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Trusts: Consequences of Attorney's Good Faith Representation of Adverse Parties in Trust Administration

Mark Reutlinger

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Notes

ADMISSION TO PRACTICE LAW: Civil Rights Arrests and Numerous Fist Fights Do Not Evidence the Type of Character Deficiency Which Excludes an Applicant From Admission to the Bar—*Hallinan v. Committee of Bar Examiners* (Cal. 1966).

Good moral character is a universally required professional qualification for an attorney.¹ There is however no agreement concerning what constitutes sufficient good moral character.² “Some there are who seem to think that [an attorney] should adhere to the standard prescribed for Caesar’s wife. Others come close to insisting that the lawyer, as well as the Boy Scout, should be clean, reverent and brave.”³ In *Hallinan v. Committee of Bar Examiners*,⁴ the California Supreme Court found that an applicant for admission to the California bar possessed sufficient good moral character despite a number of arrests for acts of civil disobedience in civil rights demonstrations and a history of “alleged habitual and continuing resort to fisticuffs to settle personal differences.”⁵ This Note examines the *Hallinan* decision and the use of good moral character as a standard in determining fitness to practice law.

The United States Supreme Court has observed that definitions of good moral character necessarily vary with “the attitudes, experiences, and prejudices of the definer.”⁶ The content of good moral character is seldom defined directly, instead it is usually defined in terms of its converse—moral turpitude.⁷ Moral

¹ See, e.g., Starrs, *Considerations on Determination of Good Moral Character*, 18 U. DET. L.J. 295 (1955). This Note will not distinguish between admission and disciplinary proceedings. In the past it was fashionable to say that higher substantive and procedural standards must be met to disbar an attorney on the theory that an attorney had a vested property right in maintaining his established practice whereas an applicant for admission was merely seeking a privilege. See, e.g., Note, 65 YALE L.J. 873 (1956). However, this distinction has been discredited, *Schwartz v. Board of Bar Examiners*, 353 U.S. 239 n.5 (1957), and was specifically disapproved by *Hallinan v. Committee of Bar Examiners*, 65 A.C. 485, 490 n.3, 421 P.2d 76, 80-81 n.3, 55 Cal. Rptr. 228, 232-33 n.3 (1966), where the California supreme court concluded that the test for admission and discipline is the same. *Id.* at 491, 421 P.2d at 81, 55 Cal. Rptr. at 233. The distinction which still generally remains between the two is that for admission the burden is upon the applicant to prove that he is morally fit, whereas for disbarment it is upon the bar to prove that an attorney is morally unfit. *E.g., id.* at 490, 421 P.2d at 80, 55 Cal. Rptr. at 232.

² See text accompanying notes 15 and 16 *infra*.

³ V. COUNTRYMAN & T. FINMAN, *THE LAWYER IN MODERN SOCIETY* 803 (1966).

⁴ 65 A.C. 485, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

⁵ *Id.* at 493, 421 P.2d at 82, 55 Cal. Rptr. at 234.

⁶ *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957).

⁷ See, e.g., *id.*; *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907 (1940); *Baker v. Miller*, 236 Ind. 20, 138 N.E.2d 145 (1956); CAL. BUS. & PROF. CODE §§ 6101, 6106 (West 1954); WEST VA. CODE ch. 30, art. 2, § 6 (1966). See also Comment, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9 (1935). The United States Supreme Court also appears to treat moral turpitude as the relevant criterion under the due process and equal protection clauses of the fourteenth amendment in reviewing refusal of admission to the bar. See *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 242 (1957).

turpitude, in turn, has been broadly defined as conduct which is "contrary to justice, honesty, and good morals,"⁸ and acts of "baseness, vileness or depravity in the duties which one person owes to another or to society in general."⁹ Predictably, the inherent ambiguity in any definition of good moral character or moral turpitude makes it difficult to apply such concepts as standards in judging professional fitness.¹⁰

The cases express two views regarding the extent of the good moral character requirement. One view sees it as the totality of an individual's conduct measured by prevailing community standards and contains all the inherently subjective and pervasive implications of morality, respectability and good citizenship.¹¹ The other, and the minority view, adopts a functional approach and inquires into a person's character only to the extent that it relates to the proper performance of an attorney's work.¹²

The divergence between the two views was evidenced in an early United States Supreme Court case, *Ex parte Wall*,¹³ which involved an attorney who allegedly participated in a lynching.¹⁴ The majority, affirming disbarment, quoted Lord Mansfield: "[T]he question is . . . whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion."¹⁵ Justice Field dissented forcefully: "It is not for every moral offense which may leave a stain upon the character that courts can summon an attorney to account. Many persons, eminent at the bar, . . . have been frequenters at the gaming-table, . . . dissolute in their habits, [or] . . . engaged in broils and quarrels disturbing the public peace; but . . . it is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them."¹⁶

According to accepted doctrine, good moral character in an attorney is

⁸ *E.g.*, *Noland v. State Bar*, 63 Cal. 2d 298, 302, 405 P.2d 129, 131, 46 Cal. Rptr. 305, 307 (1965). *But cf. In re Morris*, 74 N.M. 679, 397 P.2d 475 (1964).

⁹ *Committee on Legal Ethics v. Scherr*, 149 W. Va. 721, 726, 143 S.E.2d 141, 145 (1965).

¹⁰ Bar examiners are not always willing to acknowledge such difficulties. The chairman of one admissions committee, after stating that "decisions cannot be made without guiding principles any more than business can be transacted without money," *Starrs, Considerations on Determination of Good Moral Character*, 18 U. DET. L.J. 295, 305 (1955), then concluded that "the general principles of what has come to be known as Judaeo-Christian morality, which embodies the natural law as recognized by all men, must be the general principles by which an applicant must live if he is to be considered of good moral character," *Id.* at 305-06. To the criticism that this is perhaps vague when applied as a standard in determining admission to a profession, he answered that "this is not a foggy notion We understand more than we can express." *Id.* at 306.

¹¹ *See, e.g., Grievance Comm. v. Broder*, 112 Conn. 269, 152 A. 292 (1930). *See also* note 10 *supra*; text accompanying note 91 *infra*.

¹² *See* text accompanying note 16 *infra*.

¹³ 107 U.S. 265 (1882).

¹⁴ There was some dispute concerning the attorney's participation in the lynch mob. It is possible that he was merely a spectator. *See id.* at 266-70; *id.* at 292-95 (dissenting opinion). The attorney was never disbarred in the state courts and it is reported that he "lived to become a state court judge, apparently well thought of." *Starrs, supra* note 10, at 297-98 n.5.

¹⁵ 107 U.S. at 273

¹⁶ *Id.* at 306-07.

required to protect the public.¹⁷ However, because there is perhaps no clear view of what is required to protect the public adequately,¹⁸ preserving the prestige and dignity of the legal profession has often become an additional interest to be protected.¹⁹

Under both the functional and community-standards approaches, conduct which has brought an individual's character into question can be divided into two categories. The first category consists of conduct which involves a person's honesty and candor—his trustworthiness. Lack of such trustworthiness is sufficient under both approaches to prohibit a person from practicing law.²⁰ The second category consists of conduct which presents issues of moral and social acceptability in general and which may or may not involve a person's trustworthiness. Where trustworthiness is not involved, cases applying the community-standards approach differ considerably concerning what justifies barring a person from practicing law.²¹ The functional approach inquires into moral and social behavior only to the extent that it relates to trustworthiness.

Under either approach, the general view is that it is irrelevant whether conduct in question on character grounds is also a violation of the law.²² The inquiry is solely to determine how the specific conduct reflects on a person's moral character. Certain offenses, however, are under common law doctrine or by statute ipso facto grounds for denial of admission and for disbarment on the ground that such offenses inherently involve moral turpitude.²³ Thus, under the prevalent view conviction of a felony will result in disbarment or denial

¹⁷ See, e.g., *Zitny v. State Bar*, 64 Cal. 2d 787, 790-91 n.1, 415 P.2d 521, 523 n.1, 51 Cal. Rptr. 825, 827 n.1 (1966); *In re Nesselson*, 35 Ill. 2d 454, 220 N.E.2d 409, 412 (1966); authorities cited note 19 *infra*. Another purpose sometimes given for requiring good moral character of an attorney is to preserve the public's confidence in the courts and the judicial system. However, preserving public confidence in the judicial system is merely one aspect of protecting the public rather than an independent purpose. The maintenance of an effective judicial system is for the public's protection, and loss of the public's confidence in the system would undermine its effectiveness. See text accompanying note 73 *infra*.

¹⁸ Compare "It would indeed be a travesty, if the court were powerless to restrain rogues from parading as its officers, simply because they were clever enough to divorce their professional lives from their private lives," *In re Fischer*, 231 App. Div. 193, 202, 247 N.Y.S. 168, 170 (1930) (attorney suspended because he had a monetary interest in a social club in which card games for money were played), with Justice Field's plea, text accompanying note 16 *supra*.

¹⁹ See, e.g., *In re Rothrock*, 16 Cal. 2d 449, 459, 106 P.2d 907, 912 (1940); *In re Becker*, 16 Ill. 2d 488, 496, 158 N.E.2d 753, 757 (1959); *In re Serritella*, 5 Ill. 2d 392, 398, 125 N.E.2d 531, 534 (1955); *In re Rothrock*, 406 S.W.2d 840, 841 (Ky. 1966); *In re Lynch*, 238 S.W.2d 118, 120 (Ky. 1951) ("to uphold the ideals and traditions of an honorable profession"). See also ABA CANONS OF PROFESSIONAL ETHICS No. 29 and the relevance of public notoriety, discussed in text accompanying notes 96-98 *infra*.

²⁰ See authorities cited notes 25-38 *infra*.

²¹ See authorities cited notes 39-57 *infra*.

²² See, e.g., *In re Hallinan*, 43 Cal. 2d 243, 248, 272 P.2d 768, 771 (1954); *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907 (1940); *Baker v. Miller*, 236 Ind. 20, 24-26, 138 N.E.2d 145, 147-48 (1956); *In re Percy*, 36 N.Y. 651 (1867).

²³ See *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907 (1940); *Baker v. Miller*, 236 Ind. 20, 24-26, 138 N.E.2d 145, 147-48 (1956); CAL. BUS. & PROF. CODE §§ 6101, 6106 (West 1954); WEST VA. CODE, ch. 30, art. 2, § 6 (1966); Comment, 24 CALIF. L. REV. 9 (1935); authorities cited note 24 *infra*.

of admission; conviction of a misdemeanor, only if moral turpitude was involved in the particular offense.²⁴

In the category involving trustworthiness, it has been held that blackmail,²⁵ bribery,²⁶ assisting to collect ransom,²⁷ assisting to dispose of stolen goods,²⁸ embezzlement,²⁹ extortion,³⁰ forgery,³¹ income tax fraud,³² larceny,³³ misappropriation of clients' funds,³⁴ murder,³⁵ passing of bad checks,³⁶ perjury,³⁷ and a practice of putting slugs in parking meters³⁸ all evidence the type of character which disqualifies a person from practicing law. In the category involving moral and social acceptability, conduct casting doubt on a person's fitness to practice law has included sexual misconduct,³⁹ violations of liquor

²⁴ See, e.g., *Bartos v. United States Dist. Ct.*, 19 F.2d 722 (8th Cir. 1927); *In re Kirby*, 84 F. 606 (D.S.D. 1898); *In re Clark*, 52 Cal. 2d 322, 340 P.2d 613 (1959); *State v. Bieber*, 121 Kan. 536, 247 P. 875 (1926); *In re Welansky*, 319 Mass. 205, 65 N.E.2d 202 (1946); *In re Devine*, 26 App. Div. 211, 272 N.Y.S.2d 86 (1966).

²⁵ *People v. Varnum*, 28 Colo. 349, 64 P. 202 (1901); *In re Hart*, 131 App. Div. 661, 116 N.Y.S. 193 (1909).

²⁶ *In re Wilson*, 76 Ariz. 49, 258 P.2d 433 (1953); *Zitny v. State Bar*, 64 Cal. 2d 787, 415 P.2d 521, 51 Cal. Rptr. 825 (1966) (charges of soliciting bribes not sustained, attorney reprimanded on other grounds); *In re Wilson*, 216 N.E.2d 555 (Ind. 1966); *In re Wellcome*, 23 Mont. 450, 59 P. 445 (1899); *Matter of Levy*, 260 App. Div. 722, 23 N.Y.S.2d 414 (1940), *aff'd mem.*, 288 N.Y. 489, 41 N.E.2d 788 (1942); *In re Boland*, 127 App. Div. 746, 111 N.Y.S. 932 (1908); *In re Simpson*, 79 Okla. 305, 192 P. 1097 (1920).

²⁷ *In re Richards*, 333 Mo. 907, 63 S.W.2d 672 (1933).

²⁸ *People ex rel. Chicago Bar Ass'n Jackson*, 322 Ill. 618, 153 N.E. 621 (1926).

²⁹ *In re Cruickshank*, 47 Cal. App. 496, 190 P. 1038 (1920); *People ex rel. Colorado Bar Ass'n v. Bryce*, 36 Colo. 125, 84 P. 816 (1906); *In re Lynch*, 238 S.W.2d 118 (Ky. 1951); *In re Rockmore*, 139 App. Div. 71, 123 N.Y.S. 928 (1910).

³⁰ *Barton v. State Bar*, 2 Cal. 2d 294, 40 P.2d 502 (1935); *In re Malmin*, 364 Ill. 164, 4 N.E.2d 111 (1936).

³¹ *In re Rothrock*, 406 S.W.2d 840 (Ky. 1966); *Nelson v. Commonwealth*, 128 Ky. 779, 109 S.W. 337 (1908); *State v. Stringfellow*, 128 La. 463, 54 So. 943 (1911); *In re Sutton*, 50 Mont. 88, 145 P. 6 (1914).

³² *In re Williams*, 221 Minn. 554, 23 N.W.2d 4 (1946).

³³ *In re Urias*, 65 A.C. 261, 418 P.2d 849, 53 Cal. Rptr. 881 (1966); *In re Henry*, 15 Idaho 755, 99 P. 1054 (1909); *In re King*, 232 Minn. 327, 45 N.W.2d 562 (1950); *In re Ross*, 279 App. Div. 665, 108 N.Y.S.2d 247 (1951); *In re Lillopoulos*, 175 Wash. 338 27 P.2d 691 (1933). *But cf. Ex parte Edmead*, 27 F.2d 438, 439 (D. Mass. 1928) (deportation proceeding of an alien) ("While there is authority that all larceny involves turpitude . . . I am not prepared to agree that a boy who steals an apple from an orchard is guilty of 'inherently base, vile, or depraved conduct.'"); *In re State Bd. of Bar Examiners*, 183 So. 2d 688 (Fla. 1966) (conviction of petty larceny does not bar admission to the bar).

³⁴ *Simmons v. State Bar*, 65 A.C. 286, 419 P.2d 161, 54 Cal. Rptr. 97 (1966); *Sturr v. State Bar*, 52 Cal. 2d 125, 338 P.2d 897 (1959).

³⁵ *In re Johnson*, 143 N.W.2d 382 (Minn. 1966); *In re Patrick* 136 App. Div. 450, 120 N.Y.S. 1006 (1910).

³⁶ *In re Blasi*, 47 N.J. 447, 221 A.2d 524 (1966) (attorney suspended pending further action); *In re Shapiro*, 263 App. Div. 659, 34 N.Y.S.2d 285, (1942); *In re Dubinsky*, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938).

³⁷ *In re Ulmer*, 208 F. 461 (N.D. Ohio 1913); *In re O'Keefe*, 55 Mont. 200, 175 P. 593 (1918); *In re Klatzkie*, 142 App. Div. 352, 126 N.Y.S. 842 (1911).

³⁸ *Fellner v. Bar Ass'n*, 213 Md. 243, 131 A.2d 729 (1957).

³⁹ *Grievance Comm. v. Broder*, 112 Conn. 269, 152 A. 292 (1930) (adultery, attorney disbarred); *People ex rel. Black v. Smith*, 290 Ill. 241, 124 N.E. 807 (1919) (frequenting a

laws,⁴⁰ drunkenness,⁴¹ assault,⁴² an intemperate nature and use of abusive language,⁴³ gambling,⁴⁴ income tax evasion,⁴⁵ traffic violations,⁴⁶ making anonymous "crank" telephone calls,⁴⁷ participating in a lynching,⁴⁸ fighting a duel,⁴⁹

disorderly house insufficient grounds for disbarment); *In re Meyerson*, 190 Md. 671, 59 A.2d 489 (1948) (helping obtain an abortion, no attorney-client relationship involved, application for reinstatement of disbarred attorney denied); *In re Van Wyck*, 207 Minn. 145, 290 N.W. 227 (1940) (indecent assault on boy fifteen, attorney disbarred); *In re Fleckenstein*, 34 N.J. 20, 166 A.2d 753 (1960) (lewdness and carnal indecency, attorney suspended, illness requiring psychiatric treatment a mitigating circumstance); *In re Wesler*, 1 N.J. 573, 64 A.2d 880 (1949) (statutory rape, attorney disbarred); *In re Gould*, 4 App. Div. 2d 174, 164 N.Y.S.2d 48 (1957) (attempt to coerce into prostitution and assault with intent to commit rape, attorney disbarred); *Matter of Okin*, 272 App. Div. 607, 73 N.Y.S.2d 861 (1947) (keeping a disorderly house, attorney disbarred); *In re Hicks*, 163 Okla. 29, 20 P.2d 896 (1933) (married father of six accused of siring child of a mentally defective woman, attorney disbarred); *In re Marsh*, 42 Utah 186, 129 P. 411 (1913) (keeping a disorderly house, attorney disbarred). Disreputable sexual behavior has been reported as the second most frequent reason for dismissing students from law school. Kempner, *Current Practices of Law Schools with Respect to Character Qualifications of Students*, 34 BAR EXAMINER 106, 109 (1965).

⁴⁰ Violations of liquor prohibition has provoked perhaps the sharpest conflict among the courts. For example, where a jug containing a small quantity of intoxicants was found on the back porch of an attorney's home, the attorney was disbarred. *State v. Bieber*, 121 Kan. 536, 247 P. 875 (1926). On the other hand, it has been held that a three year suspension was not warranted in the case of an attorney who often offered a glass of beer to his guests. *Bartos v. United States Dist. Ct.*, 19 F.2d 722 (8th Cir. 1927). See cases cited in Comment, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9, 17 n.34 (1935).

⁴¹ *In re Urias*, 65 A.C. 261, 418 P.2d 849, 53 Cal. Rptr. 881 (1966) (attorney suspended); *Wood v. State ex rel Boykin*, 45 Ga. App. 783, 165 S.E. 908 (1932) (attorney disbarred); *In re Wells*, 293 Ky. 201, 168 S.W.2d 730 (1943) (attorney disbarred); *In re Osmond*, 174 Okla. 561, 54 P.2d 319 (1935) (attorney disbarred); ARK. STAT. ANN. title 25, ch. 4, § 25-401 (1947); IDAHO CODE title 3, § 3-301(6) (1947).

⁴² *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907 (1940) (conviction of assault with a deadly weapon found under the circumstances not to involve moral turpitude and not warranting disbarment); *accord*, *State v. Metcalfe*, 204 Iowa 123, 214 N.W. 874 (1927).

⁴³ *Ex parte Keeley*, 189 P. 885 (Ore. 1920) (California attorney denied admission to Oregon bar); *But cf.* *People v. Palmer*, 61 Ill. 255 (1871) (attorney disbarred on other grounds). See also authorities cited in note 56 *infra*.

⁴⁴ See *In re Fischer*, 231 App. Div. 193, 247 N.Y.S. 168 (1930) (attorney suspended because he had a monetary interest in a social club where card games for money were played).

⁴⁵ Since tax evasion includes various kinds of conduct, including mere negligent failure to file a tax return, some independent showing besides conviction is required to show moral turpitude. *In re Hallinan*, 43 Cal. 2d 243 272 P. 678 (1954); *Baker v. Miller*, 236 Ind. 20, 138 N.E.2d 145 (1956). Tax evasion should be distinguished from tax fraud. See note 32 *supra*.

⁴⁶ *In re Blasi*, 47 N.J. 447, 221 A.2d 524 (1966) (disregarding court complaints for traffic violations, attorney suspended pending further action). Numerous convictions for traffic violations have been reported as a reason for denying admission by law schools on character grounds. Kempner, *supra* note 39.

⁴⁷ *State ex rel. Bar Ass'n v. Ablah*, 348 P.2d 172 (Okla. 1959) (attorney suspended).

⁴⁸ *Ex parte Wall*, 107 U.S. 265 (1882) (attorney disbarred from practice in federal courts, but remained a member of the Florida bar and later became a state judge, see note 14 *supra*.)

⁴⁹ *Smith v. Tennessee*, 9 Tenn. 228 (1828) (attorney disbarred).

"bugging" a governor's mansion,⁵⁰ conviction of "wire-tapping,"⁵¹ conviction of a federal airplane "bomb hoax" offense,⁵² reckless driving and hit and run offenses,⁵³ involuntary manslaughter,⁵⁴ carrying on an "undignified" political campaign,⁵⁵ disparaging the integrity of the bar and the courts,⁵⁶ and failure by a conscientious objector to report for induction.⁵⁷

Whatever the merits of the above individual decisions, courts and bar examiners adhering to the community-standards approach seem to have few if any criteria to guide them. The United States Supreme Court has held that the due process and equal protection clauses of the fourteenth amendment require qualifications for bar admission to have "a rational connection with the applicant's fitness or capacity to practice law."⁵⁸ This statement may be interpreted as a functional approach. However, the courts have continued to state that fitness to practice law depends on whether a person has good moral character without articulating how or which aspects of his character are related to the performance of an attorney's work.⁵⁹ Perhaps the greatest obstacle in the development of adequate standards has been the apparent reluctance of the courts to articulate the specific interests supposedly protected by the good moral character requirement.⁶⁰

The California Supreme Court in *Hallinan*⁶¹ has adopted the functional approach to the moral character issue. When Terence Hallinan, a recent law school graduate, applied to the bar he had a record of six arrests for acts of nonviolent civil disobedience protesting denial of civil rights to minorities, two arrests in Mississippi voter registration activity, and one arrest in London while participating in a peace demonstration led by Lord Bertrand Russell.⁶² In

⁵⁰ *People ex rel. Attorney Gen. v. Ellis*, 101 Colo. 101, 70 P.2d 346 (1937) (attorney suspended and disbarment proceeding continued).

⁵¹ *Bar Ass'n v. Massengale*, 171 Ohio St. 442, 171 N.E.2d 713 (1961) (attorney disbarred).

⁵² *Bar Ass'n v. Smith*, 174 Ohio St. 452, 190 N.E.2d 267 (1963) (attorney suspended indefinitely).

⁵³ *In re Urias*, 65 A.C. 261, 418 P.2d 849, 53 Cal. Rptr. 881 (1966) (attorney suspended).

⁵⁴ *In re Alkow*, 64 Cal. 2d 838, 415 P.2d 800, 51 Cal. Rptr. 912 (1966) (attorney suspended); *In re Welansky*, 319 Mass. 205, 65 N.E.2d 202 (1946) (attorney disbarred).

⁵⁵ *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1956) (attorney reprimanded).

⁵⁶ *In re Grimes*, 364 F.2d 654 (10th Cir. 1966) (attorney disbarred); *In re Humphrey*, 174 Cal. 290, 163 P. 60 (1917) (attorney disbarred); *In re Latimer*, 11 Ill. 2d 327, 143 N.E.2d 20 (1957), *appeal dismissed and cert. denied*, 355 U.S. 82 (1957) (admission to bar denied).

⁵⁷ *In re Pontarelli*, 393 Ill. 310, 66 N.E.2d 83 (1946) (attorney disbarred). *See also In re Anastaplo*, 366 U.S. 82 (1961); *In re Summers*, 325 U.S. 561 (1945).

⁵⁸ *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

⁵⁹ *See, e.g.*, cases decided after 1957 cited notes 25-57 *supra*.

⁶⁰ Lack of specificity is inevitable if the question of good moral character, when applied as a qualification for membership in the bar, is viewed as a measure of community acceptability of a person's conduct. In *Iowa State Bar Ass'n v. Kraschel*, 148 N.W.2d 621, 627 (Iowa 1967), for example, instead of indicating any relationship between the conduct requiring disbarment and the occupational duties of an attorney, the court merely stated that the practice of law is a "highly esteemed and respected" profession, and that the evidence showed "an utter breach of faith to the public, to the courts, and to [his] fellow lawyers."

⁶¹ 65 A.C. 485, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

⁶² *Id.* at 493-95, 421 P.2d at 82-84, 55 Cal. Rptr. at 234-36.

addition, he was involved in nine fist fights between the ages of 16 and 27.⁶³ All this was urged as establishing a lack of the requisite good moral character.

Examining petitioner's civil disobedience, the court noted that all of the demonstrations in which the applicant had engaged were peaceful, that the sincerity of his beliefs and high motivation were unchallenged, and that his sentiments on nonviolent disobedience were shared "not only by large numbers of idealistic youth . . . but also by some legal scholars and other eminent people."⁶⁴ The court then held that, to the extent that acts of civil disobedience involve violations of the law, "criminal prosecution, not exclusion from the bar, is the appropriate means of punishing such offenders."⁶⁵ The court specifically distinguished a group of admission cases in which "the fraudulent acts charged . . . unlike the subject acts committed by petitioner, necessarily impair the basic objects of the legal profession,"⁶⁶ and directed the bar to limit its inquiries into an applicant's character "to assurance that, if admitted, he will not obstruct the administration of justice or otherwise act unscrupulously in his capacity as an officer of the court."⁶⁷ Turning to petitioner's fist fights, the court again strongly emphasized the same functional approach: "The question is not whether petitioner's conduct can be condoned. It cannot. The question is whether such conduct demonstrates that he does not presently possess the character to be entitled to practice law."⁶⁸ The court again distinguished prior admission and disciplinary cases which "involved acts which bear upon the individual's manifest dishonesty,"⁶⁹ and concluded that "although petitioner's past behavior may not be praiseworthy it does not reflect upon his honesty and veracity nor does it show him unfit for the proper discharge of the duties of an attorney."⁷⁰

By focusing on criteria relevant to the occupational duties of an attorney, the California supreme court has limited the previously vague question of good moral character to one of trustworthiness. The desirability of such limitation can best be judged by examining the interests which should be protected by the requirement that a person possess acceptable moral character to be permitted to practice law. The objective of protecting the public can be particularized into the following: (1) protection of those members of the public who will be the attorney's clients; (2) assurance to the client's adversary⁷¹ that an

⁶³ *Id.* at 502-10, 421 P.2d at 89-93, 55 Cal. Rptr. at 241-45.

⁶⁴ *Id.* at 499-500, 421 P.2d at 86-87, 55 Cal. Rptr. at 238-39.

⁶⁵ *Id.* at 500, 421 P.2d at 87, 55 Cal. Rptr. at 239. Violations of the law not only raise questions of moral character, but also pose a potential conflict with the attorney's position as an "officer of the court" and his commitment to uphold the law. The court did not consider this question. However, civil disobedience is distinguishable from other wilful violations of the law. A person committing civil disobedience shows disrespect not for the system—he violates the law openly and is willing to accept the court's judgment—but rather for particular unjust laws or unjust conditions which he feels require attention. See Wofford, *A Lawyer's Case for Civil Disobedience*, LIBERATION, Jan. 1961, at 12.

⁶⁶ 65 A.C. at 501, 421 P.2d at 88, 55 Cal. Rptr. at 240.

⁶⁷ *Id.* at 500-01, 421 P.2d at 87, 55 Cal. Rptr. at 239.

⁶⁸ *Id.* at 509, 421 P.2d at 93, 55 Cal. Rptr. at 245.

⁶⁹ *Id.* at 510, 421 P.2d at 93, 55 Cal. Rptr. at 245.

⁷⁰ *Id.* at 510, 421 P.2d at 94, 55 Cal. Rptr. at 246.

⁷¹ The term "adversary" is here intended to include both a specific individual and the

attorney acting on behalf of his client will not take unfair advantage of the adversary; and (3) maintenance of an effective judicial system.

An attorney's client has the foremost claim for protection. He entrusts his personal and financial affairs to an attorney, and it is inconceivable that anything less than the attorney's trustworthiness will assure that the client's interests are fully protected. At the same time, it does not seem that anything more is required. Sexual promiscuity, wifebeating, or a quarrelsome nature may evidence lack of what has traditionally been considered to be good moral character.⁷² Yet such conduct no more indicates dishonesty or untrustworthiness in an attorney than its absence assures that honesty or trustworthiness is present.

The client's adversary has a related interest to be protected. Even though an attorney's primary duty is to look after his client's interest, the client's adversary is entitled to expect that the methods used will not be unscrupulous. Again, honesty and trustworthiness will suffice to protect the adversary as well as the client.

To maintain an effective judicial system, public confidence in the system must be maintained.⁷³ The question here is whether an attorney's conduct, though unimpeachable in honesty and trustworthiness, may still be such as to discredit the courts and impair their effectiveness. Perhaps only an empirical study can fully answer this question. It should not, however, be assumed that moral or social indiscretions by attorneys will necessarily discredit the judicial system. First, it should be noted that the typical criticism of the legal profession has related to professional conduct and duties.⁷⁴ Second, the public tends to place its confidence in the merchant who delivers what he advertises and the doctor who can heal. There is no reason to suppose that the public will lose confidence in a judicial system which affords it justice because some of its members commit social or moral indiscretions in their personal affairs.⁷⁵ Moreover, while an attorney is considered "an officer of the court," the public is certainly not unaware of the separation between the judiciary on the one hand and attorneys, who in their role as attorneys are subject to supervision by the judiciary, on the other.⁷⁶

general public in those cases where there is a conflict between a client's interest and the interest of the community.

⁷² See text accompanying 7-9 *supra*.

⁷³ See note 17 *supra*.

⁷⁴ See, e.g., J. BENNETT, *OUTLAWS IN SWIVEL CHAIRS* (1958); N. DACEY, *HOW TO AVOID PROBATE* (1965); CHARLES DICKENS, *BLEAK HOUSE* (1853); Mayer, *Justice, The Law and the Lawyer*, *THE SATURDAY EVENING POST*, Feb. 26, 1966, at 36; letter to the editors of *TIME*, note 81 *infra*.

⁷⁵ That a measure is needed "to protect the public" is a favorite rallying cry for proponents of various interests. However, the public is not as unsophisticated as the frequent appearance of this insistent imperative implies. In refusing to disbar an attorney for conducting an "undignified" campaign for political office, the Supreme Court of South Dakota said: "The electors of the Fifth Judicial Circuit like the American people as a whole are politically mature and have had much experience in weighing statements made in an election campaign. The name calling, the unfair charges, the innuendoes and the destructive criticisms so characteristic of an election contest are not taken too seriously by the voters." *In re Gorsuch*, 76 S.D. 191, 199, 75 N.W.2d 644, 649 (1956). See also notes 82-84 *infra*.

⁷⁶ The courts often state that an attorney is "an officer of the court." See text accom-

As for the notion that the "dignity and prestige of the legal profession" is itself an interest to be protected,⁷⁷ there does not appear to be any more reason for allowing the legal profession to establish a qualifying standard based on "dignity and prestige" than for plumbers or ladies' garment workers, for example, to do so. To the extent that upholding the "dignity and prestige" of the legal profession is said to preserve public confidence in the judicial system, the argument is misconceived. The prestige and dignity of the legal profession is more directly a result of public confidence in the judicial system and in the professional integrity of the bar, than vice versa.

In addition, if the bar seeks to make "the lawyer, as well as the Boy Scout . . . clean, reverent, and brave"⁷⁸ on the belief that this will assure the bar and judiciary popularity and public approval, the proposition is misdirected. The very duties of the legal profession and the courts make it unlikely that universal popularity or approval of all that they do will ever be attained. Every time a lawyer wins a case, another loses his. Disgruntled clients are inevitable. The adversary proceeding itself is not calculated to win friends or influence people. An attorney is sworn to defend unpopular causes,⁷⁹ and the courts must render unpopular decisions.⁸⁰ The most competent attorneys incur the public's disdain whenever they obtain an acquittal of a "guilty" individual on a ground that the layman can only consider an incomprehensible "technicality" or "loophole."⁸¹ It is futile for attorneys to seek either popularity or approval by the public beyond what a reputation for integrity in their professional conduct will bring. But more important, ambition for public approval conflicts with the duties of an attorney. If public approval were the ultimate yardstick, there would have been few attorneys willing to defend such unpopular causes as those of accused communists during the McCarthy era.⁸² Lack of rapport between the public and the legal system can only be alleviated by educating the public. But even this will not eliminate all dissatisfaction. For even reasonable men will disagree on what does or does not merit approval.

Restrictive influences limiting the freedom of an individual to enter his

panying note 67 *supra*. Whatever the total implications of this concept, it would seem that honesty and trustworthiness are sufficiently adequate character requirements to assure courts that their officers will not obstruct the administration of justice.

⁷⁷ See text accompanying notes 17-19 *supra*.

⁷⁸ V. COUNTRYMAN & T. FINMAN, *THE LAWYER IN MODERN SOCIETY* 803 (1966).

⁷⁹ See ABA CANONS OF PROFESSIONAL ETHICS No. 4 and Oath of Admission; CAL. BUS. & PROF. CODE § 6068(h) (West 1962).

⁸⁰ Perhaps the sardonic wit of the nation's newspaper cartoonists, *see, e.g.*, *TIME*, Aug. 5, 1966, at 39, best illustrates the invective directed at the United States Supreme Court as a result of its recent decisions in the area of criminal procedure.

⁸¹ After *Time* magazine ran an article about Edward Bennett Williams, calling him "the country's top criminal lawyer," *TIME*, Feb. 10, 1967, at 66, one of its readers wrote back: "Legal morality—if it ever existed in the U.S.—is dead, as your story on Edward Bennett Williams proves. Lawyers are not concerned with the guilt or innocence of their clients but with what 'mistakes' the police or prosecution have made and what angles can be played to spring the guy—all in the name of constitutional rights. The result: not a trial to determine justice, but a game." *TIME*, Feb. 24, 1967, at 10.

⁸² Compare the case of Negroes accused of offenses against white women in the southern states. *See Powell v. Alabama*, 287 U.S. 45 (1932).

chosen profession often merely reflect the standards of the dominant group in the profession⁸³ and represent efforts to force those standards on others⁸⁴ with little if any advantage to the public.⁸⁵ Professor Reich complains: "The organized bar's greater concern with 'ambulance chasing' than with other ethical failings reflects the dominant group's suspicion of the negligence lawyer."⁸⁶ While protection of the public has traditionally been a paramount consideration in bar admission and disciplinary proceedings, the individual's interest in being allowed to practice law has not been considered an affirmative value.⁸⁷ *Hallinan* specifically recognized that the community has an affirmative

⁸³ Often not only the standards, but initiation of regulatory licensing of an occupation is traced not to a public-minded legislature, but to the group which is to be regulated. See W. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 109-11 (1965); Monaghan, *The Constitution and Occupational Licensing in Massachusetts*, 41 BOSTON U.L. REV. 157, 166 (1961); Comment, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533, 535-37 (1962).

⁸⁴ See *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1956), where an attempt was made to disbar an attorney who had conducted an "undignified" campaign for political office. Consider, also, the emphasis on the "rights" of the members of the profession in the following questioning of an applicant to the California bar: "[Y]ou are seeking admission to the profession and . . . we as your prospective colleagues have a right to expect complete candor from you on this particular question, and . . . if you don't wish to be completely candid with us then we are justified in saying you don't belong in our profession." *Konigsberg v. State Bar*, 353 U.S. 252, 288 (1957) (dissenting opinion).

⁸⁵ See, e.g., Opinion of the Justices, 322 Mass. 755, 79 N.E.2d 883 (1948) (advisory opinion that proposed bill prohibiting cemetery owners from selling monuments for cemetery lots could not be sustained as a valid exercise of the police power); W. GELLHORN, *supra* note 84, at 110:

It is hard to believe . . . that legislators are responding to any felt public need when they agree that florists and beauticians and naturopaths and shorthand reporters and all the other groupings must first be tested, sifted, and pasteurized—and then be protected against the competition of upstarts who might like to enter the occupation.

Compare the urging of former Attorney General Nicholas deB. Katzenbach that the legal profession try to meet the needs of the poor by relaxing rules against lawyers soliciting clients and nonlawyers giving legal advice, *N.Y. Times*, June 25, 1965, at 15, col. 1, with the suit by three attorneys to enjoin federally subsidized neighborhood law offices from offering free legal advice, *N.Y. Times*, Oct. 9, 1965, at 4, col. 3 (supplementary material on microfilm following the International Edition of the *New York Times* during the *New York Newspaper Guild* strike). See also Monaghan, *supra* note 83 at 181; notes 89-90 *infra*.

⁸⁶ Reich, *The New Property*, 73 YALE L.J. 733, 767 (1964). That there are such "other ethical failings" cannot be questioned. Consider the case of a prosecutor who seeks the death penalty while withholding evidence favorable to the defendant when introduction of such evidence would ipso facto result in a lesser punishment, or even an acquittal. *Miller v. Pate*, 386 U.S. 1 (1967); *TIME*, March 31, 1967, at 72-73. Not only criminal prosecution, but disciplinary action by the bar is rare in such cases.

⁸⁷ Recently, however, the individual's interest in earning a livelihood as an attorney has been accorded increasingly heavier weight in admission proceedings. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957). Admission to the bar cannot be denied without the right to confront those who give unfavorable information against the applicant. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). Nor can the practice of law be conditioned on the relinquishment of a constitutional right. *Spevack v. Klein*, 385 U.S. 511 (1967) (attorney's disbarment for invoking self-

interest in seeing that every qualified person is admitted to his chosen profession.⁸⁸ This interest of the community has increasing significance in view of the increased demand for legal services resulting from the United States Supreme Court rulings on right to representation by counsel⁸⁹ and the Government's efforts under the Office of Economic Opportunity to provide legal services for the poor.⁹⁰

Considering all of the above, *Hallinan's* limitation of the character inquiry to assurance that a person can be trusted to discharge his duties as an attorney, will protect the valid interests which have in the past been shielded by the broad criteria of good moral character. Trustworthiness is also sufficiently definite a standard to remove the arbitrariness inherent in the good moral character criterion under which even bar examiners admit that the rejection or acceptance of candidates rests upon "the age, experience, background and degree of tolerance of each member [of a character investigating committee] . . . as well as his physical and mental well being on that day."⁹¹ In the place of "wise men"⁹² applying their own notions of "natural law as recognized by all men,"⁹³ California has established an adequate standard which will assure both protection of the public and uniformity in its application. *Hallinan* is part of a trend to eliminate restraints on private conduct by government officials who dispense employment, licenses, and other forms of "government largess,"⁹⁴ by requiring all restrictions to be justified with relevant reasons accompanied by adequate procedural standards.⁹⁵

The bar's zeal to protect "the prestige and dignity of the legal profession" in past disciplinary proceedings, conducted without sufficient standards, has in some cases perhaps harmed the reputation of the bar rather than helped it. It is quite discernible that some conduct may have passed uncensored had it not attracted wide publicity.⁹⁶ Discipline of attorneys in such cases has led

incrimination privilege of fifth amendment in disciplinary proceeding and refusing to testify and produce demanded records reversed).

⁸⁸ 65 A.C. at 501, 421 P.2d at 87, 55 Cal. Rptr. at 239.

⁸⁹ *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Some law enforcement officials feel that a sufficient number of lawyers cannot be made available to meet the Supreme Court requirements and that they will forego interrogation of indigent suspects who decline to waive their rights to have an attorney present. N.Y. Times, June 20, 1966, at 1, col. 2.

⁹⁰ The American Bar Association has called on all lawyers to cooperate with the Office of Economic Opportunity in providing legal services to the poor, N.Y. Times, Feb. 8, 1965, at 52, col. 1, *id.*, Feb. 10, 1965, at 27, col. 1.

⁹¹ Green, *Procedures for Character Investigations*, 35 BAR EXAMINER 10, 14 (1966).

⁹² *Id.*

⁹³ Starrs, *Considerations on Determination of Good Moral Character*, 18 U. DET. L.J. 295, 306 (1955).

⁹⁴ "Government largess" is a term used by Professor Reich in his article on the emergence of government as a major source of wealth in the United States, to describe valuables dispensed by government: money, benefits, services, contracts, franchises and licenses. Reich, *supra* note 86.

⁹⁵ See, e.g., *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960) (state statute requiring every teacher of a state-supported school to disclose every organization to which he had belonged within the preceding five years held unconstitutional).

⁹⁶ Thus, a prominent attorney who entered into an adulterous relationship with a war

one commentator to conclude that "the bar sometimes seems less concerned with keeping its house clean than with the pretense that it is clean,"⁹⁷ and that it is preoccupied "with the pretense [of integrity] rather than the fact of integrity."⁹⁸

The *Hallinan* case itself exemplifies the dangers of remitting determination of these issues to the bar without adequate restraints on its discretion. The California supreme court emphasized its displeasure with the bar's eagerness to impeach petitioner's character. Examining one of the fist fights brought into the record against the petitioner, apparently a case of self-defense, the court could only say that it was absurd to urge that the event in any way reflected on the petitioner's character.⁹⁹ The bar also contended that the petitioner lacked truthfulness because he had failed to disclose that he was an intervener in a will contest and that he was convicted in England of "blocking a footpath." The court pointed out the obvious—namely, that in view of the extensive list of arrests which the petitioner did disclose, his nondisclosure of the two "relatively unimportant matters could not reasonably have been motivated by the belief that disclosure would harm his cause,"¹⁰⁰—and accepted the petitioner's explanation that he had merely forgotten the two items.

The California supreme court has taken the moral character requirement out of the visceral realm and adopted a functional approach requiring that an attorney be trustworthy. The generally accepted doctrine that conviction of a felony is an absolute bar preventing a person from practicing law¹⁰¹ is inconsistent with the *Hallinan* rule since the classification of an offense as a felony or misdemeanor has no relationship to whether the offense involves elements of trustworthiness.¹⁰² Trustworthiness as a standard will adequately protect the public by specifically focusing on the relevant criteria. In addition, it can be applied with a substantial measure of objectivity and will provide less likelihood that an applicant's admission to the bar will depend on such extraneous factors as the "degree of tolerance or the physical or mental well-being" of bar committee members. Under *Hallinan*, the question whether a person has sufficiently acceptable character to be allowed to practice law is one of whether he is a safe person to manage the legal affairs of others.

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hero's wife and attracted much publicity was disbarred. *Grievance Comm. v. Broder*, 112 Conn. 269, 152 A. 292 (1930). Similarly, the negligent owner of the Coconut Grove night club who was convicted of involuntary manslaughter for failing to provide adequate safeguards against fire as a result of which 491 lives were lost was also disbarred. *In re Welansky*, 319 Mass. 205, 65 N.E.2d 202 (1946).

⁹⁷ Comment, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 COLUM. L. REV. 1039, 1051 (1952).

⁹⁸ *Id.* Cf. the announcement by the president of the American Bar Association of a three year study to evaluate the enforcement of legal ethics and the concern with "how to emphasize the need for stronger discipline without implying that the legal profession is corrupt." N.Y. Times, Feb. 10, 1967, at 21, col. 1.

⁹⁹ 65 A.C. at 503, 421 P.2d at 89, 55 Cal. Rptr. at 241.

¹⁰⁰ 65 A.C. at 512, 421 P.2d at 95, 55 Cal. Rptr. at 247.

¹⁰¹ See text accompanying note 24 *supra*.

¹⁰² See, e.g., "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor." CAL. PENAL CODE § 17 (West Supp. 1966).

CONSTITUTIONAL LAW: First Amendment Right of Association for High School Student—*Robinson v. Sacramento City Unified School District* (Cal. App. 1966).

A California statute makes it illegal for pupils in public elementary or secondary schools to join "any secret fraternity, sorority, or club, wholly or partly formed from the membership of pupils attending the public schools."¹ The Sacramento Board of Education promulgated a rule providing for enforcement of the statute through suspension or expulsion of pupils who join such forbidden organizations.² Judy Robinson, a high school student and member of a sorority, the "Manana Club," challenged the rule; she claimed that the school board exceeded its delegated powers in issuing the rule and that the rule infringed her constitutional rights. In *Robinson v. Sacramento City Unified School District*,³ the District Court of Appeal upheld the school board's action, reversing the trial court which had held the rule "void as applied to the plaintiff."⁴

The appellate court held that the school board rule was authorized by the terms of the statute;⁵ the court therefore found the plaintiff to be challenging the statute itself rather than the rule.⁶ The plaintiff made constitutional objections based on the first and fourteenth amendments.⁷ The court, however, concentrated on the plaintiff's first amendment challenge.

¹ CAL. EDUC. CODE § 10604 (West 1960). The statute exempts some student groups: "Nothing in this section shall be construed to prevent any pupil from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America, or other kindred organizations not directly associated with the public schools of the State." *Id.* About half the states have similar statutes. A. FLOWERS & E. BOLMEIER, LAW AND PUPIL CONTROL 12 (1964). See, e.g., COLO. REV. STAT. § 123-21-18 (1963); KAN. STAT. ANN. § 72-5311 (1964); ORE. REV. STAT. § 336.610 (1965).

² The rule reads in part as follows: "No pupil . . . shall join . . . any fraternity, sorority, or other nonschool club which is of such a nature as to engender an undemocratic spirit in the pupils of the public schools of the district. . . membership in which . . . is perpetuated by taking in members from the pupils enrolled in the public schools on the basis of the selection and decision of its own members. (a.) Nothing in this rule shall be construed to prohibit any pupil from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America, or other kindred organizations not directly associated with the public schools of this State; or from joining youth clubs and organizations sponsored by recognized churches, adult fraternal societies or service clubs (such as Masons, Elks, Rotary, etc.) not directly associated with the public schools of this State, or nationally known youth movements and groups organized for citizenship training and physical development (such as YMCA, YWCA, Boy Scouts of America, Girl Scouts, Camp Fire Girls, etc.)" Cited in *Robinson v. Sacramento City Unified School Dist.*, 245 A.C.A. 311, 313-14 n.1, 53 Cal. Rptr. 781, 783 n.1 (1966).

³ 245 A.C.A. 311, 53 Cal. Rptr. 781 (1966).

⁴ *Id.* at 313, 53 Cal. Rptr. at 782.

⁵ The court held that the term "secret" in the statute was intended by the legislature to refer to the elements of social exclusiveness and self-perpetuating membership traditionally associated with high school fraternities. The school board was therefore authorized to regulate clubs not secret in the strict sense. *Id.* at 318, 53 Cal. Rptr. at 786.

⁶ *Id.* at 323, 53 Cal. Rptr. at 789.

⁷ The plaintiff asserted violations of the first (free assembly) and fourteenth (due process and equal protection) amendments of the United States Constitution and comparable

The plaintiff characterized regulation of membership in nonschool clubs as a violation of her first amendment freedoms of assembly and association. The court met the challenge with the following statement:

The First Amendment guarantee of the right of free assembly as applied to adults (or even to college students, concerning whose rights under the circumstances here involved we express no opinion) is not involved here. Nor do we assert that public school pupils in secondary schools have *no* constitutional rights. Here the school board is not dealing with adults but with adolescents in their formative years.⁸

In discussing the first amendment challenge, the court measured the statute by due process rather than first amendment standards.⁹ The statute was directed toward a legitimate end—the operation of the public school system. Regulation of high school sororities had a reasonable relation to that end since the legislature had found such sororities “to engender an undemocratic spirit of caste, to promote cliques, and to foster a contempt for school authority.”¹⁰ Therefore, the court upheld the statute.

The *Robinson* case in its result is consistent with virtually all of the reported high school fraternity cases.¹¹ Whether or not there is a state statute on the

provisions of the California Constitution. This Note is limited to discussion of the first amendment issues.

The plaintiff's equal protection challenge was based on the exemptions granted to some student organizations by both the rule and the statute. See notes 1-2 *supra*. While the fraternity statute was upheld against an equal protection challenge in *Bradford v. Board of Educ.*, 18 Cal. App. 19, 121 P. 929 (1912), the school board rule seems clearly discriminatory. Although the evil at which the rule is directed is the element of self-perpetuating membership in fraternities, youth clubs sponsored by service clubs like the Masons are exempted. Many of these clubs—e.g., Rainbow Girls, DeMolay, Job's Daughters—have all the characteristics of fraternities, including self-perpetuating membership. Brief for Respondent at 7-8, *Robinson v. Sacramento City Unified School District*, 245 A.C.A. 311, 53 Cal. Rptr. 781 (1966). A classification unrelated to the purpose of the rule clearly violates the equal protection clause. *Canon v. Justice Court*, 61 Cal. 2d 446, 461, 393 P.2d 428, 436, 39 Cal. Rptr. 228, 236 (1964). If the school has the right to regulate such clubs, it must do so even-handedly and cannot direct its action only at those groups which it considers undesirable. *Cf. Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 545, 171 P.2d 885, 891 (1946). The equal protection defect in the statute might be cured easily by omitting some of the exemptions; such amendment would not solve the first amendment problems.

⁸ 245 A.C.A. at 324; 53 Cal. Rptr. at 789-90.

⁹ *Id.* at 323, 53 Cal. Rptr. at 789. In applying the due process test, the court quoted from an economic regulation case, *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 146, 346 P.2d 737, 739 (1959): “[T]he inquiry of the court is limited to determining whether the object of the statute is one for which that power may legitimately be invoked and, if so, *whether the statute bears a reasonable and substantial relation to the object sought to be attained.*” Economic regulation and regulation in the first amendment area, however, are usually treated quite differently by the courts. “The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

¹⁰ *Bradford v. Board of Educ.*, 18 Cal. App. 19, 23, 121 P. 929, 931 (1912).

¹¹ *E.g.*, *Satan Fraternity v. Board of Pub. Instruction*, 156 Fla. 222, 22 So. 2d 892 (1945); *Sutton v. Board of Educ.*, 306 Ill. 507, 138 N.E. 131 (1923); *Steele v. Sexton*, 253 Mich. 32,

subject, school boards may pass rules regulating public school membership in fraternities and sororities.¹² In general, school boards have very broad powers of control over the activities of pupils in the public schools.¹³ Pupil conduct outside school hours or school grounds is not necessarily beyond the jurisdiction of the school board; the board need find only that the regulated conduct is "detrimental to [the school's] good order, and to the welfare and advancement of the pupils therein."¹⁴ As long as school board regulations have some relationship to the operation of the schools and are not clearly arbitrary, courts will not invalidate them.¹⁵

Unlike previous fraternity regulation cases,¹⁶ *Robinson* assumed that the protection of the first amendment extends to high school students.¹⁷ The court

234 N.W. 436 (1931); *Burkitt v. School Dist. No. 1*, 195 Ore. 471, 246 P.2d 566 (1952). *Contra*, *Wright v. Board of Educ.*, 295 Mo. 466, 246 S.W. 43 (1922) (regulation invalid as interference with parental control). See generally A. FLOWERS & E. BOLMEIER, LAW AND PUPIL CONTROL 11-43 (1964); Annot., 27 A.L.R. 1074 (1923).

¹² The existence of a statute outlawing high school fraternities means courts will be very reluctant to interfere with school board regulation of such clubs. "[I]t must be presumed, from the enactment of a valid statute declaring such societies illegal, that they are the source of evils which need to be eradicated." *Burkitt v. School Dist. No. 1*, 195 Ore. 471, 481, 246 P.2d 566, 571 (1952). The two cases in which school board regulations were invalidated in part or as a whole involved states without specific antifraternity statutes. *Wilson v. Abilene Independent School Dist.*, 190 S.W.2d 406 (Tex. Civ. App. 1945) (membership not regulable during school vacation); *Wright v. Board of Educ.*, 295 Mo. 466, 246 S.W. 43 (1922).

¹³ Statutes delegating rulemaking power to school boards are written in very general terms. See, e.g., CAL. EDUC. CODE § 10604 (West 1960): "The governing board of any school district may make and enforce all rules and regulations needful for the government and discipline of the schools under its charge. Any governing board shall enforce the provisions of this section by suspending, or, if necessary, expelling a pupil in any elementary or secondary school who refuses or neglects to obey any such rules or regulations."

¹⁴ *O'Rourke v. Walker*, 102 Conn. 130, 136, 128 A. 25, 26 (1925).

¹⁵ *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923); *Fertich v. Michener*, 111 Ind. 472, 11 N.E. 605 (1887); *Board of Directors v. Green*, 147 N.W.2d 854 (Iowa 1967). The reasonableness of a rule is a question of law for the court. *McLeod v. State*, 154 Miss. 468, 122 So. 737 (1929). The court will not review the findings of the school board as to facts, even if the pupil contends he was not guilty of the proscribed conduct, "except where fraud, corruption, oppression or gross injustice is palpably shown . . ." *Smith v. Board of Educ.*, 182 Ill. App. 342, 347 (1913).

¹⁶ A first amendment challenge has occasionally been raised in such cases but has been dismissed without discussion as irrelevant. See, e.g., *Isgrig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946); *Burkitt v. School Dist. No. 1*, 195 Ore. 471, 246 P.2d 566 (1952).

¹⁷ Several recent cases involving high school regulation of student expression rather than association agree with *Robinson* in assuming that the first amendment protects high school students. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966); *Tinker v. Des Moines Independent School Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966). In the *Burnside* case the court struck down a rule forbidding students to wear SNCC (Student Non-violent Coordinating Committee) buttons to school; the court held that wearing the buttons was the silent communication of an idea and was protected by the first amendment. In *Blackwell* a similar rule was upheld because the conduct of the students created a serious disturbance in the school. The court in *Tinker* upheld a rule prohibiting the wearing of armbands as a protest against the Vietnam war; the opinion stated that the interest in free expression was outweighed by the possibility of a hostile reaction from other students which would disrupt the classroom.

concluded that first amendment rights of high school students may be abridged if there is any rational basis for the state's regulatory action. State regulations interfering with first amendment rights normally must be justified by a compelling state interest¹⁸ and must be drawn as narrowly as possible to avoid unnecessary restriction of protected rights.¹⁹ Special procedural safeguards may be required to minimize the restrictive effect of the regulation.²⁰ *Robinson*, by requiring only a rational state interest to justify regulation of student first amendment rights, eliminates the special protection usually given to these "preferred" substantive rights. The main question in the case, therefore, is why first amendment rights lose their "preferred" status when high school students are involved.

The basis of the holding in *Robinson* is unclear; there are several possible explanations for the court's failure to analyze the plaintiff's right of association challenge in terms of a "preferred" right. This Note will examine some of the unarticulated reasons which may be behind the court's terse statement that "[t]he First Amendment guarantee of the right of free assembly as applied to adults . . . is not involved here,"²¹ and which may help to explain special treatment of student rights in general.

First, the court's reference to "adolescents in their formative years" and the right of association "as applied to adults"²² may indicate reliance on the *parens patriae* doctrine, applicable to the state, or the *in loco parentis* doctrine, applicable to schools, which permit those entities to disregard some constitutional limitations in dealing with children.²³ Second, the court may have concluded that although there is a first amendment right of association and assembly, that right does not include the kind of student association involved in *Robinson*. Third, the court may have been reluctant to undertake the extensive intervention in school administration which would result from the detailed judicial review required for "preferred" first amendment rights. Finally, the court may have chosen to rely on precedents holding fraternity regulation valid²⁴ rather than to undertake the development of new tests which the special nature of the high school situation would require if student first amendment rights were all treated as "preferred."

Although the *Robinson* court did not rely specifically on the *parens patriae* doctrine, by referring to "adolescents in their formative years"²⁵ it implied that the plaintiff's age made the application of conventional first amendment tests²⁶ to the fraternity statute unnecessary. The *parens patriae* doctrine, which gives the state special power to regulate children in a parental rather than govern-

¹⁸ NAACP v. Alabama, 357 U.S. 449 (1958); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

¹⁹ Shelton v. Tucker, 364 U.S. 479 (1960); Fort v. Civil Service Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).

²⁰ See Freedman v. Maryland, 380 U.S. 51 (1965).

²¹ 245 A.C.A. at 324, 53 Cal. Rptr. at 789-90.

²² *Id.*

²³ See text accompanying notes 22-44 *infra*.

²⁴ See cases cited note 11 *supra*.

²⁵ 245 A.C.A. at 324, 53 Cal. Rptr. at 790.

²⁶ See text accompanying notes 18-20 *supra*.

mental capacity,²⁷ would enable it to disregard first amendment restrictions on the state's power to regulate adults.

This parental relationship is illustrated by juvenile court acts; such acts allow the state, like the parent, to deprive the child of liberty without assuring him specific procedural rights.²⁸ Unrestricted by particular procedural demands, the juvenile court is theoretically concerned with the needs of the child; its aims are guidance and rehabilitation rather than punishment.²⁹ Even when it is incarcerating a child in reform school, the juvenile court asserts that it is helping the child, not punishing him in a criminal sense.³⁰

School board regulations designed to govern all the pupils in a given school district do not represent the kind of individual, parental treatment administered in a juvenile court as a substitute for constitutional procedural guarantees. The general *parens patriae* power of the state cannot explain a disregard of first amendment protection when the state is not acting as a substitute parent but is merely regulating the child in the exercise of its general police power. Unlike the juvenile courts, which exert their power only over neglected or delinquent children,³¹ the schools do not base their jurisdiction over children on a showing that individual parents are caring for their children inadequately.³² In passing compulsory education laws, the state takes over the function of educating all children in order to further its own economic and political well being,³³ regardless of any individual parent's ability to educate his own children adequately.

The state's special power over children, however, is not limited to situations in which it acts as a substitute parent; the *parens patriae* power also includes a special kind of paternalistic police power over children based on their apparent inability to protect themselves from certain evils.³⁴ Child labor laws³⁵ and special

²⁷ See *Prince v. Massachusetts*, 321 U.S. 158 (1944); Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 907 (1966).

²⁸ *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905). The United States Supreme Court recently held, however, that the fourteenth amendment requires that state courts afford juveniles certain specific rights: adequate notice of hearings; notice of the right to counsel and appointment of counsel for indigents; the privilege against self-incrimination. *In re Gault*, 387 U.S. 1 (1967).

²⁹ *United States v. Kent*, 383 U.S. 541, 554-55 (1965). The case illustrates the tendency to question the assertion of "parental authority" as a justification for depriving children of procedural rights in juvenile court.

³⁰ *Harling v. United States*, 295 F.2d 161 (D.C. Cir. 1961).

³¹ "Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children, where other guardianship fails." *Commonwealth v. Fisher*, 213 Pa. 48, 56-57, 62 A. 198, 201 (1905).

³² Home instruction given by parents may be equal to or superior to the instruction given in accredited schools, but that will not excuse failure to comply with compulsory education laws. *People v. Turner*, 121 Cal. App. 2d 861, 263 P.2d 685 (Super. Ct. App. Dep't 1953).

³³ *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927); *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. 1937).

³⁴ See generally Note, "For Adults Only": *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141, 146 (1959).

³⁵ See *Prince v. Massachusetts*, 321 U.S. 158 (1943).

obscenity legislation for children³⁶ are constitutional despite a restrictive effect on first amendment freedoms which would be invalid if adult rights were involved. It may be argued that compulsory education laws represent the exercise of such a power;³⁷ children may be educated for their own good because they cannot yet assess for themselves the necessity for an education. Regulation of student conduct within the school context, however, does not usually represent this kind of state interest; school regulations reflect a school's need to control students in order to carry out its own educational function. Such regulations are not imposed on children for their own protection but are comparable to laws required to maintain order in public places.

A school may not disregard first amendment protection when school regulations do not reflect a child's special need to be protected. However, during school hours and on school grounds, the teacher is traditionally said to stand *in loco parentis* to the child.³⁸ While the *parens patriae* doctrine refers to the special regulatory power of the state over all children, the *in loco parentis* doctrine confers parental authority on anyone assuming responsibility for a child's care.³⁹ In the school context, the *in loco parentis* doctrine was originally invoked as a justification for the infliction of corporal punishment by a teacher, and the phrase is still most often used in that context.⁴⁰ However, the legal fiction that the teacher stands in the place of the parent for the purpose of administering reasonable punishment in order to maintain discipline was expanded by the courts to justify the school in regulating student morals and social life just as a parent would.⁴¹ The *Robinson* court may have felt that this special school-pupil relationship reinforced the state's general *parens patriae* power to disregard some constitutional restrictions when regulating children.

However, the idea that the parent has delegated his authority to the school for the purpose of maintaining discipline, or that the school has "inherent" powers arising out of the similarity of the teacher's role to the parent's,⁴² cannot transform the nature of the school as a public agency. It is clear that the public school is subject to constitutional commands not applicable to parents. The school may not give religious instruction, while the parent may.⁴³ The

³⁶ See *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (plurality opinion), which cites with approval a Rhode Island case, *State v. Settle*, 90 R.I. 195, 156 A.2d 921 (1959), upholding special obscenity legislation for children. See also *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966) noted *infra*, at 926.

³⁷ But see *Fischler v. Municipal Court*, 233 Cal. App. 2d 780, 43 Cal. Rptr. 882 (1965), in which the court cited compulsory education law cases to support its rejection of the adult plaintiff's constitutional challenge to a court order compelling him to attend traffic school. There was no suggestion that the child and adult situations differed.

³⁸ *Lander v. Seaver*, 32 Vt. 114 (1859). See generally Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1367-72 (1963).

³⁹ *Richards v. United States*, 93 F. Supp. 208, 212 (N.D. W. Va. 1950); *State ex rel. Gilroy v. Superior Court*, 37 Wash. 2d 926, 933, 226 P.2d 882, 885 (1951).

⁴⁰ See, e.g., *Andreozzi v. Rubano*, 145 Conn. 280, 141 A.2d 639 (1958); *Eastman v. Williams*, 124 Vt. 445, 207 A.2d 146 (1965).

⁴¹ See, e.g., *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1925); *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557 (1933).

⁴² Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1367 (1963).

⁴³ *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

school may not maintain racial segregation,⁴⁴ but the parent can control his child's associations. Although the majority of parents in a community may wish religious instruction in the schools or favor racial segregation, the schools may not constitutionally act in these areas as delegates of parental authority. Similarly, the mere statement that a school is in local parentis cannot dissolve the restrictions which the first amendment places on all public agency actions that abridge first amendment rights.

When the school goes beyond disciplining an individual child for misbehavior by subjecting him to general regulations that prescribe standards for student conduct, it implements an educational policy chosen by a majority of the community acting through the legislature and through elected school boards. These regulations, which may regulate dress and haircuts,⁴⁵ as well as student expression and association,⁴⁶ are imposed on most school age children because of the state's near monopoly in education. Arguably, students represent the kind of politically powerless group whose rights deserve special protection by the courts⁴⁷ since community values may be imposed on them before they have a say in formulating those values.⁴⁸ The first amendment was designed as a protection against the very kind of majority power represented by the school's enforcement of community standards.⁴⁹

Since the legal model for the modern school is not the parent but "the social service agency and the public building complex,"⁵⁰ abridgment of student first amendment rights must be justified by the kind of state interest which justifies abridgment of adult rights of free speech. The due process test used in *Robinson* does not give adequate protection to student rights of expression and association; the abridgment of such "preferred" rights can only be justified by a compelling state interest. The compelling state interest in the maintenance of a public school system may at times justify extensive regulation of student rights. However, the school may have a variety of interests which would be furthered by restriction of first amendment rights. In each case, the court should balance the individual right against the school interest with which it conflicts. Such a balancing test would protect essential interests of the school while allowing

⁴⁴ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁴⁵ *Ferrell v. Dallas Independent School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966); *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965). See generally Comment, *The Right to Dress and Go to School*, 37 U. COLO. L. REV. 492 (1965).

⁴⁶ *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Satan Fraternity v. Board of Pub. Instruction*, 156 Fla. 222, 22 So. 2d 892 (1945).

⁴⁷ See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1390 (1963).

⁴⁸ "Today, as always, the school is the instrument through which society acculturates people into consensus before they become old enough to resist it as effectively as they could later." E. FRIEDENBERG, *COMING OF AGE IN AMERICA* 170 (Vintage ed. 1967).

⁴⁹ "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

⁵⁰ Linde, *Campus Law: Berkeley Viewed from Eugene*, 54 CALIF. L. REV. 40, 64 (1966). The quotation refers to a public university, but it seems equally applicable to the modern high school.

maximum freedom to individual rights which interfere with only a weak or colorable school interest.⁵¹

It is possible, however, that the *Robinson* court used a due process test to judge the fraternity statute because it concluded that the "preferred" first amendment right of association did not include the kind of student association to which the plaintiff belonged. The right of association asserted in *Robinson* has been afforded first amendment protection in some cases,⁵² but it is still not clear whether "a general freedom to form associations is necessarily implicit in the language of the first amendment."⁵³ The statement in *Robinson* that "the First Amendment guarantee of the right of free assembly as applied to adults . . . is not involved here" can be explained in two ways. The court may have believed that no purely social club, for adults or students, was protected by the first amendment right of association. On the other hand, the court may have concluded that the first amendment does protect social clubs for adults, but not for high school students, because of the state's special power over children. The first explanation of the court's holding would make its use of the due process test legitimate.⁵⁴ However, if social clubs are protected by the first amendment, the court should have used a balancing test to determine whether the school's interest in fraternity regulation justified abridgment of the plaintiff's "preferred" right of association.

The first amendment right of association has traditionally been discussed in the context of the right to form and belong to political parties or groups,⁵⁵ as such, it has been described as "a byproduct of many constitutional guarantees, such as the rights of petition and assembly, the rights of free speech and free press, and the right to vote."⁵⁶ The concept of a more general right of association has emerged in the holdings and discussion of recent Supreme Court cases.⁵⁷ However, these cases have been interpreted as meaning only that the first amendment protects membership in associations formed to further rights which are

⁵¹ A balancing test for first amendment freedoms is used in *NAACP v. Alabama*, 357 U.S. 449 (1958); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). For comment favoring use of the test see W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* (1961); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75. For criticism of the test see T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 53-56 (1967); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

⁵² *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 499 (1958). See generally D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* (1963); Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730 (1960).

⁵³ *Developments in the Law—Judicial Control of Private Associations*, 76 HARV. L. REV. 983, 1057 (1963).

⁵⁴ The right to travel cases suggest, however, that there are some personal rights not protected by the first amendment which the state must regulate more narrowly than it does economic rights. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958). The right of association is arguably such a personal right. See Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 20-21 (1964).

⁵⁵ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁵⁶ D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 38 (1963).

⁵⁷ See cases cited note 52 *supra*.

themselves protected by the first amendment.⁵⁸ Thus, the right of association is protected when it is association "for the advancement of beliefs and ideas."⁵⁹ The promotion of litigation in *NAACP v. Button* was protected because, for a minority group, "association for litigation may be the most effective form of political association."⁶⁰

The right of association, however, is not necessarily limited to political groups. A recent case protected association for litigation under the first amendment when it was not a form of political association, but merely involved personal injury litigation.⁶¹ Finally, the Court's opinion in *Griswold v. Connecticut*⁶² discusses in broad terms the right of association protected by the first amendment:

The right of "association," like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.⁶³

Such language, and dicta in other cases,⁶⁴ suggest that membership in a social club may well be protected by the first amendment right of association.⁶⁵

The right of association like other first amendment rights should be restricted only to further a strong state interest,⁶⁶ only in the absence of equally effective alternative means of protecting the state interest,⁶⁷ and only to the extent necessary to maintain the state interest involved.⁶⁸ The right of membership in a high school club should be evaluated in these terms.

⁵⁸ See *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1056-57 (1963); Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730, 739-40 (1960).

⁵⁹ *NAACP v. Alabama*, 357 U.S. 449, 461 (1958).

⁶⁰ 371 U.S. 415, 431 (1963).

⁶¹ *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). The dissenting opinion emphasized that the holding was an extension of the right of association, distinguishing the case from *NAACP v. Button* by pointing out that "personal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims." *Id.* at 10.

⁶² 381 U.S. 479 (1965).

⁶³ *Id.* at 483.

⁶⁴ See *Aptheker v. Secretary of State*, 378 U.S. 500, 507 (1964); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 562 (1963) (concurring opinion of Douglas, J.).

⁶⁵ Outside of a special situation like the school context involved in *Robinson*, the issue may rarely arise. "Furthermore, constitutional protection of the bare right to form or join an association is, as a practical matter, usually more symbolic than real. None of the cases in which the Supreme Court has hitherto relied upon 'the right of association' has raised the legal issues in this naked form." Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 7 (1964).

⁶⁶ Note 18 *supra*.

⁶⁷ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Schneider v. State*, 308 U.S. 147, 162 (1939). See generally Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

⁶⁸ Note 19 *supra*.

High school membership in fraternities is forbidden for both practical and ideological reasons.⁶⁹ The practical school interests at stake are the maintenance of discipline and the efficient administration of the school.⁷⁰ Fraternities which disrupt the operation of the schools are analogous to political demonstrations in public streets; first amendment rights may be restricted when their exercise interferes with the rights of others to use public facilities.⁷¹ However, the actual interference caused by the fraternities should be narrowly defined. Disruption of classroom discipline justifies severe regulatory measures; harassment of school officials by the disappointed parents of children not admitted to the clubs may not be a legitimate basis for regulation at all. Inconvenience to administrators or even general community pressure to abolish the clubs does not justify total abridgment of a first amendment right.

Even where classroom discipline is involved, the actual relationship between the clubs and the disturbance should be clarified. If fraternity members do show contempt for authority, their misconduct may be punished. Abolishing the club as an entity because of the misbehavior of a few members is based on a concept of guilt by association which is unacceptable as a reason for abridging first amendment freedoms.⁷² If the disruption is caused by the hostility of non-members, the school should be compelled to regulate the hostile conduct rather than the protected activity which caused the reaction.⁷³

When the disruptive effect of the fraternities is related to the low morale of excluded students rather than to overt hostile behavior, it may be questioned whether the school has a duty to protect its pupils from the unhappy experiences of nonmembership.⁷⁴ The fact that children are emotionally and psychologically more vulnerable than adults may constitutionally justify greater abridgment of their first amendment rights, as it does in the obscenity cases.⁷⁵ However, there is clearly a difference between regulating children for their own protection and

⁶⁹ See, e.g., *Isgrig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946); *Bradford v. Board of Educ.*, 18 Cal. App. 19, 121 P. 929 (1912). See generally A. FLOWERS & E. BOLMEIER, *LAW AND PUPIL CONTROL* 13-14 (1964).

⁷⁰ See, e.g., *Burkitt v. School Dist. No. 1*, 195 Ore. 471, 498, 246 P.2d 566, 578 (1952).

⁷¹ See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

⁷² Cf. *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

⁷³ Cf. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947); *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965). See generally Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949). But see *Tinker v. Independent School Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966).

⁷⁴ School attempts to regulate the clubs may merely increase their adverse psychological effects. "But the youngsters nevertheless know that their relationships are disapproved as undemocratic and become guilty and defiant about their own exclusiveness; the members lose, or never develop, confidence in their right to choose their own friends, and their clique then becomes a more exclusively political instrument than it otherwise would have been." E. FRIEDENBERG, *COMING OF AGE IN AMERICA* 239 (Vintage ed. 1967).

⁷⁵ See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964); *Insterstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966). See generally Note, "For Adults Only": *The Constitutionality of Government Film Censorship by Age Classification*, 69 YALE L.J. 141 (1959).

regulating some children for the protection of others. The school should be more cautious in abridging the rights of the latter.

Schools find fraternities ideologically objectionable, regardless of their actual psychological impact on other students, because they are exclusive and undemocratic.⁷⁶ Many states impose a statutory obligation on their schools to teach "democratic ideals" or "American values" as well as the more traditional academic subjects;⁷⁷ schools interpret this to mean that student activities must be regulated to reflect these values.⁷⁸ However, it may be argued that even a statute does not make the teaching of such values in the schools as compelling a state interest as the provision of a basic education. The state may not constitutionally compel all children to go to public school.⁷⁹ Private schools and, in some states, home instruction are allowable because the state's major concern is that its youth be educated, and not that they be educated in one particular way.⁸⁰ Maintenance of classroom discipline in order to provide a basic education represents a more compelling state interest than does the example of democracy in action provided by not allowing students to have exclusive clubs. Moreover, democratic ideals may be taught in the classroom by persuasive rather than coercive means.⁸¹

Statements by the schools that fraternities are undesirable because they are "snobbish" or undemocratic suggest the fear some schools may have of appearing to condone discriminatory fraternity practices. Although the problem of racial discrimination is not explicitly mentioned in cases involving high school fraternities, the issue has been adjudicated on the college level.⁸² Fraternity regulation based on the existence of racial discrimination in the clubs is based on a stronger state interest than mere dislike of exclusiveness since in the former case the school is implementing the equal protection clause of the fourteenth amendment.⁸³

⁷⁶ See, e.g., *Isgig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946); *Coggins v. Board of Educ.*, 223 N.C. 763, 28 S.E.2d 527 (1944).

⁷⁷ E.g., CAL. EDUC. CODE § 7851 (West Supp. 1966): "Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, including kindness towards domestic pets and the humane treatment of living creatures, to teach them to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and the principles of a free government."

⁷⁸ For example, school organizations must be open to all students. E. FRIEDENBERG, *COMING OF AGE IN AMERICA* 238-39 (Vintage ed. 1967).

⁷⁹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁸⁰ E.g., *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950); *State v. Peterman*, 32 Ind. App. 665, 70 N.E. 550 (1904); *Commonwealth v. Roberts*, 159 Mass. 372, 34 N.E. 402 (1893).

⁸¹ See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich 1965).

⁸² See, e.g., *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966), in which regulation of a discriminatory fraternity was upheld as valid.

⁸³ "Any deterrent effect upon the associational activity of individuals not desiring to join such organizations now open to all races must be considered incidental to the principal purpose of the state action—elimination of an associational barrier based upon race." Comment, *State Universities and the Discriminatory Fraternity: A Constitutional Analysis*, 8 U.C.L.A.L. REV. 169, 188 (1961). But see O'Neil, *Reflections on the Academic Senate*

The school interests involved in fraternity regulation have been discussed in their bearing on only one aspect of the right of association—the individual student's right of membership in an organization. The right of association, however, includes a variety of associational interests.⁸⁴ An attempt to prohibit student membership in a nonschool club may infringe the rights of the association itself or the right of nonstudent members to associate freely with students.⁸⁵ School interests which seem compelling when weighed against the rights of individual student members often will not justify prohibition of student membership in a group when the prohibition infringes the right of association of nonstudent or even adult members of the organization.⁸⁶ As in the case of racially discriminatory fraternities, the school may have to restrict itself to regulation of fraternity activities at school, thus minimizing the abridgment of the right of association of those not connected with the school.

As the discussion above indicates, use of a balancing test requires detailed analysis of the specific interests asserted by both the individual and the state. A court's adoption of a due process test may reflect a reluctance to interfere in the administration of the school. Courts have traditionally shown great deference to regulation by schools.⁸⁷ However, it has been shown that the interests which the school asserts to justify regulation of student rights may not all be of equal importance to the school's primary function of providing an education. The provision of an orderly atmosphere in which to carry on the essential task of educating young students may outweigh the interest in some kinds of expression, just as the maintenance of order in public streets and buildings sometimes outweighs adult rights of free speech.⁸⁸ In both the above cases, the state interest is the protection of the rights of other individuals to the undisrupted use of public facilities. The interest asserted by the school is much weaker when it involves protecting, not the rights of other students to an uninterrupted education, but the prestige of the school administration, the school's public relations with the community, or the convenience of school officials.⁸⁹

Resolution, 54 CALIF. L. REV. 88, 93 n.12 (1966): "Had the free speech and association question been squarely presented [by the plaintiffs who were discriminatory fraternities], and had it been shown that the undoubtedly laudable purpose of banning racial or religious discrimination on campus could have been achieved by less drastic means, the university might have been constitutionally required to regulate rather than abolish the discriminatory organizations and their offending practices."

⁸⁴ See generally Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 3-4 (1964).

⁸⁵ An association may assert both its own rights to a certain level of financial support and membership and the associational rights of its members. *NAACP v. Alabama*, 357 U.S. 449, 459-60 (1958). An individual member may assert that state action directed at him violates the associational rights of other members of his association. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

⁸⁶ School regulations may include within their scope organizations with some adult members. See, e.g., *Holroyd v. Eibling*, 116 Ohio App. 440, 188 N.E.2d 797 (1962).

⁸⁷ Courts assert that more detailed judicial inquiry into the need for various regulations would result in "confusion detrimental to the . . . efficient operation of our public school system." *Board of Directors v. Green*, 147 N.W.2d 854, 858 (Iowa 1967).

⁸⁸ See, e.g., *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

⁸⁹ *Cf. Schneider v. State*, 308 U.S. 147, 162 (1939): "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing

A court's failure to adopt a balancing test may be motivated not only by reluctance to interfere in school administration, but also by a feeling that traditional first amendment tests are not really relevant to a high school situation. The exercise of first amendment rights by high school students clearly raises different problems from those created by threats to national security or even large public demonstrations. The special nature of the school environment and the special ways in which high school students express themselves may require the courts to develop new criteria for judging student first amendment rights in general.⁹⁰ However, the inconvenience involved in formulating special tests for students does not justify the court's reliance on a due process standard which may be satisfied by any vague assertion of a state interest.⁹¹

A brief discussion of student first amendment rights other than the right of association will illustrate the inadequacy of existing first amendment analyses when applied to the high school context. Moreover, it will become apparent that, given the special nature of the high school context, it is often noncommunicative forms of self-expression like membership in a club which should have the greatest weight when a "balancing" test is used for student first amendment rights.

Although regulation of students in schools is analogous to regulation of public use of public streets and buildings, the situations differ enough that criteria for the latter regulation are not always applicable to schools. The distinction between regulation of speech content, which must be justified by a compelling state interest, and regulation of time, place, and manner of speech, which need only be reasonable,⁹² has little meaning in most school contexts. Because a school is a controlled environment, school officials could characterize total prohibition of various kinds of expression on school grounds and during school hours as a regulation of time, place, and manner. Since speech would still be unregulated outside the school, the schools might argue that school hours and grounds were not an appropriate time and place for free expression which interfered with the primary function of the school.⁹³

Similarly, the distinction between protected speech and regulable conduct does not give adequate protection to speech in a school context.⁹⁴ All expression

to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." See generally Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 *YALE L.J.* 1362, 1392-95 (1963).

⁹⁰ Different kinds of expression present different problems. Cf. *Kovacs v. Cooper*, 336 U. S. 77, 97 (1949) (concurring opinion of Jackson, J.): "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself."

⁹¹ The standard is met, for example, by a statement that high school fraternities have "a divisive influence in the school and present difficult problems for the school authorities." *Holroyd v. Eibling*, 116 Ohio App. 440, 444, 188 N.E.2d 797, 800 (1962).

⁹² See *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); O'Neil, *Reflections on the Academic Senate Resolution*, 54 *CALIF. L. REV.* 88, 104 (1966).

⁹³ See *Tinker v. Des Moines Independent School Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966).

⁹⁴ For general criticism of this distinction, see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 *SUP. CT. REV.* 1. Professor Emerson suggests a modified, more flexible use of the distinction in first amendment cases: "This judgment must be guided by consideration of whether the conduct partakes of the essential qualities of expression or

interferes with the functioning of a school and may be described as conduct regulable in the interest of the primary use of school buildings or of school time.⁹⁵ Oral speech is noise which may interfere with classes; written speech must be distributed through some medium—the student newspaper, posters, leaflets—which the school might claim should be reserved for school purposes; symbolic speech—*e.g.*, buttons or armbands—may cause a curious or hostile reaction from other students which would manifest itself as congestion in the halls, noise, or disruption of classes.

Because many traditional first amendment cases have involved expression which posed a threat to state order or security because of its communicated content,⁹⁶ it is sometimes assumed that expression must communicate ideas in order to be protected.⁹⁷ When the interest in free expression is balanced against the interest in order, noncommunicative expression may be characterized as conduct which is subject to reasonable regulation, or it may be judged to have little social utility and therefore be given little weight in the balancing process. However, a high school student may not have available to him the time or public forum in which to express himself vocally; no vehicles for the written word may be open to him. The kinds of expression most valuable to him may be those describable as symbolic expression.⁹⁸ Through armbands and buttons he can express his political and social beliefs;⁹⁹ through dress and appearance he may express his sense of individuality and his chosen style of life;¹⁰⁰ through

action. In the main this is a question of whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct. A second factor is also significant. This is whether the regulation of the conduct is, as a practical administrative matter, compatible with a workable system of free expression In formulating the distinction between expression and action there is thus a certain leeway in which the process of reconciling freedom of expression with other values and objectives can remain flexible." T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 61 (1967).

⁹⁵ However, some forms of conduct are protected by the first amendment. *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963) (peaceful demonstration); *NAACP v. Button*, 371 U.S. 415 (1963) (association to promote litigation); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (refusal to salute flag); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing). The explicit guarantee of freedom of assembly in the first amendment also clearly protects conduct.

⁹⁶ *See, e.g.*, *Dennis v. United States*, 341 U.S. 494 (1951); *Feiner v. New York*, 340 U.S. 315 (1951).

⁹⁷ *See* Comment, *Zoning, Aesthetics, and the First Amendment*, 64 *COLUM. L. REV.* 81, 91 (1964): "Before nonverbal expression is entitled to first amendment protection it must satisfy [these] requirements. First, a nonverbal symbol initially without a fixed 'meaning' in the public mind must acquire such a meaning. Second, the intellectual content of the symbol must be of a type that is traditionally accorded first amendment protection." *But cf.* *Weaver v. Jordan*, 64 Cal. 2d 235, 242, 411 P.2d 289, 294, 49 Cal. Rptr. 537, 542 (1966): The first amendment encompasses "amusement and entertainment as well as the exposition of ideas."

⁹⁸ Some kinds of symbolic expression are clearly protected by the first amendment. *See* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute); *Stromberg v. California*, 283 U.S. 359 (1931) (red flag); *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) (SNCC buttons); *Tinker v. Des Moines Independent School Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966). *See generally* Comment, *Zoning, Aesthetics, and the First Amendment*, 64 *COLUM. L. REV.* 81 (1964).

⁹⁹ *See* *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Tinker v. Des Moines Independent School Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966).

¹⁰⁰ *See* *Ferrell v. Dallas Independent School Dist.*, 261 F. Supp. 545 (N.D. Texas 1966).

his choice of associations he may define his interests and his attitudes toward others.¹⁰¹ These forms of expression are important to the individual; they create little interference with the rights of others.¹⁰² The assertions of the school that such forms of expression have a disruptive effect is rarely supported by any evidence;¹⁰³ moreover, in the first amendment area the school has some duty to attempt to regulate the "hostile audience" causing the disturbance before prohibiting the expression itself.¹⁰⁴

An attempt to articulate the reasons underlying the *Robinson* court's failure to treat the case before it as one involving a "preferred" first amendment right reveals a number of facts which might have influenced the court's holding. The language of the decision does not indicate which, if any, of the explanations offered here was controlling; all of the factors discussed must be considered by any court asked to deal with student first amendment rights. The first amendment is designed to protect individual rights against a society attempting to regulate them. The right assaulted in a specific case may seem trivial, but the larger question remains of where the line should be drawn in state regulation of the individual. Reliance on the due process test leaves schools free to abridge the first amendment rights of students whenever there is a remote possibility of disruption or whenever the student's behavior or values seem incompatible with the values being taught by the school.

Since the state's interest in the public schools is clearly compelling, the courts can protect student first amendment rights adequately only by requiring a school to justify its regulations in terms of narrowly defined and specific interests. Where the interest asserted is trivial or peripheral to the school's primary educational function, a court's use of a balancing test should result in the protection of the challenged first amendment right. Neither the parental analogy nor administrative convenience present compelling reasons for failing to give high school students such special protection. Indeed, the school's duty to teach "American values" would seem to include the duty of scrupulous adherence to constitutional commands.¹⁰⁵

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For criticism of dress and appearance regulations, see E. FRIEDENBERG, *COMING OF AGE IN AMERICA* 46-47 (Vintage ed. 1967); Comment, *The Right to Dress and Go to School*, 37 U. COLO. L. REV. 492 (1965).

¹⁰¹ See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

¹⁰² In protecting student first amendment rights, courts usually emphasize that the exercise of the right is not disruptive. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (refusal to salute flag); *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) (wearing SNCC button); *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963) (refusal to stand for anthem).

¹⁰³ See *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) (no evidence of discipline problem); *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963) (evidence "speculative at best").

¹⁰⁴ Cf. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947); *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965). See generally Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949). But see *Tinker v. Des Moines Independent School Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966).

¹⁰⁵ "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

CONSTITUTIONAL LAW: Obscenity—Children's Film Classification Statute Held Constitutional—*Interstate Circuit, Incorporated v. City of Dallas* (5th Cir. 1966).

A Dallas, Texas city ordinance¹ required all motion pictures exhibited in Dallas to be classified as "suitable" or "not suitable" for young persons.² The ordinance prohibited theater owners from showing children not only obscene films but also those featuring "brutality," "criminal violence" and "depravity" in a manner likely to incite juvenile delinquency.³ Exhibitors were required to submit a summary of the film's plot and a proposed classification to the Dallas Motion Picture Classification Board. The Board in its discretion could view any film.⁴ Exhibiting any film in Dallas that had not been classified by the Board,⁵ or knowingly⁶ admitting children to a picture classified "not suitable for children" violated the ordinance.⁷ Dallas motion picture exhibitors challenged the constitutionality of the ordinance in *Interstate Circuit, Incorporated v. City of Dallas*.⁸

The court of appeals in *Interstate Circuit* held that Dallas could constitutionally enact a children's film classification statute⁹ and that a film which is not

¹ DALLAS, TEX., REV. ORDINANCES, ch. 46A (1965), reprinted in *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590, 602-08 (5th Cir. 1966).

² *Id.* at § 46A-3. "Young person" means anyone under 16. *Id.* at § 46A-1(d). In *Paramount Film Distrib. Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959), the district court held a similar film classification statute invalid on three alternative grounds, one of which was that a 21 year age limit was unreasonable.

³ "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or (2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extramarital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered "likely to incite or encourage" crime, delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to the "prurient interest" of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is "not suitable for young persons," the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

DALLAS, TEX., REV. ORDINANCES, § 46A-1(f) (1965).

⁴ *Id.* at § 46A-3.

⁵ *Id.* at § 46A-4(a)(1).

⁶ Although the ordinance requires knowledge of the child's age, *People v. Tannenbaum*, 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966), held that such a statute need not constitutionally require knowledge of the child's age.

⁷ DALLAS, TEX., REV. ORDINANCES, § 46A-4(a)(4-5) (1965).

⁸ 366 F.2d 590 (5th Cir. 1966), *petition for cert. filed*, 35 U.S.L.W. 3273 (U.S. Jan. 13, 1967) (No. 971, 1966 Term; renumbered No. 42, 1967 Term) (appeal by motion picture exhibition), *petition for cert. filed, id.* (U.S. Jan. 16, 1967) (No. 978, 1966 Term; renumbered No. 44, 1967 Term) (appeal by City of Dallas).

⁹ 366 F.2d at 593-97. The district court, on the authority of *Butler v. Michigan*,

obscene under the Supreme Court's obscenity standard for adults¹⁰ may be obscene for children.¹¹ However, the court also ruled that the classification standard,¹² even though it applied only to children, was too broad in allowing censorship on such nonobscenity grounds as brutality and criminal violence. Therefore, the court restricted the ordinance to controlling only material obscene for children.¹³

The major question presented to the court in *Interstate Circuit* was whether the city could censor material for children by using a broad, nonobscenity standard. Concern exists about the sale to children of material featuring horror, sadism, brutality, and extreme violence. This is evidenced by the fact that many states have proscribed dissemination to children of comic books containing principally illustrated accounts of horror, terror, torture, and criminal violence.¹⁴ Proscription of these materials is defended on the theory that the state's special interest in children permits it to protect them from almost any literature that could possibly be harmful to them.¹⁵

The city argued in *Interstate Circuit* that its ordinance prohibiting children from seeing films featuring "brutality," "depravity" and "criminal violence"

352 U.S. 380 (1957), struck a clause from the ordinance providing for revocation of the exhibitor's license to show films classified as "not suitable" for children in the event of violations of the ordinance or failure to exercise ordinary diligence to determine those below the age of sixteen. This provision would deny exhibitors the right to show films not obscene as to adults and thereby preclude adults from viewing films not obscene as to them. *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19, 25 (N.D. Tex. 1965).

¹⁰ For a discussion of the adult standard, see notes 33-45 *infra* and accompanying text.

¹¹ 366 F.2d at 595. The only other case which has considered a children's film classification statute is *Paramount Film Distrib. Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959), which held a Chicago children's classification statute unconstitutional. For a discussion of this case, see note 32 *infra*.

On the constitutionality of film classification statutes, see Green, *Obscenity, Censorship, and Juvenile Delinquency*, 14 U. TORONTO L.J. 229, 245, 250-51 (1962); Note, *Entertainment: Public Pressure and the Law*, 71 HARV. L. REV. 326, 341-42 (1957); Note, "For Adults Only": *The Constitutionality of Government Film Censorship by Age Classification*, 69 YALE L.J. 141 (1960).

¹² See note 3 *supra*.

¹³ 366 F.2d at 597-98. Because the court so limited the classification standard, it was not necessary to consider the allegations as to the vagueness of provisions purporting to classify on a basis other than obscenity.

¹⁴ For good examples of this kind of legislation, see CONN. GEN. STAT. REV. § 53-244 (1958); MASS. GEN. LAWS ANN. ch. 272, § 30 (1958); TEX. PEN. CODE ANN. art. 527b (Supp. 1966). Such statutes embrace materials objectionable for children but not obscene for children.

¹⁵ In *People v. Kahan*, 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965), Judge Fuld, concurring, said:

Underlying the First Amendment is the premise that government cannot be trusted to regulate thought or opinion and that people may and, in fact, must be left to reject for themselves false or harmful doctrine whether it involves political, moral or other precepts. [Thomas v. Collins, 323 U.S. 516, 516-45 (1945) (concurring opinion of Jackson, J.); Whitney v. California, 274 U.S. 357, 375-76 (1927) (concurring opinion of Brandeis, J.)] But the same reliance need not be and has never . . . been placed on the judgment of children, and the Constitution does not secure to them the same, almost absolute, right assured to adults to judge and determine for themselves what they may read and what they should reject.

was valid against the claim that it violated the first amendment rights of minors.¹⁶ However, the Supreme Court in *Roth v. United States*¹⁷ held that only *obscene* material is beyond the protection of the first amendment and has rejected all attempts to employ nonobscenity standards in legislation proscribing the sale of literature or the censorship of films.¹⁸

The city argued that restricting first amendment rights of minors may be justified in this context by society's overriding interest in protecting its youth. It relied on *Prince v. Massachusetts*,¹⁹ in which a state statute prohibiting minors from selling periodicals or other articles of merchandise upon the streets was held not to violate the first amendment right of a child to disseminate religious literature. The *Prince* Court reasoned that the statute was not designed to limit the child's freedom of religion but rather was intended to regulate child labor. The Court then held that the statute was not unconstitutional merely because in regulating child labor it incidentally affected the child's free exercise of religion.²⁰ Therefore, *Prince* is not authority for the proposition in *Interstate Circuit* that because "the state's authority over children's activities is broader than over the like actions of adults,"²¹ it may enact a statute directly aimed at curtailing a child's first amendment rights.²²

The court found additional support for the city's position in Justice Brennan's dictum in *Jacobellis v. Ohio* that obscenity legislation be drafted narrowly to prevent the dissemination to children of material deemed "harm-

¹⁶ 366 F.2d at 597.

¹⁷ 354 U.S. 476 (1957). For a comprehensive discussion of *Roth*, see Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). Obscenity law prior to *Roth* is treated in an earlier article by the same authors: Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954). See also, Kalven, *The Metaphysics of the Law of Obscenity*, in 1960 SUP. CT. REV. 1 (P. Kurland ed. 1960).

¹⁸ *Holmby Prods., Inc. v. Vaughn*, 350 U.S. 870 (1957) (per curiam) (obscene, indecent, and immoral, and such as tends to debase or corrupt morals); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954) (per curiam) (harmful); *Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 346 U.S. 587 (1954) (per curiam) (immoral . . . [and may] tend to corrupt morals); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (sacrilegious); *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam) (prejudicial to the best interests of the people); *Winters v. New York*, 333 U.S. 507 (1948).

It is arguable that past cases rejecting broad standards are distinguishable on the ground that they concerned statutes of general application rather than children's statutes. It may be, therefore, that restrictions on more than obscenity would be constitutional if applied only to children. Note, "*For Adults Only*": *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141, 150-51 (1960).

¹⁹ 321 U.S. 158 (1944).

²⁰ Justice Black has articulated the distinction between laws which directly abridge first amendment freedoms and laws which primarily regulate conduct but which might indirectly affect those freedoms. He would hold the former unconstitutional, but agrees that the latter can be justified by a congressional or judicial balancing process. *Barenblatt v. United States*, 360 U.S. 109, 141-42 (1959) (dissenting opinion). See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

²¹ 321 U.S. at 168. By this statement the *Prince* Court meant simply that the state may regulate children's activity to a greater extent than it may regulate adults' activity. It may, for example, prohibit a child from engaging in manual labor while it may not prohibit an adult from doing so. *Id.* at 166.

²² 366 F.2d at 598.

ful" to them.²³ The use of "harmful to children" rather than "obscene as to children" may indicate that Justice Brennan envisioned the type of broad legislation found in the Dallas ordinance. However, such a close reading of the dictum seems tenuous.

There is nothing to indicate that children are relegated to second class citizenship where first amendment rights are concerned.²⁴ In *Katzev v. County of Los Angeles*²⁵ the Supreme Court of California struck down a statute proscribing the sale of crime comics to children and held that the state must show that the gravity of the evil of such comic books, discounted by its improbability, justified the invasion of the child's freedom of speech.²⁶ Further, in *Police Commissioner v. Siegel Enterprises, Incorporated*²⁷ the Maryland Supreme Court held that children have a constitutional right to read crime comics and stated that the right of young persons to read what they choose is vital to the whole community.²⁸

These cases support the conclusion reached by the court in *Interstate Circuit* that broad, nonobscenity standards in a censorship statute are unconstitutional even though the statute applies only to children. It justified its holding by recalling the long history of censorship abuse and declared that "even the child's freedom of speech [is] too precious to be subjected to the whim of the censor."²⁹ However, the court did not strike the entire statute down. Instead, it substituted its own standard for children's obscenity for the Dallas standard ruled unconstitutional.

Interstate Circuit is one of four cases³⁰ decided in 1966 which held for the first time that children's obscenity statutes³¹ are constitutional.³² These cases

²³ 378 U.S. 184, 195 (1964) (emphasis added). For full text of Justice Brennan's statement, see note 54 *infra*.

²⁴ See Note, *First Amendment Right of Association for High School Student*, 55 CALIF. L. REV. 911 (1967).

²⁵ 52 Cal. 2d 360, 341 P.2d 310 (1959).

²⁶ *Id.* at 366, 341 P.2d at 314. This test was first announced in *Dennis v. United States*, 341 U.S. 494 (1951).

²⁷ 223 Md. 110, 162 A.2d 727 (1960), *cert. denied*, 364 U.S. 909 (1960).

²⁸ *Id.* at 120, 162 A.2d at 731.

²⁹ 366 F.2d at 599. See also Chief Justice Warren's account of the history of the censorship power in *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 69-73 (1961) (dissenting opinion).

³⁰ The others were: *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966) (upholding prohibition of motion pictures visible from any public street or highway and which show bare buttocks or bare female breasts or whose main or primary material is strip-tease, burlesque or nudist-type scenes); *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 218 N.E.2d 668, 271 N.Y.S.2d 947 (1966) (upholding the state's power to enact a children's obscenity statute); *People v. Tannenbaum*, 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966) (upholding New York's children's obscenity statute against claims of unconstitutional vagueness and insufficient scienter requirements).

³¹ The phrase "children's obscenity statute" denotes a statute providing a separate obscenity standard for children. It does not include statutes which have prohibited the sale of obscene material to children without varying the adult obscenity standard. For examples of the latter, see CAL. PEN. CODE §§ 311, 311.3 (West 1956); GA. CODE ANN. §§ 26-6301.1 (Supp. 1966); KY. REV. STAT. ANN. §§ 436.100, 436.550, 436.560 (1963) (also bars certain comic books).

³² Other cases which have dealt with children's obscenity statutes have found them

raise the question whether it is possible to develop a children's obscenity standard which is both effective and constitutional.³³

In holding that obscenity is outside the area of constitutionally protected speech, the Supreme Court in *Roth* dispensed with the necessity of dealing with obscene speech as the Court has traditionally dealt with the suppression of other forms of speech and press—by applying some form of the clear and present danger test.³⁴ During the Supreme Court's 1965 term, three decisions³⁵ attempted to expand and refine the *Roth* test for obscenity.³⁶ In *Fanny Hill v. Attorney General*³⁷ the Court reaffirmed that for a finding of obscenity three elements must coalesce: (1) the dominant theme of the material must have

unconstitutional on one ground or another. See *Paramount Film Distrib. Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959), which struck down a Chicago film classification statute on three alternative grounds: (1) the 21 year age limit was unreasonable, (2) a picture cannot be simultaneously obscene as to children and not obscene as to adults, and (3) the statutory standard was hopelessly indefinite; *People v. Kahan*, 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965) (per curiam) (vagueness); *People v. Bookcase, Inc.*, 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964) (vagueness; but properly drawn children's statute would be constitutional).

³³ Other problems with children's obscenity statutes—such as whether the statute must require scienter of the age of the child and whether the statute imposes unconstitutional prior restraints—are beyond the scope of this Note. In *People v. Tannenbaum*, 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966), the court held that a requirement of scienter of the age of the child was not constitutionally mandatory. And the court held in *Interstate Circuit* that the Dallas classification statute did not impose an unconstitutional prior restraint because it complied with the standards established in *Freedman v. Maryland*, 380 U.S. 51 (1965). 366 F.2d at 599-601.

³⁴ It is beyond the scope of this Note to question the wisdom of the *Roth* approach. However, there were alternative methods for dealing with the problem. The Court could have determined whether defendant's publications tended to create a substantive evil which society had a right to prevent, *Gilflow v. New York*, 268 U.S. 652, 667-70 (1925), or whether they created a clear and present danger of such an evil, *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940); *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (concurring opinion of Brandeis, J.); *Schenk v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.), or whether the gravity of the evil, discounted by its improbability, justified such invasion of free expression as was necessary to avoid the danger, *Dennis v. United States*, 341 U.S. 494, 510 (1951). For the argument that these more traditional methods of dealing with speech should be applied to obscenity, see Comment, *More Ado About Dirty Books*, 75 YALE L.J. 1364 (1966).

³⁵ A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966) [hereinafter cited as *Fanny Hill v. Attorney General*]; *Mishkin v. New York*, 383 U.S. 502 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966).

³⁶ The *Roth* Court's definition calls for consideration of "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 354 U.S. at 489. Later decisions have attempted to clarify the test. In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), the relevant community standards were determined to be "national standards," *id.* at 192-95, and the Court held that in order to proscribe material it must be "utterly without redeeming social value." *Id.* at 191. In *Manual Enterprises v. Day*, 370 U.S. 478 (1962), the requirement that the material be patently offensive was added. *Id.* at 482. The *Manual Enterprises* Court insisted that the element of patent offensiveness was inherent in the original *Roth* test.

³⁷ 383 U.S. 413 (1966).

prurient appeal,³⁸ (2) the material must be patently offensive,³⁹ affronting community standards concerning the representation of sex, and (3) the material must be utterly without redeeming social value.⁴⁰ In *Ginzburg v. United States*⁴¹ the Court announced the new "pandering"⁴² test. If material is marketed specifically for its prurient appeal, the courts may find the material obscene even though it has a minimum of social value. Hence, in close cases, this test may render an otherwise nonobscene work obscene.⁴³ Finally, *Mishkin v. New York*⁴⁴ held that the prurient appeal requirement can be conformed to "social realities" by permitting the prurient appeal of material designed for sexual deviants to be assessed in terms of the sexual interests of intended and probable recipients.⁴⁵

Children's obscenity is merely an aspect of general obscenity law. Recognizing this, the court in *Interstate Circuit* adopted a children's standard by modifying the *Roth* test:⁴⁶

A film that is obscene when viewed by an audience of young persons is one which, to the *average young person*, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest, substantially goes beyond the customary limits of candor in description or representation of such matters to the *average young person*, and is utterly without redeeming social importance.⁴⁷

Under this children's obscenity standard, children may be isolated from material admittedly not obscene under the *Roth* test.

Evidently one reason for the recent rash of children's obscenity statutes⁴⁸ is that the Supreme Court administers the *Roth* test to protect material that in the eyes of state and local lawmakers is objectionable for children.⁴⁹ In fact, prac-

³⁸ Webster's New International Dictionary (2d ed. 1959) defines prurient in pertinent part, as follows: "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd."

³⁹ This requirement was first clearly announced in *Manual Enterprises v. Day*, 370 U.S. 478, 482 (1962).

⁴⁰ The relevance of social value was introduced in *Roth*, but the requirement that questioned material must be "utterly" without redeeming social value was articulated for the first time in *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964).

⁴¹ 383 U.S. 463 (1966).

⁴² Pandering is defined in the opinion as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." 383 U.S. at 467. This definition was adopted from Chief Justice Warren's concurring opinion in *Roth*, 354 U.S. at 495.

⁴³ 383 U.S. at 475-76. The opinion stated that "the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material . . . was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes." *Id.* at 470.

⁴⁴ 383 U.S. 502 (1966).

⁴⁵ *Id.* at 508. For an excellent account of the confused state of obscenity law after *Mishkin*, *Ginzburg*, and *Fanny Hill*, see Comment, *More Ado About Dirty Books*, 75 YALE L.J. 1364 (1966).

⁴⁶ For the *Roth* test see note 36 *supra*.

⁴⁷ 366 F.2d at 593 (emphasis added).

⁴⁸ See notes 1, 14 *supra*; notes 60, 71 *infra*.

⁴⁹ See *United States v. Klaw*, 350 F.2d 155, 158-59 (2d Cir. 1965); *People v. Bookcase*,

tically the only material that can be banned at present is hard core pornography.⁵⁰

Since the Supreme Court has never considered the constitutionality of separate standards for children, it is not clear that such standards would be held constitutional.⁵¹ In any case, separate children's standards may not operate to restrict the reading and viewing fare of adults.⁵² Hence, children's statutes must be drafted to guarantee adults unimpaired access to constitutionally protected material.⁵³

Several justices of the Supreme Court have indicated in dicta that separate children's standards would be constitutional—even desirable.⁵⁴ However, the

Inc., 14 N.Y.2d 409, 419, 201 N.E.2d 14, 19, 252 N.Y.S.2d 433, 441 (1964) (dissenting opinion of Burke, J.); *Larkin v. G. P. Putnam's Sons*, 14 N.Y.2d 399, 406, 200 N.E.2d 760, 764, 252 N.Y.S.2d 71, 77 (1964) (dissenting opinion of Desmond, J.). *But cf.*, Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326 (1957); Note, *Extralegal Censorship of Literature*, 33 N.Y.U.L. Rev. 989 (1958).

⁵⁰ *United States v. Klaw*, 350 F.2d 155, 168 (2d Cir. 1965). See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion of Stewart, J.); *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

⁵¹ *Cf. In re Gault*, 87 S. Ct. 1428 (1967) which held that a fifteen year old boy was denied due process of law because juvenile delinquency proceedings which may lead to commitment in a state institution must measure up to the constitutional essentials of due process and fair treatment. "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 1436.

⁵² *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Butler v. Michigan*, 352 U.S. 380 (1957); *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19 (N.D. Tex. 1965); *Katsev v. City of Los Angeles*, 52 Cal. 2d 360, 341 P.2d 310 (1959); *Police Comm'r v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A.2d 727 (1959), *cert. denied*, 364 U.S. 909 (1960); *State v. Miller*, 145 W.Va. 59, 112 S.E.2d 472 (1960); *Goldstein v. Commonwealth*, 200 Va. 25, 104 S.E.2d 66 (1958).

⁵³ For suggestions concerning how such a statute could prohibit the sale of proscribed material to children without impairing its availability for adults, see Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 S. CAL. L. REV. 345, 370-72 (1966).

⁵⁴ We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed *harmful to children*. But that interest does not justify a total suppression of such material, the effect of which would be to "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of *objectionable* material to children, rather than at totally prohibiting its dissemination.

Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (per Brennan, J.) (emphasis added). Chief Justice Warren in a dissenting opinion said that a work may be "inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." *Id.* at 201. Justice Harlan in his dissenting opinion made it clear that he favors allowing the state a wide scope in the field of regulating the distribution of obscene materials to children. *Id.* at 203-04. Since Justice Goldberg joined in Justice Brennan's opinion and Justice Clark joined in Chief Justice Warren's opinion, five justices seem to approve the idea of separate standards for children. See also *Ginzburg v. United States*, 383 U.S. 463, 475; *Id.* at 498 n.1 (dissenting opinion of Stewart, J.); *Fanny Hill v. Attorney General*, 383 U.S. at 421 n.8; *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 76 (concurring opinion of Clark, J.).

For pertinent statements in the lower courts, see *United States v. Klaw*, 350 F.2d 155, 164 n.10 (2d Cir. 1965); *In re Louisiana News Co. v. Dayries*, 187 F. Supp. 241, 247 (E.D.

force of these statements should not be overestimated; in *Jacobellis v. Ohio*, for example, the Court struck down a statute which attempted to protect children by applying broad children's standards to the whole community.⁵⁵

Further support for the modified *Roth* standard proposed in *Interstate Circuit* is the concept of variable obscenity found in *Mishkin*.⁵⁶ *Interstate Circuit* interpreted *Mishkin* as repudiating the concept of constant obscenity which assumes that "obscenity is an inherent quality of material that renders it unfit for everyone in all circumstances."⁵⁷ Technically, *Mishkin* held only that the prurient appeal of material designed to appeal to deviant sexual interests could be assessed in terms of its prurient appeal to sexual deviants. This may indicate that unless material is designed to appeal to the prurient interest of children it may not be proscribed for children. But the concept of variable obscenity as implicitly approved by the Supreme Court may be more expansive, allowing material which in practical effect appeals to the prurient interest of children to be proscribed as to them.⁵⁸ In any event, it is one thing to accept the theory of variable obscenity for children; it is another to harness it in a workable children's obscenity statute.

Children's obscenity legislation is premised upon widespread assumptions that children are more naive and more susceptible to the corrupting influences of pornography and more easily incited to antisocial conduct than adults;⁵⁹ the preambles to most children's obscenity statutes justify the tighter standards on the theory that dirty films, books and pictures tend to promote juvenile crime and delinquency.⁶⁰ It is also assumed that the prurient interest of children may be stimulated by material which would fail to arouse adults.

La. 1960); *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 218 N.E.2d 668, 271 N.Y.S.2d 947 (1966); *People v. Tannenbaum*, 18 N.Y.2d 268, 220 N.E.2d 783, 274 N.Y.S.2d 131 (1966); *People v. Kahan*, 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965) (per curiam); *People v. Bookcase, Inc.*, 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964); *State v. Settle*, 90 R.I. 195, 156 A.2d 921 (1959).

⁵⁵ 378 U.S. 184 (1964). The statute provided that "No person shall knowingly sell . . . [any] book . . . not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature." *Jacobellis v. Ohio*, 378 U.S. 184, 186 n.1 (1964).

⁵⁶ The differences between the concepts of "variable" and "constant" obscenity are discussed in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68, 72-73, 77-78 (1960).

⁵⁷ 366 F.2d at 595, quoting Lockhart & McClure, *supra* note 56, at 85. Lower federal courts had previously approved the concept of variable obscenity on at least two occasions. See *Manual Enterprises, Inc. v. Day*, 289 F.2d 455 (1961), *rev'd on other grounds*, 370 U.S. 478 (1962); *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957). But see *Paramount Film Distrib. Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959).

⁵⁸ See, e.g., Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 847-52 (1964); Green, *Obscenity, Censorship, and Juvenile Delinquency*, 14 U. TORONTO L.J. 229, 250-51 (1962); Lockhart & McClure, *supra* note 56, at 77-88; Note, "For Adults Only": *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141 (1960).

⁵⁹ See J. PAUL & M. SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* 191-202 (1961). It is evident that a significant portion of the citizens support obscenity legislation. See, e.g., the genesis of the ordinance in *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721, 722-23 (5th Cir. 1966).

⁶⁰ The preambles to most state and local children's obscenity statutes contain some

In fact, expert opinion is divided on whether obscene expression is more harmful to children than to adults and whether it tends to incite juvenile delinquency.⁶¹ Most experts agree that there is no scientific evidence that this is true.⁶² But legislatures regularly adopt children's obscenity statutes notwithstanding the lack of trustworthy evidence that children need special protection.⁶³

An initial hurdle that the modified *Roth* standard faces is the problem of unconstitutional vagueness. The Supreme Court has recognized that the *Roth* test is itself inherently vague.⁶⁴ The Court in *Roth* considered this problem of vagueness and concluded that, although the terms of obscenity statutes are far

statement that obscene films and literature cause juvenile delinquency. See N.J. REV. STAT. § 2A: 115-3.3 (Supp. 1966); N.Y. PEN. STAT. § 484-e (Supp. 1966). See also *Police Comm'r v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A.2d 727 (1960), *cert. denied*, 364 U.S. 909 (1960); *State v. Settle*, 90 R.I. 195, 198, 156 A.2d 921, 924 (1959) (purpose of the statute clearly to protect "youth and to combat juvenile delinquency").

⁶¹ Compare Cairns, Paul, & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962); Green, *Obscenity, Censorship, and Juvenile Delinquency*, 14 U. TORONTO L.J. 229 (1962); and Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963) with Kefauver, *Obscene and Pornographic Literature and Juvenile Delinquency*, 24 FED. PROBATION, Dec. 1960, at 3; and S. REP. No. 2381, 84th Cong., 2d Sess. (1956). See also B. KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES: ETIOLOGY, PATHOLOGY, PSYCHODYNAMICS, AND TREATMENT* (1954); N. ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* (1956); Berninghausen & Faunce, *An Exploratory Study of Juvenile Delinquency and the Reading of Sensational Books*, 33 J. OF EXPERIMENTAL EDUC. 161 (1964); Dickens & Williams, *Mass Communication: Aggression and Violence in the Mass Media*, 34 REV. OF EDUC. RESEARCH 216 (1964); Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655 (1964).

See *United States v. Roth*, 237 F.2d 796, 812-17 (2d Cir. 1956) (dissenting opinion of Frank, J.), *aff'd*, 354 U.S. 476 (1957); *Katsev v. County of Los Angeles*, 336 P.2d 6, 10-14 (Cal. App.), *vacated*, 52 Cal. 2d 360, 341 P.2d 310 (1959).

⁶² See, e.g., Green, *Obscenity, Censorship, and Juvenile Delinquency*, 14 TORONTO L.J. 229 (1962).

⁶³ See California Attorney General, *A Report to the California Legislature, Obscenity: The Law and the Nature of the Business*, April 6, 1967. The report cites with approval a comment by one Pennsylvania judge:

It is the habit of the purveyors of obscenity continuously to demand "scientific evidence" proving that it is harmful to children or to some important fraction of adults. My reply has been that the harm from this filth is obvious and my argument is based on the most commonly accepted principle of learning. . . .

Man tends to become that which he admires, and he is led to admire that which is frequently presented to him. To reach the conclusions sought by the pornographers, we have to discard every known principle of education.

Id. at 106-07.

⁶⁴ *Ginzburg v. United States*, 383 U.S. at 476-82 (dissenting opinion of Black, J.); *Jacobellis v. Ohio*, 378 U.S. at 191 (Brennan, J.); *id.* at 197 (concurring opinion of Stewart, J.); *id.* at 199-203 (dissenting opinion of Warren, C.J.); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (protected material is separated from obscene material by a "dim and uncertain line"); *NAACP v. Button*, 371 U.S. 415, 432 (1963) (strict standards of vagueness are required in the first amendment area); *Winters v. New York*, 333 U.S. 507, 522-23 (1948) (dissenting opinion of Frankfurter, J.); *Paramount Film Distrib. Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959) (that the statute is designed for children does not excuse a certain amount of vagueness). See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

from precise, the "Constitution does not require impossible standards."⁶⁵ The question in each case is whether the language of the statute "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."⁶⁶ *Interstate Circuit's* modified *Roth* standard for children, by building on an already vague standard, has compounded that vagueness.⁶⁷ Since obscene material under the *Roth* test must be both patently offensive and utterly without redeeming social value, it has become equated with hard core pornography. Because the dividing line between hard core pornography and all other expression is comparatively easy to recognize,⁶⁸ the *Roth* standard may have become clearer over time. But the modified *Roth* standard used in *Interstate Circuit* requires the retailer to distinguish between material which may lawfully be sold only to adults and material lawful for children. The retailer must determine at his peril what appeals to the prurient interest of the average child, and what is patently offensive for the average child, and what has social value for the average child. Since this may be an impossible task considering the adult's frame of reference, the modified *Roth* standard may well be unconstitutionally vague. However, the efficacy of the modified *Roth* standard is doubtful on grounds other than vagueness.

Applying a variable obscenity standard to children may accomplish very little in the way of proscribing material thought harmful for children. While it is true that the prurient interest test could be modified for children, the prurient interest of the average child is stimulated by the same kind of material that appeals to the prurient interest of the average adult. The question is whether children are titillated by less graphic sexual expression than adults.⁶⁹ In the case of pictures and films one may acquire an immunity to sexual expression so that with experience more and more potent material is needed to titillate. On the other hand, it is more likely that adults are stimulated by less erotic material than would stimulate children because, being more experienced and sophisticated than children, they can more easily read sex into the material. Hence, it may well be that all material which has prurient appeal to children will also have prurient appeal for adults, and that some material which has prurient appeal for adults will not have prurient appeal for children. Application of the variable obscenity concept to the requirement of prurient appeal may not, therefore, significantly differentiate material available under the statute for adults only from that available for children.

Apart from the problems of modifying the "prurient interest" requirement for children, it is not clear whether or how the Supreme Court would vary requirements of "patent offensiveness" and "social importance" for children. The modified *Roth* test announced in *Interstate Circuit* purports to modify the patent offensiveness requirement.⁷⁰ However, the question here is not whether the

⁶⁵ *Roth v. United States*, 354 U.S. 476, 491 (1957).

⁶⁶ *Id.*

⁶⁷ See generally *People v. Kahan*, 15 N.Y.2d 311, 314, 206 N.E.2d 333, 335, 258 N.Y.S.2d 391, 393-94 (1965) (concurring opinion of Fuld, J.); Note, *The Youth—Obscenity Problem—a Proposal*, 52 Ky. L.J. 429, 441 (1964).

⁶⁸ Compare *Ginzburg v. United States*, 383 U.S. 463, 499 (dissenting opinion of Stewart, J.), with *Id.* at 476-82 (dissenting opinion of Black, J.).

⁶⁹ See *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 77, 218 N.E.2d at 672-73, 271 N.Y.S.2d 947, 953 (1966).

⁷⁰ 366 F.2d at 593. See text accompanying note 47 *supra*.

material is patently offensive to the average child but whether the community considers it "beyond the customary limits of candor" to expose the child to the material. The New York statute makes this more explicit by providing that the patent offensiveness requirement is met if the average parent considers the material patently offensive for his child.⁷¹

If the Supreme Court modifies the prurient appeal requirement for children, it may also vary the patent offensiveness requirement. For these elements of the *Roth* test both concern the mental impact of the material on the viewer.

Whether the Supreme Court would vary the social importance requirement is, however, another matter. The most effective bar to developing an effective and constitutional children's obscenity statute is the requirement that material must be utterly without social value. It is significant that the modified *Roth* test as articulated in *Interstate Circuit* does not modify the social importance test for children. However, without modifying the social importance test it is almost impossible to achieve more stringent censorship for children. In the Supreme Court's administration of the *Roth* test, the social importance requirement has salvaged most of the material challenged even though the material appealed to prurient interest and was patently offensive.⁷² Experts can testify that almost any material has a "modicum" of social importance. Perhaps *Interstate Circuit* failed to adjust the social importance requirement because *Fanny Hill* was emphatic in holding that obscene material must be utterly without social value.⁷³

However, the "pandering" test announced in *Ginzburg* may indicate that the requirement that the material be utterly without social value is not immutable.⁷⁴ If the Court is willing to accept this invasion of the social importance doctrine, it may also adjust the social importance requirement for children.

The social importance requirement could be modified for children by requiring that, in order to be proscribed, material must be utterly without social value for the average child. However, experience with the *Roth* test indicates that the hopes of promoters of children's obscenity statutes will be frustrated if, in order to be proscribed, material must be without social importance for children. The social importance of a work depends on whether it has artistic merit, whether it is well written and has a coherent theme, or whether it expounds constructive ideas or has historical interest.⁷⁵ Under a modified social importance requirement the question in each case is whether the average child can appreciate those qualities of a work that give it social importance for adults.

It may be that the average child—especially those children fourteen to seventeen—is intellectually mature enough to appreciate a given book or film almost as fully as the average adult. If this is the case, then the children's obscenity statute will be ineffective even if it contains a modified social im-

⁷¹ See N.Y. PEN. LAW § 484-h(1)(f) (1965).

⁷² See, e.g., *Fanny Hill v. Attorney General*, 383 U.S. 413, 419-20 (1966); *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 121 N.W.2d 545 (1963).

⁷³ 383 U.S. at 418-20 (1966).

⁷⁴ *Ginzburg* held that if material is "pandered" or sold solely on the basis of its erotic interest to customers, the material could be obscene even though it had a minimum of social value. In short, defendants in the "sordid business" of purveying erotically appealing material may not make a "spurious" claim for purposes of litigation alone that their material has social value. 383 U.S. at 470 (1966).

⁷⁵ See, e.g., *Fanny Hill v. Attorney General*, 383 U.S. 413, 419-20 (1966); *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 121 N.W.2d 545 (1963).

portance criterion. Realizing this, California legislators have introduced a children's obscenity bill in which the social value of material is balanced against its prurient appeal.⁷⁶ If the prurient appeal outweighs the social importance, the work can be censored for children under the proposed law.

The proposed California bill runs directly counter to language in *Fanny Hill* that the constitutional status of material can not turn on "weighing" its social importance against its prurient appeal.⁷⁷ *Fanny Hill* seems to eliminate the possibility of emasculating the social importance requirement in a children's obscenity statute. For this reason, it may be difficult or impossible to salvage an effective and constitutional children's obscenity statute using a modified *Roth* standard.

Interstate Circuit was decided correctly. The broad, nonobscenity standard of the film classification statute was almost certainly unconstitutional. However, the modified *Roth* standard that the court substituted in its place will probably not satisfy supporters of children's obscenity statutes. While there are indications that a standard of obscenity which alters all three elements of the *Roth* test may be held constitutional by the Supreme Court, there is grave doubt whether it will keep much "objectionable" material out of the hands of children. Of course, the state may always show that such objectionable material presents a clear and present danger of a harm which the state has a right to prevent. Legislators might consider that if it cannot be demonstrated that obscene material presents a clear and present danger to children, no harm exists.

John F. Pritchard

ESTATE TAX: Remainder Interest Bequeathed to Charity Subject to a Power of Invasion Exercisable in Favor of the Life Tenant May Qualify for Charitable Deduction—*Estate of Schildkraut v. Commissioner* (2d Cir. 1966).

In *Estate of Schildkraut v. Commissioner*¹ the Second Circuit allowed a charitable deduction for a remainder interest bequeathed to charity,² where the corpus of the trust was subject to a power of invasion in favor of the testator's widow, guaranteeing her a fixed amount of trust income each year. The Commissioner argued that the invasion for the private interest could eventually reduce the charity's interest to zero, and the executors, acknowledging the probable exercise of the power each year of the widow's life, did not contend that

⁷⁶S.B. 79, § 313(a), Cal. 1967 Sess. For examples of the kind of material California hopes to proscribe for children in its new children's obscenity statute, see California Attorney General *supra*, note 63.

⁷⁷383 U.S. at 419; *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (Brennan, J.). See also *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 383 P.2d 152, 164-65, 31 Cal. Rptr. 800, 812-13 (1963).

¹368 F.2d 40 (2d Cir. 1966), *cert. denied*, 386 U.S. 959 (1967), *rev'g in part* 24 CCH Tax Ct. Mem. 1215 (1965).

²Section 2055 of the Internal Revenue Code of 1954 allows a deduction from the value of the gross estate of all bequests, legacies, devises, or transfers for public, charitable and religious uses.

the likelihood of diverting principal from the charitable to the private interest was "so remote as to be negligible."³ The court, however, held that the charitable interest could be adequately calculated with actuarial tables and therefore qualified for a deduction under section 2055 of the Internal Revenue Code.⁴

Sol Schildkraut, the testator, left an estate valued at slightly under one million dollars. His will created a trust with a principal amount of 300,000 dollars and directed his executors to pay to his widow 1,000 dollars a month out of income of the trust and, if the income was insufficient, out of principal. Upon the death of Mrs. Schildkraut, the remaining principal of the trust vested in the Schildkraut Foundation, a New York charitable corporation.⁵

The Tax Court, finding that the bequest failed to satisfy standards for deductibility under section 2055, denied the estate a charitable deduction for the present value of the amount actuarially calculated to reach the charity.⁶ The court interpreted Treasury Regulations as requiring that an ascertainable part

³ Treas. Reg. § 20.2055-2(b) (1958). For text see note 6 *infra*.

⁴ 368 F.2d at 49.

⁵ *Id.* at 41. An additional trust provision directed the executors to pay out of the trust corpus federal and state income taxes on any sum paid to the widow from the trust and the real estate taxes on certain property in Florida as long as Mrs. Schildkraut continued to own it. The court of appeals recognized the possibility of increases in tax rates during Mrs. Schildkraut's life but rejected it as a basis for denying the charitable deduction. The court held that it was judicially sound to focus only on the facts and tax rates prevailing as of the date of decedent's death. *Id.* at 49.

The tax-exempt status of the Schildkraut Foundation was not at issue in the instant proceedings; both the Tax Court and the court of appeals decisions conceded that the Foundation has the necessary attributes of a tax-exempt recipient.

⁶ Estate of Schildkraut, 24 CCH Tax Ct. Mem. 1215 (1965). The pertinent parts of the governing regulations read as follows:

§ 20.2055-2 Transfers not exclusively for charitable purposes

(a) Remainders and similar interests. If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. The present value of a remainder or other deferred payment to be made for a charitable purpose is to be determined in accordance with the rules stated in § 20.2031-7.

(b) Transfers subject to a condition or a power. If, as of the date of a decedent's death, a transfer for charitable purpose is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowed unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the occurrence of which appeared to have been highly improbable at the time of the decedent's death, the deduction is allowable. If the legatee, devisee, donee, or trustee is empowered to divert the property or fund in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power.

Hereinafter, throughout the text of this Note, these subsections of Treas. Reg. section 20.2055-2 will be referred to as "subsection (a)" and "subsection (b)."

of the charitable bequest be subject to only a negligible possibility of invasion in favor of the private interest.⁷

The Second Circuit reversed the Tax Court's denial of a charitable deduction, declaring that the proper test required a "presently ascertainable" interest and an "assurance" that the Foundation would receive it. The court thus rejected the Commissioner's argument that the deduction be denied unless the chance that the charitable foundation would not take the remainder was "negligible."⁸ The Commissioner had contended that the charity's interest was "conditional" within the meaning of Treasury Regulation section 20.2055-2(b) because it was contingent upon the life tenant's not exhausting the corpus by outliving her life expectancy. Instead, the Second Circuit found that this particular type of invasionary power—limited to a fixed amount and in no way subject to the volition of the life tenant—did not create a conditional bequest. The court stressed the measurable characteristics of the *Schildkraut* power of invasion and compared the Foundation's interest to the normal deferred assured bequest to charity: a remainder interest subject only to an outstanding life estate. The court allowed the deduction on the authority of Treasury Regulation section 20.2055-2(a), finding the Foundation's interest both "presently ascertainable" through calculations with approved actuarial tables, and an "assured bequest," there being "no uncertainty appreciably greater than the general uncertainty that attends human affairs" that the charity would not receive the bequest.⁹

⁷ See Treas. Reg. § 20.2055-2(b) (1958), *supra* note 6. Petitioners did not strongly contend that the probability of the widow living past her actuarial table estimate was negligible.

Petitioners' argument emphasized the combination of their claimed deductions. The executors sought a marital deduction for the life estate of the widow and a charitable deduction for the remainder interest to the Foundation. Because the entire amount of the trust was to go either to the widow or the charity, and because both could be described as "exempt" beneficiaries, the existence of one, it was argued, should not prejudice the deduction for the other. The Tax Court commented that this argument was appealing from a generally equitable standpoint, but that neither deduction, standing on its own, was justified by the Code. The widow's interest was terminable, and she did not have, with respect to any portion of the trust corpus, a power of appointment by will or during life exercisable by her alone and in all events; hence it failed to meet the requirements of § 2056(b)(5) of the Code and violated the "specific portion" rule of Treas. Reg. § 20.2056(b)-5 (1958). The charitable deduction, likewise, was separately evaluated and denied. 24 CCH Tax Ct. Mem. at 1219-21 (1965).

⁸ 368 F.2d at 48. The court concluded that the bequest was governed by Treas. Reg. § 20.2055-2(a) (1958), not by Treas. Reg. § 20.2055-2(b) (1958), and was therefore entitled to a deduction.

Though the court of appeals affirmed the Tax Court's denial of the marital deduction, it specifically mentioned as a "crucial fact" that the entire corpus must go to the widow or to the charity, both of whom would be tax-free recipients if the corpus were bequeathed to them directly. 368 F.2d at 48.

⁹ 368 F.2d at 48. This last quoted phrase was a conclusion and not a test announced in *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929), see text accompanying notes 16-18 *infra*. There the Supreme Court concluded that a charity's interest met the negligibility test [now promulgated in Treas. Reg. § 20.2055-2(b) (1958)] and then spoke of "no uncertainty appreciably greater than the general uncertainty that attends human affairs." In *Schildkraut*, however, it was obvious that the charity's interest could not meet the negligibility test, but the court saw fit to use *Ithaca's* conclusion anyway.

The Congressional policy of freeing gifts to charity from the estate tax has, from its inception, been intended to encourage charitable contributions.¹⁰ Even though there is no express statutory authority for bequests of future interests to charity, such bequests have never been disqualified merely because the charity's right to present enjoyment has been postponed. However, the regulations have sought to distinguish those bequests of future interests to charity which will assuredly come into possession from those whose eventual possession by the charitable beneficiary is uncertain. This distinction is a necessary one in view of the nature of the estate tax: The tax must be computed on the basis of facts and circumstances existing at the date of death; deductibility cannot await the time when the charitable bequest finally vests in possession.¹¹ Hence, if assured bequests were not treated differently than contingent bequests, there would be an obvious tax avoidance possibility for a "bequest" to charity conditioned on an unrealistic event or on the volition of the taker-in-default. The wide range of bequests between those in which the charity's interest is assured and those in which the charity's interest will undoubtedly be divested is reflected by regulations establishing standards of deductibility. Subsections (a) and (b) of Treasury Regulation section 20.2055-2¹² attempt to set out a basic description of assured and contingent bequests and to incorporate both the general legislative policy of encouraging charitable contributions and the specific limitations of deductibility that have been announced by the Supreme Court.

In 1928 the Supreme Court decided for the first time whether to allow a deduction for bequests not certain to reach a charity. In *Humes v. United States*,¹³ the Court denied a deduction for a bequest of twelve million dollars to charity because it would be defeated if the life tenant, then aged fifteen years, should live to be forty years old or should die leaving issue. The petitioner in that case made two unsuccessful arguments: First, the present value of the charity's interest was legally determinable, since the probabilities involved could be shown by standard mortality and probability tables;¹⁴ second, the charity received a vested interest in a defeasible estate which was a present property right having present value. The Court held that the fundamental question was not whether the charity's interest could be valued but whether Congress intended a deduction for contingent gifts of future interests to charity. Acknowledging that Congress' intent was to encourage charitable contributions, the Court nevertheless concluded that no deduction could be allowed for a charitable bequest dependent upon a condition unfulfilled at the date of the testator's death.¹⁵

In the following year, the Supreme Court faced the question whether a power of invasion in favor of the life tenant rendered a gift of a future interest to charity so uncertain as to preclude a deduction. In *Ithaca Trust Company v.*

¹⁰ For the history of the charitable deduction in the federal estate tax and the treasury regulations pertaining thereto see Taggart, *Charitable Deductions for Transfers of Remainder Interests Subject to Invasion*, 21 TAX L. REV. 535, 540 n.8, 543 n.12 (1966).

¹¹ *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155 (1929).

¹² See note 6 *supra*.

¹³ 276 U.S. 487 (1928), *aff'g sub nom. Mitchell v. United States*, 63 Ct. Cl. 613 (1927).

¹⁴ *Id.* at 488. The Court was skeptical of the then recently developed experience tables measuring the probability that a woman dying at a given age will die unmarried and the probability that a woman who marries will die childless.

¹⁵ *Id.* at 494.

United States,¹⁶ the will empowered the trustees to use from the principal any sum "that may be necessary to suitably maintain [my widow] in as much comfort as she now enjoys." This was a power of invasion limited by a standard that was "fixed in fact and capable of being stated in definite terms of money" and not subject to the trustee's or the widow's discretion. Since the projected income of the estate was sufficient to maintain the widow as required, the Court concluded that there was no reasonable possibility that the principal would be invaded and not pass to the charity intact.¹⁷ A charitable deduction was allowed for the present value of the entire amount of the trust corpus.

In reaching its conclusion the Court implicitly established two tests which must be satisfied before a charitable bequest can qualify for a deduction. First, a power of invasion or a condition that would deprive the charity of enjoyment must be subject to a standard that is objective and capable of measurement rather than subjective and governed by volition. Second, the possibility that the charitable transfer will not become effective must be so slight that it may be ignored, a version of the de minimus principle. These two requirements are interrelated: The standard for the power of invasion or divesting condition must be definite and measurable. Without such restraints one could never conclude with certainty that the likelihood of depriving the charity of its interest is negligible. Hence, while the objective-standard test is not specifically mentioned in the regulations, it is implicitly a part of the de minimus principle or negligibility test incorporated in subsection (b) of Treasury Regulation section 20.2055-2.¹⁸

In a 1943 case, *Merchants National Bank v. Commissioner*,¹⁹ the trustee was authorized, in his discretion, to invade corpus for the "comfort, support, maintenance, and/or happiness" of the widow and was directed to exercise that discretion with liberality toward the widow, preferring her welfare, comfort and happiness to the claims of residuary charitable beneficiaries. The taxpayer had prevailed before the Board of Tax Appeals on the premise that no corpus would in fact be diverted for the widow's benefit, since she had substantial independent means and no dependent children. The Supreme Court, however, disallowed the charitable deduction entirely. It held that the power of invasion permitting a diversion of corpus from the charitable recipient could not be estimated or accounted for in the absence of an adequate standard for a court to restrict the exercise of the trustee's discretion.²⁰ It reasoned that Congress required a more reliable measure than "happiness" and that the instruction to the trustee to exercise his discretion with liberality could not be discounted without resort to speculation. The *Merchants National Bank* case reiterated that the objective test had to be met before applying the de minimus principle of *Ithaca*.

In the course of the *Merchant's* opinion, however, the Court read a particular regulation quite broadly in an effort to clarify the requirements of the statute and approve the regulations thereunder. That regulation, which remains substantially unchanged as subsection (a), then read: ". . . a deduction may be taken of the

¹⁶ 279 U.S. 151 (1929).

¹⁷ *Id.* at 154.

¹⁸ The negligibility test of *Ithaca* was first incorporated into the Treas. Reg. 105, § 81.46 (1942), promulgated under the Internal Revenue Code of 1939, in response to court decisions which had permitted deductions of bequests assured in fact but conditional in form. *E.g.*, *United States v. Provident Trust Co.*, 291 U.S. 272 (1934), discussed at note 36 *infra*.

¹⁹ 320 U.S. 256 (1943).

²⁰ *Id.* at 260.

value of the beneficial interest in favor of the [charity] only insofar as *such interest is presently ascertainable*, and hence severable from the interest in favor of the private use."²¹ The *Merchants National Bank* Court appears to have misconstrued this regulation to require that the charitable bequest have a "presently ascertainable value."²² Thus, the distinction in the regulation between the certainty of a charitable interest and the value of that interest dissolved. To add to the confusion, the word "ascertainable" was used throughout the *Merchants* opinion as a synonym for the words "definite" and "certain," thus weakening the standard for a qualifying power of invasion.²³ The result of this broad reading and usage of the words "presently ascertainable" has been to conceal the technical and restrictive meaning of the phrase as it now stands in subsection (a).

In 1955 the Supreme Court had its most recent occasion to review charitable deductions of future interests. In *Commissioner v. Estate of Sternberger*,²⁴ a charitable bequest was to take effect only if decedent's childless twenty-seven year old daughter died without descendants surviving her and her mother. While both the Tax Court and the court of appeals approved the taxpayer's actuarial computations as fairly reflecting the present value of the future interest reduced in proportion to the charity's chance to receive the corpus,²⁵ the Supreme Court denied the charitable deduction. The Court pointed out the inappropriateness of mortality and experience tables which fail to take account of the inducement to the testator's daughter to marry and leave descendants. More importantly, it found no statutory authority for deducting any percentage of a conditional bequest to charity where there is no assurance that the charity will receive the bequest or some determinable part of it.²⁶ The Court narrowly interpreted the statutory purpose to allow a deduction only for property that will eventually be used for charitable purposes.²⁷ The Court explicitly approved the predecessors of subsections (a) and (b) of Treasury Regulation section 20.2055-2 and found that they fully implemented the predecessor of section 2055 of the 1954 Internal Revenue Code. It stated that the two pertinent Treasury Regulations were easily reconcilable and rejected the taxpayer's argument that they overlapped.²⁸

²¹ Treas. Reg. 80, § 303, Art. 44 (1934) (emphasis added); cf. Treas. Reg. § 20.2055-2 (a) (1958).

²² 320 U.S. at 259.

²³ *Id.* at 261.

²⁴ 348 U.S. 187 (1955).

²⁵ Without doubt the accuracy and acceptability of mortality and remarriage tables had improved since *Humes v. United States*, in which such tables were dismissed as "relatively little known and unused in American legal proceedings." 276 U.S. at 492 (1928).

²⁶ 348 U.S. at 198.

²⁷ The dissent in *Sternberger* argued for a percentage deduction for conditional bequests because it would further the Congressional policy of encouraging charitable contributions, and because, in the aggregate, the deductions would substantially equal the amounts received by charitable beneficiaries. *Id.* at 202.

One commentator, following this argument of the dissent, points out the unreality of the remoteness test in the area of conditional gifts. Albert, *Merchants National Bank v. Commissioner and its Uncharitable Aftermath*, 67 *DICK. L. REV.* 145 (1963). Another writer concedes the dissenters' argument but doubts whether the present rule has discouraged transfers to charity. Taggart, *supra* note 10.

²⁸ 348 U.S. at 194. Regulations 81.44 and 81.46 preceded Treasury Regulation §§ 20.2055-2 (a) and 20.2055-2(b) respectively. Section 812(d) of the 1939 Code preceded § 2055 of the 1954 Internal Revenue Code.

While the argument of overlap between the deferred bequest subsections of the regulation was not specifically pressed upon the court of appeals by the petitioners in *Schildkraut*, and, indeed, no court has discussed it in detail, it is a viable explanation for the result of the case. The overlap argument proceeds from the premise that subsection (a) sets forth the general rule of deductibility while subsection (b) sets out some specific exceptions to the rule. In not specifying that the first subsection applies to assured bequests, and that the second applies to all types of conditional bequests, the regulations leave room for the argument that bequests not specifically excluded by subsection (b) may qualify for a deduction by meeting the requirements of subsection (a). Hence, if *Sternberger* is read narrowly to prohibit under subsection (b) deductions where a charitable transfer is subject to the volition or discretion of some individual, a proportional deduction could be justified under subsection (a) for a charitable bequest dependent upon nonvolitional and measurable criteria such as life expectancy.²⁹ In relying on statistical probability or actuarial tables, the gamble for the Treasury is the same for nonvolitional conditional bequests and assured bequests: While the amount actually transferred to charity in any particular case may not equal the amount of the previous deduction, in the aggregate, the sums transferred to charities will accurately reflect the total deductions permitted.

The rationale of *Schildkraut* must be examined in light of the court of appeals' conclusion that a charitable remainder subject to a power of invasion guaranteeing the life tenant an assured amount of income is governed by subsection (a) and not subsection (b) of Treasury Regulation section 20.2055-2. The court of appeals did not attempt to support its holding with the arguments that the regulations overlapped or that they did not fully cover the area of charitable bequests of future interests.³⁰ Instead, the court relied solely upon the

²⁹ Two circuits have not interpreted *Sternberger's* prohibition against proportional deductions to be limited to volitional conditions. In *United States v. Dean*, 224 F.2d 26 (1st Cir. 1955), a bequest to charity was dependent upon the survival of one party by another. In disallowing the charitable deduction, the court said:

Off hand it would seem eminently fair and administratively simple to allow such a deduction in cases such as this where the chance that charity will take can be accurately computed actuarially. But the Supreme Court in the *Sternberger* case rejected the argument that the applicable regulations permit proportional deductions. The Court construed section 81.46 . . . as taking not a proportional but an all or nothing approach to the problem of deductions on account of contingent bequests to charity. Thus the section either denies any deduction at all for a contingent bequest to charity, or else it permits the deduction of the present value of the entire contingent bequest, allowing the latter whenever "the possibility that charity will not take is so remote as to be negligible."

224 F.2d at 29.

The same conclusion was reached in *Estate of Moffett v. Commissioner*, 269 F.2d 738 (4th Cir. 1959), where the charity's remainder interest was subject to a power of invasion for a fixed annual amount in favor of the life tenant. There the court specifically rejected the executors' argument that the charitable deduction should be valued by subtracting the actuarial value of the widow's annuity from the total value of the trust. The court disallowed a charitable deduction on the ground that the negligibility test was not satisfied.

³⁰ The argument that Treas. Reg. § 20.2055-2 does not fully cover the area of charitable bequests of future interests recognizes a third category of bequests and urges a deduction for conditional bequests that are readily measurable with statistical tables and do not involve the elements of volition or personal inducement.

Treasury Regulations, which had been approved in the *Sternberger* case, and adopted an oblique interpretation of those regulations.³¹ The remainder of this Note will analyze subsections (a) and (b) of Treasury Regulation 20.2055-2 in an attempt to rationalize the distinctions drawn therein and determine whether the *Schildkraut* conclusion is justified.

The most obvious distinction between subsections (a) and (b) is the separation of assured from conditional bequests. A remainder interest subject to a power of invasion is nothing more than another form of conditional gift because the power of invasion, if extensively exercised, can, like a divesting condition, exhaust the entire principal and leave the remainderman with nothing. An assured bequest of a future interest is distinguishable from a conditional gift because there is a complete certainty that the charity will take the principal at some future time.

The regulations establish two sets of standards for charitable deductions. If a bequest to the charitable remainderman is assured, subsection (a) permits a deduction of the present value of the future interest; if the bequest is conditional, subsection (b) requires that the condition which would deprive the charity of the bequest be shown to be so remote as to be negligible before the present value of the future interest may be deducted. This difference is supported by the arguments of the Supreme Court in *Humes, Ithaca, Merchants*, and *Sternberger* that Congress never intended a charitable deduction for funds that would not eventually be used exclusively for charitable purposes. The remoteness exception for conditional bequests is an administrative concession embracing the de minimus principle of *Ithaca*.³²

The value of assured bequests of future interests to charity may be determined by actuarial tables.³³ Treasury approval of actuarial tables is an important concession to taxpayers who otherwise would be unable to ascertain as of the date of the testator's death the exact amount of their charitable bequest and therefore could not qualify for a deduction.³⁴ In contrast to a deferred bequest subject to a term of years, the deferred bequest subject to a life estate involves a variable—lifespan—that can only be estimated for purposes of establishing present value. Actuarial tables are a convenient but inexact estimate of the amount that will eventually vest in possession of the charity. In the case of deferred assured bequests the Commissioner accepts the risk that the life tenant will outlive his life expectancy, since the degree of error only affects the measurement of the present value of the future interest and not the certainty

³¹ In so holding, the court knowingly created a split among the courts of appeals, and specifically mentioned the contrary precedent of *Estate of Moffett v. Commissioner*, 269 F.2d 738 (4th Cir. 1959). *Moffett* was followed in *Florida Nat'l Bank v. United States*, 10 Am. Fed. Tax R.2d 6179 (S.D. Fla. 1962).

Prior to *Schildkraut*, two Tax Court decisions had permitted charitable deductions under similar circumstances. *Estate of Alexander*, 25 T.C. 600 (1955); *Estate of Duker*, 18 T.C. 887 (1952).

³² See text accompanying notes 16 to 18 *supra*.

³³ Treas. Reg. § 20.2055-2(a) refers to Treas. Reg. § 20.2031-7 for rules for determining the present value of a deferred interest; Treas. Reg. § 20.2031-7, Table I, shows the present worth of an annuity, of a life interest, and of a remainder interest depending upon a single life aged from 0 to 105 years.

³⁴ The estate tax is computed according to facts and circumstances as of the time of the testator's death. *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155 (1929).

that the charity will receive the bequest. However, in the case of deferred conditional bequests, part or all of the corpus, in addition to the income interest outstanding, hangs in the balance. Therefore, while the gamble on the life expectancy remains the same, the amount of the wager is considerably increased. To protect against this additional risk, the Commissioner may, in the absence of a policy statement from Congress or a directive from the courts, decline to rely on statistical or mortality tables in the area of contingent charitable bequests.³⁵

Before continuing the analysis of assured and conditional bequests to charity, it may be useful to set forth a few examples of such bequests. The typical bequest of an assured, severable interest is life estate to *X*, remainder to charity. Conditional bequests are ordinarily of two varieties: (1) remainder to charity if the life tenant dies without issue; (2) remainder to charity if one potential beneficiary fails to survive another. Charitable remainder interests subject to a power of invasion in favor of the life tenant are usually established to provide for the life tenant's: (1) health, wealth, and "happiness;" or (2) emergency or maintenance based on an accustomed standard of living; or (3) assured income of a fixed amount each year.

Both the conditional bequest depending upon death without issue and the power of invasion governed by the whim or desire (for example, happiness) of the life tenant do not qualify for a charitable deduction.³⁶ The incentive element precludes any measurement of the interest, and eliminates the test of an objective, definite standard for appraising the remoteness of the possibility that the charitable transfer will not become effective.

A charitable bequest conditioned upon the survival of one person by another that does not meet the negligibility test of subsection (b) must be denied a charitable deduction for the reason set forth in *Sternberger*: The charity must be assured of receiving a benefit commensurate with the deduction allowed. While the value of a charitable interest may be estimated with mortality and actuarial tables, such a value reflects not only the present value but also the risk that the charitable remainderman would not take. Thus, the value of the charity's interest would not bear a direct relation to the amount which the charity might receive should the bequest be effective but would be reduced for the amount of uncertainty involved. The decision of *Sternberger* to preclude proportional charitable deductions is supported by dictum in the *Merchants National Bank* opinion which points out a difference in testators' motives between assured and conditional bequests of future interests to charity. In the former case, the testator dilutes his charitable bequest only to the extent of first affording specific private legatees the usufruct of his property for a fixed period; in the latter, the testator prefers to ensure the comfort of his private legatees and hedges his philanthropy with a condition or power of invasion for their benefit.

The problem of measurability demonstrates the usefulness of the remoteness, or negligibility, test for remainders subject to powers of invasion governed by

³⁵ *Commissioner v. Estate of Sternberger*, 348 U.S. 187, 198 (1955).

³⁶ *But cf.* *United States v. Provident Trust Co.*, 291 U.S. 272 (1934), which held the conclusive presumption that a woman is capable of bearing children as long as she lives not applicable to estate tax statutes. The condition was held no longer volitional because evidence was introduced that the life tenant was incapable of having issue.

such objective criteria as maintenance or emergency. While a court of equity can enforce the exercise or nonexercise of the power with objective standards and thus make it capable of measurement, no actual measurement is usually possible at the date of the testator's death, since an estimate of "need" involves an appraisal of income from other sources, possible medical expenses, and other variables during the person's life. Consequently, before *Schildkraut*, if courts found the standard of invasion sufficiently definite, they would consistently conclude on the facts that the possibility of any invasion was so remote as to be negligible.³⁷ Hence, the courts never reached the task of measuring the extent of a power of invasion consistent with deductibility. *Schildkraut*, on the other hand, made this measurement and endorsed the rule that, if the extent of a required invasion could be measured, a deduction would be allowed under subsection (a) of Treasury Regulation section 20.2055-2 for the charitable interest which would remain after invasion. The court based its holding on the finding that a power of invasion guaranteeing the life tenant a fixed amount of income is not within the limitations of subsection (b) of Treasury Regulation section 20.2055-2.

The major question under *Schildkraut* is thus whether the invasion results in a charitable interest more comparable to a conditional bequest of subsection (b) or an assured bequest of subsection (a). One distinguishing feature of the *Schildkraut* bequest which separates it from the typical conditional bequest is the fact that the *Schildkraut* Foundation's interest is not an all or nothing possibility, but a function of a nonvolitional probability, such as the length of the life estate, which tends to diminish, but not eliminate, the charitable remainder. In fact, the *Sternberger* prohibition against percentage deductions is inapplicable since *Schildkraut's* calculated value estimates the amount of the bequest based on a given life expectancy and does not attempt to assess the probability of complete divestment. A second distinction setting apart the *Schildkraut* bequest from charitable gifts subject to a power of invasion for maintaining an accustomed standard of living is the increased measurability of an invasionary power to guarantee a fixed amount of income from trust property. The absence of such fluctuating variables as state of health and amount of income from independent sources enabled the *Schildkraut* executors to measure the maximum amount of principal that would be required each year to provide the assured level of income to the life tenant, given the stipulated minimum earning power of the corpus.³⁸ The only variable that had to be estimated—the lifespan of the life tenant—was measured by the actuarial table approved in the Regulations for determining deductions for assured and severable charitable interests subject to a life estate.³⁹

Yet, admitting all of the characteristics of the *Schildkraut* bequest mentioned above, there is a strong argument against the similarity to an assured bequest. A charitable interest subject to any type of power of invasion is a conditional bequest because the corpus is a wasting asset. While the degree of accuracy of the actuarial tables remains constant, the degree of error is different for a severable remainder interest than it is for a remainder interest subject to a power of invasion. The effect of the income beneficiary's outliving his life expectancy

³⁷ See generally, Taggart, *supra* note 10, at 563.

³⁸ The minimum earning power of the corpus is derived from Treas. Reg. 20.2031-7(f) 1958, Table I, 3½% annual growth factor.

³⁹ See note 33 *supra*.

is far more drastic decline in the value of a wasting asset than of a nonwasting asset. Each year that the income beneficiary lives beyond the original actuarial estimate, not only is the present value of the corpus reduced, but also earning power is consumed and will never be transferred to the charity remainderman. Thus, it can be argued that the deduction in *Schildkraut* does not bear a close enough relationship to the amount which the charity will actually receive and, hence, violates the *Sternberger* rule against percentage deductions for conditional bequests to charity. The conclusion is that, in comparing an assured bequest to charity to one subject to a power of invasion in favor of a noncharitable interest, the difference is not only in measurement, but also between nonwasting and wasting assets; the difference is one of kind and not of degree.

A close reading of Treasury Regulations supports the argument that the *Schildkraut* bequest does not properly come within Treasury Regulation section 20.2055-2(a). The most important phrase in that regulation permits a deduction "of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest." A charity's interest in a bequest subject to a power of invasion cannot be presently ascertained unless a portion of the charitable bequest is exempt from the power. "Ascertain" connotes the ability to define the limits of the charitable bequest and then sever it from the bequest to the private interest. A power of invasion, though sufficiently described to leave the remainder interest measurable, defies the limitation or segregation of one bequest from the other since it makes one fund subject to the demands of both interests. The *Schildkraut* court erred in saying that the charity's interest could be ascertained with actuarial tables, for such tables can only ascertain the discounted value of that interest and not the identity interest itself.⁴⁰ The discounted value of the *Schildkraut* Foundation's interest, though calculable by actuarial tables and thus presently ascertainable, should not qualify for a charitable deduction because it fails to account for the consequences of a wasting asset: During each year beyond the estimated life expectancy, the earning power of the corpus is diminished.

In conclusion, both the specific designation in subsection (b) and not in subsection (a) of charitable bequests subject to powers of invasion and the case law interpreting these subsections as mutually exclusive argue against a deduction for the *Schildkraut* bequest. The arguments distinguishing the *Schildkraut*-type power of invasion from powers of invasion governed by less measurable standards and from volitional conditional bequests show how inadequately the Regulations cover deferred bequests to charity. Although the *Schildkraut* bequest is distinguishable from the charitable interests described in subsection (b), it does not follow that the bequest is deductible under subsection (a). Unless *Sternberger's* distinction between assured and conditional bequests and prohibition against proportional bequests are limited to volitional conditional bequests, bequests of charitable interests subject to nonvolitional conditions must be regarded as within subsection (b) and beyond subsection (a). While disallowing a charitable deduction for a *Schildkraut*-type bequest might point out the unfairness in a particular case of drawing distinctions between subsections (a) and (b), it does not argue in favor of obliterating that line altogether.

Martin E. Harband

⁴⁰ Only the dicta in *Merchants National Bank* would agree with the *Schildkraut* court's conclusion that Treasury Regulation § 20.2055(a) only requires an interest that has a presently ascertainable value.

TRUSTS: Consequences of Attorney's Good Faith Representation of Adverse Parties in Trust Administration—*Potter v. Moran* (Cal. 1966).

No servant can serve two masters . . . †

In the course of estate and trust administration, an attorney or a single law firm may be in the position of representing both the trustee and beneficiaries of a particular trust. In any such situation the attorney represents adverse parties since the beneficiaries may wish to enforce the trust provisions against the trustee.¹ Nevertheless, the attorney might feel impelled to represent such adverse parties, especially where they are amicable, where the attorney has personal familiarity with the parties and the property, or where the parties wish to avoid the added expense of obtaining independent counsel.² *Potter v. Moran*,³ however, indicates that such dual representation may deprive accountings and other proceedings between a trustee and beneficiaries of res judicata effect. Therefore, in deciding whether to obtain independent counsel, an attorney and his clients should consider both the practical advantages and the hazards of even the most well-intentioned dual representation.⁴

In *Potter v. Moran* one law firm represented both the trustee and the guardian of an estate in trust for minor beneficiaries.⁵ Although all interested parties—the trustee, the guardian, and the plaintiff residuary beneficiary—knew of and acquiesced in this dual representation,⁶ the attorneys neglected to inform the probate court of the conflict when they appeared to settle the trustee's interim accounts.⁷ The probate court approved the accounts, apparently with

† *Luke* 16:13.

¹ Thus an accounting proceeding is always an adversary proceeding. See, e.g., *In re Enger's Will*, 225 Minn. 229, 30 N.W.2d 694 (1948).

² See note 46 *infra* and accompanying text.

³ 239 Cal. App. 2d 873, 49 Cal. Rptr. 229 (1966), *petition for hearing by the Supreme Court of California denied*, *id.* at 880.

⁴ To ascertain the practice of attorneys faced with this situation, inquiry was made of several San Francisco trust and probate attorneys. It revealed a wide divergence of practice. Some of the attorneys consistently found themselves representing both the beneficiary and trustee and saw nothing unusual or hazardous in the situation; others fully realized the potential problems and would under no circumstances undertake such dual representation. Between these positions were the practices of those attorneys who would represent both parties only in the absence of an apparent conflict or with the full consent of the parties. These attorneys usually stressed the impracticality, especially in terms of expense, of independent representation and the desirability of avoiding such expense. However, few of these attorneys appeared to realize that, as the *Potter* result emphasizes, conflicts over past accountings might not manifest themselves until long after the dual representation has occurred and there has been a supposedly amicable adjudication of the accounts.

⁵ All parties except the settlors had identical interests in and capacities under each of these trusts. The settlor of one trust, Potter Jr., was the father of the minor beneficiaries, and the settlor of the other was their grandmother and the deceased wife of the plaintiff residuary beneficiary. The residuary beneficiary had been the original trustee, but at the time of the transactions in question Moran, a close friend of the family, was serving as successor trustee. The guardian of the estate of the minor beneficiaries was a trust company. The attorneys involved were longtime family attorneys of the Potters and also represented Moran and the trust company. 239 Cal. App. 2d at 874-75, 49 Cal. Rptr. at 231.

⁶ As to the effect of this purported acquiescence or consent see text accompanying notes 50-56 *infra*.

⁷ 239 Cal. App. 2d at 874-77, 49 Cal. Rptr. at 230-32.

res judicata effect on all interested parties.⁸ Several years later, however, the residuary beneficiary brought suit to reopen the accounts and examine them de novo for evidence of mismanagement and breach of fiduciary duty by the trustee.⁹ The trial court refused to reopen the accounts, holding that the probate court's decree settling them was res judicata. The court of appeal reversed and ordered the accounts reopened, finding extrinsic fraud in the attorneys' failure to inform the court of their dual role.¹⁰

Although the court spoke of lack of disclosure and extrinsic fraud, it based its decision on the presence of dual representation. It assumed that, had the probate court known of the dual representation, it would have required the appointment of independent counsel for the guardian; it stated that "no valid order could be made" while the same attorneys represented conflicting interests.¹¹ Therefore, the court implied that dual representation itself, rather than non-disclosure, precluded a binding judgment.¹² Disclosure will, as a practical matter, make a binding judgment possible if the *Potter* court is correct in assuming that a probate court informed of dual representation will necessarily require independent counsel. However, should the probate court fail to eliminate the dual representation after being informed of its existence, mere disclosure to the court would not make the decree binding.¹³

The *Potter* court relied on *Estate of Charters*¹⁴ for the proposition that dual representation per se will deprive a judgment of its res judicata effect. In *Charters*, Justice Traynor, speaking for the California supreme court, held

⁸ CAL. PROB. CODE § 1123 (West 1956). See note 23 *infra* and accompanying text.

⁹ The actual charges concerned both the mismanagement of the trust property, which included various securities, and the collection of unreasonable fees by both the trustee and the attorneys. 239 Cal. App. 2d at 879, 49 Cal. Rptr. at 234.

¹⁰ 239 Cal. App. 2d at 874-77, 49 Cal. Rptr. at 231-32.

¹¹ *Id.* at 879, 49 Cal. Rptr. at 233. It should be noted that the appellate court made no finding as to the merits of the allegations of bad faith or breach of fiduciary duty. The court held only that the previous accounting orders were not binding and sent the case back to the trial court to examine the substantive issues de novo.

¹² "Little did the [probate] court know" that the attorneys were in a position where they not only did not but "could not give [the guardian] impartial and fair advice." *Id.* at 876, 49 Cal. Rptr. at 232 (emphasis added).

¹³ The decree might still be binding if the parties are estopped by their consent to the dual representation. See text accompanying notes 47-61 *infra*.

In actual practice, in light of the informal and pro forma nature of the typical accounting hearing, it is quite possible that disclosure to the probate court will either go unnoticed or receive only cursory examination. This passive acceptance of dual representation was found to be the typical situation by many of the attorneys surveyed. An attorney desiring a binding order at the probate level on the issue of consent or the need for independent counsel—that is, a full hearing on the merits of the dual representation—might have to take the initiative on this question and see that it is fully adjudicated and not left for a decision de novo on appeal should an appeal later occur.

Perhaps one reason dual representation goes unnoticed is that beneficiaries are often not present or represented at accounting hearings, and the presence of only one attorney, for the trustee, is not unusual. As the *Potter* court indicates, it is presumed in such a situation that the beneficiary, unrepresented or represented by independent counsel, acquiesces in the accounting. See 239 Cal. App. 2d at 876, 49 Cal. Rptr. at 232. It is only where acquiescence is tainted by dual representation that the accounting will remain open to challenge.

¹⁴ 46 Cal. 2d 227, 293 P.2d 778 (1956).

that a trust accounting in which the same person was both trustee and guardian of a minor beneficiary's estate was not binding on the minor. The holding is couched in terms of "extrinsic fraud," as is the *Potter* decision. Literal reading of these cases suggests that some form of "fraudulent" conduct—some concealment or deceit, such as nondisclosure to the court—is necessary in order to reopen an accounting.¹⁵ However, *Charters* does not mention nondisclosure, and its language indicates rather that whether or not the probate court was deceived concerning dual representation, its order could not be binding if dual representation existed. The court defined extrinsic fraud very broadly, as existing whenever "a party has been prevented from fully presenting his case and there has therefore been no adversary trial of the issue."¹⁶ Thus, to find "extrinsic fraud" is, in this case, to provide equitable relief to a party who has not received a full hearing.¹⁷ In applying this equitable test, the *Charters* court found that the trustee, in "accounting to itself as guardian,"¹⁸ could not adequately represent the interests of the minor beneficiary; consequently, because the beneficiary had been deprived of a full adversary hearing, the order obtained under the dual representation was denied res judicata effect. The *Potter* court extended this rationale from the situation in which the trustee and guardian are the same person to one in which they are represented by the same counsel.¹⁹ In acting as a fiduciary toward his clients, an attorney is bound to uphold each client's interests with "undivided fidelity."²⁰ Therefore, if an accounting is not res judicata when the same person acts as both trustee and guardian, it cannot be res judicata when the same person represents both the guardian and the trustee. In neither case is the minor beneficiary adequately represented because the person submitting the accounts is also responsible for challenging them.²¹

¹⁵ The classic definition of extrinsic fraud pertains to willful concealment or misrepresentation whereby one party prevents his opponent from obtaining a full adversary hearing, such as when he conspires to keep his opponent ignorant of the proceedings. *E.g.*, *United States v. Throckmorton*, 98 U.S. 61 (1878); *Flood v. Templeton*, 152 Cal. 148, 155-57, 92 P. 78, 81 (1907); *Estate of Standing*, 99 Cal. App. 2d 668, 222 P.2d 465 (1950).

¹⁶ 46 Cal. 2d at 234, 293 P.2d at 783.

¹⁷ This is by no means a radical departure from precedent. Relief from a judgment has been granted in cases of accident, *Hallett v. Slaughter*, 22 Cal. 2d 552, 140 P.2d 3 (1943), mistake, *Bacon v. Bacon*, 150 Cal. 477, 89 P. 317 (1907), or simply wherever there is "some good reason sounding in public policy sufficient to justify the interference of equity." *Bancroft v. Bancroft*, 178 Cal. 359, 364, 173 P. 579, 581 (1918). *But cf.* *Greenfield v. Mather*, 32 Cal. 2d 23, 36, 194 P.2d 1, 9 (1948) (Traynor, J., dissenting).

¹⁸ 46 Cal. 2d at 236, 293 P.2d at 783.

¹⁹ 239 Cal. App. 2d at 879, 49 Cal. Rptr. at 233-34.

²⁰ ABA CANONS OF PROFESSIONAL ETHICS No. 6. One New York case held that the attorney for a trustee occupied the same fiduciary relationship toward the trust as did the trustee himself and "owed an equally high degree of fidelity" to the beneficiaries. *In re Bond & Mortgage Guar. Co.*, 303 N.Y. 423, 430, 103 N.E.2d 721, 725 (1952).

²¹ See text accompanying note 1 *supra*. Even if the attorney were to attack the trustee's accounts, this itself would raise questions of unethical conduct. See text accompanying note 44 *infra*.

As early as 1876 it was held that where an attorney "even colorably" appears on both sides of an adversary proceeding, an injured party may have the judgment vacated, despite a showing of good faith by the attorney. *Moore v. Gidney*, 75 N.C. 31, 36 (1876). North Carolina seems to have the most developed doctrine on this point. *Compare* *Hall v. Shippers Express, Inc.*, 234 N.C. 38, 65 S.E.2d 333 (1951), and *Marcom v. Wyatt*, 117 N.C. 129, 23

The binding effect and finality of an accounting is crucial for a trustee who may be personally responsible for trust losses attributable to his unauthorized or unreasonable transactions.²² Since few transactions are wholly beyond challenge—particularly investments which are in the least speculative and fees which are at all above average—trustees rely heavily on the fact that once an accounting is approved, liability is ordinarily precluded for all transactions which occurred during the accounting period.²³ Under the *Potter* rule, however, if the trustee's attorney has been guilty of conflicting representation, the accounting may be reopened and the trustee's account surcharged for poor investments or unreasonable expenditures. Furthermore, such reopening can occur years after the transactions were supposedly approved and closed to challenge. Since the trustee is held liable only for his own acts, and since the dual representation allows only a reopening of the accounts, the trustee is still only liable for prior mismanagement. But there is a difference between judging a transaction when it occurs and evaluating it years later.²⁴

To find the trustee liable, the *Potter* doctrine does not appear to require a showing of bad faith or even negligence; nor does it depend on the trustee's knowledge of the attorney's dual role. Therefore a later suit to reopen an accounting may be between a relatively innocent trustee and a completely innocent beneficiary in a case where their attorney was the one at fault.

The attorney in this situation will not necessarily escape liability. In fact, the consequences for him may be the severest of all. Liability may be found in both legal and ethical terms. Representation of adverse interests, at least without complete disclosure to and consent by all parties, is uniformly prohibited by canons of professional ethics.²⁵ Nor are honesty and good faith mitigating factors:

S.E. 169 (1895), *with* Annot., 154 A.L.R. 501 (1945). *Cf. In re Bond & Mortgage Guar. Co.*, 303 N.Y. 423, 103 N.E.2d 721 (1952); *Fisher v. Banta*, 66 N.Y. 468, 1 Hun 610 (1876), *quoted in* *Estate of Charters*, 46 Cal. 2d 227, 235, 293 P.2d 778, 783 (1956).

Heretofore, California appears never to have articulated this doctrine clearly; but with the advent of the *Potter* rationale, California has apparently adopted it in the form of "extrinsic fraud."

²² See, e.g., *Willson v. Security-First Nat'l Bank*, 21 Cal. 2d 705, 713, 134 P.2d 800, 805 (1943); *Creed v. McAleer*, 275 Mass. 353, 175 N.E. 761 (1931); 2 A. SCOTT, *THE LAW OF TRUSTS* § 201 (2d ed. 1956).

²³ CAL. PROB. CODE § 1123 (West 1956); *McLaughlin v. Security-First Nat'l Bank*, 20 Cal. App. 2d 602, 67 P.2d 726 (1937); *In re Enger's Will*, 225 Minn. 229, 30 N.W.2d 694 (1948). Of course, the accounting order concludes only matters actually placed in issue. See *Wile, Judicial Assistance in the Administration of California Trusts*, 14 STAN. L. REV. 231, 238 & n.33 (1962), and cases cited therein.

²⁴ Such issues as reasonableness would be viewed as of the time and circumstances of the transaction in question. See, e.g., *In re Estate of Hamon*, 60 Cal. App. 154, 157, 212 P. 399, 401 (1922); *Creed v. McAleer*, 275 Mass. 353, 357-58, 175 N.E. 761, 762-63 (1931); *Bellman v. San Francisco High School Dist.*, 11 Cal. 2d 576, 582, 81 P.2d 894, 897 (1938) (tort). See also CAL. CIV. CODE § 2261(1) (West 1954). Nonetheless, some hindsight may be inevitable where, for example, a particular investment has since proven to be totally worthless.

²⁵ ABA CANONS OF PROFESSIONAL ETHICS No. 6; RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Nos. 5-7, following CAL. BUS. & PROF. CODE § 6076 (West 1962). See *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788, 789-90 (1930); *Ishmael v. Millington*, 241 Cap. App. 2d 520, 526-28, 50 Cal. Rptr. 592, 595-97 (1966).

ABA CANON 6 defines conflicting interests as existing whenever, "in behalf of one

The rule [against representation of conflicting interests] is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.²⁶

There appear to be three possible consequences for the attorney who disregards this admonition: malpractice (negligence) liability, loss of fees, and professional discipline.

A California court has suggested that an attorney involved in a conflict of interest situation could be held liable for malpractice. In *Ishmael v. Millington*,²⁷ a husband hired his longtime attorney to represent his wife in an uncontested divorce action. The wife obtained a property settlement, meeting only perfunctorily with the attorney and relying on an estimate of community property given her by her husband.²⁸ When the estimate turned out to be far too low, the wife sued the attorney for malpractice for negligent failure to ascertain the accuracy of the estimate or otherwise prevent her husband's deception. There was no allegation or finding of bad faith on the attorney's part. The district court of appeals ruled that there was a triable issue of fact as to whether the attorney's actions—or inaction—constituted sufficient negligence to make him liable for the wife's loss.²⁹ The court stated that in most instances an attorney is prohibited from representing conflicting or potentially conflicting interests; but even in the "exceptional" cases where such representation is allowed, a higher standard of care is imposed on the attorney than would otherwise be the case.³⁰ There is an affirmative duty on the part of the attorney to make full disclosure to all parties not only of the adverse interest, but also of "the detriment to which the dual representation exposes the client and the possible need of representation by independent counsel."³¹ The court seemed to feel that such disclosure would either have alerted the wife to the possibility of concealment by her husband, or it would have resulted in the retention of independent counsel. In either case, nondisclosure was an element of the alleged negligence, causally related to the loss.³²

client, it is [the lawyer's] duty to contend for that which duty to another client requires him to oppose." See also *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 572, 15 P.2d 505, 509 (1932): "No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one."

As to the consent issue, see text accompanying notes 47-61 *infra*.

²⁶ *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788, 790 (1930).

²⁷ 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

²⁸ It was made clear that the wife relied solely on her husband's estimate and not on any misrepresentations by the attorney. *Id.* at 524, 50 Cal. Rptr. at 594. The court considered reliance immaterial, however, so long as some causal link existed between the attorney's actions and the loss. *Id.* at 529-30, 50 Cal. Rptr. at 598.

²⁹ *Id.* at 528-29, 50 Cal. Rptr. at 597.

³⁰ "The general standard of professional care," that of the "figurative lawyer of ordinary skill and capacity in the performance of like tasks," is "appropriate to the garden variety situation, where the attorney represents only one of several parties or interests. It falls short of adequate description where the attorney's professional relationship extends to two clients with divergent or conflicting interests in the same subject matter." *Id.* at 526, 528, 50 Cal. Rptr. 595, 597.

³¹ *Id.* at 526-27 n.3, 50 Cal. Rptr. at 596 n.3.

³² *Id.* at 528-30, 50 Cal. Rptr. at 597-98.

Several possibilities for malpractice liability thus arise in a situation like *Potter*. A malpractice action might be grounded on the attorney's failure to warn his clients of the possible detrimental consequences of his dual role, on his failure to suggest the retention of independent counsel, on his failure to disclose the situation to the court, or on his failure to meet the higher standard of performance imposed by *Ishmael*. In such a suit, the beneficiary might sue the attorney directly for losses caused by the trustee's faulty administration;³³ on the other hand, the trustee might sue the attorney for losses resulting from a reopening of prior accounts.³⁴ In either instance, of course, the attorney's liability for malpractice would require a finding of negligence.

Even if the attorney escapes negligence liability, he may be prevented from collecting fees from one or both parties. A leading California case in this area is *Anderson v. Eaton*,³⁵ in which the attorney for the plaintiff in a negligence action was also the counsel for the defendant's insurance carrier. The court disallowed the attorney's claim for his fee from the plaintiff. Although the facts of the case reveal possible misrepresentations by the attorney in favor of the defendant, the court was careful to disregard any imputation of wrongdoing.³⁶ Other courts have similarly disallowed attorneys' fees even where the attorney won the case for the client owing the fee,³⁷ and where the trial court, had it been informed of the conflict, would most likely not have required appointment of independent counsel.³⁸ In the latter case, although the nondisclosure might have had no bearing on the result, Judge Learned Hand stated that the attorney "failed in his duty when he did not present this matter to the court and learn its pleasure."³⁹ He added that "the usual consequence" of representing opposing interests is that the attorney is "debarred from receiving any fee from either [party] no matter how successful his labors."⁴⁰

Another consequence of dual representation is professional discipline. In *Thatcher v. United States*⁴¹ the court considered it grounds for disbarment for an attorney for one client to challenge work he had previously done for another. Consequently, even if an attorney for both beneficiary and trustee felt obligated

³³ This would be a possible cause of action regardless of whether or not the beneficiary's attorney also represented the trustee. But the higher standard of care and the fact that the attorney, in his capacity as counsel for the trustee, himself presented the accounts both to the court and to the beneficiary, would make the case for the beneficiary much easier. In *Ishmael* the attorney's actions and the fact of dual representation were found to be causally related to the plaintiff's loss even though the plaintiff had not actually relied on any representations of the attorney. 241 Cal. App. 2d at 528-30, 50 Cal. Rptr. at 597-98. In accepting an accounting as reasonable and accurate, however, a beneficiary would be relying on the attorney's presentation of the accounts as much as on the trustee's. Thus an attorney in a *Potter* situation is in a particularly vulnerable position as to responsibility for the merits of the accounts.

³⁴ He might be able to sue for any loss beyond that which he would have suffered had the transaction been declared unreasonable at the time of the original accounting.

³⁵ 211 Cal. 113, 293 P. 788 (1930).

³⁶ See text preceding note 26 *supra*.

³⁷ *Loew v. Gillespie*, 90 Misc. 616, 153 N.Y.S. 830 (Sup. Ct. 1915).

³⁸ *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917 (2d Cir.) (L. Hand, J.), *cert. denied*, 340 U.S. 813 (1950) (fee reduced).

³⁹ *Id.* at 920-21.

⁴⁰ *Id.*

⁴¹ 212 F. 801, 810-12 (6th Cir. 1914), *appeal dismissed*, 241 U.S. 644 (1916).

in good faith to challenge the trustee's accounts, he would be acting unethically, since he would, in effect, be challenging his own work. Although disbarment is doubtful except in the most serious cases, lesser disciplinary measures—suspension⁴² and reprimand,⁴³ for example—have also been invoked for representation of adverse interests. Thus attorneys are warned by the bar to avoid even “the suspicion of collusion which might result” from representation of conflicting interests.⁴⁴

An attorney might avoid these possible consequences in several ways. The only certain way to secure a binding judgment is to retain independent counsel. As the California supreme court has stated: “The path of unquestionable safety . . . would be found in abstention from participation, active or merely as advisers, in any business which may, even by unkind critics, be considered adverse to their clients' interests.”⁴⁵

However, the safest way may not always be the most practicable. In a wholly intrafamily situation, for instance, it might be very difficult to tell one member of the family to seek independent counsel while continuing to represent other members. If all parties are presently amicable, it may not be easy to foresee future conflicts. Moreover, the family attorney's familiarity with both the trust property and the parties involved may be a valuable asset in preparing and reviewing the trustee's accounts. And perhaps most important, retaining two law firms instead of one would probably involve extra expenses which would be difficult to justify to a client in light of the relative improbability of an open conflict.⁴⁶ Therefore, alternative courses of action should be considered.

If a binding decree is desired, the only real alternative to abstention is consent by all parties and full disclosure to the court. Both the California State Bar Rules of Professional Conduct⁴⁷ and the American Bar Association Canons of Professional Ethics⁴⁸ allow representation of adverse interests if consent by

⁴² See *Galbraith v. State Bar*, 218 Cal. 329, 23 P.2d 291 (1933).

⁴³ See *In re Jeter*, 163 Okla. 27, 20 P.2d 886 (1933).

⁴⁴ Los Angeles County Bar Ass'n Comm. on Legal Ethics, *Opinion No. 207*, 29 LOS ANGELES B. BULL. 137 (1954).

⁴⁵ *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 571, 15 P.2d 505, 508 (1932) (emphasis added); cf. *Magee v. State Bar*, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).

Of course, the fact that an attorney declines to represent a beneficiary—that is, “abstains”—will not necessarily result in retention of independent counsel. The beneficiary may decide to forego counsel altogether, thus making possible a binding decree whether or not the beneficiary is represented at the hearing. See note 13 *supra*. From the trustee's point of view, of course, this would be a most desirable alternative. However, for the beneficiary who desires some representation, abstention by the trustee's attorney does necessitate retention of independent counsel.

⁴⁶ There is no doubt that the “law of averages” is on the side of the attorney, since a challenge of an accounting, especially under the family circumstances dealt with here, is the exceptional case. Furthermore, where a trust is quite small it may actually be more economical to risk liability (or to pay the cost of insurance), or not to go to court at all than to obtain other counsel. For these reasons many attorneys and trustees will probably assume the risk of a nonbinding judgment even where other considerations might point to retention of independent counsel. Such a decision should, of course, be made with the full knowledge and consent of all those concerned.

⁴⁷ Nos. 5-7, following CAL. BUS. & PROF. CODE § 6076 (West 1962).

⁴⁸ No. 6.

all parties is obtained. To assure intelligent consent, the ABA also requires full disclosure to the parties of all relevant facts; the California cases have adopted this requirement.⁴⁹ Valid consent, however, is an extremely elusive concept. For example, in *Potter* the guardian, the plaintiff residuary beneficiary, and the trustee all supposedly consented to the dual representation by the attorneys. But the court pointed out that, although the plaintiff was also an attorney, he was very old (over ninety) and quite sick; furthermore, he had "no reason to believe" the attorneys would fail to disclose the facts to the court or would otherwise fail to represent his interests fully.⁵⁰ As for the guardian's supposed consent, the court simply assumed that the guardian, being "under the influence" of his attorneys, could not be considered to have given adequate consent.⁵¹ This approach implies that consent elicited by the attorney himself may not be valid. Since it is necessarily the attorney who discloses the conflict situation to the parties, and since the client would probably rely on his attorney's suggestion on such legal matters, consent completely divorced from the attorney's "influence" seems unlikely.⁵²

Even if the guardian's consent were shown to be completely informed and independent, there might be other obstacles to obtaining valid consent. It has been held that a guardian has no power to act adversely to the interests of his ward.⁵³ He may not "waive legal rights in behalf of his ward, or surrender or impair rights vested in the ward, or impose any legal burden thereon. Nor . . . can the ward be estopped . . . by reason of the guardian's act."⁵⁴ Before a guardian could consent to dual representation so as to estop the minor, he would have to show that the decision was calculated to serve the best interests of the minor.⁵⁵ Dual representation has the obvious benefit of conserving trust corpus by avoiding extra legal fees. However, the difficulty of predicting the consequences of dual representation and the apparent reluctance of the courts to recognize consent where harm has already resulted would make such a showing difficult.⁵⁶

⁴⁹ *Id.* See *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788, 789-90 (1930); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 526-27 & n.3, 50 Cal. Rptr. 592, 595-96 & n.3 (1966); cf. Los Angeles County Bar Ass'n Comm. on Legal Ethics, *Opinion No. 207*, 29 LOS ANGELES B. BULL. 137 (1954). The requirements for disclosure to the parties are extremely strict and comprehensive. See *Ishmael v. Millington supra*.

⁵⁰ 239 Cal. App. 2d at 879, 49 Cal. Rptr. at 234.

⁵¹ *Id.* at 878, 49 Cal. Rptr. at 233. The court's assumption was apparently based on challenges made by the guardian to subsequent accounts, after independent counsel had been appointed. *Id.*

⁵² Cf. *In re Boone*, 83 F. 944, 955-56 (C.C.N.D. Cal. 1897).

⁵³ For example, the guardian cannot "make admissions affecting substantial rights of the minor so as to bind the minor." *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940); accord, *White v. Joyce*, 158 U.S. 128, 146 (1894). And a ward will not be barred in a claim by the laches of his guardian. *Roach v. Matanuska Valley Farmers Cooperative Ass'n*, 87 F. Supp. 641, 648 (D. Alas. 1949), *aff'd*, 188 F.2d 162 (9th Cir. 1951).

⁵⁴ *Stockman v. City of South Portland*, 147 Me. 376, 382, 87 A.2d 679, 683 (1952), quoting 25 AM. JUR. *Guardian & Ward* § 101 (1940).

⁵⁵ See *Webster v. Horton*, 188 Ark. 610, 613, 67 S.W.2d 200, 201 (1934); *Leonardini v. Wells Fargo Bank*, 131 Cal. App. 2d 9, 280 P.2d 81 (1955); *Annot.*, 49 A.L.R.2d 1095 (1956).

⁵⁶ A beneficiary who is not sui juris could consent only through a guardian. See CAL. CODE CIV. PRO. § 372 (West 1954); 2 A. SCOTT, THE LAW OF TRUSTS § 216.3 (2d ed. 1956).

Assuming, however, the attorney decides that obtaining consent is preferable to retaining independent counsel, there are several possible methods by which consent might be obtained. While oral agreement may be sufficient if it can be established, written consent is obviously preferable. As to the coverage and timing of the agreement, consent might be secured at the outset of the representation, or prior to each particular transaction (or accounting), or subsequent thereto. It might encompass either particular transactions or the entire attorney-client relationship. The attorney who obtains consent only at the outset may later find that changed circumstances have rendered it inadequate.⁵⁷ Furthermore, it has been held that a written general release from "all the duties, burdens, obligations, and privileges" of an attorney's dealings with a former client is too broad and therefore void as contrary to public policy.⁵⁸ If an attorney wants to represent an interest adverse to his work for a present or former client, waiver must be "distinct and unconditional."⁵⁹ Thus, on the assumption that some form of consent would be effective in a *Potter* situation, the safest consent would seem to be a written waiver, obtained prior to and clearly covering the specific transaction involved. It would necessarily have to be preceded by full disclosure to the client, including a warning as to all foreseeable conflicts and at least a suggestion of retaining independent counsel.

It is always advisable to disclose dual representation and consent to the court at the outset of any proceeding. This disclosure would provide an opportunity for an immediate ruling on the validity of the consent, when independent counsel could still be secured. Furthermore, the attorney who, for whatever reason, conceals the fact of dual representation from the court may be subject to loss of fees,⁶⁰ if not loss of the judgment.

Clearly, reliance on consent and disclosure presents serious difficulties which are not easily eliminated. If the language of the courts is to be taken literally, valid consent seems virtually impossible. But despite such language, it may be that a good faith effort to obtain valid consent, including all the elements outlined above,⁶¹ would be sufficient to bind adult parties and possibly a guardian of minor parties. The lawyer who faces a conflict of interest may either "abstain" or "disclose." It is best to abstain from dual representation; but if abstention is impracticable, the safest course is to make full disclosure to all parties and to the court. Dual representation may deprive a decree of binding effect, even absent a showing of actual fraud, bad faith, or willful misdealing. For although an attorney may have the best of intentions, it is impossible to afford full and undivided representation to even the most amicable of adverse parties. The adversary system presupposes more than good faith by the trustee and his attorney: it assumes careful scrutiny of all transactions by an advocate able to give undivided loyalty to the beneficiary. In trusts, as in any other

Therefore, where a guardian must be appointed for this purpose, additional expense is incurred, nullifying some of the practical advantages of consent over independent counsel.

⁵⁷ See Los Angeles County Bar Ass'n Comm. on Legal Ethics, *Opinion No. 266*, 38 LOS ANGELES B. BULL. 141, 143 (1963).

⁵⁸ *In re Boone*, 83 F. 944, 957 (C.C.N.D. Cal. 1897).

⁵⁹ *Id.* at 958.

⁶⁰ See text accompanying notes 35-40 *supra*.

⁶¹ See text following note 58 *supra*.

branch of the law, while it is the judge's duty to be impartial, it is the attorney's duty to be biased. An attorney, of all "servants," is the least able to serve two masters.

Mark Reutlinger