Denver Law Review

Volume 44 | Issue 3 Article 9

April 2021

Vol. 44, no. 3: Full Issue

Denver Law Journal

DENVER LAW JOURNAL

VOLUME 44

1967

DENVER LAW JOURNAL

VOLUME 44 SUMMER 1967 NUMBER 3

ARTICLES

DENVER LAW JOURNAL SURVEY

NOTE

The DENVER LAW JOURNAL is published quarterly and copyrighted by the Denver Law Journal, University of Denver, College of Law, 200 West 14th Avenue, Denver, Colorado 80204.

Subscription Rates: $6.50 per year commencing with Volume 45 (1968). Subscriptions are payable in advance and are considered recurring unless notification is given that a subscription is to be discontinued.

The DENVER LAW JOURNAL is the successor publication to DICTA and the DENVER LAW CENTER JOURNAL. Back issues of all three publications are available through the Business Editor, Denver Law Journal, 200 West 14th Avenue, Denver, Colorado. Individual issues, through Volume 44 (1967): $1.50 (regular); $2.00 (Symposium).

Reprints of individual articles and hard bound copies of entire volumes are available only by special arrangement. For information regarding advertising space or subscriptions, contact the Business Editor (address above). Telephone: 1-303-753-2651.

EDITOR'S NOTE:

THE BOOK REVIEW—WHAT VALUE?

This is the fourth in a series of remarks on the value and purpose of various segments of a law review.

It has been said that book reviews are the most valuable pieces appearing in the law reviews. They are apparently read for various reasons, ranging from a simple desire to keep up with the latest books being published to pure enjoyment. Regardless of which of these services they provide, there seems little doubt that book reviews are of definite merit and are usually well-received. Although the style of individual book reviewers varies significantly, their work tends to fall into one of two general categories: (1) "reporting" and (2) "editorializing."

In the "reporting" review the reviewer concentrates his attention on the size of the book, its content, the ease with which it can be read, the sufficiency of the index, the value of the book as a reference work, etc. Altogether too often, the reporting approach is the result of little more than a brief look at the table of contents. It may have a legitimate place in a law review if kept exceptionally short — perhaps only a few paragraphs. Its value is certainly limited to keeping readers informed of significant books being published and warning them about the latest "junk" on the market. This type of review can be written quite adequately by students, and in most cases it is preferable that they do so.

The "editorialized" book review, on the other hand, is one which places limited emphasis on the book itself and its specific content. Instead, the reviewer reveals his thoughts about the subject matter of the book and his reactions to the manner of treatment. Occasionally, the reviewer departs from the book entirely and delves into one of his own pet theories that he has been able to relate to the book. Obviously, this type of book review allows the writer significantly more stylistic freedom than do other kinds of legal writing, and herein lies its uniqueness. Unhampered by the requirement that major propositions be carefully footnoted, he is free to be more imaginative and creative. Furthermore, while opinions are seldom appropriate in the normal law review article without well-reasoned arguments and careful documentation, it is precisely the writer's opinion which is the heart of the editorialized book review. It seems safe to conclude that this approach offers refreshing reading, and the more succinctly it reviews the specific content of the book and moves on to the reviewer's commentary, the more refreshing it seems to be.

Thus, if the purpose is to publish something which is a piece of legal journalism in its own right, only the editorial approach will suffice. In addition to its other features, it offers an especially good opportunity for introducing readers to areas which are peripheral to the law. Having a professor or an attorney review a non-legal book, for instance, can point out its significance to the legal profession. Furthermore, successive reviews can establish a forum for debate among prominent reviewers, allowing them to engage in a fascinating exchange of opinions on the particular book or the subject matter treated therein. The total result is usually interesting and refreshing reading — a commodity too seldom found in most law reviews.

Lowell J. Noteboom
Editor-in-Chief
1966-1967

DENVER LAW JOURNAL

VOLUME 44 SUMMER 1967 NUMBER 3

TRANSNATIONAL TRANSACTIONS, TECHNOLOGY AND THE LAW: AN ANALYSIS OF CURRENT TRENDS

BY LAWRENCE C. MCQUADE*

Mr. McQuade's article is an elaboration of a speech he delivered at the Western Regional Conference on Transnational Transactions, held at the University of Denver Law Center in April 1967. In it he discusses the impact of technological change on society. He examines four aspects of technology which bear directly on transnational business, and suggests that the need for a legal and institutional framework which will promote more effective transnational use of technology poses a challenge to the lawyer to make full and beneficial use of his creative talents.

"The discovery of phlogiston is but a first step toward an endless march of scientific progress and social turmoil."

— Axophinius, circa fifth century B.C.

INTRODUCTION

THE dynamics of the law reflect — sometimes too slowly — the dynamics of society. Nowhere does this idea manifest itself more clearly than in the era of science and technology. The iconoclasm of science at its best puts society on its mettle. American businessmen, at least, accept the challenge with skill and pleasure. They pour forth ingenuity, organization, and energy to move science's by-products into the stream of our economy. In this process of creativity, the law has a responsibility to facilitate these economic and social processes by providing a degree of order within which creativity can prevail over confusion.

Out of technology — that vigorous offspring of science — flows an impulse to change and innovation in commerce and industry. For the businessman of breadth and imagination, it opens new horizons. For the self-satisfied and the stand-patters, it poses a peril to markets and customers which can no longer be taken for granted. For the lawyer, it calls for adaptation and change at a rate fast enough to

*Assistant Secretary for Domestic and International Business, U.S. Department of Commerce.

foster the new, yet moderate enough to preserve a responsible measure of stability and respect for the virtues of values which have endured the tests of experience.

The dynamic tradition of America welcomes the challenge of technology. Four of its aspects bear directly upon transnational business and, hence, upon the lawyer with clients dealing across national lines: (1) the impact on trade; (2) the psychological-political-practical imbroglio it creates between the United States and Europe; (3) the promise it can hold for the economic problems of the less developed world; and (4) the legal and institutional framework needed to foster more effective use of technology transnationally.

I. INTERNATIONAL TRADE

First, science and technology keep changing the pattern and relative progress in international trade. The impact of technology on the pattern and progress of international trade has never been stronger than in this new era of astronautics, electronics, and nucleonics.

Obviously this is true in the case of faster and better communications and transport. Containerization, refrigeration, pipelines and other new transport techniques keep altering practicalities, costs, and trade patterns — opening up new opportunities on a worldwide basis for the businessman in inland areas like Denver — and threatening those who fail to keep up with the times.

Science and technology, of course, continually alter the kind and quality of goods and services which enter into international markets. Close to half of the dollar volume of our expanding United States exports, for example, now consists of such "high technology" products as machinery, transport equipment, and chemicals[1] — all made by highly skilled, highly paid American workers. The dynamics of this process have profound effects upon our trade balance and our trade pattern.

For those in and out of Government concerned with the health of the nation's balance of payments, this dynamic has important implications.[2] As a practical matter, the world-wide involvements of the United States mean that we need, over a period of time, a trade surplus on the order of $5 billion or more in order to pay for recurrent

[1] In 1966, United States export performance was particularly strong in products incorporating advanced engineering features, such as computers, heating and cooling equipment and pumps. Shipments of these items rose from 20% to 30% over the previous year. The increases might have been even larger had not military requirements and civilian demand in the United States market reduced export capabilities. *Exports Set Rapid Pace But Trade Surplus Shrinks,* INT'L COM., Feb. 20, 1967, at 50.

[2] The balance of payments dimension is outlined in McQuade, *Corporate Voluntary Balance of Payments Program and the Lawyer,* in PRIVATE INVESTORS ABROAD — STRUCTURES AND SAFEGUARDS 205 (V. Cameron ed. 1966).

outlays for the national security, overseas travel by our citizens, and the like. But, our balance of trade has met this objective in only two of the last five years. In addition, the United States share of the total value of free world trade has been declining, from 22.5 percent in 1954 to 19 percent in 1966.[3]

Technological innovations and applications support our broad effort to expand our exports and reduce the deficit in our balance of international payments. In 1965, the United States earned an estimated $650 million from other countries in royalty payments for technical know-how, patents, and other intangible property licensed abroad — about 4½ times the $144 million we paid others.[4]

Furthermore, technology, by raising productivity and lowering costs per unit of production, helps American industry compete more effectively in world markets. Production efficiency contributes to our high exports of such products as aircraft, computers and pharmaceuticals.

Technology is one of the elements of competitive strength in world markets. But the developer of the technology may or may not win the prizes. Research and development comprise only a *part* of the innovative process. The payoff in trade accrues to those who carry through to the market.

Japan illustrates the point. Japanese industry spends relatively little on basic research.[5] It adapts and builds upon the results of foreign research and development, both through the purchase of technical know-how and through production by foreign-owned subsidiaries. For example, the United States, the original source of transistor technology, sold $10 million worth of radios in world markets in 1966 but bought $94 million in transistor radios from Japan alone.[6]

Some people say that when a nation runs a deficit in its technical balance of payments — meaning royalties, licensing fees, and other payments for technical know-how — it suffers both economic and trade disadvantages as against nations with technical payments surpluses. This type of simple analysis is faulty because it overlooks the compensating benefits of resulting import savings and export gains. These are often difficult to quantify but if measured and put into the

---

[3] *Hearings Before the Subcomm. on Antitrust and Monopoly,* 89th Cong., 2d Sess., pt. 1, at 59.

[4] *See* Travaglini, *Licensing U.S. Know-How Abroad Is Increasing,* INT'L COM., July 25, 1966, at 2; *reprinted in* U.S. DEP'T OF COMMERCE, FOREIGN BUSINESS PRACTICES at 26 (Apr. 1967).

[5] $10.6 million in 1964, which represents 1.7% of national income. *See* The Japan Development Bank, Facts and Figures on the Japanese Economy, 1966, at 167.

[6] U.S. BUREAU OF THE CENSUS, U.S. IMPORTS OF MERCHANDISE FOR CONSUMPTION, REP. FT 125, at 159 (Dec. 1966); U.S. EXPORTS, REP. FT 410, at 398-99 (Dec. 1966).

payments vs. receipts equation the balance of advantage may be found to be with the receiver of the technology rather than the seller.[7]

Japan, with a continuing deficit in its technical balance of payments, is enjoying a rate of economic growth that substantially exceeds that of the United States.[8] The fact that it has succeeded in becoming one of the world's leading trading nations appears to disprove the assumption that a technical payments deficit must be a disadvantageous factor in international commerce. Japan's experience indicates that it is not necessary for a country to spend large sums on basic research in order to succeed in export. It can attain excellent results simply by buying foreign technology — possibly at less expense. Moreover, it demonstrates that follow-on efforts by management are essential to exploit fully the commercial advantages of new scientific and technological developments. For this genius we look to the American businessman to pursue world markets with the same zest and intelligence he displays at home.

II. POLITICS, TECHNOLOGY, TRADE AND INVESTMENT

The second issue relevant to transnational business operations raised by technology is political and psychological as well as economic. Resting on the alleged superiority of the United States in matters of science and technology, this political phenomenon is expressed in graphic terms, "Brain Drain" and "Technological Gap."[9] These terms lend emotion rather than clarity to the genuine feeling that the United States somehow has an unfair advantage over others simply because of technological excellence.

Recently a British professor called upon the United States to prohibit American companies from recruiting skilled manpower abroad. The numbers of European researchers, scientists and engineers leaving for greener American pastures are counted with alarm and it is noted that fewer American scientists have gone to Europe

---

[7] The Secretary-General of the United Nations has initiated a study of the role and impact of international licensing arrangements in the establishment and development of selected industries in various countries. Financing of Economic Development: Promotion of Private Foreign Investment in Developing Countries — Summary and Conclusions, U.N. Doc. E/4293 (1967).

[8] The percentage increase per year in real Gross National Product for 1960-1965 was 4.7 percent for the United States and 9.7 percent for Japan. For comparative data on other countries, see Table 29 in COUNCIL OF ECONOMIC ADVISORS ANN. REP., *accompanying* ECONOMIC REPORT OF THE PRESIDENT, at 171 (1967).

[9] A bibliography could be compiled on these two terms alone. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE RESEARCH AND DEVELOPMENT EFFORT IN WESTERN EUROPE, NORTH AMERICA AND THE SOVIET UNION (1965), provides an objective evaluation of the pros and cons of technological disparities. (Summarized in *Research and Development: A Major Atlantic Issue,* EUROPEAN COMMUNITY, Mar. 1966, at 8.) For a good round-up of the relevant issues see Guccione, *That U.S.-European Technology Gap: It Stems from Deep European Roots,* CHEMICAL ENGINEERING, May 8, 1967, at 90; *Technology Gap Upsets Europe,* N.Y. Times, Mar. 12, 1967, at 1, cols. 2 and 4.

to do research. The net loss is regarded as further evidence that the "gap" is getting wider, and "if allowed to continue, jeopardizes Europe's economic future."[10] For example, Amintore Fanfani, Italy's Foreign Minister, has called for a ten-year cooperative plan for technological development to help redress the alleged technological imbalance between American and European industry.[11]

To add to the confusion, there are facts stemming from the size and effectiveness of many new American investments in Europe which are disconcerting to many Europeans. For example, the total sales of General Motors has exceeded the Gross National Product of Belgium.[12] In Germany, Americans own over 40 percent of the petroleum industry. The preeminence of the United States in computers is but feebly challenged so far by any other country.[13] United States owned or controlled companies produce over one-third of Europe's auto sales,[14] yet our total investment in Western Europe is modest,[15] and we account for only a minor percentage of total business in any single European country. To compound things further, American companies enter into overseas markets with the same vigor they use at home. In some industries, the arrival of energetic, iconoclastic American management techniques into Europe has rudely jolted the comfortable cartels with their "breakfast-table agreements" and old-fashioned, gentlemanly courtesies among competitors.

All of these various ingredients somehow relate to each other. While still a murky phenomenon and related to more than technology, a European attitude of concern toward United States firms and toward the United States exists. Both American businessmen and the American Government need to worry about it. Europeans ascribe the so-called "gap" to the disruption of World War II, the postwar "brain drain," and the advantages accruing to United States technological progress through our large mass market, our extensive re-

---

[10] *U.S.-Europe Gap in Science and Technology Widening*, EUROPEAN COMMUNITY, Nov. 1966, at 10, 11.

[11] N.Y. Times, Oct. 8, 1966, at 12, col. 5.

[12] According to STANDARD AND POOR'S STANDARD CORPORATION DESCRIPTIONS 8657 (1966), General Motors' 1965 sales exceeded $20 billion. The GNP of Belgium was $16.7 billion. INT'L FINANCIAL STATISTICS, Mar. 1967, at 54.

[13] The computer industry has been watched closely as a sign that "European countries risk being squeezed out of the science-based industries." *The Wilson Community*, 222 THE ECONOMIST 197 (Jan. 21, 1967). *The Economist* comments: "It is not surprising that American corporations have virtually taken over the computer industries of Germany, France and Italy, and nearly knocked out the British industry too in 1964." *Id.* However, the explosion in the technological application of computerization is probably unique. For a summary of the development and technical extension of the electronic computer see U.S. DEP'T OF LABOR, BULL. No. 1474, TECHNOLOGICAL TRENDS IN MAJOR AMERICAN INDUSTRIES 3 (1966).

[14] Based on statistics from Automobile Manufacturers Association, Inc., Statistical Dep't, *World Motor Vehicle Data 1965*, Nov. 1966, at 22-64.

[15] The total direct long-term private investment was $13.9 billion in 1965. *See* Pizer & Cutler, *Foreign Investments, 1965-66*, SURVEY OF CURRENT BUS., Sept. 1966, at 30.

sources, and — especially — substantial United States Government support of military and space research and development. They say they cannot maintain their economic growth rate in the future if the "technological gap" continues or widens. The Europeans obviously are concerned, and the issues they raise are of concern to us and warrant our careful study and attention.

As a starting point, the President has charged Dr. Hornig, his Science Advisor, to head a group within the Government to study the real meaning of the so-called "technological gap." Under Secretary of Commerce J. Herbert Hollomon serves on this group. The Organization for Economic Cooperation and Development (OECD) has also started its own study. Out of these efforts should emerge some facts to supplant the histrionics currently in vogue and point the way to answers as to whether there is an across-the-board "technological gap," as the Europeans seem to think, or whether there are various kinds and degrees of technological disparities. The answer certainly does not lie in mere scientific or technological terms.[16]

A test based on spending on research and development — amounting to about 3 percent of our GNP — indicates that United States industry is much more oriented in this direction than its European competitors. While the United Kingdom spends a healthy 2.6 percent of its GNP on research,[17] France is spending barely half this amount and other European countries spend a good deal less.[18] The percentage differences seem less significant, however, if you consider that about half of our research and development expenditures serve military and space purposes, while Europeans spend relatively little in this field.[19] On the measure of expenditures for research and development which are of direct benefit in upgrading the technical level of the industrial sector of the economy, we are probably fairly

---

[16] Guccione sums it up in the following terms:

> In essence, it is small markets, small companies, relatively little availability of risk capital, old-fashioned management practices, resistance to change on the part of both producers and consumers, basic weaknesses in educational systems when it comes to science and technology, and debilitating anti-trust and fiscal policies that are the reasons for an unhappy European state of affairs. The technology gap is merely a symptom of it.

Guccione, *supra* note 9, at 92.

[17] In 1964-1965 Britain spent £756.6 million ($2,118.5 million) or 2.6 percent of the GNP on research and development. COUNCIL FOR SCIENTIFIC POLICY, REPORT ON SCIENCE POLICY, CMND. No. 3007, HMSO (1966).

[18] For detailed consideration of comparative expenditures for research and development, see Quinn, *Technological Competition: Europe vs. U.S.*, HARV. BUS. REV., July-Aug. 1966, at 113.

[19] The McGraw-Hill survey of 1966 research and development expenditures revealed that federal financing accounted for 54 percent or $8.4 billion of the industry total. More than half the research and development is concentrated in two industries: aerospace, and electrical machinery and communications. Washington Post, May 12, 1967, at D8, cols. 4-5. *See also* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE RESEARCH AND DEVELOPMENT EFFORT IN WESTERN EUROPE, NORTH AMERICA AND THE SOVIET UNION, ch. IV.

even with the Europeans. There is, of course, some spin-off from United States military and space research and development as well, but its impact on the economy in this regard is inadvertent and perhaps less than is generally assumed. Moreover, it is a costly way to introduce new technology into industry.[20]

There is no direct correlation between the size of such expenditures and rate of economic growth or trade expansion. Research and development spending obviously cannot explain why many European economies have grown faster than our United States economy in recent years, or why our United States exporters are encountering stiff competition from European businessmen in many world markets. Neither does it explain why the United Kingdom economy, with relatively higher research and development expenditures than other European countries, has advanced less rapidly than its continental colleagues. Europe does not in fact suffer any great dearth of technological innovation and know-how. Some European firms enjoy large foreign currency earnings from the United States and elsewhere for the use of their technological know-how and services.[21] If there is a lag, it lies in the application rather than in the possession of technology.

Such disparities as may exist between European and American industry cannot be properly considered except in the context of other differences between Europe and the United States: for example, in (1) amount of capital investment per worker; (2) degree of mechanization; (3) availability of resources; (4) size of business enterprises; (5) productivity; (6) development of mass markets; (7) size of the educational base; and (8) work habits and attitudes.

Industrial management policies and initiative in using know-how as factors in technological progress may well be *the* crucial factors, as the Japanese example suggests. A speaker from abroad broached this view at the Symposium on Technology and World Trade, held at the National Bureau of Standards last November. He said:

> To my mind there is a gap, but I'm not certain that the reason the gap is there is to be found in the technological field. I believe that the fundamental reason for the gap is more a question of mentality and attitude. . . .
>
> Science and technology are and have been present in Europe many years. What we would like is the attitude necessary for the

[20] Sixteen percent of companies surveyed by McGraw-Hill answered yes and 84 percent no when asked if they had been able to take advantage of new technology resulting from federally financed research and development. Washington Post, May 12, 1967, at D8, col. 5.

[21] Impressive testimony to this effect will be found in advertisements which Imperial Chemical Industries, of the United Kingdom, has been running in the British press. ICI says: "We do a brisk trade in brainwaves — the ideas thought up by our backroom boys. Last year these earned us £37,000 a day. That's what other people paid us for our manufacturing know-how and the rights to make our products — and they paid most of it in foreign currencies." 72 NEW STATESMAN 311 (Sept. 2, 1966).

> creation of more big industries with leaders who know how to make use of science and technology.[22]

It is reasonable to assume that our current studies will uncover some "technological gaps" — some of which may be in favor of Europe — but I doubt that we will find many, if any, which can be defined as strictly "technological." My guess is that the basic difficulties may be outside the area of technology.

As to remedies, some people have advanced the idea that our Government might engage in a give-away program of technology. This, of course, is out of the question. It neglects to take account of the private ownership of most United States industrial technology and fails to come to grips with what probably is one of the basic problems: the limitations on effectively and economically transplanting United States technology outside the United States market and resource context. Except for the results of government-financed research and development, private enterprise owns and controls United States technology. It is often protected by patents but just as often it is unpatented know-how, developed and perfected by its owners. The Government could not give it away.

On the other hand, we have long cooperated with the European nations in many fields of activity, including the sharing of technology: (1) in the OECD; (2) in the exchange of scientific and technical information through NATO; (3) in close cooperation about atomic energy through the European Atomic Energy Commission (EURATOM); (4) in the European Nuclear Energy Agency; (5) in the European Space Research Organization; and (6) in the European Launcher Development Organization. We share peaceful scientific data and technological know-how with other nations, including the European countries, through the United Nations and its specialized organizations, and through many other international groups.

Furthermore, much government-financed research and development in military, space, atomic energy, and other fields has been made accessible to anyone in the United States or abroad. Unless the information is specifically related to our national security or has been developed by industrial contractors on their own, it can be purchased at nominal cost from the Commerce Department's Clearing House for Federal Scientific and Technical Information. The Clearing House was set up expressly to make government research and development results available as widely as possible.

However, even a technology-sharing program cannot really solve Europe's problems if it turns out to be basically non-technological.

---

[22] Robert Major, Director of the Royal Norwegian Council for Scientific and Industrial Research, *quoted in* NAT'L BUREAU OF STANDARDS, MISC. PUB. NO. 284, TECHNOLOGY AND WORLD TRADE: PROCEEDINGS OF A SYMPOSIUM 107-08 (1967).

If entrepreneurial, capitalization, or other difficulties are involved, only the European nations themselves may be able to take corrective action. There are clear signs that the real nature of the problem is understood by many Europeans, but their efforts tend to be overlooked in the vain hunt for facile solutions.[23] It is a question of practicality — not of willingness or unwillingness to cooperate. Our most useful contribution in this instance may be to help identify the real disparities and their fundamental causes, so that it will be possible to determine what kind of action is most appropriate.

III. Growth of Less Developed Countries

The third major transnational business aspect of science and technology is its impact upon the economic growth prospects of the less developed countries.[24] It is quickly apparent that the greatest "gap" in technology and its dimensions is that between the industrialized countries of the world on the one hand and the less developed countries on the other. One of our national policy objectives is to contribute to the economic growth of these developing nations. As President Johnson has repeatedly emphasized, we want to help these countries help themselves. One way to do this is to help them achieve the technological progress they want and need to advance their economic development, living standards, and international trade. Sturdy, self-reliant, progressing states contribute to greater stability and security in the world. Their progress serves our own and other nations' best interests. It expands the opportunities for mutually profitable trade and investment.

What can be done to raise the level of technology in the less developed countries? As an early objective, create an economic environment conducive to innovation. This means change — and change can be painful. As of today, the kind and amount of technology that can effectively be put to work vary from country to country, industry to industry, even product to product. The needs, objectives, and development stage of each nation must be taken into account.

For example, a licensing agreement has been signed in Mexico for float glass production which will give Mexico a factory that is

[23] A realistic diagnosis of the ailment and a prescription for its cure will be found in France, *"Technology Gap" Demands "Hard Choices" of Europe*, European Community, Mar. 1967, at 18. Defense Secretary McNamara has cited education as a handicap to European economic growth, pointing out that 40% of the United States college-age population is attending college, as against 10% in the U.K., 15% in France, and 7% in Germany and Italy. Address by Secretary McNamara, Millsaps College Convocation, Jackson, Mississippi, Feb. 24, 1967, *reported in* 33 Vital Speeches 357 (1967).

[24] *See generally The Encouragement and Protection of Investment in Developing Countries*, 11 International and Comparative Law Quarterly [Int'l & Comp. L.Q.] Supp. Pub. No. 3 (1962).

far more modern than some glass plants we have in the United States. The float process for making glass is a capital-intensive, high-technology technique that might be completely unsuited to the needs, skills, and resources of some other countries. Many developing countries could benefit much more from technological investment in agriculture. Indeed, the miracle of progress in American agriculture outstrips our success in industry. This is the forthcoming frontier in the less developed countries, which are rapidly becoming more, rather than less, dependent on non-domestic food supplies. Latin America, Africa, and Asia exported a net annual average of 5 million tons of grain in 1934-1938. Today they import some 78 million tons a year.

For some less developed countries, the purchase of technological know-how — through patent royalty and licensing arrangements, joint ventures, and capital investment by the business firms of other countries — might be the easiest, quickest, and least expensive way to obtain the desired results. Others may simply want to buy the products of foreign technology. Absolute technological equality is not essential. From the standpoint of trade expansion, it is not even beneficial. If every country were as advanced in computer technology as the United States, for example, there would be little trade in computers. Technological inequality in the sense of differing fields of specialization actually stimulates trade.

What is essential is the opportunity to obtain and develop technology. The less developed countries say the technology they desperately need exists in the world, but it is too often available to them at a cost and on terms they cannot meet. The technology they want is owned largely by private companies, so the opportunities for government action by the United States and other industrialized free-enterprise countries are necessarily limited.

A. *Private Investment in Less Developed Countries*

There is a wide array of ways by which the United States encourages American private investment in the less developed countries. In addition to the AID program, the Commerce Department sends out trade missions to develop business and investment opportunities for American industry, circulates trade and investment leads to American businessmen, and provides many other business services that contribute to the transfer of American technology to less developed countries. There may be possibilities for additional action. Last year the National Export Expansion Council, which advises the Secretary of Commerce on international business policies and programs, formed an Action Committee to come up with suggestions. Recently the proposals of this Action Committee on U.S. Trade and Investment

in Developing Countries were approved by the NEEC and made public.[25]

The Committee suggested, among other things, that (1) United States firms should step up the level and quality of their trade and investment efforts in the less developed countries. Since 70 percent of the world's total population lives in less developed areas, the Committee considers it short-sighted to give them marginal attention. (2) The less developed countries themselves should make new and objective reviews of the unique contributions of capital, technology, and skills which business firms from the United States and other industrialized countries can make to their development objectives. In the light of these reviews, their governments should then seek to develop programs which will act to minimize barriers and maximize incentives to potential foreign private investment.[26]

B. *International Assistance to Less Developed Countries*

Of all the things the less developed countries can do to improve their investment climate, one of the most important is to provide basic legal protection for industrial property rights.[27] To this end, the United International Bureau for the Protection of Intellectual Property (BIRPI) has developed a Model Law for Developing Countries on Inventions.[28] Any less developed country can adopt or adapt this model law. There are options on controversial questions, so each country can frame the law to fit its own needs. BIRPI has also prepared a model trademark law, which will soon be published. Especially adapted to the needs of countries with basically non-industrialized economies, the model covers trademarks, trade names and unfair competition.[29]

Another new international effort to help the less developed countries is being made through the United Nations Industrial Development Organization (UNIDO), established by the U.N. General

---

[25] *Contained in* Report of the Action Comm. of the Nat'l Export Expansion Council, Trade and Investment in Developing Countries, Apr. 3, 1967.

[26] New studies of the nature of technological change, and of the transfer process are appearing rapidly. The U.N. Conference on the Application of Science and Technology for the Benefit of the Less Developed Areas produced a valuable series of papers on the subject from technical specialists, planners and policy-makers. The United States papers for the Conference have been published (U.S. Government Printing Office 1963). On the methodology of technological change, see M. Boretsky, *Comparative Progress in Technology, Productivity, and Economic Efficiency: U.S.S.R. vs. U.S.A.*, in NEW DIRECTIONS IN THE SOVIET ECONOMY, studies prepared for the JOINT ECONOMIC COMM., 89th Cong., 2d Sess. (1966).

[27] The Role of Patents in the Transfer of Technology to Developing Countries, U.N. Doc. E/3861/Rev. 1 (1964).

[28] UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY, BIRPI PUB. No. 801(E), MODEL LAW FOR DEVELOPING COUNTRIES ON INVENTIONS (1965).

[29] *See* Offner, *Draft Model Law for Developing Countries on Marks, Trade Names, Indications of Source, and Unfair Competition — An Appraisal*, 56 THE TRADEMARK REP. 831 (Nov. 1966).

Assembly last December to replace the U.N. Center for Industrial Development. UNIDO is an action group. Under its Special Industrial Services Program, it sends trained consultants out to less developed countries requesting assistance on specific problems, such as plant management and quality control. The U.N. has provided such technical assistance in the agricultural and health fields for many years. Now it is extending its effort into the industrial area.

UNIDO is also organizing an international symposium on industrial development which will be the first international meeting of governments to concentrate on the problems and prospects of industrial development. The three-week symposium, open to all U.N. member nations, will be held in Athens, starting November 29, 1967. In March 1968, in New Delhi, another U.N. meeting, the second United Nations Conference on Trade and Development (UNCTAD), will focus on the problems of the less developed countries in expanding their exports and obtaining technological know-how.[30]

IV. A LAWYER'S MENU: PATENTS, TRADEMARKS, STANDARDS

A fourth issue is how to enact laws and build institutions which will maximize the benefits which science and technology — to a great extent through business — can make available to people. Here is where many of the lawyer's skills come into play.[31]

A. *Patents*

Variations in patent law and practice from country to country often result in duplication of efforts, uncertainties, and unnecessary expenses which impede, if not discourage patent protection, thereby delaying the transfer of technology from one nation to another.[32]

The Convention of Paris for the Protection of Industrial Property (Paris Union),[33] of which the United States has been a member since 1887, sets forth the basic rights of patent applicants in the member states, regardless of an applicant's country of origin. But in today's world trade it is not practical to continue to operate on the principle of territoriality which necessitates separate applications in each country in order to obtain adequate protection of those rights.

---

[30] A general statement on the problems and some possible solutions in this area is presented in the U.N. report preparatory to the first UNCTAD Conference, Towards a New Trade Policy for Development, U.N. DOC. E/CONF. 46/3 (1964).

[31] For a study of the innovative process and the legal and other circumstances which foster invention and innovation, see DEP'T OF COMMERCE, TECHNOLOGICAL INNOVATION: ITS ENVIRONMENT AND MANAGEMENT (1967) (referred to as the "Charpie Report" after the name of Robert A. Charpie, Chairman of the Panel, an advisory committee of private citizens reporting to the Secretary of Commerce).

[32] The importance of patent policy in overall corporate planning is described in Shipman, *International Patent Planning,* HARV. BUS. REV., Mar.-Apr. 1967, at 56.

[33] Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372 (1887-1889), T.S. No. 379; revised at Lisbon, Oct. 31, 1958, [1962] 1 U.S.T. 1, T.I.A.S. No. 4931.

The United States is participating with other nations and with BIRPI,[34] the Secretariat for the Paris Union, in expanding international patent cooperation to make it easier to obtain adequate patent protection in both domestic and foreign markets. For example, active steps are being taken to develop a patent cooperation treaty to provide for a single international filing which could be utilized in lieu of the multiple, duplicate, foreign national filings now required. In addition, the United States Patent Office is engaged in a series of search exchange programs with a number of other countries. Patent Office experts are also studying the international classification system, to see how it and the United States system might be harmonized. Other programs, developed to assist the United States Patent Office, and American attorneys and businessmen, could also benefit their counterparts in other countries. Present activity in the field of documentation, which includes plans for improved accessibility of published technological data, is one example of such programs.

In order to provide a suitable basis in our domestic patent law for this program of expanded international patent cooperation, and to modernize the United States patent system, President Johnson has proposed a general revision of the patent laws. The Patent Reform Act of 1967,[35] transmitted by the President to the Congress on February 21, 1967, would bring about the first major revision of these laws in more than 130 years.

The proposals are based upon the Report of the President's Commission on the Patent System.[36] The Commission was appointed by the President in 1965 to study ways "to ensure that the patent system will be more effective in serving the public interest . . . ."[37] Ten leading citizens representing the business, scientific and academic communities and the bar served on the Commission together with representatives of the Secretary of Commerce, the Secretary of Defense, the Administrator of the Small Business Administration, and the Director of the National Science Foundation. The Report of the Commission testifies eloquently to the fruitfulness of interaction between informed businessmen, the bar, and members of other disciplines. Based on the practical experience of their companies, the business members were able to delineate lines of approach in the

---

[34] Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle, Geneva, Switzerland, the administering body of several industrial property and copyright conventions.

[35] S. 1042, H.R. 5924, H.R. 6043, 90th Cong., 1st Sess. (1967).

[36] PRESIDENT'S COMM'N ON THE PATENT SYSTEM, REPORT, TO PROMOTE THE PROGRESS OF . . . USEFUL ARTS IN AN AGE OF EXPLODING TECHNOLOGY (1966). *See* O'Brien, *An Appraisal of the Report of the President's Commission on the Patent System*, 49 J. OF THE PATENT OFFICE SOC'Y 139 (1967), which includes the text of the legislation proposed and a sectional analysis.

[37] Exec. Order No. 11,215, 3 C.F.R. 123-25 (Supp. 1965).

interest of simplification and improvement of industrial property rights protection which heretofore did not always coincide with the preferences and traditions which mold the patent lawyer's opinion on these issues.

Acting Under Secretary of Commerce Hollomon, urging enactment of the patent proposals, pointed out that basic revision of the system was essential "for it to serve effectively to stimulate the development and public disclosure of new technology and to provide incentives rather than barriers, to international trade."[38]

B. *Trademarks*

In the trademark field, we are exploring the possibility of developing a sound and workable international program that will provide better protection than is now available. We must have adequate protection for United States trademarks. They are valuable export assets.[39]

The most important aspect of the problem is the number of jurisdictions in which a proposed mark must be searched, cleared, and filed. Separate actions in more than 150 different jurisdictions are required for American companies to extend protection of a brand name to the rest of the world.[40] An international filing procedure, commonly called the Madrid Arrangement, was established in 1896 under the Madrid Agreement for International Registration of Trademarks, but the United States is not a member of this treaty. The filing system is still operating successfully for 21 countries, principally European, but a United States trademark owner can obtain registration under the system only if he has a bona fide industrial or commercial establishment — branch or subsidiary — in a member country.[41]

C. *Standards*

The American businessman who has been kept out of a foreign market because his product — quality and performance notwithstand-

---

[38] Statement of J. Herbert Hollomon, Acting Under Secretary of Commerce, *Hearings on H.R. 5924 before Subcomm. No. 3, House Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

[39] *See* E. OFFNER, INTERNATIONAL TRADEMARK PROTECTION (1965); Lightman, *Trademarks as "Silent Salesman,"* INT'L COM., Oct. 28, 1963, at 2.

[40] *See* St. Landau, *The Handling of Trademarks Abroad by United States Companies*, 56 THE TRADEMARK REP. 207 (Apr. 1966).

[41] Consideration is being given to United States adherence. The positions for and against adherence are propounded in 56 THE TRADEMARK REP. No. 5 (May 1966). (See especially Allen, *A Report on the Madrid Agreement*, at 290, for a discussion of the advantages of adherence to American industry, the effect on domestic trademark practice, and cost implications; and Ladas, *The Madrid Agreement for the International Registration of Trademarks and the United States*, at 346, for a position against adherence.)

ing — does not meet foreign standards is well aware that standards can be a crucial factor in international trade. Various groups, including the Panel on Engineering and Commodity Standards of the Commerce Technical Advisory Board (the LaQue Committee),[42] have suggested that the role of the United States in international standardization should be strengthened. Unlike the other industrialized countries, the United States is not represented officially by government delegates in international standardization organizations. This means that we cannot effectively encourage the international adoption of standards which would be more harmonious with American technological and industrial practices. Legislation has been proposed to improve this situation. An international standardization bill pending in Congress would provide grants to qualified standardization organizations for participation in the international standards process and for information activities.[43]

D. *Institutions*

Free trade arrangements and common markets provide another important possible step toward faster use of technology to raise economic levels. The European Economic Community and European Free Trade Area in Europe have opened up wider markets, as we hope the proposed Latin American Common Market will do in Latin America. Such markets provide a non-technical but very important boost to technically based agriculture or industry. Within these markets, much can be done by legal reform to make conditions suitable for innovation to succeed.[44] Attorneys in private practice and lawyers of the EEC Commission staff are coping with antitrust problems as the European Common Market moves ahead toward unification of national laws.[45] Common Market lawyers are also working to-

[42] The major recommendation of the industry group was to establish a new federally chartered institute to coordinate voluntary standardization activities in the United States. The report of the panel ("The LaQue Report") is available from the Clearinghouse for Federal Scientific and Technical Information, U.S. Dep't of Commerce, Springfield, Virginia 22151 (Rep. Nos. PB 166811 and PB 166812).

[43] S. 997, 90th Cong., 1st Sess. (1967).

[44] Among other innovations, the Central American states, for example, have entered into a treaty permitting "integration industries" and making valuable privileges available to companies operating in the area. Convenio sobre el Regimen de Industrias Centroamericanas de Integracion, signed by Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica, June 10, 1958; Protocol, Jan. 29, 1963; INSTITUTO INTERAMERICANO DE ESTUDIOS JURIDICOS INTERNACIONALES, INSTRUMENTOS RELATIVOS A LA INTEGRACION ECONOMICA EN AMERICA LATINA 57 (1964).

[45] *See* Gaudet, *The Common Market and the Law*, INFORMATION SERVICE OF THE EUROPEAN COMMUNITIES, COMMUNITY TOPICS No. 4 (*reprinted from* ANNALES DE DROIT ET DE SCIENCES POLITIQUES, Tome XVI, No. 2, Brussels, 1961); Grisoli, *The Impact of the European Economic Community on the Movement of the Unification of Law*, 26 LAW & CONTEMP. PROB. 418 (1961).

ward a Community-wide corporation law,[46] a common patent law and a common trademark law.[47] This year work is being started to harmonize taxes under a common system of tax on the value added at each stage of manufacture.[48]

On December 17, 1966, the U.N. General Assembly acted unanimously to establish a United Nations Commission on International Trade Law to unify and harmonize divergent national laws in this important field. The Commission will hold its first session in 1968. Since it will be working in fields affecting both national law and trade practices, its activities merit close attention by the corporate bar and lawyers generally.[49]

CONCLUSION

Changes through the world are vastly enlarging the dimensions of international law — and the role of the international lawyer. The scientific and business ingenuity of the United States has helped us achieve our preeminent position in world trade. We need these export earnings to help pay for our broad international responsibilities. Differences in industrial effectiveness between the United States and Western Europe merit thoughtful analysis so we can better under-

---

[46] INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 45TH CONFERENCE at 43 (1952); Conard, *Corporate Fusion in the Common Market*, 14 AM. J. COMP. L. 573 (1965-1966); Thompson, *The Project for a Commercial Company of European Type*, 10 INT'L & COMP. L.Q. 851 (1961); *Legal Disparities Obstruct Intra-Community Mergers*, EUROPEAN COMMUNITY, June 1966, at 6; Fligler, Multinational Public Enterprises, International Bank for Reconstruction and Development, June 1967.

Continental European literature on this subject is extensive. *E.g.*, EUROPEAN ECONOMIC COMMUNITY, SUPP. BULL. NO. 9/10-1966, MEMORANDUM BY THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY ON THE ESTABLISHMENT OF EUROPEAN COMPANIES; WANG, DIE EUROPAISCHE AKTIENGESELLSCHAFT IN DER E.W.G. (1964); Dorat des Monts, *Vers un droit europeen des societes commerciales*, 39 JURIS CLASSEUR PERIODIQUE, LA SEMAINE JURIDIQUE I-1896 (Mar. 3, 1965); Fikentscher & Grossfeld, *The Proposed Directive on Company Law*, 2 COMMON MARKET L. REV. 259 (1964); Lecourt & Chevallier, *Comment progresse le rapprochement des legislations europeenes?*, RECUEIL DALLOZ-CHRONIQUE 24 (June 30, 1965); Patry, *La Societe Anonyme de Type Europeen*, ETUDES DE DROIT COMMERCIAL EN L'HONNEUR DE PAUL CARRY 29 (1964); Rault, *Pour la creation d'une societe commerciale de type europeen*, 13 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 741 (1960); Sanders, *Vers une Societe Anonyme Europeene?*, REVISTA DELLE SOCIETA 1163 (1959); *Thibierge, Le Statut Des Societes Etrangeres*, LE STATUT DE L'ETRANGER ET LE MARCHE COMMUN, 57TH CONGRESS OF FRENCH NOTARIES, Tours (1959); Vasseur, *A Company of European Type*, 1964 JOURNAL OF BUSINESS LAW 358 and 1965 *id.* 73; Vasseur, *Quelques Arguments pour une Societe de Type Europeen*, 83 REVUE DES SOCIETES 18 (1965); Willemetz, *Une Societe de Type Europeen*, 21 REVUE DU MARCHE COMMUN 38 (1960).

[47] A summary analysis of the proposed European Patent Law is set out in 45 J. OF THE PATENT OFFICE SOC'Y No. 3 (Mar. 1963). *See also Restrictive Practices, Patents, Trade Marks and Unfair Competition in the Common Market*, 11 INT'L & COMP. L.Q., SUPP. PUB. NO. 4, at 153 (1962).

[48] *Community Draws Nearer to Economic Unity: EEC "Value Added" Tax System, First Medium-Term Economic Program Approved*, EUROPEAN COMMUNITY, Mar. 1967, at 30.

[49] Stavropoulos, The United Nations Commission on International Trade Law, 4 U.N. Monthly Chronicle 89 (No. 4, 1967).

stand some of the resulting political and economic implications. Much greater effort needs to be spent toward bringing the benefits of science to bear upon the economic needs of the less developed countries. The legal profession has much to contribute toward building the laws and the institutions within which science and industry can raise productivity and better serve our own people and the transnational world in which we live. Never before has the international lawyer had a more challenging opportunity to make full and beneficial use of his creative talents.[50]

[50] *Cf.* Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe,* 12 INT'L & COMP. L.Q. (1963); Nadelmann, *Assumption of Bankruptcy Jurisdiction Over Non-Residents,* 41 TUL. L. REV. 75 (1966); and Stein, *Assimilation of National Laws as a Function of European Integration,* 58 AM. J. INT'L L. 1 (1964). The subject-matter of the foregoing articles illustrates some of the problems and challenges. Widening U.S. participation in unification-of-law activities, resulting from U.S. membership (since 1963) in the Hague Conference on Private International Law and the International (Rome) Institute for the Unification of Private Law, is a major development which will have growing significance to businessmen and lawyers concerned with international private law and practices. For materials on the range of problems see the symposium, *Unification of Law,* 30 LAW & CONTEMP. PROB. 231 (1965).

SEX DISCRIMINATION AND STATE PROTECTIVE LAWS

BY JAMES C. OLDHAM*

An amendment was added as an afterthought to Title VII of the 1964 Civil Rights Act, banning discrimination in employment based upon sex. The Equal Employment Opportunity Commission, which was to enforce the ban, was given no guidance on the handling of conflicts between this provision of Title VII and the state protective laws. Mr.Oldham analyzes the conflict and the Commission's original position in dealing with it. Subsequently, Mr. Oldham devises a test, in the context of the preemption provision of Title VII, to determine in which instances state protective legislation should be upheld to coincide with congressional intent. Any state statute which, on its face, retains an underlying protective policy pertinent to the modern labor force, would be within the state's police power to enact, and would not be preempted by Title VII.

INTRODUCTION

CONSIDER yourself as the owner of a medium-sized cement manufacturing company. One fine morning you are confronted at your plant by a female job applicant who theretofore has gained widespread acclaim for her talents as a lady wrestler. She is seeking a job which is available at your plant — that of manually transferring 100-pound cement sacks from your warehouse to shippers' vans at the loading dock. Her application captures your attention sufficiently for you to contact your personnel man, who promptly informs you that a state law exists forbidding the employment of women in jobs which involve lifting more than 25 pounds. You convey this fact, with regrets, to your applicant. However, to your surprise and dismay, she retorts by not only eyeing you as a likely prospect for a half nelson but also brandishing before you a copy of Title VII of the Civil Rights Act of 1964, which in no uncertain terms prohibits discrimination in employment based upon sex.[1] What are you to do?

The employer's dilemma has been facetiously put, but that dilemma is both obvious and real. The answer which the employer may give at the present time is that Title VII does not oblige him to provide employment to a woman at the cost of a clear violation of

*B.S., Duke University, 1962; LL.B., Stanford University, 1965; M.S.B.A., University of Denver, 1967; Associate in the firm of Dawson, Nagel, Sherman & Howard, Denver, Colo.

[1] Civil Rights Act of 1964 § 703(a)(1), 78 Stat. 255, 42 U.S.C. § 2000e- 2(a)(1) (1964) [hereafter cited as Civil Rights Act of 1964].

state law.[2] However, that answer may soon prove to have been temporal, and even now it will vary according to the nature of the administration of the state protective law in question.[3]

Since state protective laws regulating the employment of women are not uncommon, it is probable that the employer's quandary will be a recurring problem.[4] This paper will endeavor to analyze the problems resulting from the conflict between state protective laws and the mandate of Title VII from several viewpoints. First, the published opinions of the administrative body created to administer Title VII, the Equal Employment Opportunity Commission, will be examined to discover what guidance that body has offered in this area. Representative types of state protective laws will then be discussed in terms of the degree to which they conflict with Title VII. Finally, the standards in this area anticipated from the courts, including expected responses to the inevitable argument on preemption, will receive attention.

I. A Capsule History of the Sex Discrimination Provision

A. *The General Background*

The statutory framework dealing with discrimination on the basis of sex under Title VII is simple. Employers with the jurisdictional number of employees[5] cannot "fail or refuse to hire" or deprive a person of "employment opportunities" or "otherwise adversely affect" that person because of sex. To do so constitutes an "unlawful employment practice."[6] The one exception to this rule is that discrimination on the basis of sex is permitted wherever sex is

---

[2] *See* text accompanying notes 12-22 *infra*. Unfortunately, existing interpretative opinions of the Equal Employment Opportunity Commission provide no guidance whatsoever as to how to cope with professional talents of lady wrestlers; no doubt individual resourcefulness will come to the fore in this regard.

[3] *See* text accompanying notes 25, 29-36 *infra*.

[4] According to a recent survey by the Bureau of National Affairs of 78 varied companies, restrictions imposed by state laws account for 18 percent of the cases where employment was denied females by the employers questioned. BNA, Sex & Title VII, at 7 (Survey No. 80, Apr. 1967).

[5] The definition of "employer" contained in Title VII will eventually encompass any "person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." This level of 25 employees will be attained through the following descending scale of coverage:

July 2, 1965-July 1, 1966:	100 employees
July 2, 1966-July 1, 1967:	75 employees
July 2, 1967-July 1, 1968:	50 employees
July 2, 1968 and thereafter:	25 employees

Civil Rights Act of 1964 § 701(b).

[6] Civil Rights Act of 1964 §§ 703(a)(1), (2).

"a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[7]

This sex discrimination provision was inserted into the civil rights bill as a floor amendment in the House of Representatives.[8] Thus, apart from a brief period of floor debate in both Houses, legislative history is not available to those wishing to interpret the provisions.

The debate which did occur on the sex discrimination provision is not particularly enlightening. Senator Dirksen was careful to point out that he thoroughly enjoyed discrimination in favor of the fairer sex, and that historically, such discrimination has been of a protective nature.[9] In response, Senator Clark merely indicated that equal job opportunity need not be given both sexes wherever sex is a bona fide occupational qualification for a particular job.[10] Congressman Celler took care to bring to the attention of the House a letter received from the United States Department of Labor stating the opinion of the Women's Division that the sex discrimination amendment "would not be to the best advantage of women at this time."[11] This conclusion was based upon a previous study by the President's Commission on the Status of Women, which was considering the advisability of including sex as a forbidden type of discrimination in federal government contracts. That Commission determined that discrimination based on sex involved different problems from discrimination based on race, creed, color or national origin, and should be given specialized study and treatment.[12]

Nevertheless, the sex discrimination provision became law. The provision is being taken seriously by the Equal Employment Oppor-

---

[7] Civil Rights Act of 1964 § 703(e)(1).

[8] The amendment's introduction by Congressman Smith (D., Va.) is noted at 110 CONG. REC. 2577 (1964). Representative Smith indicated his sincerity in introducing the amendment by citing a letter from a constituent which outlined the imbalance between males and females in the country and the resultant impairment of a woman's right to a husband, aggravated by the country's killing off many available males through war involvement. It has been pointed out subsequently that the purpose behind the amendment was a ploy by opponents of the Civil Rights Act to secure the entire bill's defeat. *See Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 441-42 (1966); Note, 50 IOWA L. REV. 778, 791 (1965).

[9] 110 CONG. REC. 7217 (1964).

[10] *Id.*

[11] 110 CONG. REC. 2577 (1964).

[12] *Id.* The reports of the President's Commission and committees working under it have been collected and supplemented with additional materials in M. MEAD & F. KAPLAN, AMERICAN WOMEN (1965). In addition to Rep. Celler's comments, Rep. Green, a member of the President's Commission, spoke against the amendment as being untimely and insufficiently considered. 110 CONG. REC. 2581-82 (1964). However, several of Rep. Green's female colleagues in the House spoke in favor of the amendment. *Id.* at 2580-84. *But see,* for an interesting analysis of the similarities between race and sex discimination, Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

tunity Commission; it must also be taken seriously by employers subject to Title VII.

B. *Discussion of the Effect on Protective Legislation*

The existence of state protective legislation and the potential conflict of that legislation with the sex discrimination ban of Title VII was recognized in both Houses of Congress during debate on the sex amendment. Yet the effect the amendment was intended to have on state protective laws is unclear.

Senator Dirksen's comments characterizing laws dealing with employment of women as historically being of a protective nature, coupled with Senator Clark's response,[13] certainly cannot be taken as evidencing a considered judgment that all state protective laws fall under the "bona fide occupational qualification" exception. In the House of Representatives no reference whatever was made to protective legislation, in the context of the occupational qualification exception.

Representative Celler did express apprehension that the sex amendment might be an "entering wedge" toward striking down protective legislation.[14] Representative Griffiths expressed her view that some of the protective legislation was arbitrary and would be tested and eliminated after passage of the amendment.[15] Representative Multer indicated a fear that state protective laws "may be repealed by implication" by the amendment.[16] But on the other hand, Representative Kelly stated her belief that the amendment "will not repeal the protective laws of the several States."[17] She also complimented Representative St. George for having indicated that "the protective laws of the several States would not be destroyed by our favorable action on this amendment."[18]

In sum, no Congressman appears to have asserted that the sex amendment would result in unqualified obliteration of state protective laws. No reference was made to the preemption provision of Title VII.[19] Most of the comments made did express concern that the amendment would have some effect on protective legislation. Thus, unfortunately, it is impossible to extract from the record a conclusion of congressional intent as to whether or not protective legislation would retain vitality after adoption of the sex provision.

---

[13] Text at note 9 *supra*.

[14] 110 CONG. REC. 2577-78 (1964).

[15] 110 CONG. REC. 2580 (1964).

[16] 110 CONG. REC. 2732 (1964).

[17] 110 CONG. REC. 2583 (1964).

[18] 110 CONG. REC. 2582 (1964). This comment by Mrs. Kelly is somewhat curious in light of Mrs. St. George's statement that she considered most protective laws to be disadvantageous to women. *Id.* at 2580-81.

[19] *See* text at note 109 *infra*.

II. COMMISSION VIEWS ON STATE PROTECTIVE LAWS

Assuming the desirability of an antidiscrimination statute on the subject of sex, it is plain that the federal standards and machinery created to eliminate such discrimination are lamentably inadequate. That inadequacy stems chiefly from two major factors: the relatively hasty conclusion by Congress that sex discrimination exists as an evil equatable with other types of discrimination and equally deserving of wholesale elimination; and the somewhat inconsistent failure of Congress to provide the Equal Employment Opportunity Commission with the means to enforce the discrimination ban.[20]

Both of these shortcomings are placed in sharp relief whenever the sex discrimination provision of Title VII collides with state protective laws regulating the employment of women. Such state laws proceed upon the premise that instances of sex "discrimination" are desirable as a matter of public policy — a premise which would seem to have been tacitly rejected by Congress when it included sex in Title VII.[21] Perhaps in no other context has the frustration caused the Commission by its lack of enforcement powers been more apparent than in the area of state protective laws.

The Commission's initial comments concerning such laws were forthcoming in the official guidelines on sex discrimination issued November 11, 1965.[22] It was observed by the Commission that state protective laws were generally of two types: laws providing benefits for female employees such as rest periods, and laws prohibiting the employment of women in certain hazardous or strenuous occupations.[23] This classification was accompanied by the following statement:

> The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy.
>
> . . . .
>
> The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. How-

[20] Powers of the Equal Employment Opportunity Commission extend at the present time only to conciliation, education, persuasion, technical assistance and like activities. Civil Rights Act of 1964 § 705(g). Legislative proposals are currently before both Houses of Congress which would grant enforcement powers to the Equal Employment Opportunity Commission. *See* 64 LAB. REL. REP. 210 (Mar. 6, 1967).

[21] *See* text at notes 13-18 *supra; see also* Anderson, *Civil Rights and Fair Employment*, 22 BUS. LAW. 513, 522 (1967).

[22] 29 C.F.R. § 1604 (1965) (guidelines on discrimination because of sex).

[23] *Id.* § 1604.1(a)(3).

> ever, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination.[24]

Additionally, as a means of mitigating the conflict between state protective laws and Title VII, the Commission stated its expectation that an employer would in good faith exploit any available administrative exception to a state law before asserting a bona fide occupational qualification.[25]

Under the view expressed in the guidelines, the Commission clearly considered any employer who discriminated against women pursuant to a state statute which did not have the effect of protecting women from exploitation and hazard to have committed an unlawful employment practice. This conclusion was confirmed by former Commissioner Richard Graham who said in a speech before the National Federation of Business Women that all state laws pertaining to the regulation of wages and hours and conditions of work should apply equally to men and women, with the single exception of childbirth laws.[26] Yet these views were not extremely useful to employers. The Commission did not reveal what laws or types of laws it considered to fall within its test of protection from "exploitation" or "hazard."

The occasional interpretative opinions of the General Counsel of the Commission pertaining to state protective legislation add very little to the Commission's original statements. The General Counsel has ruled that an employer was not obliged to violate reasonable licensing requirements of a state regarding professionals or entertainers "where there is no intention to discriminate on prohibited grounds."[27] The negative inference contained in this ruling is interesting — that an employer cannot rely upon the defense of a reasonable statute if his motivation is discriminatory on the basis of sex. It seems doubtful that such a negative inference was fully intended by the General Counsel. Other opinions by the Counsel on state protective laws are not controversial; none of the rulings deals with a state statute considered to be antiquated or not to possess the protective effect intended when the statute was originally enacted.[28]

---

[24] *Id.* §§ 1604.1(b), (c).

[25] *Id.* § 1604.1(c)(3).

[26] Graham, *Title VII of the Civil Rights Act*, NAT'L BUS. WOMAN, Mar. 1966, at 7.

[27] Op. Gen. Counsel (Aug. 27, 1965), BNA, 6 LAB. POL. & PRAC., FAIR EMPLOYMENT PRACTICES 401:1012 [hereinafter cited as FEP REPORTER].

[28] The General Counsel has articulated such reasonable propositions as: that Title VII prohibits classification by sex only with regard to employee status, which would not be offended by the existence of separate restroom facilities; and that an employer may not decline to hire a woman in order to escape coverage of state minimum wage laws. Op. Gen. Counsel (Sept. 20, 1965), FEP REPORTER 401:1012; Op. Ltr. Gen. Counsel (Mar. 22, 1966), FEP REPORTER 401:1012.

In any event, within the past year the Commission has retreated from its original formulations dealing with state protective legislation. In a statement adopted by the Commission on August 19, 1966, the Commission described a case before it as presenting squarely the question of "whether Title VII supersedes and in effect nullifies a state law which compels an employer to deny equal employment opportunity to women."[29] The situation was one in which there was no indication that the statute, limiting hours of work to 48 hours per week, in fact protected the health or welfare of the particular applicant. However, the Commission found itself unable to resolve the question presented to it. It was reiterated that an intention of Congress to overrule the vast number of state protective statutes outstanding could not be lightly presumed. The Commission then acknowledged that it had no ability or authority to rewrite state laws, to insulate employers against liability under state laws, or to commence suits to avoid the enforcement of state laws.[30]

As a result, the Commission officially adopted a "hands off" policy with regard to cases such as the one just mentioned. The Commission will make no determination on the merits of the case, but will merely advise the charging parties of their right to bring suit under Title VII, reserving to itself the privilege of appearing as amicus curiae in any such ensuing litigation.[31] Since this promulgation, the position stated has been applied by the General Counsel of the Commission in responding to letters of inquiry.[32]

The Commission's disengagement from the conflict between state protective legislation and Title VII is not an end to the matter. On April 10, 1967, Chairman Shulman announced that "the Com-

---

[29] FEP REPORTER 401:1601.

[30] *Id.* at 401:1601-02. The text of the Commission's comments in this regard is as follows:

> Over forty states have laws or regulations which, like California's limit the maximum daily or weekly hours which women employees may work. What effect Congress intended Title VII to have upon such laws is not clear. An intent to alter drastically this pattern of state legislation should not lightly be presumed. However, the Commission believes that in fact these laws in many situations have an adverse effect on employment opportunities for women. To what extent this adverse effect is counterbalanced by the protective function which these laws serve this Commission is not presently in a position to judge. A choice between these two competing values could probably be avoided if these protective laws were amended to provide for greater flexibility, but the Commission cannot rewrite state laws according to its own views of the public interest.
>
> The Commission's functions in processing charges under Title VII are limited to investigation, determining whether there is reasonable cause to believe a violation has occurred, and conciliation. While we have a duty to interpret Title VII, we have no authority by such an interpretation to insulate employers against possible liability under state law, nor do we have authority to institute in the name of the Commission suits to challenge or restrain the enforcement of state laws.

[31] *Id.* at 401:1602

[32] *See, e.g.*, FEP REPORTER 401:3025.

mission is presently considering whether to indicate by rule or decision the extent, if any, to which State protective legislation is affected by Title VII."[33] Subsequently, public hearings were held on the subject, and written statements were received until June 2, 1967. Thus a new statement of position by the Commission in this area appears imminent.

It is difficult to predict what that statement will be.[34] Testimony at the recently completed hearings was diverse, with views being expressed for and against the preservation of state protective legislation by witnesses of both sexes representing union and non-union organizations.[35]

But even a new tack on the subject taken by the Commission may not be a conclusive resolution. The courts ultimately will pass judgment —through suits brought by individuals, or by the Commission if and when enforcement powers are received.[36] Therefore, in anticipation of one of these eventualities, it may prove useful to review the character of representative state protective laws and to examine the severity of their conflict with Title VII as well as to suggest possible means of resolving that conflict.[37]

III. Types of State Protective Laws and the Degree of Conflict with Title VII

As indicated earlier, the Commission has categorized state protective legislation as generally either designed to provide benefits to female employees, or intended to prevent women from engaging in

[33] 32 Fed. Reg. 5999 (1967).

[34] The testimony at the hearings dealt with, among other issues, the policy considerations behind the protective laws when they were enacted and subsequent changes which invalidated them. Transcript of Proceedings, GSA, EEOC (ACE — Federal Reporter, Inc., May 2, 1967). Preemption was only considered in passing by one or two of the witnesses. *See, e.g.,* remarks of Miss Neese, *id.* at 46-48, and those of Rep. Griffiths, *id.* at 234-35.

[35] 65 LAB. REL. REP. 20-22 (May 8, 1967). According to this report of the hearings, Stephen Schlossberg, General Counsel of the United Auto Workers, testified that all protective laws are detrimental to women and should be declared to have been superseded by Title VII. Witnesses for the National Organization of Women spoke in favor of eliminating state laws arbitrarily restraining hours of work, barring night work, and limiting weight-lifting. Mrs. Mary Callahan of the IUEW stated that a clean sweep of protective laws would not be desirable since the laws represent the only protection some women have. In accord was Mrs. Anderson Page, testifying for the National Federation of Settlements and Neighborhood Centers. Mrs. Katharine Ellickson of the National Consumers League asserted that to eliminate the protective laws, even selectively, would be "unreasonable and reckless" on the basis of present inadequate information. A commissioner of the Industrial Commission of Wisconsin urged a two-year moratorium during which thoughtful solutions could be worked out. Interestingly, Chairman Schulman asked Mr. Schlossberg his reaction to a position that state maximum hour legislation would be superseded only if the work were covered by the Fair Labor Standards Act. As noted by the BNA Report, this could be a clue to the Commission's thinking. Unfortunately, Mr. Schlossberg's testimony was not included in the official transcript of the hearings so that further enlightenment is unavailable.

[36] *See* note 20 *supra.*

[37] The effect of recent fair employment practice legislation at the state level which

hazardous occupations.[38] The chief types of statutes named by the Commission in the "benefit" category are those dealing with physical facilities, wages, and overtime or other compensation for women.[39] Beyond these types of statutes, however, the "benefit"-"hazard" dichotomy loses its clarity. For example, the Commission names rest periods as a benefit given to female employees by state laws, while limitations on hours of work are listed as being designed to protect women from hazard.[40] Yet the same statute which requires a rest period for women who must stand continuously may also require an employer to limit the hours his employee may work.[41] The point is, both of these requirements constitute "protective" legislation, protecting women from the hazard of exceeding alleged inbred physical limitations or from hazards imposed by external conditions of labor.[42]

In the discussion to follow, only one class of statutes will be encountered which is clearly in the "benefit" category — specifically, the legislation dealing with unemployment compensation payments afforded to female employees discharged because of pregnancy.[43] The remainder of the statutes to be mentioned were enacted for the purpose of protecting female employees from hazardous or strenuous working conditions.[44]

---

includes sex as a prohibited basis for discrimination will also be addressed briefly. *See* text at notes 110-19 *infra.*

[38] Text at note 23 *supra.*

[39] 29 C.F.R. § 1604.1(a)(3)(i) (1965) (guidelines on discrimination because of sex.)

[40] *Id.* §§ 1604.1(a)(3)(i),(ii).

[41] *See, e.g.,* WYO. STAT. ANN. § 27-218 (1957).

[42] It is another question whether the basis for the statute remains today truly protective, or whether the only justification for the statute is anachronistic notions of chivalry.

[43] No attempt will be made in this study to detail any problems which may be inherent in the existing requirements of equal pay for equal work without regard to sex. This topic is treated under federal wage and hour legislation and administration, to which Title VII of the Civil Rights Act expressly defers. Civil Rights Act of 1964 § 703(h). In addition, the examples to be given will be limited to statutes regulating the employment relationship. Colorado does have statutes which demand separate restroom facilities for male and female employees, and separate dressing room facilities under certain circumstances. COLO. REV. STAT. ANN. § 80-2-10 (1963). For purposes of this paper, the General Counsel's ruling that these classifications by sex do not pertain to employment status and thus are not offensive to Title VII will be accepted. *See* note 28 *supra.* However, one observation in this regard is interesting. It has been firmly established in the race relations field that separate but equal facilities are but a discreet form of unconstitutional discrimination. Brown v. Board of Educ., 347 U.S. 483 (1954). This conclusion would clearly cover separate restroom facilities for whites and Negroes. Yet it would smack of lunacy for a female to apply logic and argue under Title VII that the requirement imposed by state law of separate restroom facilities for males and females is also a discreet form of prohibited discrimination. The example is trite, but it does illustrate the fact that sex discrimination inevitably involves different considerations from other types of discrimination. Of course, one easy answer to examples of this type is the observation that such differences, although based upon sex, do not proceed upon an assumed inferiority of the female sex. This point was made by Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII,* 34 GEO. WASH. L. REV. 232, 240, 249-50 (1965).

[44] Statutes to be discussed will be taken from states constituting the Rocky Mountain region and surrounding area, emphasis being given to Colorado legislation.

A. *Seats for Female Employees*

Under Colorado law, employers must provide "suitable" seats for female employees for use by those employees "when they are not necessarily engaged in the active duties for which they are employed."[45] Similar statutes are quite common in other states.[46] Utah allows an employer some discretion in that instead of being limited to "seats," he is privileged to choose from among "chairs, stools or other contrivances."[47] New Mexico, on the other hand, requires the traditional "seat" and demands that employers post a conspicuous notice in letters at least one inch high that female employees may use the seats when not engaged in active duties of employment.[48] Arizona is perhaps the most demanding state on this subject, requiring employers to maintain at least two seats for every three female employees.[49]

It is evident that any conflict between these statutes and Title VII of the Civil Rights Act of 1964 is, or should be, insignificant. Theoretically a conflict could be posed in one of two ways: by an employer's refusing to hire a female employee because of the burden of obtaining the required seating, or by a charge of "reverse discrimination" by male employees for whom such seating is not provided. As to the first setting, it is clear that an employer would violate Title VII by refusing to hire a female due to the extra cost involved. The employer is not faced with the choice of violating either Title VII or state law; he can and must comply with both.[50] Concerning reverse discrimination, the complaining male employee would seem to be logically correct in urging that, in the language of Title VII, he has been "adversely affected" on account of sex by being deprived of seating facilities. Yet the possibility that a male employee would seriously urge this position and that he would be seriously opposed by his employer is virtually nil. Even if a showdown did occur on this point, the Commission would in all probability quickly dispose

[45] COLO. REV. STAT. ANN. § 80-2-13 (1963).

[46] *See, e.g.*, IDAHO CODE ANN. § 44-1108 (1948); MONT. REV. CODES ANN. § 41-1119 (1961); NEB. REV. STAT. § 48-201 (1960); WYO. STAT. ANN. § 27-219 (1957).

[47] UTAH CODE ANN. § 34-4-2 (1953).

[48] N.M. STAT. ANN. § 59-5-10 (1953).

[49] ARIZ. REV. STAT. ANN. § 23-261 (1956). This Arizona statute and other Arizona protective legislation will be discussed as if binding on employers. It is important to note in this connection, however, that the Arizona Civil Rights Commission has ruled that whenever a conflict occurs between the Arizona Civil Rights Act ban on sex discrimination and the state law regulating hours of work, the Civil Rights Act controls. Reynolds v. Mountain States Tel. & Tel. Co., No. 17-12E (Ariz., Dec. 2, 1966), *reported at* BNA, FEP Summary of Latest Developments, No. 48 (Dec. 22, 1966). However, the Arizona Civil Rights Commission has enforcement powers only as to first offenses by employers, and the views of the state's judiciary on this subject have yet to be formulated.

[50] The General Counsel of the Commission has made an express ruling to this effect regarding state minimum wage laws. *See* note 28 *supra*.

of the matter through any administrative exception existing in the state law, or by suggesting that the employer comply with the male employee's request for equal seating "rights." In an analogous case, dealing with an employer's policy, rather than a state statute, which allowed fifteen minute breaks for women twice a day, but none for men, the General Counsel of the Commission stated that the policy violated Title VII.[51]

B. *Hours of Work*

Perhaps the most extensive and most common type of state protective legislation regulating the employment of women involves limitations on hours of employment. These statutes fall into three classes: absolute limitations on hours of work, limitations qualified as to types of work covered and as to emergencies, and limitations only in the sense of requiring time and one-half compensation for hours worked in excess of a certain number. The Colorado legislation on this subject falls into the middle class. Employment of women in "laundries, hotels, and restaurants, and in any and all manufacturing, mechanical, and mercantile establishments," other than in clerical capacities, is declared to be "injurious to health and dangerous to life and limb."[52] Thus women are not allowed to work in such employment for more than eight hours per day except in cases of "emergencies or conditions demanding immediate action."[53]

Also in the middle class of state statutes limiting hours of work is the New Mexico provision. Females may not work more than eight hours per day in any "industrial or mercantile establishment, hotel, restaurant, cafe or eating house; or in any laundry, or in any office as a stenographer, clerk, bookkeeper or in any other clerical position; or in any place of amusement; or in any telephone or telegraph office . . . ."[54] This statute is considerably broader as to the types of

---

[51] Op. Ltr. Gen. Counsel (Mar. 10, 1966), L.R.X. 1883.

[52] COLO. REV. STAT. ANN. § 80-14-9 (1963).

[53] COLO. REV. STAT. ANN. §§ 80-14-9,-10 (1963). It is interesting to note that in another provision dealing with minimum wages for women, the Colorado legislature declared that it is unlawful to employ women under "conditions of labor detrimental to their health or morals." COLO. REV. STAT. ANN. § 80-7-3 (1963). If this provision were to be taken literally, the conclusion would follow that employment under the eight-hour day law which is "declared to be injurious to health" does not involve "conditions of labor detrimental to health," since the legislature would not have condoned employment (limited to eight hours per day) which it had earlier declared to be unlawful. Such a result is so finespun that it becomes absurd. Thus the only conclusion possible is that the legislature did not intend that provisions of the minimum wage law be read with those of the eight-hour day law to yield any deductive results whatsoever.

[54] N.M. STAT. ANN. § 59-5-1 (1953). Hours of work of females in telephone and telegraph offices with more than five employees are further regulated by N.M. STAT. ANN. § 59-5-6 (1953). Also, women employees in the field of transportation apparently may work nine hours per day by virtue of N.M. STAT. ANN. § 59-5-13 (1953). *See* [1943-1944] N.M. ATTY'S GEN. OP. 4388.

employees covered than is the Colorado legislation. Nevertheless, the New Mexico statute does allow work by females in excess of eight hours per day in "emergency cases," not to exceed a total of 50 hours per week and provided overtime is paid for time worked above 48 hours per week.[55]

In Utah and Arizona, laws regulating hours of work of female employees are similar in their structure to those of Colorado and New Mexico. Utah places the eight-hour limitation on all employment of females in "any industry, trade or occupation except in domestic service and executive positions," exempting certain employment in agriculture and the perishable fruit industry.[56] The emergency exception in Utah is rather liberal, allowing the Industrial Commission to permit extra work in cases of an "emergency or peak period in the business of an employer."[57] This provision would appear to allow employment of females for more than eight hours over an extended length of time during the employer's busiest period. Such license is not available under Arizona law. That state's provisions in this area prohibit employment of females other than in domestic work for more than eight hours per day or 48 hours per week (42 hours per week on the basis of a six-hour day).[58] These requirements are not applicable to certain categories of employees such as nurses, and agricultural, perishable fruit, managerial and professional employees.[59] The only exception available to manufacturing and industrial female employees is "to meet an emergency or extraordinary need occurring occasionally and not as a regular practice," and even then an absolute cutoff exists at ten hours per day and 48 hours per week.[60]

More stringent than any of the statutes regulating hours of work which have been discussed thus far are those of Nebraska and Montana. The pertinent statutes of both of these states constitute an absolute limitation on hours of work for female employees with no administrative exceptions available for emergencies or otherwise. In Nebraska, the ceiling is nine hours per day and 54 hours per week

---

[55] N.M. STAT. ANN. § 59-5-7 (1953). Provisions for emergency work exist in the statutes dealing with telephone, telegraph and transportation employment, although curiously the telephone and telegraph exception is limited to "extreme emergencies that could not have been reasonably contemplated." N.M. STAT. ANN. §§ 59-5-6,-13 (1953).

[56] UTAH CODE ANN. § 34-4-3 (1953).

[57] *Id.*

[58] ARIZ. REV. STAT. ANN. §§ 23-281 A, B1 (1956). Recall, however that this statute is subordinate to the state civil rights law according to the Arizona Civil Rights Commission. *See* note 49 *supra.*

[59] ARIZ. REV. STAT. ANN. §§ 23-281 B2-B6 (1956).

[60] ARIZ. REV. STAT. ANN. § 23-281 B7 (1956).

for females employed in virtually all types of employment.[61] The Montana limitation is eight hours per day in most commercial types of employment, although no limitation other than the daily limit appears to exist as to the hourly work week.[62]

At the other end of the spectrum in regulating hours of work are the laws of Idaho and Wyoming. Both of these states merely require that if employment of females in the commercial establishments named exceeds eight hours per day or 48 hours per week, time and one-half shall be paid for the excess time worked.[63] Wyoming does retain a requirement that female employees who are required to be on their feet continuously be afforded two rest periods of 15 minutes each, one in the morning and one in the afternoon.[64]

The above statutes are representative of state legislation dealing with hours of work of female employees, but even among the statutes discussed, wide variations exist. The fact that these variations do exist as to both the type of business covered and the nature of the limitations imposed presents serious difficulties in terms of the administration of the sex discrimination ban of Title VII. In Nebraska and Montana, an employer filling a job which legitimately demands long hours simply cannot use female help without contravening state law. Since no administrative exceptions are available, the Commission is at once at the stage where it will merely advise a complaining female of her right to sue in the federal courts, but will not itself challenge the state law. In contrast, it is clear that an employer in Idaho or Wyoming could not decline to hire a female applicant because of the added cost which might attend required overtime payments.[65] Between these two extremes are the states requiring eight-hour days except in cases of emergencies. Under these laws, an employer would have to ascertain whether or not an administrative exception for

---

[61] NEB. REV. STAT. § 48-203 (1960). The statute applies "(a) in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, restaurant, or office in any metropolitan, primary, or first-class city in this state or (b) for any employer of twenty-five or more people within this state."

[62] MONT. REV. CODES ANN. § 41-1118 (1961), covering "any manufacturing, mechanical, or mercantile establishment, telephone exchange room, or office, or telegraph office, laundry, hotel, or restaurant."

[63] IDAHO CODE ANN. § 44-1107 (1948); WYO. STAT. ANN. § 27-218 A (1959) (Supp. 1965), *amending* § 27-218 (1957). The Idaho statute covers employment by "any mechanical or mercantile establishment, laundry, hotel, or restaurant, or telephone or telegraph establishment, or office or by any express or transportation company." The Wyoming coverage extends to "any manufacturing, mechanical, or mercantile establishment, laundry, hotel, public lodging house, apartment house, place of amusement, or restaurant."

[64] WYO. STAT. ANN. § 27-218 B (1959), *amending* § 27-218 (1957). This provision would be open to a challenge of "reverse discrimination" by a male employee.

[65] *See* notes 28, 50 *supra*. In addition, to the extent employment is covered by both the state laws in question and by the Fair Labor Standards Act, the federal overtime requirements are more exacting than are the requirements of any of the state statutes discussed. Fair Labor Standards Act of 1938, *as amended*, 29 U.S.C. §§ 201-19 (1966).

emergencies, or for peak periods in the case of Utah, would be available to him so that a female could fill the particular job satisfactorily. However, since most of the exceptions address unanticipated emergencies, it is probable that the female applicant for a job requiring long hours would be told by the Commission at the present time to resort to the courts in these states as well.

As to types of work, a clerical job necessitating considerable overtime could be filled by a female in Colorado, but could not be in New Mexico. Numerous other types of work which would be covered under the limitations on hours of employment in one state and not in another are apparent from the earlier discussion of the various states' legislation.

Thus not infrequently a woman's chances for obtaining a commercial job which demands long hours will depend on the fortuity of her place of residence. At least this is true to the extent the state legislation being discussed is enforced or respected by employers.[66] What Congress would have done about this problem under Title VII had it given the matter serious consideration is unknown. The Commission initially attempted to achieve a rough resolution of this question in its formulation which allowed only those statutes which in fact protect women from exploitation or hazard to be excepted from the Title VII sex discrimination ban. Since the Commission's present official position is to avoid the issue, the problem is now reserved for the courts, unless new rules result from the recent Commission hearings.

C. *Hazardous Occupations*

1. Mines and Mining

In Colorado, an express legislative declaration exists in the safety regulations article of the provisions relating to coal mines that "no females shall be employed in or about the coal mines, or beehive coke ovens, except in an office or clerical capacity."[67] Such a provision is not found in the statutes which govern other types of mining. However, under the "safety regulations" section of the general mining statutes, it is stated that "the commissioner of mines shall have the power to make such rules and regulations as may be necessary for the carrying out of the provisions of this article and such rules and regulations shall be enforceable in the same manner as the provisions

[66] The Arizona experience (note 49 *supra*) indicates that states may resolve these matters of their own accord. But the mere existence of sex as a prohibited ground for discrimination in a state fair employment practices law will not necessarily achieve such a result, as is indicated in text accompanying note 113 *infra*.

[67] COLO. REV. STAT. ANN. § 92-10-2 (1963).

of said statutes."[68] Citing the authority just quoted, the Commissioner of Mines has issued the following regulations:

1. No girl or woman shall be permitted at any time to work underground, nor shall they be permitted to work in mills, excavations, mines or quarries, as defined in Section 3, or at any other work which would be hazardous or harmful to them.
2. Women may be employed in mills in the operation of jigs, tables, flotation cells, dryers or filters, or at any sorting or picking belts and tables, provided that such employment does not require them to stand constantly.
3. No women shall be permitted to do any work which will be detrimental to their health. Working in offices shall not be considered detrimental.[69]

Other states are equally explicit as to the employment of women in mining operations. In Arizona, a statute exists stating bluntly that "[f]emales shall not be employed or allowed to work in or about a mine, quarry or coal breaker . . . ."[70] Similarly, in Utah, it is declared to be unlawful to employ any female "to work in any mine or smelter in this state."[71] On first glance, the Utah provision would seem to allow the employment of females in surface jobs such as in milling operations. However, the provision has been amended in cases of wartime emergencies to waive the ban, permitting females to work at mines "in other than underground work."[72] Thus, by inference, the basic prohibition must be taken to include employment of women in surface mining operations.

Until 1959, Wyoming law contained a provision prohibiting the employment of women "in or about any coal, iron or other dangerous mine, or underground work or dangerous place whatsoever in this state."[73] This statute was repealed in 1959 along with certain other provisions pertaining to child labor.[74] However, the constitutional provision, of which the statute on employment in mines was virtually a replica, remains in full force.[75]

That the employment of females was not contemplated by mining legislation of other states is evident by implication. For example, the statutes of Idaho which regulate hours of work in mines, smelters, mills and the like, expressly speak of the period of employment of "workingmen."[76] The same is true of Montana statutes regulating

---

[68] COLO. REV. STAT. ANN. § 92-33-28 (1963).

[69] COLORADO BUREAU OF MINES, BULL. NO. 19, RULES AND REGULATIONS § 54 (Jan. 1, 1962).

[70] ARIZ. REV. STAT. ANN. § 23-261 A (1956).

[71] UTAH CODE ANN. § 34-4-1 (1953).

[72] Utah Laws 1943, ch. 58, § 1; Utah Laws 1945, ch. 78, § 1; Utah Laws 1951, ch. 59, § 1.

[73] WYO. STAT. ANN. § 27-237 (1957).

[74] Wyo. Sess. Laws 1959, ch. 100, § 1.

[75] WYO. CONST. art. 9, § 3.

[76] IDAHO CODE ANN. §§ 44-1104,-1105 (1948).

hours of work in mines, mills and smelters.[77] Also, in Montana a requirement exists that coal mine owners furnish a single wash house "for the use of persons employed in such mine, for the purpose of washing themselves and changing their clothes."[78] Obviously this provision assumes the existence of male employees only. A like assumption clearly underlies the provision detailing the maintenance of "a checking system of *the employees*" since the provision is captioned "Checking *men* in and out of mines and the rights of *men* to come out of mines."[79]

Significant questions are presented as to the potential conflict of these mining statutes and regulations with Title VII. In jurisdictions such as Arizona, Utah and Wyoming, where the prohibition on the employment of women in mining is absolute and unequivocal, the problem is the standard one created by clear-cut opposition of state laws to Title VII — a problem in limbo at the moment under the views of the Equal Employment Opportunity Commission.

In Colorado, however, the express prohibition on employment of females in mining (other than coal mines) is derived from administrative regulations rather than from the legislature. The question raised is whether or not such administrative regulations, which are given the status of law in the eyes of the state, are to be given that same status in the contemplation of Title VII.[80]

A related question is posed by those state statutes which implicitly contemplate employment of only males in mining operations, but which have no express declaration by the legislature or through administrative regulations to that effect. In this case the position is open to the Commission that no clear conflict between Title VII and state law exists, so that a female cannot be denied mining employment in such states if otherwise qualified.[81]

2. Bartending and Miscellany

Both of the states mentioned earlier as possessing the most liberal statutes regarding hours of work of women employees, Idaho and Wyoming, maintain statutes prohibiting women from perform-

[77] MONT. REV. CODES ANN. §§ 41-1107,-1108 (1961).

[78] MONT. REV. CODES ANN. § 50-435 (1961).

[79] MONT. REV. CODES ANN. § 50-519 (1961) (emphasis added).

[80] *See* discussion at note 119 *infra.*

[81] This view might be especially attractive to the Commission since no problem is presented as to whether or not state statutes have been preempted. It might be argued that legislative inferences as clear as those mentioned should be binding on federal and state administrative bodies alike. In this connection, one Colorado experience is noteworthy. The Colorado legislature expressly declared employment in stamp mills and concentrating mills to be injurious to health, and on that basis limited the employment of *men* working in such capacities to an eight-hour day. COLO. REV. STAT. ANN. §§ 80-14-1,-2 (1963). The clear inference is that employment of women in the mills was not intended. Nevertheless, this inference did not deter the Bureau of Mines from ruling that women may engage in certain employment in mills generally. BULL. No. 19, § 54.2, quoted in text accompanying note 69 *supra.*

ing the job of bartender. Wyoming law expressly states that "no female shall be employed as a bartender in a room holding a retail liquor license."[82] Idaho statutes approach the matter in reverse, stating that bartenders in licensed premises must have permits, and one requirement for obtaining a permit is that the applicant be male.[83]

The chief difficulty with these statutes under Title VII is the problem of obsolescence. Probably the bartending provisions originally did stem from protective intentions toward women. No doubt bars were less decorous places at the time of the origin of these statutory restrictions than is the case now, but it may be questioned whether the protective motivation behind such provisions still has vitality. It is not known that the existence of women bartenders in states without such restrictions has been unmanageable or harmful regarding the women in question.[84]

Another type of statute regulating female employment which will be troublesome under Title VII because of its obsolescence is the occasional provision dealing with jobs performed while standing. Arizona law continues to forbid the employment of women "in any capacity where the employment compels them to remain standing constantly."[85] In addition, as noted earlier, the Colorado Bureau of Mines has forbidden the employment of women in mills in any job requiring them "to stand constantly."[86] It is difficult to imagine that either of these flat prohibitions is seriously enforced. Yet they remain in existence, and to the extent they are enforced or complied with by employers, the effectiveness of Title VII is lessened.

D. *Benefits for Unemployment due to Pregnancy*

Occasionally the unemployment compensation statutes of a particular state will contain special provisions dealing with a loss of job by a female employee because of pregnancy. These statutes are pertinent to a discussion of Title VII only to the extent that distinctions based on pregnancy can be treated as distinctions based on sex. The Commission has ruled that pregnancy is a special condition attending the female sex which must be given special consideration, notwithstanding the absence of any possible test of equality with male employees.[87]

---

[82] WYO. STAT. ANN. § 12-20 (1957).

[83] IDAHO CODE ANN. § 23-922 (1948).

[84] Nevertheless, the Idaho statute has been held constitutional by the Idaho Supreme Court as recently as 1957. State v. Burke, 79 Idaho 205, 206, 312 P.2d 806, 807 (1957). That court relied entirely in its decision on the United States Supreme Court decision in Goesaert v. Cleary, 335 U.S. 464 (1948). These cases are discussed in more detail at text accompanying notes 141-42 *infra.*

[85] ARIZ. REV. STAT. ANN. § 23-261 A (1956).

[86] BULL. NO. 19, *supra* note 69.

[87] Op. Gen. Counsel (Aug. 17, 1966), FEP REPORTER 401:3017.

On first glance, it seems hard to deny that a discharge for pregnancy is "discrimination" on the basis of sex. But even though some jobs simply cannot be handled by a woman in the advanced stages of pregnancy, that woman could be replaced by a nonpregnant female or by a male. The possibility of replacing the pregnant employee with a nonpregnant female indicates that discrimination in the sense addressed by Title VII has not occurred by the discharge. Thus, it could be said that the employer "discriminated" against his employee only because she was pregnant; that she was female was merely coincidental. Suppose, for example, that a male employee needed a leave of absence in order to effectuate an adoption. In such a case, he, too, could be discharged by an employer not because he was male but because of the disruptive effect of his action on his employer's business.[88] However, since the Commission has included the subject of pregnancy within the scope of Title VII, it will be considered briefly.

Certain unemployment compensation statutes address only the situation in which a female employee has left her employment voluntarily because of pregnancy, in which case unemployment compensation benefits are denied.[89] Even if the statute denies benefits in the case of *involuntary* terminations, as does the Utah statute, the sex discrimination ban does not apply. This type of statute does not pertain to an employer-employee relationship,[90] and the sex discrimination ban does not have anything to say about action taken on the basis of sex by persons other than employers, employment agencies and labor unions.[91]

Nevertheless, these statutes do treat special conditions created because of sex, and thus the validity of this legislation may come into question in the context of preemption if such legislation is considered to be inconsistent with Title VII. The problem of preemption will be addressed below, but it is first necessary to examine whether any such inconsistencies exist.

Just as no problems are presented by the statutes allowing benefits for voluntary terminations, none appear in the Montana-type provision which denies benefits to female employees discharged for pregnancy only if those employees fail to present evidence of ability to work.[92] In the Montana example, the decision as to whether or

---

[88] *See* in this connection Murray & Eastwood, *supra* note 43, at 239.

[89] *See, e.g.,* IDAHO CODE ANN. § 72-1366(d) (1948); NEB. REV. STAT. § 48-627(c) (1960). The Utah statute denies compensation benefits without regard to whether or not the termination of employment was voluntary or involuntary. UTAH CODE ANN. § 35-4-5(h) (1953).

[90] *Cf.* note 28 ***supra.***

[91] Civil Rights Act of 1964 § 703.

[92] MONT. REV. CODES ANN. § 87-106(i) (1961).

not to provide benefits has been removed from considerations of sex to the full extent possible under the circumstances.

The Colorado statute provides that female employees who voluntarily terminate employment because of pregnancy are not entitled to benefits; however, a pregnant employee who is involuntarily separated from a job may be entitled to receive unemployment compensation.[93] Specifically, compensation is recoverable unless the involuntary termination took place "according to the provisions of a reasonable rule of the employer providing for the separation of pregnant workers."[94] This latter condition is to a large degree inconsistent with the sex discrimination provision of Title VII, as interpreted by the Equal Employment Opportunity Commission's holding that, in general, an employer may not maintain a rule discharging female employees because of pregnancy without alternatively offering them a leave of absence.[95] For employers, this means that there can seldom, if ever, be "reasonable rules" providing for the separation of pregnant workers. The Colorado provision on this point is thus inconsistent if the state takes a view different from that of the Commission as to the reasonableness of such employer rules; otherwise, the provision is rendered essentially moot.[96]

IV. CONSIDERATION OF THE INITIAL COMMISSION TEST AS APPLIED TO THE VARIOUS TYPES OF STATE PROTECTIVE LAWS

Should the Commission be given enforcement powers, it is reasonable to assume that judicial decisions in the state protective law

---

[93] COLO. REV. STAT. ANN. §§ 82-4-8(f)(ii), (iii) (1963).

[94] COLO. REV. STAT. ANN. § 82-4-8(f)(ii) (1963).

[95] Op. Gen. Counsel (Aug. 17, 1966), FEP REPORTER 401:3017. The possibility that a female may become pregnant during her employment would not seem sufficient to label sex as a bona fide occupational qualification at the hiring stage for jobs which would be disrupted by leaves of absence. When a female employee becomes pregnant, however, may it be concluded that sex suddenly becomes a bona fide occupational qualification? An affirmative answer to that question appears, again on first glance, to be impossible, since the bona fide occupational qualification exception refers to hiring and not to discharging employees.

A more likely resolution of the matter is the possibility that the omission of discharges from the bona fide occupational qualification exception was a Congressional oversight. Oversights will occur; for example, it has been noted that the omission of national origin from the bona fide occupational qualification exception was probably inadvertent. BNA, THE CIVIL RIGHTS ACT OF 1964, at 37 (1964). Thus the existing language might be read expansively to cover the case of discharges.

[96] A similar situation was presented to the General Counsel pertaining to a provision of a state's unemployment compensation laws which permitted, but did not require, an employer to terminate female workers who married. Because of the permissive nature of the statute, the employer was not faced with the choice of complying with either state law or Title VII, and thus it was ruled that the employer must comply with Title VII and must not maintain a rule of termination for female employees who marry without having a similar rule for male employees. The aspect of the law permitting discriminatory treatment of females was thus eliminated for practical purposes. Op. Gen. Counsel (Aug. 5, 1966), FEP REPORTER 401:3013-14.

area will be prompted. The Commission has already reopened the subject by virtue of its recent public hearings.[97] In this connection, the Commission may refurbish its old views as to what state protective laws it will respect, or, more likely, it may take a completely fresh approach to the matter.

Even with enforcement powers, the Commission's latitude in dealing with state protective laws will ultimately be determined by the extent of the applicability of the preemption doctrine under the Civil Rights Act.[98] However, addressing for the moment the Commission's approach to state protective laws instead of the jurisdictional scope of Title VII, a few observations may be made.

The Commission has taken two separate approaches in handling alleged unlawful employment practices under the sex discrimination prohibition of Title VII. On the one hand, the Commission has severely limited the possibility of discrimination based on sex if pursuant to employer policies. Any employment practices based on "assumptions of the comparative employment characteristics of women in general" or on "stereotyped characteristics of the sexes" are invalid.[99] In the area of employment policies, employers are being forced to decide to hire on the basis of an individual's qualifications. On the other hand, the Commission has proceeded slowly in challenging state protective laws which may discriminate.[100]

State protective laws are no different in principle from the employer rules which have been condemned by the Commission. They invariably proceed upon the basis of a "stereotyped characterization" of the sexes to the effect that women by their nature must be afforded protection which it is unnecessary to extend to men.[101]

It is true that the Commission's initial position was merely that state laws constitute a "bona fide occupational qualification" exception to the sex discrimination ban if they in fact protect women from

---

[97] *See* text accompanying notes 33-35 *supra.*

[98] *See* text accompanying notes 127-29 *infra.*

[99] 29 C.F.R. §§ 1604.1(a)(1)(i),(ii) (1965) (guidelines on discrimination because of sex).

[100] *See* notes 22-32 *supra,* and accompanying text. *See,* in particular, comments by Miss Cunningham, Transcript, *supra* note 34, at 308-11.

[101] The Colorado legislature has admitted as much by affirmative declaration. In COLO. REV. STAT. ANN. § 80-7-1 (1963), it is stated:

> The welfare of the State of Colorado demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals, and it is therefore hereby declared, in the exercise of the police and sovereign power of the State of Colorado, that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

The Arizona Civil Rights Commission has expressly concluded that Arizona protective legislation "was based on the assumption that women were inferior to men and in need of special protection." Reynolds v. Mountain States Tel. & Tel. Co., No. 17-12E (Ariz., Dec. 2, 1966), *reported at* BNA, FEP Summary of Latest Developments, No. 48 (Dec. 22, 1966).

exploitation or hazard.[102] Yet it is clear that in most cases the Commission would not allow such rules which are excepted from the Act when in the form of state laws to be excepted if in the form of rules held and applied by employers. To cite a case in point: the General Counsel of the Commission has held that a union contract embodying a blanket prohibition against women working as bartenders is violative of Title VII, *unless* a state statute contains such a prohibition.[103] The Commission did not rule on the validity of such statutes, but under the Commission's original test, state bartending restrictions such as those mentioned earlier in this paper might have been upheld as in fact protecting women from hazard, and perhaps from exploitation.[104]

In short, to say that state-declared stereotyped characterizations of the sexes can be bona fide occupational qualifications is, more often than not, to be unfaithful to the Commission's basic philosophy under Title VII — that such rules if privately declared are invalid. Whether or not the Commission's views ultimately will be accepted by the courts, it does seem important that the Commission be consistent in giving content to the "bona fide occupational qualification" exception.[105]

It is suggested that the Commission should not hesitate to state its views on rules pertaining to the employment status of women, whether those rules derive from employers or from state legislatures.

---

[102] *See* text accompanying notes 22-25 *supra.*

[103] Op. Gen. Counsel (July 21, 1966), FEP REPORTER 401:3009-10.

[104] Even so, no social unhappiness or molestation of women appears to have occurred in states such as Colorado where the use of female bartenders is frequent. *See,* in this regard, comments at note 84 *supra* and accompanying text. This fact illustrates the chief difficulty with the sex discrimination ban of Title VII — the law attempts to change some existing social mores while retaining others, with the dividing line being extremely unclear. For example, the use of female washroom attendants has been known for years on the European Continent, but it is certain that under Title VII sex would be considered a bona fide occupational qualification justifying the denial of employment to a female applying for the job of an attendant in a male restroom in the United States. In this connection, the Commission has the task of defining what the dividing line shall be under Title VII by giving content to the phrase "bona fide occupational qualification." The Commission could start with the proposition that there are virtually no types of legal employment where "built-in" sex requirements exist, although certain occupations would be limited to one sex due to the need for maintaining social order. For example, females could not be used as guards in male penitentiaries. However, the Commission clearly will not adopt this extreme a view, as illustrated by the washroom example given earlier. Nevertheless, the resultant subjective nature of the "bona fide occupational qualification" exception makes it important for the Commission to be cautious and consistent in giving content to that exception.

[105] In addition to the need for consistency when dealing with a subjective standard, discussed in note 104 *supra,* it is significant that state fair employment practice laws generally adopt the "bona fide occupational qualification" phrase as an exception to prohibited sex discrimination. Of the five states with sex discrimination bans in their fair employment practice laws cited at note 112 *infra,* all but Wyoming utilize the "bona fide occupational qualification" phrase. Undoubtedly the development of the meaning of the identical phrase in the federal law will be influential on the content given to the exception in state usage.

Only in this manner will the Commission be able to develop a workable approach as to when sex does and when it does not constitute a bona fide occupational qualification.[106] Then, any differences between employer rules and state rules would be placed in their proper context — that of the intended jurisdictional scope of Title VII. The Commission would have power to supersede state rules which are considered offensive to Title VII to the extent that such state rules are declared by the courts to have been preempted by the federal law.[107]

V. Judicial Views and Preemption

It is natural for an administrative body charged with enforcement of a statute to seek to enforce and apply that statute as broadly as possible. It is not surprising that the Equal Employment Opportunity Commission has followed this approach regarding the sex discrimination ban of Title VII. At the same time, it is expected that the courts should and will provide a check on overenthusiastic administrative positions. This check will be provided by the courts in the case of sex discrimination. Since the "bona fide occupational qualification" exception will necessarily be given content to a large degree on a subjective basis,[108] the restraint may be exercised by the courts according to their views as to what is socially necessary in the way of eliminating sex discrimination. And, given the meager legislative history on the provision, this view may at the same time be rationalized as that which Congress "intended."

Nevertheless, the development just anticipated probably will not take place as to the sex discrimination provision of Title VII to the extent that it conflicts with state protective laws. The freedom of

[106] To be consistent with Commission views on "stereotyped characterizations," it is probable that all of the state protective laws regulating hours of work of women and regulating the ability of women to work in hazardous occupations would not be allowed to constitute "bona fide occupational qualification" exceptions. This result is the position which has been urged recently in the Commission hearings by Mr. Stephen Schlossberg, General Counsel of the United Auto Workers. 65 LAB. REL. REP. 20-21 (May 8, 1967). However, Mr. Schlossberg viewed the law as being clear that all state protective laws which conflict with the federal law are superseded by Title VII. It is suggested that an examination of § 708 of the Civil Rights Act of 1964 is necessary before any conclusion as to the clarity of the law on this point can be reached, and that upon such examination, the clarity discerned by Mr. Schlossberg is not apparent. *See* discussion accompanying notes 127-29 *infra.*

[107] The Commission has already stated that it has no power to insulate employers against liability for violations of state laws. *See* note 30 *supra.* For this reason, the Commission has refrained from instructing employers to disregard the state protective laws. Under the approach being suggested here, the Commission would still refrain from instructing employers to violate state laws which are not considered preempted by Title VII. However, it is not thought inconsistent for the Commission to state that sex is not a bona fide occupational qualification with regard to a particular statute just as it would not be with regard to a similar employer's rule, even though the Commission may not be in a position to instruct an employer to disregard the statute if that statute has not been preempted.

[108] *See* note 104 *supra.*

the courts to act on such laws will be shaped by preemption considerations, a subject on which Congress has spoken. Section 708 of Title VII reads as follows:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.[109]

This statute must be considered not only in the context of state protective laws, but also with regard to state unemployment compensation and fair employment practice laws.

A. *State Fair Employment Practice Laws*

Even though little illumination is shed by the congressional floor debate on the sex discrimination provision of Title VII, one matter is clear: Congress did not intend to supersede state antidiscrimination statutes. This view is apparent not only from the legislative record, but also from the language previously quoted from section 708.[110] In addition, it has been established through another provision of Title VII and through amplification by the Commission that the Commission will defer for a statutory period of time to state agencies enforcing state fair employment practice laws before federal conciliatory or investigatory action will be taken.[111]

Of the states which have been examined in this paper, five possess antidiscrimination statutes which include sex as a prohibited

---

[109] Civil Rights Act of 1964 § 708. Section 1104 of the same act contains a miscellaneous preemption provision:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Presumably the latter provision adds nothing new, when considered in conjunction with § 708.

[110] *See* remarks of Senator Humphrey, 110 CONG. REC. 12721 (1964). *See also* Purdy, *Title VII: Relationship and Effect on State Action*, 7 B.C. IND. & COM. L. REV. 525 (1966).

[111] Civil Rights Act of 1964 § 706. That the deferral is a rather limited one is evidenced by the following remarks of Senator Humphrey:

> Section 706(b) provides that in a State with a nondiscrimination law the individual must first follow state procedures for 60 days (or in some cases, 120 days). However, to avoid the possible imposition of onerous state requirements for initiating a proceeding, subsection (b) provides that to comply with the requirement of prior resort to the state agency, an individual need merely send a written statement of the facts to the state agency by registered mail. 110 CONG. REC. 12723 (1964).

For a general discussion of this section, see Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846 (1966).

ground.[112] Of these, only three have been accepted by the Commission as possessing sufficiently effective enforcement procedures for the Commission to follow Title VII's procedure for deferral to the state enforcement agency.[113]

While no preemption problem is generally presented as to these statutes since they do not "purport" to allow unlawful employment practices, this is not absolutely clear in two instances. The Nebraska statute contains a provision to the effect that its antidiscrimination statute is not intended to repeal "any of the provisions of the civil rights law, any other law of this state, or any municipal ordinance relating to discrimination because of race, creed, color, religion, sex, or national origin."[114] The intended scope of this provision is unclear; certainly it could be said that the Nebraska legislation discussed earlier which regulates the employment of women "relates to" discrimination because of sex, and thus is left untouched by the state fair employment practice law. If this be true, it could be argued that the Nebraska saving provision "purports" to permit acts which would be an unlawful employment practice under Title VII. This conclusion is somewhat circular in that acts complying with state law will constitute unlawful employment practices only to the extent the state protective laws are preempted. However, assuming that some of Nebraska's state protective legislation would be preempted, then to that extent the state's antidiscrimination law would also be ousted.

However, the saving provision of the Nebraska antidiscrimination statute need not be read as broadly as above. The phrase "relating to" could, and probably should, be read to refer to other state statutes in existence which tend to promote elimination of the previously named categories of discrimination.

Greater difficulty on the preemption subject exists with the Utah fair employment practice act. That law states that it is an unfair employment practice for an employer to discriminate against any person otherwise qualified because of sex, among other grounds.[115] However, the statute also states that "otherwise qualified" means "possessing the education, training, ability, moral character, integrity, disposal to work, adherence to reasonable rules and regulations, and

[112] ARIZ. REV. STAT. ANN. §§ 41-1401 to -1485 (Supp. 1966); Idaho Laws 1961, ch. 309, *as amended,* H.B. 34, L. 1967 (FEP REPORTER 451:725); Neb. Laws 1965, L.B. 656, *as amended,* L. 1967, L.B. 357 (FEP REPORTER 451:725); UTAH CODE ANN. §§ 34-17-1 to -8 (1966); WYO. STAT. ANN. §§ 27-257 to -264 (Supp. 1965). Of these statutes, those of Arizona, Nebraska and Utah appear to have been patterned directly after Title VII.

[113] FEP REPORTER 401:1022-23. The three states accepted by the Commission for deferral purposes are Nebraska, Wyoming and Utah. For a policy guide on deferral, see FEP REPORTER 451:1-4, 8, 10.

[114] Nebraska Fair Employment Practices Act § 24, FEP REPORTER 451:733.

[115] UTAH CODE ANN. § 34-17-6 (1966).

other qualifications required by an employer for any particular job."[116] This added definition is sufficiently broad and subjective to permit a conclusion that the statute "purports" to permit acts which would be unlawful employment practices under Title VII of the federal statute. The "otherwise qualified" definition does appear to enervate significantly the Utah statute.

Magnifying the difficulty with the Utah statute is the existence of certain administrative regulations. In those regulations it is said that consideration can be given to sex as a "bona fide occupational qualification" in terms of job performance, community standards of morality or propriety, or in fulfilling the provisions of other statutes, citing the Utah statute which prohibits the employment of women in mines and smelters.[117] The factor of community standards of morality or propriety would again seem to allow a wide range of subjective judgments that may or may not be based on discriminatory attitudes. Also, the reference to other statutes indicates rather clearly that at least as to the statute dealing with mines and minerals, sex is a bona fide occupational qualification by administrative declaration. Such a conclusion can stand only if the state statute referred to in the regulation itself remains valid under Title VII.[118] Since no other example is cited by the regulation, whether or not sex is a bona fide occupational qualification as to the other state protective laws existing in Utah can only be treated on a case by case basis.[119]

B. *Unemployment Compensation Legislation*

In general, state unemployment compensation statutes which provide benefits for female employees terminated from their employment because of pregnancy do not conflict with Title VII to any significant degree.[120] If those statutes which *deny* benefits to pregnant females were to be translated into employer rules denying severance pay in such situations, it is probable that these rules would

[116] *Id.*

[117] FEP REPORTER 451:1158a.

[118] *See* note 130 *infra.*

[119] A similar problem is presented by the Wyoming Fair Employment Practices Act. The state attorney general has declared that the Fair Employment Practices Act does not conflict with the provision of the Alcoholic Beverages Act which prohibits the employment of females as bartenders (*see* note 82 *supra*). WYO. ATT'Y GEN. OP. No. 11541 (Sept. 14, 1965). A further difficulty is presented in the Wyoming and Utah situations, in that it is not inevitable that administrative regulations constitute state "law" for purposes of federal preemption under § 708. If so, as would seem to be the most sensible result, the fact that such regulations might be preempted should not have any effect on the validity of the basic fair employment practices statutes. This conclusion should be equally applicable to administrative regulations amplifying or underlying state protective legislation, such as the Colorado mining regulations, discussed in the text accompanying note 80 *supra.*

[120] *See* text accompanying notes 87-91 *supra.*

violate Title VII in the view of the Commission.[121] Thus in that sense, the state statutes are inconsistent with the spirit of Title VII.

Other statutes in the unemployment compensation field embody such an inconsistency to a larger degree. For example, a Montana statute exists denying unemployment compensation to a female leaving her most recent job to be married, with no such penalty for male employees.[122] Another Montana provision states that no benefits are payable to an employee leaving her most recent job to change her place of residence to remain with her husband or relatives.[123] Provisions similar to the latter one exist in Utah and Idaho, and in no case does an equivalent provision exist pertaining to male employees.[124] If these rules were held by private employers, it is clear that the Commission would disapprove of them.[125] Yet according to the language of section 708 of Title VII, the provisions in state laws are not preempted because the state, in providing or denying unemployment compensation benefits, cannot commit an unlawful employment practice.[126] Conceivably the inconsistency between these statutes and Title VII is sufficient to permit the invocation of common law preemption authority.

These statutory provisions are, however, relatively innocuous. They would in all likelihood be made to apply equally to males and females by the states concerned. The fact that section 708 of Title VII does not cover these provisions is not of serious concern.

C. *Protective Laws*

The most pressing and difficult questions arising under section 708 stem from those state laws which truly originated for "protective" reasons. It might well be argued that all of such laws should be eliminated to the same extent that similar employer rules would be disapproved by the Commission under Title VII — that is, in almost

---

[121] The Commission has ruled that pregnancy must be given special recognition in order to provide substantial equality of employment opportunity for both sexes, and that an employer may not maintain a rule automatically discharging pregnant women without first offering them leaves of absence. Op. Gen. Counsel (Aug. 17, 1966), note 87 *supra.*

[122] MONT. REV. CODES ANN. § 87-106(g) (1961).

[123] *Id.* at § 87-106(j).

[124] IDAHO CODE ANN. § 72-1366(c) (1948); UTAH CODE ANN. § 35-4-5(i) (1966).

[125] This conclusion is made clear from the Equal Employment Opportunity Commission's interpretative opinions dealing with insurance plans provided by employers for their employees. The Commission has ruled that assumptions pertaining to the structure of families, *e.g.,* who is dependent upon whom, who is head of the household, are irrelevant as far as employer rules are concerned. The rules must be equally applicable to males and females. *See* Interpretative Opinions, FEP REPORTER 401:1011-12.

[126] Title VII addressed only discriminatory employment practices by employers possessing the jurisdictional number of employees. *See* text accompanying note 5, 6 *supra.*

all cases.[127] Yet the preemption provision of Title VII may not lead to such a result.

If section 708 is to go beyond the preservation of state anti-discrimination statutes, the problem is to discern a dividing line between those state statutes which will and those which will not be preempted by Title VII. There appear to be three possible judicial solutions within the language of section 708. First, a court could conclude that, contrary to the Commission's initial views, *any* denial of employment to a female on the basis of potential hazard to her would be a situation in which sex is a bona fide occupational qualification whether or not a state law existed. This stance, however, would eliminate most of the substance of the sex discrimination ban.

A second solution could be to stress the word "purports" as used in section 708. Since any state statute not "purporting" to permit an unlawful employment practice is not disturbed by Title VII, it could be held that no statute which on its face retains an underlying protective policy pertinent to the modern labor force can "purport" to allow an unlawful employment practice under Title VII. The Commission's initial statement that a statute must, not only by design but also in effect, protect women from hazard is thus incorporated into this second solution. Statutes which set patently "unreasonable" limitations on the employment of women according to modern standards would "purport" on their faces to allow unlawful employment practices.

This approach is admittedly somewhat amorphous. The inquiry into which statutes will continue to be valid will necessarily be directed to whether or not legitimate differences between the sexes exist as to the type of activity being regulated by a given statute. The difficulty presented is that the Commission has ruled that employers may not generalize as to employment practices if some women would thereby be prejudiced, even though the women who might complain would be few compared with the total number of women affected by the particular rule. But as far as the states are concerned, surely their police power permits generalizations which continue to address the majority of women regulated thereby even to the detriment of a few. Those protective laws retaining meaningful underlying policies would appear to represent examples of such generalizations. Since it does not appear that Congress intended to invalidate these generalizations, this second approach has been formulated as an attempt to interpret section 708 accordingly.

The third possibility is for courts to conclude that all state laws which in fact foster sex discrimination "purport" to allow unlawful

[127] This argument has been presented to the Commission in the recent hearings which were held on state protective laws. *See* note 106 *supra.*

employment practices because based on "stereotyped characteristics," even though in individual cases sex might be a bona fide occupational qualification. This solution has the advantages of being consistent with the Commission's approach to sex discrimination generally and of being easily administered. However, the result was probably not intended by Congress,[128] and it would be unlikely that the courts would promote such a broad conclusion — that *all* state protective laws "purport" to allow unlawful employment practices — without any support from legislative history.

As to the second solution, no guarantee exists that it would snare all capricious or outmoded state statutes. Another drawback of this second solution is that it depends completely on the word "purports." It therefore would allow practices under a given state statute which would constitute unlawful employment practices in other states without such a statute. A possible result could be widespread legislation in those states lacking provisions regulating the employment of women.

Nevertheless, it is thought that the second solution represents the most likely resolution of the matter. Courts will probably attempt to give content to Title VII, and a conclusion that "protection from hazard" always permits application of the bona fide occupational qualification exception seems a bit strong even for the courts. In addition, the conclusion is definitely contrary to the Equal Employment Opportunity Commission's opinions. The second solution, on the other hand, does provide a reconciliation of Commission statements with section 708 and forces no real commitment by the courts with regard to the "protection from hazard" defense when no state statute exists.

The second solution could be further supported by reading section 708 in a more general and traditional manner with regard to preemption. As once stated by Justice Stone, "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."[129] It may be said that a discussion of the "statutory purpose" behind the sex discrimination provision of Title VII is an empty inquiry due to the origin of the provision as a floor amendment. Clearly, however, the general purpose of Title VII is to eliminate discriminatory motives in hiring practices, and in that sense the purpose of the sex discrimination provision does not demand the wholesale elimination of state statutes and regulations in fact designed to protect women from "exploitation and hazard."

---

[128] *See* text accompanying notes 13-19 *supra.*

[129] Maurer v. Hamilton, 309 U.S. 598, 614 (1940).

VI. CONSTITUTIONAL QUESTIONS

The interpretative view of section 708 favored in the previous comments results in upholding certain existing state protective legislation.[130] It goes without saying that such a result must not contravene the fourteenth amendment of the Federal Constitution. This inquiry is limited to the question of whether the policy or policies underlying the legislation left standing by section 708 constitute a valid exercise by the state of its police power.[131]

Under the present state of judge-made law it is clear that most, if not all, of the protective legislation earlier discussed is constitutional. The outstanding authority in the area of maximum hours for women is the 1908 Supreme Court decision of *Muller v. Oregon*.[132] Responding to an exhaustive collection of economic and medical data briefed by Louis Brandeis, the Court concluded that physical differences between men and women did exist and that long hours for women were harmful to motherhood and thus to the public interest.[133] Therefore it was held that state legislation prohibiting women as a class from long hours of work was justified and was not in conflict with the Federal Constitution.[134] Significantly the Court had indicated that it reached this result in order "to secure a real equality of right."[135]

The *Muller* decision has been relied upon subsequently to sustain other state legislation limiting hours of work for females when such legislation would not have been considered valid if pertaining to males.[136] As has been noted elsewhere,[137] such reliance was not necessarily justified if the legislation in question, although represent-

[130] No specific appraisal of each protective law under the author's view of preemption has been undertaken. However, since that view discards statutes with outmoded rationale, it is probable that, in general, legislation prohibiting women from working in jobs requiring constant standing would be preempted. Laws limiting hours of work for females could be disapproved, at least where such laws no longer have protective influence due to the effect of federal and state wage and hour legislation. (Recall the position arguably taken by the Commission on this subject at the recent hearings, note 35 *supra*. *See also* text accompanying notes 138-40 *infra*.) Laws regulating female employment in underground mining address the worst type of working conditions involving considerable physical danger and, perhaps, danger of physical assault; these probably will continue to be valid. Bartending statutes are a marginal case. Such laws depend upon a social view of morality which does not appear relevant to the latter half of the twentieth century. Statutes requiring rest periods and seating for women also appear obsolete. Such statutes need not operate to provoke unlawful employment practices. In all likelihood the Equal Employment Opportunity Commission will be successful in urging states to revise voluntarily the latter type of statute so that the statutes apply equally to males and females.

[131] *Cf.* Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957).

[132] 208 U.S. 412 (1908).

[133] *Id.* at 421-22.

[134] *Id.* at 423.

[135] *Id.*

[136] *See, e.g.*, State v. Dominion Hotel, 17 Ariz. 267, 273, 151 P. 958, 960 (1915).

[137] Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 237 (1965).

ing a classification based on sex, actually did not serve to equalize rights of males and females in the labor force.

Most maximum hour legislation did have as its purpose the improvement of general working standards and was not intended to coddle the female sex.[138] The Fair Labor Standards Act and state wage and hour legislation have rendered this purpose obsolete to a certain extent.[139] Yet to the extent women are not covered by overtime restrictions, maximum hour legislation would appear to remain useful. In fact, retention and expansion of the legislation under such circumstances was the official recommendation of the President's Commission on the Status of Women as recently as 1965.[140]

In the area of state statutes on bartending, the Supreme Court declared in 1948 that:

> Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic.[141]

This language was quoted in 1957 without discussion by the Supreme Court of Idaho to sustain an Idaho statute restricting licenses for bartending to males.[142] These cases were decided on the basis of moral judgments; the goal of labor equality was not considered. Thus the validity of the bartending statutes under the fourteenth amendment may be open to question sooner than will the maximum hour legislation.

In this connection, recent speculation has been forthcoming to the effect that the Supreme Court would readily revise the formulations of the *Muller* and *Goesaert* decisions,[143] if presented with an appropriate case.[144] But unless and until such renovation takes place

---

[138] M. MEAD & F. KAPLAN, AMERICAN WOMEN 55-57, 128-30, 132-33 (1965).

[139] *Id.* at 55, 133.

[140] *Id.* at 211-12. Esther Peterson, Executive Vice Chairman of the President's Commission, has pointed out that the FLSA still retains significant exceptions and exemptions leaving a good portion of the labor force not covered. Peterson, *Working Women*, in THE WOMAN IN AMERICA 160 (1965). No doubt this situation was alleviated by the 1966 amendments to the FLSA, but it was not eliminated. It is interesting to note, incidentally, that the views of the President's Commission on the effect of the FLSA lend support to the hypothetical position posed by the EEOC to Mr. Schlossberg in the recent hearings, described at note 35 *supra*.

[141] Goesaert v. Cleary, 335 U.S. 464, 465-66 (1948).

[142] State v. Burke, 79 Idaho 205, 206, 312 P.2d 806, 807 (1957).

[143] *See* notes 132, 141 *supra*.

[144] *See generally* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964); Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 238-42 (1965); Note, 50 IOWA L. REV. 778 (1965). The President's Commission on the Status of Women urged such a reconsideration by the United States Supreme Court in its recommendations. M. MEAD & F. KAPLAN, AMERICAN WOMEN 212 (1965).

it is clear that state protective legislation on maximum hours, on bartending, and probably in general does not offend the fourteenth amendment.[145] Renovation might be achieved through the second approach suggested earlier to the preemption question. Under that approach to section 708, state statutes with anachronistic underlying policies would not be allowed to stand.[146]

CONCLUSION

The existence of state protective laws regulating the employment of women remains the rule rather than the exception in current state labor legislation. The statutes range from those requiring affirmative conveniences, such as seats for female employees, to those restricting the privileges of women to work long hours or in hazardous occupations. The philosophy of these statutes, particularly the latter type, is dissonant with the philosophy of the sex discrimination ban of Title VII. In this connection, it has been suggested in this article that the Equal Employment Opportunity Commission should tread carefully when speaking in terms of a state protective law as constituting a "bona fide occupational qualification" exception where an employer's rule identical with the state protective law would not stand under the Civil Rights Act. Because of the inherent vagueness in the "bona fide occupational qualification" exception, and because of the frequent adoption of the same language of exception by state fair employment practice laws, it seems important for the Commission to avoid the confusion attending the use of a double standard in giving content to the phrase. Thus, it is thought that the Commission should uniformly define the jobs for which sex does constitute a bona fide occupational qualification, regardless of the existence of a pertinent state protective law.

However, in administering Title VII, it is not suggested that the Commission should exceed the bounds of that which Congress intended. While little is clear from the meager legislative history on the provision, it does not appear that Congress intended to accomplish the wholesale elimination of state protective legislation or of other types of state legislation pertaining to the employment of women. And to the extent this question remains in doubt, constitu-

[145] A proposal to add an equal-rights amendment to the Federal Constitution whereby neither the United States nor any state could deny or abridge equal rights under the law because of sex has been introduced in every Congress since 1923. M. MEAD & F. KAPLAN, *supra* note 144, at 147; Murray & Eastwood, *supra* note 137, at 236. In fact, in the House debate on Title VII, Rep. Celler expressed surprise at the introduction of the sex amendment due to the existence of such a proposal before the Congress at that time. 110 CONG. REC. 2578 (1964). Perhaps the failure of Congress to adopt this amendment contains a further inference that Congress did not intend to make a clean sweep of state protective legislation by its enactment of the sex amendment to Title VII.

[146] *See* text following note 127 *supra*.

tional problems being absent, any solution should at least be couched in terms of intended federal preemption according to an interpretation of the provison of Title VII on that subject. In this article, a middle position on the preemption statute as it applies to state protective laws has been put forward as the most likely resolution of the matter. This solution allows state protective legislation to stand as long as it does not on its face "purport" to allow unlawful employment practices in the sense of being patently outdated as far as the modern woman's capabilities or inclinations are concerned. This results in permitting employers to deny employment to women because of a state protective law when such employment could not be denied on the basis of an employer's rule. Nevertheless, this is a question of federalism and of the extent to which Congress intended to legislate. The result is that certain discriminatory employment practices (where sex is not a bona fide occupational qualification) which Congress did not intend to eliminate, will remain.

With regard to social policy, the initial reaction is that the modern woman should not be subjected to state protective restrictions on her right to work should she choose to experience the conditions from which she is being protected. However, it is clear that the extent to which sex differences constitute "discrimination" is a question of degree, depending upon what social mores it seems desirable to perpetuate. Whether or not sex is a "bona fide occupational qualification" in any given situation is a difficult question. Individuals would be more likely to disagree in this area than they would as to race, color, creed or national origin as the basis of a "bona fide occupational qualification." As to the latter, general agreement can be obtained that bona fide qualification instances will be rare.[147] But as to sex discrimination, countervailing considerations of preserving femininity and motherhood appear. Problems of physical capabilities and of the propriety of mixing the sexes exist which are not present with regard to the other forms of discrimination.

These problems inevitably mean that as to sex, the existence of a bona fide occupational qualification will be asserted by employers with some frequency, and at the same time these assertions will be extremely difficult to establish as fact. Without the availability of "rules" of any nature allowing employers to deny employment to women where the employment would be hazardous or strenuous, complaints against employers could be frequent and burdensome. Yet the percentage of women in the labor force who would be perturbed about being denied hard labor employment would in all like-

[147] *See, e.g.*, the HOUSE JUDICIARY COMM., REPORT ON H.R. 7152, H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964) (analysis of § 704(e)), in BNA, THE CIVIL RIGHTS ACT OF 1964, at 161 (1964).

lihood be quite small. In addition, denial of employment with long hours due to state statutes on maximum hours for women still serves in some instances to protect and promote labor standards for women. Thus total elimination of all state protective laws does not seem appropriate at the present time.

For these reasons, it is thought that the second judicial solution to the preemption problem which was suggested previously is the most desirable. This solution reserves to the state and indirectly to employers the right to administer "rules" genuinely designed to protect women from hazardous or onerous working conditions. Clearly outdated statutes would not be allowed to stand. This scheme admittedly promotes maternalism through the device of a little paternalism, but this fact would not seem to be offensive — paternalism is an inbred characteristic of many laws aimed at protecting a certain group of society. Indeed, the Equal Employment Opportunity Commission has reflected this fact by having injected a bit of paternalism into the sex discrimination problem through ruling that pregnancy must be given special consideration by employers. And in any event, the areas of work left regulated by the states under the approach being suggested would be few in the total employment picture, leaving the sex discrimination ban of Title VII of the Civil Rights Act essentially unfettered and free to accomplish its intended goal of eliminating discriminatory practices within the employment relationship.

COURT CONGESTION AND CRASH PROGRAMS: A CASE STUDY

BY GRESHAM M. SYKES*
AND
MICHAEL ISBELL**

Court congestion, and the resultant serious time lapse between filing of pleadings and trial of civil cases, has been for years a major problem of both state and federal court systems. The Federal District Courts in particular face a growing backlog of pending civil cases. In the spring of 1966 the United States District Court for the District of Colorado conducted an intensive six-week program designed to reduce the Court's backlog. The operation and effects of the program were studied by the Administration of Justice Program of the College of Law at the University of Denver. Professor Sykes and Mr. Isbell report the findings of this study and examine the question of whether judicial manpower might have been more efficiently employed during the program. The Court must continue to experiment with small, tentative changes, and systematically evaluate the effectiveness of the changes, if remedies for congestion are to be found. These experiments might be directed at such goals as more accurate estimation of length of trials, more precise prediction of which cases will be settled out of court, and more efficient management of judicial time for performing nontrial duties.

DELAY in court has long been viewed as a serious defect dogging our legal system, and over the years society has attempted to cure it with a variety of remedies. Yet despite the imagination and effort devoted to getting rid of this *malaise* of the law, it appears that we are not much better off than we were 60 years ago when Roscoe Pound delivered his address on "The Causes of Popular Dissatisfaction with the Administration of Justice" at the annual meeting of the American Bar Association in 1906.[1] Court congestion is still a critical social problem, a basic threat to legal rights, and a major weakness of our tribunals.

The United States District Courts have suffered from this difficulty along with the variety of state courts. In recent years, however, the situation in state courts appears to have improved while the situation in Federal District Courts has grown worse; and the need

*Professor of Law and Social Science, College of Law, University of Denver.

**Member of the Colorado Bar; A.B., University of Colorado, 1964; J.D., University of Denver, 1966.

[1] *Reprinted in* 8 BAYLOR L. REV. 1 (1956).

for effective remedial action in the Federal system has become ever more pressing. Between 1960 and 1965, civil cases filed in all United States District Courts increased approximately 17%, from 57,791 cases to 67,678 cases. Although the percentage of cases terminated also increased during this period, cases were still coming into the courts at a faster rate than they could be disposed of. As a consequence, the backlog of cases grew from 61,251 in 1960 to 74,395 in 1965. The United States District Courts, despite the fact that they had increased the rate of disposition between 1960 and 1965, were being confronted with increasing congestion.[2]

A part of the increase in filings can be attributed, of course, to the increase in the population in the United States which went from some 181 million in 1960 to 195 million in 1965, a growth of about 8%. Since the United States Census Bureau has estimated that the population may very probably grow to 380 million by the year 2010, approximately double the 1960 figure, it is clear that the courts will undoubtedly be faced with a greatly expanded work load which cannot be solved by minor tinkering with the system.[3]

On July 1, 1964, the United States District Court for the District of Colorado, (hereinafter referred to as the Colorado U.S. District Court) had a backlog of 426 civil cases pending. During the ensuing fiscal year, 586 new cases were filed and 518 cases were terminated, increasing the backlog to 494 cases — a growth of about 16%. At this rate, the backlog of the Colorado U.S. District Court would double in six or seven years, although, fortunately, it would still not approach the staggering burden of the Southern District of New York (10,180 civil cases pending, July 1, 1964), Eastern District of Pennsylvania (5,287 cases pending), or Eastern District of Louisiana (3,952 cases pending).[4]

In 1965 the Colorado U.S. District Court ranked very near the midpoint for all United States District Courts in terms of the amount

---

[2] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S., DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. (1965). *See generally Lagging Justice,* 328 ANNALS (1960).

[3] The projections vary between 438 million and 322 million, depending on different assumptions concerning the birth rate. J. SIEGEL, M. ZITTER, & D. AKERS, PROJECTIONS OF THE POPULATION OF THE UNITED STATES, BY AGE AND SEX: 1964 TO 1985, WITH EXTENSIONS TO 2010, at 55 (U.S. Bureau of the Census, Current Population Rep., Ser. P-25, Pub. No. 286, 1964). Projections for Colorado for the year 2010 are not available, but the Bureau of the Census has made estimates for 1985, ranging from 2,971,000 to 2,726,000. Since Colorado had a population of 1,754,000 in 1960, this could well mean an increase of about 65% in 25 years. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REP., SER. P-25, PUB. NO. 326, ILLUSTRATIVE PROJECTIONS OF THE POPULATION OF THE STATES: 1970 TO 1985, at 14-15 (1966).

[4] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, *supra* note 2, at 174-75, app. table C1.

of time between a case being "at issue" and coming to trial.[5] This fact, however, must be interpreted with caution. A premature complacency about dealing with delay with apparently somewhat greater efficiency than many United States District Courts may be misleading, since Colorado's slightly better performance may be due, at least in part, to the types of cases filed and the relatively lower frequency of jury trials, rather than to greater efficiency in administrative procedures.

The distribution of types of cases filed in the Colorado U.S. District Court differs slightly from the distribution of cases filed in all United States District Courts. There is a somewhat larger percentage of contract actions and a somewhat smaller percentage of tort actions in Colorado; and since, in general, contract actions require less trial time than tort actions, the difference in the types of cases filed may help explain Colorado's slight edge in the number of months between cases "at issue" and trial — a median of 10 months in Colorado compared to approximately 11 months for all Federal District Courts. In addition, in the Colorado U. S. District Court there are relatively fewer jury trials in civil and criminal cases, and this, too, may help to speed the judicial process.[6]

I. THE CRASH PROGRAM — OBJECTIVES AND RESULTS

In any event, a desire to better the situation prompted the Court, under the direction of Chief Judge Alfred A. Arraj, to undertake an intensive six-week program to see what could be done about the growing number of cases awaiting court action. From the middle of April 1966, to the end of May 1966, two judges trying cases five days a week were to be added to the Court's normal complement of three judges.[7]

In order to determine the effect of the program (which one newspaper termed rather dramatically a "massive assault on the backlog"), the Court invited the Administration of Justice Program of the College of Law at the University of Denver to study its

---

[5] As Milton Green has pointed out, "Considerable difficulty is encountered in ascribing a precise meaning to the term 'at issue.'" We are using it here, as Green suggests, to refer to

> the status of a case when final pleadings on both sides have been filed and preliminary motions have been disposed of. In some jurisdictions, however, the term is used in a different sense. For instance, in New Jersey a case is considered "at issue" when the first answering pleading is filed, whereas in New York a case is not considered "at issue" until the pleadings have been completed, all preliminary motions made and determined, and a certificate filed by the attorneys indicating that the case is ready for trial.

Green, *The Situation in 1959*, in *Lagging Justice*, 328 ANNALS 7, 9 n.7 (1960).

[6] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, *supra* note 2, at 204.

[7] The additional judicial manpower was to be drawn from Federal District Courts in other states, depending on the work load of these judges in their courts.

operation during this period.[8] The Court started with 111 cases which it intended to dispose of during the six-week period, in order to reduce its backlog to more manageable proportions; and the outcome of these cases was as follows:

Cases Disposed of Prior to the Crash Program

1 case went to trial before the crash program got underway and was disposed of by the Court;

1 case was disposed of before the crash program by a default judgment;

1 case was disposed of before the crash program by a summary judgment;

33 cases were settled out of court before the crash program and thus did not require a trial.

Cases Disposed of During the Crash Program

29 cases were settled during the crash program (of these 29 cases, 7 involved a total of approximately 24 hours of trial time as a part of the process of settlement);

32 cases were completed by trial during the crash program and were disposed of by the Court;

3 cases were disposed of by the Court during the crash program by a summary judgment.

Cases Not Disposed of at the End of the Crash Program

7 cases were postponed for disposition, until after the end of the crash program, at the request of the attorneys;

4 cases were not brought to trial during the crash program, since further action by the Court was required or settlements which had been reached required later official approval.

It would appear, then, that by the end of the Colorado U.S. District Court's crash program, 100 cases of its planned work load of 111 cases, *i.e.* 90%, had been eliminated. In the sense that the great share of the backlog represented by the cases scheduled for this period was disposed of, the crash program could well be acclaimed a success.

However, the following points should be noted:

First, 36 cases were disposed of *before* the crash program had even begun. And of these 36 cases, 33 were settled out of court by agreement between the parties and attorneys.

---

[8] The Administration of Justice Program is financed primarily by a grant from the Russell Sage Foundation and has as one of its major objectives the creation of closer bonds between law and the social sciences. Special appreciation is to be expressed to Michael Katch and Robert Minter, students at the College of Law, for their work in the study, and to Mr. G. Walter Bowman and Mr. James Manspeaker of the Colorado District Court for their cooperation.

Second, 64 cases were disposed of *during* the crash program; but of these 64 cases, 29 were settled by agreement between the parties and attorneys.

In short — about one-third of the cases (32) were disposed of by a trial verdict during the crash program.

It is possible that the 32 cases disposed of by trial during the crash program represented a full work load for the judicial manpower available in the six-week period. The original plan, which scheduled more than three times this number for trial, might not be as naive or overly optimistic as it may appear at first glance, since the Court might have been operating with a well-reasoned expectation born of long experience that most cases scheduled for trial will *not* come to trial in fact. Indeed, the act of scheduling a case for trial may increase the chances of settlement, making a trial unnecessary: explicitly planning an event at a definite time and place makes it unlikely that the event will occur.[9]

It is also possible, however, that the 32 cases disposed of by trial during the crash program did *not* represent a full work load for the judicial manpower available in the six-week period. If this were true — if the judges had trial time they were not using — and if additional cases for trial had been available to be substituted for those which had been settled out of court, the total number of cases disposed of both by trial and settlement could have been far greater. If we assume, for example, that (1) the Court had tried and disposed of 32 cases as scheduled; (2) 62 cases had been disposed of by settlement out of court; and (3) 62 additional cases had been substituted for those settled and these additional cases had been brought to trial; then, the Court could have disposed of 156 cases — approximately 41% more dispositions than originally conceived by the crash program. The crucial question, then, is whether the judicial manpower of the Court was fully employed in taking care of the 32 cases disposed of by trial and whether additional cases could have been substituted for those disposed of by settlement.

---

[9] If a case has definitely been scheduled for trial, settlement may become more likely because the uncertainties of trial outcome loom larger in the minds of attorneys and a settlement becomes preferable. It is also possible that full, detailed work on a case, on the part of attorneys, may be delayed until it seems certain that a case will go to trial. As this process comes into play, a basis for a mutually acceptable settlement is more likely to emerge and a trial becomes unnecessary. Robert Merton has analyzed the phenomenon of the self-fulfilling prophecy in which the prediction of an event makes its occurrence more likely. *See* R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1949). We seem to be dealing here with the phenomenon of the *self-defeating* prophecy.

Whether the "rush to settlement" under the threat of an impending trial results in more just settlements remains an unexplored issue.

II. TRIAL CALENDARS — PREDICTING LENGTH OF TRIALS

The actual length of the judge's working day has, of course, been subject to much popular debate — and to much misunderstanding. Time spent in trial is in fact only one portion of the judge's work and much effort must be devoted to hearing motions, writing decisions, keeping abreast of the legal literature, pre-trial conferences, et cetera. Furthermore, as one writer has pointed out, "judges are not ordinary employees and the problem of delay in court, if the judiciary is to retain its dignity and independence, is not simply one of time-clock efficiency."[10]

Under the crash program, four days of each week were to be devoted to the trial of cases for the three regular judges of the Colorado U.S. District Court. The fifth day of the week was to be set aside for other judicial duties such as those mentioned above. Thus, the regular judges were to provide a total of 72 days available for the trial of cases during the six-week crash program. As far as the visiting jurists were concerned, each was to spend five days a week on the trial of cases, providing a total of 60 additional days available for trial work. The entire number of trial days available to the Court, then, during the crash program would in theory amount to 132 days.

Now in setting cases for trial, it is necessary for the Court to predict as accurately as possible the length of time each case is expected to take, so that a rational calendar of cases can be established.[11] The predicted lengths of trial for the cases in the crash program were as follows:

Type of Case	*Number*	*Total Predicted Days of Trial Time Required*
Contract	27	49.25
Tort	40	95.25
Actions under Statutes	42	112.00
Real Estate	2	1.50
Total	111	258.00

Since the Court had predicted that the total number of trial days required for the cases in the crash program would amount to 258, it is evident that the Court could not possibly have completed its work if its predictions for the length of cases were correct and if all cases did in fact go to trial.

Such a massive discrepancy could be explained on several grounds. First, it might be argued that the Court did *not* expect that

[10] H. ZEISEL, H. KALVEN, & B. BUCHHOLZ, DELAY IN THE COURT 14 (1959).

[11] These predicted lengths of trial are determined during the course of pre-trial conferences, based on the evaluations of the attorneys and agreed to by the Court.

all the cases in its crash program would actually go to trial but rather that they would be settled before reaching the court or settled quickly after the trial began. Since this is in fact what happened and seems to be the common experience of the Court, we think it is likely that the expectation of settlement was an important element in explaining the Court's scheduling far more trial work than it could actually accomplish.

Second, it is possible that the Court had knowingly accepted overestimated trial times for the cases it had scheduled; and thus its apparent excessive work load could actually have been disposed of within the period of the crash program. The Court would need far less than the 258 days it had predicted — it could accomplish its duties in the 132 days available.

If we take the 32 cases actually tried, to get some information on this last point, we find that the Court had based its plans on the estimate that these cases would require a total of 77.5 days for their disposition. If we assume that a judge spends an average of 6 hours per day in the trial of cases, the 32 cases would have taken 465 hours to complete.[12] In fact, these 32 cases were disposed of in some 292 hours.

In other words, the Court overestimated the time needed for its trial work by a factor of about one and one-half — at least for those cases actually reaching the trial stage.[13]

It is true, of course, that the flow of trial work is not continuous and that a case which ends before its predicted half-day or full-day mark leaves an awkward gap of several hours or more about which little can be done as far as starting another case is concerned. It makes little sense, after all, to begin a case at three o'clock in the afternoon or to expect the parties to a case to present themselves before the Court at a moment's notice. Nonetheless, it appears likely that the predictions of length of trial were grossly inaccurate.

At the same time, the Court with its extra complement of judges could have completed its disposition of 32 cases by trial in about three and one-half weeks, even with these inaccuracies of prediction about length of trial, if the Court had not been faced with unexpected settlements for which no substitute cases could be found in time and which left large holes in the trial calendar.[14] Without the

[12] The number of hours per day a judge spends on trial work in the courtroom is highly variable, depending on the press of other duties, gaps in the trial calendar, local expectations about a "normal" working day, personal work habits, etc. On the whole, however, the calculation of one day being equivalent to approximately six hours spent in trial work on the average does not seem unreasonable. *Cf.* H. ZEISEL, H. KALVEN, & B. BUCHHOLZ, *supra* note 10, ch. 16, at 181-89.

[13] Of the 32 cases going to trial, only 4 cases took longer than expected.

[14] The Court was able to schedule 14 additional cases which had not been a part of the original planning for the crash program. Nine of these cases were disposed of before the program ended and involved a total of approximately 52 hours of trial time.

help of the additional judges, the 32 cases would have required about six weeks and two days for their disposal. On the other hand, if the Court had been more accurate in its predictions in the number of days required for each case, and again assuming the Court had not been left with gaps in its calendar by unexpected settlement, the 32 cases could have been disposed of in approximately two weeks and one day. Without the help of the additional judges, the Court would have needed four weeks and one day.

III. THE NEED FOR CONTINUED EXPERIMENTATION

The essential elements of the Colorado U.S. District Court's crash program, then, can be summarized as follows: (1) the Court attempted to eliminate 111 cases (about one-fifth of its backlog) with 132 judge-days in a six-week period; (2) about one-third of these cases were disposed of by trial and about two-thirds of these cases were settled out of court, either before or during the crash program; (3) approximately 50 judge-days were required for the disposal of cases by trial; (4) about 10 judge-days were used for the cases which had been added to the program;[15] and (5) about 72 judge-days were left vacant, either because of gaps in the trial calendar due to cases which had been settled or because trials took less time than expected.

Since the Court had reserved 18 judge-days for judicial duties other than trials, it would seem that the Court was left with a surplus of some 72 judge-days which was not used with full effectiveness — approximately the time of one judge working for about three months. The question we must face is whether the Court could have been more efficient in its operation.

There is, admittedly, no easy answer and any proposed solutions must rest on a series of assumptions rather than demonstrated fact. Let us assume, however, that 200 cases had been scheduled for trial. If the ratio of cases settled to cases tried had remained the same, approximately 130 cases would have been settled out of court and 70 cases would have gone to trial. If these 70 cases had required an average of 1.5 days for trial (the average trial time observed for cases in the crash program), slightly more than 100 judge-days would have been needed for their disposition. The number of cases eliminated from the backlog would almost have been doubled.

Such a calendar of cases might seem much too venturesome. If cases are not settled out of court as expected, the Court will face a flood of irate attorneys who have been assured of a trial but for

[15] *See* note 14 *supra.*

whom no judge is available. Similarly, if cases tried take longer than expected, the Court will find that its planned work exceeds its capabilities. But the creation of a court calendar *is* a gamble, and the administrators of the Court must strike a balance between being too daring and too cautious. The temptation, of course, is to err on the side of caution, since unused judge time is far less public, far less likely to arouse the criticism of attorneys who have been promised a trial which they do not get. Such caution, however, if carried too far, is all too likely to aggravate the problem we are trying to cure — namely, the problem of court congestion.

CONCLUSION

It is our opinion, then, that if more effective remedies are to be found for reducing the backlog of the Court, the Court must reconsider its calendaring of cases and be more willing to experiment. This does not mean that the Court needs to rush to extreme innovations; small, tentative changes can be introduced, their effects evaluated, and further changes fed into the system based on experience.

Three possibilities suggest themselves immediately. First, the prediction of length of trial should be made more accurate. This would require a careful examination of the factors which are now being used (perhaps on an intuitive basis) to estimate the length of trial, prolonged and systematic comparisons of estimates and reality, the discovery of new factors, and the creation of prediction formulas in which the factors could be given their appropriate weights. It may turn out that informed judgments, without the use of formulas, are a better device; but in that case, the element leading to the consistent overestimation of length of trial should be detected and eliminated.

Second, an effort should be made to determine more precisely which cases are most likely to settle out of court and which cases are most likely to go to trial. This would require the same sort of empirical study, using observed cases and extrapolating to the future. The determination could be rather crude, at least in the beginning; but it would then be possible to construct a more rational pool of cases scheduled to be tried in a given time period, since a better balance could be achieved between cases likely and unlikely to reach the trial stage. In any event, it seems quite possible that more cases could be scheduled for trial than is true at the present time, if the procedures of the crash program are similar to those usually used by the Court, on the expectation that the majority of these cases will not in fact need to be tried.

Both length of trial and settlement out of court might seem to be matters so filled with chance, so subject to imponderables, that

greater accuracy of prediction is impossible. We do not believe this to be so, however, and we believe that there are regularities to these events which can be discovered and used by the Court. There will remain, of course, some margin of error, but within this area of the unknown the Court could be less wary of scheduling cases which will have to be postponed. The discomfiture of attorneys, witnesses, and so on must be weighed against delays in trial; and the latter may be far more costly in the long run, in terms of the administration of justice.

Third, reserving the fifth day of the week for judicial duties other than trial work may be leading to a serious loss of the Court's efficiency, despite its apparent convenience for the judges. These judicial duties might better be performed in the gaps left by cases finished more quickly than expected or cases settled out of court so near their scheduled trial date that a substitute cannot be found. This point, however, is rather debatable since these nontrial duties may require large blocks of uninterrupted time.[16] The Chief Judge has indicated that he does not believe such a solution is workable, but the issue is worth examining more closely in light of the judges' experience with such matters and their most efficient habits of time management.

In short, the Colorado U.S. District Court, like any system of administration can, we think, benefit from self-analysis, research, and experimentation — and the willingness to take chances which is a means of survival for modern organizations. Some of these experiments must inevitably fail and the Court will be criticized. The ability to withstand such criticism is one portion of the courage needed to provide our society with the highest levels of justice.

[16] *See* Drucker, *How to Manage Your Time: Everybody's No. 1 Problem*, 233 HARPER'S, Dec. 1966, at 56. Finding the appropriate time for the writing of decisions, preliminary hearings, etc., may be no less difficult than the scheduling of trials.

IMPLIED WARRANTIES IN LEASES: THE NEED FOR CHANGE

BY FRANK F. SKILLERN*

"Caveat emptor" as it is applied to leases under which the lessee may use the demised premises for an express purpose is the focal point of this article. The rule denies the lessee relief, either as a defense or as a cause of action, for additional costs of repair or construction if the premises are structurally unfit for the expressed purpose or if changes must be made in the premises to conform to local codes relating to that purpose. Mr. Skillern discusses the development of the rule in these situations, the limited remedies which are available to a lessee, and the inadequacies of these remedies in modern leasing transactions. He urges that changes in the nature of leasing transactions necessitate that courts or legislatures consider implying warranties of fitness for a particular purpose and of conformity to building codes in such leases. Mr. Skillern concludes by analyzing the nature of the proposed warranties, the prerequisites for their implication, and the new remedies which would be available if they were breached.

INTRODUCTION

LAW under the doctrine of stare decisis may become imbued with legal principles which were practical when first developed but which become inadequate at a later date to meet the demands of the situations they were designed to encompass. The doctrine of *caveat emptor* as applied to leases epitomizes such an anachronism. In the early development of cases concerning real property leases, the courts applied the strict limitations of property law and determined that no implied covenants regarding fitness of the premises for a purpose or habitation existed in a lease. The parties were expected to express in the document exactly what the state of the premises would be at time of possession as well as any other facts which the landlord might guarantee to the tenant as to the condition of the premises.

However desirable such principles were when developed, today with the growth of urban development causing an increase in leasing transactions, and the development of unimproved land through leases requiring construction, these principles are unrealistic and impractical. Not only do the parties frequently intend a particular (and often exclusive) use of the premises, but also that the landlord prepare the

* Member of the Colorado Bar; B.A., University of Chicago, 1964; J.D., University of Denver, 1966.

premises for the tenant's use. Under these circumstances, the tenant should be allowed a remedy under the lease when the premises cannot be used for the express purpose or can be so used only at additional cost. A study of *caveat emptor* as it has been applied in specific cases shows its inadequacy in leasing cases.

The general rule of *caveat emptor* has been succinctly stated in *Ph. Chaleyer, Inc. v. Simon.*[1] The court, discussing an implied warranty defense, stated, "It has been recently held that a lessor does not impliedly covenant that the demised premises are suitable for the use which he is aware is intended by the lessee."[2] Although government wartime regulations prohibited the lessee from engaging in the business stated in the lease, he was not allowed to rescind the agreement.

Caveat emptor also prevents the lessee from interposing unfitness as a defense to an action for rent. An Indiana case[3] involving the lease of lands on which the lessee wanted to build a drive-in theater is typical of this principle. The court in awarding rent to the lessor said,

> There is no implied warranty that leased premises are fit for the purposes for which they are let. . . . The rule of caveat emptor applies in the relation of landlord and tenant unless material representations constituting fraud are specifically alleged, or there is a showing of a fiduciary relationship between the parties.[4]

The rule has also been applied to a situation where the lessee could not occupy the leased premises because the building would not support his equipment. In *Soresi v. Repetti,*[5] the building required structural changes before the lessee could install his heavy equipment. The court disposed of the unfitness defense summarily, saying, "[T]he tenant has the duty to examine the premises to determine its adaptability for the desired use."[6]

---

[1] 91 F. Supp. 5 (D.N.J. 1950). *See also* 2 R. POWELL, REAL PROPERTY ¶ 225 [2] (recomp. ed. 1966); 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952), and cases cited therein, where the principle is expressed:

> There is no implied covenant or warranty that at the time the term commences the premises are in a tenantable condition or that they are adapted to the purpose for which leased. The tenant, then, cannot use such unfitness either as a defense to an action for rent or as a basis for recovery in tort for damages to person or property. (Footnotes omitted.)

Accord, Davidson v. Fischer, 11 Colo. 583, 19 P. 652 (1888).

[2] 91 F. Supp. 5, 7 (D.N.J. 1950).

[3] Anderson Drive-In Theater, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

[4] *Id.* at 393, 110 N.E.2d at 508.

[5] Soresi v. Repetti, 76 A.2d 585 (D.C. Mun. Ct. App. 1950).

[6] *Id.* at 586. *See also* Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350 (1930) (structural changes at lessee's expense).

Tort actions are also prohibited by the rule.[7] In *Widmar v. Healey,*[8] the lessee was denied recovery for injuries resulting from a stove explosion which occurred due to frozen pipes. In dismissing the claim the court said, "In the absence of fraud or of a covenant, a lessor does not represent that the premises are tenantable and may be used for the purposes for which they are apparently intended."[9]

At this point certain fact situations which are outside the scope of this paper must be distinguished. The *Soresi* court denied the lessee relief for required structural alterations to the leased premises, which were under the control of the landlord, by adhering to a questionable application of *caveat emptor.* It is another matter when untenantability is caused by factors beyond the control of the lessor. Recovery has been denied a lessee in this situation too, but the application of *caveat emptor* seems more appropriate. For example, the New York courts have denied recovery to a lessee who could not occupy a building because of noxious gases originating from outside the building.[10] Although the defense in that case was an implied covenant of habitation, the court rejected it.[11] The court discussed the defense of implied warranty and concluded it was not available. The point is that the proposed implied warranty should not extend to defects beyond the control of the lessor. Nor would the doctrine of implied warranty cover those defects or contingencies which are foreseeable by the parties. A lessor is allowed to recover rent even though his lessee could not get a liquor permit and use the premises as contemplated.[12] Such a contingency is foreseeable, and no condition will be read into the lease. *Caveat emptor* should continue to

---

[7] *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 1, at 267, and cases cited therein. *See also* Zatloff v. Winkleman, 90 R.I. 403, 158 A.2d 874 (1960).

[8] 247 N.Y. 94, 159 N.E. 874 (1928).

[9] *Id.* The court implies that recovery may have been allowed if the action had been brought on the theory of a covenant to repair. For a discussion of a lessor's tort liability for latent defects in the premises known to him or for liability when he undertakes repairs of demised premises, see Shaw v. Butterworth, 327 Mo. 622, 38 S.W.2d 57 (1931), and Holzhauer v. Sheeny, 127 Ky. 28, 104 S.W. 1034 (1907). *See also* Marx v. Standard Oil Co., 6 N.J. Super. 39, 69 A.2d 748 (1949), where the court states, "There is no implied covenant by a lessor that the demised premises are suitable for the use which he is aware is intended by the lessee. The lessor is not liable to the lessee or to invitees of the lessee for injuries received by them in accidents that may be attributed to the faulty planning or construction of the premises." *Id.* at 41, 69 A.2d at 749.

[10] Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889).

[11] The court held, "It is not open to discussion in this state, that a lease of real property only, contains no implied covenant of this character [habitation], and that . . . unless there has been fraud, deceit, or wrong-doing on the part of the landlord, the tenant is without remedy, even if the demised premises are unfit for occupation." *Id.* at 113, 23 N.E. at 127.

[12] Goodman v. Sullivan, 94 Ohio App. 390, 114 N.E.2d 856 (1952). *But see* Hyland v. Parkside Inv. Co., 10 N.J. Misc. 1148, 162 A. 521 (1932) (zoning ordinance prohibited use after possession — held, restricted use in lease is express guaranty).

control those cases in which the non-use is the result of a foreseeable problem or of a defect caused by one other than the lessor.[13]

It would be wrong to conclude that the doctrine of *caveat emptor* means a lessee is always without a remedy if he is unable to use the premises. Under contract law the tenant may rescind the lease if he can prove fraud or mutual mistake.[14] In such cases the burden is upon the lessee to show the statement, the materiality of the statement, and reliance. Frequently, as in the cases discussed here, this burden is too great.[15] The lessee usually does not receive a statement about the suitability of the land, but rather assumes this from the fact that the lease states the purpose and use of the demised premises.

Rescission on the grounds of mutual mistake was recently granted by a California court.[16] The lease stated that the premises were to be used for a bar-restaurant. However, the building would not support the weight of a bar on the second floor. The court expressly found that no structural changes were required on the leased premises; instead they would have to be made on portions of the building under the control of the lessor. Moreover, it found that both parties thought the building, without modification, could be used for the intended purposes, and the necessary costs were not expected by either. The court allowed rescission because of the mutual mistake.

Another remedy, derived from property law, is constructive eviction.[17] One such case was *Panagos v. Fox*,[18] where the lessor had built a restaurant, barbecue, and dairy bar for the lessee. The building when completed had defective walls which would not withstand

[13] This situation must be distinguished from the facts in Economy v. S.B. & L. Bldg. Corp., 138 Misc. 296, 245 N.Y.S. 352 (1930), where the court allowed the lessee to recover advance rent when he was unable to obtain a cabaret license because the building was not fireproof in accordance with the local building code. This result was not based on an implied warranty of suitability even though there was an expressed purpose in the lease. The court held that the licensing authority had no discretion to waive the requirements of the building code, and "[t]he contract, therefore, was incapable of lawful performance when it was made, although it is not to be supposed that any illegality was contemplated by the parties to it." *Id.* at 297, 245 N.Y.S. at 354. Thus the illegality constitutes failure of consideration. The *Goodman* result, discussed at note 12 *supra*, is an example of the situation in which the licensing authority does have discretion. The court in *Economy* states that then "[i]f the tenant chose to take a lease without conditions under such circumstances, and so, to bind himself absolutely for the payment of rent, the court could not relieve him from his contract." *Id.* at 297, 245 N.Y.S. at 354.

[14] *See* Williams v. Puccinelli, 236 Cal. App. 2d 512, 46 Cal. Rptr. 285 (Dist. Ct. App. Cal. 1965).

[15] *See, e.g.*, Soresi v. Repetti, 76 A.2d 585 (D.C. Mun. Ct. App. 1950) (lessee-defendant claim of misrepresentation denied); Ph. Chaleyer, Inc. v. Simon, 91 F. Supp. 5 (D.N.J. 1950) (lessee's action to rescind denied).

[16] Williams v. Puccinelli, 236 Cal. App. 2d 512, 46 Cal. Rptr. 285 (Dist. Ct. App. Cal. 1965), which has been characterized by one writer as "an apt illustration of the conflict" between property and contract law principles in leases. Note, *A Contractual Approach to Real Property Leases — A Strike at Caveat Emptor*, 2 CALIF. WESTERN L. REV. 133 (1966).

[17] *See, e.g.*, Leonard v. Armstrong, 73 Mich. 577, 41 N.W. 695 (1889).

[18] 310 Mich. 157, 16 N.W.2d 700 (1944).

water. The lessee sued to recover his deposit because the building was untenantable for his purposes. Recovery was granted on the theory of constructive eviction which the court defined as "any disturbance of the tenant's possession by the landlord or by someone under his authority whereby the premises are rendered unfit for occupancy for the purposes for which they were demised, or the tenant is deprived of the beneficial enjoyment of the premises, if the tenant abandons the premises within a reasonable time."[19]

Rescission of a lease is not always a desirable remedy. Quite often a long term lease is involved, and the demised premises have been selected for reasons collateral to the issues which may be raised in the rescission action. Hence, the premises are still desired if the defects are corrected or the alterations necessary to enable the lessee to use the premises are made. The appropriate remedy is not rescission, but recovery of damages incurred due to the required changes. Thus damages in the amount of the cost of alterations or for any other harm is a more desirable solution for the lessee.

The remedy of constructive eviction is frequently unavailable because the lessee usually can use the premises for some purpose so that the premises are not deemed untenantable. Typically he is denied the particular use he intended. The remedy is also undesirable because it terminates the lease. Constructive eviction also is not an adequate solution in those situations where only a portion of the leased premises are unusable.

In addition to the foregoing remedies for the lessee, one exception has been grafted onto the general rule of *caveat emptor.* A lease is not enforced against those lessees coming within its provisions. The exception was first stated in *Smith v. Marrable,*[20] where the court said there is an implied condition of habitation in the letting of a furnished house. This broad statement was qualified in later cases.[21] The exception was limited to situations in which a furnished dwelling was leased for a short and definite duration of time. The warranty implied was that the premises were habitable. Thus, where the basement was filled with water,[22] the home infected with insects,[23] or vermin[24] the warranty of habitability was breached and the tenant could properly quit the premises.

[19] *Id.* at 161, 16 N.W.2d at 702.

[20] 11 M. & W. 6, 152 Eng. Rep. 693 (Ex. 1843).

[21] In two other cases in 1843 the English courts were asked to apply the rule as stated in *Smith.* The limitations discussed later were found to be facts in *Smith* and prerequisites to the exception. Sutton v. Temple, 12 M. & W. 52, 152 Eng. Rep. 1108 (Ex. 1843); Hart v. Windsor, 12 M. & W. 66, 152 Eng. Rep. 1114 (Ex. 1843).

[22] For development of the exception see 11 BOSTON U.L. REV. 119 (1931), and authorities cited therein.

[23] *See, e.g.,* Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). *But see* Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947).

[24] *E.g.,* Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931).

The exception is apparently accepted universally in the United States.[25] It has, however, always been strictly limited in application.[26] It has not been extended to letting unfurnished dwellings.[27] It has been recognized in leases for periods of the summer,[28] a "season,"[29] eight months,[30] and one year,[31] but apparently for no period longer than one year. The basis of the exception is that the tenant has no time to investigate as *caveat emptor* requires. Both parties know that immediate occupancy for a specific purpose is desired, and the lessee frequently is from out of town and is unable to inspect the house, especially when the lease is for a short period of time.[32]

The remedies granted under the contract theory of implied warranty have been rarely applied to leases. Few cases have been found which allow a lessee recovery on this basis. In one such case, *J. D. Young Corporation v. McClintic,*[33] the lessee sued to cancel the lease because the building which was prepared by the lessor was defective and not complete at time of occupancy. The court held there is an implied warranty in the lease of a building under construction or to be constructed that it will be suitable for the lessee's purposes expressed in the lease if progress has not reached a stage permitting inspection of the premises.[34] Another case, *Woolford v. Electric Appliances, Inc.,*[35] involved the lease of a stall under con-

[25] The American cases are reviewed in 11 BOSTON U.L. REV. 119 (1931).

[26] *See* Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947), where the court said, "When the defendant let for the summer a furnished house at the seashore, he impliedly agreed that the house was reasonably suitable for immediate use and occupancy by the tenant. . . . [But] a condition that the premises are fit for habitation 'is implied only with regard to the state of the premises at the beginning of the tenancy and does not cover defects which arise later . . . .'" *Id.* at 632-33, 70 N.E.2d at 794-95 (citations omitted). *See also* Hacker v. Nitschke, 310 Mass. 754, 756, 39 N.E.2d 644, 646 (1942), where the court states about *Ingalls* that "[t]his is a departure from the general rule and should be confined within narrow limits." *See also* 11 BOSTON U.L. REV. 119 (1931), where the author states that in applying the exception to the rule of *caveat emptor* the American courts did so only insofar as the warranty extended to the chattels, furnishings, or goods which were incorporated into the real property lease; *caveat emptor* was still the rule if the defect of the furnished premises was structural or related to the real property. *Cf.* Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888).

[27] Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888).

[28] Smith v. Marrable, 11 M. & W. 6, 152 Eng. Rep. 693 (Ex. 1843).

[29] Ingalls v. Hobbs, 156 Mass. 349, 31 N.E. 286 (1892).

[30] Young v. Povich, 121 Me. 141, 116 A. 26 (1922).

[31] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). For criticism of the one year period as too long a period for application of the exception, see 45 MARQ. L. REV. 630 (1962).

[32] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[33] 26 S.W.2d 460 (Tex. Civ. App. 1930), *rev'd on other grounds,* 66 S.W.2d 677 (Tex. Comm'n App. 1933).

[34] J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930). *See also* Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904) (implied warranty in building under construction); Hardman Estate v. McNair, 61 Wash. 74, 111 P. 1059 (1910) (implied warranty premises to be arranged for tenant).

[35] 24 Cal. App. 2d 385, 75 P.2d 112 (1938).

struction in an open market at the time of leasing. When finished, the refrigeration in the stall was inadequate to preserve meats which the lessee offered for sale. The court held that under circumstances where there is construction to enable the lessee to put the premises to a particular use, a warranty that the construction will be adequate to permit the use is implied in the contract. Here the refrigeration unit was for one purpose — to enable the lessee to keep meats for sale. Since the unit was inadequate, the lessee recovered on an implied warranty that the stall as constructed would be reasonably suited for the intended purpose.[36]

It is important to note that in each of these cases *caveat emptor* was rejected because there was no way to inspect the final fitness of the premises under construction. The remedy in this situation is analogous to the recent decisions rejecting the rule of *caveat emptor* in the purchase of a new home and instead allowing recovery on the implied warranty theory.[37] The rationale under both circumstances resembles that applied to the lease of a furnished home for a short period of time. In these cases the lessee had little or no opportunity to inspect the premises and hence could not be penalized for what he could not observe. The warranty seems to be implied in the contract to construct and not in the lease agreement. Only one case has been discovered in which the theory of implied warranty was recognized on leased premises not under construction.[38]

Several reasons exist for extending the contract theory of implied warranty concerning the condition of demised premises to leases. In addition to the changes already mentioned in the nature of leasing transactions,[39] other reasons exist for not strictly applying *caveat emptor* to those transactions today. The lessee and lessor are not on a basis of equal knowledge regarding the premises. The owner of a building will usually be notified of building code violations present

[36] *Id.*

[37] *E.g.*, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). For a discussion of implied warranties in newly completed homes see Bearman, *Caveat Emptor in Sales of Real Property — Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961). The application of the implied warranty to the builder-vendor of a newly completed home is a logical extention of its application to a contract of sale of a home under construction. Carpenter v. Donohoe, *supra* at 83, 388 P.2d at 403.

[38] Hyland v. Parkside Inv. Co., 10 N.J. Misc. 1148, 162 A. 521 (1932). The court held a lessee who was unable to use the demised premises due to a zoning ordinance passed after possession could recover advance rent. The court said, "In this lease the landlord specifically restricted the use to one purpose, and we think this was an express guaranty of the fitness of the premises for that particular purpose. To hold otherwise would be an absurdity. A lease for a single purpose is void if that purpose is unlawful." *Id.* at 1149, 162 A. at 521. Not only is finding an express warranty under such circumstances against the weight of authority, but also the court cited no authority for the proposition that the warranty is present in a lease even though no remodeling or further construction on the demised premises is necessary. *Accord*, 1 AMERICAN LAW OF PROPERTY § 3.45, at 269 (A.J. Casner ed. 1952).

[39] Text preceding note 1 *supra.*

on his premises and also of special regulations regarding his land.[40] The lessee will not, without special investigation, know of these violations, nor will he know of structural defects in the building itself. It is not unreasonable to attribute knowledge of these facts to the lessor. He should be able to alert the lessee to them or easily discover if the use intended by the lessee is structurally feasible. To protect the lessee in these leasing transactions it is necessary to consider and apply a limited doctrine of implied warranties in leases.

I. THE IMPLIED WARRANTY

The nature of the implied warranty in the lease would be that the leased premises are suitable for the purpose of the tenant and that they are built in conformity to the applicable local codes. Thus, the lessor would assure that the premises can immediately be put to the use intended by the lessee and that the lessee may do so lawfully. If the premises do not conform to the code regulations or are structurally defective, the lessor would have to make the necessary repairs or compensate the lessee for having them done.

The warranty is designed to protect a lessee in various situations, although the usual one is where the lessor has superior knowledge. It will provide a remedy when the lessor has a structually defective building which is incapable of being used as the lessee planned.[41] Frequently a lessor agrees to build on the premises to suit the tenant, and the lease provides that the construction shall conform to the building codes. But if the lessee is a restaurant owner, a special plumbing system may be required by the plumbing code even though it is not required by the building code to which the building would conform. If the building is adequate for the building code requirements, the lessor has met the express covenant, but the premises are not suitable for occupancy for the express purpose of the lease. The lessee must install new plumbing facilities in order to use the premises in accordance with the lease terms. Under the implied covenant that the premises conform to the code regulations applicable to the intended use, the lessee could recover from the lessor the costs of installing the additional system.

A. *Limitations*

These warranties should be limited in application and would not be implied in all leases. Certain prerequisites must be shown

---

[40] *See* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409, 412 (1961), where the court discusses this point.

[41] The facts of Soresi v. Repetti, 76 A.2d 585 (D.C. Mun. Ct. App. 1950), and Anderson Drive-In Theater, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953), would bring both cases within the implied warranty theory.

before the implied warranties would be imposed. First, the lease must be for a stated purpose before the implied warranty of suitability should apply. If the purpose is known, the lessor is able to determine whether the building is structurally adequate for the expressed purpose. If the lessor is to build improvements on the premises for the lessee, he must check the necessary regulations to determine if his construction satisfies all local codes; he must also make the lessee aware of defects such as inadequate plumbing or electrical systems which may make the premises unsuitable for the intended use. Failure to do so will forfeit his right to recover his rent without penalty. However, if the purpose is not expressed in a lease, actual knowledge of the lessee's intended purpose should be sufficient to put the lessor on notice and bring the implied warranty into action. Thus, if a lease mentions no purpose but the parties only discuss a particular business of the lessee, the lessor should not be allowed to claim that the implied warranty is inapplicable because the purpose is not expressed. He should be held to have actual knowledge sufficient to enable him to ascertain the suitability of his building for that purpose.

A second limitation on the implication of these warranties is that the defects causing the unsuitability must be within the lessor's control. Thus, a dwelling rendered untenantable because of noxious gases arising from the neighborhood[42] would not fall within the implied warranty. The lessor should not be held accountable for faults which he has no power to alter. Nor can the warranty apply to cases in which the lessee before occupancy decides to alter his use.

The implied warranty of conformity with local code regulations must be limited to situations in which the untenantability of the premises is caused by violation of a specific code regulation relating to the intended use. Thus, if the code is applicable to drug stores, but not grocery stores, and the lease use is a grocery store, the warranty has not been breached even though use of the premises for the sale of drugs is not possible. The lessor can only be held to assure specific uses of the premises — not all uses. However, this warranty does not cover the situation in which the lessee knows he needs a particular permit to operate the intended business. If he is unable to get the required permit and thus cannot put the premises to the intended use, he cannot recover under this warranty. As under current law,[43] this example is a foreseeable contingency which the parties can anticipate and provide for in the lease. The implied warranty should not cover those contingencies which the parties can anticipate.

[42] Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889).

[43] Goodman v. Sullivan, 94 Ohio App. 390, 114 N.E.2d 856 (1952).

The implied warranties can only apply to defects which are latent and which make the premises unsuitable. Thus, the tenant cannot claim that the implied warranty of suitability has been breached if he leases land for a drive-in restaurant in a residential area in which business uses are prohibited. This fact is readily observable to him because zoning restrictions are a matter of public record.

B. *Remedies*

The remedy for breach of the implied warranty of suitability or conformity to local codes must differ from the present law, *i.e.,* the lessee must be able to recover the cost of altering the demised premises to permit the intended use or to conform to the code provisions. Since he may want to remain in possession, he must be allowed a damage remedy. These additional costs should be recovered from the lessor in a lump sum as damages. If the defect is the proximate cause of personal injuries, damages should be recoverable for the harm resulting therefrom.

Another remedy for the lessee should be reformation of the lease. If only a portion of the leased premises is untenantable, or if a portion does not meet the local code requirements, then the lessee should be allowed to decide whether he can or cannot use the remainder of the leased premises. If he can use part of them, the lease should be reformed to cover only the area in use and then be terminated as to that which is unsuitable. At that time, the rent should be reduced in an equitable amount by deducting the value of the portion returned to the lessor from the total rent due. Reformation would thus enable the lessee to recoup his losses on partially adequate leased premises. It is an important remedy since leased areas are frequently designed for dual purposes such as a cafeteria in one area, kitchen in an adjacent one, or a bar on one floor of a building and a restaurant on another.

The final remedy should be rescission and cancellation of the lease. If the premises are totally unusable and unsuited for the intended purposes, the lease should be terminated. However, this remedy should be strictly applied, so that if the purposes of a lease and the premises demised are separable, the lessor may enforce the lease as to a suitable portion. For example, if the lease states that one lessee will maintain a lounge on one floor and a cafeteria on another, but the cafeteria cannot be put in the building, the lessor should be able to enforce the lease and compel the lessee to put in the lounge if it is economically feasible. In short, the lessee cannot declare a lease rescinded merely because the warranties are not met

as to a portion of the lease. This restriction is particularly pertinent if the lessee has been granted remedies for partial breaches of these covenants.

The remedies for the breach of the implied warranty of suitability or for conformity to local codes would fill the gaps in the current legal remedies. Reformation of the lease provides something less than complete termination of that contract. Damages enable the lessee to recoup his losses and yet not sacrifice the lease. These solutions are needed today because the lease is a long term arrangement which is entered into for multifarious reasons. It is no longer simply for the occupancy of a building suited for one and only one purpose; it may be intended to serve several functions. Today the improvements may be built by developers for particular lessees and with specific purposes in mind. The land may be desirable as a business location even in a suburban area, and even if one intended use fails. The building may be constructed to suit the lessee or for his business purposes.

II. Conclusion

Leasing law has been strict in applying the doctrine of *caveat emptor* to a lessee who finds the demised premises unsuitable for occupancy. The lessee has been held liable for rent of the premises even though the lease stated that the premises were to be used for a particular purpose. Under the rule of *caveat emptor* the courts have held that the lessee had a duty to inspect the premises to determine their suitability for his intended use. The only exception to this rule was the case of a short term lease of a furnished dwelling.

As the lease law evolved, the lessee was provided relief if he could prove fraud or misrepresentation, mutual mistake, or constructive eviction. However, this relief took the form of cancellation or termination of the lease and allowed no recovery for damages or additional expenses of the lessee. In a few other cases the lessee was allowed relief on the theory of implied warranty that the premises being prepared would be suitable for the lessee's purpose. The warranties in those cases arose from the contract to construct or remodel and from the fact the work had not progressed far enough to allow adequate inspection. In each of them the lease was signed prior to construction of the leased premises.

Modern leasing transactions necessitate reevaluation of the doctrine of *caveat emptor* as applied to leases. The lessee no longer has as much knowledge of the premises as the lessor. Building code regulations or violations are made known to the lessor, not to the lessee. The lessor is in a better position to know of latent structural defects in a building which might go unnoticed by the inspecting

lessee since the plans and specifications of the building are not in the latter's possession.

The nature of leases also warrants reevaluation of this rule. Developers more and more frequently seek to obtain leases on an area of land before building. The lessee usually invests much time and money in determining that the area has good income potential and in preparing the leased space for his business. He cannot afford to discover after occupancy that a specific local code regulation regarding his business has not been met in construction of the building. The additional cost to correct the defect is unexpected. He does not want to cancel the lease, since he has built up good will and potential for his business in this area in anticipation of a long term lease. He needs the remedy which an implied warranty theory provides.

Moreover, the lessee, especially the small businessman, cannot accomplish the inspection which *caveat emptor* requires. He rarely will be familiar with wiring or plumbing, for example, and will not know if these systems are adequate. Nor can he afford to hire a professional engineer to investigate the site and make tests to determine the structural suitability of the building and land. The costs of this expert would be prohibitive, and yet *caveat emptor* requires the man who wants to engage in the laundry business to know that the building can support his heavy equipment. Such information is available to the lessor who can in turn inform the potential lessee of the physical suitability of the premises and of costs required by the lessee to adapt the premises to the use. The lessee must still inspect for patent defects such as broken windows, cracks in the wall, or unclean premises; he cannot recover under this theory for defects which a reasonable inspection would uncover, and the latter remains a question of fact.

Under circumstances in which the premises are unsuitable for an express use because of structural defects or local code violations, the lessee should be allowed relief against the lessor on a contractual theory of implied warranty. If a lease expresses a use or if the lessor knows of the intended use, the lessor should be held to impliedly covenant that the premises are fit for the use and conform to all local code regulations regarding the use. The warranty would be breached only if the defect is the cause of the unsuitability of the premises or if the code violation directly relates to the intended use. The warranty should not extend to defects which are beyond the lessor's ability to control or remedy. Contingencies which are foreseeable at the time of the lease should also be excepted from operation of the warranties.

The implied warranty of suitability for purpose and of con-

formity to local codes regarding the purpose would provide the lessee with a remedy less stringent than that available under current leasing law. Remedies now available frequently involve fact situations which would be covered by an implied warranty, but require proof of fraud, mistake, constructive eviction, or breach of the implied warranty of quiet enjoyment to allow relief to the lessee.[44] The relief under the theory of implied warranties would stop short of cancellation of the lease, *i.e.,* damages, proportionate reduction of rent, or reformation of the lease. Not only are these remedies more consistent with the intent of the parties, but they also enable the lessee to remain in possession under the lease.

The application of an implied warranty theory to leases gives recognition of the changes in leasing transactions today. The theory acknowledges that a lease is in essence not only a demise but also a sale, in the commercial sense, of an interest in land and, more importantly, is a contractual relationship.[45] The implied warranty suggested here would conform more closely to the intentions of the parties as well as to actual business expectations.

---

[44] Suit for the breach of implied warranty of quiet enjoyment has been occasionally utilized to seek a remedy for situations where the premises are unsuitable. *See, e.g.,* Croskey v. Shawnee Realty Co., 225 S.W.2d 509, 513-14 (K.C. Ct. App. Mo. 1949), where the court, quoting from Shaw v. Butterworth, 327 Mo. 622, 628, 38 S.W.2d 57, 60 (1931), determined,

> "In the absence of a covenant or promise, the tenant must take the premises in the condition in which he finds them, for to a mere contract of letting the rule of caveat emptor is relevant. An implied covenant on the part of the landlord that the premises are suitable for the purposes for which they are rented, or that they are in any particular condition, does not arise from the mere renting of premises."

[45] This idea is not meant to suggest that the court must find the leasing agreement was a "sale" before the implied warranties should be enforced. The warranties should be the basis of a cause of action by decisional or statutory law and should be allowed when the limitations discussed previously are present. The action should not depend upon the presence of technicalities such as a "sale," or the formal requirements in the law of sales for implying warranties. The basis of the action is the leasing agreement under the conditions outlined above — not the fact that a "sale" occurred.

THE "TORREY CANYON" DISASTER: SOME LEGAL ASPECTS

BY VED P. NANDA*

The "Torrey Canyon" disaster in March 1967 emphasized the need for effective preventive measures to avert such a disaster, and for restorative measures should such a disaster occur. Professor Nanda describes the extensiveness of the problem against the background of international and national norms that have haphazardly developed to cope with the situation. Recognizing the deficiencies in the present ability of nation states to combat oil pollution, Professor Nanda urges that nation states take the initiative through international agreements, to develop minimum standards and effective safeguards in this area.

THE *Torrey Canyon* wreck in March 1967,[1] has posed another challenge of modern technology for scientists and lawyers alike: how to prevent oil pollution of the seas and how to deal with the problem effectively. The accident occurred off southwest England. The tanker spilled approximately 80,000 tons of crude oil into the sea which coated English resort beaches on the Cornish coast with oil slicks,[2] threatened the French coast across the channel,[3] contaminated oyster beds and fisheries,[4] and caused extensive damage to bird life.[5]

---

* Assistant Professor, College of Law, University of Denver. The author wishes to thank Charles Booth, second year student at the College of Law, for his research assistance, and his colleagues William Altonin and Gary Widman for their helpful suggestions.

[1] For a report on the occurrence of the wreck and steps taken by the British Government to deal with the situation, see SEC'Y OF STATE FOR THE HOME DEP'T, THE "TORREY CANYON," CMND. NO. 3246 (1967).

[2] Winds, tides and currents washed oil onto the British beaches. For an account see C. GILL, F. BOOKER & T. SOPER, THE WRECK OF THE TORREY CANYON 60-71 (1967) [hereinafter cited as GILL]; CHEMICAL WEEK, Apr. 8, 1967, at 59.

[3] GILL, *supra* note 2, at 81-87.

[4] "[T]he fishing industry was virtually suffocated by the vast film of oil." LIFE, Apr. 14, 1967, at 31. *But see* 1 ENVIRONMENTAL SCIENCE AND TECHNOLOGY 273 (1967):

> According to Home Secretary Roy Jenkins, fish in the Seven Stones reef . . . were, several weeks later, untainted and seemed plentiful as ever. "Close in shore," he added, "where shellfish might be affected, only very few crabs and shore-haunting fish have been found dead. This was in areas heavily polluted with oil and where substantial quantities of detergent have been used."

[5] It was reported that the oil or detergent ingestion or skin burns had caused the death of 7,399 sea birds. N.Y. Times, May 27, 1967, at 51, col. 4, *But see* NEWSWEEK, Apr. 10, 1967, at 51, col. 1: "[A]t least 100,000 sea birds . . . had been killed by the chocolate-brown ooze." *See also id.*, at 110, col. 2-3. For a statement by the director of public information for the National Audubon Society before the Senate Subcommittee on Air and Water Pollution that of the 6,000 birds brought ashore after the *Torrey Canyon* disaster, "less than 500 were saved," see N.Y. Times, June 9, 1967, § M, at 80, col. 1. *See also id.*, June 11, 1967, at 55, col. 1; LIFE, Apr. 14, 1967, at 34. A British observatory is said to have estimated that 40,000 sea birds died. 1 ENVIRONMENTAL SCIENCE AND TECHNOLOGY 273 (1967). *See also* Rienow

The wrecked tanker, carrying a cargo of 117,000 tons of Kuwait crude oil, was American-owned[6] and chartered,[7] Liberian registered,[8] manned by an Italian master and crew, contracted for salvage to a Dutch company,[9] grounded on the Seven Stones reef in international waters,[10] abandoned by the owners,[11] and destroyed by the British naval and air force bombers using rockets and napalm.[12] The pending legal battle[13] will raise several complex issues of international maritime law, including the determination of liability for oil pollution which is of primary concern to all parties involved in the controversy.

In addition to the imposition of liability, however, the *Torrey Canyon* disaster has highlighted two other major needs — that effective preventive measures be taken to avert such a disaster, and that effective restorative measures be devised to handle such a crisis if it occurs. This article will discuss these issues by examining and appraising past practices and pertinent norms of national and international law. The discussion will conclude with recommendations that measures be taken both on national and international levels to deal with a future *Torrey Canyon* type of situation.

I. THE EXTENT OF THE PROBLEM

Each year, more than 700 million tons of petroleum and petroleum products are carried over the seas[14] by oil tankers that account

---

& Rienow, *The Oil Around Us,* N.Y. Times, June 4, 1967 (Magazine), at 24, 110-11; A. Hawkes, A Review of the Nature and Extent of Damage Caused by Oil Pollution at Sea, Mar. 7, 1961 (paper presented at N. Am. Wildlife Conf., Wash., D.C.), *reported in Hearing Before the Senate Comm. on Foreign Relations,* 87th Cong., 1st Sess. on Ex. C, 86th Cong., 2d Sess., at 21 (1961).

[6] The tanker was owned by the Barracuda Tanker Corp., a subsidiary of the Union Oil Co. of California, operating out of Bermuda. GILL, *supra* note 2, at 17. For a brief statement attributed to a spokesman for the Union Oil Co. of California that the *Torrey Canyon* was only under "long-term, bareboat charter" to the Union Oil Co. and that there was "no corporate relationship between Union Oil and Barracuda Tanker Corporation," see N.Y. Times, July 18, 1967, at 33, col. 8.

[7] However, the ship was on single voyage charter to the British Petroleum Co., Ltd. THE "TORREY CANYON," *supra* note 1, at 2.

[8] The Liberian registry entitled the *Torrey Canyon* to fly the Liberian flag under which she was sailing.

[9] *See* GILL, *supra* note 2, at 18, 22.

[10] The accident occurred 15 miles west of the Cornish Peninsula. GILL, *supra* note 2, at 12, 19-20.

[11] GILL, *supra* note 2, at 33, 41.

[12] *See* THE "TORREY CANYON," *supra* note 1, at 6.

[13] Prime Minister Wilson announced in the House of Commons the British decision to sue the owner, The Union Oil Co. of California. N.Y. Times, Apr. 5, 1967, at 12, col. 4. *See also id.,* May 5, 1967, at 16, col. 1; *Arrest of Torrey Canyon's sister ship,* Manchester Guardian Weekly, July 20, 1967, at 16, col. 2.

[14] Horne, *Tanker Operators Strive to Avoid Pollution of Sea,* N.Y. Times, June 11, 1967, at 88, col. 2. Recently Secretary of the Interior Stewart Udall, testifying before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works in connection with proposed amendments to the Oil Pollution Act (S. 1591, S. 1604), put the figure at approximately one billion tons. WATER CONTROL NEWS, June 19, 1967, at 1.

for 40% of the world ocean traffic.[15] Tankers built since the last world war are considerably larger in size than earlier models. While pre-World War II standard tankers carried about 15,000 tons,[16] at present the Japanese tanker *Idemitsu Maru* has a 206,000 dead-weight tonnage, six vessels of 312,000 dead-weight tonnage are now on order,[17] and super tankers of more than 500,000 dead-weight tonnage capacity are already in the planning stage.[18] Among other factors, heavy traffic, congested sea lanes, and the human element in navigation[19] would demand that the world be prepared to face the possibility of huge amounts of oil slick caused by an accidental collision, grounding or fire even if effective preventive measures were rigidly and faithfully followed.

Accidental pollution is only one source of oil pollution. In varying degrees deliberate discharges from bilge pumping, ballast dumping and tank cleaning operations, oil seeping and leakage, especially spills resulting from carelessness during fueling operations, and the trickle of refuse from oil-burning ships, add to the continuing pollution of the oceans.[20] Yearly discharge of waste oil into the seas is substantial, amounting to millions of tons.[21] According to one estimate, yearly traffic to the American ports alone — approximately 100

---

[15] Rienow & Rienow, *supra* note 5, at 24.

[16] THE NEW REPUBLIC, Apr. 29, 1967, at 4, 5.

[17] For a report that these vessels were on order in Japanese yards for service under charter to the Gulf Oil Corp., see N.Y. Times, July 22, 1967, at 40, col. 6; Kentfield, *Two Kinds of Tankers — Clean and Dirty,* N.Y. Times, May 14, 1967 (Magazine), at 24, 25. The Humble Oil and Refining Company and Esso International, Inc., have both ordered new supertankers for their fleets. N.Y. Times, Aug. 14, 1967, at 44, col. 3.

[18] For a report than tankers up to 500,000 dead-weight tons are both economically and technically feasible, see OIL & GAS J., May 22, 1967, at 79. For a statement that the British claim to have developed a structural method to build a ship of a million tons, see Kentfield, *supra* note 17, at 24, 98.

[19] It is reported that the Liberian Board of Inquiry found the Captain of the *Torrey Canyon* negligent and blamed him for the wreck, recommending that his master's license be revoked. *See* N.Y. Times, May 6, 1967, at 62, col. 1.

[20] Hawkes, *supra* note 5, at 21:

> The U.S. Coast Guard's proceedings of the Merchant Marine Council for April 1960 lists the principal sources of oil pollution of the oceans. Two of the commonest from shipping are spills during bunkering (fueling) operations and discharges from bilge and ballast tanks. Nearly half of all the oil spills whose causes were determined by the U.S. Coast Guard from January 1, 1956 to September 22, 1959 originated while oil-burning ships were taking on fuel. Bilge pumping ranked third as a traceable cause of oil pollution.

During this period hull leakage is said to have accounted for 20% of the traceable spills. *See also* Rienow & Rienow, *supra* note 5, at 112; Horne, *supra* note 14.

[21] Admiral Richmond, Commandant, U.S. Coast Guard, and Chairman of the U.S. Delegation to the 1962 London Conference convened by the Inter-Governmental Maritime Consultative Organization [hereinafter IMCO] to amend the 1954 Convention for the Prevention of Pollution of the Sea by Oil, is said to have reported to the Secretary of State: " ' . . . recent estimates indicate that world shipping is discharging waste oil into the sea at the rate of one million tons per year . . .' " Stubbs, *Oil Pollution: Penalty and Damage Aspects,* 16 JAG. J. 140, 141 (1962).

million tons of petroleum products[22] — accounts for 2.8 million barrels of oil residue dumped into the sea.[23]

Another potential pollutant is the emission of oil from loaded tankers torpedoed and sunk in World War II. The United States coasts alone are reported to have lying submerged as many as 150 such tankers[24] containing 5 million barrels of oil,[25] some of which might have been responsible for the pollution of the New Jersey[26] and Virginia[27] beaches, and the recent black tides on Cape Cod.[28]

Since oil spreads fast and over vast areas, the problem assumes serious proportions. According to a recent report the British have demonstrated that even such a negligible amount as 15 tons of oil "dropped into a calm sea can cover 8 square miles in less than a week, and that oil slicks can be traced for many hundreds of miles."[29]

A report two months after the *Torrey Canyon* disaster points to the recontamination of some English beaches after the winds and tides had washed away sand and exposed even further oil deposits.[30] Another study to examine the effects of oil pollution on a beach damaged in 1957 by two thousand tons of oil from a vessel run aground off Baja California, showed that eight years later the damaging effects still continued.[31]

Oil pollution has destructive effects on the ocean's ecology. It is widely accepted that surface slicks upset the immensely complex chain of sea life.[32] One study found that the growth of Nitzschia —

[22] Rienow & Rienow, *supra* note 5, at 111.

[23] *Id.* at 112.

[24] From a statement by Representative Jim Wright before the House Subcomm. on Rivers and Harbors, *reported in* N.Y. Times, May 23, 1967, at 10, col. 7. Deep sea divers have recently been inspecting sunken tankers off the New Jersey coast to see if their oil cargos pose a threat to the coast line. N.Y. Times, Aug. 15, 1967, at 12, col. 5.

[25] Horne, *supra* note 14.

[26] *See* editorial, *Control of Oil Pollution,* N.Y. Times, May 15, 1967, at 40, cols. 1-2; Horne, *supra* note 14.

[27] *See* statement by Secretary Udall, *reported in* N.Y. Times, May 27, 1967, at 51, col. 4. *See also Chemicals vs. Crude Oil,* CHEMICAL WEEK, May 20, 1967, at 49.

[28] Three articles from daily newspapers reporting on the Cape Cod pollution are reprinted in 113 CONG. REC. H4778-79 (daily ed. Apr. 27, 1967).

[29] Rienow & Rienow, *supra* note 5, at 24.

[30] N.Y. Times, May 27, 1967, at 51, col. 4.

[31] Reported by Clive Manwell of the Marine Biological Association in Plymouth, in 1 ENVIRONMENTAL SCIENCE AND TECHNOLOGY 273 (1967). Although no detergent had been used in the study, it was reported that in laboratory tests where detergent was used for experimental purposes, it had caused more harm than the crude oil.

[32] For a summary of Secretary Udall's statement about the "vulnerability and importance of the areas and forms of life which oil pollution damages," see WATER CONTROL NEWS, June 19, 1967, at 1. *See generally* on ecological aspects, PERSPECTIVES IN MARINE BIOLOGY 3-186 (A. Buzzati-Traverso ed. 1960); C. DAVIS, THE MARINE AND FRESH WATER PLANKTON 125-279 (1955); A. HARDY, THE OPEN SEA, ITS NATURAL HISTORY: FISH AND FISHERIES (1959); A. HARDY, THE OPEN SEA, ITS NATURAL HISTORY: THE WORLD OF PLANKTON 292-315 (1956); G. REID, ECOLOGY OF INLAND WATERS AND ESTUARIES 211-340 (1961).

a diatom food of the oyster — is seriously inhibited if oil remains for more than one week on the water's surface.[33] To illustrate, in September 1960, oil pollution is said to have caused substantial damage to the oyster fishery of Narragansett Bay.[34] The destructive effects of oil on sea birds have been repeatedly witnessed in several coastal states including the United States, United Kingdom, Germany and Canada,[35] and were recently dramatized by the *Torrey Canyon* disaster.[36] Oil pollution may affect human beings even more directly in the future if man is compelled to rely upon ocean water through artificial desalination as a major source of his domestic and industrial water supply[37] and the adverse effects of oil and the materials used to eliminate it, including detergents, are not confined to the surface alone.[38] However, the ecological effects of oil have thus far been neither systematically studied nor widely publicized.[39] The problem is therefore hard to comprehend fully, which makes it rather difficult to suggest meaningful preventive and remedial measures.

Within the narrow confines of the *Torrey Canyon* wreck, the concept of the supremacy of the law of the flag on the high seas[40]

---

[33] Dr. Paul Galtsoff, biologist for the U.S. Fish and Wildlife Service, conducted the study, which is reported in Hawkes, *supra* note 5, at 24.

[34] Rienow & Rienow, *supra* note 5, at 110.

[35] Hawkes, *supra* note 5, at 24-25.

[36] *See* GILL, *supra* note 2, at 88-112.

[37] *See, e.g.,* Dep't of the Interior, Water for Peace: A Report of Background Considerations and Recommendations on the Water for Peace Program, Mar. 1967 (recommendations on desalination), *excerpt reprinted in* 56 DEP'T STATE BULL. 761 (1967). Addresses by President Johnson and Secretary Rusk at the International Conference on Water for Peace, Washington, D.C., May 23-31, 1967, contain reference to the need for desalination. *See id.* at 903, 905. A bill to authorize appropriations for an expanded saline water conversion program is already before the Senate Subcommittee on Water and Power Resources, Internal and Insular Affairs Committee. S. 1101, 90th Cong., 2d Sess. (1967). *See also* a brief report in CHEMICAL WEEK, July 29, 1967, at 51, that the world's largest single-unit desalting plant, "rated at 2.62 million gal./day," was recently dedicated in Key West, Florida.

[38] *See* Hawkes, *supra* note 5, at 26. The detergent industry has agreed to cooperate with the Department of the Interior to develop "minimum-phosphate detergents." Secretary Udall called it a "significant and giant step forward" in adopting preventive techniques of pollution control. CHEMICAL & ENGINEERING NEWS, Aug. 7, 1967, at 16.

[39] "There is some difference of opinion as to the exact nature and variety of the effects of oil on different forms of marine life." Hawkes, *supra* note 5, at 23.

> [T]hose most aware of and concerned about oil pollution have failed to present clear, well documented, and voluminous information relative to the real extent of this problem. There is no question that the problem exists and is of disastrous proportions in some areas but there is real need for sound information making this clear to all concerned. Therein lies one of the major contributions needed from the biologists and conservationists of the world.

Id. at 26.

[40] Article 6(1) of the 1958 Geneva Convention on the High Seas provides: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. . . ." Convention on the High Seas, Apr. 29, 1958, art. 6, para. 1, [1962] 2 U.S.T. 2312, 2315, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 86 (effective Sept. 30, 1962), *quoted in* 52 AM. J. INT'L L. 842 (1958). *See also id.*, art. 5 and 7.

needs reevaluation. The problem is accentuated by the widespread practice of the flags of convenience.[41]

II. Policy Considerations

The international community has a common interest in keeping the oceans — the joint property of nations[42] — free from pollution. At the highest level of generality, this objective finds unanimous acclamation by the leading participants — nation states,[43] concerned industrial enterprises,[44] and interested groups.[45]

In specific instances, however, the conduct of participants, which is in varying degrees influenced by their conflicting and contending interests, might result in defeating the overall objective. Thus economic expediency might dictate that a tanker dump slops in the ocean instead of carrying around a tank full of it until it found shore facilities for disposal. Similarly, the objective of attracting a larger tanker fleet under its flag might result in a nation state's offering the owners of different nationalities inducements in the form of imposing less stringent national regulatory and enforcement measures. In the same way, a state might choose to reject such international regulatory norms as the 1954 Convention for the Prevention of Pollution of the Sea by Oil,[46] thus freeing the owners from being otherwise subjected to international standards and discipline.

Thus there might be a clash between the overall interest in the prevention of oil pollution and the special interests sought by the group of tanker owners and nation states unwilling to comply with

---

[41] The International Court of Justice noted in an advisory opinion that notwithstanding the foreign ownership of many vessels registered in Liberia and Panama, these countries are among the eight "largest ship-owning nations." Advisory opinion on Constitution of the Maritime Safety Committee of the IMCO, [1960] I.C.J. 150. *See generally* RIENOW, THE TEST OF NATIONALITY OF A MERCHANT VESSEL (1937); Harolds, *Some Legal Problems Arising out of Foreign Flag Operations,* 28 FORDHAM L. REV. 295 (1959); McDougal, Burke, & Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships,* 54 AM. J. INT'L L. 25 (1960); Pinto, *Flags of Convenience,* 87 JOURNAL DE DROIT INTERNATIONAL (CLUNET) 344 (1960); Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing,* 69 YALE L.J. 498 (1960). *See also* M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 1112-40 (1962); N.Y. Times, June 28, 1967, at 73, col. 5.

[42] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 473 (1792).

[43] The 1954 Convention for the Prevention of Pollution of the Sea by Oil and the 1962 Amendments are an expression of this common interest. *See* notes 46-59 *infra* and accompanying text.

[44] *See, e.g.,* Horne, *supra* note 14, at 88, cols. 2-6.

[45] *See, e.g.,* statements by the officers of the American Humane Education Society, the Audubon Society, and National Wildlife Federation in *Hearing Before the Senate Comm. on Foreign Relations, supra* note 5, at 15, 21 and 31 respectively.

[46] The 1954 Convention has been in force since July 26, 1958, but it entered into force for the United States on December 8, 1961. Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature,* May 12, 1954, [1961] 3 U.S.T. 2989, T.I.A.S. No. 4900 (effective Dec. 8, 1961) [hereinafter cited as the 1954 Convention].

the international standards. The urgency of the situation might demand that in the near future these special interests be controlled by an international agreement prohibiting the pollution of the seas by oil, irrespective of the reason therefor,[47] and imposing more severe penalties. The agreement might also establish an international agency to provide the structure and machinery for enforcement and determination of the conflicting claims.

Notwithstanding the maritime practice widely accepted heretofore and reflected in the international norms that the regulation, control and enforcement of antipollution measures on the high seas be exclusively administered by the state of the flag,[48] a first step might be taken to recognize the equally strong claim for concurrent jurisdiction when events occurring in the contiguous zones of a coastal state are likely to affect its interests. The British action of bombing the *Torrey Canyon* is one such instance.

III. TRENDS IN DECISION

Pollution of waterways caused by leaking oil-carrying wooden vessels can be traced back to the mid-18th century.[49] However, it was not until the first World War when vessels had started switching from steam to oil and oil tankers began plying the oceans that oil pollution came to be recognized as a serious problem, necessitating national and international preventive and regulatory measures. This section will briefly examine the prevalent international norms and relevant measures undertaken by two maritime powers, the United States and Great Britain, to deal with oil pollution. This will be followed by a discussion of the jurisdictional aspects.

A. *International Norms*

As the first major effort on an international scale to regulate the discharge of oil and oily wastes into the seas, the 1954 Convention for the Prevention of Pollution of the Sea by Oil[50] is applicable to "sea-going ships registered in any of the territories of a Contracting Government."[51] Since the purpose of the Convention was to prevent the pollution of the sea by oil, it sets up areas generally extending

---

[47] For exceptions, recognized by the 1962 Amendments to the 1954 Convention, as not constituting an offense under the Convention, see Amendments to the Convention of 1954, *adopted* Apr. 4-11, 1962, art. IV (a), (b), (c), [1966] 2 U.S.T. 1523, T.I.A.S. No. 6109 (effective May 18, 1967) [hereinafter cited as the 1962 Amendments].

[48] *Id.* art. VI(1).

[49] Hawkes, *supra* note 5, at 21. For the report that in 1754 the Caspian Sea off Baku was polluted by leakage of bulk oil cargo in wooden bottoms, see 16 PROCEEDINGS OF THE MERCHANT MARINE COUNCIL 199 (1959) *cited in* Stubbs, *supra* note 21, at 140.

[50] 1954 Convention, *supra* note 46.

[51] *Id.* art. II.

50 miles from land as prohibited for the discharge of oil and oily wastes.[52] It contains requirements that ships be fitted with oily-water separators[53] and that skippers keep oil record books on board the ship.[54] It pledges the signatory nation state to enforce the prohibition against the dumping or spilling of oil within those prohibited zones in offshore international waters.[55] Although the Convention does not prescribe specific penalties for violation, it says they shall be no less stringent than the penalty for a comparable discharge within the signatory's territorial waters.[56]

In 1962 the Convention was amended[57] to extend its scope and to strengthen it by bringing within its purview new categories of ships, extending the restricted zones where no oil or oily wastes may be discharged, and amending the prescribed penalties and enforcement procedures. Amendments were also adopted to meet the United States' reservations pertaining to the amendment procedure of the Convention[58] and her objection concerning the Federal Government's responsibility for providing shore facilities for the reception of oil residues.[59]

The 1958 United Nations Geneva Convention on the High Seas[60] provides that taking account of the existing treaties on the prevention of pollution of the seas, each state shall draw up regulations to prevent pollution "by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the sea bed and its subsoil . . . ."[61]

B. *The United States Action*

Following the long-established and unchallenged practice of maritime nations to have a nation state prescribe and apply norms to all ships, irrespective of their nationality, entering its territorial and internal waters,[62] federal legislation enacted in 1886 dealt with

---

[52] *Id.* art. III, annex A.

[53] *Id.* art. VII.

[54] *Id.* art. IX.

[55] *Id.* art. III and VI.

[56] *Id.* art. VI.

[57] The 1962 Amendments were adopted by the Conference of Contracting Governments to the Convention of 1954, held at London, April 4 to 11, 1962.

[58] *Compare* the 1954 Convention, art. XVI, *with* the 1962 amendments, art. XVI.

[59] *Compare* the 1954 Convention, art. VIII, *with* the new article VIII, which merely obligates a nation state to "take all appropriate steps to promote" the shore facilities. 1962 Amendments, art. VIII.

[60] *Adopted* Apr. 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962). *See* U.N. Doc. A./Conf.13/L.53 (1958). The text of the convention is contained in 52 Am. J. Int'l L. 842 (1958).

[61] 1958 Convention, art. 24, *quoted at* 52 Am. J. Int'l L. 842, 848 (1958).

[62] *See generally* M. McDougal & W. Burke, The Public Order of the Oceans 89-304 (1962).

the problem of water pollution in New York harbor.[63] The statute, preventive in nature, made it unlawful to discharge refuse into New York harbor.[64] In 1888, it was superseded by another Act, broader in scope, which made the act of dumping refuse "in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound," a misdemeanor punishable by a fine ranging from $250 to $2,500 and a prison sentence from 30 days to a year.[65]

The purpose of the Act was to prevent the discharge of any matter which would tend to obstruct navigation or would injure boats in the harbor.[66] Although oil waste was not specifically mentioned in the Act, the courts have consistently held that discharging waste fuel oil[67] or dumping oil[68] into the tidal waters is within the provisions of the Act.

Further legislation was adopted in 1890[69] and 1894,[70] controlling the deposit of refuse in the United States navigable waters generally. These Acts were superseded by the River and Harbor Act of 1899,[71] which also provided for penalties for violations similar to the ones prescribed by the 1888 Act. Construing the Act of 1899, the Court held the discharge of oil from vessels to be "refuse matter" under the Act and hence considered the discharge punishable.[72]

The first comprehensive legislation dealing with oil pollution was adopted in 1924. Entitled the Oil Pollution Act, 1924,[73] the Act is an addition to the laws already existing "for the preservation and protection of navigable waters."[74] It prohibits the "discharge of oil by any method, means, or manner into or upon the coastal navigable waters of the United States from any vessel using oil as

---

[63] Act of Aug. 5, 1886, ch. 929, § 3, 24 Stat. 329.

[64] *Id.*

[65] Act of June 29, 1888, ch. 496, § 1, 25 Stat. 209, *superseded by* New York Harbor and Adjacent Waters Act, 33 U.S.C. § 441 (1964), *as amended* Aug. 28, 1958, Pub. L. 85-802 § 1(1), 72 Stat. 970.

[66] Warner-Quinlan Co. v. United States, 273 F. 503 (3d Cir. 1921).

[67] The Albania, 30 F.2d 727 (S.D.N.Y. 1928).

[68] S.S. Nea Hellis, 116 F.2d 803 (2d Cir. 1941).

[69] Act of Sept. 19, 1890, ch. 907, § 6, 26 Stat. 453, prohibiting the obstruction of navigation by deposits of refuse, etc., in navigable waters.

[70] Act of Aug. 18, 1894, ch. 299, §§ 6-8, 28 Stat. 363, which prohibited the depositing of refuse in navigable waters for the improvement of which money had been appropriated, and prescribed penalties for violations.

[71] Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152, which prohibited discharge of "any refuse matter of any kind or description whatever . . . into any navigable water of the United States." *See also* River and Harbor Act of 1966, S. 3906, tit. 1; 33 U.S.C. §§ 411-12 (1964).

[72] United States v. Standard Oil Co., 384 U.S. 224, 230 (1966). *See also* United States v. Ballard Oil Co., 195 F.2d 369, 370-71 (2d Cir. 1952); La Merced, 84 F.2d 444, 446 (9th Cir. 1936).

[73] Act of June 7, 1924, ch. 316, 43 Stat. 604, 33 U.S.C. §§ 431-37 (1964).

[74] *Id.* § 8, 43 Stat. 606, 33 U.S.C. § 437 (1964).

fuel . . . or any vessel carrying or having oil thereon in excess of that necessary for its lubricating requirements . . . ."[75] The penalties provided by the Act are similar to the ones mentioned earlier.[76] The United States Coast Guard is the enforcing agency.[77]

More recently Congress adopted major legislation in 1966 to fight water pollution. Called the Clean Waters Restoration Act of 1966,[78] the Act amends the Federal Water Pollution Control Act,[79] and the Oil Pollution Act, 1924.[80] It requires the person [81] discharging oil from a vessel in the navigable waters of the United States to remove the same, failing which the Secretary of the Interior may arrange for its removal and the person responsible for such discharge shall be liable for the costs of such removal. It also provides for penalties: in addition to a fine of up to $2,500 and imprisonment up to a year, the vessel is liable for a penalty of up to $10,000.[82]

Since the passage of the Act, further efforts to strengthen it are already underway. Under the 1966 Act the "discharge" meant "any *grossly negligent,* or willful spilling, leaking, pumping, emitting or emptying of oil."[83] There was no provision for dealing with accidental discharge of oil. Now amendments have been proposed to make accidental discharge into coastal waters subject to the penalties mentioned above. The proposed bill, called the "Navigable Waters Pollution Control Act of 1967,"[84] would substitute "accidental, negligent" for "grossly negligent" in defining discharge,[85] thus making the owners liable for cleaning up the oil slick if there is even an accidental spilling or leaking of oil. It would also raise the limit of the penalty to $50,000.[86]

In the hearings before the Senate Public Works Committee on the bill,[87] the officials of the Federal Government enthusiastically

---

[75] *Id.* § 3, 43 Stat. 605, 33 U.S.C. § 433 (1964).

[76] The minimum fine is $500. *Id.* § 4, 43 Stat. 605, 33 U.S.C. § 434 (1964).

[77] *Id.* § 7, 43 Stat. 605-06, 33 U.S.C. § 436 (1964).

[78] Pub. L. No. 89-753, 80 Stat. 1246 (1966). For full text see WATER CONTROL NEWS, Oct. 24, 1966, at 9. *See also* Water Quality Act of 1965, Pub. L. 89-234.

[79] 33 U.S.C. §§ 466-66K (1964).

[80] Act of June 7, 1924, ch. 316, 43 Stat. 604, 33 U.S.C. §§ 431-37 (1964). *See* WATER CONTROL NEWS, Oct. 24, 1966, at 31, for the amendments.

[81] Act of June 7, 1924, ch. 316, 43 Stat. 605, 33 U.S.C. § 432(b) is amended to define person as "an individual, company, partnership, corporation, or association; any owner, operator, master, officer, or employee of a vessel; and any officer, agent or employee of the United States." Pub. L. 89-753, § 211(a), 80 Stat. 1252 (1966).

[82] *Id., amending* 33 U.S.C. § 434 (1964).

[83] *Id., amending* 33 U.S.C. § 432 (1964) (emphasis added). *See* WATER CONTROL NEWS, Oct. 24, 1966, at 31, § 2(3).

[84] S. 849, 90th Cong., 1st Sess., introduced in the Senate on Feb. 6, 1967, and referred to the Committee on Public Works.

[85] *Id.* § 2(e), *amending* 33 U.S.C. § 432 (1964).

[86] *Id.* § 4(b), *amending* 33 U.S.C. § 434 (1964).

[87] For brief reports on the hearings, see N.Y. Times, June 9, 1967, at 80, col. 1; *id.,* June 8, 1967, at 30, col. 4; *id.* May 15, 1967, at 40, col. 1.

endorsed the amendment saying that its passage would assist them in enforcing the basic federal law on the subject — the Oil Pollution Act of 1924[88] — while the representatives of the oil industry have strongly opposed it. The industry's main arguments are that (1) covering of accidental discharge under the Act would not be fair or equitable;[89] (2) Congress should defer action until the Inter-Governmental Maritime Consultative Organization has done a thorough study on the subject;[90] and (3) the United States should not act unilaterally.[91]

Finally, the Oil Pollution Act of 1961,[92] the implementing legislation for the 1954 International Convention, should be mentioned. It may also be noted that the United States' delay in ratifying the Convention and adopting the implementing legislation stemmed primarily from the oil industry's response that since the Convention did not provide means for effectively enforcing anti-pollution measures, no useful purpose would be served by joining it. Instead, voluntary arrangements by industry were considered to be more effective.[93]

In 1961, however, the Convention was ratified by the United States subject to an understanding, reservations, and recommendations. The understanding concerned the supremacy of the United States' action in United States territorial waters. The reservations pertained to the amendment procedures of the Convention and its provision that the Federal Government be obligated to provide adequate shore facilities for receiving oil and oily wastes. Recommendations were made for future amendment of the Convention.[94] The 1961 Act prohibits discharge by ships of American registry of oil or oily wastes beyond the United States territorial waters in specified zones. It also provides for the maintenance and examination of oil record books and for penalties. Subsequently, the United States accepted the 1962 Amendments to the Convention,[95] and the 1961

---

[88] N.Y. Times, June 9, 1967, at 80, col. 1.

[89] Statement by Ralph Casey, President, American Merchant Marine Institute, *reported in* N.Y. Times, June 8, 1967, at 30, col. 4.

[90] Statements attributed to Ralph Casey, General Manager of the Marine Dep't of the Gulf Oil Corporation, and W.C. Brodhead, Chairman of the American Petroleum Institute's Central Committee on Transportation by Water, *cited in* N.Y. Times, June 8, 1967, at 30, cols. 4, 5.

[91] Statement by W.C. Brodhead, *cited in* N.Y. Times, June 8, 1967, at 30, col. 5.

[92] 33 U.S.C. §§ 1001-15 (1964).

[93] *See, e.g.,* statement by Abram Chayes, former legal advisor, Department of State, *in Hearing Before the Senate Comm. on Foreign Relations,* 87th Cong., 1st Sess., on Ex. C, 86th Cong., 2d Sess., at 5 (1961).

[94] *Id.* at 2.

[95] Entered into force for the United States May 18, 1967, except for Article XIV which entered into force June 28, 1967. *See* notes 57-59 *supra* and accompanying text; U.S. DEP'T OF STATE, PUB. NO. 8188, TREATIES IN FORCE 277 (1967).

Act was amended[96] to implement the amended Convention. The provisions of the Act are in addition to those of the 1924 Act, which with some modifications, are still applicable to all ships within the territorial waters.

C. *The United Kingdom Action*

The United Kingdom adopted its first major legislation dealing with the problem of oil pollution in 1922. Entitled the Oil in Navigable Waters Act, 1922,[97] the Act made the discharge or escape of oil into the British territorial waters,[98] from a vessel capable of carrying more than 25 tons of oil[99] an offense punishable with a fine not exceeding £100 to be imposed upon the owner or master of the vessel.[100] It also provided for keeping records with respect to transfer of oil.[101]

The next step was the implementing legislation for the 1954 Convention. Entitled the Oil in Navigable Waters Act, 1955,[102] it repealed the 1922 Act.[103] The provisions of the new Act are similar to those in the United States Oil Pollution Act of 1961.[104] The new Act is wider in scope since it also covers the regulation of oil pollution from all vessels within the British territorial and inland waters.[105] Pursuant to the 1962 amendments to the 1954 Convention, the 1955 Act was amended in 1963.[106] The Board of Trade is the enforcement agency under the Act.[107]

Finally, the Continental Shelf Act, 1964,[108] makes an offense the discharge or escape of oil into any part of the sea as a result of operations for exploring the sea bed and subsoil or the exploitation of the sea's resources in designated areas. Under the Act the owner of the pipeline or the person carrying on such operations is liable and may be fined.[109]

---

[96] Pub. L. 89-551 (Sept. 1, 1966). The Act was passed by the House on June 20, 1966, and the Senate on Aug. 19, 1966. *See also* H.R. REP. No. 1479, 89th Cong., 2d Sess. (1966); S. REP. No. 1620, 89th Cong., 2d Sess. (1966).

[97] 12 & 13 Geo. 5, c. 39 [hereinafter cited as the 1922 Act].

[98] *Id.* § 8(3).

[99] *Id.* § 8(2).

[100] *Id.* § 1.

[101] *Id.* § 3(1).

[102] 3 & 4 Eliz. 2, c. 25.

[103] *Id.* § 24.

[104] 33 U.S.C. § 431 (1964).

[105] 3 & 4 Eliz. 2, c. 25, §§ 2(3) and 3(2).

[106] Oil in Navigable Waters Act, 1963, c. 28.

[107] Statutory Instrument 1965, No. 145.

[108] Statutes 1964, c. 29. On the possibility and the technique of laying deep pipelines, see DeLarvelle, *French install submarine pipeline at depth of 1,080 ft.*, OIL & GAS J., Aug. 7, 1967, at 118.

[109] The Continental Shelf Act, 1964, c. 29, §§ 5(1)(2).

IV. ISSUE OF JURISDICTION

While each nation state enjoys an almost exclusive competence to prescribe and apply norms to events occurring within its territorial waters, it has to share this competence with other nation states with respect to events occurring upon the high seas. Thus, among others, the law of the flag, the nationality of the participants involved, and the impact upon the coastal state may all be relevant factors in asserting competence regarding occurrences on the high seas.[110] However, the admiralty jurisdiction exercised by nation states, including the United States and the United Kingdom, is quite broad and would extend to the damage caused by the oil pollution from a vessel.

A. *The United States Practice*

The United States federal courts exercise a broad admiralty jurisdiction.[111] While maritime torts have always been considered a principal subject of admiralty jurisdiction,[112] until 1948 the traditional test of jurisdiction in torts was the locality of the damage, injury, or occurrence. Thus, to confer admiralty jurisdiction on the courts, the damage or injury must have occurred on the navigable waters. The court's jurisdiction did not extend to injuries caused to persons or property on land.[113]

Since 1948, pursuant to a statute adopted by Congress, the Extension of Admiralty Jurisdiction Act,[114] the admiralty jurisdiction of the United States extends to all ship-to-shore torts committed on navigable waters. It includes "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land,"[115] and is not limited to injury actually caused by the physical agency of the vessel or a particular part of it.[116]

Thus in a case dealing with claims for alleged damage to shore waterfront and beaches[117] caused by the negligent overflow of a cargo

---

[110] *See generally* M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 730-1007 (1962).

[111] *See, e.g.,* Brown v. United States, 12 U.S. (8 Cranch) 110, 137 (1814) (separate opinion).

[112] *See, e.g.,* The Clarita and the Clara, 90 U.S. (23 Wall.) 1 (1874); The Belfast, 74 U.S. (7 Wall.) 624 (1868).

[113] The Russell No. 6, 1941 A.M.C. 1610, 42 F. Supp. 904, 907 (E.D.N.Y. 1941).

[114] Act of June 19, 1948, ch. 526, 62 Stat. 496, 46 U.S.C. § 740 (1964).

[115] Fematt v. City of Los Angeles, 196 F. Supp. 89, 93 (S.D. Cal. 1961).

[116] Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963), *rehearing denied,* 374 U.S. 858 (1963). *See also* Interlake Steamship Co. v. Nielsen, 338 F.2d 879 (6th Cir. 1964), *cert. denied,* 381 U.S. 934 (1965), *rehearing denied,* 382 U.S. 873 (1965); R. & H. Development Co. v. Diesel Tanker, J.A. Martin, Inc., 2 Conn. Cir. 622, 203 A.2d 766 (app. div. 1964). On the effect of the Act see Petition of N.Y. Trap Rock Corp., 1960 A.M.C. 429, 172 F. Supp. 638 (S.D.N.Y. 1959).

[117] Petition of New Jersey Barging Corp., 168 F. Supp. 925, 938-39 (S.D.N.Y. 1958).

of heating oil in harbor waters, admiralty jurisdiction was accepted and damages awarded in "such situations of claimed injury."[118]

B. *United Kingdom Practice*

The Administration of Justice Act, 1956,[119] is comprehensive legislation dealing with the admiralty jurisdiction of the English courts. The Act extends to any claim for damage done by a ship.[120] The Colonial Courts of Admiralty Act, 1890,[121] extended the admiralty jurisdiction to the colonial courts, under which the Bermuda Supreme Court has jurisdiction to hear the *Torrey Canyon* controversy, and that is where the case is pending.[122]

V. Liability for Oil Pollution

The issue of alleged liability for producing an oil slick may be conveniently examined under the following heads: (1) international conventions and the implementing legislation; (2) municipal oil pollution statutes; and (3) at common law. The first two deal with criminal liability and the third, civil liability.

A. *International Conventions and Implementing Legislation*

The amended 1954 Convention[123] provides that it shall not constitute an offense under the Convention if (1) discharge of oil or oily mixture from a ship was done to secure the safety of the ship, prevent damage to the ship or the cargo or save life at sea;[124] or (2) the escape of oil or oily mixture resulted from damage to the ship or unavoidable leakage, provided all reasonable precautions had been taken "after the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimizing the escape";[125] or (3) the discharge of residue resulted from the "purification or clarification of fuel oil or lubricating oil," provided that such discharge was made "as far from land as is practicable."[126]

In other cases of "any discharge or escape" of oil[127] and oily mixture,[128] howsoever caused, the Convention requires the state of

---

[118] *Id.* at 932.

[119] 4 & 5 Eliz. 2, c. 46. For the various Acts that it repeals see *id.* § 57, sched. 2.

[120] *Id.* § 1(d).

[121] 53 & 54 Vict., c. 27. *See generally id.* § 2 for admiralty jurisdiction of such courts.

[122] *See* Manchester Guardian Weekly, July 20, 1967, at 16, col. 2, for a brief report on the case.

[123] *See* notes 46-59 *supra* and accompanying text.

[124] 1962 Amendments, art. IV (a).

[125] *Id.* art. IV (b).

[126] *Id.* art. IV (c).

[127] *Id.* art. I (1), defines oil as "crude oil, fuel oil, heavy diesel oil and lubricating oil."

[128] *Id.* art. I (1), defines oily mixture as "a mixture with an oil content of 100 parts or more in 1,000,000 parts of the mixture."

the registry of the vessel to impose penalties upon the offender making such discharge outside the territorial waters of the state. The penalties shall be imposed "adequate in severity to discourage any such unlawful discharge and shall not be less than the penalties which may be imposed under the law of that territory in respect of the same infringement within the territorial sea."[129] The implementing legislation in the United States, the Oil Pollution Act, 1961,[130] and the British acts of 1955 and 1963,[131] contain similar provisions.

B. *Municipal Statutes*

A trend toward stricter regulations for the purpose of controlling oil pollution from vessels within the territorial waters is increasingly in evidence. To illustrate, while the purpose of the proposed "Navigable Water Pollution Control Act of 1967" which was recently introduced in the United States Senate[132] is "to expand and improve existing law,"[133] its effect would be to make even accidental or negligent spilling of oil punishable, and to increase the penalty for such spillage.[134] Cases of "emergency imperiling life or property, or unavoidable accident, collision or stranding" are saved from the application of the Act.[135] The statement of policy announced in the bill is instructive. It says, "The Congress further finds that to abate and prevent such pollution [of the navigable waters by oil, sewage, and refuse of every kind discharged or dumped by vessels plying them] in the public interest, it is necessary that the disposal by vessels of oil, sewage, and refuse on these waters be controlled by forbidding it to the greatest practical extent . . . ."[136]

Similarly the British legislative measures, Oil in Navigable Waters Acts of 1955 and 1963,[137] and the Continental Shelf Act, 1964,[138] make the discharge of oil a punishable offense with a few exceptions. Following the lead of the 1954 Convention and the amendments thereto, it is a defense under the 1955 and 1963 Acts to prove that (1) the discharge of oil was necessary and a reasonable step "for the purpose of securing the safety of the vessel, or of preventing damage to the vessel or her cargo, or of saving life,"[139] or

---

[129] *Id.* art. VI (2).

[130] 33 U.S.C. §§ 1001-15 (1964).

[131] 3 & 4 Eliz. 2, c. 25; Oil in Navigable Waters Act, 1963, c. 28.

[132] Introduced in the Senate on Feb. 6, 1967. S. 849, 90th Cong., 1st Sess. (1967).

[133] *Id.* at 1.

[134] *Id.* § 2(e).

[135] *Id.* § 3(a).

[136] *Id.* § 2.

[137] 3 & 4 Eliz. 2, c. 25; Oil in Navigable Waters Act, 1963, c. 28.

[138] Statutes 1964, c. 29.

[139] 3 & 4 Eliz. 2, c. 25 § 4(1).

(2) the escape of oil was caused by damage to the vessel, or by leakage which "was not due to any want of reasonable care," and that as soon as practicable after the damage occurred or the leakage was discovered "all reasonable steps were taken for stopping or reducing" the escape of oil.[140]

However, the Acts make it an offense even in these emergency cases if the owner or master of the vessel discharging oil into waters of the British harbors did not report his action to the harbor officials.[141]

Under the Continental Shelf Act, 1964, it is a defense if the person owning the pipeline or carrying on drilling operations proves that he took all reasonable care to prevent the leakage and that after it was discovered "all reasonable steps were taken for stopping or reducing it."[142] The trend in England is also toward stiffer penalties.[143]

C. *Civil Liabilities at Common Law*

Oil spillage by a vessel, resulting in damage to oyster beds, fisheries, rowboats, or property on the beaches and waterfront may cause liability in tort. Civil actions pertaining to such damage will generally lie in negligence or nuisance. Although there is lack of sufficient authority in case law on various aspects of the subject, a few representative cases from the United States and the British jurisdictions will be examined here before looking into the civil aspects of the *Torrey Canyon* case.

1. The United Kingdom Case Law

In *Southport Corp. v. Esso Petroleum Co.*,[144] a 680 ton oil tanker was stranded while approaching an estuary after developing steering trouble. The master discharged over 400 tons of oil to lighten the vessel which he considered necessary to save the vessel and the crew from grave danger. The oil became deposited on the respondents' foreshore, causing damage. In an action brought for trespass and/or nuisance and/or negligence, the trial judge found that there was no trespass or nuisance and held that since the plaintiffs had failed to prove negligence, they could not recover.[145] It may be noted that the plaintiffs had pleaded as negligence, negligent navigation and nothing more. The defendants had denied negligence in addition to the

[140] *Id.* § 4 (2).

[141] *Id.* § 10.

[142] 3 & 4 Eliz. 2, c. 25, § 5(1).

[143] *See, e.g.*, an Associated Press report from London dated May 12, 1967: N.Y. Times, May 14, 1967, at 14, col. 2.

[144] [1953] 2 All E.R. 1204 (Q.B.).

[145] *Id.* at 1213.

denial of trespass and nuisance, pleading that the steering had gone out of control.

The Court of Appeals reversed, finding the defendants negligent because they had failed to sustain the burden of explaining how the well-found vessel came to be stranded and the stern frame fractured, an accident not in the ordinary course of events.[146] Denning, L.J., considered the discharge of oil a public nuisance for which he would hold the defendants liable, unless the defendants could show that such discharge was an inevitable accident, that is, "a necessity which arose utterly without their fault."[147] He would hold them liable for negligence, too, but not in trespass.[148] Finally, the House of Lords heard the appeal in *Esso Petroleum Co. v. Southport Corp.* Overruling the Court of Appeals, it held that the trial judge had rightly determined that the master was not negligent, and that therefore the vicarious liability allegations against the shipowners must also fail.[149] The House of Lords however only considered the cause of action for negligence and did not pass on the issues of trespass and nuisance. Nevertheless, Lord Tucker[150] and Lord Radcliffe[151] shared the view of Denning, L.J., that on the facts of the case trespass did not lie. Lord Radcliffe also said that the appellants were not responsible for private nuisance.[152]

In *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co.* (the *Wagon Mound* case),[153] in an appeal from the decision of the Supreme Court of New South Wales, the Privy Council expressed itself on the negligence aspects of oil spillage. Substantial damage to a wharf was caused by the carelessness of the servants of the charterer of a ship, in allowing bunkering oil to spill into Morts Bay in the port of Sydney. The oil spread to the respondents' wharf where it was subsequently ignited by molten metal falling from the wharf and setting fire to cotton waste floating on the oil. It was found as a fact that the charterers "did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water."[154] The court held them not liable as they could not reasonably have foreseen that the damage would have resulted from their servants' action.

---

[146] Southport Corp. v. Esso Petroleum Co. [1954] 2 Q.B. 182.
[147] *Id.* at 199.
[148] *Id.* at 200.
[149] [1956] A.C. 218 (1955).
[150] *Id.* at 244.
[151] *Id.* at 241.
[152] *Id.* at 242.
[153] [1961] A.C. 388 (P.C.) (N.S.W.).
[154] *Id.* at 391.

In this case, apart from the damage to the wharf by fire, the escape of the oil had also damaged the respondents' slipways and caused interruption to their operations. Although the respondents had not initially pressed any claim in respect of this damage, the trial judge said:[155] "The [respondents'] failure to press a claim for this damage is not an admission that it was not actionable damage. . . . It follows, since foreseeable damage was caused to the [respondents], that the [appellants'] careless act became impressed with the legal quality of negligence and the case therefore is covered by the principles of *Re Polemis*[156] and not those laid down in *Hay (or Bourhill) v. Young*.[157]" Later, the respondents sought to place their claim in nuisance. The Privy Council left the question open.[158]

In another case, *Miller Steamship Co., Pty. v. Overseas Tankship (U.K. Ltd.)*,[159] a large quantity of oil in a harbor was held to be a public nuisance.

2. The United States Case Law

In *Petition of New Jersey Barging Corp.*,[160] damages were granted for nuisance caused by an oil slick. There, the spilling of oil in the harbor was alleged to have caused damage to property ashore. Claims pertained to damages "for loss of use of the beach and shore . . . for loss of use of littoral or riparian rights — i.e., swimming, sunbathing, fishing, boating, picnicking, etc. . . . ."[161] The Commissioner's report,[162] confirmed by a federal court,[163] discussed the admiralty law rules with respect to damages. Stating that in admiralty the general rules of damages are applicable,[164] the Commissioner relied upon earlier cases allowing for compensation based on the element of annoyance, inconvenience and discomfort,[165] and made awards for compensation "for such annoyance, inconvenience and discomfort suffered by particular claimants to the extent of and in an amount commensurate with the annoyance and discomfort proven."[166]

In *Salaky v. Atlas Tank Processing Corp.*,[167] an action was brought to recover damages to various small craft — motorboats,

---

155 [1961] 1 All E.R. 404, 407 n. 1.
156 [1921] 3 K.B. 560.
157 [1943] A.C. 92 (1942).
158 [1961] A.C. 388, 427 (P.C.) (N.S.W.).
159 [1963] 1 Lloyd's List L.R. 402 (Sup. Ct. of N.S.W.).
160 168 F. Supp. 925 (S.D.N.Y. 1958).
161 *Id.* at 938.
162 *Id.* at 926-40.
163 *Id.* at 940.
164 *Id.* at 934.
165 *Id.* at 934-37.
166 *Id.* at 937.
167 120 F. Supp. 225 (E.D.N.Y. 1953) (supplemental opinion).

sailboats and rowboats — caused by oil sludge allegedly discharged from barges into the waters of a bay in New Jersey where these craft had been moored. The court found that since the damage could be traced to the oil slick from a barge, it would assume admiralty jurisdiction and award damages.[168]

D. *Civil Aspects of the "Torrey Canyon"*[169]

The oil slick from the *Torrey Canyon* hit the Cornish coast hardest. Besides the British[170] and the French[171] suits for cleaning up the slick/sludge, claims pertaining to damage to oyster beds and fisheries, shore fronts and beaches, hotels and restaurants are likely to arise. Counterclaims from the owners of the ship and the cargo owners against the British Government for the bombing of the ship and destroying the ship and the oil cargo may also arise, although the cargo owners could not sue the shipowners on any other grounds than the alleged unseaworthiness of the vessel.[172]

The British have brought the action in Bermuda, the headquarters of the Barracuda Tankers Corporation, the owners of the ship. However, the suit could also have been brought in Liberia, the state of the ship's registry, or in Italy, whose nationals the skipper and crew were, especially since the skipper's negligence had caused the ship to run aground.[173]

At least three main questions would arise. First, how can the damage be ascertained? For example, how much is a shore front worth? Does the loss of economic opportunity amount to damage? If so, how can it be measured? Secondly, how can negligence be proven? And, thirdly, what are the possible defenses? In their defense, for example, the ship owners could prove that they took all reasonable precautions after the occurrence of the damage to the ship.[174] They could perhaps also plead Act of God. The British Government could plead the necessity of their action and thus escape liability for bombing the ship and the oil.

---

[168] *Id.* at 227-28.

[169] For a rather cursory treatment of the subject, see GILL, *supra* note 2, at 113-22. The authors rely heavily upon newspaper accounts and on a report in NEWSWEEK, Apr. 10, 1967, at 51.

[170] *See* N.Y. Times, Apr. 5, 1967, at 12, col. 4; *id.*, May 5, 1967, § C1 at 16, col. 1; Manchester Guardian Weekly, July 20, 1967, at 16, col. 2.

[171] See for a Reuter's report from Singapore on the futile effort of the French Government agents to serve a writ on *Lake Palourde*, the sister ship of the *Torrey Canyon*, N.Y. Times, July 21, 1967, at 3, col. 3.

[172] On unseaworthiness generally, see 35 HALSBURY'S LAWS OF ENGLAND 401-10 (3d ed. 1961).

[173] *See* N.Y. Times, May 6, 1967, § C, at 62, col. 1 (finding of the Liberian Board of Inquiry).

[174] *See, e.g.*, the exception recognized by the 1954 Geneva Convention, and incorporated by the British legislature in the 1955 Act, discussed in the text accompanying notes 124 and 139 *supra*.

As a sanction, the Administration of Justice Act, 1956,[175] confers the right to arrest any other ship which, at the time the action is brought, is in the same ownership as the ship in respect of which the cause of action is alleged to have arisen.[176] This explains the arrest of the *Torrey Canyon's* sister ship, *Lake Palourde,* by serving the writ on her in Singapore when she made a one-hour stop to "take on two coils of wire rope."[177]

Finally, the law pertaining to the limitation of liability should be noted. Under the recent British Statute, the Merchant Shipping (Liability of Ship Owners and Others) Act, 1958,[178] the provisions pertaining to the limitation of liability apply to master, member of crew, or servant of the owner[179] as well as to the charterers, manager or operator.[180] The limitation of liability is applicable in the case of an act or omission done in the capacity of master or member of the crew or by one in the course of employment as a servant of the owners, causing damage to vessels, goods, or other property or rights without the owner's fault or privity. The limit on liability in respect of loss of vessels or goods is the equivalent of 1,000 gold francs per ton, or £23, 13s., 9 27/32d.[181] Thus the liability in the *Torrey Canyon* case would amount to about £4¼ million.

VI. Appraisal and Recommendation

Presently, widespread concern is being felt about the inadequacy of the prevalent norms of international maritime law to handle the liability aspects of a *Torrey Canyon* type of case, and the lack of satisfactory attention given thus far on national and international levels to deal with the preventive and restorative aspects of oil pollution in general. President Johnson's appointment of a special committee headed by the Secretaries of the Interior and Transportation to make an urgent study to determine how the United States could best "cope with the danger that oil spillage and other hazardous substances pose for shoreline areas and inhabitants,"[182] Prime Minister Wilson's call for international agreements to control the movement of

---

[175] 4 & 5 Eliz. 2, c. 46.

[176] *Id.* § 3(4b). *See also* St. Elefterio, [1957] 2 All E.R. 374, 377A (P.D.A.).

[177] For a brief report, see N.Y. Times, July 18, 1967, at 33, col. 6; Manchester Guardian Weekly, July 20, 1967, at 16, col. 2. For a Reuter's report that after an $8.4 million bond was posted, the ship sailed from Singapore, see N.Y. Times, July 21, 1967, at 3, col. 3.

[178] 6 & 7 Eliz. 2, c. 62. See for an earlier Act, Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60. The 1958 Act has modified and repealed provisions in several earlier Acts. *See* 6 & 7 Eliz. 2, c. 62, § 8 and sched.

[179] 6 & 7 Eliz. 2, c. 62, § 3 (2) (a) (b).

[180] *Id.* § 3(1).

[181] *Id.* § 1(1).

[182] *See* N.Y. Times, June 11, 1967, at 55, col. 1; *id.* May 27, 1967, at 1, col. 3.

giant tankers,[183] and the recent recommendations by the IMCO, meeting in London,[184] the American Institute of Underwriters,[185] and the oil industry,[186] are indicative of such concern.

A. *Preventive Steps*

Changes in future construction of ships, better equipment and technological devices, stricter navigational regulation, sea traffic supervision and control, international licensing of captains and officers of merchant marines, further amendments to the 1954 Convention, improved municipal enforcement measures, and special research projects, are a few steps that might reduce the potential harm by oil pollution to water, wildlife, and shore fronts.

1. Future Design and Construction of Ships

Better compartmentalization by building stronger and smaller compartments could limit the total loss of oil even if the ship ran aground, or was rammed or torpedoed, since oil would be lost only at the point of impact.[187] Inner epoxy coatings in the tanks would also minimize the amount of oil left coating the surfaces, and simplify the cleaning process.[188] The size of the tankers could perhaps be limited by international agreements. The industry may be responsive to this idea as indicated by the recent observation by the chairman of the Japan Tanker Owners Association that a number of practical considerations of costs and risks might limit the tanker size.[189]

2. Better Equipment and Technological Devices

Modern giant tankers are being equipped with oil separators and slop tanks that would reduce the discharge of oil. More recent developments such as the use of demulsifiers for breaking up oil residues, refined processes of tank washing, for example, Standard's and Mobil's "load-on-top" technique[190] which segregates tanker

---

[183] LIFE, Apr. 14, 1967, at 35.

[184] For a brief report, see N.Y. Times, May 6, 1967, at 62, col. 1.

[185] Reported in Denver Post, July 28, 1967, at 54, col. 2.

[186] *See, e.g.*, the report in N.Y. Times, May 17, 1967, at 74, col. 5.

[187] At present only military ships are equipped with better compartmentalization; otherwise, the trend is in the opposite direction. The cost involved in building smaller and stronger compartments would perhaps deter the industry from accepting this recommendation. New supertankers' compartments will be so large that internal inspection will be performed by men in small boats inside partially flooded tanks, rather than by using ladders and scaffolds.

[188] According to a recent report, most modern tankers provide for it. N.Y. Times, June 11, 1967, at 88, col. 2.

[189] The statement was made in a paper presented before the Seventh World Petroleum Congress in Mexico City, Apr. 17, 1967. Reported in *Disappearing cost advantages may end rise in tanker sizes*, OIL & GAS J., Apr. 17, 1967, at 183.

[190] *See, e.g.*, a brief report in *Hearings on House Resolution* 8760 *to Amend Oil Pollution Act*, 1966, *Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries*, 89th Cong., 2d Sess., ser. 89-33, at 25-27 (1966); N.Y. Times, June 11, 1967, at 88, col. 2; N.Y. Times, May 15, 1967, at 42, col. 1.

washings and ballast water into a single tank and allows them to remain distributed until the oil and water have separated naturally and thus results in "95 per cents of oil formerly discharged during tank washings and deballasting all vessels"[191] being retained, show a healthy trend. So does the newly introduced system by Cities Service for burning crude oil and "slop" in place of more expensive bunker "C" fuel which will eliminate the need to flush tanks and discharge bunker fuel between voyages.[192] The Cities Service system has the added attraction of being economically advantageous. Reportedly calculations show that close to one million dollars over the 20-year economic life of a tanker could be saved by employing it. Such a system could perhaps be made mandatory on all tankers.[193] Improved harbor and terminal facilities should also be provided to handle huge tankers safely.[194]

3. Navigational Regulation, Sea Traffic Control, and International Licensing of Officers

It is desirable to have an international body supervise and inspect ships' navigation equipment regularly. This body could also administer international licensing of big ships' officers and provide training schools and refresher courses for them so that they keep abreast of the latest developments in the art of navigation, especially in view of the enlarged size of the tankers and the rapidly changing technology. As a first step, this body should at least establish international standards for licensing such officers.[195]

As tankers get larger and more numerous, it will also be essential to provide well-defined routes and new mandatory sea lanes for them,[196] since huge tankers of 500,000 dead-weight tonnage cannot travel the normal shipping lanes nor enter many harbors. Furthermore, their travel as well as the routes of smaller dry-cargo ships should be controlled from the shore. Thus, the "rampant individualism" in this field, that is, the lack of any obligation on the master of

---

[191] Reported in N.Y. Times, June 4, 1967, at 115.

[192] OIL & GAS J., May 22, 1967, at 79; N.Y. Times, May 17, 1967, at 74, col. 5.

[193] The enforcement procedure could be similar to the one currently followed by some states in denying entry to their harbors to vessels that do not meet certain health safety standards.

[194] *See* N.Y. Times, July 22, 1967, at 40, col. 6. It is also reported that "the Japanese port authorities, as well as Japanese oil companies, have been concerned for some time by the potential disaster hazard of supertankers unloading in congested harbors." OIL & GAS J., Mar. 20, 1967, at 102.

[195] See for brief report on the IMCO Council's proposed study of such proposals, N.Y. Times, May 6, 1967, at 62, col. 1.

[196] *See, e.g.*, a report on the recomendations of the American Institute of Marine Underwriters which include the use of mandatory sea lanes, Denver Post, July 28, 1967, at 54, col. 1. *See also* N.Y. Times, May 15, 1967, at 40, col. 1. A subcommittee of IMCO recently recommended that sea lanes be established, especially in congested waters. N.Y. Times, Aug. 15, 1967, at 76, col. 2.

the ship to report his course, speed and position to coastal stations, should be replaced by control systems similar to the aircraft control systems.[197] Present technology, using LORAN type equipment with identification attachments, long-range, shore-based radar equipment or Doppler systems could perhaps efficiently track all vessels from port to about 500 miles offshore. Computerized control could be established and ships approaching ports could be regulated as aircraft are when they approach metropolitan airports.[198] This device could be used to warn ships of collisions or navigation errors that might cause disaster on congested sea routes. The cost of controlling and operating such a system could be borne by the maritime nations alone or be shared with the industry — shipowners and charterers.

4. Amendments to the 1954 Convention

Further amendments to the 1954 Convention[199] are recommended which would ban the dumping of all kinds of oil products including the nonpersistent ones,[200] and provide severe penalties for violations and stronger enforcement machinery.

5. Municipal Enforcement

Enforcement of existing norms on a national level may be improved by the enforcing agencies, such as the United States Coast Guard, by setting up a regular patrol system to keep a constant watch in strategic areas. Current practice in most nation states is similar to that of the United States Coast Guard which relies for its information about oil slicks on random sightings by ships and planes.[201] In many instances such sightings will be made too long after the oil slick has formed to enable the patrolling agency to trace the oil slick to a particular ship.

6. Research Projects

A common objective in preventing oil pollution of the seas would suggest that regional and international research projects, staffed by competent scientists and technical experts, be undertaken to study both the preventive and restorative aspects of the problem. A beginning could be made by establishing two regional arrange-

---

[197] *See, e.g.*, THE NATION, May 1, 1967, at 549; Prime Minister Wilson's proposal, U.S. NEWS & WORLD REP., Apr. 17, 1967, at 47.

[198] See for a brief report from London on the IMCO meeting discussing a similar proposal, N.Y. Times, May 5, 1967, at 16, col. 1. The United States government has just released the Navy's transit satellite navigational system for use by any United States merchant ship. Although the system is expensive it allows a ship to plot its position with pinpoint accuracy. TIME, Aug. 11, 1967, at 56-57.

[199] 1954 Convention, *supra* note 46.

[200] *See, e.g.*, a report that the industry endorses such an agreement, N.Y. Times, *supra* note 186.

[201] N.Y. Times, May 15, 1967, at 40, col. 1.

ments, one for Britain and other European states and the other for the United States and Canada, or an international body, to conduct such research and provide technical expertise — information, know-how and assistance — to the parties in need.[202] Each participating nation state could contribute to this fund according to its resources.[203]

B. *Restorative Measures*

Although adequate preventive steps could decrease the probability of accidents, human error and equipment failure will still result in accidents. A tanker might get off course, collide with other ships in narrow passages, run aground, or be torpedoed. Thus further improvement of post-disaster restorative measures is urgently needed. The two major problems, clean-up techniques and the liability and compensation aspects, will be studied in this section.

1. Clean-up Techniques

Since the *Torrey Canyon* disaster, effective techniques of detection, recovery, neutralization, and dispersal of spilled oil, are being widely explored.[204]

In the aftermath of the *Torrey Canyon* the British introduced floating booms of urethane foam and polystyrene to protect harbors and estuaries[205] and detergent agents to emulsify the oil slick, and tried methods of coagulating and absorbing the oil with such materials as straw and verniculate.[206] The French used sawdust which soaked up oil and was later scooped up by ships, and rigged air-pumps which sucked floating oil into specially built containers that were later disposed of ashore.[207]

Later developments include a bill introduced in the United States Senate,[208] which is aimed at developing chemical procedures for neutralizing spillages after future disasters. Furthermore, several firms are experimenting with products for discharge, sinking, dissolution, or sweeping the oil. Among other possibilities are the use of

---

[202] Federal investigators appointed to study the aftermath of the *Torrey Canyon* wreck are reported to have suggested NATO as a proper vehicle for such study. N.Y. Times, June 11, 1967, at 55, col. 1. The British weekly, *The Statist,* suggested a West European cooperative solution. British Information Services, British Weeklies, Mar. 31, 1967, at 1.

[203] The British newspaper *Sunday Telegraph* recommended such action. *See* British Information Services, Today's British Papers, Apr. 2, 1967, at 4.

[204] See for a report on the President's concern with this aspect, N.Y. Times, May 27, 1967, at 1, col. 3, and at 51, col. 4.

[205] *The wreck of the Torrey Canyon,* CHEMICAL WEEK, Apr. 8, 1967, at 59, 62.

[206] British Information Services, Policy Background, *Torrey Canyon,* Apr. 7, 1967, at 2. *See generally* SEC'Y OF STATE FOR THE HOME DEP'T, THE "TORREY CANYON," CMND. No. 3246 (1967).

[207] *Chemicals vs. Crude Oil,* CHEMICAL WEEK, May 20, 1967, at 49.

[208] Senate bill S. 1585, sponsored by Senator Warren Magnuson and seven other senators. CHEMICAL & ENGINEERING NEWS, May 1, 1967, at 27.

rotating drums,[209] oil solubilization agents,[210] digesting culture capable of "eating petroleum" like natural bacteria,[211] silicone treated fuel ash,[212] and cargo solidifications or jelling compounds.[213]. However, the possibility of biological hazards of some of these products to marine, shore, and bird life cannot be ruled out.[214] Among other measures, stockpiling of cleaning materials at strategic locations and free use of salvage vessels to enable rapid salvage of a tanker and/or its oil would be helpful.[215]

Still another device to handle the oil pollution effectively is to set up coordinating bodies at both national and international levels. Recently federal investigators who studied the British and French operations in dealing with the *Torrey Canyon* wreck have found that the absence of such bodies in both Britain and France had hampered the clean-up operations.[216]

2. Liability and Compensation Aspects

Compulsory insurance,[217] strict liability laws prescribed by international agreements, improved enforcement means by the state of registry of the vessel, and recognition under an international convention of a coastal state's right to take the protective action such as access to and destruction of a damaged ship and/or its cargo in international waters in case of a threat to its coastline,[218] are further measures to be explored. Notwithstanding the traditional deference to the law of the flag, concurrent jurisdiction of interested nation states in emergency situations should be recognized. A reevaluation of the widespread practice of the "flag of convenience" should also be undertaken.

---

[209] Rienow & Rienow, *The Oil Around Us,* N.Y. Times, June 4, 1967 (Magazine) at 115.

[210] *See* CHEMICAL WEEK, *supra* note 205; TIME, July 28, 1967, at 68.

[211] Rienow & Rienow, *supra* note 209, at 115.

[212] CHEMICAL WEEK, *supra* note 207.

[213] *Id. See also* N.Y. Times, June 11, 1967, at 55, col. 1.

[214] "[T]he American Petroleum Institute usually cautions against the use of chemicals to remedy oil spills. Among the reasons: the chemicals cause foam, possibly harmful effects on shellfish and other marine life. And coagulated oil is often a problem if it should wash up on the beach." *The wreck of the Torrey Canyon,* CHEMICAL WEEK, Apr. 8, 1967, at 59, 62. The British had studied the problems of the reduction of the biological hazards to marine, shore and bird life from the use of detergents after the *Torrey Canyon* wreck. THE "TORREY CANYON," *supra* note 206, at 8.

[215] For a brief report on such suggestions, see N.Y. Times, June 11, 1967, at 55, col. 1.

[216] *Id.*

[217] See, for the comment made by the Chairman of the IMCO Council that he could not foretell if any Council recommendation on the "sensitive, complex" issue of compulsory insurance would be forthcoming soon, N.Y. Times, May 6, 1967, at 62, col. 1.

[218] *See generally* M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS ch. 6: "Claims to Authority in Ocean Areas Adjacent to the Territorial Sea," 565-729 (1962).

Another suggestion for dealing with the damages of such disaster is to establish an international fund, into which all shipbuilders, owners, and charterers would be obligated to pay. As experience builds up showing that ships manufactured by certain firms, or operated by certain companies had fewer accidents, their contributions to the fund per ton built or carried would decrease. Simultaneously, those builders or shippers with higher accident rates would be forced to contribute heavily to the fund to maintain their privilege of entering the ports of participating nations. Those persons or nation states harmed by oil pollution would be paid from the fund, rather than having to collect from the ship that caused the damage, whether there was negligence or fault or lack of it. Such a system, which is similar in concept to the state and federal unemployment compensation funds in the United States, will require setting up an international administrative body to serve as trustee of the funds paid in, and as arbitrator of how much to pay out, and to whom in case of an accident. Such a system will also act as an economic deterrent and perhaps be helpful in curing the shipping industry of what Secretary Udall called, "sloppy habits and poor standards."[219]

CONCLUSION

Some of these recommendations are necessarily predicated upon a common interest of nation states and oil and shipping industries to find effective means to avert the hazards of oil pollution if possible, and to deal with them more economically and swiftly when such pollution occurs. For both prescription and implementation purposes, an international body such as the Inter-Governmental Maritime Consultative Organization will be a necessary vehicle.[220] But its structure and machinery will need further strengthening. If nothing else, the *Torrey Canyon* wreck has certainly highlighted the need for international cooperative measures in this field.[221]

---

[219] N.Y. Times, May 27, 1967, at 51, col. 4.

[220] On a voluntary basis, an international non-governmental organization, International Maritime Committee (IMC), founded in Brussels in 1897, has been active in drafting conventions on collisions at sea, limitation of shipowners' liability and salvage and assistance at sea. The purpose of the IMC is to contribute to unification of maritime law by means of conferences, publications and other activity. For a brief description, see YEARBOOK OF INTERNATIONAL ORGANIZATIONS 719 (11th ed. 1966-1967).

[221] That is, until nuclear power replaces oil as fuel. See for a report on the growing potential and problems of nuclear power, *Nuclear Power Goes "Critical,"* FORTUNE, Mar. 1967, at 117.

THE LAW REVIEW—IS IT MEETING THE NEEDS OF THE LEGAL COMMUNITY?*

INTRODUCTION

OVER 35 years ago, Mr. Justice Cardozo observed that leadership in legal thought had passed from the benches of the courts to the chairs of the universities, thus stimulating a willingness to cite more law review essays in briefs and opinions in order to buttress a conclusion. He noted that the advance in prestige of university life had been accompanied with a corresponding advance in the prestige of their law reviews.[1]

The law review occupies a unique position in the legal system today. Most law reviews are largely student-run institutions, publishing a variety of articles authored by professors, practitioners and students, and covering many facets of the law. Indeed, it might be said that the law review has the unique quality of allowing both "master and apprentice" to express their views. In few, if any, other professional periodicals does the student author have the opportunity to have his research and conclusions published for distribution to the profession.

If one accepts the proposition that the law review is somewhat analogous to the judicial opinion or the attorney's brief as an expression of the law, that is, the "legal opinion" of the academician, and if one accepts Mr. Justice Cardozo's observation concerning the rise in prestige of the university in legal thought, then the position of the law review is indeed an enviable one.

The law review as an institution is not new. The oldest continuously published American law journal today is the *University of Pennsylvania Law Review*.[2] To date there are approximately 102 student-run periodicals listed in the Index to Legal Periodicals.

This article represents the culmination of a one-year survey of the content of law reviews and their evaluation by the legal profession, conducted by the Denver Law Journal. The initial results were presented at the Thirteenth National Conference of Law Reviews in San Francisco, California, in March, 1967. The authors wish to express their appreciation to the staff for its participation in the collection of initial data and to the Administration of Justice Program of the University of Denver College of Law for its assistance in data compilation.

[1] Cardozo, *Introduction,* in SELECTED READINGS ON THE LAW OF CONTRACTS ix (Ass'n. Am. L. Schools ed. 1931).

[2] Douglas, *Law Reviews and Full Disclosure,* 40 WASH. L. REV. 227, 228 (1965).

Given the increasing number of law reviews, and the proposition that the legal periodical has achieved a position of authoritative value within the legal community, it follows that the editors of a law review are presented with a great responsibility for the articles that they publish. Few students have accepted editorial positions on a law review without stopping to realize that it is their responsibility to select the best topics, types of articles, and authors if they are going to contribute significantly to legal journalism. This responsibility is not to be taken lightly.

Yet, upon what bases can such determinations be made? Where can the law review editor go to find out what is of value to his readers? If he consults Harvard, Yale, Columbia, and the other "established" law reviews, intending to copy their "successful" format, how is he to be certain that their formula will be of real value in his own particular situation?

It has been said that the legal community has been oversaturated by the law reviews. Critics argue that Harvard, Yale, Columbia, and a handful of others cover all that is necessary to legal journalism. The rest of the law journals are more or less "excess baggage." If this is true, the law review editor who looks to these "established" reviews for guidance may be doing the profession more harm than good. Indeed, who can be certain that, although Harvard, Yale, Columbia, and a few others have received national recognition, they are doing all that needs to be done by a law review?

The point is simply that the law review editor has very little more than his own intuition upon which to base his important policy decisions with regard to the function of his journal. Until recently no one had taken the trouble to empirically examine the law review as an institution in order to determine its value to the legal community and its purpose for existence.

The question of crucial importance is, "How can the profession best be served by the law review?" The answer to this inquiry lies not in intuition alone, but rather in empirical analysis of what the law reviews are doing and what the legal community considers valuable in a law review in terms of its content, scope of material, types of authors, and overall approach.

In this way the law review editor can see the merits and shortcomings of the law review as an institution and his own law journal

in particular. He can find out some of the reasons for the success of the so-called "better law reviews" and even see areas where they are missing the boat in their treatment.

In 1966, the *Denver Law Journal* conducted such an empirical research project in the form of a survey concerning the value of the law review and its purpose within the legal community. The emphasis was on (1) the content of the various law reviews and (2) the expectations of the legal profession. It is hoped that the results will provide law review editors with that essential frame of reference in which to make their policy decisions — a frame of reference heretofore unavailable.

I. THE SURVEY AND ITS METHODOLOGY

The survey was designed to provide empirical data relating to four basic policy questions normally facing editors of a law review: (1) What is the proper substantive content of a law review in terms of topics to be covered and types of articles to be published? (2) What is the proper scope of treatment of a law review in terms of local vs. national emphasis? (3) Who are the most desirable authors for a law review and how can we get them to write? (4) Should a law review specialize in particular areas of the law?

In order to provide data for these questions the survey was approached in two ways: first, to determine what the law reviews listed in the Index to Legal Periodicals were actually publishing during 1965[3]; and second, to find out what the profession (judges, attorneys and professors) expected from the law review and how they utilized the legal periodical in practice. In other words, both the specific *content* of the law review and the *expectations* of the profession were examined in depth.

In order to determine the content of the various legal journals, all law reviews listed in the Index to Legal Periodicals during the calendar year 1965 were surveyed. From the student-run journals examined, over 4100 separate articles were analyzed.

In order to find out the expectations of the profession concerning the law review, the second phase of the survey was conducted by mailing questionnaires to a random sample of attorneys, judges, and

[3] At the time the survey was commenced all of the legal periodicals examined had completed publication of their reviews for 1965. This was the most recent full year of law review publications available.

professors throughout the United States. Approximately 1000 questionnaires were mailed and nearly 400 returns were received.

It might be doubted that such a small number of random responses represents a true picture of the views of the legal profession. It is well known, however, that most professional opinion polls, such as the Gallup Poll, are conducted in a similar manner, using a small random sample to represent a total population. The survey was conducted under the guidance of Dr. Gresham Sykes,[4] an experienced behavioral scientist, skilled in research methodologies of this nature. He has analyzed the data extensively and given assurance that the responses received are sufficiently random to provide a legitimate basis for the conclusions drawn.

In any attitude survey the researcher must run the risk of unreliability in the responses. The questions were designed to minimize this risk, yet we are not so naive as to assert that the responses received present a conclusively reliable picture of the opinions of the legal profession concerning the law review. Rather, we regard the similarity of the responses as illustrative and suggestive of the views of the legal community. Indeed, the answers to the questionnaire take on added significance when compared to the survey of the content of the law reviews.

II. Evaluating the Review

A. *The Profession's Opinion*

In a survey of law reviews and their value to the profession, the most logical starting point is to obtain the opinions of the members of the profession regarding the merits of the various reviews. The survey indicated not only that there is a wide range of opinion on this matter, but also that professors seem to be familiar with far more of the reviews than are the attorneys or judges. This increased familiarity is to be expected insofar as it is the professors who have the greatest access to the reviews. Few attorneys or judges have convenient access to large law libraries which carry a significant number of the many law reviews being published.

Because the average professor was able to evaluate so many of the reviews being published, while the judges and attorneys seldom

[4] Director, Administration of Justice Program, University of Denver College of Law.

evaluated more than seven or eight, Table No. 1[5] must be viewed as having been highly influenced by the professors. A substantial

[5] TABLE NO. 1: RANKING THE LAW REVIEWS

This table lists the 102 law reviews surveyed in the order of the ranking which they received by the attorneys, professors and judges with regard to their value as legal research tools.

100 = Very Helpful Most of the Time
80 = Very Helpful on Some Occasions
60 = Reasonably Helpful Most of the Time
40 = Reasonably Helpful on Some Occasions
20 = Better Than Nothing
0 = No Value

	Law Review	*Score*		*Law Review*	*Score*
1.	Harv. L. Rev.	85.5	52.	U. Fla. L. Rev.	60.9
2.	Colum. L. Rev.	84.4	53.	B.C. Ind. & Com. L. Rev.	60.0
3.	Mich. L. Rev.	83.9	54.	Neb. L. Rev.	60.0
4.	Yale L.J.	82.6	55.	Rutgers L. Rev.	60.0
5.	U. Chi. L. Rev.	81.0	56.	St. Louis U.L.J.	60.0
6.	U. Pa. L. Rev.	80.6	57.	Washburn L.J.	60.0
7.	Calif. L. Rev.	79.5	58.	Wyo. L.J.	60.0
8.	Stan. L. Rev.	79.2	59.	Utah. L. Rev.	58.9
9.	Wis. L. Rev.	77.7	60.	Kan. L. Rev.	58.5
10.	Wash. & Lee L. Rev.	76.9	61.	Mass. L.Q.	58.3
11.	Cornell L.Q.	76.6	62.	U. Cin. L. Rev.	57.9
12.	Minn. L. Rev.	76.3	63.	Tulsa L.J.	57.4
13.	N.Y.U.L. Rev.	76.2	64.	Vill. L. Rev.	57.3
14.	Va. L. Rev.	74.7	65.	Ore. L. Rev.	57.0
15.	Duke L. J.	73.3	66.	Den. L.J.	56.7
16.	Wash. L. Rev.	73.0	67.	Okla. L. Rev.	56.2
17.	Temp. L.Q.	71.9	68.	Idaho L. Rev.	56.0
18.	Texas L. Rev.	71.5	69.	Willamette L.J.	56.0
19.	Fordham L. Rev.	70.8	70.	U. Det. L.J.	55.6
20.	U.C.L.A.L. Rev.	70.5	71.	U. Colo. L. Rev.	54.7
21.	Hastings L.J.	70.0	72.	Wayne L. Rev.	54.6
22.	Ark. L. Rev.	69.2	73.	B.U.L. Rev.	54.4
23.	U. Ill. L.F.	69.1	74.	How. L.J.	54.0
24.	Iowa L. Rev.	67.9	75.	Inter-Am. L. Rev.	53.3
25.	Geo. L.J.	67.9	76.	Mo. L. Rev.	52.5
26.	Ky. L.J.	67.6	77.	S.D.L. Rev.	52.5
27.	Vand. L. Rev.	66.5	78.	U. Miami L. Rev.	51.8
28.	W. Va. L. Rev.	66.2	79.	Catholic U.L. Rev.	51.7
29.	N.C.L. Rev.	65.8	80.	Mont. L. Rev.	51.7
30.	Nw. U.L. Rev.	65.7	81.	Baylor L. Rev.	51.0
31.	Marq. L. Rev.	65.6	82.	Buffalo L. Rev.	49.5
32.	Wash. U.L.Q.	65.5	83.	Chi.-Kent L. Rev.	49.3
33.	Geo. Wash. L. Rev.	65.3	84.	Ariz. L. Rev.	48.6
34.	N.Y.L.F.	65.0	85.	U. Kan. City L. Rev.	48.6
35.	Tul. L. Rev.	63.8	86.	Miss. L.J.	48.0
36.	Md. L. Rev.	63.8	87.	N.D.L. Rev.	47.3
37.	St. John's L. Rev.	63.8	88.	Loyola L. Rev.	46.7
38.	U. Pitt. L. Rev.	63.5	89.	W. Res. L. Rev.	45.7
39.	Sw. L.J.	63.0	90.	Houston L.J.	45.0
40.	Notre Dame Law.	62.4	91.	S. Tex. L.J.	45.0
41.	Ohio St. L.J.	62.4	92.	Clev.-Mar. L. Rev.	44.8
42.	Drake L. Rev.	62.2	93.	Ala. L. Rev.	44.5
43.	S.C.L.Q.	62.2	94.	Catholic Law.	44.5
44.	Wm. & Mary L. Rev.	62.0	95.	De Paul L. Rev.	44.5
45.	Mercer L. Rev.	61.7	96.	San Diego L. Rev.	44.0
46.	Ind. L.J.	61.6	97.	Brooklyn L. Rev.	43.2
47.	La. L. Rev.	61.3	98.	Duquesne L. Rev.	42.5
48.	So. Cal. L. Rev.	61.3	99.	Maine L. Rev.	40.0
49.	Tenn. L. Rev.	61.3	100.	Santa Clara Law.	40.0
50.	Dick. L. Rev.	61.1	101.	Albany L. Rev.	38.3
51.	Syracuse L. Rev.	61.0	102.	Am. U.L. Rev.	30.0

number of judges and attorneys also responded to this portion of the questionnaire, but had their opinions alone been used, Table No. 1 would appear significantly different. For example, while Harvard, Columbia, Michigan and Yale are at the top of the list when the responses of all the members of the profession are combined, it is interesting to note that these particular reviews attained this position of notoriety primarily because of the tremendous numbers of professors casting ballots in their favor. The attorneys and judges do not regard them as highly. These reviews have won more respect in the academic community than with the practitioners and jurists. This is not to say, of course, that the latter find the *Harvard Law Review* or the *Yale Law Journal* to be of questionable value, but the people who work every day with the practical application of the law have a different opinion about the relative values of the various law reviews than do the people in the halls of academia.

In spite of these qualifications, Table No. 1 does reveal some interesting information. Based on a 100-point scale, it indicates the relative values of the law reviews in terms of their usefulness as tools for legal research. For the most part, it seems to reinforce what one might have predicted about such an evaluation, but there are some notable exceptions. It was surprising, for instance, that the *Northwestern Law Review* was in 30th place behind a number of reviews which one might have expected to receive less favorable comments.

Perhaps most significant here is the wide range of scores, coupled with the fact that no review was ranked at either extreme of the spectrum. Not a single review was considered "very helpful most of the time" nor was any dubbed "no value." Nearly 80% of the law reviews were said to be at least "reasonably helpful most of the time," and this would seem to be a feather in the caps of the law reviews. In spite of some stinging criticisms that have been handed down over the years, here is some glimmering hope that the law reviews have not been for naught.

B. *The LSAT Classes*

Not being satisfied to rank the law reviews solely on the basis of the evaluations by the attorneys, professors and judges, we undertook to classify the various reviews according to the Law School Admission Test scores[6] of the students at the schools where the re-

[6] Median Law School Admission Test scores for 1963-64 were used, since the scores for 1964-65 were not available at the time of the survey. Admittedly, these scores may have increased in the time that has passed since, but it is expected that this increase has been uniform among the law schools and that their relative rankings have not been substantially affected.

views were being published. This classification was initially based on the hypothesis that schools with high median LSAT scores would be producing high quality law reviews due to the caliber of students serving on the staffs. As our research progressed, the hypothesis began to prove to have been well founded. A glance at Table No. 2[7] indicates the high degree of correlation between this type of classification and the ranking in Table No. 1. We are not so naive as to contend that each law review in Class A is superior to every review in Class B or that the Class C reviews are superior in all cases to those in Class D. But, allowing for a reasonable number of exceptions in each case, it does seem proper to conclude that if each group

[7] TABLE NO. 2: CLASSIFICATION OF LAW REVIEWS BY LSAT SCORES.

This table divides the 102 law reviews surveyed into five classifications, according to the median LSAT scores of the entering students at the schools where they are published.

CLASS A (654-541)					
Harv. L. Rev.	(654)	Inter-Am. L. Rev.	(589)	Geo. L.J.	(559)
U. Chi. L. Rev.	(631)	N.Y.U.L. Rev.	(589)	U.C.L.A.L. Rev.	(553)
Yale L.J.	(631)	Mich. L. Rev.	(584)	So. Cal. L. Rev.	(549)
Colum. L. Rev.	(619)	Va. L. Rev.	(582)	B.C. Ind. & Com.	
Stan. L. Rev.	(614)	Wis. L. Rev.	(577)	L. Rev.	(547)
Calif. L. Rev.	(600)	Nw. U.L. Rev.	(575)	Fordham L. Rev.	(547)
U. Pa. L. Rev.	(599)	Wash. U.L.Q.	(565)	U. Colo. L. Rev.	(544)
		Cornell L.Q.	(563)		
CLASS B (540-506)					
U. Pitt. L. Rev.	(540)	Temp. L.Q.	(525)	Buffalo L. Rev.	(511)
Rutgers L. Rev.	(535)	Ind. L.J.	(524)	Ohio St. L.J.	(511)
U. Ill. L.F.	(535)	Utah L. Rev.	(524)	Sw. L.J.	(511)
Minn. L. Rev.	(533)	Albany L. Rev.	(517)	San Diego L. Rev.	(509)
Vand. L. Rev.	(532)	Den. L.J.	(517)	Texas L. Rev.	(509)
Notre Dame Law.	(530)	Dick. L. Rev.	(516)	U. Fla. L. Rev.	(509)
Santa Clara Law.	(525)	Geo. Wash. L. Rev.	(515)	W. Res. L. Rev.	(508)
		St. Louis U.L.J.	(512)		
CLASS C (505-481)					
B.U.L. Rev.	(505)	Vill. L. Rev.	(501)	Wm. & Mary L. Rev.	(488)
Catholic U.L. Rev.	(505)	De Paul L. Rev.	(500)	Md. L. Rev.	(487)
Maine L. Rev.	(505)	Catholic Law.	(499)	Ariz. L. Rev.	(484)
Kan. L. Rev.	(505)	St. John's L. Rev.	(499)	S.D.L. Rev.	(483)
Wayne L. Rev.	(505)	U. Miami L. Rev.	(499)	N.C.L. Rev.	(482)
Loyola L. Rev.	(503)	Idaho L. Rev.	(493)	Marq. L. Rev.	(481)
Iowa L. Rev.	(501)	Wash. & Lee L. Rev.	(493)	Ore. L. Rev.	(481)
Syracuse L. Rev.	(501)	N.D.L. Rev.	(489)	U. Kan. City L. Rev.	(481)
CLASS D (480-417)					
Brooklyn L. Rev.	(480)	U. Cin. L. Rev.	(472)	Washburn L.J.	(457)
Okla. L. Rev.	(476)	Chi.-Kent L. Rev.	(470)	S. Tex. L.J.	(445)
Ala. L. Rev.	(475)	Mercer L. Rev.	(469)	Am. U.L. Rev.	(439)
Drake L. Rev.	(475)	Tenn. L. Rev.	(463)	Ark. L. Rev.	(439)
Duquesne L. Rev.	(475)	Mont. L. Rev.	(461)	Houston L.J.	(433)
Wyo. L.J.	(475)	U. Det. L.J.	(461)	N.Y.L.F.	(433)
La. L. Rev.	(474)	Tulsa L.J.	(458)	W. Va. L. Rev.	(426)
Ky. L.J.	(472)	S.C.L.Q.	(457)	How. L.J.	(417)
CLASS E (No Score Available)					
Baylor L. Rev.		Mass. L.Q.		Tul. L. Rev.	
Clev.-Mar. L. Rev.		Miss. L.J.		Willamette L.J.	
Duke L.J.		Mo. L. Rev.		Wash. L. Rev.	
Hastings L.J.		Neb. L. Rev.			

is considered as a whole, the Class A reviews tend to outrank those in Class B, etc. It is for this reason that we felt justified in analyzing all of our collected data in terms of these LSAT groupings. Thus, in most of the tables which appear in this article, it will be noted that information has been classified to indicate the different trends, if any, among these various classes of reviews.

C. *Comparison With Other Research Materials*

While attorneys, professors and judges seemed to regard the law review quite highly as a legal research tool, it is significant that they consider a number of other sources to be of even greater value. Thus, Table No. 3[8] indicates that law reviews rank in sixth place behind such materials as Shepard's Citations, case digests, annotated statutes, etc. This is rather disconcerting at first glance, but it must be noted that all of the research tools in Table No. 3 received relatively favorable evaluations and that law reviews, in particular, were only about 13 percentage points below the highest ranking research tools. Furthermore, it is significant that it was the attorneys who pulled the law reviews down into sixth place. Both the judges and professors indicated a considerably higher regard for the reviews. This is not an unexplainable result since one would have expected that the busy attorney, caught up in the day-to-day routine of his practice with its accompanying pressure, deadlines and workload, simply does not have the time to consult law reviews when researching a problem. For him it is considerably more expedient to refer to the local digest or a good treatise. Furthermore, it is undoubtedly true that the practitioner's library is seldom of sufficient size to allow him to stock it with a number of good law reviews — a problem less likely to confront a judge, who ordinarily has ready access to a centrally located and government-financed law library, or the law professor, whose domain is the law school library which stocks nearly every review published.

[8] TABLE NO. 3: RELATIVE VALUES OF RESEARCH TOOLS

This table indicates the relative values of eight legal research tools as established by the attorneys, professors and judges who are using them.

	QUITE VALUABLE				LITTLE OR NO VALUE			
	Judges %	Attorneys %	Professors %	Total* %	Judges %	Attorneys %	Professors %	Total* %
Shepard's Citations	83.1	50.8	84.4	72.7	5.0	31.6	2.9	13.3
Digests	62.0	90.0	68.8	69.9	14.3	7.4	9.9	10.7
Annotated Statutes	64.9	78.3	62.8	68.8	11.5	10.7	15.3	12.4
Treatises	41.5	85.7	65.9	63.2	28.3	4.9	13.5	16.3
A. L. R.	80.2	63.3	37.8	62.4	5.7	19.1	33.9	18.2
Law Reviews	62.7	38.3	78.6	59.1	16.7	40.8	5.7	21.6
Encyclopedias	64.1	67.4	30.9	55.8	16.0	14.9	45.5	24.0
Loose-Leaf Services	29.1	57.4	59.1	47.2	21.1	20.0	9.6	17.4

*This column represents the cumulative response of all members of the profession surveyed.

Thus, we conclude that for most research purposes, the law review is of the most value to the professor and of least value to the attorney. However, this is quite probably due, not to the inherent quality of the review, but to the accessibility of the review to the researcher. People who can conveniently use it usually find it a valuable aid; those who are pressed for time and are not able to maintain a large private library simply are not able to put it to its best advantage.

Perhaps this says something to law review editors about ways to make their publications valuable to the greatest number of people. Since it is apparent that professors already find the law review to be of considerable value, the emphasis should be on ways in which the practitioner can reap more benefits from it. The first suggestion which comes to mind is that a good index is absolutely essential. Certainly every law review has a large contingent of subscribers who are practicing law locally and who subscribe to that particular review only (or perhaps to one or two others at most). Whether these persons are motivated by the fact that the review is published locally, and therefore treats local legal matters, or by some other factor, the fact remains that the review can be a good reference work on their library shelf *only* if they can get into it easily. A carefully organized, detailed index appearing at least once each year is the key here, and a cumulative index should be provided at least every ten years. If this service is provided, the attorney practicing in a rural community many miles from the metropolitan law library can subscribe to his local school's review and actually use it conveniently in his research. When the law reviews fail to index their volumes, or when they provide only haphazard substitutes where quality is needed, they do a great disservice to those of their subscribers who do not have access to the large law library carrying the Index to Legal Periodicals. It is probable that this is one of the primary reasons for the attorneys' indication that the law review was less valuable to them than any other research tool listed in Table No. 3. Until he can consult the law reviews on his shelf as easily as he can a digest, he will continue to rely on the latter.

D. *Conclusion*

Certainly, all of the information presented thus far points in one direction: as a research tool, the law review is currently most valuable to the professors, somewhat less valuable to the judges, and least valuable to the practicing attorneys. Measured against a number of other research aids, the review holds its own reasonably well, although once again the practitioners expressed their misgivings.

Measured against each other, the various reviews distribute themselves over a relatively broad continuum, with the best among them finding favor with the profession, while others were categorized as being only slightly better than nothing. We must now attempt to determine what distinguishes the good from the bad.

III. Content of the Review

A. *Substantive Emphasis*

It is undoubtedly true that few, if any, student editorial boards consciously plan in advance for the number of pages to be devoted to various legal subjects. It simply is not possible to determine the perfect ratio of constitutional law articles to family law articles, or the number of pages which should be devoted to wills and trusts as opposed to contracts or torts. Instead, most law review editors solicit articles from many authors, consciously making requests from persons in a wide variety of legal fields, but ultimately accepting articles in almost any area, provided they are well-written and timely. If a disproportionate number of excellent articles dealing with labor law are received for a particular issue, it would be surprising to find a law review which would decide to publish only one of these in order to leave room for a mediocre article on taxation merely to maintain a "balance" of subject matter. In other words, most editorial boards look first at the quality of the articles received, and secondly at the relative merits of the substantive areas treated.

Furthermore, although most editors would say that they attempt to avoid publishing an excessive number of articles on any given subject, they probably would have some difficulty in setting forth what they believe to be the ideal distribution of subject matter in their publication. Except for those very few law reviews which have chosen to specialize, the relative desirability of the various subject areas is probably seldom considered.

Nevertheless, it is very interesting, and somewhat surprising, to note the amazing similarity among the various classes of law reviews in the distribution of subject matter. For example, with only a few exceptions, they all seem to devote the most space to articles on constitutional law, less space to property articles, still less to criminal law, a very insignificant amount of space to wills and trusts, and little or no treatment of insurance or creditor's rights. Now, it certainly comes as no shock to learn that constitutional law is more popular than insurance, but the real phenomenon here is this almost identical distribution of emphasis in all of the reviews. This seems to reinforce the theory that all of the reviews simply publish what is

available, and there are a lot more authors doing things in the areas of constitutional law and property matters than in insurance law, for instance. Table No. 4[9] illustrates this similarity between the different classes of law reviews in the twenty areas receiving the most attention.

The general picture of consistent emphasis is dotted intermittently with some interesting variances from the main theme. For instance, it was found that the lower classes of reviews were devoting substantially more articles to tort law than were the higher classes. In fact, Table No. 4 reveals that with each increase in the classification of the reviews, there is an accompanying decline in the treatment of tort law. Definite trends also appear with regard to articles in labor law, business associations and antitrust. In these latter areas, the emphasis increases correspondingly with the classifications of the reviews. Thus, the Class A reviews are doing the greatest number of articles on these subjects, while the Class D reviews are publishing a significantly fewer number of these kinds of articles. Obviously, business and commercial law plays a much bigger role in the upper classes of law reviews than in their counterparts in Classes C and D.

Of course, the mere fact that these trends exist is of little import unless they have real meaning. If we were to conclude that the better reviews had risen to their positions in the legal community *because* of this increased emphasis on business and commercial law, we would have indeed uncovered a startling bit of information which

[9] TABLE NO. 4: SUBSTANTIVE EMPHASIS

This table lists the twenty substantive areas of the law which are appearing most often in the law reviews, and indicates the percentage of articles devoted to each area.

	LSAT CLASSIFICATIONS					
	Class A %	Class B %	Class C %	Class D %	Class E %	Average %
1. Constitutional Law	9.8	11.9	12.1	11.9	10.8	8.8
2. Property	7.3	8.6	9.3	8.3	9.9	8.2
3. Courts & Procedure	9.2	7.6	6.8	7.7	7.1	7.8
4. Torts	3.8	6.9	7.5	8.4	7.4	6.5
5. Taxation	6.9	8.6	5.8	4.4	3.4	6.3
6. Labor Law	8.5	7.3	4.6	2.9	4.3	6.0
7. Criminal Law	4.6	7.7	5.8	5.6	5.7	5.9
8. Contracts	3.8	3.1	3.6	5.5	4.3	4.0
9. International Law	3.8	4.4	3.6	4.0	3.7	3.9
10. Evidence	3.3	2.5	5.5	3.9	5.1	3.8
11. Business Associations	4.9	4.2	3.7	2.4	2.8	3.8
12. Attorneys	2.5	2.2	4.3	4.0	2.5	3.1
13. Family Law	1.9	2.7	5.1	3.6	1.7	3.1
14. Antitrust	4.9	2.2	1.3	1.3	.3	2.4
15. Conflicts	1.9	.8	1.4	5.3	1.7	2.2
16. Patents	2.9	2.3	2.3	1.1	1.4	2.2
17. Wills & Trusts	1.1	2.2	2.2	2.8	1.7	1.9
18. Administrative Law	2.8	2.2	.8	1.4	1.1	1.8
19. Insurance	.5	1.7	1.9	1.4	2.0	1.4
20. Creditor's Rights	1.2	.6	1.6	.9	.8	1.0
Totals	85.6	89.7	89.2	86.8	77.7	84.1

law review editors would seize upon immediately. However, the unfortunate truth would seem to be that success does not really hinge on the amount of space devoted to commercial and business articles. Nor would a de-emphasis on tort law be likely to have any noticeable effect on the reputation or status of a law review. The road to success is not so easily found.

On the other hand, this is not to say that the trends are of no value at all for our purposes. If law review editors are to make intelligent decisions when charting the future of their publications, it is axiomatic that they should ground their decisions on as many relevant facts as they can gather, and that is exactly what we have attempted to do here — present some relevant facts to be digested and used in helping to paint a more vivid picture of the law review and its purpose. Admittedly, editorial decisions relating to law review content should not be governed by mere attempts at mimicking the substantive content of Harvard, Yale, Columbia or any other Class A reviews. This course of action has already given us far too many law reviews whose editors are so busy imitating the ivy league that they have forgotten to give any serious thought to what would be best for them in their own particular situation. But, neither does it seem very wise to disregard some of the trends indicated in Table No. 4. Here the editor can see what his review should do to get in step with the better reviews if it desires to do so. Likewise, he can see how to be a non-conformist if he believes that nonconformity holds the key to success. Only if he knows what is being done can he make an intelligent decision about what needs to be done.

A closer look at what is being done is now in order. We have already noticed the general similarity of approach among the various classes of reviews and the trends in the areas of torts, labor law, antitrust, and business associations. In addition to these we can find some noticeable divergent emphasis in other areas. The two upper classes tend to publish more articles on administrative law than do Classes C and D, but the latter give broader coverage to conflicts, family law, and evidence.

Of all the areas where there are observable trends of one kind or another, which ones concern areas of the law that are relatively new and rapidly advancing? Obviously, it is the fields of labor law, antitrust and administrative law. Fifty years ago there was hardly any law at all in these areas. In fact, these fields, as we know them now, were virtually non-existent. Unlike some of the long-established fields, such as torts, domestic relations, conflicts, and evidence, the most significant legislation and decisions governing these areas are

of relatively recent origin. Admittedly, tort law and conflicts have undergone some degree of refinement and development since the turn of the century, but substantially less than these new fields which have virtually risen from nowhere overnight.

The really significant developments in these areas are happening right now. This is where the current law is being made, and this is precisely where the better law reviews have outshown their less illustrious brethren! In all three of these areas the Class A and Class B reviews are providing much broader coverage. It is in the old and well-established areas of torts, domestic relations, conflicts, and evidence that the Class C and Class D reviews have become slightly bogged down. The really important thing to remember is not that there is anything magic about concentrating on labor law instead of tort law, but rather that the most successful and influential reviews have recognized the need for treating the emerging areas of the law. Thus, the law review must face the fact which confronts all institutions in our civilization today — he who remains stagnant in the face of inevitable change will surely be forgotten. To be sure, the point has been dramatized somewhat, but the point is sound nevertheless.

Legal literature should reflect the current state of the law. Rehashing the basic tenets of the common law must yield, even if ever so slightly at first, to increased discussion of some of the frontier areas of the law. The sooner law review editors come to recognize this fact, the sooner they will be able to upgrade their publications.

B. *Types of Articles*

Regardless of the substantive areas which are ultimately treated in a particular law review, the editors should give some thought to the relative merits of the different types of articles which can be used as the vehicle for conveying ideas. In addition to book reviews, which will be considered later, there seem to be eight basic approaches which an author may take. It is often difficult, if not impossible, to determine which of these eight pigeonholes best characterizes a particular piece, but for purposes of this survey we nevertheless did so whenever reasonably possible. In order that the reader may better understand the meaning implicit in these eight labels, a brief discussion of each is in order.

1. Traditional Case Comment

The case comment or case note has traditionally appeared in the law review as a very brief synopsis of a recent case, considered by the editors to be of some significance. The usual format includes a statement of the facts, the court's holding, and the rule for which

the case stands. Although the author (nearly always a student) may venture a few remarks about the wisdom of the decision or the logic of the court's rationale, very little is offered in terms of creative thought. The obvious and primary purpose is to report to the reader an important case which has been decided.

2. Analytical Case Comment

Unlike the traditional case comment, the analytical comment is not a report of what happened. Instead of being limited to summary treatment of a particular case, the analytical comment often makes only passing reference to the case while the author concentrates his efforts on a thorough discussion of a particular issue implicit in the case. It might be said that the emphasis is vertical rather than horizontal. The author takes his narrow issue and, without discussion of all the related or semi-related issues, exhausts his topic.

3. Descriptive Article

The most noticeable distinguishing factor between the two types of comments just discussed and the six types of articles to follow is scope, and therefore, length. Although the analytical comments will usually be somewhat longer than the traditional comment because of the increased depth of treatment, neither of them approach the length or breadth of most articles.

The descriptive article is analogous to textual hornbook material. Heavily footnoted and carefully organized, it sets forth the basic rules of law governing a particular field or portion thereof. It contains very little in the way of commentary by the author and is seldom addressed to unsettled areas of the law where the rules have not yet been formulated. It is a very extensive compilation of what the law is, and thus its primary value is as a reference work.

4. Historical Article

While the descriptive article is best characterized by comparing it to a hornbook article, the historical article finds its counterpart in an ALR annotation. The emphasis is on tracing the history, trends and developments in a particular area of the law. If it deals with matters of policy or relative values of available alternatives, it does so only in an historical perspective. It looks at precedent and provides a background for the rule of law in a particular area.

5. Analytical Article

Included here are the articles in which the author not only sets forth the state of the law, but also includes his commentary upon the value of the rules. This is what has probably come to be thought of as the traditional law review article (if there is such a thing).

It is not so much a report as it is a well-reasoned study of unresolved issues and possible solutions. It employs the intuitive, rather than the empirical, approach. It may, of course, include some of the elements of a descriptive or historical article but its uniqueness lies in the fact that it does more — it analyzes the law instead of simply reporting it. The approach is similar to that of the analytical case comment, except that the scope of coverage is much broader.

6. Empirical Article

This type of article usually involves field research rather than library research and employs statistical data, tables, and charts in the presentation of the material. The author will often pose a problem which he then atttempts to solve by drawing conclusions from the collected data. Empirical articles are usually concerned with the application or impact of the law, rather than with what the law is or should be. Typical topics would be: the effect of *Miranda* on police conduct; jury studies; studies of penal institutions; or a law review survey.

7. How-to-Do-It Article

The name speaks for itself. The author takes what the practitioner would undoubtedly refer to as a "very practical" approach. He may explain how to prepare a will with a revocable trust provision, how to handle a probate estate, how to cross-examine an adverse witness, or how to draw a collective bargaining agreement. The author must be thoroughly familiar with his topic and should have had considerable experience in doing what he is telling others how to do.

8. Supreme Court Reviews

These are not unlike a compilation of excerpts from "Judicial Highlights" found in the advance sheets of the West Reporter System. Law reviews will typically summarize the important decisions by their local supreme court during the preceding year, and thus give the reader a very cursory synopsis of how, for example, the law of torts, evidence, or property has changed or developed in that time. Occasionally there is a review of legislative enactments as well. Perhaps best known in this area is Harvard's annual review of United States Supreme Court decisions.

C. *Article Distribution*

Each of the various types of articles and comments has its merits, but it could hardly be said that they are of equal value. We were particularly interested in determining which type is most often

selected by the review editors, and which the attorneys, judges and professors found most valuable.

As might be expected, the analytical article is appearing most often, although the traditional case comment is also quite popular. In view of the fact that the analytical article is nearly always much longer than the case comment, it is obvious that more pages are being devoted to the analytical article than to the case comment. Again there is an amazing consistency between the four classes of reviews. For example, they all devote almost exactly one-third of their published pieces to the analytical approach, 1% or less to the how-to-do-it article, and less than 2% to empirical material.

Only a couple of discernable trends exist. First, Table No. 5[10] reveals that the distribution of the two types of case comments varies among the classes of reviews. Although the traditional approach still seems to be predominant in most cases, it is apparent that in Class A the two types are very nearly equal. This might very well be one area where the better reviews have recognized the value of creative writing more quickly than have the reviews in the lower classes. The relative merits of these two types of comments will be discussed later.[11] Secondly, there was a slightly increased tendency for the better reviews to shy away from the historical article, although none of the reviews seem to be particularly interested in this approach.

These trends, although they do in fact exist, are considerably less significant than the overall picture of uniformity. Law review editors are obviously not interested in empirical research, historical essays, or how-to-do-it articles. At least, if they are interested, they have not been very successful in obtaining these kinds of pieces for their publications. Before venturing an opinion on the wisdom of this apparent non-interest, it is appropriate to consider briefly the reactions of the attorneys, professors and judges who were asked to evaluate these various types of articles.

[10] TABLE NO. 5: ARTICLES BEING PUBLISHED

This table indicates the relative frequency of appearance of the various types of articles and comments published in the law reviews surveyed.

	LSAT CLASSIFICATIONS					
	Class A %	Class B %	Class C %	Class D %	Class E %	Average %
Analytical Article	33.6	30.6	30.4	32.9	50.3	33.5
Traditional Comment	24.3	31.2	30.7	36.0	17.4	29.0
Analytical Comment	22.5	16.6	22.6	11.5	18.0	18.6
Descriptive Article	13.1	15.6	6.6	11.1	6.6	11.4
Historical Article	2.4	2.6	3.6	4.0	1.5	2.9
Supreme Court Review	1.2	.8	3.3	2.9	1.5	1.9
Empirical Article	1.6	.9	1.6	.3	3.3	1.3
How-to-Do-It Article	.4	.5	.8	1.0	.9	.7

[11] *See* discussion pp. 443-44 *infra*.

As Table No. 6[12] indicates, there is rather keen interest in the analytical and historical articles, as well as in the traditional case comment. The law review editors seem to be in agreement with the profession as to the value of the analytical article, but they apparently do not see eye-to-eye on the merits of the historical approach. While most of the reviews are devoting less than 3% of their articles to historical essays, most of the attorneys, judges and professors found these articles to be very valuable. In fact, the attorneys put it in first place. Perhaps law review editors should sit up and take notice of the fact that there are other kinds of valuable articles in addition to the analytical article. As mentioned earlier, this has undoubtedly come to be the traditional law review article, but the survey would indicate that more variety is needed. Not only did the profession express interest in the historical article, but they also let it be known that empirical research is of considerably more value than the editors have realized. The professors are particularly fond of this empirical approach.

The law reviews have been derelict in the area of empirical research. In the United States there are more than 100 law reviews whose staffs range in size from 20 to 90 persons or more. These are the people who are skilled in research, proficient in legal writing, and presumably the real "scholars" at their particular schools. They are capable of undertaking extensive studies of the law and its institutions; they are equipped to gather the information that has never been gathered before, to evaluate it, interpret it, and present it to the profession. These are the people who should be shouldering the responsibility for doing collectively what one or two authors simply do not have the time or resources to do individually. Yet, in 1965, of more than 4100 articles published by these reviews, only 54 involved empirical research of any kind; and only 10 were staff

[12] TABLE NO. 6: MOST DESIRABLE ARTICLES

This table lists the eight types of articles in the order of their value as determined by the responses of the attorneys, professors and judges in the survey.

	VALUABLE				LITTLE OR NO VALUE			
	Judges %	Attorneys %	Professors %	Total* %	Judges %	Attorneys %	Professors %	Total* %
Analytical Article	83.8	70.8	96.0	82.9	4.3	19.1	.9	8.3
Historical Article	78.7	80.0	84.4	80.7	5.8	10.0	8.7	8.0
Traditional Comment	79.5	82.4	74.6	79.1	8.0	11.6	21.3	13.0
Descriptive Article	70.0	68.3	60.1	66.6	15.3	20.8	36.8	23.3
Analytical Comment	54.0	62.5	71.7	61.9	20.4	24.1	15.5	20.2
Supreme Court Review	62.0	49.9	61.1	57.7	23.3	32.5	33.0	29.1
Empirical Article	40.8	29.9	74.6	46.8	30.6	42.5	12.6	29.4
How-to-Do-It Article	26.2	53.3	15.5	32.2	53.8	26.7	64.5	47.8

*This column represents the cumulative response of all members of the profession surveyed.

projects involving the very students who have the time, ability and resources to do this kind of work. The facts speak for themselves — it is time for law review editors to realize that their responsibility extends beyond exhaustive research and writing in their local libraries. As important as the latter may be, empirical studies have simply been bypassed for too long.

At a minimum, every law review should undertake one empirical research project each year. Once a topic for investigation has been selected, an appropriate number of staff members should be assigned to gather the necessary data. When this tedious process has been completed, it is necessary to evaluate and interpret the information compiled. Computer analysis will often prove invaluable, and when available should be employed. Finally, of course, there is the task of preparing an article which clearly and concisely informs the reader of the results of the study. The work required is extensive, but the end product is unique and valuable. It offers the reader information usually unavailable in the law library. It is only through these kinds of studies that the profession can be kept informed of the impact of the law on society. It is not sufficient that we simply report what the law is or purports to accomplish; we also have a responsibility to investigate and report on the ends being achieved by the means employed.

D. *Case Comments*

The case comment is sufficiently unique to warrant special discussion. As mentioned earlier, there are two very different approaches to preparing a comment: (1) traditional and (2) analytical. While reference has already been made to their popularity with law review editors and with the profession in general, the relative value of the two approaches should be considered.

The case comment has traditionally appeared in law reviews as a very brief report of a recent decision, its impact on the law, the author's reactions to and conclusions from it, and little else. However, in recent years, the tide has begun to turn away from this traditional approach, and a number of law reviews have begun to publish what is categorically termed the analytical case comment. As the name implies, the emphasis is no longer on merely reporting a recent decision — a task already being performed quite adequately by other publications. Law review editors are slowly beginning to realize that if they are going to justify publication of pieces dealing with current decisions, mere regurgitation of the facts and rule of law will no longer suffice. If there is to be any attempt at making a positive contribution to legal journalism, there must be analytical and creative thought; there must be in-depth treatment of an issue which

confronted the court. The student author will not ordinarily use the particular case as the ultimate subject of his comment, but rather as a point of departure into a thorough discussion of the significance and future implications of the ruling. There may be instances where the issue addressed by the court is not the issue which the student writer believes to be most important. In such case, he should not feel constrained by the case itself, but should concentrate his efforts on the issue he deems most relevant.

This is not to say that the facts of a particular case are never worthy of discussion or that a newly pronounced rule of law should be overlooked entirely. The point is simply that a comment is only of real value if it does something more than this. Unless law reviews do something in addition to reporting cases, they might just as well publish the citation and have their readers consult the headnotes in the advance sheets.

E. *Book Reviews*

The book review is distinct from all other forms of legal writing appearing in law reviews, and thus also requires separate treatment here. Although the style of book reviewers varies a great deal, nearly all book reviews can be fitted into one of two broad categories which might be labeled as (1) "editorializing," and (2) "reporting."

The "editorialized" book review is the one which in its most frequently used format devotes only the first couple of paragraphs to telling the reader about the book itself. From that point on, the emphasis is on the reviewer's thoughts about, and reactions to, the subject matter covered. Occasionally it will include one of his pet theories that can somehow (whether legitimately or not) be tied to the book. This type of book review allows the writer freedom of form in legal writing. Unhampered by the requirement for footnoting, he is given a chance at imaginative writing. The editorialized book review is refreshing reading, and the less it reviews the book the more refreshing it seems to be.

The "reporting" book review can best be characterized by quoting from what one book reviewer stated he intended not to do:

> I could write in greater detail of the size of the book, what I believe to be admirable restraint in the editing of cases, the wise choice of many recent cases, the possible overbalance of 'liberal' decisions, the unlikelihood of covering all the cases in the short time given to most tort teachers these days . . . the esthetic quality of West's comparatively new format, changes which have been made [from an earlier edition], possible errata, the size and sufficiency of the index, the possible value of a teacher's manual, and so on. Other reviewers will undoubtedly comment on these and lesser matters. . . .
>
> . . . I think the problem for most people who have attempted to judge

> this book, either publicly or privately, has been that they have done little more than look at the table of contents.[13]

This is precisely the point. The reporting approach to reviewing a book is usually the result of little more than a brief look at the table of contents. This kind of book review may have a legitimate place in a law review if kept exceptionally short (perhaps only a few paragraphs). If it helps the reader to stay informed of the significant books being published, there is some value in such a service.

However if the purpose is to print something which is a piece of journalism in its own right, then only the editorial approach will suffice. The survey indicated that attorneys, judges and professors are all interested in reading book reviews, and as Table No. 7[14] indicates, this is particularly true of the professors. Various reasons are given for this interest, ranging from a simple desire to know what books have been published to a quest for pure enjoyment. Some of the respondents called it the most valuable part of the law review, and others found it usually better than the book itself since it combines the book's thesis with the reviewer's analysis thereof.

IV. Scope of the Review

A. *The Problems*

Once the editorial board of a law review has arrived at some conclusions about the substantive areas most deserving of treatment and the types of articles best suited to that treatment, there remains another basic question to be answered: what is the proper scope of the law review in general, and of each article in particular? Should the emphasis be on matters of national concern, or should local issues receive the most attention? Integrally related to this question is one still more basic: whom does the law review serve, and how does this affect the scope of the material to be published? Ultimately, it seems, this questioning leads the law review editors to ponder the justification for their existence: what is the purpose of the law review? Unfortunately the first question cannot be answered intelligently without first considering the last one.

[13] Probert, Book Review, 52 Nw. U.L. Rev. 295 (1957).

[14] Table No. 7: Reader Interest in Book Reviews

This table indicates the interest of the attorneys, professors and judges in having book reviews published. The answers given were in response to the question: "Do you read book reviews appearing in law reviews?"

	Yes %	No %	No Answer %
Judges	61.3	30.6	8.1
Attorneys	45.8	45.7	8.5
Professors	84.4	12.6	3.0
Total*	62.7	31.6	5.7

*This total represents the cumulative response of all members of the profession surveyed.

Before attempting to delve into these very fundamental questions concerning the purpose of the law review and the proper scope dictated by that purpose, it is appropriate to consider some results of the survey pertaining to these questions. We initially determined the current scope of the law reviews. Table No. 8[15] indicates what is being done in two areas: constitutional law and legislation. These particular topics were chosen to illustrate some of the very definite trends among the various classes of law reviews.

For example, in the area of constitutional law, the ratio of nationally-oriented articles to locally-oriented articles is significantly higher among the Class A and B reviews than among those in Classes C and D. While the Class A publications publish about 34 federal constitutional articles for every one dealing with state constitutional law, the Class D reviews maintain a ratio of about 10-to-1 in favor of federal issues. This only verifies what one would have suspected—the better reviews have very little time for state constitutional questions. With few exceptions, their efforts are concentrated on federal matters. However, it is noteworthy that even the Class D reviews are publishing ten times as many articles on federal constitutional questions as on state matters. It must be remembered that there are simply not as many state constitutional questions confronting the courts, and one would suspect that devoting one article out of every eleven to state issues would probably result in coverage as good as or better than publishing ten articles on the federal matters.

In the area of legislation, the trend is even more pronounced. While the Class A reviews continued their emphasis on federal issues by a ratio of more than 2-to-1, Class D has reversed its emphasis in favor of state matters by nearly the same ratio. Note, however, that all four classes are doing substantially more articles on state legislative questions than they were on state constitutional issues. This is undoubtedly attributable to the increased number of

[15] TABLE NO. 8: SCOPE OF THE REVIEWS

This table indicates the percentage of the various classes of reviews being devoted to state and federal aspects of selected issues.

		LSAT CLASSIFICATIONS					
		Class A %	Class B %	Class C %	Class D %	Class E %	Average %
Constitutional Questions	A. (Federal)	13.7	15.0	16.1	12.1	12.8	14.1
	B. (State)	.4	.8	3.6	1.2	1.4	1.4
Legislation	A. (Federal)	15.9	21.7	6.6	6.6	3.7	12.6
	B. (State)	6.7	16.8	9.6	11.5	8.3	10.8
Constitutional Questions and Legislation Combined	A. (Federal)	29.6	36.7	22.7	18.7	16.5	26.7
	B. (State)	7.1	17.6	13.2	12.7	9.7	12.2

significant questions arising under state statutes as opposed to state constitutions.

An even better picture of this dichotomy of emphasis is seen if the data on constitutional law and legislation is combined. The last two lines in Table No. 8 illustrate that emphasis on federal problems is greater in Classes A and B than in the other classes. One might ask at this point whether this varied emphasis is a function of the status of the reviews. Have the Class A reviews achieved their enviable positions because they concentrated on matters of national concern, or do they emphasize national matters because they have achieved positions of prominence? No positive answer is available, but a logical explanation is easily formulated.

In the first place, the law reviews at Harvard, Yale, Columbia, Pennsylvania, etc. have been around for a long time, and they are associated with law schools that established themselves early as excellent institutions in the field of legal education. It is primarily because they were the first in the field to do a good job (or any job at all) that they initially rose to positions of leadership. Of course, the quality of the schools and the caliber of students attending was a significant factor. Suffice it to say that it is doubtful that the ratio of nationally-oriented articles to locally-oriented articles played a significant role in the early days of their development.

Whatever the initial scope of these early reviews, as the alumni continued to scatter across the country, it must have become increasingly clear that such a growing diversity of subscribers required publication of highly diversified material. As more and more nationally-oriented articles appeared, the national reputations of the reviews grew. It cannot be said, then, that national emphasis was solely a cause or effect of prominence for these law reviews; it was obviously both. If it was a substantial cause when Harvard and Yale were on the rise, it is probably less so today. When there were only a few law reviews in existence, it is undoubtedly true that those who appealed to the most people grew the fastest; but when there are well over 100 reviews being published, merely concentrating on national issues will hardly suffice in a quest for excellence and resulting prominence.

The decision of law review editorial boards concerning the scope of their publications is certainly a fundamental and important one. It would be questionable for them to reason that, since Harvard and Columbia emphasize national issues and are extremely successful, any other law review which seeks prominence must also emphasize national issues. The solution is not so simple.

In fact, the survey revealed some surprising, but interesting,

indications that just the opposite may be true. For example, both the attorneys and judges felt quite strongly that there should be increased emphasis on state law and other matters of local concern. As Table No. 9[16] indicates, only the professors were reluctant to make this recommendation, and even they were about evenly split on the question. In all, the response was about 5 to 3 in favor of increasing the space being devoted to matters of local interest. Perhaps this says something to the law review editors who have fixed their wagons to a star and are convinced that the only route to the top is via national emphasis. It is just possible that the law reviews would better serve the needs of the legal profession if their editors would face the fact that there simply isn't room for 60 or 70 nationally-oriented professional journals, all trying to outdo each other in covering exactly the same material.

This conclusion is substantiated by the fact that the attorneys, professors and judges pointed out that, although national emphasis and reputation, renowned authors, and demonstrated excellence motivate interest in the Harvard, Yale, Columbia and Michigan law reviews, subscriptions to other reviews are much more likely to be a result of the fact that (1) the review is published by a local school, (2) the review publishes material of local interest, or (3) the subscriber is an alumnus of the school. Of these three factors, local emphasis was said to be most important. Again the finger points at those editors who have forgotten their local subscribers. It is exactly at this point that these editors should face the second question raised earlier: whom does the law review serve? Does it serve only its subscribers, a large portion of whom usually are local practitioners? Does it serve only the researchers in the big law libraries where all the reviews are carried and the Index to Legal Periodicals is readily available? Does it serve only the students who participate as members of the staff and editorial board? Obviously, the answers to each of these questions must be in the negative. No law review serves only one of these interests. Hopefully, they are all served in varying degrees. It is in an attempt to determine how and to what extent each is to be served, that the final question is raised concerning the purpose of the review. Perhaps, then, this is an appropriate place

[16] TABLE NO. 9: MOST DESIRABLE SCOPE

This table indicates the response of the attorneys, professors and judges when asked their preferences on the issue of national vs. local emphasis.

	Judges %	Attorneys %	Professors %	Total* %
Publish More National & Regional Material	36.4	20.8	34.8	30.8
Publish More Local Material	54.6	63.3	32.9	51.3

*This column represents the cumulative response of all members of the profession surveyed.

to address the questions in reverse order so as to get back to the initial question of the proper scope of the law review.

B. *The Purpose of the Review*

Certainly the primary, if not the only, reason for the existence of so many law reviews is their alleged value as educational institutions within the law school itself. It is certainly not an economic law of supply and demand which has fostered more than 100 of these associations of students which are seldom able to pay more than 50% of their total operating costs at best. The law schools are willing to pick up the tab for the deficit because the students are believed to be gaining so much from law review experience. Admittedly, intensive participation on a law review for two years is of tremendous educational value, but that is not sufficient justification for the existence of this unique and expensive institution. The law review must serve the profession directly as well. Every issue published should contribute something more than useless verbiage to the ever-growing volume of legal journalism. If no contribution is made, the entire printing and mailing cost might just as well be eliminated, and the money diverted to helping educate the less fortunate, non-review students.

The two purposes of the law review are thus inextricably bound together — both are necessary; neither is sufficient. There must be educational value for the student, and there must be a positive contribution to legal journalism.

C. *Deciding Whom to Serve*

The law review provides a very real service to three groups of people: (1) the student participant, (2) the subscriber, and (3) the library researcher. The service to the student participant has just been discussed and need not be explained further. The other two beneficiaries receive different kinds of service from the law reviews. The subscriber very probably relies upon the reviews he receives as his prime source of information about current developments in the law. Unless he has convenient access to a large law library, he must depend upon the editors of the particular reviews to which he subscribes to separate the wheat from the chaff and give him the best of what is new.

The library researcher might be a law student, a professor or a metropolitan attorney. In any event, he is someone with ready access to a major law library. The library researcher does not rely on any particular law review to present the total picture on recent developments in the law. Instead, he relies on all of the law reviews to collectively exhaust all of the topics, cases, developments, etc. By using

the Index to Legal Periodicals he is able to find everything that has been written concerning his particular problem.

Trying to serve both the subscriber and the library researcher puts law review editors on the horns of a dilemma. If every review published only articles dealing with the most significant developments in the law, there would be tremendous duplication of effort and a noticeable lack of depth in legal writing. If every review felt compelled to explain the effects of cases like *Miranda* or *Sheppard* or to analyze the Uniform Commercial Code, a lot of pages better used for other topics would be lost. The library researcher would suffer in such a situation; he would be able to find 102 articles on the U.C.C. or *Miranda,* but nothing on the slightly less significant legal problems thereby precluded from treatment. Clearly this is not a desirable result.

But neither does the other extreme present very inviting results. If the law reviews are published with only the library researcher in mind, they would tend to turn out only material which was of national interest and which had not already found its way into the Index to Legal Periodicals from some competing law review. In this situation the subscriber relying on the review to update the total picture for him finds only bits and pieces of national issues, and seldom, if ever, does he receive anything relating to the developments in the local law. Insofar as he is paying between $5 and $10 annually for this service, the result is hardly justifiable.

Finding both extremes to be undesirable, the law review editors must look to the middle ground and hope to find solution in compromise. They must bring together the best of two worlds and cater to the needs of both the local subscriber and the library researcher. It is in this context that they must determine what the scope of their review will be.

D. *Choosing the Proper Scope*

Since the proper scope of any law review is determined by the people it serves, the editors must carefully analyze their position in this regard. The number of subscribers in the local state is a factor to be considered. If the only law review published in a particular state is patronized by a substantial number of local attorneys and judges, there can be very little doubt about the review's obligation to keep these people informed on matters of local interest. Except for those subscribers in the metropolitan areas having access to large law libraries, these local attorneys and judges will undoubtedly rely upon this local review to treat significant aspects of both state and national issues.

Thus, when we talk about the obligation to publish material of local interest, we do not mean to imply that the emphasis should necessarily be on state law. Rather, the scope of the review should be sufficiently broad to include any article which has appeal for the local members of the legal profession, whether it be federal or state law. The only requirement relating to publishing articles on local state law is that the really significant developments in this area not be allowed to slip by unnoticed. Unless the local law reviews treat the important local issues, they will probably not be treated at all. While there may be very few really significant developments in local law, the fact remains that a law review should never get so caught up in imitating Harvard that it forgets whom it serves. It will usually be possible to provide adequate service to the local subscriber without devoting large portions of each issue to matters of local state law; and the remaining pages can legitimately be used for material of broader scope which will not only be of interest to the local subscriber, but will make a contribution to the composite whole of legal journalism on which the library researcher relies as he pours through the ILP, hoping that someone somewhere has published an article on the exact problem he is trying to resolve.

Each law review must establish its own magic ratio of state-oriented to nationally-oriented articles. This determination will necessarily be based on the number of local subscribers, the corresponding number of subscribers in other states, the number of other law reviews serving these same people, and the past history of these reviews in terms of emphasis. In most cases it would seem probable that at least two-thirds of each issue could be devoted to nationally-oriented material; but unless another law review has assumed some responsibility for coverage of local matters, it is questionable that substantially less than one-third of each issue should be locally oriented.

V. Authors and Solicitation

A. *The Best Authors*

Another problem which seems to plague every law review editorial board is the solicitation of articles from good authors. This is undoubtedly due to the super-abundance of law reviews in comparison with the number of capable authors. Because not every review can always obtain good articles, but is determined to publish at any cost, there is a resultant wealth of second-class material.

In the survey, we attempted to determine not only who was doing the most writing for the law reviews, but also who was doing

the best writing. As Table No. 10[17] indicates, students are doing the most, while Table No. 11[18] suggests that professors are doing the best. Let us consider each of these in turn.

In the distribution of authors, as with so much of the data already considered, the similarity between the various classes of law reviews is the most prominent feature. In each of the four classes, students are writing two-thirds of the pieces being published, with professors in second place, judges third, and attorneys fourth. However, since this ranking is based on number of articles published, and not number of pages, there is reason to believe that the usual brevity of student-written case comments would result in the page prize going to the professors.

Since there were no trends among the various classes of reviews, there is no indication that the better reviews have different preferences for particular authors. While they publish a few more articles by professors and slightly fewer articles by attorneys than do the other reviews, the difference is hardly significant. In order to get some idea of the relative merits of the various authors, then, it is necessary to consider the evaluations made of them by the profession.

Table No. 11 points out that of the four most common authors of law review articles, the professors are preferred and considered to be the most reliable. The attorneys, professors and judges all seemed to agree on this point, but the opinion was especially strong among the professors themselves. Although the attorneys were in second place, they certainly do not owe this honor to the ratings given them

[17] TABLE NO. 10: AUTHORS PUBLISHING

This table indicates the percentage of articles being written by each of the various types of authors.

	LSAT CLASSIFICATIONS					
	Class A %	Class B %	Class C %	Class D %	Class E %	Average %
Student	66.5	67.6	68.6	68.1	63.1	67.2
Professor	17.8	13.1	16.9	14.8	18.3	15.9
Attorney	9.5	11.2	8.8	11.3	13.5	10.5
Judge	2.0	1.9	1.5	2.1	.9	1.8
Other	4.2	6.2	4.2	3.7	4.2	4.6

[18] TABLE NO. 11: MOST DESIRABLE AUTHORS

This table indicates the relative merits of the various authors according to the responses of the attorneys, professors and judges in the survey.

	Judges %	Attorneys %	Professors %	Total* %
Students	5.8	6.6	1.9	5.0
Professors	38.6	36.6	73.7	48.0
Attorneys	10.9	20.8	.0	11.1
Judges	16.7	5.0	.9	8.3
No Answer	27.7	30.8	23.3	24.7

*This column represents the cumulative response of all members of the profession surveyed.

by the professors. In fact, not a single professor expressed a preference for attorneys as authors. It was primarily the attorneys themselves who were responsible for their being in the number two spot. They are not unlike the professors in having a high regard for themselves as authors, however, and the judges appear to have some tendency in this direction as well.

The message for law review editors is relatively clear: if other things are equal and if there is an opportunity to be selective, the professors should be the first choice as contributing authors. However, this is not to say that attorneys, judges and students are totally unreliable authors. The ranking in Table No. 11 is a comparative one only, and there is no indication that even the students are not highly respected as authors. While student opinion of what the law should be admittedly holds little sway with the legal community, the student can nevertheless make a significant contribution. He is perfectly capable of exhaustive research and compilation of authority which will support his propositions, and in this type of writing he is as reliable as the professor.

B. *Multiple Authors*

Very few articles appearing in law reviews are written by more than one author, but, as shown in Table No. 12[19], this is definitely being done more frequently by the better reviews, particularly those in Class A. The relative merits of the single-author article and the multiple-author article are difficult to determine. It is suspected that neither is inherently better or worse than the other. And there is very little that law review editors can do to encourage or discourage this kind of collaboration by contributing authors. The increased number of multiple-author articles in the better reviews is presumably not the result of specific requests by the editors, but is due to the fact that when authors collaborate on an article it is usually done for a reason — namely, that the article is extensive and involves extraordinary amounts of time and effort in preparation. It is only logical that

[19] TABLE NO. 12: MULTIPLE AUTHORS AND STAFF PROJECTS

This table indicates the number of articles being published which are written by more than one author or which are projects of a substantial portion of the law review staff.

	LSAT CLASSIFICATIONS			
	Class A %	Class B %	Class C %	Class D %
1. Two or Three Authors	46	31	20	20
2. Staff Projects				
A. Symposiums	2	14	1	2
B. Sup. Ct. Reviews	0	1	4	5
C. Other	4	5	5	0

these super-articles would be first submitted to the better reviews in hopes of publishing them there.

When we consider the student-written material, the number of authors per article is a bit more significant. Multiple-authored student articles are most often staff projects — the joint efforts of many persons, not just two or three. Although this kind of teamwork is employed in researching and writing many types of articles, it seems to be most popular in symposium issues and for compiling the annual reviews of supreme court decisions discussed earlier.[20] In fact, 70% of the staff projects being published are one of these two types (See Table No. 12).

The staff project has more to offer than most law review editors have recognized. First, it makes sense that a group of six or seven competent students can make a much more significant contribution if they pool their research and writing efforts and concentrate on one major project instead of each turning in their individual work products on less substantial topics. And, since an article by six or seven persons will seldom, if ever, approach the combined length of their individual articles, the editors are able to allow more students to achieve that much sought-after goal of having published. While this is hardly a legitimate end in and of itself, it is certainly one of the desirable side effects of employing the staff project. Occasionally conflicts will arise when a number of people attempt to reach agreement on how the results of their combined research should be interpreted and presented, but in most cases the benefits derived from this interchange of ideas and from the give-and-take involved in group effort will far outweigh any of the difficulties.

C. *Solicitation*

It is not enough that law review editors know who the most reliable and desirable authors are; they must then persuade these individuals to take the time and expend the energy necessary for the preparation and submission of an article. This is the solicitation problem, and a very real problem it is. There are a number of techniques employed, most of which have some merit, but none of which seem to adequately solve the problem. Many law reviews routinely mail hundreds of form letters every year asking professors (and sometimes attorneys and judges as well) to contribute material to their publication. It would seem a fair guess that 95% of these letters go immediately into the recipient's waste basket and are not even given 60 seconds of careful consideration. Of the remaining 5%, some produce a hurriedly-scribbled, "Thank you, but I'm already

[20] *See* discussion p. 440 *supra.*

committed," and a very few result in an article actually being submitted. The value of the articles received under such circumstances is open to question, since one must be suspect of anyone who responds to such a form letter. The better reviews, of course, can use this technique to better advantage since even a form solicitation letter from Harvard or Yale will probably spark some interest occasionally. But, for the most part, this attempt at soliciting articles seems to be a waste of time and money.

A much more intelligent variation on this same theme requires the cooperation of the professors at the school where the review is being published. With their help, contact can be made with other professors (or attorneys or judges) with whom they are familiar. Abolition of the form letter in favor of a personal letter which opens with "Prof. Jacobs has told me that you are engaged in some research in the area of . . ." will improve the percentage of favorable responses considerably. Occasionally this technique will put the law review editors in touch with some of the recognized experts in a particular area — people who would never have considered writing for the *Podunk Law Review* but for the fact that good old Bill Jacobs is teaching at Podunk University Law School now and has asked for a favor.

A third technique which has some merit involves establishing contact with the directors of the various graduate legal programs and asking their cooperation in uncovering material being written there by participants in the program. The reactions to such requests are varied, but the response is usually favorable.

Many other methods are also employed, but regardless of *how* solicitation is handled, the time *when* it is done is most important. There is no substitute for planning well in advance in order to give authors plenty of time to write and to allow for thorough editing and any necessary re-writing.

VI. The Topical Approach, Specialization and Symposiums

This is an age of specialization, and few industries, professions or institutions have failed to conform to this new pattern of progress. In law, we find people specializing in personal injury litigation (perhaps only as defense or plaintiff's counsel), tax, natural resources, labor law, domestic relations, etc. This tide of specialization has not, and will not, pass by the law reviews unnoticed. As special fields have developed, a number of editorial boards have responded by concentrating their efforts in one or more of these areas. A law review may specialize in one of two ways, each requiring a different degree of exclusion of all material not related to the particular

specialty. Only one of these can legitimately be termed "specialization" in the purest meaning of the word. This is the selection of one topic to the total exclusion of all non-related material from every issue of the publication. The other approach involves specializing a particular issue of the law review, but choosing a new specialty for each succeeding issue. This is the symposium approach.

A. *The Symposium*

In ancient Greece, a symposium was the discussion following a banquet or social gathering, at which there was a free interchange of ideas. Plato, in one of his dialogues, reported such a symposium on the subject of ideal love. Since that time, the symposium has developed into a literary vehicle — a collection of opinions on a selected subject having as its purpose a composite analysis of the significant aspects of that topic.

Reference to Table No. 13[21] shows that in 1965, 39 law reviews published symposium issues, but the fact remains that 90% of the issues being published were not symposiums. Although these schools are putting out one or two symposiums per year, they still concentrate their efforts on the traditional approach, which results in issues containing unrelated articles on many different subjects.

The survey raises some serious doubts about the merits of this traditional approach. If the profession had one sweeping recommendation to make to law review editors, it was for a substantial increase in the number of symposiums being published. The attorneys, judges and professors all were in agreement on this point, although the most emphatic statement came from the professors. In view of this keen interest in symposiums, law review editors should give serious thought to increasing their efforts in this area.

Publishing symposium issues of a law review has advantages and disadvantages. A symposium possesses a unity of theme not found

[21] TABLE NO. 13: LAW REVIEWS PUBLISHING SYMPOSIUMS

This table lists the various law reviews that published symposiums in 1965, by LSAT class.

CLASS A	CLASS B	CLASS C	CLASS D	CLASS E
Calif. L. Rev.	Albany L. Rev.	Iowa L. Rev.	Ark. L. Rev.	Baylor L. Rev.
Colum. L. Rev.	Ind. L.J.	N.D.L. Rev.	How. L.J.	Clev.-Mar. L. Rev.
Cornell L.Q.	Minn. L. Rev.	Okla. L. Rev.	La. L. Rev.	Mo. L. Rev.
Harv. L. Rev.	Norte Dame Law.	Syracuse L. Rev.	Mercer L. Rev.	Willamette L.J.
Mich. L. Rev.	Ohio St. L.J.	Wayne L. Rev.	N.Y.L.F.	
N.Y.U.L. Rev.	Sw. L.J.	Wm. & Mary L. Rev.	S.C.L.Q.	
So. Cal. L. Rev.	Temp. L.Q.		Tenn. L. Rev.	
U.C.L.A.L. Rev.	Texas L. Rev.		Tulsa L. J.	
U. Chi. L. Rev.	U. Ill. L.F.			
U. Colo. L. Rev.	Vand. L. Rev.			
	W. Res. L. Rev.			

in the traditional issue. As in Plato's dialogue, the opinions of the different authors may vary, but throughout the symposium the theme appears, like a musical refrain, to weave their ideas into a single strand of legal inquiry. The symposium is the one issue of a law review that can offer "scope" to legal journalism. Concentrating on a particular area within the vast sphere of legal activity, the symposium can probe the depths of interrelated problems and provide a compendium of inquiry and suggested resolution to issues involved. In the more "established" areas of the law, the symposium can serve as a valuable research tool— a synthesis of important developments in that field.

Unfortunately, there are some very real hardships involved in putting together a symposium issue. Each of the articles must be related to the others, and they must all be relevant to the chosen theme. When articles are solicited for the traditional non-symposium issues, no particular problem results if the author takes a slightly different approach than the editors had expected; if the article is timely and well-done, it is still publishable. But when an article solicited for a symposium issue turns out to be focused on a different theme than the one agreed upon, problems arise. Similarly, while publication of a traditional law review permits considerable flexibility in rescheduling an article from one issue to another if problems of space limitations, unexpected necessary re-writing, or other delays arise, no such luxury is afforded the editors of symposiums. Each article must go in the designated issue or simply not be published; there are no alternatives available. If the decision is made to publish more symposiums, these potential problems must be compensated for in advance.

B. *The Topical Approach*

One solution to the dilemma posed by the need for more symposiums on the one hand and the resultant difficulties in publishing them on the other, is to adopt a somewhat more flexible scheme — the topical approach. The topical approach is different from the symposium in degree only, not in kind. A unifying theme is still used, but greater divergence is allowed, and occasional articles totally unrelated to the theme are permissible. This might simply be called the lazy man's symposium, but it would seem to be more accurately characterized as a practical approach to the need for more specialization. It offers the advantages of the symposium (unity of theme, scope and in-depth treatment), but its form is more free and flexible. The editors select a topic well in advance of the scheduled publication date, and articles are solicited from persons in the selected

field. However, the potential contributors are allowed more latitude in their choice of a specific subject relating to the general theme of the issue. Admittedly, this looser organization will result in a slight sacrifice in unity, but in most cases there will be sufficient interrelation between the articles so that a reader who is interested in one will be interested in the others as well. There is no longer a problem if one author takes a slightly different bent in his article than the editors had expected. In most cases he will still be within the broader theme used. Furthermore, an occasional article which is totally unrelated to the theme of the particular issue is not taboo here as it was in a symposium issue.

Succinctly stated, under the topical approach the editors strive to relate each issue of their review to a particular topic, but they clearly do not preclude themselves from publishing timely, well-written articles on an unrelated, but significant, subject. It is really a matter of being realistic and leaving the back door open just in case.

C. *Specialization*

Although the publication of symposium or topical issues is specialization of a kind, a truly specialized law review is one which devotes itself entirely to one topic. In recent years, for example, Boston College has specialized in commercial and industrial law, the University of Detroit in urban law, the University of Louisville in family law, and the University of Wyoming in natural resources. The editors at these various schools are attempting to establish their reviews quickly, and there is good reason to believe that they will be successful. Furthermore, it is probable that there will be even more reviews pursuing this course in the future. Those who do so are virtually assured of immediate interest (and subscriptions) from members of the legal profession involved in the particular area of specialization.

Since the rewards from this kind of complete specialization are so obvious, perhaps this discussion should point out some of the disadvantages, most of which are not so obvious. In the first place, a law review which abandons its efforts to cover many different areas of the law will certainly lose many of its previous subscribers — the people who relied on the review to keep them apprised of legal developments in general. Of course there is nothing inherently wrong in a law review's relinquishing its local clientele in favor of a new nationwide clientele of persons specializing in a particular field. But it is not a question of inherent wrong; it is a question of achieving optimum return from the law review. Each board of editors con-

templating specialization must simply decide for itself what it considers to be optimum return — a question very much like those previously discussed concerning the purpose of the review and whom it is meant to serve. If the only law review in a particular state (and many states have only one) suddenly begins to specialize, it is doubtful that the significant developments in that state will ever receive law review treatment unless, of course, the development has repercussions in other jurisdictions as well. This is not intended as a lament for the state whose law review decides to specialize; it is only meant to point out one factor to be considered when specialization is contemplated.

Another factor relevant to a decision to specialize is the effect it will have on the student members of the law review. Will the educational value of participation on the review be enhanced, hindered or left unchanged by this kind of innovation? Law school curriculums have avoided specialization in the past, presumably because it was deemed necessary that the student receive a "total" legal education. The same theory seems equally applicable to the law review insofar as it is intended to be, partially at least, an educational institution. Even where the law schools have begun to allow students to specialize during their senior year, a choice of specialties is provided. Participation on a specialized law review would, in fact, result in a degree of specialized education; but not necessarily the specialty of the student's choice. Although specializing in a student's chosen field enhances his education, is it possible that specializing in a field not to his liking would be detrimental?

It is because of this reluctance to discontinue service to present subscribers and a feeling that students gain more in a broader educational setting that we tend to question the merits of completely specializing a review. It is because we recognize the value in providing something more than issue after issue of unrelated articles that we tend to favor it. Perhaps it is because of these countervailing impulses that we find the topical approach so desirable. Combining the advantages of specialization with those of diversification, the topical approach nevertheless does not preclude serving the local subscriber. It appears to be the most desirable alternative providing a maximum combination of benefits to all concerned.

CONCLUSION

Whatever is to be concluded concerning the value of the law reviews currently in operation, one fact is obvious — they are here to stay. There is no reason to believe that any of them will be dis-

continued, and it is indeed probable that additional legal periodicals will be established at the few law schools where they do not already exist. Instead of suggesting the abolition of a substantial number of these publications, as some critics have done, it appears more realistic to make proposals for maximizing the returns from the existing reviews.

Of course, it would be impossible for the editors of more than one hundred publications to coordinate their efforts in such a way that optimum value could be achieved from their cooperative endeavors. The most that can be expected is that each editorial board be aware of the nature of the basic problems and attempt to make intelligent decisions in order to be assured that their publication is performing the best service possible, not only to the student participants, but to the profession as well. Since service to the profession has become a stated and empirically verified goal, a second basic question is essential to editors of a law review. How can the law review best serve the members of the profession, practitioner and academician alike? Hopefully, the results of this survey will provide a frame of reference for the determination of the basic policy questions which face every editorial board from time to time.

There is good reason to believe that a law review can increase its value by concentrating on the newly emerging areas of the law. Confronted with the ever-present solicitation problem and the resultant tendency to publish any reasonably well written article that is available, editors will not find it easy to locate an adequate source of material on these most desirable subjects. Yet, if the editors of a law review are to fulfill the expectations of the legal community, this problem must be overcome.

Directly related to the need for updating substantive content is the desirability of innovation with regard to the types of articles published. The empirical research article and the analytical case comment are only two examples of approaches that have appeared too seldom in the law reviews. Law review editors, like everyone else, can easily fall into a rut, being contented to follow the path of their predecessors who consistently treated the same subject matter via the same types of articles. In an age where rapid change is the touchstone of existence, there is no room for this apparent lack of creativity on the part of people whose basic abilities are greater than their work product reveals.

No question facing law review editors requires greater understanding of fundamental goals and values than that of the proper scope of their publication. Whenever this question is answered glibly

and without careful and prolonged consideration of its implications, it will surely prove to be detrimental to the law review. Whenever a decision is made to "go national" or to "go local," without first weighing the effect such a determination will have on the ultimate service rendered to local subscribers and non-local readers or library researchers, the editors will have betrayed an important obligation. A delicate balance between national and local emphasis must be maintained in order to give the law review its proper scope. The editors must analyze their journal's position carefully in the context of the legal community which it serves. The proper scope of a law review should be broad enough to cover any national issue which might be of value to local readers, yet narrow enough so as not to let important local issues slip by.

Second in importance only to the question of proper scope is the issue of whether to specialize. Recognizing that the specialist is one who limits the breadth of his endeavors and concentrates instead on depth, editors must make a basic choice between the horizontal and the vertical approach. The horizontal, or non-specialized approach will often provide the greatest service to the practitioner who relies on the local law review to keep him abreast of recent developments in the major areas of the law. The vertical, or specialized approach is more likely to attract a nationwide following of readers associated with the area of specialization. Yet it may be of little value to the local practitioner who must turn to another local review or, if there be none, simply do without the services of a legal periodical which treats matters affecting his day-to-day practice.

Both of these approaches render a valuable service, but each poses serious policy problems for the law review. Serving the local profession offers little hope for national recognition and specialization may leave the local practitioner with no service at all in many cases. Compromise by way of devoting each issue of the law review to a particular topic offers the most desirable solution. It enables the reviews to deal with many areas of the law, thus painting a broad picture for the local practitioner. At the same time, the topical approach lends itself to specialization in each topic treated, thus attracting national interest from readers who are particularly interested in the area of concentration. The result is a law review which is of service to an optimum clientele.

In the last analysis, the value of the law review lies in the answers given to all of these basic policy questions. The answers no longer need be based on intuition alone. Empirical data is available for study and reflection. The law review editor of tomorrow will

undoubtedly face new and different policy problems than the editor of today, but the basic question of the value and purpose of the law review in service to the profession will always remind him of his responsibilities.

LOWELL J. NOTEBOOM
TIMOTHY B. WALKER

NOTE

EXTRAJUDICIAL TRUTHFUL DISCLOSURE OF MEDICAL CONFIDENCES: A PHYSICIAN'S CIVIL LIABILITY

"[A] physician can, in a gossip session in the locker room at the Country Club, tell all present that John Doe, a married man, has contracted some loathsome disease. John Doe has no remedy."[1]

☐ True ☐ False

INTRODUCTION

THE answer to the question, of course, is easy if the physician told a damaging lie. But what if he told the absolute truth? The real difficulty would arise if one were asked to explain, in 25 words or less, or in a concise appellate brief, the legal — not the moral — basis for one's answer. In attempting such an explanation one would encounter some firmly entrenched legal myths and considerable confusion concerning the question of the physician's liability or non-liability in a civil action.

This note examines a physician's civil liability for extrajudicial truthful disclosure of medical confidences. Is the physician liable? If so, under what theory of law? Is there a common law liability, or is a statute necessary? If a statute is necessary, precisely what type is required? What is, or should be the function of the statute? Does it create a statutory right to a civil action, or does it serve some lesser purpose?

The following analysis of the American cases indicates that primarily during the last decade there has developed a coherent body of American judicial opinions which would hold a physician pecuniarily liable, in a civil action, for extrajudicial truthful disclosure of professional secrets or medical confidences, absent an overriding duty to society or third parties to make such disclosure.

In order to avoid hopeless entanglement in irrelevant bodies of law, it is necessary to limit the analysis severely. First, the scope of the analysis is limited to extrajudicial disclosures. There is an entirely separate body of law, mostly statutory, dealing with testi-

[1] Lipscomb, *Privileged Communications Statute — Sword and Shield,* 16 MISS. L.J. 181, 182 (1944).

mony by physicians during judicial proceedings. Second, the discussion is restricted to truthful disclosures. The law of libel and slander, which concerns itself with falsehoods, is only tangentially relevant. Third, cases on invasion of privacy by publication in newspapers, magazines, professional journals and other media have been excluded from consideration. The physician's duty not to disclose professional confidences *to anyone* is not the *sole* controlling question in such cases, and this basic issue is much too easily obscured by the other issues inherent in invasion of privacy litigation. Fourth, the discussion is limited to situations where a patient-physician relationship exists between the plaintiff and defendant. Thus, a case is beyond the scope of the analysis if the court did not consider the plaintiff to have been a patient of the defendant physician,[2] or if the disclosures were made by servants or officials of medical institutions, acting in some administrative capacity, rather than by a person acting truly in the capacity of a physician.[3] In essence, then, this note is limited to cases in which a doctor, out of court, tells a third party the truth about his patient.

I. THE SPECULATIVE PERIOD: 1920 TO CIRCA 1960

Prior to 1920 no American court seems to have been confronted with the issue of a physician's liability for extrajudicial truthful disclosure of medical confidences. *Smith v. Driscoll,*[4] decided in 1917, is often cited because of its eloquent dictum that a patient has a cause of action for extrajudicial disclosure of medical confidences. However, in that case the disclosure was actually made during a judicial proceeding. The first case in point[5] was *Simonsen v. Swenson,*[6] decided in 1920. The next reported decision on this issue did not occur until *Berry v. Moench*[7] in 1958, followed by *Clark v. Geraci*[8] in 1960. For the forty intervening years, the dialogue on the question of a physician's liability for extrajudicial truthful disclosure of medical confidences was left to the legal scholars. A sampling of the writings of these gentlemen, some of them giants in their field, gives an illuminating insight into the atti-

[2] Hammer v. Polski, 36 Misc. 2d 482 (N.Y. Sup. Ct. Special Term, N.Y. County, 1962).

[3] Tooley v. Provident Life & Acc. Ins. Co., 154 So. 2d 617 (La. Ct. App. 1963); Munzer v. Blaisdell, 183 Misc. 773, 49 N.Y.S.2d 915 (1944), *aff'd,* 269 App. Div. 970, 58 N.Y.S.2d 359 (1945).

[4] 94 Wash. 441, 162 P. 572 (1917).

[5] Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?,* 52 YALE L.J. 607, 617 (1943).

[6] 104 Neb. 224, 177 N.W. 831 (1920).

[7] 8 Utah 2d 191, 331 P.2d 814 (1958).

[8] 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

tudes which prevailed for some forty years before all but one of the cases in point were decided. Also, it is only reasonable to assume that some of the thoughts and theories of the scholars influenced at least the arguments of counsel in later litigation if not, directly, the decisions of the courts.

Earlier skepticism regarding the ability of a patient to maintain a successful action against his physician for disclosure of medical confidences slowly gave way to guarded and moderate optimism. In 1943, Chafee was quite pessimistic when he said: "While the law has been so solicitous about the doctor's duty to keep silent on the witness-stand, it has done little to protect the patient's medical secrets from disclosure to the world in general."[9] Nine years later, Guttmacher and Weihofen still saw little hope for the patient's protection under existing law: "In the main, the patient's confidences are protected against disclosure outside the courtroom primarily by the code of professional ethics rather than by the law."[10]

In 1953, DeWitt saw a legal basis for civil liability in the statutes which govern the licensing of physicians, where the statute provides for revocation of the license for unprofessional conduct such as willful betrayal of a medical confidence.[11] DeWitt reasoned: "Statutes of this type impose a *positive duty* upon the physician not to voluntarily disclose the confidences of the patients; accordingly, a breach of this duty may under certain circumstances afford redress in a civil action . . . ."[12] However, six years later he still felt obliged to make the over-all assessment that "[t]here are today [1959] few medical confidences that can really be kept secret except, of course, in a court of law where justice cries out for the facts."[13] This statement was probably not intended as a reappraisal of his earlier views concerning the significance of statutes which govern the licensing of physicians. Professor DeWitt was writing on a statute of an entirely different type, the physician-patient privilege statute, under which the patient can have his physician's testimony excluded during a trial.[14] He had earlier in the article made the point that such statutes do not control a physician's extrajudicial behavior,[15] and in

---

[9] Chafee, *supra* note 5, at 616.

[10] M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 276 (1952).

[11] DeWitt, *Medical Ethics and the Law: The Conflict Between Dual Allegiances*, 5 W. RES. L. REV. 5 (1953).

[12] *Id.* at 21.

[13] DeWitt, *Privileged Communications Between Physician and Patient*, 10 W. RES. L. REV. 488, 500 (1959).

[14] For a discussion of the relevance of the two types of statutes, see the text accompanying notes 64-73 *infra*.

[15] DeWitt, *supra* note 13, at 491.

the last sentence of the article he advocates that the physician-patient privilege during trials be abolished.[16]

While Dr. Louis J. Regan's work, *Doctor and Patient and the Law,* published in 1956, merely indicated a possibility of physicians being liable for extrajudicial disclosures,[17] Shartel and Plant, writing in 1959, were cautiously optimistic — from the patient's point of view. After discussing the impact of various types of statutes, they concluded:

> As regards the liability of a physician for damages resulting from the disclosure of information about a patient, there is not too much direct authority. But in view of all the ways, above mentioned, in which disclosure is condemned, barred, and penalized, we think it is almost certain that the courts will recognize the physician's liability when occasion arises.[18]

By 1962, Stetler and Moritz were in a position to make an assessment on the basis of case law:

> The belief that the law offers the patient no protection against unauthorized disclosures has created confusion concerning a physician's civil liability for such disclosures. Although only a few cases have been found which directly deal with this issue, they indicate that a wrongful disclosure may give rise to a civil action for damages directly caused by the violation of confidence.[19]

As can be expected, however, there were those who disagreed with the above views,[20] and it is not intended to convey the idea that there was, in 1962, or that there is now unanimity on the question of a physician's liability for extrajudicial truthful disclosure of medical confidences. Quite to the contrary, one purpose of the preceding discussion has been to show that, around the beginning of this decade, it was not at all settled law in the United States that a physician was liable for damages arising out of a betrayal of a professional secret. The second purpose was to point out the relative preoccupation with statutes as a basis for liability. This trend started with the first, and for a long time the only case in point, *Simonsen v. Swenson*,[21] decided in 1920. Nebraska happened to have a statute[22] which the court viewed as permitting the revocation of a physician's license if he betrayed a professional secret.[23] The court thought that breach of the positive duty imposed by such a statute would give rise to a

---

[16] *Id.* at 500.

[17] L. REGAN, DOCTOR AND PATIENT AND THE LAW 104 (3d ed. 1956).

[18] B. SHARTEL & M. PLANT, THE LAW OF MEDICAL PRACTICE 49 (1959).

[19] C. STETLER & A. MORITZ, DOCTOR AND PATIENT AND THE LAW 271 (4th ed. 1962).

[20] *See* Baldwin, *Confidentiality Between Physician and Patient,* 22 MD. L. REV. 181 (1962).

[21] 104 Neb. 224, 177 N.W. 831 (1920).

[22] NEB. REV. STAT. ch. 71, § 148 (1943).

[23] 104 Neb. at 227, 177 N.W. at 832.

civil action for damages.[24] The scholars, apparently, thought this to be a reasonable and tenable rationale upon which to predicate a physician's liability in a civil action.[25]

II. The Case Law

A. *History and Resume*

There are only seven American cases directly in point on the question of a physician's civil liability to his patient for extrajudicial truthful disclosure of medical confidences. The cases are set out below in chronological order.

1. *Simonsen v. Swenson,* Nebraska, 1920[26]

The physician advised a hotel manager that the patient had a communicable disease. The court found that under the facts the physician was privileged to make the disclosure because of an overriding duty to society to prevent the spread of infectious disease.[27]

2. *Berry v. Moench,* Utah, 1958[28]

The physician provided to another physician, a friend of the plaintiff's bride's family, derogatory information obtained while treating the plaintiff. The case was remanded to determine whether the facts existed which would make the disclosure privileged because of an overriding duty to a third party.[29]

3. *Clark v. Geraci,* New York, 1960[30]

Upon request of the patient, the physician certified that the patient's absences from work were due to illness. Later, and over the objections of the patient, the physician admitted to the employer that the patient's illness was due to alcoholism. The disclosure was held to have been privileged because of an overriding duty to a third party, to whom a partial disclosure had previously been made at the request of the patient.[31]

4. *Hague v. Williams,* New Jersey, 1962[32]

The defendant physician disclosed to life insurer that plaintiff's deceased child had heart disease. The disclosure was held to have

---

[24] *Id.*

[25] *See* DeWitt, *supra* note 11, at 21.

[26] 104 Neb. 224, 177 N.W. 831 (1920).

[27] *Id.* at 228, 177 N.W. at 832.

[28] 8 Utah 2d 191, 331 P.2d 814 (1958).

[29] *Id.* at 201, 331 P.2d at 820.

[30] 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

[31] *Id.* at 794, 208 N.Y.S.2d at 568.

[32] 37 N.J. 328, 181 A.2d 345 (1962).

been privileged, because of a supervening interest of society in disclosure after a patient's physical condition is made an element of a claim.[33]

5. *Hammonds v. Aetna Cas. & Sur. Co.,* Ohio, 1965[34]

The physician disclosed confidential medical information to a hospital's accident insurer. The court held Ohio's public policy to impose a duty upon the physician to maintain professional confidences and found no overriding duty to a third party under which such disclosure would be privileged. Judgment for plaintiff-patient.

6. *Quarles v. Sutherland,* Tennessee, 1965[35]

The physician provided medical reports to a store against which the patient was about to bring a personal injury action. After an accident in the store, the plaintiff was taken to the defendant physician, who did not inform her that he was the store's regular physician. The court held there was no basis at law for a cause of action against the physician under the circumstances of this case.

7. *Curry v. Corn,* New York, 1966[36]

The physician revealed to the plaintiff's husband information obtained while treating the plaintiff. The plaintiff alleged that the physician knew that her husband would use the information in a pending matrimonial action. The disclosure was held to have been privileged, on the theory that a husband has a right to information regarding illness of his wife which might affect the marital relationship.

Of the seven cases considered, all but two, *Berry v. Moench* and *Hammonds v. Aetna,* were won by the defendant doctors. In only one case, *Curry v. Corn,* did the court not reach the basic issue of a physician's liability for disclosing medical confidences.[37] In the other six cases the courts felt compelled to pass on the question of a physician's civil liability for such breach of a confidence.

In five of the six cases in which the question was reached, the courts conceded to the patient the basic right to recover damages in a civil action from a physician who makes an extrajudicial truthful disclosure of a medical confidence.[38] The courts found, however,

---

[33] *Id.* at 336, 181 A.2d 349.

[34] 243 F. Supp. 793 (N.D. Ohio 1965). *See* 11 VILL. REV. 662 (1966).

[35] 215 Tenn. 651, 389 S.W.2d 249 (1965). *See* 79 HARV. L. REV. 1723 (1966); 32 TENN. L. REV. 652 (1965).

[36] 35 U.S.L.W. 2011 (N.Y. Sup. Ct. June 21, 1966).

[37] *Id.*

[38] Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920); Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962); Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958).

that in three of the above cases the physicians were privileged to make the particular disclosures because of a duty to third parties or to society which overrode the duty to the patient to keep silent.[39]

Of the six courts which reached the question, only one, the court in *Quarles v. Sutherland*,[40] denied that the patient had any enforceable rights as to extrajudicial truthful disclosure of medical confidences.[41] And even in that case it was conceded by the court that there might be a possibility of an action on the contract, where there is a full contractual physician-patient relationship with compensation.[42] The court seemed to think that the defendant was not contractually bound because, as the facts appeared to the court, the plaintiff-patient did not attempt to compensate the physician.[43]

In summary, five out of six American courts which have addressed themselves to the issue agree that, in the absence of a privilege based on an overriding duty to third parties or society, a physician is pecuniarily liable to his patient in a civil action for damages arising out of an extrajudicial truthful disclosure of medical confidences.

B. *The Basis for a Physician's Liability*

While the courts are generally agreed on the basic question whether or not a physician is liable for a breach of professional confidence, there is considerable divergence of opinion concerning exactly what constitutes the legal foundation for a physician's civil liability for extrajudicial truthful disclosure of medical confidences. This subject will be discussed in three categories: (1) common law, (2) statutes, and (3) the ethical standards of the medical profession.

1. The Myth of the Duchess of Kingston: Is There a Common Law Basis for Liability?

Four of the seven cases under consideration either declare or intimate that there was no liability for extrajudicial truthful disclosures under the common law.[44] This notion seems to stem from a ruling on a point of evidence made in 1776 in the House of Lords,

[39] Simonsen v. Swenson, 104 Neb. 224, 228, 177 N.W. 831, 832 (1920); Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962); Clark v. Geraci, 29 Misc. 2d 791, 794-95, 208 N.Y.S.2d 564, 568-69 (Sup. Ct. 1960).

[40] 215 Tenn. 651, 389 S.W.2d 249 (1965).

[41] *Id.* at 657, 389 S.W.2d at 251.

[42] *Id.* at 657-58, 389 S.W.2d at 252.

[43] *Id.*

[44] Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 796 (N.D. Ohio 1965); Simonsen v. Swenson, 104 Neb. 224, 226, 177 N.W. 831, 832 (1920); Clark v. Geraci, 29 Misc. 2d 791, 792, 208 N.Y.S.2d 564, 567 (Sup. Ct. 1960); Quarles v. Sutherland, 215 Tenn. 651, 657, 389 S.W.2d 249, 251 (1965).

during the trial of the Duchess of Kingston for bigamy.[45] Doctor Caesar Hawkins was asked on the witness stand whether he knew of any marriage between the defendant and the Earl of Bristol. Dr. Hawkins attempted to invoke the physician-patient privilege. He said:

> I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honour.[46]

Lord Mansfield then made the following ruling, in which all the other lords acquiesced:

> [A] surgeon has no privilege, where it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. I take it for granted, that if Mr. Hawkins understands that, it is a satisfaction to him, and a clear justification to all the world.[47]

So far, Lord Mansfield had simply ruled that, during a trial, a physician must answer questions even though his answers might reveal information obtained by the physician while treating a patient. In *Quarles v. Sutherland* this ruling was correctly cited for the proposition that there was no physician-patient privilege, as to testimony during trials, under the common law.[48] Lord Mansfield, however, did not stop there, he continued:

> *If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion;* but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.[49]

Thereupon, the question was repeated, and Dr. Hawkins answered it.[50]

In this second part, Lord Mansfield clearly limited his ruling to the question of evidence during trials. If Lord Mansfield's ruling were to be accepted as an indication of a physician's liability for disclosing professional secrets under the common law, it would have to be accepted as dictum to the effect that the common law recognized the duty of the physician not to make voluntary extrajudicial disclosures of confidential information obtained in the practice of his profession. Nevertheless, in *Quarles v. Sutherland*, the court deduced, from Lord Mansfield's ruling, a common law rule to the effect that

---

[45] Trial of the Duchess of Kingston, 20 How. State Trials 355, 573 (1776), *reprinted in* Notable British Trial Series (Melville ed. 1927).

[46] *Id.* at 572.

[47] *Id.* at 573.

[48] 215 Tenn. at 656, 389 S.W.2d at 251.

[49] 20 How. State Trials at 573 (emphasis added).

[50] *Id.* at 574-76.

physicians were not liable for extrajudicial disclosures of confidential information obtained while treating their patients.[51] The court seems to have simply disregarded the second part of Lord Mansfield's ruling, although it is quoted in the opinion.[52] The court also seems to have overlooked, in its own reasoning, the distinction between a rule of evidence and substantive law, although it admonished the plaintiff for attempting to base a cause of action on a rule of evidence.[53]

There is no record of any case at English common law which decided the issue of a physician's liability for disclosing professional confidences.[54] There are, however, two Scottish cases where the courts held such actions maintainable.[55]

In summary, while there are no cases at English common law which either expressly allow or deny the patient a cause of action for extrajudicial truthful disclosure of medical confidences, there is Lord Mansfield's dictum which condemns such disclosures; and there are two Scottish cases where the actions for such disclosures were held to be maintainable.

2. Statutory Bases for Liability

There are two types of statutes which have had an impact upon the physician's liability for extrajudicial disclosure of professional confidences:

(a) Privilege statutes, which generally provide that, unless the patient consents, a physician may not give evidence during trials concerning information obtained while treating the patient.

(b) Licensing statutes or regulations, which define professional standards prerequisite to obtaining and retaining a license to practice medicine, and which classify betrayal of professional secrets as indicating unworthiness to retain a license to practice medicine.

In six of the seven cases under discussion the courts considered the question of how a privilege statute affects the civil liability of a physician for extrajudicial disclosure of professional confidences. In *Quarles v. Sutherland* the absence of such a statute was held to prevent a non-paying patient from maintaining an action.[56] In New Jersey, which did not have a privilege statute, the *Hague v. Williams* court thought the existence or absence of a privilege statute to be

[51] 215 Tenn. at 657, 389 S.W.2d at 251.

[52] *Id.* at 655-56, 389 S.W.2d at 251.

[53] *Id.* at 657, 389 S.W.2d at 252.

[54] Note, *Professional Secrecy*, 174 L.T. 187, 188 (1932).

[55] A.B. v. C.D., 14 Sess. Cas. 177 (Scot. 1851), *discussed in* DeWitt, *supra* note 11, at 20, *and in* Note, *Professional Secrecy*, 174 L.T. 187 (1932); A.B. v. C.D., 7 Fraser's Rep. 5th Ser. 72 (Scot. 1904).

[56] 215 Tenn. at 656, 389 S.W.2d at 251.

only an indication of the general public policy and thinking in regard to extrajudicial disclosures of professional confidences.[57] In both *Berry v. Moench*[58] and *Hammonds v. Aetna*[59] the courts held privilege statutes to be a positive expression of their states' public policy regarding a physician's duty to maintain professional confidences, the violation of which would provide a patient with a cause of action. In *Curry v. Corn* the court admitted it was inclined to view the privilege statute as governing merely the reception of evidence, and not as creating a cause of action against the physician. The court did not feel obliged, however, to take a position on the question.[60] In the first American case on the question, *Simonsen v. Swenson,* the court held the Nebraska privilege statute to be only a rule of evidence and, as such, not relevant to the issue of a physician's pecuniary liability for extrajudicial disclosure of professional confidences.[61]

While it is clear that privilege statutes only enunciate a rule of evidence, such statutes are, after all, a public recognition of the special nature of the doctor-patient relationship. When, as a matter of public policy, this relationship is so assiduously protected that a doctor is prohibited from testifying in court concerning information obtained during the course of treating a patient, it does not seem inconsistent to argue that the same public policy implies further restrictions upon the doctor's right to reveal confidences from his patient. What may not be revealed in court should not be permitted as the subject of casual conversation in the locker room at the Country Club.

The impact of a licensing statute was considered by the courts in three cases. Tennessee has a licensing statute;[62] however, the *Quarles v. Sutherland* court did not rely upon this statute in its decision.[63] In *Simonsen v. Swenson* the court stated that the Nebraska licensing statute imposed a positive duty upon the physician not to disclose professional confidences, and that a breach of such duty would give rise to a civil action for damages.[64] The *Hammonds v. Aetna* court held the Ohio licensing statute, like the privilege statute, to be a positive expression of that state's public policy regarding a physician's liability.[65] In *Clark v. Geraci* the court viewed New York licensing regulations as an expression of a standard upon which

---

[57] 37 N.J. at 333, 181 A.2d at 348.
[58] 8 Utah 2d at 196, 331 P.2d at 817.
[59] 243 F. Supp. at 797.
[60] 35 U.S.L.W. at 2011.
[61] 104 Neb. at 227, 177 N.W. at 832.
[62] TENN. CODE ANN. § 63-618,-619 (1965).
[63] 215 Tenn. at 656, 389 S.W.2d at 251.
[64] 104 Neb. at 227, 177 N.W. at 832.
[65] 243 F. Supp. at 800-01.

a patient has a right to rely, and as implying a duty of secrecy.[66] Treating licensing statutes as one of the expressions of a standard of public policy upon which patients have a right to rely appears to be a sound theory.

3. Medical Standards of Ethics as a Basis for Liability

In determining a physician's liability for extrajudicial disclosure of professional confidences, three courts took into consideration the published ethical standards of the medical profession itself. These standards are embodied in a portion of the Oath of Hippocrates: "Whatever in connection with my professional practice or not in connection with it I see or hear in the life of men which ought not to be spoken abroad I will not divulge as recommending that all such should be kept secret."[67] The relevant portion of the Principles of Medical Ethics (1957) of the A.M.A. states: "A physician may not reveal the Confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community."[68]

In *Hammonds v. Aetna* the medical profession's promulgated standards were held to amount to an implied promise of secrecy on the part of the doctors, which public policy demanded they obey.[69] The *Hague v. Williams* court stated that the ethical concepts propounded by the medical profession express an "inherent legal obligation which a physician owes to his patient,"[70] and viewed these ethical concepts, by themselves, as a basis for liability. In *Clark v. Geraci* the court viewed the Oath of Hippocrates as an indication or expression of a standard upon which a patient has a right to rely.[71] There seems little to criticize in the view expressed in these three cases that the medical profession should be bound by the ethical standards which it so publicly expounds.

III. Types of Action for Breach of Medical Confidence

While comments, articles and medicolegal texts have proposed several theories,[72] the courts themselves have not extensively dis-

[66] 29 Misc. 2d at 792-93, 208 N.Y.S.2d at 567.

[67] *Quoted at* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 797 (N.D. Ohio 1965).

[68] *Quoted at* Hague v. Williams, 37 N.J. 328, 332, 181 A.2d 345, 347 (1962).

[69] 243 F. Supp. at 796.

[70] 37 N.J. at 335, 181 A.2d at 348.

[71] 29 Misc. 2d at 792, 208 N.Y.S.2d at 567.

[72] *See* B. Shartel & M. Plant, The Law of Medical Practice 49 (1959); 79 Harv. L. Rev. 1723 (1966); 11 Vill. L. Rev. 662 (1966).

cussed the precise type of action which a patient should bring if he has been injured by his physician's disclosure of professional confidences. The courts in *Simonsen v. Swenson*[73] and *Hague v. Williams*[74] simply speak of a breach of the duty to keep confidences secret, and in *Curry v. Corn* the matter is not discussed at all.[75] *Berry v. Moench* is an action for libel in which the court held that where a patient-doctor relationship is involved, truth would not constitute a defense.[76] Actions in tort or contract were suggested by the court in *Hammonds v. Aetna.*[77] The *Quarles v. Sutherland* court conceded the possibility of an action on the contract, but only in the case of a full contractual physician-patient relationship with compensation paid by the patient.[78] In *Clark v. Geraci* the court thought that the patient should be able to maintain an action for malpractice.[79]

An action based upon an unwarranted disclosure of medical confidences has a number of elements in common with the ordinary malpractice suit. Such a disclosure involves a deviation from the standard of the particular school of medicine which the physician follows,[80] and from the standard of physicians in good standing within the community.[81] The basis of the action is also a breach of a professional duty.[82] The usual malpractice suit, however, is based upon a duty to exercise reasonable care as judged by standards of skill and knowledge commonly possessed by the medical profession. It should be apparent that questions of knowledge and skill have no relevance to a physician's duty of secrecy and should not be raised in an action based upon a disclosure of professional confidences.

IV. DAMAGES

In each of the seven cases discussed the plaintiff patients were clearly injured by their physician's disclosure of medical confidences. There is little discussion in these cases, however, of the measure of damages by which such injury is to be compensated. In *Simonsen v. Swenson* it was held that a physician's breach of the duty of secrecy "would give rise to a civil action for the damages naturally flowing

[73] 104 Neb. at 227, 177 N.W. at 832.

[74] 37 N.J. at 335-36, 181 A.2d at 348-49.

[75] 35 U.S.L.W. 2011 (N.Y. Sup. Ct. June 21, 1966).

[76] 8 Utah 2d at 196, 331 P.2d at 816-17.

[77] 243 F. Supp. at 801-02.

[78] 215 Tenn. at 657, 389 S.W.2d at 252.

[79] 29 Misc. 2d at 793, 208 N.Y.S.2d at 568. *Contra,* Hammer v. Polski, 36 Misc. 2d 482 (N.Y. Sup. Ct. Special Term, N.Y. County, 1962) (dictum) (disclosure during judicial proceeding, physician-patient relationship did not exist).

[80] *See* cases cited at 41 AM. JUR. *Physicians & Surgeons* § 85 n. 9 (1942).

[81] *See* cases cited at 41 AM. JUR. *Physicians & Surgeons* § 82 (1942).

[82] *Id.* § 78.

from such wrong."[83] *The Hammonds v. Aetna* court expressed approval of an "action for damages directly caused by the violation of confidence."[84] In *Berry v. Moench* it was the court's opinion that "an action would lie for any injury suffered,"[85] and it was indicated that the patient should be protected from disclosures which might be "embarrassing and harmful to him."[86]

It remains to be seen if any court will in the future allow an action for breach of a medical confidence resulting in no actual injury to the patient. There is no readily apparent reason for doing so. The patient's rights can be adequately protected by compensating him for any personal, social, or economic damages resulting from the disclosure. There is no reason for the courts to assume control of the ethical standards of the American Medical Association in cases involving a minor deviation from accepted medical standards and no actual injury to a patient.

V. Defenses

Of the seven cases under discussion, five were won by the defendant physicians interposing one or more of three distinct types of defense:

(1) That there simply is no cause of action, or legal remedy, for extrajudicial disclosure of professional confidences. This was held to be a sufficient defense in only one case, *Quarles v. Sutherland,* and was limited to a non-paying patient.[87] In *Curry v. Corn*[88] the question was not ruled upon, and the other five cases expressly reject this defense.

(2) That the patient completely waived his rights regarding disclosure of professional confidences when he requested the physician to make a partial disclosure of confidential information. This defense was interposed in only one case, *Clark v. Geraci,* and was held to be a good and sufficient defense against a malpractice action.[89]

(3) That the physician was privileged to make the particular disclosure because of a duty to third parties, which was greater than the duty to the patient to remain silent. This defense was allowed in *Simonsen v. Swenson* where the purpose of the communication was

---

[83] 104 Neb. at 227, 177 N.W. at 832.

[84] 243 F. Supp. at 802.

[85] 8 Utah 2d at 193, 331 P.2d at 817.

[86] *Id.*

[87] 215 Tenn. at 657, 389 S.W.2d at 250.

[88] 35 U.S.L.W. 2011 (N.Y. Sup. Ct. June 21, 1966).

[89] 29 Misc. 2d at 794, 208 N.Y.S.2d at 568.

to prevent the spread of contagious disease.[90] In *Clark v. Geraci* the court found a duty on the part of the physician to make a full disclosure where a partial disclosure made at the request of the patient would result in a fraud.[91] *Hague v. Williams* recognizes an overriding duty to make a disclosure to a third party where the patient's physical condition has become the element of a claim.[92] The duty to make a disclosure to a third party when the patient's physical condition is made an element of a claim is expressly rejected in *Hammonds v. Aetna.*[93] In *Curry v. Corn* the court found the physician to have a duty to inform a husband of an illness on the part of his wife which might affect the marital relationship.[94] In *Berry v. Moench* the court describes a physician's conditional privilege to make extrajudicial disclosures in the following terms: "Where life, safety, well-being or other important interest is in jeopardy, one having information which could protect against the hazard, may have a conditional privilege to reveal information for such purpose[s] . . . ."[95] Thus, in six of the seven cases under discussion, the courts expressly recognized an overriding duty to a third party as a good and sufficient defense in an action based upon an extrajudicial disclosure of confidential information by a physician.

The defense of privilege to make a communication because of an overriding duty to a third party is part of the more fully developed law of slander and libel.[96] The courts have not hesitated, however, to apply this defense in these actions for truthful disclosures of medical confidences where no libel or slander was involved. With respect to the defense of privilege, a physician who tells the truth should be entitled to, at least, the same protection as one who tells a falsehood.

CONCLUSION

It is concluded that patients now have a judicially recognized right, and physicians have a corresponding judicially recognized duty, under which the physician must not make extrajudicial disclosures of information obtained while treating the patient, unless the physician is privileged to make the disclosure because of an overriding duty to society or third parties. The violation of such right,

[90] 104 Neb. at 226, 177 N.W. at 832.

[91] 29 Misc. 2d at 793, 208 N.Y.S.2d at 567.

[92] 37 N.J. at 336, 181 A.2d at 349.

[93] 243 F. Supp. at 801.

[94] 35 U.S.L.W. at 2011.

[95] 8 Utah 2d at 197, 331 P.2d at 817-18.

[96] For full discussion in regard to the privilege of statements made by physicians, see Annot., 73 A.L.R.2d 325 (1960) (commenting on Berry v. Moench); Baldwin, *supra* note 20; and DeWitt, *supra* note 11, at 25-27.

and the breach of such duty, give rise to a civil action for damages. The patient, however, may waive his rights concerning professional secrets by requesting the physician to make a partial disclosure, if it appears later that such partial disclosure would operate as a fraud.

The majority, and better reasoned view bases the patient's cause of action on a violation of professional standards to which a physician has a duty to adhere, and upon which a patient is entitled to rely. This duty on the part of the physician may be inferred either from the public policy statements in privilege and licensing statutes or from the professional standards of conduct promulgated by the medical profession itself.

Rolf A. Hanning
Kirk P. Brady

ERRATA

DENVER LAW JOURNAL

VOLUME 44 NUMBER 2

Please note the following corrections.

Page 261, lines 23-25:

it on their own.

This is a most wholesome and welcome reaction.[195]

Speaking later he said,

Page 307, line 24:

and prospect in drawing up a statement of the current and projected

Page 319, line 11:

Munch. Lawrence P. Tiffany and Joseph A. Page were promoted to

Page 325, line 17:

1958, LL.B., 1959, University of Denver. RECENT PUBLICATIONS: "Some Goals; Some