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NOTES

Antitrust—Tying Arrangements—A Re-examination of the Per Se Rule and Identification of Tying Arrangements

It is axiomatic to antitrust law that "tying arrangements serve hardly any purpose beyond the suppression of competition."[1] Despite the apparent simplicity of this statement, the problems confronted in identifying tying arrangements and in establishing standards for measuring anticompetitiveness, once a tie-in has been identified, have confounded the courts[2] and antitrust authorities.[3]

Tying arrangements generally have involved a situation in which a *single seller* markets two *separate products* (or services) together, with one, the tying item, acting as a lever in the selling of the other, the tied product.[4] As other forms of economic leverage, tying arrangements have been treated by the courts as inherently anticompetitive[5] because

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[1] Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949). For a succinct introduction to the law of tying arrangements, see E. KINTNER, AN ANTITRUST PRIMER 47-58 (1964).

[2] Identification of tying arrangement: *Compare* Carvel Corp., TRADE REG. REP. ¶ 17,298 (FTC 1965) (defendant's franchise agreements not regarded as tying arrangements because the trademark license could not constitute a "tying product") *with* Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964) (trademark license could conceptually constitute a "tying product"). *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (advertising sold by defendant for both morning and evening newspapers only a "single product" and, therefore, no tying arrangement found), and *compare*, Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965) (AP's Ohio regional wire circuit held separate and distinct from other AP circuits and AP's argument that the "news" was the only product involved in the agreement rejected).
Suppression of competition: *Compare* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) *with* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[3] Identification of tying arrangement: *Compare* Turner, *The Validity of Tying Arrangements under the Antitrust Laws*, 72 HARV. L. REV. 50, 62-64 (1958) *with* Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 20-29 (1957).
Suppression of competition: *Compare* Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88, 96-126 *with* Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal*, 29 OHIO ST. L.J. 539, 539-54 (1968).

[4] Austin, *supra* note 3, at 89. See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); *cf.* Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965).

[5] *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947). Despite the condemnation of tying arrangements, it is clear that they are not always anticompetitive in nature. See Bowman, *supra* note 3, at 25-29.

the seller's use of economic power in an extraneous market to bring about sales in another market, in which his power may be slight, introduces an artificial element into the competition in that other market. Buyers, who may want to purchase only the tying product from the seller, are forced to purchase, as a package, items that they might rather obtain separately.[6] Thus, they must forego their free choice between competing products. Competitors of the seller in the tied market are faced with an anomalous situation in which they are forced to compete on a basis entirely divorced from the quality or price of the goods that they offer.[7] Because of their smaller size, they may be in no position to offer the similar package; or if they are able to offer the same package, doing so may divert their efforts at improving their single product.

Obviously, the successful tying arrangement has deleterious effects on competition. Thus, the Supreme Court has promulgated a per se rule[8] for determining if a tying arrangement has sufficient impact on competition to bring the seller within the sanctions of sections one[9] and two[10] of the Sherman Act, section three[11] of the Clayton Act, or section five[12] of the Federal Trade Commission Act. At least with respect to actions under the Sherman or FTC Acts,[13] that rule has been stated as follows: "They [tying arrangements] are unreasonable in and of themselves whenever a party has *sufficient economic power* with respect to the tying product to appreciably restrain free competition in the market for the tied product and a *'not insubstantial'* amount of interstate commerce

[6] See Austin, *supra* note 3, at 99.

[7] *See* Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW. U.L. REV. 626, 627-38 (1965).

[8] Actually, the "per se rule" might more accurately be described as "per se rules"; historically the "rule" has involved different elements depending upon whether the Sherman or Clayton Act was the basis of the action. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953). See also Mattson, *Condition that the Lessee or Purchaser Shall Not Deal in the Goods of a Competitor*, in AN ANTITRUST HANDBOOK 181-88 (1958).

[9] 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

[10] 26 Stat. 209 (1890), 15 U.S.C. § 2 (1958).

[11] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1952).

[12] 38 Stat. 719 (1914), 15 U.S.C. § 45 (1958).

[13] Section 1 of the Sherman Act is subsumed by section 5 of the FTC Act (prohibition of unfair methods of competition). See Austin, *supra* note 3, at 89; Turner, *supra* note 3, at 58 n.33. Thus, for purposes of the material examined in this note, it may be assumed that reference to application of the Sherman Act also includes application of the FTC Act, section 5. In fact, there is some authority for the proposition that section 5 is broader in application than section 1, under a "quasi-tying" theory (see Day, *supra* note 3, at 555-56) or under an "incipiency" doctrine (*see* Note, *Use of Section 5 of the FTC Act to Reach "Incipient" Violations of Section 3 of the Clayton Act*, 62 NW. U.L. REV. 77, 79-88 (1967)).

is affected."[14] As is often the case with a doctrinal approach, however, establishing this qualified per se rule has done little to alleviate the problems encountered by the Court in dealing with tying arrangements. A recent case, *Fortner Enterprises, Inc. v. United States Steel Corp.*,[15] emphasizes the difficulty that courts have in identifying tying arrangements and applying the per se rule. Consequently, the decision also serves to point out the deficiencies in the established doctrine and, thereby, to redirect inquiry into the actual economic problems in the tie-in area.

Fortner involved an action by a private party seeking treble damages and an injunction for violations of sections one and two of the Sherman Act.[16] The plaintiff, Fortner Enterprises, alleged that the defendant, U. S. Steel, had instigated an illegal tying arrangement whereby the defendant through its wholly owned credit corporation, U. S. Steel Homes Credit Corporation, required the plaintiff to purchase unreasonably high-priced prefabricated houses, manufactured by the defendant, as a prerequisite for obtaining low-cost, one-hundred-per-cent financing for the purchase and development of land.[17] The agreement required the plaintiff to erect one of the prefabricated houses on each of the lots purchased with the proceeds of the loan.[18]

The district court entered summary judgment for the defendant,[19] and held that although the agreement was a tying arrangement, the plaintiff had not alleged sufficient facts to establish the prerequisites for application of the per se rule, "namely sufficient market power over the tying product [credit] and foreclosure of a substantial volume of commerce in the tied product [houses]."[20] The Court of Appeals for the Sixth Circuit affirmed without opinion.[21] The Supreme Court on certiorari[22] reversed and remanded the action for trial on the merits. Justice Black spoke for the five member majority; Justices White and Fortas wrote separate dissents. The Court held that "the conduct challenged . . . involves a tying arrangement of the traditional kind"[23] and that the plaintiff had made sufficient allegations to go to trial on the issue

[14] Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958) (emphasis added), *citing* International Salt Co. v. United States, 332 U.S. 392 (1947).
[15] 394 U.S. 495 (1969).
[16] *Id.* at 496.
[17] *Id.* at 497.
[18] *Id.*
[19] See *id.*
[20] *Id.* at 497-98.
[21] *Id.* at 498.
[22] 393 U.S. 820 (1968).
[23] 394 U.S. at 498.

of unlawful suppression of competition under both the general standards of the Sherman Act[24] and the per se rule.[25]

The district court and a majority of the Supreme Court were in agreement that the defendant's conduct could be identified as a tying arrangement. The dissenters, however, were by no means convinced. Justice Fortas, in particular, based his dissent on his conviction that there was no tying arrangement involved in the case.

Whether the credit and houses constituted two separate products was Justice Fortas' chief concern.[26] In any action allegedly concerning a tie-in, the court's determination of what constitutes the lawful commercial package has the practical effect of molding competition.[27] For example, if the Court in *Fortner* had established, as Justice Fortas suggested, that the credit and homes were a single unit, U. S. Steel's competitors, in order to compete, would either have had to produce a similar package or else manipulate the sale of homes in such a manner as to entice buyers out of the market for the combined credit-homes package.[28] Without examining the possible effects of a single-product determination, Justice Fortas concluded that the agreement in question was ". . . a sale of a single product with the incidental provision of financing. It [was] not a sale of one product on condition that the buyer . . . [would] buy the other product exclusively from the seller."[29] He argued that the facts did not support the conclusion of the majority that the financing was for the purchase and development of land. Rather, he felt that "[t]he financing [was] solely and entirely ancillary to [the defendant's] sale of houses."[30] His dissent also emphasized the economic

[24] *Id.* at 500.

[25] *Id.* at 500-01.

[26] The problem of the "single seller" could have arisen in *Fortner* since U.S. Steel and the credit corporation were separate legal entities, but the Court had held in previous cases that such a subterfuge was not a defense. *See* Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); Carbice Corp. of America v. American Patents Dev. Corp., 283 U.S. 27 (1931); *cf.* Perma Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968). Obviously, if the Court were to allow a seller to incorporate subsidiaries to avoid the consequences of imposing a tie-in, the result would be tantamount to repealing all legal prohibitions against tying arrangements. In fact, Justice Black used the separateness of the defendants as an argument for finding separate products. See 314 U.S. at 507.

[27] *See* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[28] See Pearson, *Tying Arrangements and Antitrust Policy*, 60 Nw. U.L. REV. 626, 627 (1965); Turner, *supra* note 3, at 62-64.

[29] 394 U.S. at 522 (Fortas, J., dissenting).

[30] *Id.; see* Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962) (developing the concept of the reasonably ancillary restriction on a license as a valid method of protecting trademark rights). *See also* Carvel Corp.,

factors[31] that might have been involved in the case and questioned whether there would be any opportunity for the defendant at trial to present justification for the arrangement.[32]

Justice White alluded to the issue of identification of the tying arrangement when he characterized the majority's logic as "dictat[ing] the same result if unusually attractive credit terms had been offered simply for the purchase of the houses themselves."[33] One possible argument is that allegedly separate products, if sold in fixed proportions, are in fact often economically interdependent and, thus, merely portions of the same product.[34] Justice Black, however, made clear that he could not view the defendant's arrangement as a single product:

> Sales such as [those generally made on credit] are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation, and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased. Whatever the standards for determining exactly when a transaction involves only a "single product," we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product.[35]

The importance of a finding that an alleged tying arrangement involves only a single product is obvious under the doctrinal approach; conceptually there can be no way for a product effectively to act as a "lever" for the sale of itself. More precisely, the per se rule rests upon the premise that tie-ins involve an extension of power into a new or second market rather than merely an expansion of power within a market in which the defendant already holds sway.[36] In reality, however, the

TRADE REG. REP. ¶ 17,298 (FTC 1965); *cf.* Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964).

[31] 394 U.S. 523-25 (Fortas, J., dissenting).

[32] *Id.* at 523-24 n. (Fortas, J., dissenting).

[33] *Id.* at 511 (White, J., dissenting). It is possible so narrowly to state the holding in *Fortner* that it would have meaning only when credit was offered for the financing of *land* with houses tied thereto. So stated, this holding would add nothing to the law of tying arrangements enunciated in *Northern Pacific*; and U.S. Steel could avoid the holding simply by giving low-cost, one-hundred-per-cent financing on the homes and not the land. However, as Justice White suggests, the majority opinion does seem to apply to credit, regardless of its form, so long as it is used in an anti-competitive manner.

[34] *See* Bowman, *supra* note 3, at 25-27; Turner, *supra* note 3, at 67-72.

[35] 394 U.S. at 507 (footnote omitted).

[36] Bowman, *supra* note 3, at 19-20. Professor Bowman suggests that "leverage" is an ambiguous term that should be restricted to cases involving extension of

cases are replete with examples of conduct that the courts readily could define as involving either a single product or two separate ones.[37] Particularly in those cases involving determination of the appropriate *unit* of sale for a given product are the courts faced with definitional alternatives.[38] In other cases, a court may have to determine whether a particular item may be deemed so ancillary to the alleged tying product as to form a part of a single product.[39] Thus, the courts are often faced with a dilemma; and doctrines, definitions, and rules provide little, if any, aid.

If a defendant can offer some economic justification for his alleged unlawful conduct, it is advantageous for him to offer it in his argument on the issue of tie-in identification.[40] This approach may provide courts the opportunity to recognize the defendant's policy argument and to apply a balancing test to the rights of the buyer, seller, and the seller's competitors without entering the linguistic maze of the per se rule. Justifications that may prove palatable to the courts include the following: economies in production and marketing of the total package;[41] the need to maintain the "good will' established for the primary product;[42] price competition within a "hard" market for the tied product;[43] tech-

power into a new or second market. See Day, *supra* note 3, at 539-41. Professor Day distinguishes between tying arrangements and exclusive dealing on the "second market" basis.

[37] *See, e.g.*, United States v. Loew's, Inc., 371 U.S. 38 (1962).

[38] See Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); *See also* Burstein, *A Theory of Full-Line Forcing*, 55 NW. U.L. REV. 62 (1960).

[39] See cases cited note 30 *supra*.

[40] Despite the fact that the majority had no trouble labelling the tying arrangement in *Fortner*, the identification issue presents an opportunity for the defendant to offer justification, unlike the conclusory procedure involved in application of the per se rule. *Cf.* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); Note, *Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives*, 18 STAN. L. REV. 457 (1966).

[41] See Bowman, *supra* note 3, at 29; Turner, *supra* note 3, at 66-67. Of course there is the concomitant requirement that the economies in cost result in a lower price for the package. See Pearson, *supra* note 28, at 627. *See* Goodyear Tire & Rubber Co. v. FTC, 381 U.S. 357 (1965).

[42] *Compare* International Business Mach. Corp. v. United States, 298 U.S. 131 (1936) *with* FTC v. Sinclair Refining Co., 261 U.S. 463 (1923). *See* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 600-01 (3d ed. 1968). *But see* Austin, *supra* note 3, at 123.

[43] *See* 394 U.S. at 519 (White, J., dissenting). A "hard" market exists when there are only a few sellers in the market, all of whom are powerful, and there is great resistance to price competition among them. (*E.g.*, a price cut by any one of the sellers will be matched by the others.) In such a market, competion must take other forms in order to be effective. The "hard" market consideration should have been particularly relevant in *Fortner* since there is a likelihood of an oligopolistic market in prefabricated steel houses. Thus, if U.S. Steel's only competitors were the few other giants of the steel industry, it is probable that the credit offered

nological interdependence of the products;[44] custom and usage within the markets of both products;[45] patterns of consumer demand;[46] and, of primary importance, the availability and feasibility of similar techniques for the seller's competitors in the tied market.[47]

The second major issue in *Fortner*, the application of the per se rule[48] under the facts (*i.e.*, the examination of the anticompetitive effect of the defendant's conduct, given its identification as a tying arrangement), was the focal point of both the majority opinion and Justice White's dissent. The doctrines established by the Court in prior cases[49] placed two conditions on the application of the per se rule in "nonpatent, Sherman Act"[50] cases: sufficient economic power of the seller in the tying product's market and a "not insubstantial" amount of commerce affected in the tied market. These two conditions had been set forth as a means of testing the impact of a tying arrangement on competition. Without any impact on the tied market, the tying arrangement could hardly be called anticompetitive because it would be obvious that buyers were not foregoing their freedom of choice among products and competitors were not losing a substantial market. These conditions amount to a cause and effect test of impact: the defendant's power in the tying-product market representing the cause and the amount of commerce affected in the tied-product market indicating the effect.

It is arguable after *Fortner*, as indeed it was arguable after *Northern Pacific Railway v. United States*[51] and *United States v. Loew's, Inc.*,[52] that the Court has done away with the requirement of "sufficient economic power." Justice Black's opinion provides language to support almost any

by U.S. Steel was competition and in no way prejudicial to its competitors with equally "deep pockets." It seems almost incredible that none of the opinions in *Fortner* posed the question of who constituted defendant's competition in the housing market.

[44] Bowman, *supra* note 3, at 27-29.

[45] Pearson, *supra* note 28, at 627-31.

[46] *Id.* at 631, *interpreting* Crawford Transp. Co. v. Chrysler Corp., 235 F. Supp. 751 (E.D. Ky. 1962), *aff'd*, 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

[47] This issue actually forms the basis for inquiry in the tying-arrangements area. See Pearson, *supra* note 28, at 627-31. For an examination of "justifications" in general, see Note, *Business Justification for Tying Agreements: A Retreat from the Per Se Doctrine*, 17 W. RESERVE L. REV. 257 (1965).

[48] See Turner, *supra* note 3, at 64-75, for an examination of the positive attributes of a per se rule and an explication of when it should apply.

[49] See Times-Picayune Co. v. United States, 345 U.S. 594 (1953).

[50] See Turner, *supra* note 3, at 50-55.

[51] 356 U.S. 1 (1958). See Day, *supra* note 3, at 545.

[52] 371 U.S. 38 (1962).

conclusion on the issue. What is still clear after *Fortner* is that the defendant need not dominate the tying market.[53] The effect that the "distinctiveness" or "uniqueness" of the tying product has on the issue of the defendant's power is very unclear. Justice Black quoted with approval the dictum from the *Loew's* case: "[T]he crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."[54] However, later in his opinion, Black offered the following remark: "We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.' "[55] He attempted to resolve this apparent contradiction by establishing different classifications of "uniqueness."[56]

Despite the battle of words in the opinion, one clear principle emerges: when the seller establishes an appreciable number of tying arrangements, "sufficient economic power" in the tying product is conclusively presumed.[57] Obviously this principle is based on the number of buyers that a defendant can attract; thus, it is apparent that Justice Black has decreased the possibility for large corporate defendants to avoid the consequences of the per se rule once a tying arrangement has been found.

Similarly, the principle enunciated by *Fortner* on the issue of the amount of commerce necessary for application of the per se rule effectively prejudices large defendants attempting to tie products. What amounts to "not insubstantial" is determined by looking at the total dollar value of the tied products for all similar tying arrangements that the defendant has initiated, regardless of whether the action may be (as in *Fortner*) a private one between the seller and only one buyer. This statement of the "quantitative substantiality" test is quite similar to that previously followed by the Court.[58] However, *Fortner* alters the traditional test in two important ways. First, it dilutes the requirement for a substantial dollar amount by implying that a figure of two hundred thousand dollars (less than half the amount found to be "not insubstantial" in

[53] 394 U.S. at 502-03.

[54] *Id.* at 503. The confusion arising on the role of "distinctiveness" is probably due to language derived from cases involving a *patented* tying product. *See* Turner, *supra* note 3, at 50-55.

[55] 394 U.S. at 505.

[56] *Id.* at 505 n.2.

[57] *See* 394 U.S. at 504. *See also* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (sufficient economic power shown by the "host" of tying agreements the defendant had entered).

[58] *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). *See also* Day, *supra* note 3, at 540-43.

International Salt Co. v. United States,[59] which had originated the per se doctrine in 1947) would be enough[60] and by explicitly holding that an individual plaintiff in a treble-damages action can lump together all the values of tied products for all arrangements similar to his own.[61] Second, *Fortner* removes any consideration, in the majority of cases,[62] of the percentage of the "relevant market" for the tied product:

> The requirement that a "not insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie. . . . [N]ormally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely "de minimis," is foreclosed to competitors by the tie. . . .[63]

Thus, given a reduction in dollar-volume requirement and an expansion of market considerations, one inevitable result of *Fortner* would seem to be an increase in the size of the class of potential defendants in tie-in cases, with the large nationwide corporation being the most susceptible to suit. Perhaps the Court was heeding the words of Justice Cardozo that ". . . size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."[64]

The significance of *Fortner* with respect to the per se rule is obviously quite great. It serves to abolish almost completely the distinctions in application of the Clayton and Sherman Acts to tying arrangement cases.[65] The "missing link" in cases under the Clayton Act had been that the tie-ins of "services" were not subject to the proscriptions of section three while tie-ins of "products" were.[66] This fact would almost

[59] 332 U.S. 392 (1947) (five hundred thousand dollars in contracts a "not insubstantial" amount of commerce).

[60] 394 U.S. at 502 (dictum).

[61] *Id.*

[62] *Id.* at 501 ("relevant market" may be important in cases involving a small dollar volume of commerce if the defendant's sales represented a large percentage of the market).

[63] *Id.* This holding may have been derived from *Northern Pacific*, see Day, *supra* note 3, at 544-45. However, the validity of that precedent had become questionable, see Austin, *supra* note 3, at 88-95, *commenting on* the *Atlantic Refining* cases: Goodyear Tire & Rubber Co. v. FTC, 381 U.S. 357 (1965); Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964); Goodyear Tire & Rubber Co., 58 F.T.C. 309 (1961).

[64] United States v. Swift & Co., 286 U.S. 106, 116 (1932) (dictum).

[65] See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953). See also Turner, *supra* note 3, at 50-55.

[66] Mattson, *Condition that the Lessee or Purchaser Shall Not Deal in the Goods of a Competitor*, in AN ANTITRUST HANDBOOK 181-88 (1958).

undoubtedly have forced a different result in *Fortner* if the action had been brought under section three.[67] Since there is no economic distinction between goods and services, experts have universally condemned the artificial distinction in the application of the per se rule, established by *Times-Picayune Publishing Co. v. United States*,[68] for actions involving products under the Clayton Act and those involving services, necessarily under the Sherman Act.[69] The distinction resulted in the anomalous situation wherein actions against the tie-ins of services placed a heavier burden of proof on the plaintiff than that required for actions against tie-ins of products.

Fortner also makes clear the presumption against large sellers in tying arrangement cases. It now seems doubtful that these sellers will be able to offer any justification for their action sufficient to prevent application of the per se rule once the tying arrangement has been identified.[70] This conclusion is emphasized by the fact that both the "power" and "amount of commerce" requirements are, after *Fortner*, quantitatatively measured. The "number of buyers" test for power and the "dollar volume" test for amount of commerce may best be viewed as twin corollaries of a rule that completely forecloses the tie-in as a marketing technique for large sellers regardless of its competitive effect.

After examining the majority's careful explication of doctrine in *Fortner*, one might seriously ask (as, indeed, Justice White's dissent seems to ask in part)[71] the following question: Although there are now standards established on all fronts, how do these standards relate to

[67] See United States v. Investors Diversified Serv., 102 F. Supp. 645 (D. Minn. 1951) ("credit" not a "commodity" under the Clayton Act). See 52 COLUM. L. REV. 1066 (1952).

[68] 345 U.S. 594 (1953). The Court established the following distinction for application of the per se rule under the Clayton and Sherman Acts:

> When the seller enjoys a monopolistic position in the market for the "tying" product, *or* if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se*, to foreclose competitors from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met.

Id. at 608-09.

[69] *See, e.g.*, Turner, *supra* note 3, at 58.

[70] *Cf.* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); Note, *Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives*, 18 STAN. L. REV. 457 (1966); Note, *Business Justification for Tying Agreements: A Retreat from the Per Se Doctrine*, 17 W. RESERVE L. REV. 257 (1965).

[71] 394 U.S. at 514-18 (White, J., dissenting).

anticompetitiveness, and what is the actual policy and factual basis for finding the defendant's conduct unlawful? The most blatant answer to this question is that once the standards are fulfilled, anticompetitiveness exists. Obviously, this is an answer based on the sheer power of the courts and made without any conscious attempt to balance interests; but it helps to underscore the conclusory nature of the per se rule as applied in *Fortner*.[72]

The answer that the Court would undoubtedly give is that these standards act as unerring indicia of the foreclosure of a substantial amount of business to the defendant's competitors in the tied product and that this foreclosure, at the hands of large business, is usually founded on anticompetitive design. Justice Black might also add that, even if there be no anticompetitive design and although there exists justification for the arrangement, this *method* of competition is so inherently destructive of competition by other, usually smaller, businesses in the tied market that the Court is justified in making the defendant find another method of competition.[73] However, the very problem with this approach is that a seller may well find another method of competition—one that will not be given the label of "tying arrangement" but that will bring about the same effects.[74]

It is suggested that the courts may best be able to effectuate the policies of the Sherman, Clayton, and FTC Acts in the area of tying arrangements by consciously examining and balancing the interests involved: those of the seller, the buyer, and the seller's competitors. The seller may have many motives for conduct similar to that in *Fortner*, some of which may not be anticompetitive in design or practice. Justice White suggested a number of salutary interests that the defendant in *Fortner* may have had: the conduct may have been merely price competition in a different form, effected by a reduction in the economic price of the credit rather than of the houses; the defendant may have been competing in a "hard" market in which there was great practical resistance to price competition; or the defendant may have been expanding the scope of the market by bringing in buyers who would otherwise be unable to purchase the prefabricated homes at any price.[75] In addition

[72] *See* Austin, *supra* note 3, at 123.
[73] *Id.* at 122-26.
[74] See J. Scott & E. Rockefeller, Antitrust and Trade Regulation Today: 1967, at 78 (1967), suggesting that the *Standard Oil* case, 337 U.S. 293 (1949), had only resulted in the refiner buying retail locations and then leasing them to retail dealers who were still required to use only the refiner's gasoline.
[75] 394 U.S. at 516 (White, J., dissenting).

to interests previously examined in relation to identification of tying arrangements, sellers may evince other lawful reasons for their action.[76] Some, such as business expediency and similar methods used by others in the defendant's situation, are not likely to be accepted by the courts.[77] Others, particularly the interest of a newcomer to an established market, who is using the tie-in to break into the market,[78] and the interests of those sellers who are within a nascent, technical market requiring them to have particular expertise,[79] may prove to have some significance outside personal interest and may thus warrant some type of protection.

Despite the fact that the majority in *Fortner* took pains to show how the interests of the plaintiff-buyer were damaged by the tying arrangement, it seems that, on the whole, the plaintiff was actually benefitted to the extent that he was unable to receive any credit from any source outside the defendant.[80] Of course, the interests of the buyer are not unimportant; those interests—having a free choice of sellers and products and obtaining quality goods and services at optimum prices—are actually the public-policy bases for maintaining competition.[81] The problem with examining the buyer's interest is that it may be, as in *Fortner*, so elusive that it merely compounds the difficulties involved in the balancing process.

The most important interest in tying arrangement cases is that of the seller's competitors.[82] The progenitor of the present per se rule made clear this bias, for in *International Salt* the Court stated that "[i]t is unreasonable, *per se*, to foreclose competitors from any substantial market."[83] In *Fortner* Justice Black suggested that the defendant's competitors in the market for prefabricated homes might find it not only economically but also legally impossible to provide buyers credit terms similar to those offered by the defendant.[84] This factual decision should

[76] Materials cited note 70 *supra*.

[77] See Austin, *supra* note 3, at 122.

[78] *But see* Note, *Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives*, 18 STAN. L. REV. 457, 473 (1966).

[79] *Id. See* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). *See also* Austin, *supra* note 3, at 122 (suggesting that a combination of interests may weigh heavily on a court's decision).

[80] 394 U.S. at 516 (White, J., dissenting).

[81] *See* Austin, *supra* note 3, at 99.

[82] *See* Pearson, *supra* note 28, at 627-38. *Cf.* Signode Steel Strapping Co. v. FTC, 132 F.2d 48, 53 (4th Cir. 1942).

[83] International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

[84] 394 U.S. at 505-06 nn.2 & 3. Justice Black suggested that credit agencies may be precluded by law from giving one-hundred-per-cent credit in the *Fortner* situation. He added that this type of competitive pre-emption would invariably be unlawful.

logically have formed the basis of the Court's decision. Thus, had Justice Black not chosen to embark on a tortuous linguistic search for "power," he might well have found the answer to the foreclosure issue by asking three simple questions: Did the defendant's questionable conduct result in any sales within the prefabricated home market? If so, were there enough of these sales to make the defendant's competitors in that market seek to establish a similar mode of conduct? Finally, was that mode of conduct unavailable to these competitors? An affirmative answer to these questions would establish foreclosure; if the defendant were unable to provide some overriding justification, the balance could be logically struck against him, and his conduct declared unlawful.

KENNETH B. HIPP

Attorney and Client—Dealing with Clients' Property—the ABA Revision of Canon Eleven

Historically, the attorney-client relationship has been one of delicate trust, as observed by Justice Nelson in 1850:

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit. . . .[1]

A recent Iowa case, *Nadler v. Treptow*,[2] illustrates the ethical questions arising when an attorney becomes interested in his client's property. Attorney Nadler represented Elease Treptow in, among other matters, a contract for the purchase of real property from the estate of one Pappas. Financial difficulties prevented Mrs. Treptow's meeting her three-hundred-dollar-per-month contractual obligation to the estate. Because the "problem was complicated,"[3] Nadler was able to purchase from the Pappas estate at an eight-hundred-dollar reduction the interest that his client had sought. At least one complication of which the court spoke was the prior contract with Mrs. Treptow. Through it, presumably, Nadler learned of the factors that caused the reduction in price: The attorney-client relationship became one of debtor-creditor/contract vendor.[4] Nadler

[1] Stockton v. Ford, 52 U.S. 232, 247 (1850).
[2] —— Iowa ——, 166 N.W.2d 103 (1969).
[3] *Id.* at ——, 166 N.W.2d at 108 (dissenting opinion).
[4] *Id.*

then brought an action against his client for his full fee; she defended by asserting a breach of the fiduciary duty stemming from the lawyer-client relationship. The trial court found that the attorney's purchase was not against the interest of his client[5] and granted him recovery of one thousand dollars, which was fifty-four per cent of the fee sought. A majority of the Supreme Court of Iowa affirmed, commenting, "[w]e cannot say that the [trial] court's findings and conclusions were without support in the evidence."[6]

Four members of the court disagreed: "Both the municipal court and the majority opinion completely ignore the fiduciary relationship of this plaintiff to defendant, his client."[7] The dissent would have applied Canon Eleven of the American Bar Association's *Canons of Professional Ethics*, which provides:

> Dealing with Trust Property. The lawyer should refrain from any action whereby for his own personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.[8]

The basic policy underlying the dissent in *Nadler* as well as Canon Eleven is that once the client's confidence is reposed in his attorney, the latter should not be able to use it to his client's detriment or prejudice.[9] Otherwise stated,

> In America, where the stability of the courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be . . . so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. . . . It cannot be so maintained unless the conduct and motives of [the men] of our profession are such as to merit the approval of all just men.[10]

The American Bar Association Standing Committee on Professional Ethics has stated that generally it is improper for an attorney to purchase

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[5] *Id.* at ——, 166 N.W.2d at 104.
[6] *Id.* at ——, 166 N.W.2d at 105.
[7] *Id.* at ——, 166 N.W.2d at 106 (dissenting opinion).
[8] ABA CANONS OF PROFESSIONAL ETHICS No. 11. The Supreme Court of Iowa has adopted the ABA Canons, with the exception of a portion of Canon 27. IOWA CODE ANN., appendix to § 610, rule 119 (Supp. 1969). Prior to August, 1969, forty-one states and the District of Columbia had adopted the ABA Canons. Letter from Frederick R. Franklin, ABA Staff Director for Professional Standards, to J. Michael Brown, November 13, 1969 [hereinafter cited as Franklin Letter].
[9] Stockton v. Ford, 52 U.S. 232, 247 (1850).
[10] *Preamble* to ABA CANONS OF PROFESSIONAL ETHICS.

assets from an estate that he is representing.[11] The New York City Bar Committee has commented that the entire area of an attorney's dealing in his client's property is "fraught with danger."[12] Suspension of the attorney by a state bar association for breach of the fiduciary duty has been upheld in several instances.[13]

The practical application of Canon Eleven often places stringent requirements on the attorney. Courts are particularly inquiring when an attorney purports to represent a client and then takes title to property in his own name.[14] The purchase of a client's property has been allowed in several cases in which no confidence was breached and the attorney-client relationship had ended.[15] But courts have invoked the fiduciary relationship in patent infringement suits by clients against their attorneys,[16] and attorneys have been denied the right to purchase a client's real property at a foreclosure sale[17] or from an estate.[18] The protection extends to corporate clients;[19] an attorney may not purchase interests adverse to those of the corporation he represents.[20] Courts have likewise unmasked the subterfuge of third-party purchases for the attorney's benefit.[21]

Transactions between attorney and client, if disputed, have been considered prima facie fraudulent and invalid.[22] Recurrently, a presumption

[11] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 667 (1963); *accord, id.* No. 250 (1943).

[12] WILLIAM NELSON CROMWELL FOUNDATION, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION 291 (1956).

[13] Lowe v. State Bar, 40 Cal. 2d 564, 254 P.2d 506 (1953); Sunderlin v. State Bar, 33 Cal. 2d 785, 205 P.2d 382 (1949); *In re* Sandblast, 210 Ore. 65, 307 P.2d 532 (1957).

[14] Mebane v. Broadnax, 183 N.C. 333, 111 S.E. 627 (1922).

[15] Waters v. Bruner, 355 S.W.2d 230 (Tex. 1962); Minchen v. Arment, 266 S.W.2d 257 (Tex. Civ. App. 1954).

[16] Reush v. Fischer, 49 F.2d 818 (C.C.P.A. 1931); Goodrum v. Clement, 277 F. 586 (D.C. Cir. 1921); Bumgardner v. Hudson, 277 F. 552 (D.C. Cir. 1921).

[17] Gaffney v. Harmon, 405 Ill. 273, 90 N.E.2d 785 (1950); Vrooman v. Hawbaker, 377 Ill. 428, 56 N.E.2d 623 (1944); Carson v. Fogg, 34 Wash. 444, 76 P. 112 (1904). *Contra,* Kelly v. Weir, 243 F. Supp. 588 (E. D. Ark. 1965). In this case an attorney was allowed to purchase his client's real estate at a foreclosure sale that commenced when the client, against the advice of the attorney, repeatedly refused to comply with the Agricultural Adjustment Act of 1938, which limited crop production per acre and gave the government the right to foreclose for non-compliance with the Act.

[18] Healy v. Gray, 184 Iowa 111, 168 N.W. 222 (1918); Deal v. Migoski, 122 So. 2d 415 (Fla. 1960); *In re* Sandblast, 210 Ore. 65, 307 P.2d 532 (1957).

[19] Oil, Inc. v. Martin, 381 Ill. 11, 44 N.E.2d 596 (1942).

[20] Sea Cove Marina, Inc. v. Uhlendorf, 18 App. Div. 2d 1021, 239 N.Y.S.2d 29, *aff'd,* 15 N.Y.2d 714, 204 N.E.2d 499, 256 N.Y.S.2d 340 (1965).

[21] Demmel v. Hammett, 360 Mo. 737, 230 S.W.2d 686 (1950); Gragg v. Pruitt, 179 Okla. 369, 65 P.2d 994 (1936).

[22] *See, e.g.,* Baker v. Otto, 180 Md. 53, 55, 22 A.2d 924, 925 (1941).

of fraud arises,[23] and the burden is on the attorney to show that no advantage has been taken.[24] The transaction may be saved only if the attorney has fully informed his client of his intentions[25] and obtained his consent,[26] and if adequate consideration supports the exchange of property.[27] One court has gone as far as to say that without consent the transaction "is vitiated by the law, irrespective of its merits, fairness, or good faith."[28]

Although the dissent in *Nadler* pointed out that "[n]ot once did plaintiff clearly show just when and under what circumstances he advised defendant he was going to become her creditor-contract vendor,"[29] the trial court found as a fact that full disclosure was made and that the purchase could actually be to her benefit.[30] The supreme court recognized that disclosure to the client was required and affirmed the trial court's findings, but neglected in its discussion to detail just how Nadler met the standard. Nadler, therefore, received lenient treatment by the majority: He was not required to show affirmatively either his disclosure or the lack of harm to his client; it is uncertain whether he in fact completely revealed his interest in the property to Mrs. Treptow;[31] and he concededly did not pay adequate consideration.

If Nadler's conduct violated or was at least questionable under the ethical standards of his profession, what was the appropriate remedy? The procedural setting complicates this question, for Mrs. Treptow first complained of her attorney's ethics when he sued her for his fee. One remedy could have been a declaration by the court that the property be held in a constructive trust in favor of the client, as illustrated in *Healy v. Gray*.[32] Gray, an attorney, represented Healy to secure his appoint-

[23] Lawrence v. Tschirgi, 244 Iowa 386, 57 N.W.2d 46 (1953); Reeder v. Lund, 213 Iowa 300, 236 N.W. 40 (1931); Baird v. Laycock, 94 S.W.2d 1185 (Tex. Civ. App. 1936).

[24] Swaim v. Martin, 158 Ark. 469, 251 S.W. 26 (1923); G. WARVELLE, ESSAYS IN LEGAL ETHICS 155-56 (2d ed. 1920).

[25] Allison v. Caruthers, 205 Okla. 582, 239 P.2d 759 (1952).

[26] Demmel v. Hammett, 360 Mo. 737, 230 S.W.2d 686 (1950); *In re* Sandblast, 210 Ore. 65, 307 P.2d 532 (1957).

[27] "It is essential that the sale should be at a price which is fair and reasonable." Littleton v. Kincaid, 179 F.2d 848, 858 (4th Cir. 1950); *see* Deal v. Migoski, 122 So. 2d 415 (Fla. 1960).

[28] Gragg v. Pruitt, 179 Okla. 369, 372, 65 P.2d 994, 997 (1936).

[29] —— Iowa at ——, 166 N.W.2d at 108 (dissenting opinion).

[30] *Id.* at ——, 166 N.W.2d at 104.

[31] The majority (*id.* at ——, 166 N.W.2d at 104) and the dissent (*id.* at ——, 166 N.W.2d at 108) disagreed on this point.

[32] 184 Iowa 111, 168 N.W. 222 (1918).

ment as executor of his father's estate. As a result of this attorney-client relationship, Gray became aware of and purchased property, which had first been offered to his client, at five-hundred sixty dollars below the market price. The court declared a constructive trust in favor of the client. Arguably, had Mrs. Treptow pursued this course of action, she might have prevailed as did the plaintiff in *Healy*; however, she sought only to deny Nadler his fee.

Perhaps the best deterrent to questionable conduct is to deny the attorney compensation. Courts in various situations have followed the maxim that "[a]n attorney's right to compensation may be defeated by fraud or misconduct on his part."[33] In *Donaldson v. Eaton & Estes*[34] the plaintiff was allowed to reclaim a large part of an attorney's fee that the court determined to be in excess of just compensation. The court stated that "[a]n attorney who acts in bad faith and seeks to secure his personal advantage to the prejudice of his client may properly be denied compensation for his services."[35] Perhaps the majority in *Nadler* invented its own solution, the fifty-four per cent recovery being its Solomonic estimate of just compensation.[36]

The entire realm of legal ethics, including the attorney-client relationship, was re-examined by the American Bar Association at the 1969 Dallas Convention; and the existing canons were revised into a new *Code of Professional Responsibility*.[37] The Special Committee on Evaluation of Ethical Standards noted four dissatisfactions with the old Canons: (1) incomplete coverage of attorney misconduct; (2) a need for editorial revision; (3) a lack of practical sanctions; and (4) modern social changes

[33] 7 C.J.S. *Attorney and Client* § 167(c) (1937). *See, e.g.*, Shelton v. Gwathemy, 201 Misc. 75, 107 N.Y.S.2d 653 (Sup. Ct. 1951); Duffy v. Colonial Trust Co., 287 Pa. 348, 135 A. 204 (1926); Royden v. Ardoin, 160 Tex. 342, 331 S.W.2d 206 (1960).

[34] 136 Iowa 650, 114 N.W. 19 (1907).

[35] *Id.* at 656, 114 N.W. at 21.

[36] The trial court gave great weight to testimony that Nadler told Mrs. Treptow that she owed him one-thousand dollars. —— Iowa at ——, 166 N.W.2d at 105.

[37] The new Code will become effective only if courts and bar associations in individual states choose to adopt it. The Franklin Letter, *supra* note 8, states:

> As for the Code of Professional Responsibility, our information is that to date the bar associations of Arkansas, Vermont, and New York have adopted the Code. However, it is actively being considered by numerous other states and, as noted in the attachment, several states [Arizona, Nevada, New Mexico, Pennsylvania, South Dakota, Wisconsin, and perhaps Kentucky] automatically adopt the rules of ethics of the American Bar Association as they are promulgated from time to time. Therefore, on January 1, 1970, the date on which the Code of Professional Responsibility will become effective for ABA members, the Code will automatically go into effect in those states.

demanding re-evaluation of ethical standards.[38] A totally new format evolved, embodying three levels of rules with varying degrees of specificity. First are the nine "Canons," intended as "statements of axiomatic norms [or] . . . general concepts."[39] The "Ethical Considerations" applicable to each Canon attempt to offer more specific guidance. Finally, the "Disciplinary Rules" provide a "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action,"[40] although no specific procedures and penalties are prescribed.[41]

What has become of the old Canon Eleven under the new Code? It now exists as Canon Four,[42] Ethical Consideration 4-5,[43] and Disciplinary Rule 4-101 (B).[44] Ethical Consideration 4-5 creates two categories of violations, use of confidential information to the disadvantage of the client, which is expressly forbidden, and use to the advantage of the attorney, permitted only if the client consents after a full disclosure. Disciplinary Rule 4-101 (B) includes the traditional mandates of consent and disclosure,[45] but any requirement of full consideration is omitted.[46]

Concerning exchanges of information that must be kept secret, the Ethical Consideration in point is conveniently vague. It refers only to

[38] *Preface* to ABA CODE OF PROFESSIONAL RESPONSIBILITY at v (Final Draft, July 1, 1969) [hereinafter cited as CODE].

[39] Preliminary Statement to CODE at 2.

[40] *Id.*

[41] "The code makes no attempt to prescribe either disciplinary procedures or penalties for violation . . . ." *Id.*

[42] Canon Four provides: A Lawyer Should Preserve the Confidences and Secrets of a Client.

[43] Ethical Consideration 4-5 provides:

> A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after a full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates . . . .

[44] Disciplinary Rule 4-101 (B) provides:

> Except as permitted by DR 4-101 (C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after a full disclosure.

Disciplinary Rule 4-101 (C) deals only with minor exceptions to part (1) of the above.

[45] CODE, Disciplinary Rule 4-101 (B) (3).

[46] A plausible explanation is that the Code does not deal specifically with the purchase of a client's property. Instead, the Code limits generally the use of a confidence or secret.

"information acquired during the course of representation. . . ."[47] The Disciplinary Rules are more descriptive: They establish two categories of information, confidences and secrets, that may not be misused or revealed. A "confidence" is defined as "information protected by the attorney-client privilege under applicable law."[48] One writer sets forth the general law of privilege as follows:

> It is the essence of the [attorney-client] privilege that it is limited to those communications as to which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.
>
> . . . .
>
> A mere showing that the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.[49]

On the other hand, a "secret" refers to "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[50]

Thus it appears that the definitions of "confidence" and "secret" both require an intent on the part of the client that the communication remain confidential. Would the situation in *Nadler* have fit either definition? Probably not. It is unlikely that Mrs. Treptow would have been concerned that her purchase agreement with the Pappas estate remain strictly confidential; the agreement may even have been general knowledge in the community.

Apparently adding some form of *mens rea* to the elements of an attorney's misconduct, Disciplinary Rule 4-101 (B) prohibits a lawyer from "knowingly" abusing his client's confidence. Perhaps this rather perplexing requirement was included to protect a lawyer in those unusual instances in which he unknowingly transmits confidential information to a third party, has no reason to believe that use of the information will disadvantage his client, or is unaware that such information is a "confidence" or "secret" within the definition. This third possibility is most unlikely, in that it would be arguable that if Nadler did not know that the information he received was a "confidence" or "secret," he could not have violated the Code. Such a rule makes ignorance of the law a

[47] CODE, Ethical Consideration 4-5.
[48] *Id.*, Disciplinary Rule 4-101 (A).
[49] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 95, at 190-91 (1954).
[50] CODE, Disciplinary Rule 4-101 (A).

permissible defense, and such an interpretation of the Code was probably unintended since an even stricter standard is normally required of attorneys than of others. The rule should be more explicit in its use of the word "knowingly."

Why did the justices in *Nadler* believe that the attorney's conduct was unethical? Mrs. Treptow was not harmed; she was financially unable to complete her purchase of the property in any event.[51] The answer is that such conduct causes injury to the integrity of the legal profession and judicial system. The essence of the fiduciary relationship is the trust and confidence a client places in his attorney. Such trust must be protected by the law, or the effectiveness of the judicial system declines. Given his unique access to information regarding a client's property, an attorney should not be allowed to use such information to his own advantage—if for no other reasons than basic notions of fairness and equity. If, as occurred in *Nadler*, the lawyer becomes his client's creditor, he can hardly be expected to conduct the client's affairs with the objective zeal demanded of the advocate—the lawyer's own pecuniary interests become bound with those of his client.

In summary, the American Bar Association recently has clarified and strengthened the fiduciary duties of the attorney wishing to deal in his client's property. Unfortunately, the revision of the ABA Canons probably would not aid a court in dealing effectively with the situation before the Iowa court in *Nadler*. The concept of breach of a fiduciary duty owed by an attorney to his client, however, should be used by courts in the future. Such a court-formed doctrine could be developed as a basis for allowing a defense seeking reduction or disallowance of an attorney's fee. Instead of passing lightly over the acts required for fulfillment of the attorney's fiduciary duty, the Iowa court in *Nadler* should have established an explicit precedent in fiduciary misconduct by penalizing the lawyer financially.

J. MICHAEL BROWN

Constitutional Law—First Amendment Rights—Flag-Burning As Symbolic Expression

In a period when the first amendment's[1] protection of the individual from governmental power is being challenged by new and bizarre methods

[51] —— Iowa at ——, 166 N.W.2d at 104.

[1] The first amendment binds the states through the fourteenth amendment. Stromberg v. California, 283 U.S. 359 (1931).

of communicating protests,[2] the Supreme Court in *Street v. New York*[3] declined to decide whether one such method—burning an American flag—is protected as symbolic free speech. The defendant Street[4] was found guilty under a New York law making it a misdemeanor "publicly [to] mutilate, deface, defile or defy, trample upon or cast contempt upon either by words or act . . ." any flag of the United States.[5] The majority, through Justice Harlan, held that since he might have been convicted for his *words*[6] and since such a conviction would be unconstitutional, the judgment must be reversed. By refusing to reach the flag-burning issue,[7] the majority failed to settle conclusively a nagging, emotional problem[8] and to clarify the relationship between symbolic conduct and the first amendment.

The dissenting opinions chastised the majority for construing the facts to find that Street's spoken words ever were in question. Chief Justice Warren emphasized that the defendant was not convicted for his words because the lower courts and both parties on appeal addressed themselves to the issue of the defendant's act of flag-burning.[9] Justice White went farther in stating that Street's alleged conviction for his words would not

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[2] The recent self-immolations by high school students to protest the Vietnam War were a form of symbolic communication.

[3] 394 U.S. 576 (1969).

[4] The defendant was a Negro who, having heard of the shooting of James Meredith in Mississippi, went to a street corner and burned a forty-eight star American flag that he formerly had displayed on national holidays.

[5] N.Y. PENAL LAW § 1425(16)(d) (McKinney 1944). This section was repealed in 1967, ch. 791, § 50 [1967] N.Y. LAWS 2151, and superseded by N.Y. GEN. BUS. LAW § 136 (McKinney 1968), which defines the offense in identical language. Flag desecration statutes have been enacted by all states and by Congress. 18 U.S.C. § 700 (Supp. IV, 1964). There is also a Uniform Flag Law covering flag desecration. 9B UNIFORM LAWS ANNOTATED 37-40 (1957).

[6] The policeman who arrested the defendant across the street from the burning flag overheard him say to a small crowd, "We don't need no damn flag." Then Street said to the policeman, "Yes, that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag." 394 U.S. at 578-79.

[7] *Id.* at 576, 581, 594.

[8] Note Chief Justice Warren's dissent:

> In a time when the American flag has increasingly become an integral part of public protests. . . . [B]oth those who seek constitutional shelter for acts of flag desecration perpetrated in the course of a political protest and those who must enforce the law are entitled to know the scope of constitutional protection. The Court's explicit reservation of the constitutionality of flag burning prohibitions encourages others to test in the streets the power of our States and National Government to impose criminal sanctions upon those who would desecrate the flag.

Id. at 604-05.

[9] *Id.* at 595 (dissenting opinion).

matter because he was properly convicted for his acts.[10] The four dissenters were in agreement that flag-burning can be proscribed constitutionally.[11]

Had the majority dealt with the flag-burning issue, it would have found that Street's argument that such action is protected speech encounters serious obstacles. Before any communication can be protected, it must be in a form that is consistent with the first amendment. Although the Court has long defined the amendment's protection of free speech to encompass methods of communication other than traditionally recognized political oratory and distribution of pamphlets, it has made clear that an otherwise illegal act cannot be given first-amendment protection merely because the act was intended to express an idea.[12] And though the Court has recognized the communicative value of tangible symbols,[13] it has emphasized that communicative tendency is not alone sufficient to warrant first-amendment protection.[14] Nevertheless, such activities as the display of a red flag,[15] a forced flag salute,[16] a civil rights parade,[17] picketing by labor groups,[18] a lunch counter sit-in,[19] and the wearing of black armbands in opposition to the Vietnam war[20] have been held methods of expression[21] protected under the first amendment.

In cases in which the Court has decided to extend the free-speech concept to non-verbal means of expression, it has dealt with two basic and often competing concerns—a concern in avoiding disruption and a concern in assuring to all members and groups in society the ability to influence the government by appealing to the public conscience. The former touches traditional governmental police power; the latter is the basis of the first amendment. Street's contention that the first amendment

[10] *Id.* at 614-15 (dissenting opinion).

[11] Chief Justice Warren, Justice Black, Justice Fortas and Justice White dissented.

[12] United States v. O'Brien, 391 U.S. 367 (1968).

[13] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943): "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Id.* at 632.

[14] *See* United States v. O'Brien, 391 U.S. 367 (1968).

[15] Stromberg v. California, 283 U.S. 359 (1931).

[16] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[17] Cox v. Louisiana, 379 U.S. 536 (1965).

[18] Thornhill v. Alabama, 310 U.S. 88 (1940).

[19] Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring).

[20] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[21] *See also* NAACP v. Button, 371 U.S. 415 (1963) (litigation as free speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures as free speech).

should be extended to include flag-burning ultimately must be consistent with both considerations.

Stromberg v. California,[22] which held that an individual's display of a red flag in opposition to organized government was protected as free speech, was the first case extending the first amendment to cover symbolic activity. The Court in that decision expressed the underlying objective of the first amendment as "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means. . . ."[23] With this objective in mind the Court has greatly expanded the definition of speech to meet the exigencies of society. From *Stromberg*'s original extension to include an individual's passive display of a tangible symbol, the Court expanded the definition to accommodate labor and civil rights protests when the mass human behavior is symbolic in itself.[24] Such group demonstrations have been called "the poor man's printing press"[25] because they provide a means of expression for groups in society that are often unable to exert pressure adequately through the normal channels of communication.[26] The Court's decisions to include such activities under the first amendment's protection have certainly been motivated at least in part by the deprivations that both labor and the Negro have struggled to overcome.[27]

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[22] 283 U.S. 359 (1931).

[23] *Id.* at 369.

[24] *E.g.*, Cox v. Louisiana, 379 U.S. 536 (1965). Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring): "Such a demonstration, in the circumstances . . . is as much a part of the free trade in ideas . . . as is verbal expression. . . . It, like speech, appeals to good sense and the power of reason as applied through public discussion just as much as, if not more than, a public oration delivered from a soapbox at a street corner."

[25] H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 133 (1965).

[26] Adderley v. Florida, 385 U.S. 39, 50-51 (1966) (Douglas, J., dissenting): Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . .

[27] Velvel, *Freedom of Speech and the Draft Card Burning Cases*, 16 KAN. L. REV. 149, 151 (1968), advances the idea that the growing strength of labor unions was a factor in the eventual cutback of protection given to picketing. *See also* Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957). H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 6 (1965): "[A]s a thumbnail summary of the last two or three decades of speech issues in the Supreme Court, we may come to see the Negro as winning back for us the freedoms the Communists [in cases such as

Similar compensatory factors may be present in Street's case. His expression was aimed at racial intolerance, a cause having constitutional as well as ethical underpinnings. Furthermore, his protest was individual in character rather than associated with mass activity. In today's massive, bureaucratic society, the power of most individuals to communicate is indeed small. Bizarre, symbolic behavior may be the only way for an individual to make his beliefs heard.[28] Moreover, individual conduct is generally less likely to concern the police power, for it does not involve the mass coercion and intimidation that group behavior often does. Since fewer people are likely to be present, there are fewer problems with traffic control, litter, and permits, as well as less potential for violence.[29]

Even if the Court were to decide that flag burning should be incorporated as an avenue of expression encompassed by the first amendment, protection of such a method would not be automatic. Traditional oral methods of communication may be abridged if there are overriding governmental interests in doing so.[30] Justice Harlan's majority opinion in *Street* included four possible interests of the government in the defendant's oral activity:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.[31]

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961)] seemed to have lost for us."

[28] It might be argued that behavior such as flag desecration would be less bizarre and therefore would receive less publicity if there were no laws against it. Such an assertion, however, overlooks that contemporary attitudes of the majority are more relevant in determining whether an action is considered bizarre than is the illegality of the conduct.

[29] Justice Douglas seemed to recognize such a distinction between group behavior and individual behavior in his concurring opinion in Brandenburg v. Ohio, 395 U.S. 444, 450 (1969):

> Picketing can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to the number of pickets and the place and hours because traffic and other community problems would otherwise suffer. But none of these considerations are implicated in the symbolic protest to the Vietnam war in the burning of a draft card.

[30] *Cf.* State v. Peacock, 138 Me. 341, 25 A.2d 491 (1942), in which a conviction was said to be proper when based on oral criticism of the flag. The judgment was reversed on other grounds.

[31] 394 U.S. at 591.

The first three interests, the Court concluded, were not applicable to the facts in *Street*.[32] The fourth interest, while applicable to the facts, was the very type of governmental interest against which the first amendment offers protection. "[F]reedom to differ is not limited to things that do not matter much."[33]

Although the Court concluded that these interests were not sufficient to permit state action to abridge Street's oral exhortations, it does not necessarily follow that they are insufficient to prohibit flag-burning; the Court has said that the first amendment does not give the same protection to those who communicate by "conduct" as to those who communicate by "pure speech."[34] While there may be good reasons for not giving all forms of expression the same amount of protection,[35] such a dichotomy should not be over-emphasized; there can be no such thing as "pure speech." As a scholar in the field points out: "[A]ll speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."[36] The only true line between what is and what is not subject to regulation lies between beliefs and ideas, on the one hand, and actions of any form, on the other.[37]

Underlying this dichotomy between "pure speech" and "speech plus" seems to be the assumption that "speech plus" is potentially more disruptive than "pure speech." In *Tinker v. Des Moines Independent Community School District*,[38] the Court held that school children wearing black armbands to protest the Vietnam War were engaging in a symbolic act protected by the first amendment. Terming the activity "closely akin to 'pure speech,' "[39] Justice Fortas emphasized the silent and passive nature of these protests and the absence of any fear of a disturbance. Soon after his *Tinker* decision, he concurred in upholding the suspension from college of students who engaged in an "aggressive and violent demonstra-

[32] *Id.* at 591-92.

[33] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943), *quoted in* Street v. New York, 394 U.S. 576, 593 (1968).

[34] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[35] Kovacs v. Cooper, 336 U.S. 77, 97 (Jackson, J., concurring):

"The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself."

[36] H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 201 (1965).

[37] Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (Douglas, J., concurring); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940): "[This] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

[38] 393 U.S. 503 (1969).

[39] *Id.* at 505-06.

tion, and not in a peaceful, nondisruptive expression, such as was involved in *Tinker*."[40] There have been similarly distinguishable results in civil rights demonstration cases[41] and in picketing cases[42] in which certain activity was labeled within the scope of the first amendment while similar but potentially more disruptive activity was not.

The New York Court of Appeals relied on the disruption factor in sustaining Street's conviction.[43] Terming Street's activity "incendiary,"[44] Judge Fuld quoted the Supreme Court's language in *Halter v. Nebraska*:[45] "Insults to [the] flag have been the cause of war, and indignities put upon it . . . have often been resented and sometimes punished on the spot."[46] Furthermore, the New York court likened flag-burning to an abusive epithet, a category of communication that receives no first-amendment protection because of its offensive nature and because its content is not of public importance.[47]

However, in *United States v. O'Brien*,[48] the case most similar to *Street* on its facts, the Supreme Court made clear that governmental interests less primary than the maintenance of order may be sufficient to foreclose expressions such as Street's. In holding that burning of draft cards is not within the first amendment's protection, the Court said that even if such activity was a form of expression protected by the first amendment, a "substantial"[49] state interest would warrant an incidental abridgement of that expression. Although the Court in *O'Brien* possibly could have relied on the disruptive potential of public draft card burning, it did

[40] Barker v. Hardway, 394 U.S. 905 (1969) (concurring opinion).

[41] *Compare* Brown v. Louisiana, 383 U.S. 131 (1966) *with* Adderley v. Florida, 385 U.S. 39 (1966).

[42] *Compare* Thornhill v. Alabama, 310 U.S. 88 (1940) *with* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies Inc., 312 U.S. 287 (1941).

[43] People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

[44] *Id.* at 237, 229 N.E.2d at 191, 282 N.Y.S.2d at 496.

[45] 205 U.S. 34 (1907).

[46] *Id.* at 41.

[47] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941).

[48] 391 U.S. 367 (1968).

[49] *Id.* at 377. Such a governmental regulation is justified

> if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Id. In his concurring opinion Justice Harlan added the caveat that these interests must not "foreclose considerations of First Amendment claims in those rare instances when an 'incidental' restriction upon expression . . . has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate." *Id.* at 388-89 (concurring opinion).

not do so. Rather, it found that the governmental interest in the administrative efficiency of the Selective Service was sufficiently compelling to deny this avenue of communication.

By similar analysis the Court in *Street* would have had to make the determination whether the government's interest in prohibiting flag-burning is "substantial." Divested of its symbolic value, the flag is merely a piece of cloth and does not serve a substantial purpose as was found for draft cards in *O'Brien*. The government's interest in preventing breaches of the peace, which the New York Court of Appeals stated was the traditional basis for flag-desecration statutes,[50] should not be sufficient to foreclose completely this form of expression. Such an interest can be served more adequately by other statutes directly aimed at preventing breaches of the peace[51] or by regulation of the time, place, and manner of such communication.[52] Thus the question remains whether the government's interest in protecting its national symbols is sufficiently substantial to prohibit the use of these symbols in a desecrating, but communicative, manner.[53]

By striking down statutes requiring flag salutes and pledges of allegiance in schools, the Court in *West Virginia State Board of Education v. Barnette*[54] seemed to negative the assertion that the government can compel conformity and patriotism for the purpose of promoting national unity.[55] National unity is a legitimate end, but it must be promoted "by persuasion and example"[56] rather than by means of compulsion.

[50] People v. Street, 20 N.Y.2d 231, 236, 229 N.E.2d 187, 190, 282 N.Y.S.2d 491, 495 (1967). *But see* Halter v. Nebraska, 205 U.S. 34, 43 (1907), for the assertion that the flag-desecration statute also "had its origin in a purpose to cultivate a feeling of patriotism."

[51] Such statutes as breach of the peace and disorderly conduct could serve to punish the defendant if he causes disruptive activity.

[52] Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (picketing).

[53] There seems to be governmental acceptance of the use of such symbols in a manner that supports the government, *e.g.*, the widespread use of flag decals on automobile windshields.

[54] 319 U.S. 624 (1943).

[55] *Barnette* expressly overruled Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). Note Justice Frankfurter's statement in *Gobitis* concerning the public policy behind compulsory flag-saluting:

> [T]he ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people. . . . The flag is the symbol of our national unity, transcending all internal differences.

310 U.S. at 596. *See* Halter v. Nebraska, 205 U.S. 34 (1907), in which the Court speaks of the "object of maintaining the flag as an emblem of National Power and National honor." *Id.* at 42.

[56] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

Although the prohibition of the desecration of national symbols is not the same as compelling acts of allegiance, such a prohibition may be going beyond the limits of persuasion and example.

Despite *Barnette*, however, the dissenters in *Street* seem to have asserted that there is a legitimate and substantial governmental interest in promoting patriotism by means of national symbols. In saying that desecration of the flag can be proscribed, Chief Justice Warren spoke of the "power to protect the flag from acts of desecration and disgrace"[57] rather than a power to avoid the disruption attendant an act of abusing the flag. Justice Fortas, moreover, termed the flag "a special kind of personalty . . . burdened with peculiar obligations and restrictions."[58]

From the emphatic nature of the dissenting opinions, from lower court decisions sustaining flag-desecration statutes and from the lack of any strong precedent upholding such activity, the majority's refusal to meet the issue of flag-burning should be taken as a rejection of Street's contention that such an avenue of expression is protected by the first amendment. Nevertheless, the Court should realize that there are many factors in favor of expanding the first amendment's protection to include peaceful symbolic communication of any kind. Moreover, the recognition of an interest in promoting patriotic values should be a very limited one, for such an interest could lead to the kind of enforced conformity that is abhorrent to a system of government founded upon individual rights.

WILLIAM M. TROTT

Corporations—Voting Trusts—Should Trust Principles Apply to Close Corporations?

Ever since the corporate form of doing business became prevalent around the turn of the century, the attorney for the close corporation has been troubled by many difficult problems; and in trying to solve them, he has been "hampered by doctrines which are meaningful only in the context of the large, publicly held company."[1] One of these problems is that of providing some method for ensuring continuity and stability of management when no one stockholder, or faction of stockholders, owns a majority of voting stock. Another is that of providing means for resolving

[57] Street v. New York, 394 U.S. 576, 605 (1968).
[58] *Id.* at 616-17.

[1] Note, *Close Corporations: Voting Trust Legislation and Resolution of Deadlocks*, 67 COLUM. L. REV. 590 (1967).

deadlocks if two stockholders or factions each own half of the voting stock, or if there are high voting or quorum requirements with no stockholder or faction owning enough stock to meet them. As a practical matter, such difficulties do not arise in the widely-held corporation, "[w]here the shareholder . . . is rarely able to exercise any meaningful control"[2] and the "ability of management . . . to sustain itself . . . is a fact of economic life."[3] In the close corporation, however, a slight shift of stock ownership or the lost alliance of only one voting shareholder can transfer control of the corporation to a competing faction; and if the voting power resides in two equally-divided groups, deadlock is always a threat. Furthermore, when close corporations have been unsuccessful in preventing such deadlocks or crippling disputes and litigation results, the courts generally have been unable satisfactorily to resolve them because of inadequate statutory remedies.[4]

A recent Massachusetts case, *Selig v. Wexler*,[5] presents a classic example of an unsuccessful use of the voting trust to prevent deadlock and ensure stability. It also illustrates the inability of the court to satisfactorily deal with the problem because it felt constrained to apply trust law in the absence of other statutory provisions dealing specifically with this area of corporate control.

Selig involved a manufacturing corporation whose stock was owned equally by plaintiff Selig and defendant Wexler. The two owners, often unable to agree on the management policy of the corporation, entered into a voting trust agreement whereby all of the stock was placed in trust, and the owners and the corporate counsel, Mr. Riemer, were selected trustees. Riemer was considered a neutral trustee-director possessing the tie-breaking vote. This arrangement allowed the corporation to function smoothly, even to prosper, for about eight years. Selig, however, was not content. Riemer, the "neutral" trustee, constantly sided with Wexler.[6]

Two years before the agreement was to expire, Wexler and Riemer urged that it be renewed; and after extensive negotiations, during which both parties were represented by counsel and business advisors,[7] a new

[2] Note, *The Voting Trust: California Erects a Barrier to a Rational Law of Corporate Control*, 18 STAN. L. REV. 1210, 1215 (1966).

[3] *Id.* 1212.

[4] In most states the only remedy is dissolution. *See* 2 F. O'NEAL, CLOSE CORPORATIONS § 9.29 (1958).

[5] —— Mass. ——, 247 N.E.2d 567 (1969).

[6] *Id.* at ——, 247 N.E.2d at 569.

[7] Brief for Appellant at 25, Selig v. Wexler, —— Mass. ——, 247 N.E.2d 567 (1969).

voting trust agreement was executed. It provided for an additional director to resolve deadlocks by means of a rather intricate formula.[8] Both Selig and Wexler entered into lifetime employment contracts with the corporation, and the agreement provided that the trust was to continue at least until the death of the survivor.[9] Thus both Selig and Wexler, who apparently had complete knowledge of what the agreement entailed, irrevocably bound themselves to abide by it for the remainder of their lives.

The trust remained in effect for about two years. Selig again grew dissatisfied because Riemer and Silverman, the two supposedly neutral directors, always sided with Wexler.[10] After Selig attempted without success[11] to take control at the annual meeting, when the terms of the two neutral directors were to expire, he brought suit against Wexler and Riemer and asked the court to terminate the trust.

The trial court, apparently without authority to provide specific positive relief, ordered that if the voting trust could be amended within sixty days so as to provide for a truly neutral trustee and one or more neutral directors, the bill would be dismissed.[12] Since no amendment was made, the court granted the termination requested by Selig, and the Supreme Court of Massachusetts affirmed.[13]

After finding that the neutral directors had in fact been partial, and that this lack of impartiality frustrated the trust's purposes, the court set forth the principles of law on which it based its decision to terminate the trust:

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[8] The agreement provided that there would continue to be eight directors, three chosen by Selig, three by Wexler, plus Riemer and Silverman [the company accountant]. . . . The neutral directors were to be chosen by a vote of four of the five trustees. In the event of an impasse, the Company's by-laws were to be amended to provide for an [*sic*] ninth director. The directors then in office would attempt to choose the seventh, eight, and ninth directors from six nominees, three nominated by Selig and three by Wexler. Each such nominee had to be either a Company officer earning at least $15,000 a year or a former director. Every director was required to cast a vote for four different nominees. If this procedure also produced a deadlock, then a selection was to be made from the nominees by lot. The voting trustees, as required by the agreement, would then elect the candidates so chosen.

—— Mass. at ——, 247 N.E.2d at 570.

[9] *Id.*

[10] *Id.* at ——, 247 N.E.2d at 571.

[11] *Id.* Selig had the two members of his family who were directors resign in order to be eligible for election as "neutral" directors under the deadlock-breaking plan. These vacancies were to be filled by other members of the Selig family. Wexler prevented this action by adjourning the meeting.

[12] *Id.* at ——, 247 N.E.2d at 572.

[13] *Id.*

> There is no question that voting trusts are valid in this Commonwealth. The rules of trust law in general apply to voting trusts, unless the terms of the trust agreement provide otherwise. Undoubtedly a trust may be terminated if the purposes for which it was created become impossible of accomplishment. We are of the opinion that under this principle a voting trust may likewise be terminated when its purposes have become frustrated or impossible.[14]

The court then stated that impossibility and frustration are not exactly the same, and that although it was not impossible to carry out the terms of the trust, its objectives had been defeated. In order to support its decision, the court resorted to contract law and a Connecticut case holding that

> [t]he doctrine of frustration of purpose, which has more modern origins . . . [than the doctrine of impossibility] excuses a promisor in certain situations where the objectives of the contract have been utterly defeated by circumstances arising after the formation of the agreement . . . . Excuse is allowed under this rule even though there is no impediment to actual performance.[15]

It is important first to point out that the court did not declare this trust to be invalid but held only that its purpose had been frustrated. Assuming this determination to be correct, and assuming that the court was justified in following the established,[16] though questioned,[17] authority that the rules of trust law in general apply to voting trusts, it is necessary to determine whether such law was correctly applied. There is much authority supporting the termination of regular trusts if the purpose has been accomplished or if such accomplishment has become impossible or illegal.[18] But the treatises, including the ones cited by the court, do not mention frustration of purpose as a ground for termination, and *Selig* appears to be the first case expressly holding that a voting trust is terminable for such a reason.

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[14] *Id.* at ——, 247 N.E.2d at 572-73. (Citations omitted).

[15] Hess v. Dumouchell Paper Co., 154 Conn. 343, 350-51, 225 A.2d 797, 801 (1966).

[16] G. BOGERT, TRUSTS AND TRUSTEES § 251 (2d ed. 1964) [hereinafter cited as BOGERT]; Gose, *Legal Characteristics and Consequences of Voting Trusts*, 20 WASH. L. REV. 129 (1945).

[17] *See* Warren v. Pim, 66 N.J. Eq. 353, 59 A. 773 (Ct. Err. & App. 1904); National Liberty Ins. Co. v. Bank of America, 126 Misc. 753, 214 N.Y.S. 643 (Sup. Ct. 1926).

[18] Gordon v. Gordon, 332 Mass. 193, 196-97, 124 N.E.2d 226, 229 (1954); BOGERT, § 1002 (2d ed. 1962); A. SCOTT, TRUSTS § 335 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 335 (1959).

It is true that both impossibility and frustration are grounds for discharge of the duty to perform a contract,[19] but no authority has been found for extending the excuse of frustration to trust law. The case[20] cited by the court in support of its analogy to contract law does not justify such an extension: It dealt exclusively with a contract, and no trust was involved.

The court in *Selig* distinguished between the partiality of the trustee and the frustration of the purpose of the trust as grounds for termination.[21] It emphasized that the reason for termination was not Riemer's lack of independence as a trustee, but the frustration of the trust's purposes.

> The decision that the trust's purposes had been frustrated was based on the conclusion that the neutral trustee [and] the neutral directors . . . were not in fact independent or impartial [and since the] existing neutral directors . . . would be entitled to vote [and since] Riemer and Silverman were in fact not neutral directors; therefore the procedure could not have been carried out as intended, and the purpose of the trust was frustrated.[22]

Since the frustration of purpose resulted from the partisan alliance of the neutral trustee and directors, the distinction seems technical at best. The fiction was necessary, however, since under trust law the lack of independence of the trustee would be grounds only for his removal[23] and not for termination of the trust since equity will not permit a trust to fail for lack of a trustee.[24] The court applied its interpretation of trust law not only to the trustee but also to the directors; a distinction between the function of the two should have been made. That two of the existing directors were no longer neutral would not seem to impeach the validity of the underlying agreement by which they were elected, but would raise only the question of their competency as directors and whether they had violated their fiduciary duty as such. Trust law would certainly not be applicable to resolve such a question.[25]

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[19] 6 A. CORBIN, CONTRACTS § 1322 (1950).

[20] Hess v. Dumouchell Paper Co., 154 Conn. 343, 225 A.2d 797 (1966).

[21] —— Mass. at ——, 247 N.E.2d at 572 n.5.

[22] *Id.* at ——, 247 N.E.2d at 573.

[23] BOGERT § 527 (2d ed. 1960); RESTATEMENT (SECOND) OF TRUSTS § 107 (1950).

[24] Attorney Gen. v. Goodell, 180 Mass. 538, 62 N.E. 962 (1902); BOGERT § 150 (2d ed. 1960); RESTATEMENT (SECOND) OF TRUSTS § 32 (1959).

[25] According to corporation law, however, a removal-for-cause action can be brought against a director by the corporation itself or by a shareholder. Cause includes incompetency and breach of fiduciary duty. W. FLETCHER, PRIVATE CORPORATIONS §§ 351-56 (perm. ed. rev. 1969).

The most significant aspect of *Selig* is the fact that the court felt constrained to apply trust law in the first place. Without a single reference to the principles of corporation law, the court "solved"[26] what was essentially a corporate power struggle. While it is true that the legal mechanism employed in this case was a voting "trust," substance rather than form should control.

The voting trust was devised to avoid the effect of the anti-separation doctrine, which invalidates any agreement or device separating irrevocably the voting power of stock from its ownership.[27] Use of a trust transfers the legal ownership of the stock, including the voting rights, to a trustee; the stockholder receives trust certificates evidencing his "beneficial ownership."[28]

> The voting trust was designed and eventually sanctioned to effectuate a binding separation of voting power from ownership, although reliance was placed on the fiction that the anti-separation doctrine is not violated by the trust device because the vote remains with the legal owner. This fiction only impedes analysis and should be abandoned.[29]

Since there is considerable evidence that such separation is no longer contrary to public policy when there are valid reasons for it,[30] the fiction of the voting trust is no longer justified. When such a device is encountered, the courts should look past the trust form and consider the substance of the agreement itself.

Furthermore, it is at least questionable whether voting trusts are true trusts.[31] Although the courts have generally stated that they are and that trust law applies,[32] there is authority to the contrary. In *Warren v. Pim*[33] the court said:

> But in truth and in essence, and for all purposes of a court of equity, a voting trust that has for its sole object the permanent separation

[26] It is quite possible that the parties are in a worse situation than before since continued litigation is almost certain and the continued existence of this profitable company is placed in jeopardy.

[27] 1 F. O'NEAL, CLOSE CORPORATIONS § 5.04, at 227 (1958).

[28] *Id.* § 5.31.

[29] 18 STAN. L. REV., *supra* note 2, at 1217.

[30] "[C]onsistency does not permit the conclusion . . . that the present public policy of this state condemns the separation of voting rights from beneficial stock ownership." Lehrman v. Cohen, 43 Del. Ch. 222, 229, 222 A.2d 800, 807 (Sup. Ct. 1966). *See, e.g.*, W. FLETCHER, PRIVATE CORPORATIONS § 2080, at 395-96 (perm. ed. rev. 1969); 18 STAN. L. REV., *supra* note 2, at 1212-14.

[31] *See* note 17 *supra.*

[32] *See* note 16 *supra.*

[33] 66 N.J. Eq. 353, 356, 59 A. 773, 776 (Ct. Er. & App. 1904).

> of the voting power from the substantial ownership of the shares is not a putting of the shares in trust.

A New York court has agreed.

> Equally untenable is the suggestion that the court should treat this as a genuine trust agreement, and under general equity powers designate a trustee to effectuate its purposes. It is not a real trust agreement under which equity exercises such function, but a mere voting trust agreement.[34]

Legislatures, by commonly using the word "trustee," have implied that voting trusts are true trusts; however, they have not been satisfied to permit these voting agreements to be governed solely by common trust law but have imposed restrictions completely repugnant to established trust-law principles. Typical is the North Carolina statute[35] limiting the duration of voting trusts to ten years and preserving for the "beneficial owners" many of the attributes of legal owners or stockholders. In California the legislature has made voting trusts terminable at will by a majority of the beneficiaries.[36]

Attitudes surrounding the voting trust and the restrictions placed on them have little relevance to the close corporation.

> A close corporation is, in essence, a contractual agreement among a few shareholders; hence freedom of contract has exerted a strong influence upon the law's attitude toward such enterprises. The emerging view is that a unanimous agreement of the shareholders should be permitted to accomplish any lawful objective.[37]

The basic tests of the validity of any provisions of a shareholders' agreement are whether they are compatible with public policy, whether they adhere to state laws and the corporate charter, and whether they adversely affect the rights of creditors or other shareholders.[38] In *Selig*, the court failed to consider the first two of these tests, and in dealing with the third, it gave no weight to the fact that the agreement was the result of unanimous stockholder action.[39]

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[34] National Liberty Ins. Co. v. Bank of America, 126 Misc. 753, ——, 214 N.Y.S. 643, 652 (Sup. Ct. 1926).

[35] N.C. GEN. STAT. § 55-72 (1967).

[36] CAL. CORP. CODE § 2231 (1965).

[37] 67 COLUM. L. REV., *supra* note 1, at 596.

[38] Morganstern, *Agreements for Small Corporation Control*, 17 CLEV.-MAR. L. REV. 324, 327 (1968).

[39] *See* Woodruff v. Wentworth, 133 Mass. 309, 314 (1882), in which the court held that agreements resulting from unanimous shareholder action should be given weight against attack. *See also* 1 O'NEAL, *supra* note 27, at § 5.24.

There is evidence of a trend toward a more realistic and enlightened view that increased contractual flexibility and freedom will be allowed and enforced in situations involving close corporations.[40] Furthermore, indications are that the more enlightened state legislatures have recognized the need for statutory provisions dealing specifically with control problems of close corporations.[41] California has a procedure[42] whereby a provisional director may be appointed by the court in case of deadlock. This provisional director has all of the powers of other directors and is thus able to cast the tie-breaking vote and break the deadlock.

A more far-reaching remedy is the compulsory buy-out of shares of a dissenting stockholder. This provision was developed under section 210 of the English Companies Act of 1948,[43] and has been substantially enacted in Connecticut.[44] It authorizes the court to order the majority stockholder or "oppressor" shareholder to buy the injured stockholder's shares at a fair price as determined by the court. While this remedy may seem harsh, it does prevent the possible dissolution of a viable corporation and at the same time insures that the injured shareholders are fairly compensated.

A third remedy, and by far the most comprehensive, is also taken from section 210 of the English Companies Act. This provision, which has been adopted only by South Carolina in the United States, allows the court to "make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate."[45]

Selig emphasizes the need for legislation providing such remedies. If any of these legislative solutions had been available to the court, it would have been able to deal with the problem much more effectively and realistically. Until such statutory remedies are available, however, court analysis in situations involving voting trusts should deal with the sub-

[40] *See* Weil v. Beresth, 154 Conn. 12, 220 A.2d 456 (1966), in which the court specifically enforced a shareholder agreement; Lehrman v. Cohen, 43 Del. Ch. 222, 222 A.2d 800 (Sup. Ct. 1966), in which the court upheld a shareholder agreement in a situation similar to *Selig*; DEL. CODE ANN. tit. 8, § 354 (Supp. 1968); N.C. GEN. STAT. § 55-73 (1965).

[41] Folk, *Revisiting the North Carolina Corporation Law: The Robinson Treatise Reviewed and the Statute Reconsidered*, 43 N.C.L. REV. 768, 864 (1965); *accord*, Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043 (1969).

[42] CAL. CORP. CODE § 819 (1965).

[43] Companies Act, 11 & 12 Geo. 6, c. 38, § 210 (1948).

[44] CONN. GEN. STAT. § 33-384 (1961).

[45] S. C. CODE ANN. § 12022.23 (Supp. 1968). Such relief includes but is not limited to amending the by-laws; changing any resolution of the corporation; directing or prohibiting any act of the corporation, shareholders, directors, or officers; and providing for purchase of a shareholder's stock at a fair price.

stance of the agreement and should more accurately reflect the true nature of the voting "trust"—a corporate control device.

TURNER VANN ADAMS

Criminal Law—Involuntary Manslaughter Arising Out of Business Transactions

In *Commonwealth v. Feinberg*[1] the Supreme Court of Pennsylvania affirmed the conviction of a merchant on five counts of involuntary manslaughter arising out of the sale to and consumption by certain individuals of Sterno, a jelly-like substance intended for heating purposes. Sitting without a jury, the trial court determined that the defendant knew or should have known first, that some of his purchasers intended to consume rather than to burn the substance and second, that consumption of it could be lethal.[2] Evidence on the former issue was that in selling Sterno the defendant recognized an order to "make one" as a request for a can of Sterno to drink, often referred to Sterno as shoe polish, and frequently requested customers to hide their purchased Sterno as they left the premises.[3] Directed toward the latter issue was evidence that each can of the lethal Sterno was marked on the lid as follows: "Institutional Sterno. Danger. Poison. Not for home use. For commercial and industrial use only."[4] The chemical contents of the industrial Sterno were not stated on the container, and the defendant was not otherwise informed of those contents. The non-lethal Sterno that the defendant had apparently been selling for some time was marked "Caution. Flammable. For use only as a fuel."[5] Both containers were identical except that the industrial Sterno did not have a paper wrap-around label.

The supreme court applied contrasting legal tests to each of these two problems. It repeatedly stated that the defendant "knew or should have known" that the Sterno would be lethal if consumed.[6] Evidence in the nature of objective facts, such as the contrasting markings on the containers of lethal and non-lethal Sterno, supported this conclusion. Applying an objective standard, the court found that since a reasonable man would have been aware of the poisonous nature of the Sterno, the defen-

[1] 433 Pa. 558, 253 A.2d 636 (1969).
[2] *Id.* at ——, 253 A.2d at 641.
[3] Commonwealth v. Feinberg, 211 Pa. Super. 100, 103 n.3, 234 A.2d 913, 914 n.3 (1967).
[4] *Id.* at 103, 234 A.2d at 914.
[5] *Id.*
[6] 433 Pa. at ——, 253 A.2d at 641, 643, 644.

dant would be charged with that knowledge.[7] On the other hand, the court stated several times in *Feinberg* that the defendant did in fact know that his patrons intended to consume the substance.[8] Evidence supporting that conclusion was in the nature of subjective proof of the defendant's actual knowledge such as his own actions and words. By applying both the subjective and objective tests the court did not limit itself strictly to either one.

Involuntary manslaughter is commonly said to be the killing of another through the commission of reckless and wanton acts. Its essence is "intentional conduct, by way either of commission or omission, where there is a duty to act, which involves a high degree of likelihood that substantial harm will result to another."[9] In *Feinberg* the conduct in question, selling Sterno, was an intentional act. There was a high degree of likelihood that harm would result due to the lethal nature of the Sterno and the probability that the "skid-row" alcoholics would drink it. Therefore, whether the defendant was under a duty is the major issue in the case.

A duty to act arises from the obligation to conform to a standard of care.[10] Three different standards of care were proposed at various stages in the history of this case. A merchant might be required to ascertain how a purchaser intended to use an item purchased.[11] If the use were dangerous, selling the item would subject the merchant to criminal

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[7] So far as perception is concerned, it seems clear that the actor must give to his surroundings the attention which a standard reasonable man would consider necessary under the circumstances, and that he must use such sense as he has to discover what is readily apparent. He may be negligent in failing to look, or in failing to observe what is visible when he does look. W. PROSSER, LAW OF TORTS § 32, at 160 (2d ed. 1964) [hereinafter cited as PROSSER].

[8] 433 Pa. at ——, 253 A.2d 641-42. Once, however, the court unexplainably stated that the defendant sold the substance "knowing or having reason to know" that his patrons intended to consume rather than to burn it. *Id.* at ——, 253 A.2d at 642. In addition, the court quoted from the Pennsylvania intermediate appellate court, which concluded that the defendant "might reasonably have expected" purchasers to drink the substance. *Id.* at ——, 253 A.2d at 642; *quoting* 211 Pa. Super. at 110, 234 A.2d 917 (1967). This 1967 opinion is cited in 40 AM. JUR. 2d *Homicide* § 86 (1968) to support the following proposition:

> Thus, it has been held that a merchant in a "skid-row" district who sold a solidified alcohol, popularly called "canned heat" which had additives specified by the United States government to render it unfit for drinking purposes, to purchasers whom he knew or should have known intended to use the substance for drinking purposes, could be held guilty of involuntary manslaughter where the purchasers died as a result of drinking the substance.

[9] Commonwealth v. Welansky, 316 Mass. 383, 399, 55 N.E.2d 902, 910 (1944).

[10] PROSSER § 53, at 331.

[11] 433 Pa. at ——, 253 A.2d at 642.

liability for the harmful consequences. Broader even than strict liability in tort,[12] this comprehensive standard of care was rejected summarily by the supreme court.[13] The intermediate appellate court expressed the standard that it adopted as follows:

> In light of the recognized weaknesses of the purchasers of the product, and [defendant's] greater concern for profit than with the results of his actions, he was grossly negligent and demonstrated a wanton and reckless disregard for the welfare of those *whom he might reasonably have expected* to use the product for drinking purposes.[14]

That court applied to defendant's behavior an objective standard based on the actions of a reasonable man. The third possible standard of care is the apparent holding of the supreme court: A merchant is bound by a legal duty not to sell an item only if he is aware of dangerous abnormal use "contemplated" by a purchaser.[15] Although the court appeared to choose the subjective standard (what the defendant actually knew) instead of the objective standard (what he should have known), it still left doubt by stating once in the opinion that the defendant "knew or should have known" the intentions of his customers.[16]

Feinberg is novel because of the court's application of a duty to a merchant who sells an item that may be lethal if used in an abnormal way. The court explained that it was controlled by the "black letter law"[17] of *Thiede v. State*,[18] an old Nebraska case holding that a person who unintentionally gave poisonous liquor to another was guilty of involuntary manslaughter. It is important to note, however, that *Thiede* is distinguishable from *Feinberg* by the same facts making the latter a significant case. *Thiede* involved criminal liability for the defendant who simply offered moonshine liquor to a friend; *Feinberg* involved a sale by a merchant. The duty of the former was to provide a nonlethal drink. The same duty would require the latter to insure that any item out of hundreds or even thousands sold would be safe for normal use. Although

[12] PROSSER § 96, at 667-68. The seller is not liable in tort if a purchaser uses an item in an unforeseen way: McCready v. United Iron & Steel Co., 272 F.2d 700 (10th Cir. 1959) (using window casements as a ladder); Schfranek v. Benjamin Moore & Co., 54 F.2d 76 (S.D.N.Y. 1931) (stirring a wall decorating compound with a finger); Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Springfield, Mo., Ct. App. 1944) (intentionally setting a finger nail polish on fire).

[13] 433 Pa. at ——, 253 A.2d at 642.

[14] 211 Pa. Super. at 110, 234 A.2d at 917 (emphasis added).

[15] 433 Pa. at ——, 253 A.2d at 642.

[16] See note 8 *supra*.

[17] 433 Pa. at ——, 253 A.2d at 641.

[18] 106 Neb. 48, 182 N.W. 570 (1921).

courts have recognized such a duty to some extent in the law of torts,[19] they have not previously carried it over into criminal law. *Thiede* is also distinguishable because in *Feinberg* an abnormal use was the cause of death. This fact compounds the stringent result reached by applying the duty of *Thiede* to the facts of *Feinberg*. Under such an application, a merchant must refrain from selling not only inherently dangerous articles but also those that may be dangerous if used in an abnormal way if he knows (or, possibly, has reason to know) of the intended dangerous use.

Tort liability for negligence has been applied to a vendor who fails to exercise reasonable care in the sale.[20] A defendant owner of a hardware store has been held liable in tort for having sold ammunition to a fourteen-year-old who accidentally shot a neighbor.[21] A bartender has been found liable for tort damages that resulted from a fight instigated by a customer who had consumed too much of the defendant's liquor.[22] Criminal liability under these circumstances was not imposed on the defendants.[23] However, under the standard of *Feinberg* a criminal indictment arguably could have been sought.

If, as in *Feinberg*, a court expands criminal liability into areas previously covered only by tort law, then that court should deal with policies that may distinguish criminal law. It has been asserted that making criminal negligence coincide with tort negligence would be too harsh;[24] criminal liability should be reserved for cases of moral fault since the impending sanctions can have no effect on the inadvertent actor.[25] Further-

[19] PROSSER § 97, at 677-78. Following Spencer v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (applying liability without fault to a seller when a house collapsed), courts have applied liability without fault to the sale of automobiles, tires, airplanes, an electric cable, grinding wheels, a combination power tool, playground equipment, herbicides, insecticides, a chair, a riveting machine, and a water heater.

[20] PROSSER § 95, at 648-49.

[21] Mautino v. Piercedale Supply Co., 338 Pa. 435, 13 A.2d 51 (1940).

[22] Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).

[23] Each of the cases was a civil proceeding for damages. Although none specifically held that a criminal action would not be upheld, no action was in fact brought. In Commonwealth v. Root, 403 Pa. 571, 170 A.2d 310 (1961), the court stated that if the tort rule for causation were applied to criminal proceedings, then in each of the cases the defendant would have been guilty of involuntary manslaughter. *Id.* at 577, 170 A.2d at 312-13. Implicit in that statement is the court's assumption that no criminal action could be brought.

[24] R. MOREHEAD, THE LAW OF HOMICIDE 112 (1952). *Cf.* Commonwealth v. Root, 403 Pa. 571, 577, 170 A.2d 310, 312-13 (1961); Davis, *The Development Negligence as a Basis for Criminal Liability in Criminal Homicide Cases*, 26 KY. L.J. 209, 223 (1938).

[25] G. WILLIAMS, CRIMINAL LAW 99 (1961). *Cf.* Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 416-17 (1958). *But see* MODEL PENAL CODE 2.02, Comment at 126-27 (Tent. Draft No. 4, 1955):

more, juries are reluctant to convict persons of criminal negligence.[26] On the other hand, the high degree of culpability in this particular case militated in favor of imposing on the defendant a duty analogous to that in tort law. Perhaps for this reason the court, without alluding to any of these distinguishing policies, recognized a duty for a merchant to act in a situation in which he possessed knowledge that the item purchased would be used in an abnormal manner.

A conviction for involuntary manslaughter requires not only that the defendant be negligent in doing some lawful act but that his negligence cause the harmful result.[27] Causation has been characterized as the "degree of participation that is necessary to warrant a conviction."[28] In *Feinberg*, analysis of causation is complicated by the fact that the deceased's own acts contributed to his death.

Actual causation[29] (causa sine qua non)[30] is established in *Feinberg* by convincing evidence. An expert toxicologist testified that death could have resulted from consumption of the new industrial Sterno but not from the ordinary Sterno that the defendant previously sold.[31] The de-

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Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct.

Id.

[26] The following statistics indicate clearly that more than twice as many persons accused of criminal negligence are acquitted, or have the charges dismissed, as those accused of all crimes.

	1966		*1967*	
	Criminal Negligence	*All Crimes*	*Criminal Negligence*	*All Crimes*
Years				
Total persons charged	865	2,170,850	857	2,310,722
Percentages:				
Guilty as charged	35.2%	64.9%	36.5%	63.5%
Guilty of lesser offense	10.6%	2.6%	11.7%	2.4%
Acquitted or dismissed	45.4%	15.9%	44.3%	16.2%
Referred to juvenile court	8.8%	16.6%	7.5%	17.9%
	100.0%	100.0%	100.0%	100.0%

1967 FBI, UNIFORM CRIME REPORTS 109; 1966 FBI, UNIFORM CRIME REPORTS 104. See MODEL PENAL CODE § 201.4, Comment at 53-54 (Tent. Draft No. 9, 1959).

[27] Commonwealth v. Root, 403 Pa. 571, 574, 170 A.2d 310, 311 (1961).

[28] Note, *Criminal Liability of Participants in Fatal Russian Roulette*, 21 WASH. & LEE L. REV. 121 (1964).

[29] R. PERKINS, CRIMINAL LAW 687 & n.11 (2d ed. 1969) [hereinafter cited as PERKINS].

[30] "[W]ithout which the result would not have occurred." State v. Des Champs, 126 S.C. 416, 420, 120 S.E. 491, 493 (1923).

[31] 433 Pa. at ——, 253 A.2d at 642.

fendant's cigar store was the only retail outlet in Philadelphia that dispensed the lethal liquid.[32] If the defendant had not sold the dangerous Sterno; no harmful results would have occurred.

In *Commonwealth v. Atencio*[33] the Supreme Court of Massachusetts took an approach to causation which, although different from *Feinberg*, might be pertinent. Relying on implicit conspiracy, the court found that the "Commonwealth had an interest that the deceased should not be killed by the wanton or reckless conduct of himself and others. . . . Such conduct could be found in the concerted action and cooperation of the defendants in helping to bring about the deceased's foolish act."[34]

Although in *Atencio* the defendant was guilty as principal in the second degree[35] and, if the same reasoning is applied, in *Feinberg* as an accessory before the fact,[36] in each case guilt would be coincident with that of the perpetrator.[37] Since the perpetrators in each case were the victims, imputing their guilt to the defendants is questionable due to the difficulty of ascribing an unlawful act to the deceased persons. If a deceased's act is suicide, it would be a felony only in a few jurisdictions.[38] If his act is criminal negligence that resulted in his own death, it would not be a crime. *Atencio* suggested a third possible crime, conspiracy to create a risk.[39] Conspiracy is, however, a tenuous argument in *Feinberg* since the evidence presented at least implied that the deceased was not the victim of suicide, and otherwise no recognized crime could be imputed to the defendant.

Even though the defendant's act may have been a cause in fact of the harmful consequence, it may not have been a "legal cause."[40] Legal

[32] 211 Pa. Super. at 104, 234 A.2d at 915.

[33] 345 Mass. 627, 189 N.E.2d 223 (1963).

[34] *Id.* at 629, 189 N.E.2d at 224-25.

[35] 9 VILL. L. REV. 134, 136-37 (1963). A principal in the second degree is one who is guilty by reason of having aided, counseled or encouraged the commission of a crime in his presence. PERKINS 658.

[36] An accessory before the fact is one who is guilty by reason of having aided or encouraged commission of the crime without having been present at the moment of perpetration. PERKINS 663. The defendant in *Feinberg* could be considered an accessory before the fact since he had aided the deceased by selling him poisonous Sterno but was not present when he drank it.

[37] PERKINS 684.

[38] *E.g.*, Southern Life & Health Ins. Co. v. Wynn, 29 Ala. App. 207, ——, 194 So. 421, 423 (1940).

[39] "[Wanton and reckless conduct] could be found in the concerted action and cooperation of the defendants in helping to bring about the deceased's foolish act." 345 Mass. at 629, 189 N.E.2d at 225.

[40] PERKINS 690-91. Among other terms used to convey the same meaning are primary cause, efficient cause, efficient proximate cause, efficient adequate cause and proximate cause.

cause and its synonyms denote "what the courts will regard as *the* cause."[41] When, as in *Feinberg*, legal cause is complicated by the intervening act of the deceased, courts have had serious difficulty.

In *Thiede*[42] the Nebraska court held that the deceased's voluntary act of drinking poisonous liquor did not insulate the defendant from criminal liability because that act was what the defendant had "contemplated."[43] If the defendant intended[44] for his friend to drink the liquor, then he should have been responsible for any consequences. Although the standard of care applied in *Feinberg* is distinguishable from that in *Thiede*, the chain of causation in the two cases is similar. In fact, the Supreme Court of Pennsylvania in *Feinberg* followed[45] the causation argument made in *Thiede*.

But that court in *Commonwealth v. Root*[46] reversed a conviction for involuntary manslaughter on the theory of a superseding intervening act. The defendant in that case was engaged in an automobile race with another person who, in attempting to pass the defendant, crashed head-on into an oncoming vehicle and was killed. The court considered the defendant's criminal liability to be cut off by the independent intervening act of his competitor:

> Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause.[47]

In *Feinberg* the independent intervening act in question was the deceased's drinking the Sterno. The court held on the basis of the objective evidence offered that the defendant should have known about the lethal nature of the substance.[48] The deceased, therefore, might be equally charged with knowledge of the danger since the only warning was on the

[41] Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 104 (1911) (emphasis added).

[42] See p. 346 *supra*.

[43] 106 Neb. at 59, 182 N.W. at 574. "Contemplate signifies a purpose in respect to the future." Reed v. Philadelphia Transp. Co., 171 Pa. Super. 60, 64, 90 A.2d 371, 373 (1952).

[44] "To 'intend' must be understood to mean the same with 'design' or 'contemplate.'" State v. McDonald, 4 Port. 449, 455 (Ala. 1837).

[45] 433 Pa. at ——, 253 A.2d at 642.

[46] 403 Pa. 571, 170 A.2d 310 (1961).

[47] *Id.* at 579, 170 A.2d at 313.

[48] See p. 345 & note 7 *supra*.

Sterno container itself and was as plain to him as it was to the defendant. If the deceased was thus aware of the danger, his independent act, as the one in *Root*, could insulate the defendant from criminal liability. The court concluded that *Root* may be distinguished by the fact that the intervening act in *Feinberg* was what the defendant had contemplated. Although the defendant in *Root* had expected his competitor to try to pass, he probably had not expected that the attempt would be performed in a negligent manner. However, this distinction is not persuasive since the two had engaged in a high-speed race in which any attempt to pass might be negligent. The intervening act of the attempt to pass was therefore just as foreseeable or contemplated as that of drinking Sterno. *Root* easily could have been controlling on the facts of *Feinberg*.

The result in *Atencio* was based not only on conspiracy but also on criminal negligence in "helping to bring about the deceased's foolish act."[49] The defendant in *Feinberg* by selling the lethal Sterno to those whom he knew or should have known would drink it likewise helped to bring about a foolish act even though he was not present when the Sterno was consumed.

The decision in *Feinberg* could have been controlled by or distinguished from any one of the above three decisions because it contains both the elements on which each of the cases was based and additional elements by which to distinguish them. What is clear is that *Feinberg* involved a factual situation filled with culpability. In order to increase his already substantial sales of Sterno to alcoholics, the defendant had purchased industrial Sterno in order to receive a larger quantity. During the time that he had industrial Sterno available for sale, thirty-one persons in the skid-row district of Philadelphia died from methanol poisoning.[50] In holding criminal liability on these facts, the court expanded the tort concept of legal duty into the area of criminal law. It also considered the difficult causation problem that will always be raised by imposition of that duty. After *Feinberg*, a merchant might be convicted of arson for selling gasoline in the face of a threat of riot on the theory that he knew or should have known that purchasers intended to make fire bombs. A druggist might be convicted for selling one of many types of common remedies if he suspected that it might be improperly imbibed or injected. Although it is not completely clear in which cases this legal duty is to be imposed,

[49] 345 Mass. at 629, 189 N.E.2d at 225. See p. 349 *supra*.

[50] 433 Pa. at ——, 253 A.2d at 638. The defendant was convicted on five counts for those deaths.

ground is broken for its extension to any merchant who reasonably should know the use for which his products are intended.

RICHARD L. GRIER

Criminal Procedure—Requirements for Acceptance of Guilty Pleas

A recent study estimates that in some jurisdictions as many as ninety per cent of all criminal convictions are obtained through guilty pleas.[1] The Supreme Court has set forth explicit standards that must be followed by both state and federal judges before a guilty plea can be accepted. The holding in *McCarthy v. United States*[2] binds federal trial judges to the requirements of rule 11 of the Federal Rules of Criminal Procedure. And if the dissent in *Boykin v. Alabama*[3] is correct, the majority opinion in that case compels state courts to follow the basic requirements of rule 11. The rule provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily and with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea (*as amended* effective July 1, 1966).

In *McCarthy* the defendant was prosecuted for tax evasion in a federal district court in Illinois and entered a plea of guilty to one of three counts. The court accepted this plea after McCarthy's counsel stated that he had advised the defendant of the consequences of the plea. The defendant expressed his desire to plead guilty and acknowledged his understanding of the consequences of such a plea with respect to the waiver of jury trial and the punishment involved. At the insistence of the prosecutor, the defendant further stated that the plea had not been induced by threats or promises.[4] McCarthy was convicted and appealed to the Court of Appeals for the Seventh Circuit on the ground that his guilty plea

[1] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967).
[2] 89 S. Ct. 1166 (1969).
[3] 89 S. Ct. 1709 (1969).
[4] United States v. McCarthy, 387 F.2d 838, 840 (7th Cir. 1968).

should be set aside because the trial court had failed to follow rule 11. The court of appeals, holding that the district court judge had complied with rule 11, affirmed the conviction.[5]

The Supreme Court reversed and remanded on the ground that the trial judge had failed to determine that there was a factual basis for the plea.[6] In the majority opinion Chief Justice Warren pointed out that strict adherence to the requirements of rule 11 aids the trial judge in that "he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary."[7] Failure to comply with the requirements of the rule, the Court held, required setting aside the defendant's plea and affording him an opportunity to plead anew.[8]

Having explicitly interpreted rule 11, the next step taken by the Supreme Court was to demand adherence by the states to many, if not all, of its requirements. In *Boykin* the defendant in the state court entered pleas of guilty to five counts of robbery and was sentenced to death. On appeal to the Alabama Supreme Court, he argued that the punishment of death was "cruel and unusual" within the meaning of the United States Constitution.[9] The Alabama court unanimously rejected this contention, but three justices dissented on the ground that the record was inadequate to show that petitioner had intelligently and knowingly pleaded guilty.[10] On certiorari, the United States Supreme Court reversed the conviction on the ground that it was error for the trial judge to accept the guilty plea without first determining that the plea was intelligent and voluntary. The Court further emphasized the necessity, for the benefit of both the defendant and the state, of establishing a record disclosing that the plea was voluntarily and knowingly entered.[11]

Before *McCarthy* and *Boykin*, state and federal law was inconsistent in setting standards for the acceptance of a guilty plea. In general, however, most courts refrained from accepting a guilty plea without first determining that it was fair to the defendant under the circumstances of the case.[12]

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[5] *Id.* at 842-43.
[6] 89 S. Ct. at 1171.
[7] *Id.*
[8] *Id.* at 1172-74.
[9] U.S. CONST. amend. VIII.
[10] Boykin v. State, 281 Ala. 659, 207 So. 2d 412 (1968).
[11] 89 S. Ct. at 1712.
[12] Annot., 97 A.L.R.2d 551 (1964.)

> The ultimate question, not yet resolved, is how much procedural formality and regularity the plea of guilty process will be given and, in this regard, to what extent formality will be consistent with the other objectives of guilty plea process.[13]

The federal courts have long strived to avoid either an excess of formality on the one hand or the hurried acceptance of guilty pleas without proper interrogation of defendants on the other.[14] The decisions prior to *McCarthy* fall into two rather indistinct groups. Most courts, while recognizing the need for some certainty of fairness in the acceptance of guilty pleas, did not require any specific set of inquiries to be made. A small minority stated that a more explicit procedure should be followed.

In *Waddy v. Heer*[15] the Court of Appeals for the Sixth Circuit declined to hold that due process requires compliance with a particular procedure when a plea is accepted from a defendant represented by counsel. The court did say that the preferred practice would be to have the fact that the accused comprehended the effect of his plea appear on the record at the time the plea is entered.[16] Even less stringent is *Stephens v. United States*,[17] in which the court stated that failure to comply fully with rule 11 is not fatal to the entry of a guilty plea.[18] At least one court has noted the need for "something more than the presence of counsel and the statement that the defendant pleads guilty. . . ."[19] Several courts have allowed the determination of the voluntariness of the plea to come from sources other than the trial judge's questioning of the defendant.[20]

Foremost in the line of decisions of the distinct minority of federal courts that demanded stricter adherence to rule 11 is *Heiden v. United*

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[13] D. NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 52 (1966) [hereinafter cited as NEWMAN]. *See also* 20 SYRACUSE L. REV. 109, 111 (1968).

[14] Protection of the defendant who pleads guilty is not a recent idea. The constitutional foundation of rule 11 was indicated in Smith v. O'Grady, 312 U.S. 329 (1941). The Court indicated that notice of the true nature of the charge is "[t]he first and most universally recognized requirement of due process. . . ." *Id.* at 334. Earlier, in Kercheval v. United States, 274 U.S. 220 (1927), the Court said: "Out of just consideration for persons accused of crime, courts are careful that a plea shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Id.* at 223.

[15] 383 F.2d 789 (6th Cir. 1967).

[16] *Id.* at 795.

[17] 376 F.2d 23 (10th Cir. 1967).

[18] *Id.* at 24.

[19] Rimanich v. United States, 357 F.2d 537, 538 (5th Cir. 1966).

[20] Dorrough v. United States, 385 F.2d 887 (5th Cir. 1967), *discussed in* Gentile, *Fair Bargains and Accurate Pleas*, 49 BOSTON U.L. REV. 514, 519-23 (1969); United States v. Rizzo, 362 F.2d 97 (7th Cir. 1966); United States v. Davis, 212 F.2d 264, 267 (7th Cir. 1954).

States,[21] relied on in part by the majority in *McCarthy*.[22] According to *Heiden*, "[p]rejudice . . . is established when lack of understanding in a specific and material respect is sufficiently alleged and such asserted lack, if it existed, would have been disclosed by a proper examination by the trial judge."[23] Several courts expressly or impliedly rejected *Heiden*'s rationale.[24]

Federal courts also differed on how far the trial judge must go in informing the defendant of the consequences of his plea. Prior to *McCarthy* the rule seemed to be that merely informing the defendant of the direct consequences of the plea was sufficient.[25]

Before *Boykin*, the state courts employed a variety of procedures to achieve some protection similar to that intended by rule 11. Today, states can draw from the American Bar Association's *Project on Minimum Standards for Criminal Justice*[26] to establish uniform rules governing acceptance of guilty pleas. While a detailed analysis of current state procedures is not feasible in this note, examples selected from a few states point out the disparity in their procedures for accepting guilty pleas. Missouri requires some questioning of the defendant by the trial judge to determine whether the plea is voluntary.[27] The Supreme Court of Tennessee reached the opposite result in a similar situation.[28] Several states

[21] 353 F.2d 53 (9th Cir. 1965), *noted in* 41 TEMP. L.Q. 491, 497-501 (1968).
[22] 89 S. Ct. at 1172-73.
[23] 353 F.2d at 55.
[24] Stephens v. United States, 376 F.2d 23, 24-25 (6th Cir. 1967); Halliday v. United States, 380 F.2d 270, 272 (1st Cir. 1967); Brokaw v. United States, 368 F.2d 508, 510 (4th Cir. 1966).
[25] Trujillo v. United States, 377 F.2d 266 (5th Cir. 1967) (no need to inform of ineligibility for parole); Meaton v. United States, 328 F.2d 379 (5th Cir. 1964) (no need to inform of loss of civic privileges); Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963) (non-availability of probation and parole not a "consequence"); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) (no need to inform of loss of voting rights). *But see* Munich v. United States, 337 F.2d 356 (9th Cir. 1964). *See also* 41 TEMP. L.Q. 491 (1968).
[26] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY §§ 1.4-.7 (Approved Draft 1968). The provisions are quite similar to FED. R. CRIM. P. 11: section 1.4 provides for the questioning of the defendant by the trial judge in order to insure that the defendant fully understands the charge against him and the consequences of the plea; section 1.5 is aimed at insuring that the plea is voluntary; section 1.6 requires that there be a factual basis for the plea; section 1.7 requires that a record be made of the guilty plea proceedings.
[27] State v. Rose, 440 S.W.2d 441 (Mo. 1969). The court pointed out that proper inquiry at the trial level lessens the need for such post-conviction hearings. *Id.* at 445-46.
[28] Richmond v. Henderson, —— Tenn. ——, 439 S.W.2d 263 (1969). The court acknowledged that counsel deliberately misrepresented certain facts to the defendant, but refused to overturn the acceptance of the guilty plea. The court apparently felt that misconduct of defense counsel must be so obvious as to attract

have statutes bearing on the question.[29] Michigan, for example, requires that:

> Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusations, and without undue influence.[30]

In fact, this requirement is followed only in murder cases.[31]

An apparently explicit standard governing the acceptance of guilty pleas now exists, at least in the federal courts. A federal trial judge must follow *McCarthy's* interpretation of rule 11 and can no longer "resort to 'assumptions' not based upon recorded responses to his inquiries."[32] The defendant in pleading guilty must relinquish a "known right or privilege."[33] "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[34] In addition to directing the judge to satisfy himself that the plea is intelligent and voluntary, *McCarthy* requires a determination that there is a factual basis for the plea. All of these inquiries into the defendant's understanding of the plea must be demonstrated *"in the record at the time the plea is entered."*[35] Relying heavily on *Heiden* the Court noted in *McCarthy* that "rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding 'in this highly subjective area.' "[36]

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the immediate attention of the trial court: "At relator's trial there would have been nothing apparent to the court which would have indicated the underhanded method in which the attorney shirked his duty to his client and procured a guilty plea." *Id.* at 266.

[29] *E.g.*, CONN. GEN. STAT. ANN. § 54-60 (1958) (no provision for the questioning of the defendant included); N.C. GEN. STAT. § 15-4.1 (1965) (plea must be voluntary but no requirement that there be a factual basis for it). Several states presently have procedural rules that closely resemble rule 11: *e.g.*, FLA. R. CRIM. P. 1.170(a); MO. R. CRIM. P. 25.04. Neither of these two rules require that there be a factual basis for the plea.

[30] MICH. COMP. LAWS § 768.35 (1948).

[31] NEWMAN, *supra* note 13, at 11-12. Both Wisconsin and Michigan employ procedures other than direct questioning by trial judge. *Id.* 13-21.

[32] McCarthy v. United States, 89 S. Ct. 1166, 1171 (1969).

[33] *Id., quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[34] 89 S. Ct. at 1171.

[35] *Id.* at 1173 (emphasis by the Court).

[36] *Id.* at 1172.

In the future, failure to comply with the requirements of the rule will result in affording the defendant the "opportunity to plead anew."[37]

The impact that Boykin will have on state courts is not so clear. If one views Justice Harlan's dissenting opinion as setting forth the unequivocal interpretation of the decision, there is little room for disputing the contention that rule 11 now applies to the states. "The Court thus in effect fastens upon the states, as a matter of federal constitutional law, the rigid prophylactic requirements of rule 11. . . ."[38] But it is difficult to read such an interpretation into the majority opinion in light of the fact that rule 11 is never mentioned. It is perhaps significant that the case was brought to the Supreme Court on the question of cruel and unusual punishment; reversal of the decision below can be viewed as a means of correcting the wrong at hand while avoiding the more controversial issue of the constitutionality of the death penalty.

In *Boykin*, after stating that the right to trial by jury, the right to confront one's accusers, and the privilege against self-incrimination are simultaneously waived when a defendant pleads guilty,[39] the Court simply held that "we cannot presume a waiver of these three important federal rights from a silent record."[40] The opinion also held that there must be an affirmative showing that the plea was intelligently and voluntarily entered.[41] In order to contend successfully that Justice Harlan's interpretation is the correct one, it will be necessary to look beyond the opinion itself since he gave no concrete reasons for the assertion that rule 11 now applies to the states.

The soundest manner in which to support the dissenting opinion's contention is to analyze *Boykin* in conjunction with *McCarthy*. The decisions are apparently dissimilar; the majority in *McCarthy* refused to discuss the constitutional issues involved[42] while the majority in *Boykin* resolved them. A close reading of *McCarthy*, however, discloses that these constitutional questions were prominent in the minds of the justices voting in the majority:

> These two purposes have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives sev-

[37] *Id.* at 1174.
[38] 89 S. Ct. at 1713 (dissenting opinion).
[39] *Id.* at 1712.
[40] *Id.* The Court, quoting *McCarthy*, stated: " 'Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.' " *Id.* at 1712 n.5.
[41] *Id.* at 1712.
[42] 89 S. Ct. at 1169.

> eral constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.[43]

The similarity of the above language to the following excerpt from *Boykin* is obvious:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth. . . . Second is the right to trial by jury. . . . Third is the right to confront one's accusers. . . . We cannot presume a waiver of these three important federal rights from a silent record.[44]

Further, in perhaps the most significant portion of the *Boykin* decision the Court stated:

> What is at stake for an accused facing death or imprisonment demands utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure that he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought.[45]

According to *McCarthy*, the two primary reasons for strict enforcement of rule 11 are protection of the accused and the establishment of a record adequate to sustain post-conviction attacks.[46] Since the protection of the accused is the primary aim in both state and federal courts and since the same constitutional rights are involved, state courts will apparently be compelled to comply with the requirements of rule 11.

There is one provision of rule 11 that arguably does not apply to the states. *Boykin* does not mention any need to determine whether there is a "factual basis"[47] for the plea. In *McCarthy* the Court gave two reasons

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[43] *Id.* at 1171.
[44] 89 S. Ct. at 1712.
[45] *Id.*
[46] 89 S. Ct. at 1170-72.
[47] The meaning of "factual basis" was discussed in *McCarthy*:
The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the

in support of the factual inquiry required by the rule. First, such a finding by the trial court weighs against post-conviction attacks on the plea. Second, this safeguard protects a defendant against pleading guilty to a charge for which he could not be convicted.[48]

But even the most well-advised defendant may harbor doubts as to whether his particular acts were sufficient to fall within a particular statutory definition of a crime. Why should a defendant with such doubts be forced to undergo the ordeal of jury decision, which is sometimes inaccurate, if he is willing to accept lenient sentencing for a lesser offense? It is this type of defendant to whom the plea-bargaining process will be most attractive. Assuming that the defendant is represented by a lawyer interested in achieving the best results for his client, the question becomes whether all parties concerned will best be served by waiver of trial and acceptance of a more lenient sentence. If defense counsel feels that his client's chances at trial are poor enough to warrant a guilty plea, then the defendant should have the opportunity to make the choice, even though there may be no definite "factual" basis for the plea.

The plea-bargaining process offers something for both the courts and the defendant: By pleading guilty and waiving trial, the defendant saves the judicial process a tremendous amount of time;[49] and most judges impose more lenient sentences than would be given for conviction after a full trial.[50] There are two general types of "bargain" made between prosecutor and defense counsel in the typical plea-bargaining situation. The one less common is the plea of guilty to a lesser non-included offense—an offense that has no substantial relationship to the acts committed by the defendant. The factual-basis requirement should now eliminate such pleas in the federal courts. The more common plea arrangement is that

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charge but without realizing that his conduct does not actually fall within the charge."

89 S. Ct. at 1171 (*quoting* rule 11).

[48] *Id.* at 1170-72.

[49] Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 881-82 (1964).

[50] *See id.* 869-70. *See also* Gentile, *Fair Bargains and Accurate Pleas*, 49 BOSTON U.L. REV. 514, 548 (1969), in which the author, after noting the prevalence of the practice of discrimination in sentencing in favor of defendants who plead guilty, states:

> In this light, justification for discriminatory treatment based on the method of guilt determination needs little elaboration. The guilty plea is only secondarily a means of guilt determination. It is primarily a means of law enforcement. Without the "carrot" and "stick" of discrimination, guilty pleas would not be offered with desirable frequency. . . . In fact, it is the overriding interest of society in effective law enforcement which justifies the discrimination.

in which the defendant enters a plea of guilty to a lesser included offense.[51] Under a factual basis requirement, even pleas of guilty to lesser included offenses may well be rejected if the judge cannot find from the facts before him a close relation to the substantive elements of the crime to which the plea of guilty is entered. In order to accept such pleas the judge often will be forced to conduct an extended hearing, and it is not likely that this result is what the Court deciding *McCarthy* had in mind when it stressed the need for a factual determination.[52] At any rate, state courts should not follow a rigid factual-basis test for guilty pleas until the Supreme Court makes clear that this requirement is specifically binding upon them.

A further problem in complying with the requirements of rule 11 will likely arise when the courts are forced to define "consequences of the plea."[53] Interesting questions arise when one tries to draw a line between results that are direct enough to be considered consequences, of which the defendant must be informed, and those more indirect results of which the defendant need have no knowledge. For example, by pleading guilty a defendant also waives any defenses that he may have. Must the judge therefore explore the merits of any possible defense available to the defendant? Must, indeed may, a judge inform the defendant that one consequence of a guilty plea is the likelihood of a more lenient sentence? Arguably, presenting a defendant with the choice of asserting his innocence or accepting a lesser penalty would have a "chilling" effect on the exercise of his constitutional rights within the meaning of *United States v. Jackson*.[54]

Requiring the trial judge personally to question the defendant shifts a portion of the task of assisting the defendant from counsel to the court. The procedure adopted to carry out this task is crucial. The judge must

[51] For an excellent discussion of typical plea-arrangement situations, see *Guilty Plea Bargaining*, *supra* note 49 at 866-70.

[52] The most obvious example of a situation that may well require hearing on the question of whether there is a factual basis for the plea is that of a crime involving a specific intent. In order to determine with precision that the specific intent existed, the judge may be forced to review past decisions dealing with the specific intent as well as to interrogate the defendant at length. Arguably, the better solution would be to require the judge to determine only that there is a probability that the requisite intent was present.

[53] *See* cases cited note 25 *supra*. *See generally* 20 SYRACUSE L. REV. 109 (1968).

[54] 390 U.S. 570 (1968). *Jackson* involved a prosecution under the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1948). Under the Act, the only way a defendant could avoid risking the death penalty was to plead guilty and thus waive his right to jury trial, his right to confront his accusers, and his privilege against self-incrimination. The Court held that this provision had a chilling effect on the assertion of these rights and was thus unconstitutional.

directly question the defendant to determine whether he understands the significance of what he is doing in pleading guilty. Can one who has not been previously informed of the consequences of a plea of guilty (and it is this type of defendant that the rule was designed to protect) quickly weigh all the alternatives and then make the best decision? Some significant amount of time must be allowed him, the exact amount to be determined by such factors as his intelligence and previous experience.

Certainly the above problems will have to be resolved in order for the requirements of rule 11 to serve the interests of justice. In spite of these difficulties, the decisions in *McCarthy* and *Boykin* should benefit all parties involved in the process of guilty plea acceptance. In addition to setting forth a more or less uniform set of rules, the Court has provided significant safeguards for both the trial court and the defendant. By requiring an explicit set of inquiries to be made at the trial stage, the Court assured that future defendants will be better informed and thus presumably more able to make intelligent decisions. Trial court judgments will receive greater protection since a guilty plea under the requirements will likely be upheld against subsequent attacks.

TRAVIS W. MOON

Decedents' Estates—Does North Carolina Law Adequately Protect Surviving Spouses?

Although the policy of freedom to distribute property at death is strong, a state may feel compelled to intervene if inadequate provision is made for the surviving spouse. At common law the surviving spouse was protected by the marital estates of curtesy and dower.[1] But with the advent of an industrial society, most state legislatures have perceived that these common-law protections have become outmoded. Land is no longer the principal asset of most estates, and, when it is, the marital estates often impose a restraint on its alienability thought undesirable by modern critics.[2] States have sought new means to protect a surviving spouse.[3] To this end, North Carolina has enacted the Intestate Succession Act,[4] which purports to promulgate this policy.

[1] *See generally* 25 AM. JUR. 2d *Dower and Curtesy* § 3 (1966).

[2] *See* 1 AMERICAN LAW OF PROPERTY § 5.5, at 332-34 (A. J. Casner ed. 1952); 3 VERNIER, AMERICAN FAMILY LAWS § 189, at 351-54 (1935).

[3] *See* 1 AMERICAN LAW OF PROPERTY § 5.5, at 332-34 (A. J. Casner ed. 1952); 3 VERNIER, AMERICAN FAMILY LAWS § 189, at 351-54 (1935).

[4] N.C. GEN. STAT. §§ 29-1 to -30 (1966) (chapter 29). *See also* N.C. GEN. STAT. § 30-1, -2 (1966), entitled "Surviving Spouses." These statutes were en-

The Act secures protection for a surviving spouse by two means: the intestate share and the qualified right to dissent. The intestate share consists of a large fraction (usually one-half or one-third) of the net estate,[5] the net estate being defined as "all property of a decedent . . . exclusive of family allowances, cost of administration, and all lawful claims against the estate."[6] If there is a will, the surviving spouse is offered the qualified right to dissent and to take a "forced share" generally equal to the intestate share.[7] North Carolina General Statutes section 30-1 limits the right to dissent to:

> . . . those cases where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator: (1) Is less than the intestate share of such spouse . . . .

The Act evidences two important legislative determinations. The first is the decision to accord financial protection to a surviving spouse while

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acted together, and, although only chapter 29 is entitled the "Intestate Succession Act," they will hereinafter be referred to collectively as the "Act." As of 1966 thirty-nine states, excluding the eight community property states and the civil-law state of Louisiana, had enacted similar statutory provisions to protect a surviving spouse. Plager, *The Spouse's Nonbarrable Share: A Solution In Search of a Problem*, 33 U. CHI. L. REV. 681 n.4 (1966).

[5] N.C. GEN. STAT. § 29-14 (1966).

> Share of the surviving spouse—The share of the surviving spouse shall . . . be as follows:
>
> (1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, one half of the net estate, including one-half of the personal property and a one-half undivided interest in the real property; or
>
> (2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, one third of the net estate, including one third of the personal property and a one-third undivided interest in the real property; or
>
> (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children but is survived by one or more parents, a one-half undivided interest in the real property and the first ten thousand dollars ($10,000.00) in value plus one half of the remainder of the personal property; or
>
> (4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent, all the net estate.

[6] N.C. GEN. STAT. §§ 29-2(2), (3) (1966).

[7] *See* N.C. GEN. STAT. § 30-3 (1966). When the testator is not survived by a lineal descendant or parent, or if the surviving spouse is a second or successive spouse and lineal descendants survive, the spouse, upon dissent, is entitled to only half his or her intestate share. In the former situation, the intestate share is computed before federal estate taxes are deducted. *Id.* The statute is interpreted in Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963).

recognizing the policy of freedom to distribute property at death. A surviving spouse can dissent from an adverse will and take an intestate share, and the legacies of the will to others remain effective although diminished pro rata.[8] The failure to consider the factor of need in the allotment of the forced intestate share indicates that this protection is accorded either upon the theory that the surviving spouse necessarily made a financial contribution to the deceased's wealth or on the ground of a post mortum extension of the deceased's lifetime obligation to support his spouse.[9]

The second determination is to include only property that can pass by intestate distribution in computing the surviving spouse's share, with one exception: A surviving spouse may dissent from the will if the aggregate value of what the spouse receives under it and "the property or interests in property passing in any manner outside the will" to the spouse as a result of the death of the testator is less than the intestate share.[10] Such property or interests always pass by contract or deed. Section 30-1(b) delineates some of these "outside properties":

> [B]y way of illustration and not of limitation, the following shall . . . be included in the computation of the value of the property or interests in property passing to the surviving spouse as a result of the death of the testator:
>
> (1) The value of a legal or equitable life estate for the life of the surviving spouse;
> (2) The value of the proceeds of an annuity for the surviving spouse;
> (3) The value of proceeds of insurance policies on the life of the decedent received by the spouse;
> (4) The value of any property passing by survivorship . . . ;
> (5) The value of the principal of a trust under the terms of which the surviving spouse holds a general power of appointment over the principal of the trust estate;
>
> except that no property or interest in property shall be so included to the extent that the surviving spouse or another in his behalf either gave or donated it or paid or contributed to its purchase price.

However, these "outside properties" can have a substantial impact upon the promulgation of the legislature's policy, and the failure to deal

[8] N.C. GEN. STAT. § 30-3(c) (1966).

[9] *See* Plager, *The Spouse's Nonbarrable Share: A Solution In Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

[10] N.C. GEN. STAT. § 30-1(a)(1) (1966).

adequately with them can render the statutes irrational in light of their purpose. *In re Estate of Connor*[11] illustrates the inconsistent results obtained under the Act and, more importantly, suggests a solution to the problem of effectively implementing its policy.

Connor died testate and was survived by his widow and a parent. Under the terms of the will his widow was named beneficiary of a trust. The trust principal, over which Mrs. Connor had a general testamentary power of appointment, was to be determined by a marital deduction formula, which would provide for the corpus an amount equal to the difference between the maximum marital deduction allowed under the federal estate tax laws and those interests that could be used in computing the deduction passing to the widow outside the trust.[12] In addition to the trust, Mrs. Connor received insurance proceeds and the sole ownership of survivorship property as a result of her husband's death.[13]

Mrs. Connor, apparently dissatisfied with the gift in trust, filed a timely dissent to the will. In support of her right to dissent, she argued that since her statutory intestate share was greater than one-half of the net probate estate, and that since the maximum marital deduction formula limited the value of properties passing to her as a result of her husband's death to one-half of the adjusted gross estate, she was entitled to dissent even without a valuation of the properties.[14]

The North Carolina Court of Appeals pointed out the fallacy of Mrs. Connor's argument: The net estate as determined for probate purposes and the adjusted gross estate as determined for federal estate tax purposes are not necessarily computed upon the basis of the same properties. Insurance proceeds and survivorship estates may be included in the adjusted gross estate and are, therefore, deductible under the marital deduction if certain requirements are met, but they are never included in the net probate estate. Accordingly, the value of the benefits passing to Mrs. Connor as a result of her husband's death, an amount equal to a maximum marital deduction, could have been greater than her intestate share, which was a portion of the net probate estate. If so, she

[11] 5 N.C. App. 228, 168 S.E.2d 245 (1969).

[12] INT. REV. CODE of 1954, § 2056, allows a fifty per cent marital deduction from the adjusted gross estate. For a definition of adjusted gross estate see INT. REV. CODE of 1954, § 2053.

[13] 5 N.C. App. at 228, 168 S.E.2d at 246-47.

[14] Brief for Appellant at 7, 8, *In re* Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1965).

was barred from dissenting. The court remanded for a determination of the two values.[15]

At first impression, *Connor* seems to illustrate a successful implementation of a policy that demands both financial protection for a surviving spouse and freedom for the deceased to distribute his property. According to the result, Mrs. Connor may dissent only if she did not receive the statutory minimum by contract, will, and deed as a result of her husband's death.

If dissent is ultimately permitted, however, the delicate balance of policy is upset. Section 30-3 entitles a dissenting spouse to a full intestate share in addition to the benefits passing by deed and contract. If the values of the insurance proceeds and joint estates are great and the testamentary bequest relatively small, Mrs. Connor will receive a substantial windfall that will deplete her husband's testamentary distribution to other beneficiaries.[16] The statute's inflexibility is magnified by the fact that the difference of even one dollar in outside property or in the net estate could trigger such an inequitable result.[17] Furthermore, an identical distribution would have been effected had Connor died intestate, except that Mrs. Connor would not have had to qualify for her windfall.[18] The legislature has allowed the existence of properties passing outside the net probate estate to defeat the policy behind the Act.

A greater deviation from the policy occurs if the surviving spouse does not benefit from the property passing outside the net estate. Instead of receiving a financial windfall, the spouse may be effectively disinherited. For example, if a large portion of a decedent's wealth has been invested in life insurance or in income-producing interests and the spouse is not a beneficiary, the net estate is diminished; and the surviving spouse receives only the same portion of the net estate as if the outside property

[15] 5 N.C. App. at 235, 168 S.E.2d at 250.

[16] If the net estate consisted of real property valued at 20,000 dollars and personal property valued at 10,000 dollars, Mrs. Connor could dissent if she received less than a value of 20,000 dollars by will, contract, and deed. *See* N.C. GEN. STAT. § 29-14(3) (1966), reprinted in full, *supra* note 5; and N.C. GEN. STAT. § 30-1(a)(1) (1966). If the properties passing by contract and deed were valued at 19,000 dollars and she were omitted from the will, upon dissent she would be entitled to 20,000 dollars in real and personal property plus the insurance proceeds and joint estates, a net total of 39,000 dollars.

[17] For example, in the fact situation of note 16 *supra*, if the "outside properties" were valued at 14,999 dollars, Mrs. Connor could dissent. But if they were valued at 15,000 dollars, the dissent would not be allowed.

[18] *See* N.C. GEN. STAT. § 29-14 (1966).

did not exist. Doubtless many a spiteful spouse has employed this technique to deprive his survivor of a fair measure of financial protection.[19]

These deleterious inconsistencies—the possibility of a windfall on one extreme and effective disinheritance on the other—are caused by inadequate legislative attention to interests in property that vest by operation of contract and deed. Such distortions of sound distribution policy can and should be corrected. Mrs. Connor's construction of the term "net estate" provides a solution. She based her argument upon the assumption that the net probate estate included the value of *all* benefits passing to her as a result of her husband's death.[20] The court in *Connor*, of course, was shackled by section 29-2. However, a net estate legislatively enlarged to include all interests passing to anyone as a result of a decedent's death to the extent the decedent owned them in fee at death, or contributed to their purchase price, would provide the flexibility lacking in the present statutes. All inconsistencies would be resolved whether the deceased died testate or intestate.

Suppose, for example, that a decedent died testate survived by only one lineal descendant and left an enlarged net estate valued at 30,000 dollars. The surviving spouse could dissent from the will if the value of benefits passing to her[21] was less than 15,000 dollars.[22] If the spouse were omitted from the will, but received 14,000 dollars in insurance proceeds, upon dissent she would be entitled to an intestate share valued at 15,000 dollars.[23] Because the surviving spouse has already received the insurance proceeds, a contribution of only 1,000 dollars in real and personal property would be required from the other beneficiaries to complete the allotment. The possibility of a windfall would be eliminated, and disruption of the testamentary distribution would be minimized.

If the decedent above had died intestate, the surviving spouse would receive the same portion of his wealth even if another person were the beneficiary of the insurance policy. Thus, if the enlarged net estate were valued at 30,000 dollars, the surviving spouse would again be entitled

[19] *See* Effland, *Estate Planning: Co-Ownership*, 1958 WIS. L. REV. 507; Goldman, *Rights of the Spouse and the Creditor in Intervivos Trusts*, 17 U. CIN. L. REV. 1 (1948); Vance, *The Beneficiary's Interest in a Life Insurance Policy*, 31 YALE L.J. 343 (1922).

[20] Brief for Appellant, *In re* Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

[21] Under N.C. GEN. STAT. § 30-3 (1966), both a surviving husband and a surviving wife are entitled to dissent. "Her" is employed in the text for convenience and not for limitation.

[22] N.C. GEN. STAT. §§ 29-14(3), 30-1(a)(1) (1966).

[23] *See* N.C. GEN. STAT. § 30-3(a) (1966).

to an intestate share of 15,000 dollars in real and personal property.[24] If the spouse were the beneficiary of life insurance proceeds amounting to 15,000 dollars, for example, she would receive no additional money. But if 15,000 dollars of the proceeds went to other persons, the surviving spouse would be entitled to an undiminished intestate share. As long as there are properties passing by intestate succession valued at an amount sufficient to equal an intestate share, the surviving spouse is not denied a minimum provision.[25]

Despite the advantages discussed above, one objection may be made to enlarging the net estate. The Intestate Succession Act provides an intestate share for the lineal descendants[26] and, in certain situations, for the parents of the deceased.[27] If a portion of the property passing to them by intestate succession were appropriated to make up a deficiency in the surviving spouse's minimum provision, the intestate shares of the beneficiaries would be diminished pro rata. The enlarged net estate would not have to be employed in this limited situation if the legislature found the appropriation undesirable. But since the surviving spouse is the principal beneficiary of the Intestate Succession Act, as only she can dissent from a will, it would not be a radical deviation from the theory of the Act to allow a lineal descendant's or parent's intestate share to be defeated. Furthermore, the threat of invasion of a child's or parent's share would deter schemes to disinherit the surviving spouse by depleting the enlarged net estate of properties that pass by intestacy.

The Intestate Succession Act does not now promulgate consistently the policy of providing economic security for the surviving spouse within a framework of freedom of property distribution at death. The flaws can be remedied if the net estate is redefined to include the value of all interests in property passing in any manner as a result of a decedent's death, to the extent that they were contributed by the deceased.[28]

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[24] *Id.*

[25] If there were 14,000 dollars of intestate property, the spouse would receive all of such property. Only a deficit of 1,000 dollars from a full intestate share would result. Obviously an estate planner could entirely defeat a surviving spouse's share by simply depleting the estate of property that can pass by intestacy. However, the legislature could remedy any remaining deficit by allowing an invasion of the "outside interests."

[26] N.C. GEN. STAT. §§ 29-15(1), (2) (1966).

[27] N.C. GEN. STAT. § 29-15(3) (1966).

[28] The problem of classifying gifts in contemplation of death would arise, but they, too, could be included within the enlarged net estate as properties passing "as a result of a decedent's death." *See* Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); MODEL PROBATE CODE § 33(b) (1946).

Labor Law—Pre-Hearing Discovery of Employees' Statements

The principle of full disclosure through discovery has, at least since the adoption of the Federal Rules of Civil Procedure in 1938,[1] become fully entrenched in litigation conducted in federal and most state courts. It has not, however, become an established principle in proceedings before the National Labor Relations Board although the Board's adjudicative hearings closely resemble court litigation[2] to which discovery has been so usefully applied. This fact appears on its face somewhat difficult to justify. The expressed rationale for discovery in civil adjudications—that it minimizes "gamesmanship" and surprise, identifies and simplifies the issues, and tends in the long run to expedite the adjudicative process—seems also applicable to Board hearings. As Professor Davis has stated in his treatise on administrative law, "[p]robably no sound reason can be given for failure to extend to administrative adjudications the discovery procedures worked out for judicial proceedings."[3]

In the recent case of *NLRB v. Schill Steel Products, Inc.*,[4] the Court of Appeals for the Fifth Circuit addressed itself to this important question of discovery prior to labor hearings on petition of the Board to adjudge Schill Steel in civil contempt for failure to comply with a cease and desist order.[5] The company acquiesced in the Board's motion that a special master be appointed to hear contempt proceedings, but moved for a specific provision in the order that would allow discovery of all statements taken by the Board in the course of its investigation from witnesses whose testimony the Board intended to adduce at the contempt hearing. The court rejected the Board's argument that such discovery could lead to undue intimidation of witnesses by the employer and held the statements subject to discovery under the Federal Rules of Civil Procedure. Noting that under the Board's own rules, statements

[1] FED. R. CIV. P. 26-37.

[2] An adjudicatory hearing is similar to a trial; the parties present evidence, subject to cross-examination and rebuttal, before a tribunal which makes a determination of fact and law. 1 K. DAVIS, ADMINISTRATIVE LAW § 7.01 (1958).

[3] *Id.* § 8.15, at 589.

[4] 408 F.2d 803 (5th Cir. 1969).

[5] The Fifth Circuit had previously handed down a decree on February 2, 1965, enforcing the Board's orders of February 8, 1963, and August 20, 1963, that the company cease and desist from certain named violations of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act. In the principal case, the Board, alleging that the company had failed to comply with the court's decree, petitioned the court to adjudge the company in civil contempt.

of such witnesses were to be turned over anyway *after* they testified,[6] the court concluded that discovery at the pre-hearing stage would not lead to greater coercion.[7]

The decision in *Schill* dramatizes the split between the federal courts and the Board on the issue of pre-hearing discovery of employee statements. The federal courts for several years have consistently recognized the right to such discovery in original proceedings in federal court. For example in a 1962 case, *Fusco v. Richard W. Kasse Baking Co.*,[8] the Board's regional director filed a petition seeking to have certain unfair labor practices enjoined. The respondent served on the regional director a subpoena calling for him to testify and produce certain affidavits, reports, and memoranda. The regional director declined to produce the material. The court held that the discovery provisions of the federal rules were applicable, but limited discovery to affidavits and statements of those employees who were to appear as witnesses for the petitioner.[9] The court in *Fusco*, and other federal courts[10] since that decision, reasoned that although the action is brought by an official governmental agency, the agency is in no different position than any ordinary litigant and is therefore bound by the discovery provisions of the Federal Rules of Civil Procedure.

Contrary to the practice in the federal courts, the Board has consistently refused to allow any pre-hearing discovery in Board proceedings[11] despite repeated attempts by respondents to gain discovery privileges. In view of the current trend of full disclosure in civil actions and in light of the *Schill* decision, a re-examination of Board policy denying discovery seems imperative. The focus will be on discovery of statements of witnesses whom the Board plans to call for testimony at the hearing. Since the investigation of unfair labor practices centers around such statements, the contents, if discoverable, would be most beneficial to the respondent in preparing its defense.

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[6] See note 40 *infra* and accompanying text.

[7] 408 F.2d at 805.

[8] 205 F. Supp. 459 (N.D. Ohio 1962).

[9] *Id.* at 464.

[10] *See, e.g.*, Sperandeo v. Milk Drivers Local 537, 334 F.2d 381 (10th Cir. 1964); Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961); Madden v. Milk Wagon Drivers Local 753, 229 F. Supp. 490 (N.D. Ill. 1964); Fusco v. Richard W. Kasse Baking Co., 205 F. Supp. 459 (N.D. Ohio 1962).

[11] *See, e.g.*, Walsh-Lumpkin Wholesale Drug Co., 129 N.L.R.B. 294, 296 (1960); Plumbers & Steamfitters Local 100, 128 N.L.R.B. 398, 400 (1960); Sealtest S. Dairies, 126 N.L.R.B. 1223 n.3 (1960); Chambers Mfg. Corp., 124 N.L.R.B. 721, 722 (1959).

CURRENT BOARD PRACTICE

The rules and regulations of the Board expressly forbid any formal discovery of a witness' statements or the information contained in those statements without consent of the Board itself. This policy is reflected in Board regulation 102.118:

> No . . . employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause . . . with respect to any information, facts, or other matter coming to his knowledge, in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board . . . without the written consent of the Board . . . .[12]

Nor does the Administrative Procedure Act,[13] which provides statutory guidelines of the rules of evidence and procedure to be followed by the various federal agencies, contain any provisions for discovery in the administrative adjudicative process.

Employers have, of course, attempted informal means of discovery to ascertain what employees have told the Board. But informal discovery may be subject to strictly enforced limitations. For example, in *Winn Dixie Stores, Inc.*,[14] the Board held "that the Respondent's requests [to his employees] for copies of the employees' statements to the General Counsel constitute interference, restraint, and coercion within the meaning of section 8(a)(1) of the [National Labor Relations] Act."[15] In fact, it is immaterial whether the statements are actually handed over. The request itself is a violation.[16]

However, the Board has been more tolerant of employer interrogation of employees.

> [A]n employer is privileged to interview employees for the purpose of discovering facts within the limits of the issues raised by a complaint, where the employer or its counsel, does so for the purpose of preparing its case for trial and does not go beyond the necessities of such preparation to pry into matters of union membership, to discuss the nature or extent of union activity, to dissuade employees from joining or re-

[12] 29 C.F.R. § 102.118(a) (1969).
[13] 5 U.S.C. §§ 1001-11 (1964).
[14] 143 N.L.R.B. 848 (1963), *enforced*, 341 F.2d 750 (6th Cir. 1965).
[15] *Id.* at 850.
[16] Henry I. Siegel Co. v. NLRB, 328 F.2d 25, 27 (2d Cir. 1964).

maining members of a union, or otherwise to interfere with the statutory right to self-organization.[17]

This ruling strikes a delicate balance between the legitimate interest of the employer in preparing its case for trial and the interest of the employee in being free from unwarranted interrogation—a balance that an employer risks upsetting each time he questions an employee. In *Joy Silk Mills, Inc. v. NLRB*[18] the court recognized this danger:

> Apparently this rule means that an employer may question his employees in preparation for a hearing but is restricted to questions relevant to the charges of unfair labor practice and of sufficient probative value *to justify the risk of intimidation which interrogation as to union matters necessarily entails*; and that even such questions may not be asked where there is purposeful intimidation of employees. *Such a standard assumes that interrogation of employees concerning their union activities is, of itself, coercive,* but that fairness to the employer requires that a limited amount of such questioning be permitted despite the possible restraint which may result.[19]

The privilege is a narrow one, and "[a]ny interrogation by the employer relating to union matters presents an ever present danger of coercing employees in violation of their § 7 rights."[20] Undoubtedly, such limitations are justified. Moreover, if formal pre-hearing discovery of witness statements were allowed, the justification for employer interrogation—a type of informal discovery with hazards to all involved—would be practically eliminated.

While denying discovery to others, the Board through its investigative powers has the ability to ascertain facts relevant to a controversy well before the hearing stage. This power is derived from section 11(*l*) of the Labor Management Relations Act, which provides that

> [t]he Board or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question.[21]

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[17] May Dep't Stores Co., 70 N.L.R.B. 94, 95 (1946).
[18] 185 F.2d 732 (D.C. Cir. 1950).
[19] *Id.* at 743 (emphasis added).
[20] Texas Indus., Inc. v. NLRB, 336 F.2d 128, 133 (5th Cir. 1964).
[21] Labor-Management Relations Act (Taft-Hartley Act) § 11(1), 29 U.S.C. § 161(1) (1964).

Such broad investigative powers have been strongly criticized by Professor Davis in his treatise on administrative law;[22] nevertheless, they insure that the Board will be well prepared in advance of the hearing.[23]

Attacks on Board Policy

Attempts to assert discovery privileges in Board proceedings have met with little success. For example, section 102.118(a) of the Board's rules[24] was attacked as a denial of due process in *NLRB v. Vapor Blast Manufacturing Co.*[25] However, the court held that the rules of the Board restricting examination of documents did not deny procedural due process and that the Board had responsibility "to formulate its own rules for unfair practice hearings and to determine whether full discovery is practicable in such hearings."[26]

Other attempts to gain discovery have been based on section 10(b) of the Labor-Management Relations Act, the last sentence of which provides that unfair labor practice hearings shall "be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . ."[27] The Board's position is that this provision "clearly relates to evidence *before* the Board, and not to pretrial privileges accorded parties to judicial proceedings."[28] This interpretation has also received judicial endorsement.[29]

The frustration experienced by parties to a Board proceeding is exhibited by the fact that in at least one instance an attempt at discovery has been made under the recently passed Public Information Act,[30]

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[22] 1 K. Davis, Administrative Law § 3.01, at 160 (1958).

[23] For an analysis of the scope of administrative investigative powers see *id.* §§ 3.01-.14 (1958).

[24] See 29 C.F.R. § 102.118(a) (1969), *supra* note 12, and text immediately preceding.

[25] 287 F.2d 402 (7th Cir.), *cert. denied*, 368 U.S. 823 (1961).

[26] 287 F.2d at 407.

[27] Labor-Management Relations Act (Taft-Hartley Act) § 10(b), 29 U.S.C. § 160(b) (1964).

[28] Del. E. Webb Constr. Co., 95 N.L.R.B. 377 n.2 (1951).

[29] *See, e.g.*, NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407 (7th Cir. 1961); Raser Tanning Co. v. NLRB, 276 F.2d 80, 83 (6th Cir. 1960).

[30] 5 U.S.C. § 552 (Supp. III, 1965-67). Subsection (a)(3) states in pertinent part:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules . . . shall make the records promptly available to any persons.

which has as its purpose the making of government records more readily accessible to the public for inspection. In the first reported opinion[31] under the Act, plaintiff employer brought suit to prevent withholding by the Board of certain documents consisting of witnesses' statements. The court denied the requested disclosure on the ground that the material came under the Act's exemption immunizing investigatory files compiled for law enforcement purposes.[32]

Because of the courts' unqualified refusal to find any statutory or constitutional basis for the claim that discovery should be granted, it is not surprising that the Board has evinced considerable antipathy to such disclosure. One attack on the Board's rules in this general area, however, has been successful although it met with stiff opposition from the Board.

The attack was based on *Jencks v. United States*,[33] a criminal case in which the defendant Jencks was prosecuted for filing a false non-Communist affidavit with the National Labor Relations Board. Two F.B.I. informers were crucial government witnesses. Jencks sought an order requiring the Government to produce for inspection the reports relating to those matters about which each informer had testified. The trial court denied the order, and the court of appeals affirmed. The Supreme Court reversed, holding that *once a witness has testified,* a defendant is entitled to an order directing the government to produce for inspection by the defendant any reports made by the witness touching the events and activities to which he gave testimony.[34] Since under *Jencks* the statements are to be turned over to the defendant only after the witness has testified, the net effect of the holding is to provide the defendant a source for impeachment of the witness.

Relying upon the rule derived from *Jencks*, the respondent in *Great Atlantic & Pacific Tea Co.*[35] sought the production of all documents that might be relevant and material to the cross-examination of a hearing witness. The contention that regulations barring such disclosure had been abrogated by *Jencks* was rejected by the Board, which held that the decision should not operate to overturn statutes authorizing agencies to adopt rules reasonably calculated to maintain their records inviolate.[36]

[31] Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. Puerto Rico 1967).
[32] 5 U.S.C. § 552(b)(7) (Supp. III, 1965-67).
[33] 353 U.S. 657 (1957).
[34] *Id.* at 668.
[35] 118 N.L.R.B. 1280 (1957).
[36] *Id.* at 1282.

Subsequently the Court of Appeals of the Second Circuit in *NLRB v. Adhesive Products Corp.*[37] considered the same question and on the authority of *Jencks* reversed the district court, which had denied production under the Board rule forbidding disclosure.[38] In the wake of the Second Circuit's decision, the Board in *Ra-Rich Manufacturing Corp.*[39] held that *Jencks* applied to its proceedings and thereby overruled its position in *Great Atlantic & Pacific Tea Co.* Thus, for purposes of cross-examination the Board affords parties the right to production of pre-hearing statements made by witnesses who have *already testified* to matters contained in those statements.[40]

Nevertheless, the *Jencks* rule as applied to hearings before the Board cannot be regarded as a substitute for discovery; it becomes operative only after the hearings have begun and one or more witnesses have testified. The chief utility of the rule remains co-extensive with its original purpose—to provide a respondent with a source of material upon which to impeach a witness. Though of indisputable value, this right to obtain witnesses' statements serves a purpose essentially distinct from the privilege of becoming apprised of an opposing party's information before adjudication in order to eliminate needless issues and prepare an effective defense.

Need for Discovery in 8(a)(3) Proceedings

A look at discovery against the background of one particular type of Board proceeding may be enlightening. Section 8(a)(3) makes any discriminatory treatment for the purpose of encouraging or discouraging union membership an unfair labor practice.[41] Charges under this provision make up the great bulk of Board cases against employers. In 1967 there

[37] 258 F.2d 403 (2d Cir. 1958).
[38] *Id.* at 408.
[39] 121 N.L.R.B. 700 (1958).
[40] 29 C.F.R. § 102.118(b)(1) (1969), as pertinent, reads:

> [A]fter a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the trial examiner shall, upon motion of the respondent, order the production of any statement . . . of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the trial examiner shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

[41] Labor-Management Relations Act (Taft-Hartley Act) § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

were 7,463 charges of discrimination—sixty-six per cent of the total filings against employers.[42]

The key to sustaining a discrimination charge lies in the government's ability to prove that the motive behind the employer's action was to encourage or discourage union activity. In the typical proceeding the government is fairly assured of a *prima facie* case of discrimination if it can prove the following questions of fact: (1) that the employee was a union member or adherent; (2) that the employer knew this fact; (3) that the employer was anti-union; and (4) that the employee was treated unlike non-union employees. For example, in a typical discrimination case, the trial examiner's analysis of the government's case reads in pertinent part as follows:

> There is no doubt that Allen was quite an active *union adherent*, and after the visit of Allen, McKinney, and Walker to Snipes' office on September 25 there can be no question about Snipes' *knowledge* of this fact. It has previously been found that the Respondent was vigorously *opposed* to the Union's advent. The timing of Allen's *discharge* within a few hours after Snipes became aware of Allen's prounion sympathies is therefore *suspect*.[43]

Of course additional factors, if present, are also introduced by the government to strengthen its case. It can fairly be said that the Board is quite liberal in permitting inferences to be drawn from these surrounding circumstances.[44]

In discrimination cases under section 8(a)(3) the Board pays lip service to the proposition that the burden of proof is on the government; however, because of the relative ease with which inference is allowed, the burden of going forward appears to shift to the employer to show good cause for his actions.[45] Undoubtedly the burden should be on the

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[42] NATIONAL LABOR RELATIONS BOARD, THIRTY-SECOND ANNUAL REPORT, Table 2, at 218 (1967).

[43] Wellington Mill Div. West Point Mfg. Co., 141 N.L.R.B. 819, 835 (1963), *modified*, 330 F.2d 579 (4th Cir. 1964).

[44] *See* Miller Elec. Mfg. Co. v. NLRB, 265 F.2d 225, 226 (7th Cir. 1959); NLRB v. Blue Bell, Inc., 219 F.2d 796, 798 (5th Cir. 1955); Indiana Metal Prod. Corp. v. NLRB, 202 F.2d 613, 616 (7th Cir. 1953); Interlake Iron Corp. v. NLRB, 131 F.2d 129, 133 (7th Cir. 1942); NLRB v. Illinois Tool Works, 119 F.2d 356, 363 (7th Cir. 1941).

[45] Jasper Nat'l. Mattress Co., 89 N.L.R.B. 75, 77-78 (1950). The Board stated that after the government had established its *prima facie* case, "[i]t . . . devolved upon the Respondent to come forward with reasonably convincing evidence to show that the discharges were actually for nondiscriminatory reasons." Other Board decisions have stated this proposition more explicitly. *See, e.g.*, Pacific

employer since the reasons for his actions are peculiarly within his knowledge. However, once saddled with this burden, the question then becomes whether it should often be made intolerable by denying the employer discovery privileges. Such a situation is particularly disturbing because overt acts of the kind that are a part of everyday business management are laid open to inferences that may sustain the charge. As it stands now, prior to the hearing the respondent has no idea on which of his acts or conversations the government will base its case or introduce for the drawing of inferences. The employer is in a very unenviable position. He does not know to what facts his proof must be responsive; therefore, he often cannot adequately prepare a defense. In view of the large number of discrimination cases—about two of every three charges against employers heard by the Board—discovery would appear to be justified by this type of proceeding alone.

Objections to Discovery

Although witness statements have never been subject to discovery in Board proceedings, it is conceivable that should they in the future be held discoverable, the Board could protect them under the work product doctrine. This doctrine excludes from discovery such items as a lawyer's own notes and memoranda or anything else reflecting his mental impressions, theories, or conclusions, including statements that he has taken from witnesses. Although the work product doctrine was formulated in civil cases, it would seem applicable to administrative hearings that are basically adversary. The policies behind the work product rule are based on the adversary process.[46]

The leading case involving the work product doctrine is *Hickman v. Taylor*,[47] in which witnesses' statements were protected from discovery. The basis for the Court's holding was that the plaintiff had made no showing of necessity for the discovery. The Court stated that the petitioner "has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired."[48] After pointing out the numerous other means available to petitioner to obtain the information sought, the Court

Mills, 91 N.L.R.B. 60, 61 (1950), where the Board held that "the burden of *going forward with evidence* after the *prima facie* case of discriminatory character of discharge had been established necessarily falls upon the Respondent."

[46] *See* Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

[47] 329 U.S. 495 (1947).

[48] *Id.* at 508.

concluded that he was attempting "to secure the production of written statements . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice."[49]

There is, of course, no firm rule to use in determining the necessity that must be shown for discovery of work product. However, Professor Wright in his analysis of the case states that "[u]ndoubtedly the single most important factor in measuring necessity or justification for discovery of work product materials is whether the information in question is otherwise available to the party seeking discovery."[50] The courts, in effect, should balance the competing interests of the parties involved. The court in *Hickman* found that there was equal opportunity on the part of both parties to prepare for trial.

Applying the above reasoning to an unfair labor practice proceeding, discovery seems strongly justified; there are no alternative effective means of discovery available to an employer. A great disparity exists between the respective abilities of the parties involved as far as preparation for the hearing is concerned. Detailed information of alleged unfair labor practices is to be found only from employees, to whom the employer's access is severely restricted by Board decisions. Thus it appears that the federal courts could find the requisite necessity for discovery. The Court in *Hickman* intimated as much by stating that "production might be justified where the witnesses are no longer available or can be reached only with difficulty."[51] Mr. Justice Jackson in his concurring opinion reiterated the position of the Court:

> There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interest of justice require that such statements be made available.[52]

In sum, it is unlikely that the work product rule would impair discovery of witnesses' statements in a Board proceeding. Furthermore, the need for ascertaining the truth seemingly outweighs any harm resulting from work product disclosure.

Thus far, the Board has sucessfully based its denial of discovery rights

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[49] *Id.* at 509.
[50] C. WRIGHT, FEDERAL COURTS § 82, at 317 (1963).
[51] 329 U.S. at 511.
[52] *Id.* at 519.

on a more pragmatic objection than assertion of the work product rule. A Board investigation is unique in that most of the statements taken during its course are obtained from *employees*—a fact distinguishing Board adjudicatory proceedings from civil cases in a way significantly related to the appropriateness of discovery. There is a seemingly genuine fear by the Board that if discovery of witnesses' statements were allowed beforehand, such disclosure could lead to undue intimidation by the employer.[53]

The point is well taken that an employee who is asked to cooperate with the Board by giving a statement to its investigator is in a particularly delicate situation. Indeed, the real danger of granting discovery appears to be the prohibitive effect on an employee's willingness to give statements; the employee may choose to remain silent, and the Board's ability to conduct effective investigations would become more difficult. The Court of Appeals for the Fifth Circuit in *Texas Industries, Inc. v. NLRB*[54] remarked that

> [I]t would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures. The employee will be understandably reluctant to reveal information prejudicial to his employer when the employer can easily find out that he has done so.[55]

While such a rationale seems perfectly valid, the risk of such disclosure and its prohibitive effect appear to be present under current Board procedure. Under the *Jencks* rule, a witness' statement is available to the respondent after the witness has testified. Thus, if discovery were allowed only of statements of witnesses whom the Board planned to have testify at the hearing, it would follow that the prohibitive effect would be no greater than under the *Jencks* rule. The Fifth Circuit took this view in *Schill* to reject the Board's argument that discovery would lead to intimidation. The court stated that it was "unable to see how the danger of coercion or reprisal becomes greater if we require that the statements to the Board of witnesses who testify be turned over at the discovery stage rather than during the course of the hearing."[56] This reasoning also appears valid in proceedings before the Board.

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[53] *See, e.g.*, NLRB v. Schill Steel Prod., Inc., 408 F.2d 803 (5th Cir. 1969).
[54] 336 F.2d 128 (5th Cir. 1964).
[55] *Id.* at 134.
[56] 408 F.2d at 805.

STATUTORY PROHIBITIONS AGAINST INTIMIDATION AND A PROPOSAL

Some protection against intimidation is provided employees by statutory prohibitions. Pertinent is section 8(a)(4) of the Labor-Management Relations Act making it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."[57] It is not unreasonable to believe that the great majority of employers who have been charged with an unfair labor practice will not subject themselves to a second such charge by discriminating against an employee who files charges or makes statements to the Board. But undoubtedly there are a handful who would continue to resist the provisions of the Act at any cost. The Board's concern in this area reveals a lack of faith in the remedy of section 8(a)(4) provided for such an occurrence. Perhaps there is good cause for the Board's concern; since coercion is in itself a separate unfair labor practice, it calls for a separate proceeding against the employer. Consequently, if an employee is fired for filing charges with the Board, it may be quite some time before his rights are asserted in court, especially if appeals are taken.

A practical solution to the problem would be to provide an *immediate* means of relief to an employee who feels that he has been prejudiced under section 8(a)(4). Such relief could be made available by section 10(*l*) of the Labor-Management Relations Act, which provides that immediate injunctive relief or a temporary restraining order may be granted for certain unfair labor practice charges.[58] Amendment of

[57] Labor-Management Relations Act (Taft-Hartley Act) § 8(a)(4), 29 U.S.C. § 158(a)(4) (1964).

[58] Labor-Management Relations Act (Taft-Hartley Act) § 10(*l*), 29 U.S.C. § 160(*l*) (1964) reads in pertinent part:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed, or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should be issued, he shall on behalf of the Board, petition any district court of the United States . . . within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary

this section to include section 8(a)(4) in the list of unfair labor practices for which injunctive relief is available would be a big step in providing the employee with more protection against coercion by his employer. Such a strengthening of the remedy against intimidation would complement adoption of pre-hearing discovery of employees' statements.

CONCLUSION

It seems anomalous that discovery of employees' statements to the Board is allowed in original proceedings in federal court but not for hearings before the Board itself. Since the main argument by the Board against discovery is fear of employer intimidation, the solution would appear to be a strengthening of the remedy against such intimidation to complement the adoption of discovery procedures.

On April 13, 1961, the Administrative Conference of the United States was established by executive order to consider administrative law problems and make recommendations. The Conference officially endorsed discovery in Recommendation No. 30 in 1963: "The Conference approves the principle of discovery in adjudicatory proceedings and recommends that each agency adopt rules providing for discovery to the extent and in the manner appropriate to its proceedings."[59] Over five years have passed and the Board has not yet acted on this recommendation. It is obvious, therefore, that if a change is to be made, it must come about through amendment of the National Labor Relations Act by Congress. Hopefully such action will be forthcoming.

F. FINCHER JARRELL

Military Law—Jurisdiction of Courts-Martial To Try Servicemen for Civilian Offenses

Since the days of the Continental Army, the question of how much judicial authority should be vested in the military has been the subject of continuing debate. The Constitution gave Congress the power "[t]o make Rules for the Government and Regulation of the land and naval

restraining order as it deems just and proper, notwithstanding any other provision of law.

[59] Recommendation No. 30 of the 1963 Administrative Conference of the United States, *quoted in* Fuchs, *The Administrative Conference of the United States*, 15 AD. L. REV. 6, 45 (1963).

Forces"[1] but did not further define this power, and Congress has liberally dispensed judicial power to the military by enacting the codes of military laws that have governed the armed forces.[2]

The codification of military law presently in effect is the Uniform Code of Military Justice[3] (UCMJ), which became effective May 31, 1951. When passing the UCMJ, Congress had before it a group of cases that arose during World War II in which serious offenders escaped trial because there was no court having jurisdiction by the time their offenses were discovered.[4] Furthermore, Congress was faced for the first time with large numbers of military dependents accompanying servicemen abroad.[5] To meet these problems, Congress retained from the Articles of War court-martial jurisdiction for the military over certain civilians[6] and enlarged military jurisdiction over discharged servicemen[7] and active-duty personnel.[8]

Expanded court-martial jurisdiction under the UCMJ was rapidly attacked by both ex-servicemen[9] and civilians,[10] and their attacks were mostly successful.[11] The Supreme Court in these cases based its diminution

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[1] U.S. CONST. art. I, § 8.

[2] W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 11-15 (1955) [hereinafter cited as AYCOCK & WURFEL]; Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 319-27 (1964).

[3] 10 U.S.C. §§ 801-940 (1964).

[4] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 21 (1955). *See* AYCOCK & WURFEL 43-44.

[5] AYCOCK & WURFEL 59-63.

[6] *Compare* Article of War 2, Act of June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 787 *with* UCMJ art. 2(11), 10 U.S.C. § 802(11) (1964).

[7] UCMJ art. 3(a), 10 U.S.C. § 803(a) (1964) provides:

> Subject to section 843 of this title (article 43) no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a state, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

Article of War 94, Act of June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 805-06, provided for court-martial jurisdiction after discharge only for fraud, larceny, or embezzlement committed against the government while on active duty.

[8] *Compare* the proviso to Article of War 92, Act of June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 805 *with* UCMJ art. 5, 10 U.S.C. § 805 (1964).

[9] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[10] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

[11] Only Mrs. Covert was unsuccessful on her first attempt. Reid v. Covert, 351 U.S. 487 (1956).

of military jurisdiction on the fact that the defendants were not military personnel and therefore were not properly "in the land or naval forces" so as to be excluded from the fifth and sixth amendment rights to indictment and trial by jury.[12] But the Court's language seemed to preclude its ever withholding military jurisdiction over active-duty servicemen.[13] The lower courts in both the federal and military appeals systems considered the question closed after the statement in *Kinsella v. United States ex rel. Singleton* that "[t]he test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' "[14] In subsequent cases the question of military jurisdiction over active-duty personnel, when raised, was summarily dismissed.[15]

The Supreme Court, without overruling the previous cases, decided in *O'Callahan v. Parker*[16] that an active-duty serviceman was not automatically subject to court-martial jurisdiction. The Court rejected so much of the *Singleton* "status" test as would give automatic jurisdiction and stated that active-duty status is necessary, but not alone sufficient, to vest military jurisdiction.[17] The Court furnished a list of seven, or possibly eight, factors indicating that the defendant O'Callahan was so severed from the military at the time and under the circumstances of his alleged offenses that he must be considered a civilian for jurisdictional

[12] U.S. CONST. amend. V provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . ." The exception has been extended by implication to the right to trial by jury contained in the sixth amendment. *Ex parte* Quirin, 317 U.S. 1, 40 (1942); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).

[13] When the offense was cognizable in a civil court, the military's jurisdiction was concurrent. *See* Reid v. Covert, 354 U.S. 1, 23, 30 (1957). *See also* Peek v. United States, 321 F.2d 934 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964), in which an active-duty soldier committed an armed robbery of a military courier on a military post with a weapon issued him by the Army. The soldier objected to trial in the federal district court on the grounds that the military had preferential jurisdiction. His contention was held to be without merit.

[14] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240-41 (1960).

[15] Branford v. United States, 356 F.2d 876 (7th Cir. 1966); Owens v. Markley, 289 F.2d 751 (7th Cir. 1961); Pickens v. Cox, 282 F.2d 784 (10th Cir. 1960); Thompson v. Willingham, 217 F. Supp. 901 (M.D. Pa. 1962); United States v. Schafer, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962); Herrington, A.C.M. 18339, 33 C.M.R. 814 (1963); Panchisin, A.C.M. 17156, 30 C.M.R. 921 (1961).

[16] 395 U.S. 258 (1969). For the procedural history see O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966), *appeal dismissed*, 372 F.2d 136 (3d Cir. 1967), *aff'd on rehearing*, 390 F.2d 360 (3d Cir.), *cert. granted*, 393 U.S. 822 (1968); *military appeal reported*, 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967).

[17] 395 U.S. at 266-67.

purposes. The charges against O'Callahan grew out of an attempted rape perpetrated in the city of Honolulu, Hawaii—not "on a military post or enclave . . . ."[18] At the time the crime was committed, O'Callahan was on leave in the city.[19] The victim was a fourteen-year-old girl vacationing in Hawaii who had no military connection whatsoever;[20] she was not a person "performing any duties relating to the military."[21] The offense was committed in peacetime; the civil courts were open and available; and the offense was committed within the territorial limits of the United States.[22] No question of military authority, security, or property was involved in the case.[23] Finally, although the fact was not mentioned in the holding, O'Callahan was in civilian clothes when he allegedly attempted to rape the girl.[24] This combination of factors was persuasive to the Court in its finding that the case did not arise "in the land or naval forces" and that O'Callahan was entitled to a grand jury indictment under the fifth amendment and a jury trial under the sixth amendment.[25]

If the Court's statement that these offenses were not "committed on a military post or enclave"[26] is strictly construed, it will mean that the military can exercise jurisdiction over any offense committed by an active-duty serviceman on post without considering the other factors, but that civil courts have jurisdiction over all off-post offenses. The Court of Military Appeals[27] now will apparently sustain military jurisdiction over all on-post offenses committed by servicemen,[28] and also will uphold mili-

[18] *Id.* at 273.
[19] *Id.* at 259-61, 273.
[20] O'Callahan v. Parker, 390 F.2d 360, 361 (3d Cir. 1968). The Supreme Court did not mention this total lack of military connection in the statement of facts.
[21] 395 U.S. at 273.
[22] *Id.*
[23] *Id.* at 274.
[24] *Id.* at 259.
[25] Certiorari was granted to consider the limited question of whether court-martial jurisdiction over essentially civilian crimes is a denial of the fifth and sixth amendment jury rights. 395 U.S. at 261. The Court mentioned other procedural deficiencies of courts-martial—possible command influence, ad hoc judicial bodies, vague statutes, a preference for discipline rather than justice—that may have influenced the decision. *Id.* at 262-66.
[26] *Id.* at 273.
[27] The Court of Military Appeals is the highest appellate court in the military justice hierarchy; it consists of three civilian judges who hear appeals from all services. 10 U.S.C.A. § 867 (Supp. 1969).
[28] United States v. Prather, 18 U.S.C.M.A. 560, 561, 40 C.M.R. 272, — (1969); United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969). See HEADQUARTERS, DEPARTMENT OF THE ARMY, PAMPHLET 27-69-24, Oct. 2, 1969, 1-6

tary jurisdiction over off-post offenses in limited circumstances.[29] The Court of Military Appeals seems to be correct in its interpretation of jurisdiction over on-post offenses inasmuch as the military commander is totally responsible for discipline and morale on his installation and thus has a significant interest in exercising jurisdiction. Military interests may extend to off-post offenses as well, and the territorial boundary of the post should not become an automatic jurisdictional barrier. Specific examples of the correct exercise of military jurisdiction over off-post offenses are more easily considered in connection with the other factors in *O'Callahan* since in such cases at least some of these other factors must be present to justify military jurisdiction.

The Court in deciding *O'Callahan* did not clearly define what relationship must exist between the accused's service duties and his offense for the military to exercise jurisdiction. If all other factors are the same, the *absence* status of the accused should make little difference in determining whether the offense is "service connected"; however, the *duty* status of the accused at the time of the offense bears directly on connection with the service. The Court did not confine itself strictly to on-duty offenses, but spoke of a "connection"[30] between the accused's duties and the crime. Presumably, then, when the off-post offense is inseparable from the accused's duties, military jurisdiction is appropriate. The Court of Military Appeals has not yet directly addressed itself to the situation in which an on-duty serviceman commits an off-post offense,[31] but it should permit the exercise of jurisdiction in such a case.

If the victim must actually be performing military duties at the time

[hereinafter cited as DA PAM 27-69-24], digesting the following cases from the Court of Military Appeals: United States v. Henderson, No. 22,128, Sept. 26, 1969 (carnal knowledge committed off post not subject to court-martial jurisdiction); United States v. Smith, No. 22,180, Sept. 26, 1969 (*contra*, when carnal knowledge committed on post); United States v. Riehle, No. 22,040, Sept. 26, 1969 (no court-martial jurisdiction over off-post auto theft); United States v. Paxiao, No. 22,230, Sept. 26, 1969 (*contra*, when auto theft committed on post); United States v. Shockley, No. 21,667, Sept. 26, 1969 (court-martial jurisdiction over sodomy committed on post; *contra*, off post); United States v. Williams, No. 22,176, Sept. 26, 1969 (court-martial jurisdiction over bad checks cashed on post; *contra*, off post); United States v. Crapo, No. 21,866, Sept. 26, 1969 (court-martial jurisdiction over robbery where force and violence occurred on post; *contra*, off post).

[29] *E.g.*, off-post narcotics offenses. *See* p. 388 & note 47 *infra*.

[30] 395 U.S. at 273.

[31] In the only reported case in which this factor was specifically discussed, the offender was either off duty or on leave when he committed each of his offenses. United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969). The court did not give the date of Borys' offenses, but the case apparently applies *O'Callahan* retroactively. N.Y. Times, Sept. 14, 1969, § 1, at 1, col. 4.

of the offense, few off-post cases will come before courts-martial: The only military persons regularly performing duties off post are military policemen, investigators, vehicle drivers, recruiters, and the like. On the other hand, if the victim need only be *connected* with the military in some fashion, many more off-post crimes committed by servicemen will be tried in military courts.

Thus far, the Court of Military Appeals has followed the language of the Supreme Court to the letter, even to the extent of finding that carnal knowledge of a military dependent off post does not invoke military jurisdiction. The court stated in *United States v. Henderson*[32] that the victim's "service connection was natal and not legal and, as such, [was] insufficient to bring her personally within the ambit of the Uniform Code."[33] If by this language the Court of Military Appeals meant that off-post offenses committed against other servicemen who are off duty, but still within the ambit of the UCMJ, are subject to court-martial jurisdiction, its interpretation should be sustained. However, by excluding dependents from the category of victims whose status allows court-martial jurisdiction, the Court of Military Appeals did not give sufficient attention to the impact on the military community of crimes perpetrated against dependents. That husbands and fathers are often absent for extended periods places on the military system an additional burden of protecting dependents; offenses by servicemen against dependents should be considered to have the same military significance as offenses against other servicemen.

Three factors in the Court's resolution of *O'Callahan*—that the offense occur in peacetime, that the civil courts be open, and that the offense be committed within the territorial limits of the United States[34]—are obviously concomitants of one another. If civil jurisdiction is to vest only over those cases that occur within the territorial limits[35] of the United States, then "civil courts" must mean the state and federal courts.[36] Since

[32] No. 22,128, Sept. 26, 1969, *digested in* DA PAM 27-69-24 at 1.

[33] *Id.* (the quotation is extracted from the court's opinion).

[34] 395 U.S. at 273.

[35] The Court of Military Appeals has indicated that this interpretation will be followed. United States v. Goldman, 18 U.S.C.M.A. 516, 517, 40 C.M.R. 228, — (1969). Chief Judge Quinn so stated in his dissent in United States v. Borys, 18 U.S.C.M.A. 547, 551, 40 C.M.R. 257, — (1969) (dissenting opinion).

[36] *But see* the dissenting opinion in United States v. Borys, 18 U.S.C.M.A. 547, 551-53, 40 C.M.R. 257, — (1969), the key rationale of which is that the Hawaiian courts at the time of O'Callahan's alleged offenses were federal courts, and that therefore the words "civil courts" in *O'Callahan* mean only federal courts.

these courts will always be available, except in times of imposition of martial law or of actual invasion, the only question remaining is the meaning of the term "peacetime." One judge on the Army Court of Military Review[37] has stated in several cases that the Vietnam conflict—a time of war for purposes of removing the statute of limitations on offenses of unauthorized absence[38]—is a sufficient time of war for court-martial jurisdiction under *O'Callahan*.[39] Although the Court of Military Appeals has not explicitly decided the question, apparently the court has assumed that the Vietnam conflict is not a time of war. It has dismissed several cases arising after *O'Callahan* on the grounds of lack of court-martial jurisdiction.[40] Had the Court of Military Appeals found the present conflict to be a time of war, presumably it would have sustained jurisdiction. The court is probably correct in its assumption: The existence of a distant war, declared or undeclared, has little relevance to a crime committed within the territorial United States by an active-duty serviceman.[41] Absent declared war, and probably not even then so long as the actual fighting remains distant, offenses committed within the United States should be deemed "peacetime" offenses.

The final factor that the Court outlined in *O'Callahan* was that the offense charged did not concern military authority, security, or property.[42] If "security" means the physical integrity of the installation and the documents and equipment thereon,[43] few problems of interpretation

[37] The Courts of Military Review are the intermediate appellate courts in the military. These courts review only the cases arising in the branch of the service that they serve. 10 U.S.C. § 866 (1964) established these courts, which were formerly called Boards of Review.

[38] Anderson, C.M. 416112, 38 C.M.R. 582 (1967).

[39] White, C.M. 420140, Aug. 12, 1969; Vipond, C.M. 420264, July 23, 1969, *both digested in* HEADQUARTERS, DEPARTMENT OF THE ARMY, PAMPHLET 27-69-23, Sept. 25, 1969, at 4, 5 [hereinafter cited as DA PAM 27-69-23]; Konieczko, C.M. 419706, June 19, 1969 *digested in* HEADQUARTERS, DEPARTMENT OF THE ARMY, PAMPHLET 27-69-20, Aug. 14, 1969, at 10.

[40] *See* those cases cited note 28 *supra*, that were dismissed for lack of court-martial jurisdiction.

[41] The only authoritative case in point appears to be Caldwell v. Parker, 252 U.S. 376 (1920), holding that the civilian courts had concurrent jurisdiction over a murder committed by an active-duty serviceman in the state of Alabama during World War I. This case arose under the Articles of War, which forbade military trials of defendants charged with capital crimes committed within the United States. The Court indicated that there was a sufficient time of war for the exercise of military jurisdiction, but that such jurisdiction was not exclusive. *But see Ex parte* King, 246 F. 868 (E.D. Ky. 1917).

[42] 395 U.S. at 274.

[43] The Court of Military Appeals has not gone beyond this definition. *See* DA PAM 27-69-24, at 2-4, 6-7, *digesting* United States v. Smith, No. 22,180, Sept. 26,

should arise. "Property" is self-explanatory. "Military authority," however, is a rather complex concept. If by the phrase "flouting of military authority"[44] the Court means purely military offenses such as disobedience of a lawful order or assaulting a superior in the performance of his duties, then the same objections arise as when "military victim" is construed too literally. Situations immediately come to mind in which an off-duty individual could commit an offense against his direct superior, also off-duty, and be subject only to civil law under a restrictive interpretation of "military authority." Yet civilian courts cannot consider the implications of the offense on military effectiveness, and the services must prevent off-duty activities from interfering with command structures. The danger exists, of course, that the phrase "flouting of military authority" could be used to justify prosecuting off-base political activism or other disapproved, but not illegal, conduct.[45] This phrase should be broadly construed when an offense is committed against another serviceman, but not when the crime is essentially victimless, as in narcotics cases or when non-illegal conduct, such as political activity, is involved.

Whether the accused was in civilian clothes at the time of the offense is also a pertinent consideration. The Court of Military Appeals has

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1969; United States v. Shockley, No. 21,667, Sept. 26, 1969; United States v. Paxiao, No. 22,230, Sept. 26, 1969; United States v. Harris, No. 22,028, Sept. 26, 1969.

[44] 395 U.S. at 274.

[45] Since there is no specific provision in the UCMJ under which enlisted personnel could be prosecuted for such activities, the charge would have to be brought under art. 134, 10 U.S.C. § 934 (1964), which provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of the good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the court.

The "crimes and offenses not capital" clause refers only to those crimes denounced by Congress in the United States Code and thus would not apply in the situation under consideration. AYCOCK & WURFEL 311-12. Prosecution could be brought under either the "to the prejudice of the good order and discipline" clause or the "discredit to the armed forces" clause. However, there could be no prosecution under art. 134 for an offense separately denounced in the UCMJ. United States v. Norris, 2 U.S.C.M.A. 236, 239-40, 8 C.M.R. 36, 39-40 (1953); United States v. Haywood, 2 U.S.C.M.A. 376, 377, 9 C.M.R. 6, 7 (1953); AYCOCK & WURFEL 313. Depending upon the particular activity involved, an officer can be prosecuted under art. 88, 10 U.S.C. § 888 (1964), for contempt toward officials, and under art. 133, 10 U.S.C. § 933 (1964), for conduct unbecoming an officer. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

found the lack of uniform to be significant.[46] Where other considerations are inconclusive, that the offender was uniformed could tip the balance in favor of military jurisdiction; but the presence of the uniform, without more, should not be enough to sustain court-martial jurisdiction.

Narcotics present a special problem since Congress has not in the UCMJ specifically prohibited their use or possession. Traditionally, narcotics offenses have been punished as violations of the general article prohibiting conduct to the "prejudice of the good order and discipline in the armed forces."[47] An alternative method has been the issuance of an order forbidding use and possession and prosecution for disobedience of the order.[48] Because an off-post narcotics violation has no classical "victim" and will most likely occur while the offender is off duty and in civilian clothes, a strict reading of *O'Callahan* often will not allow the military to exercise jurisdiction. The Court of Military Appeals has decided, however, to sustain court-martial jurisdiction over all off-post narcotics offenses.[49] In reaching this result, the court in narcotics cases apparently has considered the factors of whether there is "no military significance" and the offense is "not service connected" separately from the others set forth in *O'Callahan.* It seems obvious that these phrases have no meaning except that which is given them by the facts of the case. *O'Callahan* should be as binding on military jurisdiction over narcotics offenses as it is in all other cases.

Under *O'Callahan,* civilian courts are assured exclusive jurisdiction over a serviceman only when he is accused of an offense committed off post within the United States in peacetime while he was not on duty, and if it involves no question of military authority, property, or security. In civilian courts a serviceman charged with a felony is guaranteed a grand jury indictment and trial by his peers, a court and counsel owing allegiance only to their own consciences, the remedy of a declaratory judgment if he is prosecuted under an invalid statute, and "an atmosphere conducive to the protection of individual rights . . . ."[50] Another sig-

[46] United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969).

[47] United States v. Williams, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957); United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

[48] *See, e.g.,* United States v. Castro, No. 22,046, Sept. 26, 1969, *digested in* DA PAM 27-69-24, at 4; United States v. Koepke, 18 U.S.C.M.A. 100, 39 C.M.R. 100 (1969).

[49] *See* United States v. Castro, No. 22,046, Sept. 26, 1969, *digested in* DA PAM 27-69-24, at 4. *See also* United States v. Boyd, No. 22,120, Sept. 19, 1969; United States v. Beeker, No. 21,787, Sept. 12, 1969, *both digested in* DA PAM 27-69-23, at 1, 3.

[50] 395 U.S. at 266.

nificant advantage to the serviceman defendant, not mentioned by the Supreme Court in *O'Callahan*, is that vesting exclusive jurisdiction in the civil courts over certain offenses removes the double jeopardy to which he was subject when the civil and military courts had concurrent jurisdiction.[51] With exclusive civil jurisdiction, the only legal action that can be taken by the military is a prosecution for any period of unauthorized absence generated by civilian confinement.[52]

The holding of *O'Callahan*, however, is not limited to serious offenses, which entitle the offender to a jury trial. The Court simply stated that the defendant "could not be tried by court-martial but rather was entitled to trial by the civilian courts."[53] By this statement it presumably meant to require exclusive civil jurisdiction over all offenses that satisfy the elements of *O'Callahan*. Since there is as yet no right to a jury in trials of "petty" offenses,[54] the military offender tried in a civilian court for a petty offense is faced with severe military consequences without having gained the advantage of a jury trial. Because civil authorities with exclusive jurisdiction over a petty offender can no longer turn him over to the military for trial, he will either make bond or be jailed. If he is able to make bond and return to his unit before being declared absent without leave, his subsequent return to civil authorities for trial, and any sentence served, will not be considered a punishable unauthorized absence,[55] but he will have to make up the lost time at the end of his enlistment.[56]

The military petty offender who is unable to make bond before his authorized absence expires is in more serious trouble. If he is held in jail beyond his authorized absence period and is later convicted, even if he meanwhile returned to duty, the initial absence becomes unauthorized, although the period of confinement is not;[57] both periods, however, must be made up by an equal amount of additional active duty.[58] As for the

[51] *E.g.*, United States v. Borys, 18 U.S.C.M.A. 547, 548, 40 C.M.R. 257, — (1969) (civilian acquittal followed by military conviction); Herrington, A.C.M. 18339, 33 C.M.R. 814 (1963) (simultaneous murder trials by civil and military courts, both resulting in convictions).

[52] MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 165 (1969) [hereinafter cited as MCM (1969)].

[53] 395 U.S. at 274.

[54] Cheff v. Schnackenberg, 384 U.S. 373 (1966). *See* Duncan v. Louisiana, 391 U.S. 145, 161 (1968).

[55] MCM ¶ 165 (1969).

[56] 10 U.S.C. § 972 (1964).

[57] MCM ¶ 165 (1969).

[58] 10 U.S.C. § 972 (1964).

petty offender who is unable to make bail at any time before trial, upon conviction his absence becomes unauthorized from the time that his pass or leave expired;[59] as of that time his pay and any family allotment stop;[60] the period of confinement is "bad time" that must be made up;[61] and upon returning to duty he will be subject to military prosecution as an unauthorized absentee for the period of confinement by the civil authorities.[62]

Conversely, if the serviceman were initially returned to the military for disciplinary action, he would not have to answer for unauthorized absence (unless he were held by civilian authorities past his authorized absence period); he could not lose more than two-thirds of his pay for whatever the period of punishment adjudged;[63] his family allotment could not be added onto his pay before computing the forfeiture and would continue unabated;[64] and he would incur no "bad time" to make up unless confined by the military as punishment.[65]

The ragged division of jurisdiction resulting from *O'Callahan* will cause the military and civilian bench and bar considerable difficulty until firmer jurisdictional lines are hammered out in new cases, and the decision may result in injustice to individual defendants in test cases. Nevertheless, two valuable safeguards are afforded the serious offender by the holding in *O'Callahan.* First, the decision provides for the application of the procedural safeguard of the jury system to those cases involving servicemen that the military should have little interest in prosecuting; second, by vesting exclusive jurisdiction in the civil courts, *O'Callahan* reduces the possibility of double jeopardy for service personnel that was always present under concurrent jurisdiction. But until the Court extends the right to a jury trial to all civilian criminal defendants,[66] or until the UCMJ and the military's financial regulations are altered to mitigate the military consequences of a civilian conviction,

[59] MCM ¶ 165 (1969).

[60] MS COMP. GEN. (1959), *digested in* 9 DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES *Pay and Allowances* § 21.3 (1959-60); 36 COMP. GEN. 173 (1956), *digested in* 6 DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES *Pay and Allowances* § 18.1 (1956-57).

[61] 10 U.S.C. § 972 (1964).

[62] MCM ¶ 165 (1969).

[63] *Id.* ¶¶ 15(b), 16(b). This statement assumes that any petty offense will not be tried by a general court-martial.

[64] *Id.* ¶ 126(h)(2).

[65] 10 U.S.C. § 972 (1964). Restriction to certain limits, a common punishment for minor offenses, is not "bad time" under this statute.

[66] Some states do provide for a jury trial for all defendants charged with crimes. *See, e.g.,* N.C. CONST. art. 1, §§ 12, 13.

those offenders whose crimes are classified as petty offenses under prevailing constitutional standards should not be deprived of the potential collateral advantages of a military trial and should be excluded from the *O'Callahan* rule.

ROGER GROOT

Patents—The Overruling of the Licensee Estoppel Doctrine

The favored status once enjoyed by patentees before the United States Supreme Court has undergone considerable change in this century. Many of the older concepts have been re-examined in light of the current state of the patent system and the competing demands of other areas of the law. For example, the exclusiveness of the patent grant is repugnant to the free-competition teachings of antitrust policy. These factors have prompted searching reappraisals of the privileges historically inherent in the grant; in some cases, privilege-bestowing decisions of the past have fallen.

More than one hundred years ago, the Supreme Court held that one who had derived benefits from the use of another's patent was estopped to deny its validity when sued by the owner for a share of the profits.[1] The effect of the estoppel doctrine was to shield many questionable patents from attack. In *Lear, Inc. v. Adkins*[2] the Supreme Court recently disapproved this venerable doctrine. The Court stressed the strong public interest in general circulation and use of ideas not entitled to patent protection[3] and reasoned that the estoppel doctrine was often a bar to the most logical contestant of patentability.[4]

Adkins, while employed by Lear, had designed an apparatus increasing the accuracy of gyroscopes. While his patent application was pending, he licensed Lear to use his invention in return for royalties. After paying royalties for approximately two years, Lear decided that the discovery by Adkins had been fully anticipated by a prior patent and announced that it would no longer pay royalties on production at one of its locations. Lear later discontinued payments altogether. Shortly thereafter, Adkins finally

[1] Kinsman v. Parkhurst, 59 U.S. (18 How.) 289 (1855).
[2] 89 S. Ct. 1902 (1969).
[3] *Id.* at 1910-11.
[4] *Id.* at 1911. The high costs of patent litigation and the specter of possible treble damages for infringement under 35 U.S.C. § 284 (1964) can effectively deter a third party from attacking a patent that he desires to use. Although the same hardships may confront the licensee, he has more to gain since he is already utilizing the patent and is saddled with royalty payments.

obtained his patent and sued Lear for breach of the license agreement. The licensee sought to prove its claim of invalidity of the patent, but the California Supreme Court invoked the estoppel doctrine to preclude Lear from asserting this defense.[5]

The estoppel doctrine had been widely applied by both federal and state courts.[6] One theory that has been offered in justification of estoppel is that one receiving bargained-for benefits under a contract cannot contest the validity of those benefits.[7] Another theory compares the estopped party to an agent who, having collected money owed his principal, cannot contend that there was no debt and refuse to turn over the funds.[8] In other cases, an analogy has been drawn from the doctrine that a tenant in possession cannot dispute the title of his landlord.[9]

The harshness of the estoppel doctrine was met in many jurisdictions by various exceptions. One of these, the repudiation exception, permitted a licensee to repudiate the license agreement, give notice to the licensor, and then contest the validity of the patent.[10] Continued use of the patent, however, would give rise to a cause of action for infringement.[11] Another exception, eviction, generally applied only to exclusive licensees[12] and arose when the patent was declared invalid in a suit between the patentee and a third party.[13] Since the exclusive licensee contracts for a monopoly, the determination of invalidity ousts him from that position because outsiders can then use the invention. The result is a failure of consideration for the license agreement,[14] and the licensee can assert the eviction as

[5] Adkins v. Lear, Inc., 67 Cal. 2d 882, 435 P.2d 321, 64 Cal. Rptr. 545 (1967), *rev'd*, 89 S. Ct. 1902 (1969).

[6] *E.g.*, Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950); Moore v. National Water-Tube Boiler Co., 84 F. 346 (C.C.D.N.J. 1897); Thomson Spot Welder Co. v. Oldberg Mfg. Co., 234 Mich. 317, 207 N.W. 828 (1926); Davis Co. v. Burnsville Hosiery Mills, Inc., 242 N.C. 718, 89 S.E.2d 410 (1955); *see* 4 A. WALKER, PATENTS § 403 (Deller's 2d ed. 1965).

[7] Kinsman v. Parkhurst, 59 U.S. (18 How.) 289, 293 (1855).

[8] *Id.*

[9] White v. Lee, 14 F. 789, 790 (C.C.D. Mass. 1882); Wilder v. Adams, 29 F. Cas. 1216, 1217-18 (No. 17,647) (C.C.D. Mass. 1846).

[10] Universal Rim Co. v. Scott, 21 F.2d 346 (N.D. Ohio 1922); Crew v. Flanagan, 242 Minn. 549, 65 N.W.2d 878 (1954). See Note, *The Doctrine of Licensee Repudiation in Patent Law*, 63 YALE L.J. 125 (1953).

[11] At least one state required the repudiating licensee to make post-repudiation use of the patent to allow the licensor the option to sue for infringement. Elgin Nat. Watch Co. v. Bulova Watch Co., 281 App. Div. 219, 118 N.Y.S.2d 197 (1953).

[12] Appleton Toy & Furniture Co. v. Lehman Co. of America, 165 F.2d 801 (7th Cir. 1948).

[13] Drackett Chem. Co. v. Chamberlain Co., 63 F.2d 853 (6th Cir. 1933).

[14] An exclusive licensee contracts for both a monopoly in the use of the patent

a defense if sued by the licensor for royalties accruing subsequent to the determination that the patent is invalid.

Other exceptions to the estoppel doctrine were carved out by several landmark Supreme Court decisions, some of which left little doubt as to what the ultimate disposition of the doctrine would be.[15] In *Westinghouse Electric & Manufacturing Co. v. Formica Insulation Co.*,[16] Formica had assigned his invention to his employer, Westinghouse. Prior to approval of the patent application, the inventor terminated his employment and started his own business, the Formica Company. The patent issued subsequently to Westinghouse. Meanwhile, the Formica Company had begun manufacturing substantially the same product covered by the patent. Sued for infringement, Formica, although estopped from contesting the patent's validity, was allowed to show that its only novelty was dependent upon its encompassment of a two-step process of manufacturing. Since Formica's product was not novel because it was manufactured by a one-step process that embraced prior art, it did not fall within the protection of Westinghouse's patent. The Court said: "Of course, the state of the art can not be used to destroy the patent and defeat the grant, because the assignor is estopped to do this. But the state of the art may be used to construe and narrow the claims of the patent, conceding their validity."[17] Although the case involved an assignment and assignor estoppel, courts have readily applied the *Formica* "narrowing" exception to license situations.[18] This limitation upon the estoppel doctrine resulted in an anomaly because it allowed attacks only on patents possessing some novelty while leaving entirely worthless ones unaffected.[19] However, in many instances

and freedom from an infringement suit by the patentee. A non-exclusive licensee, however, contracts only for freedom from an infringement suit; by definition, he has no monopoly. Thus, where a third party succeeds in having the patent declared invalid, the non-exclusive licensee still has his freedom from an infringement suit. For a discussion of the eviction concept, see Note, 48 COLUM. L. REV. 1101 (1948).

[15] As the Court said in *Lear*: "Given the extent to which the estoppel principle had been eroded by our prior decisions, we believe it clear that the patent owner—even before this decision—could not confidently rely upon the continuing vitality of the doctrine." 89 S. Ct. at 1913 n.19. See also Note, *Estoppel to Deny Validity—A Slender Reed*, 23 N.Y.U. INTRA. L. REV. 237 (1968).

[16] 266 U.S. 342 (1924).

[17] *Id.* at 351.

[18] *E.g.*, New Wrinkle, Inc. v. John L. Armitage & Co., 277 F.2d 409 (3d Cir. 1960); Midland Steel Prods. Co. v. Clark Equip. Co., 174 F.2d 541 (6th Cir.), *cert. denied*, 338 U.S. 892 (1949).

[19] [I]f a patent had *some* novelty *Formica* permitted the old owner to defend an infringement action by showing that the invention's novel aspects did not extend to include the old owner's product; on the other hand, if a patent had *no* novelty at all, the old owner could not defend successfully since he

it necessarily restricted the scope of protection previously enjoyed by many patentees.

Twenty-one years after *Formica*, the Court made additional inroads into the estoppel doctrine. In *Scott Paper Co. v. Marcalus Manufacturing Co.*,[20] the Court held that an assignor of a patent, sued for infringement by the assignee, could defend by showing that the alleged infringing device was copied from a prior patent now expired. The assignor had made the invention sued upon, had assigned his patent application to a third party who in turn assigned it to Scott, and subsequently had begun his own company that produced and sold essentially the same product covered by the patent. Necessarily admitting that the patent that he had assigned was worthless, the assignor contended that his machine was a copy of a prior patent issued in 1912. The Court of Appeals for the Third Circuit, reversing the district court, which had invoked the estoppel doctrine, held that the *Formica* "narrowing" exception allowed the assignor to show the prior art to limit the claims of the assigned patent; and since the earlier expired patent completely anticipated the assigned patent, the latter was limited to no claim at all.[21] The Supreme Court affirmed the holding of no infringement, but on new grounds. It pointed out that once a patent expires, the invention is dedicated to the public. Therefore, the estoppel doctrine could not prevent one from using the invention of an expired patent because

> [t]he public has invested in such free use by the grant of a monopoly to the patentee for a limited time. Hence any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws.[22]

This exception to the estoppel doctrine has since been applied to license cases.[23] Thus, while *Formica* avoided the estoppel doctrine by allowing a licensee to show his device to be outside the scope of the licensor's nar-

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would be obliged to launch the direct attack on the patent that *Formica* seemed to forbid.
Lear, Inc. v. Adkins, 89 S. Ct. 1902, 1908 (1969).

[20] 326 U.S. 249 (1945).

[21] Automatic Paper Mach. Co. v. Marcalus Mfg. Co., 147 F.2d 608 (3d Cir.), *aff'd sub nom.* Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249 (1945).

[22] 326 U.S. at 256.

[23] *E.g.*, Hall Laboratories, Inc. v. National Aluminate Corp., 224 F.2d 303 (3d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); Hooker Chem. Corp. v. Velsicol Chem. Corp., 235 F. Supp. 412 (W.D. Tenn. 1964) (dictum).

rowly construed patent, *Scott* evaded the doctrine by permitting licensees to prove that they were using solely the ideas of an expired patent.

Another exception to licensee estoppel was grounded specifically upon antitrust policy. In *Sola Electric Co. v. Jefferson Electric Co.*,[24] the Supreme Court was faced with a license agreement containing a naked price restriction, lawful under the Sherman Act only if supported by a valid patent.[25] The licensor-patentee had sued for royalties and an injunction restraining sales outside the terms of the license agreement. Reversing the lower court's invocation of the estoppel doctrine,[26] the Supreme Court held that the estoppel rule, whether state or federal, must yield to the public policy of the Sherman Act precluding enforcement of such unlawful agreements.[27]

Five years later, the Court went further in deciding *Edward Katzinger Co. v. Chicago Metallic Manufacturing Co.*[28] and *MacGregor v. Westinghouse Electric & Manufacturing Co.*,[29] both of which also involved license agreements with price restrictions. Unlike the licensor in *Sola*, who had sought to enforce the provisions of the license controlling prices, the licensors in *Katzinger* and *MacGregor* were seeking only royalties; indeed, the licensors had made no attempt to enforce the price-fixing clauses.[30] The Court held that the entire agreement was tainted because the price-fixing and royalty provisions were not severable: "Consequently, when one part of the consideration is unenforceable because in violation of law, its integrated companion must go with it."[31] Therefore, the licensees were allowed to attack the validity of the patents. The above exceptions and others that were developed to the estoppel doctrine indicated judicial recognition of the conflict between the stability of contracts and the patentees' privileges on one side, and, on the other, the right of public access to ideas not protected by a valid patent.

The public right of free access to technological improvements falling short of patentability was set out in two far-reaching companion cases, *Compco Corp. v. Day-Brite Lighting, Inc.*[32] and *Sears, Roebuck & Co. v.*

[24] 317 U.S. 173 (1942).
[25] *Id.* at 175.
[26] Jefferson Elec. Co. v. Sola Elec. Co., 125 F.2d 322 (7th Cir. 1941), *rev'd*, 317 U.S. 173 (1942).
[27] 317 U.S. at 175, 177.
[28] 329 U.S. 394 (1947).
[29] 329 U.S. 402 (1947).
[30] *Id.* at 412 & n.4 (dissenting opinion).
[31] 329 U.S. at 401.
[32] 376 U.S. 234 (1964).

Stiffel Co.[33] Although these were infringement suits not involving licenses, the Court in *Lear* relied heavily upon them. In both cases, patentees brought actions in an Illinois district court. They alleged that the defendants were selling articles identical in design to those of the patentees and that these actions constituted infringement and unfair competition. The defendants contended that the patents were invalid; the district court so held but applied the state law of unfair competition and granted injunctions and ordered accountings for damages. The unfair competition holdings rested upon customer confusion over source of the products. The Court of Appeals for the Seventh Circuit affirmed in both cases.[34] On certiorari, the Supreme Court reversed, holding that while a state may impose certain requirements such as labeling to prevent misleading consumers, state prohibition against copying unpatented articles is incompatible with federal patent laws. Justice Black stated that "[m]ere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied."[35] The analogy to licensee estoppel is clear: Whether the estoppel doctrine is a matter of federal or state law, it cannot, by barring potential litigants, extend patent protection to ideas that federal patent policy demands shall have no protection.

The Supreme Court had previously indicated in *Altvater v. Freeman*[36] that the federal courts in infringement cases should not hold patents valid if such a holding is unnecessary to disposition of a case. The Court, citing an earlier case,[37] indicated that because there would not be any justiciable controversy[38] it was improper upon a determination of no infringement to proceed further and hold the patent valid. On the other hand, even if a court finds no infringement, it may proceed to find the patent invalid, for such a determination serves the public interest.[39]

[33] 376 U.S. 225 (1964).

[34] Stiffel Co. v. Sears, Roebuck & Co., 313 F.2d 115 (7th Cir. 1963), *rev'd*, 376 U.S. 225 (1964); Day-Brite Lighting, Inc. v. Compco Corp., 311 F.2d 26 (7th Cir. 1962), *rev'd*, 376 U.S. 234 (1964).

[35] 376 U.S. at 232. For a discussion of these cases and the impact of federal patent and copyright policy on the law of unfair competition, see Treece, *Patent Policy and Preemption: The Stiffel & Compco Cases*, 32 U. CHI. L. REV. 80 (1964); Comment, *Does Stiffel Stifle the Law of Unfair Competition?*, 37 U. COLO. L. REV. 86 (1964).

[36] 319 U.S. 359, 363 (1943).

[37] Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939).

[38] If an alleged infringer can prove that he is not infringing, he has no reason to attack the patent's validity.

[39] Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327 (1945).

Lear's contribution to the demise of patentee privileges is not limited to the overruling of the estoppel doctrine. Besides allowing Lear to attack the patent on remand, the Court made significant new law—and raised profound new questions—in the area of license contracts generally. Adkins had filed his initial patent application in 1954; the license agreement was consummated in 1955; and the patent issued in 1960.[40] The Court was faced with a provision in the contract calling for Lear to pay royalties until such time as the patent was held invalid. Acknowledging the benefits derived by Lear from the pre-patent licensing, the Court declared that Lear would not be liable for royalties accruing after the 1960 patent issued if he could prove it invalid.[41] The parties' contract was deemed to be "no more controlling on this issue than is the State's doctrine of estoppel, which is also rooted in contract principles."[42] The Court was concerned with the frustration of federal policies that would result if licensees were required to continue royalty payments while challenging patents in the courts. Mr. Justice Harlan, writing for the Court, cited the probable dilatory legal tactics by licensors, the incentive to attack patents that early freedom from royalties would provide licensees, and the undermining effect that similar contract provisions would have on the federal policy favoring full and free use of ideas in the public domain.[43]

The Court also raised, but did not decide, the question whether Adkins was entitled to 1955-1960 pre-patent royalties. Determination of such an issue ultimately will depend upon "whether, and to what extent, the States may protect the owners of *unpatented* inventions who are willing to disclose their ideas to manufacturers only upon payment of royalties."[44] The Court deferred decision until the state courts could consider the problem.

> Our decision today will, of course, require the state courts to reconsider the theoretical basis of their decisions enforcing the contractual rights of inventors and it is impossible to predict the extent to which this reevaluation may revolutionize the law of any particular State in this regard. . . . Given the difficulty and importance of this task, [our definition] should be undertaken only after the state courts have, after fully focussed inquiry, determined the extent to which they will respect the contractual rights of such inventors in the future.

[40] Lear, Inc. v. Adkins, 89 S. Ct. 1902, 1904 (1969).
[41] *Id.* at 1911-13.
[42] *Id.* at 1912.
[43] *Id.* at 1912-13.
[44] *Id.* at 1913.

> Indeed, on remand, the California courts may well reconcile the competing demands of patent and contract law in a way which would not warrant further review in this Court.[45]

The pronouncements on royalties were not necessary to disposition of the case; indeed, as Mr. Justice White, concurring in part, indicated, these issues were not even before the Court.[46] That these questions were nevertheless reached has implications worth probing. Since *Stiffel* and *Compco* prohibit patent-type protection for ideas not shielded by the patent laws, do they not also prohibit the states from enforcing contracts for payment to inventors in return for disclosures of unpatented ideas? Mr. Justice Black, concurring in part and dissenting in part, answered in the affirmative.[47]

Since jurisdiction over suits involving royalty contracts, absent diversity, lies exclusively with the state courts,[48] it was appropriate to allow them preliminary consideration of this problem. However, this consideration may well be perfunctory in view of the Supreme Court's inclinations to restrict patent protection together with the limitations imposed by the *Stiffel-Compco* mandate. If invalidity of the patent disallows royalties after it issues, there seems to be little reason to allow royalties for the period prior to issuance. Moreover, since issued patents are presumed valid[49] and represent a property right,[50] payments for their use until they are actually adjudicated invalid arguably rest on stronger ground than do payments for use of ideas not yet patented.

An appealing argument might be made that until a patent grant is issued, the invention is beyond the reach of federal law and, therefore, the rights of contracting parties should be defined exclusively by the states. However, this contention is apparently foreclosed by the holdings in *Stiffel, Compco* and *Lear* that because the federal patent laws deny protection to some ideas, there must be free access to them.

Privileges of the patent grant were affected by *Lear* in three ways.

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[45] *Id.*

[46] *Id.* at 1915.

[47] *Id.* at 1914. Justice Black was joined by the Chief Justice and Mr. Justice Douglas.

[48] Luckett v. Delpark, Inc., 270 U.S. 496 (1926); Albright v. Teas, 106 U.S. 613 (1882); *see* Note, *The Jurisdiction of State Courts over Cases Involving Patents*, 31 COLUM. L. REV. 461 (1931).

[49] Cantrell v. Wallick, 117 U.S. 689, 695-96 (1886); H. Wenzel Tent & Duck Co. v. White Stag Mfg. Co., 199 F.2d 740, 743 (9th Cir. 1952); 35 U.S.C. § 282 (Supp. III, 1968).

[50] James v. Campbell, 104 U.S. 356, 357-58 (1881).

First, the final rites administered to the estoppel doctrine will allow more patent attacks. Second, excusing post-patent royalties if attacks are successful will provide licensees additional incentive to litigate. Finally, the decision portends a probable loss of royalties for the pre-patent period as well. Apparently, the Supreme Court's past benevolent attitude toward the patent system has given way to a disposition of bare tolerance; no doubt, additional incursions into patentees' privileges will be made. The ultimate result will depend upon the extent to which the patent system and conflicting policies, such as those of the antitrust laws, can peacefully coexist.

JAMES E. CLINE

Poverty Law—Unconstitutionality of Residence Requirements for Welfare Assistance

The United States Supreme Court in *Shapiro v. Thompson*[1] recently held that one-year waiting period requirements as a condition precedent to receiving public assistance violate the equal protection clause of the fourteenth amendment by discriminating between two classes of citizens on the basis of residence.[2] In three separate cases[3] district courts, holding the residence requirements unconstitutional, had found that the appellees, the applicants rejected for public assistance, were eligible for benefits in every respect except for the requirement of residence for a full year prior to application. The Supreme Court agreed with the lower courts that the interests promoted by the classification and asserted by the appellants were either interests that cannot be constitutionally promoted by government or that are not "compelling" state interests.[4]

The appellants' primary justification for the waiting periods was protection of the budgetary integrity of state public assistance programs. They defended the residence provisions on the fiscal grounds that people who require welfare assistance during their first year of residence in a

[1] 394 U.S. 618 (1969).

[2] *Id.* at 638-42.

[3] On certiorari the Court consolidated Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967); and Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967). The inclusion of the case from the District of Columbia was based on Bolling v. Sharpe, 374 U.S. 497 (1954), in which the Court held that the fifth amendment's due process clause incorporated the equal protection clause of the fourteenth amendment. 394 U.S. at 641-42. See also Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967), which was not appealed.

[4] 394 U.S. at 627.

state are likely to become continuing burdens on state welfare programs, that migration of indigents who would enter the state solely to obtain larger benefits would be discouraged by residence requirements, and that an attempt to distinguish between new and old residents on the basis of their contributions to the community through tax payments should be permitted. Administrative and related governmental objectives allegedly served by the waiting periods were (1) facilitating the planning of the welfare budget; (2) providing an objective test of residence; (3) minimizing the opportunity for applicants' fraudulent receipt of payments from more than one jurisdiction; and (4) encouragement of early entry into the labor force. These justifications were dismissed by the Court as either without basis in fact or impermissible because less drastic means are available to obtain the same objectives.[5] Indeed, the Court found "weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions."[6]

There are two separate tests that the Court uses to determine whether a state classification violates the equal protection clause; the nature of the rights that the classification allegedly infringes determines which of the two is applied.[7] If the rights affected are "fundamental," the classification can only be sustained if it is justified by compelling state interests.[8] On other hand, the traditional attitude is to uphold state classifications affecting nonfundamental rights unless the Court finds that the classifications are arbitrary.[9]

Waiting-period requirements create two classes of needy resident families indistinguishable from each other except that one is composed of residents of a year or more and the other of residents of less than a year in the jurisdiction. The majority in *Shapiro* held that this distinction infringed upon the fundamental right of interstate travel and thus that only compelling state interests could justify the classifications.[10] After the

[5] *Id.* at 627-38.

[6] *Id.* at 628. The Court found that residence requirements date from Elizabethan Poor Laws, which were based on the concept that each local community should care for its own indigents. *Id.* at 628 n.7.

[7] *Id.* at 660-63 (Harlan, J., dissenting).

[8] Apparently, the requirement that a classification based upon a "suspect" criterion must be supported by a state's compelling interest arose in Korematsu v. United States, 323 U.S. 214 (1944). That case involved racial classifications, which have since been regarded as inherently "suspect." *See* Loving v. Virginia, 388 U.S. 1 (1967). In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court by invalidating property requirements for voting added "wealth" to the list of those which are suspect; in Williams v. Rhodes, 393 U.S. 23 (1968), the criterion of political allegiance may have been added.

[9] *E.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949).

[10] 394 U.S. at 634.

Court concluded that the appellants neither used nor needed the one-year waiting period for the suggested governmental purposes, it stated that the residence requirement did not even meet the traditional equal protection test of whether a state classification is rational. Justice Harlan in dissent disagreed with this evaluation of the right to travel and argued that the less-rigid test of an absence of arbitrariness was appropriate.[11]

In recent years the equal protection clause has been expanded to invalidate many state limitations upon certain classes of citizenry, especially those limitations affecting fundamental rights. The Supreme Court in *Kramer v. Union Free School District*[12] overturned a New York voting requirement providing that residents who were otherwise able to vote in state and federal elections were eligible to vote in school district elections only if (1) they owned or leased taxable real property within the district or (2) were parents of children enrolled in the public schools. Even assuming that New York may legitimately limit the franchise in school district elections to those primarily interested in school affairs, this particular requirement is invalid because it does not accomplish this purpose with sufficient precision to justify denying any qualified voter his franchise.

In the broader field of public welfare, the Court invalidated a Louisiana wrongful death statute denying benefits to illegitimate children.[13] The Court based its decision on the traditional equal protection test and found invidious the denial of the same claim for relief to illegitimate children as allowed legitimate children.[14] A ceiling upon grants to welfare recipients regardless of the size of their families has been held by several district courts to violate the equal protection test of arbitrariness.[15] Discrimination against families with many children cannot be justified solely by the state interest of saving money. Although a state has a valid interest in preserving the fiscal integrity of its programs, "[t]he saving of welfare costs cannot justify an otherwise invidious classification."[16]

In *Shapiro* the waiting periods affected the right of interstate movement; the majority opinion categorized this right to travel with the preferred, fundamental freedoms of the first amendment. The right to

[11] *Id.* at 661-62 (dissenting opinion).
[12] 395 U.S. 621 (1969).
[13] Levy v. Louisiana, 391 U.S. 68 (1968).
[14] *Id.* at 72. The Court said that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother." *Id.*
[15] Westberry v. Fisher, 297 F. Supp. 1109 (S.D. Me. 1969); Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969); Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968). The Court recently granted certiorari to hear cases involving maximum family grants. See N.Y. Times, Oct. 14, 1969, § 1, at 1, col. 2.
[16] Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

interstate travel free from state restrictions, prior to the implementation of the fourteenth amendment, had been recognized in *Crandall v. Nevada.*[17] The Supreme Court in *Crandall* forbade the state of Nevada from levying a tax upon commercial vehicles as they passed through the state. Although the Court expressly refused to rely on the commerce clause, it nevertheless held the tax invalid as an interference with vital governmental functions because, among other things, it denied citizens free access to governmental centers.[18] In *Edwards v. California*[19] the Court invalidated a statute making it a misdemeanor for any person knowingly to aid in transporting an indigent into California. A majority found that the statute imposed an unconstitutional state burden on interstate commerce. The burden on commerce was immediate and absolute in *Edwards* since indigents were excluded rather than deterred; the unconstitutional action was solely that of the state.[20] In *Shapiro* the majority held that section 602(b) of the Social Security Act[21] does not authorize state residence requirements, but only permits the Secretary of Health, Education and Welfare to approve welfare grants to those states with no more than one-year limitations. Even if the majority assumed congressional authorization of waiting periods, the provisions insofar as they permit such requirements would be violative of constitutional restrictions on state action limiting freedom of interstate travel.[22]

Professor Chafee has proposed that "liberty" under the due process clause includes the liberty of movement.[23] The Supreme Court, until

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[17] 73 U.S. (6 Wall.) 35 (1867).

[18] *Id.* at 43.

[19] 314 U.S. 160 (1941).

[20] In two concurring opinions four justices thought that the statute violated the privileges and immunities clause of the fourteenth amendment. *Id.* at 177-86.

[21] 42 U.S.C. § 602(b) (1964). This section provides that:

> The Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

[22] 394 U.S. at 641. In *Edwards,* the Court relied on the commerce clause to invalidate a state restraint on interstate travel. *Id.* The majority in *Shapiro* invalidated congressional authorization of the District of Columbia's welfare requirements even though the power to regulate commerce was granted solely to Congress. *Id.* Thus, the commerce clause is obviously not the basis of the right to travel discussed in *Shapiro.*

[23] Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 192 (1956).

Shapiro, had applied this "liberty of movement" argument only to protect the right to travel abroad from infringement by the federal government. *Kent v. Dulles*,[24] which held that the Secretary of State was not authorized to withhold a passport because the plaintiffs refused to sign affidavits concerning their membership in the Communist Party, stated by way of dictum, "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . ."[25] Subsequent cases involving federal restrictions on travel have included similar statements attributing the source of the right to travel to the due process clause of the fifth amendment.[26]

Aptheker v. Secretary of State[27] is the only case prior to *Shapiro* in which the Court invalidated a *congressionally* imposed restriction on the right to travel. However, *Aptheker* involved a flat prohibition upon certain travel and a claim that the congressional restriction compelled choice between right to travel and the first amendment right to freedom of association.[28]

Whether the Supreme Court finally holds the commerce clause, the due process clause, or the privileges and immunities clause of the fourteenth amendment to be the constitutional source protecting freedom of interstate travel, the ultimate concern is to what extent the state or federal government may impinge upon this right.[29] For example, is not the right to travel affected, if not chilled, by one state's offering higher welfare benefits than another?

The decision in *Shapiro* leaves uncertain the validity of other state-imposed waiting periods or residence requirements for determining eligibilities to vote,[30] to obtain a license to practice a profession, to hunt, and to exercise other similar privileges and rights.[31] Assuming a waiting

[24] 357 U.S. 116 (1958).

[25] *Id.* at 125.

[26] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 13-16 (1965) (upholding a restriction on travel to Cuba as not violative of due process.)

[27] 378 U.S. 500 (1964).

[28] *Cf.* Zemel v. Rusk, 381 U.S. 1, 16 (1965).

[29] The Court in *Shapiro* did not justify the right to travel by the commerce clause. Indeed, if it had, it could possibly have upheld the District of Columbia residence requirements even though it invalidated those of the states. *See* note 22 *supra*.

[30] The Court recently avoided a direct decision on Colorado's six-month residence requirement for voting in national elections. The Court held the question "moot" because of the occurrence of the election and the subsequent reduction of the residency requirement from six months to two months. Hall v. Beals, 38 U.S.L.W. 4006 (U.S. Nov. 25, 1969).

[31] A California system for determining tuition at state colleges based on residency classification has recently been upheld as not arbitrary. See Kirk v. Board of Regents, —— Cal. App. 2d ——, 78 Cal. Rptr. 260 (Dist. Ct. App. 1969).

period for the applicant in each case, is there such a difference affecting the right to travel between the denial of a license to practice a profession and the denial of welfare benefits so that one classification is valid and the other "invidious"? Is the right to vote, which the Constitution protects from certain forms of discrimination,[32] less fundamental than the right to travel, which is not specifically mentioned in the Constitution? So it would seem: The Supreme Court in *Carrington v. Rash*[33] recently stated, "Texas has unquestioned power to impose reasonable residence requirements on the availability of the ballot."[34]

Residence requirements in welfare programs do not reflect the economic need of an increasingly mobile work force.[35] Such requirements are opposed to democratic principles because they make second-class citizens of Americans who follow the tradition of seeking a better life for themselves and their families. Of paramount importance, they are contrary to the social philosophy recognized in this country for more than thirty years. "The Social Security Act of 1935 embodied the philosophy that every person in the country should have an access to an income sufficient to meet the essential needs of life."[36]

Although the disposal of welfare residence requirements may have been demanded by the Constitution and socio-economic policies, the consequences may not be entirely beneficial. It is possible that a few welfare-minded states now will suffer a greater burden.[37] If these states are compelled to limit their welfare programs or to enact proportionately greater taxes, in the final analysis the overall welfare system may have been deterred rather than promoted. On the other hand, the abolition of residence requirements should encourage greater federal participation in welfare programs.[38] Federalizing the welfare system might eliminate the present disparity between state welfare payments, spread the cost of wel-

[32] U.S. CONST. amend. XV & XIX.

[33] 380 U.S. 89 (1965).

[34] *Id.* at 91. In *Carrington* the Court invalidated a provision in the Texas Constitution that denied the right to vote to members of the armed forces who moved their homes to Texas during their military duty and who remained in the service while there.

[35] See Note, *Welfare Benefits—A Constitutional Right to Change Residence?*, 7 J. FAMILY L. 660, 665 (1968).

[36] Note, *Residence Requirements in State Public Welfare Statutes—I*, 51 IOWA L.REV. 1080, 1090 (1966).

[37] See Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CALIF. L. REV. 567, 618 (1966).

[38] Note, *The Constitutionality of Welfare Residence Requirements*, 22 SW. L.J. 341, 349 (1968). For President Nixon's proposals outlining welfare reform, see N.Y. Times, Aug. 9, 1969, § c, at 10.

fare equally throughout the country, and possibly lead to more efficient administration.[39]

Although Justice Harlan in *Shapiro* labeled the majority's holding an unwise extension of the equal protection clause,[40] it seems that if this trend toward expansion continues, state classifications that deny a right or privilege to one portion of its citizenry will be subject to closer scrutiny than in the past. There is no indication what classification the Court will next regard as "inherently suspect."

GEORGE HACKNEY EATMAN

Torts—Extrinsic-Fact Test in the Law of Slander

The law of defamation has provoked many caustic comments from legal writers. Sir Frederick Pollock notes that "no branch of the law has been more fertile of litigation than this [defamation] . . . nor has any been more perplexed with minute and barren distinctions."[1] Dean Prosser calls defamation "a senseless thing, for which no court and no writer has had a kind word for upwards of a century and a half. It has been denounced many times in whatever scathing terms the vivid imagination of learned and literary authors could invent . . . ."[2]

The confusion that tends to invade this area of the law is apparent in a recent North Carolina Court of Appeals case, *Beane v. Weiman Co.*[3] In an action for slander by a former employee against her former employer, her former employer's president, and two other company employees, the plaintiff alleged that a company official had been informed by the two other employees that plaintiff had called their wives and reported that they were consorting with other women. The official told plaintiff that one of the other employees was essential to the company and that he had no choice but to terminate plaintiff's employment. Plaintiff further alleged that these words were spoken by the employee-defendants with

[39] One suggested approach calls for the use of a negative income tax. See Tobin, Pechman, & Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967).

[40] 394 U.S. at 659 (dissenting opinion).

[1] F. POLLOCK, THE LAW OF TORTS 237 (12th ed. 1923).

[2] Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960). In a lighter vein A. P. Herbert noted that "the law of libel is almost incomprehensible, except to those who have studied it from their cradles, and even for them it is a labyrinth of uncertainties, of false clues, blind alleys, and unexplored passages." A. P. HERBERT, UNCOMMON LAW 129 (1936).

[3] 5 N.C. App. 276, 168 S.E.2d 236 (1969).

malice and for the purpose of harming plaintiff's reputation and employment, that they had been repeated with malice by the company official within the scope of his employment, and that the words had caused injury to the plaintiff in her occupation. A demurrer to the complaint was sustained by the lower court and the North Carolina Court of Appeals affirmed.[4]

The separate actions for slander and libel have their roots deep in the common law. An early jurisdictional clash with the ecclesiastical courts resulted in the development of certain categories of words where pecuniary loss would be presumed and the common law courts would have jurisdiction.[5] Three categories of slander developed within which the plaintiff could recover without proof of damage: (1) words imputing a crime involving moral turpitude; (2) words imputing a loathesome disease; and (3) words affecting the plaintiff in his business, trade, profession, or office. In all other cases the plaintiff could not get his case to the jury without alleging and proving his pecuniary loss.[6] Incontinency of an innocent woman has been added by statute as a fourth category in most jurisdictions.[7] The courts referred to words falling within the categories as slander per se and those not within the categories as slander per quod.[8]

At common law the utterance could be within the categories by its apparent meaning or only by reason of extrinsic circumstances. The plaintiff was allowed to plead and prove facts not apparent upon the face of the publication by way of "inducement." He could then establish the defamatory sense of the publication with reference to such facts by "innuendo."[9] Such an innuendo was required whenever the plaintiff relied on extrinsic facts to give the words a defamatory meaning. In such a case the plaintiff was required to plead the words, the extrinsic facts, and knowledge of those facts by one or more of those persons to whom the words were published.[10] If by this method the plaintiff could estab-

[4] *Id.* at 276-77, 168 S.E.2d at 236-37.

[5] W. PROSSER, LAW OF TORTS 772 (3d ed. 1964) [hereinafter cited as PROSSER]; Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 110-12; Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 555-60 (1903).

[6] GATLEY ON LIBEL AND SLANDER 143 (6th ed. R. McEwen & P. Lewis 1967) [hereinafter cited as GATLEY]; M. NEWELL, SLANDER AND LIBEL 6-7 (4th ed. 1924) [hereinafter cited as NEWELL]; PROSSER 772-80.

[7] *E.g.*, N.C. GEN. STAT. § 99-4 (1965).

[8] Henn, *Libel-by-Extrinsic-Fact*, 47 CORNELL L.Q. 14, 17-18 (1961).

[9] GATLEY, *supra* note 6, at 94-95; PROSSER, *supra* note 5, at 766.

[10] GATLEY, *supra* note 6, at 94.

lish that the words were within any of the categories, the words were held to be slander per se without the requirement for allegation of special damages.

The law of libel, however, developed along different lines. The potential threat of the written word was recognized early by the English monarchy, and this realization led to the exercise of jurisdiction by the Star Chamber in certain cases of written defamation. The special categories that emerged in slander did not develop in libel since the early emphasis was not on limiting the action but on expanding it as part of a general censorship program.[11] Recovery is still allowed in England and in a minority of the American jurisdictions for all libel with no requirement that plaintiff plead and prove damages.[12] However, the majority of American jurisdictions have deviated from the common law rule.[13] The majority allow recovery without proof of special damages only in those cases in which the defamatory nature of the writing is apparent on its face or in which the plaintiff can show, by resorting to extrinsic facts, that the writing falls within the four special slander categories. In all other cases in which only extrinsic facts show defamation, the plaintiff must plead and prove special damages.[14]

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[11] Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 116-22; Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 562-71 (1903).

[12] Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 843 (1960). The *Restatement of Torts* states that "[O]ne who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom." RESTATEMENT OF TORTS § 3-569 (1938).

[13] *See*, Henn, *Libel-by-Extrinsic-Fact*, 47 CORNELL L.Q. 14 (1961); Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966). *But see* Eldredge, *Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966). For a discussion of this problem in North Carolina see Note, 33 N.C.L. REV. 674 (1955). The most recent statement of the North Carolina position is found in Robinson v. Nationwide Ins. Co., 273 N.C. 391, 159 S.E.2d 896 (1968).

[14] Dean Prosser's proposed revisal of the *Restatement of Torts* would read as follows:

§ 569. Liability Without Proof of Special Harm.

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is

(a) Libel whose defamatory meaning is apparent from the publication itself without reference to extrinsic facts, or

(b) Libel or slander which imputes to another

(i) A criminal offense, . . .

(ii) A loathesome disease, . . .

(iii) Matter incompatible with his business, trade, profession or office, . . .

(iv) Unchastity on the part of a women, ...

The extrinsic-fact test, which determines if the plaintiff must plead and prove special damages, evolved solely in the law of libel. The two categories of libel were labelled per se and per quod.[15] Libel per se required no special damages; libel per quod did. But the double meaning of these two terms created a situation ripe with possibilities for confusion by the courts.

The categories of words held to be slander per se have long been recognized in North Carolina.[16] The court in *Beane* quoted with approval from *Penner v. Elliott*,[17] an earlier North Carolina slander case in which the North Carolina Supreme Court said that "[w]e must look to the common law, under the guidance of our own decided cases . . ."[18] and the words held to be slander per se included "[a]ccusations of crime or offenses involving moral turpitude, defamatory statements about a person with respect to his trade, occupation or business, imputations of having a loathesome disease, and the like."[19]

The confusion arises in the law of slander in North Carolina when the plaintiff must resort to extrinsic facts to show the defamatory meaning of the utterance. There is authority for the proposition that North Carolina adheres to the common law rule allowing the plaintiff to resort to extrinsic evidence to bring the utterance into one of the slander per se categories without his having to show special damages. The common law rule was stated in an early case, *Watts v. Greenlee*,[20] in which the court, considering a charge of incontinency,"[21] said that "[w]ords not in themselves actionable may be rendered so . . . by something extrinsic, with the aid of *innuendo*."[22]

In certain cases the plaintiff may be forced to rely on extrinsic facts such as an unusual meaning of the utterance or facts known to the hearer to prove defamation. If the defamatory meaning thus alleged is subject

(2) One who publishes any other libel or slander is subject to liability only upon proof of special harm . . . .

Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 850 (1960).

[15] *E.g.*, Flake v. Greensboro News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938); *see* Henn, *supra* note 8, at 22.

[16] *E.g.*, Broadway v. Cope, 208 N.C. 85, 179 S.E. 452 (1935) (injury to trade); Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933) (crime involving moral turpitude); McKee v. Wilson, 87 N.C. 300 (1882) (crime and use of office).

[17] 225 N.C. 33, 33 S.E.2d 124 (1945).

[18] *Id.* at 34, 33 S.E.2d at 125.

[19] *Id.*

[20] 13 N.C. 115 (1829).

[21] *Id.* at 118-19.

[22] *Id.* at 117.

to permissible inference, the case is for the jury. For example, the plaintiff resorted to extrinsic facts in *Oates v. Wachovia Bank & Trust Co.*,[23] a case involving an accusation of crime. The court allowed the introduction of the "circumstances of the publication" and "the hearer's knowledge of facts which would influence their understanding of the words used"[24] without requiring an allegation of special damages.

Scott v. Harrison[25] contains another exposition of the majority position with respect to extrinsic evidence in the law of slander. The plaintiff, a high school principal's wife, alleged that defendant had said that the plaintiff had been forbidden to go on the premises of a school at which her husband had been principal.[26] Justice Seawell in a well-reasoned opinion criticized the arbitrary categories of slander, but reaffirmed the position of the categories in North Carolina law.[27] In approaching the problem of extrinsic evidence, he said that "[i]n the complaint under consideration none of the charges of slander is laid with an 'innuendo' attaching any special meaning to the words used other than that which is obvious, and under the ordinary meaning they are not actionable per se."[28] Clearly, "innuendo" would have been allowed to bring the words within the common law slander categories.

A hint of confusion and deviation from the common law is contained in the early case *Pegram v. Stoltz*.[29] In an action for slander, the plaintiff alleged that the defendant called him "a perjured man" for falsely swearing as to his residence before a board of registrars.[30] The court first concluded that the crime alleged was not infamous; thus the accusation was not within that category of slander.[31] The court, discussing the introduction of extrinsic evidence, stated that

> [W]hen the words spoken are such as do not on their face import such degradation as will of course be injurious . . . then the plaintiff must aver some special damage, which is called laying his action with a *per quod*, and must show by proof that he has in point of fact sustained a loss before he can recover.[32]

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[23] 205 N.C. 14, 169 S.E. 869 (1933).
[24] *Id.* at 17, 169 S.E. at 871.
[25] 215 N.C. 427, 2 S.E.2d 1 (1939).
[26] *Id.* at 428-29, 2 S.E.2d at 1-2.
[27] *Id.* at 430, 2 S.E.2d at 2.
[28] *Id.* at 430, 2 S.E.2d at 2.
[29] 76 N.C. 349 (1877).
[30] *Id.* at 349-50.
[31] *Id.* at 352.
[32] *Id.* at 351.

This statement can be regarded as surplusage in the decision of the case since extrinsic circumstances could not have brought the accusation within any of the slander per se categories. The implication is present, however, that extrinsic circumstances would not have been allowed to prove the words actionable per se.

The North Carolina Supreme Court continued its deviation from the common law in *Deese v. Collins*,[33] in which the allegation was that the defendant had charged the plaintiff, a white man, with having Negro blood.[34] The court relied on the common law slander categories to hold that the allegation was not slander per se.[35] The court also implied that extrinsic evidence would not have been allowed to bring the utterance within the slander categories by quoting with approval[36] from *Pegram*, but again this part of the opinion can be considered dictum since extrinsic evidence would not have aided the plaintiff. In *Badame v. Lampke*,[37] cited by the court of appeals in *Beane*, the Supreme Court of North Carolina confirmed its confusion of the common law of defamation. The words complained of in this case were directed toward a businessman and clearly fell within one common law category of slander per se.[38] Relying on *Deese v. Collins*,[39] the court expressly imported the extrinsic-fact test, a libel distinction, into the law of slander by stating

> [I]f the injurious character of the spoken statement appears, not on its face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing its injurious effect, such utterance is said to be actionable only *per quod*, and in such cases, the injurious character of the words must be pleaded and proved, and in order to recover there must be allegation and proof of some special damage.[40]

The court concluded in this case that the defamation was apparent on its face.[41]

In *Beane* the court relied both on *Penner v. Elliott*,[42] which is authority for application of the traditional common law slander test, and on *Badame*

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[33] 191 N.C. 749, 133 S.E. 92 (1926).
[34] *Id.* at 749, 133 S.E. at 92.
[35] *Id.* at 751, 133 S.E. at 92-93.
[36] *Id.* at 750, 133 S.E. at 92.
[37] 242 N.C. 755, 89 S.E.2d 466 (1955).
[38] *Id.* at 757, 89 S.E.2d at 468.
[39] 191 N.C. 749, 133 S.E. 92 (1926).
[40] 242 N.C. at 757, 89 S.E.2d at 467-68.
[41] *Id.* at 757, 89 S.E.2d at 468.
[42] 225 N.C. 33, 33 S.E.2d 124 (1945).

v. Lampke,[43] which requires use of the extrinsic-fact test. The court could have decided that the words did not fall within the category of injury to trade and employment and thus might have relied solely on the traditional slander test of *Penner* in its resolution of the case on the facts before it. It is impossible to determine if the court actually intended to give effect to the extrinsic-fact test in concluding that the words were actionable per quod. The vagueness surrounding the court's holding serves only to amplify the confusion that exists in the law of defamation in North Carolina.

The apparent application in *Beane* of both the traditional slander test and the extrinsic-fact test has definite implications for plaintiffs in future slander cases. If both tests are to be applied in North Carolina to determine what will be slander per se, future plaintiffs will have to allege and be able to prove special damages in all cases in which the utterance does not on its face fall within the four slander categories. These requirements present a formidable hurdle for plaintiffs in cases in which proof of special damages is difficult.

The most plausible explanation for use of the extrinsic-fact test in libel is that a limited number of people will understand the defamatory nature of the writing if it is not apparent on the face. This same consideration should apply to the law of slander, and thus the North Carolina courts are serving a useful function in the area of defamation if they are attempting to require special damages to make actionable oral statements that on their face do not fall within one of the four traditional categories.[44] The possibility of abuse has always existed in cases in which the words were held to be slander per se since the jury had discretion to award damages without evidence of the plaintiff's actual loss. As a measure to prevent petty suits and as an aid in first amendment protection, the application of the extrinsic-fact test to supplement the traditional category test will be valuable in the law of slander.

The confusion of the North Carolina courts over the extrinsic-fact test arises not so much from the importation of this test from the law of libel into that of slander as it does from the inconsistent application of

[43] 242 N.C. 755, 89 S.E.2d 466 (1955).

[44] The application of the extrinsic-fact test in North Carolina slander cases has been more restrictive than the application of the same test in libel actions in a majority of American jurisdictions. In libel, the majority allow the introduction of extrinsic facts to bring the writing within the traditional slander categories without requiring proof of special damages. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 850 (1960).

the test in slander cases. In addition, there appears to be confusion over whether the extrinsic-fact test was a determining factor in those cases in which it was stated as the applicable law. These areas of confusion should be clarified in the next appropriate case to insure that plaintiffs are able to foresee recovery with some reasonable degree of certainty and to make clear whether the extrinsic-fact test will always be applied when oral statements are not actionable on their face.

LANNY B. BRIDGERS

Torts—Liability of Physicians for Violation of Certification Requirements in Commitment Process

The right of a mentally ill woman not to be restrained against her will was the concern of the court in *Di Giovanni v. Pessel.*[1] In affirming an award of punitive damages against a physician whose false affidavit was a substantial factor in the commitment of the plaintiff to a mental hospital, the court aptly reflected intolerance toward the wilful and injurious dereliction of a statutorily imposed duty. Unfortunately, convoluted reasoning obscured the expression of this judicial intolerance.

The civil rights of the mentally ill have received close scrutiny in recent years,[2] and legislation has reflected concern for those rights.[3] Generally, statutes authorizing involuntary commitment require a judicial hearing before commitment can be effected; commonly, these statutes require medical certification as to the insanity of the individual involved before commitment can be ordered. In case of an emergency whereby the individual must be restrained immediately and there is insufficient time for

[1] 104 N.J. Super. 550, 250 A.2d 756 (Super. Ct., App. Div. 1969).

[2] *See, e.g.*, R. FARMER, THE RIGHTS OF THE MENTALLY ILL (1967); F. LINDMAN & D. MCINTYRE, JR., THE MENTALLY DISABLED AND THE LAW (1961) [hereinafter cited as LINDMAN & MCINTYRE]; NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (Public Health Service Pub. No. 51, 1952); R. ROCK, M. JACOBSEN, & R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL (1968) [hereinafter cited as ROCK]; *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. I (1961); Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274 (1953); Comment, *The New Mental Health Codes: Safeguards in Compulsory Commitment and Release*, 61 NW. U.L. REV. 977 (1967).

[3] *See, e.g.*, D.C. CODE ANN. §§ 21-501 to -591 (1967). In its report to the Senate when the bill was under consideration, the Senate Judiciary Committee expressed the hope that the act would serve as a model for revision of state hospitalization laws. SENATE COMM. ON THE JUDICIARY, PROTECTING THE CONSTITUTIONAL RIGHTS OF THE MENTALLY ILL, S. REP. No. 925, 88th Cong., 2d Sess. 10 (1964).

a hearing, judicial review is required shortly after hospitalization. For one who is successfully committed, mandatory periodic review of his condition by medical authorities or habeas corpus assures that his confinement is not continued after he regains his sanity.[4]

Despite this concern for the rights of the mentally ill, courts have found inherent difficulties in disposing of suits against doctors whose alleged nonfeasance or misfeasance of statutory examination provisions has resulted in an unjustified constraint, for the individual right of freedom must be balanced with the public interest and medical realities. Moreover, fitting the particular facts to a traditional cause of action may be difficult. False imprisonment at first glance would seem to be an appropriate action since it evolved as a means to protect individual freedom of movement.[5] However, as will be demonstrated, this theory is limited by the effect of a court order in those cases involving judicial hospitalization. Malicious prosecution,[6] abuse of process, conspiracy, and defamation are other traditional theories upon which a plaintiff might rely in seeking relief against a doctor who abuses his authority during a commitment proceeding. But these actions also have inherent limitations,[7] the discussion of which is beyond the scope of this note.

Another difficulty is that involvement by the judiciary in the commitment process can raise a problem of privilege. For example, some courts have accorded the certifying physicians an absolute immunity from any

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[4] *See* LINDMAN & MCINTYRE 15-40; ROCK 41-46.

[5] W. PROSSER, LAW OF TORTS § 12, at 54 (3d ed. 1964) [hereinafter cited as PROSSER].

[6] Malicious prosecution is similar to, and sometimes confused with, false imprisonment. It comprehends the malicious institution of a groundless action and is directed against the one who instituted that action. To recover under malicious prosecution, the plaintiff not only must show that the defendant instituted the groundless action, but he also must prove that the former proceeding terminated in his favor and that the defendant maliciously and without probable cause instituted the action. *See* PROSSER § 12, at 61-62, § 113, at 853-55, § 114, at 870-75. *See generally* Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. REV. 285 (1969). The dissenting opinion in *Di Giovanni* scored the majority for failing to distinguish between malicious prosecution and false imprisonment; the majority opinion asserted that it was improbable that Dr. Pessel could be held liable for malicious prosecution since he did not initiate or instigate the proceedings. 104 N.J. Super. at 564-68, 577, 250 A.2d at 763-65, 771.

[7] *See generally* as to abuse of process, PROSSER § 115, at 876-78; Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. REV. 285, 286-91 (1969); as to conspiracy, Cook v. Robinson, 216 Ga. 328, 116 S.E.2d 742 (1960); as to defamation, Fisher v. Payne, 93 Fla. 1085, 1092, 113 So. 378, 380 (1927); Jarman v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954). For a general discussion on liability connected with commitment proceedings, see Note, *Civil Liability of Persons Participating in the Detention of the Allegedly Mentally Ill*, 1966 WASH. U.L.Q. 193.

civil action by virtue of their participation in a legal proceeding,[8] and others have granted a qualified immunity.[9] The act of examination has been held on at least one occasion to be a prerequisite to acquiring any immunity.[10] One court has characterized the nature of charges involving alleged nonfeasance or misfeasance of the certification requirement as a libel action from which the physicians would be absolutely immune by virtue of their privileged status as witnesses in a judicial proceeding.[11]

Di Giovanni spawned difficulties even though the facts were undisputed. The plaintiff, Mrs. Di Giovanni, had suffered from a deteriorating mental condition for over a year. During this period, she had been examined and treated on several occasions by Dr. Pessel, an internist, who last saw her in March, 1965. Aware that her condition was growing worse he suggested to plaintiff's family in July, 1965, that she be hospitalized for psychiatric treatment. The family instituted commitment proceedings shortly thereafter.[12]

One of the New Jersey statutes governing hospitalization of the mentally ill[13] requires examination of the patient by two physicians at the institution of the action for commitment. The physicians must certify that the patient is insane; and, of critical importance in the *Di Giovanni* case, every certificate must "set forth the date of the making of the personal examination of the subject of the action, which must be made in every case by the physician signing the certificate not more than ten days prior to the admission of such person to the institution . . . ."[14] In addition the observed condition must be described in the certificates.[15]

Accordingly, the family of Mrs. Di Giovanni obtained certification from a psychiatrist, Dr. Borrus, who stated that she needed hospitalization

[8] *E.g.*, Dabkowski v. Davis, 364 Mich. 429, 111 N.W.2d 68 (1961); Linder v. Foster, 209 Minn. 43, 295 N.W. 299 (1940).

[9] *E.g.*, Christopher v. Henry, 284 Ky. 127, 143 S.W.2d 1069 (1940) (logic and good faith perform a prominent part in determining liability).

[10] *See* Beckham v. Cline, 151 Fla. 481, 10 So. 2d 419 (1942). *Compare* Sukeforth v. Thegen, — Me. —, 256 A.2d 162 (1969) *with* Dunbar v. Greenlaw, 152 Me. 270, 128 A.2d 218 (1956).

[11] Fowle v. Fowle, 255 N.C. 720, 122 S.E.2d 722 (1961); Bailey v. McGill, 247 N.C. 286, 100 S.E.2d 860 (1957), *noted in* 36 N.C.L. REV. 552 (1958). *See also* Jarman v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954).

[12] 104 N.J. Super. at 556-58, 250 A.2d at 759-60.

[13] N.J. STAT. ANN. § 30:4-29 (1964), *as amended* (Supp. 1969). For the purpose of this note the amended statute does not vary substantially from the former statute.

[14] *Id.* § 30:4-30 (1964).

[15] *Id.* § 30:4-37 (1964).

"for her welfare, observation, and treatment."[16] Because of difficulty in arranging another examination by any local psychiatrist, they prevailed upon Dr. Pessel to provide the other certificate. He agreed to furnish it *without examining her*, on condition that a psychiatrist confirm his diagnosis. In August he falsely certified that he had examined Mrs. Di Giovanni within the requisite period and had found her in need of immediate restraint for her own safety and the safety of her relatives.[17]

The family then obtained an order of temporary commitment from a local municipal court,[18] and the seventy-three-year-old lady was committed to a mental hospital operated by Carrier Clinic. She was discharged about one month later and subsequently brought actions against the clinic and the two doctors for malpractice and false imprisonment. The trial judge, after the presentation of all evidence, granted Carrier's motion for summary judgment, dismissed the malpractice claims against the two doctors, but ruled as a matter of law that the doctors were liable for false imprisonment. He further ruled that the plaintiff's indisputable need for psychiatric treatment preempted recovery of compensatory damages and that the jury would be asked only to determine the amount of punitive damages.[19]

On appeal the Superior Court affirmed the judgment for Carrier,[20] affirmed the dismissal of the malpractice claims,[21] and reversed the ruling against Dr. Borrus[22] while affirming judgment against Dr. Pessel.[23] One justice wrote the court opinion for all holdings except the ruling against Dr. Pessel, from which he dissented (dissenting opinion). Another wrote the court opinion affirming the ruling against Dr. Pessel (majority opinion), and the third justice wrote an opinion concurring in the result (concurring opinion).

Since the facts were undisputed, it remained for the justices to determine whether the trial judge was correct in finding false imprisonment

[16] 104 N.J. Super. at 570, 250 A.2d at 767.
[17] *Id.* at 556-58, 568, 250 A.2d at 759-60, 766.
[18] N.J. STAT. ANN. § 30:4-37 (1964).
[19] 104 N.J. Super. at 554-55, 250 A.2d at 758.
[20] *Id.* at 554, 559-61, 250 A.2d at 758, 761-62. The court found no proof of negligence and no false imprisonment because the municipal magistrate authorized the confinement.
[21] *Id.* at 561-63, 250 A.2d at 762-63. There was no proof of a standard of medical practice to which Dr. Borrus allegedly failed to adhere and no proof of injury as to Dr. Pessel.
[22] *Id.* at 563-64, 250 A.2d at 763. Defective notarization of the affidavit was held insufficient to impose liability.
[23] *Id.* at 568, 250 A.2d at 766.

as a matter of law. In contemplating the issue of false imprisonment, the court followed the *Restatement (Second) of Torts* which defines the elements of the action in this manner:

> An Actor is subject to liability to another for false imprisonment if
> (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
> (b) his act directly or indirectly results in such a confinement of the other, and
> (c) the other is conscious of the confinement or is harmed by it.[24]

The majority summarily declared that "[i]t can scarcely be denied that the essential elements of this tort thus defined in the Restatement have been established in the case of Dr. Pessel."[25]

The court then faced the question whether any legal justification for the constraint of Mrs. Di Giovanni's person existed. Legal justification, of course, would defeat recovery under false imprisonment.[26] To discount the possibility of this defense, the court advanced two theories. First, it stated that Dr. Pessel's conduct in knowingly making a false certificate was legally indefensible and sufficient of itself to justify the award of punitive damages.[27] Second, it asserted that the plaintiff's condition was not sufficient *as a matter of law* to justify involuntary commitment. In reference to the latter theory, New Jersey courts have narrowly limited the degree of mental illness warranting immediate involuntary restraint. As described in the majority opinion, "[t]he general test as to the nature of the insanity warranting immediate involuntary restraint is whether there is a danger that the patient may injure herself or some other member of the public."[28] The proof did not manifest this degree of

[24] RESTATEMENT (SECOND) OF TORTS § 35 (1965).

[25] 104 N.J. Super. at 571, 250 A.2d at 767-68.

[26] *Id.* at 571-72, 250 A.2d at 768. *See* Kraft v. Montgomery Ward & Co., 220 Ore. 230, 244, 348 P.2d 239, 243 (1959); Mailey v. De Pasquale's Estate, 94 R.I. 31, 34-35, 177 A.2d 376, 379 (1962).

[27] 104 N.J. Super at 571, 250 A.2d at 768.

[28] *Id.* N.J. STAT. ANN. § 30:4-37 (1964) merely demands the doctor to exercise his judgment whether the condition of the patient is sufficient to warrant restraint. Under N.C. GEN. STAT. §§ 122-63 to -64 (1964), *need of observation and treatment* is the standard for commitment. These statutes are typical of the vague guidance legislatures have provided for determining the degree of mental illness that warrants involuntary commitment. This vagueness is disturbing in a libertarian sense, for freedom is too precious to be subjected to the caprice of ambiguity. Significantly, the United States Congress has authorized the District Court for the District of Columbia to order involuntary hospitalization only if a

insanity in Mrs. Di Giovanni's case although she obviously needed certain treatment; but, according to the majority opinion, the fundamental inquiry was whether the treatment needed necessitated involuntary confinement. Dr. Borrus did not indicate such a necessity in his affidavit; neither did the record of her hospitalization, which was considered to be of controlling significance.[29] Since involuntary restraint was not necessary and the doctor's conduct was legally indefensible, there was no legal justification for the restraint, the court seemed to reason.[30]

Nowhere in the majority opinion is there a discussion of the effect of the court order of temporary commitment, but it should have been of threshold concern because a valid court order negates the unlawfulness of restraint essential in an action for false imprisonment. Such an order *provides legal justification* for confinement, and hence a resulting imprisonment is not false; it is legitimate.[31] For this reason, involuntary hospitalization resulting from a valid court order will not give rise to an action for false imprisonment, even if the order had been obtained by giving false information to the court.[32] The concurring justice concluded without elaboration that the magistrate's order of temporary commitment should not insulate Dr. Pessel from responding in damages for false imprisonment.[33] The dissenting justice disagreed strongly and asserted that the majority was rejecting the settled rule.[34] And indeed,

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mentally ill person, because of his illness, is likely to injure himself or others if allowed to remain at liberty. D.C. CODE ANN. § 20-545 (1967). For a view that a fixed standard should not be developed, see ROCK, *supra* note 2, at 256-60. LINDMAN & MCINTYRE, *supra* note 2, at 40, conclude that statutes should clearly express the degree of mental illness justifying involuntary hospitalization. For a general discussion of this problem, see Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 954-60 (1959).

[29] 104 N.J. Super. at 573-74, 250 A.2d at 768-69.

[30] *Id.* at 571-74, 250 A.2d at 767-69 (*semble*).

[31] Whitten v. Bennett, 86 F. 405 (2d Cir. 1898); O'Shaughnessy v. Baxter, 121 Mass. 515 (1877); Apgar v. Woolston, 43 N.J.L. 57, 58 (Sup. Ct. 1881); Melton v. Rickman, 225 N.C. 700, 703, 36 S.E.2d 276, 277-78 (1945) (by implication); 35 C.J.S. *False Imprisonment* § 16 (1960). *See* Kraft v. Montgomery Ward & Co., 220 Ore. 230, 244, 348 P.2d 239, 243 (1959); Mailey v. De Pasquale's Estate, 94 R.I. 31, 34-35, 177 A.2d 376, 379 (1962); 32 AM. JUR. 2d *False Imprisonment* §§ 8, 66, 85 (1967).

[32] Mezullo v. Maletz, 331 Mass. 233, 237, 118 N.E.2d 356, 359 (1954); Pate v. Stevens, 257 S.W.2d 763, 766-67 (Tex. Civ. App. 1953). *See also* C. BURDICK, THE LAW OF TORTS 303, 309 (4th ed. 1926); PROSSER § 12, at 62; 32 AM. JUR. 2d *False Imprisonment* § 66 (1967).

[33] 104 N.J. Super. at 577, 250 A.2d at 771.

[34] *Id.* at 564, 250 A.2d at 763. The dissent also disputed the matter of plaintiff's condition and concluded that the proofs *did* evince a need for confinement. *Id.* at 566-67, 250 A.2d at 765.

by focusing on the indefensibility of Dr. Pessel's conduct and the actual condition of Mrs. Di Giovanni to the exclusion of the effect of the court order, the majority does appear to reject the great weight of authority and to establish its own notion of legal justification. Perhaps the prevailing justices felt that the role of the magistrate was too perfunctory to be considered a judicial act of the kind that should protect the doctor from false imprisonment. If so, they could understandably ignore the court order,[35] but they did not articulate this view except possibly inferentially by the general tone of their opinions.

The court perhaps could have shown absence of legal justification for the confinement by asserting that the court order was invalid because of the inadequate certification of Dr. Borrus. His certificate did not manifest any emergency conditions justifying the immediate confinement of Mrs. Di Giovanni;[36] therefore, because of the previously discussed judicial limitation on immediate involuntary restraint, his certificate was insufficient to support an order of temporary commitment. The magistrate could not validly issue the order without two proper affidavits.[37] Hence his order arguably was invalid and did not provide legal justification for the imprisonment. But this line of reasoning could lead to other complications. If it were accepted, Dr. Pessel could plausibly contend that the magistrate's impropriety constituted an intervening, superseding cause of the false imprisonment.[38] Since the certificates, *in addition to* the order, constitute the warrant and authority for admission and detention for a temporary period,[39] Carrier Clinic might not be so readily freed

[35] LINDMAN & MCINTYRE, *supra* note 2, at 23; *cf.* Sukeforth v. Thegen, — Me. —, 256 A.2d 162, 163 (1969). Just how much discretion the magistrate has under N.J. STAT. ANN. § 30:4-37 (1964) is not clear. Technically, his order of temporary commitment institutes the inquiry into the sanity of the individual involved, but his order follows in sequence the certification by the physicians. It seems logical that he would not issue an order of temporary commitment without probable cause to do so. Significantly, the plaintiff conceded, and the court apparently agreed, that the magistrate's order authorizing the initial confinement of Mrs. Di Giovanni was sufficient for Carrier to act upon. Although the majority felt that Dr. Pessel could not rely on that order as a defense since he was aware of the defect in procedure, the status accorded the order in regard to defendant Carrier indicates that the magistrate's discretion is sufficient to constitute a meaningful judicial proceeding and is not perfunctory. 104 N.J. Super. at 559, 563, 577, 250 A.2d at 761, 763, 770.

[36] 104 N.J. Super. at 573, 250 A.2d at 768.

[37] N.J. STAT. ANN. §§ 30:4-29, -37 (1964).

[38] *See* Pennell v. Cummings, 75 Me. 163, 166-67 (1883); Niven v. Boland, 177 Mass. 11, 12-13, 58 N.E. 282, 282-83 (1900).

[39] N.J. STAT. ANN. § 30:4-37 (1964).

from liability.[40] Furthermore, one could argue that the magistrate should be liable because he acted without legal authority by virtue of the same defect.[41] These arguments serve to emphasize the need for legislative attention in elucidating the degree of mental illness warranting involuntary hospitalization of the mentally ill.

After discussing the problem of legal justification, the court next examined the possibility of the existence of any immunity that might protect Dr. Pessel. Where a false imprisonment comprises an element of a legal proceeding, a privilege is accorded the person who institutes that proceeding. The privilege is the same as that of any person charged with malicious prosecution: He is not liable for any confinement, even though illegal, and is shielded from liability for malicious prosecution by the strenuous evidentiary requirements of that action.[42] The basis of the privilege is the public policy of encouraging private actions to enhance public order. The court reasoned that the doctor did not fall into the category of one who institutes or instigates the action and could not thereby avail himself of the privilege. Neither could he be said to fall within the protected categories of judicial officers and those relying on the judicial process, as Carrier Clinic, since he was cognizant of the fatal defect. Too, public policy would be ill-served by extending an immunity to one who flouted the law as did Dr. Pessel.[43]

Patently, the inexorable objective of the court was to enforce the statutory provisions for involuntary commitment and to secure the plaintiff's rights under those provisions. It is unfortunate, however, that the court found it necessary to examine false imprisonment at length in relation to the violation of the certification requirement. A prosaic, technical discussion of cause of action, legal justification, and privilege detracts from the court's objective. This methodology raises the spectre of the "forms of action [ruling] us from their graves."[44] The same end could have been achieved more simply, directly, and clearly by holding the doctor liable for violation of a statutory duty that proximately resulted in an injury—the unwarranted restraint of liberty. The gist of this

[40] *Cf.* Warner v. State, 297 N.Y. 395, 79 N.E.2d 459 (1948).

[41] *See* Pennell v, Cummings, 75 Me. 163, 166-67 (1883) (by implication); *cf.* Warner v. State, 297 N.Y. 395, 404, 79 N.E.2d 459, 464 (1948); C. BURDICK, THE LAW OF TORTS 304 (4th ed. 1926).

[42] See note 6 *supra.*

[43] Di Giovanni v. Pessel, 104 N.J. Super. 550, 574-77, 250 A.2d 756, 769-70 (Super. Ct., App. Div. 1969).

[44] F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1954).

civil action is the familiar concept of duty, violation of duty, injury, and causation. If the legislature intended the statute to protect an individual or class of individuals, an injurious breach of that statute should be actionable.[45] The concept of "negligence per se" is closely analogous in that it affords recognition of a standard of care legislatively designed for the protection of a class of persons, an unexcused violation of which will be considered actionable negligence if it results in the contemplated type of harm.[46]

The dissenting and majority opinions expressed agreement that Dr. Pessel's conduct constituted negligence,[47] and they reflected the idea that an *unnecessary* confinement could be considered an injury resulting from that negligence.[48] Although "negligence" seems somewhat of a misnomer due to the intentional and designed nature of his violation of the statute,[49] the readiness of the court to so term it is pertinent.[50] Since the majority viewed the doctor's conduct as a substantial factor in causing the confinement and viewed the restraint as unwarranted, the court had an adequate basis to find liability with less effort and superficiality.[51]

The theory of liability just suggested is particularly applicable to the certification statute involved in *Di Giovanni* inasmuch as its implicit purpose, along with the other relevant statutes, is to assure that only

[45] *See* J. SALMOND, THE LAW OF TORTS 467-74 (12th ed. 1957). *See also* RESTATEMENT (SECOND) OF TORTS §§ 286, 288 (1965).

[46] *See generally* PROSSER § 35, at 202-03; 38 AM. JUR. *Negligence* § 158 (1941).

[47] 104 N.J. Super. at 562-63, 571, 250 A.2d at 762-63, 767.

[48] *Id.* at 566, 571, 250 A.2d at 765, 767.

[49] Price v. Phillips, 90 N.J. Super. 480, 485-86, 218 A.2d 167, 169 (Super. Ct., App. Div. 1966); 65 C.J.S. *Negligence* § 1(7) (1966).

[50] The attitude of the New Jersey court is in sharp contrast to that of the North Carolina Supreme Court manifested in Bailey v. McGill, 247 N.C. 286, 100 S.E.2d 860 (1957). One writer has suggested that a negligence action would be appropriate under the circumstances in *Bailey*. Note, *Torts—Physicians and Surgeons—Liability for Signing a Certificate of Insanity Without Proper Examination of the Alleged Lunatic*, 36 N.C.L. REV. 552 (1958). However, the North Carolina court in a repeat performance refused to recognize a negligence action in Fowle v. Fowle, 255 N.C. 720, 122 S.E.2d 722 (1961).

[51] In Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939), involving a wrongful commitment to a mental hospital, the court used language that is apropos. It discounted the significance of whether the plaintiff, after arguing malicious prosecution in the court below, had changed his theory to abuse of process. "We do not see how a choice either way in technical nomenclature could shorten the arm of the Court in its attempt to reach justice between the parties. . . . [The complaint] is sufficient . . . however the alleged mistreatment of the plaintiff may be legally tagged. . . ." *Id.* at 332, 4 S.E.2d at 874. *See also* Keller v. Butler, 246 N.Y. 249, 254, 158 N.E. 510, 512 (1927); PROSSER § 1, at 3-4; Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91 (1921).

mentally ill persons in *real* need of restraint are deprived of their liberty. The importance of requiring doctors to comply with such safeguards demands stringency in enforcement; as the court recognized, an intentional violation is indefensible.[52] Those courts that accord an extensive privilege to certifying physicians notwithstanding their wilful violation of their duty to examine the subjects of the proceedings create a paradox—the law immunizes defiance of the law. Criminal sanctions hardly seem appropriate for conduct similar to Dr. Pessel's, which lacked malevolence or wantonness. Professional discipline from the appropriate state medical organization affords no relief to an improperly committed person. Furthermore, it is very questionable whether courts should leave the enforcement of state law to professional organizations.

Of course, under any theory of liability doctors would be protected from spurious suits in which a negligent examination is alleged by the arduous requirements of proof of medical malpractice.[53] Actual necessity for restraint because of danger to self and others should be a good defense in a suit for wrongful commitment, for restraint would not be unwarranted substantively even if it were obtained by procedural imperfection; hence there would be no significant injury for which recovery would be merited.[54]

Holding Dr. Pessel directly liable for his intentional violation of the certification statute would have provided perspicuous warning to certifying doctors and would have boldly manifested the willingness of the judiciary to enforce legislation protective of individual rights. Such a holding also would have furthered the retreat from the "forms of action"

[52] Di Giovanni v. Pessel, 104 N.J. Super. 550, 572, 250 A.2d 756, 768 (Super. Ct., App. Div. 1969); *cf.* Warner v. State, 297 N.Y. 395, 404, 79 N.E.2d 459, 464 (1948).

[53] *See* Williams v. Le Bar, 141 Pa. 149, 21 A. 525 (1891) (per curiam).

[54] Miller v. West, 165 Md. 245, 248, 167 A. 696, 698 (1933); *cf.* Christopher v. Henry, 284 Ky. 127, 136, 143 S.W.2d 1069, 1074 (1940). One could readily speculate that the court in *Di Giovanni* might have allowed a monetary recovery in order to effectuate an adamant policy of strict adherence to the certification requirement even if the plaintiff *had been* so mentally ill as to be dangerous to herself and others. This speculation is logical if concern for the conduct of the doctor loomed larger than concern for the grief caused the plaintiff. It seems doctrinaire, however, to consider one who is mentally ill to the degree warranting immediate restraint to deserve compensation for an involuntary hospitalization brought about through a faulty process. The policy of the certification statute is nonetheless served by the actual result reached on the facts of *Di Giovanni*. Even if the decision is limited to its facts, no rational doctor would risk violating the statutory commitment procedure on the fortuity that the individual concerned was actually insane to the requisite degree.

mentality. Despite its beclouding semantics, the decision is exemplary insofar as it represents judicial intolerance of the wilful and injurious dereliction of statutorily imposed duty; it remains for another court to achieve the same result in a more straightforward manner.

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