules. It is submitted that deciding these cases on a broad basis of negligence will eliminate the necessity of making sometimes tenuous distinctions to permit an injured plaintiff to be a member of a class to whom a duty was owed. It may be argued, however, that the court is setting too rapid a pace by eliminating the common law rules and exceptions developed with respect to trespassers because the common law rules based on foreseeability have been adequate.[61]

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59. As early as 1857, it was said in a negligence case that "a case of this sort . . . could only be submitted to a jury with one result." Toomey v. London & Brighton Ry., 140 Eng. Rep. 696 (C.B. 1857).

60. LAW REFORM COMM., THIRD REPORT, CMD No. 9305, at 43–44 (1954).

61. Nevertheless, in the rare situations where the foreseeability of injury to a trespasser is greater than the foreseeability of injury to an invitee, the reasonableness test will provide the flexibility needed to impose liability. For example, if there is a wooden bridge on the landowner's property which, unknown to the landowner, is sufficiently deteriorated so as to be unable to support a frequent trespass by auto, there may be greater foreseeability of harm to the known trespasser, who travels over the bridge by car, than there is to the invitee, who travels over the bridge by foot. Under the traditional rules, the landowner's duty would be to warn of defects which are known, whereas under the reasonable man test, the court may hold that reasonableness requires the landowner to inspect. Another example is where the landowner keeps a defective electric wire on his premises. It may be said that the foreseeability of harm would be greater to a discovered trespasser who is unaware of the defect, than it would be to an electrician, an invitee, who would readily recognize the defect and need no warning of the danger.