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COMMENTS

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CONSTITUTIONAL LAW—REAPPORTIONMENT—EFFECT OF ONE MAN, ONE VOTE PRINCIPLE ON LOCAL GOVERNMENT BELOW THE STATE LEGISLATIVE LEVEL*

I. Introduction and Background

There has been much activity in the apportionment area since the landmark case of *Baker* v. *Carr*[1] recognized that legislative apportionment which allegedly deprived one of equal protection of the law in violation of the fourteenth amendment to the Federal Constitution presented a justiciable constitutional cause of action over which the federal courts had jurisdiction. Soon after *Baker* the courts were flooded with litigation contesting the apportionment of the legislative bodies in numerous states. However, *Baker* had done little more than establish the general postulate that the fourteenth amendment prohibited "invidious discrimination,"[2] and it was not until the decision in *Grey* v. *Sanders*[3] that the genesis of the "one person, one vote" principle emerged under the equal protection clause of the fourteenth amendment. The Court articulated it as follows:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.[4]

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* Sailor v. Board of Educ., 87 S. Ct. 1549 (1967); Dusch v. Davis, 87 S. Ct. 1554 (1967).

1. 369 U.S. 186 (1962).

2. *See* Sims v. Frink, 208 F. Supp. 431, 436 (M.D. Ala. 1962); Westberry v. Vandiver, 206 F. Supp. 276, 282 (N.D. Ga. 1962).

3. 372 U.S. 368 (1963). The court held the Georgia county unit system unconstitutional for use in statewide primary elections. This device permitted every qualified voter one vote; but it employed a system of tabulating the results which ultimately accorded rural votes more weight than urban votes, resulting in a dilution of the weight of the votes in some areas merely because of the voter's residence. See also Wesberry v. Sanders, 376 U.S. 1 (1964), dealing with apportionment of congressional districts and enunciating the principle of equal representation for equal numbers of people.

4. Grey v. Sanders, 372 U.S. 368, 379 (1963).

The court went on to proclaim that "[t]he conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—*one person, one vote.*"[5]

Following *Grey* came *Reynolds* v. *Sims*[6] and its companion cases[7] dealing with the apportionment of state legislatures. *Reynolds* recognized the equal protection clause as requiring both houses of a bicameral state legislature to be apportioned substantially on a population basis. In *Reynolds* and its five companion cases the Court enunciated various general standards that the states must meet to satisfy the "one man, one vote" principle. The states must make an honest and good faith effort to draw districts in both houses of the legislature as representative of equal population as practicable.[8] The resulting apportionment must be one based substantially on population, and the equal population principle must not be diluted in any significant way.[9] However, there are neither uniform formulas nor rigid mathematical criteria for evaluating the constitutionality of the apportionment. Instead, the courts must determine if there has been faithful adherence to a plan of population-based representation, allowing only those minor deviations which are free from any taint of discrimination or arbitrariness.[10] Some variance is permissible when intended to foster rational state policy, but population must not be eclipsed as the controlling consideration in the apportionment scheme.[11] Furthermore, the equal representation principle may not be negated by the majority of the voters of the state. If the scheme contravenes the dictates of the equal protection clause, it will not be validated by majority approval.[12]

As is readily apparent from the foregoing, the Court has laid down a very flexible general principle which is adaptable to varying circumstances. A recent Supreme Court apportionment

5. *Id.* at 381 (emphasis added).

6. Reynolds v. Sims, 377 U.S. 533 (1964).

7. WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm'n For Fair Representation v. Towes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964).

8. Reynolds v. Sims, 377 U.S. 533, 577 (1964).

9. *Id.* at 578.

10. Roman v. Sincock, 377 U.S. 695, 710 (1964).

11. Reynolds v. Sims, 377 U.S. 533, 581 (1964).

12. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964).

case conceived a somewhat more specific guide for the application of the *Reynolds* principle. After the reapportionment of the Florida legislature there was still a considerable imbalance among districts for which no justification was advanced. The Court observed that

> [*d*]*e minimus* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimus* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy.[13]

Nevertheless, the Court has been content generally to allow the lower courts to work out the specific standards for evaluating state legislative apportionment schemes, concluding that the doctrine can best be developed on a case-by-case basis in the context of actual litigation.[14]

II. State and Federal Application of *Reynolds* to Local Governmental Bodies

Since apportionment of state legislative bodies in accordance with the "one person, one vote" principle is now an established requirement, there is much discussion as to what extent, if any, these principles have application below the state level to local governmental bodies.[15] The majority of the courts, both state and federal, which have been confronted with the question have reasoned that the equal protection clause applies equally on both local and state legislative levels. Accordingly, the *Reynolds* principle has been applied to a parish police jury,[16] city councils,[17] county boards of supervisors,[18] county commissioners,[19]

13. Swann v. Adams, 385 U.S. 440, 444 (1967).
14. Reynolds v. Sims, 377 U.S. 533, 578 (1964).
15. *See* Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21 (1965); 44 Neb. L. Rev. 850 (1965); 53 Va. L. Rev. 953 (1967).
16. Simon v. Lafayette Parish Police Jury, 226 F. Supp. 301 (W.D. La. 1964).
17. Ellis v. Mayor and City Council, 352 F.2d 123 (4th Cir. 1965); Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965).
18. Bianchi v. Griffing, 238 F. Supp. 997, *appeal dismissed*, 382 U.S. 15 (1965); Bianchi v. Griffing, 256 F. Supp. 617 (1966), *remanded*, 87 S. Ct. 1544 (1967); Dyer v. Rich, 259 F. Supp. 741 (N.D. Miss. 1966); Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98 (1966); Knudson v. Klevering, 377 Mich. 666, 141 N.W.2d 120 (1966); Mauk v. Hoffman, 87 N.J. Super. 276, 209 A.2d 150 (1965); Boldstein v. Rockefeller, 45 Misc. 2d 778, 257 N.Y.S.2d 994 (1965); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965).
19. Hanlon v. Towey, 274 Minn. 187, 142 N.W.2d 741 (1966); Bailey v. Jones, 139 N.W.2d 385 (Sup. Ct. S.D. 1966).

and school boards.[20] The lower courts have not been unanimous, however, in their application of *Reynolds* to local bodies.[21] There has been some reliance on the Court's earlier (pre-*Reynolds*) dismissal of *Tedesco* v. *Board of Supervisors of Election*[22] and, more recently, *Glass* v. *Hancock County Election Commissioners*[23] to support the contention that the *Reynolds* principle should be limited to state legislatures.

As previously noted, the weight of authority has extended the *Reynolds* principle to local governmental agencies. In adopting this position the courts have often looked to the nature of the governmental body to justify the extension.[24] While conceding that many local positions could be made appointive by the legislature, some courts have asserted that once the state under its plenary power provides the right to vote, it must adhere to the "one person, one vote" principle and must insure equal representation.[25] Others have discussed the disparity between a local government body of an administrative character and one legislative in nature, requiring equal representation in the latter while finding it unnecessary in the former.[26] Indeed, the majority of those courts which have extended "one man, one vote" to local governmental bodies have acknowledged, either expressly or impliedly, the administrative-legislative distinction and have confined the application of *Reynolds* to elective bodies possessing

20. Strickland v. Burns, 256 F. Supp. 824 (M.D. Tenn. 1966); Delozier v. Tyrone Area School Bd., 247 F. Supp. 30 (W.D. Pa. 1965).

21. *See* Moody v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966), *remanded*, 87 S. Ct. 1544 (1967); Johnson v. Genesee County, 232 F. Supp. 567 (E.D. Mich. 1964).

22. 43 So.2d 514 (La. Ct. App. 1949), *appeal dismissed*, 339 U.S. 940 (1950). In *Tedesco* there was a large disparity in the number of people represented by some members of the city commissioners due to malapportioned election districts.

23. 250 Miss. 40, 156 So.2d 825 (1963), *appeal dismissed*, 378 U.S. 558 (1964). In *Glass* there was a population disparity among county supervisor districts. The Mississippi Supreme Court affirmed the refusal to grant injunctive relief on the theory that there was an adequate statutory remedy at law for redistricting.

24. *See generally* Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965).

25. Delozier v. Tyrone Area School Bd., 247 F. Supp. 30, 34-35 (W.D. Pa. 1965); Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98 (1966); Hanlon v. Towey, 274 Minn. 187, 142 N.W.2d 741 (1966); Bailey v. Jones, 139 N.W.2d 385, 388 (Sup. Ct. S.D. 1966); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965).

26. Hanlon v. Towey, 274 Minn. 187, 142 N.W.2d 741, 747 (1966); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249, 256 (1965).

some legislative powers.[27] However, one three-judge federal district court recently declined to recognize this distinction, ruling that elected county school commissioners must be apportioned according to population, even though the local body allegedly performed only administrative functions, so long as its delegated powers were not insignificant or unimportant.[28]

III. Recent Trends and Developments

The United States Supreme Court recently decided four cases in the area of apportionment of local governmental bodies. In none of these did it determine to just what extent *Reynolds* would be applied at the local level. The Court remanded two of these cases to the district court for want of jurisdiction and consequently did not reach the merits.[29] The other two cases, *Sailor*

27. *See* Dyer v. Rich, 259 F. Supp. 741 (N.D. Miss. 1966); Bianchi v. Griffing, 238 F. Supp. 997, 1004 (E.D.N.Y. 1965); Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 782, 262 N.Y.S.2d 444, 449 (1965); Mauk v. Hoffman, 87 N.J. Super. 276, 209 A.2d 150, 152 (1965); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249, 256 (1965). See also New Jersey State AFL-CIO v. State Fed. Dist. Bd. of Educ., 93 N.J. Super. 31, 40, 224 A.2d 519, 524 (1966), where the court stated that

> [t]hese decisions [*Reynolds, Mauk,* etc.] make it clear that a government which has the power to enact legislation directly affecting its constituents should be apportioned on a proportional basis. The concern of the courts was not with organizations which do not represent the electorate as their chosen ruling body and which do not enact legislation directly affecting their constituents.

28. Strickland v. Burns, 256 F. Supp. 824, 827 (M.D. Tenn. 1966). Judge Miller's concurring opinion in *Strickland* expressly rejected the administrative-legislative distinction.

> It is fruitless, in my view, to pursue the elusive distinction between legislative and administrative functions. . . . So long as a subordinate body is vested with significant and important powers of government whether they be labeled legislative, or administrative, or both, I can see no reason why it should be permissible under the equal protection clause for a state arbitrarily to debase the value of one person's vote in favor of another.

Id. at 836 (concurring opinion). The dissent in *Strickland,* however, emphasized the administrative-legislative distinction and concluded that *Reynolds* did not apply to local elections to agencies possessing no legislative power: "Once the Legislature is validly constituted, I do not believe there is a constitutional requirement that personnel of its subservient arms and agencies, created to perform purely administrative functions, must be elected on the 'one man, one vote' basis." *Id.* at 837 (dissenting opinion).

29. Moody v. Flowers, 87 S. Ct. 1544 (1967). The lower court cases of Moody v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966), and Bianchi v. Griffing, 256 F. Supp. 617 (E.D.N.Y. 1966), were combined for remand to their respective district courts because the three-judge district courts from which the appeals came were improperly convened. The statute involved in each case was not of statewide application; therefore, the litigation should have been heard by a single-judge district court and appeal taken to the circuit court of appeals. For this reason the Supreme Court held that it did not have jurisdiction and remanded the cases to allow appeal to the circuit court of appeals.

v. *Board of Supervisors*[30] and *Dusch* v. *Davis*,[31] do shed some light on the issue of local application of *Reynolds*, and they provide more food for speculation on the ultimate stand the Court will take on the matter.

In *Sailor* the action was brought to declare the Board of Education of Kent County unconstitutionally constituted. The county board was a five-member body chosen by delegates from the local school boards. The members of the local school boards were elected by the school electors, and each local school board sent one delegate to a biennial meeting where the delegates chose the five-member county board. The delegates from the local school boards each had one vote irrespective of the population of the local school district. The Court held that no election was required for members of the County Board of Education which performed essentially administrative functions, that the system by which the board members were chosen was basically appointive rather than elective and did not violate the equal protection clause of the fourteenth amendment, and that the principle of "one man, one vote" had no relevancy to this situation.

Thus, the Court confirmed the significance of the administrative-legislative distinction forecast in the lower courts by agreeing that there is no constitutional requirement that administrative bodies be elective. Indeed, at the outset the Court emphasized that the state has vast leeway in the management of its internal affairs unless they run afoul of some federally protected right. In addition, it recognized that the state is at liberty to appoint state and local officers of a *non-legislative* character. The Court then pointed out that "[t]he County Board of Education performs essentially administrative functions; and while they are important, they are not legislative in the classical sense."[32] Having established that nonlegislative officers could be appointed, the court concluded that there was no *election* being contested, but rather the *appointment* of the county board members by the delegates was the contested matter. This being the

30. 87 S. Ct. 1549 (1967).

31. 87 S. Ct. 1554 (1967).

32. Sailor v. Board of Education, 87 S. Ct. 1549, 1553 (1967). The powers of the board include appointment of a county school superintendent, preparation of an annual budget and levy of taxes, distribution of delinquent taxes, furnishing consulting or supervisory service to a constituent school district, conducting cooperative educational programs, employment of teachers for special educational programs, establishing, at the direction of the Board of Supervisors, a school for children in juvenile homes and transfer of areas from one school district to another. *Id.* at 1553, n.7.

case, the Court resolved that "one man, one vote" had no relevancy because no election was involved and none required. It emphasized, however, that it was not deciding whether the *Reynolds* principle must be applied to the election of a local administrative official or agency where the election process had been provided. Moreover, it refused to decide whether *Reynolds* necessitates the apportionment of municipal or county *legislative* agencies. Therefore, one finds that *Sailor* added little to the basic consideration of *Reynolds*' application to local governmental bodies, because the facts of the case did not require such application.

Unlike the situation in *Sailor* where the court concluded that no election had been contested, there was an election procedure challenged in *Davis*. This litigation arose after Virginia Beach, Virginia, consolidated with adjoining Princess Anne County and adopted a borough form of government. The boroughs varied widely in population from 733 in the smallest to 29,048 in the largest. The amended charter provided for a city council of eleven members, four of whom were elected at large without regard to residence. The remaining seven were elected by the voters of the entire city, one being required to reside in each of the seven boroughs. The Court upheld the residence requirement in ruling that the seven-four plan did not constitute invidious discrimination violative of the equal protection clause as it resulted in no distinction on the basis of race, creed, economic status or location.

Justice Douglas, who was also the author of the *Sailor* opinion, wrote a brief opinion rejecting the circuit court's holding that the plan discriminated against some voters because of their place of residence. The Court pointed out that all of the city's voters elected the eleven councilmen and although a councilman was required to reside in each of the seven boroughs, he was responsive to the will of the entire population of the city. Thus, he was not a representative of the borough but was a representative of the entire city. In sustaining the residence requirement the Court cited the recent case of *Fortson* v. *Dorsey*[33] which upheld a similar requirement for the election of state senators from a multi-district county by pointing out that each senator was a representative of the entire county and not just the district in which he resided. In *Dusch* the residence requirement was

33. 379 U.S. 433, 438 (1965).

viewed as failing to represent invidious discrimination fatal to the apportionment scheme; it was part and parcel of an honest effort to represent the varied and conflicting interests within the vast urban-rural complex by placing persons on the council with knowledge of the various areas within the city.

It is interesting to note that in *Dusch* the Court assumed *arguendo* that *Reynolds* will govern the apportionment of local legislative agencies and then proceeded to reverse the circuit court of appeals ruling that the *Reynolds* standard applied to the city council and had been violated. In doing so, however, the Court pointed out that the *Reynolds* test of invidious discrimination had not been violated, assuming *arguendo* that it governed the situation. Therefore, *Dusch* does not answer finally the question of whether *Reynolds* governs the apportionment of local elective bodies. In *Sailor* the Court made the *arguendo* assumption that where the state provides for an election of a local official or agency, the requirements of *Reynolds* must be met, but it reserved the question for a later case. Because of the facts in *Dusch*, the Court was not compelled to determine whether *Reynolds* applied on the local level; however, the *arguendo* assumptions in both *Sailor* and *Dusch* give strong indications of the leanings of the Court.

IV. Conclusion

A review of the pertinent lower court decisions, the general language of *Reynolds* itself, and the implications one can derive from *Sailor* and *Dusch* seem to indicate that when a case with the appropriate set of facts reaches the Court, the *Reynolds* principle will be extended in application to include local elective officials or agencies of a *legislative* nature. Moreover, there is strong argument for the application of *Reynolds* to local *administrative* officials or agencies once the elective process is provided. Just where the line will be drawn remains a matter of sheer speculation; but it seems possible, perhaps even probable, that the "one man, one vote" principle will become an integral part of the elective process at the local level just as it has at the state level.

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CRIMINAL PROCEDURE—FOURTH AMENDMENT—REJECTION OF MERE EVIDENCE RULE IN SEARCH AND SEIZURE CASES*

The United States Supreme Court has finally rejected the distinction recognized in many earlier cases between seizure of items of evidential value only and seizure of instruments, fruits, and contraband. Even in an era of increased protection of the individual's constitutional rights, the mere evidence rule has been constantly criticized as an irrational impediment to law enforcement. Its demise will undoubtedly be greeted enthusiastically by police officials.

In *Warden, Maryland Penitentiary v. Hayden*,[1] a Maryland court convicted the respondent of armed robbery. He had been arrested in his home minutes after the robbery of a taxicab company office. The robber was followed to the house and was observed being admitted by the respondent's wife. Hayden was found in an upstairs bedroom feigning sleep and was arrested when a search of the house disclosed no other man. Among the items seized by the police were a jacket and a pair of trousers which matched the description of the clothing worn by the robber. The jacket and trousers were admitted in evidence at the trial without objection. The respondent was convicted and sentenced to prison. After unsuccessful state court proceedings, he sought and was denied federal habeas corpus relief in the Maryland district court. A divided panel of the Court of Appeals for the Fourth Circuit reversed, holding that the items had evidential value only and, therefore, were not lawfully subject to seizure.[2] The United States Supreme Court reversed, rejecting the mere evidence distinction as based on premises no longer accepted as rules governing the application of the fourth amendment.[3]

The fourth amendment was a reaction to the use of the general warrant in England and the writs of assistance in the Colonies and was intended to protect against invasions of "the sanctity of a man's home and the privacies of life."[4] Protection of these interests was assured by prohibiting all "unreasonable" searches

* Warden, Maryland Penitentiary v. Hayden, 87 S. Ct. 1642 (1967).

1. 87 S. Ct. 1642 (1967).
2. Hayden v. Warden, Md. Penitentiary, 363 F.2d 647 (4th Cir. 1966).
3. Warden, Md. Penitentiary v. Hayden, 87 S. Ct. 1642 (1967).
4. Boyd v. United States, 116 U.S. 616, 630 (1886).

and seizures and by requiring the use of warrants, thereby interposing "a magistrate between the citizen and the police."[5]

There is nothing in the language of the fourth amendment to support the distinction between "mere evidence" and instrumentalities, fruits of crime or contraband. The people are guaranteed the right to be secure in their persons, houses and effects without regard to the use to which any of these things is applied. This constitutional right is certainly unrelated to the mere evidence limitation. A purely evidentiary search disturbs one's privacy no more than a search intended to uncover an instrumentality, a fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. In addition, nothing in the nature of the property seized as evidence renders it more private than property seized, for example, as an instrumentality. Depending on the circumstances, the same article might be mere evidence in one case and be considered an instrumentality in another.

The asserted rule that mere evidence cannot be seized under a warrant or incident to an arrest has been generally condemned as unsound by modern writers. It is typically described as "unfortunate"[6] and is an often-cited example of a legal absurdity.[7] No satisfactory rationale for this doctrine has ever been articulated; it creates a totally arbitrary impediment to law enforcement without protecting any important interest of the individual. A defendant has a constitutional right to be free from any unreasonable searches and seizures by law enforcement officials. However, when the search itself is reasonable, it becomes impossible to understand why the admissibility of seized items should depend on whether they are merely evidentiary or evidentiary plus something else.

Stolen property—the fruits of crime—has always been subject to seizure. The power to search for stolen property was gradually extended to cover any property which the private citizen was not permitted to possess, including instrumentalities of crime and contraband.[8] No separate governmental interest in evidence used merely to apprehend and convict criminals was recognized; it was essential that some *property interest* be asserted. The mere

5. McDonald v. United States, 335 U.S. 451, 455 (1948).

6. 8 J. WIGMORE, EVIDENCE 45 (McNaughton rev. ed. 1961).

7. Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law*, 49 CAL. L. REV. 474, 478 (1961).

8. *Id.* at 475.

evidence rule seems to have its foundation in these property concepts.[9] The modern view, however, is that the exclusionary rules of evidence exist primarily to protect personal rights rather than property interests and that common law property concepts are usually irrelevant.[10] It seems rather anachronistic to determine the admissibility of evidence on the basis of the sovereign's right at common law to replevy the items.

Although property concepts may have engendered the rule, some of the opinions imply that its major purpose is to prevent exploratory searches.[11] If that is the rule's purpose, it is not its effect. The mere evidence rule does not prevent exploratory searches at all; it prevents the seizure of mere evidence in the course of *any* search, reasonable or unreasonable, specific or general. It has also been suggested that the rule protects privacy by preserving a man's most private papers from seizure, however reasonable it might be.[12] The difficulty with this rationale is that the rule protects, not all private papers, but only those which constitute mere evidence.[13] Private papers which are also the instruments of crime may be seized.[14]

Finally, it is impossible to sustain the mere evidence rule as a corollary to the privilege against self-incrimination. It is not limited to self-incriminating writings; and when such writings are obtained by seizure instead of by subpoena, their genuineness is not impliedly admitted. Moreover, the papers are no less self-incriminating when they can be classified as contraband, instruments, or fruits. However, the possibility of mere evidence being violative of the fifth amendment may represent the largest loophole in the court's rejection of the mere evidence distinction in *Hayden*.[15]

The greatest stumbling block to rejection of the mere evidence rule has been the contention that *Gouled v. United States*[16]

9. Gouled v. United States, 255 U.S. 298, 309 (1921).

10. Jones v. United States, 362 U.S. 257, 266 (1932).

11. *See, e.g.*, Lefkowitz v. United States, 285 U.S. 452, 465 (1932).

12. 20 U. CHI. L. REV. 319, 327 (1953).

13. "There is no special sanction in papers, as distinguished from forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." Gouled v. United States, 255 U.S. 298, 309 (1921).

14. Abel v. United States, 362 U.S. 217, 238 (1960).

15. "This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." Warden, Md. Penitentiary v. Hayden, 87 S. Ct. 1642, 1648 (1967).

16. 255 U.S. 298 (1921).

adopted the rule as a constitutional standard. Although the Court in *Gouled* purported to rest its holding on the fourth and fifth amendments, it did not rely on any specific constitutional language.[17] *Ker v. California*[18] has since recognized that the purpose of the distinction between constitutional and supervisory rules is to separate fundamental civil liberties, which the states must respect, from federal procedural rules, which the states may ignore. Opinions written before this distinction assumed its present crucial importance may have to be reinterpreted in the light of "the demands of our federal system."[19]

Gouled v. United States[20] is especially ripe for reinterpretation, because its adoption of the mere evidence rule as a constitutional standard was not necessary to the result in the case. The validity of a warrant authorizing the seizure of materials stipulated to be merely evidentiary was challenged. The federal statute under which the warrant was issued authorized seizure only when the property was "stolen or embezzled" or "used as the means of committing a felony."[21] Instead of basing its decision on the statute the court concluded that the search and seizure violated the fourth and fifth amendments. Perhaps it meant no more than that the seizure was unconstitutional because seizures that exceed statutory authority are always unreasonable.

The Supreme Court has not treated the *Gouled* rule as a fundamental constitutional standard. The rule has been distinguished nearly out of existence by the instrumentality exception. *Gouled* recognized that instruments used in the commission of crime may be seized because of the public's interest in preventing their use in subsequent crimes.[22] This policy furnishes no justification for the use of the instrument as evidence if such use would otherwise violate the fourth and fifth amendments. It is not necessary to use the instrument as evidence in order to prevent its use in future crimes. Sending the owner to prison may prevent future crimes, but this consideration applies to mere evidence as well as instrumentalities and is equally applicable to fruits and contraband. Nor is it clear how in some situations one can determine whether or not an item is the instrument or fruit or evidence of a crime until the owner's guilt or innocence is determined at the trial.

17. *Id.*
18. 374 U.S. 23 (1963).
19. *Id.* at 33.
20. 255 U.S. 298 (1921).
21. Act of June 15, 1917, ch. 30, § 11, 40 Stat. 228.
22. Gouled v. United States, 255 U.S. 298, 309 (1921).

The first Supreme Court case to interpret the *Gouled* rule was also the first to invoke the instrumentality exception to restrict it. In *Marron v. United States*[23] federal officers lawfully entered a saloon and observed illegal sales of liquor. They then arrested the employees and patrons and seized a business ledger and some utility bills. The seizure was held reasonable as incident to an arrest, and the items were admitted into evidence. The Court circumvented the mere evidence rule in holding that the bills and accounts were convenient if not necessary to conducting an illegal liquor business and were therefore seizable instrumentalities of the crime.[24] It was not suggested that seizing the items would prevent future crimes other than by enabling the government to obtain convictions.

In *United States v. Lefkowitz*,[25] as in *Marron*, federal officers raided an illegal liquor establishment and seized business records and utility bills. The difference here was that the officers did not confine themselves to seizing items in plain view, but thoroughly searched wastebaskets, cabinets and drawers. The evidence was suppressed by the Court because the search was too broad and because the items seized were mere evidence.[26] Consider, however, the manner in which the Court distinguished *Marron*. In *Marron*, the Court concluded that the search was reasonable and that the items were instruments of the crime.[27] Since the articles seized and the offense charged were almost precisely the same in both cases, the distinction between the two was to be found only in the scope of the search. When the search was so broad as to be exploratory in nature, the mere evidence rule was resorted to as an alternative—and, of course, superfluous—ground for exclusion. When the search was otherwise reasonable, the same items became instruments of crime.

Marron and *Lefkowitz* set the pattern for future treatment of the mere evidence rule by the Supreme Court. Although the rule was never expressly repudiated, neither was any evidence ever suppressed in reliance on it standing alone. In virtually every case the legality of a search incident to arrest was the major issue.[28]

23. 275 U.S. 192 (1927).
24. *Id.* at 199.
25. 285 U.S. 452 (1932).
26. *Id.* at 464.
27. *Id.* at 465.
28. *See, e.g.*, Zap v. United States, 328 U.S. 624 (1946), where the disputed issue was whether incriminating evidence (a check) could be seized in the course of a search to which the defendant had consented by contract. The court

The Court in *Hayden* agreed that the survival of the *Gouled* distinction is "attributable more to chance than considered judgment";[29] it was equally critical of the rule's claim to constitutionality. "*Gouled* concluded, needlessly it appears, that the Constitution virtually limited searches and seizures to these categories."[30] Mr. Justice Brennan, writing for the majority, noted that *Mapp v. Ohio*[31] had only recently made the mere evidence rule a problem in the state courts,[32] and that pressure against the rule in the federal courts had "taken the form rather of broadening the categories of evidence subject to seizure, thereby creating considerable confusion in the law."[33]

The Court also interpreted *Schmerber v. California*[34] as having settled the proposition that it is reasonable, within the fourth amendment, to conduct "otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals,"[35] an observation which might startle some students of that well known decision. Mr. Justice Brennan made it clear that the *Hayden* decision would not serve as a license for exploratory searches. A nexus must be found between the item to be seized and criminal behavior.[36] Therefore, in the case of mere evidence, "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required."[37]

The court had no difficulty in locating the required nexus in the instant case; the clothes which were seized matched the description of those worn by the robber, and "the police therefore could reasonably believe that the items would aid in the identification of the culprit."[38]

The *Gouled* mere evidence rule has been cited often but is generally no longer applied. Its claim to constitutional standing rested on a single case in which it was not necessary to decide

held that, since the search was lawful, the agents could have copied the check and used the copy as evidence; therefore no purpose would be served in excluding the check as being violative of the mere evidence rule.

29. Warden, Md. Penitentiary v. Hayden, 87 S. Ct. 1642, 1650 (1967).
30. *Id.* at 1651.
31. 367 U.S. 643 (1961).
32. Warden, Md. Penitentiary v. Hayden, 87 S. Ct. 1642, 1651 (1967).
33. *Id.*
34. 384 U.S. 757 (1966).
35. Warden, Md. Penitentiary v. Hayden, 87 S. Ct. 1642, 1650 (1967).
36. *Id.*
37. *Id.*
38. *Id.*

any constitutional issues. It has been distinguished in subsequent opinions, almost to the point of extinction, by technical exceptions which have usually omitted policy considerations. It has been a favorite target of writers. No clear constitutional basis can be found for it. Its rejection must be welcomed. It is unfortunate that the Supreme Court waited so long to cast aside such an arbitrary impediment to law enforcement.

THOMAS EUGENE ALLEN, III

CORPORATIONS—FULL DISCLOSURE—BREACH OF FIDUCIARY DUTY OWED BY OFFICER AND/OR DIRECTOR TO MINORITY STOCKHOLDERS*

I. Introduction

While there is much to be said for the postulate that morality and ethics cannot be legislated, effective steps can be taken to deter individuals from deviating from desired standards of conduct. Self-imposed restrictions combined with an adherence to basic concepts of ethics and "fair play" would reduce if not eliminate conflicts of interest arising from certain business transactions. However, such a Utopian ideal, no matter how desirable, commands little attention in the pragmatists' environment of the business world of today.[1] As proposed by William L. Cary,[2]

> [D]isclosure is the most *realistic* means of coping with the ever-present problem of conflicts of interest.... Disclosure is the foundation of reliance on self-regulatory approaches to conflict problems and is the clearest alternative to greater governmental or institutional intervention.... [T]he purpose of forbidding undisclosed interests is to eliminate inducements to wrongdoing and promote freedom of judgment, rather than provide for restitution of damages.[3]

II. The Problem

The issue in *Jacobson v. Yaschik*[4] was whether, under the circumstances, the defendant owed the plaintiff a duty to disclose to her such facts as might affect the value of her stock.

* Jacobson v. Yaschik, 155 S.E.2d 601 (S.C. 1967).

1. Baumhart, *How Ethical Are Businessmen,* 39 Harv. Bus. Rev. 6, 7 (July-Aug. 1961). In a poll conducted by the *Harvard Business Review* businessmen were asked the following type of question: If you were a board member in possession of certain information which when made public would appreciate the value of your company's stock, would you purchase shares of stock of the company? The response was that over forty-two per cent answered affirmatively. In reply to another question quizzing the businessman as to how he thought the average businessman would react in such a situation, sixty-one per cent felt that the average executive would take advantage of the situation and would purchase the stock. *See* SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262 (S.D.N.Y. 1966).

2. Chairman of the SEC since June 5, 1961.

3. Cary, *Corporate Standards and Legal Rules,* 50 Calif. L. Rev. 408, 409 (1962) (emphasis added).

4. 155 S.E.2d 601 (1967).

The plaintiff, Jacobson, was the owner of twenty-five percent —fifty shares—of the capital stock in Syndicate, Inc. which held an eighty-two acre tract of land as its only asset. The defendant, Yaschik, was president, general manager and majority stockholder in the corporation. He owned seventy-five percent—150 shares—of the corporation's total capitalization. The transaction complained of occurred during negotiations between Jacobson and Yaschik relative to the former's sale of her interest to the latter—the sale having been consummated on May 8, 1964, for 30,000 dollars. On May 1, 1964, unbeknown to the plaintiff, Yaschik contracted with a third party for the sale of two hundred shares of Syndicate, Inc. for a purchase price of 144,000 dollars. The plaintiff's fifty shares were therefore valued at 36,000 dollars; in addition to the 6,000 dollar difference, two acres of the original eighty-two acre tract were to be conveyed for a nominal sum to a corporation owned by Yaschik.

The plaintiff, in her action to recover her prorata share of the profit together with punitive damages, relied upon two theories: (1) fraudulent concealment in breach of a fiduciary duty owed to a fellow stockholder; (2)constructive representation of a false and material element of the stock sale upon which she had a right to rely and did rely to her detriment. The defendant, Yaschik, demurred, asserting that: (1) neither theory was sufficient as there was no allegation of an active perpetration of fraud upon the plaintiff by him—his silence and failure to disclose the aforementioned arrangements relative to the stock sale was the only wrong alleged; and (2) there was no allegation that he as an officer and director of the corporation had gained special facts and knowledge not accessible to the plaintiff.

The court, in sustaining the lower court's decision to overrule the demurrer, relied upon *Black v. Simpson*,[5] wherein the South Carolina Supreme Court determined:

> The defendant, as director and manager, was trustee not only of the corporation, but for all the stockholders. . . . His duty was to manage the corporate property for the benefit of the stockholders; and in the performance of that duty he was chargeable with the utmost good faith. It was a breach of his trust to all of the stockholders to use any means to acquire for himself the corporate property, except in the open after giving to the stockholders, fully and candidly, all material information he possessed as to its condition and

5. 94 S.C. 312, 77 S.E. 1023 (1913).

> value. Yet, according to the complaint, he entered upon a scheme to control the corporation and acquire the corporate property for his own advantage by positive concealment as to the real condition of the corporation and the value of its property.[6]

That the defendant acted for his personal benefit to the plaintiff's detriment is reasonably evident. In upholding the trial judge the court concluded that *Black* committed it to the position that:

> [O]fficers and directors of a corporation stand in a fiduciary relationship to the individual stockholders and in every instance must make a full disclosure of all relevant facts when purchasing shares of stock from a stockholder . . . .[7]

An analysis of the instant case necessitates a review of three concepts regarding the corporate officer's duty of disclosure: the minority rule as adopted herein; the majority concept as advanced by the defendant; and the "special facts" doctrine as advocated by the plaintiff.

There is a conflict of authority accompanied by some confusion regarding the application of these three concepts to the duty of a corporate officer to disclose information relative to stock values before purchasing a fellow stockholder's shares.

III. The Majority Rule, the "Special Facts" Doctrine and the Minority Rule[8]

The majority rule rejects any fiduciary relationship between a corporate director and/or officer and a fellow stockholder with respect to the purchase of the shareholder's stock in the absence of an *active fraud.* Since there is no fiduciary obligation on behalf of the director or officer, he is under no duty to disclose any information regarding the future value of the shares which he purchases. Though he may remain silent, he cannot actively suppress such information or intentionally misrepresent the facts.[9]

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6. *Id.* at 315, 77 S.E. at 1025.

7. Jacobson v. Yaschik, 155 S.E.2d 601, 605 (S.C. 1967).

8. See the cases discussed and cited in Annot. 7 A.L.R.3d 500 (1966); Annot. 84 A.L.R. 615 (1933).

9. *See* Fletcher, Cyclopedia Of The Law Of Private Corporations § 1168.1 (perm. ed. rev. 1965).

The "special facts" doctrine as enunciated in *Strong v. Repide*[10] represents an exception to the majority rule. This doctrine imposes a limited fiduciary duty on the director in stock-purchase transactions with a fellow stockholder. In situations where the director or officer gains special knowledge[11] which might affect the value of the stock to be purchased, a fiduciary relationship is created obligating the director to disclose any and all facts affecting the value of the stock.[12]

The minority rule carries the degree of the fiduciary relationship between director and shareholder one step further in establishing the fiduciary standing as a matter of law. The director or officer cannot purchase stock from a fellow shareholder without first fully disclosing any information he has which might indicate an appreciation in the value of the stock.[13]

To varying degrees all three concepts concern the fiduciary relationship. Although the premises underlying the fiduciary relationship are not complex, attempts to apply the doctrine were often accompanied by considerable confusion.[14] This confusion has engendered a lack of uniformity which has aggravated the initial dilemma.

In an effort to promote a better understanding of the fiduciary doctrine in relation to dominant shareholders, it has been suggested that there are basically two approaches to imposing the fiduciary duties:[15]

> One is a *direct approach* by which one, attentive to the principles of equity, looks at the relation of the dominant shareholder to the other shareholders and concludes as a matter of law that it is a fiduciary relation. The other is an *indirect approach* by which one looks in the first instance at the relation of the directors to shareholders and concludes that if a shareholder dominates the corporation through his influence over the directors he must bear an identical relation to the minority shareholders.[16]

10. 213 U.S. 419 (1909).

11. Such special knowledge may include knowledge of proposed mergers, assured sales, etc.

12. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1171 (perm. ed. rev. 1965).

13. *Id.* at § 1168.2.

14. Geller v. Transamerica Corp., 53 F. Supp. 625, 629 (D. Del. 1943).

15. Comment, *The Fiduciary Relation of the Dominant Shareholder to the Minority Shareholders,* 9 HAST. L.J. 306 (1958).

16. *Id.* at 307.

The ambiguity in the application of the fiduciary doctrine has resulted primarily from a majority of the courts adopting the position that since the director does not share truly legalistic relationship (trustee, agent, etc.) with the individual stockholder, there can be no fiducial relation between the two parties.[17] The majority of the courts have adhered to this rationale which recognizes the directors as not standing in any fiducial relation to the individual shareholders. There has been a growing trend, however, to circumvent the harshness of the majority rule by applying the fiduciary doctrine so as to establish a duty of disclosure.[18]

IV. OPEN CORPORATION *v.* CLOSE CORPORATION

While there is considerable disagreement among commentators as to the exact definition of a close corporation, the following desiderata are generally recognized: (1) The stockholders are few; (2) Most or all of the stockholders are officers and directors; (3) Circulation of the outstanding shares is limited or restricted to the existing stockholders, or there is no readily available market for their shares; and (4) The stockholders are generally relatives and are intimately acquainted.[19] The basic consideration is one of determining

> [H]ow to permit a small group of businessmen to obtain the benefits of limited liability quickly and at a reasonable cost, thus encouraging small business enterprise . . . without at the same time exposing the public at large to the danger of stock swindles . . . .[20]

The defendant conceded that "[p]ersuasive reasons may be given for applying the *minority rule to officers and directors of a large corporate organization where its stock is widely distributed and held in comparatively small units*,"[21] but he maintained that no such compelling reasons had been advanced justifying

17. Note, *The Fiduciary Relationship of the Corporate Director to the Individual Shareholder*, 13 WYO. L.J. 140, 142-43 (1959).

18. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1175 (perm. ed. rev. 1965).

19. Annot., 7 A.L.R.3d 500, 501 (1966).

20. Adickes, *A "Closed Corporation Law" for California*, 54 CALIF. L. REV. 1990 (1966).

21. Brief for Defendant, Appellant-Respondent at 10, Jacobson v. Yaschik, 155 S.E.2d 601 (S.C. 1967). The defendant argues that the minority rule is for the protection of the small shareholder who has invested in a large corporation where because of the size and complexity of the situation it is virtually impossible for him to receive or obtain intelligent information.

the application of the minority rule to a small, dormant corporation.[22] In this respect, however, he failed to acknowledge that

> In view of the intimacy among participants . . . the courts should be somewhat more inclined to impose a fiduciary duty on shareholder-director-officers of a close corporation in their dealings with a fellow shareholder than they are to impose a fiduciary duty on directors, officers or shareholders in a publicly held corporation.[23]

As mentioned previously, the majority—no fiducuary duty—rule appears to have been generally discredited in the close corporation setting as placing in jeopardy the interest of a minority shareholder. Some of the factors underlying this increasing unpopularity are: (1) The limited number of shareholders enables a few stockholders to "freeze out"[24] the remainder; (2) The lack of a readily available market upon which the shares can be traded often makes it difficult to appraise the value of a share of stock; and (3) The intimate relationship between the parties promotes a greater amount of confidence in and reliance upon one's fellow shareholder.[25]

It is not disputed that upon incorporation directors and officers attain certain powers and that the "majority" rules. However, the mere fact of incorporation should not be interpreted as giving the majority shareholders license to arbitrarily exercise their powers at the expense and frustration of the minority shareholders.[26] It is to prevent such inequitable situations from arising that the courts impose a fiduciary duty upon the officers, directors and majority stockholders.

V. Acceptance of the "Fiduciary" Rule

In recent years the minority or "fiduciary" rule has received greater acceptance, and the fiduciary duty has been established as a matter of law by cases and statutes. For example, the state

22. *Id.* at 10. The defendant further contends that the minority rule should not be applied because "[e]ach stockholder had an intimate knowledge of the sole asset, the conduct of the business [dormant], and the value of the stock [which was only the value of the land]."

23. O'Neal, Close Corporations: Law and Practice § 8.15 (perm. ed. 1958).

24. "Freeze out" is a term used to describe an abusive action taken by majority shareholders when they use inside information or their majority to force minority shareholders from the corporation.

25. Annot., 7 A.L.R.3d 500, 502 (1966).

26. O'Neal, Close Corporations: Law and Practice § 8.07 (perm. ed. 1958).

courts of Arizona,[27] Colorado[28] and Iowa[29] have viewed precedents in their respective jurisdictions as dictating that corporate officers and directors occupy a fiduciary relation to their fellow stockholders and must act in the utmost good faith. The Iowa court gave some insight into the imposition of the "fiduciary" rule when it stated that "[i]t is the policy of the law to put fiduciaries beyond the reach of temptation by making it unprofitable to yield to it."[30] Deterrence appears to be one of the main underlying reasons for applying fiduciary standing as a matter of law.

Several jurisdictions have remedied the situation by statute.[31] California and New York have proposed but have failed to adopt such legislation. The California proposal[32] applied to a closed corporation in particular.

In addition to protection afforded by the states, the shareholder is also protected by the Securities Exchange Act of 1934 which encourages and in some respects demands full disclosure. Under this act protection has been extended to close corporations pursuant to Rule 10B-5, Code of Federal Regulations in those cases where the deceptive transaction is effected "in connection with" the use of the United States mails or means or instrumentalities of interstate commerce.[33]

In South Carolina, thirty-five years after *Black*, the court in *Gilbert v. McLeod Infirmary*[34] discussed the fiduciary duty as follows:

> Undoubtedly the directors of a corporation in the management of the corporate affairs occupy a position of extreme trust and confidence and exercise great power for good or bad over the corporation and its shareholders . . . . Toward

27. Hatch v. Emery, 1 Ariz. App. 142, 146, 400 P.2d 349, 353 (1965).

28. Hudson v. American Founders Life Ins. Co. of Denver, 151 Colo. 54, 57-58, 377 P.2d 391, 393 (1962).

29. Schildberg Rock Prod. Co., Inc. v. Brooks, 258 Iowa 759, 140 N.W.2d 132 (1966).

30. *Id.* at 766, 140 N.W.2d at 136.

31. Several of the states which have enacted statutes which have designated the standing between corporate officers and directors, and stockholders as that of a fiduciary are Louisiana and North Carolina. *See, e.g.,* N.C. GEN. STAT. ch. 55, § 55-35 (1965).

32. Adickes, *A "Closed Corporation Law" for California,* 54 CALIF. L. REV. 1990, 2019 (1966).

33. For a comprehensive discussion of federal legislation in this area see O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE § 8.16 (perm. ed. 1958).

34. 219 S.C. 174, 64 S.E.2d 524 (1951).

> . . . [the corporation] and the shareholders they undoubtedly stand in a fiduciary relation as far as corporate business is concerned . . . .[35]

In 1963 the state legislature added the words "of the shareholder" to section 12-18.15 of the South Carolina Code. The amended section then read as follows: "The directors and officers of a corporation shall exercise their powers and discharge their duties in good faith with a view to the interests of the corporation and of the shareholders . . . ."[36] As evidenced by the above cases and amendment, the South Carolina courts and legislature are becoming more aware of the fiduciary relationship as demanding full disclosure from the corporate director and officer as a matter of law.

VI. CONCLUSION

The *Jacobson* decision has as a matter of law imposed a fiduciary relationship upon corporate officers and directors. While the holding of the court dealt specifically with the obligation of full disclosure in regard to the purchasing of stock by a director and/or officer from a fellow shareholder, it is not unlikely that the fiduciary concept will be extended beyond this particular type of transaction. As already discussed, some jurisdictions using the fiduciary concept have afforded this doctrine broad, pervasive application, to the extent that the stockholder will be protected from practically any type of abuse arising from transactions with corporate officers and directors. There seems to be an increasing interest in requiring full disclosure based upon the fiduciary doctrine. The courts and legislatures of some jurisdictions are prescribing higher business standards as abuses come to light.

In all probability the *Jacobson* holding will not be restricted to close corporation transactions only. It has long been recognized that there were cogent and persuasive reasons for applying the minority rule to widely distributed, publicly held corporations. Such considerations as the complexity of the transactions and the shareholder's absence from the "hub" of the business have rendered full disclosure a necessity. Now it is being realized that there are equally valid arguments for requiring an

35. *Id.* at 185, 64 S.E.2d at 528-29.
36. S.C. CODE ANN. § 12-18.15 (Supp. 1966).

absolute fiduciary standing in conjunction with full disclosure to be applied to the close corporation as well.

> It is the role of wise counselors to assist in the development of refined standards and to point out to managers . . . that good ethics are not only good business in the long run, but also the overture to law in an evolving society.[37]

EDWARD P. GUERARD, JR.

37. Cary, *Corporate Standards and Legal Rules,* 50 CALIF. L. REV. 408, 420 (1962).

CRIMINAL PROCEDURE—MIRANDA: APPLICATION AT RETRIALS

While their impact has not been as catastrophic as many originally anticipated, the strict requirements for the admissibility at trial of statements obtained during custodial interrogation, as enunciated in *Miranda v. Arizona*,[1] have become a dominant consideration in the preparation and trial of every criminal case. Perhaps the most important issue raised by *Miranda* concerned its retroactive application. This issue was resolved in *Johnson v. New Jersey*[2] where the Supreme Court ruled that *Miranda* was not to be applied retroactively and would, consequently, be unavailable as grounds for appeal from decisions rendered prior to June 13, 1966—the date of the *Miranda* decision. It is the objective of this article to consider another question, left unanswered by *Johnson*, which is being raised with increasing frequency across the nation: Are the new standards for determining the admissibility at trial of statements taken during in-custody interrogation to be applied at the retrial of cases originally tried prior to *Miranda* but remanded for a retrial subsequent to the effective date of *Miranda*?

As a constitutional prerequisite for the admissibility of statements, either exculpatory or inculpatory, given by a suspect in the course of custodial interrogation, *Miranda* imposed upon the prosecution the burden of showing that prior to beginning the interrogation the suspect was warned that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to the presence of an attorney at the interrogation, and that counsel would be appointed for him if he could not afford an attorney. Though these rights can be waived by the suspect, a silent record will not give rise to a presumption of a waiver. It is incumbent upon the prosecution to demonstrate affirmatively that the waiver was made voluntarily, knowingly and intelligently.

In *Johnson* a convicted murderer sought to overturn his conviction, alleging that he had been denied permission to consult an attorney before being interrogated. Since the appeal was filed prior to the date of the *Miranda* decision, it was argued on the basis of *Escobedo v. Illinois*[3] which had been decided subsequent

1. 384 U.S. 436 (1966).
2. 384 U.S. 719 (1966).
3. 378 U.S. 478 (1964).

to the original conviction. The Court ruled that *Escobedo* and *Miranda* were not to be applied retroactively and that the new rules delineated in these cases were not to affect cases pending on direct appeal on the respective dates of these decisions.

Two weeks after the *Johnson* decision the question of whether or not to apply the *Miranda* standards to retrials was first raised in *State v. Shoffner*,[4] with the Supreme Court of Wisconsin concluding in the affirmative. Characteristic of many subsequent cases concerning this issue, *Shoffner* contained a dissenting opinion. Within the month the question was decided in three other cases on appeal being remanded for new trials, the most notable of which was *Gibson v. United States*.[5] In *Gibson* the United States Court of Appeals for the Fifth Circuit reversed a conviction under the Dyer Act. In remanding the case for retrial, it observed:

> Appellants' alleged statements and admissions to the Agent, must now hurdle the barriers unveiled in the recent off-spring of Escobedo, including, Miranda v. Arizona, Vignera v. New York, Westover v. United States and California v. Stewart .... This formidable foursome, the legitimacy of which is challenged by four members of the Supreme Court, may cause the district judge to reappraise his previous stand on the admissibility of the challenged statements and admissions. The "guidelines" suggested by the Chief Justice, were not available at the time of trial and we see no reason why those principles should not be applied on the new trial of this cause. Johnson et al. v. New Jersey ... would appear to support this view. Consequently, the district judge should have the first chance to take another look at the problem.[6]

Other than its reference to *Johnson*, which has been referred to as "scarcely convincing",[7] the *Gibson* Court failed to articulate its reasons for concluding that *Miranda* should be applied at the retrial—a conclusion which has been cited as dictum in many cases on this issue. *Gibson* gives no hint that a contrary interpretation might be possible. The Court of Appeals of Kentucky went so far as to say, "[*i*]*t is certain* that the principles

4. 31 Wis. 2d 412, 143 N.W.2d 458 (1966).
5. 363 F.2d 146 (5th Cir. 1966).
6. *Id.* at 148.
7. People v. Worley, 227 N.E.2d 746, 749 (Ill. 1967).

enunciated in Escobedo and in Miranda v. State of Arizona . . . will be applicable in the event of another trial. See Johnson v. State of New Jersey."[8] Granted, the weight of authority indicates that the conclusions drawn by the above courts are correct;[9] but that the matter is by no means *certain* is evidenced by decisions to the contrary in Delaware, Georgia, Illinois, New Jersey, New York and Pennsylvania.[10] The decisions from Arizona, California and Wisconsin adopting the *Gibson* view contain vigorous dissents. Moreover, all of the courts which have decided this issue, either for or against the application of *Miranda* at retrials, interpret *Johnson* as supporting their position. If the solution to this disputed issue is to be found, it should lie within the holding and rationale of *Johnson*, where the Supreme Court examines the purpose of its decision in *Miranda* and discusses the criteria for deciding the question of retroactivity.

The Court determined in *Johnson*: "We hold further that Miranda applies only to cases in which the trial began after the date of our decision one week ago."[11] No distinction is made between trials and retrials. Several of the state courts attempted to answer the question by interpreting the meaning of "trial." In holding *Miranda* applicable to retrials, the Supreme Court of California in *People v. Doherty*[12] interpreted "trial" in light of that state's Penal Code which provides that "[t]he granting of a new trial places the parties in the same position as if no trial had been had."[13] In *Jenkins v. State*[14] Delaware interpreted

8. Creech v. Commonwealth, 412 S.W.2d 245, 247 (Ky. 1967) (emphasis added).

9. United States *ex rel.* Pierce v. Pinto, 259 F. Supp. 729 (D.N.J. 1966), *aff'd per curiam*, 374 F.2d 427 (3d Cir. 1967); Gibson v. United States, 363 F.2d 146 (5th Cir. 1966); Government of the Virgin Islands v. Lovell, 378 F.2d 799 (3rd Cir. 1967); State v. Brock, 101 Ariz. 168, 172, 416 P.2d 601, 605 (1966); People v. Doherty, 429 P.2d 177, 59 Cal. Rptr. 857 (1967); State v. Ruiz, 421 P.2d 305, 307 n.3 (Hawaii 1966); State v. McCarther, 197 Kan. 279, 286, 416 P.2d 290, 296 (1966); Creech v. Commonwealth, 412 S.W.2d 245, 247 (Ky. 1967); State v. Jackson, 270 N.C. 773, 155 S.E.2d 236 (1967); State v. Shoffner, 31 Wis. 2d 412, 433, 143 N.W.2d 458, 468 (1966); *cf.* Moorer v. South Carolina, 368 F.2d 458, 462 (4th Cir. 1966).

10. Jenkins v. State, 230 A.2d 262 (Del. 1967); Sims v. State, 223 Ga. 465, 156 S.E.2d 65 (1967); People v. Worley, 227 N.E.2d 746 (Ill. 1967); People v. LaBelle, 53 Misc. 2d 111, 277 N.Y.S.2d 847 (Rensselaer County Ct. 1967); State v. Vigiliano, 50 N.J. 51, 232 A.2d 129 (1967); Commonwealth v. Brady, 1 Cr. Law Rep. 2305 (Crawford County Ct., Pa. 1967).

11. Johnson v. New Jersey, 384 U.S. 719, 721 (1966).

12. 429 P.2d 177, 59 Cal. Rptr. 857 (1967).

13. CAL. PENAL CODE § 1180 (West 1967).

14. 230 A.2d 262 (Del. 1967).

"trial" on the basis of prior decisions as supporting an opposite result. In considering the meaning of the word as used in the *Johnson* decision, the Delaware court stated, "[a]lthough *de novo*, a new trial is not a new case; it is a continuation of the original case until the judgment is final. In our opinion, *Johnson* refers to 'cases' the *original* trial of which commenced after June 13, 1966."[15] Because the various jurisdictions do not have a uniform concept of the word "trial", *Johnson* does not support a definite conclusion one way or the other. This ambiguity is aggravated by the statement in *Johnson* that "Miranda should apply only to cases commenced after [the decision was] announced."[16]

As pointed out in the Illinois case of *People v. Worley*,[17] "[a] retrial is not ordinarily thought of as the commencement of a case."[18] Equally confusing is the statement in *Johnson* that "[f]uture defendants will benefit fully from our new standards. . . ."[19] The term "future defendants" also lacks a uniform connotation and could be construed to support either view. Further digression into the construction of the isolated phraseology employed in *Johnson* would be fruitless.

The Illinois Supreme Court derives support for its contention that *Miranda* is not applicable to retrials from a comparison of the holding in *Johnson* with that in *Linkletter v. Walker*[20] with respect to cases pending on direct appeal. *Linkletter* held that the rule announced in *Mapp v. Ohio*[21] excluding evidence gained as the result of an illegal search and seizure was not retroactive. *Johnson* specifically refused to apply *Miranda* to cases pending on direct appeal, whereas *Linkletter* applied *Mapp* to such cases. The weakness of this argument is illustrated by a review of the other possible explanations for the contrasting holdings.

The holding and terminology in *Johnson* are inconclusive with respect to the application of *Miranda* to retrials. This necessitates an examination of *Johnson* designed to ascertain the intentions of the Court and to determine if these ends would be furthered by the application of *Miranda* standards to retrials. The

15. *Id.* at 274 (emphasis added).
16. Johnson v. New Jersey, 384 U.S. 719, 733 (1966).
17. 227 N.E.2d 746 (Ill. 1967).
18. *Id.* at 750.
19. Johnson v. New Jersey, 384 U.S. 719, 732 (1966).
20. 381 U.S. 618 (1965).
21. 367 U.S. 643 (1961).

criteria for determining the question of retroactivity were established in *Linkletter* and *Tehan* v. *Shott*.[22] In discussing the application of the principles in these cases to the question of whether or not *Miranda* was to be given retroactive effect, the Court noted:

> In the past year we have twice dealt with the problem of retroactivity in connection with other constitutional rules of criminal procedure. These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exingencies of the situation require such an application." These cases also delineate criteria by which such an issue may be resolved. We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda*.[23]

The primary objective of *Miranda* was to give full effect to the fifth amendment privilege against self-incrimination. The application of *Miranda* to retrials would certainly promote this objective. Another purpose was to increase the reliability of the fact-finding process; and, arguably, this would be facilitated also by applying *Miranda* at retrials. Those opposing this argument have a convincing answer, however.

> [W]hether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . [W]hile Escobedo and Miranda guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.[24]

Since the reliability of the statements was not a problem of such concern as to warrant retroactive application, it is not essential to a fair retrial that the new standards be applied. With regard to a voluntariness claim, a host of cases decided prior to *Escobedo*, are available to defendants in cases decided prior to *Miranda*.

22. 382 U.S. 406 (1966).
23. Johnson v. New Jersey, 384 U.S. 719, 726-27 (1966).
24. *Id.* at 728-30.

The second criterion the Court agreed to consider was the reliance placed on its prior decisions. *Johnson* recognized that "[l]aw enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*."[25] Those contesting *Miranda's* application at retrials cite this criterion as one of their principle arguments. Nevertheless, "the court did not accord decisive importance to the reliance of police officers on prior decisions in planning admissible custodial interrogations."[26] Nor was any consideration given to the possibility of applying *Miranda* only to statements taken after its effective date. Even in a case tried for the first time subsequent to June 13, 1966, statements taken prior to that date would be inadmissible unless they met the new standards. This strongly indicates that a different rule would not be established for retrials. It is indeed unfortunate that many statements obtained through diligent efforts on the part of conscientious law enforcement officers would thereby be rendered inadmissible in the prosecution of cases the outcome of which might well rest upon their admission or exclusion. But, it would be almost humorous to suggest that any more than lip service was given this element of reliance; to the contrary, the recent decisions in the criminal procedure area are apparently motivated by distrust of law enforcement officers whom the Court characterizes as poor guardians of constitutional rights.

The reliance the Court was primarily concerned with was that which trial judges had placed on previously recognized standards in admitting statements the admission of which would constitute reversible error should *Miranda* be given retroactive effect. This consideration focuses attention on the third and controlling factor in the Court's decision—the effect such a ruling would have on the administration of justice.

> [R]etroactive application . . . would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards.[27]

25. *Id.* at 731.
26. People v. Doherty, 429 P.2d 177, 183, 59 Cal. Rptr. 857, 863 (1967).
27. Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

The proliferation of appeals and retrials of incarcerated persons engendered by such a ruling would, in the Court's own words, "impose an unjustifiable burden"[28] on the now already over-docketed courts. This sound argument against retroactivity does not lend itself to solution of the question of whether or not to apply *Miranda* at retrials, because these cases must be retried anyway. No additional load is placed on the court dockets by applying or not applying *Miranda* at retrials. It should be noted that the courts of Delaware and Illinois adopt a contrary view and suggest that forcing the retrial of cases without admitting statements upon which the prosecution based its case is just such an "unjustifiable burden" as *Johnson* seeks to avoid. But if the Supreme Court felt that way, it would have allowed statements taken prior to *Miranda* to be admitted without insisting upon compliance with the new standards.

In summary, bare language in *Johnson* gives no conclusive support to either side of the argument; but an examination of the Court's intentions is more helpful. Applying *Miranda* at retrials would protect the fifth amendment right against self-incrimination—the main function of *Miranda*. The "reliance on prior decisions" factor would have little influence on the Court, except as it placed a burden on the administration of justice by permitting or requiring additional trials. But, the cases discussed here must be retried anyway, and, therefore, this consideration does not affect the application of the new standards at retrial. Finally, *Johnson* is concerned with the date the statements are offered as evidence at trial, not with the date the statements were obtained. Statements violative of *Miranda* standards taken prior to June 13, 1966, could not be admitted at a trial held after that date. The same reasoning should apply to retrials; the effectuation of standards designed to protect the fifth amendment right against self-incrimination is deemed more important than preventing some undeserving criminal from availing himself of the arbitrary results as would be occasioned by the application of *Miranda* to retrials.[29] A majority of the

28. *Id.* at 733.

29. An example illustrating how the application of *Miranda* to retrials would produce arbitrary results is included in the concurring opinion in *People v. Doherty*:

> Assume the case of defendants *A* and *B*, arrested in March 1966 and both tried in May 1966, both of whom gave inculpatory statements, without which convictions could not have been assured, to authorities who scrupulously complied with *Dorado* but whose admonitions fell short of *Miranda* directives. Assume there is no error in the trial of defendant *A* but that

cases, including of those decided by the federal circuit courts on this point, support the conclusion that *Miranda* should be applied to retrials, but a strong minority are convinced otherwise. This leads to the likelihood that the Supreme Court will be called upon to decide the issue, and indications are it will require *Miranda* to be applied at the retrial of cases originally decided prior to the effective date of *Miranda*. If the Court so decides, those persons convicted in retrials in jurisdictions where the *Miranda* standards were not applied will have grounds for appeal, possibly leading to yet another trial—exactly what *Johnson* seeks to avoid. However, in the unlikely event the Court does decide to the contrary, in those jurisdictions adhering to the majority view and applying *Miranda* to retrials, the prosecution would be precluded from appealing the erroneous exclusion of statements violative of *Miranda* standards, except in cases where such appeal is permitted by statute.[30] Nor would the states be required to change their procedure for reason that *Johnson* expressly permits the states to employ stricter standards than those adopted by the Supreme Court.[31]

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B's conviction is reversed because of errors wholly unrelated to constitutional provisions. When *B*'s retrial takes place after June 13, 1966, the majority would require his statement to be excluded, and as a result *B* would go free whereas *A* suffers a penalty for the identical crime detected under identical circumstances.

429 P.2d 177, 187, 59 Cal. Rptr. 857, 867-68 (1967).

30. 5 WHARTON'S CRIMINAL LAW AND PROCEDURE § 2251 (1957).
In the absence of a statute clearly conferring the right, as a general rule, the state or the United States cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case.

Fifth amendment double jeopardy prohibition does not apply to states via the fourteenth amendment due process clause so as to prevent appeal by the prosecution where state statute allows the state to appeal in criminal cases. Palko v. Connecticut, 302 U.S. 319 (1937). *See* Kepner v. United States, 195 U.S. 100 (1904).

31. Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

DAMAGES—HUSBAND AND WIFE, PARENT AND CHILD —PUNITIVE DAMAGES DISALLOWED IN HUSBAND'S CAUSE OF ACTION ARISING OUT OF INJURIES TO HIS WIFE AND MINOR CHILD*

Hughey v. Ausborn[1] presented only one clearly defined issue—whether a husband could recover punitive damages for injury to his wife and minor child; but the court's rationale in this case suggests a changing trend in the area of punitive damages in South Carolina. The decision places in question the basic theory and policy considerations upon which the award of punitive damages seems to rest in South Carolina and casts doubt upon the validity and consistency of the rules regarding punitive damages which have evolved both through court decision and legislative enactment.

In *Hughey* the plaintiff brought suit seeking recovery of medical expenses, damages for loss of consortium and punitive damages resulting from injuries which his wife and minor child had sustained in an automobile accident. In previous actions against the same defendant, the wife and child had recovered actual and punitive damages for their personal injuries. At the close of testimony in the present suit, the defendant moved for a directed verdict as to punitive damages. This motion was overruled and the jury instructed to find both actual and punitive damages. On appeal the Supreme Court of South Carolina reversed as to punitive damages, holding that punitive damages are not an element of a husband's cause of action to recover for loss of consortium and medical expenses arising out of injuries sustained by his wife and minor child.

I. Introduction

Most jurisdictions recognize that when a defendant's conduct has been willful or reckless, it is within the province of the jury to make a separate award in excess of compensation, variously labeled punitive damages, exemplary damages, vindictive damages and even "smart money;"[2] but the courts are not in accord as to the policy ends to be effected thereby. Some courts have adhered to the more conventional position, reflected

* Hughey v. Ausborn, 154 S.E.2d 839 (S.C. 1967).

1. 154 S.E.2d 839 (S.C. 1967).
2. *See generally* 25 C.J.S. *Damages* § 117(1) (1966).

in the earlier South Carolina cases,[3] that damages in excess of compensation are awarded in civil actions entirely as a means of punishment, intended to deter the defendant and others like him from committing similar acts in the future.[4] Other jurisdictions regard punitive damages primarily as compensation for injuries not susceptible of accurate measurement, such as mental anguish or distress, insult, indignity and fright, and only incidentally as a means of deterrence.[5] Although it is clear that mental anguish is compensated solely through an award of actual damages in South Carolina,[6] there is language in some of the South Carolina cases which suggests that punitive damages are not entirely separable in theory from actual damages and have a truly compensatory aspect. For example, the court has said:

> Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but in addition thereto operating as a deterring punishment to the wrong-doer, and as a warning to others.[7]
>
> We have also recognized that such damages are awarded not only as punishment and as a deterrent to the commission of like offenses, but as vindication of a private right. . . . Therefore such damages involve a compensatory aspect which we have long recognized.[8]

Although such a compensatory theory might provide some justification for the windfall allowed a plaintiff through an award of punitive damages, the majority of the court in *Hughey*

3. *E.g.*, Chanellor v. Vaughn, 2 Bay 416 (S.C. 1802) wherein a motion for new trial on the ground that damages were awarded in excess of compensation was denied. It was the court's opinion that "[t]he peace and good order of the community depended very much on making proper examples of such disorderly and turbulent men as the defendant appeared to be." *See also* Spikes v. English, 4 Strob. 34 (S.C. 1849).

4. *See generally* 22 AM. JUR. 2d *Damages* § 237 (1965).

5. *See generally* Annot., 16 A.L.R. 771, 793-97 (1922), *supplemented,* 123 A.L.R. 1115, 1121-1122 (1939).

6. Lanford v. West Oakwood Cemetery Addition, Inc., 223 S.C. 350, 75 S.E.2d 865 (1953); Shuler v. Heitley, 209 S.C. 198, 39 S.E.2d 360 (1946).

7. Watts v. South Bound R.R., 60 S.C. 67, 73, 38 S.E. 240, 242 (1901), *quoted with approval in* Rogers v. Florence Printing Co., 233 S.C. 567, 573, 106 S.E.2d 258, 261 (1958).

8. Hicks v. Herring, 246 S.C. 429, 437, 144 S.E.2d 151, 155 (1965).

seems to have minimized, if not rejected, the concept of compensation as a basis for allowing recovery of punitive damages. This aspect of the *Hughey* rationale is discussed below.

II. The Hughey Rationale

A. Cases Distinguished.

Cases cited for the proposition that the husband should be allowed to recover punitive damages were distinguished from the present fact situation. In *Fennel v. Littlejohn*[9] the plaintiff brought a criminal conversation suit based on the extra-marital relationship between his wife and the defendant. A judgment for actual and punitive damages was affirmed on appeal. *Fennel* was distinguished from the present case on the grounds that the defendant's conduct there did not create a cause of action in the wife, but only in the husband; thus, duplicate recovery of punitive damages, such as was involved in *Hughey*, was not in issue.

In *Webb v. Southern Railway*[10] the plaintiff alleged that the defendant's agents wrongfully persuaded her minor child to engage in dangerous railroad work as result of which the minor was injured. A prior suit brought by the child against the same defendant based entirely on his injury had been defeated upon a finding of contributory negligence. The mother, however, was successful in her suit, and a judgment for actual and punitive damages was affirmed on appeal. The court found it significant that the child's suit and the mother's suit in *Webb* were entirely separate—one based on personal injury and one based on enticement of a minor child. The defendant's alleged negligence in injuring the child, which formed the basis of the child's suit, need not have been proved in the mother's suit;[11] and the child's contributory negligence, which defeated his recovery, could not be pleaded as a defense in the mother's suit.[12] In the present case, although the husband's, wife's and child's suits have been regarded as separate causes of action for some purposes,[13] they

9. 240 S.C. 189, 125 S.E.2d 408 (1962).

10. 104 S.C. 89, 88 S.E. 297 (1916).

11. Although the existence of the child's injury as a proximate result of the defendant's conduct may have increased the damages awarded to the mother, her cause of action was original and based entirely on wrongful enticement of a minor child, not on the minor's injury.

12. Webb v. Southern Ry., 104 S.C. 89, 94, 88 S.E. 297, 299 (1916).

13. *E.g.*, Priester v. Southern Ry., 151 S.C. 433, 149 S.E. 226 (1929); Hall v. Waters, 132 S.C. 117, 128 S.E. 860 (1925).

each arose out of the same wrong committed by the defendant; and the contributory negligence of the wife or child, if proved in the husband's action, would serve to defeat his recovery.[14] The majority of the court found *Webb* distinguishable on these grounds.

B. Actual Damages.

Although with regard to punitive damages the specific question presented in *Hughey* was one of novel impression, the basic principles concerning recovery of actual damages by the husband, wife and child have long been established. As will be seen later, the majority of the court in *Hughey* found that these principles provided support for their decision concerning recovery of punitive damages by the husband, wife and child.

When a minor child is injured through the fault of another, a cause of action arises on behalf of the child through his guardian *ad litem* to recover for pain and suffering and impairment of future earning capacity; a separate cause of action arises in favor of the child's father for loss of services and medical expenses.[15] The father's cause of action derives from the legal obligation imposed upon him to provide support and furnish necessaries for his minor child.[16] This legal obligation comprehends payment of the child's medical expenses; thus, medical expenses are not an element of the child's suit.[17]

The Married Woman's Property Act,[18] which made it possible for a wife to sue in her own name, did not abridge the common law rules with respect to the husband's cause of action for medical expenses and loss of consortium which arise when his wife is injured as a result of a third party's negligence.[19] As with the

14. 27 AM. JUR. *Husband and Wife* § 507 (1940); 39 AM. JUR. *Parent and Child* §§ 81, 85 (1942).

15. *See generally* 67 C.J.S. *Parent and Child* §§ 40, 41 (1950).

16. Campbell v. Campbell, 200 S.C. 67, 20 S.E.2d 237 (1942). *See also* Harris v. Leslie, 195 S.C. 526, 12 S.E.2d 538 (1940); Workman v. Workman, 174 S.C. 490, 178 S.E. 121 (1935); S.C. CODE ANN. § 20-303 (Supp. 1966); 67 C.J.S. *Parent and Child* § 15 (1950).

17. Medlin v. United States, 244 F. Supp. 403 (D.S.C. 1963); Bridges v. Joanna Cotton Mill, 214 S.C. 319, 52 S.E.2d 406 (1949); Tucker v. Buffalo Cotton Mills, 76 S.C. 539, 57 S.E. 626 (1907).

18. S.C. CODE ANN. § 10-216 (1962).

19. Vernon v. Atlantic Coast Line R.R., 218 S.C. 402, 63 S.E.2d 53 (1951); Cook v. Atlantic Coast Line R.R., 196 S.C. 230, 241-44, 13 S.E.2d 1, 6-7 (1941); Priester v. Southern Ry., 151 S.C. 433, 149 S.E. 226 (1929); Coulter v. Hermitage Cotton Mills, 112 S.C. 93, 98 S.E. 846 (1919). *But see* Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 213 (1961); Brazell v. Camden, 238 S.C. 580, 121 S.E.2d 221 (1961). *See also* Sheffield v. American Indem. Co., 245 S.C. 389, 140 S.E.2d 787 (1965); Sossamon v. Nationwide Mut. Ins. Co., 243 S.C. 552, 135 S.E.2d 87 (1964).

father's cause of action for injury to his child, the husband's cause of action for injury to his wife derives from his legal obligation of support[20] and is separate from the wife's cause of action for loss of earnings and pain and suffering.[21]

C. Analogy to Actual Damages.

The following extract from the concurring opinion of Justice Brailsford sets out essentially the grounds upon which the *Hughey* decision was based:

> [T]he courts have been astute to separate the elements of damage sustained by the injured child or wife from those accruing to the father or husband. This is important to assure that each element of damage is awarded to the person justly entitled thereto and to protect the defendant from being mulct twice for the same loss. This salutary policy has been consistently followed by the courts with respect to compensatory damages. It seems reasonable and just that it should be applied to punitive damages, which, as pointed out in the dissent, have a compensatory aspect.[22]

As the above extract illustrates, the court relied at least partially on the basic principles concerning the allocation of actual damages between the husband, wife and child in deciding that the husband could not recover punitive damages notwithstanding the defendant's reckless or willful conduct. The particular elements of actual damage caused by the defendant's conduct are so apportioned among the various parties that each recovers only those elements which represent his own loss. In the same sense that a sum for medical expenses is awarded exclusively to the father in compensation of his unique loss, it was the court's opinion that punitive damages should be awarded exclusively to the wife and child, who were the parties more directly injured.

Even though these principles were consistent with the majority opinion, they were not conclusive as to the issue in question. While actual damages could be divided among the various plaintiffs to compensate each unique loss, punitive damages, since

20. Cook v. Cook, 213 S.C. 247, 49 S.E.2d 9 (1948); Holloway v. Holloway, 203 S.C. 339, 27 S.E.2d 457 (1943); State v. Bagwell, 125 S.C. 401, 118 S.E. 767 (1923). *See also* S.C. CODE ANN. § 20-204 (1962).

21. Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). *Cf.* S.C. CODE ANN. § 20-204 (1962).

22. Hughey v. Ausborn, 154 S.E.2d 839, 843 (S.C. 1967) (concurring opinion).

awarded in excess of compensation, are not susceptible to a logical division on the same basis. An award to compensate pain and suffering, for example, was given exclusively to the wife and child because the husband did not personally sustain this element of damage. The award of punitive damages, on the other hand, is not based on any unique compensable loss sustained. Even nominal compensatory damages will support a cause of action for punitive damages.[23] Although the husband was not physically injured, recovery of punitive damages has never been restricted to cases involving physical injury.[24]

Secondly, the above extract suggests that punitive damages have a truly compensatory aspect[25] and for this reason should be apportioned, as are compensatory damages, so as to avoid duplicate recovery for the same loss. If this proposition were conclusive, however, recovery of punitive damages by both the wife and child in their separate suits against the defendant would represent an anomalous duplicate recovery. In *Hughey* the jury found that the defendant's conduct had been reckless, willful, or wanton, and the actual damage sustained by the husband in the form of medical expenses was at least as definite and immediate as the actual damage sustained by the wife and child. Thus, all the requisites of a cause of action for punitive damages which were present in the wife's or child's suit were also present in the husband's suit.

D. The Punishment Rationale.

Since the analogy to the recovery of actual damages based upon a compensatory theory of punitive damages did not provide a conclusive solution to the problem at hand, *Hughey* may be taken as a clarification of the court's viewpoint with respect to the nature and purpose of punitive damages in general. The decision in *Hughey* actually turned on the third argument inherent in Justice Brailsford's concurring opinion—that the defendant should not be "mulct twice" for the same wrong. In refusing to emphasize a compensatory aspect of punitive damages over the more traditional punishment concept, the court was probably motivated by the obvious proposition that in future cases it

23. Hinson v. A.T. Sistare Construction Co., 236 S.C. 125, 113 S.E.2d 341 (1960).

24. *Id.* at 125, 113 S.E.2d at 341; Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942).

25. *See* cases cited note 7, 8 *supra.*

would be difficult, if not impossible, to limit the number of times a defendant could be mulct with punitive damages when sued in separate actions by several plaintiffs.[26] If punitive damages are regarded as a kind of compensation for the willful invasion of a private right, there is no reason why the husband should not have been "compensated" equally with his wife and child[27] as discussed above. But if punitive damages are regarded as a means of deterrence, then the policy reasons against successive punishment for the same wrong would require that punitive damages not be assessed again in the husband's action. It was not double compensation, but double punishment for the same wrong, which motivated the *Hughey* limitation on recovery of punitive damages.

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26. *See* Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173, 1194-95 (1931). Professor Morris illustrated the problem of double punishment by reference to the two *Luther v. Shaw* cases, 157 Wis. 231, 147 N.W. 17 (1914) and 157 Wis. 234, 147 N.W. 18 (1914) in which one plaintiff recovered punitive damages in a breach of promise suit and the plaintiff's father subsequently recovered punitive damages against the same defendant in a seduction suit. As a solution to this problem it was suggested that the jury should be apprised of the amount of punitive damages assessed against the defendant in the first action or that the two actions should be consolidated. Professor Morris recognized that the problem increases in complexity as the number of plaintiffs increases. The parade of horrors thus foreshadowed became a reality in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967), where several hundred suits were pending against the defendant drug manufacturer. The court, speaking through Judge Friendly, denied punitive damages altogether, rejecting the notion that punitive damages sufficient to deter should be awarded the first few plaintiffs to sue:

> Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, "Hold, enough," in the hope that others would follow. While jurisprudes might comprehend why Toole in California should walk off with $250,000 more than a compensatory recovery and Roginsky in the Southern District of New York and Mrs. Ostopowitz in Westchester County with $100,000, most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other 75 cases before Judge Croake or elsewhere in the country should get less or none. And, whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare, even assuming the defendant would want such a charge, and still more unrealistic to expect that the jury would follow such an instruction or that, if they didn't, the judge would reduce the award below what had become the going rate.

Id. at 839-40.

27. See the dissenting opinion of Bussey, A.J., wherein the following question was propounded: "Can it be soundly argued that a man is entitled to recover punitive damages when his rights as to his horse, his cow or his wagon are willfully violated, but may have no vindication of his willfully and wantonly violated rights as to his wife or his child?" Hughey v. Ausborn, 154 S.E.2d 839, 844 (S.C. 1967). The answer would seem to be that a man's horse, cow, or wagon cannot recover punitive damages in separate actions against the defendant.

III. PUNITIVE DAMAGES AND CRIMINAL PUNISHMENT

Hughey is not the first case in this jurisdiction involving punitive damages in which the issue of double punishment was before the court. With respect to the relationship between the assessment of punitive damages and punishment under the criminal law, the court previously decided that not only was the violation of a criminal statute sufficient foundation for an action to recover punitive damages,[28] but also that evidence of prior criminal prosecution and fine was not admissible in mitigation: "[T]he indictment and civil action are prosecuted for the same trespass, but not by the same parties. One is an offense against society, the other a private wrong."[29]

Most courts in extending this rationale have concluded that the constitutional protection against double jeopardy did not require a choice between punitive damages and criminal indictment even though the same wrongful act of the defendant formed the basis of both actions.[30] It has been said that the compensatory theory of punitive damages originated as a means of avoiding this constitutional issue.[31]

A minority of jurisdictions have adopted the opposite view that punitive damages cannot be awarded for a willful or reckless tort which is also punishable as a crime, since the defendant should not be punished twice for the same wrong.[32] Certain other jurisdictions, which do not consider criminal punishment or fine as a bar to recovery of punitive damages, do allow evidence of prior criminal sanction in mitigation of punitive damages.[33]

The *Hughey* rationale would seem to be more in keeping with the minority rule. If a defendant should not have to pay punitive damages because such damages had already been assessed in a prior action based on the same tortious act, it would seem to

28. Saint Charles Mercantile Co. v. Armour & Co., 156 S.C. 397, 153 S.E. 473 (1930).

29. Wolff v. Cohen, 8 Rich. L. 144, 151 (S.C. 1855), *quoted with approval in* Edwards v. Wessinger, 65 S.C. 161, 165, 43 S.C. 518, 519 (1903).

30. *See generally* Annot., 16 A.L.R. 771, 798-08 (1922), *supplemented,* 123 A.L.R. 1115, 1122 (1939).

31. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 435 (5th Cir. 1962).

32. *E.g.,* Shufakiss v. Duray, 85 Ind. App. 426, 154 N.E. 289 (1926). *See generally* Annot., 16 A.L.R. 771, 801-03 (1922), *supplemented,* 123 A.L.R. 1115, 1122 (1939).

33. *E.g.,* Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911). *See generally* 16 A.L.R. 771, 803-808 (1922).

follow that evidence of a previously imposed criminal sanction should at least be admissible in mitigation of punitive damages in a civil action arising out of the same tort. The South Carolina cases disallowing evidence of a prior criminal sanction in mitigation seem to be doubtful precedent in view of the better reasoning in the *Hughey* decision.

IV. MASTER AND SERVANT

In many jurisdictions, before a master can be made to respond in punitive damages for the willful torts of his servant, the plaintiff must prove that the master participated in, ratified, or authorized the wrongful act.[34] In South Carolina, however, the master's liability for punitive damages rests entirely upon the doctrine of *respondeat superior*, and neither ratification, authorization nor participation need be proved.[35] It would seem that this rule must be grounded in the compensatory principle, which was rejected in *Hughey*, for punitive damages are assessed against the master notwithstanding his innocence. *Hughey* seems to stand for the proposition that a defendant should not be punished successively in separate suits for the same willful or reckless act. It would seem inconsistent that a master should be punished through an assessment of punitive damages even though he committed no willful or reckless act. The master may have been negligent in hiring or failing properly to supervise his servants; but the common law of torts has never seen fit to assess punitive damages as a deterrent to mere negligence.

Furthermore, in *Johnson v. Atlantic Coast Line Railroad*[36] the court, in overruling a prior decision,[37] held that punitive damages could be assessed in separate sums against the master and servant. Oddly enough, the majority opinion in this case was based upon the well established rule that the jury may consider evidence of the defendant's wealth in determining the amount of punitive damages necessary to deter, and this rule is, itself, based upon the punishment concept of punitive damages: against a wealthy defendant, a larger assessment of punitive damages is necessary in order to effect specific deterrence.[38]

34. *See generally* 25 C.J.S. *Damages* § 125(4) (1966).

35. Hooper v. Hutto, 160 S.C. 404, 158 S.E. 726 (1931); Taber v. Seaboard Airline Ry., 81 S.C. 317, 62 S.E. 311 (1908); Reeves v. Southern Ry., 68 S.C. 89, 46 S.E. 543 (1904).

36. 142 S.C. 125, 140 S.E. 443 (1927).

37. Jenkins v. Southern Ry., 130 S.C. 180, 125 S.E. 912 (1924).

38. Calder v. Southern Ry., 89 S.C. 287, 302-303, 71 S.E. 841, 846 (1911).

The *Johnson* rationale was stated as follows:

> [O]ne defendant could not justly be held liable in punitive damages measured by the wealth of some other defendant. Either it must be placed within the province of the jury to find separate verdicts, or the rule permitting consideration of evidence of wealth of the defendants must go out of the issue of punitive damages. There is no middle ground between these two propositions.[39]

It would seem, however, that since the master's liability rests entirely on the wrongful act of his servant under the fiction of *respondeat superior*, the master should be liable only in the amount for which his servant alone would be liable, and only the servant's wealth need be admissible. Since the master is held vicariously liable notwithstanding his lack of participation in the wrongful act, under a compensatory theory of punitive damages, the rule permitting consideration of the defendant's wealth, which is based upon the punishment concept, *should* be abandoned. Since the innocent master is not in need of deterrence, there is no reason to allow a separate verdict of punitive damages against the master based upon his wealth.

The better rule would seem to be that offered in the dissenting opinion in *Johnson* that punitive damages should not be apportionable, nor evidence of the master's wealth admissible, unless the master has participated in, authorized or ratified the tortious act so as to merit punishment himself.[40] Indeed, the punishment concept of punitive damages implicit in the *Hughey* rationale would seem to suggest that the master should not be liable at all for punitive damages absent participation, authorization or ratification.

V. LIABILITY INSURANCE

In addition to the master-servant cases the present insurance law in this state suggests a compensatory theory of punitive damages contrary to the *Hughey* rationale. The automobile insurance statutes in South Carolina, as amended in 1964, make it clear that a liability policy must provide coverage for punitive damages,[41] thus rendering any question of public policy in this

39. Johnson v. Atlantic Coast Line R.R., 142 S.C. 125, 159-60, 140 S.E. 443, 454 (1927).

40. *Id.* at 168, 140 S.E. at 457 (dissenting opinion).

41. S.C. CODE ANN. § 46-750.31(4) (Supp. 1966).

area moot. In a case which arose before the amendment, the court construed a liability policy as sufficiently broad to cover punitive damages without discussing the issue of public policy.[42] The Court of Appeals for the Fifth Circuit, however, did reach this issue in interpreting Florida decisions and held that an insurance policy which in terms covered punitive damages contravened public policy by shifting liability from the wrongdoer to the insurance company:[43]

> Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.[44]
>
> Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong.[45]

Moreover, the requirement that an insurance company pay punitive damages is inconsistent with the rule allowing the defendant's wealth to be admissible as a factor in assessment. There is no reason to allow evidence of the defendant's wealth to determine the amount of punitive damages necessary to deter because the insurance company, not the defendant, must pay these damages. Obviously, the insurance company's wealth cannot be admitted into evidence even though *Johnson v. Atlantic Coast Line Railroad*[46] indicates that the jury may consider the wealth of the master, a kind of insurer himself under the doctrine of *respondeat superior*.

Finally, it has been said that the purpose of the award of punitive damages is to enforce deterrence generally so that "all

42. Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965). *See also* Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Thornton, 244 F.2d 823 (4th Cir. 1957). In *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964), the court decided that the uninsured motorist statute prior to amendment, S.C. CODE ANN. §§ 46-750.11 and 46-750.14-.18 (1962), did not require coverage; therefore, the court did not reach the issue of public policy.

43. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

44. *Id.* at 440.

45. *Id.*

46. 142 S.C. 125, 140 S.E. 443 (1927).

the people may look to the law of their land to defend them from wrongful invasions of both their personal and property rights."[47] It would seem that the present insurance law in South Carolina would impede rather than further this policy, for the wrongdoer is allowed to escape, the insurance company which has done no wrong is punished directly, and in the end society as a whole, which the court would protect, is punished indirectly by way of higher insurance rates.[48]

VI. CONCLUSION

Hughey seems to represent a reversal in the trend reflected in the criminal punishment cases, the master-servant cases, and the present insurance law and reflects a return to the more conventional punishment concept of punitive damages. If punitive damages are awarded as a means of punishment and deterrence, a limitation should be set, wherever practicable, on the number of times a defendant can be punished for the same tortious act. Although the limitation set in *Hughey* is somewhat arbitrary—both the wife and child were permitted to recover punitive damages from the defendant for the same wrongful act[49]—it was nonetheless a realistic compromise. Perhaps the *Hughey* rule will be applied by analogy in other situations where several plaintiffs seek recovery of punitive damages against the same defendant for the same wrong committed. And perhaps *Hughey* will provide the basis for a reconsideration by the court of the distinction between actual damages, punitive damages, and criminal punishment, as well as a reconsideration of the nature and purpose of punitive damages in general.

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47. *Id.* at 139, 140 S.E. at 447.

48. *Accord,* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440-41 (5th Cir. 1962).

49. Compare quoted material note 26 *supra.*

MUNICIPAL CORPORATIONS AND EMINENT DOMAIN—RIGHT OF INDIVIDUAL TO RECOVER FOR DAMAGE TO PRIVATE PROPERTY OCCASIONED BY ALLEGED NEGLIGENCE OF MUNICIPAL CORPORATION IN WIDENING STREET*

The familiar constitutional guaranty that private property shall not be taken for public use without just compensation[1] has been softening the effects of the power of eminent domain in this country for many years. It is in substance found in the constitutions of most, if not all, of the states, and yet, in spite of the long tenure and universality of this principle, it is still in many respects a difficult one for courts to interpret and apply.[2] In the recent case of *Kline* v. *City of Columbia*,[3] the South Carolina Supreme Court examined the law as it has developed in this state, particularly with respect to that conduct which constitutes a taking of property under the state constitution.[4]

The plaintiffs in this action were the owners of a building located on Huger Street in Columbia, South Carolina. In November of 1962 the city of Columbia began excavating a street in the vicinity of the building in order to relocate a fire hydrant and prepare for a widening of the street at that point. The complaint charged that during this excavation, employees of the city negligently ruptured a gas line running from the street to the building, thereby allowing gas to seep into the building where it came in contact with a gas heater and ignited. The resulting explosion and fire severely damaged the building and its contents. The complaint further charged the city's employees with negligence in failing promptly to inform the South Carolina Electric and Gas Company, its co-defendant, of the ruptured line and alleged negligence on the part of the company in failing promptly to shut off the gas when notified.

The plaintiffs maintained that the damage caused by the city constituted a taking of their property under Article I, section 17 of the South Carolina Constitution for which they should be

* Kline v. City of Columbia, 155 S.E.2d 597 (S.C. 1967).

1. U.S. CONST. amend. V.

2. 18 AM. JUR. *Eminent Domain* § 3 (1938).

3. 155 S.E.2d 597 (S.C. 1967).

4. S.C. CONST. art. 1, § 17. "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."

compensated and, in addition, that the facts would sustain a cause of action under section 47-70 of the South Carolina Code.[5] The city moved to strike those paragraphs of the complaint asserting its negligent failure to notify the gas company and demurred to the complaint on the ground that it did not state a cause of action under either the constitution or the code. Both the motion to strike and the demurrer were overruled by the lower court.

Before examining the supreme court's analysis of the constitutional issue, some attention should be directed to previous decisions concerning the application of section 17. This section is in itself the basis for recovery by an injured party; it does not depend on enabling legislation for its authority.[6] It applies to action by the state, its agents[7] or municipal corporations.[8] The South Carolina Supreme Court has been very liberal in its interpretation of what is meant by the term "taking". Unlike many jurisdictions, the law of this state acknowledges no distinction between "taking" and the *damaging* of property where such damage results from the maintenance of a public work.[9]

Further, it has been held that this damage need not be physical in nature nor of substantial degree; section 17 applies as well to cases where only the normal use or enjoyment of the property has been impaired.[10]

To sustain its contention that the facts as alleged in the *Kline* case were not compatible with the above interpretations, the city relied wholly upon *Collins v. City of Greenville.*[11] There an employee of the city of Greenville attempted to unclog a sewer pipe by forcing the collected debris farther down the pipe. This debris later collected at another point in the sewage system

5. S.C. CODE ANN. § 47-70 (1962).
Any person who shall receive bodily injury or damages in his person or property through a defect in any street, causeway, bridge or public way or by reason of a defect or mismanagement of anything under control of the corporation within the limits of any city or town may recover in an action against such city or town the amount of actual damages sustained by him. . . .

6. Moseley v. South Carolina State Highway Dep't, 236 S.C. 499, 115 S.E.2d 172 (1960).

7. University of South Carolina v. Mehlman, 245 S.C. 180, 139 S.E.2d 771 (1964).

8. Smith v. City of Greenville, 229 S.C. 252, 92 S.E.2d 639 (1956).

9. Moss v. South Carolina State Highway Dep't, 223 S.C. 282, 75 S.E.2d 462 (1953).

10. Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956).

11. 233 S.C. 506, 105 S.E.2d 704 (1958).

causing water to overflow the fixtures in the plaintiff's building. Rejecting the contention that the resulting damage to the floors and carpets of the building amounted to a taking of property, the court stated in part:

> [T]here was no taking for public use which is permanent or of a permanent nature, and growing out of positive act of the appellant. The complaint reveals that there was a single isolated instance which resulted in damage to the respondent. There was no degree of permanent taking in the constitutional sense nor was there continuity of such over a period of time.[12]

The court in *Kline* conceded some similarity between the two cases and seemed to agree fully with the above reasoning. However, it determined that since the city of Columbia was, at the time of the accident, engaged in a definite project—widening the street as a permanent improvement for the public use—a cause of action under the constitution could be sustained. The appellant's case was therefore distinguished largely on its facts.

Perhaps the strongest argument in favor of sustaining the action is presented by comparing the present case to those dealing with the damaging of property by water. A long line of South Carolina cases bear witness to the proposition that when, in the course of constructing or improving a public work, water is diverted onto privately owned land, the owner thereof is entitled to just compensation.[13] This is true whether the inundation is permanent or occasional so long as it is accompanied by property damage.[14] Emphasizing the similarity between these two situations, the court observed that: "No logical reason is suggested why the invasion of one's property with a highly inflammable substance, such as gas, should be considered any less a taking of property than an invasion by water."[15]

This approach to the question was further bolstered by the citation of several decisions involving air pollution. In *Kneece v. City of Columbia*[16] the plaintiff was allowed to recover for

12. *Id.* at 512, 105 S.E.2d at 708.

13. Milhous v. South Carolina State Highway Dep't, 194 S.C. 33, 8 S.E.2d 852 (1940); Chick Springs Water Co. v. South Carolina State Highway Dep't, 159 S.C. 481, 157 S.E. 842 (1930); Faust v. Richland County, 117 S.C. 251, 109 S.E. 151 (1921).

14. Lindsey v. City of Greenville, 247 S.C. 232, 146 S.E.2d 863 (1966).

15. Kline v. City of Columbia, 155 S.E.2d 597, 599 (S.C. 1967).

16. 128 S.C. 375, 123 S.E. 100 (1924).

damages to his premises caused by disagreeable odors emitting from a nearby incinerator belonging to the city. In an earlier case[17] an action was sustained when fumes from a slaughter house interferred with the normal use and enjoyment of adjacent lands.

On the basis of the facts alleged in the plaintiff's complaint and their similarity with the cases mentioned above, the court ruled against the city by concluding that a cause of action under section 17 of the constitution had been sufficiently established.

The nature of the city's appeal required the court to determine whether a case had also been established under section 47-70 of the South Carolina Code. Normally, such a determination would not have been necessary once the constitutional question had been decided, but here the city also moved to strike those paragraphs of the complaint charging it with negligence. Allegations of negligence are inconsistent with a demand for relief under the constitution,[18] but they are essential to a complaint based on the code.[19] Accordingly, unless the plaintiffs were also allowed to proceed under the code, the motion to strike would have to be sustained.[20]

Section 47-70 is consistent with the general rule that a municipality is liable for damages resulting from a failure to keep its streets and roadways in a reasonably safe condition.[21] The statute, however, must be strictly construed, and one seeking to recover under it must clearly establish that he belongs to the class being protected.[22] A number of cases have limited its protection to those persons using the street for travel at the time of injury.[23] The application of these decisions to the facts in the *Kline* case proved difficult—so much so, in fact, that the court was unable to reach a clear cut decision. The city maintained that the plaintiffs were not entitled to the protection of the statute because they were not *using* the street when the injury occurred. Certainly, in the ordinary sense of the term "use" this is true; but the plaintiffs contended that even though they were

17. Derrick v. City of Columbia, 122 S.C. 29, 114 S.E. 857 (1922).

18. Rice Hope Plantation v. South Carolina Pub. Serv. Authority, 216 S.C. 500, 59 S.E.2d 132 (1950).

19. Gilchrist v. City of Charleston, 115 S.C. 367, 105 S.E. 741 (1921).

20. Kline v. City of Columbia, 155 S.E.2d 597, 600 (S.C. 1967).

21. Dolan v. City of Camden, 233 S.C. 1, 103 S.E.2d 328 (1958).

22. Singleton v. City of Sumter, 180 S.C. 536, 186 S.E. 535 (1936).

23. *See* Hicks v. City of Columbia, 225 S.C. 553, 83 S.E.2d 199 (1954); Athanas v. City of Spartanburg, 196 S.C. 19, 12 S.E.2d 39 (1940).

not traveling on the street at the time, they were nevertheless making legitimate use of it. That is, at the time of the damage they were using the street for the purpose of transporting fuel through pipes located beneath that portion of the street which is generally traveled. In addition they claimed ownership of the underlying fee. Their argument is not without support. The case of *Leppard v. Central Carolina Telephone Company*,[24] decided in 1944, established that the use of a street to transport fuel, power, or telephone messages does not place an additional burden upon the easement. There are other cases which suggest that a street may properly be "used" for activities other than travel.[25]

The precise question involved has never been before our supreme court. The cases suggested by the parties here afforded support only through their language and dictum, and persuasive arguments were offered by both sides. There was, in effect, not much for the court to base its decision on. In addition, the question would have to be decided in ruling on a demurrer involving facts alleged but not proved at trial. Realizing this and cognizant that any decision reached would have a profound effect on future cases brought under the statute, the court left the question open. It declared only that the plaintiffs had the right to prove, if they could, a cause of action under the statute at trial.

Thus, a determination that could have made this case instrumental in extending the statutory protection was avoided. As a result, the law is still not clear with respect to just who is protected. In holding the plaintiffs entitled to recover under the constitution, the court seemed to be applying an established doctrine to a new set of facts rather than extending the fundamental concept. Nevertheless, this decision may illustrate a propensity on the part of the court to grant some means of relief to those persons injured by municipal corporations which might yet result in the liberalization of the law in this area.

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24. 205 S.C. 1, 30 S.E. 2d 755 (1944).

25. *See* Gowan v. Greenville County, 193 S.C. 327, 8 S.E.2d 509 (1940); Reeves v. City of Easley, 167 S.C. 231, 166 S.E. 120 (1932).