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Notes and Comments

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Antitrust—Post-Acquisition Evidence and Conglomerate Mergers

In merger cases brought under section 7 of the Clayton Act,[1] trial often does not take place until several years after the merger. Because section 7 requires a predictive judgment as to the probability that a merger may substantially lessen competition,[2] there is a temptation to test probabilities against the particular post-merger history. A recent decision of the Supreme Court may be interpreted as indicating that post-merger evidence is not admissible. This note will consider whether the Court has put forward a general rule excluding post-acquisition evidence in light of the factual situation of that case and the methods used in reaching the finding of illegality.

In *FTC v. Procter & Gamble Co.*[3] the Court held that Procter & Gamble's 1957 acquisition of the Clorox Company violated section 7. Procter & Gamble was the leading firm in the detergent field. Clorox, with 49 percent of total liquid bleach sales, was the dominant firm in that industry, and together with its principal rival,

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[1] 15 U.S.C. § 18 (1964), *formerly* 38 Stat. 631 (1914), provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-37, 247 (1960) [hereinafter cited as Bok], for a review of the legislative history of the Celler-Kefauver Anti-Merger Act, 64 Stat. 1125 (1950), which amended section 7. The technical additions and deletions are shown in Brown Shoe Company v. United States, 370 U.S. 294, 311 n.18 (1962).

[2] FTC v. Consolidated Foods Corp., 380 U.S. 592, 598 (1965); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 322-23, 332 (1962); United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589, 598 (1957); *cf.* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 308-09 (1949).

[3] 58 F.T.C. 1203 (1961) (remand order), *followed*, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,573 (1962) (summary of the FTC hearing examiner's second report), *aff'd as modified*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673 (FTC 1963), *rev'd and vacated*, 358 F.2d 74 (6th Cir. 1966), *rev'd and affirming Commission*, 386 U.S. 568 (1967).

Purex, accounted for almost 65 per cent of national sales. Six firms sold over 80 per cent of the nation's liquid bleach. The Court found that "all liquid bleach is chemically identical," and attributed Clorox's dominance to heavy advertising and promotional expenditures. Procter's acquisition of Clorox would probably injure competition because it eliminated Procter as a potential entrant and "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading smaller firms from aggressively competing. . . ."[4]

The Court focused its attention upon three probable anticompetitive effects of the merger. First, the merger increased opportunities for anticompetitive behavior, such as predatory pricing.[5] Second, the merger produced certain undesirable economies, chiefly in advertising.[6] Third, the merger caused structural alterations, through the elimination of a potential entrant into the concentrated industry, that would probably lessen competition. Also, Procter's merging into the industry had raised barriers to any further entry.[7]

As pointed out in a concurring opinion by Mr. Justice Harlan, the majority did not give much consideration to the question of the proper weight to accord post-acquisition evidence.[8] This was in many ways the main source of difference between the Commission and the Sixth Circuit. The FTC hearing examiner had decided that the merger violated section 7, but the full Commission had found, at first consideration, that the record did not offer the Commission "an informed hindsight upon which it can act," but rather allowed it to place "too much reliance upon treacherous conjecture."[9] Thus, the examiner was directed to consider post-acquisition developments. However, on second consideration, the Commission stated that in this case post-acquisition evidence was irrelevant and held the merger unlawful on the original record.[10] The court of appeals reversed the Commission, holding that the record, and particularly the post-acquisition history, did not support the claimed

[4] 386 U.S. at 578.
[5] 386 U.S. at 575.
[6] 386 U.S. at 579.
[7] 386 U.S. at 580-81.
[8] 386 U.S. at 591 (concurring opinion of Harlan, J.).
[9] 58 F.T.C. 1203, 1207 (1961).
[10] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,587 (FTC 1963).

probability of anticompetitive effects.[11] The Supreme Court reversed the court of appeals and largely adopted the Commission's method of analysis. The Court, by its brusque treatment of the point, seemed to hold that post-acquisition evidence is generally irrelevant; in fact, the Commission's finding may have been determined by the nature of the post-acquisition evidence introduced by Procter, and not by any position that all types of post-acquisition evidence should be excluded.

Throughout the proceedings Procter argued that post-acquisition developments should be considered to test the probabilities of anticompetitive effects.[12] Since the merger was conglomerate,[13] it did not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger.[14] Nor did it have the effect of automatically eliminating a competitor as in a horizontal merger.[15] Therefore, Procter argued, analysis of the anticompetitive potentialities of the merger required a broader scope of inquiry. The fact that the record failed to show any instances where the Commission's predictions had become reality meant that these claimed probabilities were mere possibilities and therefore too speculative to support a finding that the merger was unlawful.[16]

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[11] 358 F.2d at 84.

[12] 386 U.S. at 591 (concurring opinion of Harlan, J.).

[13] Conglomerate mergers in their pure form involve the merger of companies that are neither customers, suppliers, or competitors. Pure conglomerate mergers are rare. As pointed out by Professor Turner, management rarely enters a field in which they have no experience. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1315 (1965) [hereinafter cited as Turner].

[14] The simple vertical merger is the acquisition of a firm that buys the product sold by the acquirer, or sells a product bought by the acquirer. It may lead to an extension of market power from one level to another, as when a manufacturer obtains the main or primary source of a vital material. Furthermore, it may impair competition by foreclosing markets to competitors or to prospective entrants. Turner 1315, 1317.

[15] The simple horizontal merger involves acquisition of a firm producing an identical product or a close substitute and selling it in the same geographic market. Horizontal mergers eliminate competition that exists between two firms, and further increase market concentration. Turner 1315, 1317.

Few mergers are clearly *vertical* or *horizontal*, but may include characteristics of both. For example, in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the merger was horizontal in some ways, vertical in others. Brown Shoe was primarily a shoe manufacturer, but also retailed some of its shoes. Kinney, the acquired firm, was primarily a retailer of shoes, but manufactured some also. The Court treated the merger as predominantly vertical.

[16] "Mere possibility" will not establish the statutory requirement that

The Commission argued that section 7 clearly does not require the existence of actual anticompetitive effects, but rather a conclusion as to the probability of various possible economic consequences of the merger. Except in the most obvious cases, economic theory does not permit completely confident judgments even when all possibly relevant facts have been assembled and considered.[17] Therefore, the addition of inconclusive post-acquisition evidence would serve no useful purpose but rather would tend to lengthen and complicate the litigation. The post-merger history of Procter-Clorox tended neither to confirm nor disprove the probability of anticompetitive consequences because it was difficult to know to what extent post-merger developments were caused by the merger, and not by other factors.[18] Furthermore, dependence upon post-acquisition evidence offered by the respondent showing a paucity of actual anticompetitive developments would allow controls to be evaded by the dissimulation of market power during the period of observation.[19] This policy consideration is similar to the rule against self-serving statements.[20] Thus, broadening the range of inquiry to include factors incapable of clear resolution might inhibit rational decision-making,[21] exhaust limited enforcement funds and curb the effectiveness of the Commission.[22]

Commissioner Elman reasoned that consideration of five factors, all present in *Procter*, might permit adjudication of the conglomerate merger with as much facility as percentage ratios afford in the case of a horizontal or vertical merger:[23]

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the effect of the merger "may be" to lessen competition substantially. United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 598 (1957).

[17] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,573-74 (FTC 1963).

[18] *Id.* at 21,587.

[19] *Id.* at 21,574. *Cf.* 386 U.S. at 592 (concurring opinion of Harlan, J.).

[20] *See* 6 J. WIGMORE, EVIDENCE §§ 1714, 1732; 2 AM. JUR.2d *Administrative Law* § 385 (1962).

[21] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,574 (FTC 1963); *cf.* Bok 246; Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955).

[22] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,574 (FTC 1963); *cf.* 386 U.S. at 592 (concurring opinion of Harlan, J.).

"With 5 million U.S. companies in a 790 billion dollars annual economy, that's a large order for any Federal agency—particularly one with only 1,150 employees and an annual budget of 14 million dollars." NEWSWEEK, Oct. 23, 1967, at 82.

[23] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,580 (FTC 1963). *Cf.* Elman, *The Need for Certainty and Predictability in the*

1. Is there a size disparity of the acquiring firm relative to the other firms in the industry;
2. Is the market so concentrated as to make *potential*, rather than *actual*, competition significant, and what is the position of the acquired firm within this market;
3. Does the merger involve the elimination of a significant potential entrant;
4. What is the position of the acquiring firm in other industries;
5. What sorts of economies are enabled by the merger?

The Commission did not consider whether one or more of these factors taken separately might be dispositive of the case.[24] Rather the merger of Procter and Clorox was condemned because of the probability of three anticompetitive consequences arising out of a conjunction of all five factors. An analysis of these three consequences will necessarily involve discussion of evidentiary requirements and will highlight the commission's general approach to post-acquisition evidence.

I. *Increased Opportunity for Anticompetitive Behavior*

Predatory pricing and its milder counterpart, disciplinary pricing, were two manifestly anticompetitive practices made more possible by the merger of Clorox and Procter.

Predatory behavior can be classified into three types: price warfare, promotional expenditure warfare, and use of Clorox as a loss leader. All three types were considered distinct possibilities by the Commission.[25]

Because Procter would be able to cover its losses with funds obtained from both other geographic bleach markets and the other product markets in which it was active, such as detergent, it might sell Clorox at a price lower than customary profit-maximizing considerations would dictate for the purpose of driving other competing bleach producers out of the market. Procter might achieve the same effect by greatly increasing advertising and promotional expenditures and eliminate rivals by using expensive procedures be-

Application of the Merger Law, 40 N.Y.U.L. REV. 613 (1965); Address by Chairman Dixon, 14th Annual Spring Meeting of the Section on Antitrust Law, American Bar Association, in Washington, D.C., April 14, 1966, 5 TRADE REG. REP. ¶ 50,142 (1966).

[24] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,581 (FTC 1963).

[25] *Id.* at 21,579. *See* 386 U.S. at 576.

yond their financial means.[26] Or Procter might use Clorox as a loss-leader, in order to yield off-setting profits on other Procter products, such as detergent. Clorox might be sold at prices below out-of-pocket costs for the purpose of increasing sales of complimentary products. Though not done with the intent to destroy rivals, this practice might have the same effect.[27]

Disciplinary pricing, or short-term predation done with the intent of preventing competing bleach producers from challenging Clorox's dominance, was a further possibility in *Procter*. Moreover, the possibility that Procter would resort to disciplinary pricing or out-right predation was interpreted by the Commission as a possible psychological restriction upon competition in the liquid bleach industry.[28]

There is some controversy among commentators as to whether the mere possibility of predatory or disciplinary behavior should be a negative factor in merger litigation.[29] It is argued that clear-cut examples of such behavior are largely lacking, and that furthermore, if such behavior were effective it would violate other antitrust statutes. For example, predatory pricing as an "attempt to monopolize" is a clear violation of section 2 of the Sherman Act,[30] and predatory pricing in one of several geographic markets violates the Robinson-Patman Act.[31] Loss-leader underpricing might be attacked as an "unfair method of competition" or an "unfair act or practice" under section 5 of the Federal Trade Commission Act.[32] Nevertheless, the Court apparently held that the increased possibilities of such behavior were negative factors in finding against the merger.

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[26] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,564 (FTC 1963).

[27] *Id.* at 21,578-79. *See* Turner 1346-49.

[28] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,579 (FTC 1963). *See* 386 U.S. at 579, n.3.

[29] *E.g.*, Turner 1346. Professor Turner argues that the possibility of predatory disciplinary behavior "seems so improbable a consequence of conglomerate acquisitions that it deserves little weight in formulating anti-merger rules based on prospective effects." However, the possibility of such behavior has played a major part in some merger cases. *See, e.g.*, 309 F.2d 223 (D.C. Cir. 1962) (Arrow Foil case); 233 F. Supp. 718 (E.D. Mo. 1964) (Cupples case).

[30] 15 U.S.C. §§ 1-7 (1964). *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946). *See generally*, Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956).

[31] 15 U.S.C. § 13a (1964). *Cf.* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960).

[32] 15 U.S.C. § 46 (1964). *Cf.* FTC v. Nat'l Lead Co. 352 U.S. 419 (1957).

Post-acquisition evidence demonstrating that the respondent had engaged in such anticompetitive behavior could be held by the enforcement agency to be decisive against the merger.[33] Yet, the failure of such a practice, largely within the respondent's control, to materialize would not be, under *Procter*, significant. In the former, the evidence would be relevant; whereas, in the later it would be irrelevant due to the obvious possibility that the respondent "held back."

II. *Undesirable Potential Economies*

Both the Court and the Commission recognized that Clorox would enjoy substantial competitive advantages over other liquid bleach producers because of the use of Procter's substantial advertising discounts.[34] In fact one of the reports by Procter's promotion department emphasized that Procter would be able to make more effective use of Clorox's advertising budget due to the large discounts given Procter, as a major advertiser, by television networks and magazines.[35]

Commissioner Elman argued that such potential economies were undesirable.[36] Because all liquid bleaches were chemically identical, such advertising was merely persuasive rather than informational. Clorox, already the most heavily advertised bleach, was the most expensive.[37] As he saw it, price competition beneficial to the consumer had given way to brand competition beneficial only to the seller. Cost advantages enabling still more extensive advertising

[33] *See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965). There, Consolidated had attempted with some success, to follow a policy of reciprocal buying, or reciprocity. Simple "reciprocity" is a threatened withdrawal of orders if the products of an affiliate cease being bought, or a conditioning of future purchases on the receipt of orders for the products of that affiliate. However, "reciprocity" was not a factor in *Procter*.

[34] 386 U.S. at 580; [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,576-77 (FTC 1963).

[35] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,577 (FTC 1963). These discounts were very substantial. For example, for the same expenditure Clorox could, by using the Procter discount, obtain 33 per cent more network television advertising, and it would be of a superior type.

[36] These advertising economies could be classified as false economies because they stemmed from sheer size, rather than greater efficiency. *See* Turner 1323-26.

[37] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,585-86 (FTC 1963).

could, therefore, only impair price competition further, to the detriment of the consumer.[38]

To the extent that Procter had used its advertising discounts to buy advertising for Clorox, it was the utilization of undesirable economies. The failure of Procter fully to realize these savings was of little significance, for obviously it could do so.[39] Evidence showing that despite full utilization of discounts there had been no obvious change in competition might be relevant, though such an approach would necessarily involve the objection that the Commission simply was not equipped to enter into the sort of wide economic investigation that the evaluation of such an occurrence would entail. On the other hand, evidence that such competitive advantages available to Clorox caused competitors to merge might be admissible because it would involve a much narrower investigation. However, such an approach would not favor the respondent, but would instead be used by the government to show the decisive nature of such potential economies.[40] At this point it may seem that the government always wins when post-acquisition evidence is involved. But, if this be true to any extent, it is only because the evidence is relevant or manageable when offered by the government, but irrelevant or unmanageable when offered by the respondent.

III. *Structural Alterations*

Conglomerate mergers do not obviously change the actual competitive structure of a given market because at least on the face of things they involve merely one company stepping into the place of another company which is neither a competitor, supplier or customer of the acquirer. However, certain subtle changes in the competitive relationships may be significant.

Two primary considerations in *Procter* were the loss of a potential entrant and the raising of substantial entry barriers.

Procter, at the time of the merger, was a successful, experienced

[38] *Id.* One is reminded of cosmetic-manufacturer Charles Revlon's comment upon criticism of large advertising expenditures because they increased the price of the item: "We sell hope."

[39] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,587.

[40] The criticism of advertising, in the Commission's opinion particularly, has led to speculation that it might indicate the start of direct government regulation of such marketing practices. *See* Bork, *The Supreme Court and Corporate Efficiency*, FORTUNE, Aug. 1967, at 92. *Quaere* if such regulation might be possible under section 5 of the Federal Trade Commission Act, note 32 *supra.*

firm in the household products field. It was familiar with the production and marketing of a complimentary line of products and had a history of internal expansion into related fields such as the abrasive cleanser industry.[41] Procter was one of a very few companies powerful enough to challenge Clorox's dominant position with some hope of success. Procter had considered independent entry into the liquid bleach industry prior to its acquisition of Clorox.[42] From these facts the Commission concluded that Procter was a uniquely qualified potential entrant. The liquid bleach industry was highly concentrated. Actual competition, while not entirely absent, was not vigorous. Under such circumstances potential competition from a likely entrant might serve the same function that actual competition served in other more competitive markets. For example, the Commission considered it likely that firms within the liquid bleach industry had curbed the trend towards high oligopoly profits in order to make entry as unattractive as possible. Therefore, Procter's merging into the industry by acquiring its potentially greatest competitor, Clorox, eliminated "one of the last factors tending to preserve a modicum of competitive pricing and business policies in the liquid bleach industry. . . ."[43]

Clorox, at the time of the merger, enjoyed certain competitive advantages that could discourage outside entrants: product differentiation and a reserve of accumulated consumer preference; some financial reserves; and considerable pricing flexibility. Though such factors had not deterred Procter's successful penetration of the abrasive cleanser market, such factors, supplemented by Procter's financial size and aggressive marketing techniques, tended to make entry barriers, in the appraisal of possible entrants, very high. Furthermore, expansion into new regional markets contemplated by existing bleach producers other than Clorox might be deterred. High entry barriers, made even higher by the Procter-Clorox merger, decreased the possibility of new entrants, and correspondingly diminished any residual potential competition effects.[44]

Evidence of post-acquisition entry, conceivably by firms such

[41] In 1957 Procter introduced "Comet" cleanser and within 20 months obtained 36.5 per cent of the national market, though faced with substantial competition from established cleanser manufacturers, such as Purex (Bab-O). [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,564 (FTC 1963).

[42] *Id.* at 21,564-65.

[43] *Id.* at 21,584.

[44] *Id.* See Turner 1358.

as Colgate or Lever Brothers, into the liquid bleach industry might be relevant insofar as it would tend to disprove the argument that Procter was one of a very few potential entrants whose entry resulted not only in a significant diminution of potential competition, but raised entry barriers.[45] However, there are at least two possible objections to the use of such a post-acquisition entry as a means to refute probabilities. First, entry by a large firm does not necessarily imply that entry by smaller firms has not been effectively foreclosed by the merger. Second, the transformation of a predominantly small-firm industry into one dominated by large firms may be undesirable in light of Congressional concern for the preservation of allegedly beneficial small-firm competition.[46] Such post-acquisition evidence would be unlikely to succeed as a refutation of the government's arguments, and because of its negative implications might further harm the respondent's case.

There are two other possible structural alterations discussed by the Commission. Though they bear upon the issue of potential competition, they are more directly used to interpret post-acquisition developments. These two alterations are "triggered mergers" and possible broader definition of the relevant product market.

The Commission considered it likely that Procter's merger into the market might "trigger" defensive mergers among the smaller firms in the liquid bleach market. Such triggered mergers might be prompted by a desire to achieve greater competitive equality with Clorox, or to protect market shares in the face of a much more powerful competitor. The Court concluded that second-ranked Purex's merger with fourth-ranked Fleecy White was such a triggered merger.[47] This merger, it was argued, was the result of "the lesson of Erie," where Purex's attempt to enter a market dominated by Clorox brought on a price and promotional war. The result of this competitive warfare was that Purex withdrew from the market, and Clorox's market share increased.[48]

[45] *But cf.* United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

[46] *Accord,* United States v. Von's Grocery Co., 384 U.S. 270, 273 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 367 & n.43 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 320, 344 (1962); United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (Hand, J.); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 588, 592 (S.D.N.Y. 1958).

[47] 386 U.S. at 578.

[48] 386 U.S. at 579 n.3.

Furthermore, Commissioner Elman stated that certain post-acquisition developments may require the consideration of their effects upon potential competition within a given product market.[49] For example, the post-merger development of a related item may itself influence competition within a given market. This situation was presented in the Commission's later decision against the acquisition of the S.O.S. Company by General Foods.[50] The fact situation was very similar to *Procter*,[51] but there were several major differences. For one thing, General Foods had not been in any meaningful way a potential entrant into the steel wool soap pad industry.[52] Furthermore, following the merger several large firms outside the steel wool industry had introduced plastic scouring pads. These were in some ways acceptable substitutes for steel wool soap pads. In the cleaning of Teflon-coated cookware they were directly competing, and in fact displacing, steel wool soap pads from a growing part of the market. The majority of the Commission defined the relevant market as the steel wool soap pad market. Commissioner Elman, dissenting, argued that the majority should have at least taken into account the influences that these post-acquisition developments probably would have on the real and potential competitive forces within the steel wool soap pad industry.[53] Thus, post-acquisition evidence in this context may be significant and may be entertained by the Commission.

IV. *Conclusion*

Three general observations concerning the admissibility of post-acquisition may be helpful.

First, to the extent that specific anticompetitive consequences within the control of the respondent have not materialized, this failure to act will not be significant. The enforcement tribunal would probably resist any attempt by the respondent to introduce such post-acquisition evidence on the ground that it was self-serving

[49] [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673 at 21,584 (FTC 1963).

[50] General Foods Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,465 (FTC 1966).

[51] *Id.* at 22,732-42. Here the majority set forth an eleven page "Comparison of Operative Facts in the General Foods and Procter & Gamble Cases."

[52] *Id.* at 22,746 (dissenting opinion of Commissioner Elman).

[53] *Id.* at 22,748-49 (dissenting opinion of Commissioner Elman).

and might have been manufactured by the holding back of market power during the period of observation.

Second, if such anticompetitive consequences have become apparent, the government is almost certain to use them against the legality of the merger.[54]

Third, the enforcement tribunal is unlikely to consider evidence showing that there has been no overall change in the market. Such evidence would be open to the objection that its evaluation would require that type of general economic investigation of all possibly relevant factors that the Commission wanted to avoid. The Commission would argue that such a broad survey would not be likely to be of any benefit, even if it were possible.[55]

The attitudes of the Federal Trade Commission are significant because they probably are largely shared by the Antitrust Division of the Justice Department. Both agencies have been successful in persuading the Supreme Court to adopt their arguments.[56] In *Procter*, the majority of the Court apparently approved of the Commission's handling of the case.[57] Thus the attitudes of the Commission are probably those of the majority of the Court.

In light of the Court's earlier decision in the *duPont-General Motors* case,[58] the Government's attitude towards post-acquisition evidence as set forth in *Procter* may become very significant. In *duPont*, the purchase of 23 per cent of General Motors stock was successfully attacked thirty years after the acquisition. The Court held that a merger may be attacked "whenever the reasonable like-

[54] This "double-standard" is criticized in Day, *Conglomerate Mergers and "The Curse of Bigness"*, 42 N.C.L. REV. 511, 557 (1964); Reilly, *Conglomerate Mergers—An Argument for Action*, 61 NW. U.L. REV. 522, 536 (1966); Solomon, *Section 7 of the Clayton Act*, 53 A.B.A.J. 137, 140-41 (1967).

[55] *Cf.* Cook, *Merger Law and Big Business: A Look Ahead*, 40 N.Y.U.L. REV. 710, 713 (1965); Phillips, *Some Implications of the Supreme Court's Antimerger Decisions*, 21 SW. L.J. 429, 440-41 (1967); Rill, *The Trend Toward Social Competition Under Section 7 of the Clayton Act*, 54 GEO. L.J. 891, 901 (1966).

[56] *See*, Note, 45 N.C.L. REV. 1015, 1019 n.27 (1967).

[57] One Commissioner has stated that the Court "is in full agreement with the Commission's approach to section 7 enforcement against conglomerate acquisitions." Address by Commissioner John R. Reilly, Antitrust Section of the Ohio State Bar Association, in Dayton, May 12, 1967, 5 TRADE REG. REP. ¶ 50,170, at 55,229 (1967). *See also*, J. SCOTT & E. ROCKEFELLER, ANTITRUST AND TRADE REGULATION TODAY: 1967, 116 (1967).

[58] United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957). *See* Bromley, *Business' View of the duPont-General Motors Decision*, 46 GEO. L.J. 646, 653-54 (1958).

lihood appears that the acquisition will result in a restraint. . . ."[59] The willingness of enforcement tribunals to consider not only probable anticompetitive consequences, but also their actual manifestation becomes significant when the respondent is denied in many instances from using the absence of such consequences to refute the Government's arguments.

However, the respondent may be able to use certain types of post-acquisition evidence, especially of developments arising beyond its control and going to the core of the government's analysis of potential competition.[60] Two examples—post-merger entry and the development of a related product that tends to broaden the relevant market—have already been mentioned. Furthermore, it should be clear from the discussion that relevant economic data gathered after the merger and not at all related to a respondent's post-acquisition behavior or probable anti-competitive effects generally should not be excluded merely because the studies, made after the merger, technically make such data "post-acquisition evidence." For example, a respondent will probably not make studies of relevant market or product class until after the merger when suit is brought; the admissibility of such evidence clearly should not be questioned.

More immediately, post-acquisition evidence will be decisive in the treble-damages action filed by Purex Corporation against Procter & Gamble.[61] Section 4 of the Clayton Act provides for treble-

[59] 353 U.S. at 592.

[60] See Procter & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,574 (FTC 1963):

> Specifically, we think that the admission of post-acquisition data is proper only in the unusual case in which the structure of the market has changed radically since the merger—for example, where the market share of the merged firm has dwindled to insignificance—or in the perhaps still more unusual case in which the adverse effects of the merger on competition have already become manifest in the behavior of the firms in the market.

For an example of disastrous mergers, *compare* Dresser Industries, Inc., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,513 (FTC 1963), *with* Fruehauf Trailer Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,260 (FTC 1965). However, neither of these involves the conglomerate situation. Observe that while future developments may cause the reopening of a case, they will not cause the Commission to modify a decree. *Compare* National Tea Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,463 (FTC 1966), *with* Reynolds Metals Co., 56 F.T.C. 743 (divestiture order), 56 F.T.C. 1680 (1960) (petition to reopen denied), *aff'd*, 309 F.2d 223 (D.C. Cir. 1962).

[61] Cincinnati Enquirer, Oct. 24, 1967, at 38, col.2. The suit, filed in federal district court in Los Angeles, asks 174.5 million dollars in damages. Purex, at the time of the merger of Clorox and Procter, had total sales of 50 million dollars, but this includes sales of a variety of household products

damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Purex's complaint alleges that Procter-Clorox "engaged and continued to engage in severe and sustained predatory price cutting."[62] Implicit within Purex's claim for relief is the requirement that there be actual post-merger injury. However, neither the Court nor the Commission found that Procter had actually engaged in any definite anticompetitive behavior. Had there been any such behavior it seems highly unlikely that the Commission would have failed to use it against the merger, if only because an analysis based upon the actual manifestation of predatory pricing would have been far simpler. Therefore, it will be interesting to see to what extent, if any, the Commission might have considerably simplified their task by the use of such evidence.

K. G. ROBINSON, JR.

Attorney and Client—Compensation of Indigent's Counsel in Federal Post-Conviction Proceedings

The North Carolina Supreme Court has recently held that counsel appointed to defend an indigent defendant in the courts of North Carolina cannot be compensated by the state for work done in the federal courts to vacate the state conviction.[1] The attorneys re-

and not just liquid bleach. Observe that section 5(b) of the Clayton Act suspends the running of the statute of limitations during the pendency of government proceedings and for one year thereafter.

[62] *Id.*

[1] State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967), *cert. denied*, 389 U.S. 828 (1967). The attorneys were appointed in Mecklenburg County Superior Court in 1959 to defend Elmer Davis, Jr. who was charged with rape and murder under ch. 112 (1949) N.C. SESS. L. (required counsel for indigents charged with a capital offense). The conviction was appealed to the North Carolina Supreme Court which affirmed, State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960). After a petition for rehearing was denied, the attorneys won a stay of execution and sought certiorari from the United States Supreme Court which was denied, Davis v. North Carolina, 365 U.S. 855 (1961). Attorneys then petitioned the federal district court for a writ of habeas corpus which was denied, Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961). On appeal the Fourth Circuit Court of Appeals reversed and remanded the case to the district court to determine whether Davis' confession was obtained within the bounds of due process, Davis v. North Carolina, 310 F.2d 904 (4th Cir. 1962). The district court again refused to grant the writ, Davis v. North Carolina, 221 F. Supp. 494 (E.D. N.C. 1963) and the court of appeals upheld the lower court in a 3-2 decision, Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964). The Supreme Court granted certiorari and in Davis v. North Carolina, 384 U.S. 737 (1966),

ceived 1,700 dollars from Mecklenburg County for the work done in the courts of North Carolina[2] and sought an additional 1,758.72 dollars for expenses and 30,000 dollars as the reasonable value of their services in the federal courts.[3] The lower court ordered the state to pay the attorneys 8,000 dollars pursuant to N.C. GEN. STAT. § 15-5 (1965).[4] The court stated that failure to compensate these attorneys would be a denial of due process and equal protection under the fourteenth amendment of the United States Constitution and would deprive the attorneys of their "rights" under the Constitution of North Carolina.[5]

The North Carolina Supreme Court granted certiorari and reversed the lower court. It held that section 15-5 did not apply to the facts presented and it was error to allow compensation in this case.[6] "The power to provide compensation for lawyers representing indigent defendants rests with the Legislature and not the courts."[7]

It appears that the Supreme Court of North Carolina is the only appellate court to have passed on the question of whether a state should pay a lawyer who represents an indigent state prisoner in

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reversed and remanded the case to the district court. Davis was subsequently ordered released from custody and the state elected not retry him.

[2] State v. Davis, 270 N.C. 1, 2, 153 S.E.2d 749, 750 (1967); this payment was subsequent to ch. 247 [1917] N.C. SESS. L. as amended by ch. 226 [1937] N.C. SESS. L., allowing the fee of appointed counsel in capital cases to be determined by the judge and paid by the county where the defendant was indicted.

[3] 270 N.C. at 4, 153 S.E.2d at 751.

[4] N.C. GEN. STAT. § 15-5 (1965) states in part: "Whenever an attorney is appointed by the court to defend an indigent defendant he shall receive a fee for performing such service to be fixed by the court which shall be reasonable and commensurate with the time consumed, the nature of the case, the amount of fees usually charged for such cases in the county or locality. . . ."

[5] State v. Davis, 270 N.C. 1, 13, 153 S.E.2d 749, 757 (1967). Neither the judge below nor the attorneys' brief stated any specific provision of the North Carolina Constitution which would be violated by the state's refusal to pay compensation: "[A] person who asserts that a particular act violates his rights under the Constitution must point out the particular provision of the Constitution that he claims is violated." *Id.*

[6] *Id.* at 9, 153 S.E.2d at 755. If N.C. GEN. STAT. § 15-5 (1965) is read alone it would appear broad enough to cover the circumstances in the instant case, but when read in conjunction with N.C. GEN. STAT. § 15-4.1 (1965) its coverage does appear limited to compensation for state proceedings only. N.C. GEN. STAT. § 15-4.1 states in part: "When a defendant charged with a felony is not represented by counsel. . . . If the judge finds that the defendant is indigent . . . he shall appoint counsel for the defendant . . . . In case of an appeal to the supreme court the judge shall appoint counsel for such appeal or continue the services of the counsel already appointed . . . ."

[7] 270 N.C. at 10, 153 S.E.2d at 755.

subsequent proceedings in the federal courts.[8] On the question of services rendered within the same judicial system, the weight of authority in this country and England adheres to the general principle that only the legislature can provide for the compensation of an indigent's court appointed lawyer.[9] Two theories have been offered in support of this principle, either singly or in conjunction. First, a lawyer is an officer of the court and as such has special rights and privileges, a corollary to which is the duty, when called upon by the court, to defend indigent criminal defendants. One who accepts the office of attorney does so *cum onere*, with all the burdens incident thereto.[10] Second, the obligation to defend indigents without compensation is a condition under which a lawyer is licensed by the state to practice law.[11] The courts have used this reasoning to reject the claims of attorneys that refusal to compensate them for their work was an unconstitutional deprivation of property.

A minority of courts has rejected the idea that only the legislature can provide for the payment of court appointed counsel.[12] Those courts claiming the power to grant compensation despite the lack of legislative authority have given various reasons: (1) the

[8] 270 N.C. at 13, 153 S.E.2d at 757. The circumstances presented by this case probably constitute the only way that the question of compensation of counsel could occur in North Carolina today. North Carolina provides for mandatory appointment of counsel in state post-conviction proceedings, N.C. GEN. STAT. §§ 15-217 to -222 (1965), and requires that such counsel be compensated, N.C. GEN. STAT. § 15-219 (1965).

[9] Dolan v. United States, 351 F.2d 671 (5th Cir. 1965); United States v. Dillon, *In re* Strayer, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); Jackson v. State, 413 P.2d 488 (Alaska 1966); Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143 (1966); Warner v. Commonwealth, 400 S.W.2d 209 (Ky. 1966); *In re* Mears, 124 Vt. 131, 198 A.2d 27 (1964); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943); All these cases concerned compensation for services rendered in the same judicial system which denied the compensation.

[10] Cases cited note 9 *supra*.

[11] Cases cited note 9 *supra*.

[12] Dillon v. United States, *In re* Strayer, 230 F. Supp. 487 (D. Ore. 1964), *rev'd*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); People *ex rel.* Conn v. Randolph, 35 Ill.2d. 24, 219 N.E.2d 337 (1966) (the court stated that it had the power to relieve an intolerable burden on assigned counsel but the permanent solution was for the legislature); Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940); Hyatt v. Hamilton County, 121 Iowa 292, 96 N.W. 885 (1903); State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966) (the court delayed its plan until January 1, 1967 to give the legislature time to act on the matter); County of Dane v. Smith, 13 Wis. 585 (1861). *But see* Green Lake County v. Waupaca County, 113 Wis. 425 (1902). All these cases concerned services rendered to the same judicial system which granted the compensation.

court's power to grant compensation for a public taking of private property;[13] (2) the theory of implied contract;[14] and (3) authority incidental to the power of the court to appoint attorneys for indigents.[15] In allowing the compensation, these courts have rejected the idea that lawyers are a privileged class and that the defense of indigents can be made a condition to the state's grant of a license to practice law.[16]

While it is true that almost all states[17] and the federal government[18] provide some method of compensating assigned counsel for trial and appellate work, the area of post-conviction proceedings has been almost ignored.[19] Today an attorney, appointed to represent an indigent defendant, who decides to seek relief in the federal courts[20] from a state or federal conviction, will probably not receive compensation from any source.

The federal courts have held that the sixth amendment right to counsel does not apply in a post-conviction proceeding.[21] The reason often given is that such proceedings are civil rather than criminal.[22] However, a failure to appoint counsel may be reversible

[13] Dillon v. United States, *In re* Strayer, 230 F. Supp. 487 (D. Ore. 1964), *rev'd* 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

[14] Haytt v. Hamilton County, 121 Iowa 292, 96 N.W. 885 (1903); (the state, by requesting and accepting the services of appointed counsel, implies a promise to pay the reasonable value thereof).

[15] Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940); State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

[16] Dillon v. United States, *In re* Strayer, 230 F. Supp. 487, 493 (D. Ore. 1964); Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940). In Ruckenbrod v. Mullins, 102 Utah 548, 553, 133 P.2d 325, 327 (1943), the court rejected the idea that defense of indigents could be made a condition to the granting of a license by the state to practice law but allowed compensation on the "officer of the court" theory.

[17] See L. SILVERSTEIN, DEFENSE OF THE POOR 253-67 (1966) for a summary of the various state statutes relating to appointment and compensation of counsel for indigent defendants as of March 1, 1965.

[18] The Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e).

[19] AMERICAN BAR ASS'N, STANDARDS RELATING TO POST-CONVICTION REMEDIES: TENTATIVE DRAFT 65 (1967) [hereinafter cited as A.B.A. STANDARDS].

[20] 'Federal post-conviction proceedings' for the purpose of this note mean proceedings under 28 U.S.C. § 2241 (1958) (brought by one who seeks relief in the federal court from a state court conviction), and under 28 U.S.C. § 2255 (1958) (brought to vacate a federal conviction).

[21] Whether or not this rule should be changed is beyond the scope of this note. For discussions of this rule see: 51 CALIF. L. REV. 970 (1963); 30 U. CHI. L. REV. 583 (1963); and 19 U. MIAMI L. REV. 432 (1965).

[22] *E.g.*, Baker v. United States, 334 F.2d 444, 447 (8th Cir. 1964) (appointment of counsel is within the discretion of the trial court); Huizar v. United States, 339 F.2d 173 (5th Cir. 1965).

error if the circumstances of the particular case show that such failure resulted in a denial of due process as required by the fifth amendment.[23] If a substantial issue of fact is alleged in the petition which would require a hearing in the case of a non-indigent defendant, counsel should be appointed.[24]

The procedure of appointing counsel to represent an indigent petitioner for post-conviction relief only after the court has determined that the petition is not frivolous has received some criticism,[25] but it does have merit. The classification of the relief as civil rather than criminal is not the real reason for the refusal to appoint counsel as a matter of right.[26] Sounder reasons for the practice are as follows: (1) these proceedings follow criminal proceedings where the petitioner has had benefit of counsel at every step; (2) such proceedings are not part of the guilt determining process, but follow it; and (3) petitions may be resubmitted and are often frivolous.[27]

Once the court determines that a petition does have merit and decides to appoint counsel, he should be compensated.[28] The burden confronting counsel assigned for post-conviction proceedings is often greater than that faced by counsel assigned at the trial level.[29] When a hearing is granted, "it must be a fair one considering all the circumstances, adequate. . . to allow a meaningful presentation

[23] Dillon v. United States, 307 F.2d 445 (9th Cir. 1962).

[24] *Id.*; Eskridge v. Rhay, 345 F.2d 778 (9th Cir. 1965); Campbell v. United States, 318 F.2d 874 (7th Cir. 1963) (a divided court held that Gideon v. Wainwright, 372 U.S. 335 (1963), required appointment of counsel); Anderson v. Heinze, 258 F.2d 479 (9th Cir. 1958); Green v. United States, 158 F. Supp. 804 (D. Mass. 1958)

[25] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 47 (1967). This report recommended the appointment of counsel for petitioners as a matter of course. See also articles cited note 21 *supra.*

[26] Dillon v. United States, 307 F.2d 445, 447 (9th Cir. 1962); United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960).

[27] Dillon v. United States, 307 F.2d 445, 447 (9th Cir. 1962).

[28] A.B.A. STANDARDS § 4.4(a) (1967): "It is most desirable to avoid processing of applications for post-conviction relief beyond the initial screening of the documents without counsel. . . . When private counsel are appointed. . . their services should be compensated adequately from public funds."

[29] REPORT OF ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 45 (1963) [hereinafter cited as COMMITTEE ON POVERTY]. Some examples of these are: (1) if there is a factual issue witnesses must be located and their memories may be poor; (2) often counsel must work from a "cold" record; (3) legal issues are often complex and require much research; (4) the proceedings can be protracted (five years in the instant case); and many others.

of the petitioner's claims."[30] Whether failure to compensate attorneys for the work they do when appointed to represent an indigent results in constitutionally inadequate advocacy has yet to be answered. While some data on this question has been collected, it is insufficient to allow an affirmative answer.[31] It is difficult if not impossible to determine what motivates an attorney to exhaust every means of relief for his indigent client.[32] However, when assigned counsel has received less than adequate compensation for his work at trial and on appeal,[33] the financial burden of federal post-conviction relief may be too great.[34] Such a situation presents a serious ethical problem to the lawyer who fears that the diligent prosecution of his client's rights may seriously affect his earning capacity.

The Bar alone should not be required to carry the burden of the costs of post-conviction proceedings. The infrequency of appointment where it is discretionary may in some ways be attributed to the reluctance of the court, state or federal, to impose the financial burden of such proceeding on the bar.[35] If due process requires counsel to be appointed for the indigent petitioner in the federal court,[36] the duty to provide counsel should be that of the federal government and not the legal profession. The fifth amendment guarantee of just compensation was designed to prevent the government from placing a public burden on a single person or group of persons.[37] When a fair hearing requires representation of the petitioner, coun-

[30] *Id.*

[31] SILVERSTEIN, *supra* note 17 at 20-27. In one study, defendants with assigned counsel pleaded guilty more often and received prison sentences rather than probation more often than defendants with retained counsel.

[32] State v. Rush, 46 N.J. 399, 408, 217 A.2d 441, 444 (1966).

[33] The compensation allowed by the various statutes is often nominal. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e) provides a maximum of 15 dollars per hour for work in court and 10 dollars per hour for work outside of court, not to exceed 500 dollars for a felony or 300 dollars for a misdemeanor, with a proviso for payment in excess of this limit in extraordinary circumstances. Compensation for appeal work "in no event" is to exceed 500 dollars for a felony and 300 dollars for a misdemeanor. W. VA. CODE ANN. § 62-3-1 (1966) provides for a maximum of 50 dollars for a felony and 25 dollars for a misdemeanor.

[34] Dillon v. United States, *In re* Strayer, 230 F. Supp. 487, 495 (D. Ore. 1964) (two young attorneys were forced to borrow money to support themselves when a case they were assigned lasted almost six months).

[35] A.B.A. STANDARDS 65: United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960).

[36] Cases cited *supra* note 24.

[37] Dillon v. United States, *In re* Strayer, 230 F. Supp. 487, 493 (D. Ore. 1964).

sel should be appointed: "Counsel. . . should be permitted to make as effective a presentation as the merits allow. This requires that counsel be granted reasonable compensation and. . . expenses properly incurred."[38]

While the majority of jurisdictions place the responsibility of providing for compensation of appointed counsel on the legislature,[39] in federal post-conviction proceedings the issue is complicated by the question of which legislature—state or federal. Compensation of counsel for petitioners seeking relief under 28 U.S.C. § 2255 from federal convictions must be the responsibility of the federal government. One of the most delicate problems in the dual system of government is the power of the federal courts to grant relief to state prisoners by vacating state court convictions. The issue of compensation of counsel for state prisoners seeking federal relief merely compounds the problem.

A state could enact a statute which authorized the payment of attorneys for work done in the federal courts to vacate the convictions of indigent state prisoners, although this appears highly unlikely. States dislike the use of habeas corpus by the federal courts to vacate state court convictions. Since the state court has no jurisdiction to appoint counsel for a federal court proceeding, the state legislatures would be reluctant to appropriate money without any control over its disbursement.[40]

It would seem that the best solution is a federal statute that provides compensation for attorneys appointed in the federal court to represent indigent petitioners proceeding under either 28 U.S.C. § 2241 (state prisoners) or 28 U.S.C. § 2255 (federal prisoners). Whether the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, is sufficient for this purpose has not yet been decided.[41] The statute

[38] COMMITTEE ON POVERTY 45.

[39] See note 9 *supra.*

[40] State v. Davis, 270 N.C. 1, 8, 153 S.E.2d 749, 754 (1967). The attorneys in this case were never appointed by any court to represent Davis in the federal courts.

[41] In *In re* Hagler, 246 F. Supp. 716 (D. Hawaii 1965), the court held that compensation could not be paid to counsel appointed to seek post-conviction relief under the Criminal Justice Act of 1964. However, the court treated the action before it as equivalent to a motion pursuant to Rules 12 and 48 of the FEDERAL RULES OF CRIMINAL PROCEDURE and granted the counsel compensation; In United States v. Boyden, 248 F. Supp. 291 (S.D. Cal. 1965) the court allowed compensation under the Criminal Act of 1964 to counsel appointed to represent an indigent defendant in a probation revocation proceeding, saying that the hearing was an extension of the criminal proceeding.

says that "A defendant. . . shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner through appeal."[42] The Attorney General of the United States said that the statute was "designed to afford representation to each defendant throughout his involvement in the judicial process."[43] But the committee which was established to implement the statute stated that the act was not meant to apply to post-conviction proceedings.[44] Since there is a strong possibility that the courts will refuse to grant compensation to counsel appointed for post-conviction purposes under the Criminal Justice Act of 1964, Congress should pass legislation specifically addressed to the problem.

Providing counsel for a prisoner attacking the validity of a state conviction in the federal courts creates a delicate situation.[45] It is just this situation which strongly supports the present practice of not appointing counsel in such proceedings as a matter of course. It would be most offensive to the states if counsel were automatically appointed to examine the record for constitutional defects whenever a petition was filed. Such appointment is not required[46] to establish the equality in the administration of criminal justice which the Supreme Court has sought.[47] The proposed statute should set up guidelines that counsel not be appointed if the petition is frivolous or if there has been a prior unsuccessful application where the prisoner was represented by counsel.[48]

When appointed counsel's duty to his client terminates with the final judgment of the court appointing him, there is a gap in representation.[49] The statute could remedy this by establishing a procedure whereby a preliminary motion filed with the petition would

[42] The Criminal Justice Act of 1964, 18 U.S.C. § 3006A(c).

[43] Letter from Robert F. Kennedy, United States Attorney General, to President John F. Kennedy, March 6, 1963, U.S. CODE CONG. & ADMIN. NEWS 2994-95 (1964).

[44] REPORT OF THE COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT OF 1964, 36 F.R.D. 277, 287 (1965)

[45] COMMITTEE ON POVERTY 45.

[46] See notes 22-25 *supra* and accompanying text.

[47] Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Smith v. Bennett, 365 U.S. 707, (1961); Griffin v. Illinois, 351 U.S. 12 (1956); Johnson v. Zerbst, 304 U.S. 458 (1938).

[48] A.B.A. STANDARDS 67.

[49] *Id.*

allow the court to continue the appointment if it determined counsel was required.[50]

STEPHEN E. CULBRETH

Constitutional Law—Effect of the Right to Speedy Trial on Nolle Prosequi

In *Klopfer v. North Carolina*,[1] the United States Supreme Court held that the sixth amendment guarantee of the right to speedy trial is a basic right protected by the Constitution and is therefore incorporated into the due process clause and made obligatory upon the states under the fourteenth amendment.[2] Implicit in the decision is the proposition that the speedy trial guarantee is to be enforced against the states according to the federal standard.[3]

In *Klopfer*, a violation of the sixth amendment was found in the use of the North Carolina procedural device of "nolle prosequi with leave." Its objectionable characteristic is the power given the state solicitor to suspend indefinitely action on a case, after an indictment has been filed, and notwithstanding defendant's timely demand for trial.

Klopfer, a Duke University professor, was tried in March, 1964 on charges of criminal trespass resulting from his participation in a widespread effort to desegregate stores and eating places in Chapel Hill in January of that year.[4] A mistrial was declared when the jury could not agree and the case was continued. Prior to the next

[50] *Id.* It is hoped that this would reduce the number of claims for relief and all but eliminate the frivolous ones. Counsel should advise the prisoner of the risks inherent in filing the petition: it endangers eligibility for parole and if successful the relief is usually limited to a new trial and the danger of a higher sentence.

[1] 87 S. Ct. 988 (1967).

[2] *E.g.*, Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right to confrontation); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel). These decisions, like the instant case, are part of a continuing pattern which is apparently directed towards complete imposition of at least the guarantees of the first eight amendments upon the states by declaring them to be a part of the fourteenth amendment. For a discussion of how, if at all, this operation should come about, *see* Palko v. Connecticut, 302 U.S. 319 (1937).

[3] "To be enforced against the states under the Fourteenth Amendment according to the same standards that protect these personal rights against federal encroachment." Malloy v. Hogan, 378 U.S. 1, 10 (1964).

[4] *See* Pollitt, *Legal Problems in Southern Desegregation: The Chapel Hill Story*, 43 N.C.L. REV. 689 (1965).

session of criminal court, Klopfer was informed by the solicitor that a *nolle prosequi* would be requested. Klopfer objected on the basis that the 1964 Civil Rights Act, as construed by the United States Supreme Court,[5] had abated the trespass prosecution. The solicitor thereupon moved for, and was granted, a further continuance. The matter came to a head on August 9, 1965, when the case was considered in response to a motion filed by Klopfer when he discovered that his case was not docketed for the August term. At the hearing on that motion, the solicitor was granted a *nol. pros.* with leave. The North Carolina Supreme Court affirmed,[6] and further appeal to the United States Supreme Court resulted in unanimous reversal.

The holding in *Klopfer* renders the federal speedy trial standard binding on the states but fails to explain just what that standard is. The Federal Rules of Criminal Procedure contain a general authorization for the courts to dismiss an indictment if there is unnecessary delay in bringing the case to trial.[7] The facts and circumstances of each case are to be considered in determining whether there has been an unconstitutional deprivation of the right to speedy trial.[8] These facts are to be viewed in light of three purposes of the guarantee: (1) to prevent undue incarceration prior to trial; (2) to minimize anxiety and concern attendant upon public accusation; and (3) to limit the possibility that delay will impair the ability of the accused to defend himself.[9]

Decisions of the lower federal courts help to clarify the basic speedy trial guidelines. Consideration must be given to the potential as well as the actual prejudice which may result from long delays.[10] Lower federal courts cite with approval many state decisions to the effect that prejudice in fact is not required to be shown by the defendant.[11] Additionally, the federal decisions appear to place the basic burden of justification for delay upon the govern-

[5] In Hamm v. City of Rock Hill, 379 U.S. 306 (1964) the Supreme Court held that pending trespass prosecutions for acts which were declared legal by the Civil Rights Act of 1964 were abated by the act, even though the trespass occurred prior to its passage.

[6] State v. Klopfer, 266 N.C. 349, 145 S.E.2d 909 (1966).

[7] FED. R. CRIM. P. 48(b).

[8] Pollard v. United States, 352 U.S. 354, 361 (1957).

[9] United States v. Ewell, 383 U.S. 116, 120 (1966).

[10] United States v. McWilliams, 163 F.2d 695, 696 (D.C. Cir. 1947).

[11] United States v. Provoo, 17 F.R.D. 183, 198 (D. Md. 1955), *aff'd.*, 350 U.S. 857 (1955).

ment, rather than the accused. In *Hedgepeth v. United States*[12] there is a statement that, whereas time is only one factor to consider, it is nevertheless the most important factor, and the longer the delay the heavier the burden on the government in arguing that the right has not been abridged.[13] Other factors to be given weight are the diligence of the prosecution, the defense, and the court.[14] Finally, federal authorities agree that the speedy trial guarantee may be waived, and that a presumption of waiver or acquiescence arises when no demand for trial is made.[15]

In spite of the broadness of the federal speedy trial standard, it appears that compliance with the fourteenth amendment requirement of "fundamental fairness"[16] calls for a close re-examination of the old and respected device of *nol. pros.* in North Carolina.[17] In both *nol. pros.* and *nol. pros.* with leave, the permission of the court is theoretically required before a case may be restored to the trial docket, and in both actions the defendant loses no freedom of movement.[18] In *nol. pros.* with leave, however, the general permission of the court to reinstate the indictment is given at the time *nol. pros.* with leave is granted. This leaves the date of the trial, if there is to be one, completely in the control of the solicitor. In view of the Supreme Court's holding in *Klopfer* that the right to speedy trial affords affirmative protection against *unjustified* delay, it is difficult to see how the procedure of *nol. pros.* with leave can be further tolerated. The solicitor cannot justify in advance a delay of undetermined length. In the case of simple *nol. pros.*, the court must grant permission at the time of reinstatement. In this context, keeping in mind the federal standard requirement of the present decision, the question arises as to whether or not the North

[12] 364 F.2d 684 (D.C. Cir. 1966).
[13] *Id.* at 687.
[14] *Id.*
[15] United States v. Provoo, 17 F.R.D. 183, 198 (D.Md. 1955). *See also* Annot., 57 A.L.R.2d 302, 306 (1958).
[16] Gideon v. Wainwright, 372 U.S. 335, 342 (1963).
[17] *Nolle prosequi* is not authorized by statute, but has evidently been carried over from English common law, where its use can be traced back to the time of Charles II. Goddard v. Smith, 87 Eng. Rep. 1008, 1009 (Q.B. 1705). For a detailed explanation of the employment of *nolle prosequi* in North Carolina and a warning that the state decision in Klopfer could be an abuse, see Note, 44 N.C.L. REV. 1126 (1966).
[18] The state does not restrict travel, but one who is under indictment may be denied a passport by the Secretary of State, and thus forbidden to leave the country. See Kent v. Dulles, 357 U.S. 116 (1958).

Carolina courts would refuse permission to reinstate, based solely on a failure by the solicitor to justify the delay. To date, except for *Klopfer*, it appears that no speedy trial standard, federal or state, has seriously impaired the solicitor's use of *nol. pros.* and *nol. pros.* with leave.

The North Carolina Supreme Court is quite clear about appointing inferior courts at all levels as watchdogs to guard against abuses of *nol. pros.*;[19] but apparently it has not departed from the criterion that "the discharge of the prisoner without delay is the true test of the termination of the action so that it matters not whether it is terminated by nol pros. . . and nol pros with leave."[20] The following sentiments appear to be more in keeping with the *Klopfer* decision: "The belief that all judges will take care to see that no unfairness is allowed to take place disregards the fact that the loss of the right to speedy trial is in itself unfair."[21]

Prior to the present decision, the speedy trial standard in North Carolina appears to have involved judicial consideration of four factors: (1) length of the delay, (2) reason for the delay, (3) resultant prejudice to the defendant, and (4) any waiver of the guarantee by the defendant.[22] In addition, it is strongly indicated that the guarantee does not apply to persons released on bail,[23] and that the burden rests upon the person asserting denial of a speedy trial to show that the delay was due to willfulness or neglect on the part of the state.[24] A demand for trial is apparently also a requisite in order to avoid waiver of the guarantee.[25]

A comparison with the federal speedy trial standard outlined above shows that too much weight is being given in North Carolina to the freedom of the defendant as a balm to soothe the ills of delay. Likewise, the state appears not to be in line with the federal standard as to where the basic burden lies when the issue of speedy trial arises. The federal proposition that the delay must not be purposeful or oppressive[26] is not to be narrowly construed; the delay does not have to be deliberate to violate the sixth amendment and its

[19] State v. Smith, 129 N.C. 546, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256, 258 (1852); State v. Thompson, 10 N.C. 614 (1825).
[20] Wilkinson v. Wilkinson, 159 N.C. 265, 267, 74 S.E. 740, 741 (1912).
[21] Note, 13 OKLA. L. REV. 325, 329 (1960).
[22] State v. Lowry, 263 N.C. 536, 542, 139 S.E.2d 870, 875 (1965).
[23] *Id.* at 543, 139 S.E.2d at 876.
[24] State v. Hollars, 266 N.C. 45, 52, 145 S.E.2d 309, 314 (1965).
[25] *Id.* at 53, 145 S.E.2d at 315.
[26] Pollard v. United States, 352 U.S. 354, 361 (1957).

very length may place a heavy burden of justification upon the prosecution.

Otherwise, so long as the anxiety attendant to public accusation is given proper weight, the factors considered by the North Carolina courts appear adequate for the determination of whether the speedy trial guarantee has been abridged, according to the federal standard. The requirements of the fourteenth amendment, then, would apparently be met if judges put teeth into the device of *nol. pros.* by seriously evaluating, in light of the federal standard, each request by a solicitor to reinstate an indictment. There appears to be no way of squaring *nol. pros.* with leave with the fourteenth amendment and the use of this device should be abandoned.

It can be fairly concluded that *Klopfer* requires only a new attitude in employment of simple *nol. pros.* But difficulties may be avoided, and time and money saved if some method of safeguarding the right to speedy trial is employed other than dismissal of indictments by the courts upon determination that the federal standard has not been met. The precise requirements of the guarantee are sure to remain subject to interpretation, and therefore to litigation. It would serve the ends of efficiency as well as justice if the state were to go beyond the bare minimum requirement as it stands today and enact a statute which places a definite and reasonable limitation upon the state whereby an accused person must either be brought to trial or the indictment dismissed.

Many states have such statutes. The details vary but the most common limitations provide for dismissal if the defendant is not brought to trial within sixty days after the filing of the indictment or information,[27] or within the present or next succeeding term of court,[28] or a combination of the two.[29] All of the statutes provide that they are not operative if the delay is at defendant's request and many are not absolute in that they operate only in the event good cause it not shown for delay past the statutory period.[30] It is suggested that North Carolina draft a statute which provides that:

[27] ARIZ. RULES CRIM. PROC. 236 (1956); CAL. PEN. CODE § 1382 (1954); NEV. REV. STAT. § 178.495 (1957); WASH. REV. CODE § 10.46.010 (1961).

[28] GA. CODE ANN. § 27-1901 (1953); IDAHO CODE tit. 19, § 3501 (1948); ME. REV. STAT. ANN. tit. 15, § 1201 (1964); N.D. REV. CODE § 29-1801 (1943); OKLA. STAT. tit. 22, § 812 (1951); UTAH CODE ANN. § 77-51-1 (1953).

[29] IOWA CODE § 795.2 (1962).

[30] The statutes of Arizona, California, Idaho, Nevada and Oklahoma contain this provision.

(1) defendant must be brought to trial within the same term of court in which the indictment is filed, or within the next succeeding term of a court competent to try him, and (2) unless good cause is shown by the state for failure to bring defendant to trial within this period, this statute shall operate as a bar to future prosecution for offenses arising out of facts alleged in the indictment. This proposed statute would not operate as a "sword for the defendant,"[31] for the General Assembly is able to draft initially, and subsequently revise as necessary, the time limitations to reflect the current ability of the state's courts, acting with reasonable diligence, to bring persons to trial. That period at any given time might be longer than two terms of court. At any rate, *Klopfer* makes clear that an outer limit of some type, however determined, is necessary.

So much for the law. In reality, Klopfer has not yet had his trial. He attempted to have the case removed to federal court under procedures recently outlined by the United States Supreme Court for cases arising out of civil rights disputes.[32] But the federal district court declined to take jurisdiction on November 17, 1967, stating that the state court should be given another chance to dismiss the indictment.

WILLIAM S. GEIMER

Constitutional Law—Defamation under the First Amendment—The Actual Malice Test and "Public Figures"

In *New York Times Co. v. Sullivan*[1] the United States Supreme Court held that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[2] was such that in certain cases libelous misstatements of fact were qualifiedly protected by the first and fourteenth amendments. In granting this constitutional protection to misstatements of fact,[3] the Court held that the protection was for critics of the

[31] State v. Lowry, 263 N.C. 536, 542, 139 S.E.2d 870, 875 (1965).
[32] Georgia v. Rachel, 384 U.S. 780 (1966); Greenwood v. Peacock, 384 U.S. 808 (1966).

[1] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[2] *Id.* at 270.
[3] The Court expressly adopted the minority view. 376 U.S. at 280 & 281. *See, e.g.*, Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962); Annot., 150 A.L.R. 358 (1944).

official conduct of public officials[4] but that it did not extend to a libelous statement made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[5] Failure to show that plaintiff was a public official or proof of actual malice destroyed the protection.

Much discussion and debate followed the *New York Times* decision concerning how far the constitutional protection was to be extended.[6] In response to this uncertainty, the Court granted certiorari in two cases to decide whether the first amendment protects "public figures" as well as public officials and if so, when the protection was to be lost.[7] Case No. 150, *Associated Press v. Walker* was a libel action arising out of newspaper accounts concerning the integration riots of September 30, 1962, at the University of Mississippi.[8] Case No. 37, *Curtis Publishing Co. v. Butts* arose out of an article published in the *Saturday Evening Post*[9] which falsely accused the athletic director of the University of Georgia of having conspired to "fix" a college football game.[10]

In deciding these two cases all members of the Court agreed that the first amendment qualifiedly protects libelous misstatements of fact made about "public figures" as well as those concerning public officials.[11] There was disagreement, however, over the test to be employed in determining the proof necessary to destroy the constitutional protection.[12] Five members of the Court applied the "actual malice" test of *New York Times* and reversed *Walker* because there

[4] 376 U.S. at 283.

[5] 376 U.S. at 279.

[6] Hanson, *Developments in the Law of Libel: Impact of the New York Times Rule*, 7 WM. & MARY L. REV. 215 (1966); Comment, *New York Times v. Sullivan: The Public Official and The Public Figure*, 30 ALBANY L. REV. 316 (1966); Note, 42 U. WASH. L. REV. 654 (1967).

[7] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[8] *Id.* at 140.

[9] SATURDAY EVENING POST, March 23, 1963, at 80.

[10] 388 U.S. at 135.

[11] 388 U.S. at 131-33 (syllabus). In thus extending the constitutional protection to "public figures," however, the Court failed to give a concrete standard for determining when a person was a "public figure." This interesting point is beyond the scope and purpose of this note. For discussion of who constitutes a public official *see, e.g.*, Rosenblatt v. Baer, 383 U.S. 75 (1966); Note, 46 BOSTON U. L. REV. 568 (1966); Note, 52 CORNELL L.Q. 419 (1967); Note, 39 TEMP. L.Q. 510 (1966).

[12] The first two parts of the opinion of Chief Justice Warren constituted the only majority opinion by the Court. 388 U.S. at 164. The four justices who concurred in this part of his opinion disagreed with the last half of the opinion, two of them dissenting on grounds other than the question of reckless disregard. 388 U.S. at 172.

was no proof of actual malice.[13] In *Butts*, however, two of these concluded that the evidence was insufficient to show the degree of reckless disregard necessary to defeat the constitutional protection while the remaining three thought it was sufficient.[14] The remaining four members of the Court voted to reverse *Walker* and to affirm *Butts*[15] arguing, however, that "the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake."[16] Instead they felt that the public figure should be able to recover on "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[17] The conflict in these opinions raises the question of whether the proof required to defeat the constitutional protection is to be less rigorous where public figures rather than public officials are involved.

The actual malice test as promulgated in *New York Times* is a two part test. The first half of the test, actual knowledge of the falsity of a statement, is easily applied.[18] It is in determining reckless disregard of the truth or falsity of the statement that problems arise. From the very nature of the test it can be seen that a determination of reckless disregard will involve many factors.[19] Cases which present the question, however, frequently involve wide publication of a statement, the falsity of which could have been discovered prior to publication by a more thorough investigation.[20] Thus the effect of the degree of investigation upon the determination of reckless disregard may often be important. To analyze this test under *New York Times* and *Butts* it is necessary to look at the specific factors the courts have found relevant.

In *New York Times*, the defendant newspaper published a paid advertisement which supported the civil rights movement in

[13] 388 U.S. at 164.
[14] 388 U.S. at 170-71.
[15] 388 U.S. at 133.
[16] 388 U.S. at 155.
[17] 388 U.S. at 155.
[18] Fox v. Kahn, 421 Pa. 563, 221 A.2d 181 (1966), *cert. denied*, 385 U.S. 935 (1966).
[19] It is clear that many factors have an effect upon the amount of investigation required. Some of these factors are: (1) The time lag between the occurrence of an alleged fact and its publication (is it "hot" news?); (2) The degree to which the publication is clearly defamatory; (3) Notice of probable falsity of the statement.
[20] *E.g.*, Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966).

Alabama. Several false statements were made about the activities of the Montgomery, Alabama, police department which plaintiff, the head of the department, claimed defamed him by innuendo. The Court held that the failure of defendant to investigate the validity of the statements before publication was "constitutionally insufficient" to show reckless disregard.[21] A clearer example of what the Court required for proof of reckless disregard in the case of public officials is found in *Garrison v. Louisiana*.[22] There the District Attorney of Orleans Parrish, Louisiana, was convicted under a Louisiana criminal libel statute for falsely accusing eight local judges of misconduct in office and dereliction of duty. The Supreme Court held, in striking down the statute as unconstitutional, that the trial court's finding that the statements were made with personal malice and without reasonable grounds to believe them true[23] was not sufficient to show reckless disregard because even where personal malice is present, defeasance of the protection can not be based on unreasonableness or mere negligence.[24] Thus, it seems that the reckless disregard test, as applied to public officials in these two cases, is a stringent test, almost the equivalent of requiring culpable knowledge.[25]

Although *Garrison* is the only post-*New York Times* decision by the Supreme Court that gives a further definitive showing of what would constitute reckless disregard in libel actions, several other courts have interpreted the standard, often in terms of investigation. The Court of Appeals for the Fifth Circuit in applying the test stated: "While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by public official."[26] Where a reporter for defendant newspaper wrote a story falsely accusing plaintiff, a justice of the peace, and his daughter of trying cases without jurisdiction, the fact that the reporter failed to make a

[21] 376 U.S. at 265.
[22] 379 U.S. 64 (1964).
[23] State v. Garrison, 244 La. 787, 154 So. 2d 400 (1963).
[24] 379 U.S. at 79.
[25] At least one state court has interpreted it this way, stating that "[R]eckless disregard must be the equivalent of the 'calculated falsehood' . . . ." Pauling v. National Review, 49 Misc. 2d 975, 981, 269 N.Y.S.2d 11, 19 (Sup. Ct. 1966).
[26] New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966).

single check of the court records for verification was held insufficient to show reckless disregard of the truth.[27] By contrast, where defendant magazine published an article which was based on the Civil Rights Commission Report and which stated that plaintiff was brutal towards Negroes when in fact the report only alleged this, the court held there was sufficient evidence to go to the jury on the question of reckless disregard.[28] The fact that the story was based on a written report from which information was inaccurately reported strongly suggests the existence of actual knowledge. A much clearer case of reckless disregard is found in *Thompson v. St. Amant*.[29] There the defendant, a candidate for public office, made a speech in which he accused a deputy sheriff, along with others, of taking bribes. Recovery was allowed on proof that defendant did not know plaintiff personally but based his clearly defamatory statement on the sole affidavit of a man of questionable reliability.

The defamatory article in *Butts* was based upon the affidavit of an insurance salesman who testified that an electrical error allowed him to overhear a telephone conversation in which Butts revealed the plays and plans of the Georgia team to an opposing coach. In determining that the evidence in *Butts* was constitutionally sufficient to show reckless disregard of the truth under *New York Times*, the Chief Justice alluded to the fact that "little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue."[30] But is it reasonable to require a publisher to investigate every time he is notified that a story to be printed is untrue? In the *New York Times* case, the plaintiff notified the Times that the statements in the advertisement were false and demanded a retraction. The Court held that "The Times' failure to retract . . . is . . . not adequate evidence of malice for constitutional purposes."[31] In addition, the Fifth Circuit Court of Appeals has interpreted *New York Times* to allow reporters to rely on a single source, exactly what the *Saturday Evening Post* did.[32] In his opinion the Chief

[27] Ross v. News-Journal Co., —Del.—, 228 A.2d 531 (1967).
[28] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966).
[29] 250 La. 405, 196 So. 2d 255 (1967).
[30] 388 U.S. at 169-70.
[31] 376 U.S. at 286.
[32] New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).

Justice alluded to the fact that the *Saturday Evening Post* had decided to embark on "a program of 'sophisticated muckraking' . . . "[33] and that it had published the article "with full knowledge of the harm that [was] . . . likely . . . [to] result . . ."[34] It should be remembered that in *Garrison* the defendant made his defamatory accusations in anger with the purpose of revenge, and even though they were made without reasonable grounds to believe them true, these facts were held not to constitute reckless disregard.[35] By comparing the amount of investigation held to be adequate in *New York Times* and *Garrison* with the amount held to be insufficient to avoid a finding of reckless disregard in *Butts*, it is reasonable to conclude that the test of reckless disregard applied to public figures in *Butts* is less rigorous than the one applied to public officials. This conclusion is buttressed by the fact that two members of the majority that extended the *New York Times* standard were of the opinion that the evidence in *Butts* was not constitutionally sufficient to show actual malice.[36] In addition, four members of the Court felt that a different and less rigorous test should be applied to public figures.[37]

It is submitted that the Supreme Court applied a less rigorous standard of actual malice in *Butts* than that applied to public officials. By applying a different standard the Court may be doing what Mr. Justice Black describes as "getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity."[38] It would not be unreasonably burdensome to have different standards of proof for public figures and public officials if these standards were clearly set forth by the Court. The first amendment does not necessarily require that a man who is well known because of his personal qualities be exposed to the same amount of uncompensated libel as the man who holds a public office, simply for the sake of having one legal standard. Whether the first amendment requires this equal exposure at all must be clarified by the Court in a future decision.

By failing to hold the public figure in *Butts* to the same standards of proof required from public officials, the Court left many

[33] 388 U.S. at 169.
[34] 388 U.S. at 170.
[35] 379 U.S. at 79.
[36] 388 U.S. at 170-71.
[37] 388 U.S. at 155.
[38] 388 U.S. at 171.

questions unanswered, not the least of which is whether this standard will apply uniformly to all public figures. It should be noted that Butts, while a public figure in one sense, had not "thrust himself into the vortex" of public controversy. Contrasted to this, General Walker had voluntarily involved himself in a public controversy by going to the University of Mississippi and speaking to the rioters. In a great majority of the cases decided prior to *Butts* in which the courts were willing to extend the *New York Times* rule to public figures, these public figures had voluntarily involved themselves in major public issues. Thus where a Nobel prize winning professor had publicly advocated the cessation of nuclear testing, the Eighth Circuit Court of Appeals by dictum held him subject to the actual malice rule.[39] On the other hand courts have been unwilling to extend the constitutional protection where the plaintiff was not involved in important public issues.[40]

It is purely subjective speculation to state that the Court intends the reckless disregard test to be different for different types of public figures. Yet the fact that such speculation can be rationally made is strong evidence of the confusing nature of this decision. In any event it is reasonable to conclude that the Court failed to adhere to the reasoning of the Chief Justice that "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy,"[41] because the Court in *Butts* ostensibly did apply a different standard of proof than that applied to public officials.

JAMES R. CARPENTER, JR.

Constitutional Law—Procedural Due Process—Extension to the High School Disciplinary Proceeding

In *Madera v. Board of Education*,[1] the Federal District Court for the Southern District of New York held the due process clause

[39] Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966) (dictum); *accord*, Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965), *rev'd on other grounds*, 368 F.2d 189 (6th Cir. 1966).

[40] Dempsey v. Time, Inc., 43 Misc. 2d 754, 252 N.Y.S.2d 186 (Sup. Ct. 1964); *accord*, Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966).

[41] 388 U.S. at 163.

[1] 267 F. Supp. 356 (S.D.N.Y. 1967).

of the fourteenth amendment applicable to a high school suspension hearing. The plaintiff, a 14 year old pupil, was suspended from his school. The incident which precipitated his suspension was not stated in the opinion. His parents were notified that a "guidance conference" would be held regarding the suspension. An attorney was obtained by the parents but was advised that attorneys are not permitted to attend the conference under General Circular No. 16 of the New York City School Board.[2] The court found it had jurisdiction to enjoin the use of this provision under 42 U.S.C. Section 1983[3] and issued an injunction primarily because of the drastic consequences which could result from this apparently innocent, child-oriented guidance conference. Any one of the following could happen to Victor Madera: (1) loss of his personal liberty by being involuntarily incarcerated by the district superintendent of schools;[4] (2) temporary expulsion; (3) permanent expulsion; (4) his being sent to a special day school for socially maladjusted pupils.[5] Moreover, his parents might have an action brought against them in a child neglect proceeding.[6] With particular reference to these grave consequences the court specifically held that "enforcement by defendants of the 'no attorneys provision' of Circular No. 16 deprives plaintiffs of their right to a hearing in a state initiated proceeding which puts in jeopardy the minor plaintiff's liberty and right to attend public schools."[7]

Madera limits its discussion to the right to counsel issue. Per-

[2] General Circular No. 16 (1965-66) of the New York City School Board provides: "Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al., to plan educationally for the benefit of the child, attorneys seeking to represent the parent or child may not participate." 267 F. Supp. at 358.

[3] 42 U.S.C. § 1983 (1964) provides: "Every person who, under color of any statute ordinance, regulation, custom, or usage. . . subjects. . . any citizen. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable for redress to the party injured. . . at law. . . in equity, or other proper proceeding. . . ."

[4] The defendant school authorities under N.Y. EDUC. LAW § 3214 (McKinney 1953), can confine a pupil in any private school, orphan's home, or similar institution or with other private agencies provided they have the written consent of the parents. If the parents refuse to "consent" in writing, they *"shall"* be proceeded against for violating their statutory duty to see to the pupil's attendance at school. N.Y. EDUC. LAW, §§ 3205, 3212, 3214 (McKinney 1953) (emphasis added); *See also,* N.Y. FAMILY CT. ACT, §§ 312, 332, 335, 337 (McKinney 1963).

[5] 267 F. Supp. at 366-69.

[6] N.Y. FAMILY CT. ACT, §§ 312, 332, 335, 337 (McKinney 1963).

[7] 267 F. Supp. at 369.

haps courts in future high school disciplinary cases will be confronted with other procedural due process rights in situations which involve involuntary incarceration or permanent withdrawal of the right to attend a public school. The fundamental fairness of the high school disciplinary proceeding will be in issue. Since there is little authority in this area, these courts, confronted with the problem of what procedural standards should apply to meet the fairness test, may look outside the high school hearing to other disciplinary proceedings that involve similar situations and consequences. If the consequence of the proceeding involves incarceration, the courts may turn to the juvenile proceeding for procedural guidelines. If the only consequence of the high school hearing is permanent expulsion, the court may find relevant those procedural safeguards granted to college students.

The law relating to college expulsions within the last decade found itself in transition as it mirrored the changing character of academic freedom.[8] National attention recently focused on college student disciplinary proceedings arising from political expressions through peace demonstrations[9] and academic expressions through

[8] A partial bibliography of materials treating due process and college student disciplinary proceedings follows: T. E. BLACKWELL, COLLEGE LAW (1961); Blackwell, *Can a Student Be Expelled Without Due Process?*, COLLEGE AND UNIV. BUSINESS 31 (1961); Jacobson, *The Expulsion of Students and Due Process of Law*, 34 J. HIGHER EDUC. 250 (1963); Seavy, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Van Alstyne, *Student Academic Freedom*, 2 L. IN TRANS. Q. 1 (1965); Comment, *Procedural Limitations on the Expulsion of College and University Students*, 10 ST. LOUIS U. L.J. 542 (1966); Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 ILL. L.F. 438; Note, *Judicial Review-Procedural Due Process in Student Disciplinary Proceedings*, 42 N.C.L. REV. 152 (1965); Note, *Expulsion of College and Professional Students-Rights and Remedies*, 38 NOTRE DAME LAW 174 (1963); Annot., 58 A.L.R.2d 903 (1958); 55 AM. JUR. *Universities and Colleges* § 22 (1946); 14 C.J.S. *Colleges and Universities* § 26 (1939). The following concern the changing character of academic freedom: Williamson, *Do Students Have Academic Freedom?*, COLLEGE AND UNIV. BUSINESS 466 (1964); Van Alstyne, *Student Academic Freedom*, 2 L. IN TRANS. Q. 1 (1965); NATIONAL STUDENT ASSOCIATION, CODIFICATION OF POLICY (1961); AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES (1961), reprinted in 48 AM. ASS'N UNIV. PROFESSORS BULL. 110 (1962).

[9] Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967). This case held "that the student plaintiffs had no constitutional, statutory, or contractual right to a notice of charges and a hearing before they could be expelled. . . ." *Id.* at 614. The holding was based upon Howard University being a private rather than a public institution. The fourteenth amendment appears to apply only to state financed universities, but as due process expands so does the

editorials.[10] In the early cases the main issue was whether the university had complied with its side of the bargain with the student as manifested through its catalogue and bulletins. This issue was usually decided in favor of the university because its rules and charter showed it had committed itself to very little.[11] Numerous rationales were given for denying due process to students.[12] The

area of state action. *See, e.g.*, Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961). As college level education is being recognized as a fundamental interest and as private universities use more public subsidies, these private universities will be circumvented by more constitutional restraints. Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368, 388 (1963); *see also*, Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399, 413-16 (1962).

[10] Dickey v. Alabama State Bd. of Educ., Civil No. 2593-N (M.D. Ala. Sept. 8, 1967). This court ruled that a state-supported college may not promulgate "unreasonable rules and regulations" that restrict academic or political expression by students.

[11] *See* Van Alstyne, *Student Academic Freedom*, 2 L. IN TRANS. Q. 1, 8 n.24 (1965), for numerous cases on this point.

[12] A classic statement of the rationale for denying due process is that found in the college catalogue which the student contracts to follow upon admittance. The Syracuse University catalogue of 1928 was a typical example of this. Anthony v. Syracuse Univ., 224 App. Div. 487, 489, 231 N.Y. Supp. 435, 438 (1928); Annot. 58 A.L.R.2d 903, 913 (1958). For a modern example of this see Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), where the Howard University catalogue explained the relation between the University and its students as follows: "Attendance at Howard University is a privilege. In order to protect its standards of scholarship and character, the University reserves the right, and the student concedes to the University the right, to deny admission to and to require the withdrawal of any student at any time for any reason deemed sufficient to the University. . . ." *Id.* at 613. Another rationale is the *in loco parentis* argument which justifies summary discipline because the university is dealing with "legal infants," whose collective welfare has to be safeguarded from contamination by undesirable elements. Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368, 376 (1963). How can this rationale be valid when almost all entering students are at least eighteen which is legal adulthood for many purposes, and the average age, including graduate students, is above twenty-two? U.S. BUREAU OF THE CENSUS, SERIES P-20, 110 CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS 12 (July 24, 1961). Another rationale stresses that only the wealthiest institutions can afford the legally trained personnel that would be required if full due process rights are given. Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144, 11 Ohio C.C. Dec. 515 (1901). Another rationale states that the college does not have the authority to fulfill the responsibility, i.e., the president cannot compel witnesses to attend the hearing or testify. State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433, *cert. denied*, 277 U.S. 591 (1928). "It certainly cannot be maintained that it [student disciplinary proceeding] means a hearing like that which constitutes the trial of a chancery suit,. . .

basic question whether due process rights were available to college students finally culminated in *Dixon v. Alabama State Board of Education*[13] and *Knight v. State Board of Education*.[14] These cases specifically grounded federal jurisdiction in state college student expulsion cases on the due process clause of the fourteenth amendment.[15] *Dixon* was the first to hold that due process requires notice and some opportunity to be heard before a student at a tax supported college can be expelled.[16] The rationale of these cases was the importance attached to a public education. In *Dixon*, the court felt that "without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens."[17] In *Knight*, the court concurred with the *Dixon* holding that the right to attend school was not a mere privilege but a constitutional right.[18] In effect, the right to an education is the opportunity to succeed in life.

To protect that right it is now settled that dismissal from a state university or college without the semblance of a hearing would violate procedural due process.[19] The next consideration is what this

for there is no power vested in the president of the university to compel the attendance of witnesses or force them to testify if they were in attendance." *Id.* at 213, 263 P. at 436.

[13] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1962). The case has been extensively noted: 14 ALA. L. REV. 126 (1961); 50 GEO. L.J. 314 (1961); 75 HARV. L. REV. 1429 (1962); 60 MICH. L. REV. 499 (1962); 15 VAND. L. REV. 1005 (1962).

[14] 200 F. Supp. 174 (M.D. Tenn. 1961).

[15] Cases cited notes 13, 14 *supra*. *See also, In re Carter*, 262 N.C. 360, 137 S.E.2d 150 (1964), a recent North Carolina case which held that a student expelled from the University of North Carolina was entitled to judicial review under the state statute, N.C. GEN. STAT. §§ 143-306 to -316 (1953); Note, *Judicial Review-Procedural Due Process in Student Disciplinary Proceedings*, 43 N.C.L. REV. 152 (1965).

[16] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1962).

[17] *Id.* at 157.

[18] "[T]he fact remains that it [college education] is an interest of almost incalculable value. . . . Private interests are to be evaluated under the due process clause. . . not in terms of labels or fictions, but in terms of their true significance and worth." 200 F. Supp. at 178.

[19] Cases cited notes 13, 14 *supra*. *See also*, Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). "Dismissal from college affects a student's life too drastically to be left to even the barest possibility of arbitrary action by college administrators. Expulsion carries with it an ineradicable stigma which usually prevents admission to another institution, with the result that a student's chances for higher education may be gone forever." Jacobson, *The Expulsion of Students and Due Process of Law*. 34 J. HIGHER ED. 250, 254-55 (1963).

hearing that deprives a student of his right to an education should encompass. *Madera*, involving possible incarceration or expulsion, limited itself to the right to counsel issue. Should the right to counsel be one procedural due process right granted to the high school disciplinary proceeding? In *Matter of Goldwyn*,[20] on June 27, 1967, the court held that the Department of Education acting solely on the principal's letter could not suspend a high school student's examination privileges without a hearing at which she could defend herself with the assistance of counsel.[21] In areas outside the educational cases, courts have stressed the importance of the right to counsel at a hearing. In *Powell v. Alabama*,[22] the court held that one of the basic components of a hearing in a criminal case was the right to counsel, and a denial of that right would be denial of a hearing.[23] In administrative proceedings which are purely investigatory rather than adjudicative in nature, there is no general right to counsel.[24] But if there is a right to a hearing as a matter of procedural due process, i.e., if there is a constitutionally protected right,[25] then denial of counsel may result in the hearing's failure to meet the test of fairness.[26] The right to be represented by counsel is presently regarded as an essential element of our system of criminal justice.[27] Thus, the right to a hearing to meet the constitutional standard of fairness requires the right to counsel, if desired. This conclusion gives strength to the holding in *Madera* on the right to counsel issue.

What other procedural rights should encompass the high school suspension hearing besides the right to counsel? Obviously more than the right to counsel is involved. One commentator argued for the full panoply of procedural safeguards:

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[20] 157 N.Y.L.J. 17 (Super. Ct. Queens County, June 27 1967). For a discussion of the case see TIME, July 14, 1967 at 41; 9 WEL. L. BULL. 2 (July 1967).

[21] 157 N.Y.L.J. 17

[22] 287 U.S. 45 (1932).

[23] *Id.* at 68-69.

[24] Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944), noted in 58 COLUM. L. REV. 395 (1958). *See also*, Rauh & Pollitt, *Right to and Nature of Representation Before Congressional Committees*, 45 MINN. L. REV. 853 (1961).

[25] *See, e.g.*, Board of Educ. v. Kennedy, 256 Ala. 478, 55 So.2d 511 (1951); Almon v. Morgan County, 245 Ala. 241, 16 So.2d 511 (1944) (due process contemplates representation by counsel if desired).

[26] Hyun v. Landon, 219 F.2d 404 (9th Cir. 1955), *aff'd*, 350 U.S. 990 (1956).

[27] Gideon v. Wainwright, 372 U.S. 335 (1963).

> When we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes. . . , our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution. . . should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.[28]

Dixon sets forth a model of the procedural rights that should be given to the college student disciplinary proceeding, following the tone of the above comment. The court in *Dixon* stated that there must be advance notice to the student which should "contain a statement of the specific charges and grounds which, if proven, would justify expulsion. . . ."[29] The hearing should allow presentation of both sides of the case in considerable detail.[30] Although cross-examination is not required, the student should be given the names of the witnesses against him and a report of their testimony.[31] He should be allowed to present his own defense and to present oral testimony or written affidavits of witnesses in his behalf.[32]

The courts facing the problem of what procedural standards should apply to high school hearings could stop with the college cases and conclude by analogy that the right to a hearing, the right to counsel, and the model of procedural safeguards outlined in *Dixon* should apply equally to the student expelled from high school.

Nevertheless, there appears to be something inherently different between high school and college. Colleges are more selective and optional; only the qualified can be admitted. High schools are open to everyone, and compulsory in that society desires that everyone should attend high school. Courts may look beyond the college cases because of this distinction and the additional factor that involuntary incarceration may result from the high school hearing either directly as in *Madera* or indirectly by referral from the school proceeding to the juvenile court. Thus the courts may look to the juvenile courts for guidance for the high school proceeding. In-

[28] Seavy, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406-07 (1957).
[29] 294 F.2d 150, 158 (5th Cir. 1961).
[30] *Id.* at 159.
[31] *Id.*
[32] *Id.*

deed, it may be that high school suspension whether there is possible incarceration or not is so different from the college suspension that the analogy to the juvenile court procedural rights should always be considered.

The theory behind a juvenile court proceeding and a high school guidance conference is essentially the same, i.e., rehabilitation. Both seek to formulate what will be best for the child so that he will be a positive rather than a negative factor to society's interests. The juvenile is made "to feel that he is the object of [the State's] care and solicitude,"[33] so the proceedings are not adversary but the state is proceeding as *parens patriae*.[34] Nevertheless, there is presently little disagreement that the due process clause has a part in these hearings.[35] In *Kent v. United States*,[36] the United States Supreme Court, regarding the juvenile court statute which was ambiguous on this point, said:

> there is no place in our system of law for reaching a result of such tremendous consequences without ceremony, without hearing, without effective assistance of counsel, without a statement of reasons. . .[37] [T]he hearing must measure up to the essentials of due process and fair treatment.[38]

On May 15, 1967, the Supreme Court of the United States (Fortas, J.), relying in part upon the Report of the President's Commission on Law Enforcement and Administration of Justice,[39] reiterated the above quote, and specifically held for constitutional reasons in *In re Gault*[40] that a juvenile has right to notice of the charges,[41] to counsel,[42] to confrontation and cross-examination of

[33] Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).
[34] *Id.* at 109.
[35] Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Gardner, *The Kent Case and the Juvenile Court*, 52 A.B.A.J. 923 (1966); Ketcham, *The Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585 (1965); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).
[36] 383 U.S. 541 (1966).
[37] *Id.* at 554.
[38] *Id.* at 562.
[39] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 55-56, 78, 80-81, 84-87 (1967). [hereinafter cited as PRESIDENT'S COMMISSION]
[40] 87 S. Ct. 1428 (1967).
[41] *Id.* at 1446.
[42] *Id.* at 1451. *See also*, Lehman, *A Juvenile's Right to Counsel in a Delinquency Hearing*, 17 JUVENILE CT. JUDGE'S JOURNAL 53 (1966); The

witnesses,[43] and to the privilege against self-incrimination.[44] In granting these procedural due process rights to juveniles, the Court felt that recent reports[45] suggest "that the appearance as well as actuality of fairness, impartiality and orderliness—in short, the essentials of due process may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[46]

It would seem that if appropriate due process is followed in high school expulsions the student will similarly feel he is being treated fairly and will respond to the decisions of the board more readily. Denver Judge Rubin at a recent meeting of National Council of Juvenile Court Judges echoed this sentiment:

> The present system, which shuns the adversary system and prefers flexible and informal deliberations, denies consistent legal protection to the child. As a result, the child does not understand himself or the system. By incorporation of Constitutional safeguards into this system, individualized justice can become a reality.[47]

Similarly the informal high school hearing denies consistent legal protection in that its actions may be arbitrary or cursory. What the appropriate due process rights given to the high school student are will depend on the jurisdiction and the possible consequences of the disciplinary hearing. If the only outcome of the hearing would be expulsion, temporary or permanent, perhaps the college cases alone should apply. If college and high school are regarded as fundamentally and inherently different, then perhaps the procedural safeguards laid down in Gault are applicable. When numerous drastic consequences could result as in *Madera,* a high school stu-

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President's Crime Commission felt "that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel." PRESIDENT'S COMMISSION 86.

[43] 87 S. Ct. at 1459.

[44] 87 S. Ct. at 1458. The Supreme Court of the United States has broadly applied the constitutional guarantee that no person shall be compelled to be a witness against himself when he is threatened with deprivation of his liberty. "The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964); *accord,* Malloy v. Hogan, 378 U.S. 1 (1964).

[45] F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 19 (1964); The President's Crime Commission concluded: "There is increasing evidence that the informal procedures. . . may . . . engender in the child a sense of injustice provoked by seemingly all-powerful and changeless exercise of authority. . . ." PRESIDENT'S COMMISSION 85.

[46] 87 S. Ct. at 1443.

[47] TIME, August 4, 1967 at 68.

dent facing an expulsion hearing should be given those procedural due process rights granted to the college student and to the juvenile. Both society and the student will benefit if some procedural safeguards are granted to the high school suspension hearing rather than arbitrary procedural laxness.

ERIC MILLS HOLMES

Criminal Law—Sentencing—Denial of Credit for Time Served or Longer Sentence Imposed at Retrial

In *Patton v. North Carolina*[1] Eddie W. Patton was tried in the Superior Court of North Carolina for armed robbery in October, 1960. He was unrepresented by counsel and entered a plea of nolo contendere at the close of the state's evidence. He was convicted, received a sentence of twenty years and did not appeal. However, after serving nearly five years in prison, he applied for a state post-conviction hearing which resulted in a new trial based on the denial of his constitutional right to counsel at the first trial. Represented by counsel at the second trial in February, 1965, Patton pleaded not guilty and was convicted by a jury on the original indictment charging armed robbery. The trial judge purported to give Patton credit for the nearly five years served on the original twenty year sentence and then sentenced him to twenty years imprisonment.

The effect of this sentence is an increased punishment. Had he not appealed Patton would have been eligible for parole in October, 1965. If he had not been paroled, and without taking earned time factors into account, he would have completed the first sentence in October, 1980. As a result of the sentence at the second trial, Patton will not be eligible for parole until February, 1970, and the sentence will not terminate until February, 1985. Because he obtained a new trial, Patton will remain in prison five years longer than if he had not asserted his right to seek a fair trial.

After the second trial, Patton applied to the federal district court for a writ of habeas corpus. The writ was granted[2] and the Court of Appeals for the Fourth Circuit affirmed.

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[1] 381 F.2d 636 (4th Cir. 1967).

[2] Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966); *noted in* 1966 DUKE L.J. 1172; 80 HARV. L. REV. 891 (1967); 20 VAND. L. REV. 660 (1967); 12 VILL. L. REV. 380 (1967). *See generally* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L.J. 606 (1965) [hereinafter cited as Van Alstyne].

Harsher sentencing imposed upon a successful criminal appellant at retrial can be accomplished by denying credit for the time served under the original sentence or by imposing a longer sentence. This practice is widespread[3] and is most often justified upon two grounds. It has been said that when the conviction at the first trial is overturned upon appeal or through other appropriate procedural methods it is then "void," with the result that the sentence imposed at the first trial is to be ignored thereafter.[4] It is also said that when the appellant seeks post-conviction relief he waives whatever benefit he may have enjoyed under the first sentence.[5] These theories had their origin in a different setting. In order to justify the use of habeas corpus as a tool of review, federal courts granted the writs "only if the court ordering imprisonment was without jurisdiction—*i.e.*, if the order was 'void.'"[6] Then, to prevent a defendant from contending that double jeopardy protection barred a retrial, the courts generally held that the first sentence was void or that the defendant waived his rights under the previous conviction.[7]

Patton is significant not only for its result, but because it is

[3] The North Carolina Supreme Court allows longer sentences with credit or sentences without credit except that the increased sentence when added to the time appellant has already served may not exceed the maximum sentence allowed for the offense. State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966); State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965); State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964); 44 N.C.L. REV. 458 (1966). State v. Pearce, *supra*, was decided after the Patton decision was rendered in the district court. In refusing to follow that decision, the North Carolina Supreme Court stated, "We adhere to our former decisions." State v. Pearce, *supra* at 708, 151 S.E.2d at 572.

[4] *See e.g.*, United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); United States v. Harmon, 68 F. 472 (D. Kan. 1895). *See generally* Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239 (1951) [hereinafter cited as Whalen].

[5] Whalen 240-44. Van Alstyne 610, suggests two additional rationales used by other courts:

> In other jurisdictions it is said that the appellate court has no authority to revise a sentence imposed by a trial court within statutory limits, and that the defendant should look to the executive department for an exercise of the clemency power. Elsewhere, in rejecting double jeopardy claims, courts have held with Justice Holmes that a new trial and sentence is simply a continuation of the same case, and thus the previous sentence of the defendant does not foreclose independent consideration of an appropriate sentence at the second trial in that case.

[6] Whalen 242.

[7] Whalen 240-44. *See generally* Comley, *Former Jeopardy*, 35 YALE L.J. 674 (1926).

the first case at the level of the court of appeals in which the constitutional issues have been fully considered. The court stated the issue as "whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds."[8] It found that a defendant may not be so sentenced and based its decision on three grounds arising from the United States Constitution.

The first ground grows out of the due process clause.[9] Had Patton remained in prison without appealing his unconstitutional conviction, he could have served out his term to 1980 and could have been eligible for parole in 1965.[10] On the other hand, Patton could choose to seek his constitutional right to a fair trial by utilizing appropriate post-conviction remedies. The state tells Patton and those similarly placed that if he chooses to seek the fair trial, he does so upon the condition that he give up the right to have the first sentence remain the same[11] and risks a more severe sentence if convicted at the second trial. The court held that forcing upon the defendant the risk of harsher punishment as a condition for securing a constitutional right violates the due process clause of the fourteenth amendment. "Enjoyment of a benefit or protection provided by law," the court said, "cannot be conditioned upon the 'waiver' of a constitutional right."[12] Although not explicitly spelled out by the court, it follows by implication that the benefit of a constitutional right cannot be conditioned upon the waiver of a

[8] 381 F.2d 636.

[9] In Hill v. Holman, 255 F. Supp. 924 (M.D. Ala. 1966), the court held that denial of credit for time served in this situation was a denial of due process. The court said:

> The constitutional requirements of due process will not permit the State of Alabama to require petitioner Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit court.

Id. at 925.

[10] N.C. GEN. STAT. § 148-58 (1964) provides:

> All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate . . . .

[11] Under the North Carolina decisions the sentence of a defendant may not be increased after the term of the trial court has expired and service of sentence has commenced. State v. Lawrence, 264 N.C. 220, 141 S.E.2d 264 (1965); State v. McLamb, 203 N.C. 442, 166 S.E. 507 (1932); State v. Warren, 92 N.C. 825 (1885). This rule is followed in all jurisdictions. Van Alstyne 615.

[12] 381 F.2d at 640.

benefit or protection provided by state law, in this case the protection of not having the sentence lengthened.[13]

The doctrine of unconstitutional condition is well established[14] and its application in this situation should not be startling. As the court pointed out, the Supreme Court has been concerned in several cases with restrictions on a convicted defendant's access to post-conviction relief.[15] In an analogous situation the Fourth Circuit has held that the trial judge must take into account the time a defendant was incarcerated while awaiting trial.[16] In *United States v. Walker*[17] the same court considered a case where the defendant had been sentenced in his absence to three years. He successfully attacked the sentence on the ground of his absence and was resentenced to five years. It was held that the district court had unintentionally penalized the defendant for asserting his constitutional right to seek correction and that a constitutional right cannot be so conditioned.[18]

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[13] Van Alstyne 616.

[14] *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926). *See generally* 73 HARV. L. REV. 1595 (1960). In Frost & Frost Trucking Co. v. Railroad Comm'n, *supra*, a state law operated to prevent a private carrier from enjoying the benefit of state highways unless it submitted to being regulated as a common carrier by the railroad commission and being subjected to common carrier liability. Noting that under the due process clause a private carrier could not be forcibly converted into a common carrier by legislation, the Court held that the state could not condition use of the state highways upon the relinquishment of a constitutional right.

[15] 381 F.2d at 640. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Douglas v. California, 372 U.S. 353 (1963); Green v. United States, 355 U.S. 184 (1957); Griffin v. Illinois, 351 U.S. 12 (1956). In Fay v. Noia, *supra*, Noia and two other defendants were convicted of felony murder in 1942. Noia was sentenced to life imprisonment, his two companions to death. Noia did not appeal for fear that if he was again convicted he too would would receive the death penalty. The other two defendants, who did not have this fear, appealed successfully on the ground that their confessions had been coerced. They were released in 1955 since the state did not have a case without the confessions. Noia then decided to appeal, but the state courts refused relief because his appeal had not been timely. The Supreme Court held that Noia should have been granted a petition for habeas corpus in the federal courts because the "grisly choice" which he faced caused him not to appeal and his choice not to appeal could not "realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures." 372 U.S. at 440.

[16] Dunn v. United States, 376 F.2d 191 (4th Cir. 1967). The result in this case seemed to be based largely on the legislative history behind a federal statute requiring that such credit be given where the statute defining the offense requires the imposition of a minimum mandatory sentence.

[17] 346 F.2d 428 (4th Cir. 1965).

[18] The court in *Walker* relied upon Green v. United States, 355 U.S. 184

While adopting the district court's holding on due process and equal protection grounds, the court of appeals extended the lower court's holding considerably. At the lower court the holding had been that if a harsher sentence is given at the second trial, there must be a "discernable" reason and "facts tending to rationally support the imposition of such a penalty. . . ."[19] The court of appeals placed an absolute ban on harsher sentences even if there was additional testimony introduced at the second trial tending to support a harsher sentence. In this respect the court followed the First Circuit in *Marano v. United States.*[20] That court said, "The danger that the government may succeed in obtaining more damaging evidence on a retrial is just as real as the danger, for example, that the judge on his own may wish to reconsider unfavorably to the defendant, the factors which led to his original disposition."[21] It also pointed out that imposition of a harsher sentence by the same judge who felt he had been too lenient the first time or by a different judge "having a different approach towards sentencing . . . might well be substantial deterrents to a decision to appeal."[22] In sum, the court said, "A defendant's right of appeal must be unfettered."[23]

In placing this absolute ban on harsher resentencing, the court in *Patton* drew upon the reasoning of the Supreme Court with respect to the right to counsel. In *Gideon v. Wainwright*[24] it was recognized that the lack of counsel created an opportunity for unfairness although in a particular case it may not have prejudiced the defendant's rights. To eliminate this opportunity the presumption of injury was made conclusive. Therefore in *Patton* the court held

(1957). In that case Green had been convicted of second degree murder, had successfully appealed, and upon retrial had been convicted of first degree murder on the original indictment. The Supreme Court held that Green could not be tried a second time for first degree murder because such a trial placed him in double jeopardy. It is significant to note that while placing its decision on double jeopardy grounds, the Court was greatly concerned with the fact that the defendant "must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment." The Court concluded that the defendant should not be placed "in such an incredible dilemma." *Id.* at 193.

[19] Patton v. North Carolina, 256 F. Supp. 225, 236 (W.D.N.C. 1966).

[20] 374 F.2d 583 (1st Cir. 1967).

[21] *Id.* at 585.

[22] *Id.*

[23] *Id.*

[24] 372 U.S. 335 (1963).

that "the new sentence shall not exceed the old."[25] Thus, the court makes it impossible to punish the defendant for attacking his original conviction. The possibility that abuses may go undetected is removed, and the doubtful task of determining whether reasons are discernable or rationally support the imposition of a harsher sentence is eliminated.

The second basis of the *Patton* decision was the equal protection clause of the fourteenth amendment. Since in North Carolina there can be no increase in a defendant's sentence after the term of the trial court has expired and the defendant has begun serving his sentence,[26] the threat of a harsher sentence falls only upon one class of prisoners—those who seek post-conviction relief. Conceding that the state might create a system to review and, if necessary, increase sentences, the court made clear that it cannot arbitrarily classify those who are exercising their right to obtain a fair trial as the only group subject to such an increase. Such "an arbitrary classification [is] offensive to the equal protection clause."[27]

[25] 381 F.2d at 641.

[26] Note 11 *supra.*

[27] 381 F.2d at 642. In Griffin v. Illinois, 351 U.S. 12 (1956), two indigent defendants were convicted of armed robbery in state court. In order to appeal it was required by state law that the appellant furnish the appellate court a bill of exceptions or report of the proceedings at the trial. The defendants moved in the trial court that such records be provided to them without cost since they were indigent. The motion was denied. The Supreme Court recognized that constitutionally a state is not required to provide appellate review, but it held that a state providing such review may not "do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18. In Gray v. Hocker, 268 F. Supp. 1004 (D. Nev. 1967), a state statute required that the time for service of criminal sentences be computed from the date they were imposed. The effect of the statute was to preclude the trial judge at a retrial of a successful criminal appellant from allowing credit for time served under the overturned sentence. Relying on Griffin v. Illinois, *supra,* the court held the statute unconstitutional as applied because it deprived the appellant of equal protection of the laws. In Gainey v. Turner, 266 F. Supp. 95 (E.D.N.C. 1967) the court had before it essentially the same fact situation as in *Patton.* It held that harsher resentencing violated the due process and equal protection clauses. In its discussion of equal protection the court found "no rational basis for distinguishing as a class those who successfully attack [their convictions] and those who do not." It found "no legitimate or permissable [governmental] objective that is served by a state's resentencing practice that results in a denial of credit for time served in the absence of justifiable reasons that appear in the record." The court pointed out that the state of North Carolina had enacted no legislation providing for sentence review which showed that "the legislature has not considered a review of sentences of compelling state interest." It finally found that since the classification was arbitrary and there was no compelling state interest served, "no nexus between the classification and the objective of government can save the re-

The equal protection ground is relevant to another dimension of this problem. The proposition that harsher resentencing is prohibited as an unconstitutional condition on the right to a fair trial would have no application to a defendant whose original trial was free of constitutional error but had been overturned on some other ground.[28] The equal protection clause, however, does apply in that situation and would protect that defendant from harsher resentencing.[29]

The *Patton* court utilized still a third ground for its decision although noting that it was not necessary to do so.[30] It held that "the constitutional protection against double jeopardy would be violated if an increased sentence or a denial of credit is permitted on retrial."[31]

In order to invoke the double jeopardy protection provided in the fifth amendment the court had to get over the hurdle of whether or not that protection is applicable to the states through the fourteenth amendment. The problem was solved in a footnote[32] where the court relied upon *United States ex rel. Hetenyi v. Wilkens*[33] from the Court of Appeals for the Second Circuit. In that case it was pointed out by then Judge Thurgood Marshall that under the Supreme Court cases "[t]he Due Process clause of the Fourteenth Amendment imposes some limitations on a state's power to reprosecute an individual for the same crime."[34] The court in *Hetenyi* held that the double jeopardy clause is applicable to the states because the "basic core" of the double jeopardy guarantee is as fundamental as "those other guarantees of the Bill of Rights already held by the Supreme Court . . . to be absorbed . . . ."[35] Although this ap-

sentencing practice in question." The court held that under Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928), these three elements had to be found for the sentencing practice "to withstand attack under the Equal Protection Clause." 266 F. Supp. at 101-02. *Accord,* Patton v. Ross, 267 F. Supp. 387 (E.D.N.C. 1967).

[28] They were given as fair a trial as the Constitution requires, and therefore are not required to waive the protection of their original sentence as a condition of obtaining a constitutionally fair trial. Van Alstyne 615-16.

[29] Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967).

[30] 381 F.2d at 643.

[31] 381 F.2d at 643.

[32] 381 F.2d at 643 n.20.

[33] 348 F.2d 844 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

[34] *Id.* at 849.

[35] *Id.* at 853. The first amendment, New York Times v. Sullivan, 376 U.S. 254 (1964); the fourth amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963); the self-incrimination clause of the fifth amendment, Malloy v. Hogan, 378 U.S. 1 (1964); the right to counsel

proach seems to be a reasonable ramification of the selective incorporation theory, in the absence of a direct holding by the Supreme Court to that effect it is not one of the *Patton* court's stronger points.

As for the double jeopardy holding itself, the court relied primarily on that aspect of double jeopardy which prohibits multiple punishment for the same offense.[36] The court saw "no constitutionally significant distinction"[37] between prohibiting an increase in a defendant's sentence once service commenced, and a harsher sentence upon retrial for the same offense following a successful appeal.

Patton had also asserted that he was " 'impliedly acquitted' "[38] of any punishment beyond the twenty years originally received and therefore placed in double jeopardy when subjected to a harsher sentence. This argument was based on *Green v. United States*[39] in which the Supreme Court held that where an accused had been convicted of second-degree murder and had successfully appealed, he could not then be retried for first degree murder. The theory there was that by returning a verdict of second-degree murder when it also could have returned a verdict of first-degree murder, the jury had impliedly acquitted him of the latter charge. The *Patton* court admitted with the defendant, however, "that to maintain that he was 'acquitted' at the first trial of any penalty greater than twenty years, is as much a fiction as that he has 'waived' the benefit of his initial sentence by appealing his conviction."[40]

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and confrontation clauses of the sixth amendment, Gideon v. Wainwright, 372 U.S. 335 (1963); Pointer v. Texas, 380 U.S. 400 (1965); the cruel and unusual punishment prohibition of the eighth amendment, Robinson v. California, 370 U.S. 660 (1962).

[36] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). In *Lange* the petitioner had been convicted of a federal offense for which the punishment was a fine or imprisonment. Petitioner was sentenced to a term of imprisonment and payment of a fine. He was freed on a writ of habeas corpus and brought before the same judge who had imposed the original sentence for resentencing. The second time the judge sentenced petitioner only to a term of imprisonment. The Supreme Court held that he had to be released altogether because he had paid his fine, the money having passed out of the legal control of anyone but Congress, and had served five days on the first sentence. To have required him to serve the second sentence, after having paid the fine, would have placed him in double jeopardy. The Court did "not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Id.* at 173.

[37] 381 F2.d at 645. The court also applied this double jeopardy holding in Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967).

[38] 381 F.2d at 645.

[39] 355 U.S. 184 (1957).

[40] 381 F.2d at 645. In Stroud v. United States, 251 U.S. 15 (1919),

The *Patton* decision is welcome and in our enlightened system of criminal justice could be considered long overdue. It is fundamentally unfair for a state to deprive a prisoner of several years of his freedom on the basis of an erroneous trial for a particular crime, and then upon a retrial for the same crime refuse to take those years into account when resentencing him.

Not everyone will be in agreement with the *Patton* rule, and it is significant to note the reasons why. In the recent case of *Shear v. Boles*[41] the federal district court defended vigorously the right of a trial judge to impose a harsher sentence at a second trial after a successful appeal. There it was said that a federal habeas corpus court should exercise "judicial restraint" because of "the fear of undermining the traditional role of the trial judge."[42] The argument is that the trial judge has "the benefit of presentence reports, . . . can observe, first hand, the demeanor of the defendant . . . and is most aware of the actual as well as the extenuating circumstances of the defendant's crime."[43] These are points well taken in a defense of the traditional discretion of the trial judge in sentencing.

It should be pointed out that if the defendant did not plead guilty or nolo contendere at the first trial and received a full trial

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the defendant had been convicted of first degree murder and received a life sentence. That conviction was reversed, he was retried for first degree murder, and after a second conviction he was sentenced to death. The Supreme Court upheld the sentence in the face of double jeopardy arguments. The court in *Patton* distinguished *Stroud* in that it appeared "that the case was argued to the Court on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder." 381 F.2d at 644. The muliple punishment aspect of double jeopardy was not considered in *Stroud.* In People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963), the California Supreme Court held that the double jeopardy protection of the California constitution would prohibit a second conviction for the same degree of the same offense after a successful appeal of the first conviction in which a non-constitutional error had been committed. The court relied upon the "implied acquittal" rationale of Green v. United States, 355 U.S. 184 (1957).

[41] 263 F. Supp. 855 (N.D.W.Va. 1967).

[42] *Id.* at 859. In United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967), it was said:

> It is submitted it would be a flagrant trespass of an independent state judiciary, to question its discretionary judgment, in the imposition of a sentence, where the trial judge, in the possession of all the facts relative thereto, in a proceeding in a Federal court on a writ of habeas corpus—already ruled on by the highest tribunal of the state—would vacate the same, unless it clearly flouted constitutional standards of due process.

Id. at 812.

[43] Shear v. Boles, 263 F. Supp. 855, 859 (N.D.W.Va. 1967).

with the state introducing as much evidence as it legally may, the trial judge at that trial had all of the desired information and exercised his discretion as to sentencing to the fullest extent. When the judge at a retrial revises an original sentence thus imposed, he is in effect reviewing the original sentence. The equal protection clause militates against such selective review of the sentences of only those convicted defendants who appeal.

Further resistance to the *Patton* rule will come from those who fear that at the second trial new evidence will appear clearly showing that the first sentence was inadequate. This evidence generally will be introduced to bear on the defendant's guilt but will ultimately induce the judge to impose a harsher sentence; it will be of a nature showing that defendant's conduct was unusually heinous. Were harsher resentencing allowed after such new evidence, abuses would surely result. The prosecution could endeavor to turn up evidence more damaging to the defendant at the second trial, just as the same judge might want to change his mind at the second trial.[44] Theoretically the prosecution will have had a full opportunity at the first trial to introduce all evidence which might in the end bear on the sentence. There would seem to be no compelling reason to give the prosecution a second chance. It is true that there may be instances when it would have been impossible for the new evidence to have been unearthed for use at the first trial. In such a case the defendant would unfairly benefit. The considerations supporting the general application of the rule should outweigh the possibility that such a case might arise, and there should be no abolition of the rule just because of this limited situation. There is no reason that an exception could not be made for this type of situation, assuming workable standards could be laid down.

The Court of Appeals for the First Circuit, while prohibiting harsher resentencing as a general proposition, would allow it based on events occurring subsequent to the first trial and contained in a presentence report.[45] Defendants who do not appeal do not have their sentences increased because of their bad behavior, however; thus, it is a denial of equal protection to increase the sentences of those who do appeal. The state has adequate means to allow for bad behavior subsequent to trial, *e.g.*, denial of parole.

The court in *Shear* points out that where a defendant pleads

[44] Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967).
[45] *Id.*

guilty following arrest, thus avoiding the necessity for a trial, "the first sentencing judge may not have had a meaningful opportunity to weigh . . . the defendant's . . . character and to consider the other important, intangible factors which play a vital role in the determination of a sentence."[46] When the defendant pleads not guilty at the second trial, presumably the judge at that trial is afforded such an opportunity. Many convicted defendants have pleaded guilty after arrest and are serving the sentences received without appealing. No judge will ever have an opportunity to weigh the character of those defendants or to consider other intangible factors and adjust their sentence accordingly. It is only by denying an equal measure of protection to an appealing defendant that his sentence can be lengthened.

In *United States ex rel. Starner v. Russell*[47] the Court of Appeals for the Third Circuit, in justifying harsher sentences at retrial, noted that federal and state courts generally follow the practice of extending leniency when the defendant pleads guilty and do not do so when the defendant chooses to go to trial.[48] The implication apparently is that leniency at the first trial justifies the harsher sentence at the second trial. This practice is a clear illustration of penalizing the defendant merely for seeking a full and fair trial.

It could be argued that the result in *Patton* will lead to the imposition of a harsher sentence in the first trial so that if the defendant appeals and gets a new trial the second trial judge will not be restricted to a sentence that might seem to him to be inadequate. This practice would seem to be highly unlikely in view of the gross unfairness to all defendants so sentenced and of the many other factors that influence the trial judge in imposing sentences.

It should be asked whether the *Patton* decision might be applicable to other situations. Suppose a driver, after having been stopped on the highway by a law enforcement officer for exceeding the speed limit, is asked to open his trunk to let the officer examine its contents. If the driver complies with the request he may not receive a traffic ticket but only a warning. If he refuses, he is sure to receive the ticket. The driver complies and in his trunk is found incriminating evidence that leads to his conviction for a crime completely unrelated to the speeding. Has the driver "waived"

[46] Shear v. Boles, 263 F. Supp. 855, 860 (N.D.W.Va. 1967).
[47] 378 F.2d 808 (3d Cir. 1967).
[48] *Id.* at 812.

his right to be free from unreasonable search and seizure, or is the waiver one that is forced and not of free choice as is the purported waiver of the defendant who decides to appeal his conviction?

Suppose a person is arrested and charged with a crime. The officials offer the accused and his attorney the following proposition: if the accused will plead guilty to a lesser charge the state will reciprocate by recommending leniency and by other rewards usually offered where guilty-plea bargaining is carried on. The accused and his attorney, after weighing the chances of conviction and of receiving a heavier sentence if there is a not guilty plea, decide to accept the offer.[49] Is this situation essentially different from the situation of the convicted defendant who weighs his chances of a heavier sentence and decides not to appeal?[50]

Suppose a state statute provides that a defendant indicted for first degree murder may plead guilty, with the consent of the court and the district attorney, and in that event he may only be sentenced to life imprisonment if convicted.[51] Such a statute would mean that if the defendant pleads not guilty, there would be a trial at which he might receive the death penalty. Can the state constitutionally allow the defendant to exercise his right to a jury trial only at the peril of receiving the death penalty?

Finally, suppose a defendant is convicted of a crime in a court of limited jurisdiction within the state such as a city court. A fine is imposed along with court costs. He then appeals to a court of general jurisdiction such as the state superior court for a trial de novo. He is again convicted, but a heavier fine is imposed and the defendant has to pay the higher court costs. Is this such a restriction on the right to appeal as would be prohibited by the *Patton* court?

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[49] A similar situation is posed in L. HALL & Y. KAMISAR, MODERN CRIMINAL PROCEDURE 505 (1966).

[50] It should be pointed out that guilty-plea bargaining is an entirely acceptable and presently necessary function. Further, the choice of the defendant is admittedly more freely made than the choice in the Patton situation.

[51] N.Y. PEN. LAW §§ 1045(2), 1045a (McKinney, Supp. 1966). This statute is presently being challenged on the ground that it conditions the exercise of the right to a hearing upon the risk of death. Brief for Petitioner-Appellant at 14-16, Moore v. State, pending in the Supreme Court of New York, Appellate Division, Fourth Department.

Evidence—Privileged Communications—Accountant and Client

At common law no privilege for confidential communications between an accountant and his client was recognized.[1] Nor does an accountant-client privilege exist in the federal system.[2] Even

[1] Falsone v. United States, 205 F.2d 734, 739 (5th Cir. 1953), *cert. denied*, 346 U.S. 864 (1953); *In re* Fisher, 51 F.2d 424, 425 (S.D.N.Y. 1931); *see* Clayton v. Canida, 223 S.W.2d 264, 266 (Tex. Ct. App. 1949). The only privileges recognized at common law were the attorney-client privilege, 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE], and the husband-wife privilege, 1 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 101 (1961). A substantial majority of jurisdictions have enacted statutes creating physician-patient and priest-penitent privileges, WIGMORE § 2286; See also 46 N.C.L. REV. —(1967). In recent years the attorney-client privilege has been extended to include the accountant when employed by the attorney, United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). This extension of the attorney-client privilege was rejected as recently as 1949, however, in Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949), where the accountant was hired by the attorney to aid in preparation of a tax fraud case. The court said that the presence of the accountant was a convenience and not indispensable as the presence of the attorney's secretary might be. *Accord*, Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951). However, in *Kovel*, where the accountant, employed full time by the law firm, was held in contempt in the district court for refusing to testify concerning alleged tax violations of a client of the law firm, the court of appeals reversed, stating that "[T]he presence of the accountant is necessary. . . for the effective consultation between the client and the lawyer, which the privilege is designed to permit." 296 F.2d at 922. The privilege established in the *Kovel* case was extended to include the accountant's work papers in United States v. Judson, 322 F.2d 460 (9th Cir. 1963), where the attorney advised his client to obtain a net worth statement. The client engaged an accountant who prepared the statement and gave it to the attorney, who was then served with a subpoena *duces tecum* to produce the statement and the accountant's work papers. The Ninth Circuit reversed the position it had taken in *Himmelfarb*, holding that these documents constituted confidential communications within the attorney-client privilege. However, where the attorney is also an accountant, accounting services are not covered by the attorney-client privilege. Olender v. United States, 210 F.2d 795 (9th Cir. 1954); *In re* Colton, 201 F. Supp. 13 (S.D.N.Y. 1961); United States v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Cal. 1952); *In re* Fisher, 51 F.2d 424 (S.D.N.Y. 1931). This narrow extension of the attorney-client privilege is recognized only when the client communicates first with an attorney who then retains an accountant. Furthermore, the accountant's services must consist of accounting work required by the attorney in giving legal rather than accounting advice. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); Olender v. United States, 210 F.2d 795 (9th Cir. 1954).

[2] United States v. Bowman, 236 F. Supp. 548, 550 (M.D. Pa. 1964); United States v. Culver, 224 F. Supp. 419, 434 (D. Md. 1963); *In re* Colton, 201 F. Supp. 13, 16 (S.D.N.Y. 1961); United States v. Stoehr, 100 F. Supp. 143, 162 (M.D. Pa. 1951); *In re* Borden Co., 75 F. Supp. 857, 860 (N.D. Ill. 1948).

though several jurisdictions have enacted statutes creating such a privilege, there is considerable doubt among the authorities that the privilege is in the public interest.[3] This comment is directed to the question of whether the need to protect the accountant-client relationship is sufficient to justify the incidental sacrifices in the effective administration of justice.

The evidentiary privileges in no way aid the ascertainment of truth.[4] To justify the establishment of a privilege, the general duty of every man to give all relevant testimony must be overcome, and any exemption from this duty must be regarded as an exception to the general rule.[5] Dean Wigmore's four fundamental conditions of social policy are generally recognized as necessary to the establishment of a privilege:

> (1) the communications must originate in a confidence that will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which, in the opinion of community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the proper disposal of litigation.[6]

In recent years several state legislatures have concluded that a privilege for the accountant-client relation satisfies these conditions. Fifteen states and Puerto Rico have enacted statutes conferring the status of privileged communications upon professional information obtained by accountants.[7] Although there

[3] J. CAREY & W. DOHERTY, ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION 134 (1966) [hereinafter cited as CAREY & DOHERTY]; WIGMORE § 2286.

[4] C. MCCORMICK, EVIDENCE § 72 (1954); 16 TEXAS L. REV. 447 (1938).

[5] WIGMORE § 2192.

[6] *Id.* § 2285.

[7] *Arizona:* "[C.P.A.'s] and public accountants . . . shall not be required to divulge, nor . . . voluntarily divulge information which they have received by reason of the confidential nature of their employment. . . . [the section does not apply to criminal or bankruptcy matters]." ARIZ. REV. STAT. ANN. § 32-749 (Supp. 1966). *Colorado*: "A [C.P.A.] shall not be examined without the consent of his client as to any communication made by the client, to him in person or through . . . books of account and financial records, or his advice, reports or working papers given or made thereon in the course of professional employment. . . ." COLO. REV. STAT. ANN. § 154-1-7 (7) (1963). In Pattie Lea Inc. v. District Court, ——— Colo. ———, 423 P.2d 27 (1967), a state court for the first time was called upon to interpret a statute creating an accountant-client privilege. In this case the defendant corporations sought a writ of prohibition to prevent the taking of a deposition of a certified public accountant concerning his preparation of audits,

financial statements, annual reports and income tax returns for the defendants. The court determined that under the Colorado statute any confidential communications made by a client to a certified public accountant in the course of his professional employment fell within the statutory privilege.
Florida: "All communications between [C.P.A.'s] and public accountants and the person for whom such [C.P.A.] or public accountant shall have made any audit or other investigation in a professional capacity, and all information obtained . . . in their professional capacity concerning the business and affairs of clients shall be deemed privileged. . . ." FLA. STAT. § 473.15 (1965).
Georgia: "Any communication to any practicing [C.P.A.] transmitted to such accountant in anticipation of, or pending, the employment of such accountant shall be treated as confidential and not . . . divulged by said accountant in any proceedings. . . ." GA. CODE ANN. § 84-216 (1955).
Illinois: "A public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a public accountant." ILL. ANN. STAT. ch. 110½, § 51 (Smith-Hurd 1966).
Iowa: "The information acquired by registered practitioners . . . in the course of professional engagements shall be deemed . . . privileged, and except by written permission of the clients involved . . . shall not be disclosed . . . provided [the section does not apply to criminal or bankruptcy matters]." IOWA CODE ANN. § 116.15 (1949).
Kentucky: "A [C.P.A.] or public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as such." KY. REV. STAT. § 325.440 (1962).
Louisiana: "No [C.P.A.], public accountant, or person employed by [a C.P.A.] or public accountant, shall be required to, or voluntarily . . . divulge . . . any communications made to him by any person employing him to examine, audit, or report on any books, records, or accounts . . . except by express permission of the person employing him. . . ." LA. REV. STAT. ANN. § 37:85 (1964).
Maryland: "Except by express permission of the person employing him . . . a [C.P.A.] or public accountant or any person employed by him shall not be required to . . . divulge . . . any communications made to him by any person employing him to examine, audit or report on any books, records, accounts or statements nor any information derived therefrom in rendering professional service; provided [the section does not apply to criminal or bankruptcy matters]." MD. ANN. CODE art. 75A, § 20 (1957).
Michigan: "Except by written permission of the client . . . a [C.P.A.] or public accountant . . . shall not be required to, and shall not voluntarily . . . divulge information . . . in connection with any examination of, audit of, or report on, any books, records, or accounts which he . . . may be employed to make. This section shall not be construed as prohibiting the disclosure of information to a third party having an interest in or relying on an opinion rendered by a [C.P.A.]." MICH. STAT. ANN. § 18.23 (Stat. Release 19, 1967).
Missouri: Statute was enacted in 1967 and the citation is not available.
Nevada: "An accountant cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. . . ." NEV. REV. STAT. § 48.065 (1957).
New Mexico: "A certified or registered public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as such. . . ." N.M. STAT. ANN. § 67-23-26 (1953).

are substantial variations among these statutes,[8] the overall trend is toward the creation of a broad accountant-client privilege. As this trend may soon come to the attention of the North Carolina General Assembly, an analysis of the privilege is desirable.

Pennsylvania: "Except by permission of the client . . . a [C.P.A.] . . . shall not be required to, and shall not voluntarily . . . divulge information . . . in connection with any professional services as a [C.P.A.] other than the examination of, audit of or report on any financial statements, books, records or accounts, which he may be engaged to make. . . . Provided [the section does not apply to criminal or bankruptcy matters]." PA. STAT. ANN. tit. 63, § 9.11a (Supp. 1966).
Puerto Rico: "No court shall require a [C.P.A.] or public accountant to divulge information or evidence obtained by him in his confidential capacity as such." P.R. LAWS ANN. tit. 20, § 790 (1961).
Tennessee: "[C.P.A.'s] . . . shall not divulge nor shall they . . . be required to divulge, any information which may have been communicated to them . . . by reason of the confidential nature of their employment. . . . [E]xcept [the section does not apply to criminal or bankruptcy matters]." TENN. CODE ANN. § 62-114 (1955).

[8] There are four major variations among the statutes. *First,* some of the statutes apply only to certified public accountants [Colorado, Georgia, Pennsylvania and Tennessee], whereas others extend the privilege to include "public accountants" or to public accounting generally. A certified public accountant is a public practitioner in accountancy who holds a certificate issued after he has met the statutory qualifications of the issuing state. The meaning of the term "public accountant" may vary somewhat from state to state. See note 15 *infra.* In most states a public accountant is a public practitioner in accountancy who is registered to practice after meeting certain prescribed statutory qualifications. In all cases the requirements for registration are considerably less than those for certification. *Second,* a number of the statutes specifically provide that the privilege is not applicable in situations involving criminal or bankruptcy laws [Arizona, Iowa, Maryland, Pennsylvania and Tennessee], whereas the others appear to apply to all situations. *Third,* some of the statutes specifically exclude certain types of accountancy services, whereas the others appear to apply to all such services. The Pennsylvania statute excludes information acquired by the C.P.A. in "the examination of, audit of or report on any financial statements, books, records or accounts. . . ." PA. STAT. ANN. tit. 63, § 9.11a (Supp. 1966). This is discussed in United States v. Bowman, 358 F.2d 421 (3d Cir. 1966). In 1967, Michigan amended its statute to include the following statement: "This section shall not be construed as prohibiting the disclosure of information to a third party having an interest in or relying on an opinion rendered by a certified public accountant." MICH. STAT. ANN. § 18.23 (Stat. Release 19, 1967). *Fourth,* several of the statutes are not clear as to whether the privilege inures to the benefit of the client or the accountant. In Dorfman v. Rombs, 218 F. Supp. 905 (N.D. Ill. 1963), the court interpreted the Illinois statute as creating an "accountant" privilege since the statute does not mention a "client". If the *Dorfman* decision is a proper one, the Arizona, Kentucky, New Mexico, Puerto Rico and Tennessee statutes are ostensibly open to similar interpretations. The other statutes refer to the "client" and generally require the client's consent before confidences may be divulged by the accountant. Such a statute has been interpreted as creating a "client" privilege. Weck v. District Court, —— Colo. ——, 408 P.2d 987 (1965).

Dean Wigmore has embodied in his four fundamental conditions of policy the basic philosophy of a privilege against testimonial disclosure.[9] The accountant-client privilege satisfies the first condition in that only confidential communications are protected. The second condition, that this element of confidentiality is essential to the full maintenance of the relation between the parties, is also satisfied by the privilege because the client must disclose highly confidential financial details. However, it is important to consider the second condition as it relates to condition four. It is of little value to say that the privilege is necessary to the full maintenance of the relation when the status of the relation is only slightly less than satisfactory without the privilege. The importance lies in the incremental benefit gained from the establishment of the privilege, which must be weighed against incidental detriments to the administration of justice. The third condition, that the community opinion foster the relation, also appears to be satisfied since there is increasing reliance by the general public on the services of certified public accountants.[10] However, the extent to which the relation is to be fostered must also be a matter of degree and considered in relation with condition four. The state and national professional organizations of certified public accountants and state legislatures have recognized that it is in the public interest to foster the accountant-client relationship, and have gone to great lengths to do so.[11] The result is that the C.P.A. has attained the

[9] WIGMORE § 2285.

[10] J. CAREY, THE CPA PLANS FOR THE FUTURE 120-27 (1965) [hereinafter cited as CAREY].

[11] The American Institute of Certified Public Accountants has developed a strict code of ethics, AICPA, CODE OF PROFESSIONAL ETHICS (1967), and the state societies have adopted similar rules, CAREY 330. The states have fostered the accountant-client relation by the voluntary acceptance of a uniform C.P.A. examination, CAREY 464, and most states have granted statutory authority to boards of accountancy to form legally enforceable rules of professional conduct, CAREY & DOHERTY 8. Furthermore, there is a growing majority of states adopting "regulatory" licensing statutes, Heimbucher, *Fifty-three Jurisdictions*, 112 J. ACCOUNTANCY 42 (Nov. 1961). "The basic philosophy underlying the regulatory statutes is that the independent audit function is so affected with the public interest that all who engage in such practice should be required to meet certain statutory standards of qualifications and conduct." *Id.* Generally, these statutes restrict the use of public accountancy titles to those who have met the prescribed qualifications for certification as a C.P.A. To avoid retroactively depriving public accountants already in practice of their means of livelihood, these laws must provide for licensing this group. However, most regulatory laws do not provide for the continued licensing of public accountants. Thus, the practi-

status of a true professional and has been accorded the respect of the community.[12] The client is well protected against the voluntary disclosure of confiidential information by his C.P.A.[13] But is it in the best interest of the community to foster the relationship to such an extent that a court of law will be unable to compel disclosures of confidences?

The fourth and most important condition prevents justification of the accountant-client privilege. To satisfy this condition the benefits gained from the privilege must exceed on balance the detriments which may result in the administration of justice. Proponents of the privilege argue that the relationship will benefit in that the client's hesitancy to make full disclosure will be removed, thus making it possible for the C.P.A. to function more effectively. To show that this benefit is not of sufficient importance to satisfy the fourth condition, it is helpful to examine the three principal functions of the C.P.A.—taxation, auditing and management consulting services.[14]

The primary interest of C.P.A.'s who desire an accountant-client privilege is to promote full disclosure of information necessary for the preparation of income tax returns.[15] This is based on the premise that the privilege would protect clients who may be unjustly charged with fraud or need protection against "fishing expeditions."[16] Although the cases are somewhat inconsistent, the federal courts generally refuse to apply state accountant-client privileges in federal tax investigations.[17] Therefore, the privilege is virtually

cal effect of these laws is that ultimately the practice of public accountancy will be restrited to C.P.A.'s, CAREY 476. In the states that have not enacted regulatory laws, so-called "permissive" laws are in effect. These laws provide only for granting the C.P.A. title to those who qualify and permit anyone else to use similar titles such as "public accountant" and to perform all types of accountancy services, including independent audits. *Heimbucher, supra,* at 43.

[12] CAREY 485.

[13] J. Carey, *Professional Ethics and the Public Interest,* 102 J. ACCOUNTANCY 38, 41 (Nov. 1956).

[14] CAREY & DOHERTY 18.

[15] CAREY 327.

[16] *Id.*

[17] In Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), *cert. denied,* 346 U.S. 864 (1953), the Fifth Circuit refused to apply the Florida accountant-client privilege statute and enforced a summons which compelled an accountant to testify and to bring all documents relating to the client's income tax return. *Accord, In re* Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953), *cert. denied,* 347 U.S. 960 (1954). *But see* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), where an attorney refused to dis-

useless in the area of taxation. Even if this were not the case, it is doubtful that the privilege would encourage disclosures, the protection of which would be in the public interest. If the taxpayer gives the C.P.A. full and accurate information, his taxes will be computed correctly by a competent practitioner. In the event of a spot-check, all deductions could be readily explained without doing injury to the accountant-client relation. The same is true for an unintentional failure to disclose certain information since payment of the deficiency would likely end the matter. If non-disclosure and hence underpayment by the taxpayer is intentional, it is in the public interest to insure that correct taxes are paid and that a tax fraud does not go unchecked. Therefore, an accountant-client privilege does not inure to the benefit of the honest citizen, but would assist the perpetrator of a tax fraud.[18] In the area of taxation there is little, if any, benefit which inures to the relationship as a result of the privilege.

The auditing or attest function of the C.P.A. "results in the expression of an opinion by an independent expert that a communication of economic data by one party to another is fairly presented."[19] The position that corporate management will be unduly hesitant to make disclosures to an auditor if the court can compel the auditor to disclose confidences appears to be unfounded. If adequate information is not made available to the auditor, he must render a qualified opinion or disclaim certain aspects of the enterprise's operation. Such an opinion can only serve as notice to potential investors and creditors of a possible weakness in the enterprise. The economic pressures on corporate management to secure a favorable opinion is sufficient to overcome any hesitancy to disclose material information. It is true that management is reluctant to

close the name of his client to an internal revenue agent. The Ninth Circuit applied the attorney-client privilege to reverse a civil contempt judgment against the attorney. The court held that this was a "civil" case as opposed to an administrative proceeding. *Compare Baird* with FTC v. St. Regis Paper Co., 304 F.2d 731 (7th Cir. 1962), where the court attempted to explain the inconsistency between *Falsone* and *Baird*. But in Colton v. United States, 306 F.2d 633, 636 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963), the Second Circuit said that "[W]e do not agree . . . that a hearing held by the Internal Revenue Service . . . is a 'civil action' governed by state evidence law . . . or that state law should govern for any other reason." See Comment, *Accountants, Privileged Communications, and Section 7602 of the Internal Revenue Code*, 10 ST. LOUIS U. L. J. 252 (1965).

[18] 37 CHI. BAR RECORD 291 (1956).

[19] Bevis, *The CPA's Attest Function in Modern Society*, 113 J. ACCOUNTANCY 28 (Feb. 1962).

disclose more information than is necessary for fear that competitors will benefit from these disclosures. These fears appear unjustifiable as modern managements "seem to be able to find out in one way or another what they want to know about their competitors."[20] As a practical matter, it does not appear that an auditor's effectiveness would be greatly enhanced by a privilege. Furthermore, some writers and legislators have expressed concern that the privilege is inconsistent with the auditor's independence.[21] The auditor's code of ethics requires that he remain independent and disclose to the public any material finding necessary to prevent a misleading financial statement. Suppose an auditor makes a finding that affects the client's financial position and its disclosure may prove detrimental to the client. Will the fact that this finding is privileged against disclosure in a court of law affect the auditor's determination of whether it should be disclosed to third parties? Might the auditor be tempted to gamble for the protection of the client? To forego any adverse effects, two states have specifically excluded the auditing function from the privilege.[22]

Management services rendered by C.P.A.'s are generally internal services such as inventory valuation policies, depreciation procedures, advice on investment problems and many other such services.[23] Management often desires these services when faced with a problem beyond the scope of the accountants inside the corporation, or it may merely desire an independent analysis of a problem. Since the services rendered are to be used internally, these services cannot be distinguished from the work done by inside accountants. As agents of the corporate principal, inside accountants have a fiduciary duty of non-disclosure of confidential information.[24] The C.P.A. rendering management services, as an agent of the corporate client or as a professional practitioner subject to his code of ethics, has a similar duty of non-disclosure. In the face of litigation, no privilege is recognized for confidential communications between the corporate principal and the inside accountant. Such a privilege is obviously not in the public interest since it would insulate virtually all business transactions. No jurisdiction has a statute creating

[20] CAREY 144.
[21] CAREY & DOHERTY 134.
[22] Michigan and Pennsylvania. *See* note 8 *supra.*
[23] CAREY & DOHERTY 107.
[24] W. SEAVEY, LAW OF AGENCY § 152 (1964).

an employer-employee privilege.[25] How then can a privilege be justified between a management services consultant and a corporate client?

In the report of the American Bar Association's Committee on the Improvement of the Law of Evidence in 1937-38,[26] the committee recommended a strict application of existing privileges and recommended against further recognition of so called "novel privileges." Since that date several jurisdictions have failed to heed these recommendations. Most of the statutes noted above have been enacted since 1938. The American Institute of Certified Public Accountants has not adopted a position either in favor of or in opposition to the privilege since it may be detrimental to the profession's interest.[27] State C.P.A. societies are not affiliated with the Institute and it is these societies that sponsor privilege legislation. However, legislators are faced with the realities that the privilege is (a) virtually useless in the area of taxation, (b) of negligible benefit, and possibly a hindrance, to the effectiveness of the audit function, and (c) unwarranted as to management consultants. The benefits gained by the accountant-client relation due to the privilege are slight, and do not exceed on balance the injury that would inure to the effective administration of justice.

HAROLD N. BYNUM

Evidence—Privileged Communications—The New North Carolina Priest-Penitent Statute

In 1967 the North Carolina General Assembly enacted a new priest-penitent[1] privilege statute.[2] The statute is the second of its

[25] WIGMORE § 2286.
[26] 63 ABA REP. 570, 595 (1938).
[27] Letter from Timothy T. McCaffrey, state legislation Manager, AICPA, to Harold N. Bynum, Sept. 14, 1967.

[1] Usage of the term "priest-penitent" is common as a characterization of the relationship which exists between any clergyman of any religious faith and one who receives his professional aid. 97 C.J.S. *Witnesses* § 263 (1957). One of the most liberal extensions of this group to whom the privilege is applied is found in Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917), in which admissions of fornication by a young woman before a Presbyterian body of elders were held a confidential communication.

[2] N.C. GEN. STAT. § 8-53.1 (1967):

> No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any

kind passed in North Carolina, the first having been enacted in 1959 and amended in 1963.[3] Aside from the interesting fact that the former statute was substantially altered only eight years after its enactment, the changes in at least three important respects reveal with greater clarity the present status of the privilege in this state. It is the purpose of this note to discuss the changes made and their effects, and to comment upon problems left unresolved.

First, the requirement that the communicant object to the testimony of the clergyman was removed to make the privilege more absolute.[4] Under the former statute an objection by the communicant was required to evoke the privilege, and a failure to object was interpreted as a waiver of the privilege.[5] As a practical matter this means that the jury may be less prejudiced in that the court, rather than the communicant, calls forth the testimonial immunity. But it does not necessarily follow that the privilege exists apart from its benefit to the communicant, for he alone can waive the privilege.[6] Assuming that it exists for the benefit of the communicant alone, then clearly it cannot be claimed by the priest to protect himself once it has been waived.

Only in open court can the privilege be waived. An express rather than an implied waiver seems to be favored, but the latter

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information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

[3] N.C. SESS. LAWS 1959, c. 646, as amended, 1963, c. 200:

No clergyman, ordained minister, priest, rabbi, or accredited Christian Science practitioner of an established church or religious organization shall be required to testify in any action, suit, or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, when the giving of such testimony is objected to by the communicant; provided, that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.

[4] "There is a limited number of statutory privileges. They are absolute in the sense that, even in matters involving public justice, a court may not compel disclosure of confidential communications thus made privileged." People v. Keating, 286 App. Div. 150, 152, 141 N.Y.S.2d 562, 565 (1955).

[5] Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 78 (1963) [hereinafter cited as Reese].

[6] *Id.*

may properly be found where the communicant testifies "concerning what transpired at confession."[7] With regard to the other usual methods of waiver,[8] it is certain that a statement by the communicant would suffice. It is less certain that a signed affidavit would meet this test and practically indisputable that an out-of-court stipulation by the parties would be insufficient to constitute waiver.[9]

Second, the provision by which the judge could compel disclosure when necessary in his opinion to the proper administration of justice was omitted from the new statute. It is likely that this provision for compulsory disclosure was originally included in the old statute because of the similar provision in the physician-patient privilege statute.[10] There is, however, greater justification for such a power where the privilege is primarily evoked in litigation involving life insurance policies and misrepresentations of health, corporeal injuries and their extent, and testimentary dispositions and the issue of mental capacity.[11] In litigation involving the priest-penitent privilege there are few cases in which the "only evidence against a defendant is his confession to a clergyman."[12] Moreover, doubt has been expressed that the "existence" of the privilege is a potent factor in the exclusion of relevant testimony since "it would be a poor priest or clergyman that would reveal confidential confessions and an even poorer prosecutor who would insist upon it."[13] Appreciation for the omission of this discretionary power is enhanced when one considers that the trial judge's discretion "would be final because the only possible ground for review would have to be whether it 'was in his opinion' and even the most ingenious logician could

[7] *Id.* at 79. Concerning the physician-patient privilege, the court, in Capps v. Lynch, 253 N.C. 18, 23, 116 S.E.2d 137, 141 (1960), said that waiver is "by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, . . . or . . . testifies to the communication between himself and physician."

[8] Reese at 79.

[9] This conclusion follows from analysis of the provision stating that the statute will not apply only "where communicant *in open court* waives the privilege conferred." Statute cited note 2 *supra.* [Emphasis added].

[10] *See* 38 N.C.L. REV. 190, 191 (1960). For the physician-patient privilege statute, as a means of comparison, see N.C. GEN. STAT. § 8-53 (1953).

[11] Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 38, 125 S.E.2d 326, 331 (1962). A definite "finding appearing of record," Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840 (1937), was necessary to show that compulsory testimony was required by the "ends of justice," Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

[12] 27 IND. L.J. 256, 267 (1952).

[13] Quick, *Privileges Under the Uniform Rules of Evidence,* 26 U. CIN. L. REV. 537, 545 (1957).

hardly make 'his opinion' reviewable before an appellate court."[14] Divestment of the discretionary power gets the judge "off the hook" in uncomfortable cases because he realizes that any decision to compel a clergyman to testify is likely to result not only in contempt proceedings and imprisonment but also in marshalling public opinion in the clergyman's favor.[15]

Third, the description of the confidential communication reflects broadened conditions under which the privilege may be claimed. The unswerving persuasion of the clergyman as to his professional obligations and responsibilities[16] is reflected in the liberal terms in which the new privilege statute was enacted. Any information communicated and entrusted to him in his professional capacity and necessary for him to discharge his official functions is to be regarded as incompetent testimony.[17] Thus it appears that the intent of the General Assembly was *not* to limit the communication to a confession of sins alone, the privileged status of which would depend upon the "confession" requirements of a particular church.[18] Rather, the type of information to which the privilege extends is explicated by the paradoxically broadening limitation that the "person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted."[19] However, there is no requirement that the claimant be a member of the congregation or church which the minister serves.[20] Under this broadened coverage it would seem that information obtained during marriage counseling or reconciliation sessions with a clergyman would be accorded the privilege.[21] It is less certain that the privilege is applicable to in-

[14] Reese at 76.

[15] Reese at 60-61.

[16] For the attitude typical of most clergymen when faced with the dilemma requiring a choice of either testifying or facing contempt of court proceedings, *see* Greensboro Daily News, June 19, 1966, § D, at 12, col. 1-8, and *In re* Williams, 269 N.C. 68, 70-72, 152 S.E.2d 317, 319-321 (1967).

[17] Statute cited note 2 *supra.*

[18] *See In re* Swenson, 183 Minn. 602, 604, 237 N.W. 589, 590 (1931).

[19] Statute cited note 2 *supra.*

[20] Kohloff v. Bronx Savings Bank, 37 Misc.2d 27, 233 N.Y.S.2d 849 (New York City Civ. Ct. 1962).

[21] Kruglikov v. Kruglikov, 29 Misc.2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961). The decision was under a statute similar to that of North Carolina. Such information has been denied the privilege under a dissimilar statute limiting "confessions" to those in the "course of discipline enjoined by the church." Although the statute was said not to have provided the privilege

formation in the records of a church-related agency.[22] While North Carolina is avowedly a "strict constructionist"[23] of privilege statutes, the court has extended the physician-patient privilege to certain hospital records[24] so that an analogous extension of the priest-penitent privilege would not be without precedent.

Although the new statute is instructive in regard to many previously unanswered questions about the privilege in North Caroline, it is no panacea. At least two primary questions, for example, were left unresolved in *In re Williams*,[25] which is believed to have had a catalytic effect on the recent statute.[26]

The first—and less difficult—question was whether the superior court was correct in holding that "any testimony from [the minister] concerning *any conversation* he might have had with the defendant"[27] would be recognized as a privileged communication. In regard to this question it should be remembered that under the new statute the communication must have reference to the giving of spiritual counsel, aid, or advice.[28] Therefore, testimony concerning "any conversation" is too broad a classification for application of the privilege. Casual or friendly conversation unrelated to the above

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as to marriage counseling, the court managed to find a privilege in a pre-conference agreement with the rabbi. Simrin v. Simrin, 233 Cal.App.2d 90, 43 Cal. Rptr. 376 (1965).

[22] State v. Lender, 266 Minn. 561, 124 N.W.2d 355 (1963) (no allegation of *confession* of unwed mother).

[23] Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 37, 125, S.E.2d 326, 331 (1962).

[24] *Id.*

[25] 269 N.C. 68, 152 S.E.2d 317 (1967). This is the only case concerning the former priest-penitent statute to reach the Supreme Court. The privilege was raised as a collateral matter in a criminal prosecution in the superior court when Williams, a Baptist minister called as a witness by both the state and the defendant, refused to be sworn as a witness or to testify as to his observations while in the home of the defendant. Upon the defendant's objection the court ruled that testimony concerning any conversation between the defendant and Williams, his minister, would be a privileged communication. But the defendant did not object to testimony concerning Williams' observations and the court held Williams in contempt of court for his refusal to answer a question concerning what he had seen. The case was dealt with on appeal by construing the statute strictly according to the procedural requirement of an objection by the communicant for the testimony to be incompetent.

[26] For an overview of some of the factors which brought about the statutory change, see Finlator, "Resolution to be Presented to the Baptist State Convention of North Carolina Meeting in Winston Salem, November 14, 1966."

[27] 269 N.C. at 71, 152 S.E.2d at 320. [Emphasis added].

[28] *See* State v. Brown, 95 Iowa 381, 64 N.W. 277 (1895).

purposes cannot be said to fall within the protection of the privilege.[29]

More difficult is the complex question of whether an observation of a clergyman incident to a privileged communication is also privileged "information" within the meaning of the statute. Generally a statute creating a privilege against disclosure of a confidential communication "has been construed to include observations, as well as communications."[30] Since the statute includes "any" information, there is no reason to exclude from the definition of information those observations "communicated" to the priest in the course of spiritual counseling. Such observations would circumscribe the acts of the communicant, his general attitude and his personal appearance. These are necessary concomitants of the intimate face-to-face nature of counseling. At least one state has provided by statute that clergymen are under no duty to report a communicant's gunshot wound to law enforcement officials if such a report would violate a confidential communication.[31]

This conclusion, however, does not answer the question of whether observations concerning persons or subjects other than the communicant are to be accorded the privilege. One may argue that were it not for the purpose of receiving privileged information the clergyman would not have been in a position to make such an observation. Thus it would follow that the privileged information should include the observations which otherwise would not have been made. The difficulty with this argument is that it has been extended beyond its practical limitations. It is analogous in this respect to the "but for" theory of proximate cause restrictions which do not allow one involved in an automobile accident to be assessed with fault merely because had he not been driving the accident would not have occurred.

But the above argument—while invalid in its application to third parties or subjects having no personal connection with the communicant—may well apply to those persons or things immediately in-

[29] *See* Angleton v. Angleton, 84 Idaho 77, 370 P.2d 788 (1962) which held not privileged remarks during conversations in course of friendly meetings.

[30] *See* Boyles v. Cora, 232 Iowa 822, 841, 6 N.W.2d 401, 410 (1942); *cf.* Buuck v. Kruckeberg, 121 Ind.App. 362, 95 N.E.2d 304 (1950), where it was held that personal observations not involving a confession enjoined by the church are admissible (observation as to soundness of mind of grantor of deed).

[31] OHIO REV. CODE § 2917.44 (1961).

volved with either the communicant or the communication in a manner similar to his personal appearance. The logic of the privilege seems to require inclusion of this latter type of observation within privileged information. If it did not, for example, the effect of the privilege as to testimony concerning the penitent's admissions of thefts would certainly be vitiated by subsequent testimony of the priest that he saw the stolen goods. Thus it is clear that formulation of comprehensive rules dealing with varying factual situations must await case by case development of more specific privilege principles.

The new statute embodies the recognition by the General Assembly that the purpose of the former statute could be better served by broadening the terms defining the privilege. The new statute follows a trend among state legislatures to liberalize the priest-penitent privilege[32] and should be well received by the clergy and the Bar. Such a direction clearly conforms to the basic policy underlying the priest-privilege that

> . . . Knowledge so acquired in the performance of a spiritual function . . . is not to be transformed into evidence to be given to the whole world. . . . The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the . . . spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.[33]

THOMAS W. TAYLOR

Insurance—The "Other Insurance" Clause Conflict

The controversy among the courts concerning conflicting "other insurance" clauses[1] in automobile liability policies is no small one. This conflict arises when two policies appear to provide general coverage to a driver, yet each claims exclusion from liability. That claim is generally based on provisions in each stating either that

[32] North Carolina was among the twelve states in which priest-penitent statutes were enacted during the five-year period, 1957-1962. There has been no apparent abuse of the privilege, evidenced by the fact that no state has ever repealed its statute once it was adopted. Reese at 58.

[33] Mullen v. U.S., 263 F.2d 275, 280 (D.C. Cir. 1959).

[1] "Other insurance" clauses are "clauses which purport to vary the coverage of the policy if there is another policy or other policies protecting the risk insured against." Annot., 76 A.L.R.2d 502, 503 (1961).

the policy shall not extend coverage where there is available to the driver other valid and collectible insurance, or that the policy shall provide coverage only for liability in excess of the limits of such other insurance.

In *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*[2] Mrs. Widenhouse, with a view toward purchasing, drove an automobile owned and held for sale by Concord Motors, Inc. She struck and injured David Clontz. Concord Motors held a "Garage Liability Policy" issued by Shelby Mutual Insurance Company under which Mrs. Widenhouse was insured as an operator with the permission of the named insured. Mrs. Widenhouse was also covered by an owner's liability policy with "drive other car"[3] coverage issued to her husband by the Allstate Insurance Company. Both Mrs. Widenhouse and Concord Motors were sued by Clontz's father as next friend. Allstate sued Shelby Mutual for declaratory judgment concerning the liability of the insurers. The Supreme Court held that the garage liability policy did not cover the accident because of the provision therein that a user such as Mrs. Widenhouse would not be covered if other valid and collectible automobile insurance, *either primary or excess*, was available to such user. The provision was held to be controlling even though the Allstate policy contained a provision that insurance with respect to a non-owned automobile would be *excess* insurance over other valid and collectible insurance.[4]

There are three principal types of "other insurance" clauses: (1) the "escape" clause, providing that in the event of other insurance the insurer issuing the policy in question will be released from all liability; (2) the "excess" clause, providing that in the event of

[2] 269 N.C. 341, 152 S.E.2d 436 (1967).

[3] A "drive other car" clause is one which provides that if the owner is subjected to liability due to his casual driving of another vehicle, the insurer will assume such liability.

[4] Allstate also contended that the fact that Mrs. Widenhouse was driving a dealer-owned automobile was an event which invoked an exclusionary provision of their policy relating to a non-owned automobile used by insured "in the automobile business." The court denied the contention that this was a use "in the automobile business" on the basis of Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 146 S.E.2d 410 (1966). 269 N.C. at 347, 152 S.E.2d at 441. The *Jamestown* case is North Carolina's only previous encounter with the problem here involved. There the conflict was between a clause excluding coverage where a non-owned car was being used in the "automobile business" and a garage liability policy containing an ordinary "escape" clause. Since the Court ruled that the car was not being used in the "automobile business" and thus not within the exclusion of the former policy, direct confrontation with the conflict was avoided.

other insurance the coverage offered by the policy in question shall be "excess" coverage—*i.e.* the insurer will be liable only if the loss is in excess of the maximum coverage afforded by the other policy or policies; and (3) the "pro rata" clause, providing that in the event of other insurance the insurer issuing the policy in question shall be liable only for the proportion of the loss that represents the ratio between the limit of liability stated therein and the total limit of liability in all other valid and collectible insurance covering the loss.[5] Since automobile liability policies often contain "drive other car" clauses, and since many policies extend their coverage to motor vehicles "used" by or on behalf of the named insured in addition to the vehicle owned by him, it is not infrequent that a loss caused by the operation of a motor vehicle is covered by two or more policies. As each of these policies may also have "other insurance" clauses, the possibility for conflict becomes obvious.[6] This is especially true in North Carolina as every owner of an automobile is required to have liability insurance coverage. Because of the potential frequency of this conflict and North Carolina's recent entry into the controversy, it is necessary to analyze the Supreme Court's holding in light of policyholder interests and the effective administration of justice.[7]

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[5] Annot., 76 A.L.R.2d 502, 503 (1961).

[6] *Id.* at 504.

[7] Although it is difficult to generalize in this area, a few trends are worth noting. Ordinarily conflicts arise between clauses easily classifiable as one of the three types. In the greatest number of cases the conflict between a "no liability" or "escape" clause and an "excess" clause has been resolved by imposing liability on the insurer issuing the "escape" policy. However, it has been held that the conflict between these clauses is irreconcilable and the insurers should be compelled to prorate the loss. Oregon Auto Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958 (9th Cir. 1952); Zurich Gen. Accident & Liability Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); New Amsterdam Cas. Co. v. Certain Underwriters, 34 Ill.2d 424, 216 N.E.2d 665 (1966); New Amsterdam Cas. Co. v. Certain Underwriters, 56 Ill. App.2d 224, 205 N.E.2d 735 (1965); Travelers Indemnity Co. v. State Auto Ins. Co., 67 Ohio App. 457, 37 N.E.2d 198 (1941); *see generally*, Annot., 46 A.L.R.2d 1163, 1164-67 (1956). For treatment of conflicts between two "pro rata" clauses, see Liberty Universal Ins. Co. v. Nat. Surety Corp., 338 F.2d 988 (5th Cir. 1964); Celina Mut. Cas. Co. v. Citizens Cas. Co., 194 Md. 236, 71 A.2d 20 (1950); Maryland Cas. Co. v. Hunter, 341 Mass. 238, 168 N.E.2d 271 (1960); *see generally*, Annot., 21 A.L.R.2d 611 (1952). For treatment of conflicts between a "no liability" clause and a "pro rata" clause, see McFarland v. Chicago Express, Inc., 200 F.2d 5 (7th Cir. 1952); *see generally*, Annot., 46 A.L.R.2d 1163, 1167-68 (1956). For treatment of conflicts between an "excess" clause and a "pro rata" clause, see Globe Indemnity Co. v. Capital Ins. & Surety Co., 352 F.2d 236 (9th Cir. 1965); Citizens Mut. Auto. Ins.

The Allstate case is a good example of the difficulty involved in attempting to reconcile the conflicts that frequently arise. The clause in the Allstate policy was of the ordinary "excess" type:

> [T]he insurance with respect to a temporary substitute or non-owned automobile shall be *excess insurance over any other valid and collectible insurance.*[8]

The clause in the Shelby Mutual "Garage Liability Policy" was classifiable as an "escape" or "no liability" clause, but its language varied from that normally used in such clauses:

> [O]nly if no other valid and collectible automobile liability insurance, *either primary or excess,* with limits of liability at least equal to the minimum limits specified by the Financial Responsibility Law of the state in which the automobile is principally garaged, is available to such person . . . [shall this policy be valid].[9]

The usual "escape" clause does not contain the language "either primary or excess," but merely states that if there is other valid and collectible insurance available to the driver, the policy affords no coverage. It is this distinction on which the Court based its conclusion that the Shelby Mutual policy did not provide coverage for Mrs. Widenhouse. In considering the policies, the court said:

> [H]ere, the Shelby Mutual policy is not ambiguous with reference to the intent of the parties to exclude coverage under it where the other policy contains an "excess" clause. The Shelby Mutual Policy expressly makes the existence of such "excess" policy an event which sets the Shelby Mutual's exclusionary clause into operation . . .[10]

The Court reasoned that since the Allstate "excess" policy invoked the exclusionary clause of the Shelby Mutual policy, the event which would activate the limitation or deferment clause of the Allstate

Co. v. Liberty Mut. Ins. Co., 273 F.2d 189 (6th Cir. 1959); Mountain States Mut. Cas. Co. v. American Cas. Co., 135 Mont. 475, 342 P.2d 748 (1959); Lamb-Weston Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 341 P.2d 110 (1959); Jensen v. New Amsterdam Ins. Co., 65 Ill. App.2d 407, 213 N.E.2d 141 (1965); *see generally,* Annot., 76 A.L.R.2d 502 (1961).

[8] 269 N.C. at 345, 152 S.E.2d at 439.

[9] 269 N.C. at 344, 152 S.E.2d at 439.

[10] 269 N.C. at 351, 152 S.E.2d at 443. Before making this statement the court distinguished the recent Illinois decision in New Amsterdam Cas. Co. v. Certain Underwriters, 34 Ill.2d 424, 216 N.E.2d 665 (1966) holding that an "excess" policy was not such as would set an "escape" policy's exclusionary clause in operation.

policy had not occurred.[11] In other words, the Allstate policy was an event which triggered the Shelby Mutual "escape" limitation. Thus the Shelby Mutual policy was no longer in existence and could not invoke the Allstate "excess" limitation.

It is not clear why the court could not have first considered the effect of Allstate's "excess" policy and then considered whether the Shelby Mutual policy was such as would invoke the Allstate limitation. The court itself recognized that Allstate intended to provide initial coverage only in the event no other valid and collectible insurance was available.[12] Had the court first considered the Allstate policy, it would have recognized that the Shelby Mutual policy would clearly be "valid and collectible insurance". That policy would thus be an event which would trigger the Allstate "excess" limitation. It then follows that the Allstate policy would no longer be in existence and thus could not invoke the Shelby Mutual "escape" limitation. Shelby Mutual would thus be liable up to the limits of its policy.[13] The circuity of this reasoning is obvious. It is typical of the reasoning used in other jurisdictions to hold that the conflict between the usual type of "escape" and "excess" clauses should be resolved in favor of the "excess" policy.[14]

It is questionable whether the addition of the language "either primary or excess" is a distinction sufficient to justify the effect

[11] 269 N.C. at 345, 152 S.E.2d at 439.

[12] 269 N.C. at 349, 152 S.E.2d at 442.

[13] In the event the liability to Clontz exceeds the limits of the Shelby Mutual policy Allstate will be liable for any excess. However, the concern here is over which of the two companies must bear the burden of defending Mrs. Widenhouse and sustain the initial liability, if any. If it could be assumed that there will be such liability and it will be in excess of the Shelby Mutual policy limits then there may be some logic in the court's reasoning. Even so, such "logic" is no more than the result of a battle of semantics, an approach which as will be seen should be rejected.

[14] *See, e.g.*, Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1942); *but see* Oregon Auto Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958 (9th Cir. 1952). There is another argument which is interesting to note. It is questionable whether the court was correct in assuming that Allstate's "excess" clause was within the meaning and intent of Shelby Mutual's exclusion. It is the practice of some vehicle owners, such as large trucking concerns, to be self-insurers up to a certain amount and to cover any liability above such amount through the purchase of *excess liability insurance*. In view of Shelby Mutual's reference to "[O]ther . . . liability insurance ,either primary or excess. . . ," 269 N.C. at 344, 152 S.E. 2d at 439, it is possible that it had in mind only that type of "excess" liability insurance. In any event the rule that an insurance policy is to be strictly construed against the insurance company could be read to require the above interpretation of the Shelby Mutual clause.

given it in the Allstate case.[15] Only two other courts have considered this precise conflict.[16] Our court rejected the Louisiana conclusion that the policies are mutually repugnant and liability should therefore be prorated, because it was based on the "unsound" premise that the "escape" clause in one policy and the "excess" clause in the other policy were "like" provisions.[17] However, the distinction offered by the North Carolina Supreme Court is not as persuasive as the finding that the policies contained "like" provisions.[18] In defense of its conclusion the Louisiana Court stated that:

[15] It has been the majority position in the past to hold that the ordinary "excess" clause will prevail over the ordinary "escape" clause. See note 7 *supra*. The North Carolina Court has taken the opposite view in the *Allstate* case on the basis of additional language placed in the "escape" clause. It will be shown that when these clauses were added the meaning and intent of each company was indistinguishable and therefore the clauses should have been held irreconcilable and the companies required to pro rate any loss.

[16] The Florida Court in Continental Cas. Co. v. Weekes, 74 So.2d 367 (Fla. 1954) supported the North Carolina position. There the Court was faced with an owner-lessor liability provision stating that the insurance does not apply "to any liability for such loss as is covered on a primary, contributory, excess or any other basis by insurance in another company", and a driver-lessee liability provision providing for "excess" coverage over any other valid and collectible insurance. Though the Court purported to rely strongly on the case of *McFarland v. Chicago Express, Inc.*, 200 F.2d 5, 6 (7th Cir. 1952), it appears that they concluded that the former policy should prevail without giving any conceptual justification. The Louisiana Court of Appeals twice took the opposite view. In *Lincombe v. State Farm Mut. Auto Ins. Co.*, 166 So.2d 920 (La. App. 1964), *cert. denied*, 246 La. 905, 168 So.2d 820 (1964) the court was faced with a driver policy identical to the Allstate policy in the present case and an owner policy identical to that of Shelby Mutual. The two policies were held mutually repugnant and the companies required to prorate. The other case, *State Farm Mut. Auto. Ins. Co. v. Travelers Ins. Co.*, 184 So.2d 750 (La. App. 1966), *cert. denied*, 249 La. 454, 187 So.2d 439 (1966), arose out of the same fact situation as *Lincombe* and involved the identical provisions. These two Louisiana cases would seem to be the better authority for our court since they are more recent and most clearly present the conflict.

[17] 269 N.C. at 351, 152 S.E.2d at 444.

[18] In our opinion there is no real difference between the quoted provisions of these policies. In each the purpose is to relieve the insurer from all or a portion of the liability which it otherwise would have if there is other valid and collectible insurance of the same type available to the insured. Actually the insurance afforded by one of these policies is not any more "available" to the insured than is the insurance provided by the other. We think, therefore, that the "excess insurance" clause in the State Farm policy and the "other insurance" or escape clause in the Travelers policy are mutually repugnant to each other, and that insofar as the claim in this case is concerned those provisions of the policies are ineffective.

Lincombe v. State Farm Mut. Auto. Ins. Co., 166 So.2d 920, 925 (La. App. 1964).

> . . . we correctly held it was impossible to reconcile the respective "excess" and "escape" clauses in the two policies. Indeed, there is actually no way by logic or word-sense to reconcile two such clauses, where each policy by itself can apply as a primary insurer, but where the clause in each policy nevertheless attempts to make its own liability secondary to that of any other policy issued by a similar primary insurer. For then the primary and (attempted) secondary liability of each policy chase the other through infinity, something like trying to answer the question: which came first, the chicken or the egg?[19]

It is evident that the resolution of this conflict depends largely on the determination of whether such clauses are "like" or distinguishable so as to justify applying one before the other. With so few guides such a determination should not be made without considering the intent of the contracting parties.[20]

The most obvious intent of each insurer was "to make its own liability secondary to that of any other policy issued by a similar primary insurer."[21] The only real difference for present purposes is that each insurance company chose a different type of "other insurance" clause to accomplish the same result.[22] By including the extra language in its "escape" clause Shelby Mutual may well have intended to show a specific intent to prevail over the "excess" or any other type clause. But the purpose was still to make their insurance coverage secondary to any other insurance which might potentially cover the loss. By engaging in a senseless battle of semantics, the court has fostered an endless battle of terms with each company changing its policy provisions in order to prevail over another company doing the same. On the other hand, a rec-

[19] State Farm Mut. Auto Ins. Co. v. Travelers Ins. Co., 184 So.2d 750, 753-54 (La. App. 1966). The quote is from Judge Tate's concurring opinion; see that opinion at pages 754 and 755 for a very lucid and persuasive argument that the owner's insurer in this type of case should be held primarily liable.

[20] An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. It is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions.

Hawley v. Indemnity Ins. Co., 257 N.C. 381, 387, 126 S.E.2d 161, 167 (1962).

[21] State Farm Mut. Auto Ins. Co. v. Travelers Ins. Co., 184 So.2d 750, 754 (La. App. 1966).

[22] There is the minor difference that Allstate intended coverage if other policy limits were not sufficient to cover the liability while Shelby Mutual did not.

ognition that these are "like" provisions calling for a sharing of the loss will put an end to such a useless contest.

There are two alternatives to the court's repeated participation in this battle of semantics. First, proration could be required whenever a conflict arises. The policyholder would know what to expect and would receive all benefits of timely investigation, settlement effort or defense and he would not have to await litigation between the insurance companies. The insurance companies themselves would no longer need to engage in a "battle of forms." Furthermore, the court's time and the taxpayers' money would not be wasted on futile endeavors to reconcile the irreconcilable. It may be that in isolated cases the outcome will be unfair to a particular insurer, but on balance the greatest justice will be accomplished. The second alternative is the development of principles indicating which insurer will be held primarily liable in conflict situations. In the *Allstate* case it may be that the driver's insurer should be primarily liable since his insured was the party at fault. On the other hand, it may be that the car owner's insurer should be primarily liable since his insured was responsible for the use of the car. It may even be that the insurers should share the loss since each insured was partly responsible. Such a set of guiding principles was suggested by the Pacific Claims Executives Association.[23] The formulation of such principles would enable insurance companies to determine accurately when they will be liable in conflict situations. The resulting advantages would be the same as those applying in the case of proration.[24]

Either of these alternatives is more desirable than the course taken by the court in *Allstate* which in effect requires that the parties await a semantic battle in the courts to resolve each new change as it arises. Reconsideration of this conflict in light of the above analysis and available alternatives would be to the benefit of policyholders, insurance companies and the court itself.

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[23] Those principles were outlined in an article by Kenneth S. Hawkes in the Insurance Law Journal. Hawkes, *Liability Guiding Principles*, 1960 INS. LAW J. 481.

[24] Either of these alternatives would likely have some affect on the rates charged by the companies for these types of coverage. However, in view of the many variables involved a discussion of such is not within the scope of this note. But it should be recognized that the savings to insurance companies in terms of litigation and related expenses would almost certainly be reflected in the rates charged.

Labor Law—Judicial Enforcement of Labor Union Fines in State Courts

Two locals of the United Auto Workers, operating under a union security agreement, called economic strikes against the Allis-Chalmers Manufacturing Company after authorization by two thirds of the membership. Several union members refused to participate in the strikes and returned to work. Following settlement of the strikes, the union tried these members before the proper union tribunal on charges of conduct unbecoming a union member and imposed fines ranging from twenty to one hundred dollars. Upon the refusal of several members to pay, the union successfully sued in the state court to enforce the fine. Allis-Chalmers then filed charges with the National Labor Relations Board[1] alleging that the union's action was an unfair labor practice under section 8(b)(1)(A) of the Labor-Management Relation Act[2] in that it restrained or coerced the members in the exercise of their section 7 right[3] to "refrain" from concerted activities. On appeal the Supreme Court held that section 8(b)(1)(A) prohibits neither the imposition of reasonable fines on full union members nor the judicial enforcement of such fines.[4]

The Court, relying heavily upon legislative history, found that section 8(b)(1)(A) was aimed mainly at organizational tactics of unions and that it was not intended to apply to internal union affairs.

[1] The Board dismissed the complaint. 149 N.L.R.B. 67 (1964). A three judge panel of the Seventh Circuit unanimously affirmed the dismissal, 34 U.S.L. WEEK 2157 (1965) (the decision has been withdrawn and will not appear in the official reports). The Seventh Circuit on rehearing en banc reversed (4 to 3), 358 F.2d 656 (7th Cir. 1966). The Supreme Court reversed the Seventh Circuit in a 5 to 4 decision, 388 U.S. 175 (1967).

[2] § 8(b)(1)(A) states "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 157 (§ 7) of this title:" The section then adds a proviso, "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." Labor Management Relations Act § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1964), [hereinafter cited as Taft-Hartley].

[3] § 7 states "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ." Taft-Hartley § 7, 29 U.S.C. § 157 (1964).

[4] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

This construction avoided the essential and perplexing problem inherent in all union disciplinary cases—the conflict between the section 8(b)(1)(A) proviso and the member's section 7 rights.[5] The reliability of the legislative history of the section is, at best, limited. Reliance must be placed exclusively upon the Senate debates,[6] a notably inferior source of legislative history, due to the fact that section 8(b)(1)(A) was not included in the original Senate bill as it emerged from the Committee on Labor and Public Welfare,[7] but was added as an amendment; and since the conference committee adopted the Senate's version without change.[8] The available history is, at most, evidence of the intent of one half of Congress, and that intent is unclear as evidenced by the conflicts in testimony of the various senators regarding the scope of section 8(b)(1)(A). Remarks of Senators Taft[9] and Pepper[10] indicate a basis from which a reasonable argument can be made establishing that a secondary purpose of section 8(b)(1)(A) was to protect union members from their leaders.[11]

In light of the brevity and internal conflict of the legislative history argument, the majority sought to bolster its decision by reliance on the section 8(b)(1)(A) proviso[12] and pure policy.[13]

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[5] The union's right to make rules in relation to the acquisition or retention of membership (the § 8(b)(1)(A) proviso) versus the employee's right to participate in or refrain from concerted activity (§ 7 Rights).

[6] P. MISHKIN & C. MORRIS, ON LAW IN COURTS, 404-5 (1965).

[7] S. REP. No. 105, 80th Cong., 1st Sess. 35 (1947), cited in 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 441 (1948) [hereinafter cited as 1947 Leg. Hist.].

[8] The report of the committee was unrevealing.

[9] "If there is anything clear in the development of labor union history in the past 10 years it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders." 93 Cong. Rec. 4023 (1947), cited in 2 Leg. Hist. 1028.

[10] "This amendment is an effort to protect the workers against their own leaders, chosen by them under their own constitution and by-laws." 93 Cong. Rec. 4023 (1947), in 2 Leg. Hist. 1029.

[11] Comment, *8(b)(1)(A) Limitations Upon The Right Of A Union To Fine Its Members*, 115 U. of PA. L. REV. 47, 52 (1966).

[12] ". . . [S]uch a distinction [between court enforcement and expulsion] would visit upon the member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or to deplete its ranks." N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 192 (1967).

[13] "Where the union is weak, and membership therefore of little value, the union faced with further depletion of its ranks may have no real choice except to condone the member's disobedience. Yet it is just such weak unions

Each of these approaches is open to attacks of varying merit. The Court's argument based on the proviso to section 8(b)(1)(A), which guarantees to unions the right to "prescribe its own rules with respect to the acquisition or retention of membership therein. . ." is valid only when asserted against an attempt to proscribe all fines, rather than only those judicially enforced. Simply stated, the Court's argument is that since Congress allowed a greater coercive means (expulsion), it could not have intended to prohibit a lesser one (fines). The rationale is sound when limited to fines backed by expulsion since they are always less coercive than expulsion due to the fact that the member may opt out rather than pay. But it fails completely when viewed in the context of a weak union judicially enforcing a fine. Obviously the fine is more coercive than expulsion, otherwise the union would not find it necessary to employ the courts to enforce it.

The Court's argument based on public policy—that weak unions, if deprived of the power to judicially enforce fines, will either have to condone wrongdoing or deplete their ranks—is by far its strongest. Either of the above would greatly hamper the union in its statutory obligation to bargain collectively and, as the Court determined, effectively. However, although it may be beneficial to nourish sickly unions at the expense of their members, is not this a policy determination better left to Congress? In fact, a contrary intent may be glossed from the Act in its allowance of free elections,[14] resignation of members,[15] decertification petitions,[16] and prohibition of compulsory membership, absent a collective bargaining agreement to the contrary.[17]

Justice White, who concurred with the Court's decision, implicitly rejected the Court's interpretation of the legislative history of section 8(b)(1)(A)[18] and employed the proviso to reach his

for which the power to execute union decisions taken for the benefit of all employees is most critical to effective discharge of its statutory function." *Id.* at 183-84.

[14] Taft-Hartley § 9(a), 29 U.S.C. § 159(a) (1964).

[15] Employees have the right to refrain from union activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. Taft-Hartley § 7, 29 U.S.C. § 157 (1964).

[16] Taft-Hartley § 9(c), 29 U.S.C. § 159(c) (1964).

[17] Taft-Hartley § 7, 29 U.S.C. § 157 (1964).

[18] Mr. Justice White joins the dissenters in their belief that § 8(b)(1)(A) is broader than merely organizational tactics and therefore applies to union discipline.

result.[19] Consequently, a majority of five justices rejected the interpretation of 8(b)(1)(A) which formed the foundation for the Court's decision. Justice White and the four dissenters read 8(b)(1)(A) as extending beyond organizational tactics onto the sphere of internal union discipline. His opinion tenuously[20] accepts the majority's "greater-lesser" proposition "[that] there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derrogation of section 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive."[21]

Justice White appears to err along with the majority in crystalizing the issue as one of allowance or prohibition of all fines, thereby making the proviso argument viable. As noted above, this argument fails when applied to judicially enforced fines since they may often be more coercive than expulsion. Justice White's rationale, though faulty, is more conceptually consistent with the balance of the Act than the Court's approach which, carried to its logical conclusion, would allow violence and coercion as long as they were employed in internal affairs of the union rather than in organizational drives. His approach does not foreclose the applicability of 8(b)(1)(A) to non-organizational areas, but merely limits its application in internal union affairs by way of the proviso.

II

In light of the lack of precedent in the area of union discipline and the dirth of legislative background, *Allis-Chalmers* presented the Court with an opportunity to adopt the "result-orientated"[22]

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[19] Hence, a union may expel to enforce its own internal rules, even though a particular rule limits the § 7 rights of its members and even though expulsion to enforce it would be a clear and serious brand of "coercion" imposed in derogation of those § 7 rights. Such restraint and coercion Congress permitted by adding the proviso to § 8(b)(1)(A).
388 U.S. 175, 197-98 (1967) (concurring opinion).

[20] "But the Court seems unanimous in upholding the rule against crossing picket lines during a strike and its enforceability by expulsion from membership. On this premise I think the opinion written for the Court is the more persuasive and sensible construction of the statute and I therefore join it, although I am doubtful about the implications of some of its generalized statements."
Id. at 199. (concurring opinion).

[21] *Id.* at 198. (concurring opinion).

[22] *Union Disciplinary Power And Section 8(b)(1)(A) Of The National Labor Relations Act: Limitations On The Immunity Doctrine*, 41 N.Y.U.L. REV. 584, 589 (1966).

approach which has recently gained favor with the Board[23] and to replace its traditional "means" test. The "result" approach is simply a balancing of all the interests involved and is akin to the nexus or balance of interests approach often applied to constitutional problems. It appears that this approach is the only avenue to a conceptually sound, workable body of labor law.[24]

Concededly the "nexus" approach is more difficult to administer than the traditional means test but the results should be infinitely more satisfying from both a practical and conceptual viewpoint. It takes into consideration five variables: (1) the permissible objective of the union as related to the furtherance of union goals; (2) the source of union power; (3) the means used to achieve the permissible objective; (4) the degree of invasion upon the member's rights; and (5) the right of the member to be protected from coercion.

The initial inquiry is whether the union's objective is permissible, and if permissible, how closely is it related to the furtherance of work-related collective employee goals.[25] The source of union power is the next important variable in ascertaining the degree of invasion of members' rights permissible in a given situation. The manner of acquisition of members determines the rights acquired by the union, i.e., the union should acceed to a greater number of rights when membership is voluntary rather than forced. An open shop situation exemplifies voluntary surrender while a union security shop may embody both voluntary surrender and forced grant.

The "means" must be viewed from dual perspectives: their effectiveness and exclusiveness in achieving the desired union goal and their effect upon the rights of members—the degree of invasion. The following commonly employed means are scaled in descending order according to degrees of invasion: violence, court enforced fines, expulsion, suspension, and fines enforceable by expulsion. Violence, probably the most effective method of achieving union goals, is always proscribed. The right to be protected is the final variable and will usually be the employee's right to engage in or

[23] See *Id.* at 590.

[24] This is the approach taken by the Labor Board in Local 138, Int'l Union of Operating Engineers, 148 N.L.R.B. 679 (1964), where it protected the right of a union member to file charges against his union with impunity from internal union fines.

[25] The closeness of the relationship or the necessity determines the value of the permissible objective.

refrain from some concerted activity. Some difficulty arises in attempting to evaluate this right in different contexts. At present, it appears that a member's greatest right is his access to the board,[26] while the right to file a decertificatian petition is of little value.[27]

Permissible Objective and Member's Right to be Protected

The *Allis-Chalmers* problem is perplexing because both the permissible objective and the member's right are of great value. Solidarity (the permissible objective) is crucial during a strike period, but then so is the worker's right to make decisions which have a marked incidence upon his individual well-being: the striker loses his wages and possibly his job.[28] This standoff in interests demands that the means employed be formulated with precision to satisfy best both interests—the greatest effectiveness with the least invasion. A deeper probing of the three remaining variables is necessary to a "result" approach to *Allis-Chalmers.*

Source of Union Power

The basic inquiry at this point is the voluntariness of the member's association with the union in a security shop situation. If a man voluntarily joins the union, he is subject to its discipline. But if his membership is a product of the security agreement, the union may not impose its will upon him since a security agreement may not be used for any purpose other than the collection of dues and fees.[29] Theoretically at least, voluntariness will also be a vital factor in the litigation to collect the fines since the union's cause of action has been traditionally based upon the contract theory.[30]

Several aspects of the present security shop situation negate voluntariness. The typical agreement states that membership is required, as does the Taft-Hartley Act.[31] The average worker, not being an avid reader of the federal reporters, will not know that membership has been whittled down to its "financial core."[32] Even if the "financial core" option is spelled out in the contract, most

[26] Local 138, Int'l Union of Operating Eng'rs, 148 N.L.R.B. 679 (1964).
[27] Tawas Tube Prods. Inc., 151 N.L.R.B. 46 (1965).
[28] See N.L.R.B. v. Mackey Radio & Tel. Co., 304 U.S. 333 (1938).
[29] Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 41 (1954).
[30] International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958).
[31] Taft-Hartley § 8(A)(3), 29 U.S.C. § 158(A)(3) (1964).
[32] N.L.R.B. v. General Motors Corp., 373 U.S. 734 (1963), held that the Taft-Hartley union security clause did not permit any more than the collection of union dues and fees.

employees will not be cognizant of this fact. Assuming that the worker has the requisite knowledge, is his decision to accept full membership voluntary in the absence of a valid alternative? The majority of unions assess the same dues and fees upon both the "financial core" and the full member who enjoys all the attendant union benefits. In effect the unions are saying to prospective members, "You must pay X dollars to us every month or lose your job. You may choose limited membership and receive nothing for your money, or full membership and receive a voice and a vote in union decisions, plus any internal union benefits financed out of dues and fees." It would be an extreme test of the elasticity of logic to term the selection of full membership under these conditions a voluntary choice. Board member Leedom captured the essence of the situation in one pithy sentence: "Who can say as a verity that a man forced to buy a cake will not eat it?"[33]

Union constitutional restrictions limiting resignation also taint the voluntariness of the continuing association between union and members. The First Circuit has upheld a United Auto Workers constitutional provision requiring that all resignations be submitted by registered mail to the financial secretary of the member's local within ten days of the end of the fiscal year.[34] Membership can not be genuinely voluntary unless the union offers dissident members a continuing, realistic choice to opt out of the union. The right to refrain from union activities becomes illusory if unions can judicially force obligations upon dissidents thus frozen into membership.

The Court in *Allis-Chalmers* concerned itself solely with the member's present status—was he a "full member?" Motivation for the membership was considered irrelevant. This approach allows the coercive security agreement to be used for a purpose other than to compel payment of union dues and fees[35]—a clear violation of the section 8(A)(3) proviso.[36] If judicial enforcement is to be

[33] General Motors Corp., 133 N.L.R.B. 451, 463 (1961) (dissenting opinion).

[34] N.L.R.B. v. U.A.W., 320 F.2d 12 (1st Cir. 1963).

[35] Radio Officers' Union v. N.L.R.B., 347 U.S. 17 (1954).

[36] *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the

permitted, the courts must offer some protection against the misuse of the security clause.[37] The union should bear the burden of proving that the prospective member knew of his choice between financial core and full membership and voluntarily made it. Also the choice should be realistic—financial core members charged only their fair share of the bargaining costs, or charged equal dues with all other members but also receiving equal benefits which could not be divested.[38] The only difference between the two types of membership in the latter situation would be the franchise. The courts should also limit resignation restrictions to the barest minimum reasonable in order to insure the continuing voluntariness of the association.

Degree of Invasion

"Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine."[39] The above statement is a truism but obfuscates the real issue—whether fines should be judicially enforcable. There has been no attempt to require unions to expel rather than fine delinquent members. This choice is, and should be, left to the unions. A fine backed by expulsion can not be more coercive than one enforced by court action. The individual member is in the best possible position to balance, on a personal basis, the benefits of union membership against the amount of the fine, and to choose the less coercive path, be it expulsion or payment of the fine.

Allowing judicial enforcement will force the member into costly and time consuming litigation. Many employee rights will fall by default simply because the cost of litigation is greater than the amount of the fine.[40] Also, the uncertainty of litigation will induce

periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

Taft-Hartley § 8(a)(3) 29 U.S.C. § 158(a)(3) (1964).

[37] Requiring membership under the security clause and then using that membership to impose court enforced fines upon those who are unwilling to participate in union activities constitutes subversion of § 8(A)(3).

[38] The choice between the alternative types of financial core memberships should be left to the unions since they will face the resultant bookkeeping problems.

[39] N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 183 (1967).

[40] "The very fact that so few cases involve individuals unsupported by factional groups suggests that the lone member's rights go by default, and many lawyers frankly admitted that they would not take a case unless it was backed by a substantial group." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 222 (1960).

many members to forego their statutory protections since there is no chance of a double loss—attorney's fees plus fine—if the member acceeds and pays the fine.

Since the majority of state courts base their consideration of these fines on the contract theory, their main inquiry is whether the member's action was proscribed in the union constitution or by-laws, and whether there is substantial evidence to support the fine.[41] This appellate approach taken by state courts certainly deprives the disciplined member of the protection he deserves on the fact finding level of the litigation. There is seldom an inquiry into whether the membership (hence the contract) was coercive. This should be a controlling factor in the litigation. Also, judicial enforcement would arm the unions with a great auxiliary power, the power to force a member into submission by the threat of a large fine. How many members whose names appear on the union rolls will be willing to ignore the threat in the hope that they will later be able to convince the Board or the state court that they were not full members or that the fines were unreasonable?

The Necessity of the Means

The rationale behind section 8(A)(3) is that the union should be allowed to contract with the employer to force non-union employees, who are deriving benefits from union representation, to pay their share of the bargaining costs.[42] If unions are limited to enforcement by expulsion, the rationale behind section 8(A)(3) will be frustrated since the expelled employee will no longer have to pay dues and the union will be powerless to affect his job status,[43] while still retaining the duty to represent him equally.[44] Expulsion in the security shop situation puts the disciplined member in a better position than his financial core brethren in that he enjoys all the benefits of a non-full member, i.e., equal representation, with none of the burdens, i.e., payment of his share of the bargaining costs. The effect of this "discipline" upon union solidarity during the

[41] ANNOT., 21 A.L.R.2d 1397, 1442 (1952).

[42] Radio Officers' Union v. N.L.R.B., 347 U.S. 17 (1954).

[43] Under §§ 8(A)(3) and 8(b)(2), if a union operating under a union security agreement expels a member for any reason other than failure to pay dues, *e.g.*, failure to pay a disciplinary fine, the union forfeits its right to require that he pay dues as a condition of employment. Taft-Hartley §§ 8(A)(3), 8(b)(2), 29 U.S.C. §§ 158(A)(3), 158(b)(2) (1964).

[44] Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir.), *rev'd per curiam*, 250 U.S. 892 (1955).

crucial strike period could be catastrophic, especially in the case of a weak union.[45] The proscription of judicial enforcement of union fines would also present a loophole for workers intent upon avoiding their financial obligation to the union. A worker might join the union and then intentionally violate union discipline in order to escape the single obligation the section 8(A)(3) proviso meant to impose upon him: financial support of his bargaining representatives. The union would be forced to tolerate his misbehavior, which very likely would be detrimental to solidarity, or to expel him. Undoubtedly, a member could force expulsion by a continuing calculated course of misconduct.

The evils created by the proscription of judicial enforcement in the security shop situation are not insoluable. They may be neutralized by allowing unions to suspend delinquent members without forfeiting their right to collect dues,[46] or by permitting unions to demote or "expel" delinquent members to financial core status—obligated to pay their share of the bargaining costs. Title I of the Landrum-Griffin Act[47] provides adequate safeguards against arbitrary use of these powers by the unions.

Conclusion

The means of intra-union discipline sanctioned by *Allis-Chalmers,* especially in the context of a security shop agreement, allow too great a margin for an impermissible degree of invasion of members' rights. The adoption of the proposed judicial safeguards would make it a much closer case—to be determined by the feasibility of the alternative methods of enforcement. The relative strength of unions and members negates the necessity of the addition of this new weapon to the union arsenal which already includes the proviso-secured expulsion sanction along with potent diverse modes of informal ostracism. Proscription of judicial enforcement obviates to a great extent the necessity of inquiry as to the voluntariness of the association since the member may opt out of the union

[45] Members of a strong well-established union with good internal benefits would be more likely to pay their fines than expose themselves to loss of those benefits. But a member of a weak union with little or no internal benefits would likely opt for expulsion to avoid the expense of both the fine and future dues. Therefore the weak union would have to either condone wrong doing or suffer the loss of revenue by depleting its ranks.

[46] 76 YALE L.J. 563, 567 (1967).

[47] Labor-Management Reporting and Disclosure Act §§ 101-105, 29 U.S.C. §§ 411-15 (1964).

at no dollar cost to himself. Also, limiting the ultimate union discipline to expulsion provides an internal restraint upon unions to impose only reasonable fines, while at the same time providing them with a real incentive to make themselves more desirable so that members will opt to pay the fines rather than be expelled.

WILLIAM J. DOCKERY

Sales—Products Liability—Sales Warranties of the Uniform Commercial Code

The Uniform Commercial Code sales warranties have caused several practical and theoretical problems in determining the appropriate basis of manufacturer liability in defective product cases. The growth of non-fault liability,[1] either in tort or on the sales contract, has been characterized by increasing permissiveness toward consumer recovery against remote manufacturers. This note is addressed to the relation between the Code scheme of recovery and common law non-fault remedies.

The basic Code money-damages remedy[2] for a purchaser of a defective product is an action on the sales contract for breach of the seller's warranty, express or implied. The Code sales warranties correspond roughly to those developed at common law.[3] Section

[1] See Prosser, *The Assault Upon the Citidel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [Hereinafter cited as Prosser].

[2] See UNIFORM COMMERCIAL CODE § 2-711 for buyer's remedies in general. All citations are made to the 1962 official text of the Uniform Commercial Code. The Code has been adopted in forty-eight states and the District of Columbia.

[3] Prosser termed the sales warranty "a freak hybrid born of illicit intercourse of tort and contract." The action for breach of warranty was originally on the case, a tort action, and resembled the action for deceit. Prosser states that it was not until 1778 that an action on a contract for breach of warranty was held to lie at all. However, once the action on the contract was permitted, the defenses to breach of contract, principally lack of privity and limitation of consequential damages, became entrenched in the law.

The warranty concept evolved, first through the food cases, to the point where implied warranties were imposed by operation of the law regardless of the seller's contractual undertaking. Liability was non-fault and in effect tort duties were imposed on sellers. Since *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), removed the privity barrier only with respect to negligence liability, courts invented a variety of devices, such as fictitious agency or warranties running with the product, to circumvent the privity rules. See Prosser at 1124. However, the defense of lack of privity to the breach of warranty action remains viable in many jurisdictions, and, further, the warranty has retained elements of both tort and

2-313 (the express warranty) holds a seller responsible for his representations to the buyer, section 2-314 (implied warranty of merchantability) requires that the product be fit for any ordinary use, and section 2-315 (implied warranty of fitness) requires fitness for any particular use of which the seller is apprised before the sale. The warranties arise only upon a sale of goods,[4] can be disclaimed[5] and are contractual in theory.[6]

The Code does not require an allegation of privity between plaintiff buyer and defendant seller/manufacturer in a breach of warranty action. The official comment states that the overall position of the Code is that of neutrality.[7] However, section 2-318 extends the protection of the seller's warranties horizontally to members of the buyer's family and household, and to guests in his home: if the buyer can maintain an action, then these persons may also.

The Code's warranty liability is, inferentially, limited to sellers of goods.[8] Further, section 2-715(2)(b) specifies that the buyer's consequential damages for breach of warranty include "injury to person or property proximately resulting from any breach of warranty," and section 2-719(3) states that any limitation of consequential damages "for injury to the person in the case of consumer goods is prima facie unconscionable." Sections 2-318, 2-715(2)(b), and 2-719(3) perpetuate the confusion of tort and contract remedies which existed in the common law breach of warranty action.[9]

A potentially troublesome jurisprudential problem is present in

contract liability. See Comment, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335 (1924). The argument is made that the privity requirement in warranty cases was an historical accident. See Mull v. Colt Co., 31 F.R.D. 154, 173 (S.D.N.Y. 1962); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). The evolution of the privity rule is discussed in detail in Prosser. See also 43 N.C.L. REV. 647 (1965).

[4] *See* note 8 *infra.*

[5] There is an exception: a limitation of liability for personal injury is prima facie unconscionable unless all warranties have first been disclaimed. See UNIFORM COMMERCIAL CODE § 2-719(3).

[6] *See* Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, 309 (1961).

[7] UNIFORM COMMERCIAL CODE § 2-318, comment 3.

[8] UNIFORM COMMERCIAL CODE § 2-103(1)(d); 2-106(1); 2-313(1)(a); 2-314(1); 2-315. But see UNIFORM COMMERCIAL CODE § 2-313, comment 2.

[9] *See* Fisher, *Implied Warranties of Quality—A Tort Peg in a Contract Hole*, 11 FOOD DRUG COSM. L.J. 262 (1956); Comment, *Manufacturer's Liability to Remote Purchasers For "Economic Loss" Damages—Tort or Contract*, 114 U. PA. L. REV. 539 (1966). See note 3, *supra.*

Code related litigation. Hawkland argues that the Code was intended to operate as a code in the civil law sense, that is, in this context, as the *only* source of law governing commercial transactions.[10] The principal distinction between a civil law code and ordinary legislation is that the former pre-empts its subject area.[11] From Hawkland's premise it can be argued that Article II of the Code precludes common law remedies where the basis of liability stems from a sale transaction.[12]

Hence in a typical products liability situation, where the consumer will normally have in addition to the Code remedy a parallel—and often overlapping—common law tort remedy, there will always be lurking in the background a serious jurisprudential question over the propriety of by-passing the Code remedy, even when the Code remedy as contrasted with the common law remedy does not afford full and fair relief. This did not constitute a critical problem at the time the Code was drafted,[13] 1945—1952, since, at that time,

[10] Hawkland argues that the failure of the earlier uniform commercial statutes can be attributed to their lack of pre-emption, system, and comprehension, and that this circumstance weighed heavily in the drafting of the Code. Hawkland cites the concern of the chief architect of the Code, Karl Llewellyn, over a (pre-Code) system of law which gave courts leeway in selecting from among two or more alternative principals of law a principle to settle a commercial dispute. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 ILL. L. F. 291, 299 (1962).

[11] "There is a wide difference between . . . a statute and a true code. A 'code' is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts." Id. at 292. UNIFORM COMMERCIAL CODE § 1-103 provides:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall *supplement* its provisions. (Emphasis added).

§ 1-104 provides:

> This Act being a general act intended as *a unified coverage of its subject matter*, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided. (Emphasis added).

See generally Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

[12] Arguably, Article II should apply to commercial transactions analogous to sales, such as leases and bailments. See Comment, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

[13] The history of the drafting of the Code is set out in Schnader, *The New Movement Toward Uniformity in Commercial Law—The Uniform*

the warranty action was with some exceptions[14] the only non-fault remedy open to an injured consumer. However, six years subsequent to the drafting of the Code, the first of the strict tort liability cases was decided.[15] This created an anomaly—at the time the Code was drafted, sections 2-318, 2-715(2)(b) and 2-719(3) were intended to be, and at the time represented, a liberalization of consumer remedies, yet subsequently the judicially created doctrine of strict tort liability went far beyond the liberalities of the Code.

The strict liability doctrine is based on breach of a tort duty running directly from the manufacturer to the consumer. The breach occurs when an unreasonably dangerous product is placed on the market. Liability is non-fault—it is no defense that the manufacturer exercised all possible care in the preparation or sale of his product.[16] It is usually held that the plaintiff has met his

Commercial Code Marches On, 13 BUS. LAW. 646 (1958). A more liberal version of § 2-318 was originally drafted in 1950. However, in 1951 it was replaced by the present version of § 2-318. The wide divergence of state law privity rules is usually cited as the reason for the change. See Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 3 UCC REPORTING SERVICE 672, 678 (1967).

[14] In some jurisdictions the exceptions to the principle of no non-fault liability without privity were extensive even before the Code was drafted. The development of exceptions to the general rule, for example, in the food and ultra-hazardous product cases, is set out in Prosser 1103—14.

[15] Prosser states that *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 80 N.W.2d 873 (1958), was the first case to apply strict tort liability without limiting the principle to a given class of cases, such as those involving food products intended for human consumption. Prosser 1112.

[16] RESTATEMENT (SECOND) of TORTS § 402A (1965), provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

This section has been adopted in at least six jurisdictions by judicial decision. *See* Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965); Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); Wights v. Staff Jennings, Inc., 241 Or. 301, 405 P.2d 624 (1965); Ford

burden by showing that (1) an unreasonably dangerous condition existed while the product was in the manufacturer's hands, that (2) that this defect caused the injury, while (3) the product was being used in a normal (or foreseeable) way by (4) an intended user of it.[17]

Assuming, for the sake of argument, that the Code is not pre-emptive, alternative remedies can in theory apply to many claims—relief can be granted either on the basis of breach of the Code warranties or in tort. If this is the case then ideally definite principles should govern the decision to give relief on the basis of one ground or the other. Indefiniteness of legal duties and remedies in commercial transactions existed before the Code, and was to have been corrected by the Code. This is a basic argument in favor of pre-emption. However, in the face of alternative remedies, a rational method of determining the appropriate basis of liability is to look to the traditional distinctions made between contract and tort liability: to the relation between the parties to the action, the functions of the two actions, the interests protected by each and the types of loss recoverable in each.

In both actions the effect of plaintiff's recovery is to shift a loss of some kind from him to the defendant. However, the relation between the plaintiff and the defendant which existed prior to the tort or breach of contract is very different. Parties to a contract have consented to deal with each other, while a tortfeasor and his victim normally have not. Tort duties have no consensual basis but are imposed by law.[18] If the action is on the contract the rights and duties *inter se* have previously been consented to by

Motor Co. v. Lonam. 398 S.W.2d 240 (Tenn. 1966). Comment *m* to § 402A states:

> The rule stated in this Section is not governed by the provisions . . . of the Uniform Commercial Code; and it is not affected by limitations on the scope and content of warranties, or by any limitation to 'buyer' and 'seller' in [the Code]. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by [the Code]. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement . . . ."

[17] See note 16 and cases there cited. Prosser states that 22 jurisdictions have adopted strict liability as to all products on one theory or another. Prosser, *Strict Liability to the Consumer*, 18 HASTINGS L.J. 9, 15 (1966).

[18] See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

the contracting parties, or, as a minimum, consent to deal has been given.[19]

The function of the two actions is also different. The breach of contract action is treated as a device for satisfying the performance expectation bargained for in the contract. The tort action, however, is intended to restore the plaintiff to the position he occupied before the tort was committed—to make him whole.[20] Both actions embody a device—the contemplation-of-the-parties rule in contract and proximate cause in tort—which effectively reduces the defendant's liability beneath what his misfeasance has caused in fact. While the standard is roughly the same, reasonable foreseeability, the function of recovery in the two actions is entirely different notwithstanding the similarity of the liability limiting rules.

A more basic distinction is in the interests protected by the two actions. The interest traditionally protected in the contract action is the performance of promises, on which, supposedly, the fabric of commercial transactions rests. The interest protected by a tort action, however, is the personal security of the plaintiff and his property—freedom from unprivileged interference.[21] To this it is frequently added that the tort action protects a social interest in risk (loss) distribution over as wide a range as possible.[22]

The consensual-non-consensual distinctions between the two actions require that if the basis of the plaintiff's claim is that the defendant did not perform his promise, then privity of contract or some other consensual relation should exist between the plaintiff and the defendant. Similarly, if the interest being protected is promise performing, and/or if the perceived function of the action is satisfaction of the bargain, then there should be either plaintiff—defendant privity or some other consensual relation. The qualification of "some other consensual relation" is added because it is possible to conceive of situations where there is no privity of contract yet where each of the contract action distinctions can be made

[19] The distinction made here is not inconsistent with the concept of duties imposed by law on the contracting parties. The question asked is whether the plaintiff and the defendant have, or have not, agreed to deal with each other before the wrong complained of was committed. See L. SIMPSON, CONTRACTS § 3 (2d ed. 1965).

[20] R. MCCORMICK, DAMAGES § 137 (1935). The remedy of recission an exception to this distinction.

[21] L. GREEN, RATIONALE of PROXIMATE CAUSE 51 (1927).

[22] *E.g.*, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 462, 150 P.2d 436, 441 (1944).

in favor of enforcing contract liability, for example, in a third party beneficiary situation, or where an express warranty has been made directly to a plaintiff not in privity.

To make a final distinction, there are different types of losses upon which the two actions operate in a products liability context. One of these is injury to the person of the plaintiff and to his property; tort law has traditionally focused here. The other is economic loss unrelated to personal injury or to injury to the property other than the product.[23] This loss lies in the destruction of the value of the product—loss of the bargain—and traditionally

[23] The Supreme Courts of California and New Jersey decided oppositely the question of recovery of pure economic loss in an action to enforce strict tort liability. In *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52,207 A.2d 305 (1965), the plaintiff was permitted to recover the value of the defective product from the non-privity manufacturer of the product. There had been no personal injury or injury to property other than the product. The New Jersey Court stated that in mass marketing transactions the retailer is a mere conduit, while the manufacturer is the "father of the product," and his responsibility should be no different where only economic loss is involved. In *Seely v. White Motor Co.*, 63 Cal.2d 1,403 P.2d 145, 5 Cal. Rptr. 17 (1965), the California court, in dicta, stated its view that strict tort liability should govern the distinct problem of physical injuries. The court felt that the breach of warranty action functioned better to compensate plaintiffs for loss of the commercial bargain, and that to impose strict tort liability for all loss caused by defective products might subject the manufacturer to liability unknown in scope. Justice Peters, in a carefully reasoned dissent, pointed out that the majority rationale for imposing strict tort liability in any circumstance was the theory of loss (or risk) spreading rather than deterrance to the manufacturer, and that therefore on this rationale there was no basis to distinguish between physical and non-physical loss. Id. at 158.

If the rationale of strict liability is loss spreading then there is no legitimate basis for the *Seeley* distinction. It is often suggested that this problem does not lend itself to legal analysis but is properly the concern of an economist. As between an ordinary plaintiff and an ordinary defendant, the defendant's capacity to spread his loss will depend upon two factors: whether the risk involved has sufficiently frequency of occurrence to warrant insurance and if so whether the defendant has had the foresight to insure against it. If the defendant has no insurance the loss will remain on him if he is found liable. From an economist's viewpoint this is neither desirable nor undesirable since it would accomplish no gain in total utility provided plaintiff and defendant have roughly the same incomes—the marginal utility of the dollar amount lost is the same to both. However, if the plaintiff is insured against the loss and the defendant not, then it is economically preferable for the loss to remain on the plaintiff for now he can spread it. This reasoning suggests that liability should turn on which party is insured. The Code partially adopts this position in § 2-510 where it is provided that a non-defaulting party in certain circumstances may, to the extent of his effective insurance coverage, treat the risk of loss as remaining on the defaulting party. Prosser, among others, objects to liability turning on insurance coverage. However, if loss spreading is the only relevant question, the

is compensible in an action on a contract. The distinction can be illustrated by comparing the case of a machine which does not work

economic sense of the proposition is unassailable—less total utility is lost if the party who is insured is found liable.

In the case of the manufacturer defendant, the minimum loss of total utility is accomplished through his ability to spread the loss by raising prices to his customers, assuming for now that this is possible. In both the case of the ordinary defendant who is insured and the manufacturer defendant, the result is the same, provided that the manufacturer is able to spread his loss. In the former case the spreading is accomplished through a raise in the insurer's premiums to all his customers. What makes loss spreading economically preferable is the concept of diminishing marginal utility. This posits that each additional unit of consumption has less utility than the one which preceded it—the second Cadillac does not have as much utility as the first. By inference, then, each previous unit of consumption has more utility than the next one. Therefore if one unit of consumption is taken away from ten people the loss in total utility is less than if ten units of consumption are taken away from one person. This is because each of the first nine units, counting back nine through one, has increasing marginal utility, while the tenth has the least utility of all. See P. SAMUELSON, ECONOMICS 427-30 (1964); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 527 (1961). However, an economist would quarrel with the facile assumption that the manufacturer defendant will as a matter of course be able to distribute his losses through price rises. See Prosser at 1120. This assumption is implicit in identifying loss spreading as a justification for strict liability, or, as Justice Peters did in *Seeley*, setting up the function of loss spreading as a barrier to distinctions between physical and economic injury. This is not to say that Justice Peter's argument is invalid—because there is no indication that it is more difficult for a manufacturer to distribute one type of loss than another—but rather to say that judicial decisions to date have not taken account of relevant economic theory.

The case of the perfect competitor: the perfect competitor is defined as one who is a mere price taker and can sell as little or as much quantity as he desires without affecting market price or without shifting his demand curve either to the left or to the right. *The perfect competitor has no power to raise prices.* However, strict liability may result in output reduction. According to the marginal cost theory of output, the perfect—or any other—competitor in determining how much quantity to produce is, during the short run, not concerned with fixed costs but rather will always push quantity to the point that price equals marginal cost. Where price equals marginal cost of the last unit of output no more quantity will be produced until price or marginal cost changes. Therefore, whether strict liability will have any effect on quantity during the short run depends upon whether the cost of the liability are fixed—constant with quantity increments—or variable. If the former is the case strict liability will have no effect on quantity during the short run, and it has already been noted that the perfect competitor has no power to raise price. However, if the cost is variable, the effect of strict liability will be to reduce output during the short run as marginal costs will reflect this cost. During the long run, if the cost of strict liability is variable it will have already been included in marginal cost and is removed from the picture, except that since less quantity is now being produced there will probably be a slight price rise in the market. However, if the cost is fixed, during the long run it will cause the perfect competitor to reach a new equilibrium at a slightly lower quantity and a slightly higher price.

This brief analysis is intended as a model to illustrate that strict liability

and thereby causes loss of profits, with the case of a machine which blows up and kills everybody.

Applying the principles outlined here to the Code, section 2-318 can be rationalized in contract terms as each of the enumerated classes of persons can be considered third party beneficiaries of the buyer's contract. The section does not codify the common law test of intent to benefit, but it is close enough to the typical third party beneficiary situation to permit the rationalization. Consent to deal with members of the buyer's household and guests can fairly be attributed to the seller. The Code's real reparture from contract theory is in sections 2-715(2)(b) and 2-719(3). The former section specifically makes damages for personal injuries recoverable in a breach of warranty action and the latter deprives the seller of the power to limit or exclude liability for personal injury if he has first not disclaimed away all warranties.

While it is settled law that personal injuries are within the contemplation of the parties rule and recoverable in breach of warranty,[24] this doctrine is the result of using the warranty action as a vehicle for imposing tort duties on the seller.[25] Consequently, with respect to personal injuries, the contemplation rule in warranty cases has become indistinguishable from the tort standard of proximate cause. The original scope of the rule, in pure contract, was quite different: it was intended to limit liability in the situation where unforeseeable consequences *in a commercial context* result from the non-performance of a contract term, as where, for example, breach of a time term causes loss of profits.[26] It is a conceptual

will not always result in immediate loss spreading through price rises. The effect of strict liability will vary in the case of the imperfect competitor and the monopolist from what has been outlined here. See Calabresi, *Some Thought on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961). See generally Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966); Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965); ANNOT., 13 A.L.R.3d 1057, 1090 (1967).

[24] *E.g.*, Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931). "[T]he law is clear that such damages for personal injury are recoverable under an ordinary warranty." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[25] *See* note 3 *supra* and materials there cited. See also Fisher, *Implied Warranties of Quality—A Tort Peg in a Contract Hole*, 11 FOOD DRUG COSM. L.J. 262 (1956); Comment, *Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract*, 114 U. PA. L. REV. 539 (1966).

[26] *See* L. SIMPSON, CONTRACTS 396 (2d Ed. 1965); McCormick, *The Contemplation Rule as a Limitation Upon Damages for Breach of Contract*,

misapplication of the rule to hold that personal injuries are, per se, within it. The inquiry is misdirected—if a purchaser buys a cigarette containing a cancer causing agent this does not necessarily mean that the seller has breached his contract.[27] If the cigarette is otherwise of good quality and meets commercial standards the buyer, arguably, got what he bargained for—a smoke—and an action on the contract for breach would satisfy neither the bargain satisfying (purpose of recovery) nor the promise performing (interest protected) rationales of the action. Whether the eventuality of the buyer contracting cancer was within the contemplation of the parties is irrelevant.[28] Suppose, however, that the buyer was on the verge of a nervous breakdown and needed a quick smoke and the seller tendered delivery past the time due. If this failure of performance causes a nervous breakdown, there is a contemplation of the parties question, that is, whether the buyer's condition was previously brought home to the seller. Whether a tort duty, running from manufacturer to consumer, should be imposed on the cigarette manufacturer, and then whether this duty has been breached, are distinct and unrelated matters. The conceptual difficulty that this analysis leads to is in saying that a personal injury-causing product can be merchantable. However, this is the result of treating the breach of warranty as a tort.

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19 MINN. L. REV. 497 (1935). Amram and Goodman, *Some Problems in the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259, 268 (1952), are critical of cases which "while talking in terms of contract liability for breach of warranty have in fact imposed a tort standard of 'proximate damage.'" Pointing to *Naumann v. Wehle Brewing Co.*, 127 Conn. 44, 5 A.2d 181 (1940), where a store owner recovered for personal injuries when a bottle of ale exploded, they say, "Her action based on an alleged breach of warranty that the ale was of merchantable quality, though it could hardly be argued that personal injuries to a retail merchant were a foreseeable consequence of a breach of this warranty which is designed to protect commercial interests." *Id.* at 270. See generally L. FRUMER and M. FRIEDMAN, PRODUCTS LIABILITY § 16.01(2) (1967).

[27] *See* Note, 26 ALBANY L. REV. 354, 359 (1962). *But see* Green v. American Tobacco Co., 154 So.2d 169 (Fla. 1963).

[28] It is irrelevant where the buyer is enforcing a *contract* against the seller. If, for example, the buyer purchases weed killer which works—it kills weeds—the seller has fully performed his contract. If the weed killer also causes the buyer to develop a rash the question is whether the seller ought to be held liable for marketing a dangerous product, not whether the injury was within the contemplation of the parties. The contemplation rule remains viable, however, in contract actions, as where, for example, the contemplation of the parties must be examined to determine whether the seller has given a warranty of fitness for a particular purpose. *See* UNIFORM COMMERCIAL CODE § 2-315.

Similarly, depriving the seller of the power to limit or exclude liability for personal injuries without first disclaiming all warranties is a departure from contract theory. While it is true that the Code permits disclaimer of warranties, it is highly unlikely that a seller interested in the good will or trade name value of his product will do so in the conspicuous manner which the Code requires. Since only non-fault liability—common law tort and Code warranty—is being considered the public policy against limitations of negligence liability is not present. In this context unconscionability has traditionally been limited to two situations: where one party because of superior bargaining power is able to impose remedy depriving limitations of liability on the other (adhesion contracts), and where fine print, or ambiguous or otherwise "shady" disclaimers have been used. Both of these elements are illustrated in *Henningsen v. Bloomfield Motors, Inc.*,[29] where an industry wide standard form contract disclaimed all implied warranties and limited the seller's liability to cost of repair of the automobiles sold. The contract was held unconscionable. However, limitations of non-fault liability and disclaimers of warranties have not traditionally been treated as unconscionable *per se*.[30]

Apart from the theoretical problems under discussion, the perpetuation in the Code of the hybrid nature of the sales warranty can have the effect of retarding the judicial development of other consumer remedies. In *Hochgertel v. Canada Dry Corp.*,[31] the first major case construing section 2-318, the Pennsylvania Supreme Court gave restrictive effect to the section on the principle *enumeratio unius est exclusio alterius*. The court reasoned that since the plaintiff, an employee of a purchaser, was not a purchaser nor one of the classes of persons enumerated in section 2-318, "it is not for us to legislate or by interpretation to add to legislation matters which the legislature saw fit not to include."[32] On the ground

[29] 32 N.J. 358, 161 A.2d 69 (1960).

[30] *See generally* Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 BOSTON COL. IND. and COM. L. REV. 285 (1963).

[31] 409 Pa. 610, 187 A.2d 575 (1963).

[32] 409 Pa. 614, 187 A.2d 577 (1963). Three years later the Pennsylvania court adopted § 402A of the Restatement of Torts verbatim. Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). See, for cases following *Hochgertel*, Atlas Aluminum Corp. v. Borden Chemical Corp., 233 F. Supp. 53 (E.D. Pa. 1964); Driver v. F. A. Mitchell Co., 35 F.R.D. 226 (E.D. Pa. 1964); Wilson v. American Chain & Cable Co., 216 F. Supp. 32 (E.D. Pa. 1963). *Cf.* Phares v. Dandia Lumber Co., 62 N.M. 90, 305 P.2d 367, 370 (1957). Note that a judicial hat hanging peg—to avoid the Hochgertel result—exists in section 1-103 of the Code. See note 11 *supra*.

that the section was too restrictive it was not enacted in California and Utah.[33] To the argument that the official comments state the overall neutrality of the Code on the issue of privity, the Pennsylvania court answered that the legislature did not enact the comments. While in fairness it should be said that courts construing the Code tend to refer to the comments, the doubtful status of the comments—they are not law nor are they legislative history[34]—presents a problem in jurisdictions where legislative histories may shed no light on the legislative purpose behind section 2-318.[35] The pre-emption argument, if it is relevant to *Hochgertel*, is probably neutral as to the *Hochgertel* result—the fact that the Code pre-empts sales remedies does not indicate one way or another whether a court should religiously restrict the *scope* of the Code remedies. What the pre-emption argument militates against is the total by-passing of the Code remedies in favor of a common law remedy.[36] This argument,

[33] *See* CALIFORNIA SENATE FACT-FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, PART I, THE UNIFORM COMMERCIAL CODE 457-58 (1959-61): Comment, *Implied Warranty, Strict Tort Liability for Personal Injuries, And the Uniform Commercial Code § 2-318*, 13 KAN. L. REV. 411 (1965). In addition, non-uniform versions of section 2-318 have been enacted in ten states. REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 13 (1967). This report proposes two alternative amendments for states dissatisfied with section 2-318. Alternative B states that "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Alternative C states that "A seller's warranty whether express or implied extends to any person who may be reasonably be expected to use, consume or be affected by the goods and is injured by breach of warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends." The accompanying proposed amendments to the official comments to section 2-318 state generally that the purpose of the proposals is to extend the protection of the Code warranties consistent with case law liberalization of the privity rules. Id. at 14.

[34] See E. FARNSWORTH, NEGOTIABLE INSTRUMENTS 7-8 (2d ed. 1965). In *Henry v. John W. Eshelman & Sons*, 209 A.2d 46 (R.I. 1965), the Rhode Island Supreme Court interpreted the official comment to section 2-318 to mean that the legislature had left it to the courts to determine whether the privity rules ought to be abrogated in warranty actions. This approach seems to equate the comments with legislative history, which they are not.

[35] However, just as it can be asked whether the comments reflect legislative intent, it can also be asked whether the intention to pre-empt which Hawkland attributes to the drafters was adopted by the legislature in enacting the Code. The difference, however, is that there is statutory authority for the pre-emption argument. See UNIFORM COMMERCIAL CODE §§ 1-103, 1-104. *See* note 11 *supra*.

[36] *But see* Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966), and

however, did not trouble the Pennsylvania court—three years after *Hochgertel*, in *Webb v. Zern*,[37] it adopted section 402A of the Restatement of Torts as a rule of law in products liability cases.

Beyond the problems so far discussed, there are other "intricacies of sales law" relevant to warranty relief which have (necessarily) been included in the Code. Principally these are the sale of goods requirement and the notice giving requirement.

The Code requires that all defendants in breach of warranty actions shall be sellers of goods.[38] Section 2-108 defines a sale as the "passing of title from the seller to the buyer for a price." A literal application of the Code terms precludes the possibility of successful warranty actions against the sellers of services, bailors and lessors. While the word "seller" sometimes creeps into strict tort liability formulations,[39] the tort liability principle is not burdened with a background of sales case law interpretation of the words, "sale," "seller" and "goods." Further, the judicial doctrine of strict tort liability is not circumscribed by the jurisprudential arguments which may influence the construction of the Code.

In *Cintrone v. Hertz Leasing & Rental Service*,[40] the New Jersey Supreme Court extended strict tort liability to the leasing of motor vehicles. In doing so, the court made passing reference[41] to the official comment to section 2-313 which states the intention of the drafters that the Code provisions were not intended to restrict case law application of the warranties to non-sale transactions. The case illustrates that it is conceptually a simple matter to extend tort liability to non-sale transactions. The word "seller" in the Code does not have to be tortured into meaning "lessor," and the imposition of liability can be frankly made on the basis of policy.

Section 2-314 specifically provides that the serving for value of food or drink for consumption either on the premises or elsewhere is a sale. Beyond this provision, the Code leaves unresolved the problems arising from the distinction between the sale of goods

Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965). In both of these cases the court felt that section 2-318 was inapplicable because strict liability in tort was the basis for relief. These cases also ignored the preemption argument.

[37] 422 Pa. 424, 220 A.2d 853 (1966).

[38] *See* note 8 *supra.*

[39] It is used in SECTION 402A OF THE RESTATEMENT OF TORTS. See note 16 *supra.*

[40] 45 N.J. 434, 212 A.2d 769 (1965).

[41] The adoption of the Code post-dated the facts of the case.

and the sale of services. In *Epstein v. Giannattasio*,[42] a Connecticut court held that a beauty parlor treatment was a sale of services and there could be no breach of the Code warranties.

The notice giving requirement of the Code should not prove to be burdensome to consumer recovery for breach of the Code warranties. While the requirement of giving notice of breach within a reasonable time is usually pointed out as one of the principle differences between tort and warranty liability, the notice giving requirement is not that much more exacting than the requirement common to both actions of bringing suit within the time provided by the statute of limitations. In *Pritchard v. Liggett & Myers Tobacco Co.*,[43] a cigarette smoker gave notice to the manufacturer ten months after the smoker's lung was removed that he was electing to treat the purchase of cigarettes allegedly containing cancer causing agents as a breach of warranty. After having been persuaded that the delayed notice did not prejudice the manufacturer, the court held that this notice was not insufficient as a matter of law. In a non-Code case, *Greenman v. Yuba Power Products, Inc.*,[44] the California court dispensed with the notice requirement altogether in an action for breach of warranty where personal injury damages had been alleged. The court held that the seller's liability was properly in tort and therefore the sales law concept of notice had no application. The distinction is logical. The function of giving notice in a commercial context is to permit the seller to repair whatever the breach has caused. In a personal injury context this is impossible. However, the Code does require notice of breach[45] and where the Code warranty remedies are used to recover personal injury damages the *Greenman* result cannot follow.

Section 2-725(1) provides that an action for breach of warranty must be brought within four years after the action has accrued. Further, section 2-725(2) indicates that an action accrues when the breach occurs, upon tender of delivery of the defective product, "regardless of the aggrieved party's lack of knowledge of the breach." The import of this section is that if an injury occurs more than four years after tender of delivery the buyer cannot

[42] 25 Conn. Supp. 109, 197 A.2d 342 (1963). See generally Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957), and cases there cited; 43 N.C.L. REV. 1019 (1965).

[43] 295 F.2d 292 (3d Cir. 1961).

[44] 27 Cal. Rptr. 697, 59 Cal.2d 57, 377 P.2d 897 (1963).

[45] Uniform Commercial Code § 2-607(3)(a).

commence an action. The problem raised by this section is that most states have tort statutes shorter than four years, which, in view of the hybrid nature of the warranty,[46] may result in interesting categorizations of the liability which a plaintiff is seeking to enforce. There has been no pattern of repeal or modification of existing statutes of limitations upon adoption of the Code.[47]

Conclusion

No matter how liberally the Code warranties are construed they remain circumscribed by the "intricacies of the law of sales."[48] Notice, disclaimers, etc., are the children of sales law and their parentage is a judicial bias in favor of protecting struggling nineteenth century industry vis-a-vis consumer plaintiffs. Serious jurisprudential problems arise, furthermore, when the Code sales law is by-passed in favor of parallel common law tort remedies. If *Hotchgertel*[49] proves to be a prototype of judicial reasoning under the Code, the ultimate effect of the sections under discussion may be to retard the growth of non-fault tort remedies. Further, the hybrid mixture of contract and tort law in the sales warranty results in hazy, poorly reasoned conceptualizations of the basis of liability in products liability cases.[50]

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[46] *See* Fisher, *Implied Warranties of Quality—A Tort Peg in a Contract Hole*, 11 FOOD DRUG COSM. L.J. 262 (1956); Comment, *Manufacturer's Liability to Remote Purchasers For "Economic Loss" Damages—Tort or Contract?* 114 U. PA. L. REV. 539 (1966).

[47] *See* Freedman, *Products Liability Under the Uniform Commercial Code*, 10 PRAC. LAW., April 1964, at 49, 64.

[48] More differences flow from affixing the label "breach of contract" to the plaintiff's action than the ones under discussion. The contract action will not normally permit recovery for wrongful death. The contract action may fail for uncertainty, illegality, want of consideration, or because of the statute of frauds or the parole evidence rule, or because of infancy or discharge in bankruptcy. Different conflicts and joinder rules may apply, and the plaintiff may only be able to bring a single action for multiple breaches. See W. PROSSER, TORTS 641-2 (3d ed. 1964) and cases there cited. *See, e.g.*, Williams v. Connolly, 227 F. Supp. 539, 542 (D. Minn. 1964); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936).

[49] 409 Pa. 610, 187 A.2d 575 (1963). Frumer and Friedman have analyzed the possible consequences of section 2-318 and conclude that it should not prove to be restrictive. L. FRUMER and M. FRIEDMAN, PRODUCTS LIABILITY § 16.04(3) (1967). But see Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281 (1961); 13 KAN. L. REV. 411 (1965); 31 BROOKLYN L. REV. 367 (1965).

[50] [W]e hold the bottler, of a Pepsi-Cola which the non-privity plaintiff purchased, by advertising and sales promotion addressed to the consumer, induced her to 'Come Alive' and that she was 'in

It has been pointed out that it is perfectly consistent to insist on privity in contract cases and at the same time impose non-fault tort liability in the absence of privity on the basis of other policies.[51] Further, the existence of contractual remedies, where there is manufacturer—consumer privity, does not bar tort remedies in the case of tortuous conduct. Prosser makes the distinction that when the defendant's misfeasance goes beyond breaching the terms of his contract, then the proper basis of liability is in tort.[52]

It has already been noted that the inclusion of personal injuries within the contemplation rule is the consequence of imposing seller tort duties through the sales warranty.[53] Sections 2-715(2)(b) and 2-719(3) perpetuate this. The inclusion of damages for personal injury as a normal element of recovery in a contract action and the prohibition against limitations of (non-fault) liability for personal injury commingle two distinct legal relationships—that between two parties to a contract and that between a tortfeasor and his victim. If there is something to be said for conceptual clarity in the law, these two sections do not say it.[54]

The repeal of sections 2-318, 2-715(2)(b) and 2-719(3) is suggested. Repeal of these sections would leave the privity doctrine viable in warranty actions, would limit recovery to the loss of the commercial bargain and would permit the seller to limit or exclude non-fault personal injury liability. The Code warranty protection would then be limited to implementing the traditional promise performing and bargain satisfying rationales of the breach of contract action. As Prosser argues and as several courts have

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the Pepsi Generation.' . . . The evidence in this case was sufficient to go to the jury on the theory implied warranty resulting from the manner in which the Pepsi-Cola was advertised and traveled from the bottler to the plaintiff.

Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967).

"Then you should say what you mean," the March Hare went on. "I do," Alice hastily replied; "at least I mean what I say—that's the same thing you know." "Not the same thing a bit!" said the Hatter. "Why you might just as well say that 'I see what I eat' is the same as 'I eat what I see'!"

LEWIS CARROLL, ALICE IN WONDERLAND.

[51] *See* Byrd and Dobbs, *Torts, Survey of North Carolina Case Law*, 43 N.C.L. REV. 906, 937 (1965).

[52] W. PROSSER, TORTS 641 (3d ed. 1964).

[53] *See* note 3 and materials there cited.

[54] UNIFORM COMMERCIAL CODE §§ 1-102(2) and 1-102(2)(a) state: "Underlying purposes and policies of this Act are (a) to *simplify, clarify* and *modernize* the law governing commercial transactions." (Emphasis added).

concluded, the breach of warranty action is an unsuitable vehicle for tort recovery.[55] Yet at the same time it remains a viable instrument for protecting the integrity of the commercial bargain and affording relief in the case of breach.

The suggestions made presuppose the continuing rapid development of the remedy of strict tort liability and are not intended to affect the problem of unconscionable contracts.[56]

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[55] *See* Prosser 1127. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Ca. Rptr. 697 (1963).

[56] *See Kessler, Contracts of Adhesion, Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).