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# Revival of Revoked Wills

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# Comments

## REVIVAL OF REVOKED WILLS
### *In re* Stringer's Estate as construed by *In re* Wilson's Estate

*Assume*: In 1949, the testator executed a valid will. In 1952 he executed another will which contained an express revocation of all prior wills and codicils. Subsequently, the testator physically destroyed the 1952 will. The 1949 will was in existence at his death.

*Question*: Was the 1949 will revived by the destruction of the revoking will?

In response to this situation in 1959 in *In re Stringer's Estate*,[1] the Wyoming Supreme Court answered "No," reasoning that:

> The legislative silence relative to the question of revival does not incline us to believe a presumption is created that a will revoked in one or the other of the ways authorized by express statute is brought back to life. If any presumption at all is indicated, it seems more reasonable to us that it should be that the presence in our laws of an express statute prescribing ways in which a will may be revoked, without there being further statute providing for revival of such a revoked will, manifests that the legislature has intentionally spoken its last word concerning the existence of such a revoked testament.[2]

*Assume*: On December 26, 1961, the testatrix executed a valid will. Early in 1962 she executed a holographic will which disposed of her entire estate. Later in 1962, the testatrix executed a codicil to the 1961 will, making no reference to the holographic instrument, declaring "I hereby reaffirm and readopt the provisions of my Last Will and Testament dated December 26, 1961."
*Question*: Was the 1961 will revived by the execution of the codicil?

Responding to this situation in December of 1964 in *In re Wilson's Estate*,[3] the Wyoming Supreme Court had this to say:

"[T]he subsequent codicil of April 11, 1962 would have the effect of reviving the December 26, 1961 will, which has been shown still to be in existence."[4]

In commenting upon counsel's reliance on the language of *In re Stringer's Estate* to mean that "there is no revival of once revoked wills in Wyoming," the court continued.

> It is hard for us to realize how counsel could go so far afield and

1. *In re* Stringer's Estate, 80 Wyo. 389, 343 P.2d 508, *modified*, 80 Wyo. 426, 345 P.2d 786 (1959)
2. *Id.* at 343 P.2d at 516.
3. *In re* Wilson's Estate, 397 P.2d 805 (Wyo. 1964).
4. *Id.* at 809. In arriving at this conclusion, the court assumed the validity of the holographic instrument, although its validity was in serious doubt. The court reasoned that it would make no difference anyway, as the codicil to the 1961 will effectively revoked the intermediate holographic will.

read into the *Stringer* opinion what he attempts to read into it. The author, Justice Harnsberger, commented that legislative silence relative to the question of revival does not incline the court to believe a *presumption* is created that a will revoked is brought back to life—the meaning being, brought back to life by the subsequent destruction of a later will.

If counsel had read the opinion with ordinary care, he would have noted that the discussion related to whether or not there was sufficient evidence to raise a *presumption* that the destroying of the 1952 will by a testator was done with the purpose of re-establishing or reviving a 1949 will. There was found not to be sufficient evidence to raise such a presumption.

Justice Harnsberger's opinion clearly recognizes that courts have accepted the theory that, in the absence of statutes, the subsequent destruction of a revoking will does not have the effect of reviving the former will unless there is evidence that it was the intention of the testator to revive the former will. The principle was accepted that the question of revival is one of pure intention without there being any *presumption* either for or against revival arising by virtue of the destruction of the revocatory will.[5] (Emphasis is that of the court.)

Thus, the Wyoming Supreme Court twice attempted to deal with the problem of revival of a once revoked will. Based on the language and reasoning of the Wyoming cases cited and on other authority, it is the purpose of this article to comment on this relatively simple, but highly misunderstood area of the law of wills.

Assuming a revoked or otherwise invalid will, there are five methods by which it might be revived.[6]

The most obvious method, of course, is to totally redraft the will, executing it with the proper statutory formalities. This is not, technically, a revival of a once revoked will, but simply an execution of a new instrument, which replaces the one revoked.

Second, the will may be revalidated by re-execution of the testamentary formalities; such re-execution to include a re-signing by the testator and attestation by the requisite number of witnesses.[7]

Third, revival may be affected by dependent relative revocation.[8] This is a revival by operation of law, not by any overt act of the testator, which doctrine may or may not be recognized by the various jurisdictions.[9]

Fourth, where the prior will is still in existence, but is invalid because re-

5. *Ibid.*
6. It is somewhat of a misnomer to state that a will which has never been valid for one reason or another may be revived, since a document which has never been valid cannot, technically, be revalidated or revived. This, however, is the language used by many courts, including Wyoming. *In re* Nelson's Estate, 72 Wyo. 444, 266 P.2d 238 (1954); See also ATKINSON, WILLS §90 (2d ed. 1953).
7. Ellerbeck v. Haws, 1 Utah 2d 229, 265 P.2d 404 (1953).
8. 2 BOWE-PARKER: PAGE ON WILLS §21.57 (1960).
9. If the reader is interested in this phase of revival, an excellent starting point is 2 BOWE-PARKER, *supra* note 8, at §§21.57 through 21.65.

voked by operation of law or by a later instrument, it may be revived, or as some courts and authorities say, "re-published" by the execution of a codicil.[10]

Finally, where the prior will is still in existence, revocation of a revoking will might revive the former testament.[11]

This article will be limited to a discussion of the latter two methods by which a once revoked will may be revived. Only a cursory examination will be given to revival of a will by codicil as this area of the law is well settled, while revival by revocation of the revoking instrument will be dealt with in some detail.

## REVIVAL BY CODICIL

In the course of the opinion in *In re Wilson's Estate*, the Wyoming Court cited at length the Annotation in 33 A.L.R. 2d 922, part of which states:

> Although in many of the cases collected herein it has been held for any number of reasons, that the codicil in question did not effect the revival of a prior revoked will or codicil, no case has been found in support of the proposition that the revival of a will or codicil which has been revoked but which is in existence, cannot be effected by means of a subsequent codicil.[12]

With perhaps the exception of the language in *In re Stringer's Estate*, before the clarifying opinion in *In re Wilson's Estate*, no authority was found in disagreement with the above quotation, either before the date of the above cited quotation (1954) or afterward.[13]

It is therefore well settled that a codicil, so long as it is executed with the applicable statutory requirements, can effectively revive or validate a will which has been revoked or is otherwise invalid, so long as the revoked or invalid will is still in existence. As will be seen later, it may be the only method available to revive a revoked will.[14]

To say, however, that a codicil can revive a revoked will is not to say that such a codicil *will* do so.

In order that a codicil may effectively validate a revoked instrument there must be a showing of intent to revive[15] and the codicil must describe sufficiently the will to be validated.[16]

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10. *In re Wilson's Estate, supra* note 3.
11. *In re Stringer's Estate, supra* note 1.
12. Annot., 33 A.L.R.2d 922, 925 (1954).
13. Blackett v. Ziegler, 153 Iowa 344, 133 N.W. 901, 37 L.R.A. 291 (1911); Derr v. Derr, 123 Kan. 681, 256 Pac. 800, 53 A.L.R. 515 (1927); Florey v. Meeker, 94 Ore. 257, 240 P.2d 1177 (1952); *In re* Nelson's Estate, 72 Wyo. 444, 266 P.2d 238 (1954); Second National Bank v. United States, 222 F.Supp. 446 (D.Conn. 1963); Alden v. Lewis, 248 Miss. 663, 160 So.2d 181 (1964).
14. See *infra* at page —.
15. Fuller v. Nazal, 259 Ala. 598, 67 So.2d 806 (1953); Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920); Gooch v. Gooch, 134 Va. 21, 113 S.E. 873 (1922); See generally 2 BOWE-PARKER, *supra* note 8, at §23.6.
16. Fifth Third Union Trust Co. v. Athenaeum of Ohio, 169 N.E.2d 707 (Ohio 1959); *In re* Kerner's Will, 14 Misc.2d 545, 179 N.Y.S.2d 122 (1958); Grotts v. Casburn, 295 Ill. 286, 129 N.E. 137, 14 A.L.R. (1920); See generally 2 BOWE-PARKER, *supra* note 8 at §23.7.

The Wyoming court, impliedly at least, recognized both of these requisites in *In re Wilson's Estate* wherein they stated that it was necessary to concern themselves with any presumption one way or another as to revival because "the codicil clearly and unequivocally declared that the testatrix reaffirmed and re-adopted the provisions of her will dated December 26, 1962.[17]

In summary, as to revival by codicil, the general, if not the universal rule, is that a will, still in existence, which has been revoked either expressly, by inconsistency, or by operation of law, may be revived or validated by the execution of a valid codicil, so long as the codicil indicates an intent on the part of the testator to revive the revoked will and so long as the revoked will is sufficiently described.

### REVIVAL BY REVOCATION OF THE REVOKING INSTRUMENT

In 1911, the Iowa Supreme Court lamented: "Does the destruction or cancellation of a second will, containing an express revocation of a former one in itself revive the first or former one? Upon no subject in the law of wills are the authorities in such hopeless and irreconciable conflict."[18]

The Wyoming Supreme Court agreed, at least as to the existence of a conflict, in 1959, when it said in *In re Stringer's Estate* responding to counsel's citation of diverse authority on the subject: "the sum total of which merely illustrates there is a wide difference of opinion in different jurisdictions as to the reviving effect of the revocation of a subsequent will which is relied upon as having revoked a former will."[19]

Numerous courts and authorities have commented, some with a seeming dispair, on the various theories which are said to prevail over this area of the law of wills. Annotations in *American Law Reports* enumerate five theories as set forth below;[20] Page on *Wills* recognizes three basic theories with variations

17. *In re Wilson's Estate, supra* note 3, at 809. The reader is cautioned at this point not to confuse the terms revival and republication relative to a finding of intent. Although some courts have stated that in the absence of a showing of a contrary intent a revoked will is revived by a validly executed codicil, it is "doubtful whether such a statement represents the conclusion that it is not necessary that the codicil indicate an intention to revive; that is in other words, that a codicil revealing nothing as to the intention of the testators to the revival will operate to revive." Annot., 33 A.L.R.2d 932, n. 13 (1954). "Revival" by codicil results in republication of the revoked will as of the date of the codicil and, as pointed out above, requires a showing of intent. 2 BOWE-PARKER, *supra* note 8, at §23.5. The term "republication," however, usually refers to the effect upon a valid will by a later codicil. Annot., 33 A.L.R. 2d 928 (1954). In the case of a republication of a valid and existing will, it is the general rule that intent to republish the existing will is presumed unless a contrary intent appears. *In re* Herbert's Estate, 131 Cal. App.2d 666, 281 P.2d 57 (1955); *In re* Gibbon's Estate, 192 Okla. 372, 137 P.2d 928, 146 A.L.R. 1361 (1943). Most courts, however, use the term "republication" interchangeably to apply both to republication of a valid will and revival of a revoked will where such revival is accomplished by execution of a codicil.
18. *Blackett v. Ziegler, supra* note 13.
19. *In re Stringer's Estate, supra* note 1, at 515.
20. Annot., 28 A.L.R. 911 (1924); Annot., 162 A.L.R. 1072 (1946).

of each;[21] Atkinson on *Wills* lists four possibilities;[22] and *Corpus Juris Secundum* and *American Jurisprudence* agree substantially with Page on *Wills*.[23]

Inasmuch as the Annotation in Volume 28 of *American Law Reports*, relied upon by the Wyoming court in *In re Stringer's Estate*, includes all of the theories discussed by the various authorities, it is used here as the starting point of this discussion.[24]

The first is the strict common law theory that the former will is revived "as a matter of law," when the revoking will is destroyed or itself revoked. The view at common law was that wills are ambulatory until the death of the testator. While the testator is living, it does not matter what he does as to his testamentary declarations since any will or codicil will not become operative until his death. Therefore, revocation of the revoking will during the testator's lifetime prevents it from taking effect as a revoking instrument because it, as well as the first will, is ambulatory.[25]

Second, the Annotation states that there is another group of cases which hold "that the earlier will is revived unless an intention to the contrary

21. BOWE-PARKER, *supra* note 8, at §§21.49 through 21.56. After outlining the history of the common law rule and the ecclesiastical rule Page states that the "American rules" in the absence of statute fall into the classic categories of the common law view and the ecclesiastical view while some hold with no revival unless the former will is re-executed or republished. Other jurisdictions "distinguish between the cases in which the later will contains an express revocation clause, and the cases in which it operates as a revocation only because it is inconsistent with the earlier will." Citing relatively early cases from Alabama, Delaware, Iowa, Maryland, Michigan, New York, Pennsylvania and South Carolina, Page states categorically that the destruction of the will which has revoked the former by inconsistency, serves to revive the prior will. For some reason, perhaps because of the unusual statutes in Louisiana and the construction given to them, Page lists the Louisiana rule as a separate rule, although in effect, Louisiana follows the common law rule that a will does not become effective until death, and should the testator die with both wills in existence, only then is the first one revoked.
22. ATKINSON, *supra* note 6, at §92. Under the heading "American Rules," Atkinson states that "In the absence of statute, there is a great divergence of viewpoint among the American cases. . . . Some jurisdictions follow the common law rule in general, others that of the ecclesiastical courts, but often there are qualifications or variations of these two." Atkinson's two other theories which he says are followed by other jurisdictions are revival "unless the testator intends not to do so," and revival only by republication. Contrast Atkinson's statement "Most jurisdictions do not recognize this distinction and apply the same rule of revival regardless of whether or not there in an express clause of revocation in the second will" with Page's statement (*supra* note 21), as to jurisdictions which distinguish between revocations by inconsistency and express clause.
23. 95 C.J.S. *Wills* §298 (1957); 57 AM.JUR. *Wills* §619 (1948).
24. Annot., 28 A.L.R. 911, (1924).
25. *Id.* at 912. It should be pointed out that although many courts and some authorities speak of reviving a former will as a matter of law when the later will is revoked, the term "revival" is not technically correct because of the theory on which the rule is based. The theory of revival as a matter of law comes from the common law proposition that wills are ambulatory until death. Since, by this theory, death is the only event which will bring into operation testamentary documents written during the testator's lifetime, a revoking instrument later destroyed would be considered as never having had any effect upon the will because the will itself has no operative effect until death. Therefore, there would be nothing to revive. See 2 BOWE-PARKER *supra* note 8, at §21.54.

appears."[26] In other words, there is a presumption that the first will is revived unless it is shown that the testator intended to die intestate.

Third, the theory is propounded "that the earlier will is not revived,"[27] meaning that the only methods of revival would be re-execution or republication.

Fourth, "that the earlier will is not revived unless an intention to revive it appears,"[28] meaning, apparently, that there is a presumption against revival.

Finally, the Annotation recognizes that in many jurisdictions "the question is one of intention without any presumption for or against revival."[29] This fifth theory was the view of a majority of the English ecclesiastical courts.

To compound the problem, it is said that courts have varied the rules when revocation is by inconsistency of the later will, rather than by an express revocation clause.[30] Furthermore, it is not clear what the courts mean when they speak of the existence of presumption as to revival. Page on *Wills* suggests that, when courts say that there is no presumption one way or the other, "Possibly this merely means that there is no strong inference of fact either way."[31]

Considering all of these theories and variations thereof, enumerated and perpetuated by eminent authority, it is no wonder that courts in reviewing these authorities have found "irreconcilable conflict."

It is submitted, however, that the conflict does not exist in fact and is but of historic significance; that the five classifications set forth by the *American Law Reports*, and the intricate variations of the "common law rule," and the "ecclesiastical rule" are for, the most part, no longer applicable.

The classifications, it is submitted, should be limited to three categories, two of which are relatively insignificant except, perhaps, to emphasize the great weight of authority. These classifications are:

I. Revival where intention to do so is clear, which will be termed the "American Rule" for the purpose of this article.

II. Revival as a matter of law upon revocation of the revoking instrument.

III. Revival only by re-execution or republication.

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26. Annot., 28 A.L.R. 91 (1924).
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Id.* at 911, 912; See also BOWE-PARKER, *supra* note 8, at 21.54.
31. Examples of unclear language regarding the existence and effect of presumptions may be found in both the *In re Stringer's Estate*, *supra* note 1, and *In re Wilson's Estate*, *supra* note 3. The reader is referred to the quotation from those opinions set forth at the first of this article. In both opinions, the court states that there is no presumption for or against revival; however, the *Wilson* opinion indicates that "sufficient evidence" might raise a presumption that the former will is revived. Does the court simply mean that if evidence is introduced indicating that the testator intended to revive the former will by revocation of the revoking intrument, revival will depend upon the strength of that evidence? It is suggested that the answer to that question is and should be "yes," and that no amount of evidence would ever "raise a presumption" within the legal meaning of that phase.

I. *The American Rule*

Eighteen states provide by statute that a revoked will is not revived unless it appears that it was the testator's intention to revive the first will.[32] New Mexico has a similar statute which does not allow revival by revocation of the revoking will "unless the validity of the first will be acknowledged."[33] What amounts to an "acknowledgment" is unknown as there are no reported cases.[34]

Of the ten states which by case law follow the "American Rule," nine[35] hold either that a will is not revived unless intent is shown, or, like Wyoming, that whether or not the former will is revived will depend entirely upon a showing of intent, there being no presumption either for or against revival. It appears to make no practical difference in these nine states whether the courts use "no revival without intent" or "no presumption either way," since by the cases, if no intent to revive is shown, revocation, standing alone, will not revive the former will.

The tenth non-statute state using intent to resolve the matter of revival is Maryland whose courts have stated that the cancellation of a revoking will is *prima facie* evidence of an intention to revive a former will. This is the only state found which clearly holds that there is a presumption of revival.[36] Since the presumption is rebuttable, the testator's intention may still be said to be controlling, and therefore Maryland is numbered among those states holding with the "American Rule."

II. *Revival As a Matter of Law*

Four states,[37] by judicial decision reach the result that the former will is revived as a matter of law when the revoking will is destroyed or revoked. These states, recognizing the ambulatory character of wills, follow the strict common

32. Rees, *American Wills Statutes*, 46 VA. L. Rev. 856, 890 (1960). The eighteen states are Alabama, Alaska, California, Idaho, Indiana, Kansas, Missouri, Montana, Nevada, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah and Washington.
33. N.M. STAT. ANN. §30-1-9 (1953).
34. Intent, which probably is inclusive of New Mexico's "acknowledgement," is said to be shown from all of the surrounding circumstances including careful preservation of the former will; McClure v. McClure, 86 Tenn. 173, 6 S.W. 44 (1887); and from the declarations of the testator at the time of revoking the later will; *Blackett v. Ziegler*, *supra* note 13.
35. IOWA: *In re* Farley's Estate, 237 Iowa 1069, 24 N.W.2d 453 (1946); MASSACHUSETTS: Pickens v. Davis, 134 Mass. 252, 45 Am.Rep. 322 (1883); MINNESOTA: *In re* Tibbett's Estate, 153 Minn. 53, 189 N.W. 401 (1922); NEBRASKA: Williams v. Miles, 68 Neb. 463, 94 N.W. 705, 62 L.R.A. 383, 110 Am-St.Rep. 431, *rehearing denied* 68 Neb. 463, 96 N.W. 151, 62 L.R.A. 383, 110 Am.St.Rep. 431 (1903); NEW HAMPSHIRE: Lane v. Hill, 68 N.H. 275, 44 Atl. 393, 73 Am.St.Rep. 591 (1895); NEW JERSEY: *In re* Davis' Estate, 134 N.J.Eq. 393, 35 A.2d 880, *reversing* 132 N.J.Eq. 282, 28 A.2d 72, *reversing* 18 N.J. Misc. 665, 15 A.2d 895 (1944); TENNESSEE: Wrinkle v. Williams, 37 Tenn. App. 27, 260 S.W.2d 304 (1953); VERMONT: *In re* Gould's Will, 72 Vt. 316, 47 Atl. 1082 (1900); WYOMING: *In re Stringer*, *supra* note 1; *In re Wilson*, *supra* note 3.
36. Rabe v. McAllister, 77 Md. 97, 8 A.2d 922 (1939).
37. CONNECTICUT: Whitehill v. Halbing, 98 Conn. 21, 118 Atl. 454, 28 A.L.R. 895 (1922); DELAWARE: Dawson v. Smith, 3 Houst. 92 (Del. 1865); RHODE ISLAND: Bates v. Hacking, 28 R. I. 523, 68 Atl. 622, 14 L.R.A.(N.S.) 937, 125 AmSt.Rep. 759 (1908); SOUTH CAROLINA: Kolloch v. Williams, 131 S.C. 352, 127 S.E. 444 (1925).

law theory. Statutes in two states[38] require revival, although it has taken court decisions to construe the statutes to reach this result.[39]

III. *Revival By Republication or Re-execution*

Of the twelve states which do not allow revival except by republication or re-execution after a will has been at one time revoked, nine,[40] have statutes specifically requiring re-execution or republication. One state, Texas, has a section in its probate code which states that in order to obtain probate of a will, the proponent must prove "to the satisfaction of the court . . . that such will has not been revoked by the testator."[41] This section has been construed to preclude revival except by republication or re-execution.[42]

The two remaining states in this catagory[43] reach this result (revival only by re-execution or republication), without the benefit of a statute, the courts reasoning that since the statutes specifically prescribe how a will is to be executed, a will, once revoked, may not be brought back to life except by those methods.

In summary it is found as to revival of a former will by revocation of the revoking instrument that (a) twenty-nine states, nineteen by statute and ten by court decision, have required that revival of the former will by revocation of the revoking instrument depends upon the intent of the testator; (b) only six states, two by statute and four by court decision, reach the conclusion that a former will is automatically revived by revocation of the revoking will; (c) twelve states, ten of which are governed by statute, require that a once revoked will may only be revived by republication or re-execution, and finally (d) only three states, Arizona, Colorado and Maine have neither statutes nor decisions on the subject. Based on these facts, it is suggested that the textbook authorities and the annotators of *American Law Reports* and the encyclopedias should reconsider the law of revival with a view toward discontinuing the intricate distinctions among and within the three basic theories as set forth above. A review of the statutes and cases indicates that these distinctions are no longer applicable as examples of existing law on the subject, and if used at all should be limited to historical background.

The perpetration of the distinctions serves only to unnecessarily lengthen the discussion of the subject in the cases, because, almost without exception, the courts in those states deciding the question for the first time write at length about presumption and the other intricate distinctions propounded. In the last analysis, however, these same courts put all the nice distinctions aside,

38. LOUISIANA: LA. CIV. CODE, art. 1644, 1645 and 1646 (Slovenko 1961); MICHIGAN: MICH. STAT. ANN. §27.3178(96) (1962).
39. Succession of Dambly, 191 La. 500, 186 So. 7 (1938); Dingman v. Dingman, 199 Mich. 384, 165 N.W. 712 (1917); *In re* Leech's Estate, 277 Mich. 299, 269 N.W. 181 (1936); *In re* Francis' Estate, 349 Mich. 339, 84 N.W.2d 782 (1957).
40. Rees, *supra* note 32: Arkansas, Florida, Georgia, Hawaii, Illinois, Kentucky, North Carolina, Virginia, and West Virginia.
41. TEX. PROB. CODE ANN. §88 (1956).
42. Brackenridge v. Roberts, 114 Tex. 418, 267 S.W. 244 (1924).
43. MISSISSIPPI: Bohanon v. Walcot, 2 Miss. (1 How.) 336, 29 Am. Dec. 631 (Miss. 1836); WISCONSIN: *In re* Eberhardt's Estate, 1 Wis.2d 439, 85 N.W.2d 483 (1957).

choosing one of the three theories above, that is, the "American Rule," revival as a matter of law, or revival only by republication or re-execution. This is exactly what the Wyoming court did in the course of the *Stringer* opinion. Although the language leaves something to be desired, it is clear that the court first reviewed the authorities, second, talked of presumption and the other distinctions set forth by the Annotation in volume 28 of the *American Law Reports* and then, called upon their old friend, "intention of the testator" as the controlling factor. This reasoning process was again evident in the dicta of the *Wilson* opinion, where the court more clearly set forth the law to be applied in this state to revival of revoked wills by destruction of the revoking instrument.

As to which of the three theories *should* be applied, it is clear that the "American Rule" operates to preserve the controlling philosophy of the entire law of wills, *i.e.*, the testator's desires are to be protected through a finding of his intent. Neither of the other rules provide such protection, as they must operate regardless of intent.

Still, the authorities in the field continue to promote and preserve the various intricate theories set forth above. Considering this review of the statutes and the cases, it would seem that the authorities have yet to catch up with the "lawmakers," both in the legislatures and in the courts.

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