CASE COMMENTS

ATTORNEY AND CLIENT—CONTINGENT-FEE CONTRACT IN DIVORCE-CONNECTED PROPERTY SETTLEMENT HELD NOT PER SE VOID AS CONTRARY TO PUBLIC POLICY

Defendant retained attorneys to represent her in a divorce and property settlement controversy with her husband. The attorneys sued defendant under a contract whereby she was to pay them, "as fee for . . . negotiating and obtaining the said property settlement," 1 a certain percentage of that settlement. The court held, upon demurrer, that the contingent-fee contract was not invalid per se. Kraus v. Naumnburg, 13 Bucks 547 (C.P. Bucks County, Pa., 1964).

Historically, all contingent-fee contracts were considered objectionable on the ground that they tarnish the lawyer's image as a professional man and a servant of the court by giving him a stake in the case. 2 Nevertheless, most contingent-fee contracts are valid, 3 because they provide a means by which an impecunious client can obtain a lawyer. 4 Although the underlying justification applies only to impecunious clients, use of the contingent-fee contract has extended to clients who are not of this class. 5 In divorce actions, however, contingent-fee contracts have generally been held to be void as against public policy on the ground that they tend to influence the attorney to work for the dissolution of the marriage, whereas public policy favors reconciliation whenever possible. 6

1 Instant case at 548.
2 Radin, Contingent Fees in California, 28 CALIF. L. REV. 587, 588 (1940); Note, 47 IOWA L. REV. 942 (1962) ; see Backus v. Byron, 4 Mich. 535 (1857) (contingent-fee contract void as champertous).
3 Hughes, The Contingent Fee Contract in Massachusetts, 43 B.U.L. REV. 1, 2 (1963) ; Radin, supra note 2, at 589.
4 Newman v. Freitas, 129 Cal. 283, 292, 61 Pac. 907, 910 (1900) (dictum); Hughes, supra note 3, at 8; Radin, supra note 2, at 589; Note, 47 IOWA L. REV. 942 (1962).

A further reason for voiding contingent-fee contracts in divorce cases is based on the presupposition that the amount of alimony the court requires the husband to provide as support for his wife is based on the needs of the wife and is not intended for the benefit of any third party. Jordan v. Westerman, 62 Mich. 170, 180, 28 N.W. 826, 830 (1886). This consideration does not apply in the instant case, where the amount of the property settlement was determined independently of the court.

(278)
As there is no material distinction between a contingent-fee contract in a divorce case and that in the present case, where the property settlement and the divorce action were interdependent, the court's holding that the contract was not void per se rejects the established rule. The court suggested that each case must be scrutinized "to determine whether or not the contingent fee agreement in question is in fact contrary to public policy." It offered four reasons in support of this new rule. First, a contingent-fee contract can encourage reconciliation because it tends to influence the client to reconcile and thus avoid paying an attorney's fee. Second, since the legislature has made provision for divorce, it cannot be against public policy to obtain one when the specified circumstances exist. Third, when an attorney represents a wife without an estate of her own, the attorney's fee is almost always in fact contingent regardless of the form of the compensation. And fourth, voiding contingent-fee contracts would deprive the impecunious spouse of the services of an attorney.

The argument that a client might be influenced to effect a reconciliation by the possibility of saving the attorney's fee is unrealistic. To one entering divorce proceedings, the attorney's fee must seem insignificant compared with the domestic problems which gave rise to the divorce proceedings or with other factors tending to promote reconciliation. Furthermore, most contingent-fee cases involve the attorney for a wife who is suing for divorce. Since she would pay the fee on the basis of a net gain (alimony or property settlement) and thus acquire no out-of-pocket expenses, it would probably not appear to her that a reconciliation would save her money.

The court is unjustified in asserting that enactment of laws allowing divorce under specified circumstances indicates that divorce is not against public policy when those circumstances exist. While the interests of society cannot be served by the perpetuation of a moribund marriage, many marriages which could legally be dissolved are not yet moribund.

---

7 The court stated that the property settlement was not conditioned on the granting of a divorce, but made no attempt to show that the policy considerations were different. If the contingent fee will tend to persuade the attorney to prevent a reconciliation in a divorce case, it is just as likely to do so in a property settlement controversy which, even though theoretically independent from the divorce, is less likely if the divorce does not take place.

8 Instant case at 554.

9 Id. at 552.

10 Id. at 553.

11 Ibid.

12 Ibid.


14 Lingner v. Lingner, 165 Tenn. 525, 534, 56 S.W.2d 749, 752 (1933); 1 Nelson, Divorce and Annulment § 2.02 (2d ed. 1945).
In the latter cases public policy urges reconciliation, and the lawyer's self-interest, generated by a contingent-fee contract, conflicts with the interests of society.

The court is naive in suggesting case-by-case determination of whether the contingent-fee contract in question is in fact contrary to public policy. It seems to expect the client resisting enforcement of such a contract to make the argument in court that the divorce he or she has just obtained should not, and absent the lawyer's actions would not, have come about. The probabilities of someone making that argument seem minimal.

In endorsing a case-by-case determination, the court may have meant either that contingent fees will be permitted in divorce cases only when the marriage in question is clearly unsalvable, or that they will be permitted only where it is ascertained that the attorney did not work for dissolution of the marriage.

Blanket voidance of contingent-fee contracts attains the desired end—deterring lawyers from working against the marriage—more effectively than either case-by-case approach. If blanket voidance is the rule, the lawyer knows that any contingent-fee contract he makes will be unenforceable. The case-by-case approach, on the other hand, involves problems

---

15 Radin, supra note 2, at 590; see 1 Freedman, Marriage and Divorce in Pennsylvania § 5, at 9 (2d ed. 1957); 1 Nelson, op. cit. supra note 14, § 2.02. "The family unit is an indispensable factor in the growth of an orderly and civilized society." Miner, Conciliation Rather Than Reconciliation, 43 ILL. L. Rev. 464, 468 (1948).

16 This analysis does not require that every contingent-fee contract in a divorce setting be invalidated. For instance, the spouse defending a divorce action might agree with his or her attorney to a fee contingent on the avoidance of a divorce or a fee inversely related in size to the amount of property the client is forced to give up. Such a contract would not tend to induce the lawyer to work for the dissolution of the marriage and should therefore be permissible. On the other hand, the fact that the client is nominally defending against a divorce is insufficient to warrant the use of a fee, like that in Krieger v. Bulpitt, 40 Cal. 2d 97, 251 P.2d 673 (1953), contingent on the amount of property to be received by the client as a result of the divorce. Such a contract will have just as strong an influence on the lawyer to work for dissolution as a similar contract with the spouse who is actually suing for the divorce and similarly should be void.

17 This court receives support for its theory of case-by-case determination from Krieger v. Bulpitt, supra note 16. In that case the plaintiff attorney had represented a husband defending in a divorce action. In Mahoney v. Sharff, 191 Cal. App. 2d 191, 12 Cal. Rptr. 515 (Dist. Ct. App. 1961), the court in dictum cited Krieger for the proposition that "under certain circumstances where a divorce action is pending a plaintiff wife may legally enter into a contingent fee contract with an attorney who is to represent her in that proceeding." Id. at 194, 12 Cal. Rptr. at 517. Krieger depended to a large extent upon Hill v. Hill, 23 Cal. 2d 82, 142 P.2d 417 (1943). In Hill, however, the contract in question was a property settlement between a husband and wife. The general rule in such cases is to look at the agreement to see if it promoted or facilitated the divorce. See, e.g., Hoy's Estate, 308 Pa. 131, 162 Atl. 155 (1932); Miller v. Miller, 284 Pa. 414, 131 Atl. 236 (1925). It is one thing for a husband and wife to realize that their marriage is dead and make appropriate arrangements. It is quite another for a third party to be placed in a position in which a premium is placed upon his working for the dissolution of what may be a salvable marriage.

18 The rationale of the blanket voidance rule is similar to that which prohibits a trustee from selling trust property to himself, regardless of the lack of fraud or the fairness of the price, unless all beneficiaries consent. The fear is that the con-
of proof, whether the inquiry be directed to salvability or actual conduct. It would be both difficult and socially undesirable to attempt to prove in court that a marriage was or was not unsalvable. Inquiry into the attorney's actual conduct may be even more futile, since he could probably work for dissolution of the marriage without his client being aware of it. Even if the client were conscious of the attorney's efforts toward dissolution, the latter's actions might be too subtle to be conducive to proof in a court.

Because it removes the source of the temptation, blanket voidance is likely to have a beneficial effect on the conduct even of the lawyer who wishes to be strictly ethical. If contingent-fee contracts are permitted where the marriage is unsalvable, the lawyer asked to represent a spouse on a contingent-fee basis might unconsciously stretch to find the marriage unsalvable. Once he had made such a finding, he would justifiably feel that there was no reason to be careful not to work against the marriage. Even if the lawyer is prohibited only from working for dissolution, the temptation of the contingent fee remains and may overcome his inclination to be ethical.

Further problems are evident if the court is to inquire into the attorney's actual conduct, because the courts have indicated that the only conduct to be censured is working for dissolution. Even if the court finds that the lawyer has not worked for dissolution, the contingent fee may still have had the undesirable effect of deterring him from affirmatively working for reconciliation. A primary responsibility of the attorney is to work for the best interests of his client. Since reconciliation may well be to the interest of the client, whether he is aware of it or not, a lawyer's failure to explore actively with his client the possibilities for reconciliation...
should be considered improper. Even if the courts looked for failure to fulfill this ethical responsibility, they would be unable to distinguish lip service from sincere effort.

Finally, in some jurisdictions the lawyer who enters into a prohibited contingent-fee agreement is subject to disciplinary action by the local bar association for unethical conduct. If all contingent-fee agreements are prohibited, violation of the ethical standard will be comparatively easy to detect, for only the existence of the contract need come to the attention of the bar association in order for the breach of ethics to be evident. If the courts determine validity on the basis of a case-by-case examination, cognizance by the bar association of the existence of a contingent-fee contract will not lead it to conclude that the lawyer was engaged in any improper activity, because the contract is not on its face inconsistent with ethical conduct. The bar association, therefore, probably will not initiate disciplinary proceedings unless additional, hard-to-uncover information comes to its attention. Furthermore, the same problems of proof which confront a court attempting to determine the validity of the contract

22 See ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES No. 82, at 192 (1957):

An attorney is obligated to advise his client as to the best interests of the client as seen by the attorney. In many divorce cases the best interests of both parties will be promoted by a reconciliation; but in other cases the best interests of one or the other or even of both parties will be promoted by the divorce. If the attorney honestly believed that the best interests of his client would be prejudiced by a reconciliation, it was, in the opinion of the committee, entirely proper for him to advise his client to that effect.

Commentators have made explicit the apparent implication of this opinion. See Cunningham, The Lawyer as a Family Counselor: As the Judge Sees Him, 22 U. KAN. CITY L. REV. 45 (1953); Kargman, The Lawyer as Divorce Counselor, 46 A.B.A.J. 399 (1960); Zacher, The Professional Responsibility of the Lawyer in Divorce, 27 Mo. L. REV. 466 (1962); Note, The Role of the Lawyer in Divorce, 21 U. PITT. L. REV. 720 (1960).

"During the last century, liability for 'nonfeasance' has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. It is not likely that this process of extension has ended." Prosser, op. cit. supra note 21, at 355.

23 One court has upheld disciplinary action against a lawyer who made a contingent-fee contract which was against public policy on the general ground that the execution of such an agreement is a breach of professional obligation. State ex rel. Nebraska State Bar Ass'n v. Dunker, 160 Neb. 779, 784, 71 N.W.2d 502, 506 (1955). Another court said disciplinary action could be based on Canon 13 of the ABA Canons of Professional Ethics, which provides that "a contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court as to its reasonableness." The court reasoned that this canon "countenances contingent fee contracts only when they are sanctioned by law. A contingent fee contract which contravenes public policy and is for that reason void is not sanctioned by law. It is therefore a violation of the ethics of the profession for an attorney to enter into such a contract." In re Smith, 42 Wash. 2d 188, 197, 254 P.2d 464, 469 (1953). Since the case was one of first impression, the court declined to discipline the attorney.
confront the bar association in the disciplinary proceeding. Finally, if the salvability of the marriage is the test, the attorney has available the defense that he thought the marriage to be unsalvable, and that any error was simply a mistake of judgment, not a breach of ethics.\textsuperscript{24}

The court also asserted that if the wife has no estate of her own, the agreement for compensation will be contingent in the last analysis, no matter what form it takes. What the court failed to recognize is that this contingency is less likely to influence the lawyer to work for the dissolution of the marriage. Under a contingent-fee contract the lawyer's fee is dependent upon his client's obtaining a divorce. His self-interest, therefore, is tied to obtaining the divorce and produces the tendency in him to work for the dissolution of the marriage. On the other hand, under a flat fee arrangement the lawyer is still legally entitled to his fee even when no divorce is obtained, and he stands a chance of obtaining it. If failure to obtain the divorce was due to reconciliation, the husband would probably feel a moral, if not legal, obligation to pay the attorney, especially if the attorney aided in the reconciliation. Consequently, the incentive to work for divorce will not be so strong, and the lawyer will be less inhibited in working for reconciliation.

Finally, the court argued that the contingent fee supplies the only means by which an impecunious person can obtain a lawyer. This argument applies only when the client's spouse has almost all the money in the family, since the contingent-fee arrangement would be unnecessary if both spouses had money and would be useless if both were impecunious. Many states, however, have statutes which provide for payment of lawyers representing wives in divorce actions.\textsuperscript{25} These counsel fees include remuneration for services rendered in negotiating a property settlement.\textsuperscript{26} While the statutes make no provision for the attorney who takes a divorce

\textsuperscript{24}There is one instance when an exception to the rule of blanket voidance could be made. An attorney could be allowed to take a divorce case on a contingent-fee basis if he has a certificate from a social agency that a divorce would be socially useful. A lawyer-social agency relationship could conceivably be established in which the social agency would interview potential divorcees, explore the possibilities of reconciliation, and in appropriate cases issue the certificate. The social agency would be certified by the state to make such decisions. Since the reason for using the social agency would be simply to put the decision on salvability in the hands of a disinterested party, there would be no reason to have review of the agency's findings.

\textsuperscript{25}\textit{E.g.,} N.M. STAT. ANN. § 22-7-6 (1953); PA. STAT. ANN. tit. 23, § 46 (1955). These statutes allow the court to require the husband to pay counsel fees and costs of the wife. They do not generally work in the other direction and help the impecunious husband. \textit{But see} CAL. CIV. CODE § 137.3. When there is no statute enabling the husband to obtain counsel fees from his wife, and in addition there is no Legal Aid Society which will represent the husband, he should be allowed, if financially unable to retain an attorney on a flat fee, to retain him on a contingent-fee basis. This situation is rare as it assumes both that the husband cannot afford an attorney, and that the wife has money which the husband will get as a result of the divorce. See generally Comment, 20 OHIO ST. L.J. 329 (1959).

case but reconciles the parties before the action is filed, the lawyer in such a situation could probably recover for his services from the reconciled couple.\textsuperscript{27}

CONSTITUTIONAL LAW—FIRST AMENDMENT REQUIRES QUALIFIED PRIVILEGE TO PUBLISH DEFAMATORY MISSTATEMENTS ABOUT PUBLIC OFFICIALS

Petitioner newspaper printed a political advertisement paid for by an integrationist group. Since the group was headed by a figure of apparent respectability and since the advertisement contained no criticism of any individual, the newspaper did not verify the statements in the advertisement. In fact the advertisement contained several untrue statements allegedly concerning Montgomery, Alabama, police. Respondent, Montgomery's police commissioner, brought a civil libel action against petitioner in Alabama. The trial judge refused to charge the jury that recovery must be based on a showing of actual malice. The jury awarded respondent $500,000. On appeal, the Alabama Supreme Court affirmed.\textsuperscript{1} The United States Supreme Court reversed, holding, \textit{inter alia}, that a public official may not constitutionally recover damages for a false and defamatory statement about his public conduct unless he shows that the statement was motivated by actual malice. \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964).

The present decision is the first in which the Supreme Court has found in constitutional free speech guarantees a limitation on state civil libel law.\textsuperscript{2} State law generally recognizes a right to make public "fair comment" on

\textsuperscript{27} Although this is not the case in Bucks County, Pennsylvania, another means generally available to an impecunious spouse for obtaining an attorney is the Legal Aid Society. Legal Aid, generally unavailable in personal injury cases, because other attorneys can take them on a contingent-fee basis, is available to a spouse who cannot otherwise afford a lawyer. Brownell, \textit{Legal Aid in the United States} 72, 75 (1951).

In the District of Columbia, whenever a staff attorney of the Legal Aid Society is representing the husband or wife in any domestic relations litigation, it is his duty "to lend his best efforts to bring about a reconciliation, or to conciliate the differences between the parties." \textit{Should We Attempt Marriage Counseling?}, 22 Legal Aid Brief Case 206, 209 (1964). In some localities Legal Aid will only take a divorce case when there exists a "social need for divorce." Gardiner, \textit{What About Divorce?}, 14 Legal Aid Brief Case 63, 64 (1956).


\textsuperscript{2} In Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 342 (1942), \textit{affirming mem. by an equally divided court} 122 F.2d 288 (2d Cir. 1941), the lack of a Supreme Court opinion left open the question of the constitutionality of the court of appeals' holding, 122 F.2d at 290, that a false and defamatory statement about the political motivation of a Congressman was actionable. Howard v. Lyons, 360 U.S. 593 (1959), dealing with the absolute privilege of federal officials to publish defamatory statements in the course of their duties, did not turn on first amendment issues. Farmer's Educ. & Co-op. Union of America v. WDAY, Inc., 360 U.S. 525 (1959), concerned a question of the supremacy of a federal statute over state civil libel law. This exhausts the list of decisions in which the Supreme Court has heard an appeal from a civil libel action brought under state law.
CASE COMMENTS

matters of legitimate interest to the community. This right consists of an immunity for publication in good faith of otherwise actionable expressions of opinion based upon true or privileged statements of fact. The immunity is not defeated if conclusions are unreasonably deduced from their premises, but comments may not bear so little relevance to the stated facts as to imply the existence of unstated defamatory facts. Included among the matters to which the fair comment privilege applies are the conduct of public officials, the qualifications of candidates for public office, and the management of schools, charities, and business enterprises vital to the public welfare, as well as artistic, scientific, and athletic exhibitions intended for public consumption.

Until the present decision, American courts were divided on the question whether the immunity protecting fair comment on the conduct of public officials and the qualifications of candidates for public office should be supplemented by a qualified privilege to make false and defamatory statements of fact about them. A majority of jurisdictions refused to recognize such a privilege. Their refusal has been grounded on the belief that harm to the reputations of public men permitted by establishment of the qualified privilege rule outweighed the value to the community of the additional information about public affairs produced by the privilege. Many courts in majority jurisdictions have also echoed the fear of Judge (later Chief Justice) Taft that the privilege rule might permit damage to reputation great enough to deter worthy men from seeking public office. The minority jurisdictions, however, concluded that the interest of the community in free discussion of public issues requires a qualified privilege to publish false and defamatory statements of fact about public officials. It is such a rule which the Court's present opinion holds required by the Constitution.

3 1 Harper & James, Torts § 5.28 (1956); Prosser, Torts § 110, at 812-16 (3d ed. 1964); 3 Restatement, Torts §§ 606-07 (1938); Hallen, Fair Comment, 8 Texas L. Rev. 41 (1929).

4 3 Restatement, Torts § 606(1), comment c (1938).

5 Authorities cited note 3 supra.


8 Post Publishing Co. v. Hallam, supra note 7, at 540.

9 See, e.g., Coleman v. MacLennan, 78 Kan. 711, 730-40, 98 Pac. 281, 286-91 (1908). See also authorities cited note 6 supra.

10 Some minority jurisdiction cases say that a lack of due care on the defendant's part is sufficient to defeat the qualified privilege to make a defamatory misstatement about a public official. Lafferty v. Houlihan, 81 N.H. 67, 72-73, 121 Atl. 92, 95-96 (1923); Coleman v. MacLennan, 78 Kan. 711, 713, 743, 98 Pac. 281, 282, 292 (1908) (dictum); Jackson v. Pittsburgh Times, 152 Pa. 406, 416, 25 Atl. 613, 616-17 (1893) (dictum); Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 303-07, 27 S.E.2d 837, 843-44 (1943) (dictum). The instant case, however, holds that negligence does not defeat the constitutionally required privilege. Instant case at 288.

As the Lafferty and Jackson cases indicate, New Hampshire's and Pennsylvania's conditional privilege depends on the defendant's showing of reasonable
Any assessment of the implications of the present decision must derive in part from an examination of the argument used by the Court to arrive at the present holding. That argument is bottomed on the proposition that the first amendment was designed to protect and promote uninhibited debate on public issues. From the language used in its lengthy exposition of this proposition, it is clear that the Court's concern was not with the first amendment's protection of free speech generally. Rather the opinion focuses on an interest in "public discussion" and "free political discussion" about "government," "public questions," "public institutions," and "public characters," all for the purpose of "bringing about political and social changes desired by the people," and so "that government may be responsive to the will of the people." It is an interest thus described which the Court finds constitutionally protected despite the interest of public officials in their reputations.

Language of the present opinion is not the sole source of authority to which courts may turn for guidance in seeking to apply the present holding to future cases. Precedents in the jurisdictions that have established a proper motive. In Pennsylvania the defense also fails if the tone and format of the publication are not proper. O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 315-16, 51 A.2d 775, 778-79, cert. denied, 332 U.S. 766 (1947); Mulderig v. Wilkes-Barre Times, 215 Pa. 420, 64 Atl. 636 (1907). All these requirements put potential defendants in a significantly less advantageous position than the rule of the instant case and might well be held to be an unconstitutional inhibition of debate on public issues.

The posture of Pennsylvania's libel law has been further complicated by a statute, PA. STAT. ANN. tit. 12, § 1583 (1953), passed after the Jackson case:

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damage may be awarded as the jury shall deem proper.


In Missouri there is no qualified privilege for the publication of a defamatory misstatement of fact. But in an action based on an alleged defamatory statement about a public official, the court held recovery would be defeated unless the plaintiff proved falsity. Kleinschmidt v. Johnson, 183 S.W.2d 82, 84-85 (Mo. 1944). This is a shift from the normal requirement in libel actions that the defendant must carry the burden of proving truth. It is conceivable that the instant case might be read not to require a qualified privilege in a jurisdiction applying the rule of the Kleinschmidt case. See instant case at 279.

11 Id. at 269.
12 Id. at 269-76.
13 Id. at 270.
14 Id. at 269.
15 Id. at 274.
16 Id. at 279.
lished qualified privilege for substantially the same reasons advanced by the Court in the present opinion will be relevant in determining the statements to which the constitutional privilege applies. It is virtually certain that the immunity will include statements about politically appointed as well as elected officials and statements about legislators, judges, and officials charged with executive duties. Opinions in minority jurisdictions indicate that statements about officials, like a justice of the peace or a village clerk, whose exercise of power is restricted to very small communities, are also privileged, and nothing in the present opinion suggests that the size of the public concerned is relevant to the need for uninhibited debate.

It is almost equally certain that the constitutional requirement of privilege will be extended to protect nonmalicious falsehoods about candidates for public office. Indeed the present opinion's emphasis on the first amendment's protection of uninhibited debate as a means of bringing about constructive political and social change applies with special force when society is to choose new men to govern it. In all jurisdictions where a qualified privilege protects statements about public officers, the same protection extends to statements made about candidates for public office, and the present decision alludes to the "candidate" rule with apparent approval.

Less certain is whether the present opinion requires that a qualified privilege protect statements about every person employed by the government. In a strictly literal sense, the occupant of any government post is a public official, and minority jurisdictions have rarely questioned the assumption that the term "public official" or "public officer" comprehends any

17 Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1 (1921) (police chief appointed and removable by mayor).
22 The suggestion is made in dictum in Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964).
23 Instant case at 269-72.
24 Noel, supra note 6, at 898. On the basis of a comparison of Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 305, 27 S.E.2d 837, 844 (1943) (charge that public official misapplied state funds held qualifiedly privileged), with Sweeney v. Baker, 13 W. Va. 158, 183-84 (1878) (no qualified privilege for statements about candidate for office), Noel claims that West Virginia is an exception to the statement in the text. But, since his article was published, the decision in England v. Daily Gazette Publishing Co., 143 W. Va. 700, 711, 104 S.E.2d 306, 312-13 (1958) (qualified privilege held inapplicable to charge that state legislator sold his vote), has thrown doubt on whether the Bailey case actually signaled adoption of the minority rule with regard to public officials.
25 Instant case at 280-82.
government employee for purposes of the privilege rule.\textsuperscript{26} Statements about a policeman\textsuperscript{27} and an investigator in a district attorney's office\textsuperscript{28} have been said to be conditionally immune. Moreover, it is generally held that communications by a government employee are at least qualifiedly privileged,\textsuperscript{29} and the existence of privileges for such statements, according to the present opinion, is an important reason for establishing a corresponding immunity for citizens' statements about officials.\textsuperscript{30} This authority and reasoning may prove persuasive in future cases, but the rationale of the present opinion requires only that qualified privilege extend to a contribution to debate on "public issues" designed to bring about "political and social changes desired by the people." The Court's language, in other words, calls for application of the immunity only to statements about officials powerful\textsuperscript{31} enough to affect affairs which may properly be labeled "political" or "social." Thus the damage to the reputation of a minor government employee, which extension of qualified privilege might permit, is not justified by enhancement of that interest which the Court says the first amendment protects.

An extremely uncertain question is whether the qualified privilege rule will be extended to statements made about individuals or groups other than officials or candidates. With the exception of a few holdings in a few states,\textsuperscript{32} all the cases in minority jurisdictions have extended that privilege only to statements about officials and candidates.\textsuperscript{33} Moreover, the Court's own discussion of the privilege issue contains no direct reference to statements about persons neither officials nor candidates. But there is a strong

\textsuperscript{26} But cf. Browder v. Cook, 59 F. Supp. 225, 230-31 (N.D. Idaho 1944), suggesting that a newspaper article about a postmaster, whom the court assumed to be under civil service, should not be protected even by the fair comment immunity.

\textsuperscript{27} Lafferty v. Houlihan, 81 N.H. 67, 121 Atl. 92 (1923) (dictum).


\textsuperscript{29} 1 HARPER & JAMES, op. cit. supra note 3, § 5.23, at 429-30; FROSSER, op. cit. supra note 3, § 105, at 802-04; 3 Restatement, Torts § 591 (1938).

\textsuperscript{30} Instant case at 282.

\textsuperscript{31} Such power is indicated by authority to hire, discharge, and promote large numbers of personnel, to disburse large amounts of public funds, to make findings of fact on which valuable interests depend, or to direct the conduct of any considerable number of men employing force on behalf of the state.

\textsuperscript{32} See note 36 infra and accompanying text.

\textsuperscript{33} Jurisdictions which formerly held statements about officials and candidates not privileged refused a fortiori to establish conditional immunity to make public mis-statements about other persons. See, e.g., State Press Co. v. Willett, 219 Ark. 850, 245 S.W.2d 403 (1952) (minister who broadcast sermons on radio); Hubbard v. Allyn, 200 Mass. 166, 168-70, 86 N.E. 356, 358 (1908) (town baker); Marr v. Puinam, 156 Ore. 1, 34, 246 F.2d 509, 523-24 (1952) (radio repair service); Bell Publishing Co. v. Garrett Eng'r Co., 141 Tex. 51, 61-64, 170 S.W.2d 197, 204 (1943) (engineering firm under contract with municipality); FROSSER, op. cit. supra note 3, § 110, at 814 n.80. One court seems to have held to the contrary without stating any reasons for conferring the privilege. Powell v. Young, 151 Va. 985, 999, 1002-03, 144 S.E. 624, 628, 145 S.E. 731 (1928).
argument arising out of the present opinion for such extension to statements about certain individuals other than officials and candidates. The Court holds that the Constitution requires exposure of the reputations of public officials to public defamatory misstatements because orderly change in a democratic society depends on uninhibited debate on public issues. Implicit in this proposition is the idea that public officials, like the respondent city commissioner, are in such positions of power that they, far more than the average citizen, significantly influence community affairs. Modern inquiries into the functioning of American society indicate, however, that the process of contemporary social development is as much affected by political parties, large corporations, labor unions, and lobbying groups as it is by government. A corollary is that individuals who set the policies of such organizations possess as much ability to influence community concerns as do occupants of responsible government posts. It follows that an interest in public discussion protected by the first amendment requires a qualified privilege to make public defamatory misstatements about such nonofficial persons and about the organizations they lead just as much as it requires privilege for misstatements about officials and candidates.

Authority for this extension of the rule may be found in a few minority jurisdiction cases and in dictum in Coleman v. MacLennan, a leading case holding privileged statements about a candidate for public office:


35 Under existing libel law, publication of some false and defamatory statements about such nonofficial individuals may be conditionally immune because of the privilege to make a fair report. This privilege attaches to the accurate reproduction of statements, or of the substance of statements, made at a proceeding, official or unofficial, in which the public has a legitimate interest. E.g., Barrows v. Bell, 73 Mass. 301, 309-16 (1856); Harper & James, op. cit. supra note 3, § 5.24, at 431-32.


Bearce v. Bass, supra, has, however, been seriously questioned by Pattangall v. Mooers, 113 Me. 412, 418-19, 94 Atl. 561, 564 (1915). In Charles Parker Co. v. Silver City Crystal Co., supra, the Connecticut Supreme Court of Errors cited five cases in support of its holding. Of these, two cases, Flanagan v. Nicholson Publishing Co., 137 La. 588, 599, 68 So. 964, 968 (1915), and South Hetton Coal Co. v. Northeastern News Ass'n [1894] 1 Q.B. 133, 145, dealt with fair comment. Tilles v. Pulitzer Publishing Co., 241 Mo. 609, 635, 145 S.W. 1143, 1152-54 (1912), concerned the totally distinct qualified privilege to make public a fair report of a governmental publication already privileged by virtue of the source which issued it. The other two cases cited were Bearce v. Bass, supra, and Crane v. Waters, supra.

37 78 Kan. 711, 98 Pac. 281 (1908). The instant case cites Coleman with approval and at length. Instant case at 280-82.
[I]t must be borne in mind that the correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government—municipal, state and national; to the management of all public institutions—educational, charitable and penal; to the conduct of all corporate enterprises affected with a public interest—transportation, banking, insurance, and to innumerable other subjects involving the public welfare.38

One minority jurisdiction opinion, however, has gone beyond this view and held privileged a statement made about the manager of a heavyweight boxing champion on the basis of its interest to the public.39 The present decision, however, does not contain language from which the constitutional requirement of qualified privilege may be inferred to extend to publications about such persons as sports figures,40 entertainers, artists, and writers. The common acceptation of the key terms "public men," "public institutions," and "public issues," by which the Court describes the constitutionally-protected interest which the qualified privilege promotes, limits the constitutional requirement of that rule to statements made about political and economic activities which materially affect the public welfare.

CONSTITUTIONAL LAW—TRANSFUSIONS ORDERED FOR DYING WOMAN OVER RELIGIOUS OBJECTIONS

Respondent, a Jehovah's Witness and mother of a seven-month-old child, willingly entered the hospital suffering from severe internal hemorrhaging. Believing that only immediate blood transfusions could save her life, the hospital officials sought court authorization to administer them over the religious objections of respondent and her husband.1 After the applica—

38 78 Kan. at 734-35, 98 Pac. at 289.
40 Dempsey v. Time, Inc., 43 Misc. 2d 219, 252 N.Y.S.2d 186, 188 (Sup. Ct. 1964) (qualified privilege not required by instant case to extend to statements that a heavyweight title fighter had plaster of paris in his gloves in a championship bout forty-five years ago); cf. Spahn v. Julian Messner, Inc., 250 N.Y.S.2d 529, 534-35 (Sup. Ct. 1964). Prior to the instant case doubt as to the proper doctrine was expressed in Cepeda v. Cowles Magazines & Broadcasting, Inc., 328 F.2d 869, 872-73 (9th Cir.), cert. denied, 33 U.S.L. WEEK 3129 (U.S. Oct. 12, 1964) (statement that major league baseball player failed to get along with teammates). The Cepeda case was decided under California law, which extended the qualified privilege to statements about public officials and candidates. See note 17 supra.

1 Jehovah's Witnesses interpret portions of the Old Testament as forbidding them to eat or introduce into their bodies any human or animal blood. See WATCH TOWER BIBLE & TRACT SOCIETY, BLOOD, MEDICINE AND THE LAW OF GOD (1961); HOW, RELIGION, MEDICINE AND LAW, 3 CAN. B.J. 365 (1960). It might be that
tion was denied by the federal district court, it was presented to a judge on the court of appeals, who held an informal hearing at the hospital. Although respondent's only statement was "against my will," and her husband refused to give permission, the hospital was quickly granted authority to administer transfusions "necessary to save her life." Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000, rehearing denied per curiam, 331 F.2d 1010 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964).

Owing to the consensual nature of the doctor-patient relationship, any treatment, even if beneficial, has been found to be a battery if administered respondent and her husband were amenable to the transfusions so long as they were authorized by court order and not by their consent. See instant case at 1007. But see Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964); Erickson v. Dilgard, No. 11974/62, Sup. Ct. Nassau County, N.Y., Oct. 1, 1962.

2 Instant case at 1007.

3 A detailed discussion of the procedural aspects of the case is beyond the scope of this comment. However, some of the problems should be noted.

The emergency nature of the situation afforded the judge little time to consider procedural bases for his action. His opinion was not filed until almost five months after the order was granted.

In order to justify granting the order at the appellate level, the judge viewed the application to the district court as a complaint under Fed. R. Civ. P. 8(a) and (f), which allow pleadings irregular in form provided they perform the complaint's function and give grounds for jurisdiction and relief. Its denial was considered a determination on the merits. Acting without the statutory requirement of a quorum, see 28 U.S.C. §§ 46(b)-(d) (1958), the judge based his authority on the All Writs Act of the Judiciary Code, 28 U.S.C. § 1651 (1958), which gives federal judges the power to grant "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of the law," and justified it on the theory of maintaining the status quo in order to preserve the court's jurisdiction. However, it is difficult to see how granting the order preserved the status quo. The implementation of the order was precisely the relief sought on the merits, and the circumstances seem to have been such as to moot the question immediately upon its implementation. Probably recognizing the finality of such an order, the judge then discussed at length the merits of the situation, despite the fact that the order ostensibly went only to the preserving of jurisdiction.

The requisite case and controversy were found in the hospital's risk of civil and criminal liability by withholding the transfusions. But it would appear that obtaining a waiver from the respondent would have released the hospital from civil liability by terminating or limiting the parties' contract. See, e.g., Dashell v. Griffith, 84 Md. 363, 35 Atl. 1094 (1896); Ricks v. Budge, 91 Utah 307, 64 P.2d 208 (1937). As to criminal liability of the doctor, the law is unclear. Courts have upheld manslaughter convictions where a legal duty of care existed. See Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962); State v. Hardister, 38 Ark. 605 (1882). But cf. State v. McFadden, 48 Wash. 259, 93 Pac. 414 (1908). However, it is generally stated that a doctor's obligation cannot go beyond the consent, express or implied, of the patient. See Dashell v. Griffith, supra; Ricks v. Budge, supra; note 4 infra and accompanying text. No cases seem to have dealt with the situation where a competent patient refused consent to treatment and death resulted. Regardless of whether the doctor would, in such a case, be criminally liable, it is questionable whether an action to avoid possible future criminal liability provides the requisite case or controversy. See Poe v. Ullman, 367 U.S. 497 (1961).

For a more thorough treatment of the procedural aspects of the case, see 77 Harv. L. Rev. 1539 (1964); 39 N.Y.U.L. Rev. 706 (1964).
without consent.4 “[U]nder a free government . . . the free citizen’s first and greatest right, which underlies all others [is] . . . the right to the inviolability of his person, in other words, his right to himself . . . .” 5 Because the decision is in the hands of the individual, medical authorities have no general right to force treatment upon him, even if known to be in his best interests.6

The present case presents a conflict between the humanitarian and moral interest in preserving life and the law’s evolving concern with the individual’s religious freedom. One manifestation of this evolution has been the tendency toward a broader interpretation of what is or is not a religion.7 There has been a corresponding increase in the courts’ willingness to allow activities as being within the free exercise of religion which might otherwise be proscribed under the police power.8 Unless it can be said that freedom of person and religion does not extend to the refusal of efforts to save one’s life,9 some “compelling interest”10 must be found on


6 Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905). The occasional exceptions to the requirement of consent involve emergency situations where obtaining consent is difficult or impossible and are decided on a theory of “implied consent.” See McGuire v. Rix, 118 Neb. 434, 225 N.W. 120 (1929); Sullivan v. Montgomery, 155 Misc. 448, 279 N.Y.S. 575 (1935). Such a theory could not apply here, as in the instant case, consent was specifically withheld.

7 See United States v. Ballard, 322 U.S. 78 (1944) (whether a belief is religious depends upon the sincerity with which it is held, not its reasonableness). Compare People v. Ruggles, 8 Johns. R. 290, 295, 5 Am. Dec. 335, 337 (N.Y. 1811): “[W]e are a [C]hristian people, and the morality of the country is deeply ingrained upon [C]hristianity, and not upon the doctrines of worship of those [e.g., Mohammedan] imposters,” (quoted with approval in Church of the Holy Trinity v. United States, 143 U.S. 457, 470-71 (1892)), with Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961) (Black Islam is a religion).

8 See Martin v. City of Struthers, 319 U.S. 141 (1943) (wartime bell-ringing statute designed to accommodate night defense workers held unconstitutional as applied to Jehovah’s Witnesses distributing literature); Jones v. Opelika, 319 U.S. 103 (1943), reversing 316 U.S. 584 (1942) (license tax upon sale of literature unconstitutional as applied to Jehovah’s Witnesses); Cantwell v. Connecticut, 310 U.S. 296 (1940) (offensive remarks about Christian beliefs protected as religious exercise); People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (Sup. Ct. 1964) (statute forbidding use of narcotic-like peyote unconstitutional as applied to religious ceremony); In re Jenison, 125 N.W.2d 588 (Minn. 1963), following remand of 375 U.S. 14 (per curiam), vacating 265 Minn. 96, 120 N.W.2d 515 (1963) (refusal to serve on jury under religious objection to judging others).

9 Cf. Reynolds v. United States, 98 U.S. 145 (1878) (federal statutory prohibition of polygamy constitutional). “[I]f a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?” Id. at 166 (dictum).


Clearly, such a compelling interest would exist where the actor’s conduct endangered others. See, e.g., “the snake cases”: Hill v. State, 38 Ala. App. 404, 88 So. 2d 880, cert. denied, 264 Ala. 697, 88 So. 2d 887 (1956); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948); Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947).
the part of the state to justify the court's interference with respondent's choice in the present case.

One such interest might be derived from the doctrine of *parens patriae*—the sovereign power of guardianship over minors and incompetents—which allows the court to intercede when parents or guardians are remiss in their duty of care. Most states faced with the question of whether medical treatment of a child can be given over the parents' religious objections have allowed it when the child's health and safety would otherwise be seriously endangered. A recent New Jersey decision has extended this power to include the administration of transfusions to a pregnant woman over her religious objections, where both her life and that of her child were in grave danger without them. The court held that the child's right to live, even before birth, was superior to the mother's right to bodily inviolability.

Although respondent was not pregnant, the court in the present case attempted to apply *parens patriae* on the ground that since a court can intercede when a mother neglects her child, it can also act to prevent the

---


The State of Washington appears to be an exception in holding that the state has no right to intercede when parents are acting against the child's best interests but in good faith. See In re Frank, 41 Wash. 2d 294, 248 P.2d 553 (1952); In re Hudson, 13 Wash. 2d 673, 123 P.2d 765 (1942). However, the Washington court seems to have been faced only with situations where the recommended treatment entailed a substantial risk, and it is not clear what would be done if such a risk were not present.

District of Columbia statute law might limit the power in cases involving religious beliefs. See note 37 infra and accompanying text.


14 It is possible that this case goes as far as the instant case itself, since transfusions were given to the mother after delivery. Letter from H. Frank Carpenter, Counsel for the Hospital, to the University of Pennsylvania Law Review, August 26, 1964, on file in Biddle Law Library, University of Pennsylvania. It is unclear whether the court intended that its order be carried so far:

We have no difficulty in so deciding with respect to the infant child. The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life. Here we think it is unnecessary to decide that question in broad terms because the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them... The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of her child, as the physician in charge at the time may determine.


15 See, e.g., Palmer v. State, 223 Md. 341, 164 A.2d 467 (1960); State v. Sandford, 99 Me. 441, 59 Atl. 597 (1905). See also note 11 supra.
consummate neglect, abdication of life. However, the refusal of respondent's husband to authorize the transfusion indicates that he acceded to her wishes even though they might result in leaving the child motherless. It would not seem that one parent should be found guilty of child abandonment in a situation where the other parent has agreed to her leaving and, presumably, to provide for the child alone.

The second branch of parens patriae, the protection of incompetents, would be applicable if, as the court intimates, respondent was non compos mentis at the time. But in light of the first amendment protection of religious exercises, courts should use particular care in making such a determination of fact. That an individual's choice is seemingly inconsistent with the general mores of society should not, in itself, afford a basis for a finding of non compos mentis. However, there is little more in the record of the present case to support a finding that respondent was, in fact, incompetent.

Even assuming that respondent was non compos mentis, a question may be raised concerning the weight to be given the opinions held by her before becoming incompetent. Normally, such opinions should be honored. See In re Church, 141 F. Supp. 703 (D.D.C. 1956) (bonds bought by woman when competent with the intention of saving them for her son cannot be sold by conservators after she becomes incompetent). However, the gravity of the decision to be made in the instant case would probably support an exception to this general rule in light of the fact that competent people will frequently change their opinions on familiar matters when the consequences become immediate and fatal. See the discussion of "fear-rousing appeals" in Hovland, Janis & Kelly, Communication and Persuasion: Psychological Studies of Opinion Change 56 (1953).

The same logic would seem to prevent respondent's husband, as guardian, from acting in defense of her wishes. His own beliefs would carry no more weight than those of a parent refusing medical care for his child, since the state's powers are identical in the two cases. See Kutzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (Dist. Ct. App. 1950); State ex rel. Janney v. Housekeeper, 70 Md. 162, 16 Atl. 382 (1889); In re Hilton's Estate, 72 Wyo. 389, 418, 265 F.2d 747, 759 (1954).

It is unclear whether the religious beliefs of respondent's husband would provide a defense in a manslaughter prosecution based on his failure to provide care for an incompetent wife. See Craig v. State, 220 Md. 590, 155 A.2d 684 (1959) (dictum) (religion no defense). Compare State v. Sandford, 99 Me. 441, 59 Atl. 597 (1905), with State v. Chenowith, 163 Ind. 94, 71 N.E. 197 (1904). The provisions of D.C. CODE ANN. 6-119i (1961) might excuse the husband, as guardian, from such liability in the District of Columbia. Absent religious considerations, however, it is clear that such action could result in criminal liability. See Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962).

In considering the fact that respondent had told him the transfusions were against her will, the judge stated: "I was reluctant to press her because of the seriousness of her condition and because I felt that to suggest repeatedly the imminence of death without blood might place a strain on her religious convictions." Instant case at 1007. This would indicate some capacity for understanding and decision on the part of respondent. The court's most categorical opinion on the matter is that, "Mrs. Jones was in extremis and hardly compos mentis at the time in question . . . ." Id. at 1008.
The court also justifies its action by inferring that an act such as respondent's might be viewed as suicide and declaring the state's right to prevent it.\textsuperscript{22} \textit{Erickson v. Dilgard} \textsuperscript{23} is apparently the only case involving a factual situation identical to that of the present case. There the court answered the hospital's contention that the patient's refusal was suicide by saying:

[T]here is always the question of judgment involved as to whether or not the medical decision is correct and . . . it seems to me that the individual who is the subject of that decision has the final say . . . in a system which gives the greatest possible protection to the individual in furtherance of his own desires.\textsuperscript{24}

Even if respondent's act should be viewed as attempted suicide, there remains the question of the court's right to prevent it. If suicide is a crime, it can be prevented in the normal exercise of the police power. However, as the court in the present case recognized, "whether attempted suicide is a crime is in doubt in some jurisdictions, including the District of Columbia." \textsuperscript{25} Few American jurisdictions have actually held it criminal.\textsuperscript{26} Others have either declared suicide noncriminal,\textsuperscript{27} or have avoided answering the question of its criminality.\textsuperscript{28}

\textsuperscript{22} \textit{Id.} at 1008.

\textsuperscript{23} No. 11974/62, Sup. Ct. Nassau County, N.Y., Oct. 1, 1962. The patient in that case was suffering from upper gastrointestinal bleeding. After explaining to him that without transfusions he "would die from loss of blood," and still being refused permission, the hospital sought court authorization to administer them. There was no question of the patient's competency, but death seemed certain without transfusions.

\textsuperscript{24} Record, p. 17, No. 11974/62, Sup. Ct. Nassau County, N.Y., Oct. 1, 1962. The idea that medical treatment can be forced on a person on the ground of preventing suicide has been called "absurd." \textit{Williams, Criminal Law—The General Part} 733 n.7 (2d ed. 1961).

A second argument against viewing respondent's wishes, carried to fruition, as suicide is that self-destruction, done for altruistic or noble purposes, cannot be called suicide. Appealing though this argument may be, the better view seems to be that: "For legal purposes, however, it is better to class such an act as suicide, while admitting the fullest moral—and perhaps legal—justification for it. It would throw legal terminology into confusion to assert that an act done from a good motive is not done intentionally." \textit{Williams, op. cit. supra} at 36. (Emphasis added.)

\textsuperscript{25} Instant case at 1009.


\textsuperscript{28} See, e.g., Rudolph v. United States \textit{ex rel.} Stuart, 36 App. D.C. 379 (D.C. Sup. Ct. 1911); Royal Circle v. Achterrath, 204 Ill. 549, 68 N.E. 492 (1903); Sampson v. Ladies of Maccabees, 89 Neb. 64, 131 N.W. 1022 (1911); Ray v. Leader Fed. Sav. & Loan Ass'n, 40 Texm. App. 623, 292 S.W.2d 458 (1955); cf.
Arguably, there exists a theory that suicide, while not criminal, is a "grave public wrong." But even assuming that this vague theory justifies the prevention of suicide, the interest of the hospital as simply one member of society, and thus one recipient of this general "wrong," does not seem significant enough to give it standing to litigate. Furthermore, a theory that the hospital, in its medical capacity, assumes a more significant relationship to society and the individual in cases involving medical procedures would not seem to affect this lack of standing.

In some states statutes make concessions to the personal and religious freedom of the individual in medical matters. The District of Columbia Code grants the Commissioners of the District authority to require the

Silving, Suicide and Law, in Shenidman & Farberow, Clues to Suicide 79, 91 (1957): "As shown by the fact that attempted suicide is a crime in only very few states and that even in these states prosecution is rarely instituted, moral censure of suicide today is not prevalent."

Several writers have taken the position that there is no societal right to interfere with a competent individual's election to commit suicide. See, e.g., Dublin, Suicide: A Sociological and Statistical Study 149 (1963); Fedden, Suicide 283 (1958); Williams, The Sanctity of Life and the Criminal Law 293 (1957).

The sole reported decision dealing with suicide in the District of Columbia is one discussing decedent's heirs' standing to collect his police death benefits upon his suicide. The opinion views suicide as a wrongful act, disqualifying the heirs from collecting, but does not label it a crime. Rudolph v. United States ex rel. Stuart, supra.


Noncriminal suicide could be prevented on the grounds that the individual is creating a public disturbance—dubious in the instant case—or is incompetent. See Williams, The Sanctity of Life and the Criminal Law 290 (1957). To presume incompetency, however, would be improper, since many statistical studies indicate that most individuals who commit suicide are not incompetent. See East, Medical Aspects of Crime 167-68, 187 (1936); Cart, Suicide, in American Board of Legal Medicine, Inc., Collected Papers 1956-1959, at 197 (1960). Indeed, the legal presumption in cases involving suicide seems to be that the individual is legally sane. See Stiles v. Clifton Springs Sanitarium Co., supra; Royal Circle v. Achtenthal, 204 Ill. 549, 68 N.E. 492 (1903). Of course, suicides are probably prevented by the police even when attempted by sane persons in a manner not tending to cause a public disturbance, but it seems that the question of the right to interfere has never been litigated. Cf. Calvert, The Constable's Pocket Guide to Powers of Arrest and Charges 3 (1962).

Noncriminal suicide could be prevented on the grounds that the individual is creating a public disturbance—dubious in the instant case—or is incompetent. See Williams, The Sanctity of Life and the Criminal Law 290 (1957). To presume incompetency, however, would be improper, since many statistical studies indicate that most individuals who commit suicide are not incompetent. See East, Medical Aspects of Crime 167-68, 187 (1936); Cart, Suicide, in American Board of Legal Medicine, Inc., Collected Papers 1956-1959, at 197 (1960). Indeed, the legal presumption in cases involving suicide seems to be that the individual is legally sane. See Stiles v. Clifton Springs Sanitarium Co., supra; Royal Circle v. Achtenthal, 204 Ill. 549, 68 N.E. 492 (1903). Of course, suicides are probably prevented by the police even when attempted by sane persons in a manner not tending to cause a public disturbance, but it seems that the question of the right to interfere has never been litigated. Cf. Calvert, The Constable's Pocket Guide to Powers of Arrest and Charges 3 (1962).

Compare Massachusetts v. Mellon, 262 U.S. 447 (1923) (individual taxpayer has no standing to challenge government spending from general resources).

Compare Tileston v. Ullman, 318 U.S. 44 (1943) (medical profession gives doctor no special standing to sue as guardian of women's lives in attempt to overturn statute prohibiting promulgation of birth control information).

reporting of certain malignant diseases, but adds the caveat that nothing in that section shall empower them to compel any person suffering from such diseases to submit to examination or treatment. Although the Code grants broader powers to the Commissioners with regard to communicable diseases and establishes jurisdiction in the courts both to make specific orders for the treatment or quarantine of infected persons and to punish those who refuse such treatment, these powers are qualified:

With respect to all persons who, either on behalf of themselves or their minor children or wards, rely in good faith upon spiritual means or prayer in the free exercise of religion to prevent or cure disease, nothing in [these sections] shall have the effect of requiring or giving the health officer or other person the right to compel any such person, minor child or ward, to go to or be confined in a hospital or other medical institution unless no other place for quarantine of such person, minor child or ward can be secured, nor to compel any such person, minor child or ward to submit to any medical treatment.

Thus, even in the one area where Congress has granted power to compel submission to medical treatment, it has withheld this power from both courts and Commissioners where it conflicts with religious freedom. At least an equal degree of respect should attach to the wishes of an individual with a noncommunicable disease.

INCOME TAX—DUBERSTEIN APPLIED TO APPELLATE REVIEW OF EDUCATIONAL EXPENSE DEDUCTIONS UNDER SECTION 162(a)

James Condit, an office manager and accountant, and Martin Welsh, an internal revenue agent, each sought to deduct the cost of his night law


Although the statute was probably directed toward protecting the faith-healing practices of groups such as the Christian Scientists, blood abstinence seems no less the “exercise of religion” than does faith healing. To refuse its application in the instant case would be to forbid practices of the Jehovah’s Witness faith while tolerating identical practices by Christian Scientists, thus discriminating against the former.

38 In the section applying to communicable diseases, Congress felt the necessity of specifically granting the courts power to compel treatment. See D.C. Code Ann. § 6-119h (1961). However, there is no such grant made with regard to noncommunicable diseases, and, in fact, the section seems to deny such power. See D.C. Code Ann. § 6-1303 (1961). An intent to withhold the power in the latter case seems reasonable since communicable diseases create a danger to other members of society not present in noncommunicable ailments.
school education under section 162(a) of the Internal Revenue Code of 1954, which allows "as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ." The Commissioner disallowed the deductions in each case. Welsh paid his additional assessment and brought suit for refund in the United States district court, which decided in his favor, while Condit took his case to the Tax Court, where the Commissioner's position was sustained. In neither case was there any substantial dispute as to the basic facts. Each court based its decision on its interpretation of Treasury Regulation 1.162-5, which declares educational expenses deductible as "ordinary and necessary" expenses under section 162(a) if undertaken primarily for the purpose of: (1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or (2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status or employment.

The Court of Appeals for the Sixth Circuit, in separate per curiam opinions, affirmed both on the same day, citing Commissioner v. Duberstein for the proposition that a trial court's conclusion as to the "primary purpose" of the taxpayer is a finding of fact and, as such, is binding on the appellate court unless clearly erroneous. Welsh v. United States, 329 F.2d 145 (6th Cir. 1964); Condit v. Commissioner, 329 F.2d 153 (6th Cir. 1964).

The Duberstein case held that the question of whether a payment is to be excluded from the gross income of the recipient as a gift, under the 1939 Code equivalent of present section 102(a), depends on the "intent of the payor" and that this is a question of fact to be decided by the trier of fact based on that tribunal's "experience with the mainsprings of human con-

---

5 INT. REV. CODE OF 1939, § 22(b) (3), 53 Stat. 10 [hereinafter all sections cited refer to INT. REV. CODE OF 1954 unless otherwise indicated]: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."
duct." The majority said that no more detailed standard could be laid down as a matter of law. Mr. Justice Frankfurter disagreed: "I do think that greater explicitness is possible in isolating and emphasizing factors which militate against a gift in particular situations." He further stated: "What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences." The situation presented by the Welsh and Condit cases would seem to bear out this observation.

Welsh was the first case in which the cost of obtaining a law school education was held deductible as an ordinary and necessary business expense. The district court did not find that the education was required of the taxpayer or that it was customary in his line of work, but rested its decision solely on its finding that it was the subjective intent of the taxpayer to maintain his position rather than to enter a new profession. Objective facts were considered only in relation to the basic question of subjective intent.

The propositions that intent is a question of fact and that a finding

---

7 Id. at 291 (citing Fed. R. Civ. P. 52(a)).
8 Id. at 289.
9 Id. at 295 (concurring in part and dissenting in part).
10 Id. at 297.
11 See 2 CCH 1964 STAND. FED. TAX REP. ¶ 1360; Shaw, Education as an Ordinary and Necessary Expense in Carrying on a Trade or Business, 19 TAX L. REV. 1, 18-19 (1963); 11 LOYOLA L. REV. 307 (1963); 17 U. MIAMI L. REV. 424 (1963); 13 U.S. TAX WEEK 483 (1964). Since Welsh, law school education expenses have been held deductible in Fortney v. Campbell, 64-1 U.S. Tax Cas. ¶ 9489 (N.D. Tex. 1964) (IRS examiner); Walter T. Charlton, 23 CCH Tax Ct. Mem. 420 (1964) (CPA); Richard M. Baum, 23 CCH Tax Ct. Mem. 206 (1964) (insurance claims adjuster); William J. Brennan, 22 CCH Tax Ct. Mem. 1222 (1963) (IRS examiner); Donald P. Frazee, 22 CCH Tax Ct. Mem. 1086 (1963) (civilian Air Force employee). Unlike Welsh, none of these decisions is expressly based on the taxpayer's subjective intent. Paradoxically, when their cases were tried, Condit was still employed in his pre-law-school capacity while Welsh was a practicing attorney.
13 "The first sentence of paragraph (b) supra [of Treas. Reg. § 1.162-5] introduces the element of subjective intent into the question of whether the expenses are deductible or not, and this was the basis on which the case was tried." Id. at 599. The first sentence of paragraph (b) reads:
Expenditures made by a taxpayer for his education are not deductible if they are for education undertaken primarily for the purpose of obtaining a new position or substantial advancement in position, or primarily for the purpose of fulfilling the general educational aspirations or other personal purposes of the taxpayer.
Id. at 598.
of fact is not to be upset on appeal unless clearly erroneous are not open to dispute. However, it is not clear that the appellate court was correct in allowing the equation of primary purpose with subjective intent so as to preclude any meaningful review. Although the plain meaning of the words "primary purpose" might indicate a directive to focus judicial inquiry into an examination of subjective intentions, such an interpretation would be inconsistent with the accepted approach to the statutory standard of what is "ordinary and necessary" in carrying on one's trade or business.

The determination of what is "ordinary and necessary" under section 162(a) presents different problems from the determination of a "gift" under section 102(a). The word "gift" is not a technical term, but is to be construed in its colloquial sense, based on a factual inquiry into the state of mind of the payor. Not so with ordinary and necessary. This phrase carries a gloss of administrative and judicial interpretation to the effect that the conclusion as to what is "ordinary and necessary" must be reached by a broad yet objective inquiry. An expense is generally considered "necessary" if "appropriate and helpful." Although the determination of what is "ordinary" has given rise to considerable dispute, the various suggested criteria pertain to the nature of the expenditure and its relationship to the customary conduct of the taxpayer's trade or business, not to the state of mind of the taxpayer. All the criteria may be said to rest, at least in part, on an underlying implication that whether an expenditure is "ordinary and necessary" will depend upon a determination as to whether a hard-headed businessman would have incurred it under like circumstances.

between questions of law and questions of fact is one well-established in the law, and one with which lawyers and judges have long been familiar," with Professor Brown's statement, Brown, supra at 900: "[W]e rather suspect that this seemingly rigid dichotomy of law and fact is only a bit of legalistic mummery designed to conceal from the uninitiated the fact that the courts decide these questions about as they wish."  

15 Fed. R. Civ. P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (cited in Duberstein).


17 Mr. Justice Cardozo wrote for the Court in Welch v. Helvering, 290 U.S. 111, 115 (1933): "The standard set up by the statute [now § 162(a)] is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." Although this language is similar to that in Duberstein, see text accompanying note 6 supra, the Court in Welch went on to decide the issue as a matter of law, rather than refer it back to the trier of fact.

18 Cf. Welch v. Helvering, supra note 17, at 113.

19 "It is the kind of transaction out of which the obligation arose and its normalcy in the particular business which are crucial and controlling." Deputy v. du Pont, 308 U.S. 488, 496 (1940); see 4 Mertens, Federal Income Taxation § 25.09 (Zimet & Diamond rev. 1960). If, as Professor Wolfman suggests, "ordinary" is only intended to distinguish current from capital expenditures, the inquiry remains equally objective. See Wolfman, Professors and the "Ordinary and Necessary" Business Expense, 112 U. Pa. L. Rev. 1089, 1111-12 (1964).
That person is the so-called average hard-headed businessman and not necessarily the taxpayer himself.\textsuperscript{20}

The use of “primary purpose” in the regulation is unfortunate because of its susceptibility to interpretation in the \textit{Welsh} manner, making the determination of “ordinary and necessary” rest on the subjective intent of the taxpayer.\textsuperscript{21}

Furthermore, intent is a more workable standard in the \textit{Duberstein} area of gift exclusion where, in the typical case, the intent of the payor, a third party, is evidenced by several more or less objective criteria.\textsuperscript{22} As the \textit{Duberstein} Court observed: “[T]he donor’s characterization of his action is not determinative—...there must be an objective inquiry as to whether what is called a gift amounts to it in reality.”\textsuperscript{23} However, if the issue is to be the intent of the taxpayer himself in a unilateral undertaking, the inquiry seems likely to dissolve into a more or less irrational choice between conflicting bald assertions of intent, each case turning on the trial court’s view of the taxpayer’s credibility. If the expenditure is for education not reasonably adapted to the maintenance or improvement of skills required by the taxpayer in his business or to meeting the requirements of his employer, the deduction should be disallowed regardless of the taxpayer’s state of mind.

Although the \textit{Welsh} and \textit{Condit} cases are, of course, not identical in every respect, it would not be unreasonable to conclude that the same court would not have decided one case for the taxpayer and the other for the Government. In fact the Tax Court, in an opinion filed the same day as


\textsuperscript{21} In \textit{Rudolph v. United States}, 370 U.S. 269 (1962) (per curiam), the Court applied the \textit{Duberstein} approach to a question of “primary purpose” under § 162(a). An insurance agent had been given an all-expense-paid trip to a convention. The district court had held that since pleasure was the primary purpose of the company in offering the trip and of the taxpayer in taking it, the value was income to the taxpayer, and the expenses were not deductible. 189 F. Supp. 2 (N.D. Tex. 1960). The court of appeals affirmed, 291 F.2d 841 (5th Cir. 1961). The Supreme Court, in a per curiam opinion joined in by only four justices, dismissed certiorari as improvidently granted, stating that “primary purpose” was a finding of fact that must stand unless clearly erroneous. This case, like \textit{Duberstein}, involved the intent of a third party, which can be assessed by relatively objective criteria. Earlier, in \textit{Patterson v. Thomas}, 289 F.2d 108 (5th Cir.), \textit{cert. denied}, 368 U.S. 837 (1961), the court reversed the district court’s finding that the primary purpose of the taxpayer was to conduct business on his trip, expressly considering the following criteria: the time spent on personal as opposed to business activities, the fact that all participants were co-employees, the fact that the convention was held at a resort hotel, and the expressed attitude of the taxpayer’s employer. \textit{Id.} at 113-14.

\textsuperscript{22} \textit{E.g.}, the existence of a moral or legal obligation, how the payor treated the item on his own return, the prospects of economic benefit to the payor, the existence of an established practice of making similar payments, and, in the case of payments to widows of corporation officers, the minutes or resolution of the directors meeting at which the payment was approved. Control over these criteria was exercised in \textit{Estate of Kuntz v. Commissioner}, 300 F.2d 849 (6th Cir.), \textit{cert. denied}, 371 U.S. 903 (1962), where the court reversed the tax court for relying solely on the resolution of the directors in a payments-to-widow situation.

Condit was upheld by the same judge, upheld the disallowance of a deduction for law school expenses by a revenue agent under circumstances strikingly similar to Welsh. If the only difference between the cases is that Welsh was able to convince the court that in securing the education he was acted upon by the proper motives, whereas Condit was not so fortunate, it would seem that a taxpayer in a similar situation would do well to pay his additional assessment and sue in the district court for a refund. This impetus to “forum shopping” discriminates against the taxpayer who is unable to pay an assessment and is thus deprived of the choice of a forum which, as evidenced by the present cases, may seem more sympathetic to his cause. Furthermore, even if some courts tend to treat taxpayers more favorably, the subjectivity of the standard makes it likely that some litigants whose situations are identical will be taxed differently even in the same court. Although the possibility of deduction as a reward to the successful litigant may seem more sporting, the practical workability and equitable application of the tax law demand a higher degree of uniformity. Therefore, the uncritical extension of Duberstein’s restriction of review to areas not analytically akin to Duberstein should be avoided.

The Treasury has declared in Revenue Ruling 60-97: “In order to satisfy any of these tests [under Treas. Reg. § 1.162-5] . . . it is not enough to assert or deny the purpose of the taxpayer in general terms. Rather, it is necessary that the taxpayer show his purpose through specific facts.” The applicable regulation, together with this revenue ruling, provides a number of categories of intermediate findings into which inquiry could be canalized in order to set some guide for the resolution of future controversies and provide some more adequate basis of review than mere acceptance of the trial court’s conclusion on the ultimate factual-legal question as a Duberstein-type finding of fact. For example: (a) What skills are appropriate and helpful in the taxpayer’s present position? (b) What are the requirements of the employer or of applicable law or regulations? (c) Are these requirements imposed for a bona fide business purpose?

---


25 Congress sought to eliminate this discrimination when it amended § 1441(a) of the 1939 Code, 53 Stat. 164 (now Int. Rev. Code of 1954, § 7482(a)), in 1948 to make Tax Court decisions reviewable in the same manner and to the same extent as nonjury district court decisions. 93 Cong. Rec. A3279 (1947) (extension of remarks of Representative Hobbs).

26 1960-1 Cum. Bull. 69, 70. Example 10 of Rev. Rul. 60-97 is strikingly similar to the facts of Condit and Welsh:

A trust officer in a bank undertakes to study law. The knowledge of the law will be helpful in discharging his duties. His employer does not require him to engage in such studies. He registers for the entire regular curriculum leading to the bachelor of laws degree. Since the taxpayer is pursuing a complete course of education in law which will lead toward qualifying him in that field, in which he has not previously qualified, his expenses for such education are considered to have been incurred for the purpose of qualifying in that new field and are, therefore, not deductible.

Id. at 78.

(d) Did the taxpayer have knowledge of these requirements before assuming his position?  (e) What is the customary practice of other members of the profession?  

(f) Has the taxpayer met the minimum requirements for qualification in his intended profession?  (g) Does the education meet the express requirements of a new profession, or of a new specialty or position?  

The facts of Condit and Welsh, if subjective intent were eliminated as a factor, would indicate identical answers to these intermediate questions. A court should make some more significant stride in the direction of isolating and emphasizing those factors that militate for or against deductibility, rather than write off this inconsistency as a necessary concomitant of the license given the trier of fact under Duberstein.  

TRADE REGULATION—FEDERAL TRADE COMMISSION PRESCRIBES HEALTH WARNINGS FOR CIGARETTE ADVERTISING  

In response to the report of the Advisory Committee to the Surgeon General that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action," the Federal Trade Commission issued the Cigarette Advertising Trade Regulation...
Rule. The rule directed the entire industry to include a warning in all its advertisements and labels that cigarette smoking is dangerous to health and may cause death from cancer and other diseases. Failure to display such a statement, clearly and conspicuously, is designated “misleading advertisement,” an “unfair and deceptive practice or act” under section 5 of the Federal Trade Commission Act. Trade Regulation Rule for Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking, 29 Fed. Reg. 5477 (1964).

The Commission claims a clear mandate to issue the present order in the exercise of the power granted it by the Federal Trade Commission.

Commissioner MacIntyre dissented, saying that the industry should be given a chance to police itself. Trade Reg. Rep. ¶ 50238 (June 29, 1964). MacIntyre argued that the industry had not been given adequate time to comply voluntarily with the provisional set of rules issued by the Commission on January 22, 1964, 29 Fed. Reg. 530-32 (Jan. 22, 1964), pointing to the fact that the industry had established a privately-enforced Cigarette Advertising Code. The present rule is a use of a new regulatory procedure, the industry-wide trade regulation rule. Procedures and Rules of Practice for the Federal Trade Commission, 16 C.F.R. § 1.63 (Supp. 1963). Not yet resolved with regard to the new procedure are such questions as reviewability, right to challenge the propriety of the rule in later litigation, and the authority to promulgate the rules. Commission discussion of the legal effects of the rule has not been clear. Compare FTC, Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule 129 (1964) [hereinafter cited as Statement of Purpose], with id. at 145. By advocating a clearly advisory ruling rather than the questionably binding one issued, MacIntyre's dissent focuses attention on the problems of the present procedure. This comment will not deal with these issues.

The provisional rules which triggered the industry response provided as follows:

Rule 1: a specifically worded caution to be included in all future advertisements.

Rule 2: an order to eliminate all statements or implications that smoking is good for the health, not a health hazard, or that one brand of cigarettes is less dangerous than another. Rule 3: a ban on the tar and nicotine derby (a term which has come to mean the competition among companies to advertise that one has less tar and nicotine than another). See 29 Fed. Reg. 530-32 (Jan. 22, 1964). Proposed rule 3 was dropped because the Commission felt that the private industry code set up in September 1955 to ban the tar and nicotine derby had been sufficiently effective. Rule 2 was discarded in favor of rule 1, which was adopted in modified form.

Realizing the complex practical problems involved in adding insertions to all advertising and labeling, the Commission put the effective date of the order at July 1, 1965, for advertising and January 1, 1965, for labeling. Complaints or exemption hearings on the advertising order could be had until May 1, 1965. See 29 Fed. Reg. 8324 (July 2, 1964); Trade Reg. Rep. ¶ 7939 (Sept. 15, 1964). At the behest of Representative Oren Harris, chairman of the House Interstate and Foreign Commerce Committee, the Commission decided to delay the effective date of the labeling order to permit time for congressional investigation and/or action. N.Y. Times, Aug. 22, 1964, p. 19, col. 1. Many Congressmen have questioned the Commission's authority to act and have introduced bills in Congress to specifically empower the Commission to act as it has already acted. E.g., H.R. 3610, 4168, 5973, 7476, 9512, 9655, 9657, 9668, 9693, 9808, 11671, 11714, 89th Cong., 2d Sess. (1964). The New York Times and The Wall Street Journal speculated that, although the Commission did not explicitly so state, it agreed to the delay because it too questions its authority. N.Y. Times. Aug. 22, 1964, p. 19, col. 1; Wall Street Journal, Aug. 24, 1964, p. 1, col. 3. In addition Dr. Luther Terry, Surgeon General of the United States, has suggested that in the opinion of his Advisory Committee, the FTC Act should be amended to give the Commission power to take the remedial action advocated by his report. Trade Reg. Rep. ¶ 55238 (June 29, 1964).

CASE COMMENTS

Act 5 over trade practices, a term which by judicial definition encompasses advertising. 7 But both the words and the history of the statute belie the Commission's contention. Under section 5(a) (6) the Commission is empowered "to prevent persons, partnerships, or corporations . . . from using . . . deceptive acts or practices in commerce." 8 After an adjudicatory hearing, if a practice or act which the Commission has "reason to believe [an advertiser] . . . has been or is using" is found deceptive, the Commission may order the offender to "cease and desist." 9

In enforcing this provision the Commission often orders deletion of a false phrase 10 or elimination of a "false implication or overtone." 11 Less commonly, it directs excision of an entire advertisement or trademark, or an affirmative insertion, as in the present case. 12 But, however exercised, the Commission's scope of action has been circumscribed to permit only that which is necessary to eradicate the deception. In cases involving orders to excise a whole trademark, the Supreme Court has sanctioned only those complete excisions required to cure the deceptive quality of the trademark. 13 Similarly, courts have distinguished affirmative disclosure "necessary" to

---

6 STATEMENT OF PURPOSE 83-85.
7 Shafe v. FTC, 256 F.2d 661, 663 (6th Cir. 1958): "The use of advertising is well recognized as an integral part of the production and distribution of goods, and as such is subject to the regulatory powers of the Commission." Accord, E. F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956), cert. denied, 352 U.S. 969 (1956); Reddi-Spred Corp. v. FTC, 229 F.2d 557 (3d Cir. 1956).
10 See, e.g., Jacob Siegel Co. v. FTC, 36 F.T.C. 563 (1943), aff'd, 150 F.2d 751 (3d Cir. 1945), rev'd, 327 U.S. 608 (1946); FTC v. Algoma Lumber Co., 15 F.T.C. 657 (1931), rev'd, 64 F.2d 618 (9th Cir. 1932), rev'd, 291 U.S. 67 (1934); FTC v. Royal Milling Co., 15 F.T.C. 38 (1931), rev'd, 38 F.2d 861 (6th Cir. 1931), rev'd, 288 U.S. 212 (1933). The first two cases decided by the FTC were cases of this kind: FTC v. A. Theo. Abbott & Co., 1 F.T.C. 16 (1916); FTC v. Circle Cilk Co., 1 F.T.C. 13 (1916) (textile products containing no silk were advertised as "silk" or "cilk," and the Commission ordered these names deleted).
11 See, e.g., Fell v. FTC, 285 F.2d 879 (9th Cir. 1960); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1943); Wybrant Sys. Prod. Corp., 54 F.T.C. 1681 (1958), aff'd, 266 F.2d 571 (2d Cir.), cert. denied, 361 U.S. 883 (1959); Proctor & Gamble v. FTC, 11 F.2d 47 (6th Cir. 1926) (dictum). For a discussion of the various types of deletion orders regarding false advertisements, see Barnes, False Advertising, 23 Ohio St. L.J. 597, 646 (1962); Note, Federal Regulation of False Advertising, 5 Boston College Industrial and Commercial L. Rev. 704, 717-25 (1964).
12 See, e.g., Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964); Haskelite Co. v. FTC, 127 F.2d 765 (7th Cir. 1942); Waltham Precision Instrument Co., No. 6914, F.T.C., July 20, 1962, aff'd, 327 F.2d 437 (7th Cir. 1964); Ward Labs, Inc., 55 F.T.C. 1337 (1959), aff'd, 276 F.2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960). On affirmative disclosures, see brief discussions in Millstein, The Federal Trade Commission and False Advertising, 64 Colum. L. Rev. 439, 490 (1964); Barnes, False Advertising, 23 Ohio St. L.J. 597, 645 (1962).
13 See, e.g., Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946); FTC v. Royal Milling Co., 288 U.S. 212 (1933).
eliminate a false statement or implication of the advertisement itself, and affirmative disclosure not "necessary" to dispel falsity, but informative to the consumer.\textsuperscript{14}

In its use of the former, or "corrective" disclosure, the Commission has acted cautiously and has generally been upheld by the courts.\textsuperscript{15} In such cases, the Commission functions positively by responding to a particular deceptive element in the advertisement itself. In this type of case, the Commission's order is conditional: so long as the misrepresentation continues, the affirmative disclosure must continue. For example, a scalp treatment company that claimed it could cure "almost all" cases of baldness did not reveal its actual ineffectiveness against the male pattern type.\textsuperscript{16} The court upheld the Commission order that "failure to disclose that approximately 95 per cent of the cases of baldness fall within the male pattern type is plainly misleading, when the petitioners claim they treat effectively virtually all cases of baldness."\textsuperscript{17}

On the other hand, \textit{Alberty v. FTC}, the only case to consider the question squarely, held the Commission lacked power to order an informative disclosure and described such authority as "the power to control the marketing of all . . . products . . . ."\textsuperscript{18} The \textit{Alberty} court differentiated the Commission's right to prescribe "corrective" disclosures from power to order "informative" disclosure and, in reversing the FTC, concluded that "Congress gave the Commission the full of the former but did not give it the latter."\textsuperscript{19} In this case a tonic manufacturer had claimed that his product was able to cure fatigue caused by iron deficiency anemia. The FTC did not deny this claim, but insisted that the manufacturer include in all future advertisements the information that iron deficiency anemia was only a minor cause of fatigue, and, further, that his product could not relieve fatigue from other causes.\textsuperscript{20} While such information

\textsuperscript{14}See \textit{Alberty v. FTC}, 182 F.2d 36 (D.C. Cir.), \textit{cert. denied}, 340 U.S. 818 (1950). Affirmative disclosure cases are few, and affirmative disclosure discussions fewer. Prior to 1950, the courts did not even question the few orders of this kind which the Commission handed down. After 1950 the courts were awakened to the \textit{Alberty} distinction between informative and corrective disclosures, but discussion was still scant. See, \textit{e.g.}, \textit{Kerran v. FTC}, 265 F.2d 246 (10th Cir.), \textit{cert. denied sub nom.} Double Eagle Ref. Co. v. FTC, 361 U.S. 818 (1959); \textit{Ward Labs, Inc.}, 55 F.T.C. 1337 (1959), \textit{aff'd}, 276 F.2d 952 (2d Cir.), \textit{cert. denied}, 364 U.S. 827 (1960).

\textsuperscript{15}Millstein, \textit{supra} note 12, at 490.

\textsuperscript{16}Keele Hair & Scalp Specialists, Inc., 55 F.T.C. 1840 (1959), \textit{enforced}, 275 F.2d 18 (5th Cir. 1960). See also \textit{Trade Regulation Rule on Binoculars}, \textit{TRADE REG. REP.} \textit{¶} 50273 (June 29, 1964).

\textsuperscript{17}275 F.2d at 23. (Emphasis added.)

\textsuperscript{18}182 F.2d 36, 39 (D.C. Cir. 1950), \textit{cert. denied}, 340 U.S. 818 (1950). Although \textit{Alberty} was actually decided under § 15, the food and drug amendment of the FTC Act, not under § 5, the Commission has broader corrective powers under § 15 than under § 5, so the principles of \textit{Alberty} should be applicable a fortiori to the present problem.

\textsuperscript{19}Id. at 39.

\textsuperscript{20}Id. at 37. See Note, \textit{The Regulation of Advertising}, 56 \textit{COLUM. L. REV.} 1018, 1028 (1956), asserting that the conclusion of \textit{Alberty} is due "to a recognition that the primary function of the FTC is to prevent false and misleading claims rather than to require informative disclosure."
might be “interesting” and perhaps “useful” to the public, the court refused to require the manufacturer to educate the public at his own expense.

The legislative history of the act supports the *Alberty* interpretation of Commission power.\(^{21}\) When the Federal Trade Commission Act, designed to maintain competitive conditions, was passed in 1914, the thought of government regulating business in general by proscription was relatively new,\(^{22}\) that of regulating by prescription yet unformed.\(^{23}\) Whereas congressional discussion indicates that the power and discretion accorded the Commission were to be broad, such power was not to take the form of compulsory affirmative action designed to buttress competition.\(^{24}\) The agency that Senator Newlands, father of the FTC and floor manager of the original bill, proposed to Congress was simply “an administrative tribunal . . . with powers of recommendation, with powers of condemnation, [and] with powers of correction.”\(^{25}\)

In 1938 the Wheeler-Lea Amendment to the FTC Act expanded the Commission’s power to cover all deceptive acts and practices in commerce, including those having no effect on competition.\(^{26}\) Although the prevailing attitude was no longer hostile to positive governmental intervention,\(^{27}\)


\(^{22}\) “It must be remembered that this commission enters a new field of governmental activity.” H.R. Rep. No. 533, 63d Cong., 2d Sess. 8 (1913).


\(^{24}\) Congress hesitated even to give the Commission the power to compel business to carry out the correction which it recommended let alone to compel positive reforms. See 51 CONG. REC. 8977 (1913) (remarks of Representative Murdock). Interpreting this question of the Commission’s power over remedy, the Supreme Court declared that the Commission does not have unlimited choice as to remedy, but rather is confined to that type of remedial action necessary to correct the evil. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-12 (1946) (dictum) (excision of trademark case).

\(^{25}\) 47 CONG. REC. 1225 (1911) (remarks of Senator Newlands); accord, S. REP. No. 597, 63d Cong., 3d Sess. 19 (1914). Although phrased in terms of “competition” and “competitive conditions,” congressional observations on the laissez faire character of the Commission are here pertinent. *Cf. Davis, Administrative Law* 9 (1959). The “negative” attitude of Congress toward Commission intervention is reflected in the Senate report on the bill: “[W]hat is meant when we use the phrase ‘maintaining competition’ is [only] maintaining competitive conditions . . . .” S. REP. No. 1326, 62d Cong., 3d Sess. 3 (1913).


\(^{27}\) Compare Schechter Poultry Corp. v. United States, 295 U.S. 495, 552-53 (1935). In *Schechter*, the NIRA was struck down as an unconstitutional delegation of congressional power. In his concurring opinion Mr. Justice Cardozo specifically described the nature of the codes which the NIRA was to promulgate: “[A] code is not to be restricted to the elimination of business practices . . . . It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected.” *Id.* at 552. Such administrative action he
Congress gave the FTC new power only "to the same extent [as] that . . . over unfair methods of competition . . . ." 28 The comments of Senator Wolverton, a drafter of the amendment, indicate this intent: "The bill . . . places no requirement on the advertiser to make any statement concerning the commodity, but does require that he shall make no statement that is misleading in a material respect." 29

The Commission contends that the present trade regulation rule is corrective because it is necessary to offset the cumulative effect of advertising claims that cigarettes are pleasure-, status-, and success-giving and desirable. 30 The image of smoking conveyed by such advertising "is inconsistent with and misrepresents the complete truth about smoking, which is that while it may afford pleasure, it is a habit difficult to break and extremely dangerous to life and health." 31 Furthermore, the Commission asserts:

It is a prevalent view in our society that the Government protects the public against advertisements to promote the sale of dangerous products. The mere fact that advertisement of ciga-

---


29 83 CONG. REC. 396 (1938).

30 STATEMENT OF PURPOSE 52. In the alternative the Commission claims the power to order informative disclosures, on the basis of "the principle, established in the interpretation and application of the Federal Trade Commission Act, that it is unfair and deceptive trade practice to fail to disclose material facts concerning a product which may influence many consumers in their decision whether to purchase the product, particularly where the use of the product might endanger health and safety." Notice of Labeling Rules, 29 Fed. Reg. 530-31 (Jan. 22, 1964). The Commission retained this view in STATEMENT OF PURPOSE 106. In this respect the instant order differs from a more recent trade regulation rule issued by the Commission directing advertisers of previously used lubricating oil actively to represent that the oil was previously used. In that rule the Commission explicitly stated that such a statement must be added because the advertisements "represented directly or by implication that such oil is new and unused, and . . . represented that such oil has been 're-refined' when in fact the physical and chemical contaminants acquired through use have not been removed by a refining process." 29 Fed. Reg. 11650 (Aug. 14, 1964). Further, the Commission noted, the packages for new and previously used oil were identical. Since the order asserted that "substitution is unlawful, even if qualitative equivalence could be shown and the consumer is prejudiced if he is led to expect one thing and is supplied with something else," the order itself contained a finding which rendered the order corrective in nature. 29 Fed. Reg. 11650 (Aug. 14, 1964).

31 STATEMENT OF PURPOSE 102.
rettes is officially tolerated carries an implication that cigarettes are not considered as serious a health threat as other products not generally tolerated...\textsuperscript{32}

Thus, massive and skillful advertising has "blunted public awareness and appreciation"\textsuperscript{33} of the hazards of smoking, so that the advertisements themselves must refute the public misconception.\textsuperscript{34}

Even accepting the Commission's determination that the public now carries a mistaken impression of the relation of smoking to health, the order is not justified. For the representations that the Commission describes as misleading say only that the product is good,\textsuperscript{35} a representation common to all advertising. Thus, if the Commission can here require affirmative disclosure, it can require all advertising to disclose all defects. Although the Commission attempts to distinguish the present case on the ground that a health hazard has been clearly established by a governmental report, neither does section 5 give nor does the Commission claim general jurisdiction to protect the public from health hazards. The Commission asserts that many people believe "the Government protects the public against advertisements to promote the sale of dangerous products."\textsuperscript{36} But statutory mandate and not popular conception of what constitutes proper Government action must delimit the scope of Commission power. Since there is no deception, there can be no correction. Thus the present rule is of the informative rather than the corrective-conditional type.

The Commission rejects the argument that the very fact of public and governmental concern about the health hazards of smoking\textsuperscript{37} differentiates

\textsuperscript{32}Id. at 111.

\textsuperscript{33}Id. at 105. \textit{But see} Borden, \textit{The Economic Effects of Advertising} 222 (1942), in which the author listed advertising as sixth and last among the causes of the great growth of the cigarette market.

\textsuperscript{34}The Commission noted that: "[T]he duty exists even if no individual advertisement, viewed in isolation, is deceptive under conventional principles. ... [T]he duty arises precisely because of the tendency of the industry's advertising to neutralize the impact of ... educational efforts." \textit{STATEMENT OF PURPOSE} 105. Such a rationalization of a remedy is a curiosity in the annals of the FTC, for "to date, and properly, the FTC has not adopted the view that advertising \textit{must} always inform, or always perform any specific function, although the subject has been debated, Alberty \textit{v. FTC}..." \textit{Millstein, supra} note 12, at 443 n.20; accord, Howrey, \textit{The Federal Trade Commission: A Revolution of Responsibilities}, 40 A.B.A.J. 113, 114 (1954).

\textsuperscript{35}See \textit{STATEMENT OF PURPOSE} 102. The Commission's past actions in the field of cigarette advertising have fit into the prohibitive pattern. See, \textit{e.g.}, Brown \& Williamson Tobacco Corp., 50 F.T.C. 986 (1960) (consent order) (prohibition of representation of filter efficacy prohibited); American Tobacco Co., 47 F.T.C. 1393 (1951) (prohibited representation that twice as many independent experts smoke Luckies because of their knowledge of the grades of tobacco that American buys); R. J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950), \textit{modified}, 192 F.2d 535 (7th Cir. 1951), \textit{order on remand}, 48 F.T.C. 682 (1952) (prohibited representation that Camels aid digestion, do not impair "wind" of athletes, will never harm or irritate the throat, and are soothing to the nerves); London Tobacco Co., 36 F.T.C. 282 (1943) (prohibited any words, pictures, or other representation that any domestic product is imported).

\textsuperscript{36}\textit{STATEMENT OF PURPOSE} 111.

\textsuperscript{37}American Medical Association Newsletter, Aug. 2, 1964, p. 1, col. 3. The article reports that information on the hazards of cigarette smoking is being distributed
this case from ones in which the knowledge of the health hazard is peculiarly within the control of the advertiser, that the implications of a neutral advertisement, neither affirming nor denying a danger widely, if not universally, known to the public are necessarily less "deceptive" than those of a similar advertisement directed to an unsuspecting public. Since the Commission does concede that there is more than ordinary concern, the principle of \textit{Alberty} applies a fortiori to cigarette advertising because recent, continuing, and extensive publicity has certainly made the public more cognizant of the connection between smoking and cancer than of the connection between fatigue and iron deficiency anemia.

In the alternative the Commission contends that the present trade regulation rule is "corrective" under the "standard of lawfulness [of section 15, relating to food, drugs, and cosmetics, which is] . . . fully applicable in a Section 5 proceeding,"\footnote{STATEMENT OF PURPOSE 92} even though section 15 is technically inapplicable to cigarettes.\footnote{STATEMENT OF PURPOSE 92 n.83.} That section prohibits false advertising of drugs, food, and cosmetics "if the use of the commodity advertised may be injurious to the health"\footnote{Federal Trade Commission Act § 15(a) (1), 52 Stat. 114 (1938), as amended, 15 U.S.C. § 55(a) (1) (1958).} even when properly used. Moreover, in determining whether a drug advertisement is "false," the FTC is specifically directed to consider "not only representations made . . . but also the extent to which the advertisement fails to reveal facts material with respect to consequences which may result from the use of the commodity . . . ."\footnote{Ibid.}

But the rationale of section 15, with its broadened definition of "corrective" disclosure, does not apply to cigarette advertisements. When section 15 was added to the FTC Act, congressional concern centered on consumer purchase of worthless nostrums.\footnote{\textit{Liggett & Myers Tobacco Co. v. FTC}, 108 F. Supp. 573 (1952), aff'd mem., 203 F.2d 955 (2d Cir. 1953).} Congress concluded that drugs claim therapeutic value, and hence a failure to reveal deleterious effects constitutes a misrepresentation. Accordingly, as to drugs, a Commission order to reveal the deleterious attributes in effect constitutes a "corrective" disclosure. Cigarettes, by contrast, do not make positive therapeutic claims, and consumers do not attribute remedial value to cigarettes. The one case which considered the question, \textit{Liggett & Myers Tobacco Co. v. FTC},\footnote{See, \textit{e.g.}, the remarks of Senator Kenney, a proponent of § 15: "[Diabetes cures] . . . are sold only because of the false claims advertised for them. . . . [A] sufferer from diabetes will . . . rely on the false representations in the advertising . . . ." 83 Cong. Rec. 395 (1938).} in the elementary and high schools throughout the country. \textit{Id.} at 14. In addition information is being disseminated via clinics. In New York City, for example, therapy clinics are booming, and mass meetings are being held. Such publicity reaches the very same people apparently influenced by cigarette advertisements. \textit{N.Y. Times}, Aug. 31, 1964, p. 1, col. 4.
held that cigarettes are not within the purview of the section.  In that case an advertisement affirmatively claimed that certain "cigarettes can be smoked by any smoker without inducing any adverse affect [sic] upon the nose, throat and accessory organs of the smoker," but the court rebuffed an attempt by the Commission to apply the corrective disclosure standards of section 15. Considering that section 15 standards were held inapplicable to cigarette advertisements making positive claims, it is difficult to deny that they would be at least equally inapplicable to the present advertising, in which the Commission did not find any such claim.

\[44\] As times and conditions change it is fitting that an administrative agency, before resorting to the legislature, should seek to invoke new means of coping with still unsolved problems. But in its zeal the agency must not exceed the bounds of its statute. The legislative history, such as it is, coupled with indications of contemporaneous administrative interpretation leads me to the conclusion that Congress, had the matter been considered, would not have intended cigarettes to be included as an article within the statute . . . .

\[45\] Id. at 577.

\[45\] Id. at 573 (quoting paragraph 6 of Commission Complaint).