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Editorial Section

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EDITORS' NOTE

The first amendment has inspired more than its share of legal theorizing. From the absolutist view that "no law" means no law[1] to complex inquiries into legislative purpose and motivation,[2] judges and scholars have offered their theories on how first amendment decisions should be made. In our lead article, Professor David S. Bogen launches a different inquiry: Does the *Supreme Court* have a coherent theory for deciding cases in this area? From an examination of the various "tests" employed by the Court in the different areas of protected and unprotected expression, a picture of the elephant, to use Professor Bogen's imagery, emerges. In the course of his demonstration that there is a more or less consistent superstructure to the first amendment cases, the author delineates the Supreme Court's work on obscenity, fighting words, clear and present danger, and libel-false light. The article does dual service, then, as a primer on several complex areas of first amendment law and as a theoretical inquiry of the first order. The combination enhances both endeavors.

In our second article, Professor Robert I. Keller urges enactment of a highly graduated state income tax rate schedule. High graduation provides a mechanism for meeting the state's needs for increasing revenue that is not likely to be outmoded by inflation or continued governmental growth. In addition it tends to distribute the state tax burden more equitably among the different income levels and takes advantage of the federal deductibility of state taxes so that a substantial increase in state tax revenues will have only a diminished impact on the net tax burden of state taxpayers. In fact, as Professor Keller demonstrates, a state can increase its own revenue while *decreasing* the overall burden on its taxpayers by "forcing" the federal government to allow more deductions and thus to decrease its tax collection from state taxpayers. The proposal merits careful consideration by the legislature.

The first student piece in this issue is a comment on Maryland's law of negligent misrepresentation. The case-by-case process through which the Maryland Court of Appeals molds our common law is, in the case of this tort, not yet complete. Unanswered questions abound. Similarity to the action of deceit is a constant source of confusion. Uncertainty is aggravated by occasional inconsistency in the opinions of the court. The whole area fairly demands scholarly examination,

1. *See* Barenblatt v. United States, 360 U.S. 109, 140–44 (1959) (Black, J., dissenting).

2. *E.g.*, Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

reconciliation, and dissertation. The author applies sound theoretical analysis to exhaustive research in the area, producing, it is hoped, a piece of lasting value to anyone concerned with Maryland's law of misrepresentation.

Next is a student note on *Alyeska Pipeline Service Co. v. Wilderness Society,*[3] a case in which the Supreme Court sharply restricted the number of situations in which the federal courts may award attorneys' fees to prevailing litigants. The Court refused, absent legislative guidance, to authorize fees under the private attorney general theory. Many lower courts had been using this theory to award fees where private litigation had been used to enforce public law. The author places the decision in perspective by examining the history of attorney fee awards in the United States and by considering the effect the decision will have on the area. In addition the author considers the case's impact on public interest litigation of which *Alyeska* was a prime example, concluding that the future of public interest litigation, at least in part, now rests with Congress.

The recent decision section offers a varied fare with subject cases dealing with administrative bias, comparative negligence, and tying arrangements. The issue closes with a review by Professor William P. Cunningham of Seton Pollack's *Legal Aid — The First Twenty-Five Years.* England's program for providing legal assistance to the poor is examined in this book by one of the giants of the English legal establishment. The reviewer ably summarizes the book, calling particular attention to the author's comparison of the English and American legal aid systems. The two programs, it seems, are different not only in their structure and scope, but in their basic purpose as well. Former Dean Cunningham, having recently returned from a sabbatical in England, seems in a perfect position to judge the book. He scores it highly.

The following students have contributed a note or comment to this issue:

Angus R. Everton
Ellen Levy Widen

The following students have contributed a recent decision to this issue:

Jerome S. Colt
Robert P. O'Brien
Saul E. Zalesch

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3. 421 U.S. 240 (1975).