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THE CONTROVERSIAL IMAGE OF MR. JUSTICE MURPHY

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On this, the tenth anniversary of the death of Mr. Justice Murphy, the Georgetown Law Journal takes pride in publishing this commemorative work by Mr. Eugene Gressman. As law clerk to Mr. Justice Murphy for five years, Mr. Gressman has gained a peculiar insight into his subject matter. In the course of his warm tribute to this controversial member of the Court, the author has included some hitherto unpublished letters and memoranda, which provide a perceptive picture of the motivations of the Justice—and the man.

Frank Murphy was the seventy-second Associate Justice of the United States Supreme Court, serving from 1940 to 1949. Today, ten years after his death, he remains one of the most controversial and misunderstood individuals ever to sit on the high tribunal. Yet beneath the clouds of discord may be found a unique and lasting contribution to the cause of human freedom and the eminence of the Supreme Court.

In a sense, Frank Murphy’s public life was predestined to be one of controversy and misunderstanding. His labors in the public vineyard took place in an age of violent controversy bounded by two catastrophic world wars. The great changes in the nation’s economic, social and political structure of that era were marked by bitter disputation. Those who took active roles in the government of man were compelled by the onward rush of events to make difficult and disputed decisions. They had to choose between standing still or forging ahead to new frontiers of executive, legislative and judicial powers. And those like Frank Murphy who were temperamentally equipped to make firm, forward-looking

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1 Murphy occupied the seat on the Supreme Court which is newest in point of time of establishment by Congress. The seat was created by An Act to Amend the Judicial System of the United States, 16 Stat. 44 (1869), and has been filled successively by Justices Joseph P. Bradley, George Shiras, William R. Day, Pierce Butler, Frank Murphy and Tom C. Clark.
decisions and to speak out boldly and eloquently in support of their choices became the special targets of criticism, misunderstanding and abuse.

By 1940, when Murphy was elevated from the Attorney Generalship to the Supreme Court, the controversial nature of his public reputation was full-blown. The preceding seventeen years had seen him in the vortex of politics, serving in an impressive variety of public posts. His image on the public conscience had become vivid and lasting.

Wherever he had gone—to Detroit as a criminal court judge and as Mayor, to Manila as Governor General and then as High Commissioner of the Philippines, to Lansing as Governor of Michigan, and finally to Washington as Attorney General—the stormy winds of crisis and controversy had swirled about him. He had been confronted with the vast unemployment and financial crisis of a depression-torn Detroit. In Manila he had fought in the controversy over Philippine independence. In Lansing it had become his duty to resolve the highly emotional problems created by the sit-down strike technique. And as Attorney General he had collided head on with the volatile problems of corruption in high places and with the legal implications of a nation moving closer to war. Thus had the spotlight of national attention been focused upon him with increasing intensity. So successful had he been in his various public ventures that speculation had become rife over his political future, a future that some said might lead to the Vice Presidency if not the White House itself.²

Such were the political sources of the controversial image of Frank Murphy as he came to the threshold of the Supreme Court. It was an image that many persons cast into a permanent mold. To some he was a warm humanitarian, a skillful administrator and a tough fighter for human freedoms and social justice. To others, however, he was a self-righteous visionary, a crusader prone to subordinate law and order to mystical concepts of justice, and a political hack with no interest or ability in legal problems. Little that Frank Murphy did or said on the

² One astute observer, James Farley, has reported that in 1939 he believed Roosevelt "would select Harry Hopkins, Robert Jackson or Frank Murphy, in the order named" to succeed him in the White House if Roosevelt himself did not run again. Farley, Jim Farley's Story: The Roosevelt Years 153 (1948).

On Jan. 24, 1940, Prof. Arthur Schlesinger, Sr., wrote to Murphy as follows: "With somewhat mixed feelings I send you my heartiest congratulations upon your translation to the Supreme Court. My feelings are mixed because I had been hoping to vote for you for President of the United States at the forthcoming election. Nevertheless, I fully realize that you will perform a greater long-time service to the nation as a member of the high court." (Letter is in the possession of the author.)
high bench seemed to change the nature of these preconceived and contradictory notions.

Indeed, Murphy's tenure on the Court served to heighten this clash of impressions. As the fifth New Deal appointee, Murphy symbolized Roosevelt's quiet victory over the judicial old guard. But as the Roosevelt majority on the Court increased and solidified, new judicial battles broke out. No longer did the issues revolve about the constitutional scope of federal and state economic powers. Differences now arose as to the extent of the individual's rights under the Constitution, as to the appropriate standards of criminal justice and as to the proper interpretation to be accorded federal statutes. Not unwillingly, Murphy was thrust into the center of these new conflicts and he spoke out frequently and forcefully. Criticism of the New Deal Court's behavior mounted to high crescendos in the nation's press, with the most violent attacks being directed at the so-called liberal wing composed of Justices Black, Douglas, Murphy and Rutledge. And again the well-established dichotomy of opinion about Murphy became evident. He was viewed either as a humanitarian in the finest judicial sense or as an inept jurist with little respect for the traditional role of the Court.

At the time of Murphy's death in 1949 the same division of comment appeared in the public eulogies. Only this time the sheer weight of expression lay on the side of vitriolic criticism. Much of the nation's "responsible" press limited its favorable remarks to platitudinous comments that "his goodness of heart and sincerity of purpose won him respect on every side." And it was conceded that on occasion "he could rise to eloquence and power in keeping with the best traditions of the Supreme Court . . . ."

3 N.Y. Times, July 20, 1949 (editorial). The Louisville Courier-Journal, in a similar vein, commented editorially on July 20, 1949, that "none could deny that Murphy served his country well" and that he was "a profoundly religious, able, and devoted servant of the people of his country."

Liberal journals and commentators, of course, were fulsome in their praise. Thus the New Republic, Aug. 1, 1949, pp. 5-6, wrote:

The rare qualities of Justice Murphy make him unusually difficult to replace. His extreme humanitarianism produced an unusual ability to arrive at true justice, often by unorthodox routes. Frank Murphy was a liberal in the economic field, a strong supporter of the anti-trust laws and the powers of the state to regulate for the common good. . . . But his deep personal concern for individual liberty made him prominent among all the judges of the Court on cases involving civil rights. . . . Frank Murphy was a spiritual son of the New Deal. On matters involving human liberties, he was the conscience of the Court.

4 Washington Post, July 20, 1949 (editorial). The Pittsburgh Post-Gazette on the same day editorialized that Murphy "had an especial passion for safeguarding civil liberties, and while his critics might charge that he was somewhat wanting in intellectual drive they could never question the sincerity of his democratic sentiments."
For the most part, however, the editorial dictate parroted the old shibboleths that Murphy tended to put his personal sympathies above the law and that he was ever ready to twist logic in order to strike a blow for liberty or the underdog. And with frequent references to the sit-down strike struggles of his gubernatorial days, it was widely proclaimed that Murphy’s “humanitarianism predominated over his attachment to law and order” and that “his special talent was not that of a judge but that of a crusader . . . .”

Even the Supreme Court itself, when it came time in 1951 to commemorate formally the life and works of Frank Murphy, took special note of his controversial nature. Chief Justice Vinson, speaking on behalf of the Court, stated:

Frank Murphy was, is, and, for years, will continue to be a controversial figure. Whenever and wherever democracy is lived or discussed, the problem of the individual versus the state will occupy men’s thoughts and deeds. Frank Murphy’s opinions, whether he was writing for the Court, for himself and others in separate agreement, or vigorous dissent, will be censured or revered, depending upon one’s own predilections. Whatever may be history’s decision, however, on his wisdom or the accuracy of his fears, all who read his words will be impressed with his integrity, his courage, and his faith in the principles for which he stood.

The ensuing years have neither softened nor resolved the Murphy enigma. His strengths and his weaknesses have not yet received their final evaluations. Despite all his known predilections and sympathies, Frank Murphy still remains for many persons a riddle both as to his personality and his jurisprudence. His memory can still incur the warmest kind of admiration or the severest sort of criticism. History has obviously not yet written its final epitaph for him.

Significantly, those who to date have studied closely the life and work of this man have been uniformly struck by the depth of Murphy’s convictions and by the extent to which he reflected the most basic and universal of American ideals. Frank Murphy, it has been said, belongs to that small but admirable group of Supreme Court justices “who, disdaining the tortuous paths of the law, assert in a clarion peal the basic

5 Washington Daily News, July 20, 1949 (editorial). Joining in the hue and cry was the Washington Evening Star editorial of July 20, 1949: “Justice Murphy was handicapped by two conspicuously unfortunate tendencies. When confronted with a conflict between his humanitarian sympathies and a principle of law, he was inclined, or so it seemed, to make the principle of law conform to his own predilections. Secondly, he had a weakness for extravagant language. . . . But it is indicative . . . that, despite his undoubted talents, he was a miscast on a court of last resort.”


truth, so often forgotten by those with their nose close to the earth of precedent, that law is at root an instrument for the achievement of social goals." And in the most penetrating and trustworthy study yet made of this man, the following conclusions have been drawn:

(1) Although considered doctrinaire, Murphy's creed was hammered out in practice rather than in sheltered contemplation. Forced by events to think through eternal questions of political obligation, he operated from a lifelong fusion of ancient Catholic doctrines and the early American ideology, which clustered on the central value of individual human dignity. (2) In quest of fame through good works, Murphy conceived of government as a ministry; and after witnessing the pains of industrialism in Michigan, he became fully committed to positive governmental responsibility for social justice and civil liberty, to the force of government-by-example, and to a thoroughly instrumental approach toward law. (3) Profoundly moved by world war, he thought of America as the last hope of civilization, with the result that American treatment of freedom and minorities became to him the acid test of its historic principles and example abroad. (4) These premises underlay Murphy's unique attitude toward the judicial function, i.e., actively pursuing "justice" in terms of humanitarianism and native ideals of liberty. (5) Although his conscious idealism convinced some that Murphy was an inept jurist, his judicial unorthodoxy stemmed less from technical incapacity in law than from his fighting temperament and his conception of the Court as an instrument for effecting ideals which we all, to varying degrees, profess.

In short, Murphy's entire career illustrates what happens when a passionate man of affairs takes the American creed seriously and attempts to apply ancient principles to the solution of contemporary problems.

Although it is too early to render final judgment, Murphy left a solid imprint on his time. A magnificent exposition of principle in pursuit of a nation's "mission of justice," and a steadily deepening philosophy of human freedom, bear witness to the vitality of both the ideals he championed and his own operational creed: " 'Faith without works is dead.' So it is with democracy."9

Yet such views are far from universal. A substantial body of opinion still holds that Murphy was a "self-intoxicated," "self-dedicated" and "somewhat messianic" individual10 whose "hyperactive concern for indi-

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8 Roche, The Utopian Pilgrimage of Mr. Justice Murphy, 10 Vand. L. Rev. 369, 394 (1957).
10 These descriptive words appeared in an article by Prof. Arthur Schlesinger, Jr., The Supreme Court: 1947, Fortune, Jan., 1947, pp. 73, 76. This article was deeply resented by Murphy, a unique reaction on his part. So strong were his feelings that he felt compelled to return to the publisher of the magazine an enlarged print of his picture which had accompanied the article. Murphy's covering letter (a copy of which is in the possession of the author), dated January 16, 1947, said in part:

The picture would serve only as an unwanted reminder to me of the highly distorted and inaccurate article on the Court and its members which appeared in the January
individual rights" led him "into ventures little short of quixotic."11 This viewpoint, which is seldom articulated in print since his death,12 is currently marked by occasional slighting references to Murphy's talents, and by a word-of-mouth tradition in law school circles that the Justice was a legal illiterate, a New Deal political hack who approached the sacred arcana of the Law with a disrespect that verged on blasphemy, who looked upon hallowed judicial traditions as a drunk views a lamppost: as a means of support rather than a source of light.13

He is said to have twisted legal principles to make them conform to his own brand of humanitarianism and to have indulged in reckless, emotional statements indicative of a lack of judicial restraint.

This is not a pretty picture which Murphy's critics seek to paint. Indeed, the criticism itself is so lacking in restraint and balance as to reflect adversely upon its very substance. Much of it seems to stem from a misunderstanding of the Justice himself and of the nature of the judicial processes of the Supreme Court. Murphy, of course, admittedly "never attempted or professed to be a 'lawyer's lawyer'"14 or to be steeped in legal lore. Concededly, his "frame of reference had as its centerpiece a vigilant defense of the underdog and an unassailable belief in the overwhelming importance of the individual,"15 and in his philos-

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12 One of the few exorcitations to appear in print after Murphy's death is to be found in Kurland, Book Review, 22 U. Chi. L. Rev. 297, 299 (1954). Kurland, a former law clerk to Mr. Justice Frankfurter, attempted to lump Murphy and Mr. Chief Justice Vinson together in the following derogatory fashion:

Neither had any great intellectual capacity. Both were absolutely dependent upon their law clerks for the production of their opinions. Both were very much concerned with their place in history, though neither had any feeling for the history of the Court as an institution. . . . Each had desires for a non-judicial role in government. Neither dealt with the cases presented as complex problems: for each there was one issue which forced decision. Each felt a very special loyalty to the President who had appointed him. Both were more impressed with the office which they held than with the function they were called upon to perform.

13 Roche, supra note 8, at 369.
14 Remarks of Mr. Chief Justice Vinson on behalf of the Court at the Murphy memorial session, 340 U.S. xx (1951).
15 Id. at xxiii.
ophy "the most important function of government in general, and this Court, in particular, was the protection of individual freedom and thought from restriction."\textsuperscript{16} But to assume from those elements that Murphy was a legal incompetent who viewed with disrespect every legal principle that stood in the way of protecting some hapless criminal or member of the Jehovah's Witness sect is illogical, untrue and inconsistent with the principles of sound biographical analysis.

But the illogic and unfairness of the attack on Murphy do not destroy the extensiveness or the importance of the low esteem in which he is held. Indeed, the very intensity of the Frank Murphy debate, as it continues unresolved and unabated albeit on a low key, is indicative not only of the need for further inquiry and evaluation but also of the significance of the man and his career. Such debates do not develop over the ciphers of our judicial and political history. They concern only those who, for good or for evil, have left a substantial impact or have significantly mirrored important facets of national life.

Such a man was Frank Murphy. And such a man cannot be adequately evaluated, nor fairly analyzed, within the confines of a paragraph or even a single law review article. Here was a complex, exciting personality who was the living embodiment of an era of political and judicial controversy. He represented an important step in the development and application of certain basic American ideals. To understand that personality requires a broad-scale appreciation of the age in which he lived; it requires an intelligent comprehension of the man's background, his motivations and his experiences; and it requires an objective appraisal of his influences on the governmental and judicial processes in which he participated.

In short, something more is necessary than a glib reference to Frank Murphy as a warm humanitarian. And something more is necessary than a slighting reference to him as a messianic judicial misfit with a cardiac response to legal problems. The demands of truth and historical perspective can be satisfied only by honest and unemotional inquiry. To that end, without pretense of a definitive or totally objective resolution of the manifold debate, the following comments and suggestions are offered by one who was privileged to serve Frank Murphy and to observe at intimate range his judicial philosophy and activities.

**Judicial Empathy**

Jerome Frank once wrote that a great judge, a "judicial judge—the critic on the bench—should be vitally imaginative, an artist, if you

\textsuperscript{16} Id. at xxiv.
please, quick with empathy, the capacity to feel himself into the minds and moods of other men." More than that, he must have

a poetic imagination, a sensitive awareness of the individual human beings involved in law suits, and an eagerness that their unique sayings and doings shall not be ignored. His interest is in having justice done in each case, not in contriving a neat system of rules to satisfy the lazy or those with such callow sensibilities that only smooth-flowing harmonies satisfy them.18

Frank Murphy had this magic quality of empathy to a superlative degree in his judicial, his political and his personal life. This sensitive awareness of the human element involved in a law suit, this ability to project himself into the minds and moods of the otherwise impersonal litigants, was a significant key to Murphy’s judicial career.

Time and again throughout his entire life Murphy exhibited this art of identification. As Mayor of Detroit, for example, he dealt with the unemployment problem not alone in terms of cold statistics and revenue bonds. Despite the fact that he himself had never known real economic privation, he was able to feel passionately for the problems of those “thousands who have slept nightly with only the park bench beneath them and the starry heavens to cover them; the high-spirited men and women of bountiful America, reduced to the mortification of daily presence in the bread lines, often with their children beside them, the destitute sick forced to endure the line-up at the public clinic . . . .\n
Such identification was not a mere pose or an oratorical device for popular acclaim. This was a sincere deep feeling that exhibited itself in countless ways in the dark depression days. It led to the promise that not one deserving man or woman would go hungry in Detroit because of circumstances beyond the person’s control, a pledge which he engineered to fulfillment. Most of all, the sincerity of the identification was shown by the affection held for him by countless thousands of Detroit citizens who benefited from his public acts. The common men and women of that city came to know that his eloquent words were to be believed and that here was a man who really cared for their problems. And they never forgot him. At his death, sixteen years after he had departed from the Detroit limelight, it was they who grieved the most; over 20,000 of them stood in line for hours to pay their last respects as he lay in the City Hall.20

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18 Id. at 1109.
19 Radio address of Mayor Frank Murphy, The Procession of Forgotten Men, delivered over Station WJR, Detroit, Nov. 7, 1932.
20 This demonstration of popular esteem, while somewhat regional in character, is
Thus it was natural for Justice Murphy to bring to bear upon the parade of cases before the Supreme Court this ingrained sensitivity to "the minds and moods" of the affected individuals. Fred Korematsu, for example, was to Murphy something more than an abstract vehicle for engaging in an ivory tower debate over the validity of the war-time exclusion of Japanese Americans from the West Coast.21 To Murphy, Korematsu was an unknown but nonetheless real human being who felt deeply about the military order of exclusion. Murphy's understanding of the cruel impact such an order must have had upon Korematsu's dignity and well-being gave vibrant life to Murphy's approach to the case. This was an understanding that helped to inspire his "penetrating and painstaking dissent"22 in which he eloquently protested what he described as the Court's "legalization of racism."23

Whenever personal interests and human freedoms were at stake, Murphy exhibited this talent of empathy. He was instinctively aware of the human equation involved and was not satisfied that true justice had been achieved until appropriate recognition had been given to that equation in working out the constitutional or statutory problem presented by a particular case. This forthright concern over the humanistic aspects of a case led to the inevitable charge that Murphy deliberately championed the cause of the underdog, the unpopular and the accused. One of his judicial brethren once listed what he jocularly described as "F.M.'s Clients":

perhaps unprecedented in the annals of Supreme Court Justices. The Associated Press dispatch, as reported in the Washington Post, July 22, 1949, § B, p. 2, col. 5, reported the event as follows:

There were "big men" from all walks of life . . . . But mostly they were "little people"—the ones who loved and were loved by Justice Murphy perhaps the most.

Several men with dirty overalls were in the long line outside the city hall; one barber stopped in during his lunch hour; a number of admirers knelt beside the casket; some carried shopping bags, others babies; one elderly Negro couple placed a rose and card on the flag-draped casket.

The ratio of Negroes and minority groups for whom the late justice fought so vigorously during his long public life was high.

Among the many who expressed formal condolences were the Red Caps of Pennsylvania Station in New York City. N.Y. Times, July 22, 1949, p. 20, col. 2.


22 Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 Colum. L. Rev. 175, 190 (1945).

23 323 U.S. at 242. A letter from Norman Thomas to Justice Murphy, Jan. 6, 1945, read: "Recently I read the full text of the Court's decision in the Korematsu case, and the dissents.

"If America is to continue and to grow as a democracy, I believe your dissenting opinion will live as one of that democracy's great documents. You have put us all in your debt. I confess I am appalled at the casuistry of the majority opinion." (A copy of the letter is in the possession of the author.)
But to assume, as so many have, that Murphy's sympathetic understanding of the human element of a case represented a personal, unjudicious attitude is to misconstrue and pervert a most vital element in the art of achieving justice. Judgment without understanding or regard for the human element is soon likely to lead to a mechanistic norm of jurisprudence divorced from reality. The law is concerned with human beings and their relationships with each other. And if the law is developed and applied in an unimaginative fashion, ignoring the feelings and aspirations of those with whom it deals, the public support so essential to an effective legal system will eventually wither.

Murphy's capacity to appreciate the human element, moreover, was only one part of his adjudicatory approach. His unique background as chief executive of a large city, a semi-independent nation and a populous state, plus his duties as the nation's chief law enforcement officer, ingrained in him a rich and realistic appreciation of the public interest involved in Supreme Court litigation. If anything, this understanding of the governmental interests was more personal to Murphy than his appreciation of private interests since almost his entire career prior to 1940 had been devoted to the responsible development and protection of governmental power.25 And from his work as an assistant federal prosecutor26 and a criminal court judge, he acquired a direct under-

24 Undated note, Frankfurter to Murphy. (Note is in the possession of the author.)
25 When Felix Frankfurter was still a professor at the Harvard Law School, he dispassionately stated in 1937 that Governor Murphy's settlement of the General Motors sit-down strike reflected "pertinacity, segacity [sic], and a profound sense of fairness." Letter from Felix Frankfurter to Frank Murphy, Feb. 12, 1937, reprinted in Hearing Before a Subcommittee of the Committee on the Judiciary Relative to Nomination of Frank Murphy to be Attorney General of the United States, 76th Cong., 1st Sess. 6 (1939).
26 Murphy's first prominent experience was that of Assistant District Attorney for the United States in Detroit following World War I. He was assigned to aid in the prosecution of a notorious $30,000,000 war graft case.
standing of the problems and viewpoints of criminal prosecutors, an understanding that was invaluable to him in the wide variety of criminal prosecutions on review in the Supreme Court.

Justice Murphy thus had a penetrating insight into the competing elements involved in the eternal struggle between the individual and society. But he did more than merely comprehend or acknowledge the pulse of these competing forces. To this deep insight he added a full measure of creative imagination, an ability to bring to bear upon the problems before him new thoughts and new ideas. He was not content to pour old wine into the bottles of legal controversy simply because precedent so dictated. If some advance in law, science, sociology or economics was pertinent, he was not afraid to apply it if justice would thereby be served.

Thus it was that on taking his place in 1923 on the Recorder’s Court, the highest criminal tribunal of Detroit, Murphy declared:

I recognize, my friends, that those who join the sorrowful procession here do not all come in on an equal footing. They are not all of equal intelligence, of equal mental and physical capacity. Fortunately, science is assisting us each day to determine more accurately mental conditions and we find now that the psychopathic clinic is an indispensable adjunct of this court. Likewise we find that the probation department, which offers such opportunities for regeneration and for the salvaging of those week [sic] persons who constantly come before this court, is an indispensable adjunct in the operation of this court. I want these departments to succeed. I am very anxious about it.

. . . .

We know, my friends, that there is not any one reason for the existence of the criminal. We also know that these courts alone cannot do away with the criminal. Society fails in its duty unless society makes an effort to determine the cause and then attack the cause of criminality, and assists to point out the individual and social force that contributes to the conditions creating criminality.27

The case was admittedly one of the most stupendously brazen and comprehensive attempts at wholesale graft arising out of the war. It concerned a gigantic plot to seize and convert all of the surplus war supplies in the Central States. . . .

The case started in a Federal Court here, before Judge Tuttle, in December of 1920, and lasted more than four months. . . .

. . . . When the final evidence was in, Murphy exhausted seven hours in his summing up to the jury. Colonel Felder, chief counsel for the defense, publicly congratulated the young prosecutor on his masterly argument. . . .

. . . . [Following the guilty verdicts] A. Mitchell Palmer, then United States attorney general, and General Pershing both extended official commendations to Murphy.

Detroit Times, April 23, 1933, p. 7, Murphy Souvenir Section.

Murphy later noted to one of his law clerks that “since I was a boy in the D.A. office in Detroit I have seen the peril of conspiracy law.” Note dated Nov. 11, 1947, to Eugene Gressman. (Note is in the possession of the author.)

27 This speech was fully reprinted in the Detroit Times on the day that Murphy took office in 1923.
So, too, when sitting as an arbitrator of a wage dispute in 1926 between Detroit newspaper publishers and the stereotypers' union, Murphy rendered an opinion that was far advanced for its time, an opinion that revealed an amazing alertness to the modern theory that wages should be related not only to the cost of living but also to the industry's productivity increases. In his written opinion, Murphy wrote:

In industry as in all else the present is fleeting and the future is difficult to forecast, and an arbitration giving consideration to "the condition of business" principle must keep this fact constantly in mind. In the interest of industrial efficiency and friendly cooperation between the employer and employes, wages should bear some relation not only to national wealth but specifically to the product of the industry concerned. In the present instance, the Union has a right to assume that the growing productivity of the publishers' business entitles its members to a progressive standard of living. Under all of the proofs and having in mind the recognized present general prosperity, it is fair to conclude that in the business of the publishers profits are likely to be high and on the increase. Therefore, generally speaking, they should be able to pay higher wages. When the opposite conditions prevail, a contrary conclusion may be reached.

... Economists, employers, and employes have in recent years directed their attention to a large extent to the question of real wages as distinguished from money wages for the reason that what dollars will buy is more important than the number of dollars received as a wage. It is only by constantly raising real wages and not just money wages that prosperity is brought about.

... A living wage is not a mathematical certitude but in each instance is a practical judgment depending upon the soundness and fairness and vision of whoever declares it. In the present controversy, this Board is disposed to give more consideration to human welfare and the possibility of improving human cooperation between the stereotypers and publishers than in reaching some mathematical calculation of a living wage.28

This sense of creative imagination and awareness of the many facets of our civilization stood Frank Murphy in good stead during his years on the Supreme Court. Thus, recognizing the unique function of the Court to establish high standards of judicial conduct for the federal bench, Murphy was ever zealous to advance those standards to the end that justice might be improved. In one notable instance,29 he was joined by Justices Frankfurter and Rutledge in protesting the refusal of the

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28 Detroit Labor News, Aug. 20, 1926, p. 4, cols. 1, 2, 3. The stereotypers' union was reported as "highly pleased at the results of the arbitration" whereby the stereotypers were given an increase of $3.60 in their weekly wage and a bonus for working double shifts and Saturday nights. Id. at p. 1, col. 1.

Court to explore some of the frontiers of criminal law. The particular issue was whether a District of Columbia jury could consider mental deficiency as a factor relevant to the premeditation necessary for a first degree murder conviction. In dissenting from the Court's ruling that it would not interfere with the District of Columbia court's rejection of that factor, Murphy wrote:

It is undeniably difficult, as the Government points out, to determine with any high degree of certainty whether a defendant has a general mental impairment and whether such a disorder renders him incapable of the requisite deliberation and premeditation. The difficulty springs primarily from the present limited scope of medical and psychiatric knowledge of mental disease. But this knowledge is ever increasing. It seems senseless to shut the door on the assistance which medicine and psychiatry can give in regard to these matters, however inexact and incomplete that assistance may presently be. Precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy.

If, as a result [of recognizing mental deficiency as a relevant factor], new rules of evidence or new modes of treatment for the partly defective must be devised, our system of criminal jurisprudence will be that much further enlightened. Such progress clearly outweighs any temporary dislocation of settled modes of procedure. Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization.

This constant striving to understand and accommodate competing interests and to pursue the ends of justice with imagination and creativity was one of Justice Murphy's marks of distinction. Whether he always achieved full understanding or accommodation may be debated; and some of the results of his creativity can be questioned. But the important fact is that he possessed an ample cup of those "poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof." Or, as Thurman Arnold has put it: "Mr. Justice Murphy was a great judge because of three qualities. The first was simplicity; the second was courage; the third was insight into the substance of the problems of the changing times in which he lived."

30 Id. at 493-94.
31 Frankfurter, The Job of a Supreme Court Justice, N.Y. Times, Nov. 28, 1954, § 6 (Magazine), p. 14. Clarence Darrow, who tried the famous Sweet murder trials before Judge Murphy in the Recorder's Court in Detroit, described Murphy as "a judge who not only seemed human, but who proved to be the kindest and most understanding man I have ever happened to meet on the bench." Darrow, The Story of My Life 306 (1932).
32 Arnold, Mr. Justice Murphy, 63 Harv. L. Rev. 289, 293 (1949). Mr. Justice Black
Justice Murphy never attempted to spell out an elaborate judicial philosophy for himself. He was not prone to ruminate in his opinions about the nature of the judicial process, the function of the Supreme Court in our system of government, or the need for judicial self-restraint. Essentially, Murphy was a man of action and a judge of action. His creed, as has been said, “was hammered out in practice rather than in sheltered contemplation.”

Murphy’s philosophy as a judge must therefore be put together from his formal opinions, his votes, his comments, his background and his whole personality. The resulting mosaic may indeed be a more trustworthy picture of his philosophy than a series of self-serving declarations on his part. The reality of a philosophy is always to be found more in its practice and application than in its mere enunciation.

At the core of the judicial philosophy of any man who sits on the Supreme Court is his concept of the role and function of the Court of which he is a transitory but integral part. The whole complex of the factors relevant to Murphy’s philosophy point to a conception of the Court as an institution with an affirmative and influential role to play in the American form of government. He knew his history well, and he knew that the Court was necessarily limited in its jurisdiction and its scope of power. But he also realized that the very essence of the function of a Justice of the Supreme Court is to resolve or at least to accommodate conflicting legal principles, principles which frequently reflect some of the most controversial of the political, social and economic issues of the day. And in the process of such resolution and

has written of Murphy as follows: “He did not merely advocate the equality of people without regard to race, color or religion; he believed it. He loved mercy. If he hated anything, it was exploitation of the weak by the strong. He had undaunted courage rooted in faith—faith in his country, faith in its historic freedoms, and faith in the God of Love he worshipped.” Black, Mr. Justice Murphy, 48 Mich. L. Rev. 739 (1950).


The core of the difficulty is that there is hardly a question of any real difficulty before the Court that does not entail more than one so-called principle. . . .

But judges . . . have to adjudicate. If the conflict cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty.


“Scarcely any political question arises in the United States that is not resolved, sooner
accommodation the Court and the Justices thereof perforce must, within
the known limits of their power, act in an influential manner.

To act influentially, of course, one must act responsibly. One must
also act in accordance with what one conceives to be the most rational,
the most consistent with juridical ideals and constitutional or statutory
principles. Chief Justice Marshall so acted when he led the Court in
decision after decision establishing the bitterly contested supremacy of
the federal government.\textsuperscript{36} Chief Justice Taney so acted when he led the
Court—unfortunately, as it turned out—to the ruling in the \textit{Dred Scott}
case.\textsuperscript{37} And Mr. Chief Justice Warren and all his colleagues so acted
when they unanimously discarded the "separate but equal" principle in
evaluating the constitutional validity of segregated public education.\textsuperscript{38}

The point here is not whether the Court, or any Justice thereof, has
made a right or wrong resolution or accommodation of the issues pre-
\vspace{10pt} sented. The significant fact is that choices must be made, choices which,
however made, leave a substantial imprint upon one facet or another
of our government and our way of life. Whichever way the Court rules
in a given case, the result has an important if not decisive impact upon
the political, social or economic elements underlying the case.\textsuperscript{39} The fact
that a case may be complex or the legal issues clouded may make the
choice more difficult, but the impact of the choice is nonetheless sig-
nificant.

Murphy fully appreciated this critical aspect of the Court’s function,
this making of influential choices. He recognized it with all the native
instincts of the superb politician that he was. The making of influential
choices by the Supreme Court is in a basic sense an exercise of the art
of politics of the highest order. The Court, no less than the President
and the Congress, has the duty to implement and apply the political
document known as the Constitution of the United States.\textsuperscript{40}

\textit{or later, into a judicial question.”} 1 de Tocqueville, Democracy in America 280 (Bradley ed.
1948).

\textsuperscript{36} See, e.g., \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316 (1819); \textit{Cohens v. Virginia},
19 U.S. (6 Wheat.) 264 (1821).

\textsuperscript{37} \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393 (1856).

\textsuperscript{38} \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954).

\textsuperscript{39} The judge in the American system has been described as one “brought into the
political arena independently of his own will. He judges the law only because he is
obliged to judge a case. The political question that he is called upon to resolve is
connected with the interest of the parties, and he cannot refuse to decide it without a denial
of justice.” 1 de Tocqueville, Democracy in America 103 (Bradley ed. 1948).

\textsuperscript{40} It is the peculiar position of the Supreme Court, however, that the disputes which
fall to it for decision are governed by principles which have a special political origin
and purpose. This is notably true of that set of rules we call the Federal Constitution,
statesmanship in the finest sense of the term must, therefore, be exhibited by all three branches of the government, acting within the bounds of their respective spheres, if the structure of the national government is to be maintained properly. The performance of that function by the Court is and always has been a difficult and agonizing one, and it is and always will be a function that creates widespread controversy and criticism over the results reached. Yet it is an inescapable function under the constitutional system.

Frank Murphy, with all his judicial, executive and administrative background, firmly comprehended this basic role of the Supreme Court. To him the Court was something more than a compendium and dispenser of neat crochets of legalisms. He could, when necessary, knit crochets in the best of traditions and deal appropriately with jurisdictional and other complexities. But he sensed that the Court, to a degree unknown to any other judicial body in the world, was a major creative influence in the governmental scheme. Murphy was therefore determined to bring to bear upon his portion of the Court’s important function the very highest concepts of justice that his background and experience had taught him. If the Court of necessity had to render decisions with inevitable repercussions on the American way of life, Murphy wanted, within the proper limits of the Court’s function and jurisdiction, to make his voice and his vote count on the side of what he conceived to be the fundamental premises of that way of life.

In expressing these deeply felt premises, Murphy has often been accused of subordinating legal principles as though he had ignored some uniform code available for automatic application to cases coming before the Court. Murphy’s opinions, of course, were replete with appropriate legal principles, citations and references. Like any competent judge, he

and a court which must resolve a controversy before it by reference to the terms of that document is, of necessity, operating in a highly political context.


41 If we accept and require the peaceful resolution of controversies as they arise by the exercise of an independent judicial power, then we must be prepared to pay the price that some of those controversies will have political consequences, thereby laying the tribunal itself open to a charge by the unsuccessful litigant that it has wrongfully assumed political power, or, at the least, has improperly reflected political considerations in the result reached. We cannot have it both ways. If we want a judicial power to decide our cases, we must recognize that this in itself is a basic political decision; and that, accordingly, the exercise of judicial power is political in this fundamental sense. And if we want all our cases to be amenable to the judicial power, and not merely those which are politically colorless, we must be prepared to weigh the disappointment some of us may feel with particular decisions in the light of the considerations which led us as a people to evolve the judicial power as a factor in our plan of government.

Id. at 540-41.
drew from the vast storehouse of legal principles those that he felt best suited to the particular case, ignoring, distinguishing or limiting those that he felt to be inappropriate. And he had a healthy respect for precedent. But he intuitively realized the profound fact that an effective judge, particularly one sitting on the Supreme Court, cannot live by rules alone.\(^42\) The creative art of judging in the politico-judicial realm of the Supreme Court frequently calls for something more than a pedestrian application of a well-settled rule of law. Intelligent application of the concepts of due process and equal protection, for example, can neither be captured solely within the confines of established principles nor ossified in terms of the precedents of yesteryear. Those concepts must undergo constant judicial growth and refinement in light of the myriad facets of an ever-changing society if they are to retain vitality. Murphy's acceptance of that fact and his rejection of a slavish regard for what he conceived to be inappropriate or decadent rules constituted one of his greatest strengths on the bench.

Such, then, is the context of Murphy's major contribution to the work of the Supreme Court. That contribution, however phrased and however viewed, was necessarily one attuned to the Court's great and historic function as a political institution within the constitutional framework. His entire pre-Court career was, in a real sense, one of preparation for this contribution. From his earliest days, when his mother taught him the essence of morality and humanitarianism, down through the years of public administration, Murphy constantly developed and refined his conception of the primacy of human freedoms and the dignity of the individual. This development and refinement came not only in the form of reflection and written words but also in the practical application of libertarian ideals to governmental functions.\(^43\)

\(^42\) Jerome Frank has pointed out "that able judges cannot live by rules alone" and that rules serve merely to "nudge the judge, give him hints, strong hints he must seldom disregard; but a judge who knows nothing but the rules will be a judicial routiniser, a dispenser of injustice, since . . . the art of judging really lies in the ability to cope with the unruly." Frank, Book Review, 61 Yale L.J. 1108, 1113 (1952).

\(^43\) A notable example of Murphy's practical application of his libertarian concepts was his creation of a Civil Liberties Unit within the Department of Justice during his tenure as Attorney General. Murphy commented on this action in a letter to President Roosevelt in 1939:

Through this unit for the first time in our history the full weight of the Department will be thrown behind the effort to preserve in this country the blessings of liberty, the spirit of tolerance, and the fundamental principles of democracy. To this end the Civil Liberties Unit has been charged with the enforcement of the federal civil liberties statutes, the conduct of an inquiry into the need for additional legislation on the subject, and, in general, the invigoration of the federal government’s endeavors
And so Frank Murphy came to the Court fully prepared and uniquely equipped to aid the Court in its great "duty of implementing the constitutional safeguards that protect individual rights" and the "vital, living principles that authorize and limit governmental powers in our Nation." Eloquently, unashamedly and consistently, he gave his voice and his vote in support of basic constitutional principles of human freedom and basic precepts of economic and social justice. He conceived of the Constitution as a document embodying broad concepts and ideals which he was duty-bound to mirror, thereby recognizing "its historic purpose, its high political character, and its modern social and legal implications." He viewed the Bill of Rights, in short, with more passion and feeling than he viewed the Internal Revenue Code. In discharging his constitutional duty to render fair judgment on all matters coming before the Court, Murphy felt that this obligation reached its loftiest peak when dealing with the ageless conflict between the individual and society.

Central to the Murphy judicial creed was the preeminence under the constitutional pattern of the individual's rights—the concept that "the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid." Nothing, he said, "enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and

to protect fundamental rights in this period of social transition.

It is my personal opinion that the creation of this unit at your order, with all the emphasis it places upon the protection of the civil liberties of the individual citizen and of minority groups, is one of the most significant happenings in American legal history.

Letter from Frank Murphy to President Franklin D. Roosevelt, July 7, 1939. (Copy of the letter is in the possession of the author.)


45 This is not an occasion to cite chapter and verse as to all of Murphy's many expressions on the court. For more detailed descriptions, see Barnett, Mr. Justice Murphy, Civil Liberties and the Holmes Tradition, 32 Cornell L.Q. 177 (1946); Cox, The Influence of Mr. Justice Murphy on Labor Law, 48 Mich. L. Rev. 767 (1950); Fahy, The Judicial Philosophy of Mr. Justice Murphy, 60 Yale L.J. 812 (1951); Frank, Justice Murphy: The Goals Attempted, 59 Yale L.J. 1 (1949); Gressman, Mr. Justice Murphy—A Preliminary Appraisal, 50 Colum. L. Rev. 29 (1950); Man, Jr., Mr. Justice Murphy and the Supreme Court, 36 Va. L. Rev. 889 (1950); Marshall, Mr. Justice Murphy and Civil Rights, 48 Mich. L. Rev. 745 (1950); Roche, The Utopian Pilgrimage of Mr. Justice Murphy, 10 Vand. L. Rev. 369 (1957).


proclaim one's religious convictions." And the reason why the ordinary presumption of validity cannot apply to statutes impinging on such constitutional rights, he indicated, was that "abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." Only where "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" was Murphy willing to consent to an abridgement of speech.

This broad vision of the human freedoms reached full flower in Murphy's dissent in In re Yamashita, where the Court sustained the jurisdiction of an American military commission to try a captured Japanese commander for an alleged war crime without regard to the constitutional protections of due process. Said Murphy:

The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. . . . [whenever] life or liberty is threatened by virtue of the authority of the United States.

In giving such broad recognition to the immutable principles of individual freedom embodied in the Bill of Rights, Murphy was merely reflecting an old American idiom. At heart, the Murphy credo was nothing more than Jeffersonian idealism in modern and simpler terminology. He was saying in slightly different language what the Court itself had said from time to time in the past—that there are "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard," that there are "fundamental principles of liberty and justice which lie at the base of all our

48 Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (concurring opinion).
49 Thornhill v. Alabama, 310 U.S. 88, 95 (1940).
51 327 U.S. 1, 26 (1946) (dissenting opinion).
52 Id. at 26-27.
civil and political institutions,"54 and that due process of law involves "the very essence of a scheme of ordered liberty."55

Nor was Murphy's insistence on the primacy of the rights guaranteed by the first and fourteenth amendments particularly novel or unique. He was merely applying a recognized and responsible viewpoint that any restriction on the freedom to speak or write is an obstruction to the democratic process and therefore not entitled to any presumption of validity.56 The highest aim of our Constitution, he would have agreed, "is that it seeks to protect the freedom and dignity of man by imposing severe and enforceable limitations upon the freedom of the State."57 He was only saying what was said so well recently, that

the civil liberties guarantees in the Constitution. . . . state our highest aspirations. They are our political reason for being; they are the things we talk about when we would persuade ourselves or others that our county deserves well of history, deserves to be rallied to in its present struggle with a system in which "freedom of speech" is freedom to say what is welcome to authority, and "equal protection" is the equality of the cemetery. Surely such words, standing where they do and serving such a function, are to be construed with the utmost breadth. The proper office of legal acumen is to give them new scope and life, rather than to prune them down to whatever may currently be regarded as harmlessness.58

In other words, Justice Murphy accepted certain major and established premises of constitutional interpretation, premises which every judge must either accept or reject. Having adopted such premises, Murphy then proceeded to apply them with a vigor, a consistency and an eloquence unmatched in the records of the Supreme Court. In that application lies the real substance of Murphy's importance in judicial history. He reflected the libertarian spirit of his age in full revolt against restrictions on human freedom imposed openly or covertly in the name of racial, political, religious or war-time bias.

Always did Murphy make his views known publicly with vigor and eloquence. He spoke with a lifetime of conviction on matters affecting civil liberties, a conviction compounded of experience and learning. He spoke with passion and feeling, as when he invoked the wrath of consti-

54 Hebert v. Louisiana, 272 U.S. 312, 316 (1926).
tutional condemnation upon what he conceived to be a statutory monument to man's intolerance of man.\(^{59}\) And sometimes he spoke with anger, as when he protested the possible “procession of judicial lynchings without due process of law”\(^{60}\) that might follow from the Court's actions in the *Yamashita* and *Homma* cases. Moreover, he always spoke with candor, boldness and forthrightness. On occasion, his frankness carried him beyond the point where other liberal Justices were willing to go. Undaunted by suggestions that “softer blows” might be more effective on occasion, Murphy was unafraid to strip a legislative enactment of its rational facade and lay bare what he thought to be its ugly racist core.\(^ {61}\)

More importantly, he spoke effectively. History will never be able to record precisely the impact his words had upon the advancement of human freedoms in this land. But whether he wrote for the Court or for himself alone, his words were read throughout the length and breadth of the country, and from such overt indications as editorial comments and written communications the impact on his era was substantial. From responsible sources came such praise as denouncing him the “spiritual heir” of Brandeis\(^ {62}\) and he was frequently referred to as the conscience

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60 Homma v. Patterson, 327 U.S. 759-60 (1946) (dissenting opinion). Murphy's rare displays of anger were never directed at any member of the Court or the Court itself but were confined to the matters at issue. Justice Jackson once had occasion to tell Murphy that “you have never put into an opinion, however much we disagreed, anything that a Christian gentleman would not properly say . . . . But I have no resentment now or at any time about your opinions—just at times disagreements.” Undated note, Jackson to Murphy. (Note is in the possession of the author.)

61 Murphy's concurring opinion in Oyama v. California, 332 U.S. 633, 650 (1948), was a detailed description of the social, economic and racial antagonisms underlying the California Alien Land Law, leading him to conclude that the law was plainly invalid under the equal protection clause of the fourteenth amendment. Only Justice Rutledge joined him. In writing Murphy why he did not join this opinion, Mr. Justice Black said:

I wrote . . . because I am of opinion that the view can be advocated more effectively by softer blows than you used. Maybe that is a mistaken idea . . . . Furthermore, I do not like to dignify the suggestion that the California law is not anti-Japanese. You prove that it is very effectively I think—but I believe the fact is so notorious that it should be ignored because it has no possible validity.

One other thing. I recall no argument you make that, in my judgment, is not supportable. But many of those facts thus forthrightly stated, may be taken up in some parts of the world to attempt to do us harm.

I fully recognize that there are persuasive arguments to support such frank statements as you have made. But after much consideration I reached the conclusion that it would be wiser to express what you did in what I first referred to as “softer” language.

Note, Black to Murphy, Jan. 16, 1948. (Note is in the possession of the author.)

of the Court. His opinions may well stand among the definitive expressions of the libertarian viewpoint toward the Supreme Court and the content of its duties during the turbulent decade of the 1940's. And in their exposition of the verities of human freedom and justice, those opinions may project an intangible but real influence on causes and controversies yet to be resolved.

Much more difficult to assess, of course, is the extent, if any, of his influence within the Court itself. Doubtless it was not very great. Justices for the most part are the keepers of their own consciences and are likely to be influenced by little beyond their own viewpoints and predilections. Still, Murphy on numerous occasions took a very active role in the Court conferences and was known to be influential at times in securing a grant of a writ of certiorari or an affirmance or reversal in a closely contested vote. His closest friend on the bench, in judicial philosophy and otherwise, was Justice Rutledge, followed by Justices Black and Douglas, and there were undoubtedly areas of influence between and among all of these Justices on occasion.

Perhaps it was the very intensity of his beliefs and devotion to principle in this vital area of civil liberties that led to the criticism of Murphy as one who put humanitarianism above the law. Sometimes he overstated his position. And it has been said that "perhaps he was so often misunderstood because many phrases he used—such as 'good government'—sounded platitudinous" and "his high moral tone made

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63 See, e.g., Scanlan, The Passing of Justice Murphy—the Conscience of a Court, 25 Notre Dame Law. 7 (1949).
64 Justice Rutledge once wrote Justice Murphy about the latter's performance at a particular Court conference: "You are not a [name of another Justice then sitting]. He may feel strongly but I've never seen emotional evidence of it. That lack of intense feeling is why he can't see some of these biggest things right. There are times when emotional force must be added to intellectual. So I'm all for your occasional volcanic eruptions. They do you, me and all others good." Note, Rutledge to Murphy, May 3, 1948. (Note is in the possession of the author.)

From his college days it was reported that "the rapid-fire oratory of Murphy easily wins for him the appellation of 'The Verbal Tornado.'" Michigan Daily (Ann Arbor, Mich.), Nov. 9, 1916, p. 1.
65 Justice Rutledge once said:

"Nobody but a Murphy would fully understand a Rutledge's independence or his respect for a Murphy's. And were it not for you, this place would be damn nigh intolerable to me. This Court makes a great show of standing for free thought and tolerance with it. (I think they go together) But we—I mean the Court—do not know what tolerance means in the freedom of speech, within its own walls—except for you and perhaps two others of our brethren."

Note, Rutledge to Murphy, June 18, 1944. (Note is in the possession of the author.)
66 Muller, Frank Murphy: Ornament of the Bar, 17 Detroit Law. 181, 183 (Sept. 1949).
him vulnerable to the charge of hypocrisy." He cried so frequently in the wilderness that some came not to believe him, and some were so opposed to his basic judicial viewpoint toward the Court that they were ready to assume that he must be trying to impose his predilections upon the law.

Nowhere has this current of discontent with Murphy been better expressed than by Justice Frankfurter, who once wrote him as follows:

Your biographers in 1986 will be confronted with many problems—e.g., the problem that Al Smith dealt with, in that wonderful article on the Americanism of a Catholic, and also the problem of a man with a sensitive conscience when confronted with his duty as a judge and his feelings as a humanitarian. Specifically, your biographers will have to face this question: which is the more courageous character—a sensitive humanitarian who has taken the oath as a judge, with the resulting confined freedom of a judge to give expression to his own compassion and therefore does not yield to his compassion, or the same person who thinks his compassion is the measure of law?

What is the difference between you and Louis XIV, who said "I am the law," when you say "I am the law, jurisdiction or no jurisdiction"?

After long meditation and the most merciful suspension of judgment, the afore-said biographers will conclude that their Justice failed to keep in mind the vital doctrine of separation of Church and State, more particularly in that he exercised the compassionate privileges of a priest when in fact he was only a judge.

Here, then, is the essence of the Frank Murphy controversy. Did he think that his own compassion was the measure of the law, or did he merely draw upon his humanitarian and compassionate instincts when dealing with human rights and freedoms in the effectuation of his duties as a member of that essentially political body, the Supreme Court? Did he put humanitarianism above the law, or did he simply take humanitarianism or the American belief in the dignity of man as a guide whenever relevant to a choice between constitutional or legal principles? In other words, was he wrong in declining to view the legal and constitutional principles relating to individual liberty as an icy, impersonal set of objective rules completely divorced from a judge's humanitarian and compassionate instincts? Was he right in treating such principles as a responsible amalgamation of diverse but relevant man-made factors, including appropriate elements of humanitarianism and compassion?

It has been suggested herein, but only in the broadest of brush strokes, that the answer is that Frank Murphy was a Justice who applied his humanitarian instincts in the finest traditions of the Court. He was not a great Justice in the classic sense, but neither was he a legal illiterate

68 Undated note, Frankfurter to Murphy. (Note is in the possession of the author.)
or a judicial misfit. He represented, and represented well, a deep tradition in American life, a native-born compassion for human freedom. Perhaps the apogee of that tradition, in all its simplicity and depth of emotion, has passed by forever. But it was that historic tradition that Frank Murphy eloquently grasped and perpetuated in the volumes of the Supreme Court Reports. In his own words:

I am a public servant with zeal to do good and not much in the way of tools to achieve all that for the human family that is spawned in both my heart and mind. But there is no one, no interest that I seek to serve other than the common good. . . . . . .

It worries me sometimes that I am so inadequate. For every hour—even every moment of from dawn to dusk—there is before me the God-given privilege to enlarge men’s freedoms and make them content with justice.  

Those who would contest the validity of the judicial assumptions and actions of Frank Murphy now have the burden of demonstrating, if they can, that he was something less than an honest judicial statesman who gave to the Court one of its finest hours of humanitarian justice.  

The evidence that he was such a statesman is far too voluminous and convincing to permit a continuation of the unsupported assumption that he thought and acted as though his compassion were the sole measure of law.

Justice Brandeis once commented: “There is in most Americans some spark of idealism, which can be fanned into a flame. It takes sometimes a divining rod to find what it is; but when found . . . the results are often most extraordinary.” In Frank Murphy the spark of idealism was found and fanned into a high flame. The results were most extraordinary and significant in the development of the Supreme Court’s function in the American way of government.

69 Letter from Mr. Justice Murphy to author, Sept. 5, 1943. (Letter is in the possession of the author.)

70 "The decisive factor regarding work on this Court is whether a man is completely disinterested or not—meaning by 'disinterest' regard exclusively for (1) the result that judicial conscience and right require and (2) expressing that result as carefully as the best craftsmanship can achieve." Note, Frankfurter to Murphy, March 29, 1947. (Note is in the possession of the author.)

71 Quoted in Mason, Brandeis: A Free Man’s Life 592 (1946).
COMPARATIVE TELEVISION AND THE
CHANCELLOR’S FOOT

BERNARD SCHWARTZ*

An important and much criticized phase of the administrative activity of
the Federal Communications Commission is the granting and denial of
licenses to operate the various media of communications. Professor Schwartz
in this article makes a detailed analysis of the criteria used by the FCC in
licensing television stations, finds them unduly favorable to the large corporate
applicant, and more seriously, finds application of these criteria inconsistent
in similar cases, with the suggested possibility that extra-legal influence is the
predominating factor. To insulate these proceedings from undue influence,
Professor Schwartz suggests alternatively a separate tribunal to hear these
cases or a controlled system of competitive bidding for licenses.

On January 23, 1958, the New York Times published excerpts from
the memorandum submitted by the present writer, as chief counsel, to
the Chairman of the Special Subcommittee on Legislative Oversight of
the House of Representatives.¹ The memorandum, which suggested that
the Subcommittee hold its first hearings on the work of the Federal Com-
munications Commission, was sharply critical of the FCC.

Most of the public controversy that followed the Times publication
focused upon the charges of misconduct against certain FCC Commis-
sioners contained in the memorandum. All but ignored by the press and
the public were those portions of the document which took strong ex-
ception to the legal operations of the Commission, to which, in fact, the
great bulk of the memorandum was devoted.

From a legal point of view, the most important part of the memora-
dum was its critique of the comparative television decisions of the FCC.
According to it, there has been a striking modification in the criteria
employed by the Commission to guide it in these cases:

Such modification has been in the direction of diminishing the importance of criteria
such as local ownership, integration of ownership and management, and diversifi-
cation of control of the media of mass communications (all of which tend to favor
the small newcomer, without established broadcasting interests) and magnifying the

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¹ N.Y. Times, Jan. 23, 1958, p. 14, col. 1. The Legislative Oversight Subcommittee was
set up in March 1957 to investigate the federal regulatory agencies. For the steps leading
to its creation, see Subcommittee on Legislative Oversight, Interim Report, H.R. Rep. No.
1602, 85th Cong., 2d Sess. 2-10 (1958); Schwartz, The Professor and the Commissions
ch. 1 (1959).
weight given to the criterion of broadcast experience (which tends to favor the large established company, with extensive existing broadcast interests).\(^2\)

In a number of recent cases, indeed, the memorandum asserted, the experience factor has tended to be all but conclusive. The result, it was said, has been a growing number of decisions which increase the already pronounced tendency toward concentration of ownership in the broadcast field.

In addition, a disturbing inconsistency in the FCC decisions was noted:

Even more disquieting, perhaps, than the trend toward modification just noted is the fact that the Commission has not been consistent in its application of the modified criteria. Thus, alongside the decisions just noted, which appear unduly to favor the large applicant with extensive broadcast interests, there are other cases in recent years where the Commission has continued to give a preponderant weight to those standards, such as local ownership, integration of ownership and management, and diversification, which favor the small applicant without extensive interests in radio and television. Such inconsistency by the Commission may enable it to reach the result in a given case toward which it is predisposed, even though such result is contrary to its decisions in other similar cases.\(^3\)

Developments subsequent to the *Times* publication prevented the present writer from publicly presenting the materials upon which the conclusions just quoted were based. Nor, as it turned out, did the Legislative Oversight Subcommittee itself, embroiled as it became in the political controversy that led to the resignations of FCC Commissioner Richard Mack\(^4\) and Presidential Assistant Sherman Adams,\(^5\) adequately develop such materials in its hearings.

The present article represents an attempt to analyze the comparative television decisions of the FCC. Legal analysis in this area can be particularly fruitful, for it furnishes an opportunity to observe the administrative process in actual operation. All too many writings on administrative law are based upon theoretical conceptions which may or may not be translated into practical reality. By concentrating in depth upon the case law of an important federal agency, we can ascertain the extent to which there is a variance between theory and reality in this field.

**Public Interest**

The FCC is a typical modern regulatory agency. It has been vested with very broad powers under the Communications Act of 1934.\(^6\) Nor


\(^3\) Id. col. 5.

\(^4\) Id. March 4, 1958, p. 1, col. 1.

\(^5\) Id. Sept. 23, 1958, p. 1, col. 8.

has Congress really limited the Commission's authority by defined standards in the enabling statute. All that the act provides by way of a standard for the grant of a broadcast license is the catchall touchstone7 of "public convenience, interest, or necessity."8 The same standard is repeated (with minor variations) throughout the act.9

According to the Supreme Court, the public interest standard "is as concrete as the complicated factors for judgment in such a field of delegated authority permit."10 All the same, it is plain that such a standard is anything but mechanical or self-defining. On the contrary, it implies the widest areas of administrative judgment and therefore of discretion.11 In the words of a leading case, the statutory standard "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."12

One can go further and wonder whether a standard such as that contained in the Communications Act really furnishes any effective legislative guide. As Professor Davis puts it, "telling the agency to do what is in the public interest is the practical equivalent of instructing it: 'Here is the problem. Deal with it.' "13

A statute such as the Communications Act poses a very real problem to the Commission created by it. On the one hand, the agency is vested with the very widest powers of regulation—powers whose exercise may well be matters of life and death to the industry concerned. On the other, the agency has not been furnished by Congress with any actual guide to govern the exercise of its authority in specific cases. A standard like that of public interest in the Communications Act gives the Commission well-nigh complete latitude to act in individual cases as it wishes—and it is not even subject to the need for maintaining the corpus of its law consistent.

Such internal consistency in jurisprudence is, however, a prime requisite of any successfully functioning governmental organ. If it is to be attained by an administrative agency like the FCC, the Commission must itself fill in the gaps in its enabling statute by developing its own standards or criteria to guide it in the exercise of its authority in specific cases.

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7 See NBC v. United States, 319 U.S. 190, 216 (1943).
Such development of standards by the administrative expert is, indeed, one of the prime justifications for broad delegations of power to the administrative process. Unless a body like the FCC develops and consistently applies workable criteria to canalize the exercise of its statutory powers, such exercise must depend in individual instances upon the personal will of the Commissioners. Such purely personal justice is, by its very nature, unsatisfactory.

In the FCC, the problem has been essentially that of reducing to concrete terms the wholesale statutory standard of public interest. The problem has confronted the Commission in various administrative contexts: allocation plans and other rulemaking proceedings, general policy statements, license grants to sole applicants, license renewals, license transfers, license modifications and comparative license cases.

The manner in which the FCC has met the need to reduce the public interest standard to more meaningful criteria can best be seen in the comparative proceedings before the Commission. "It is in the comparative hearing context," the recent Barrow Report on Network Broadcasting points out, "that the Commission is afforded an appropriate forum for a consideration of the full spectrum of factors which may contribute to or detract from the ability of a given applicant to serve the public interest. This proceeding permits the Commission to consider in the fullest degree the qualitative elements entering into service to the public."14

The comparative case arises in the FCC when there is more than one applicant for a single broadcast license and the Commission must select the applicant it considers best qualified to serve the public interest. Under Ashbacker Radio Corp. v. FCC,15 when there are two or more applications for the same broadcast facilities, such applications are mutually exclusive and must be dealt with by the Commission in the same proceeding. In such a proceeding, the Commission must make a comparative choice between the competing applicants. The FCC in these cases is thus the forum for selecting from the mutually exclusive applications that party in whose hands a license will best serve the public interest.


15 326 U.S. 327 (1945).
The comparative nature of the Commission's choice was stressed by Mr. Justice Frankfurter in *NBC v. United States*.16 According to his opinion there, the FCC's licensing function is not limited to determining that there are no technological objections to the granting of a license:

If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation [of] ... radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity."17

It is important to bear in mind that the FCC itself performs a screening function in the initial stages of these comparative proceedings. Its job at this stage is to exclude all who do not meet minimum legal, financial and technical requirements. Only those who successfully run the gantlet of such preliminary screening remain to participate in the comparative hearing itself. The result is that all the applicants who remain for consideration in the final FCC decision have, in the words of the Barrow Report, "established their ability to serve the public interest."18 This means that all of the contestants in the hearing cases to be discussed have demonstrated affirmatively that they are qualified to receive licenses.

Nor is the Commission's choice among such applicants, all of whom possess at least minimum qualifications, made easier by the manner in which the applications themselves are drawn up.

The applications are boiler-plate affairs drawn up by professionals and sometimes used over and over again with different names. Each contender presents a formalistic sprinkling of locally prominent and judiciously representative types among its stockholders, and promises more in the way of a balanced program diet than it is ever called upon to deliver.19

The FCC itself has recognized this. "We would be deluding ourselves and the public," conceded the Commission in a 1954 opinion, "if we concluded that the program proposals will be produced exactly as represented."20

It is these factors which make the FCC's inconsistency of such significance in the comparative television cases to be discussed. The losing

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16 319 U.S. 190 (1943).
17 Id. at 216-17.
18 Barrow Report 163. See also id. at 59.
applicants in these cases have all demonstrated that they possess at least the minimum positive qualifications needed to operate a television station. The FCC has, it is true, held that their competitors were comparatively better qualified in the public interest. But the choice becomes a purely personal one unless the Commission consistently follows the same deciding criteria. It is because all the applicants in the cases to be discussed have shown themselves qualified to receive licenses that it is especially essential that the choice among them be made on the basis of consistent criteria. Otherwise, this vital field is left entirely open to the subjective judgment of the Commissioners.

**The Comparative Criteria**

The FCC itself has recognized the need for it to develop more detailed criteria to guide its application of the statutory standard of public interest in particular cases. In 1956, the Chairman of the FCC stated:

Congress in the Communications Act of 1934 or its several amendments refrained from laying down definitive criteria to guide the Commission in selecting the best qualified applicant among several competing for a particular channel or facility. Instead, it has left that task to the Commission to work out under the applicable standard, the public interest, convenience, and necessity.21

What are the criteria that the FCC has developed to govern its decisions in comparative television cases? This question was addressed to the Chairman of the Commission during a 1956 Senate hearing. The Chairman replied:

A list of the comparative criteria, which have been evolved and employed by the Commission in the comparative television cases, would include the following: Proposed programming and policies, local ownership, integration of ownership and management, participation in civic activities, record of past broadcast performance, broadcast experience, relative likelihood of effectuation of proposals as shown by the contacts made with local groups and similar efforts, carefulness of operational planning for television, staffing, diversification of the background of the persons controlling, diversification of control of the mediums of mass communications.22

Not all of the criteria listed by the FCC Chairman have the same relative importance. Thus, in the words of the Chairman in the same letter, “three factors on the list, diversification of the background of the persons controlling, participation in civic activities, or carefulness of operational planning for television, do not carry the same weight as the

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22 Ibid.
others."23 Nor is a rigid formulation of a relative scale of importance of the various comparative criteria feasible. Analysis of the FCC decisions does, however, enable an approximate delineation to be made. Such analysis demonstrates that the following are, in fact, the criteria which tend to be most relied upon in the vast majority of comparative television cases:

(1) local ownership;
(2) integration of ownership and management;
(3) past performance;
(4) broadcast experience;
(5) proposed programming and policies;
(6) diversification of control of the media of mass communications.24

DIVERSIFICATION AND PUBLIC INTEREST

A prime purpose of the system of regulation set up by Congress over broadcasting is to prevent overconcentration in the radio-television field. The Communications Act was enacted "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."25

The congressional policy of maintaining the field of broadcasting as one of free competition26 has strongly influenced the FCC in its application of the comparative criteria developed by it. Emphasis upon competition naturally leads to emphasis upon diversity of ownership in broadcasting. The Commission itself has recognized this:

One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free, competitive basis. . . . It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public than the operation of broadcast stations by a small and limited group of licensees.27

Diffusion of power within the broadcast industry bears a close rela-

23 Id. at 980.
26 Television Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 22, pt. 2, at 3582. The Communications Act itself expressly prescribes authorizations if "the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce." 48 Stat. 1088 (1934), 47 U.S.C. § 314 (1952).
tionship to the basic values upon which our system is grounded. The first amendment itself, the highest Court has stated, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Concentrated ownership of the awesome potential of the television channel presents obvious dangers, particularly when combined with extensive control of other mass media interests. Control of communications means control of the approaches to the mind of the public.

Three of the comparative criteria developed by the FCC are directly related to the prevention of overconcentration of ownership in communications. These are the criteria of local ownership, integration of ownership and management, and diversification of control of the media of mass communications.

The importance of local ownership as a criterion was recognized even before the FCC itself was established. "In a sense," said the Federal Radio Commission (the administrative predecessor of the FCC) some twenty years ago, "a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves." This concept of the radio and television station as a "local mouthpiece" has been expressly reitered, both by the FCC and the Supreme Court.

The concept of the broadcast facility as a local institution is strongly supported by a criterion favoring local ownership of stations. Local owners, firmly rooted in the community, are more likely to be cognizant of and responsive to local needs than are nonresidents who have no ties with the community. But the local ownership criterion does more than recognize the needs of the particular community. If the local resident is to be preferred, the inevitable effect is to make it harder for licensees to acquire multiple broadcast interests. The local ownership criterion tilts the Commission scales against the outside applicant who divides his time and attention among several broadcast markets, rather than devoting his full resources to the particular community for which the license is to be granted. Indeed, if local ownership were to be the determinative factor

32 See Barrow Report 125.
33 See Bamberger Broadcasting Serv., Inc., 3 Pike & Fischer Radio Reg. 914, 925 (1946).
34 Compare Barrow Report 556.
in comparative cases, it would make multiple ownership in broadcasting all but impossible.\(^35\)

The same is true of the criterion of integration of ownership and management. Under this criterion, an applicant is to be preferred to the extent that its owners will actually participate in the management of the proposed broadcast station. Such participation by those vested with the rights of ownership, says the Commission, is the best way of ensuring that the program proposals and policies contained in an application will really be carried out.\(^36\) The integration criterion, like that of local ownership, also has the inevitable effect of preventing concentration in communications. The large multiple owner cannot possibly personally manage the different stations (as well as other communications interests) which he owns. If the integration criterion is given decisive weight, the FCC must prefer applicants who have no other communications interests.

The surest way for the Commission to further the policy against concentration of ownership in communications, of course, is for it directly to prefer applicants who have no other communications interests. This is what the FCC has sought in developing a specific criterion of diversification of control of the media of mass communications. Under it, the Commission must consider the existing communications interests of competing applicants. It will then award a preference to the applicant which does not have other such interests. An important 1946 decision reads:

The Commission is of the opinion that where there is a choice between two applicants, one of whom has a television station and another which does not, public interest is better served by granting a license to the newcomer .... Under this policy, it is possible for the maximum number of qualified people to participate in television and not have it restricted to a few large interests.\(^37\)

A Commission fully cognizant of the values which the Congress sought to promote in setting up a system of communications regulation will give those criteria which prevent concentration of ownership the highest priority on the comparative scale. In the eloquent words of an FCC member at the beginning of 1953,

The insistence in public policy upon the broadest possible diversification of control over our mass media of communications is one based upon more than mere

\(^{35}\) Except insofar as multiple owners would acquire their interests through transfers purchased from successful grantees in the comparative cases.


academic or philosophic interest. . . . In the economic sphere, diversification permits a fuller measure of competition by and between a larger, energetic and more independent number of participants that is productive of the maximum development of the media in response thereto. And in other non-economic areas of the public interest, such diversification of control among multiform interests serves to bring about a greater freedom of access to communications facilities that gives, in the context of modern times and problems, fuller meaning and scope to our nation's and each individual's freedom of speech, viewpoint and conscience.38

To a Commission which adheres to this view, prevention of concentration will be the lodestar of communications regulation. Such a Commission will give all but decisive weight to the comparative criteria that prevent concentration, i.e., local ownership, integration of ownership and management, and diversification.

THE MODIFIED CRITERIA

The values which a regulatory agency will seek to promote in practice are, of course, closely related to its members' own feelings with regard to the goals sought to be attained by the Congress in enacting the particular scheme of regulation. As already noted, the FCC was created by the Communications Act for the purpose of regulating broadcasting in the public interest. But vacancies on the Commission in recent years have, in the words of a Reporter article, "successively been filled by men to whom the whole idea of regulation is clearly as distasteful as integrated swimming pools to a Daughter of the Confederacy."39

Under the criteria developed by prior Commissions, diversification of broadcast ownership in small local owners was a primary purpose of regulation. Concentration of control was seen to be basically incompatible with the political and economic values which the Communications Act was intended to further. To the Commission of the past five years, on the other hand, concentration of ownership in radio and television is not necessarily a matter for governmental concern. On the contrary, to a Commission which echoes the sentiment of its past Chairman as being "pretty much on record as believing in as few controls of business as possible,"40 concentration is to be regarded as an inevitable development in the economy, with which the Government should not interfere. In 1956, John C. Doerfer, the present FCC Chairman, was questioned at a hearing of the House Antitrust Subcommittee. In the

39 Bendiner, supra note 19, at 26.
40 Ibid.
course of the questioning, Mr. Maletz, the Subcommittee counsel, read the conclusion of a 1941 FCC report to the effect that the record revealed at every turn a dominant position of the network organization in the field of radio broadcasting. He then asked the present FCC Chairman:

Would that be a matter that would be disturbing to you if the same situation were shown in television broadcasting?

Mr. Doerfer: Not at all.
Mr. Maletz: It would not disturb you?
Mr. Doerfer: Not at all.
Mr. Maletz: Explain why not.
Mr. Doerfer: Somebody has to be dominant. Somebody is big... 41

It is hardly surprising that a Commission which believes in the inevitability of bigness should modify the criteria which govern its comparative decisions so as to give ever-diminishing weight to those criteria which promote diversification of ownership. Such a modification has occurred throughout the field of broadcasting. It is in the television cases, however, that it has been of particular practical significance. Because of the so-called "freeze" imposed by the FCC in September 1948, 42 which stopped all processing of applications for new television stations until mid-1952, the vast majority of television licenses have been awarded by the Eisenhower-appointed Commission. It is the comparative criteria employed by the present Commission that have governed the grant of four out of five television channels. 43 It is the present FCC, too, which has, for all practical purposes, determined the extent to which television station ownership should be concentrated in hands which already control other communications media.

As noted above, the comparative criteria which bear a direct relationship to the prevention of overconcentration are those of local ownership, integration of ownership and management, and diversification itself. Where these criteria are dominant, the Commission is bound to decide in favor of the small, local applicant, without other communications interests. If they are to be relegated to a lesser plane, the Commission's decision process will, on the contrary, be weighted in favor of the large

41 Television Hearings, supra note 26, at 3153-54.
42 See Barrow Report 22.
43 Only 108 of the 475 commercial stations in operation on July 1, 1957, received their licenses before the lifting of the "freeze." In addition, 53 VHF and 121 UHF television stations not yet on the air were authorized by the post-"freeze" FCC as of July 1, 1957. See Barrow Report 31.
outside applicant, who already controls extensive communications interests since, as we shall see, the other criteria employed by the Commission clearly favor such an applicant.

It is precisely the weight given to the criteria of local ownership, integration and diversification which the present FCC has been changing. "In the case at bar," noted the Court of Appeals for the District of Columbia in 1956, "there appears some suggestion that the Commission has changed, or is changing, its views as to the dominant importance of local ownership and as to the evil of a concentration of the media of mass information."\(^{44}\)

1. Local Ownership

On March 8, 1957, the FCC decided a comparative case involving the grant of channel 13 in Indianapolis, Indiana (Indianapolis Broadcasting, Inc.).\(^{45}\) There were four applicants before the Commission. Three were made up almost entirely of local residents. The fourth, Crosley Broadcasting Corporation, already had extensive broadcast interests, and was a wholly owned subsidiary of the AVCO Manufacturing Corporation, a large New York holding company. The Commission’s decision awarded the Indianapolis channel to Crosley despite the fact that there was "no local residence shown for any of the officers or directors of Crosley or its parent AVCO."\(^{46}\)

The Indianapolis decision demonstrates, in a striking manner, the changed attitude of the FCC toward the importance of the local ownership criterion. "I am not satisfied," caustically declared a dissenting Commissioner, "that adequate consideration has been given to the application of criterion of many previous decisions of the Commission. The opinion gives scant attention to local ownership, an important factor in many previous cases."\(^{47}\)

A Commission which adhered to the concept of the broadcast facility as a "local mouthpiece" would hardly prefer the application of an absentee owner who had no real identification with the community to be served. Just two years before the Indianapolis decision, the FCC, in Westinghouse Radio Stations, Inc.,\(^{48}\) was confronted with an application comparable to that of Crosley for a television channel in Portland, Oregon.

\(^{46}\) Id. at 933.
\(^{47}\) Id. at 951 (dissenting opinion of Commissioner Hyde).
There, too, there were three local applicants and an outside corporation, Westinghouse Radio Stations, which was wholly owned by a large eastern corporation, Westinghouse Electric Corporation.\(^{49}\) In denying Westinghouse's application and granting that of one of the local applicants, the Commission strongly stressed the criterion of local ownership. Westinghouse, said its opinion, is an absentee owner. "To Portland, the east is nearly a continent away. To Portland, its civic affairs and its community needs would find more facile expression and development through a television facility whose guiding principals are locally resident or indigenous to the Pacific Northwest of which it is a part."\(^{50}\)

In the present FCC, it is the *Portland* decision, not that in *Indianapolis*, that constitutes the greater aberration. In other recent cases also, applicants with very strong elements of preference on the basis of local ownership lost out to absentee multiple owners, who had no real roots in the particular community. Thus, channel 11 in St. Louis was awarded to the Columbia Broadcasting System (one of the two major broadcast networks), all of whose officers, directors and holders of more than one percent of voting stock resided outside the St. Louis area (*St. Louis Telecast, Inc.*).\(^{51}\) The application of the New York controlled corporation, already a giant in the field of broadcasting, was preferred over those of three applicants which were almost entirely owned by local residents. Similarly, channel 8 in Tampa, Florida, was granted to a newspaper, ninety percent of whose stock was owned by nonresidents.\(^{62}\) The two losing applicants\(^ {53}\) were almost entirely locally owned.\(^ {64}\)

The *Indianapolis*, *St. Louis*, and *Tampa* cases show clearly that there is a trend of FCC decisions toward attaching ever-diminishing importance to the factor of local ownership.\(^ {55}\) The Commission has not,

\(^{49}\) Westinghouse, like Crosley, also had other extensive broadcast interests.

\(^{50}\) Barrow Report 127.

\(^{51}\) 12 Pike & Fischer Radio Reg. 1289 (1957).


\(^{53}\) One of the losing applicants also owned a newspaper in the area.

\(^{54}\) See Scripps-Howard Radio, Inc., 11 Pike & Fischer Radio Reg. 985 (1956), where a Knoxville channel was awarded to an applicant the majority of whose stock (60%) was owned by nonresidents as against an applicant 100% locally owned. See also Evansville Television, Inc., 11 Pike & Fischer Radio Reg. 411 (1956), where an Evansville, Indiana channel was given to an applicant whose dominant stockholders were nonresidents, as against a locally owned applicant; and Petersburg Television Corp., 10 Pike & Fischer Radio Reg. 567 (1954), where a Petersburg, Virginia grant was made to an applicant controlled by a nonresident as against a locally owned applicant.

\(^{55}\) Barrow Report 127.
however, remained content with refusing to give the preferential weight to local ownership that had been accorded in previous years. In a number of recent cases where it has purported to follow the local ownership criterion, it has applied it in such a way as to change its impact.

The type of case referred to is illustrated by Travelers Broadcasting Serv. Corp. At issue there was the only VHF television channel allocated to Hartford, Connecticut. There were two competing applicants. One consisted of a number of local citizens formed as a group to apply for the channel. The other was controlled by a giant insurance company, all but a fraction of whose stock was owned by persons residing outside the Hartford area. If the test of local ownership were to be applied here, it would seem that the first applicant should be entitled to a preference. But the Commission did not, in this case, look to the residence of the owners (i.e., the stockholders) of the second applicant. Instead, it looked to the residence of its officers and directors, ignoring the fact that they were not the owners of the company. This approach enabled the Commission to grant the channel to the second applicant, i.e., the insurance company.

After the FCC decision in this case, the losing applicant filed a petition for rehearing in which it asserted that the Commission had misapplied the local ownership criterion, claiming that "local residence is being used as a new criterion rather than local ownership." The Commission, in rejecting the petition, declared, "this is a contention without substance, all parties considered being stockholders or principals of the applicants in responsible positions."

It is hard to see how the Commission's statement really answers the claim that the local ownership criterion has been changed. The very purpose of the criterion is to ensure that broadcast outlets are owned by people who have roots in the community being served. The local ownership of an applicant ensures that the station will respond to the needs of the community. But the criterion is distorted if the residences of those who do not have ownership interests are controlling. Where a corporate applicant is involved, it is the stockholders who have the necessary ownership interest. To look to the residence of the corporate

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58 Id. at 304.
60 If the applicant does not have any stockholders, the situation is, of course, a different one. See, e.g., Triad Television Corp., 25 F.C.C. 848, 1017 (1958); Loyola University,
managers alone, as the Commission did in the Hartford case, is subtly to change the local ownership criterion itself and to do so in a way that enables the application of a large corporate applicant to be preferred. 61

2. Integration of Ownership and Management

To the press and the public, the Miami Channel 10 case (WKAT, Inc.), 62 has become notorious as the "horrible example" in comparative television proceedings. The hearings held by the Legislative Oversight Subcommittee on that case revealed all the elements of a major administrative scandal, culminating in the resignation and subsequent indictment of an FCC Commissioner. 63 Those who had studied the Commission's comparative television decisions had, however, been disturbed by the Miami Channel 10 decision even before it became the subject of congressional hearings. For it sharply pointed up a modification in the FCC's application of its criterion of integration of ownership and management comparable to that already noted with regard to local ownership.

In the Channel 10 case there were four applicants for the contested Miami channel. The principal contenders were WKAT, Inc. (all of whose stock was owned by Colonel A. Frank Katzenline) and Public Service Television, Inc., a wholly owned subsidiary of National Airlines. The examiner had found in favor of WKAT, but the Commission reversed and awarded the channel to Public Service. 64

In the FCC's decision, the criterion of integration clearly appears to have played a major part. 65 The record showed that Colonel Katzenline, the sole stockholder of WKAT, would closely supervise its broadcast activities. While the exact time he would give to the day-to-day television operation was not precisely spelled out, it would certainly, in the


For cases looking to the residence of stockholders for purposes of the local ownership criterion, see note 125 infra.


64 The court of appeals remanded the case to the FCC because of the facts revealed during the Legislative Oversight Subcommittee hearings. WKAT, Inc. v. FCC, 103 U.S. App. D.C. 324, 258 F.2d 163 (1958).

65 12 Pike & Fischer Radio Reg. at 75-76.
Commission's own words, "appear that he would devote a considerable amount of time to the television station." As against such direct participation by the one hundred percent owner of WKAT in management, Public Service could point only to a planned participation of certain of its officers and directors in the running of the television station. It especially relied on the fact that Mr. George T. Baker, who was both its president and the president of its parent company, National Airlines, proposed to spend seventy-five percent of his time on the operation of the television station. But those who would help to manage Public Service's station had less than an eighteen percent stock interest in the parent company which owned all of Public Service's stock.

Despite the seeming superiority of WKAT in integration (100% as against 18%), the Commission found that "a distinct preference is awarded Public Service over WKAT" with regard to integration. It did so by looking to the integration not of Public Service's owners (i.e., its stockholders) into its management but to the integration of its officers and directors. The integration of Public Service's principal officer was then given even greater weight than that of the one hundred percent stock interest of WKAT.

What the FCC did here was comparable to what it has done in applying the criterion of local ownership. And here, too, the change in approach has been favorable toward the large corporate applicant whose owners cannot possibly participate directly in managing the proposed television station. The integration criterion was intended to promote diffusion in broadcast ownership and favor the application of the small applicant. An ad hoc applicant formed of a group of local residents or one wholly owned by one man or a few men can more easily meet the integration test literally applied. A large corporation which already has other business interests cannot meet this test, unless the Commission treats its principal officers as owners for purposes of the integration criterion.

In addition, for the Commission to look to the integration, not of the stock owners, but of the managers of a corporate applicant, is for it to lose sight of the underlying purpose of the integration criterion. Integration, said the Commission a few years ago, "not only provides some assurance that program proposals and policies enunciated in hearings

66 Id. at 64.
67 Id. at 20.
68 Id. at 66.
before the Commission, will be carried out, but also goes to the very root of continuous operation in the public interest." This is so because the people who will operate the station are the owners themselves, with the full control that their ownership gives them. When the station is to be run by nonowners, there is no comparable assurance that their proposals and policies will continue to be carried out. It is thus, as the FCC put it in one of the first cases after the lifting of the television "freeze," "far more probable that the promises and commitments made in applications contemplating a high percentage of integration of ownership in management will be carried into execution than in the case of applications not proposing such integration or a relatively small percentage thereof."

For the FCC to look to the integration, not of a corporation's owners, but of its principal officers, as it did in the Miami Channel 10 case, is for it to convert the criterion of "integration of ownership with management" into one of "integration of management with management." The Commission itself recognized this in the 1956 Raleigh case (WPTF Radio Co.). "We note, however," reads its opinion there, "that WPTF's point of reliance, in this connection, speaks more in terms of integration of management and operation, than it does of integration of ownership with management. We are more vitally concerned with the latter aspect."

Despite this language in the Raleigh case, there are other important recent decisions in which the FCC has followed its approach in the Miami Channel 10 case in applying the integration criterion. It was this approach which enabled the Commission to favor the applications of the large corporate applicants in the already-discussed Indianapolis, St. Louis, Tampa and Hartford cases. In the St. Louis case the Commission expressly conceded that there was "no integration from a stock ownership standpoint"; while in the Hartford decision it was noted that "ordinarily, so small a percentage of stock ownership would not be en-

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71 12 Pike & Fischer Radio Reg. 609 (1956). For other cases where the Commission has looked to the integration of stockholders, see note 125 infra.
72 Id. at 658b-58c.
77 12 Pike & Fischer Radio Reg. at 1378.
titled to great weight."78 By following the Miami Channel 10 approach, nevertheless, it was able to ignore the superior ownership integration of the losing applicants. And the same has been true in a number of other recent comparative cases.79

In addition to modifying the integration criterion in the manner just discussed, the FCC has developed the principle that the criteria of local ownership and integration are to be given much less weight when there is available in the record materials on the past broadcast performance of any of the applicants. The starting point for this development was a statement made in the 1954 case of WJR, The Goodwill Station, Inc.80 After referring there to the importance of local ownership and integration, the Commission declared:

However, where a record establishing the past performance of the applicants in this regard is available, such factors become less determinative. . . . Thus, when a record of an applicant's past performance in the operation of a broadcast station is available, such factors as local residence . . . and integration of ownership and management become less critical.81

The principle thus stated has been applied in a number of more recent comparative television decisions.82 Its significance for our purposes lies in the fact that it, too, enables the FCC to prefer the applications of large broadcast owners, who might otherwise have little chance of meeting the local ownership and integration criteria. The applicant who already has extensive broadcast interests always has a past record. If such record permits the Commission to ignore the criteria which are unfavorable to such applicant, it is hardly surprising that so many of the recent FCC decisions promote concentration rather than diffusion of broadcast ownership.

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78 12 Pike & Fischer Radio Reg. at 802.
81 Id. at 260d. The Commission cited Hearst Radio, Inc., 6 Pike & Fischer Radio Reg. 994 (1951), in support of this principle. Since it was a renewal case, however, it is not directly relevant as a precedent here.
3. **Diversification of Communications Control**

As already noted, it is the *Miami Channel 10* case\(^{83}\) that has received more public attention than any other FCC decision. To those who have strongly supported the Commission's policy in favor of diversification of control of the media of mass communications, however, the FCC's decision in another Miami comparative case—that involving the award of channel 7 in that city (*Biscayne Television Corp.*)\(^{84}\)—was even more disquieting.

There were four competing applicants in the *Miami Channel 7* case. Three were made up of groups of local applicants who had no identification with any communications media. The fourth applicant, Biscayne Television Corporation, on the other hand, was in an entirely different position. Its two leading stockholders separately controlled the only two daily newspapers in Miami. In addition, each of these stockholders owned a radio station in Miami, as well as very large newspaper and radio and television interests elsewhere. The Biscayne application, in other words, was made by the dominant communications owners in the area, who already had complete ownership of the local press and much of local radio. If there was any case where the diversification criterion appeared controlling, it seemed to be this one. The Commission, nevertheless, awarded channel 7 to Biscayne.

A comparable decision, involving the grant of channel 5 to WHDH in Boston\(^{85}\) has been the subject of sharp controversy.\(^{86}\) There were four contenders in the *Boston* case. Two were made up of local Bostonians who had organized for the purpose of acquiring the station and whose other communications interests were insubstantial. The other two applicants had extensive communications interests. One, DuMont, owned television stations in New York and Washington and was owned by a large motion picture company which also had broadcast interests. The other, WHDH, was owned by the Boston Herald-Traveler Corporation, publisher of the largest morning and afternoon newspapers, as well as owner of one of the two fifty-kilowatt radio stations in Boston.

The *Boston* case is striking, not only because of its fact pattern, but also because of the interest taken in it by the Congress. After the ex-

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86 The reason for the controversy may be that the winning applicant in Boston was a newspaper affiliated with one political party, while that in Miami was made up of a combination of Republican and Democratic newspapers.
aminer had decided the case in favor of one of the groups of local applicants without extensive communications interests (he had rejected the WHDH application on the ground that, to give it the channel, would be to place in the same hands no fewer than five "instrumentalities for the dissemination of news and views within the same area"87), the FCC Chairman was questioned before a House committee. Telling about the incident later, in a speech on the floor of the House, a Congressman declared,

Asked what the Commission would do about an applicant which publishes two daily newspapers in a community and operates the only clear-channel fifty-thousand-watt broadcasting station,88 and is tainted with a long record of monopoly,89 the reply was clear; there would be a red flag on such an applicant's petition, our committee was told.90

Despite this assurance by the FCC Chairman, however, the Commission, early in 1957, reversed its examiner and awarded channel 5 to WHDH, the applicant owned by the Boston Herald-Traveler.

What was it that led the FCC thus to ignore the diversification criterion and award the Miami and Boston channels to applicants who already owned such extensive communications interests?

In both the Miami Channel 7 and Boston cases, the winning applicants were found clearly superior in meeting the criterion of broadcast experience. What the FCC has done in these cases has been to treat the experience of the competing applicants as the key element in influencing its decisions. The greater broadcasting experience of Biscayne and WHDH91 was found to outweigh their clear deficiencies with regard to the diversification criterion. In the Miami Channel 7 case, the Commission expressly referred to the broadcast experience of Biscayne's princi-

88 There actually appear to be two such radio stations in Boston. See 13 Pike & Fischer Radio Reg. at 582. (Author's footnote.)
89 The parent company of the Herald-Traveler had been found to have violated the antitrust laws. See United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953). (Author's footnote.)
90 103 Cong. Rec. 5001 (1957) (remarks of Representative Dingell). One may have some doubts about the propriety of the congressional questioning of the FCC Chairman on a pending case. See Newman & Keaton, Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?, 41 Calif. L. Rev. 565, 574 (1953).
91 It should be noted that this was not true as between WHDH and DuMont in the Boston case. DuMont was, however, given only a slight preference over WHDH on this factor, and it was held outweighed by the preferences given WHDH on all other factors. 13 Pike & Fischer Radio Reg. at 571, 586.
pals as "a vital element."92 In Boston, the FCC opinion emphasized the need for "specialized skills" in broadcasters "acquired through a substantial period of experience,"93 and referred to the factor of experience as of "substantial importance."94 In actuality, as a dissenting Commissioner points out, the experience and past broadcast record of WHDH were used by the Commission completely to outweigh the superiority of competing applicants in other respects.

The effect of these preferences for other applicants is then neutralized by the majority's rationale that "... the assurance of effectuation which is gathered from its [WHDH] superior broadcasting record over a period of years in the community concerned and the experience qualifications which its principals demonstrate ... [merit a grant to WHDH] notwithstanding that the diversification policy of the Commission would be better served by a grant to either Greater Boston or MBT."95

In a number of other recent cases, too, the FCC appears wholly to have subordinated the need for diversification to the criterion of broadcasting experience. In them, as in Miami Channel 7 and Boston, large multiple owners of broadcast and other communications interests were preferred despite the fact that competing applicants were substantially superior in terms of diversification. Thus, in the already-referred to Tampa Tribune case,96 the channel was awarded to the publisher of Tampa's only morning newspaper (which also owned a radio station) because of its experience, as against an applicant which owned no communications interests in the area.97 And the same approach was followed in decisions granting channels to newspaper and radio owners in Rochester, New York,98 Paducah, Kentucky,99 and Knoxville, Tennessee.100

In the Indianapolis101 and St. Louis102 cases (discussed above), the ex-

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94 Id. at 569.
95 Id. at 588 (dissenting opinion of Commissioner Bartley).
97 A third applicant in the case also owned a newspaper and radio station in the area.
perience of the winning applicants, a large multiple owner and one of the two major national networks, was the factor which overcame the nonpossession of any comparable communications interests by competing applicants.\textsuperscript{103}

The FCC emphasis in these cases on the experience of television applicants is a development of great significance. It bears a direct relationship to the principle, discussed in the prior section, that the local ownership and integration criteria are to be minimized where an applicant's past broadcast record is available. It is the large multiple owner who has both a past broadcast record and experience, and, the larger his ownership, the greater will be his advantage in this respect. It is the small, local newcomer who inevitably has neither past record nor experience in broadcasting. Thus, as the Barrow Report points out, "diminution of importance accorded diversification must necessarily carry with it a dilution of those factors which it frequently tends to reinforce, such as local ownership."\textsuperscript{104}

The FCC's recent emphasis on broadcasting experience must inevitably involve a disregarding of the diversification policy. If, on the basis of his past experience, one already in the communications business is to be preferred, what room is really left for the promotion of diversification? The Commission's stress on experience, in the words of the Barrow Report,

would appear to encourage increased concentration of control over broadcast facilities since it is only through the previous operation of such facilities that experience is gained. . . . [C]onsequently, this is a preference which always operates in favor of the owner of other broadcast facilities and against new entry which would provide greater diversification . . . .\textsuperscript{105}

The Court of Appeals for the District of Columbia also has recognized that emphasis on experience must necessarily involve a watering down of diversification.\textsuperscript{106} On review of the FCC's decision in the Miami Channel 7 case, the court stated:

The comparative qualifications of the competing applicants made the choice between them a close one. This is emphasized by the decided advantage of the other applicants with respect to diversification of media of mass communication, long considered important because of the public interest in non-concentration of control

\textsuperscript{103} See 12 Pike & Fischer Radio Reg. at 949-50; 12 Pike & Fischer Radio Reg. at 1383, 1391.

\textsuperscript{104} Barrow Report 124.

\textsuperscript{105} Id. at 119.

\textsuperscript{106} Sunbeam Television Corp. v. FCC, 100 U.S. App. D.C. 82, 243 F.2d 26 (1957).
over, and of the sources of, media of communication. The Commission held “there can be no question that each of the other three applicants is entitled to a preference over Biscayne on this factor.” The importance of this preference given to the appellants over Biscayne is intrinsically obvious. But the importance of Biscayne’s own preferences based on the broadcast experience and past records of its principals is not so obvious. In considerable part these preferences appear to have arisen from Biscayne’s concentration of media of mass communication, which is itself an adverse rather than a preferential factor.107

In other words, experience and diversification are criteria which are inversely related: experience in broadcasting can be acquired only through ownership of or affiliation with existing radio-television facilities.108 The author of the Barrow Report in a 1958 Commission hearing stated, “The Commission has from time to time emphasized a record of sound past performance as the best indication of future broadcasting service. This gives the owner of one or more stations a ‘leg up’ in the race for another station. The scales are tipped in the multiple owner’s favor and ‘new blood’ has less opportunity to enter broadcasting except in the small, risk-venture markets.”109 The large concentrated broadcast owner is bound to be preferred if experience becomes the primary consideration110—to the clear detriment of the diversification policy.

The cases just discussed lend clear support to the conclusion of the Barrow Report that “the seemingly vigorous support given the diversification policy by the Commission in many of its official statements has been seriously eroded by a long series of qualifying decisions.”111 Nor can one who is cognizant of the importance of the values served by diversification help but be disturbed by its dilution in the decisions discussed. Particularly disquieting is the FCC’s apparent lack of concern at granting an available television channel to the owner of a dominant local newspaper and radio station.112 As a dissenting Commissioner well put it in Ohio Valley Broadcasting Corp.,113 concerning a television channel in Clarksburg, West Virginia,

107 Id. at 84-85, 243 F.2d at 28-29.
110 See Southland Television Co., 10 Pike & Fischer Radio Reg. 699, 744 (1955), where the FCC itself recognized that, if past records as a broadcast licensee were the decisive factor, “newcomers to broadcasting would be at an insurmountable disadvantage.”
111 Barrow Report 121-22.
112 See cases cited notes 52, 84, 93, 98-100 supra.
The power and influence that go with a television station in the VHF band, combined with the power and influence this applicant already has through its vast broadcasting, newspaper and other interests, may, by their sheer weight, not only adversely affect the development of competitive practices in the field of mass communications in that area, but also restrict the opportunities of the people of West Virginia to receive views and information from diverse sources, which is so essential to the welfare of the public.114

For the Commission to find such concentration of television, radio and newspaper interests in the hands of one owner to be in the public interest is for it wholly to lose sight of the basic policies underlying the system of regulation ordained by the Congress.

Every recent study of broadcasting, from the FCC's own Barrow Report115 to congressional analyses,116 has emphasized concentration of ownership and control as its dominant characteristic. In modifying its comparative criteria in the manner discussed, the FCC has, without any doubt, greatly contributed to the trend toward concentration. In 1953, at the very beginning of the Commission's tendency in these cases to accord ever-diminishing significance to diversification, Commissioner Hennock caustically commented:

Today we open a vast Pandora's Box, one forbidding in aspect and one that will not easily be shut again. Our action here encourages the drying up of the well-springs of diversification. It may possibly forecast the bleak day of complete elimination of the small or moderately sized and fully independent operator from all of the broadcasting, particularly television.117

**Ownership, Integration and Inconsistency**

If the cases just discussed stood alone, one could (as the remarks in the prior paragraphs indicate) strongly disagree with the FCC's tendency in them to favor the applications of large broadcast operators. Such disagreement would, however, be one on the basic policies underlying the Communications Act, on which reasonable men may differ. Certainly, it may be said, the FCC is entitled to its own views on the extent to which it should promote diversification. Nor is the Commission's present approach in these cases necessarily improper because it represents a sharp modification of that followed by earlier Commissions. An ad-

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115 Barrow Report 170-206.


ministrative agency has the right to change its jurisprudence to accord with its changed conception of the public interest. In the words of the Court of Appeals for the District of Columbia, in *Pinellas Broadcasting Co. v. FCC*, a case where the FCC's changed view on local ownership and diversification was challenged, "it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." Even if the FCC is drastically modifying the application of its comparative criteria, "in so doing it is operating within the area of legislative-executive judgment."

But the FCC decisions that have been discussed (which sharply alter the weight given to those criteria which seek to prevent concentration in communications ownership and control) do not stand alone. Side by side with them in the FCC reports are decisions in which the present Commission appears to apply the criteria of local ownership, integration of ownership and management, and diversification as zealously as did its pre-1953 predecessors.

In discussing the cases in which the Commission has continued to apply the criteria which promote diversification, we shall be dealing with that aspect of the FCC's operation that has most troubled outside observers. The results in these cases, we shall see, are often diametrically opposed to those reached in the cases already discussed. The inconsistency here has, indeed, been so striking as to lead some to wonder whether Commission decisions have really been governed by any defined standards. As a popular analysis of the comparative television cases puts it, "the FCC seems to have fallen into such a morass of inconsistency and ad hoc judgments that there now seems to be almost no rule of law in parceling out these fabulously valuable public assets. As one former commissioner puts it, they are being 'handed out like door prizes.'"

We have already seen how the FCC has, in cases like *Indianapolis* and *St. Louis*, all but disregarded the local ownership criterion. In others, like *Hartford*, it applied the criterion in such a way as to favor

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119  Id. at 238, 230 F.2d at 206.
120  Ibid.
the large corporate applicant by looking to the residence, not of the applicant's owners (i.e., its stockholders), but of its officers and directors. There are, however, also many decisions in recent years in which the Commission has continued to apply the local ownership criterion strictly. Thus, there have been cases involving corporate applicants, basically similar in this respect to the *Hartford* case, where the Commission did look to the residence of the stockholders, not just of the officers and directors, to determine whether there was local ownership in the particular applicant.\(^{125}\)

The same has been true of the criterion of integration of ownership and management. In the *Miami Channel 10* case\(^ {128}\) and others like it, we saw how the Commission has tended to convert the integration test into one of "integration of management with management," by looking to the participation in management of a corporate applicant's officers and directors rather than to that of its stockholders.\(^ {127}\) Yet there are other decisions, which involved applicants similar to that in *Miami Channel 10*, where the Commission has continued to place decisional stress upon the integration of those with stock interests.\(^ {128}\) The results in these cases

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\(^{127}\) Id. at 64-66.

\(^{128}\) See City of Jacksonville, 12 Pike & Fischer Radio Reg. 113, 180r (1956), where the Commission said, "the concept of integration, strictly speaking, involves participation by the ownership and not by those who represent ownership . . . ."

have, of course, been unfavorable, so far as any integration preference was concerned, to the particular corporate applicants, inconsistent though such results may seem with a decision like *Miami Channel 10*.

Not unnaturally, the FCC's inconsistency in these cases has made things difficult for its examiners. In a number of cases, the examiner sought to follow what he believed to be the new thrust of Commission jurisprudence, as enunciated by decisions like *Miami Channel 10*, and to look to the integration of the particular corporate applicant's officers and directors, even though they did not have substantial stock interests. In three of these cases, however, the FCC reversed, saying that the examiners had misapplied the integration criterion. The examiner, said the Commission in one of these cases, erroneously looked to the integration of "officers and directors, not necessarily also stockholders." In another, pungently declared the Commission, "as a first condition, by the very definition of the term, the integration proposed must be by persons beneficially interested in the applicant, as owners thereof"—a condition which applies, of course, with equal force to the corporate applicants involved in cases like *Miami Channel 10*.

In our prior discussion of integration, we dealt with the recent cases in which the FCC applied the principle that local ownership and integration are to be minimized where a past broadcast record is available. In the 1956 *Fresno* case (*California Inland Broadcasting Co.*), the examiner had followed this approach and rejected the integration factor as of no real decisional significance in view of the fact that both applicants had a record of past broadcast performance in the Fresno area. Here, however, the Commission reversed, saying the examiner had not acted in "accord with previous Commission decisions." Even if there is a past record, says the FCC opinion, local residence and integration are of decisional significance. There are other decisions, too, where the FCC has followed the same approach, declaring that local ownership and

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133 Id. at 306f.

134 Id. at 306d-g. In this case, integration seemed to be the determinative factor.
integration must be given weight even where there is a past record—
inconsistent though these decisions may be with those already discussed,
where the Commission applied the principle that a past record permits it
to ignore the local ownership and integration criteria.

The FCC's inconsistency with regard to integration is pointed up by
the division in the Commission in the 1954 Tampa Tribune case.
The decision there did not give weight to the fact that there was prac-
tically no integration in the winning applicant, applying the principle that
integration is not important where a past record is available. Commissioner Bartley, who dissented, stated his belief that this principle
should not apply "where the past records of broadcast experience . . .
are substantially equal." Yet it was precisely this Bartley view that
the Commission itself followed in two more recent cases, stating in one
of them that the principle "that when the record of an applicant's past
performance in the operation of a broadcast station is available, such
factors as local residence . . . and integration of ownership and manage-
ment become of 'minor significance' . . . is predicated upon a clear
preference accorded an applicant as to its past broadcast record."

On the other hand, in another recent case, City of Jacksonville, involving
the grant of a channel in Jacksonville, Florida, the superiority in integration
of the winning applicant was a determinative factor despite the
clear preference accorded the past broadcast record of the losing
applicant.

Sometimes, the inconsistency of the Commission in applying the local
ownership and integration criteria appears so striking as to border on

135 WPTF Radio Co., 12 Pike & Fischer Radio Reg. 609, 670a (1956); City of Jackson-
ville, 12 Pike & Fischer Radio Reg. 113, 180p-q (1956); Evansville Television, Inc., 11
811, 872 (1955); WSAV, Inc., 10 Pike & Fischer Radio Reg. 402, 430o (1955); Tampa
Times Co., 10 Pike & Fischer Radio Reg. 77, 132 (1954). In the already discussed Boston
case, integration was a determinative factor in favor of WHDH against DuMont, although
both had past records.
137 Id. at 770c.
138 Id. at 770s.
(Emphasis added.) See also WPTF Radio Co., 12 Pike & Fischer Radio Reg. 670a, 670f
(1957).
140 12 Pike & Fischer Radio Reg. 113, 182 (1956). The inconsistency here becomes even
greater if we bear in mind that the decisions cited in the prior note were rendered on
petitions for rehearing. The original decisions which they confirmed were both rendered
by the FCC in 1956, the year when the Jacksonville case was also decided.
ludicrous. The Commission has emphasized that meeting the criterion of local ownership does not depend on the length of local residence. If both applicants are locally owned, one will not be given a preference merely because its owners happen to have resided longer in the community. For example, in its July 1957 Oakland decision (Television East Bay), the Commission treated an applicant's largest stockholder who had resided in the area for only two years as a local resident, enabling the applicant to score a preference on the local ownership criterion.

In the June 1957 Orlando case (WORZ, Inc.), the fifty-five percent stockholder of the losing applicant had maintained an apartment in Orlando since 1950 and bought a home there in 1952. Since then she had spent the bulk of her time in Orlando and was a registered voter there. Under the Oakland approach, this applicant should be treated as locally owned and should be awarded a strong preference over the competing applicant, which was without substantial local ownership—a preference which might well tip the scales in this close case. Here, however, the FCC's decision stressed the lack of long term residence on the part of the first applicant and refused to grant any preference with regard to local ownership.

The same type of inconsistency may be found in the Commission's decisions on integration. It is, of course, customary for applicants to present themselves in the most favorable light with regard to the criteria employed by the Commission. "It is not farfetched," wryly commented the examiner in one case, "to say that ETV [one of the applicants] . . . has deliberately fashioned its presentation so as take advantage of the conventional criteria." Where integration is concerned, it is not unusual for owners of different applicants to give exaggerated accounts of the amount of time they will personally devote to the management of their proposed stations. The FCC has, however, often refused to be bound by such time estimates in determining the extent of integration of

143 Id. at 58-59.
144 Id. at 1157 (1957).
145 Id. at 1165.
146 Id. at 1207-08.
147 Evansville Television, Inc., 11 Pike & Fischer Radio Reg. 411, 453 (1956). Compare The Tribune Co., 9 Pike & Fischer Radio Reg. 719, 770f (1954), where the Commission conceded, "we would be deluding ourselves and the public, if we concluded that the program proposals will be produced exactly as represented."
ownership with management in a particular applicant. Thus, the claim that an applicant’s principal would devote most or all of his time to the television station was rejected because of his other business interests and activities.\footnote{WMBD, Inc., 11 Pike & Fischer Radio Reg. 533, 600 (1956); Radio Station KHF Co., 11 Pike & Fischer Radio Reg. 1, 110 (1955); KWTX Broadcasting Co., 11 Pike & Fischer Radio Reg. 365, 399 (1954). Compare Aladdin Radio & Television, Inc., 9 Pike & Fischer Radio Reg. 1, 39 (1953).}  

Similarly, the proposal that an important stockholder would be integrated into daily operation for approximately seventy-five percent of his time was discounted because of the state of his health.\footnote{Appalachian Broadcasting Corp., 11 Pike & Fischer Radio Reg. 1327, 1390 (1956).}

Such looking behind an applicant’s claim to the realities of the record was not, on the other hand, the approach followed by the FCC in its recent decisions involving channel 10 in Miami\footnote{WKAT, Inc., 12 Pike & Fischer Radio Reg. 1 (1957).} and a station in Portsmouth, Virginia (Beachview Broadcasting Corp.).\footnote{11 Pike & Fischer Radio Reg. 939 (1956).} In the Miami Channel 10 case, the Commission found a high degree of integration in the National Airlines subsidiary that won the case, influenced largely by the testimony of Mr. Baker, the president of National, that he would devote at least seventy-five percent of his time to the management of the television station. It is hard to believe that the head of a major airline could give so much of his time to managing a minor subsidiary, particularly in view of the competitive and other woes by which the airlines are beset.\footnote{See WKAT, Inc., 14 Pike & Fischer Radio Reg. 1263, 1264 (1957), where the Commission refused to allow the reopening of the record to show a worsened competitive position of National Airlines.} Yet the Commission accepted Baker’s claim at face value, despite loud protests from the competing applicants.

The Portsmouth case involved a comparable situation. One of the principals in the winning applicant was a veteran Congressman. He testified that fifty percent of his time would be spent on the television station’s affairs.\footnote{11 Pike & Fischer Radio Reg. at 956f. The Commission stated that this would be true (according to the Congressman) while Congress was not in session, while the examiner stated without any qualification, that the Congressman would devote 20 hours to the station. Id. at 972b.} Anyone familiar with the working of the Congress knows how farfetched it is to expect a senior Congressman to devote half of his time (even when Congress is not in session) to an unimportant economic sideline. Again, nevertheless, the FCC did not even bother to
question the claim in holding that the Congressman's interest was substantially integrated with management.\footnote{The opposing applicant specifically claimed that the Congressman in question could not "reasonably be expected to devote to the day-to-day operation of the station the time proposed." 11 Pike & Fischer Radio Reg. at 972b.}

**Concentration and Confusion**

It is in its application of the diversification criterion, strictly speaking, that one finds the most striking inconsistency in the comparative television decisions. We have already seen how, in cases like *Miami Channel 7*\footnote{Biscayne Television Corp., 11 Pike & Fischer Radio Reg. 1113 (1956).} and *Boston*,\footnote{WHDH, Inc., 13 Pike & Fischer Radio Reg. 507 (1957).} the FCC awarded channels to applicants which already owned dominant newspapers and radio stations in the community. The Commission justified its grants in these cases on the ground of the winning applicants' greater broadcast experience, which was said to outweigh the concentration of communications ownership in them. There have been other cases, however, involving applications basically similar to those in the *Miami Channel 7* and *Boston* cases, where the Commission followed a wholly different approach. Typical cases of this type arose in Madison, Wisconsin and Sacramento, California.

In the *Madison* case (*Radio Wisconsin, Inc.*),\footnote{10 Pike & Fischer Radio Reg. 1224 (1955).} there were two applicants for the available VHF channel. Radio Wisconsin owned a radio station in Madison, and five other radio and three television stations in the regional area. In addition, its principal stockholder had controlling interests in four major Wisconsin newspapers. The competing applicant, Badger Television Company, was controlled by the only two newspapers in Madison and also owned a Madison radio station. The concentration of local communications in Badger was very much like that which existed in the winning applicant in *Miami Channel 7*. The rationale of that case would appear to support an award to Badger,\footnote{In these cases, it should be noted, the FCC has followed a uniform policy of enfranchising the relatively best qualified applicant even when all the applicants control extensive communications interests. See Comment, 66 Yale L.J. 365, 374-76 (1957).} particularly since the opposing applicant in *Madison* (unlike those in *Miami Channel 7*) had extensive communications interests in Wisconsin, though mostly outside the Madison area.

In the *Madison* case, however, the FCC reversed the examiner's decision in favor of Badger and awarded the channel to Radio Wisconsin, basing its decision entirely on the need for diversification of ownership...
in the communications media in Madison. Said the Commission, in its opinion, "The degree of local concentration of control over sources of views and news in a city such as Madison which would be present in the event of our grant to Badger outweighs, in our view, the extent of the more numerous but less concentrated holdings of Radio Wisconsin."\(^{159}\)

The preference given to Radio Wisconsin with regard to diversification, concluded the opinion, "controls our decision of the proceeding."\(^{160}\)

If the Madison case was comparable in everything but result to Miami Channel 7, the Sacramento case (McClatchy Broadcasting Co.),\(^{161}\) bears a similar relationship to the Boston Channel 5 case. One of the two applicants for the Sacramento channel, Sacramento Telecasters, was made up primarily of a group of local residents who had no other communications interests. Its competitor, McClatchy Broadcasting Company, owned one of the two daily newspapers in Sacramento and a 50,000 watt radio station in that city, as well as several newspapers and radio stations in other central California communities.\(^{162}\) As in the Boston case, McClatchy owned the largest newspaper and most powerful radio station in the community to be served. If anything, on the record presented, McClatchy was superior to the Boston Herald-Traveler in experience and its past record was clearly outstanding.\(^{163}\) If the Miami Channel 7 and Boston approaches had been followed (with the element of experience being held to outweigh that of diversification), McClatchy would undoubtedly have been awarded the channel. In Sacramento, as in Madison, however, the FCC gave conclusive weight to diversification. According to the Commission, "the superiority McClatchy has demonstrated with respect to certain factors does not outweigh the comparative advantages adhering to Telecasters because of its freedom from ties with other radio, newspaper and television interests . . . ."\(^{164}\)

In our prior discussion of the FCC decisions seeming to modify the weight given to the diversification criterion, we have referred to the cases where the Commission has granted television channels to applicants who already owned local newspapers and radio stations, and, in some cases, even where the newspapers in question were the only ones in the com-

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159 10 Pike & Fischer Radio Reg. at 1248.
160 Id. at 1249.
162 The McClatchy papers had 39% of the newspaper circulation in the area. Id. at 1210.
163 Id. at 1220h.
164 Id. at 1220k.
munity. But there have also been other cases comparable to Madison and Sacramento, where the diversification criterion has been declared determinative in the denying of channels to similar newspaper and radio applicants. Thus, the present Commission has denied the applications of the owner of two of the three newspapers published in New Orleans, Louisiana and a radio station there,166 the owner of one of the two newspapers and a radio station in Shreveport, Louisiana,167 the owner of the only two newspapers and a radio station in Richmond, Virginia168 and an applicant who published the only daily newspapers and operated a radio station in Mobile, Alabama.169

Particularly useful in pointing up the inconsistency in the FCC's application of the diversification criterion are its decisions in two cases in Tampa, Florida. There are two daily newspapers published in Tampa, the morning Tribune (with some 110,000 circulation) and the evening Times (with some 50,000 circulation). Each of these newspapers owns a radio station, and there are, in addition, two other radio stations in Tampa and three in nearby St. Petersburg, which also has two newspapers (with a circulation of some 70,000). There are two available VHF channels in Tampa. The Tampa Tribune applied for one of these channels; the Tampa Times for the other. On August 6, 1954, the Tribune application for channel 8 was granted in The Tribune Co.170 Less than a month later, on September 2, 1954, that of the Times for channel 13 was denied in Tampa Times Co.171

These two decisions of the FCC, rendered at almost the same time, are all but completely irreconcilable. In the first place, it should be noted that the Times was owned almost entirely by local residents. The Tribune was owned by absentee owners, though its competing applicants were locally owned.172 There was also all but no integration of ownership and management in the Tribune. But the Commission was able to disregard the local ownership and integration criteria by relying on the principle

165 See cases cited notes 98-100 supra.
166 Loyola University, 12 Pike & Fischer Radio Reg. 1017 (1956).
that they are not important where there is a past broadcast record. This was true, although the past record of one of its competitors was at least equal to that of the Tribune.\(^{173}\) In the \textit{Times} case,\(^{174}\) on the other hand, although the \textit{Times} was found to have considerable integration, a preference was given to its competitor. This was done despite the fact that the \textit{Times} seemed to have a superior past broadcast record.\(^{175}\)

The Commission's inconsistency thus noted in applying the local ownership and integration criteria in the two Tampa cases set the stage for its even more striking inconsistency on diversification. In both cases, there were competing applicants who had no communications interests in the area. In the Tribune case, the FCC held that this was outweighed by the experience of the Tribune in the broadcast field. In the Times case, on the contrary, diversification was the key criterion.\(^{176}\) This was true although the \textit{Times} had extensive broadcast experience comparable to that of the Tribune and had as good a past broadcast record.\(^{177}\)

The result was that, in these contemporaneous decisions, the locally owned and operated evening paper in Tampa was denied a television station on the ground of the need to serve the Commission's policy of diversification, while the absentee owned morning newspaper (which had over twice the circulation) was granted a channel on the ground that its experience (which appeared no greater than that of the other paper) outweighed its demerit on the diversification factor. Well could a dissenting FCC Commissioner state, of the \textit{Times} decision, "I cannot reconcile it with our decision in the Tampa Tribune case . . . ."\(^{178}\)

The FCC's decisions are not only different in their application of the comparative criteria. Even more striking is the difference in presentation of the facts in the two opinions. In the Tribune case, the Commission declared that diversification "loses some emphasis when there is a variety of diversely owned stations and newspapers in the community."\(^{179}\) Thirteen newspapers, said the Tribune opinion, are published within the area.\(^{180}\) Among these, it emphasized that there are two Spanish language

\(^{173}\) Id. at 743-45.
\(^{175}\) Id. at 140g (dissenting opinion).
\(^{176}\) Id. at 139, 140b.
\(^{177}\) Id. at 137. The Times, it should be noted, had operated a radio station since 1933 and the Tribune since 1938.
\(^{178}\) Id. at 140g (dissenting opinion of Commissioner Doerfer).
\(^{179}\) 9 Pike & Fischer Radio Reg. at 770i.
\(^{180}\) Id. at 724.
newspapers in Tampa itself. The impression generated is, of course, that of a large number of similar newspapers in the area (particularly since the Tribune opinion does not give the circulation figures of most of the papers in question).

In the Times opinion, the facts concerning newspapers in the particular community are presented differently. This time, the Spanish papers in Tampa and most of the other papers in the regional area are not even mentioned, much less given any significance. Instead, the opinion emphasizes the fact that the Times is “one of the two daily newspapers (and the only evening newspaper) in Tampa” and that “it has the largest circulation of any afternoon newspaper on the Florida west coast . . . .” One who did not closely compare the Tribune and Times opinions would come away from a reading of the Tribune case with the belief that the Tribune was only one of a great many newspapers in the community, while the Times opinion would leave him with the impression that the Times was the dominant paper in its field. Actually, of course, one and the same community was involved in both cases. The Tribune and the Times were direct competitors of each other (not of the eleven other papers listed in the Tribune opinion) and, if anything, it was the Tribune that was dominant, as between them, for it had over twice the circulation of the Times.

The Chancellor’s Foot?

What are we to think of a tribunal which decides cases so basically similar as those of the Tampa Tribune and Tampa Times in so diametrically opposed a manner? And what about the inconsistent results in cases like Miami Channel 7, Boston, Madison and Sacramento?

“If there is no meaning in it,” said Alice’s King, “that saves a world of trouble, you know, as we needn’t try to find any.” To many, the method of Alice’s King is the only one that can be used in dealing with so apparently erratic an agency as the FCC. “Comparative cases,” declares a recent Senate report, “are resolved through an arbitrary set of criteria whose application . . . is shaped to suit the cases of the moment.” In this view, the FCC is so idiosyncratic in its actions that there is no principle by which one can try to explain its decisions—

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181 Id. at 770g.
183 Id. at 92.
unless it be that which John Selden used for the equity of his day, *i.e.*, the "Chancellor's foot."

To others, however, most of the comparative television decisions can be explained rationally—though not in terms of the criteria ostensibly employed by the FCC. In a 1957 article in Harper's, Professor Louis L. Jaffe delivered a stinging indictment of the FCC's work in the comparative television cases. According to him, the comparative criteria themselves have become "spurious criteria, used to justify results otherwise arrived at."\(^{185}\) What are these other factors which have led to the results in these cases? Professor Jaffe, at the very beginning of his article, refers to assertions that the FCC's decisions have been motivated by political considerations.

Such assertions are, of course, all but impossible to prove or disprove, particularly in a legal article. All the same, certain significant statistics can be derived from a listing of the decisions of the FCC under the Eisenhower Administration involving television applications by newspaper owners.\(^{186}\)

Under the present FCC (*i.e.*, since the first inauguration of President Eisenhower), the following newspapers have received television channels from the Commission:\(^{187}\)

- **Tampa Tribune**
- **Cincinnati Times-Star**
- **Miami Herald**


\(^{186}\) These are the television applicants whose political affiliations can be shown objectively. Such affiliations are listed in Ayer & Son's Directory, Newspapers & Periodicals (1958) [hereinafter cited as Ayer] and Editor & Publisher, 1958 Year Book Number [hereinafter cited as Editor & Publisher]. Unfortunately, all too many newspapers are listed as "Independent" in these publications. Even for such papers, however, there is a convenient political indicator to be found in the candidates whom the papers supported during the last two presidential elections.

\(^{187}\) There have also been several cases where newspaper applicants received channels from examiners, but there were no appeals to the Commission itself. These are not listed.


\(^{189}\) Scripps-Howard Radio, Inc., 11 Pike & Fischer Radio Reg. 985 (1956). This paper is listed as Republican in Ayer 803, and Editor & Publisher 118.

\(^{189}\) Biscayne Television Corp., 11 Pike & Fischer Radio Reg. 1113 (1956). Though listed as Independent in Ayer 193 and Editor & Publisher 48, the Herald supported Eisenhower in 1952 and 1956. Letter from Associate Editor John D. Pennekamp (Miami Herald) to Author, Oct. 21, 1958. It should be noted that the Miami Daily News, listed as Democrat in Ayer 193, and Editor & Publisher 48, was a co-applicant with the Herald in this case.
Omaha World-Herald\textsuperscript{191}
Paducah Sun-Democrat\textsuperscript{192}
Boston Herald-Traveler\textsuperscript{193}
Gannett Newspapers\textsuperscript{194}
Hearst Newspapers\textsuperscript{195}
Houston Post\textsuperscript{196}

Of these nine newspaper applicants, not one supported Adlai Stevenson in the election before it received its channel; eight have been Republican or Eisenhower Democrats.

At the same time, the following newspaper applicants have been denied channels by the present FCC:

\begin{itemize}
\item St. Petersburg Times\textsuperscript{197}
\item McClatchy Newspapers\textsuperscript{198}
\end{itemize}

The winning applicant here was thus made up of a combination of Republican and Democratic newspapers.

\textsuperscript{191} KFAB Broadcasting Co., 12 Pike & Fischer Radio Reg. 317 (1956). Though listed as Independent in Ayer 605 and Editor & Publisher 100, this paper supported Eisenhower in 1952 and 1956. Letter from Managing Editor F. Ware (Omaha World-Herald) to Author, Oct. 21, 1958.

\textsuperscript{192} Columbia Amusement Co., 12 Pike & Fischer Radio Reg. 509 (1956). This paper is listed as Independent Democrat in Ayer 410 and Editor & Publisher 74. It supported Stevenson in 1952, but supported no candidate in 1956. Letter from Associate Editor Fred Patton (Paducah Sun-Democrat) to Author, Oct. 9, 1958. Its television channel was awarded to it shortly after the 1956 election.


\textsuperscript{194} WHEC, Inc., 14 Pike & Fischer Radio Reg. 150 (1958). The Rochester Times-Union, the Gannett paper in the city involved, is listed as Independent Republican in Ayer 753 and Editor & Publisher 110.


\textsuperscript{196} The Enterprise Co., 17 Pike & Fischer Radio Reg. 48 (1958), 9 Pike & Fischer Radio Reg. 818u (1955). It is listed as Independent Democrat in Ayer 992 and Independent in Editor & Publisher 152. But it supported Eisenhower in 1952 and 1956 (letter from Editor (Houston Post) to Author, Oct. 20, 1958), and its publisher’s wife served in the President’s Cabinet as the first Secretary of Health, Education, & Welfare.


\textsuperscript{198} McClatchy Broadcasting Co., 9 Pike & Fischer Radio Reg. 1190 (1954). Though listed as Independent in Ayer 117 and Editor & Publisher 38, the Sacramento Bee, the
Fort Wayne Journal-Gazette
Tampa Times
Mobile Press Register
Shreveport Times
Madison Capital Times
Wichita Eagle
Scripps-Howard Newspapers
Richmond News Leader and Times-Dispatch
Lincoln Journal
Indianapolis Star-News
New Orleans Times-Picayune
Beaumont Enterprise

McClatchy paper in the city involved, supported Stevenson in 1952 and 1956. Letter from Editor M. Depew (Sacramento Bee) to Author, Nov. 3, 1958.

Radio Fort Wayne, Inc., 9 Pike & Fischer Radio Reg. 1221 (1954). It is listed as Independent Democrat in Ayer 319 and Editor & Publisher 64.


WKRG-TV, Inc., 10 Pike & Fischer Radio Reg. 225 (1955). This paper is listed as Independent Democrat in Ayer 41 and Editor & Publisher 28.


Loyola University, 12 Pike & Fischer Radio Reg. 1017 (1956). It is listed as Independent Democrat in Ayer 423 and Editor & Publisher 76.

The Enterprise Co., 17 Pike & Fischer Radio Reg. 48 (1958); 9 Pike & Fischer Radio
Of these fourteen newspaper applicants who were denied channels, nine have been supporters of the Democratic Party.\textsuperscript{211} Two, who supported President Eisenhower, lost to other papers which backed the present Administration.\textsuperscript{212} The remaining three list themselves as Independent, though they supported Eisenhower in the last two national elections.\textsuperscript{213}

If we add up the results in these FCC decisions, we find that some nine Democratic newspapers have been denied television licenses, while eight papers which have been Republicans or Eisenhower Democrats have been awarded channels. No newspaper which supported Stevenson at the election before its case was decided has received a channel, except in one case where such paper was a co-applicant with a leading Eisenhower paper.\textsuperscript{214}

In the decisions involving unsuccessful Democratic applicants are those like \textit{Madison} and the \textit{Tampa Times}, which strictly apply the diversification policy. In those involving applications of Eisenhower supporters are decisions like \textit{Boston} and the \textit{Tampa Tribune}, where the FCC found that the concentration of communications interests in the winning applicants was outweighed by their greater broadcast experience. Indeed, if we go back over the decisions which strictly apply the policy against diversification, we will see that, by and large, they are those which have denied television channels to Democratic newspapers.\textsuperscript{215} Those where the FCC has appeared to ignore the communications interests of the winning applicants have, on the contrary, been those awarding channels to newspapers that have supported the Eisenhower Administration.\textsuperscript{216}

"Everything's got a moral," as Alice's Duchess put it, "if only you can find it." In the comparative television decisions, is the moral to be found in political considerations?

The results in the television cases involving newspaper applicants are

Reg. 818u (1955). It is listed as Independent Democrat in Ayer 973 and Editor & Publisher 147.

\textsuperscript{211} Cases cited notes 197, 198, 199, 200, 201, 203, 206, 209 and 210 supra.

\textsuperscript{212} Scripps-Howard Newspapers, note 205 supra, lost to Cincinnati Times-Star, note 189 supra, and Lincoln Journal, note 207 supra, lost to Omaha World-Herald, note 191 supra.

\textsuperscript{213} Cases cited notes 202, 204, 208 supra. In July 1958, the Buffalo-Courier Express was denied a channel. Great Lakes Television, Inc., 13 Pike & Fischer Radio Reg. 669 (1958). It is listed as Independent in Ayer 663 and Editor & Publisher 104, though it supported Eisenhower in 1956 (with no one endorsed by it in 1952). Letter from Executive Editor L. King (Buffalo Courier Express) to Author, Nov. 3, 1958. Since this decision against an Eisenhower paper occurred well after, and may well have been influenced by, the Legislative Oversight investigation of the FCC, it has not been included in our list.

\textsuperscript{214} See note 190 supra.

\textsuperscript{215} Authorities cited notes 198, 199, 200, 201, 203, 206, 209 and 210 supra.

\textsuperscript{216} Authorities cited notes 188, 189, 190, 193, 194, 195 and 196 supra.
most suggestive in indicating an affirmative answer to this question. "It is, of course," as Professor Jaffe points out, "obvious that a charge of this sort cannot be demonstrated with the kind of certainty that would be necessary to hang a man." At the same time, the proportion of Republican successes and Democratic failures among newspaper applicants in the present FCC appears too high to be the result of mere coincidence.

According to Jaffe, the case against the FCC "rests on the record of the Commission's decisions in licensing television stations, and the reaction of the bench and bar. And on the basis of this record it seems clear that the FCC is dealing a heavy blow to good government." Our analysis of the comparative television decisions would seem to indicate that the Jaffe attack on the FCC is justified. A more difficult question is that of what ought to be done to remedy the present unsatisfactory situation in the comparative television cases. An obvious minimum requirement is for the Congress itself to prescribe criteria in the Communications Act by which the FCC would be bound in choosing among television applicants. Our analysis of the FCC case law certainly seems to indicate that the Commission in actual operation has fallen short of the basic expectations which the Congress had in creating it. The FCC was intended to develop its own standards and criteria to canalize the well-nigh unfettered discretion conferred upon it by the Communications Act. But the FCC has not applied the comparative criteria with any real consistency and has, as we have seen, rendered decisions in similar cases which appear diametrically opposed. Well could a recent Senate report refer to "the inconsistency and lack of judicial character of the Commission's actions and their effect on the public's interest." The difficulty here clearly lies in the carte blanche given to the FCC by its enabling statute. If the wholesale "public interest" standard in the Communications Act were to be replaced by more definite criteria, much of the problem might be resolved. It may well be that, when it first created the FCC, the Congress did not have any actual regulatory experience from which to draw in fashioning standards to limit the discretion delegated. As the highest Court put it in NBC v. United States, Congress would have frustrated "the purposes for which the Communications Act of 1934 was brought into being by attempting an

217 Jaffe, supra note 185, at 79.
218 Id. at 77.
220 319 U.S. 190 (1943).
itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency.”

Today this is no longer true. A quarter century of FCC regulation has both shown us the inadequacy of the present system and given us sufficient regulatory experience to enable the legislature itself to establish standards.

In the field of comparative television, however, it would not be enough for the Congress merely to import into the statute the criteria which the FCC has developed. For the FCC criteria themselves are contradictory (e.g., that of experience is inversely related to that of diversification), and it is necessary for the Congress to choose among the criteria in terms of their relative importance in furthering the public interest.

One familiar with the development of broadcasting in this country must agree with the recent conclusion of the FCC’s own Barrow Report that “diversification of ownership and control of facilities is a policy of prime importance in the broadcasting industry . . . .” Certainly, in a system such as ours, it is of vital significance to prevent concentrated ownership of media with such awesome potential for the molding of public opinion. “Monopoly in the mass communication of news and advertising,” categorically declared a federal court in 1950, “is contrary to the public interest . . . .” In view of this, it would not, as the Barrow Report puts it, “appear unreasonable . . . to assert that the diversification factor—in light of the highly significant competitive objective it seeks to achieve—should be accorded a high order of priority on the relative scale of comparative factors.”

What has just been said points to the need for amendment of the Communications Act so that it will prescribe expressly that the FCC must give decisive weight to the extent to which its awards will promote the diversification policy. Such amendment should provide that, in deciding comparative cases, the Commission shall give priority to applicants who are superior on the criteria of diversification itself, local ownership and integration of ownership and management—i.e., those criteria which directly promote the diversification policy. Only if no applicant establishes its superiority on these criteria should the Commission be permitted to decide on the basis of its conception of the “public interest” in the particular case.

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221 Id. at 219.
222 Barrow Report 107.
224 Barrow Report 124.
At the present time, the FCC in operation seems, all too often, to follow the method of Rabelais' Judge Bridleogoose, who decided cases according to a throw of the dice. "There are criteria," states a recent comment in The New York Times, "but they have been applied so haphazardly that no one knows the rules.\(^{225}\) If the Congress itself would clearly specify the criteria which must be given decisive weight, this unhappy situation might become a thing of the past.

It might, however, be argued that the present operation of the FCC is so unsatisfactory that even the congressional prescription of specific standards would not really resolve the situation. An agency which is dominated by political factors, for example, would still know how to use even the statutory standards as facades to mask decisions actually motivated by political considerations. If such is the case, it might be claimed, what is needed is a more drastic remedy, such as the elimination of the FCC as the deciding agency in this field.

It would not, all the same, accomplish much merely to vest the FCC's present authority in comparative cases in some other governmental agency. If such powers were given to an executive department (such as the Department of Commerce), the dangers of direct political and other pressures would be even greater than in an independent commission. If another multi-headed agency were created in the place of the FCC, there is no assurance that it would operate more satisfactorily than the present Commission.

That leaves us with two possible alternatives which have recently been urged. The first was suggested by the second Hoover Commission's recommendation for the establishment of an administrative court to which would be transferred many of the adjudicatory functions of our administrative agencies.\(^{226}\) Though the Hoover Commission did not itself include the FCC among the agencies whose functions would be transferred to the proposed court, there is no reason why, if such court were to be created, it could not also be vested with much of the adjudicatory jurisdiction of the FCC.

The other drastic alternative which has been urged is that of awarding television licenses on the basis of competitive bidding. Under this proposal, the role of the FCC would be reduced to more or less that of screening television applicants to ensure that they meet minimum legal, financial and technical requirements, much as the Commission does at

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\(^{225}\) Lewis, F.C.C. Prestige at Record Low, N.Y. Times, Nov. 16, 1958, § 4, p. 8, col. 2.

present in determining which applicants are to be permitted to proceed to comparative hearings. In addition to providing the purely objective standard of the highest bid as the decisive factor, competitive bidding would have the virtue in this area of giving to the government a return for valuable public assets which, until now, have, in the striking characterization of a former FCC Commissioner, been "handed out like door prizes."227 As a recent House report well puts it, "spectrum frequencies ... are a precious natural asset belonging to all the people."228 To require those who receive such frequencies to make appropriate payment seems no more than proper.229

Both the proposal for transfer of the FCC's adjudicatory functions to an administrative court like that contemplated by the second Hoover Commission and that for the resolution of comparative television cases by competitive bidding would end the present unsatisfactory situation in the FCC. There is, however, little likelihood that either proposal will be given effect in the foreseeable future. It is not often that such drastic remedies are adopted for unsatisfactory legal institutions. "It is natural," Professor Plucknett informs us, "that so straightforward a remedy should only be employed when there are men with vigor and courage to carry it out. It is apt to be characteristic of the great moments of the common law, therefore, rather than of those less heroic times when the system is in repose."230

We would delude ourselves if we thought of our own day as one of the heroic moments of the common law. At the same time, it is highly significant that responsible people are even talking in terms of the drastic remedies which have been mentioned for dealing with the present situation in the FCC. The mere discussion of such Draconian measures indicates clearly the extent to which the Commission has fallen in public esteem. "F.C.C. Prestige At Record Low," declared a recent New York Times headline.231 Our detailed analysis of the manner in which the Commission has acted in its comparative television decisions shows

229 If a competitive bidding system were to be adopted, it would be necessary to impose some limitations to prevent overconcentration in the hands of owners whose financial resources would enable them to make the highest bids—e.g., a stringent limitation on the number of stations which can be owned.
231 Lewis, supra note 225.
clearly why public confidence in the FCC has been undermined. To restore such confidence, some really drastic solutions may be necessary.

But our analysis in depth of the FCC case law may have an even deeper significance for students of administrative law. In our day, we have seen a growth of administrative authority that has been without parallel in Anglo-American law—at least since Tudor and Stuart days. More and more the Congress has been delegating to federal agencies significant powers of lawmaking. The exercise of such powers today completely dwarfs the direct exercise of legislative and judicial powers by the Congress and the courts. Administrative law is thus, in Chief Justice Vanderbilt’s apt characterization, “the outstanding legal development of the twentieth century, reflecting in the law the hegemony of the executive arm of the government.”

“In the opinion of this House,” reads a famous House of Commons resolution of the time of Charles I, “the power of the Executive has increased, is increasing, and ought to be diminished.” There are doubtless many who would like to see a similar resolution moved in our own legislature. Yet it is not the growth of administrative authority as such that constitutes the great danger. Administrative power, properly controlled, is an essential tool to enable the modern state to perform its multifold tasks. Danger lies in the possession of uncontrolled discretion—of power which, in Mr. Justice Cardozo’s celebrated phrase, is not canalized within banks which keep it from overflowing. “Unless we make the requirements for administrative action strict and demanding,” a member of the Supreme Court, who has been anything but noted for his hostility toward the administrative process, has asserted, “expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty.”

Twenty years ago, it would have been most unusual for one of Mr. Justice Douglas’ political convictions to speak in this way about administrative power. The administrative process, then, was seen by its proponents as the great hope in our governmental system. Through it, they hoped to work a progressive modification of the economy and the society, comparable, at the very least, to the great English Reform Move-

ment of the last century. Many of them, in fact, went even further and saw in the administrative agency the ultimate supplanter of private industry, which would take over the role of economic leadership in the "public interest." "This was the ultimate view that enthralled the extreme New Dealer. This was the horrid specter that terrified the world of private industry." 235

More recently, many of us have had time for the sober second thought and have come to realize that neither the thrill nor the chill of the 1930's adequately reflected the reality of the administrative process. In a noted dissent two years before his death, Mr. Justice Jackson referred critically to what he termed "malaise in the administrative scheme."236 One who analyzes in depth the case law of an agency like the FCC cannot help but feel that the malaise referred to is more than an isolated phenomenon. Certainly, the FCC's pattern of behavior in the comparative television cases makes one ask whether extreme proponents of the administrative process have not been dealing more in the realm of fiction than in that of fact.

In 1941, Roscoe Pound wrote a strong attack against the way in which administrative agencies operate. The situation, said he, is "much more serious" than most observers are willing to acknowledge.237 Pound's strictures led to inevitable criticisms of his lack of understanding of the facts of life in the agencies.238 With the advantage of almost two decades' hindsight, one may now wonder whether it was not Pound, but his critics, who were looking at the agencies through the distorting lenses of fictitious preconceptions. To those who still look upon the administrative process in terms of exaggerated hopes, one familiar with the actual operation of an agency like the FCC may, indeed, be tempted to use the famous phrase of Judge Learned Hand: "These are false hopes, believe me, these are false hopes."239


236 FTC v. Ruberoid Co., 343 U.S. 470, 482 (1952) (dissenting opinion).


238 The most extreme of such criticism is contained in Davis, Dean Pound and Administrative Law, 42 Colum. L. Rev. 89 (1942).

239 Quoted in Schwartz, The Supreme Court 371 (1957), from an address by Judge Learned Hand, "I Am an American Day" ceremony, New York City, May 21, 1944, in The Spirit of Liberty 189, 190 (1953) (Dilliard ed.).
PUBLIC RESPONSIBILITY AND THE UNINSURED MOTORIST

JOSEPH P. MURPHY* AND ROSS D. NETHERTON**

Since the mid-1920's efforts to alleviate the hardships caused by uncollectible claims and judgments against financially irresponsible motorists have undergone a legislative evolution. It began with the concept of suspending driving privileges subsequent to an accident caused by a financially irresponsible party, thus tending to bar the members of this portion of the driving public from future use of the highways. Today it is represented by the emerging concept that all of the members of the driving public have a duty to compensate an innocent victim when he is injured by a financially irresponsible member of their own class. Messrs. Murphy and Netherton present a comprehensive survey of the existing automobile financial responsibility laws in the United States and the British Commonwealth. Their survey includes (1) the motorist responsibility programs consisting of security-type and compulsory insurance, (2) the recent growth of the public responsibility programs consisting of mandatory uninsured motorist coverage and unsatisfied judgment funds, and (3) the various combinations of these two programs which can result in different burdens of cost distribution. Against this background the authors then offer their own recommendations concerning criteria to be applied in future legislative efforts.

Motorists in the second half-century of the Automobile Age are keenly aware that widespread use of motor vehicles has resulted in many problems as well as blessings. Not the least of the problems now urgently calling for solution arises from the high cost of motor vehicle accidents, or, more particularly, the problem which arises in those instances where claims and judgments arising out of accidents cannot be collected because of the financial irresponsibility of the negligent driver, or where, through no fault of the victim, recovery of damages is not possible. State legislation dating back to the 1920's attests to the long-standing public policy that all operators of motor vehicles should be financially responsible.¹ Implicit in this policy is the underlying proposition that the cost of injuries and damage inflicted because of negligence should not be permitted to rest upon the shoulders of the victim, and that, where necessary, society should see to it that the cost of these otherwise uncompensated injuries is either forced upon the

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negligent wrongdoer, or distributed throughout the community as one of the costs of motor vehicle operation.

The evolution of laws implementing this policy has, in thirty-five years, progressed through several distinct phases. Throughout most of this period, states have been preoccupied with legislation designed to implement the policy of financial responsibility of motorists. Here the objective has been to attain the highest possible degree of voluntary financial responsibility among the motoring public. Most recently, however, this evolution has entered a new phase in which the states have turned from the objective of increasing motorist financial responsibility to the objective of assuring compensation for all innocent victims of automobile accidents. To put it more briefly, the legislative evolution has begun to move from its financial responsibility phase into its public responsibility phase.

This is not to say that current developments indicate a feeling that the legislation of the "financial responsibility period" was misconceived or useless. Quite the contrary, the history of the law and the nature of the problem have required that public policy regarding uncompensated automobile accidents first go through the evolution that has occurred. Public responsibility for uncompensated automobile accident costs can properly come only after financial responsibility laws have developed to the point where their maximum effect is realized, i.e., where they have achieved their "saturation point." The time and circumstances of this development will vary in different states. At present it can only be said that for some states this time has arrived, and plans for public responsibility are the inevitable next step in their legislative evolution.

In this setting, there is need to review the history of financial responsibility policy, the measure of the uninsured accident problem, the various proposals for public responsibility that are emerging, and the main considerations bearing on their prospects of success. Only in the context of such a study can a workable plan for implementing the policy of public responsibility be offered.

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Legislative Evolution of Financial Responsibility Laws

The legislative evolution of financial responsibility laws can be traced from Connecticut's financial responsibility statute of 1925, which provided that motor vehicle owners convicted of reckless driving, driving while intoxicated, "evasion of responsibility," or involved in accidents resulting in death, bodily injury or property damage exceeding one hundred dollars must prove their ability to respond in damages for judg-
ments rendered against them.\(^2\) This effort to impel motorists to voluntarily provide themselves with evidence of financial responsibility was a compromise with demands for legislation that would require proof of financial responsibility as a prerequisite to the registration of vehicles. In 1927, New Hampshire,\(^3\) Maine,\(^4\) Vermont\(^5\) and Rhode Island\(^6\) enacted legislation similar to Connecticut's law; and Minnesota\(^7\) adopted a statute requiring proof of financial responsibility by all motorists convicted of driving while intoxicated. During the decade that followed, financial responsibility laws based on the Connecticut prototype were enacted in twenty-seven states, the District of Columbia, Hawaii and eight Canadian provinces. Model legislation was developed by the American Automobile Association in 1930, and was revised in 1933, 1935 and 1936 to reflect improvement in administrative features gained through state experience with these laws.\(^8\)

The year 1927 also saw the beginning of compulsory insurance in Massachusetts. At that time, Massachusetts estimated that about thirty percent of its motorists were insured, and its legislative committee declared the Commonwealth's policy in these forthright terms:

We think it not alone the right, but the duty as well, of the Commonwealth to insist that those whom it permits to operate on the public ways a machine as dangerous as the self-propelled vehicles of the present day give adequate guarantees that judgments which may be obtained against them shall be collectible at least with respect to those arising from personal injuries.\(^9\)

Under its law, Massachusetts required motorists to show evidence of liability insurance coverage as a prerequisite to obtaining annual vehicle registration, and insurance coverage so certified must be coterminous with the period of vehicle registration.\(^10\) The device of making proof of financial responsibility a condition of vehicle registration was not, in 1927, entirely new to common law countries.\(^11\) The Motor Vehicle

\(^2\) Conn. Laws 1925, ch. 183.
\(^3\) N.H. Laws 1927, ch. 54.
\(^5\) Vt. Laws 1927, ch. 81.
\(^6\) R.I. Laws 1927, ch. 1040.
\(^7\) Minn. Laws 1927, ch. 412.
\(^10\) Mass. Laws 1925, ch. 346 (which became effective in 1927).
\(^11\) The validity of proposed compulsory insurance legislation was considered in Opinion of the Justices, 81 N.H. 566, 129 Atl. 117 (1925), but the proposed legislation was not enacted. Also, early cases on the validity of laws requiring insurance or bonded
Third Party Insurance Act of 1928 in New Zealand appears to have inaugurated this idea; and Great Britain, following an extensive study of the road transport problem by a Royal Commission, included compulsory insurance in the provisions of the Road Traffic Act of 1930. This British legislation not only required certification of insurance coverage prior to registration, but declared it a crime to drive without adequate insurance. In other legislation adopted in 1930, Parliament provided for a direct right of action by the victim against the insurer in the event that the insured was found to be insolvent.

Compulsory insurance did not, however, find widespread favor in the United States; and during the twenty-five years from 1927 to 1952, Massachusetts remained the only state where compulsory insurance was seriously considered. Throughout these years, financial responsibility laws became nationwide in their adoption and acceptance, and the original conception of Connecticut's 1925 law was refined and perfected with experience. Compulsory insurance in Massachusetts, on the other hand, became the whipping boy of debates on the uncompensated accident problem. It was cited and criticized for a wide range of faults allegedly inherent in any attempt to achieve financial responsibility through compulsory methods. However, despite high insurance costs, political controversies over rate-making, charges of "red-tape" and inconvenience to the public, Massachusetts did not abandon its compulsory insurance law.

The failure of compulsory insurance to find widespread favor in the United States during the period 1927 to 1952 may also be explained by the fact that financial responsibility laws showed a remarkable ability to grow and meet the changing demands of the public regarding uncollectible automobile accident claims and judgments.

To the simple beginnings outlined in the 1925 Connecticut statute was added the first substantive refinement known as "future proof." In certain criminal cases, typically those in which a motorist was convicted as a condition to the operation of taxicabs are collected in Annot., 22 A.L.R. 230 (1923).

12 19 Geo. 5, c. 52 (N.Z.).
13 20 & 21 Geo. 5, c. 43.
14 Third Parties (Rights Against Insurers) Act, 1930, 20 & 21 Geo. 5, c. 25.
16 See American Automobile Ass'n, Safety Responsibility Bill, pp. iii-iv (1952).
vicited of a traffic law violation serious enough to require suspension of the driver license, it was provided that the driver license and vehicle registration must be suspended and not be restored until the expiration of the suspension period, and then not unless and until proof of financial responsibility to cover possible future accidents was filed with the state. Such proof, in the form of insurance coverage, bond or money, must remain on file for a specified period, generally three years. Also, in civil cases where there was failure to satisfy a judgment entered as a result of an automobile accident, the financially irresponsible judgment debtor's driver license and vehicle registration were suspended until the judgment was paid, and not restored until "future proof" had been deposited with the state.

During the decade 1927 to 1937, future proof laws represented the accepted extent to which there was any justification for the state to interpose its power to assist the process of recovering claims and judgments against financially irresponsible drivers. The American Automobile Association's model Safety Responsibility Bill was the prototype for state legislatures, and the legislative policy of this law was explained as follows:

It was hoped that a large number of reckless and financially irresponsible motorists would be ruled off the road by suspension of their operating privileges and registrations, thereby not only cutting down accidents, but making it more likely that those persons who used the roads would be those who were more able to pay damages assessed against them. Also, the law was designed to be a stimulus to motorists generally to secure liability insurance or otherwise make themselves financially responsible with respect to future accidents and thereby avoid the burden and inconvenience which might be incurred if they should be involved in accidents and not be able to pay judgments for damages. It was believed that many motorists would prefer to take advance precautions with respect to such possible liability.17

Admittedly, "future proof" was a limited form of compulsory insurance, since motorists coming within the scope of the law were required to maintain proof of financial responsibility for a certain period of time as a condition of retaining their driver license and vehicle registration. It was, however, a form of compulsion acceptable in terms of a policy which was based on the premise that the problem of uncollectible claims and judgments could be controlled to a satisfactory degree by reaching those drivers whose records demonstrated recklessness and financial irresponsibility. Not yet acceptable was the proposition that all motorists, regardless of record or financial status, should give advance proof of their ability to pay for future accidents.

17 Id. at iv.
The future proof laws of the 1930's had one serious shortcoming which eventually led to a further step in extending their scope. In connection with civil claims, it was still necessary for victims to obtain a judgment and show it to be unsatisfied before the "future proof" requirements of the law could be applied. Few accident victims found comfort in the prospect of litigation against a motorist when all appearances indicated that he was "judgment proof." Commentators later summed up the situation thus:

It was optimistically but incorrectly assumed under the earlier [future proof] laws that many uninsured and irresponsible motorists would be identified by the entry of uncollected or uncollectible judgments against them. It has been proved more realistic to assume that a claimant will examine the financial status of a person before filing suit against him, and where no possibility of recovery appears, no action will be taken.\(^\text{18}\)

New Hampshire, in 1937, pointed a way out of this dilemma.\(^\text{19}\) Legislation enacted in that year required that all motorists involved in accidents resulting in death, personal injury or property damage exceeding a specified amount must report the circumstances of the accident, and, unless of a class specifically exempted by law, must at the same time show proof of financial responsibility to pay claims arising from the accident up to certain limits. These requirements applied to all parties to an accident regardless of recklessness or violation of motor vehicle laws or whether any suit for damages had been commenced by any other party involved in the accident. Preliminary evaluation of possible damages by the state agency responsible for administering the law was the basis for determining the amount of financial responsibility which must be shown, and once deposited, this evidence of financial responsibility served as security for other parties to the accident. This new legislation became known as the "security-type" law.

The advent of the security-type law in 1937 represented a long step forward in implementation of the policy of motorist financial responsibility for claims and judgments arising out of automobile accidents. Insurance was the most obvious and most practical method of maintaining financial responsibility; and, since insurance could not be writ-

\(^\text{18}\) Id. at vii. Another writer has expressed the conclusion that when a driver was not sued because of this reason, his "lack of financial responsibility protected him from the operation of a statute intended to bar him from the road because of his financial irresponsibility." Taken from an article written by Frank P. Grad in a 1949 study undertaken by the Legislature Drafting Research Fund of Columbia Law School and reprinted in the 1953 Semi-final Report of Cal. Assembly Comm. on Finance and Insurance, p. 83.

ten retroactively, motorists naturally felt a stronger impulsion to provide themselves with insurance coverage before any accident might occur. Financial responsibility was recognized as a condition for retention of driving privileges and registration, although it was not yet publicly acceptable to make proof of financial responsibility a condition precedent for obtaining a driver license and vehicle registration.

The security feature soon became a basic part of state financial responsibility laws. By 1945, fourteen states had adopted the security feature, and others were seriously considering it as a result of its recent incorporation into the model legislation of the American Automobile Association and the Uniform Vehicle Code.\(^{20}\) By 1952, forty-one states had security-type laws, two (New Mexico and North Carolina) had future proof-type laws, and four states (Arkansas, Kansas, Missouri and South Dakota) and the District of Columbia had the original, judgment-type law. Massachusetts remained the only state with compulsory insurance. As a case study in legislative evolution, financial responsibility laws presented an impressive record. The twenty-five years from 1927 to 1952 had seen adoption of some form of these laws in all states, the District of Columbia and Hawaii. A total of 88.7 percent of the motorists in the United States were subject to security-type laws in their home states, and, perhaps of equal importance, the high degree of uniformity of the security-type laws had encouraged widespread reciprocity among the states in applying the penalties for financial irresponsibility regardless of where it occurred. The success of the security-type law was also attested in figures showing the percentage of motorists covered by automobile liability insurance. Nationwide figures are not easily obtainable on this point, but an analysis of accident reports in individual states shows a steady growth in reported insurance coverage following the enactment of the security requirement. In New York, for example, creditable reports indicated that the percentage of insured motorists rose from approximately thirty-three percent in 1937 to approximately ninety percent in 1951.\(^{21}\) Other states began to report similar experience. Without doubt the security feature proved effective in attaining the objective for which it was intended—it impelled a large number of motorists to acquire and maintain the financial means to respond in damages for injuries caused in automobile

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\(^{20}\) The American Automobile Association’s Model Safety-Responsibility Bill, supra note 16, was amended in 1943 to include the security feature, and in 1944 the security feature was approved by the National Committee on Uniform Traffic Laws and Ordinances for inclusion in the Uniform Motor Vehicle Act § 17.

\(^{21}\) N.Y. Dep’t of Insurance, The Problem of the Uninsured Motorist, p. 10 (1951).
accidents, and it accomplished this result with a minimum of government interference with private insurance practice.

Gratifying as this progress was, however, it did not hold the promise of ever completely eliminating the problem of uncollectible claims and judgments by eliminating all financially irresponsible motorists. New York, with its estimate of approximately ninety-five percent of its motorists insured, still reported in 1952 that the dollar loss attributable to uninsured drivers was $7,250,000.22 Public pressure to "close the gap" in the financial responsibility laws continued strong, and, because the great proportion of these uncollectible claims arose from cases which the security-type law could not reach, the issue of extending public responsibility into this field became the focal point of debate. Proponents of legislation to establish public responsibility pointed to what they asserted were inherent limitations in the financial responsibility approach to the problem. The financial responsibility laws, they said, could not be brought to bear on motorists until after an accident had occurred. Thus they were comparable to the fictional dog of the common law, who was allowed to have one bite before being recognized by the law as dangerous and deserving to be placed under restrictions. Also, accidents caused by hit-and-run drivers, out-of-state drivers, and drivers operating cars without the knowledge or permission of the owner were all beyond the scope of financial responsibility laws. These points became the bedrock upon which support for the policy of public responsibility rested.

Full public responsibility for uncollectible automobile accident claims and judgments met with determined resistance. To most, the suggestion was identified with compensation without regard to fault and was a notion which went contrary to both political prudence and the tradition of the common law.23 Proposals for public responsibility which retained the principle of recovery only where fault was shown were still novel, although experiments in North Dakota24 and the Canadian provinces25

22 Ibid.
23 Compensation had been recommended as early as 1932 in the Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (Feb. 1932), but had never been seriously supported by any organized group. In 1952, the only existing compensation law was in Saskatchewan.
were being watched with interest. Thus public debate centered on possible methods of giving a fuller implementation to the policy of motorist financial responsibility through compulsory insurance.

New York became the forum for this debate in its legislative sessions of 1952 to 1956, and observers watched the contest develop around a framework of certain generally accepted policy premises set forth in the Insurance Department's report on the uninsured motorist problem in 1951. These were:

(1) Insurance costs must be kept as low as possible with due regard to the adequacy of rates to the insurance business.

(2) Highway safety should not be subordinated.

(3) Insurance companies licensed to do business in the state should handle the insurance without being compelled to compete with a state fund or have their underwriting privileges unduly impaired.

(4) The opportunity for political meddling with either the rating or the underwriting of the companies should be eliminated.

Governor Dewey, in his annual message to the legislature in 1953, spoke optimistically of the chance for acceptable legislation within these premises, saying:

I believe the time has come to challenge the right to drive of that small minority who continue to operate vehicles without insurance or other evidence of ability to recompense the victims of their accidents. This is not a new departure. Under our Safety Responsibility Law, drivers who are involved in accidents must maintain proof of insurance or financial responsibility. The present law does not begin to operate, however, until after the damage is done and victims may be dead or permanently incapacitated.

. . . .

The objections that have been raised to a mandatory insurance program can easily be overcome through a well-drafted law and sound administration. There is no necessity for the creation of a state fund as part of a mandatory insurance program. . . .

. . . . What is required is the willingness and determination to devise a system which will eliminate the irresponsible motorist from the highways and maintain the integrity of the insurance companies doing business in this state. I am unwilling to believe that we lack the resourcefulness or integrity to solve the administrative problems.

Following this, the state administration offered a two-part legislative plan consisting of legislation which required proof of insurance as a prerequisite to vehicle registration but left underwriting practices and rate-making procedures unchanged. Further, there was a supplementary

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26 N.Y. Dep't of Insurance, op. cit. supra note 21, at 22.
program, known as the "Assigned Case Plan," under which the insurance industry itself undertook to handle and pay qualified claims which otherwise would be uncollectible under the law. Governor Dewey's two-part program was immediately met by opposition both inside and outside the legislature, and a wide range of counter-proposals was offered. These included proposals for an unsatisfied judgment fund similar to the law enacted in New Jersey in 1952, proposals for mandatory impoundment of vehicles of financially irresponsible drivers, and the insurance industry's so-called "Voluntary Plan," under which insurance companies would be authorized to sell insurance against loss caused by uninsured drivers.28

For the next three years, the proponents of these various plans stood in stalemate. The state administration was unable to unite the legislature in support of its program, and interested private groups, including the insurance associations, insurance agents, automobile clubs and bar associations, generally opposed any major change in the existing security-type law. The final phase of the debate began, however, in 1956, when Governor Harriman placed the state administration squarely behind a policy of public responsibility for uncollectible claims and judgments and called for enactment of an unsatisfied judgment fund, or, as an alternative, compulsory insurance. At this point two new factors emerged to break the stalemate. One was the example of New Jersey, where, in 1955, an unsatisfied claim and judgment fund had become available for the payment of uncollectible claims and judgments. The other was the shift of the mutual insurance companies to a position in support of compulsory insurance. The balance was thus tipped, and on April 16, 1956, Governor Harriman signed the New York Motor Vehicle Financial Security Act of 1956, 5 Am. U.L. Rev. 37 (1956). Massachusetts was no longer the only state with compulsory insurance.

The New York compulsory insurance law differed from the Massachusetts law in several important respects. New York declared it a misdemeanor to drive without having financial responsibility, either in the form of insurance or a deposit of cash or bond. Insurance policies in New York need not be coterminous with the registration period as required in Massachusetts. Premium rates in New York were set by


the insurance companies under existing rate-making procedures. Nom-
nally, the New York law applied to out-of-state motorists as well as
New York drivers. Expenses of administering compulsory insurance
were assessed pro rata among all automobile liability insurance carriers
in New York in proportion to their annual premiums from this form of
insurance. Impoundment of the vehicles of motorists who allowed judg-
ments against them to remain unsatisfied was also provided for in the
New York law.

To many observers in 1956 it seemed that New York had overcome
the difficulties which had plagued Massachusetts’ compulsory insurance
plan and had achieved the ultimate step in implementing a policy of
motorist financial responsibility. The “gap” which had existed under
financial responsibility laws had been closed as completely as possible.
If the law proved as successful in practice as it appeared on paper, the
remaining problem of uncollectible claims and judgments would be so
negligible that the need for seeking public responsibility in this field
would no longer exist. Numerous states commenced study of the possi-
bility of adapting the New York law to their own situation, and North
Carolina, in 1957, did adopt a compulsory insurance law closely pat-
terned after the New York plan. As the New York law went into
effect in 1957, it remained to be seen whether in fact the legislative
draftsmen had written a law which would make compulsory insurance a
practical and acceptable method of achieving motorist financial respon-
sibility.

II
STUDIES OF THE UNINSURED ACCIDENT PROBLEM: Dichtung und
Wahrheit

With the tremendous increase in automobile registrations and passen-
ger miles since World War II, the logical concomitant of increased risk
exposure and consequent accident frequency on the highways has gener-
ated a profusion of legislative studies concerning the problem of auto-
mobile accidents, not the least of which is the penury of many motorists
whose legal liability arising out of such accidents is not covered by auto-
mobile liability insurance. A review of such studies reveals not only a re-
markable consistency in the methodology of those groups charged with
the responsibility of studying the facts, but an equally remarkable diverg-
ence of conclusions based on substantially similar information.

For purposes of this discussion a selected group of some well-considered reports will be referred to.

The most striking aspect of the reports studied is the paucity of precise and meaningful statistics on which to base conclusions that the uninsured motorist is or is not a serious national or state problem. Starting with the broadest possible basis of comparison, the National Safety Council, using a formula based on numbers of accidents, personal injuries and deaths, computed the total economic loss of the nation arising out of motor vehicle accidents in 1957 as $5,300,000,000, of which $3,450,000,000 is allocated to deaths and personal injuries.\(^{31}\) Using the same formula in the District of Columbia, the total loss was estimated as $13,566,400, of which $10,475,000 is allocable to deaths and personal injuries.\(^{32}\)

The reduction of such estimated totals to workable proportions based on demonstrably valid evidence is extremely difficult. To be of use in evaluating any legislative proposal designed to ameliorate the problem of the uninsured motorist, it is necessary first to determine what percentage of motorists are uninsured, and secondly, to determine what percentage of the total economic loss is caused by such uninsured motorists.

Admittedly, it is not possible to determine accurately the extent to which present financial responsibility laws have encouraged motorists to become insured:

The figures on licensed drivers, motor vehicles, and insured motorists all are in continuous fluctuation. Drivers die, move out of the state, or cease to use vehicles; cars are destroyed, sold or moved out of the state; insured motorists die, dispose of, wreck or lose their cars, move out of the state, or transfer their insurance. And new ones take their places.\(^{33}\)

To this observation might be added the fact that many states report an annual increase in total registrations.\(^{34}\) In addition, many out-of-state uninsured vehicles are involved in motor vehicle accidents.\(^{35}\) Studies have been made, however, to determine the number of uninsured motor


\(^{33}\) Conclusions and Recommendations of the Governor's Commission with Regard to the Study of the Problem of the Uninsured Motorist in Michigan, p. 7 (Dec. 6, 1957).

\(^{34}\) See, e.g., Ill. Legislative Council, Motor Vehicle Accident Compensation, Pub. No. 128, p. 2 (Nov. 1956), in which there is reported an annual increase of 200,000 registered vehicles in Illinois.

\(^{35}\) In the District of Columbia, for example, 1,408 nonresident motorists were suspended for failure to show financial responsibility in 1958.
vehicles, not as a numerical entity at an instant of time, but rather as an average over a period of time, using the means available to arrive at a specific percentile of a sampling of the total number of vehicles registered in a specific state or of those involved in motor vehicle accidents. By a process of statistical illication there is then computed an approximate percentage representing uninsured motorists who enter the overall problem. Most frequently this is done by examining the accident reports processed by the administrator of the state's financial responsibility law, determining the total number of vehicles involved in accidents and the number of uninsured vehicles of that total.

The weakness of such sampling is immediately apparent. Some of the salient reasons are: (1) where uninsured vehicles are involved in reportable accidents, it can be assumed that a certain percentage will not be reported; (2) the sample usually constitutes less than ten percent of the total number of vehicles registered in the jurisdiction; (3) there is a disparity in the reporting level between rural and urban areas as well as the level of insurance coverage.\(^{36}\)

At least one state, Pennsylvania, used a different approach. Each applicant for the registration of a passenger motor vehicle was requested to answer "yes" or "no" to the question of liability insurance covering the vehicle.\(^{37}\) Out of a total of some 3,500,000 registered vehicles, over 223,000 applicants answered "no," and over 254,000 failed to answer the question. By assuming that fifty per cent of those failing to answer were uninsured, it was concluded that 353,000 vehicles, or ten percent of those registered in Pennsylvania, were uninsured.\(^{38}\) Apparently no consideration was accorded the fact that statements affirming insurance coverage were given voluntarily and not verified, and that many motorists are unaware that the insurance carried on their vehicles is not liability coverage until they are involved in accidents.\(^{39}\)


\(^{38}\) Ibid. It was also assumed that 10% of the nonresident motorists using Pennsylvania highways were uninsured and that therefore uninsured vehicles totalled 10% of all vehicles on the highways. No basis for this assumption was stated.

\(^{39}\) Financial Responsibility Law administrators are constantly beset by persons whose privileges are suspended, complaining that they thought their vehicles were "entirely covered," only to learn that at the time an accident occurred the only insurance protection in effect was physical damage insurance protecting the owner and the mortgage-lending or financing institution. Indeed it is becoming a common practice for physical damage insurers to insure only the losses sustained by lending and financing institutions where the owner is considered an undesirable underwriting risk.
From the foregoing it can be seen that conclusions of various study groups might easily differ as to the percentage of uninsured motorists in a given jurisdiction. This has been the case. Some studies have considered the number of uninsured vehicles reflected in financial responsibility accident reports as being an accurate measure of the total picture.\textsuperscript{40} Other studies place the percentage somewhere near but below or above the figure indicated by coverage claimed in accident reports,\textsuperscript{41} while one state commission published this remarkable synchysis in logic:

There is no need, however, to be as vague about the situation as are the estimates provided this Commission and voiced by the Secretary of State in connection with this question during the past year. These have variously been "7 or 8 per cent uninsured", "nearly three-quarters of a million vehicles", "500,000 drivers", "10 per cent", "15 to 20 per cent", and "20 per cent or more".

The safety responsibility law reports filed with the Secretary of State provide a basis for reasonable determination. During 1956, 142,860 such reports were filed. Of these, 10.5 per cent, or 15,000, showed uninsured cars.

But this does not necessarily mean, and probably does not, that 10.5 per cent of all Michigan cars are uninsured. These reports seldom are filed when all drivers in an accident are insured, because they then serve no practical purpose. An estimated 340,000 cars were involved in Michigan accidents in 1956, so it is a fair presumption that most of the 197,000 drivers on whom reports were not filed were insured. It is very likely, therefore, that no more than 4.5 per cent of all cars in the state are uninsured.\textsuperscript{42}

The reasons for such divergent findings are not hard to find: the reports are simply attempts to state statistical facts based in turn on postulates of at least doubtful validity. This is not to imply that there is no uninsured motorist problem or that the problem is not a serious one. Rather, it emphasizes the need for circumspect examination of available data and a more thorough evaluation of and improvement in data gathering facilities in this important field. The difficulty of discriminating between dichtung und wahrheit in this area has led one legislative council to base its conclusions on a less critical recitation of statistics:

It is not necessary to belabor the point, when one realizes that literally thousands of accidents take place every day and the best available estimates indicate that in Virginia at least one-third of the accidents involved uninsured vehicles. Almost everyone can, in his own experience or the experience of his immediate family or

\textsuperscript{40} The Senate Interim Comm. of the State of Cal. on Vehicles and Aircraft, The Financially Irresponsible Motorist, p. 9 (1955).

\textsuperscript{41} Wis. Legislative Council, op. cit. supra note 36, at 82. "Most people will agree that the Wisconsin coverage does not exceed 85%.

\textsuperscript{42} Governor's Comm'n, Mich., op. cit. supra note 33, at 7. It would appear that the composition of the Committee, Commission or Council studying the problem has a great deal to do with the conclusions of the group.
friends, recall an instance in which injury or damage resulted from the negligence of an irresponsible motorist and adequate indemnification could not be had.\footnote{38} The determination of total economic loss caused by uninsured motorists presents an even more obscure problem, since, necessarily, it must be based on the validity of the determination of the percentage of uninsured vehicles and upon the evaluation of the intangibles inherent in personal injury cases. The formula generally used is a simple arithmetical one. For example, in California, the Department of Motor Vehicles’ accident reports showed that during the years 1952 through 1954, the number of insured vehicles involved in accidents was approximately eighty-four percent. Insurers during the year 1953 paid approximately $84,000,000 in direct losses incurred. From these figures it was estimated that the total amount of damage should be $100,000,000 and, therefore, that $16,000,000 in losses were incurred as a result of the operation of uninsured vehicles.\footnote{44}

A more precise method of measuring damages involving uninsured vehicles is found in an analysis of the Division of Motor Vehicles of Virginia which contains an individual accident case evaluation for the month of July 1955. Trained evaluators in the department examined 5,961 accident files and evaluated non-insured property damage in the amount of $546,250, and bodily injuries not covered by insurance in the amount of $393,500.\footnote{45}

At this point it might be well to question whether the number of uninsured motorists or the economic loss occasioned by uninsured vehicles is significant. Assume, for example, that in California $16,000,000 of a total of $100,000,000 in property damage and personal injuries arose out of motor vehicle accidents involving uninsured vehicles in 1953. It is hardly possible that all uninsured motorists involved in such accidents were legally responsible for such damages or injuries. The statistical isolation of those who were legally responsible would seem to be the first step in determining an accurate measurement of the overall problem. No detailed study of this nature has been found. The Safety Responsibility Division of the District of Columbia conducted a thirty-day study in much the same manner as the analysis made by the Virginia Division of Motor Vehicles during the month of December...
1958, but carried the analysis one step further: by examining police reports, witnesses’ statements and diagrams of each accident, trained evaluators, under the most conservative ground rules possible, determined the number of uninsured motorists who were at fault and the amount of damages and injuries for which such motorists should be held legally responsible.\textsuperscript{46} The results were not unexpected: eighteen percent of the motorists involved were uninsured and the majority of this group (seventy percent) were considered responsible for the damages and injuries arising out of the accidents. The total economic loss of all accidents examined (1,747) was estimated at nearly $725,000 of which uninsured motorists caused losses amounting to about $140,000.

The latter analysis is not presented as a suggestion that it is a more accurate method of statistical adduction for use in connection with the problem of the uninsured motorist. It is suggested, however, that such an analysis may be more useful than one in which all uninsured property damage and personal injury loss is lumped together, regardless of fault, depending upon the legislative objectives which are to be achieved. If, for example, the objective is to increase the financial responsibility of the ever shifting, changing mass of individual vehicle owners, at times insured and at other times uninsured, the problem must be treated as one in which there is a constant potential among the uninsured group as such, and the fact that some uninsured motorists are not at fault in motor vehicle accidents is unimportant. On the other hand, if the legislative objective is to provide relief against uninsured legal liability, the more particular type of study and analysis becomes desirable since the cost of financing the program, the extent of coverage to be provided, and the cost of administration can only be determined by more precise measurements of the basic problem.

For example, if the legislative objective is by compulsory insurance to eliminate the substantial number of uninsured vehicles from the highways, and to permit the consequent smaller number of accidents involving uninsured residents and the usual number of accidents involving uninsured nonresidents, the more particular analysis is unnecessary. If the legislative objective is to extend public policy to greater lengths in meeting the problem, for example by way of a state fund, the number of possible claims and their value become most important in that the costs of administration and coverage to be afforded are determined by the more particular measure of the problem.

In summary, the studies referred to above show: (1) there is a social and economic problem which is of dismaying proportions under any method of measurement, and is made even more serious for many innocent victims of automobile accidents for whom none of the statutory devices thus far discussed have provided effective relief; (2) the problem of measuring the losses caused by financially irresponsible motorists is of such nature that no precise evaluation is available—or, perhaps, possible; (3) some of the variant conclusions arising out of substantially the same statistical data can be avoided by a reasonable percipience of the limitations of available records and the legislative objectives; and (4) perhaps a workable method for obtaining more meaningful data has been suggested for the use of those who have been or who may be called upon to examine the problem.

III

MOTORISTS' FINANCIAL RESPONSIBILITY AND PUBLIC POLICY

What is the role of government in the problem of financial responsibility in motor vehicle accidents? Why must government concern itself with motorist financial responsibility at all? One of the simplest expressions on this subject is found in this comment on the compulsory insurance law enacted by Massachusetts in 1925:

[T]he year 1920 arrived, World War I had ended, and 319,774 cars were on the road in the Commonwealth. The horse and buggy days were over and the American automobile had truly gone into mass production. Along with this remarkable advance of motoring, however, an increasingly disturbing problem presented itself. Too many of our friends and neighbors were being killed or injured in automobile accidents, most of them by motorists who were both uninsured and otherwise financially irresponsible.47

In 1957, to cite only the grimmest statistics—in accidental deaths in the United States—some 95,000 persons lost their lives.48 Of these, nearly 39,000 died in automobile accidents. An examination of various categories of accidental deaths shows clearly that deaths resulting from automobile accidents far outnumber those in any other category. The right of operating a motor vehicle is controlled by the state, its use is regulated by the state, and its misuse is punishable by the state. In no other area of licensing and regulation of activities involving accidental deaths or injuries is government faced with a comparable social problem of providing recompense for the negligence of its licensees. For example,

47 Casualty Insurance Companies Serving Massachusetts, The First Thirty Years, p. 6 (Sept. 1957). (Emphasis added.)
firearms are licensed for use in hunting but no significant public pressure has arisen because of accidental harm caused by the negligent use of such firearms.

In response to the growing number of citizens who become victims of financially irresponsible motorists, the evolution in motor vehicle financial responsibility laws described above took place. Today one might paraphrase the quotation above by saying that 1946 arrived, World War II was over, there were thirty to forty million registered motor vehicles in the United States, and automobile accidents were again killing and injuring too many of our friends who are victims of the negligence of financially irresponsible motorists. Assuming nine-six percent of all vehicles are insured at a given time, the problem of the uninsured motorist when one million vehicles are registered is perhaps tolerable. Simple arithmetic explains the problem when forty million vehicles are registered, four percent of which are uninsured. Unfortunately, as seen by the studies made on the subject, we may not make the assumption that only four percent of our motor vehicles are uninsured. We may further paraphrase the quotation above and say that the horse and buggy days of financial responsibility laws are over.

The historical survey above shows that most state legislatures first turned to the future proof financial responsibility law, later the so-called security-type responsibility law. It has been stated that financial responsibility legislation was developed "as a result of, and as the insurance companies' answer to, the growing demand for compulsory insurance of some kind."49 Opposition to compulsory insurance is still found mainly among insurance executives, although there are others.50 Some insurance representatives favor compulsory insurance today, but only as an alternative to any further extension of public responsibility into the regulation of the financial responsibility of motorists. This group maintains that: "Either the New York type of law or the equal responsibility law will provide effective means of reducing the problem of the uncompensated victim to the point where it is no longer of social significance."51

49 Cal. Assembly, op. cit. supra note 18, at 81.
51 Wise, Financially Irresponsible Motorist and the Uncompensated Accident Victim, 1957 Ins. L.J. 139, 146.
As will be seen, the New York legislature did not agree with this evaluation of a compulsory law's effectiveness and embarked on a new approach to supplement the compulsory law, a form of unsatisfied claim and judgment fund law. Why was compulsory insurance supplemented by a new form of public responsibility? Admittedly the number of accidents involving uninsured residents' vehicles is much lower under a compulsory insurance law than under a safety responsibility law. For example, in 1956, prior to the effective date of the New York compulsory insurance law, the New York Bureau of Motor Vehicles issued 75,000 suspension orders against financially irresponsible resident motorists, but in 1957 under the compulsory insurance law only 163 revocations were issued for the same reason.\(^52\) However, over 21,000 nonresidents' privileges were suspended because no evidence of insurance coverage was presented. Add to this the number of hit-and-run accidents, unauthorized use cases, stolen vehicles, disclaimers by insurance carriers, and the problem takes on new dimensions which cannot be ignored. Governor Harriman in a message to the people of New York on the compulsory insurance law stated this fact with blunt frankness:

> When I signed this measure, I indicated that although it was a substantial step toward security, just treatment and assuring a greater measure of safety for the citizens of our state, it still fell short of protecting all of the innocent victims of motor vehicle accidents against loss arising from personal injury and death. Thus, the innocent victims of the hit-and-run, the stolen car and the uninsured out-of-state automobile were still unable to receive the benefits afforded to others.\(^53\)

Here is an expression of the basis of the new philosophy of public responsibility regarding automobile accidents. It is no longer thought that a certain number of uncompensated innocent victims each year is tolerable. Uninsured accidents are no longer a prerogative of the motoring public. Apparently the view is, as Governor Harriman indicated, that all innocent victims must be compensated, at least for personal injuries and deaths arising out of automobile accidents.

Perhaps one writer has correctly gauged the cause of this new philosophy:

> Its basis is that the individual does not have the ultimate responsibility for his own economic security but that such responsibility rests with his government. The philosophy has found expression in many aspects of our present economic life. The


\(^{53}\) Message by Governor Harriman printed in the Foreword to This Is Motor Vehicle Accident Indemnification Corporation—New Protection For You, N.Y. Insurance Dep't, p. 2 (1958).
establishment of social security and welfare agencies, the press for socialized medicine, price supports and other measures, all have as their purpose the elimination of risk by the individual and the assumption of risk by the government.

It is this force . . . that is a major factor in creating a demand that something be done for the so-called "uncompensated accident victim." This force must be recognized if we are to make a proper analysis of the schemes which will be proposed to solve the question.\textsuperscript{54}

Gradually the philosophy that some victims of motor vehicle accidents must expect to suffer their losses depending on the fortuitous presence or absence of insurance coverage is being abandoned in favor of a policy requiring the motoring public to discharge a duty to all who suffer injury or death through the negligence of one of its members. The concept may be extended to property damage with the same logic that applies to personal injury losses. Legislative methods of translating this policy into a workable plan will be examined later.

There are those who still view the security-type "safety responsibility law" as the best possible answer to the problem. Apparently, the tremendous increase in automobile registrations during the past ten years, coupled with an apparently static percentile of insured vehicles in many, if not most jurisdictions, have escaped them as being significant.\textsuperscript{55} Many fail to recognize weaknesses in these laws and some even conclude that such weaknesses were virtues. For example, prior to the enactment of the New York compulsory law, it was said that in New York, where the Safety Responsibility Law had been in effect since 1942, fewer than four percent of the drivers involved in accidents in 1953 were uninsured, that uninsured motorists deposited $1,286,721 to furnish proof of ability to meet damage claims, that 20,394 releases were filed, and thus that a substantial majority of the uninsured demonstrated their financial responsibility, thereby reducing the number of financially irresponsible motorists to an even smaller group.\textsuperscript{56}

Here again simple arithmetic exposes the weakness of the law: 75,260 New York residents were suspended under the same law in 1956. But what is even more critical is that an examination of financial responsibility records shows that many releases represent compromise settlements based on the small amounts the impecunious are able to pay and are further tempered in many cases by the fact that if the settlement is not

\textsuperscript{54} Wise, supra note 51, at 140.
\textsuperscript{55} The percentage of insured motorists involved in District of Columbia accidents, for example, remains constant at 82-84\% each reporting period.
\textsuperscript{56} Association of Casualty and Surety Cos., op. cit. supra note 50, at 9-10. No other state has reported nearly as high percentage of insured motorists involved in accidents.
made and the operating privilege of the tortfeasor is not restored, the victim will receive nothing. Further examination shows that "a small number of motorists satisfy the law by depositing security in an amount sufficient to cover the injury or damage to other parties. Usually an amount is deposited only in cases in which the injury or damage is relatively slight. When damage becomes extensive, few motorists are financially responsible."57

The experience in the District of Columbia follows the pattern. The average deposit made thus far during the fiscal year 1959 is $170.35.68 What seems to be of more significance, however, is the fact that since the District of Columbia Safety Responsibility Act became effective, security deposits in the amount of $303,643.52 have been made of which only $35,297.57 have been assigned to claimants or paid to judgment debtors, while $177,449.78 has been refunded to depositors.59 This would seem to indicate that most uninsured motorists who cause accidents are not financially responsible, while innocent victims of such accidents are the depositors who comply with the law, and it is the former who, in the final analysis, create the problem now before us.

At the other extreme of opinions on the effectiveness of safety responsibility laws, there are those who believe such laws are of little value at least as they are presently written:

Regardless of the position taken by the legislatures in the various states, one thing is definite—the present so-called Safety Responsibility Laws are not the answer to this problem. In fact, they are as bad, if not worse, than no such law at all. The idea is good, and appropriate legislation can remedy the defects and provide a cooperation between the insurance industry and the law enforcement divisions in the various states. They must work together if the problem is to be solved.60

A combined group of insurance associations, the American Mutual Alliance, the Association of Casualty and Surety Companies and the National Association of Independent Insurers, representing about seventy-nine percent of the automobile insurance policies issued in the United States, are proposing a series of amendments to the presently prevailing security-type law which are designed to strengthen the law, thereby hoping to persuade more motorists to become insured.61 Since cooper-

57 Wis. Legislative Council, op. cit. supra note 36, at 84.
59 Ibid.
ation between the insurance industry and law enforcement agencies has been suggested, it is appropriate that we examine this very recent effort on the part of the industry and evaluate their proposals using the criteria of what appears to be the trend of public responsibility today.

The program has the objective of strengthening present financial responsibility laws and embraces a number of modifications of provisions usually found in all security-type laws. Only the changes marking policy departures from present laws will be noted.62

At present only those accidents in which property damage in an amount exceeding one hundred dollars to the property of one person, or those in which personal injury occurs, are reportable in most states.63 The obvious purpose in setting a property damage minimum is to avoid processing of minor cases. The first proposal of the insurance industry would lower the limit to fifty dollars so that more persons would become subject to the act, thereby increasing by persuasion the number of insured motorists. This expectation is based on the same theory that underlies the law at present: the threat of losing one's permit will impel motorists to seek voluntary insurance coverage rather than take a chance on having an accident and becoming subject to the law.

Another proposal is to require uninsured motorists involved in accidents to deposit a minimum of $500 as security regardless of damage done to other persons involved in the accident. Again this requirement is proposed as an added "inducement" to persuade more persons to become voluntarily insured, and to induce uninsured motorists to settle small claims promptly rather than deposit the larger sum.

The third proposal is to impound vehicles of uninsured motorists following an accident. Here the threat of losing one's motor vehicle is expected to present even more forceful persuasion factors than the threat of losing a permit or registration privileges. Also the impoundment is said to be an inducement to settle claims by the owner of the impounded vehicle which would be available for the payment of a judgment to the extent of the owner's equity.

The fourth change would extend compulsory insurance requirements to include persons convicted of moving traffic violations on two occasions without a showing that the vehicle involved was insured.

62 See American Mutual Insurance Alliance, the Ass'n of Casualty and Surety Cos., and the National Ass'n of Independent Insurers, A Program for Responsibility on Our Highways.

63 One state has a $35 minimum, 13 states have a $50 minimum, and one state has a $75 minimum. See Association of Casualty and Surety Cos., Automobile Financial Responsibility and Related Laws, Chart I.
The declaration of policy offered by the proponents of the program states that its aim is to strengthen present laws for the protection of the public "by assuring that those motorists who have been involved in accidents or in traffic violations and who have demonstrated their need for financial responsibility will either provide financial responsibility or be removed from the highways."64

The italicized portion of the quoted statement shows that the purpose of the proposed amendments of present laws does not depart from the basic philosophy of the security-type law now in effect in most states:65 motorists are free to insure or not as they choose but will suffer the loss of their operating and registration privileges after they have caused personal injury or property damages and cannot show evidence of financial responsibility. Here again the "one bite" feature of the law is retained and raises the question: will public policy permit some innocent victims of traffic accidents to suffer their injuries without compensation, while others are made whole because by sheer chance the latter were injured by an insured motorist? The person injured or damaged can take little solace from the fact that the uninsured motorist will lose his operating privileges. Of course, extending the number of suspensions against uninsured motorists may have a persuasive effect upon the public to some extent, but it is the considered opinion of these writers that the number of uninsured motorists involved in accidents will not be reduced materially. Some persons will not insure unless compelled to do so; others allow their policies to lapse or be cancelled even when compelled to insure; and still others are involved in accidents who would ordinarily be insured but because of financial reasons, or a misconception of what constitutes liability insurance,66 or the known difficulty of obtaining insurance because of age, prior record, and the like, find themselves responsible for accidents but are without the finan-

64 See American Mutual Alliance, op. cit. supra note 67, at 2. (Emphasis added.)
65 Two states, New York and North Carolina, have superimposed compulsory insurance laws on the already existing security-type financial responsibility law; Massachusetts has had a compulsory insurance law in effect since 1927.
66 This misconception of many individuals is understandable. Many if not most buyers of automobiles must purchase their vehicles on credit. At the time of sale, dealers insist of course on the buyer's purchase of physical damage insurance for the protection of the finance company. Usually no mention is made of the need for liability coverage for economic reasons: the cost of liability insurance may very well discourage the sale. Any administrator of a financial responsibility law can recall innumerable instances in which a person subject to the suspension provisions of the law complained that he was told "you are fully covered" only to find upon the happening of an accident that his vehicle was insured only by physical damage coverage.
cial means of paying for the results of their negligence. In addition, each year thousands of new vehicle owners become part of the uninsured potential with the same attitudes of responsibility and financial ability as the group described above.

This group cannot be eliminated even in jurisdictions having a compulsory insurance law, much less in a jurisdiction having a partly persuasive, partly compulsory law as is the case in the majority of states today. Indeed it was precisely the inability of the New York compulsory insurance law to eliminate this group to a degree consistent with New York's public policy that led New York to move beyond compulsory insurance into the realm of public responsibility for motor vehicle accident victims. This policy, which recognizes that only through the assumption of public responsibility can the burden of hardship be lifted from all innocent victims of accidents, is best expressed in the declaration of purpose of the New York Motor Vehicle Accident Indemnification Corporation Law of 1958:

The legislature finds and declares that the motor vehicle financial security act as enacted in nineteen hundred fifty-six, which requires the owner of a motor vehicle to furnish proof of financial security as a condition to registration, fails to accomplish its full purpose of securing to innocent victims of motor vehicle accidents recompense for the injury and financial loss inflicted upon them, in that the act makes no provision for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by (1) uninsured motor vehicles registered in a state other than New York, (2) unidentified motor vehicles which leave the scene of an accident, (3) motor vehicles registered in this state as to which at the time of the accident there was not in effect a policy of liability insurance, (4) stolen motor vehicles, (5) motor vehicles operated without the permission of the owner, (6) insured motor vehicles where the insurer disclaims liability or denies coverage and (7) unregistered motor vehicles. The legislature determines that it is a matter of grave concern that such innocent victims are not recompensed for the injury and financial loss inflicted upon them and that the public interest can best be served by closing such gaps in the motor vehicle financial security act through the incorporation and operation of a motor vehicle accident indemnification corporation.\(^6\)

In summary, the choice between retaining the present admixture of partly persuasive and partly compulsory security-type laws, or compulsory insurance laws, or, of adopting supplementary statutory programs under which public responsibility for the payment of claims and judgments is assumed, is simply the choice of providing compensation for all innocent victims of motor vehicle accidents, except, of course, uninsured motorists, or of providing a means of compensation for a

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certain percentage of such victims. The manner in which a few jurisdictions have attempted to supplement the presently prevailing system is significant.

IV

IMPLEMENTATION OF PUBLIC RESPONSIBILITY FOR UNCOLLECTIBLE AUTOMOBILE ACCIDENT CLAIMS

Implementation of the policy of public responsibility for uncollectible automobile accident claims may, at the present time, be studied in the legislation of six states and nine Canadian provinces. Comparisons are revealing, for both in objectives and administrative features these laws contain significant differences. For comparison, the plans presently in effect may be classified as follows: (1) Mandatory Uninsured Motorist Coverage, as found in New Hampshire, New York and Virginia; (2) State-operated Unsatisfied Claim and Judgment Funds, as found in North Dakota, New Jersey and Maryland; (3) Industry-operated Unsatisfied Judgment Funds, as found in New York and Virginia; and (4) Canadian Unsatisfied Judgment Funds.

1. Mandatory Uninsured Motorist Coverage

The simple device of providing insurance against uncollectible automobile accident claims was first proposed during the legislative debate in New York in 1954.\(^6\) It was then called "The Voluntary Plan," and it was offered by the insurance industry as a way for the insured motorist who was involved in an accident with an uninsured driver to put himself in the same position as if he had been injured by an insured motorist. Since 1954, this type of coverage, sold as an additional endorsement on a regular policy of automobile liability insurance, has been adopted as an optional feature by most automobile liability carriers throughout the United States. It is now generally called "Uninsured Motorist Coverage," or sometimes "Family Protection Insurance."

Protection under this coverage is in the same amounts as the minimum limits required by state financial responsibility laws and applies to all sums which the insured shall be legally entitled to recover under the law. Protection sometimes is limited to death and personal injury, and sometimes covers death, personal injury and property damage. Proof of claim is accomplished by reducing the claim to judgment, and special additional proofs are required when hit-and-run claims are involved.

The endorsement also generally provides that the insured shall not settle his claim with a wrongdoer, or prosecute a claim to judgment without consent of the insurer, in addition to the usual conditions relating to notice, assistance, cooperation, changes, declarations and cancellations. Arbitration of differences between the policy holder and the insurer is also a customary feature.

Uninsured Motorist Coverage was first proposed as a counter-measure to compulsory insurance and state-operated unsatisfied judgment funds. Hence, its originators made every effort to keep its cost low. At present, depending upon the locality and extent of coverage, the range of premiums is from two to thirteen dollars. Since 1957, most carriers have made this coverage available to pedestrians at approximately the same premium rate as to motorists.

The offer of voluntary Uninsured Motorist Coverage did not divert the drive for compulsory insurance in New York as its proponents had at first hoped. The rapid adoption of this form of coverage, however, in the competitive insurance industry and its acceptance by the motoring public logically led to the thought that it would be desirable to make Uninsured Motorist Coverage a standard feature of every policy of automobile liability insurance. Thus, it was argued, at least all insured motorists would have protection against injury and damage caused by financially irresponsible motorists.

New Hampshire in 1957 was the first state to implement this suggestion. Under its law, the Uninsured Motorist Coverage was required only for claims arising from death or personal injury. In 1958, New York and Virginia added mandatory Uninsured Motorist Coverage to their laws in connection with the establishment of industry-operated unsatisfied judgment funds. In New York, coverage was limited to death and personal injury claims; Virginia, however, also included property damage coverage.

2. State-operated Unsatisfied Judgment Funds

The Unsatisfied Judgment Funds of North Dakota, New Jersey and Maryland represent formal acceptance by the state of public responsibility for the recovery of automobile accident claims caused by financially irresponsible drivers and others who, for various reasons, cannot be compelled to pay for injuries caused by their negligence. In these states, official agencies undertake the financing of the fund, supervision

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of the management of the fund, and protection of the fund against unqualified claims.

Under the North Dakota Unsatisfied Judgment Fund, enacted in 1947, the cost of uncollectible accident claims for death or personal injury is distributed evenly over the entire motoring public. The fund was established by assessing each motorist an additional one dollar at the time of his 1948 vehicle registration. Maintenance of the fund by additional assessments is provided for as follows: "[I]f on the 1st day of June in any year the amount of such fund is $100,000.00 or more, the requirement for the payment of such fee shall be suspended during the succeeding year and until such year in which, on the first day of June of the previous year the amount of such fund is less than $100,000, when such fee shall be reimposed and collected."71 Recovery from the fund is limited to the minimum amounts of financial responsibility required under the state's security-type law, and claims on the fund must be in excess of $300. In its original form, the North Dakota law applied only to claims against financially irresponsible motorists; in 1951, however, the law was amended to permit claims arising from hit-and-run accidents.72

Procedure for protection of the fund against unqualified claims is provided. Applicants who have reduced their claims to judgment must file their claims upon the fund in the district court where the judgment was rendered, together with notice to the Attorney General of the State. When hearing is granted, the applicant must show: (1) that he has obtained judgment in a matter which is within the scope of the fund; (2) that he has caused execution to be issued on his judgment and found the judgment debtor's property insufficient to satisfy the judgment; (3) that the judgment debtor has been examined for other assets or insurance and that an exhaustive search has been made to discover other property from which the judgment might be paid; and (4) that no other or further property with which to satisfy the judgment can be found. Where a claim arises out of an accident in which the party liable cannot be ascertained, proceedings to obtain payment from the fund are initiated by service of process on the State Highway Commissioner. In both of the foregoing types of proceedings to obtain payment from the

fund, the state Attorney General has the right to appear and show cause why payment should be denied; and, in all cases based on default judgments, the appearance of the Attorney General is mandatory. Appeals from the order of the court in regard to payment from the fund may be made by either the judgment creditor or the Attorney General.

In contrast to this relatively simple procedure of the North Dakota law, New Jersey's Unsatisfied Claim and Judgment Fund seems vastly more complex. Much of this apparent complexity, however, becomes understandable when it is remembered that New Jersey must deal with some 2,000,000 registered vehicles, while North Dakota can measure its needs in terms of approximately 300,000 registered vehicles.

In the establishment of its fund, New Jersey introduced a differential rate of assessment of insured and uninsured motorists, reflecting a policy that in maintaining the fund the uninsured motorist should pay more heavily than the motorist who voluntarily maintained himself financially responsible. The initial assessment in 1954 was one dollar for insured motorists, three dollars for uninsured motorists, and one-half percent of the premiums collected by automobile liability insurance carriers during the previous calendar year. In 1956, however, assessment of the insurance carriers was dropped, and the differential between insured and uninsured drivers was set at one dollar to eight dollars. Finally, in 1958, direct assessment of the insured motorist was discontinued altogether, and the fund was maintained by annual assessments of up to fifteen dollars on the uninsured motorists.

Recovery from the fund in New Jersey is permitted up to the limits of the state's security-type law. In 1952, this was $5,000 and $10,000 for death and personal injury, and $1,000 for property damage. In 1958, these limits were raised to $10,000/20,000 and $5,000 for both the security-type Safety-Responsibility law and the Unsatisfied Judgment Fund.

Custody of the fund is assigned to the State Treasurer, and management of the fund is vested in a six-man board, consisting of the Commissioner of Insurance, Director of Motor Vehicles, and four representatives of the insurance industry. Procedure for payment of claims from the fund requires that notice of intention to file a claim be sent to the board within a specified period following an accident in order that investigation and defense may be undertaken where necessary. Cases in which notice has been filed are then assigned to specific in-

surance carriers for investigation and defense. Such assignments must be made in all cases based on default judgments and hit-and-run accidents, and may be assigned in any other case, where necessary, in order to protect the fund. Assignments are made in proportion to the premium writings of the various insurers. Actual application for payment of claims from the fund is made through proceedings before a court, at which time the applicant must show that he has reduced his claim to a judgment which remains unsatisfied in an amount over $100 and that his claim is otherwise qualified under a list of specific conditions set forth in the statute.\textsuperscript{75} If, on the basis of this evidence, the court is satisfied of the truth of the applicant's allegations, and if he has fully pursued and exhausted all remedies available to him for recovering damages for his injuries, an order is issued directing the State Treasurer to make payment from the fund. Where claims arise from hit-and-run accidents, proceedings take the form of an action against the State Treasurer. The claimant must prove injuries, damages, and that the identity of the person responsible is not ascertainable.

Settlement of claims otherwise eligible for payment from the fund is provided in two situations: (1) in actions against financially irresponsible motorists where a judgment against the defendant would clearly be uncollectible, the insurer to whom the case has been assigned may, with the approval of the board and the court, settle claims not exceeding $2,500; and (2) in cases brought against the State Treasurer for hit-and-run injuries, the board may enter into a settlement with plaintiff and submit it to the court for approval and order of payment from the fund.\textsuperscript{76}

Payment of an unsatisfied judgment by the state through its fund places the judgment debtor under obligation to the fund until the fund is repaid. When a claim is paid on a judgment rendered against a financially irresponsible motorist, the law requires that the judgment creditor assign the judgment to the State Treasurer; also, when the State Treasurer pays a claim based on a judgment in a proceeding in which he has been a party, he becomes subrogated to the rights of the judgment creditor. Notice of these judgments is given to the state Director of Motor Vehicles, and thereafter the vehicle registration and driver license of the financially irresponsible driver may not be restored until he has (1) fully repaid the State Treasurer, with interest, all amounts which the fund has paid on the judgment rendered against him.

\textsuperscript{75} Ibid. The original act of 1952 had provided a minimum claim of $200.
\textsuperscript{76} Ibid. The original act of 1952 had provided for settlement of claims up to $1,000.
and (2) satisfied all requirements of the Safety-Responsibility Law relating to maintenance of future proof.

In all essential features, the Maryland Unsatisfied Claim and Judgment Fund Law of 1957 is patterned after the New Jersey law.\(^{77}\) Most differences are in the details. The Maryland law utilized differential rates of assessment in the creation of its fund in 1958, levying one dollar on insured motorists and eight dollars on the uninsured. The minimum amount of claim eligible for payment from the fund in Maryland is set at $100 as compared with $200 in New Jersey. One change of substance was made in adapting the New Jersey law to Maryland’s policy. The Maryland law permits the fund to pay claims of eligible guests of the claimant, the claimant’s spouse, children and parents, all of whom are not eligible to bring claims under the New Jersey law. The Maryland Unsatisfied Claim and Judgment Fund will become available for payment of claims arising after June 1, 1959.

3. Industry-operated Unsatisfied Judgment Funds

During the years 1952 to 1956, committees of the New York legislature devoted fully as much time to the study of unsatisfied judgment funds as to compulsory insurance. A plan of compulsory insurance coupled with a plan for assisting accident victims who found themselves with judgments against financially irresponsible drivers or claims arising from hit-and-run injuries was presented as a two-fold program by the state administration. Regarding the latter part of this program, the Joint Legislative Committee in 1952 recommended supplementing compulsory insurance with the “Assigned Case Plan.” Under such a plan claims against financially irresponsible drivers and unidentified drivers would be assigned to insurance companies for disposition in the same manner as if the company were the insurer of the vehicle involved.\(^{78}\) Claim payments and administrative costs of this plan would be absorbed by the insurance carriers. Management of the program would be vested in the Insurance Commissioner and a board representing the insurance industry. In 1956, however, the state administration receded to a position of asking for enactment of either compulsory insurance or an unsatisfied judgment fund, with the result that compulsory insurance was enacted

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forthwith. The Governor, however, spoke plainly of the shortcomings of compulsory insurance when he signed the law and gave fair warning that he still sought to supplement compulsory insurance with a plan that would assure all innocent accident victims of some recompense for their injuries. In the year that followed, the New Jersey Unsatisfied Claim and Judgment Fund Law was studied closely, and in 1958 New York enacted a new law which combined certain features of the New Jersey state-operated fund and the assigned case plan as proposed in 1952.

The Motor Vehicle Accident Indemnification Corporation Law of 1958 created a public, non-stock corporation to which all companies writing automobile liability insurance in New York were made members. Management of the corporation was vested in a six-man board of directors, composed of two members designated by the stock companies’ association, two from the mutual companies’ association, and one each from the independent stock and mutual companies. The law also required that all policies issued by member companies must provide that the corporation would, within the limits of $10,000/20,000, assume the obligation to pay legally enforceable claims for death or personal injuries arising out of accidents caused by the following: (1) uninsured, out-of-state vehicles; (2) unidentified hit-and-run drivers; (3) drivers of New York cars which were not insured; (4) stolen cars; (5) cars operated without the owner’s consent; (6) insured cars where the insurer denies liability or denies coverage; and (7) unregistered vehicles.

To implement this obligation, the corporation was authorized to prescribe the form of policies, assign cases to member companies for investigation and adjustment, appear on behalf of financially irresponsible motorists and defend against claims with respect to which notice had been given that payment would be sought from the corporation, and levy assessments on member companies for funds sufficient to pay claims qualified for indemnification under the law.

Eligibility to apply for payment of claims by the corporation was limited to New York residents, motorist or pedestrian, who had uncollectible judgments against financially irresponsible motorists or otherwise coming within the scope of the law. Since the enactment of the law and the creation of the corporation, arrangements have been made with New Jersey for reciprocal recognition of claims by the funds of both states. Persons who at the time of an accident are uninsured, how-

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ever, and their spouses, when riding as a passenger in an uninsured vehicle, or persons driving a vehicle in violation of an order of suspension or revocation of registration or driver license are not eligible to claim payment from the corporation.

Procedure for obtaining payment of claims by the corporation is essentially similar to that prescribed for the state-operated funds of New Jersey and Maryland. Applicants must notify the corporation of intent to file a claim and furnish information necessary to permit investigation and defense of the corporation's funds. When an injured person belonging to one of the groups qualified under the law to recover from the corporation has reduced his claim to judgment and finds that it is uncollectible because of the financial irresponsibility of the judgment debtor, he may petition the court for an order on the corporation to pay the unsatisfied portion of the judgment up to the limits of the corporation's liability. Following a hearing, the court will issue its order. In cases where no judgment can be obtained prior to filing a claim, the claimant may proceed directly against the corporation by petition for an order of payment. Proof of injury and eligibility for payment are then brought out in a hearing on the petition. Settlement by the victim with the defendant motorist or his insurer does not bar recovery from the corporation if the victim's claim is otherwise qualified; partial settlements, however, are deductible from the amount payable by the corporation.

The New York Motor Vehicle Accident Indemnification Corporation Law contains provisions similar to the New Jersey and Maryland laws in regard to postponing restoration of driver licenses and vehicle registrations of a financially irresponsible motorist until he has repaid the corporation all amounts paid out on his behalf. In addition, the New York law requires impoundment of the vehicle of a motorist who has been involved in an accident and does not have proof of financial responsibility. Once impounded, the uninsured vehicle is not returned to its owner until final disposition of claims against him or the lapse of one year without any claim having been filed.

The New York plan became effective for filing of claims on January 1, 1959, and the experience of its first months of operation revealed that claims against uninsured out-of-state drivers and claims arising from unidentified drivers' negligence constituted the bulk of cases offered for payment from the fund. Thus, although the new law requires the insurance industry to absorb the cost of claims, payments and administration of the indemnification plan, these costs did not appear likely to
prove burdensome because of the presence of compulsory insurance and the statutory limitations on eligibility to file claims against the Corporation.

The Virginia plan, also adopted in 1958, combines elements of the mandatory uninsured motorist coverage, the assigned case plan, and a state-operated unsatisfied judgment fund. Efforts to implement a policy of public responsibility for uncollectible accident claims and judgments in Virginia commenced in 1956, when strong efforts were made to enact a state-operated unsatisfied judgment fund law similar to that in New Jersey. This proposal failed to pass and was referred to the legislative advisory council for study. The council's report in 1958 again recommended a state-operated unsatisfied judgment fund plan and legislation along this line was reintroduced in the legislature. Opposition to making the state fully responsible for the operation of the plan compelled compromise, however, and when finally enacted, the Virginia plan was embodied in three separate laws, all to become effective within the 1959 registration year.

One act requires all automobile liability policies sold in the state to include the uninsured motorist coverage.\(^{81}\)

Another provides for proof of financial responsibility at the time of annual vehicle registration; and, although not making insurance a prerequisite for registration, requires assessment of an additional fee of fifteen dollars for registration of an uninsured vehicle.\(^{82}\) The additional funds thus collected are deposited in a special "Uninsured Motorists Fund" held by the State Treasurer.

A third act specifies procedure for annual distribution of the Uninsured Motorists Fund among the automobile liability carriers in proportion to the number of policies written as a means of offsetting the additional cost of handling claims under the Uninsured Motorists Coverage.\(^{83}\)

4. Canadian Unsatisfied Judgment Funds

A striking pattern of similarity characterizes the unsatisfied judgment funds of the eight Canadian provinces which have adopted this form of public responsibility for uncollectible claims and judgments.\(^{84}\) The cost


\(^{84}\) Rev. Stat. of Alberta c. 209 (1955); Motor-vehicle Act, Amendment Act, 1947, 11 Geo. 6, c. 62 (B.C.); Rev. Stat. of Manitoba c. 112 (1954); The Motor Vehicle Act, 1955, 4 Eliz. 2, c. 13 (N.B.); Rev. Stat. of Newfoundland c. 94 (1952); The Motor
of maintaining the funds is spread evenly over the entire motoring public by periodic uniform assessments in connection with vehicle registration or driver license renewal. Generally, the authority to order an assess-
ment is discretionary with the lieutenant-governor in council, but som-
times statutory guides are provided in the form of maximum and mini-
imum levels at which a fund is to be maintained. Administration of
these funds is entirely in the hands of provincial officials, with the
provincial secretary-treasurer, the minister of highways and the solicitor
general having the key roles. Administrative expenses of operating the
Canadian funds are paid as part of the regular budget of the provincial
government.

Statutory limits of recovery from Canadian funds coincide with
the limits of their financial responsibility laws, and procedure for appli-
cation is simple and direct. Where claims lie against another motorist
who can be brought to court, the victim proceeds to obtain judgment.
Thereafter he endeavors to collect the judgment “as resolutely as though
the Unsatisfied Judgment Fund did not exist.” If this effort fails, the vic-
tim may apply to the court for payment from the fund. In proceedings on
petition for payment of claims from the fund, the minister of highways
is represented by the provincial solicitor general whose responsibility
it is to protect the fund from unqualified claims. Where the solicitor
general’s office makes no defense against payment, the proceedings be-
come for all practical purposes ex parte. A review of the experience
with cases which are defended indicates that collusion between the
parties to an accident is rare, but that instances where a defendant for
some reason fails to offer a good defense which is available to him
require vigilance by the defenders of the fund.85 As a result, defense

Vehicle Act, 13 Geo. 6, c. 37 (N.S. 1949); Rev. Stat. of Ontario c. 167 (1950); An Act to
Amend the Highway Traffic Act, 1945, 9 Geo. 6, c. 17 (P.E.I.), as amended, P.E.I. Rev.

85 An address by the Hon. Eric Silk, Q.C., before a joint bar and insurance group
meeting on May 27, 1957, is revealing on this point. Here, Mr. Silk said:
You will appreciate the difficulties which were inherent in this situation—I refer to
the situation where a person is sued and he does not have enough interest in the out-
come of the action to defend it. There is an opportunity for collusion between the
Plaintiff and the Defendant, but I am not so much concerned about that as the case
where the Defendant may have a defense on the merits but for some reason or other
he does not bother to defend the action . . . . There are a considerable number who
confuse these proceedings with the Police Court proceedings and explain that
there is no need to go to court because the Magistrate threw the charge out . . . . At
any rate, the situation was corrected as far as it was possible to do so, in 1948, by
an amendment to the effect that anyone taking default judgment without notice
thereof to the Minister of Highways would not be entitled to recover from the Fund.
(Processed.)
by the solicitor general is provided for in all cases arising from default judgments.

Proceedings arising out of hit-and-run injuries are brought against a “Party Unknown” as nominal defendant or against the registrar of motor vehicles. Investigation of the circumstances of the accident is carried out by the provincial police; and, where the defense against the claim is appropriate, the claim is challenged in the subsequent court hearing.

The province of Saskatchewan is not generally regarded as having an unsatisfied judgment fund plan, but rather a state-operated automobile accident compensation plan.\(^{86}\) A close reading of the Saskatchewan law, however, reveals many points of similarity to other plans for state-operated special funds in Canada and the United States. The Saskatchewan law requires that all motorists when renewing vehicle registrations or driver licenses must file a certificate of insurance issued by the Saskatchewan Government Insurance Office. The basic premium for this certificate is established by statute, but is subject to review by the provincial Rate Appeal Board. It may be increased by the insurer in accordance with the risk record of the applicant. In the event that a judgment against a financially irresponsible motorist or unidentified driver is uncollectible, the insured is entitled to compensation in accordance with a fixed scale of benefits set forth by law. Exclusions under this compensation plan are also set forth by statute and include persons who when injured are: driving under the influence of intoxicants or drugs; not properly licensed to drive; engaged in an illicit transport or a crime; driving in a race or speed test; guilty of gross negligence or misconduct; hauling an unregistered trailer; driving an overcrowded vehicle; hauling a bicycle, sleigh, toboggan or skier; or driving without sufficient lights for nighttime or other atmospheric conditions. Claims for damages are handled in the normal manner of insurance adjustments, with provision for arbitration and right of action in the courts in cases of disagreement between insured and insurer. These provisions of the Saskatchewan law supplement the provincial financial responsibility law.

Summary comparison of the Canadian laws with those of the United States reveals that not only have the Canadian provinces accepted the policy of public responsibility on a wider scale, but have implemented this policy on a more uniform pattern than is apparent in the United States. During the period 1947 to 1955, the Canadian provinces established their present plans with very little of the struggle which char-

characterized the American state legislative scene during the same years. Compulsory insurance apparently has never been seriously considered outside Saskatchewan where it has taken a unique form. Reconciliation of the Canadian laws with constitutional limitations has also been smooth. Thus, while the movement toward public responsibility in the United States has proceeded more slowly and with greater diversity of ideas, the Canadian pattern now seems to be well established after a relatively short and smooth transition. 57

V

PUBLIC RESPONSIBILITY AND CONSTITUTIONAL LIMITATIONS

Comparison of current plans for implementation of the policy of public responsibility suggests the possibility that constitutional questions will have to be considered in defining the state's appropriate role in compelling participation in these plans. It is one thing, for example, for North Dakota to implement its policy of public responsibility through a plan operated entirely by the state and financed by equal assessments upon all members of the motoring public. But what happens when this relatively simple, direct approach is modified to require the active participation of the insurance carriers in the investigation and defense of claims against the fund, as in Maryland and New Jersey? What happens when, as in New York, the insurance carriers are to not

57 A comment on the absence of bitter debate in the Canadian legislatures when unsatisfied judgment fund proposals were considered is found in Piper, 3 Federation of Insurance Counsel Quarterly, No. 2, at 34 (1953):

Another question which a reader, familiar with automobile insurance in the United States of America, might well ask is: "Why did the insurance companies accept the Unsatisfied Judgment Fund in Canada, and yet oppose proposals for similar plans in the United States?" An authoritative answer can not be given . . .

Being practical men, they accepted the law as it was enacted. It was not long before they discovered the value of the Unsatisfied Judgment Fund in ways they had not contemplated. Why, then, oppose legislation already on the statute books which satisfied a public demand, materially reduced clamor for compulsory automobile insurance with all its attendant evils, and offset the political campaign of socialists for a government operated compulsory compensation plan? Furthermore, addition of Unsatisfied Judgment Fund provisions aroused interest among other provincial governments in the Safety Responsibility Law where previously there had been little response to representations in its favor.

In the United States of America the opinion has been widely expressed that the whole principle of the Unsatisfied Judgment Fund is socialistic. . .

In Canada we find it hard to understand this attitude. Unsatisfied Judgment Funds as they have been established here in no way encroach on the free operation of private insurance. They deprive no company of premium income or other revenue which might be earned but for their existence. In fact, as we see the operation of Unsatisfied Judgment Funds across Canada we realize more and more that they guarantee the preservation of free enterprise automobile insurance underwriting by eliminating the one basis of public dissatisfaction, the Achilles heel, as was stated earlier, of the Safety Responsibility Law.
only handle the claims, but also absorb the cost of payment of those claims? Finally, what is the legal significance of plans in which an unequal burden of financing the fund is cast upon the uninsured motorist, who, by law, is also declared ineligible to obtain any benefit from the fund? These questions bring the policy face-to-face with the constitutional limitations that define the scope of the state’s police power.

There is a ready tendency in these instances to assert that unsatisfied claim and judgment fund plans impose “unconstitutional conditions” upon those whom the state requires to participate either involuntarily or without hope of commensurate benefit, and that the state may not require one to bargain away constitutionally guaranteed rights in return for permission to exercise a privilege which it is within the sovereign power of the state to deny if it chooses. The doctrine of unconstitutional conditions has been expressed in many forms, but seldom more bluntly than by Mr. Justice Sutherland in Frost & Frost Trucking Co. v. Railroad Comm’n:88

It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.89

Like all such broad constitutional pronouncements, however, this has two sides: on one hand, it is obviously necessary to have a barrier against subversive attacks by the government upon the privileges guaranteed by the Constitution; on the other, it is equally clear that, if fully extended to its logical limit, this doctrine would seriously impair the power of a government to advance policies which are socially desirable.90

It has thus developed that the pattern of the law relating to constitutional conditions is interwoven with many cases where the state’s bargaining power is upheld.91

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88 271 U.S. 583 (1926).
89 Id. at 593-94.
91 Early instances of laws requiring motorists involved in accidents to report the circumstances thereof raised questions of self-incrimination, but the power of the state was
Cases dealing with insurance carrier participation in compulsory insurance and assigned risk plans probably form the closest parallels to the questions raised by unsatisfied claim and judgment funds. Regarding the power of the state to compel insurance, the Massachusetts Supreme Judicial Court has said:

The question whether a particular risk shall be assumed by an insurer or surety is an important factor in the conduct of such business. Health, age, and susceptibility to disease form the basis of acceptance or rejection of most applicants for life insurance. Character, physical capacity, sight, hearing, financial responsibility, record of past conduct, personal habits, nature and extent of business and general reputation are among the elements of essential significance in determining whether motor vehicle liability bonding or insurance for any particular applicant shall be undertaken. To subject the determination of such a vital question by an insurer or surety to review is a great interference with freedom of contract. The right to freedom of contract is secured as a general rule by the constitutions of Commonwealth and Nation; but there are exceptions where legislative interference with the right is permissible. We are of the opinion that the proposed bill in this aspect does not transcend legislative power. The right of the citizen to register a motor vehicle whereby he may travel upon the ways is made strictly conditional upon his depositing cash or securities or procuring a motor vehicle liability policy or bond. This, too, is a great interference with freedom of action. The refusal by corporations to issue such policy or sign such bond may drive one out of business or seriously impair his convenience. Where such paramount interests are at stake with sole reference to the use of public ways provided wholly at the expense of the government, there is constitutional basis for legislative regulation to the end that no injustice may be done. Unwarranted discrimination may arise against certain applicants. Instances may arise of honest difference as to whether a policy or bond ought to be issued at all, or whether, after issuance, it ought to be cancelled. To provide an impartial tribunal to settle such controversies, although going to the verge of power, cannot in our opinion be pronounced an excess of the authority conferred by the Constitution upon the General Court.92

Also pertinent is the decision of the United States Supreme Court in *California State Auto. Ass'n v. Maloney*93 upholding the power of the state to compel all automobile liability insurance carriers to subscribe to a plan for equitable apportionment among them of applicants who otherwise were unable to obtain insurance because they were considered bad risks. Here the court said: "This case in its broadest reach is one in which the state requires in the public interest each member of a

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upheld. See State v. Sterrin, 78 N.H. 220, 98 Atl. 482 (1916); People v. Rosenheimer, 209 N.Y. 115, 102 N.E. 530 (1913). Security-type Safety-Responsibility Laws have also been challenged under the due process clause but have uniformly been upheld. See Escobedo v. State Dept of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); Berberian v. Lussier, 139 A.2d 869 (R.I. 1958); State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953).


93 341 U.S. 105 (1951).
business to assume a *pro rata* share of a burden which modern conditions have made incident to the business."  

These decisions attest the broad scope of the state's power in devising and implementing plans to cope with the financial responsibility problem, but neither goes quite as far in requiring the contribution of uncompensated services as do the unsatisfied judgment fund laws. The question which must eventually be settled is whether these latter plans have overreached the constitutional barrier. To date, the evidence seems to indicate that the courts will not view the unsatisfied judgment funds as instances where the state has driven too hard a bargain. To date, the most comprehensive judicial review of the constitutional aspects of unsatisfied judgment funds is contained in the recent Maryland Court of Appeals decision in *Allied Am. Mut. Fire Ins. Co. v. Monroe.* Here the Maryland unsatisfied judgment fund was challenged by insurers and their insureds because of the financial and other contributions which the law required them to make. In upholding the validity of the law, the court referred to *California State Auto. Ass'n v. Maloney,* noting:

The state could take over the business of automobile liability insurance completely and exclude private participation, or it could compel private insurers in that field to insure all motorists assigned to them, as the *Maloney* case makes plain on both points. Since the State lawfully could impose those burdens or exactions on automobile liability insurers, it properly can make the lighter demands on them that the Act calls for, as a condition of doing in Maryland the business in which they are engaged for profit.

From this premise, the court moved on to more precisely analyze the application of this principle to the Maryland law:

The business from which the insurers make their profits protects not only their policyholders but also those who are injured or whose property is damaged by the negligence on the roads of their insureds. The State decided against itself going into the business of insuring all motorists, against requiring compulsory insurance of all motorists, and determined that it would, in effect, go into the business of insuring to a limited extent, only impecunious motorists who are not insured. To accomplish this limited effort for the general public welfare, it called upon those in private business in the same field to pay a comparatively insignificant proportion of Maryland premiums, which could not exceed ten per cent of the cost of the program, and to furnish, without direct recompense, the services and skill of their employees—the claims investigators—and independent contractors customarily used in their own work—their lawyers. The claim of the insurers that these calls on their labor and skill are arbitrary and oppressive is in the abstract. ... It cannot now be said that what the insurers must do under the Act will bear upon them unduly.

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94 Id. at 109.
95 No. 244, Ct. of App., Md., Apr. 17, 1959. (The slip opinion is not paginated.)
96 341 U.S. 105 (1951).
Thus, as to both the insurers and their insureds, the court found "no sound ground" on which to challenge the compulsory contributions to the fund, declaring that "It is clearly established that the State may raise funds by taxation to expend for general welfare, and it is for the legislature and not the taxpayers or the courts to choose the methods and subjects of taxation."

This Maryland decision also relied in part on a decision of the New Jersey Supreme Court delivered only a few months prior.97 In this case, the plaintiff challenged the constitutionality of that provision of the New Jersey Unsatisfied Claim and Judgment Fund Law which precludes a person who sustains personal injuries from recovery through the fund if, at the time of his accident, he was riding in an uninsured car owned by him, his spouse, parents or children. He argued that there was no rational basis for excluding him, his spouse, parents and children, while, under the same law, permitting recovery from the fund for an uninsured motorist who was injured while a pedestrian. The New Jersey court sustained the constitutionality of the law, saying, in part:

[1]If the exclusion of the class selected bears some rational relation to the fulfillment of an essential legislative design or to some substantive consideration of policy bearing upon the common welfare, it is not sufficient to demonstrate that the legislative object might be more fully achieved by another more expansive or inclusive classification, for the Legislature may recognize degrees of harm and hit the evil where it is felt most.98

Other fields of activity where mandatory pooling arrangements have been upheld may provide further strength for the case of the unsatisfied judgment funds. Railroad retirement pension plans, unemployment compensation, and depositors' guaranty plans—utilizing compulsory contributions by members of the public who may never have occasion to draw upon these funds—have been constitutionally approved and now are an accepted feature of modern government's responsibility.99 Parallel trends in the field of taxation have utilized the principle of differential rates to equitably spread the cost of governmental service among those members of the public who either derive a particular benefit from a public service or activity, or whose own activities cast a special burden of costs upon the public.100 The connecting link between these

98 Id. at 524, 141 A.2d at 5.
100 Reconciliation of differential rates of taxation and assessment with the constitutional
trends in legal doctrine and the problem of uncollectible automobile accident claims and judgments may have been provided by the New York Joint Legislative Committee as long ago as 1938, when it observed:

Study of the possibility of recovery from two-thirds of non-insured vehicles when an accident occurs is established as approximately one chance in four. Therefore either the injured is unjustly burdened with payment of medical, hospital and funeral expenses in the case of a fatal accident, or where such injured persons by reason of their financial status are unable to assume this burden, the State or municipality through its institutions, and often by financial aid through its Department of Charities, is called upon to compensate. Such a requirement from the General Fund of government becomes distributed among the shoulders of all citizens in the form of taxation.\footnote{Leg. Doc. No. 91, p. 43 (1938).}

Reflection on the doctrine of unconstitutional conditions as it may be applied to unsatisfied claim and judgment fund plans leads one to doubt that any lasting valid objection can be made to the implementation of public responsibility on these grounds. Even if it is conceded that the legislative methods now being used may not be the best, the consequences of a constitutional challenge seem, at most, likely to result only in revealing how the legislation may be perfected in its administrative aspects. The policy of public responsibility is becoming accepted, and a broad and flexible area of state power exists within which plans for the implementation of this policy may be worked out. In terms of constitutional limitations on public responsibility, Mr. Justice Holmes seems to have correctly described the situation when he wrote in Noble State Bank \textit{v. Haskell}:\footnote{219 U.S. 104, 111 (1911).} "It may be said in a general way that the police power extends to all of the great public matters. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

\section*{VI}

\textbf{A Workable Plan of Public Responsibility}

A workable plan of public responsibility, in the judgment of the writers, must meet as nearly as possible the following requirements: (1)
the plan must offer maximum coverage to the greatest number of persons consistent with other conditions contained herein; (2) it must be administered within the confines of private insurance principles to the maximum extent possible and must not permit competition between government and private insurance companies; (3) such a plan must be one which is least costly in terms of direct charges to the public, and also cost of administration, and one in which costs are distributed most equitably; and (4) the plan must be acceptable within the framework of present rules of tort law and the administration of justice in that the rules of liability based on negligence are retained.

Each of the plans reviewed in Part IV above may be examined in the light of these criteria.

Concerning the first criterion, the uninsured motorists' endorsement is a most useful method of reaching a large segment of those persons who are injured in person or whose property is damaged by the negligence of an uninsured motorist. The endorsement usually covers the named insured, and, while residents of the same household, his spouse and relatives of either, and any other person occupying the insured vehicle. In addition, under the Virginia plan, damage to the insured vehicle is covered.\(^{103}\) If offered on a voluntary basis, however, there is no assurance that the motoring public will protect itself by use of the endorsement; and, therefore, to be of maximum potential, the coverage must be made mandatory as a standard provision of all automobile liability insurance policies. Even when made mandatory, however, there is a segment of the public which cannot be protected: persons who own no vehicle and who are injured as pedestrians by, or as passengers in, uninsured vehicles, or persons whose property other than motor vehicles is damaged by uninsured motorists. In addition, no property damage coverage, including automobile damage, is afforded in many jurisdictions.\(^{104}\)

The state-operated unsatisfied claim and judgment fund offers the possibility of coverage to all persons injured or whose property is damaged in automobile accidents by uninsured motorists, including property other than motor vehicles. As to qualified claimants, the North Dakota plan provides that any person who obtains a judgment against an uninsured motorist may apply to the fund for payment.\(^{105}\) In the New Jersey and Maryland plans, the uninsured motorist is excluded from


\(^{104}\) See N.Y. Sess. Laws 1958, ch. 759 § 626.

coverage. As to property damage, the North Dakota plan provides no coverage, while in the New Jersey and Maryland plans property damage of any kind is included.

The industry-operated unsatisfied claim and judgment plan as conceived in New York provides coverage for personal injury or death, but none for property damage. Neither an uninsured motorist nor his spouse may qualify for payment of a claim.

As to the second criterion, the Virginia plan, or an uninsured motorist endorsement, operates entirely through the mechanism of private insurance insofar as claims and payments therefor are concerned. The state-operated unsatisfied claim and judgment plans described herein, both those in the United States and those in Canada, require the state to set up administrative machinery for the investigation and defense of claims, a cash fund from which to pay claims and judgments, and a method of financing such a fund including the responsibility for assessing certain motorists, or the insurance industry, or the public generally, or any combination of those.

To the extent that both insured and uninsured motorists are permitted to contribute to and receive benefits from the fund, as in North Dakota, the state is plainly selling insurance in competition with private insurance. Likewise to the extent that insured motorists are compelled to subsidize the investigation and defense of claims against uninsured motorists, as in Maryland and New Jersey, for the benefit of insured motorists and certain nonmotorists who could be protected by an uninsured motorist endorsement, the state is competing with private insurance. The industry-operated plan in effect in New York operates entirely through the insurance industry.

The third criterion, that of cost and the equitable distribution of costs

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106 Md. Ann. Code art. 66½, § 159(c) (1957); N.J. Rev. Stat. § 39:6-69 (Supp. 1958). The exclusions should be explained. In Maryland a claimant is disqualified if he was operating an uninsured motor vehicle owned by him. Likewise, the spouse of a judgment debtor is excluded. The New Jersey law disqualifies as a claimant the owner or operator of an uninsured vehicle. Further, a guest occupant of a motor vehicle owned or operated by the judgment debtor, as well as the spouse, parent or child of the judgment debtor is disqualified as a claimant, as are claimants covered by workmen's compensation and, although insured, a claimant operating in violation of an order of suspension or revocation.

107 See N.Y. Sess. Laws 1958, ch. 759 §§ 601(b), 611(b). The New York law disqualifies any person operating any uninsured vehicle, and the owners of an uninsured vehicle, and his spouse if either are injured as passengers in such vehicle. Also disqualified are: persons operating a vehicle in violation of an order of suspension or revocation, and claims against persons not liable under law, for example between husband and wife, infant and parent.
raises extremely vexing questions in the balancing of interests. Insurance executives argue that in the state-operated fund plan, the burden of cost is placed on the already insured and responsible motorist, and that assessments against the insurer and cost to the insurer for investigation and defense of claims\textsuperscript{108} will ultimately be borne by the insured motorist in the form of increased premiums.\textsuperscript{109} In the New York industry-operated plan, all costs are borne by insurance carriers doing business in the state, and must, of course, be recouped through increased premium rates to be charged against insured motorists.

The fourth criterion excludes the possibility of any plan which does not fit the present rules of tort law for the settlement of claims and judgments arising out of motor vehicle accidents. This would exclude automobile compensation plans, such as the plan adopted in 1947 in the Canadian Province of Saskatchewan\textsuperscript{110} and proposed as long ago as 1932 in the United States.\textsuperscript{111} The present writers are strongly opposed to any proposal which seeks to substitute a principle of compensation without fault in limited measure for the legal principle of allowing full recovery against the negligent wrongdoer.

What then, is a workable plan of public responsibility within the meaning of the principles defined herein? Obviously no specific legislative proposal can be made, but certain guide-lines may be suggested from the discussion.

First, the uninsured motorist endorsement should be made mandatory as part of any statutory program aimed at the uninsured motorist problem. If such endorsement is made a standard provision in all automobile liability policies, the only persons insurance coverage could not protect would be those who own no vehicle and are injured as pedestrians by or in uninsured vehicles. This relatively small group of possible claimants could be protected either by a state-operated fund or by an industry-operated fund. These two must be compared as to the equities in cost distribution.

If an industry-operated plan is adopted, the total cost of financing the payment of claims for injuries of the comparatively small group of

\textsuperscript{108} The cost of investigation and defense is borne by the fund directly in North Dakota, and by insurance carriers in Maryland and New Jersey.


\textsuperscript{110} Rev. Stat. of Sask. c. 23 (1955).

\textsuperscript{111} Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (Feb. 1952).
claimants must be borne by insured motorists.\textsuperscript{112} To the degree that some motorists remain voluntarily uninsured under a security-type law, this program would not be equitable, so that a compulsory insurance law, insuring that all motorists contribute to the cost of closing the "gap" must be enacted.

If a state-operated fund is adopted, the total cost of financing the payment of claims for injuries for the group not protected by an uninsured motorist endorsement will be borne by the group of individuals who create the problem: the uninsured motorists. This can be done without becoming costly because under such a plan uninsured motorists are disqualified as such from making a claim and insured motorists are protected by insurance coverage, leaving only the small group of non-owners described above as possible claimants.

The factors to be weighed in choosing between the two types of funds seem clear. Under an industry-operated plan, the state takes no part in the administration and payment of claims, whereas with a limited state-operated plan the state must direct the investigation, defense and payment of claims and create a fund from which expenses of administration and payments are made. Under an industry-operated plan, compulsory insurance laws must be enacted in order to make the plan feasible. In this connection, the cost of a compulsory insurance law superimposed upon a security-type law must be considered. The administrative expenses required for the verification and filing of insurance coverage, the filing of cancellation notices, enforcement of penal provisions and for the police action necessary to compel the surrender of registration certificates and tags is likely to be staggering.\textsuperscript{113} The expenses of investigation, defense and payment of claims must be subsidized by insured motorists, and to this cost must be added the expenses of administering a compulsory insurance law. On the other hand, a limited state-operated fund could be financed entirely by contributions of uninsured motorists with no cost to insured motorists other than

\textsuperscript{112} Unless, of course, a law could be devised under which uninsured motorists would have to contribute directly to insurance companies—a proposal of rather doubtful constitutional validity.

\textsuperscript{113} See American Association of Motor Vehicle Administration Bulletin, p. 4 (Feb. 1958), for comment on the need for an increased budget. Any administrator of a safety responsibility law under which only a small number of motorists must file and maintain evidence of compulsory insurance is aware of the large number of man-hours necessary to file certificates of insurance and cancellations, suspend persons whose insurance coverage lapses or is cancelled, plus the time spent by investigators or police officers in enforcing suspension orders.
premiums for their own uninsured motorist endorsement. This latter consideration, in the light of the other factors upon which the successful administration of the industry-operated plans depend, would seem to be decisive in determining the choice of administrative means which best serve the motoring public's interest.

Thus, despite a diversity in the choice of plans available, it would seem entirely possible to implement a policy of public responsibility for uncollectible automobile accident claims and judgments in any state where such a policy is justified, and to offer a plan which is consistent with the essential criteria of maximum scope, minimum interference with existing private industry at every point where industry is capable of meeting the needs of the public, reduction of costs to the greatest possible extent, and retention of the tort principle of recovery only for fault. Plans based on these principles will, it is hoped, emerge as the logical next step in the legislative evolution of public responsibility for uncollectible automobile accident claims and judgments in the United States.
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NOTES

A SURVEY OF THE HEARSAY RULE AND ITS EXCEPTIONS IN THE DISTRICT OF COLUMBIA

PART II*

DECLARATIONS OF PHYSICAL CONDITION IN THE DISTRICT OF COLUMBIA

Owing to the pace of modern life, there has been an enormous increase in the amount of personal injury litigation. Such litigation presents the evidentiary feature of pain and suffering of the victim when proving the nature or extent of the physical injury and the damages to which the victim is entitled. One problem that arises quite often at trial is the admissibility of statements made out of court by the victim which are indicative of the extent of his pain and suffering. For example: A is injured in an automobile accident caused by B's negligence. After the accident A complains to C of the severe pain and suffering he is undergoing as a result of the injury. While the objective physical condition of A is helpful in determining the intensity of the pain suffered, the better evidence for both legal and medical purposes is the injured person's own natural and contemporary expressions, in this case, those made to C. Should C be allowed to testify to these declarations tending to show A's bodily condition in the suit between A and B?

The obstacle to the use of these declarations is the rule against hearsay. Hearsay in the District of Columbia consists of statements made by persons other than witnesses, introduced in order to establish the truth of the statements.\(^1\) This testimony is generally excluded because it is not under oath and not subject to cross-examination. The statements of A upon reflection seem to be hearsay. The statements are given by a person, other than the witness, not under oath at the time they are made. There is no opportunity for cross-examination of the declarant, and the evidence is offered and received to prove the matter asserted in the declaration; in this case, that A actually suffered pain. Every element of the rule is present and no conclusion can be drawn other than that these

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* Part I of this survey may be found in 47 Georgetown L.J. 549 (1959), containing the following notes: What Is Hearsay, at 551; Extradjudicial Admissions in the District of Columbia, at 560; and Declarations Against Interest in The District of Columbia, at 579.

statements are hearsay, and if they are to be admitted, it must be under some exception to the hearsay rule.

The early decisions in the District of Columbia admitted the testimony in question, but did so for improper reasons. These cases admitted in evidence declarations concerning bodily condition as part of the res gestae, rather than explicitly under an exception to the hearsay rule. In District of Columbia v. Dietrich, the declarations made by a woman to her husband tending to show the severity of injuries occasioned because of a defect in a sidewalk were admitted as part of the res gestae. Again in Patterson v. Ocean Acc. & Guar. Corp., the court admitted as part of the res gestae declarations made by an osteopath to his wife and brother-in-law that he had strained his back while treating a patient. What did the court mean by its use of this term? In neither case did the court articulate the theory which underlies the admissibility of such declarations. The statement was merely made that the evidence is admissible as part of the res gestae. If anything, the phrase implies that a statement is admissible if it is part of the matter about which we are disputing. On analysis this is neither a limitation on, nor an enlightenment of the problem of admissibility. Professor E. M. Morgan most aptly sets forth the prevailing attitude toward the res gestae phrase: "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as res gestae."

Lately, however, the District of Columbia courts have begun to discard this useless phrase and admit in evidence the declaration concerning bodily condition as an exception to the hearsay rule. The court in Guthrie v. United States settled the difficulty when it admitted the testimony of an occupant of a rooming house that he heard a woman's voice on the day of the alleged murder coming from the defendant's room saying, "Whatever you are doing, please don't do this to me." The court stated: "The woman's utterance showed something physically painful or at least unpleasant was being done to her and indicated her

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3 23 App. D.C. at 579.
5 Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922).
revulsion or alarm. It was therefore admissible under an established exception to the hearsay rule which admits statements of a person's own mental and physical condition.\footnote{Id. at 365, 207 F.2d at 23.}

\textit{Guthrie} should not be taken as being a revolutionary case. It is responsible, rather, for perceiving the true reason for admitting this type testimony, which has been admitted before, but under the guise of a meaningless Latin phrase.

At this point it must be noted that when dealing with statements of bodily condition, we are not dealing with one exception, but two related but ultimately distinguishable and independent hearsay exceptions: those statements made to physicians, and those statements made to persons other than physicians. The reasons which qualify the former as an exception, it will be seen, are quite different from those which qualify the latter.

\textbf{The Policy of Necessity}

Generally speaking, in order for testimony to be admitted under an exception to the hearsay rule, there must be a need for resorting to the hearsay evidence.\footnote{5 Wigmore, Evidence § 1420 (3d ed. 1940) [hereinafter cited as Wigmore].} This necessity principle presents itself in different forms when applied to the various exceptions. It might be in the form of the impossibility of producing the witness on the stand, or the inconvenience of obtaining the person's testimony.\footnote{6 Wigmore § 1714.} Applied specifically to the exception under discussion, the necessity principle presents itself in an altogether different form. The necessity that the courts will require to admit such evidence depends upon its degree of reliability.\footnote{Cf. 6 Wigmore § 1714.}

The judicial determination has been made that there is a practical reason for resorting to a declarant's own statements of bodily condition; they are usually the best evidence of his condition. It is true that pain and suffering may be proved by testimony that is not hearsay, but this proof is difficult to obtain. Circumstantial evidence, while helpful, is not necessarily more probative than the direct evidence in the form of the injured person's statements. The out-of-court statements are decidedly superior to the party's testimony in court, since by the time of trial, passage of time and desire for the "adequate award" are likely to produce exaggeration.

Some jurisdictions, following the lead of New York, distinguish be-
tween the two types of statements of pain in determining the require-
ment of necessity. Where the statement is made to a lay person,
these courts insist that the declarant be unavailable before the hearsay
will be admitted.11 Where the statement is made to a doctor during con-
sultation, however, no unavailability requirement is imposed.12 This dis-
tinction is directly dependent upon the relative reliability of the two
statements. As noted above, the early District of Columbia cases admitted
the testimony of persons other than physicians, but did so under the
theory of res gestae. Although the declarant was unavailable in the
recent Guthrie case, the language of the court seems to indicate that it
would favor the admission. The court, citing Professor Wigmore, who
advances the orthodox view,13 states that the testimony should be admit-
ted "under an established exception to the hearsay rule which admits
statements of a person's own mental or physical condition."14 In the
light of the early decisions, and from the language of the Guthrie case and
its failure to take notice of the absolute necessity approach or the phy-
sician-limitation approach, it appears that the District of Columbia
adopts the view of the majority of American jurisdictions, and does not
impose an unavailability requirement in either case.

Special Reliability

As a general rule, exceptions to the hearsay rule are created as the
courts come to recognize that certain types of out-of-court statements
have elements of special reliability which set them apart from the general
run of hearsay and which tend to compensate for the lack of oath and of
opportunity to cross-examine. Do declarations of bodily condition
possess that high degree of trustworthiness which is necessary in order
to admit them in evidence? To answer this question it becomes necessary
to divide its treatment into two parts: statements made to ordinary third
persons and statements made to physicians.

Statements Made to Persons Other Than Physicians

The traditional view as stated by McCormick is that the "special re-
liability [of this exception] is said to be furnished by the spontaneous

11 Reed v. New York Cent. R.R., 45 N.Y. 574, 579 (1871). But that evidence of
exclamations, groans and screams concomitant with pain made to persons other than
physicians is admissible as part of the res gestae, see Annot., 64 A.L.R. 557, 566 (1929).
12 Kennedy v. Rochester City & B.R.R., 130 N.Y. 654, 29 N.E. 141 (1891); see 6
Wigmore § 1719; Annot., 64 A.L.R. 557, 565 (1929).
13 6 Wigmore § 1714.
quality of the declarations, supposedly assured by the fact that the declarations must purport to describe a condition presently existing at the time of the declaration. It must be conceded, however, that in situations not involving inarticulate cries and groans, the concept of spontaneity is stretched quite far by admitting statements of present pain. However, the reasonable assumption is that, for the most part, people do not complain of present pain and suffering unless it actually exists, and it appears to be safe to admit such declarations to show the physical condition of the person at the time the statements were made. Generally the common sense of the jurors can be relied upon to detect simulation and misrepresentation.

All jurisdictions recognize the special reliability of such statements. Even those jurisdictions which follow the New York rule impliedly admit this because, although they refuse to admit the testimony of persons other than physicians, their refusal is not based on the theory that such statements are untrustworthy but that they are less trustworthy, for when the declarant is not available, these courts do admit the evidence in question. The question finally comes down to just how trustworthy such statements are. The orthodox view is that such declarations, if they are spontaneous, are highly trustworthy, whereas the New York view admits to a lesser degree of reliability, where the statements are made to a layman.

Statements by an injured person concerning the cause of the injury, the circumstances attending the accident and the nature of the injury made to a third person, are held to be inadmissible on the ground that such statements do not possess special reliability. This follows from the fact that if special reliability is furnished by the spontaneity of the declaration, then deliberate accounts of past occurrences, which contain little degree of spontaneity and possibly a large degree of self-interest, should be excluded. Such statements do not relate to any internal state and are therefore not naturally called for by the present pain and suffering. Although not faced with the precise situation, it is believed that the District of Columbia courts would follow this line of reasoning if the problem arose.

15 McCormick, Evidence § 265 (1954) [hereinafter cited as McCormick].
16 Ibid.
18 Ibid.
19 6 Wigmore § 1722.
Statements Made to Physicians

The District of Columbia,21 as well as all other jurisdictions,22 holds that statements of present bodily condition made to a physician upon examination for the purposes of treatment, are admissible under an exception to the rule excluding hearsay. Such statements not only possess the same relative spontaneity, but they derive added and more significant reliability from the fact that the declarant recognizes that his treatment may depend upon the accuracy and honesty of the protestations of pain.23 If this latter reason is the true one for admitting in evidence declarations of bodily condition made to physicians, the scope of the exception appears to be broader than the exception which admits statements made to ordinary third persons.

It will be remembered that when dealing with the exception as applied to statements made to persons other than physicians, a distinction was made between those declarations which are the spontaneous manifestations of bodily condition, which are admissible, and mere descriptive statements of pain or other symptoms already past. This result is perfectly logical when it is realized that the special reliability of such declarations is furnished by their spontaneous quality and that these statements of past symptoms lack spontaneity.

It does not follow, however, that the same distinction should be drawn between statements of present bodily condition and statements of past bodily condition when made to a doctor. Statements made to a doctor draw reliability not only from spontaneity, but from the knowledge of the patient that his proper treatment will hinge upon the accuracy of his declarations. This reason is as applicable when the statement pertains to past condition as to when it relates to present condition.24 As stated by Judge Learned Hand in Meaney v. United States:25

If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can

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22 For collection of cases, see Annots., 130 A.L.R. 977 (1941); 80 A.L.R. 1527 (1932); 67 A.L.R. 10, 11 (1930).
24 Meaney v. United States, 112 F.2d 538, 540 (2d Cir. 1940); United States v. Calvey, 110 F.2d 327, 330 (3d Cir. 1940); United States v. Tyrakowski, 50 F.2d 766, 771 (7th Cir. 1931). That the line between past and present symptoms cannot be sharply drawn, see Hartford Acc. & Indem. Co. v. Baugh, 87 F.2d 240 (5th Cir. 1937) ("He came to the office and told me that his sputum was stained with blood," held inadmissible).
25 112 F.2d 538 (2d Cir. 1940).
only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. . . . A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment.28

The District of Columbia has not settled this question precisely.27 Therefore an examination of the reasons why statements of present pain made to physicians are held admissible in the District is necessary to determine whether this jurisdiction is ready to adopt the conclusion of Judge Hand. If such declarations are considered reliable because of their spontaneous quality, then clearly the District of Columbia should be one of those jurisdictions distinguishing between present and past symptoms. But if their reliability is furnished because made to a doctor for the purpose of treatment, perhaps the way is paved for an adoption of what seems to be sound legal analysis. That the former does not appear to be the case is pointed out in Washington, A. & Mt. V. Ry. v. Fincham.28 That case held that, absent a showing that the statements were self-serving and not made for the purpose of obtaining treatment, the evidence is properly admitted.29 This clearly indicates why the District of Columbia admits statements of present pain made to physicians, i.e., if the statements were made at an examination conducted for the treatment of an ailment, the evidence is competent.

In the light of these reasons for admitting declarations of present pain made to physicians, and the several federal court decisions, especially the Meaney case and the Stewart case30 which followed it, it appears that the District of Columbia would not distinguish between declarations of present and past symptoms, provided the patient is consulting the physician for treatment.

Although the question has not been decided in the District of Columbia, judicial authority asserts that the time of making the statement with reference to bringing suit does not affect its admissibility.31 The

26 Id. at 539-40.
27 Cf. Patterson v. Ocean Acc. & Guar. Corp., 25 App. D.C. 46 (1905), where the court held statements as to cause of the accident inadmissible. This is the majority view. For collection of cases, see 6 Wigmore § 1722(a) n.1.
29 Id. at 419. (Emphasis added.)
30 Stewart v. Baltimore & O.R.R., 137 F.2d 527 (2d Cir. 1943).
31 For discussion and case references, see Abbott, Facts 1185 (5th ed. 1937); Rogers, Expert Testimony § 134 (3d ed. 1941); 6 Wigmore § 1721; Annots., 67 A.L.R. 10, 21 (1930); 64 A.L.R. 557, 568 (1929).
Eighth Circuit in *Kansas City, Ft. S. & M. R.R. v. Stoner*32 rejected the *post litem motam* rule. That court stated:

The admissibility of statements made indicating pain and suffering is not dependent upon the time the same were made with reference to the bringing of an action for damages, but upon the circumstances under which they were made. If the statements were indications of present pain and suffering of such a character that, if made before suit was brought, they would be admissible, then the mere fact that the suit was pending would not render them inadmissible.33

Professor Wigmore reasons that in personal injury litigation, the thought of legal redress often occurs very soon after the accident, if not immediately. To adhere to a strict application of the *post litem motam* rule would result in a rejection of this entire class of evidence, including sincere statements of pain and suffering. He suggests that there should be a common-sense application of the rule which would depend on the circumstances of each case.34

Statements of pain made to a physician employed only to testify are an interesting corollary of the *post litem motam* question. It is well settled in the District of Columbia,35 and probably in the majority of jurisdictions that have passed on the question, that the genuine hearsay use of statements of present pain when made to a physician employed only to testify is commonly denied because of its lack of special reliability.36 Indeed, if anything, such statements possess special unreliability.

At this point mention should be made of one of the non-hearsay uses of statements made to a physician. It has been held in the District of Columbia37 and generally elsewhere38 that the physician is permitted to give a general account of the history, including the patient's statements of injury, past symptoms and present symptoms as of the time of the

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32 51 Fed. 649 (8th Cir. 1892).
33 Id. at 657.
34 6 Wigmore § 1721.
36 Chicago & N.W. Ry. v. Garwood, 167 F.2d 848 (8th Cir. 1948); Nashville, C. & St. L. Ry. v. York, 127 F.2d 606 (6th Cir. 1942); United States v. Nickle, 60 F.2d 372 (8th Cir. 1932); Delaware L. & W.R.R. v. Roalefs, 70 Fed. 21 (3d Cir. 1895). But see Chicago Rys. v. Kramer, 234 Fed. 245 (7th Cir. 1916) (doctor consulted for treatment but with expectation that he will testify held not to be within the restriction).
38 See, e.g., Lowery v. Jones, 219 Ala. 201, 121 So. 704 (1929); 6 Wigmore § 1720(1); Annots., 130 A.L.R. 977, 979 (1941); 80 A.L.R. 1527, 1528 (1932); 67 A.L.R. 10, 18 (1930).
examination in order to lay a foundation for the physician's opinion. It must be remembered that these statements are not offered to prove the truth of the matter asserted. Rather, they are offered simply to prove that the statements were made and form part of the foundation on which the physician's opinion is based.\textsuperscript{39} The reason for admitting such extra-judicial statements is that in diagnosing, the physician must necessarily rely largely upon the history and symptoms described to him by the patient.\textsuperscript{40}

**CONCLUSION**

It is well settled that the District of Columbia admits in evidence certain declarations of bodily conditions under an exception to the rule against hearsay. In its abandonment of the meaningless *res gestae* phrase, the *Guthrie* case established the legitimate rationale of the exception.

Although the exception is recognized, the conditions under which it can be employed present problems which can be solved only by future litigation. The distinction between present and past symptoms regarding their admissibility in evidence is one of these problems. Statements of past symptoms are as significant in modern personal injury litigation as statements of present existing physical condition. The rationale of the federal courts, which reject the distinction, appears most persuasive for admitting this type of evidence. The conclusion reached by these courts, particularly in actions for death and serious bodily injury, where there are no eye-witnesses other than the victim, seems the view most consonant with the demands of justice.\textsuperscript{41}

**MICHAEL J. FERRO, JR.**

**DYING DECLARATIONS IN THE DISTRICT OF COLUMBIA**

In the context of a discussion of the hearsay evidence rule, dying declarations are statements made after an individual has suffered a mortal wound, uttered with a settled conviction that death is imminent, and which pertain to the facts and circumstances of the wounding. A statement of this kind can play a significant evidentiary role in the courtroom. Suppose, for example, John Jones and Sam Smith are engaged in a poker game in Smith's room. No one else is present. By the end of

\textsuperscript{39} McCormick § 267.
\textsuperscript{41} McCormick § 266.
the evening Jones has lost a considerable sum of money to Smith and an argument develops. Jones becomes enraged, takes out a gun, shoots Smith and flees. Smith staggers down the stairs into his landlord’s room and gasps, “I’m dying. Jones shot me after I beat him in poker.” Smith then collapses and dies. The evidentiary importance of Smith’s “dying declaration” is obvious. Short of a confession by Jones, it may be the only direct evidence of the manner of the fatality.

The question immediately arises, is such a declaration admissible in evidence? In our example, could the landlord relate at the trial of Jones for the murder of Smith the dying declaration of the victim?

The statement is squarely within the District of Columbia’s definition of hearsay: “evidence of statements made by persons other than the witness, introduced in order to establish the truth of the statements.”

For here the landlord is attempting to testify that the deceased Smith had said that Jones shot him; this out-of-court assertion being introduced to establish the truth of Smith’s statement, namely, that Jones had in fact fired the fatal shot. If such valuable and often essential evidence is not to be lost to the prosecution, it must be shown to qualify under one of the recognized exceptions to the hearsay rule. At an early date the courts of the District of Columbia established dying declarations as an exception to the hearsay rule. The exception admitting such statements, although clearly hearsay, is made for two reasons: (1) the necessities of the case, and (2) the special reliability of such statements stemming from the fact that they were made by a person facing what he believed to be imminent and certain death.

Let us first examine the aspect of necessity. In each of the few District of Columbia decisions concerning dying declarations, the declarant had died before the trial. With the declarant thus unavailable to testify directly, testimony concerning his statement could either be excluded as hearsay or admitted as an exception to this rule. The old Supreme Court of the District of Columbia, in admitting such a statement in a homicide case, recognized that “dying declarations . . . are generally admitted from the necessity of the case . . . because otherwise [such] testimony must be lost . . . .”

The United States Supreme Court reasoned in Carver v. United States that admission of this testimony may “prevent

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3 United States v. Schneider, 24 D.C. 381, 403 (1893).
4 164 U.S. 694 (1897).
an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present."

The accompanying reason for admitting such testimony is its special reliability, the declarations having been made by a person with a settled conviction of the imminence and certainty of his death. As expressed in United States v. Schneider, the only District of Columbia case containing a thorough discussion of dying declarations, "[D]eclarations made at such a time are supposed to be made under as strong a sanction and guaranty of truth as if he [the declarant] were under oath and on the witness stand." Or, as stated by the Supreme Court in Mattox v. United States, "The admission of the testimony is justified . . . in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose."

Presumably the fear of facing one's Maker shortly after having told a lie, or a fear at least of the unknown in the case of an atheist or agnostic, or the realization by the more pragmatic declarant that he won't be around to profit from any advantageous mistruth, to a large extent removes the danger of falsehood and thus lends the testimony a high degree of reliability. Since the statement appears to have the same trustworthiness and solemnity as one made by a witness under oath, one of the prime objections to the admission of hearsay, that the speaker had no fear of being indicted for perjury, is overcome. That the fear of death greatly reduces the possibility of lying and thus compensates for the lack of opportunity to cross-examine the declarant seems plausible enough, and a sound reason for admitting dying declarations as an exception to the hearsay rule.

What are the requisites, then, that must be met before a dying declaration will be admitted in evidence in the courts of the District of

5 Id. at 697.
6 24 D.C. 381 (1893).
7 Id. at 403.
8 146 U.S. 140 (1892).
9 Id. at 152.
10 For a discussion of this aspect, see 5 Wigmore, Evidence §§ 1438, 1443 (3d ed. 1940) [hereinafter cited as Wigmore]. The latter section indicates that where it is shown that the declarant, at the time of the making of the statement, displayed a feeling of hatred or revenge, this might overcome the effect of the fear of death and thereby render the declaration inadmissible. See McCormick, Evidence § 259 (1954) [hereinafter cited as McCormick]; 2 Underhill, Criminal Evidence § 285 (5th ed. 1956); 1 Wharton, Criminal Evidence § 297 (12th ed. 1955).
Columbia? The first requisite is that the declarant be dead at the time of the trial, and therefore unavailable for direct testimony—a requisite which the textwriters indicate is almost universal.\textsuperscript{11} In the six District of Columbia decisions and the three decisions of the Supreme Court which are concerned with dying declarations, the declarant was dead at the time his statement was introduced at trial, although none of these decisions expressly declares that this is necessary before the statement will be admissible.

As noted previously, necessity is one of the principal reasons cited by the courts for admitting dying declarations, since otherwise the testimony must be lost.\textsuperscript{12} What of the statement made by a party who has suffered what he firmly believes to be a fatal wound but from which he recovers? With death as a requisite, even though the witness might be unavailable in the sense of being absent from the jurisdiction, physically unable to testify, or presently mentally incapacitated, his dying declaration must be ruled inadmissible. But the statement was made under circumstances which surround it with the same trustworthiness as one safeguarded by the solemnity of an oath, at a time when the facts were fresh in the declarant's mind, and is recognized by the courts as being highly reliable. Why not utilize such statements when a party is beyond the jurisdiction of the court, physically unable to testify, or otherwise justifiably unavailable? This broader interpretation of unavailability is sufficient in the "former testimony" exception to the hearsay rule.\textsuperscript{13} Why be more stringent with regard to dying declarations?

The answer to this question is closely tied to the second requisite—that dying declarations must be limited in their admissibility to homicide cases in which the accused is charged with the death of the declarant. If the declarant recovers, there is no ensuing homicide case in which the declaration may be utilized. Neither the courts of the District of Columbia nor the Supreme Court have expressly stated that dying declarations are admissible only in homicide cases in which the accused is charged with the death of the declarant, for the local courts have never been asked to rule on their admissibility in cases other than homicide. Though the death of the declarant is required by an overwhelming majority of the states, this limitation is severely criticized by some of the most noted authorities.\textsuperscript{14} If the fear of impending death results

\textsuperscript{11} McCormick § 259; 5 Wigmore § 1431.
\textsuperscript{12} United States v. Schneider, 24 D.C. 381, 403 (1893).
\textsuperscript{13} McCormick § 234; 5 Wigmore §§ 1402-15.
\textsuperscript{14} McCormick § 260; 5 Wigmore §§ 1431-33, 1436.
in the declarant's making a highly reliable statement, why, they argue, limit its use to homicide cases? Why not admit dying declarations in all criminal cases? And further, why not also extend the use of such testimony to civil cases? Professor McCormick expresses the belief that the application of dying declarations has been narrowly limited because judges fear that a jury may treat such statements too emotionally. If this be the case, why should such emotion-charged testimony be admitted against an accused who is on trial for his life, and against whom the only direct evidence may be this dying declaration? If it can be assumed that these statements will not be too emotionally treated by the jury, logic would seem to demand that their use be extended to all criminal cases so that crimes such as rape, robbery and abortion may also be more easily prosecuted or more ably defended; and also, into the area of civil litigation, for use in an action for wrongful death, for example.

These criticisms seem justified. When the time comes for the courts of the District of Columbia to rule upon the admissibility of dying declarations in a non-homicide case, logic would seem to compel them to allow a more liberal admission of dying declarations. The District of Columbia has as an example of a judicial liberalization of the rule admitting dying declarations the case of Thurston v. Fritz.\textsuperscript{15} There the Supreme Court of Kansas rejected the traditional limitations as based more upon respect for their age than upon reason. In an action by a seller's executor for the balance due on a land sale agreement, the court admitted the dying declaration of the seller as evidence tending to show the true facts of the sale. By statute, Colorado has joined in this attempt to expand the use of dying declarations, making them "admissible in evidence in all civil and criminal trials and other proceedings before courts, commissions and other tribunals . . . ."\textsuperscript{16} Arkansas\textsuperscript{17} and North Carolina\textsuperscript{18} have seen fit to expand the use of such testimony to civil actions for fatal injuries. Professor Wigmore notes that a few other states have inched away from this limitation to admit dying declarations in abortion and other related cases.\textsuperscript{19} Further encouragement for the use of such evidence is provided by the Uniform Rules of Evidence which

\begin{itemize}
  \item \textsuperscript{15} 91 Kan. 468, 138 Pac. 625 (1914).
  \item \textsuperscript{17}  Ark. Stat. § 28-712 (1947).
  \item \textsuperscript{18}  N.C. Gen. Stat. § 28-173 (1950).
  \item \textsuperscript{19}  5 Wigmore § 1432(3).
\end{itemize}
would admit dying declarations without regard to the type of action.\textsuperscript{20} Any such extension seems a step in the right direction.

If the use of dying declarations were extended to non-homicide cases it would greatly enhance the argument for admitting such statements, even if the declarant should recover, provided he is unavailable for testimony in the sense of being outside of the jurisdiction of the court, physically incapable of testifying, or mentally incapacitated. As indicated earlier, the necessity for the admission of dying declarations has been explained by the courts strictly in the sense of the declarant being dead, with his dying statement existing as valuable testimony which must be salvaged for use in the trial of the party accused of the murder. If the use of dying declarations is not to be limited to homicide cases, should the concept of necessity because of unavailability be confined to necessity because of death of the declarant? Such testimony seems altogether too valuable to be circumscribed by such strictures.

A third requisite for the admissibility of dying declarations, as indicated in the \textit{Schneider} case, is that they must pertain only "to the immediate act [the homicide] and the circumstances under which it was committed."\textsuperscript{21} Indicative of the extent to which dying declarations are presently admissible to show the facts and circumstances leading up to the fatal injury is the case of \textit{United States v. Heath}.

The defendant, Heath, harassed the declarant and eventually struck him on the arm with an axe. The injured party fled into a nearby house in which he had a room. A short time after he stepped out of his room, Heath, who had been waiting outside of the room, attacked again and this time landed a knife blow which eventually proved fatal. Shortly after the knifing, the wounded man, believing himself to be dying, made a statement in which he told not only of the knifing but also of the earlier axing. In admitting the entire statement the court held, in essence, that the two attacks constituted one entire occurrence, the lapse of time between the two notwithstanding. Thus it is seen that the circumstances of death, about which dying declarations are admissible, may be a series of connected acts.

The fourth requisite, one already touched upon in the discussion of why dying declarations are an exception to the hearsay rule, is that the statement must have been made while the declarant was experiencing a settled conviction of impending death. That such a state of mind greatly

\textsuperscript{20} Uniform Rule of Evidence 63(5).
\textsuperscript{21} 24 D.C. at 403.
\textsuperscript{22} 23 D.C. 272 (1891).
reduces the possibility of false statements seems indisputable. To what degree must a declarant have been convinced that he was near death before his declaration can be admitted? In United States v. Woods the court excluded the declaration because it was not convinced "that there was a settled conviction in the mind of the deceased that she was about to die." A stated solemn belief by the declarant was sufficient to admit the statement in the Heath case. But, "as long as a lingering hope of recovery [on the part of the declarant] remains, they [dying declarations] are entitled to no weight and must be excluded." The Supreme Court in Shepard v. United States, in rejecting a statement as not meeting this requisite, noted that the "declarant must have spoken without hope of recovery and in the shadow of impending death.

This settled conviction of impending death may be shown by the statement itself. Illustrative of this is the Heath case, in which the court admitted a written dying declaration which began,

"I, Emanuel Tobin, being, as I solemnly believe, in the presence of death, from the effects of a mortal hurt, from which I am now suffering, and having abandoned all hope of recovery, in the face, as I believe, of impending death, do solemnly state that the circumstances under which I received the said mortal injury are . . . ."

As evidenced by the Schneider case, the fear of imminent death "need not be proved exclusively by his [the declarant's] expressions, but may be gathered from the circumstances of his condition." The fact that the declarant had suffered three pistol ball wounds, from which she was suffering excruciating pain, when considered together with the declarant's statement, was sufficient to indicate a settled conviction of imminent death. In the 1833 case of United States v. Taylor, the fact that the declarant had asked to see a priest was a circumstance admitted to show the existence of a settled conviction of impending death.

It is evident from an examination of these cases that the courts of the District of Columbia, before admitting the dying declaration in evidence, first determine as a preliminary question of fact whether the declarant actually spoke with a settled conviction of the imminence of his death.

24 Id. at 763.
25 23 D.C. at 280-82.
26 United States v. Schneider, 24 D.C. 351, 403 (1893).
27 290 U.S. 96 (1933).
28 Id. at 99.
29 23 D.C. at 280.
30 24 D.C. at 404.
This is in keeping with the majority of jurisdictions. The weight to be given dying declarations, once admitted, is strictly a jury question.

Following this explanation of the requisites for the admissibility of a dying declaration in the District of Columbia, a few additional general observations are proper. *Mattox v. United States* notes that in homicide cases dying declarations are admissible in favor of the accused as well as against him. Certainly this allowance should be carried over to non-homicide cases if and when the admissibility of dying declarations is so extended. If a statement is reliable enough to be used against a party accused of a homicide, it is necessarily reliable enough to be used in his favor, or for or against any party in any litigation, be it criminal or civil.

The Supreme Court observed in *Carver v. United States* that testimony is admissible to impeach the declarations of the deceased, once admitted in evidence. Thus, an inconsistent statement, a showing of a feeling of malice or revenge, might be used to impeach the credibility of a declarant whose dying declaration is in question. Dying declarations "may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad . . . ." In this case the Supreme Court held it was error for the trial court to refuse to admit statements by the deceased contradictory to her dying declarations, and tending to show that the accused had not shot the declarant intentionally.

To allow the declaration, there must be proof that the declarant had "knowledge or the opportunity for knowledge, as to the acts that are declared." Just as the ordinary witness must testify as to his personal observations and not to his suspicions or guesses, the declarant must speak of known facts and not of "suspicion or conjecture." In other words, the testimonial requirements are the same for a dying declaration as for the testimony of the ordinary witness.

What if a dying declaration contains an opinion rather than a mere expression of knowledge of facts? Professor Wigmore argues that as the

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32 See 5 Wigmore § 1451.
33 Ibid.
34 146 U.S. 140 (1892).
35 164 U.S. 694 (1897).
36 Id. at 697.
38 Ibid.
39 5 Wigmore § 1445.
declarant is no longer available his every inference is valuable, and therefore his statement, containing an opinion should not be ruled out under the so-called opinion rule.40 McCormick concurs, stating, "[T]he opinion rule, designed as a regulation of the manner of questioning of witnesses in court, is entirely inappropriate as a restriction upon out-of-court declarations."41 Yet, as Professor Wigmore notes, most courts do apply some form of the opinion rule in questioning the admissibility of dying declarations.42 The Supreme Court in the Shepard case, in commenting affirmatively on Professor Wigmore's viewpoint, stated that "the form is not decisive, though it be that of a conclusion, a statement of the result with the antecedent steps omitted."43 The opinion continues, "'He murdered me,' does not cease to be competent as a dying declaration because in the statement of the act there is also an appraisal of the crime."44 This liberal approach, backed by the reasoning of both Professors Wigmore and McCormick, is convincing.

This, in essence, is the District of Columbia doctrine of dying declarations. With the paucity of District cases on the subject, and with no District decisions in point since the 1893 Schneider case, the theories expounded and the limitations imposed by other jurisdictions, which led McCormick to refer to this exception as "the most mystical in its theory and the most arbitrary in its limitations,"45 have not been expressly set forth in the District. Unshackled by precedent based upon "mystical theory" and "arbitrary limitations," the courts of the District of Columbia are free to follow the liberal and logical lead of the Supreme Court of Kansas in extending the admissibility of dying declarations beyond homicide cases and even into the field of civil litigation. They are also free to admit such declarations in instances where the declarant has recovered but is for other reasons unavailable at the time of a trial in which his declaration could prove significant.

William R. Ratchford

40 5 Wigmore § 1447.
41 McCormick § 262.
42 5 Wigmore § 1447.
43 290 U.S. at 101.
44 Ibid.
45 McCormick § 258.
FORMER TESTIMONY IN THE DISTRICT OF COLUMBIA

INTRODUCTION

Hearsay evidence is not a subject that easily lends itself to succinct definition because of its many ramifications. For the purposes of this note, however, hearsay evidence is an out-of-court statement offered to prove the truth of the matter stated.¹ For example, A is involved in a suit with B; C has made statements which could affect the rights of A and B. If C’s statements are to be admissible into evidence, C must testify himself; then there will be an “in court” statement to prove the issues being litigated. If C does not testify in person, the statement would ordinarily be “out of court.” Because the statement was made out of court by a person not under oath, whose demeanor cannot be observed and veracity tested by cross-examination and confrontation, his statements are deemed unreliable. Because these statements are deemed unreliable, they are held to be inadmissible as proof of the substantive issues involved.

It appears that the District of Columbia has chosen to follow this definition of hearsay, as evidenced by the case of Kelley v. United States.² Consequently, when out-of-court statements are offered to prove material and substantive issues before the courts of the District of Columbia, it would seem that they should be excluded because of the Kelley case as hearsay evidence.

Former Testimony Is Hearsay Evidence

When testimony given at a prior judicial proceeding or at the taking of a deposition of a witness is offered to prove the matter before the court, this constitutes hearsay evidence. For example, A sues B, and C is a witness. The case is dismissed and later retried. If C’s testimony at the former trial is offered in the second trial, there is an out-of-court statement by C offered to prove the matters in issue before the court. It makes no difference that the prior statements were made in a court, since they were not made in this court. C’s testimony would then be hearsay, and C himself should testify. The evidence may be contained in a transcript or an oral report of C’s prior testimony, or in a deposition taken before trial. It may have been introduced either in a separate case or pro-

¹ McCormick, Evidence § 230 (1954) [hereinafter cited as McCormick].
² 99 U.S. App. D.C. 13, 236 F.2d 746 (1956). “[E]vidence of statements made by persons other than the witness, introduced in order to establish the truth of the statements.” Id. at 15, 236 F.2d at 748.
ceeding or in a separate hearing of a present pending case.\textsuperscript{3} In any event it is hearsay, and the logical result is that it should be inadmissible as an out-of-court statement offered to prove the truth of the matter stated. The question then arises as to whether adopting this position as an ironclad rule would not be overly stringent and productive of injustice in many instances.

To ward off oppressive results of the application of the hearsay rule, the courts have developed certain "exceptions" to the hearsay rule, allowing this type of evidence where it can be shown that two elements are present: (1) there must be a showing of \textit{special reliability} for admitting the hearsay and, (2) there must be a real \textit{necessity} for its admission. When these elements are present the reason for exclusion, \textit{i.e.}, unreliability, will have been neutralized. If former testimony is to be admissible, it must be admitted as an exception to the hearsay rule, since it is clearly hearsay.

**Former Testimony as an Exception to the Hearsay Rule**

At the outset, it should be noted that there is a divergence of opinion among the textwriters as to whether former testimony is admitted as an exception to the hearsay rule. Professor Wigmore feels that once testimony has been subjected to cross-examination, it should be admitted, but not as an exception to the hearsay rule, since in his opinion such evidence is not hearsay.\textsuperscript{4} On the other hand, there is the view espoused by most of the courts and Professor McCormick to the effect that former testimony when admitted is admitted as an exception to the hearsay rule.\textsuperscript{5} In view of the \textit{Kelley} case and other District cases concerning former testimony, it appears that the District of Columbia courts tend to support the view of Professor McCormick. This is confirmed by a survey of the cases which reveals a greater number of requirements for special reliability and necessity than merely an opportunity for cross-examination. Consequently, even though Professor Wigmore's view may be sound in many respects, the fact still remains that the District of Columbia courts have not followed it.

At this point, an examination of the requirements for special reliability and necessity which have been set down by the courts of the District will prove beneficial in searching for the underlying theory behind the admission and exclusion of former testimony in the courts.

\textsuperscript{3} McCormick § 230.

\textsuperscript{4} \textit{5} Wigmore, Evidence § 1370 (3d ed. 1940) [hereinafter cited as Wigmore].

\textsuperscript{5} McCormick § 230.
Special Reliability

In order to admit into evidence the former testimony of a witness as an exception to the hearsay rule, it is first necessary to convince the second court that the previous testimony is specially reliable. Testimony becomes specially reliable when given under oath and when there has been an adequate opportunity for cross-examination. In order to insure compliance with the latter, the courts have laid down the requirements of identity of issues, identity of parties, and proper prior proceeding. If these three safeguards are present, cross-examination will be adequate, and when coupled with the oath, the former testimony becomes specially reliable.

Opportunity for Cross-Examination

Cases dealing with former testimony invariably mention an opportunity for cross-examination as being an absolute prerequisite for the admission of such evidence. If former testimony has been subjected to cross-examination the evidence may then be specially reliable.

With the exception of one case, which for all practical purposes may be treated as overruled, the District of Columbia has strictly followed the rule that the opportunity for cross-examination must have been available. In Marine Ins. Co. v. Hodgson, the defendant offered to read into evidence a copy of a deposition taken in preparation for a reading before a vice-admiralty court. The evidence was declared incompetent to prove the facts, one of the reasons being that the plaintiff had no opportunity for cross-examination. Miller v. United States illustrates in a more definite manner the general rule in the District. On appeal, error was assigned because the court permitted the former testimony of a person who had since died to be read to the jury in the subsequent proceeding. It was decided that the reported testimony of a witness who was fully examined and cross-examined and who died before the second trial was properly admitted into evidence.

These two cases set out the requirement of cross-examination for the District, but they do little more. Numerous problems have arisen in other jurisdictions concerning the application of this requirement which have not been considered in the District. While it is not within the scope of this note to treat all of these problems, three of them do arise with such

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6 Joice v. Alexander, 13 Fed. Cas. 907 (No. 7435) (C.C.D.C. 1808), involved the petition of a Negro for freedom. Testimony was admitted in spite of the fact that it was not subject to cross-examination.

7 10 U.S. (6 Cranch) 206 (1810).

8 41 App. D.C. 52 (1913).
frequency as to warrant brief consideration with an eye toward what the District might do when confronted with similar situations.

1. Is actual cross-examination necessary? The admissibility of former testimony does not depend on the actual act of cross-examination so long as the opportunity to cross-examine was available. If such a right is not exercised it is deemed to be waived.\(^9\) The logic of this position is excellent. To hold otherwise is to say that a party can use his own failure to cross-examine at a prior trial to the detriment of his opponent at a later trial. The language of *Marine Ins. Co. v. Hodgson*,\(^10\) which ruled former testimony incompetent because there had been no opportunity for cross-examination, indicates that the District will not require cross-examination in fact. Moreover, the weight of authority in other jurisdictions appears to support this view.\(^11\)

2. Must the party against whom the former testimony is offered have been present at the prior trial in order to have an opportunity to cross-examine? This problem is of particular importance in class, representative or derivative actions. Accordingly, one court has laid down the following test: was the party against whom the former testimony is offered represented by counsel who participated in the trial and had an opportunity to cross-examine the witness?\(^12\) If the answer to this inquiry is “yes,” then the former testimony should be admitted. The value of this test is that it not only covers situations where the parties in both actions are identical, but can be extended to include class, representative or derivative actions. In the latter, the party bringing the second suit may object to the admission of the former testimony on the ground that although he was a member of the class represented in the first action, he was not personally present and his rights should not have been adjudicated in another proceeding. This liberal test is broad enough to enable the judge to determine whether there is any merit to this objection.

An alternative solution to this problem is that after due notice of a trial is given, the hearing becomes public and this is sufficient notice of the proceeding to those who have a right to be represented. “All that is required is ‘actual or constructive notice of the examination and an opportunity to be present and examine or cross-examine.’”\(^13\) Following this rationale, any litigation acts as constructive notice for all who could

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\(^10\) 10 U.S. (6 Cranch) at 214.

\(^11\) McCormick § 231.

\(^12\) Hill v. McWhorter, 237 Ala. 419, 421, 187 So. 494, 495 (1939).

be represented, even if they have no actual knowledge of its existence. By receiving constructive notice they also have an opportunity to cross-examine. Since the opportunity to cross-examine was available, former testimony should be admitted against them at a subsequent trial.

A comparison of these two views shows the former to be better reasoned. In the first, the issue of whether a party was represented by counsel who had an opportunity to cross-examine is put squarely to the judge for his determination, based on the facts of the individual case. The second solution seems to work an injustice on those who had no notice of the first action by implying such notice simply because the trial was public. No room is left for the exceptional case and no provision is made for proper representation by counsel at the prior trial. It is suggested that should similar situations arise in the District of Columbia, the first and more liberal solution be adopted.

3. May the party against whom the evidence was introduced at the prior trial use this evidence in his own behalf at the subsequent trial? When this issue is raised the reasoning of the objecting party is usually that since he introduced the testimony on direct examination, he had no opportunity to cross-examine the witness at the former trial. There is little merit in this objection. Since the defendant examined the witness, it makes no difference whether it was on direct or cross-examination and the plaintiff is allowed to introduce the evidence. This conclusion provides a valid exception to the rule that former testimony must have been subjected to cross-examination.

Identity of Issues

One authority treats the requirement of identical issues in both proceedings as "a means of fulfilling the policy of securing an adequate opportunity of cross-examination by the party against whom testimony is now offered or by someone in like interest." Since identity of issues helps to insure an adequate opportunity for cross-examination, it is also an important factor in showing special reliability.

There is only one District of Columbia case which directly mentions identity of issues. McCormick v. Howard allowed the testimonial deposition of Cyrus McCormick relating to his mowing machine. The courts simply laid down the requirement of identity of issues by admitting this evidence on the basis that the subject matter of the prior trial at which

15 McCormick § 233.
the deposition was taken was the same as the later proceeding. The District of Columbia Code also contains a statement which sets out identity of issues as a requirement for admission of the testimony of a deceased or insane party.\footnote{D.C. Code Ann. § 14-303 (1951). "If a party, after having testified at a time when he was competent to do so, shall die or become insane or otherwise incapable of testifying, his testimony may be given in evidence in any trial or hearing in relation to the same subject-matter between the same parties or their legal representatives, as the case may be; and in such case the opposite party may testify in opposition thereto."}

Because of the lack of District cases on this point, a brief discussion of the reasons given for this requirement and a quick look at how it is treated by other jurisdictions might be of interest.

It is necessary to understand the reasons behind identity of issues as a requirement for the admission of former testimony if this concept is to be grasped. When the issues are not the same, cross-examination at the first trial would not have been directed to the same material points of investigation that are pertinent at the second trial. As a result, the cross-examination would not have been an adequate test for exposing testimonial inaccuracies.\footnote{Parrish v. Bryant, 237 N.C. 256, 258, 74 S.E.2d 726, 727 (1953).} With this concept well in mind, attention must be directed to the manner in which the courts interpret identity of issues.

A survey of the cases reveals two apparently contrasting views. The first holds the requirement to be satisfied where the issue on which the former evidence is offered is common to both cases, and it is immaterial that there are other issues in either case or even that the subject matter is different.\footnote{Gibson v. Gagnon, 82 Colo. 108, 113, 257 Pac. 348, 350 (1927).} The second view states that the subject matter must be the same.\footnote{Lieberman v. Warman, 19 N.J. Misc. 417, 419, 20 A.2d 604, 606 (Workmen's Comp. Bur. 1941).} In spite of contrasting language, there is really no substantive conflict between these two rules. Rather, the conflict lies in the mode of expression only. Each court is using the word "subject matter" in a different sense. It should be noted that the lone District case of McCormick v. Howard\footnote{15 Fed. Cas. at 1308.} also uses this language.

Under the first rule allowing the subject matter to be different, the court is speaking of the general subject matter of the two suits,\footnote{82 Colo. at 113, 257 Pac. at 350.} not the
specific subject matter to which the evidence relates. Under the second rule, when the court states that the subject matter must be the same, it is not referring to the general subject matter of both actions. Rather, the court is saying that the specific subject matter in the prior trial which provoked the testimony, must be the same as the specific subject matter of the later trial for the benefit of which the testimony is to be admitted.23 In actual practice, both rules reach the same result although their language appears contrary, and both satisfy the purpose of the requirement.24

In order to avoid needless litigation concerning the meaning of "subject matter" in the District of Columbia it is suggested that if and when the court does pass on this point, it emphasize the fact that "subject matter" refers to a specific issue in a trial and not to the general matter with which the trial is concerned.

Identity of Parties

The question whether the parties in a subsequent judicial proceeding must be the same as those in a prior proceeding is directly related to the determination of special reliability. If the parties need not be the same, then adequate cross-examination might be absent, thereby leaving reliability doubtful. This question reached an early disposition in the District of Columbia in the venerable case of Marine Ins. Co. v. Hodgson,25 where a deposition from an admiralty court was properly excluded in a subsequent trial. Apparently the Court here was influenced by the fact that the proceedings in the admiralty court were ex parte. The plaintiff in the subsequent trial was not a party to the prior proceeding. Again, in Fresh v. Gilson,26 the Court excluded prior testimony offered at a subsequent trial. The plaintiff was not a party in the former proceeding, and the Court recognized in effect a requirement of identity of parties.

The holdings of the Fresh and Marine Ins. Co. cases were later crys-

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23 19 N.J. Misc. at 419, 20 A.2d at 606. Here the findings of a deceased medical witness at the prior hearing were incorporated into hypothetical questions put to the medical witness at the later trial. It was these specific issues which the court referred to when they spoke of "subject matter."

24 See, Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 160 S.W.2d 740 (1942); Hassett v. Rathbone, 204 App. Div. 229, 233, 198 N.Y. Supp. 381, 384 (1923). The latter sets out the rule by requiring only that the subject-matter to which the evidence relates shall be the same.

25 10 U.S. (6 Cranch) at 214.

26 41 U.S. (16 Pet.) 327 (1842).
tallized in *Washington Gas Light Co. v. District of Columbia.*

In this case, the District had been held liable in a previous trial for damages suffered by a pedestrian who had fallen into an open gas-main hole in a sidewalk. In the subsequent trial, the District sought contribution from the Washington Gas Light Company, alleging that the company was in control of the gas-main hole and was liable. During the course of the second trial, testimony from the former trial, to which the gas company was not a party, was offered into evidence. This former testimony was excluded because the parties in the second suit were not the same as those in the first action. As a result of these three cases, it can be concluded that in the District of Columbia a requirement of identity of parties must be satisfied before the testimony can be admitted in a subsequent proceeding. It is apparent that a lack of such an identity directly affects the reliability of this class of hearsay evidence.

Occasionally the question arises as to what type of identity of parties is required before the testimony may be admitted in a subsequent trial. There appear to be two positions taken by the courts: (1) an absolute identity, and (2) a substantial identity between the prior and subsequent parties.

The District of Columbia Code provides that former testimony will be admitted "in relation to the same subject-matter between the same parties or their legal representatives . . . ." Does this proviso mean that there must be an absolute identity of parties, with the exception concerning a legal representative, or does it mean a substantial identity? The modern trend as indicated by several cases and supported by Professor McCormick requires a substantial identity only. An identity is said to be substantial when there is either the property concept of privity or the privity of interest relationship.

The property concept of privity has been explained in this manner:

The term "privity" denotes mutual or successive relationships to the same right of property, and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and co-parceners; privies in *representation*, executor and testator, administrator and intestate; privies in law, where the law, without privity of blood or estate casts the land on another, as by escheat.81

27 161 U.S. 316 (1896).
30 McCormick § 232.
31 Metropolitan St. Ry. v. Gumby, 99 Fed. 192, 198 (2d Cir. 1900). (Emphasis added.)
The District of Columbia Code specifies only one of these privity relationships, that of the legal representative. If the well known principle of statutory construction that the inclusion of one excludes all others is to be applied, a very good case could be made for a rule that in the District the parties must be absolutely identical with the exception of a legal representative of a former party. Thus, no extension of the privity relationship would be allowed.

The second type of privity relationship which can constitute substantial identity is privity of interest between the prior and subsequent parties. In Bartlett v. Kansas City Pub. Serv. Co.,\textsuperscript{32} both the absolute identity and the privity of property relationship were rejected. Instead, the privity of interest test was applied. Thus, testimony in a prior suit by a wife for personal injuries was admissible in evidence by the husband in a subsequent suit for loss of services against the same defendant. The basis for allowing this testimony was that the defendant in the prior suit had the same motive and interest for cross-examination that he would have had in the second suit. The holding of the Bartlett case is the opposite extreme from the absolute identity requirement, and appears to be in agreement with the view expressed by Professor Wigmore who advocates the rejection of the property concept of privity and a substitution of this motive and interest test to determine privity.\textsuperscript{33}

\textit{Nature of the Prior Proceeding}

The nature of the prior proceeding is often discussed with regard to the special reliability of the former testimony. However, it should be noted that the nature of the prior proceeding seems to decrease in importance when the other requirements for special reliability are present.

In the District of Columbia, no dispute arose over the admissibility of testimony from a Senate subcommittee in a later subornation of perjury trial, Meyers v. United States.\textsuperscript{34} The question raised on appeal did not concern the nature of the prior proceeding, but rather the method of proving the testimony given before the subcommittee. Apparently the court was able to find both special reliability and necessity for the testimony, and it was admitted. Similarly, in Newman v. United States,\textsuperscript{35} testimony from a Senate hearing was held inadmissible, not because of the nature of the prior proceeding, but because it was irrelevant. In the

\textsuperscript{32} 349 Mo. 13, 160 S.W.2d 740 (1942).
\textsuperscript{33} 5 Wigmore § 1388.
\textsuperscript{34} 84 U.S. App. D.C. 101, 171 F.2d 800 (1948).
\textsuperscript{35} 43 App. D.C. 53 (1915).
Meyers and Newman cases, it seems that the nature of the former proceeding is of little importance. But when does it become of value? There is some indication of a solution in Capital Traction v. King.\footnote{Id.} There, the testimony of a deceased witness at a coroner's inquest was not admissible in evidence in a subsequent damage suit by the deceased's representative. On appeal, the court held the coroner's inquest not to be a judicial proceeding within the meaning of section 1065 of the District of Columbia Code.\footnote{Id.} Perhaps the court was guided by the statement of Professor Wigmore that, "in the United States . . . the lack of cross-examination as an element in coroner's procedure makes such testimony inadmissible . . . ."\footnote{5 Wigmore § 1374.} Consequently, the courts of the District of Columbia appear to hold that the nature of the former proceeding increases in importance when the other requirements for special reliability are absent. The former proceeding will not be classified as judicial if an oath is not administered, attendance compelled, and cross-examination employed as part of its procedure.

Some jurisdictions draw a distinction between a civil and a criminal proceeding, disallowing testimony of one to be admitted in the other to prove substantive matters before the court.\footnote{Cholson v. Smith, 210 Miss. 28, 31, 48 So. 2d 603, 605 (1950); Brown v. Bailey, 215 S.C. 175, 190, 54 S.E.2d 769, 775 (1949); McGehee v. Perkins, 188 Va. 116, 126, 49 S.E.2d 304, 309 (1948).} Others follow the common-law rule that testimony from a criminal prosecution is admissible in a subsequent civil suit.\footnote{See, e.g., Travelers' Fire Ins. Co. v. Wright, 322 P.2d 417, 418 (Okla. 1958).} Although this distinction is often drawn, it should be noted that generally the nature of the former proceeding is not a valid objection if it was judicial, and if the former testimony can be shown to have the marks of special reliability.

**Necessity**

After the requirements for special reliability have been satisfied, should the courts then automatically admit the former testimony? Even if the former testimony has been shown to be specially reliable, the fact remains that this class of evidence is still hearsay. Consequently, the courts usually set forth a second requirement in addition to special reliability. The former testimony must be necessary to the just adjudication of the later trial. For example, suppose A sues B and the case is...
dismissed. At a new trial, A attempts to introduce testimony given by C in the first trial. It is shown that there had been an opportunity for cross-examination, identity of issues, and identity of parties. Should the evidence be admitted? The solution lies in a consideration of the necessity for the admission of C's testimony at the later trial. Obviously, if C is still available to testify, then his personal testimony would be more reliable than the transcript or report from the first trial. Consequently, if C is not dead, disabled or absent from the jurisdiction, C's former testimony should not be admitted even though shown to be specially reliable. There must be a necessity for its admission.

**Death of the Witness**

Simply stated, the issue to be resolved is whether the death of a witness constitutes the required necessity justifying the admission of former testimony into evidence. The law in the District of Columbia is well settled on this point.

As early as 1808, the District recognized the admissibility of the former testimony of a person who had since died.41 Among the later cases dealing with the problem was *Bennett v. Adams*,42 where the court admitted the testimony, but laid down the requirement "that evidence must be of the very words of the deceased witness. It is not sufficient for the witness to state what he understood to be the substance or effect of the language of the deceased witness."43 The requirement of exact language was apparently found to be burdensome and unnecessary. In *United States v. White*44 this restriction on the testimony of the deceased was abandoned when the court noted that "it was not necessary to prove the very words of the witness."45 Death is the clearest and most obvious example of necessity. However, it must be remembered that the other requirements of special reliability must also be fulfilled before the former testimony will be admitted.

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41 Joice v. Alexander, 13 Fed. Cas. 907 (No. 7435) (C.C.D.C. 1808). While this case is no longer valid for determining the other requirements that former testimony must meet, it does show that even at this early date the District recognized the necessity for admitting the former testimony.


43 Ibid.

44 28 Fed. Cas. 572, 573 (No. 16679) (C.C.D.C. 1838). The defendant was indicted for burning the Treasury Building of the United States. The first indictment was dismissed on demurrer after a Mr. Howard had testified. At the second trial Mr. Howard's former testimony was allowed to be introduced into evidence since he had died in the interim.

45 Ibid.
Disability of the Witness

The phrase "disability of the witness" incorporates at least four important situations. Two of these have been dealt with in the District by statute and cases, but the remainder have not been passed upon at the present time. Fortunately the rules governing these situations are clearly defined in other jurisdictions and will be of aid in determining what the District of Columbia might require to constitute sufficient necessity when confronted with the same problems.

1. Physical Disability. Generally courts are in agreement that this is a cause for the admission of former testimony. A difference of opinion arises, however, as to whether this disability must be permanent.

One extreme holds that when a witness is physically unable to testify, his former testimony may be admitted into evidence provided the testimony is especially reliable.46 This view does not qualify the requirement by insisting on a showing of permanent disability and in this respect is most liberal. The other extreme states that there is "no authority which holds that a temporary illness is sufficient to justify the reading of testimony taken upon a former trial. . . . The only safe rule is that illness must be of permanent character."47 Between these two extremes lies a third view which forms a compromise. If a witness is laboring under such physical infirmity as to render impossible the production of his deposition within a reasonable time, the use of former testimony is permitted. However, if a witness is only temporarily unable to attend court, the testimony may be procured at a later time and the former evidence will not be admitted.48 This "reasonable time" test seems to provide an equitable solution.

2. Mental Disability. The District of Columbia Code provides that in the case of an insane party former testimony will be admitted "in relation to the same subject-matter between the same parties or their legal representatives . . . ."49 As with physical disability the problem arises as to whether mental disability must also be permanent.

The authorities from other jurisdictions are in general accord that mental disability is one of the reasons for admitting former testimony.50 However, once again the extreme position is taken by one court that the

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46 Lone Star Gas Co. v. State, 137 Tex. 279, 308, 153 S.W.2d 681, 697 (1941).
50 See, e.g., Atwood v. Atwood, 86 Conn. 579, 584, 86 Atl. 29, 31 (1913).
witness must be in such a mental state that he will probably never be able to attend a trial. 51

Although mental and physical disability differ from the medical standpoint, with relation to the admission of former testimony they should be treated together. There is no good reason why the "reasonable time" test should not be applied to both disabilities. This would give the judge the authority to determine a reasonable time for the witness to appear in person. If it is shown that the witness is so mentally deranged that he cannot be present within this time, or that his testimony will be of no value if he does appear, the former testimony should be admitted immediately.

3. Failure of Memory. Most jurisdictions agree that when a witness is not mentally incapacitated, a record of his former testimony will not be admitted merely because he has forgotten the facts to which he previously testified. 52 The principal reason offered is the possibility that the testimony at the first trial might be false. At that time there may have been no known way of breaking down such testimony on cross-examination; but before the second trial its falsity may be discovered and the witness may not dare to testify as he had on the first trial. To escape embarrassment he could conveniently say he had forgotten the transaction in order to make his former testimony admissible. As a result, the impeachment of a doubtful witness by cross-examination would be avoided. 53

Although this same line of reasoning could also be applied for the purpose of excluding former testimony because of mental or physical disability, the courts do not extend the doctrine that far. The reason seems to be that when a witness is genuinely disabled in mind or body, courts are not as quick to suspect a fraud as they are when a witness in sound health suddenly states that he fails to recollect his testimony at a previous trial.

Based on the merits of this reasoning and what appears to be the

52 See, e.g., Rio Grande So. R.R. v. Campbell, 55 Colo. 493, 496, 136 Pac. 68, 69 (1913). The Supreme Court of Colorado reversed the trial court which had permitted the former evidence of the witness to be admitted since the witness said he did not remember the fact to which he formerly testified. The witness was in good health, sane and about twenty-six or twenty-eight years of age. Accord, Turner v. Missouri-Kan.-Tex. R.R., 346 Mo. 28, 142 S.W.2d 455 (1940).
weight of authority in the United States, failure to recollect does not constitute the type of necessity that will admit former testimony.

4. Legal Disability. When a party cannot testify at the second trial by reason of the death of his opponent, may he introduce his own former testimony into evidence? The District of Columbia answered this question affirmatively in *Bowie v. Hume*.

The court reasoned that if the defendant had been dead, the testimony would have been admitted without question. But though still living there had supervened a cause which disqualified him from testifying as a living witness without any fault of his own, i.e., the death of his opponent. Under these circumstances the former testimony should be admitted.

**Absence of the Witness**

The third way in which the requirement of necessity can be satisfied is suggested in the situation where the witness who testified at the prior proceeding is absent from the jurisdiction of the court and cannot be compelled to attend by subpoena. Conversely, if the witness is still within the jurisdiction, there is no necessity to admit his former testimony, assuming the witness is alive and competent to testify.

In the case of *Karrick v. Cantrill*, the Rent Commission for the District of Columbia had made an evaluation of certain property at a prior hearing. At a later trial, the testimony upon which this evaluation was made was admitted in evidence over objection. On appeal it was held that the prior testimony should not have been admitted in the face of a showing that the witness was still within the jurisdiction. While providing a negative approach to the problem, the *Karrick* case holds by implication that if a witness is absent from the jurisdiction and cannot be compelled to testify, there exists a real necessity for the admission of the former testimony. That the offering party must make a showing that the witness is absent from the jurisdiction is evident from the language of *Fresh v. Gilson*. There a witness was asked to relate what another witness had testified to in the former trial. The Court held it erroneous to admit this testimony, especially without an attempt to account for the absence of the witness whose testimony was being given second hand. Consequently, it is clear that the District of Columbia requires a

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54 13 App. D.C. 282 (1898).
57 41 U.S. (16 Pet.) 327 (1842).
showing that the witness is absent from the jurisdiction. Then, the necessity for admission of the former testimony will probably be present.

The cases decided in the District, while answering the most important question as to the admissibility of former testimony when the witness is beyond the compulsory powers of subpoena, do not indicate how they would solve many other problems likely to arise. For example, will the testimony be admitted where the witness is not permanently but merely temporarily removed? Several jurisdictions indicate that a temporary absence will satisfy the necessity requirement,58 while others say that the absence must be permanent to justify the admission of former testimony.59 Most courts are in agreement that where the witness is absent because of the procurement of one of the parties, the testimony will be admitted as a matter of course at the behest of the opposite party.60 Another common requirement is that a diligent search be made for the witness before the former testimony can be offered in evidence.61 The usual reason for the diligent search requirement is that a deposition may then be taken and the opposite party would have an opportunity to cross-examine.

From a consideration of these problems, one is at a loss to predict how the District of Columbia courts would decide if faced with similar situations. The reason is that the cases have offered little basis for prediction. Whether permanent or temporary absence will satisfy the necessity requirement, or whether a search must be made, are indeed speculative questions. As a matter of course, the courts of the District of Columbia would probably admit or exclude the testimony of a witness whose absence was procured by the adverse party depending upon whether such testimony would subject the innocent party to undue prejudice. However, regarding temporary or permanent absence as a requirement for the admission of former testimony, it is suggested that the “reasonable time” test utilized in the physical disability cases be adopted. In any event, absence of the witness generally appears to be a good reason

59 See, e.g., Liverpool & London & Globe Ins. Co. v. Dicerson, 244 Ala. 381, 13 So. 2d 520 (1943); Hines v. Miniard, 208 Ala. 176, 94 So. 302 (1922).
60 See, e.g., Lone Star Gas Co. v. State, 137 Tex. 279, 308, 153 S.W.2d 681, 697 (1941).
61 Id. at 308, 153 S.W.2d at 697. The court listed the requirements for the admission of former testimony; one of these requirements was “that the witness is . . . beyond the jurisdiction of the court, or that his whereabouts is unknown and a diligent search has been made to ascertain where he is . . . .”
for allowing the former testimony in evidence as satisfaction of the requirement of necessity.

CONCLUSION

There are two innovations in the law of former testimony which are worthy of mention for purposes of comparison with the requirements set down by the District of Columbia courts.

The Uniform Rules of Evidence seek to admit the former testimony of an unavailable witness when:

(i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered.\(^{62}\)

Here the principal requirements of special reliability and necessity are preserved. As previously indicated, both appear to be prerequisites for the admission of former testimony in the District of Columbia.

The second innovation which is far more liberal than the first is the Model Code of Evidence. It abolishes the limitations set down by most jurisdictions that the parties and issues be the same, and even does away with the restriction that the witness must be unavailable at the later trial.\(^{63}\) Thus the Model Code abrogates two of the important safeguards laid down by the courts to insure that the evidence is specially reliable and in addition does away with one of the components of necessity. The extreme position taken by the Model Code makes it very doubtful that it will be well received in the District.

The present status of the law in the District of Columbia seems to require first, a showing that the former evidence sought to be introduced has some saving feature about it which raises its veracity above the scope of ordinary hearsay evidence, \(i.e.,\) it is specially reliable. In order to prove this special reliability the following questions must be answered affirmatively: (1) Has there been an adequate opportunity to cross-examine? (2) Was there an identity of issues? (3) Was there an identity of parties? (4) Was the prior proceeding a judicial one? If the answer to all of these questions is "yes," special reliability has been shown and the evidence is of the quality that the courts will admit.

A second requirement for the admission of former testimony as an exception to the hearsay rule is proof that there is a necessity for ad-

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\(^{62}\) Uniform Rule of Evidence 63(3).

\(^{63}\) Model Code of Evidence rule 511 (1942).
mitting this evidence by considering the following interrogatories: (1) Was there a death or disability to account for the absence of live testimony? (2) Is the witness absent from the jurisdiction? If the answer to just one of the questions is "yes," the showing of necessity is fulfilled. When it has been shown that both special reliability and necessity are present, former testimony should be admitted into evidence as an exception to the hearsay rule.

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OFFICIAL WRITTEN STATEMENTS IN THE
DISTRICT OF COLUMBIA

INTRODUCTION

This article is devoted to the exception to the hearsay rule labelled "official written statements." It seems propitious to begin with a general definition of hearsay as defined in the District of Columbia by the case of Kelley v. United States.1 Hearsay is "evidence of statements made by persons other than the witness, introduced in order to establish the truth of the statements."2 Needless to say, the admission of such testimony is contrary to the Anglo-American concept of trial procedure. We employ an adversary system. To allow resort to such statements deprives the opponent of his most effective instrument of protection—cross-examination. Such statements suffer further from their unguarded utterance, that is to say, they are not given under oath. But hearsay evidence is used in American courts; its use is disparaged, however, and it is only tolerated when necessary and when there are adequate safeguards as to its special trustworthiness.

The exception created for official written statements is susceptible of subdivision into four categories: records, reports, certified copies and certificates. It is immediately evident that all these documents are hearsay within the Kelley definition. The topic for consideration, then, is whether these written records, reports and certificates are admissible, or should be admissible, in court as an exception to the rule excluding hearsay. If, for example, a party to an action wants to prove that his adversary had a certain motor vehicle license number, must he bring into court an official from the office of the Director of Vehicles and

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2 Id. at 15, 236 F.2d at 748.
Traffic, or may he introduce the records of that department? It is clear
that the record is an out-of-court statement offered to show the truth of
the matter contained therein. The admissibility of this type of evidence
is universally recognized, yet the defendant's counsel has not been
allowed to cross-examine as to the records, and the recording clerk may
be available for personal testimony.

The justification for this patent use of hearsay can be found in the
special trustworthiness attributed to statements made pursuant to official
duty. The presumption is that one acting in an official capacity will do
his duty and, if the duty is to make an entry in a record, he will do so
accurately. His lack of interest coupled with a sense of obligation to the
public has satisfied the courts that his written work is reliable. Professor
Wigmore has aptly observed that we cannot afford to challenge this pre-
sumption.\(^3\) Since these official written statements are considered to
possess a high degree of reliability, the degree of necessity required is
not urgent. It is not a matter of death, insanity or absence, but rather
a matter of convenience. It is considered inexpedient to disrupt the
public business by demanding the presence of public officials in court.

In the District of Columbia today this is largely covered by statute.
The applicable section of the United States Code provides that "books
or records of account or minutes of proceedings of any department or
agency of the United States shall be admissible to prove the act, trans-
action or occurrence as a memorandum of which the same were made or
kept."\(^4\)

It is necessary to analyze the common-law elements of official
written statements, for, as is evident, the statute has provided merely
for their admissibility and has left the task of defining an official written
statement to the courts. McCormick has assembled from the decisions
a workable definition which can be used as a guide: "[A] written state-
ment of a public official which he had a duty to make, and which he has
made upon first hand knowledge, is receivable as evidence of the facts
recited."\(^5\)

The definition sets forth two requirements. The first is that a state-
ment shall have been made pursuant to official duty. The fact that the
declarant is an official is not alone sufficient. He must be in execution
of an official duty when he makes the particular statement.\(^6\) No express

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3 Wigmore, Evidence § 1632 (3d ed. 1940) [hereinafter cited as Wigmore].
5 McCormick, Evidence § 291 (1954) [hereinafter cited as McCormick].
statute or regulation is needed for creating the authority or duty to make the statement. Furthermore, the person having the duty and the person making the statement must in theory be identical.

The second requirement of the McCormick definition is that the declarant have firsthand knowledge. However, this is not "judicially employed to the extent of impractical strictness . . . ." Certain kinds of official statements, such as those of a notary public, are clearly intended by the law to be based upon personal observation. But it has also been held in the District of Columbia that there are circumstances where the work is apportioned and the statement of the official is based upon faith in the subordinate's firsthand information and not upon his own. Usually where the official statement encompasses a situation of which the official or his deputies can have no firsthand knowledge, the statement is hearsay upon hearsay and not admissible.

**Official Records and Registers**

Regularity of recurrence is the distinguishing feature of official records and registers in contradistinction to other official statements. As a general proposition, these records are admitted under the Federal Shop Book Rule, a codification of the exception for business records in general, rather than under the official written statements exception. At common law, the need requirement of the business records exception was one of unavailability, while the necessity for the official statements exception was merely convenience. The Federal Shop Book Rule adopted the convenience criterion and placed the two exceptions on a par. Since the Federal Shop Book Rule was broad enough to embrace government records, it has become common practice to resort to this statute for admission of official records instead of the official written statements exception.

However, the District of Columbia in *New York Life Ins. Co. v. Taylor* imposed an additional requirement on the Shop Book Rule, which has impaired its efficacy and which may possibly prompt attorneys to employ the official written statements exception when seeking to introduce evidence prohibited by the *Taylor* rule. The burden superimposed upon the Shop Book Rule involves the admissibility of records

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7 Ibid.
8 5 Wigmore § 1635.
which contain opinion, specifically diagnostic hospital reports. The District requires that the diagnosis, made in the regular course of business, be one upon which all competent doctors agree.\textsuperscript{13} In the \textit{Taylor} case the record was introduced to prove that the patient had a mental condition, and the court felt that the reliability of such a statement was open to debate. In other words, the truth of the statement could not be assured by the mere fact of regularity and by the other safeguards provided by the Shop Book Rule. It has been suggested by Judge Fahy, first in \textit{Lyles v. United States}\textsuperscript{14} and subsequently in \textit{Polisnik v. United States},\textsuperscript{15} that this type of evidence, when it arises from the exercise of official duty, should be admissible under the official written statements exception. The District Court has not adopted this view, however, and it seems unlikely that it will. If the rationale of the \textit{Taylor} exclusion is sound, it seems doubtful that official hospital records of a government-operated hospital or insane asylum would be any more reliable than those of a private institution. To hold that the official nature of the government doctor’s duty motivates him to a higher degree of diagnostic insight than his civilian counterpart, and thereby erases the opinion character of the record is to defy common experience.

\textbf{Reports}

For the purpose of this note a report consists of a written statement which is the result of an investigation of an event which transpired outside the presence of an official or his deputies. Within the scope of this definition would fall, for example, the report of the Civil Aeronautics Board official, the policeman and the fire marshal. In the District of Columbia such reports are considered unreliable and therefore inadmissible because of the lack of firsthand knowledge.\textsuperscript{16} It would seem that these reports should be admissible as an exception to the hearsay rule, when another basis of reliability can compensate for this lack of firsthand knowledge. Some have predicated this reliability, and hence admissibility, on a duty to investigate.\textsuperscript{17} A report of the Civil Aeronautics

\textsuperscript{13} The Shop Book Rule provides that “all other circumstances of the making of such writing or record . . . may be shown to affect its weight, but such circumstances shall not affect its admissibility.” 28 U.S.C. § 1732 (1952).


\textsuperscript{15} 259 F.2d 951 (1958).


\textsuperscript{17} See Uniform Rule of Evidence 63(15); Stasiukevich v. Nicolls, 168 F.2d 474, 479 (1st Cir. 1948).
Board provides a good example. The Board is empowered to take the testimony of witnesses in fulfillment of its duty to determine the cause of an airplane accident. Clearly the investigator has no firsthand knowledge. Nevertheless, his interest in reaching the truth will theoretically cause him to conduct his search in such a way that in the scale of probabilities the truth will be reached. In effect, he assumes the role of the cross-examiner.

If such a report is sufficiently reliable for government regulatory legislation, it would appear to suffice as prima facie evidence of a fact in private litigation. Although a CAB report is not admissible by the agency's own restrictions,\(^\text{18}\) it provides a clear case where the duty to investigate may supply the reliability necessary for admission when firsthand knowledge is lacking. The District of Columbia's exclusion of the CAB report is based not solely upon the ground of the agency's statutory prohibition, but also on the ground that such a report constitutes hearsay upon hearsay.\(^\text{19}\) Such a carte blanche exclusion fails to recognize the source of reliability for official written statements. If the compulsion towards the truth attributed to those acting under a duty is a real factor, then the requirement of firsthand knowledge in such a case should not be mandatory. Accordingly, it has been suggested that the admissibility of investigative reports should lie in the discretion of the court.\(^\text{20}\) "This view will permit the judge to weigh such factors as the personal knowledge and expertness of the reporter, or the want of them, the concrete or inferential character of the findings, and the availability or not of other persons who could testify to the facts.\(^\text{21}\)

The CAB report presents the best example for admissibility in this area. The difficulty arises in the case of police and fire reports. Concerning the former, there is normally no duty to investigate the accuracy of statements made by bystanders to the police, and therefore such reports are properly excluded. In the case of a fire marshal's report the relative factors involved are placed acutely in focus. In a given circumstance the duty to investigate may or may not counterbalance the lack of firsthand knowledge, according to our concepts of fairness and practical experience. Thus, the court should exclude the cursory report of


\(^{20}\) Stasiukevich v. Nicolls, 168 F.2d 474 (1st Cir. 1948); Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944).

\(^{21}\) McCormick § 294.
the unqualified fire marshal, but should allow in evidence a more elaborate report compiled by a team of recognized experts. This clearly illustrates the wisdom of allowing the trial court to determine admissibility on an *ad hoc* basis.

**Certified Copies**

A certified copy of a document is hearsay because it contains an out-of-court assertion that this is an accurate copy of the record. Such a copy actually constitutes hearsay upon hearsay, for the record certified is also hearsay. Assuming, however, that the record itself would be admissible under the Shop Book Rule or the exception for official records, discussed *supra*, it is necessary to consider the hearsay quality of the certified copy itself. The problem is narrowed, then, to certification of the copy. This is the act which constitutes the out-of-court statement offered to prove the truth of the matter contained therein, *i.e.*, that a particular paper is a copy of the record.

The admissibility of certified copies was recognized at common law and is now generally provided for by statute. The statute applicable in the District of Columbia reads as follows: "Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."^{22}

This type of written statement does not come within the province of the Shop Book Rule, for there is no regularity nor are the certificates kept in official custody. Thus, if admissible, it must be under the present exception. All that is required is that the certified copy be made under the sanction of official duty,^{23} that the certifying officer have first hand knowledge of the record which he is certifying, and that the copy or transcript be an exact duplicate of the record. Since the duty only encompasses the obligation to make a copy, an opinion of what the record contains is an excess of authority and not admissible. The stringency of this requirement is illustrated in a District case^{24} involving a patent dispute wherein one party offered an alleged certified copy of the patent records of a foreign country. The certificate declared that the "annexed specification and drawing are in due conformity with the original."^{25} The court excluded the certified copy pointing out that the word "conformity" is susceptible to varying interpretations, and consequently the quality of

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^{25} Id. at 216, 289 Fed. at 614.
exactness was fatally lacking. The court said that the "official certification of a fact drawn or gathered from a public record is a mere legal conclusion or the opinion of the certifying officer and so not admissible as evidence. He should copy the record verbatim, certifying that he has done so, and that the copy is an accurate transcript of the original."28

The record, however, which is copied and certified must be one that would be admissible under the present exception as interpreted by the courts or admissible under the Shop Book Rule. This would necessarily exclude the certification of a report in the nature of a CAB finding, discussed supra.

CERTIFICATES

The admission of a certificate depends upon the resolution of two problems.

(1) Who makes the certificate? Although, as was said earlier, it is the duty, not the status as an official, which gives official written statements their reliability, normally some official status is necessary. What the courts are striving for is impartiality and to the extent that the declarant's status as an official will insure this impartiality, it will be required. But the court may be satisfied that the declarant is unbiased without regard to official status. There are times when a duty is imposed upon a person, who is not an official in the strict sense of the word, to certify the happening of an event. Hence, a clergyman is required to certify the fact of a marriage ceremony, or the doctor to certify a birth or death. Such statements are usually admissible. The justification, of course, is the disinterestedness and proclivity for accuracy attributed to these professions. On the contrary, courts will generally exclude the certification of a motorist concerning an automobile accident, even though such certification is required by statute, because the adequate safeguards for impartiality are lacking.

(2) For what reason is the certificate offered in evidence? A death certificate may be offered first of all to prove the fact of death. Initially in the District of Columbia it was not admissible for this purpose because it was not considered a public record, but rather a formal request for statistical purposes.27 The District has since joined the majority of jurisdictions in recognizing the death certificate as a public record.28

The original District of Columbia holding, however, does illustrate an

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26 Ibid.
important point in the use of this exception. The certificate which is offered in evidence must first qualify as an official statement before it falls within the purview of this exception.

The second purpose for which a death certificate may be offered is to establish the cause of death. A pertinent example here would be the introduction in evidence of a death certificate by an insurance company resisting a claim upon a life policy because the insured allegedly committed suicide and the death certificate so states. In other words, the cause of death is in issue and the insurance company desires to use the death certificate to assert the truth of the fact of suicide. In the District of Columbia it is clear that the declarant must have firsthand knowledge because the courts will not be satisfied with a duty to investigate.\(^29\) What is meant by firsthand knowledge is not clear. A certificate is admissible as prima facie evidence of the time, place and cause of death when it has been signed by the \textit{physician in attendance}.\(^30\) Attendance fulfills the requirement of firsthand knowledge, but the words "in attendance" themselves present an ambiguity. Do they mean that the physician must actually be attending the patient at the moment of death, as can be fairly implied by his ability to certify the time of death? Or do these words also include the physician who attended the deceased during his final illness but who by chance was not present at the very moment of death? At first glance it would seem reasonable for the courts to admit statements of the latter as to cause of death, but it must be emphasized that the cause of death is the very fact in issue; perhaps this justifies strict adherence to the firsthand knowledge requirement.

\textbf{James M. Denny}

\textbf{BUSINESS RECORDS IN THE DISTRICT OF COLUMBIA}

Business records such as ledgers, daybooks and journals used for the purpose of establishing the truth of the information they contain are clearly hearsay. At common law, however, the use of such records was permitted as an exception to the exclusion of hearsay evidence. The rationale of the exception was simple: such records were inherently reliable because business affairs were governed by them. A necessity to utilize them at trial was present if the original entrant was unavailable


to testify. Divided into two branches, the exception embraced shop-books maintained by a party himself and book entries made by a third person in the regular course of business. The employment of the shop-book rule was quite restricted owing to the common law's reluctance to allow a party to testify for himself. On the other hand, records made in the regular course of business by someone other than a party were received with more readiness. In addition to being made in the regular course of business as a requirement, the record had to be made "upon the personal knowledge of the recorder or of some employee reporting to him, and entered at or near the time of the transaction recorded, as a record of original entry ... ."

When the record meets these requirements its reliability is presumed. A further step, however, is necessary before the record is admitted. The one who made the record must be unavailable to testify; his absence produces the necessity for using the record at trial. Of course, if the entrant himself testifies, the record can be pressed into service as past recollection recorded, or it can be used to refresh the witness' memory. At times, the record may be employed as an admission, a declaration against interest or an official written statement. These various utilizations of business records are not within the exception under discussion. As McCormick points out, the principles of the business records exception only apply "when the business record is itself offered as evidence of the truth of its terms without the production of the person who made the entry."

Modern business conditions have rendered the strict common-law exception unworkable. It is obvious that a contemporary business con-

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1 5 Wigmore, Evidence § 1518 (3d ed. 1940) [hereinafter cited as Wigmore].
3 McCormick, Evidence § 282 (1954) [hereinafter cited as McCormick].
4 McCormick § 283; 5 Wigmore § 1518.
6 5 Wigmore § 1521.
7 A perfect example of a business record used as past recollection recorded is found in Shimaburkuro v. Nagayama, 78 U.S. App. D.C. 271, 144 F.2d 13 (1944).
8 McCormick § 281.
cern holding thousands of records, made by clerks who are normally available to testify but have little actual knowledge of the facts they record, would be hard pressed to qualify such records under the exception. Realizing this weakness, a group of distinguished legal scholars drew up a Model Act in 1927 which, as Wigmore indicates, "serves to embrace and replace the whole of this Exception in both branches." The Model Act became the source of the federal statute enacted in 1936 which controls the admission of business records in federal courts. Loosely labelled the Federal Shop Book Rule by courts and practitioners alike, the statute is an attempt to ameliorate the common-law exception and bring it more into line with modern conditions. This is accomplished by setting aside the common-law requirement of entrant unavailability, an object that was foremost in the minds of the draftsmen of the Model Act. Aside from the removal of this historical limitation, the federal statute does not modify to any great degree the other requirements of the common-law business records exception. But, as one federal court has pointed out, "it [Federal Shop Book Rule] should be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed . . . ."

9 5 Wigmore § 1520. In 1936 a Uniform Business Records as Evidence Act appeared, and it has been the source of a number of state laws. The Uniform Act, set out in 5 Wigmore § 1520, leaves to the court more discretion than does the Model Act. Note, 48 Colum. L. Rev. 920, 922 (1948).

10 28 U.S.C. § 695 (1940), as amended, 28 U.S.C. § 1732 (1952). The amended statute is basically the same as the original except that it admits certain reproductions of business records. Following is the pertinent section of the statute:

(a) In any court of the United States and in any court established by act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.

11 The statute should be called the Federal Business Records Act since records made in the regular course of business was the branch of the exception that inspired the draftsmen rather than the shopbook branch. See Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481 (1946).

12 McCormick § 289. Palmer v. Hoffman, 129 F.2d 976 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943), and Buckley v. Altheimer. 152 F.2d 502 (7th Cir. 1945), indicate that the statute was designed for a more liberal business records admission policy.

13 McCormick § 289.

14 Buckley v. Altheimer, 152 F.2d 502, 507-08 (7th Cir. 1945).
For the most part, District of Columbia courts have followed the liberal trend in accepting business records under the statute. One of the more unstinting applications of the statute's liberality occurred in 1948 in Orndorff v. Cohen. In that case a husband and wife were sued for an unpaid balance on an open account. Acknowledging the husband's insolvency, the plaintiff tried to show that the defendants had operated as a partnership. To prove the partnership, or at least a holding out of a partnership by the defendants, the plaintiff offered in evidence his ledger sheet headed "Cambridge Restaurant (Phillip Z. Cohen and Bess Cohen)," on which he had made entries during a phone conversation with Mr. Cohen. The plaintiff also testified that, as a result of the conversation, he was led to believe that the Cohens operated as a partnership. The lower court rejected the ledger sheet as hearsay.

On appeal, the Municipal Court of Appeals reversed, stating that the "ledger sheet was clearly admissible under the Federal Shop Book rule . . . as a record made in the regular course of business." Under the statute the circumstances surrounding the making of the ledger were a matter of weight, not admissibility. The ledger sheet itself was proof of the holding out and the consequent reliance the plaintiff placed on the ostensible partnership in extending credit. "A written record made at the time of a conversation and in the regular course of business obviously may carry more weight with a jury than a repetition of the conversation itself."

If the Orndorff case had occurred prior to the passage of the Federal Business Records Act, there is little doubt that the ledger sheet would not have been admitted as a business record. At best, the plaintiff might have used it to refresh his memory, or as a record of a past recollection; but because of his presence as a witness, the unavailability requirement of the common-law business records exception would not have been met.

Although entrant unavailability is no longer required, common-law experience is still very much alive in the business records exception to the hearsay rule in the District of Columbia. In Clainos v. United States, the lower court admitted in evidence a police identification picture of the defendant which contained on its reverse side a series of notations about the man's previous convictions. The Court of Appeals rejected the

16 Id. at 795.
17 Id. at 796.
18 Ibid.
photograph on the ground that, in addition to not meeting the District's requirements as to showing previous convictions, it was not admissible under the Federal Business Records statute. The court said, "that [statute] is confined to records kept in the course of the business of which the transaction was a part. It does not refer to an external record which might happen to have been kept by a person outside that business."\textsuperscript{20}

Exploring still further the meaning of the statute, the court added:

The Rule contemplates that certain events are regularly recorded as "routine reflections of the day to day operations of a business" so that "the character of the records and their earmarks of reliability" import trustworthiness. Thus, the recordation becomes a reliable recitation of the fact. The preparation and maintenance of notations of events outside the operation of the business are not the recordation contemplated.\textsuperscript{21}

In effect, Judge Prettyman was stating the principle that, though the statute has eased the admission of business records by dropping out entrant unavailability, the remaining common-law requirements still control.

Seemingly, in view of the common-law background and the statutory language about the weight of the evidence, there would be little difficulty once a record qualified as one made in the regular course of business. Unfortunately this is not the case in the District of Columbia. Since 1945 District courts have repeatedly rejected certain hospital records, which have otherwise qualified as business records, because they contained court-construed opinion. It is in this area that the District courts are less liberal than most of the other federal courts. To a far lesser degree the same approach is taken toward opinion in certain police reports. It is with these two areas of dispute that the subsequent discussion will concern itself.

**BUSINESS RECORDS INVOLVING OPINION**

Within the language of the statute, "the term 'business' . . . includes business, profession, occupation, and calling of any kind"; and the record can be one of "any act, transaction, occurrence or event."\textsuperscript{22} It has been generally recognized that a hospital operates as a business and maintains records which are in themselves trustworthy. To call doctors and nurses away from their duties to testify has been deemed an unjustifiable interference with the operation of hospitals.\textsuperscript{23} The conflict as to the

\textsuperscript{20} Id. at 280, 163 F.2d at 595.
\textsuperscript{21} Id. at 281, 163 F.2d at 596.
\textsuperscript{23} 5 Wigmore § 1707.
admissibility of hospital records has arisen when the records deal with court-construed opinion on mental or physical conditions of patients.24

In the District of Columbia the issue about opinion in hospital records was first raised in 1945 when the United States Court of Appeals for the District of Columbia Circuit handed down its decision in New York Life Ins. Co. v. Taylor.25 That case involved an action brought on an insurance policy to recover double indemnity for the death of the insured who was killed by a fall into a stair well in Walter Reed General Hospital. The insurance company based its defense on possible suicide of the insured and attempted to offer in evidence records from the hospital which indicated that the decedent had a history of psychoneurosis and had shown suicidal tendencies during hospital interviews. The lower court rejected the use of these records. The Court of Appeals agreed that to admit such records would not be a proper application of the Federal Business Records Rule.

The court based its decision on its belief that the Supreme Court case of Palmer v. Hoffman26 "limited the admission of records under the Federal Shop Book Rule statute to those which are trustworthy because they represent routine reflection of day-to-day operations."27 By attempting to use the hospital records, the defendant in Taylor was not trying to show routine facts but was offering "to prove the truth of accounts of events and of complicated medical and psychiatric diagnoses."28 The court added:

There is lacking any internal check on the reliability of the records in this respect, such as that provided for "payrolls, accounts receivable, accounts payable, bills of lading and the like." . . . To admit a narrative report of an event, or a conversation, or a diagnosis, as a substitute for oral testimony, is to give any large organization the right to use self-serving statements without the important test of cross-examination.29

A rehearing was granted to reconsider the admissibility of the hospital records rejected in the lower court. The court this time explained at greater length its earlier holding. Judge Arnold wrote that business records are reliable because of "an efficient clerical system, and . . . the

24 Morgan, supra note 11, at 562.
26 318 U.S. 109 (1943). The Supreme Court stated that the test of admissibility has to be "the character of the records and their earmarks of reliability . . . acquired from their source and origin and the nature of their compilation." Id. at 114.
27 79 U.S. App. D.C. at 69, 147 F.2d at 300.
28 Ibid.
29 Id. at 69-70, 147 F.2d at 300-01.
fact that they are the kind of observations on which competent men would not differ."  30 Records concerning a patient's physical condition or treatment which would not cause physicians to disagree would be admissible under the statute. But psychiatric diagnosis is based on conjecture and opinion. What is a mental disorder to one psychiatrist is not necessarily so to another, while all physicians presumably agree on what is a broken leg or a fractured skull. "The test should be whether they are records of a readily observable condition of the patient or his treatment."  31 As to records of conversations in which the insured had indicated a desire to die, these too should not be admissible. The mere fact that the records showed selected portions of the interviews leads on to the necessity of cross-examination. As Judge Arnold said: "Cross-examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor."  32

Judge Edgerton dissented in part, claiming that it was error to refuse admission of the records. Using the language of the statute itself, he observed that there are three requirements to be met before a business record is admissible:

1. Was the writing "made as a memorandum or record of any act, transaction, occurrence or event"?  
2. Was it "made in the regular course of any business"?  
3. Was it the regular course to make the record "within a reasonable time"? Like other preliminary questions of fact upon which the admissibility of evidence depends, these are questions for the judge.  33

In his view, the hospital records in this case fulfilled the statutory mandates and should have been admitted. In effect Judge Edgerton was saying that the court should either admit or refuse to admit business records under the statutory standards; it should not judge the contents of the records so long as they qualified for admission under the statute. The weight of the records was for the jury, not the court.

Commentators on the Taylor case have agreed with Judge Edgerton's analysis.  34 Most courts inferentially reject the majority's opinion and

30 Id. at 72, 147 F.2d at 303.  
31 Id. at 75, 147 F.2d at 306.  
32 Id. at 70, 147 F.2d at 301.  
33 Id. at 79, 147 F.2d at 310. Judge Edgerton's dissent seems to state that under the majority's decision all hospital records of diagnosis are inadmissible. The court clarified this misconception on the appeal from the retrial by stating that only hospital records should be rejected which constitute "hearsay, opinion or diagnosis, about which equally competent men could differ, and as to which cross-examination is necessary in eliciting the truth." New York Life Ins. Co. v. Taylor, 81 U.S. App. D.C. 331, 332, 158 F.2d 328, 329 (1946).
34 Criticism of the Taylor case is found in Morgan, supra note 11; Note, 48 Colum.
admit records of psychiatric diagnosis.\textsuperscript{35} When the liberal wording of the federal statute and the decisions of the courts which have dealt with it are considered,\textsuperscript{36} it is quite likely that the Taylor holding is too severe a limitation on the use of records containing opinion. The decision in the Palmer case,\textsuperscript{37} which Judge Arnold believed to be controlling in Taylor, seems to have been prompted by the Supreme Court's fear that to allow as a business record the railroad engineer's statement about the accident would result in the admission of any self-serving statement, made with litigation in prospect, that could vaguely qualify as a business record. There seems to be a vast difference between a mental diagnosis made by a hospital physician in the regular course of business and the possibly self-serving statements of an engineer made outside the regular course of business.

However regarded by commentators and courts, the Taylor exclusion still applies to business records embracing opinion in the District of Columbia. The courts have usually excluded only psychiatric opinion under the ruling, although it is broad enough to extend to controversial physical examinations. In a 1951 case, however, the District Court for the District of Columbia excluded several notebooks in a patent case because under the Taylor doctrine "the Federal Shop Book rule is limited to routine, clerical entries made contemporaneously with the event by a person charged with the duty of maintaining the records. They do not extend to matters of opinion and similar matters."\textsuperscript{38} Nonetheless, hospital records in the District cases still provide the most fertile area for debate about the Taylor rule.

In Washington Coca-Cola Bottling Works, Inc. v. Tawney,\textsuperscript{39} the court denied that the Taylor rule excluded all medical examinations. There the

\textsuperscript{35} Buckminster v. Commissioner, 147 F.2d 331 (2d Cir. 1944). Judge Frank thought that the Taylor decision was in error and not binding on his court. Id. at 335. In an earlier opinion, affirmed by the Supreme Court, Judge Frank based his objections to certain records on the fact that there was present a "powerful motive to misstate" when the records were made. Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943).


\textsuperscript{37} 318 U.S. 109 (1943).

\textsuperscript{38} 98 U.S. App. D.C. 151, 233 F.2d 353 (1956).
plaintiff suffered injuries from swallowing glass fragments hidden in the beverage she was drinking. Admitted in evidence were hospital records containing the results of a physician's rectal examination of the plaintiff after she suffered her injuries. Distinguishing the present records from those in Taylor, Judge Burger stated that they dealt with "observations of physical facts as plain to the trained eye as a compound fracture, and upon which competent physicians would not be likely to disagree."40

Two hospital slides which had been used for urethral and vaginal smear tests were found admissible in a carnal knowledge case.41 The intern who had taken the smears could not specifically identify the slides as the ones he had taken. It was shown that they were the type of slides used in the hospital, and that the girl's name had been scratched on the back of each slide for identification. The court concluded that there was "no doubt that these slides were made and kept in the regular course of business and that it was the hospital's regular course of business to make them."42 The application of the Taylor rule against opinion, however, seems doubtful in this case because the bacteriologist who made the analysis of the smears was able to testify to his examination, thereby subjecting the opinion elements of the slides to the rigors of cross-examination.

In another case a defendant claimed that the Taylor requirements were not met when certain hospital records were admitted in his trial below.43 The defendant had been accused of assault with intent to rob. His victim had been examined and X-rayed at a local hospital. Producing the records of his treatment in court, the hospital's record librarian testified that they were records kept in the normal course of business. The Municipal Court of Appeals stated that "the report here involved was routine in nature. reciting merely the name of the patient, dates of admission and discharge, and the injury for which he was treated."44 Under the Taylor rule they were clearly admissible.

Probably the clearest recent statement of the Taylor doctrine is found in a 1958 decision of the United States Court of Appeals for the District of Columbia Circuit. In Lyles v. United States45 the court, sitting en banc, affirmed the holding of the lower court that records of a federal

40 Id. at 152, 233 F.2d at 354.
42 Id. at 163, 211 F.2d at 23.
44 Id. at 412.
penal hospital were not admissible in support of defendant's claim of insanity. The majority held that the Federal Business Records Records Act deals with facts, not opinions. An opinion of a psychiatrist that defendant was schizophrenic would be admissible if the doctor were testifying. His testimony, however, would be subject to cross-examination as is the testimony of all expert witnesses who testify. To allow the record here "would be to submit as a fact the medical conclusion of a doctor without inquiry, showing, or cross-examination as to his qualifications, the data upon which he reached his conclusion ..." Judge Bazelon, joined by Chief Judge Edgerton and Judge Washington, dissented vigorously on the majority's view of the continuing validity of *Taylor*. The dissenting judges claimed that the *Taylor* rule, by restricting the applicability of the statute, misinterpreted the *Palmer* case. They could see no reason to differentiate between diagnostic and clinical records since a hospital in the regular course of its business maintains both. Anticipating his approach in a later case, Judge Fahy dissented in a separate opinion. He suggested that the record in this case, involving as it did a government institution, should have been admissible under the official records exception to the hearsay rule.

As has been pointed out by the foregoing discussion, the exclusion rule of *Taylor* is well entrenched in the District of Columbia. Clearly, no record containing psychiatric opinion is admissible under the statute. Reported applications of the exclusion aspect of *Taylor* are few. The courts refer to the *Taylor* case constantly in the negative way of non-applicability to the particular facts. But the District courts rarely exclude anything other than psychiatric opinion on the basis of *Taylor*. It is believed that Judge Fahy's suggested use of the records as official records might be one way around the rigid rule of *Taylor* if the hospital records are from state or federal institutions.

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46 Id. at 28, 254 F.2d at 731.
47 Id. at 33, 254 F.2d at 736.
48 Id. at 35, 254 F.2d at 738.
POLICE REPORTS AND THE BUSINESS RECORDS EXCEPTION

Is a police report admissible as a business record under the federal statute? This question raises the final problem area in the District of Columbia's application of the Federal Business Records Rule. The clearest exposition of the District approach to the problem is found in Levin v. Green. The Municipal Court of Appeals held inadmissible a police report of an automobile collision. It rejected the record because it contained conclusions about the cause of the accident. The court, by referring to the holding in Taylor about hospital records containing "hearsay, opinion or diagnosis," was led to the conclusion that "in a civil action arising from an automobile accident a police report . . . is not to be admitted under the Federal Shop Book Act if it contains hearsay or conjecture or conclusion."55

Again the argument may be made that to refer, as the court does in Levin, to hearsay-on-hearsay is to miss the purpose of the business records exception. It is certainly the policeman's duty to make a record of what he observes and hears at an accident. That his record sometimes contains conclusions is probably unavoidable. But it should be remembered that the statute itself says that the "circumstances of the making of such writing or record, including lack of personal knowledge . . . may be shown to affect its weight, but . . . not its admissibility."57

CONCLUSION

The District of Columbia applies a narrow interpretation of the Federal Business Records Rule in the one area of opinion. Criticism has not dislodged the idea that there is something invalid in admitting a record containing opinion, particularly in the area of psychiatric diagnosis. It is suggested that by so interpreting the statute the local courts have overlooked the basic fact that the Federal Business Records Rule was designed to make easier the use of business records. With so recent an affirmation of the Taylor rule as 1958, it is unlikely that records involving opinion will find any judicial doors opening to them in the District of Columbia.

Daniel M. Redmond

54 106 A.2d 136 (Munic. Ct. App. D.C. 1954). This case also contains a survey of the position taken by other federal courts on this matter.
55 Id. at 138.
56 Ibid.
DECISIONS

CONSTITUTIONAL LAW—THE EXPORT-IMPORT CLAUSE DOES NOT PROHIBIT A STATE AD VALOREM TAX ON GOODS STORED BY AN IMPORTER FOR USE IN MANUFACTURING WHEN SUCH GOODS ARE IRREVOCABLY COMMITTED TO THIS PROCESS BECAUSE OF THEIR NECESSITY TO CURRENT OPERATIONAL DEMANDS. Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959).

Youngstown Sheet and Tube Company, an Ohio corporation, operated a plant in which it manufactured iron and steel. The ores necessary to operate the plant were obtained from both domestic and foreign sources. The imported ores were transported by railroad from their port of entry to the plant where they were stored in piles separated from the domestic ores. These piles contained an estimated three month supply of ore. They supplied ore to smaller piles or stock bins which were closer to the plant and which contained a one or two day supply of ore. The ore from the stock bins was fed directly into the furnaces. The State of Ohio imposed an ad valorem tax upon the average value of iron ores held by Youngstown during the tax year ended January 1, 1954. This tax was upheld by the Ohio Supreme Court.1 On appeal from this ruling the United States Supreme Court noted probable jurisdiction.2

United States Plywood Corporation was engaged in the manufacture of wood products within the State of Wisconsin. Both domestic and imported lumbers and veneers were utilized in the process. The imported lumber, shipped directly from Canada to the plant, was received as either loose boards or bundles. Upon its arrival the lumber was stored in a yard adjacent to the plant for the purpose of air drying. This aeration did not complete the process of drying as the goods had to be treated in the company’s kiln before they could be used in the manufacture of veneered products. As the daily needs of manufacturing required, the lumber was removed from the yard for use in the kiln. The veneers, imported from three countries, were received in bundles and were also stored in the yard. Unlike the lumber, however, the veneers were not stored in the yard for the purpose of air drying, but merely to supply the manufacturing process. The city tax assessor of Algoma imposed a property tax upon one-half of the imported lumber and veneers present in the yard on the day of assessment. The Supreme Court of Wisconsin upheld the tax.3

The United States Supreme Court decided the cases together. Held, since the importation process had definitely ended, and since the goods had been irrevocably committed to use in manufacturing because of their necessity to

1 Youngstown Sheet & Tube Co. v. Bowers, 166 Ohio St. 122, 140 N.E.2d 313 (1957).
3 United States Plywood Corp. v. City of Algoma, 2 Wis. 2d 567, 87 N.W.2d 481 (1958).
current operational demands, the importers had so acted upon the imported material as to cause the products to lose their character as imports and their immunity from state taxation provided by the Constitution.\(^5\)

The Constitution vests in the federal government the primary power to tax imports from foreign countries.\(^6\) The states retain the right to tax property within their borders.\(^7\) This leaves one area unsettled: when does federal taxation of imports cease and state taxation of personal property begin?

This question is analogous to the problem of when a state can tax interstate commerce, and the arguments advanced in favor of state taxation in that case have been raised in support of state taxation of imports. They are: (1) a tax imposed upon domestic goods which cannot be imposed upon imported goods of a comparable nature results in a discrimination against domestic products;\(^8\) and (2) the state, by rendering protective services such as fire and police protection, or by providing certain privileges, should be able to assess the recipients of these services and privileges.\(^9\)

The first judicial demarcation between federal and state taxation of imports was presented in Brown v. Maryland,\(^10\) where the Court recognized that the constitutional prohibition on the states to lay a duty on imports could conflict with the acknowledged power of the states to tax persons and property within their territory.\(^11\) Unwilling to impose a rigid standard, the Court stated broadly:

It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state . . . . \(^12\)

Viewed in its broadest possible interpretation this statement by Chief Justice Marshall has had a profound effect upon the entire subject of taxation of imports and is considered the pivotal point of all later decisions. It was not intended, however, to define with exactitude the line between federal and state taxation in all cases, but merely to indicate the relevant general principles. It has been the task of succeeding Courts to interpret the facts of a particular case in terms of Brown v. Maryland. Thus in the instant cases, although the Court was guided by the broad limitations imposed by that decision,\(^13\) it still faced the task of determining the applicability of these principles to the Youngstown and Plywood cases.

Although the holding of Brown v. Maryland was a narrow one, that Court

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\(^6\) U.S. Const. art. I, § 10, cl. 2.

\(^7\) Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

\(^8\) Hooven & Allison Co. v. Evatt, 324 U.S. 652, 690 (1945) (dissenting opinion).

\(^9\) Low v. Austin, 80 U.S. (13 Wall.) 29, 31 (1872).


\(^11\) Id. at 441.

\(^12\) Id. at 441-42.

\(^13\) 358 U.S. at 542-43.
did suggest by way of dicta some specific instances when the immunity of imports from state taxation should apply and when it should cease. The Court said, for example, that, because the purpose of importing goods was to sell them, and because the importer had already paid duty on the goods, he should be allowed to accomplish his objective without an intervening state tax.\(^{14}\) Such immunity was held to be terminated by the importer's sale of the goods or by his travelling with them as an itinerant peddler.\(^{15}\) The Court imposed yet another and more important standard. It said that the immunity should apply so long as the goods remained in the original form or package in which they were imported.\(^{16}\) This "original package" doctrine has been held not to apply when the goods cannot properly be considered as having been shipped in a package,\(^{17}\) or when the goods have been shipped in an unusually small package in an attempt to avoid state taxation.\(^{18}\) But aside from these exceptional circumstances the "original package" doctrine has uniformly controlled the taxation of goods imported for sale since the \textit{Brown} decision.

A different problem is presented when the goods are imported not for sale but for use by the importer in his own manufacturing process. The first case decided by the Supreme Court involving such goods was \textit{Hooven & Allison Co. v. Evatt},\(^{19}\) where the Court held that hemp retained by the importer for use in his manufacturing process and placed within his warehouse in the original packages could not be subjected to state taxation. The Court, in equating goods imported for use in manufacturing to goods imported for sale, said: "We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale."\(^{20}\) The traditional rules governing immunity were, therefore, held to apply in either case.

In deciding the present cases, the Court felt that \textit{Hooven} was not controlling.\(^{21}\) In \textit{Hooven} the hemp which was stored in the warehouse was intended for eventual use in manufacturing. There was no contention and no showing that this hemp was so vital to the company's current operational needs that it could have been said to have entered the manufacturing process.\(^{22}\) However, this was the precise issue which the Court felt it was called upon to decide in \textit{Youngstown} and \textit{Plywood}.\(^{23}\) On the basis of the facts stipulated it found that the presence of the goods was so vital to current manufacturing needs that they were, therefore, not immune from state taxation.\(^{24}\)

\(^{15}\) Id. at 443.
\(^{16}\) Id. at 442.
\(^{17}\) Tres Ritos Ranch Co. v. Abbott, 44 N.M. 556, 561, 105 P.2d 1070, 1073 (1940).
\(^{18}\) May v. New Orleans, 178 U.S. 496 (1900).
\(^{19}\) 324 U.S. 652 (1945).
\(^{20}\) Id. at 667.
\(^{21}\) 358 U.S. at 544.
\(^{22}\) 324 U.S. at 667.
\(^{23}\) 358 U.S. at 544.
\(^{24}\) Id. at 545-49.
In a strong dissenting opinion written by Mr. Justice Frankfurter, in which Mr. Justice Harlan joined, it was urged that *Hooven* and the instant cases were not distinguishable on the facts and that in no sense could goods awaiting use in manufacturing process be considered as being used within the rule developed in *Hooven*. To the dissenters, therefore, the majority opinion represented not only a direct overruling of the *Hooven* decision, but also an unwarranted extension of the states’ right to tax imports.

Whether or not Mr. Justice Frankfurter’s position is valid, it is clear that the present cases do represent an extension of the states’ ability to tax imports. The Court refused to rely on precedent when the facts indicated that at least as to some of the goods it might reasonably have done so. In the *Plywood* case the Court, in declining to differentiate between the loose lumber and that imported in bundles, rejected the controlling effect of the original package doctrine. Similarly, in *Youngstown* the Court refused to distinguish between the ores stored in the larger and more remote piles and that stored in the smaller stock bins which were placed next to the plant and were used within two days, saying that “taxability cannot depend upon whether the size of the pile of stored materials or its distance from the place of actual fabrication or consumption is a little more or a little less.”

The opinion in the instant cases indicates that the Court was principally influenced by three factors: (1) the lower courts had found that the goods were necessary to the importers’ current operational needs; (2) a denial of immunity in these circumstances was not inconsistent with the intent of the framers of the Constitution to protect the nonimporting state from the importing state; and (3) the importation journey had definitely ended and the goods were irrevocably committed to the manufacturing purpose for which they were imported.

An important aspect of the present decision is the attitude assumed by the Court. In prior cases this problem of when imports become subject to state taxation had been viewed largely as one of limitation upon the states. Here the Court seemed to assume that the state has this right unless otherwise prohibited. Consequently, finding nothing in the Constitution or in prior decisions which prohibited this particular tax, the Court upheld it.

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25 Id. at 567-73.
26 Id. at 569-70.
27 Id. at 552-53.
29 358 U.S. at 548-49.
30 Id. at 546-47.
31 Id. at 545-48.
32 Id. at 549.
33 Id. at 543.
In one respect at least the instant decision is helpful. Owing to the difficulties inherent in administering a tax on imports, it is obvious that practical considerations must be given preference over such fictions as the original package. The approach taken by the tax assessors in both the Youngstown and Plywood cases in merely taxing the property present as part of the current manufacturing needs on the day of assessment was an eminently realistic one. The Court accordingly condoned this procedure and said that, since the domestic and foreign ores were being stored and used in the same way, they both stood in the same relation to the state and hence should be subject to the same tax.35

In failing to distinguish between domestic goods and imports, the Court may well have overlooked the intent of the framers of the Constitution to do so. This intent is evidenced by the fact that foreign commerce is protected from state intervention by two specific clauses. The first affirmatively grants to Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."36 The other expressly denies the states the right to impose duties on imports by providing that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ."37 Since the import clause has been interpreted as applying only to goods imported from foreign countries,38 domestic goods are not so well fortified against state intervention as are foreign imports—the former's sole protection emanating from the commerce clause.

Because of the ever increasing effect of foreign trade upon foreign policy, any device such as a tariff or a duty should be imposed only with precise uniformity39 and after a most careful consideration of national policies. In order to prevent selfish state action from destroying this delicate balance, it seems necessary that the federal government retain maximum control.40 It is submitted that the instant cases have not only announced a doctrine which extends the states' right to tax imported goods, but have done so in a manner which is inconsistent with this concept of a controlled and orderly federal policy.

JOHN B. FROHLING

35 358 U.S. at 549.
36 U.S. Const. art. I, § 8, cl. 3.
37 U.S. Const. art. I, § 10, cl. 2. See also McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 427 (1940); Board of Trustees v. United States, 289 U.S. 48, 56-57 (1933).
38 Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).
40 See 358 U.S. at 551-52 (dissenting opinion).
MILITARY LAW—ARTICLE 92 OF THE ARTICLES OF WAR DENYING COURT-MARTIAL JURISDICTION OVER A MURDER COMMITTED WITHIN THE UNITED STATES IN TIME OF PEACE IS CONSTRUED TO DENY COURT-MARTIAL JURISDICTION OVER AN OFFENSE COMMITTED SUBSEQUENT TO THE END OF HOSTILITIES BUT PRIOR TO THE OFFICIAL DECLARATION OF PEACE. Lee v. Madigan, 358 U.S. 228 (1959).

On June 10, 1949, petitioner, John Lee, was serving a twenty year sentence at Camp Cooke Disciplinary Barracks for the crime of armed robbery for which he had also been dishonorably discharged from military service. On that date he allegedly killed a fellow prisoner and was convicted of conspiracy to commit murder by a court-martial. He was sentenced to death (commuted to life imprisonment) pursuant to article 92 of the Articles of War. In 1957, while in confinement, he petitioned the United States District Court for the Northern District of California for a writ of habeas corpus, challenging the jurisdiction of the court-martial on two grounds: (1) that he could not be constitutionally tried by a court-martial because he was not a member of the armed forces at the time the offense was committed, and (2) that he was tried in time of peace as defined by article 92 of the Articles of War. Relief was denied and the order affirmed by the court of appeals. On certiorari, the United States Supreme Court reversed, two Justices dissenting. Held, the words “in time of peace” as used in article 92 of the Articles of War which were then in force, divesting courts-martial of jurisdiction in cases of murder, are strictly construed in the light of the substantial personal rights involved. As a consequence, June 10, 1949, was “in time of peace,” although official peace by treaty had not been declared, and, therefore, the court-martial lacked jurisdiction to try the petitioner. No mention was made of the constitutional issue raised by petitioner’s first contention.

Article 92 of the Articles of War read, in pertinent part, as follows:

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct . . . . Provided, That no person shall be tried by court-martial for murder . . . committed [sic] within the geographical limits of the States of the Union and the District of Columbia in time of peace.

The actual hostilities of World War II ended with the surrender of Japan on September 2, 1945. On December 31, 1946, the President proclaimed the cessation of hostilities. It was not until October 19, 1951, that the war ended officially with Germany and April 28, 1952, with Japan. It will be observed

3 Lee v. Madigan, 248 F.2d 783 (9th Cir. 1957).
that the offense in the instant case was committed after the declared end of hostilities but before the official declaration of peace with Germany or Japan.

The Court was confronted with a solid line of cases decided since World War I interpreting a variety of statutes containing clauses suspending their operation at war's end. Two Supreme Court decisions had accepted the date of a formal proclamation of peace as the date on which a war is terminated. 9 No distinction was made in these cases concerning the nature of the rights involved and it was commonly stated that the termination of a war was a political function beyond the interpretive province of the judicial branch. 10 The first of these decisions, Hamilton v. Kentucky Distilleries & Warehouse Co., 11 involved government seizure of whiskey under a war power statute in 1919 before a proclamation of peace. The statute had been enacted after the Armistice and was to remain in effect "until the termination of demobilization, the date of which shall be determined and proclaimed by the President." 12 The seizures were upheld on the ground that the war still existed. The second, Kahn v. Anderson, 13 involved, as did the instant case, court-martial jurisdiction under article 92. It was similar in another respect in that it also involved a former soldier convicted of conspiracy to commit murder while imprisoned. The case is distinguishable from Lee v. Madigan, however, because the murder had been committed prior to the cessation of hostilities. Petitioner in Kahn relied on the same clause in issue here and contended that the court-martial lacked jurisdiction to continue in time of peace a trial previously begun. The Court accepted, arguendo, the petitioner's contention and proceeded to decide that "time of peace" in article 92 meant "peace in the complete sense, officially proclaimed." 14 The uniformity in result which followed these cases can be contrasted with the decisions involving war powers and military jurisdiction which had followed earlier wars.

Litigation involving the question of when a war has ended is almost as old as the Republic. In 1796 the Court may have set the pattern which was to be followed later by stating that "the treaty of peace abolishes the subject of the war." 15 Since then, each major war in which the United States has engaged, except the War of 1812 and the Mexican War, has produced numerous decisions on this question. The Spanish-American War provided two cases which illustrate that courts have arrived at different conclusions depending on the nature of the rights involved. Hostilities ended on August 12, 1898, and the treaty of peace was effective as of April 11, 1899. In Hijo v. United

11 251 U.S. 146 (1919).
12 Act of Nov. 12, 1918, ch. 212, 40 Stat. 1046 (1918).
13 255 U.S. 1 (1921).
14 Id. at 10.
15 Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796). (Emphasis added.)
States, a Spanish national sought to charge the United States for illegal use of his vessel (legally captured during the war) after the end of hostilities. The Court stated that "a state of war did not cease until the ratification of April, 1899, of the treaty of peace." In a district court case, In re Cadwallader, a soldier was charged with deserting the army on October 16, 1898, (after termination of hostilities but before the treaty). A statute provided a limitation of two years on the offense of desertion in time of peace. Since two years had passed when the soldier was apprehended, the issue of when war ended and peace began had to be resolved. It was held that the armistice ended the war. The court based its holding upon the conclusion that desertion during actual peace is less severe an offense than desertion in time of actual war, and that therefore Congress intended to give such a meaning to the statute. The peace treaty was ignored. It may be safely asserted, therefore, that some discrimination has been exercised at least by the lower federal courts in determining the dates on which wars have ended, depending upon the rights to be protected.

Manifestly, there is no necessary connection between the length of time required to negotiate peace agreements and the period during which it is prudent to continue acting under the war powers. Nevertheless, as has been seen, wartime statutes have been held to retain their force until the restoration of a formal state of peace. There are two reasons for this. The first is the realization that dislocations occurring after a war necessitate an extension of wartime controls. This idea is exemplified by the oft-quoted language in Stewart v. Kahn, where it was said, "the [war] power is not limited to victories in the field . . . . It carries with it inherently the power to . . . remedy the evils which have arisen from its rise and progress." Secondly, since some cut-off date must be found, and since the declaration of a termination of war is considered a political act, the courts will often accept such date as determinative.

The war powers, however, have been recognized as the most dangerous in the whole catalogue of powers of free government. Members of the Court, although reluctant to curtail them, have expressed concern where personal liberties are involved and have cautioned against prolonging them during a period of technical war.

The courts have always been jealous of military jurisdiction which, strictly

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16 194 U.S. 315 (1904).
17 Id. at 323.
18 127 Fed. 881 (D. Mo. 1904).
19 78 U.S. (11 Wall.) 493 (1870).
20 Id. at 507.
24 Woods v. Cloyd W. Miller Co., 333 U.S. 138, 147 (1948) (concurring opinion); In re Yamashita, 327 U.S. 1, 46 (1946) (dissenting opinion).
speaking, is not included within the war powers, being exercisable in time of peace and having separate constitutional authority. There are several cogent reasons for giving military jurisdiction only the essential power needed to keep discipline within the armed forces. Military jurisdiction, having authority under the constitutional grant to the legislature, is sui generis, apart from the law which governs the federal courts. The scope of review allowed the civil courts over military tribunals has been limited almost solely to questions of jurisdiction. Because "any expansion of court-martial jurisdiction ... necessarily encroaches on the jurisdiction of federal courts set up under article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals," the courts are careful to narrowly construe any grant of jurisdiction to military tribunals. The Court has announced its intention of restricting military tribunals to the narrowest jurisdiction deemed absolutely necessary to maintaining discipline among troops on active duty.

The Court in the instant case recognized that the reasons which justify a formal end to a war for economic readjustment purposes lose their validity when personal rights are involved. Therefore the Court refused to be bound by those decisions involving the economic exercise of the war powers. Mr. Justice Douglas, speaking for the Court, also summarily dismissed as a "generalized statement" the contention that the termination of a state of war is a "political act." The statement in Kahn construing the clause in article 92 to mean peace "officially proclaimed" was rejected as dictum. The Court also distinguished those cases involving power over aliens.

After doing so, the Court did not balk at the recognition that it had sacrificed uniformity in order to protect constitutional guarantees. "A more particularized and discriminating analysis must be made. ... [T]he Nation may be 'at war' for one purpose and 'at peace' for another." Whether peace has arrived is dependent upon the sense of the particular statute involved. "Only mischief can result if those terms are given one meaning regardless of the statutory context."

The Court did not discuss the fact that article 118 of the Uniform Code of Military Justice which replaced article 92 of the Articles of War has neither wartime nor geographical limits, but such broad statutes are apparently incompatible with its avowed intention to limit military jurisdiction. Although

25 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 141-42 (1866) (concurring opinion).
30 Id. at 22.
31 358 U.S. at 230.
32 Id. at 230-31.
33 Id. at 231.
the immediate effect of the instant case is blunted by the fact that article 92
is no longer subsisting, to consider Lee v. Madigan as merely an ad hoc decision
is to ignore the existence of analogous statutory language and the future
exercise of the war powers. The protection of constitutional rights is of greater
value than uniformity in statutory construction, and it is submitted that the
construction made by the Court in the instant case gives substance to these
rights.

GEORGE A. PAPPY

PARTNERSHIPS—A PARTNERSHIP IS A LEGAL ENTITY SEPARATE FROM THE
INDIVIDUAL PARTNERS FOR THE PURPOSES OF CRIMINAL LIABILITY UNDER
SECTION 322(A) OF THE MOTOR CARRIERS ACT AND SECTION 835 OF TITLE
18, UNITED STATES CODE. United States v. A & P Trucking Co., 358 U.S.
121 (1958).

The United States charged A & P Trucking Company, a partnership, with
violations of the regulations of the Interstate Commerce Commission pertaining
to the transportation of explosives. Defendant was specifically charged in
separate informations under the comprehensive misdemeanor sections of Title
18, United States Code and the Motor Carrier Act of 1935 which make it
a crime knowingly to violate the ICC regulations. The United States District
Court dismissed the informations on the ground that a partnership could not
be guilty of violating these statutes. The government appealed directly to
the Supreme Court under the authority of the Criminal Appeals Act. The
Supreme Court reversed, Justices Douglas, Black, Frankfurter and Whittaker
dissenting in part. Held, a partnership is a legal entity separate from the
individual partners for the purpose of criminal liability under section 322(a)
of the Motor Carriers Act and section 835 of Title 18, United States Code. The
dissenting justices agreed with the majority in regard to liability under
section 322(a) but would not make a partnership criminally liable under
section 835.


1 49 C.F.R. §§ 77.823(a) (1949), 193.95(a), 191.8 (Supp. 1958).
7 Id. at 127–28.
Section 322(a) of the Motor Carriers Act states that “any person [who] knowingly and willfully” violates the regulations shall be subject to fine.\(^8\) Section 303(a) of the Act defines “person” as including partnerships.\(^9\) In agreeing that partnerships are liable under 322(a) all the members of the Court recognized the authority of Congress to change the common law.\(^10\) The problems in the field of partnership liability have stemmed from conflicting theories as to its nature. The entity theory of the partnership holds that the partnership is a legal person distinct from the members of the firm.\(^11\) This theory is akin to the similar theory involving corporations and allows the partnership firm as such to incur criminal liability. The aggregate theory states that a partnership is a relationship rather than a person, with no personality other than that of the persons who compose it.\(^12\) Under this theory when the partnership is guilty of a crime the partners should be indicted as individuals and not as a firm. This view was the rule at common law and has been essentially incorporated into the Uniform Partnership Act which is in force in most of the states.\(^13\) Since both section 322(a) and section 835 make the partnership proper liable, the holding in the instant case changes the common law rule. It is in regard to section 835 that the Court divided as to the intent of Congress to include partnerships under its provisions.

Section 835 makes “whoever knowingly” violates the regulations criminally liable but does not include within itself a definition of the word “whoever.”\(^14\) The rules of construction to be used in interpreting the provisions of the United States Code provide that in determining the meaning of any Act of Congress, unless the context indicates otherwise, the words “person” and “whoever” include partnerships.\(^15\) In construing section 835 both the majority and the dissent agreed that it should be read in conjunction with these rules.\(^16\) They differed, however, as to the effect of the word “knowingly” on the word “whoever” in an absence of a definition of the latter. The dissenters felt, that since by the common-law rule a partnership as an entity cannot have \(\text{sciente}\)r, the inclusion of the knowledge requirement coupled with the absence


\(^10\) 138 U.S. at 124, 128.


\(^16\) 158 U.S. at 123, 128. The Court thus applied the general rule of statutory construction which states that the interpretation clause and the statute must all be construed together as part of the same statute. If the two can be harmonized, there can be no objection to allowing the interpretation clause to control the language of the statute. See Crawford, Construction of Statutes § 208 (1940).
of a definition of "whoever" embracing partnerships was a "context" indicating a congressional intent that the code rule of construction should not apply.17

The doctrine of respondeat superior generally has not been extended beyond the corporation or joint stock association in establishing criminal guilt or liability.18 As pointed out in the dissenting opinion, the present statute requires "culpable intent."19 Though the master is held liable for the tortious acts of the servant committed within the scope of employment, the criminal liability of the master does not extend this far.20 The dissent impliedly raises the question of whether a partner who might be completely free of any guilty knowledge of the wrongful acts of his employee, should be penalized by a fine levied against the assets of the partnership. One approach would make the individual responsible suffer the penalty rather than increase the costs of running the business by a fine levied on the business itself.21 However the problem often requires a balancing of interests between innocent partners and the protection of the public.

Hardships there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.22

Thus often the public interest overrides the individual innocence of persons "standing in responsible relation to a public danger."23 Notwithstanding the majority statement that the partners as individuals cannot be convicted without knowledge, the practical effect of the instant decision is to punish them by penalizing the partnership assets. This result may be justified on the ground of giving the statute an all-inclusive effect for the general public interest.

The other reasons for the dissenters' failure to find an intent to include partnerships under section 835, namely, the rule that criminal statutes should be strictly construed and the adoption of the aggregate theory by the Uniform Partnership Act and by the majority of the states, would not appear to lend as much strength to their argument as the fact that partners might be criminally punished without scienter. While a strict construction of a penal statute respects the basic separation between the legislative and judicial functions, it may also bypass a clear congressional intent to the contrary. "No rule of construction, however, requires that a penal statute be strained . . . in order

17 358 U.S. at 128.
19 358 U.S. at 128.
22 Id. at 284-85.
23 Id. at 281.
to exclude conduct clearly intended to be within its scope . . . ."24 Further, their assumption that, from the adoption of the aggregate theory by the Uniform Partnership Act, Congress intended that section 835 reflect such theory is open to question. As the majority indicates, partnerships have been specifically included within the scope of many regulatory acts.25 Further, there is a growing tendency on the part of the courts to treat the partnership as an entity distinct and separate from the persons composing it.26 Judge Learned Hand, in discussing the confusion in the law of partnerships, stated, "It could be straightened out into great simplicity, and in accordance with business usages and business understanding, if the entity of the firm, though a fiction, were consistently recognized and enforced."27 Though most courts give "lip service" to the rule that the partnership is not technically a legal entity, it is quite often treated as one for many purposes and the inability of the partnership to incur liability has often been changed by statute.28 The dissent finds its strongest argument in the fact that on the face of the statute at least the carrier violating the regulations would not escape liability since the individual partners might still be held liable upon a finding of guilty knowledge. However, the proof of such knowledge in many instances might be very difficult. In view of the strong necessity for full application of the regulations, it cannot be said that Congress was unaware of the difficulty of obtaining such proof when it included the word "whoever" with knowledge that it embraced partnerships under the code rules of construction. The inclusion of the words "knowingly" and "willfully" of themselves do not exclude the application of the entity theory since the doctrine of respondeat superior has been used to impose criminal liability on corporations and joint stock associations.29 Since Congress may impose criminal liability on those forms of business, there is no reason why the knowledge of the partnership may not be established by proof of the knowledge of its authorized agents.

It is difficult to ignore the statement of the majority that the business form of the carrier that violates the regulations should be immaterial in imposing punishment for such infractions.30 Safety of operation of interstate motor carriers was of prime concern to Congress in passing the regulations in question. The language of the statute itself lends weight to these observations when it declares that the regulations shall be binding upon all common carriers.31

25 358 U.S. at 124-25, n.3.
28 68 C.J.S. Partnerships § 207 (1950).
30 358 U.S. at 124. Failure to impose liability on the partnership would more readily allow a motor carrier to avoid regulation by a simple change in business form because of the difficulty of proving the actual knowledge of a partner.
If they are not enforceable against a partnership they would then not be binding upon all. "[W]e perceive no reason why Congress should have intended to make partnership motor carriers criminally liable for infractions of § 322(a), but not for violations of § 835."32 The dissenters impliedly recognize that this anomalous situation would exist under their holding but they preferred to leave the correction of the situation to the legislature.33

Conformity with the manifest intent of Congress is the supreme rule of statutory construction. The intent of Congress to include partnerships within the purview of the statute gains strength from the definition clause of the Code, the prior application of the respondeat superior doctrine to other forms of businesses and the urgent public policy reasons for extending the coverage of regulations regarding the transportation of explosive materials to everyone engaged in such activity. Congress could have made the present statute one of strict liability by striking out the knowledge requirement and defining "whoever" to include partnerships within section 835 proper. The inclusion of the knowledge requirement does not lead to the sole conclusion that partnerships were not within the coverage of the act. An equally cogent argument is that the intent of Congress was to require that proof of the knowledge of the employees of the partnership would be sufficient to hold the partnership liable as an entity.

In construing the Espionage Act of 1917,34 the United States Circuit Court of Appeals for the Second Circuit extended the scope of the word "whoever" to include partnerships and corporations. The words of the court on that occasion are applicable to the instant case. "Common sense requires the act to be construed, even at the expense of its letter, so as to cover the mischief intended to be prevented."35 The purpose of Congress in the instant case seems clear: to obtain the uniform control of interstate commerce in the matter of the transportation of explosives. Because of the difficulty of obtaining proof of knowledge of the partners themselves and the ineffectiveness of prosecuting the individual employee who violates the regulation, the application of the doctrine of respondeat superior to make a partnership criminally liable for acts of its employees is correct if the proper uniform control of interstate commerce is to be obtained.

JOHN D. MATTHEWS

32 358 U.S. at 124-25.
33 Id. at 128.
34 40 Stat. 219 (1917) (now 18 U.S.C. § 2388 (1952)).
BOOK REVIEWS


I believe that it is self-evident that no one can write or talk English like the English. As a youth studying abroad and as an unsatiated collegian returned to England for a postgraduate course at Oxford, I never lost the opportunity to visit the London courts. The architecture of the courtrooms and the colorful raiment worn by the lawyers and judges always made me feel that I was witnessing a succession of dramatic productions in a theatre. But what impressed me even more than this was the charming language which flowed from the lips of all the legal gentry. It did not seem possible that these actors always spoke in so sweetly modulated a voice, so soft a cadence, and so musical and dulcet a key. One could easily believe that here was a manner of speaking especially adopted for the occasion, just as the wigs and robes formed part of the costumery of a play. And yet this was indeed the natural speech of the London courts.

The English not only can beautifully play their parts in the theatre of the law but they can write about the courts with the talent of angels. How can one fail to be captivated by the very first paragraph in the book, The Trial of Dr. Adams, written by Miss Sybille Bedford?

The Judge came on swiftly. Out of the side-door, an ermined puppet progressing weightless along the bench, head held at an angle, an arm swinging, the other crooked under cloth and gloves, trailing a wake of subtlety, of secret powers, age: an Elizabethan shadow gliding across the arras.1

I cannot resist the temptation to quote the second paragraph:

The high-backed chair has been pulled, helped forward, the figure is seated, has bowed, and the hundred or so people who had gathered themselves at split notice to their feet rustle and subside into apportioned place. And now the prisoner, the accused himself is here—how had he come, how had one missed the instant of that other clockwork entry?2

I must, however, smother the desire to continue quoting because no book review should be as long as the book itself. The Trial of Dr. Adams is exactly what the title says. Dr. John Bodkin Adams, a physician in the popular seaside resort of Eastbourne for over thirty-five years, was charged with the murder of one of his wealthy patients, the eighty-one-

1 Bedford, The Trial of Dr. Adams 1 (1959).
2 Id. at 2.
year-old Mrs. Morell who left an estate worth one hundred and fifty-seven thousand pounds. The Crown charged that Dr. Adams, under the guise of medical treatment and of "easing her pain," administered to her at intervals substantial quantities of morphia and heroin, thereby precipitating or hastening her death, so that he could obtain a chest of silver and a Rolls-Royce car bequeathed to him in her will.

Manning, the prosecution guns was the Attorney General of the Realm, Sir Reginald Manningham Buller, Q.C., M.P., opposed by the redoubtable Geoffrey Lawrence, Q.C. The trial took place in the famous criminal court known as Old Bailey in London and lasted seventeen days. The jury deliberated only forty-four minutes and acquitted the doctor.

Even before one opens the book, he has a general idea of the nature of the trial and, of course, if he reads the newspapers at all he recalls that a couple of years ago headlines told of the English doctor who was charged with murdering a patient for gain and that eventually he was acquitted. This realization, however, in no way dims the vividness of the print or subdues the living drama unfolding on the rapidly turned pages. One could easily believe that Miss Bedford is a lawyer (that is, a barrister), because she is so much at home amid trial procedure. She is not, however, a barrister. The reason why she describes so accurately and revealingly what is happening in the witness box, in the defendant's dock, at the counsel pew, and at the judicial bench is that she understands human beings. She feels what every character in the dramatis personae feels, and then with that gifted hand of hers she waves the wand which recreates all the moods, tensions, surprises, excitement and passion which go into a murder trial.

She writes in the historical present. Everything is happening today—now. She tells of a nurse who has taken the stand to testify. "Nurse Stronach—stocky, a face of blurred features except for a narrow mouth and strong jaw."3 No trouble identifying Miss Stronach, who has testified for the prosecution and is now about to be cross-examined by defense counsel. Miss Bedford introduces you to him and to the scene:

The name of counsel for the defence is Mr. Geoffrey Lawrence, Q.C. Until they have been heard, the figures in counsel's row are but profiles and faces defined under a wig. Distinct and uncontemporary faces, florid or wicked, ascetic, witty, coarse, learned, gay, dimpled or gnarled; one sees profiles of simian scholars, cupids and distinguished Jesuits, and the profiles of accomplished sheep.

Mr. Lawrence has stood up. He appears a youngish man, slight. His profile is a fine one.

3 Id. at 15.
“Nurse Stronach, how many patients,” the voice is very good, “do you think you have attended since Mrs. Morell died?”
“I could not possibly tell you.”
[Suavely] “A great many?”
“Yes. In private nursing we are in and out constantly.”
Mr. Lawrence: “You have been constantly nursing other patients during the last six or seven years?”
Nurse Stronach: “Yes.”
“And for what you told my Lord and the members of the jury this morning, you were relying on your memory of events that happened on one case six or seven years ago?”
[Light snap] “Yes.”

Visitors to a court who see only what is happening before their eyes miss a great deal of superb drama, because a trial is not merely society banded together, speaking through chosen representatives to determine the guilt or innocence of a human being caught in the web of fateful circumstance. A trial is life itself. A witness is about to testify. Where did he come from? How does he happen to be here? Miss Bedford takes you by the hand.

One wonders—where does it begin, the road that leads into the witness-box? The police call; one talks, one is reluctant or one does one’s best, perhaps one volunteers; details come flooding back, one realises one knows something of significance, or thinks one does; another interview; a statement made; and there one is called for the prosecution. The day is a long way off. And first there is the evidence before the magistrates, the inspector has said it’s nothing, one knows a face or two in court, no one presses very hard, the defence shows no claws . . . The great day is there. Well, one’s only come to do one’s duty. London. The Central Criminal Court. One’s picture in every evening paper. Waiting. One’s name is called. And there one stands in fur-tipped coat and everything is quite different. The daze wears off . . . The jury doesn’t look like much, the Judge looks kind (one hardly likes to look at the accused), the Q.C. is ever so considerate: answers trip off, it’s easy. And then comes the cross-examination.

The reader, of course, knows that Dr. Adams is going to be acquitted at the end of the book. Does he want him to be acquitted? The reader is really not worried. Perhaps it is because subconsciously he knows all the time that the child on the cliff will never really fall over the edge. But what does excite the reader is the witnesses, the lawyers, and the Judge. Ah yes, the Judge. And what a Judge. Brilliant, considerate, courteous, fair—always fair, to both sides. Mr. Lawrence is cross-examining the detective-superintendent about his conversation with the

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4 Id. at 18.
5 Id. at 25.
defendant at the time of the latter's arrest. The witness wants to look at his notes. The Judge asks Mr. Lawrence if he would object to this.

"No, I want to be quite fair. If the superintendent cannot answer my questions without his notes, by all means let him have them."

Detective-superintendent [rapping out] "That is quite improper. I want to be accurate."

The Judge [cold and final] "Do not intervene please when counsel is addressing me."

Mr. Lawrence, to the superintendent, "Was that observation addressed to me?"

"No. It was an answer, I thought, to something you were saying to me." The superintendent's "you" has a veiled contemptuous ring.

Mr. Lawrence: "To whom was it directed if not to me?" 6

The Judge had intervened because he thought the witness was baiting the lawyer but now the Judge feels the lawyer is baiting the witness, and so, in a quiet tone, he addresses defense counsel: "Mr. Lawrence, I think I have dealt with it sufficiently." 7

It is a battle of medical experts. The Crown's doctors see in the nurses' testimony and reports the clearest intent on the part of the defendant to hasten Mrs. Morell's death. The defendant's medical evidence is to the contrary. And that is the issue. At times the testimony is technical, but it is always a bell ringing alarm or hope to the doctor in the dock and to the partisans in the countroom who sigh, smile, or twist their handkerchiefs as their end of the seesaw moves toward or away from the gallows.

The speeches of the prosecution and defense counsel at the end of the trial are classics of forensic argument; the charge of the Judge (which in England is referred to as the Summing-Up) is a masterpiece of clarity, impartiality and fairness. The defendant did not take the stand. How does the Judge warn the jury that the enjoyment of this constitutional right is not to be construed against him, as so often happens in our courts? Listen to this clarion voice speaking from the mountain top of irrefragable equity and justice:

"On that question the Doctor stood on his rights and did not speak. I have made it quite clear that I am not criticising that. I do not criticise it at all. [With a measure of fervour] I hope that the day will never come when that right is denied to any Englishman. It is not a refuge of technicality: the law on this matter reflects the natural thought of England. So great is our horror at the idea that a man might be questioned, forced to speak and perhaps to condemn himself out of his own mouth, [for the first time without detachment] that we afford to everyone suspected or

6 Id. at 90.

7 Ibid.
accused of a crime, at every stage, and to the very end, the right to say: 'Ask me no questions, I shall answer none. Prove your case.' 8

And now, I shall not quench the welling desire to quote the closing words of the charge of the illustrious Mr. Justice Patrick Devlin in the trial of Dr. Adams:

"... And so this long process ends with the question with which it began: 'Murder? Can you prove it?'

"I dare say it is the first time that you have sat in that jurybox. It is not the first time that I have sat in this chair. And not infrequently I have heard a case presented by the prosecution that seemed to me to be manifestly a strong one, and sometimes I have felt it my duty to tell the jury so. I do not think, therefore, that I ought to hesitate to tell you that here the case for the defence seems to me to be manifestly a strong one... But it is the same question in the end, always the same—is the case for the Crown strong enough to carry conviction to your mind? It is your question. You have to answer it. It lies always with you, the jury. Always with you. And you will now consider what that answer shall be." 9

And now a word which, I hope, is hardly necessary. I highly recommend the reading of The Trial of Dr. Adams.

MICHAEL A. MUSMANNO*


The dedication speaks eloquently of the purpose the authors had in mind in preparing this volume: To All Those Who Seek the Rule of Law in World Affairs.1 This same thought and hope run like a leitmotif through the predecessors, Peace Through Disarmament and Charter Revision (1953) and Supplement (1956).

The authors analyze the present world organization and its relation to the more than 2,700,000,000 people who inhabit this earth and who are represented in the United Nations. This analysis results in a strong recommendation for a comprehensive revision of the United Nations Charter. To this end, the present charter and the proposed changes are set forth in parallel columns so that the reader can more readily see and understand their nature and intent.

The book is complete in 540 pages divided into nineteen chapters,

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8 Id. at 236-37.
9 Id. at 237.
* Justice, Supreme Court of Pennsylvania.
1 Clark & Sohn, World Peace Through World Law v (1958).
seven annexes and two appendices. Chapter I has a significant heading which speaks for itself: "Purposes and Principles." The next four chapters deal with the membership and organs of the United Nations, the General Assembly and the Executive Council. Following these the authors deal with "Pacific Settlement of Disputes" (VI); "Regional Arrangements" (VIII); and "World Economic and Social Advancement" (IX). Three chapters are devoted to a discussion of the government of non-self-governing territories ("Declaration Regarding Non-Self-Governing Territories"); "International Trusteeship System"; "The Trusteeship Council". Chapter XIV is devoted to an examination of "The Judicial and Conciliation System." Here some rather significant innovations are advocated as, for example, a "World Conciliation Board" and a "World Equity Tribunal" together with designated "regional courts" of the United Nations. The text ends with some miscellaneous topics such as the Secretariat, transitional security arrangements, amendments, and ratification and signature.

One of the more practical recommendations is found in Annex II, "The United Nations Peace Force." This force would be recruited over a ten-year period during which the nations would undergo a total disarmament; the maximum strength would not exceed 1,800,000 men, including the reserve.

The authors are well qualified to bring forward a plan for substituting the "rule of law" for the "rule of men." Both are distinguished lawyers who have devoted much thought and elicited constructive comment from people throughout the world to whom preliminary drafts of the proposed revisions were sent.

It is clear that this program is of world-wide interest. As a worthy successor to the "Grand Dessein" of Henry IV of France, and in more recent times, the Holy Alliance of Alexander I of Russia and the League of Nations, it merits the careful attention not only of lawyers, but of all students of political science and world affairs.

There is no doubt of the sincerity and earnest, almost pious hopefulness of the authors in presenting this cosmic peace plan. Substitutes for armed conflict are found in three major proposals: disarmament, a world police force and a system of United Nations courts. Facing reality compels the question: would a totalitarian state whose government is based on force and power accept total disarmament? Considering the suspicious nature of the communist leaders, and their constant preoccupation with new and more deadly engines of destruction, to wit, atom bombs, hydrogen bombs and sputniks, it seems hardly plausible that they
would render more than lip service to these idealistic and far-reaching proposals for the establishment of the new Utopia. Nevertheless, when it comes to the substitution of peace for war any plan is worthy of trial. As Fox once said, "This may be a bad peace, but there is no such thing as a good war."

There is, however, a general question that appears apropos: have the authors reckoned with Russia? It seems quite unrealistic to suppose that the Soviet Union would consent to disarming itself and placing itself at the mercy of what it conceives to be a capitalist-dominated society.

And with regard to the judicial organs proposed by the authors for the pacific disposition of international conflicts, there is no indication that they will meet with greater success than the proposed program of disarmament. The International Court of Justice, a permanent court with fifteen judges, has been sitting at The Hague for twelve years. In that time it has made ten decisions. In this respect the United States has not set a very good example in adopting the Connally amendment which gives this country main libre to determine the International Court's jurisdiction when the Government alleges that the controversy is one of policy rather than law. With the Connally amendment as a continuing obstacle, the usefulness of the International Court of Justice is greatly limited. The amendment has afforded and continues to afford ample grounds for criticism.

It is this reviewer's conclusion that the world is not quite ready for the world organization proposed by Messrs. Clark and Sohn.

WALTER H. E. JAEGER*


Bernard Schwartz, the former Chief Counsel of the House Subcommittee on Legislative Oversight, has been on the law faculty at New York University since 1947. He is the author of numerous law journal articles and has written several books,¹ and has earned a wide reputation as an authority on administrative and constitutional law. In August 1957 he took leave from the University to begin his short career as Chief Coun-

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¹ The Supreme Court, Constitutional Review in Retrospect (1957); American Constitutional Law (1955); American Administrative Law (1950); Law and the Executive in Britain, A Comparative Study (1949).
sel to the House Subcommittee investigating the regulatory commissions. The story of his rise and fall with the Subcommittee is told in *The Professor and the Commissions*.

The duster describes the work properly as both “explosive and timely.” We are told that Doctor Schwartz details for the first time the full pattern of corruption invading the powerful fourth branch of our Government—the “big six” regulatory agencies. These include: the Federal Communications Commission, the Civil Aeronautics Board, the Interstate Commerce Commission, the Federal Power Commission, the Federal Trade Commission, and the Securities and Exchange Commission. We are told that the revelations of “gross improprieties” in the Federal Communications Commission, the Civil Aeronautics Board and other Federal Commissions shocked the country in February 1958, and that now, a year later, comes the Chief Counsel’s own dramatic story of the “complacency-jolting probe by the House Subcommittee on Legislative Oversight.” The blurb indicates that Bernard Schwartz tells: (1) how he uncovers the facts that led to the resignation of Commissioner Richard Mack and Presidential Assistant Sherman Adams, (2) why behind the scenes efforts were made to hamper and hush up the investigation, (3) why he was forced to make public his evidence of “duplicate expense accounts” and vote selling, (4) why the Subcommittee suddenly began to investigate its own Chief Counsel and, finally, (5) what important areas the Harris Committee has barely touched upon in its subsequent hearings.

Representative Oren Harris, Chairman of the House Legislative Oversight Subcommittee, recently told a Federal Communications Commission Bar Association luncheon meeting that his Subcommittee made several mistakes. “In fact, about the first and perhaps the most serious mistake the Committee made was that it employed Dr. [Bernard] Schwartz as its chief counsel.” In his speech, Rep. Harris took issue with the methods, tactics and procedures employed by Dr. Schwartz. He branded the book as containing inaccurate claims and called it the most outstanding proof of why the Subcommittee should never have employed him.3

Bernard Schwartz is an able lawyer with a deep understanding of the administrative process. In the past he has written scholarly works that do him credit. *The Professor and the Commissions* is filled with much

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3 Ibid.
that is worthwhile for those who are interested in good government and in exciting new developments in administrative law. The work is permanently marred, however, because the author insists upon justifying his position. Schwartz bitterly attacks the House Subcommittee and its members in a determined effort to come off as a shining knight in white armor fighting adversity on all sides. The Professor becomes completely wrapped up in defending the law professor's battle against corruption. Every one else in sight is "out of step." This is most unfortunate because in the book Schwartz has done some solid thinking about the problems that confront administrative agencies and has made some powerful suggestions that merit careful analysis.

An example of what is worthwhile in the Schwartz work is the chapter that deals with the Federal Communications Commission wherein he discusses the criteria that come into play when that agency is called upon to decide a contested case where two or more applicants are applying for one television frequency. He makes quite clear that there is a certain inconsistency in the decided cases and that the time is overripe for a re-examination of those criteria. In addition, his suggestions for reform are thoughtful ones that merit serious consideration. He makes out a strong case for a clear congressional statement of the proper ethical standards to be followed by commissioners. He urges that the regulatory commissioners should be as independent as judges, and favors the creation of an Administrative Court of the United States.

In sum, there is much that is valuable in The Professor and the Commissions. Dr. Schwartz is still an able student of the administrative process, but his bitterness toward the Subcommittee makes the book almost not worth reading. If he had given this latest endeavor the same dispassionate approach which he gave his other works, he might have made a great contribution to the administration of justice. There is no doubt but that there is need for a thoughtful study of the complex problems that have arisen as a result of the establishment of the independent regulatory agencies. The author has not risen to the task. Instead his anger and vindictiveness have caused him to fall far below the mark of his other books. He is more interested in explaining away his actions as counsel for the Subcommittee and in justifying actions that he is hard put to justify. It is hoped that his next endeavor will bear more fruit.

THOMAS H. WALL*

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BOOKS RECEIVED


