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Recent Decisions

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RECENT DECISIONS

Civil Rights—A Mental Patient’s Right To Refuse Antipsychotic Drugs: A Constitutional Right Needing Protection

Throughout our nation’s mental hospitals, doctors treat psychotic patients with antipsychotic drugs.1 Often they administer the drugs for staff convenience or patient punishment, instead of treatment.2 In addition, the drugs’ side effects are sometimes debilitating to the patient.3 Patients and courts have become increasingly involved in deciding whether an involuntarily confined mental patient in a state hospital4 has the right to refuse treatment with these drugs and, if so, what is the proper procedure to protect that right. The Supreme Court has the opportunity to decide whether patients have this constitutional right and what procedures must protect it.5 This piece will study the two recent decisions in this area, Okin v. Rogers6

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3 See notes 16-19 and accompanying text infra.
4 The district court in Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), distinguished between voluntarily and involuntarily confined mental patients in its discussion, but concluded that both have the same constitutional right to refuse treatment. Id. at 1368. The First Circuit, though, held that if a voluntarily confined mental patient refuses treatment, the hospital can ask the patient to leave. Okin v. Rogers, 634 F.2d 650, 661 (1st Cir. 1980), cert. granted, 101 S. Ct. 1972 (1981). Whether or not a voluntarily confined mental patient can be asked to leave, no one doubts that he, like any other voluntary patient, can refuse a particular treatment. This piece therefore discusses the involuntarily confined mental patient in a state hospital.
5 Okin v. Rogers, 101 S. Ct. 1972 (1981). The name of the case has been changed to Mills v. Rogers; however, this comment will continue to cite it as Okin v. Rogers.
6 478 F. Supp. 1342 (D. Mass. 1979), 634 F.2d 650 (1st Cir. 1980), cert. granted, 101 S. Ct. 1972 (1981). A class action was brought on behalf of the voluntary and involuntary mental patients at Boston State Hospital against the Massachusetts State Commissioner of Mental Health and various hospital officials and physicians responsible for plaintiffs’ treatment. Plaintiffs asserted that they had a constitutional right to refuse treatment with antipsychotic drugs, basing their right on the first, fourth, fifth, eighth, and ninth amendments as applied through the fourteenth amendment’s due process clause. Absent emergency circumstances, plaintiffs contended that they could make decisions and that the hospital should respect those decisions. 478 F. Supp. at 1352, 1360-61.

On the other hand, defendants’ primary argument was that committed mental patients, whether voluntary or involuntary, are incompetent to make treatment decisions, and, therefore, the state has a parens patriae obligation and right to provide treatment. Defendants further asserted that mental patients do not have a constitutional right to refuse treatment. Id. at 1353.
and *Rennie v. Klein*, and their impact on these issues.

I. Antipsychotic Drugs

Antipsychotic drugs are a subclass of psychotropic drugs, which are used to treat psychiatric problems. Antipsychotic drugs, which are used in treating the psychoses, particularly schizophrenia, have caused a therapeutic revolution. Antipsychotics not only produce significant behavioral improvements, but, by controlling the more disruptive aspects of schizophrenia, they also make feasible other kinds of therapy. Some schizophrenics now function in the community, while hospitals discharge others to nursing homes or halfway houses.

Antipsychotic drugs initially sedate even the most intensely agitated and excited patient, without producing sleep. Although the antipsychotic effect may take weeks to fully develop, it will eventually modify thought disorders, autism, hallucinations, and delusions. The drugs do not cure the mental patient; they allow him to function outside the hospital if doctors maintain treatment.

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7 653 F.2d 836 (3d Cir. 1981). Rennie, involuntarily confined although not adjudicated incompetent, sought a preliminary injunction ordering the psychiatrists and officials of Ancora State Hospital, New Jersey, not to medicate him forcibly in a nonemergency. Rennie reacted adversely to antipsychotics, but his best treatment combined antipsychotics with lithium and an antidepressant. 462 F. Supp. 1131, 1135-40 (D.N.J. 1978).

The original suit later became a class action with patients in five mental hospitals seeking a preliminary injunction. 476 F. Supp. 1294, 1297-98 (D.N.J. 1979). The parties recognized that voluntary patients have the right to refuse treatment under New Jersey law. *Id.* at 1307. The court discussed the rights of persons involuntarily committed to state institutions only where no incompetency adjudication has been made. 653 F.2d at 846 n.12. But whether a mental patient is voluntarily or involuntarily committed, they all have or do not have the same constitutional right to refuse treatment. The voluntary-involuntary distinction only affects how the courts protect that right once they find it exists. *See* note 61 and accompanying text *infra*.


10 DuBose, *supra* note 9, at 1169. Other therapies include milieu therapy, psychotherapy, group therapy and occupational therapy. *Id.*

11 *Id.*

12 Rhoden, *supra* note 1, at 378.

13 *Id.* *See also* Symonds, *supra* note 9, at 704; DuBose, *supra* note 8, at 1169.
one hospital improved with antipsychotic drug treatment.\textsuperscript{14} For these reasons, it is not surprising that doctors prefer antipsychotic drugs for psychosis treatment.\textsuperscript{15}

Antipsychotic drug treatment can also create serious side effects. During the first two weeks of treatment, mental patients may feel drowsy and may also experience a number of annoying nervous system effects.\textsuperscript{16} Antipsychotic drugs can also affect appetite, sexuality, and hormone secretion.\textsuperscript{17} The drugs may produce several side effects severely impairing muscle control and movement.\textsuperscript{18} Another side effect is fatal in thirty percent of the cases in which it develops.\textsuperscript{19}

Thus, although antipsychotic drugs can control schizophrenic symptoms, many informed mental patients, after considering the possible side effects, have refused such treatment.\textsuperscript{20} They claim that the United States Constitution guarantees their right to refuse the drugs.

II. The Constitutional Right to Refuse Antipsychotic Drug Treatment

Mental patients' claimed constitutional right to refuse antipsychotic drug treatment has several possible bases.\textsuperscript{21} The right is at-
tributed to the eighth amendment protection against cruel and unusual punishment,\textsuperscript{22} the first amendment right to freedom of thought,\textsuperscript{23} the fourteenth amendment due process clause,\textsuperscript{24} and, finally, the right to privacy.\textsuperscript{25}

A. Eighth Amendment: Cruel and Unusual Punishment

Since courts have traditionally applied the eighth amendment in the penal context only,\textsuperscript{26} it is difficult to apply it to involuntarily confined mental patients. The Supreme Court has favored an "intent" theory of punishment, suggesting that sanctions are punishment only when the legislature intends them to be penal.\textsuperscript{27} Under this theory, the eighth amendment thus applies only in criminal matters.\textsuperscript{28}

The United States Court of Appeals for the Third Circuit, in \textit{Rennie v. Klein}\textsuperscript{29} followed the intent theory in refusing to apply an eighth amendment argument to involuntarily confined mental pa-

\textsuperscript{22} "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. See notes 26-38 and accompanying text \textit{infra}. The eighth amendment is applicable to the states. Robinson v. California, 370 U.S. 660 (1962).


\textsuperscript{24} "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . . [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1. See notes 51-64 and accompanying text \textit{infra}.


The equal protection clause may also apply. U.S. CONST. amend. XIV, § 1. Where the state allows voluntary patients, whether mentally or physically ill, to make their own treatment decision, but denies that right to involuntarily confined, but competent, mental patients, no rational basis for the distinction exists and a denial of equal protection may result. See Rennie v. Klein, 653 F.2d 836, 842 n.7 (3d Cir. 1981); \textit{Development in the Law—Civil Commitment of the Mentally Ill}, 87 HARV. L. REV. 1190, 1215-16 (1974) [hereinafter cited as \textit{Developments}]; Plotkin, supra note 14, at 495-96. See also Craig v. Boren, 429 U.S. 190 (1976) (gender-based discrimination).

\textsuperscript{26} Ingraham v. Wright, 430 U.S. 651, 666 (1977) (action by junior high school students against school officials alleging they had been subjected to corporal punishment in violation of their constitutional rights). Plotkin, supra note 14, at 494.

\textsuperscript{27} \textit{Developments}, supra note 25, at 1331-32.

\textsuperscript{28} Id. at 1331-33.

\textsuperscript{29} 653 F.2d 836 (3d Cir. 1981).
tients. The court stated that the eighth amendment prevents "excesses in the punishment of those who have been convicted of a crime." The court further stated that "it is necessary to distinguish the status of prisoners who are legitimately being punished for the commission of a crime from those who are mentally ill or retarded through no fault of their own and are innocent of any offenses against society." Finally, the court rejected the eighth amendment as a proper protection for mental patients, because mental patients are "entitled to more humane treatment" than that accorded prisoners.

The Supreme Court recently indicated that it might be shifting toward the "impact" theory. The impact theory holds that all deprivations similar to those found in prisons come under the eighth amendment. Significantly, the indication of this shift came in reference to treatment in mental institutions.

The Court suggested that mental patients could receive treatment similar enough to punishment to come under eighth amendment protection. But when treatment such as the administration of antipsychotic drugs has a legitimate and widely accepted therapeutic value, and hospitals use it for therapeutic purposes, it is not punishment. Hence, even under the impact theory, the eighth amendment would not grant a mental patient the right to refuse proper antipsychotic drug treatment.

B. First Amendment: Right to Freedom of Thought

Mental patients also argue that their constitutional right to refuse antipsychotic drugs springs from the first amendment. The ar-

30 Id. at 844.
31 Id.
32 Id. See note 61 and accompanying text infra (compelling state interest justifies forcible medication in an emergency).
33 Ingraham v. Wright, 430 U.S. at 669 n.37 (1977). But see Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (Court did not apply the eighth amendment to pretrial detainees because they had not been adjudicated guilty).
34 Developments, supra note 25, at 1331.
35 430 U.S. at 669 n.37.
36 For example, treatment given solely for control or staff convenience, or psychosurgery (lobotomy) are possibly "punishments." See Plotkin, supra note 14, at 494.
38 If the state hospitals do not use the drugs for therapeutic purposes, their use may be punishment. See note 36 supra.
argument is that if the first amendment protects the expression of ideas and thoughts, it must also protect an individual’s right to generate the ideas and thoughts.40 This argument is not new,41 but the notion that courts may rely directly on freedom of thought, where freedom of expression is not in controversy, is a recent development.42

In Okin v. Rogers,43 the Massachusetts District Court applied the freedom of thought rationale to an antipsychotic drug case.44 The court held that the first amendment rights to freedom of expression and thought include the right to be free from involuntary mind control, and upheld the mental patients’ constitutional right to refuse antipsychotic drug treatment.45 On appeal, the First Circuit did not even discuss the first amendment argument.46

Mental patients also made the first amendment argument in the New Jersey District Court in Rennie.47 The court concluded that if forced medication is otherwise appropriate, the temporary dulling of the senses accompanying the medication does not violate the first amendment.48 On appeal, the Third Circuit did not discuss the first amendment claim.49

Under the freedom of thought rationale, mental patients can refuse any treatment that significantly affects their thought processes. Mental patients could thus refuse antipsychotic drug treatment precisely because the drugs work—they modify the thought processes.50 If a mental patient has a constitutional right to refuse drug treatment, it should not be solely because the treatment is effective.

40 Plotkin, supra note 14, at 494.
41 Rhoden, supra note 1, at 389.
42 Id. This theory probably arose because of modern behavior control methods, such as drug treatment. Id. See Kaimowitz v. Department of Mental Health, Cir. No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), reprinted in A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902 (1974) (court accepted this theory where a state hospital wanted to submit a mental patient to experimental psychosurgery).
44 478 F. Supp. at 1367.
45 Id. The court stated that in extraordinary circumstances, such as an emergency, the right can be overridden. Id. See note 61 infra (compelling state interest justifies overriding the right to refuse treatment).
46 634 F.2d at 654 n.2.
48 Id. at 1144.
50 Rhoden, supra note 1, at 395.
C. Due Process Liberty Interest or Right to Privacy

A mental patient's constitutional right to refuse antipsychotic drug treatment, based on the fundamental right to personal security, has recently been acknowledged by both courts and commentators.\(^{51}\) They find the fundamental right to personal security in either the due process liberty interest\(^{52}\) or the right to privacy.\(^{53}\) The First Circuit in Okin adopted the privacy argument and the Third Circuit in Rennie adopted the liberty interest argument.

In Okin, the First Circuit declared that a person has a constitutional right to decide whether to submit to antipsychotic drug treatment.\(^{54}\) The court concluded that the right to refuse treatment probably arises from the fourteenth amendment’s due process clause, "most likely as a part of the penumbral right to privacy, bodily integrity, or personal security."\(^{55}\)

The Third Circuit, in Rennie, also declared that a mental patient has a right to refuse antipsychotic drug treatment. The court stated that forcible drug treatment intrudes on personal security, a liberty interest protected by the fourteenth amendment’s due process clause.\(^{56}\) The court rejected the defendant’s argument that a liberty interest protected by the due process clause must be rooted in state law.\(^{57}\) The court stated:

A liberty interest may flow directly from the United States Constitution itself, despite silence or contrary indication in state law. Were it otherwise, a state's statutory law would occupy a position higher than the Constitution. Thus it is not correct to say that a liberty interest can only originate in state law. A more accurate statement is that state law can give rise to a liberty interest that

\(^{51}\) Okin v. Rogers, 634 F.2d 650; Rennie v. Klein, 653 F.2d 836; Rhoden, supra note 1, at 382-88.

\(^{52}\) The liberty interest has been held to prevent "unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. at 672-74.

\(^{53}\) The right to privacy is found in the "penumbra" of the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Its origin has been variously asserted to be the first, fourth, fifth, ninth, and fourteenth amendments. Plotkin, supra note 14, at 493. The right to privacy discussed here may be more properly termed the right to personal autonomy. It is not to be confused with the more common meaning of privacy as the state of keeping one's personal affairs nonpublic. Rhoden, supra note 1, at 384 n.103. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 624-29 (1978, 1979-80 Supp.).

\(^{54}\) 634 F.2d at 653. The court noted in particular the drugs' serious and potentially harmful effects. \textit{Id.}

\(^{55}\) Id. The court in \textit{Okin} apparently concludes that the right to privacy arises out of the due process clause, a proposition that is not universally accepted. \textit{See note 53 supra.}

\(^{56}\) 653 F.2d at 844.

\(^{57}\) \textit{Id.} at 841-42.
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would not otherwise exist. 58

The court concluded its discussion by stating that a difference of constitutional significance exists between involuntary confinement and commitment with forced treatment. 59 The Third Circuit thus held that forced drug treatment infringed on a mental patient’s constitutionally protected liberty interest.

The court in Rennie also suggested that the distinction between a constitutional right to refuse antipsychotic drug treatment based on privacy and one based on substantive due process is illusory. 60 The terms describing each basis—bodily integrity, bodily autonomy and personal security—mean the same thing: people have a right to control their bodies. Whether the right is called a privacy right or a liberty interest, mental patients are entitled to refuse antipsychotic drug treatment. 61

The right to refuse antipsychotic drug treatment is not found in the eighth amendment’s prohibition against cruel and unusual punishment, or the first amendment’s protection of freedom of thought and expression. But it is part of the right to personal security found in the fourteenth amendment’s due process clause and the right to privacy. If the Supreme Court agrees, 62 state hospitals cannot infringe on that right without giving mental patients “due process of law.” 63 Courts can ensure that hospitals provide mental patients with due process by reviewing existing hospital procedures and, where necessary, establishing procedures protecting that right. 64

58 Id. at 842.
59 Id. at 844.
60 Id. at 841 n.6.
61 All mental patients have the same right to refuse treatment. Different circumstances, however, will require different procedures to protect that right. See notes 65-89 and accompanying text infra. Nobody disputes that hospitals may forcibly medicate mental patients in an emergency. See Rogers v. Okin, 478 F. Supp. 1342, 1352 (D. Mass. 1979) (parties stipulated to this effect); W. PROSSER, LAW OF TORTS § 18, at 103 (4th ed. 1971). The mental patients still possess their constitutional right to refuse treatment, but, because of the danger to the mental patients and those around them, the state has a compelling state interest justifying infringement of that right. Rennie v. Klein, 462 F. Supp. at 1145-47. See generally Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding compulsory vaccination because of a compelling state interest). See also Rhoden, supra note 1, at 385-86.
62 The Supreme Court has granted certiorari in Okin to consider the issue. 101 S. Ct. 1972 (1981).
63 U.S. CONST. amend. XIV, § 1.
64 The Supreme Court granted certiorari in Okin on a federalism issue. The Supreme Court must resolve whether a federal court can formulate and implement guidelines for state authorities without violating federalism principles. See Rizzo v. Goode, 423 U.S. 362, 380 (1976) (federalism principles apply where state agency or local government and federal courts are involved). The Court has stated that only when “[state] authorities fail in their affirma-
III. The Procedures to Protect the Right to Refuse Antipsychotic Drug Treatment

A. Recent Decisions

The First Circuit in Okin examined the district court’s procedures for protecting the right to refuse antipsychotic drugs for all mental patients in emergencies and for incompetent mental patients in nonemergencies. The court rejected the district court’s standard for emergency medication, that there must be a “substantial likelihood” of physical harm to the patient or others if the hospital does not medicate the patient. The court instructed the district court to design different emergency procedures, suggesting that they should not give physicians unlimited discretion in exercising their professional judgment, and that, at a minimum, a qualified physician should determine in each case that medication is necessary.

The court then considered the district court’s standards for medicating incompetent mental patients in non-emergencies. After a court adjudicates a mental patient incompetent, the court appoints a guardian for that patient. The court affirmed the district court’s ruling that this guardian may exercise the incompetent mental patient’s right to refuse antipsychotic drugs in a non-emergency, but refused to require guardian permission for each treatment decision involving

tive obligations” can a federal court “correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.” The nature of the violation determines the remedy’s scope. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14-16 (1971) (Court formulated guidelines for implementing Brown v. Bd. of Educ., 347 U.S. 483 (1954)). Also, “[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.” Id. at 15-16. Finally, district courts can retain jurisdiction to ensure that the remedy protects the constitutional right. Id. at 21 (jurisdiction retained to ensure no perpetuation or re-establishment of the dual school system).

If a federal court thus finds a constitutional violation, it has the authority to establish an appropriate remedy applicable to state authorities. A federal court’s establishing procedures protecting a mental patient’s right to refuse antipsychotic drugs is such a remedy. However, the Supreme Court has never decided whether the federal court must first give the state officials a chance to remedy the constitutional violation before the court establishes a remedy. Thus, since courts have only recently established the constitutional right to refuse antipsychotic drug treatment, federalism principles may require that courts give state officials this chance.

66 The court suggested that the need to prevent violence must outweigh the possibility of harm to the mental patient, and the doctor must rule out reasonable alternatives before forcibly medicating a mental patient in an emergency. 634 F.2d 650, 656 (1st Cir. 1980).
67 Id. The court also ordered the district court to expand the definition of emergency to situations where the mental patient’s mental health is in danger. Id. at 659-60.
68 Id. at 658-59.
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In making treatment decisions for incompetent mental patients, the court ordered hospitals to use the "substituted judgment" standard. The court also ordered the hospitals to provide minimal procedural requirements to ensure that this standard is met, such as periodic review of patients' medical histories by a non-treating doctor. The court remanded the case to the district court to design additional procedural safeguards.

Unlike the Massachusetts hospitals in Okin, the New Jersey Division of Mental Health and Hospitals in Rennie had issued regulations (the Bulletin) providing for hospital review of a mental patient's refusal to accept medication. The Bulletin authorizes the hospital's chief executive officer to consent to a doctor's administering medicine recommended by the mental patient's doctor in an emergency. The hospital may medicate the mental patient upon the doctor's order alone if waiting for the chief executive officer's consent will jeopardize the patient's life.

The Bulletin then outlines the procedures doctors must follow when an involuntary mental patient refuses prescribed psychotropic medicine. The doctor must first attempt to explain to the mental patient his diagnosis, the reasons for prescribing that medication, and the disadvantages of alternative treatments. If the mental patient still refuses, the patient's "treatment team" must meet, with the patient present if he is able. The treatment team then tries to formulate a treatment plan acceptable to the mental patient and the team.

If the mental patient still refuses medication after this meeting, the hospital must follow different procedures for incompetent and

69 The court reasoned that this requirement was impractical, incapable of enforcement, and, most importantly, might create a tendency for doctors not to treat patients because of the inconvenience in seeking the guardian's permission. Id. at 660-61.

70 The state must try to make the same decision that it thinks the individual would make if he were competent. Id. at 661.

71 Id.


73 The Bulletin, in section II(A), defined an emergency as a situation where medication is necessary "in order to prevent the death of or serious consequences to a patient." 462 F. Supp. at 1149.

74 Id.

75 Id. at 1150.

76 The "treatment team" consists of the treating doctor and others at the hospital who deal with the patient, such as psychologists, social workers, and nurses. The team's opinion is only a recommendation to the treating doctor. 476 F. Supp. at 1303.

77 462 F. Supp. at 1150.
competent mental patients. For an incompetent mental patient, the
doctor must attempt to secure the guardian's consent. If the guard-
ian, after reasonable notice and request for consent, refuses or ne-
glects to consent, the chief executive officer may consent to doctors’
administering the medicine.78

If an involuntary mental patient has not been adjudicated in-
competent, the medical director or his designee must conduct a per-
sonal examination of the patient's record. If the medical director
agrees that forced medication is proper, the doctor can administer it.
The Bulletin also authorizes, but does not require, the medical direc-
tor to consult an independent psychiatrist for an evaluation of the
patient's need for medication. If the outside consultant does not re-
commend medication, the medical director must address the consult-
ant's recommendations and conclusions in his report for the mental
patient's records. The medical director must also review each week
the programs of involuntary mental patients refusing medication.79
The hospitals also followed a practice, not required by the Bulletin,
in which the director or other doctor of the Division of Mental
Health and Hospitals reviewed all compulsory medication cases.80

The Third Circuit held that the Bulletin procedures satisfied
due process,81 reversing the district court's decision that the proce-
dures were insufficient.82 The court essentially told the district court

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78 Id.
79 Id. at 1150-51.
80 476 F. Supp. at 1303.
81 The court based its analysis on the Supreme Court’s decision in Mathews v. Eldridge,
424 U.S. 319 (1976), which outlined the required due process protections for state agency
proceedings. Mathews requires courts to analyze three factors before deciding whether state
procedures satisfy due process: (1) the private interest at stake; (2) the risk of an erroneous
decision through the state's procedures, as well as the value of any alternative safeguards; and
(3) the governmental interest, including fiscal and administrative burdens that other procedu-
ral requirements would impose. Id. at 335.

Applying these three factors to the hospitals' procedures, the court found that although
there was a private interest at stake, the mental patients' right to refuse antipsychotic drugs,
the minor risk of error presented by the state hospitals' procedures, and the substantial bur-
dens placed on the state hospitals by the district court's plan outweighed that private interest.
The court approved New Jersey's regulatory system and rejected the district court's plan. 653
F.2d 836, 850-51 (3d Cir. 1981).
82 653 F.2d 836 (3d Cir. 1981). The district court had found that state hospitals ignored
the Bulletin, overused the emergency exception, failed to report refusals to take medication,
intimidated the mental patients into accepting medication, and failed to inform mental pa-
tients of their rights. The court also found that the medical director's reviews of treatment
refusal cases were not independent and objective. 476 F. Supp. at 1303-05. The district court
ordered the state hospitals to obtain written consent from mental patients each time they
prescribed psychotropic drugs in a nonemergency, and to set up a Patient Advocates system
to assist patients in exercising their rights. The court also ordered an informal review by an
not to rewrite the Bulletin, but to enforce it. If after a reasonable
time the court finds that the procedures are not working, it will
explore other methods to protect the mental patients' constitutional
rights.

B. Analysis and Suggested Procedures

The courts in *Okin* and *Rennie* took opposite approaches in deter-
mining what procedures were necessary to protect the right to refuse
antipsychotic drugs. The First Circuit in *Okin* decided that the fed-
eral judiciary should determine what procedures the hospitals would
use. The Third Circuit in *Rennie* reviewed and upheld as satisfying
due process requirements the state hospitals' regulations.

Both approaches can be criticized. Because courts lack expertise
in mental health treatment, it is questionable whether they should
write hospital procedures. Courts also tend to structure any proce-
dure as an adversary process, creating stress and competition be-
tween mental patients and their doctors, rather than encouraging
treatment. The First Circuit's approach may also violate federal-
ism principles, which give state authorities the primary responsibility
for solving these problems. But if courts give hospitals total control
over writing procedures, the hospitals may give themselves too much
discretion over mental patients' treatment decisions. For example, in
*Rennie*, the Bulletin does not require state hospitals to follow the
guardian's decision against medicating an incompetent mental pa-
tient. The Bulletin also does not require, but permits, state hospi-
tals to consult a neutral decisionmaker. The state hospitals,
therefore, have almost total control of the mental patients' treatment
decisions.

One commentator offers a compromise that would give mental
patients their constitutional right without burdening the state with
judicial proceedings. She proposes that an administrative officer,
rather than a judge, hold hearings limited to the issue of incompe-
tency to make treatment decisions. If the hearing officer finds that

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83 If the procedures are not working, then hospitals are violating patients' constitutional
rights, and a court's designing new procedures may not violate federalism principles. See note
64 supra.

84 653 F.2d at 851.


86 See note 64 and accompanying text supra.

87 See note 78 and accompanying text supra.

88 See note 79 and accompanying text supra.
the mental patient is incompetent to make a treatment decision, the officer makes that decision. This procedure promotes consistency, knowledgeability, and neutrality in such decisions.89

State hospitals should be allowed to formulate procedures protecting the constitutional right to refuse antipsychotic drug treatment, and courts should review the procedures for due process violations. All state hospitals, however, should also be required to provide involuntary mental patients with two other rights: (1) that hospitals inform a mental patient or his guardian of his right to refuse treatment with antipsychotic drugs in a non-emergency;90 and (2) that state hospitals give mental patients an informal review of their decision to refuse treatment by an administrative officer, independent from the hospital bureaucracy.91

If the Constitution entitles suspected criminals to know their rights,92 it should entitle mental patients in similar custody, but innocent of any crime, to the same right.93 The right to refuse antipsychotic drugs is worthless unless the patient, as well as his family and guardian, knows it exists. Therefore, before medicating a patient in a nonemergency, the doctor should be required to tell the mental patient that he can refuse the antipsychotic drugs.94

An independent officer's determination that forced medication is necessary guarantees that state hospitals do not abuse their discretion to administer drugs. The officer should hold informal hearings, giving the mental patient and the hospital an opportunity to express their opinions and present relevant information. The hearing should not be an adversary contest, but an informal discussion of what is the mental patient's best treatment. Finally, courts should oversee state hospitals, ensuring that the hospitals give mental patients these rights and that any protective procedures provide the mental patient with due process.95

The right of a mental patient to refuse treatment with anti-

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89 See Rhoden, supra note 1, at 406-08.
90 See note 61 supra (compelling state interest justifies infringement of right in an emergency).
91 See note 89 and accompanying text supra. This officer should be a mental health professional, such as a psychiatrist or psychologist.
93 See text accompanying notes 31-32 supra.
94 If the mental patient is incompetent, the doctor should be required to inform his guardian of this right.
95 In states such as Massachusetts, however, which do not give voluntary mental patients the right to refuse treatment, voluntary mental patients may not share these rights. In such a jurisdiction, the patient must leave the state hospital if he refuses treatment. See note 4 supra.
psychotic drugs is constitutionally protected. The recent decisions in Okin and Rennie affirm this right and formulate procedures to protect it. The Supreme Court granted certiorari in Okin to determine definitively whether this right exists, and, if so, whether the First Circuit erred in ordering the district court, rather than the state hospitals, to formulate protective procedures. Rennie upheld the hospitals’ procedures as affording due process. Neither decision goes far enough, however, in protecting mental patients’ rights. State hospitals should be required to inform mental patients of their right to refuse antipsychotic drugs in a nonemergency and to review any mental patient’s treatment refusal in an informal hearing by an administrative officer.

Perhaps the most important consideration, however, is the mental patient’s well-being. Although antipsychotic drugs have a tremendous effect on a mental patient’s physical and emotional well-being, they are often never asked the simple question, “[H]ow does the medication agree with you?”96 Courts, hospitals, and legislatures should keep that question in mind when they decide if a mental patient has a constitutional right to refuse treatment with antipsychotic drugs and, if so, what procedures they should require to protect this right.

Marianne Lafferty
William J. Lawrence, III
Anthony A. Lusvardi

Gifts—The Income Tax Treatment of Net Gifts

Frequently, gifts will be conditioned on the payment of the gift tax by the recipient. Such a transaction has been termed a net gift.\(^1\) The income tax effect of such a conditioned transfer has caused a split in the courts. In *Diedrich v. Commissioner*,\(^2\) the Eighth Circuit held that such a transfer confers income on the transferor. On substantially similar facts, the Sixth Circuit in *Owen v. Commissioner*\(^3\) held that no income tax liability results from such a transfer.

It seems clear that an economic benefit has been conferred upon the donor to the extent the gift tax paid exceeds the adjusted basis of the gift and the economic benefit test established in *Diedrich* should be the controlling test.\(^4\)

I. State of the Law

Two clear lines of cases emerge in this area. *Owen* has sprung from the Sixth Circuit's seminal case of *Turner v. Commissioner*,\(^5\) subsequently followed by the Fourth and Fifth Circuits in *Hirst v. Commissioner*\(^6\) and *Estate of Davis v. Commissioner*.\(^7\) These decisions find that a

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\(^1\) Diedrich v. Commissioner, 643 F.2d 499, 501 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3216 (U.S. Oct. 6, 1981). Only that portion of the value of the property transferred which exceeds the amount of the gift taxes due on the transfer is considered to have been transferred with donative intent, and therefore characterized as a gift, subject to gift taxes. *Id.* at 501 n.8.


\(^3\) 81-2 USTC (CCH) ¶ 9509 (6th Cir. 1981), aff'd 37 T.C.M. (CCH) 272 (1973).

\(^4\) I.R.C. § 1001(a) provides: "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis." Since a gift may be viewed as a "disposition," the amount of the gift tax paid by the donee may be viewed as an "amount realized therefrom." These statutory terms explain the reason for contending that the benefit to the donor equals the excess of the gift tax liability over the property's adjusted basis.

\(^5\) 410 F.2d 752 (6th Cir. 1969), aff'd per curiam 49 T.C. 356 (1968). In *Turner*, the taxpayer transferred shares of stock to her children and to trustees of her grandchildren pursuant to an agreement by the children to reimburse her for the gift tax and an agreement by the trustees to reimburse her out of the trust corpora. The court found that the taxpayer realized no income. *Id.* at 753.

\(^6\) 572 F.2d 427 (4th Cir. 1978) (en banc), aff'd 63 T.C. 307 (1974). Mrs. Hirst, an 81-year-old widow, owned a one-half interest in non-income producing undeveloped real estate, the remainder of which was owned by her deceased husband's estate. Besides the real estate, Mrs. Hirst owned the house she was living in, a one-half interest in another house being used
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net gift transaction yields no income tax liability. The *Diedrich* decision by the Eighth Circuit, however, is the harbinger of a new line of cases arguing that where there is an economic benefit, there should be taxation. Predecessors in this line of cases are the Second and Seventh Circuit decisions in *Estate of Levine v. Commissioner* 8 and *Evangelista v. Commissioner*. 9

While the gift tax consequences of a net gift are clear-cut, 10 *Diedrich* and *Owen* have perpetuated the division regarding the income tax treatment of net gifts. 11 *Diedrich* consolidated two cases, both involving gifts of low basis, highly appreciated securities by the taxpayer to family members 12 expressly conditioned on the donee's promise to pay all resulting gift taxes. In each case, the Commissioner determined that the taxpayer realized income from the donee's

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7 469 F.2d 694 (5th Cir. 1972), aff'd per curiam 30 T.C.M. (CCH) 1363 (1974). The taxpayer made a gift of stock to his son and two trusts on the condition that they assume and pay all gift taxes from the transaction. The court held that a condition requiring the donees to pay the resulting gift taxes does not alter the result that the transfer constituted a gift.

8 634 F.2d 12 (2d Cir. 1980), aff'd 72 T.C. 307 (1974). The taxpayer made a gift of real estate encumbered by non-recourse mortgages to a trust for the benefit of his three grandchildren. The donee trust assumed the mortgage, the taxpayer's obligation to pay the accrued interest and the real estate operating expenses for the prior year. The court held that the donee's assumption and payment of expenses incurred in connection with the donated real estate for which the donor was personally liable constituted income to the donor.

9 629 F.2d 1218 (7th Cir. 1980), aff'd 71 T.C. 1057 (1979). The taxpayer transferred his interest in 33 autos subject to a security interest held by the bank to a trust established for the sole benefit of his two children, and the trustee (taxpayer's wife) assumed primary liability for payment of the remaining note balance. The court held that the transaction was taxable to the taxpayer to the extent the liability assumed by the trustee exceeded the adjusted basis in the autos transferred. This case is not discussed further in this article, but merely illustrates the 7th Circuit's willingness to follow an "economic benefit" test. *See* notes 66-92 and accompanying text infra.

10 In Sarah Helen Harrison, 17 T.C. 1350 (1952), the Tax Court held that, in determining the net value of the gift (upon which the gift tax is assessed), the amount of the gift tax shall be excluded from the gross value of the gift as a retained interest. 17 T.C. at 1357. The court reasoned that, since the donor did not intend the amount of the property's value necessary to pay the gift tax to be a gift, that amount was not taxable as "value of . . . property passing from the donor." Treas. Reg. 108, § 86.3 (1944). 17 T.C. at 1357.


11 *See* notes 38-92 and accompanying text infra.

12 The taxpayers in *Diedrich* transferred stock outright to their son and in trust for the benefit of their daughters. The taxpayer in *United Missouri Bank*, the companion case, made a gift outright to her son. 643 F.2d at 500 n.3.
payment of the gift taxes assessed on the transfer to the extent the gift
tax exceeded the donor's basis in the transferred property.\textsuperscript{13}

In \textit{Diedrich}, the Commissioner argued that \textit{Crane v. Commissioner}\textsuperscript{14} and \textit{Old Colony Trust Co. v. Commissioner}\textsuperscript{15} established the principle that non-cash consideration received is nonetheless realized income.\textsuperscript{16} Since the donor must pay federal gift taxes,\textsuperscript{17} the Commissioner contended that the donor realized income in the amount of gift taxes paid by the donee.\textsuperscript{18}

The taxpayers in \textit{Diedrich} argued that \textit{Crane} and \textit{Old Colony Trust} had not previously been applied to a net gift situation where the donor personally received no money or other property representing a portion of the gift property's appreciated value.\textsuperscript{19} The taxpayers also relied upon the Tax Court cases which followed \textit{Turner}.\textsuperscript{20}

Though the \textit{Diedrich} and \textit{Turner} facts were indistinguishable, the Eighth Circuit declined to follow \textit{Turner}, stating that the correct approach was taken in the post-\textit{Turner} cases of \textit{Johnson v. Commissioner}\textsuperscript{21}

\\[\text{(December 1981)}\]

\textsuperscript{13} Id. at 500.
\textsuperscript{14} 331 U.S. 1 (1947). The taxpayer in \textit{Crane} transferred to an unrelated party a building subject to a mortgage. The court found that the taxpayer had realized income, stating:

\begin{quote}
A mortgagor, not personally liable on the debt, who sells the property subject to the mortgage and for additional consideration, realizes a benefit in the amount of the mortgage . . . . If he transfers subject to the mortgage, the benefit to him is as real and substantial as if the mortgage were discharged, or as if a personal debt in an equal amount had been assumed by another.
\end{quote}

\textit{Id.} at 14.

\textsuperscript{15} 279 U.S. 716 (1929). The taxpayer, as officer of his company, acquiesced to the company's payment of his personal federal and state income taxes. The Court found that the company's payment constituted additional income to the employee, stating, "[t]he discharge by a third person of an obligation to him is equivalent to receipt by the person taxed." \textit{Id.} at 729.

\textsuperscript{16} 643 F.2d at 501.
\textsuperscript{17} I.R.C. § 2502(d) states "[t]he tax imposed by section 2501 [the gift tax] shall be paid by the donor."

\textsuperscript{18} 643 F.2d at 501.
\textsuperscript{19} Id.

\textsuperscript{20} \textit{Id.} at 504. The Eighth Circuit noted that the \textit{Turner} rationale had been followed in all subsequent tax court decisions presenting similar facts. \textit{Id.} at 502. These included \textit{Owen}; Estate of Henry v. Commissioner, 69 T.C. 665 (1978), appeal docketed, No. 78-1340 (6th Cir. July 31, 1978); \textit{Hirst}; and \textit{Estate of Davis}. 643 F.2d at 504.


Dr. Johnson borrowed $200,000 from a bank without recourse and secured the note with stock having a fair market value of $500,000 and a basis of about $11,000. The taxpayer then transferred the stock into an irrevocable trust for the benefit of his children, and the trustees replaced the taxpayer's note with their own, secured by the same stock. The taxpayer paid $150,000 in gift tax from the $200,000 original note proceeds, leaving him with $50,000 cash. The court held that the taxpayer realized income on amounts by which the loan proceeds exceeded the stock's basis, even though part of the loan proceeds were used to pay the gift tax on the transfers.
and Levine. Although Johnson did not involve a net gift, the Sixth Circuit stated that regardless of the characterization of the transaction, each taxpayer received something of value from the transfer, resulting in gross income. In Levine, which likewise did not involve a net gift, the Second Circuit held that the donor realized gain to the extent his obligation assumed by the donee exceeded the donor’s adjusted basis in the transferred property. The Diedrich court found no meaningful distinction between the pre-existing encumbrances in Levine and Johnson and those arising at the time of transfer.

Notwithstanding “stare decisis and fair play,” the Eighth Circuit ruled that the taxpayer’s reliance upon the Turner line of cases did not control its decision. The court explained that when these net gifts were made, the Eighth Circuit had not yet determined the income tax consequences of such gifts and that “claims of reliance [in federal tax law] are to be given little weight.”

Soon after the Commissioner’s Eighth Circuit victory in Diedrich, the Sixth Circuit announced a taxpayer victory in Owen on facts indistinguishable from those in Diedrich. In Owen, married taxpayers transferred highly appreciated, low basis stock into trust for their grandchildren. The trusts then borrowed money from the trustee bank to pay all federal and state gift taxes on the transfers in accordance with the trust instrument.

The Commissioner abandoned his previous “part sale, part gift” argument, arguing instead that because a transaction’s substance must prevail over its form, Johnson required the taxpayers to recog-
nize income. The Sixth Circuit sustained the Tax Court's finding against the Commissioner, but rejected the Tax Court's reasoning. The Tax Court had followed its decision in Estate of Henry v. Commissioner and held that the net gifts bore no adverse income tax consequences to the taxpayer-donor. The Tax Court ruled that since the taxpayer intended only to make a gift, rather than a sale, the transaction was a nontaxable pure net gift. The Sixth Circuit noted the split in the circuits that developed when Diedrich was decided and concluded that it must follow Turner if it was still good law. In addition, the court found Crane and Old Colony Trust persuasive and reasoned that discharging a gift tax liability in Hirst and Turner had the same impact upon the donor as discharging the pre-existing debt in Johnson. Finally, after stating that "the critical fact was that the donor received something of value and it made absolutely no difference to what use the money was put," the court did an about-face and held for the taxpayer on the basis of stare decisis, upholding Turner once again.

II. Principal Theories

Two theories prevail regarding net gifts. One may broadly be called the "donor's intent" theory, and illustrates the current major-
ity rule. The second, more recent theory is the "economic benefit" theory, which represents the emerging trend.

A. Donor's Intent Theory

The problem of income tax treatment of net gifts originated in connection with gifts to trusts where the donor's gift tax was paid with trust income. In this situation, the courts taxed the donor on the theory that the trust income had been reserved for his benefit.\(^{38}\)

*Turner* could not be resolved by application of the retained interest theory, since the donees paid the donor's gift tax either from available cash or sale of part of the gifted securities, not from trust income. The Commissioner in *Turner* planned to litigate the case based upon a part sale, part gift\(^{39}\) argument, but in his brief the Commissioner conceded that the transfers to the trust donees were not sales and the Tax Court rejected the part sale, part gift argument.

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\(^{38}\) See 81-2 USTC at 87,659; 32 Rutgers L. Rev. 389, 391 (1979) [hereinafter cited as Rutgers Comment]. Principal early cases include Estate of Scheaffer, 377 T.C. 99 (1961), affd, 313 F.2d 738 (8th Cir.), cert. denied, 375 U.S. 818 (1963); Clifton B. Russel, 5 T.C. 974 (1945), appeal dismissed, 154 F.2d 829 (1st Cir. 1946); Estate of Staley, 47 B.T.A. 260 (1942), aff'd, 136 F.2d 368 (5th Cir.), cert. denied, 320 U.S. 786 (1943).

This precept is reflected in I.R.C. § 677(a), and was instrumental in the decision in *Krause v. Commissioner*, 56 T.C. 1242 (1971), appeal dismissed, (6th Cir. 1972). I.R.C. § 677(a) provides: "The grantor shall be treated as the owner of any portion of a trust . . . whose income . . . in the discretion of the grantor or a nonadverse party . . . may be (1) distributed to the grantor . . . [or] (2) held or accumulated for future distribution to the grantor . . . ." In *Krause*, the taxpayer transferred property to three trusts created for the benefit of his grandchildren, and the trustees agreed to pay the resulting gift tax liabilities. The trustees were given discretion to use the trust income, proceeds of sale of corpus, or borrowed funds for this purpose. The Tax Court held that the taxpayers received taxable income prior to the payment of the gift tax liabilities, but did not realize any other income as a result of the payment of such taxes. The court's obvious emphasis was on the trustee's control of the trust income:

Where a person transfers property to a trust and, as a condition to the transfer, the trustee agrees to pay the resulting gift tax liability, the donor is taxable on any trust income which the trustee may use for that purpose. Within the meaning of section 677, he is treated as an owner of a portion of the trust because its income . . . may be used to discharge his legal obligation [the gift tax]. Under section 671, the donor is taxable on the income . . . which may be used to discharge his legal obligation to pay the gift tax.

56 T.C. at 1245-46.

Thus, even though the *Krause* court rejected the Commissioner's "part sale, part gift" argument on the authority of *Turner*, id. at 1248, this case stands for the proposition that trust income which may be used to discharge the donor's legal obligations may be properly taxed to him, rather than for the proposition that *Turner* was correctly decided. The *Krause* case is notable in that the Commissioner abandoned the distinction between individual and trust donees and argued "part sale, part gift" in both instances. 81-2 USTC at 87,660.

\(^{39}\) See note 30 supra.
as to the individual donees.\textsuperscript{40} The court treated the property transfers as net gifts, reasoning that the donor had intended to give the value of the shares less the value of the gift tax payable on the transfers.\textsuperscript{41} Thus, the donor "retained" use of that portion of the gift equal to the gift tax liability.\textsuperscript{42}

The \textit{Turner} rationale precluded a finding of a taxable gain since the donor \textit{intended} only to make a net gift. The donor's intent is determined from the facts of each case, but a strong presumption of wholly gratuitous intent exists.\textsuperscript{43}

The intent standard for donor taxation became widely accepted in the 1970's after it was followed in \textit{Estate of Davis v. Commissioner}.\textsuperscript{44} In the 1978 \textit{Hirst} decision, the Fourth Circuit found that the facts determined that the taxpayer received no income.\textsuperscript{45} The \textit{Hirst} court cited \textit{Turner} as the basis of its decision,\textsuperscript{46} and stated the familiar \textit{Turner} test, that the predominant fact is that the taxpayer intended not to sell but only to make a gift.\textsuperscript{47} The court then added a new twist, finding that no \textit{economic gain} accrued to the taxpayer, except release from the normal tax burden of a real estate owner.\textsuperscript{48} The court thus leaned toward the economic benefit test as a second criterion for determining the income tax liability of the donor. The \textit{Hirst} court acknowledged the validity of the economic benefit test by stating that discharge of another's obligation produces income,\textsuperscript{49} but added that

\textsuperscript{40} 49 T.C. at 362-63. \\
\textsuperscript{41} \textit{Id.} at 363; 410 F.2d at 753. \\
\textsuperscript{42} One commentator proposes still another "retained interest" theory whereby the donor treated as retaining a property interest would recognize a gain or loss on the disposition of this interest. A net gift giver would encounter the same income tax liability as a donor who physically divides his property and sells part of it to pay the gift tax. This retained interest result presumably reflects both the substance of the net gift transaction \textit{and} the parties' intent, since the donor merely wants to make a gift conditioned upon the donee's assumption of the gift tax liability, rather than to sell the property to the donee. The commentator notes, however, that the courts are unlikely to adopt this retained interest analysis because it is more disadvantageous to the taxpayer than is the IRS's part sale, part gift position. 63 \textit{CORNELL L. REV.} 1074, 1086, 1088-89 (1978) [hereinafter cited as \textit{CORNELL Comment}]. \\
\textsuperscript{43} \textit{See} \textit{RUTGERS} Comment, \textit{supra} note 38, at 394 & n.34. \\
\textsuperscript{44} \textit{See} note 7 \textit{supra}. \\
\textsuperscript{45} 572 F.2d at 431. \textit{See} note 6 \textit{supra}. \\
\textsuperscript{46} 572 F.2d at 431. \\
\textsuperscript{47} \textit{Id.} at 430. \\
\textsuperscript{48} \textit{Id.} (emphasis added). The majority indicates that relief from the responsibility for the payment of accruing real estate taxes is not such an economic advantage to Mrs. Hirst that she should be taxed on its receipt. \textit{Id.} at 430 n.9. The court seems to place weight on the fact that no pre-existing liability was present when it observed that she received nothing by virtue of the transaction, but was simply not worse off. \textit{Id.} at 431. This observation ignores the substance of the transaction. \textit{See} notes 75, 88-89 and accompanying text \textit{infra}. \\
\textsuperscript{49} 572 F.2d at 431.
the relationship between the parties and the existence of other obligations are equally important considerations.50

_Hirst_ identified three criteria as determinative of whether a net gift results in taxable income to the donor: (1) the subjective intent of the donor in making the transfer,51 (2) the economic benefit to the donor from the transfer,52 and (3) other subjective considerations.53 Even though the intent and economic benefit tests54 indicate that the transferor realized taxable income, other subjective factors, such as the age or financial position of the donor, may militate against income tax liability.55

Recently, _Henry_ followed _Turner_56 but justified its holding on stare decisis and fair play.57 Although the _Henry_ court reiterated the idea that the taxpayer did not intend to sell the property,58 it seemed more impressed with the rejection of the Commissioner's part sale, part gift argument by a plurality of the courts of appeals.

_Owen_ is the most recent standard-bearer for _Turner_, although dictum in the case casts doubt on _Turner_'s posture as precedent.59 The Tax Court followed _Henry_ and ruled under the donor's intent doctrine of _Turner_ that the taxpayers intended only to make a gift.60 The Sixth Circuit declined to wholeheartedly endorse the donor's intent theory adopted by the Tax Court.61 Instead, the appellate court stated that under the _Old Colony Trust_ and _Crane_ decisions, discharge of a debt is a benefit to the taxpayer and receipt of a benefit is

50 _Id._
51 _Id._ at 430.
52 _Id._ at 431.
53 _Id._
54 The _Hirst_ court found that the donor received no economic benefit, _see_ note 48 _supra_, but in light of subsequent decisions such as _Diedrich_ and _Owen_ (holding that the relief from gift tax liability is a benefit), the court would probably not continue to believe this finding.
55 The _Hirst_ court in fact found Mrs. _Hirst_'s age and financial position, _see_ note 6 _supra_, to be persuasive factors militating against imposing tax liability upon her. _See_ 572 F.2d at 431.
56 The court noted that _Johnson_ had limited _Turner_ to its facts, rather than overruling it, and assumed that _Turner_ was to apply to future indistinguishable fact situations. One commentator has advanced the idea that the limited affirmance of _Turner_ may have been intended to restrict the holding to the particular taxpayer in _Turner_, supporting the Commissioner's position in the _Hirst_ appeal. _RUTGERS_ Comment, _supra_ note 38, at 404 & n.11; _Hirst_, 572 F.2d 427 (1978), Brief for Appellant at 17 n.7. _See_ also note 78 _infra_.
57 69 T.C. 665. _See_ notes 26 & 32 _supra_.
58 69 T.C. at 674.
59 _See_ 81-2 USTC at 87,661, 87,664.
60 _See_ notes 32-33 and accompanying text _supra_.
61 81-2 USTC at 87,663.
equivalent to receipt of income. Thus, the donor realizes income to the extent that the donee satisfies the donor's debt. The court hesitated, however, to rely upon the intent standard, and resolved the case by concluding that stare decisis compelled a verdict for the taxpayer. Since stare decisis serves as the life-support system for Turner's donor intent theory, the theory is on less than solid ground.

B. Economic Benefit Theory

Courts have recently applied the economic benefit theory to net gift questions. The theory, as applied to individuals, originated in the part sale, part gift argument advanced by the Commissioner in Turner. Before Turner, the Commissioner had invoked section 677 of the Internal Revenue Code which attributed to the donor income from the trust used to pay gift taxes. However, in Turner only small amounts of current trust income were used to pay the gift taxes, since property sales proceeds and available cash covered most of the liabilities. The Commissioner therefore advanced his part sale, part gift theory, contending that the donor realized income to the extent that the gift tax liability of the donor exceeded his adjusted basis in the transferred property. The court rejected this theory and held the transfer to be a nontaxable event.

The Tax Court also rejected the part sale, part gift characterization in Krause v. Commissioner and Davis before it was accepted by the Tax Court in Johnson. On appeal, the Sixth Circuit in Johnson

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62 Id.
63 Id.
64 Id.
66 In Guest, the Tax Court noted that it had continued to adhere to Turner in the interest of fair play and stare decisis, despite the Commissioner's continued opposition and the Johnson opinion. The court noted that Diedrich had rejected the Turner approach, but declined to rule upon the vitality of the Turner doctrine since a net gift situation was not presented. Id. at 12-77 n.10.
67 I.R.C. § 677(a) provides: "The grantor shall be treated as the owner of any portion of a trust . . . whose income . . . in the discretion of the grantor or a nonadverse party . . . may be (1) distributed to the grantor . . . [or] (2) held or accumulated for future distribution to the grantor . . . ." See note 38 and accompanying text supra.
68 49 T.C. at 359-60; 572 F.2d at 428-29.
69 See note 30 supra.
70 See notes 40-42 and accompanying text supra.
72 469 F.2d 694. See note 7 supra.
73 The appellate court noted that whether the transaction was described as "part sale, part gift" or a "net gift" was not important. The important thing was the taxpayer's receiv-
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replaced the part sale, part gift theory with the economic benefit test. The appellate court looked to the substance of the transaction; namely, the donor had received money debt-free and used part of that money to pay the gift taxes on his transfer of stock into the trust. The same result would have occurred if the Turner facts were before the court, that is, the $150,000 would have been viewed as receipt of the donee's payment of the donor's gift tax liability. Using the economic benefit rationale, the court found that payment of a donor's gift tax liability by the donee constituted income to the donor. After examining the facts of Turner and reaching a different result, the court limited Turner to its peculiar facts.

The Johnson court advanced three theories upon which liability could be based. First, under section 61 of the Code, the $200,000 received by the taxpayer free of any repayment obligation was gross income, regardless of how the money was used. Second, because section 2502(d) imposes the legal obligation on the donor to pay gift taxes, the donee's payment of the donor's liability constitutes income to the donor under the principles expressed in Old Colony Trust. Third, under the Crane doctrine, the donor realized income when he disposed of the debt by transferring the encumbered property into trust. The Johnson court stated that Crane governed the transaction because the taxpayers received cash without personal liability to repay the notes. The court thus rejected Turner's subjective intent test and replaced it with the more objective economic benefit test. The Johnson court also noted the greater possibility, under the economic

ing "something of value" upon the transfer. 495 F.2d at 1083. Therefore, the Commissioner's "part sale, part gift" rationale was explicitly accepted only by the Tax Court in Johnson. See Johnson, 59 T.C. at 817.

495 F.2d at 1083.

See notes 21 & 23 and accompanying text supra.

495 F.2d at 1083.

Id.

78 In Turner, the Commissioner conceded that the gifts to the trusts were not "sales." However, the Commissioner made no concessions respecting the gifts to the individual donees in the case. 81-2 USTC at 87,661 n.10. (The case involved gifts to the taxpayer's children directly and to her grandchildren in trust. 410 F.2d at 752). In light of the Commissioner's concessions, some courts have interpreted Johnson's limitation of Turner as applying to all individual and trust donees. See note 56 supra. Others have regarded the limitation as applying only to the individuals in the case. Id.

79 I.R.C. § 61(a) states: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . ."

80 495 F.2d at 1083.

81 Id. See also note 15 supra.

82 495 F.2d at 1083. See also note 14 supra.

83 495 F.2d at 1083.
benefit test, of applying the Tax Code equitably to basically similar transactions.84

In Levine, the Second Circuit followed Johnson,85 holding that the donee's assumption and payment of expenses for which the donor was personally liable on the donated property gave rise to donor income. The court viewed the gift tax as any other personal liability of the donor, and found income upon the donee's payment of the tax.86

The next examination of the economic benefit theory occurred in Diedrich,87 decided a year after Levine. The Eighth Circuit stated the economic benefit test concisely: "It makes no difference whether [the taxpayer] receives the benefit in the form of relief of encumbrance, or in the form of relief of tax liability: the determinative factor is the receipt of the benefit.88 Looking to the substance of the transaction, the court noted that the transferor was actually receiving something in return for his gift transfer, and concluded that the transferor's intent could not change the economic effect of the event.89

An Iowa district court recently followed Diedrich's economic benefit test. In Molinaro v. United States90 the court held that donors of stock received a taxable benefit to the extent that the gift tax liability assumed by the donees exceeded the donor's adjusted basis in the stock.91 The Molinaro court viewed Diedrich as overruling prior Tax Court decisions92 which, consistent with the Turner rationale, had permitted income tax-free treatment of net gifts.

84 The court noted the difficulty involved in depending upon hindsight determinations of actual intent to establish income tax consequences, and the different treatment that would result when taxpayers doing the same actions intend different things. Id. at 1083 n.6.

85 The Hirst dissent also stated that the Turner decision was wrong in holding that a net gift gave rise to no taxable event for income tax purposes, 572 F.2d at 437 (Thomsen, J., dissenting), and concluded that the donor should realize income. Id. at 439.

86 634 F.2d at 17.

87 See notes 10-28 and accompanying text supra.

88 643 F.2d at 503-04. (emphasis added).

89 Id. at 504 (quoting Note, 52 TEMP. L.Q. 139, 151 (1979) [hereinafter cited as TEMPLE Note]).

90 81-1 USTC ¶ 9362, 47 AM. FED. TAX REP. 2d (P-H) 81-1457 (N.D. Iowa 1981). In Molinaro, stock transfers were conditioned upon the transferees' (various relatives and trusts) assumption of the taxpayer's gift tax liability in proportion to the shares received. The district court held that Diedrich warranted a finding of taxable income to the donors to the extent that the gift tax liability assumed by the donees exceeded the donors' adjusted basis in the stock. Id. at 81-1459.

91 Id.

92 Id. The Tax Court in Hirst had indicated that it would continue to follow Turner in net gift cases until a clear-cut overruling had taken place. 63 T.C. at 314-15. The Molinaro court considered Diedrich to be the vitiating agent. See also note 65 supra.
III. Critique of Turner's Intent Theory

Turner and its progeny have been criticized by commentators.93 These cases allowed donors to characterize net gift transfers as net gifts for income tax purposes as well as gift tax purposes,94 even though income tax provisions are to be construed separately from gift tax provisions,95 and held that initial donative intent justified tax-free treatment.96 However, a transfer may be a net gift for gift tax purposes and still expose the donor to income tax liability; therefore the Turner intent standard has not been applied properly to a net gift transfer.

The legal precedent used by the Turner court failed to directly support the decision. The cases cited by the court97 involved trust income under Code sections 671 and 677, and were unrelated to donee assumption of gift tax liabilities creating donor income.98

The Turner court was concerned that the Commissioner's position would allow a double credit to transferees in calculating their adjusted basis for the money paid as gift tax.99 Johnson, however, resolved this question in the Commissioner's favor.100

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93 See, e.g., Temple Note, supra note 89; Note, Income Tax Consequences of Encumbered Gifts—The Advent of Crane, 28 U. Fla. L. Rev. 935 (1976); 48 Tenn. L. Rev. 404 (1981) [hereinafter cited as Tennessee Comment]; Rutgers Comment, supra note 38; Cornell Comment, supra note 42.

94 572 F.2d at 437 (Thomsen, J., dissenting).

95 See Farid-Es-Sultaneh v. Commissioner, 160 F.2d 812, 814 (2d Cir. 1947).

96 See notes 29-65 and accompanying text supra.


98 See Temple Note, supra note 89, at 153. See also note 38 supra.

99 The court's concern in Turner arose from Treas. Reg. § 1.1015-4(a), which states that the transferee's basis in a part gift, part sale calculation would be the amount paid for the property plus the amount of gift tax paid on the transfer. The Turner court felt that application of this regulation, when the gift tax had been paid by the transferee, would result in a double credit to the transferee. The rationale behind the court's concern can best be seen in an example.

Assume that A transfers to B property worth $20,000 upon the condition that B pay the resulting gift taxes of $2,000. Since this is a part gift, part sale, B's basis under Treas. Reg. § 1.1015-4(a) is the amount paid by B for the property ($2,000) plus the amount of gift taxes paid on the transfer ($2,000). B's resulting basis is $4,000. From this the Turner court would conclude that B received a double credit.

100 Johnson held that both credits to the transferee's adjusted basis were independently proper. The court found that the amount received by the transferor should be credited to the transferee's basis because the transferor has to pay a capital gains tax on the amount of appreciation of his stock. Since this portion of the stock has already been taxed it should not be taxed again. The Johnson court found that the transferee's basis should also be credited for
The intent approach also ignores the Supreme Court's decision in *Helvering v. Bruun*,\(^{101}\) which held that although economic gain is not always taxable as income, such gain may arise from an exchange of property, payment of a taxpayer's indebtedness, relief from a liability, or other profit realized from the completion of a transaction.\(^{102}\) The receipt of some economic benefit is the crucial factor.\(^{103}\) *Old Colony Trust* stated that the taxpayer received a benefit upon relief of an encumbrance for which he is personally liable.\(^{104}\) *Crane* extended this concept to apply in situations where the taxpayer is not personally liable and no other party has assumed the debt.\(^{105}\)

Pertinent policy concerns exist in the net gift area, yet courts have not discussed such policies at any length. Arguments for nontaxable net gift treatment rest primarily on the notion of fairness. A donor with a small amount of liquid assets may be unable to give away an asset such as a building without selling either part of the building or other assets to pay the gift taxes. Another concern is the possible inhibitive effect that an income tax could have on gratuitous transfers. Donors, if taxed, will have less incentive to make gifts despite the donee's payment of the gift tax.

Policy concerns favoring income tax imposition also have merit. First, the income tax liability would not arise until the gift tax assessed on the transfer exceeded the donor's adjusted basis; thus for liability to occur the property would have to be highly appreciated.\(^{106}\) Second, a greater legal certainty would exist under an objective economic benefit standard. Third, an objective standard would treat similarly situated taxpayers more equitably than a subjective intent standard.\(^{107}\)

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101 309 U.S. 461 (1940).
102 Id. at 469.
103 Id.
104 279 U.S. at 729. *See note 15 supra.*
105 331 U.S. at 13. *See note 14 supra.*
106 The donor's income tax liability would be assessed on the excess of the gift tax liability over the property's adjusted basis. Since the gift tax liability is a fraction of the property's value at the time of transfer, *see* notes 107 and 117 *infra*, the value must have greatly appreciated in order for the gift tax to exceed the property's adjusted basis.
107 *See note 84 supra.* This may be illustrated with an example. Assume A makes a net gift of 40 acres of land to B, each acre having a fair market value of $10,000 and a basis of $500. The net gift is $356,731 and the gift tax on the transfer is $43,269. See 1975-1 C.B. 310 (*superseding* Rev. Rul. 71-232, 1971-1 C.B. 275); TENNESSEE Comment, *supra* note 93, at 406. C, similarly situated to A, transfers 35.67 lots to D and retains 4.33, which he then sells in order to pay the gift tax. Since C had to sell 4.33 lots, with a total fair market value of
Stare decisis and "fair play" have been used to perpetuate incorrect results. The Hirst court refused to recognize any benefit accruing to Mrs. Hirst in the interest of fairness. In Henry, the court relied upon stare decisis and fair play where the assessed tax deficiency exceeded $600,000 and the taxpayer had relied upon Turner as clear precedent. These two factors motivated the Tax Court to follow Turner, even though the court seemed uncertain of its soundness as precedent. Finally, the Owen decision was based solely on Turner's status as precedent. The Sixth Circuit indicated that stare decisis dictated its decision, but that they would have applied Johnson had it not been for the indistinguishable Turner facts. The court noted the taxpayer's reliance on Turner, and allowed this reliance only because the taxpayer conducted the transactions before Johnson was decided. The Owen court concluded that "in most matters it is more important that the applicable rule of law be settled than it be settled right." This position hardly comports with the judicial system's traditional goal of doing justice for both parties.

V. Conclusion

Conflicting decisions on the income tax consequences of net gifts have prompted the Supreme Court to grant certiorari to Diedrich. The Court's decision should guide courts in deciding similar cases on appeal and provide certainty in the net gift area. The Court will do that if it approves the economic benefit test used by the Sixth Circuit in Diedrich. Since Turner's vitality has been weakened by

$43,300 and a total basis of $2,165, he must realize capital gains of $41,135. The donor's gift tax on the transfer is $42,918. I.R.C. § 2001. If the motivations of A and C are the same then A, like C, should be taxed to the extent the gift taxes paid by the donee exceed A's basis in the property transferred. A should recognize capital gain in the year of the transfer. See also author's example in CORNELL Comment, supra note 42, at 1084-85 n.88; and notes 38-42 and accompanying text supra.
Johnson, the court should also consider overturning Turner, thereby removing any possible confusion about the law in the net gift setting.

The Supreme Court's affirmance of Diedrich will solidify the economic benefit test as the benchmark for taxpayers to rely upon in making transfers of appreciated property subject to the donee's assumption of the gift tax and provide for equitable tax treatment of basically similar transactions.

David Hasper
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Search and Seizure—FOURTH AMENDMENT: THE CONSTITUTIONAL SCOPE OF WARRANTLESS AUTOMOBILE SEARCHES

The fourth amendment established the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."¹ The Supreme Court of the United States has sought to protect each person’s reasonable expectation of privacy² by holding that warrantless searches are "per se" unreasonable.³ However, there are certain exceptions to this general warrant requirement.⁴ The Supreme Court has found the "automobile exception" to the warrant requirement⁵ particularly troublesome when applied to the search of a container found during an automobile search. While the Supreme Court has clearly defined warrantless automobile searches,⁶ it has not adequately defined the constitutional scope of the warrantless search of containers found during such searches.

This article examines two recent Supreme Court decisions which address the constitutional scope of warrantless searches of containers.

¹ U.S. CONST. amend. IV.
² Prior to 1967, the fourth amendment was interpreted as only protecting against a physical intrusion or "trespass" into a "constitutionally protected area." See, e.g., Lopez v. United States, 373 U.S. 427, 439 (1963); Silverman v. United States, 365 U.S. 505, 512 (1961); Olmstead v. United States, 277 U.S. 438, 464 (1928). The Supreme Court rejected this interpretation in Katz v. United States, 389 U.S. 347 (1967). Justice Stewart stated:
   The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Id. at 351-52 (citations omitted). Thus the Court shifted from protecting the security of private property to protecting a person's "reasonable expectation of privacy." Id. at 361 (Harlan, J., concurring).
found during automobile searches. Part I reviews the historical development of the "automobile exception" to the warrant requirement; Part II analyzes the two most recent Supreme Court decisions in this area; and Part III proposes a test for determining the constitutionality of warrantless searches of containers found during automobile searches.

I. The Automobile Exception to the Warrant Requirement

The Supreme Court has recognized a difference under the fourth amendment between home searches and automobile searches. Generally, a police officer must obtain a search warrant before searching a home; probable cause alone is insufficient. However, upon lawfully stopping an automobile, a police officer may search the automobile without obtaining a search warrant if he has probable cause to believe the automobile contains contraband.

The Court relied originally on the automobile's inherent mobility as the main rationale justifying warrantless automobile searches. However, the lesser expectation of privacy in the automobile as compared to the home has emerged as a more important rationale for the automobile exception. The Court has cited several factors explaining this lesser privacy expectation. First, the automobile serves as transportation, not as a repository for personal effects. Second, the automobile travels public roads where its occupants and contents are in plain view. Finally, the states have regulated the use of automobiles through laws requiring registration of automobiles and

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8 399 U.S. at 48; 267 U.S. at 153.
9 The Court recently reaffirmed that a search warrant is needed to search a person's home, Steagald v. United States, 101 S. Ct. 1642, 1647 (1981).
10 Chambers v. Maroney, 399 U.S. at 51. The Court has noted that when an automobile is stopped on the highway, the opportunity to search may be fleeting because the automobile is readily movable. See Carroll v. United States, 267 U.S. at 153. However, the Supreme Court has found unconstitutional the warrantless search of an automobile parked in the defendant's driveway. The Court in Coolidge noted that the automobile was not being used for any illegal purpose, and that the police officers had ample opportunity to obtain a search warrant. The Court concluded that: "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Id.; 403 U.S. at 479-80.
14 Cardwell v. Lewis, 417 U.S. at 590.
drivers.\textsuperscript{15}

The Court, prior to July 1981, had not addressed the warrantless search of containers found during traditional automobile exception searches. The Court has addressed in \textit{Chadwick v. United States}\textsuperscript{16} and \textit{Arkansas v. Sanders}\textsuperscript{17} the search of containers located in automobiles. However, these cases are not "automobile exception" cases. The locus of the search in both \textit{Chadwick} and \textit{Sanders} was the container and not the automobile.\textsuperscript{18} In both cases, police officers had probable cause to believe that the container held contraband even before the container was placed in the automobile. The relationship between the container and the automobile was mere coincidence.\textsuperscript{19}

\textit{Chadwick} involved the warrantless search of a locked footlocker located in the trunk of a parked car.\textsuperscript{20} In \textit{Chadwick}, the government argued that the warrant requirement only applied to home searches, and that the standard for searches outside the home should be probable cause.\textsuperscript{21} The Court rejected this argument. Noting that the fourth amendment "protects people, not places,"\textsuperscript{22} the Court found that people may have constitutionally protected privacy expectations both inside and outside the home.\textsuperscript{23} The Court then found that the warrantless search of the locked footlocker violated Chadwick's reasonable privacy expectations under the fourth amendment.\textsuperscript{24}

The Court distinguished \textit{Chadwick} from the automobile search cases in two ways. First, a person has a greater privacy expectation in his luggage than he has in his automobile.\textsuperscript{25} Second, taking possession of luggage while obtaining a search warrant places fewer burdens on police officers than taking possession of an automobile for that time period.\textsuperscript{26}

\textit{Arkansas v. Sanders}\textsuperscript{27} dealt with the warrantless search of luggage
taken from a legally stopped automobile. In Sanders, the Court reiterated the Chadwick reasoning that the exigencies associated with an automobile search are not present in a luggage search.28 The Court held that placing closed luggage in an automobile does not extinguish a person’s reasonable expectation of privacy in the luggage.29 Many federal and state courts have interpreted Chadwick and Sanders as holding that constitutional distinctions may be based on the type of container searched.30 Relying on Chadwick and Sanders, these courts have suggested that containers generally used to store non-personal items may constitutionally be given less protection under the fourth amendment than containers commonly used to store personal items.31 This analysis stems from the language in Chadwick and Sanders indicating that reasonable expectations of privacy are violated by a warrantless luggage search because people generally store personal items in luggage.32

The foregoing summarizes the pre-July 1981 law regarding warrantless searches of automobiles and containers located in automobiles but not found in an automobile exception search. In July 1981, the Supreme Court clarified the law regarding constitutional distinctions based on the type of container, and announced tests for analyzing the constitutional scope of warrantless searches.

II. Recent Supreme Court Decisions

On July 1, 1981, the Supreme Court announced its decisions in Robbins v. California33 and New York v. Belton.34 Both cases addressed the constitutional scope of warrantless searches of containers found during an automobile search. In Robbins, the container was discovered in the trunk of the automobile. In Belton, the container was found in the interior passenger area of the automobile.

A. Robbins v. California

In Robbins, police officers legally stopped an automobile and searched it for drugs which they had probable cause to believe were

28 Id. at 763-64.
29 Id. at 764-65.
31 Id.
While legally searching the trunk, the police officers found two brick-shaped objects wrapped in opaque plastic and sealed with tape. The police officers opened the plastic wrapping without obtaining a search warrant, and discovered that the packages contained marijuana. In a plurality opinion, the Court held that the warrantless container search violated the fourth amendment.

The Court in Robbins rejected the suggestion that the type of container searched might determine a person's reasonable expectation of privacy in it. The Court stated that the fourth amendment makes no distinction between personal and non-personal property. If the owner shows that he does not want the contents of his container made public—generally by closing the container—the fourth amendment must protect his reasonable privacy expectations. The Court rejected any constitutional distinction between containers based on a personal contents/non-personal contents dichotomy because of the problems inherent in objectively distinguishing the possible contents of particular container types. "What one person may put in a suitcase, another may put in a plastic bag," the Court reasoned.

In Robbins, the Court attempted to establish a "bright line" constitutionality test for searches of containers found during legal searches of stopped automobiles. With two exceptions, closed containers found in the non-passenger areas of legally stopped

35 101 S. Ct. at 2844.
36 Id.
38 101 S. Ct. at 2847.
39 Id. at 2845-46.
40 Id. at 2846.
41 Id.
42 Id.
43 Id.
44 The two exceptions are (1) containers which reveal their contents by their outward appearance (such as a gun case); and (2) containers whose contents are in plain view (such as an open container or a clear plastic bag). These exceptions were originally discussed in Sanders: "Thus, some containers . . . by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." Sanders v. Arkansas, 442 U.S. at 764-65 n.13.
45 Police officers may conduct warrantless searches of containers found in the passenger area of an automobile if one of the automobile's occupants has been arrested. See New York v. Belton, 101 S. Ct. 2860 (1981). See also text accompanying notes 51-53 infra.
automobiles cannot be searched without a warrant.

The Robbins approach should be advantageous to the courts and to police officers in that it should diminish the difficulty of distinguishing between different types of containers. However, this approach may be burdensome in terms of time and manpower pressures on police agencies. As Justice Powell noted, a police officer will have to fill out appropriate forms, await a decision from a magistrate, and finally obtain a warrant before being able to search even the most inconsequential container. These procedures may remove the police officer from his normal duties for extended periods of time.

The extent to which Robbins will affect fourth amendment law is not clear. The Court's opinion was supported by only a plurality of its members. Justice Powell's concurrence, on which the final decision depended, rejected the plurality's rationale.

B. New York v. Belton

The Supreme Court decided New York v. Belton on the same day as Robbins. In Belton, a police officer arrested the occupants of a car he had legally stopped. While searching the automobile's interior, he found a jacket. The police officer searched a zippered pocket of the jacket and found cocaine. The Court held that the search was a constitutional search incident to a valid custodial arrest.

46 As Justice Blackmun noted, however, the "bright line" test does not resolve whether a container's exterior "announ[ce]s its contents." 101 S. Ct. at 2851 (Blackmun, J., dissenting). "O[n]ly time will tell whether the 'test' for determining whether a package's exterior announce[s] its contents will lead to a new stream of litigation." Id.

47 Id. at 2849 (Powell, J., concurring). Justice Powell cited a Dixie Cup and a cigar box as two examples of such inconsequential containers. Id. (Powell, J., concurring).

48 The burden on police is even greater in rural areas, where a police officer may have to travel long distances just to find a magistrate. Id. at 2852 (Rehnquist, J., dissenting). Justice Powell points out that this administrative burden would be justified if significant fourth amendment values were being protected. However, he found no such protection. Id. at 2849-50 (Powell, J., concurring).

49 The Third Circuit has already indicated that it will not accept Robbins as binding precedent. Virgin Islands v. Rasool, 657 F.2d 582 (3d Cir. 1981). Rasool involved a warrantless search, with probable cause, of a paper bag on the back seat of a car. Although the case was ultimately decided on the authority of New York v. Belton, 101 S. Ct. 2860 (1981), the court rejected Robbins in dicta. For a general discussion of the precedential value of plurality decisions, see Comment, The Precedential Value of Supreme Court Plurality Decisions, 80 COLUM. L. REV. 756 (1980).

50 101 S. Ct. at 2847 (Powell, J., concurring).


52 Id. at 2862.

53 Id. at 2865.
In *Chimel v. California*, the Court stated the principles governing the geographic area which can be constitutionally subjected to a warrantless search incident to an arrest. In applying the *Chimel* principles to an automobile search, the Court in *Belton* permitted, incident to arrest, the warrantless search of the interior passenger area of an automobile and any containers found in that area.

In *Belton*, the police officer had arrested the defendants and taken them away from the automobile before he searched the automobile’s interior and the zippered jacket pocket in which he found the illegal drugs. The defendants could not have gained access to the automobile’s interior at the time of arrest. Therefore, the holding in *Belton* appears to permit police officers to search an automobile’s interior incident to an arrest regardless of whether any danger exists that a suspect may gain access to that area.

*Chimel*’s holding was based on two premises: (1) the police officer’s well-being requires that he must prevent the arrestee from gaining access to a dangerous weapon; and (2) the state’s interest in preserving evidence requires that police officers must prevent the arrestee from destroying evidence. In *Belton*, the Court expanded the constitutional scope of a search incident to an arrest by allowing police officers to conduct a warrantless search incident to an arrest even though any weapons or evidence in the automobile’s interior were outside the arrestee’s possible access.

The legal fiction used in *Belton*, that an automobile’s passenger area is always within the arrestee’s reach, appears to run counter to the Court’s earlier statement that any warrantless search must be

55 In *Chimel*, the Court held that a police officer may legally search the area in the arrestee’s immediate control. This area includes the geographical area from which the arrestee may gain control of a weapon or evidence. *Id.* at 763.
56 101 S. Ct. at 2864.
57 *Id.* at 2862.
59 *Chimel* v. California, 395 U.S. at 763.
60 101 S. Ct. at 2867 (Brennan, J., dissenting). The Court’s application of *Chimel* to the facts in *Belton* does create a legal fiction. It would be physically uncomfortable, if not impossible, for a police officer to conduct a thorough search while the automobile’s occupants remain in the automobile. Conducting a search in this manner would also be dangerous for the police officer. Therefore, the police officer must remove the occupants from the automobile before he can conduct a search. Once removed from the automobile, the occupants no longer have access to the automobile’s interior. As a result, a search incident to arrest in the *Belton* situation cannot be justified under the *Chimel* rationale.
"strictly tied to and justified by the circumstances which rendered its
initiation possible." The circumstances which make a search inci-
dent to arrest possible are the necessities of protecting police officers
and preserving evidence in an insecure situation. However, police
officers are not threatened by weapons inside an automobile's inte-
rior, and the preservation of evidence in the automobile's interior is
not threatened, if the arrestee has no access to that area.

The Belton holding would apparently allow police officers to use
routine traffic arrests as a basis for searching an automobile's inte-
rrior and any container found there. As a result, the Belton holding
has increased the possibility that police officers might use routine
traffic violations as a pretext to stop an automobile, arrest the driver,
and search the automobile. That holding has also disposed of both
the search warrant and probable cause restrictions on police officers
who search an automobile's interior pursuant to a traffic violation
arrest. As Justice White stated: "This [authorization of a search
without any type of reasonable suspicion] calls for more cautious than
the court exhibits . . . ."

The Court's holdings in Robbins and Belton demonstrate the
problems inherent in analyzing the constitutionality of container
searches conducted during warrantless automobile searches. In one
day, the Court both narrowed and broadened the scope of the war-
rant requirement in these situations. Reading Robbins and Belton
together, the Supreme Court ruled that, notwithstanding a lack of
probable cause to search, police officers may conduct a warrantless
search of the interior passenger area of any automobile and any
container found there, provided they have legally arrested one of the

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62 All of the concurring and dissenting justices in Belton except Justice Rehnquist view
Belton as an extreme and unjustified extension of Chimel. See Robbins v. California, 101 S. Ct.
2841, 2858-59 (1981) (Stevens, J., dissenting in Robbins and concurring in Belton); New York v.
Belton, 101 S. Ct. 2860, 2868 (1981) (Brennan, J., dissenting); id. at 2870 (White, J.,
dissenting).
63 Certain states authorize police to make full custodial arrests for routine traffic viola-
tions. See 101 S. Ct. at 2858-59 n.12 (Stevens, J., dissenting in Robbins and concurring in Belton).
Such arrests are not constitutionally prohibited, although a strong argument can be
made that they should be. See W. LAFAVE, SEARCH AND SEIZURE § 5.2.
64 See 101 S. Ct. at 2859 (Stevens, J., dissenting in Robbins and concurring in Belton). A
police officer is not required to demonstrate probable cause for making a search incident to
cause must support the arrest, however. In Robinson, the police officer had probable cause to
arrest. id. at 227.
65 101 S. Ct. at 2870 (White, J., dissenting).
automobile's occupants. However, police officers may not search containers found in any other part of the automobile without a search warrant, even if they have probable cause to search, unless the container's illegal contents are obvious to the observer.

In both Robbins and Belton, the police legally stopped an automobile, smelled marijuana smoke, and found other facts indicating drugs were present in the automobile. These facts were sufficient to form probable cause to search the automobile in Robbins and probable cause to arrest the suspects in Belton. In Robbins, probable cause justified the search which led to the container, the plastic-covered marijuana. In Belton, the legal arrest justified the search which led to the container, the jacket pocket. The only significant factual difference between Robbins and Belton was the location of the container searched; the plastic-covered marijuana in Robbins was found in the automobile's trunk, while the jacket in Belton was found in the automobile's backseat. This single factual difference does not support the Court's use of two different tests resulting in inconsistent holdings in these factually similar cases. A single test yielding consistent results in factually similar automobile search cases is needed.

III. Proposed Test

The Supreme Court has granted certiorari in the case of United States v. Ross, a case factually similar to Robbins. In Ross, police officers searched a paper sack found in the trunk of a legally stopped automobile. The police officers had probable cause to search the automobile for illegal drugs. The United States Court of Appeals for the District of Columbia Circuit found the search to be unconstitutional.

Although the District of Columbia Circuit decided Ross before

66 See text accompanying notes 51-56 supra.
67 See text accompanying notes 44-45 supra.
69 101 S. Ct. at 2844. From these facts, the Court assumed probable cause in Robbins. The Court made no such probable cause assumption in Belton. Because of the almost identical facts, it is reasonable to assume probable cause in Belton.
70 Id.
71 101 S. Ct. at 2862.
73 655 F.2d at 1162.
74 Id.
75 Id.
the Supreme Court decided Robbins, its holding in Ross followed a rationale very similar to that which the Supreme Court later adopted in Robbins.\(^{76}\) The District of Columbia Circuit held that a person's expectation of privacy does not depend on the type of container searched and that a person could have a constitutionally protected privacy expectation in a paper sack.\(^{77}\)

Ross, Robbins and Belton all present a similar scenario: (1) a police officer legally stops an automobile; (2) the police officer finds facts sufficient to justify a search, which leads to the discovery of a container; and (3) the police officer searches the container found in the automobile. Any proposed test should resolve these three cases in a consistent manner.

A test requiring strict application of the warrant requirement—the test used in Robbins and Ross—would render consistent results in cases like Ross, Robbins and Belton. However, this approach does have several administrative and theoretical shortcomings. First, as discussed previously, this approach may place burdensome time and manpower pressures on police departments.\(^{78}\) Second, based on a reasonable expectation of privacy analysis, it seems intuitively inconsistent to permit police officers to conduct warrantless searches of locked glove compartments\(^{79}\) or automobile trunks,\(^{80}\) while ruling unconstitutional police officers' warrantless searches of closed containers found during automobile searches. A person's expectation of privacy in his locked glove compartment or trunk is certainly no less than his privacy expectation in a paper sack or even in a locked box located in the same automobile.\(^{81}\) Finally, a strict warrant requirement would necessitate detaining the automobile's occupants until a warrant can be obtained. The occupants must then choose between consenting to an immediate search, or being detained until a determination can be made as to whether a warrant will be issued.\(^{82}\) This choice poses the danger that police officers may be tempted to

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76 In rejecting what the District of Columbia had termed the "worthy container rule," the Supreme Court's opinion in Robbins, authored by Justice Stewart, had cited with approval the majority opinion in Ross. 101 S. Ct. at 2846. (The D.C. Circuit in Ross used both "worthy container rule" and "unworthy container rule" to describe the same rule. We will use the term "worthy container rule.").

77 655 F.2d at 1171.

78 See text accompanying notes 46-48 supra.


81 Judge Wilkey made this point in his dissent in Ross, 655 F.2d at 1194 (Wilkey, J., dissenting).

82 Id. at 1198-99.
threaten detention in order to coerce consent.\textsuperscript{83}

Justice Stevens, in \textit{Robbins} and \textit{Belton}, suggested applying the automobile exception to searches of containers found during a lawful warrantless automobile search.\textsuperscript{84} Applying the automobile exception to container searches would allow the police officer to search both the automobile and any containers found in the automobile without a warrant, provided the police officer had probable cause to believe contraband would be found.\textsuperscript{85}

In his dissenting opinion in \textit{Ross}, Judge Wilkey noted the purposes for requiring a search warrant for home searches. First, in cases where a magistrate does not find probable cause, and therefore does not issue a search warrant, the warrant requirement eliminates any official intrusion. Second, the search warrant restricts the search's scope. Finally, a search warrant reassures the subject of the search that the police officers demanding to enter his home are official police agents lawfully authorized to conduct the search.\textsuperscript{86}

In cases where police officers seize a container from an automobile after a legal warrantless search, the three purposes for requiring a warrant "largely evaporate."\textsuperscript{87} First, if the magistrate does not issue a warrant to search the containers seized, the level of intrusion is reduced only slightly. The police officers have already stopped and detained the automobile's occupants, and have deprived the occupants of possession and control over the container. Second, the search warrant does not effectively limit the search's scope—the police officers likely have already searched the entire automobile. Finally, after the automobile's occupants have been stopped, searched, deprived of control over the container, and possibly arrested, "the moment for reassuring the car's occupants of the lawful purpose of the police long since will have passed."\textsuperscript{88}

Applying the automobile exception to the searches of containers found during an automobile search would eliminate the necessity of a search warrant in those cases; however, the courts would require

\textsuperscript{83} Judge Wilkey noted that the threat of arrest and its trappings—booking, fingerprinting, and so forth—will have a powerfully coercive effect on innocent persons because of the popular perception of the lifelong consequences of an arrest record. \textit{Id.} at 1199.

\textsuperscript{84} 101 S. Ct. at 2855 (Stevens, J., dissenting in \textit{Robbins} and concurring in \textit{Belton}).

\textsuperscript{85} Probable cause requires that the container being searched must be reasonably capable of holding the contraband being sought. \textit{Id.} at 2857 n.8. For example, police officers could not claim to have probable cause in searching a matchbox for an illegal shotgun, but they could make such a claim in searching almost any container for illegal drugs.

\textsuperscript{86} 655 F.2d at 1194-95 (Wilkey, J., dissenting).

\textsuperscript{87} \textit{Id.} at 1195. \textit{Accord}, Arkansas v. Sanders, 442 U.S. at 770 (Blackmun, J., dissenting).

\textsuperscript{88} 655 F.2d at 1195 (Wilkey, J., dissenting).
police officers to demonstrate probable cause before admitting any evidence discovered in such a search. Although the Supreme Court has shown strong preference for the warrant requirement as a safeguard against unreasonable searches, it has allowed warrantless automobile searches based on probable cause. The rationales which support warrantless automobile searches also support warrantless searches of containers found during a valid warrantless automobile search. These rationales include: (1) avoiding the time and manpower burdens involved in detaining property and suspects while waiting for a magistrate to issue a warrant; (2) the mobility of the automobile and the suspects, often making obtaining a search warrant impracticable; and (3) the lesser expectation of privacy in an automobile, which has been extended to integral parts of the automobile. Also, the warrant requirement entails detaining the container and the suspects until a warrant is issued. This detention is in itself a substantial intrusion upon a suspect. To say that this intrusion is justified as a lesser intrusion than a warrantless search is, as the Court has said in a similar context, "a debatable question . . . ."

Adopting either the strict warrant requirement or the automobile exception in analyzing searches of containers found during automobile searches would help eliminate the danger of police using routine traffic arrests as a pretext to search without a search warrant or probable cause. The strict warrant standard requires a search warrant before a search; the automobile exception requires probable cause for a search. Also, adopting either the strict warrant requirement or the automobile exception would eliminate any "worthy

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89 See Chambers v. Maroney, 399 U.S. 42, 51. Justice White, writing for the Court, stated:

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search under the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made.

Id.

90 See text accompanying notes 8-15 supra.


92 Chambers v. Maroney, 399 U.S. 42, 51 (1969). "But which is the 'greater' and which is the 'lesser' intrusion is itself a debatable question . . . . For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." Id. at 51-52.
container rule" which would require courts and police officers to make the often impossible distinctions as to which containers require fourth amendment protection and which do not.

However, applying the automobile exception to searches of containers found during automobile searches has advantages over the present law. First, law enforcement will not be burdened by the time and manpower pressures which the Robbins blanket warrant requirement imposes.93 Also, the Court would no longer have to strain, as it did in Belton, to justify seemingly reasonable searches which would not be allowed under the strict warrant requirement. As Belton aptly demonstrates, such straining can have dangerous consequences.94

IV. Conclusion

The automobile exception to the search warrant requirement should be the constitutional test of warrantless searches of containers found during a legal automobile search. Analysis of the container search cases under the automobile exception will result in consistent holdings and provide protection against unreasonable searches. Under this test, a police officer may constitutionally search without a search warrant any containers found in a legally stopped automobile provided he has probable cause to search the automobile and the container for contraband.

Justice Powell views a test based on the automobile exception as a "ground for agreement" by a majority of the Supreme Court.95 He has stated: "[The Court has] an institutional responsibility . . . to make every reasonable effort to harmonize our views on constitutional questions of broad practical application."96 Applying the automobile exception to warrantless searches of containers found during legal automobile searches would bring harmony to an area of constitutional law which is badly out of tune.

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93 See notes 47-48 supra and accompanying text.
94 As pointed out, Belton, in bypassing both the warrant and probable cause requirements, seems to have opened the door to using routing traffic stops as a pretext to search an automobile's interior. See text accompanying notes 63-65 supra. Applying the automobile exception in Belton would have justified the search without straining the search incident to arrest rationales.
96 Id. at 2851 n.4.