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Notes

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NOTES

Constitutional Law—Prior Restraint Enforced Against Publication of Classified Material by CIA Employee

> The "right to know" is in a period of gestation. . . . [P]eople will increasingly insist upon knowing what their government is doing and . . . because this knowledge is vital to government by the people, the "right to know" will grow.[1]

The public's "right to know" is dependent upon the free exercise of the first amendment freedoms of speech and press. This right seemingly received strong reaffirmance in *New York Times Co. v. United States*,[2] when the Supreme Court dissolved a preliminary injunction which had prohibited the *New York Times* and *Washington Post* from publishing excerpts from a classified Pentagon study of United States policy decisions in Vietnam. However, the scope of the Pentagon Papers case has recently been narrowed by the Court of Appeals for the Fourth Circuit in *United States v. Marchetti*,[3] in which the court affirmed the issuance of an injunction enforcing a secrecy agreement which had been exacted by the Central Intelligence Agency (CIA) from an employee as a condition of employment.[4]

Before Victor Marchetti began working for the CIA in 1955 he was required to sign a secrecy agreement in which he promised not to divulge any classified information, intelligence, or knowledge concerning the present and future security of the United States, except in the performance of his official duties, unless specifically authorized in writing by the CIA Director or his authorized representative.[5] After his resignation in 1969 Marchetti published a novel and a magazine article critical of some policies and practices of the CIA.[6] In March of 1972 he submitted to *Esquire* magazine and six other publishers an article in which he related some of his experiences as an agent.[7]

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[1]United States v. Marchetti, 466 F.2d 1309, 1318-19 (4th Cir.) (Craven, J., concurring), *cert. denied*, 93 S. Ct. 553 (1972).

[2]403 U.S. 713 (1971) (per curiam). This case is commonly known and will hereinafter be referred to as the Pentagon Papers case.

[3]466 F.2d 1309 (4th Cir. 1972).

[4]*Id.* at 1311-12.

[5]*Id.* at 1312.

[6]*Id.* at 1313.

[7]*Id.*

After learning of this, the United States, alleging that the article contained classified information concerning intelligence sources, methods, and operations, sought an injunction to enforce the secrecy agreement.[8] The district court granted the injunction and ordered Marchetti to submit all writings to the CIA Director for prior approval and not to release, without prior Agency approval, *any* writing relating to the Agency or to intelligence.[9] The Fourth Circuit upheld the substance of the district court decree but limited the requirement of prior approval to the release of *classified* material.[10] The decision further provided that the CIA must respond within thirty days after submission of material for approval and that Marchetti would be entitled to judicial review of any CIA denial of publication approval.[11] However, the burden of obtaining such review would be on Marchetti. The issues on review would be limited to whether or not the information were classified, and if so, whether or not it had previously been disclosed to the public.[12]

Any consideration of the doctrine of prior restraint[13] should begin with *Near v. Minnesota*,[14] the landmark case in this area. *Near* involved a statute which provided for the "abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.' "[15] Whenever such nuisance existed, an appropriate public official, or a citizen if such official took no action, could maintain an action to perpetually enjoin the persons committing the nuisance from further maintaining it.[16] In declaring the statute unconstitutional the Supreme Court held that the chief purpose of the first amendment guarantee is to prevent prior restraints upon publication, and that while such protection is not "absolutely unlimited," limitations have been recognized only in "exceptional cases."[17]

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[8]*Id.* at 1311, 1313.

[9]*Id.* at 1311.

[10]*Id.* at 1311, 1318.

[11]*Id.* at 1317.

[12]*Id.* at 1317-18. Judge Craven concurred in the court's decision, but disagreed that the scope of judicial review should be so limited, preferring not to foreclose inquiry into whether or not secrecy classifications are reasonable. *Id.* at 1318-19.

[13]The doctrine of prior restraint has been defined as holding that the first amendment prohibits governments from imposing any system of prior restraint, with certain limited exceptions, in any area of expression within the boundaries of the amendment. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

[14]283 U.S. 697 (1931).

[15]*Id.* at 701-02.

[16]*Id.* at 702-03.

[17]*Id.* at 713, 716. "Exceptional cases" mentioned by the Court included enforcements against

The Court in *Near* was highly suspicious of any restraint that would eliminate or decrease criticism of public officials.[18] This concern has broadened, and the doctrine of prior restraint has been applied to subsequent cases involving licensing statutes that have required the acquisition of a permit from a public official prior to the exercise of first amendment rights. Fearing arbitrary denials of licenses by officials who might base their decisions on the content of the intended expression, the Court has overturned statutes and ordinances which have not contained adequate guidelines for implementation.[19] On the other hand, the Court has upheld narrowly drawn statutes with explicit standards based upon the time, place, and manner of the intended expression.[20]

Similarly, prior restraints in the area of obscenity have been scrutinized in order to avoid suppression of expression protected by the first amendment.[21] In *Kingsley Books, Inc. v. Brown*[22] the Court upheld a statute which authorized a municipality to enjoin the sale and distribution of written and printed material that had been found at a trial to be obscene. This case was distinguished from *Near* because the statute was directed solely at obscenity and imposed no restraint upon materials not already published and found to be obscene.[23]

Censorship of motion pictures has presented its own unique problems. In *Times Film Corp. v. City of Chicago*[24] the Court refused to establish a general rule that movie censorship statutes are unconstitutional *per se*, and said: "It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech

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obscene publications, government actions to prevent actual obstruction to its recruiting services or the publication of the sailing dates of transports or the number and location of troops, and government actions to protect against incitements to acts of violence and the overthrow by force of orderly government. *Id.* at 716.

[18]*Id.* at 710, 713.

[19]*E.g.*, Saia v. New York, 334 U.S. 558 (1948) (use of sound amplification devices); Lovell v. City of Griffin, 303 U.S. 444 (1938) (distribution of religious literature).

[20]*E.g.*, Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (parade permits).

[21]In light of the definition of the doctrine of prior restraint in note 13 *supra*, it may at first seem meaningless to discuss prior restraint in relation to obscenity, which is unprotected by the first amendment. Roth v. United States, 354 U.S. 476 (1957). However, because of the Fourth Circuit's reliance in *Marchetti* upon a movie censorship case in establishing safeguards, 466 F.2d at 1317, such discussion can be helpful. Besides, if one adheres to the "absolutist" first amendment philosophy, obscenity deserves as much protection as anything else. Freedman v. Maryland, 380 U.S. 51, 61-62 (1965) (Douglas, J., concurring).

[22]354 U.S. 436 (1957).

[23]*Id.* at 445.

[24]365 U.S. 43 (1961).

are invalid."[25] Subsequently, in *Freedman v. Maryland*,[26] however, particular features of a Maryland statute were challenged. There the Court found the prior restraint invalid because the absence of appropriate procedural safeguards produced a danger of undue suppression of protected as well as unprotected expression.[27]

The history of prior restraint consists primarily of statutory enactments that have infringed upon first amendment rights. Unprecedented, therefore, was the government's attempt in the Pentagon Papers case to enjoin the *New York Times* and the *Washington Post* from publishing the contents of a classified study of United States policy decisions in Vietnam.[28] On the surface, at least, the decision in that case seemed to give the doctrine of prior restraint its greatest impetus in forty years. The Supreme Court, in denying the injunction, ruled that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" and that the United States had failed to carry its burden of showing justification for such restraint.[29] There were, however, six concurring and three dissenting opinions, and the exact legal principles of the decision are difficult to determine.[30]

Although the competing interests of governmental secrecy and first amendment freedoms were very similar in *Marchetti* and the Pentagon Papers case, the respective courts reached opposite conclusions. In the Pentagon Papers case there was no explicit statement as to why the government had failed to overcome the presumption against prior restraints, and the injunction was denied. In *Marchetti* no explicit statement can be found as to how the government met its heavy burden, yet the injunction was granted.

The Fourth Circuit relied upon three major factors in implicitly establishing that the presumption against prior restraint had been overcome. First, the court found that the Constitution,[31] Supreme Court

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[25]*Id.* at 47.

[26]380 U.S. 51 (1965).

[27]*Id.* at 60. The procedural safeguards required by the Court to accompany a system of prior submission to a censor included (1) placing the burden of proving the film is obscene on the censor, (2) assuring the right to a final judicial determination on the merits, and (3) prompt judicial review. *Id.* at 58-59.

[28]403 U.S. at 714.

[29]*Id.*

[30]Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971).

[31]U.S. CONST. art. II, § 2.

decisions,[32] and history[33] have clearly established the government's right to "internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest."[34] The court correctly noted that nothing in the Constitution requires the government to divulge information. The historical development of the use of "executive privilege" in refusing to disclose information to Congress can be justified on a separation-of-powers theory.[35] However, this theory collides with the view that sovereignty resides in the people, and that government may interfere with the people's "right to know" only when they consent, and that presidential power to withhold information from the public is truly a narrowly limited "privilege" and not a right.[36]

Secondly, the court considered the nature of the material Marchetti sought to disclose and determined that although "ordinary criminal sanctions *might* suffice to prevent unauthorized disclosure of such information . . . the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted."[37] In the Pentagon Papers case the government also argued that it had a right to secrecy and that disclosure of the information would be harmful.[38] Perhaps a distinction between the two cases can be found in the nature of the classified materials involved. In the Pentagon Papers case the information concerned a war which was a major national issue. The Supreme Court, therefore, may have felt especially compelled to allow such information to flow freely to the public. The Fourth Circuit may not have felt this same

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[32]*E.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936). There the Court recognized the paramount role of the President in foreign affairs and the need for secrecy in regard to information gathered by the President's "confidential sources." But the Court also said that this executive power, like every other governmental power, "must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320.

[33]466 F.2d at 1316. In enacting the Freedom of Information Act Congress recognized the need for secrecy and provided that "[t]his section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy . . . ." 5 U.S.C. § 552(b) (1970). Exec. Order No. 10,501, 3 C.F.R. 306 (1972), established the classification system that is currently in use.

[34]466 F.2d at 1315.

[35]*See* Kutner, *Freedom of Information: Due Process of the Right to Know, 18* CATHOLIC LAW. 50, 52 (1972).

[36]*See* Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667, 668-70, 770 (1959).

[37]466 F.2d at 1317 (emphasis added).

[38]403 U.S. at 732 (White, J., concurring).

sense of urgency in regard to Marchetti's material. Also, the Pentagon study covered decisions only up to the year 1968, while the classified materials in *Marchetti*, if the secrecy agreement is taken literally, concerned the "present and future security of the United States."[39]

The chief distinction between the two cases, however, probably lies in the court's third factor, the "position of trust and confidence" in which the government placed Marchetti.[40] "Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably [have implied] a secrecy agreement had there been no formally expressed agreement . . . ."[41] In the Pentagon Papers case there was no confidential relationship between the government and the newspapers involved. Had there been no such relationship in *Marchetti*, there is language in the Fourth Circuit's opinion which indicates that the injunction would not have been affirmed: "Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by *employees* and *former employees* of classified information obtained *during the course of employment*."[42]

The combination of these three factors enabled the government to overcome the heavy presumption against the constitutionality of its system of prior restraint. In balancing the governmental interest against the first amendment rights involved, however, the court had to consider whether a sufficient nexus existed between the secrecy interest and the means by which the government sought to protect that interest. The court found that it is reasonable for government agencies to protect internal secrets through secrecy agreements with employes.[43] Some support and authority for this view can be found in Justice Stewart's concurring opinion in the Pentagon Papers case.[44] He felt that since the President has the power to conduct foreign affairs and to maintain the national defense, his responsibility is to insure that the confidentiality necessary to carry out his duties receives protection.

The Fourth Circuit, however, did not base its determination that this system of prior restraint is reasonable solely on the President's

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[39]466 F.2d at 1312 n.1.

[40]*Id.* at 1313.

[41]*Id.* at 1316.

[42]*Id.* at 1316-17 (emphasis added).

[43]*Id.* at 1316.

[44]403 U.S. at 729-30.

inherent powers to preserve vital secrecy. The court said that "Congress has imposed on the Director of Central Intelligence the responsibility for protecting intelligence sources and methods."[45] Secrecy agreements as a condition of employment are "entirely appropriate to a program in implementation of the congressional direction of secrecy."[46] According to Justice White's concurring opinion in the Pentagon Papers case, an express congressional mandate would seem to be necessary: "[T]he United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these."[47]

Apparently the Fourth Circuit was satisfied that congressional authorization plus inherent executive power had combined to enable the government reasonably to require a prospective CIA employee to waive his first amendment rights. This sanction given to the employment contract may be usefully compared to the old and generally discredited right-privilege distinction.[48] The old notion was that government employment or the conferral of a government benefit was a privilege which the government could take away without affording any procedural due process. It has since been established that the termination of government employment cannot be based upon an exercise of first amendment rights by the employee.[49] Therefore, it seems arguable that the initial grant of government employment cannot be based on the surrender of first amendment rights.

The court insisted, however, that Marchetti, in signing a secrecy agreement, did not surrender his first amendment right of free speech.[50] "The agreement is enforceable only because it is not a violation of those rights."[51] Taken out of context, this statement could be interpreted as meaning that there is no first amendment right to speak about material which the government has designated as classified. But in the context

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[45]466 F.2d at 1316. 50 U.S.C. § 403(d)(3) (1970) reads: "[T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure . . . ."

[46]466 F.2d at 1316.

[47]403 U.S. at 731.

[48]For a good analysis of the distinction and its constitutional implications, *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[49]*E.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968).

[50]466 F.2d at 1317.

[51]*Id.*

of the entire decision and in light of Justice Brennan's analysis of the nature of the classified material in the Pentagon Papers case,[52] the court seems to have held that it is not a violation of a person's first amendment rights to require that person to waive such rights as a condition of government employment when disclosure of the information to which the employee is exposed "may reasonably be thought to be inconsistent with the national interest."[53]

In order to insure that the prohibition on expression is kept to a minimum the court provided several safeguards. Feeling that undue delay would impair the reasonableness of the restraint, the court set thirty days as the maximum period in which the CIA should respond after submission of material for approval.[54] The court further provided that Marchetti, on his own initiative, could obtain judicial review of any CIA action disapproving publication.[55] It is certainly arguable that these safeguards are inadequate. The CIA needs only to indicate whether or not material submitted by Marchetti is classified. A few days would be more than a reasonable amount of time in which to make such a determination. And though judicial review may be obtained, there are no set time limits within which a decision must be handed down.

These inadequacies, however, are insubstantial when compared to the limitations placed by the court upon the scope of judicial review. "The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain."[56] By imposing this narrow restriction upon the scope of review, the court has foreclosed any determination of whether such restraints prohibit the free and robust discussion of public issues and personalities which is necessary to the proper exercise of the people's function in the democratic process.[57]

Since the court will look no further than the classified stamp on the cover, material which may be merely embarrassing to a public offi-

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[52]Justice Brennan said that unlike obscene material, there was no question that the Pentagon Papers material was within the first amendment's protection. 403 U.S. at 726.

[53]466 F.2d at 1315.

[54]*Id.* at 1317.

[55]*Id.*

[56]*Id.* at 1318.

[57]This was the Supreme Court's main concern in *Near*. *See* text accompanying note 17 *supra*. Similarly, in the licensing cases, the Court feared that a licensing official might arbitrarily deny the license due to the content of the intended expression. *See* text accompanying notes 18-19 *supra*. This concern broadened in the obscenity cases, where the Court moved to prevent suppression of protected expression. *See* text accompanying notes 20-26 *supra*.

cial rather than essential to the national security or the sensitive aspects of foreign affairs may remain undisclosed. The CIA has been relieved of any burden of proving the necessity of the classification and prior restraint. This conflicts with Justice Brennan's view[58] that the first amendment tolerates no prior restraints predicated upon conjecture that untoward consequences may result. Accordingly, he urged that only allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport at sea can support the issuance of even an interim restraining order.

The Fourth Circuit, however, is not without support for its determination that the process of classification is an executive function beyond the scope of judicial review.[59] An effective argument can be advanced that it would be extremely difficult to recognize the importance of a particular secrecy classification without knowledge of many other related secrets. "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."[60] Yet the term "classified" is very broad, and the court has perhaps swung the balance too far in the direction of the governmental interest. More appropriate might be a requirement that the government show that disclosure of the material will "surely result in direct, immediate, and irreparable damage to our Nation or its people."[61]

Judge Craven has suggested a possible compromise.[62] A presumption of reasonableness in favor of the government classification should be established. The person challenging a classification would be required to demonstrate that it is arbitrary and capricious before it could be invalidated. This approach has the advantage of allowing inquiry into the classification process. It has the serious disadvantage, however, of shifting the burden of overcoming the heavy presumption to the person desiring to exercise his first amendment freedom of speech.

In perspective the *Marchetti* decision is an unprecedented movement toward the restriction of first amendment rights. It leaves open the possibility that Marchetti's exercise of free speech will depend solely

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[58]403 U.S. at 725-27.

[59]*E.g.*, Epstein v. Resor, 421 F.2d 930, 933 (9th Cir. 1970).

[60]466 F.2d at 1318.

[61]403 U.S. at 730 (Stewart, J., concurring).

[62]466 F.2d at 1318.

upon the discretion of an executive official. In view of this danger the recent denial of certiorari by the Supreme Court[63] is disappointing. Hopefully, the determining factor in the denial was that no attempt to restrain publication of specific material has yet been made.[64] If so, the Court, upon actual submission of material and denial of authorization to publish, could still determine that judicial review of the classification system is necessary for the protection of our cherished freedoms of speech and press.

KENNETH L. EAGLE

Consumer Protection—Disclosure of Cognovit Provisions as Security Interests Under the Truth in Lending Act

The Truth in Lending Act,[1] which became effective on July 1, 1969, provides: "[I]t is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[2] Pursuant to authority granted by the Act,[3] the Board of Governors of the Federal Reserve System has published Federal Reserve Board Regulation Z[4] to implement the purposes of the Act. Prior to the passage of the Truth in Lending Act, it was impossible for most consumers to purchase credit in any rational or intelligent manner.[5] The problem was not simply an inability to understand complex finance charges, for consumers were (and still are) often intimidated by the legalistic language that is so lavishly employed in both the large and fine print of loan instruments.

Creditors often retain security interests[6] within the body of loan

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[63]93 S. Ct. 553 (1972).

[64]McCormick, *Marchetti v. United States*, N.Y. Times, Dec. 30, 1972, at 21, cols. 5-6 (city ed.).

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[1]15 U.S.C. §§ 1601-65 (1970).

[2]*Id.* § 1601.

[3]*Id.*

[4]12 C.F.R. Part 226 (1972).

[5]B. CLARK & J. FONESCA, HANDLING CONSUMER CREDIT CASES 137 (1972) [hereinafter cited as CLARK & FONESCA].

[6] "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages,

instruments. This may be unknown to the debtor, or if known, the legal effect is generally not fully understood.[7] For this reason, the Truth in Lending Act requires that creditors disclose security interests that arise from consumer credit sales that are not connected with an open-end credit plan.[8] In a recent case, *Douglas v. Beneficial Finance Co.*,[9] the United States Court of Appeals for the Ninth Circuit has reached an unsatisfying result by reversing the district court and holding that a confession of judgment or cognovit clause[10] need not be disclosed as a security interest by creditors in Alaska. The court arrived at this result in a manner that seems overly technical and against the spirit and purpose of the Truth in Lending Act.[11]

Sandra Douglas had instituted a class action against Beneficial Finance Company by charging that Beneficial had violated the Act by failing to make disclosure of confession of judgment clauses contained in promissory notes taken as evidence of debts owed by members of the class to Beneficial.[12] The cognovit clause employed by Beneficial provided that the debtor consented to the jurisdiction of any state and that Beneficial could have judgment by confession without notice. The clause also provided that the debtor waived all rights of exemption and that no lien would be created on any real property used as a principal residence during the term of the note.[13]

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deeds of trust, and other consensual or confessed liens whether or not recorded, mechnic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

12 C.F.R. § 226.2(z) (1972).

[7]CLARK & FONESCA 110.

[8]15 U.S.C. § 1638(a)(10)(1970). Under an open-end credit plan (such as a credit card or revolving charge account), the Act requires disclosure of "[t]he conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended under the plan . . . ." *Id.* § 1637(a)(7).

[9]469 F.2d 453 (9th Cir. 1972).

[10]A confession of judgment or cognovit clause, sometimes referred to as a warrant of attorney, generally takes the form of a consent given by the debtor to the jurisdiction of any forum along with authorization for the creditor's attorney to appear and confess judgment against him. Both notice and opportunity to defend are waived.

[11]*See* text accompanying note 2 *supra.*

[12]469 F.2d at 454. The district court held that Beneficial did not have standing to challenge the constitutionality of the cognovit clause. Douglas v. Beneficial Finance Co., 334 F. Supp. 1166, 1176 (D. Alas. 1971).

[13]The clause in question reads as follows in all of the notes:

Undersigned jointly and severally authorize and empower any attorney of law of any court of record of the State of Alaska or elsewhere in the United States to appear

The Act requires that creditors disclose "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates."[14] Any debtor to whom a creditor fails to make the required disclosures may bring an action against the creditor for damages.[15] In such an action the debtor may recover twice the amount of finance charges with the limitation that the total amount of recovery may not be less than one hundred dollars nor greater than one thousand dollars.[16] In addition, if the action is successful the debtor may recover the costs of the action along with reasonable attorney's fees.[17] The debtor has the right to rescind any transaction in which the creditor acquires a security interest in any real property if the property is or is expected to be used as the principal residence of the debtor.[18] This right to rescind may be exercised only until midnight of the third business day after the transaction is consummated[19] if the creditor discloses to the debtor his rights under section 1635. The debtor has an indefinite right to rescind, however, if the creditor fails to make the required notice and disclosure.[20] Douglas sought damages for herself and the members of their class and sought the right to rescind for those members of the class who owned real property used or expected to be used as a principle residence.[21]

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for undersigned, or any one of undersigned, on an action on this note in any court of the United States, State of Alaska or elsewhere in the United States at any time after default in the payment of the amount of any installment of principal and interest thereon, and confess judgment against any one or all of the undersigned for the amount due with interest and charges permitted by said Section 06.20.260, of the Alaska Statutes, all without any benefit of valuation and appraisal laws. All parties hereto severally waive demand and presentment for payment, notice of nonpayment, notice of protest and protest of this note and agree that their liability hereunder shall not be affected by any extension of the time of payment of all or any part of the amount owing hereon at any time or times, and further waive all rights of exemption under the laws of this State. It is understood and agreed that this clause shall not operate to create a lien on any real property owned and occupied by the undersigned as a principle residence at any time during the term of this note.

334 F. Supp. at 1170.

[14]15 U.S.C. § 1638(a)(10) (1970).

[15]15 U.S.C. § 1640(a) (1970).

[16]15 U.S.C. § 1640(a)(1) (1970).

[17]15 U.S.C. § 1640(a)(2) (1970).

[18]15 U.S.C. § 1635(a) (1970).

[19]*Id.*

[20]Letter from Griffith L. Garwood, December 30, 1969, in 4 CCH Consumer Credit Guide ¶ 30,245 at 66,112 (1972).

[21]334 F. Supp. at 1178.

Security interests are defined in Federal Reserve Board Regulation Z to include "other consensual or confessed liens whether or not recorded."[22] Critical to the decisions of both the district court and the court of appeals is the Board's Interpretation of the definition of "security interest:"

> (b) In some of the States, confession of judgment clauses or cognovit provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.
> (c) Since confession of judgment clauses and cognovit provisions in such States have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding *before* judgment may be entered or recorded against him, such clauses and provisions in those states are security interests . . . .[23]

The district court held that the confession of judgment clause used by Beneficial in its notes[24] was a security interest requiring disclosure under section 1639(a)(8) of the Act.[25]

Alaska has a statute which purports to make confessions of judgment lawful even without notice.[26] However, the district court's interpretation of the requirements of rule 57(c) of the Alaska Rules of Civil Procedure[27] would preclude entry of judgment without notice because rule 93 provides for the superiority of the rules when there is a conflict with any other statutory provision concerning procedure.[28] Consequently, the district court predicated its damage award for failure to disclose a security interest on the impact of a confession of judgment clause:

> It is frequently stated that a forum court in a conflict of law situation

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[22] *See* note 6 *supra.*

[23] Federal Reserve Board Regulation Z Interpretation, 12 C.F.R. § 226.202(b)-(c) (emphasis added).

[24] *See* note 13 *supra.*

[25] 334 F. Supp. at 1170.

[26] ALASKA STAT. § 09.30.050 (1962).

[27] The confession shall be made, assented to and acknowledged and judgment given in the same manner as a confession in an action pending, but in addition, the confession shall be verified by the oath of the person making it, and shall authorize a judgment to be given for a particular sum.

Alaska R. Civ. P. 57(c)(2).

[28] 334 F. Supp. at 1171.

> will apply its . . . own procedural law. [Citing Lillegraven v. Tengs, 375 P.2d 139 (Alaska 1962).] If, as defendant contends and Rule 57 implies, the entry of judgment pursuant to a confession is a procedural matter, then the forum state need not apply Alaska Rule 57. If, on the other hand, confession of judgment is a matter of substantive law, then Rule 93 would be inapplicable and A.S. 09.30.050 would permit entry of judgment without notice, not only in Alaska, but in any state looking to Alaska law. In either case the confession of judgment clause runs afoul of the Truth in Lending Act.[29]

The Court of Appeals reversed. The notes were executed in and subject to the laws of Alaska. The appellate court relied on the absence of any evidence that would indicate that Beneficial had ever secured judgments in other states as hypothesized by the lower court.[30] Then the court proceeded:

> In such circumstances, we hold that the district court's decision disregards the Board's interpretation of its regulation, which states that confession of judgment clauses are security interests "in those States" in which judgment may be entered without notice and hearing. The district court's view would make this limitation meaningless.[31]

Confessions of judgment are not held in high regard by many commentators.[32] The courts have also given the practice rather close scrutiny in recent cases.[33] However, the practice was able to survive a constitutional attack under the due process clause in two recent United States Supreme Court decisions, *D.H. Overmeyer Co. v. Frick Co.*[34] and *Swarb v. Lennox*,[35] that held that confessions of judgment were not illegal *per se*.[36] Nevertheless, the correctness of the decision in *Douglas* must depend upon the Truth in Lending Act and the prescriptions of

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[29]*Id.* at 1173.

[30]469 F.2d at 456.

[31]*Id.*

[32]"There is a nearly unanimous feeling of distaste toward the cognovit note . . . ." CLARK & FONSECA 111. *But see* Note, *Consumer Protection—Truth in Lending and the Cognovit Judgment*, 1970 WIS. L. REV. 216 (1970) in which the procedure is defended as it is applied in Wisconsin on the grounds of economy and efficiency.

[33]*E.g.*, Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971); Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).

[34]405 U.S. 174 (1972).

[35]405 U.S. 191 (1972).

[36]For a discussion of *Overmyer* and *Swarb*, *see* Note, *Constitutional Law—Cognovit Notes: Pretrial Waiver of Constitutional Rights in Civil Cases*, 51 N.C.L. REV. 554 (1973).

the Board of Governors of the Federal Reserve System rather than upon the esteem in which the device of confession of judgment is held.

In fact, the Court of Appeals reversed the district court's interpretation of the pertinent statutory and regulatory material only so far as the meaning to be afforded the Board's Interpretation of section 226.2(z) of Regulation Z.[37]

It is true that the Board interprets confession of judgment clauses to be security interests only *"in those States"* in which a judgment can be awarded without notice and a hearing.[38] However, it is also true that the Board said, "In some of the States, confession of judgment clauses or cognovit provisions are lawful and *make it possible* . . . to record a lien on property . . . simply by recordation entry of judgment . . . ."[39] While the choice of law rules in this area are confused and diverse,[40] it seems clear that many states would probably apply the Alaska law in passing upon the validity of cognovit notes *executed* in Alaska.[41] Furthermore, Alaska courts would probably give full faith and credit to judgments taken on such notes in other states.[42] However, in *Atlas Credit Corp. v. Ezrine*,[43] the New York Court of Appeals held that judgments obtained in Pennsylvania under a cognovit note were not entitled to full faith and credit as they were not true judgments and that judgments obtained under cognovit notes violate due process of law. Since Alaska has a specific statutory provision providing for cognovit notes, its courts might be less likely to follow the lead of New York.[44] Therefore, it would seem that the district court's "hypothetical" is realistic and that Alaska law may "make it possible"[45] to acquire a judgment by confession.

The Board's interpretation must share the blame for the Court of Appeals decision. The interpretation is ambiguous and clearly admits of the meaning applied to it by the appellate court. However, the over-

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[37]*See* text accompanying note 23 *supra*.

[38]12 C.F.R. § 226.202(c) (1972) (emphasis added).

[39]12 C.F.R. § 226.202(b) (1972) (emphasis added).

[40]*See generally* Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961); Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. REV. 243 (1970).

[41]*See* 47 AM. JUR. 2d *Judgments* § 1120, at 166-68 (1969); Schuchman, *Confession of Judgment as a Conflict of Laws Problem*, 36 NOTRE DAME LAWYER 461, 464-65 (1961).

[42]*See* Annot., 39 A.L.R.2d 1232 (1955).

[43]25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).

[44]334 F. Supp. at 1171.

[45]12 C.F.R. § 226.202(b) (1972).

riding purpose of the Act is to require disclosure; it is concerned with state law only to the extent of ensuring that consumers have the necessary information so that they may make a more rational use of credit. The Truth in Lending Act seeks to protect the consumer-debtor,[46] and the effect upon him is the same no matter what legal process is employed in securing the judgment against him. Consequently, the detrimental effects of a confession of judgment clause dictate that it be included within the interpretation of security interest unless it is clearly excluded by the Federal Reserve Board regulations or interpretations. Therefore the district court's decision would seem to be more closely aligned with the purpose and spirit of the Truth in Lending Act.

Since the court of appeals decided that the cognovit provisions contained in Beneficial's notes were not security interests requiring disclosure under the Turth in Lending Act, the issue of rescission was not reached. The district court did reach the issue and found that the right to rescind existed.[47]

The Truth in Lending Act makes the following provision concerning rescission:

> Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section . . . .[48]

The pertinent language of Regulation Z provides for recission where "a security interest is or *will be* retained or acquired"[49] in the debtor's residential real property. The Board's Interpretation of section 226.2 says that cognovit clauses are security interests "even if the judgment cannot be entered until after a default by the obligor."[50] However, when a cognovit clause expressly states that all liens upon residential real property are excluded from its operation, then the right to rescind does not apply.[51]

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[46]*See* text accompanying note 2 *supra.*

[47]334 F. Supp. at 1178.

[48]15 U.S.C. § 1635(a) (1970).

[49]12 C.F.R. § 226.9(a) (1972) (emphasis added).

[50]12 C.F.R. § 226.202(c) (1972).

[51]*Id.* § 226.202(d).

Beneficial's note contained this sentence: "It is understood and agreed that this clause shall not operate to create a lien on any real property owned and occupied by the undersigned as a principle residence at any time *during the term of this note.*"[52]

The district court held that the unlimited right to rescind applied since the note would expire upon default by the debtor and entry of judgment and Beneficial would not be precluded by the terms of the note from recording a lien upon the debtor's home after judgment because the debtor waived all exemption rights.

There is no reason to believe that the language in Beneficial's notes concerning real property was included for any reason other than to comply with the Board's Interpretation that precludes rescission if the cognovit clause expressly excludes liens upon real property.[53] Beneficial has given with one hand while taking away with the other. The district court decided correctly in holding that this is not enough.

Overmeyer and *Swarb* have left the constitutional status of the cognovit note uncertain. A clear holding of unconstitutionality would have completely eliminated the problem. Some states do not allow the use of cognovit notes,[54] some allow it with procedural restrictions (*e.g.*, Alaska),[55] and some allow the use of cognovit notes at least to some extent without notice and hearing.[56] If a note containing a cognovit provision is executed in a state which prohibits the use of cognovit provisions and judgment is sought there, then no problem arises. Again, there is no problem when a note is executed in a state where the procedural laws require that notice and a hearing be given to the debtor—there would be no security interest under the Truth and Lending Act and the consumer is protected by notice and hearing. If a cognovit note is executed in a state permitting the use of cognovit provisions and judgment is sought there, then clearly disclosure must be made under the Act.[57] The difficulty arises when a note is executed in a state

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[52]*See* note 13 *supra* (emphasis added).

[53]12 C.F.R. § 226.202(d) (1972).

[54]Note, *Due Process—Confession of Judgment Procedures Are Not Unconstitutional Per Se*, 25 VAND. L. REV. 613, 613 n.3 (1972); Note, *Constitutional Law—Confession of Judgments—Pennsylvania Entry of Judgment by Confession Procedure Based Upon Waiver of Notice Without Adequate Understanding by the Debtors Held Violative of the Due Process Clause of the Fourteenth Amendment*, 16 VILL. L. REV. 571, 573 n.9 (1971).

[55]*See* note 54 *supra.*

[56]*Id.*

[57]12 C.F.R. § 226.2(z) (1972).

where the use of cognovit provisions is limited in some way and judgment is later sought in another state with unrestricted cognovit provisions. The state in which the judgment is sought could grant the judgment without notice and hearing either through the application of its own nonrestrictive laws or through application of its own procedural rules in conjunction with the substantive law regarding the use of cognovit provisions of the state of execution.

The district court's solution to this problem was to require disclosure in any case where it is *possible* for a creditor to obtain a judgment against the debtor through the use of a cognovit clause without notice and hearing. The court of appeals, by dwelling upon the language "in those States"[58] in the Board's Interpretation has replaced a solution that is more in keeping with the spirit and purpose of the Truth in Lending Act with one that seems technical and against the purpose of the Act. The impact of this decision is somewhat limited. As previously indicated, only a few states allow unrestrictied use of cognovit provisions.[59] Moreover, the *Swarb* and *Overmeyer* decisions raise grave doubts as to the constitutionality of the cognovit provisions employed by Beneficial in this case and in most consumer credit transactions.

D. STEVE ROBBINS

Criminal Law—Increased Sentences on an Appeal by Right from Inferior Courts

In 1969 the United States Supreme Court held in *North Carolina v. Pearce*[1] that a criminal defendant who had successfully appealed his original conviction could not receive a more severe sentence on reconviction unless the increase directly resulted from defendant's conduct subsequent to his original conviction. The Court concluded that while there was no absolute constitutional bar to an increased sentence on retrial,[2] due process precluded penalizing a defendant for having successfully

[58]469 F.2d at 456.

[59]*See* note 54 *supra*.

[1]395 U.S. 711 (1969).

[2]"We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." *Id.* at 723.

attacked his original conviction.[3] Since a defendant who feared judicial retaliation through vindictive sentencing could unconstitutionally be deterred from exercising his right to appeal, due process required that a defendant be freed of such an apprehension.[4] The Court therefore imposed a rule that severely limited the imposition of increased sentences on retrial.[5]

However, in 1972 the United States Supreme Court held in *Colten v. Kentucky*[6] that a criminal defendant who had exercised his absolute right to a trial *de novo* in a superior court following conviction in an inferior court could receive a more severe sentence upon reconviction in a court of general criminal jurisdiction. The Court concluded that the danger of being penalized for seeking a new trial was not inherent in the *Colten* situation,[7] nor would a defendant be deterred from exercising his absolute right to a new trial by a fear of judicial vindictiveness.[8] Thus due process did not require the application of the *Pearce* rule to *de novo* trials.[9]

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[3]*Id.* at 724; *see* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965). *See also* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[4]395 U.S. at 725.

[5]The Court formulated the *Pearce* rule as follows:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

[6]92 S. Ct. 1953 (1972).

[7]*Id.* at 1960.

[8]*Id.* For a discussion of the opposite view *see* Aplin, *Sentence Increases on Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427, 455-60 (1970). *See also, The Supreme Court, 1968 Term*, 83 HARV. L. REV. 1, 187-92 (1969); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 837 (1969).

[9]The following cases have held that the *Pearce* Court's reasoning was applicable to trial *de novo*: Wood v. Ross, 434 F.2d 297 (4th Cir. 1970), *vacated and remanded on ground of possible mootness sub nom.* North Carolina v. Rice, 404 U.S. 244 (1971); Griffin v. Wilkerson, 335 F. Supp. 1272 (W.D. Va. 1972); Torrance v. Henry, 304 F. Supp. 725 (E.D.N.C. 1969); Bronstein v. Superior Court, 106 Ariz. 251, 475 P.2d 235 (1970); State v. Shak, 51 Hawaii 626, 466 P.2d 420 (1970); Eldridge v. State, ___ Ind. ___, 267 N.E.2d 48 (1971); Cherry v. State, 9 Md. App. 416, 264 A.2d 887 (1970); Commonwealth v. Harper, 219 Pa. Super. 100, 280 A.2d 637 (1971).

Contra: Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); Mann v. Commonwealth, ___ Mass. ___, 271 N.E.2d 331 (1971); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); Kansas City v. Henderson, 468 S.W.2d 48 (Mo. 1971); State v.

Lewis Colten was tried and convicted of disorderly conduct in a Kentucky inferior court.[10] Inferior courts in Kentucky have jurisdiction over those criminal offenses which are punishable by a maximum of one year's imprisonment and a five hundred dollar fine.[11] Trials in the inferior courts, the first tier of the Kentucky two-tier system, are generally speedier and less costly than trials conducted in a court of general jurisdiction, but they lack some of the constitutional safeguards available in the superior courts.[12] The defendant in the inferior court may either enter a defense to the charge or plead guilty. In either case, a defendant convicted in an inferior court has an absolute right to a trial *de novo* in a superior court.[13] In the trial *de novo* the case proceeds as if brought in the superior court in the first instance.[14] When Colten was given an increased sentence following his conviction in the trial *de novo*, he appealed his conviction on the basis that the *Pearce* rule was applicable to the trial *de novo*.[15] The Kentucky Court of Appeals affirmed his

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Stanosheck, 186 Neb. 17, 180 N.W.2d 226 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Johnson v. Commonwealth, 212 Va. 579, 186 S.E.2d 53, *cert. denied*, 407 U.S. 925 (1972); Evans v. City of Richmond, 210 Va. 403, 171 S.E.2d 247 (1969).

[10]The defendant was originally convicted in the Quarterly Court of Fayette County, Kentucky. The Quarterly Court, a court of limited criminal jurisdiction, does not make a record of its proceedings. Defendant was there fined ten dollars, and he exercised his right to appeal to a superior court. Colten v. Commonwealth, 467 S.W.2d 374 (Ky. 1971).

[11]KY. REV. STAT. ANN. §§ 25.010, 26.010 (1970).

[12]The extent to which inferior courts afford a defendant full protection of his constitutional rights varies from state to state. Many inferior courts make no record of the proceedings, fail to insure a jury trial, and generally conduct trials in a more relaxed manner than the trials conducted in a court of general criminal jurisdiction.

[13]KY. R. CRIM. P. 12.06. For an example of judicial application of a prior formulation of this rule *see* Brown v. Hoblitzell, 307 S.W.2d 739 (Ky. 1957).

[14]KY. R. CRIM. P. 12.06 provides that: "Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court ...." Many states have similar statutory provisions: ARIZ. REV. STAT. ANN. § 22-371 (1956), § 22-375 (Supp. 1972-73); ARK. STAT. ANN. § 44-509 (1964); COLO R. CRIM. P. 37; FLA. STAT. ANN. §§ 924.41-.45 (Supp. 1972-73); IND. ANN. STAT. § 9-713 (1956); KAN. STAT. ANN. §§ 22-3609 to -3610 (Supp. 1972); ME. REV. STAT. ANN. tit. 4, § 156 (1964); MD. ANN. CODE art. 5, § 43 (Supp. 1972); MICH. STAT. ANN. § 28.1226 (Supp. 1972); MINN. STAT. ANN. §§ 488.20, 633.20-.22 (Supp. 1973); MISS. CODE ANN. §§ 1201-02 (Supp. 1972); MO. SUP. CT. R. 22; MONT. REV. CODES ANN. §§ 95-2004, -2009 (1947); NEB. REV. STAT. §§ 29-601, -611 (1964); NEV. REV. STAT. §§ 189.010-.080 (1967); N.H. REV. STAT. ANN. §§ 502:18, 502-A:11-12 (1968); N.M. STAT. ANN. §§ 36-15-1 to -3 (1972); N.C. GEN. STAT. § 15-177 (1965), § 15.177.1 (Supp. 1971); N.D. CTN. CODE § 33-12-40 (1960); TEX. CODE CRIM. PRO. art. 44.17 (1966); WASH. REV. CODE ANN. § 35.20.070 (1965); W. VA. CODE ANN. § 50-18-2 (1966).

[15]Colten v. Kentucky, 92 S. Ct. 1953, 1956 (1972). On trial *de novo* defendant was again convicted, this time in the circuit court, a court of general criminal jurisdiction. He was then fined

conviction.[16] Colten then appealed to the United States Supreme Court.[17]

Colten argued that the rationale used by the Court in *Pearce* to limit the imposition of increased sentences on appeal was equally applicable to the trial *de novo*:[18]

> Both . . . involve reconviction and resentencing, both provide the convicted defendant with the right to "appeal" and in both—even though under the Kentucky scheme the "appeal" is in reality a trial *de novo*—a penalty for the same crime is fixed twice, with the same potential for an increased penalty upon a successful "appeal."[19]

The only real distinction, according to Colten, was in the source of authority for his new trial. In *Pearce* the new trial was granted after an appellate court determination that the decision of the trial court could not stand; in *Colten* the authority for the trial *de novo* came directly from a statutory provision.[20] Since no record was made of the inferior court proceedings, appellate review in *Colten* was impossible. The statute, therefore, compensated for a lack of review of the inferior court trial by assuring the defendant of a right to a new trial. Thus the distinction was in form and not substance and should not afford a basis for withholding the *Pearce* limitation on increased sentences to the trial *de novo* situation.[21]

The Court concluded, however, that there were in fact several meaningful distinctions between a retrial on remand and a trial *de novo*.[22]

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fifty dollars and costs. The circuit court judge offered no explanation for the more severe sentence. Colten v. Commonwealth, 467 S.W.2d 374, 378 (Ky. 1971).

[16]The defendant appealed the decision of the circuit court to the Kentucky Court of Appeals. He challenged the constitutionality of the Kentucky Disorderly Conduct Statute as well as the imposition of a more severe sentence in the circuit court. The Kentucky Court of Appeals upheld the constitutionality of the statute and the imposition of the increased sentence. Colten v. Commonwealth, 467 S.W.2d 374, 378-79 (Ky. 1971).

[17]Colten argued that the disorderly conduct statute was unconstitutionally broad and vague both on its face and as applied, and that the increased sentence twice placed him in jeopardy and deprived him of due process of law. Brief for Appellant at 15, 32, 38, Colten v. Kentucky, 92 S. Ct. 1953 (1972).

[18]*Id.* at 40.

[19]Colten v. Kentucky, 92 S. Ct. 1953, 1960 (1972).

[20]*See* note 13 and accompanying text *supra*.

[21]Brief for Appellant at 41.

[22]Mr. Justice Marshall, in dissent, took the view that *Pearce* was based upon the recognition that "whenever a defendant is tried twice for the same offense, there is inherent in the situation the danger of vindictive sentencing the second time around, and that this danger will deter some defendants from seeking a second trial." 92 S. Ct. at 1965.

> We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly. Nor is the *de novo* court even asked to find error in another court's work.[23]

Furthermore, the Court concluded that there was no reason to believe that the superior court would deal any more strictly with a trial *de novo* defendant than with a defendant initially appearing before that court.[24]

The reasons offered by the Court to distinguish *Pearce* from the trial *de novo* situation in *Colten* are not completely convincing. The Supreme Court seemed to believe that the danger of vindictiveness was greater in *Pearce* because he was sentenced on retrial by the same court from which he had successfully appealed. Technically it was the same court, the Superior Court of North Carolina sitting in Durham County,[25] but two different judges presided over the two trials.[26] If the Court meant that Pearce was sentenced twice by the same judge, the Court was clearly wrong. If the Court meant only that *Pearce* was sentenced twice in the Superior Court in Durham County, the Court was correct but its argument was greatly weakened.

Other distinctions utilized by the Court to distinguish *Pearce* from *Colten* are similarily questionable. The Court correctly stated that the trial *de novo* court in *Colten* was not even "asked to find error in another court's work."[27] However, this is equally true of the court that retried Pearce. Only the appellate court that remanded *Pearce* had the responsibility of finding error in another court's work. The duty imposed on the court that retried Pearce was identical to the duty imposed on the trial *de novo* court in *Colten*; that duty was to afford the defendant a fair trial consistent with constitutional safeguards.

The Court also declared that while judicial impatience towards a defendant who has already had one fair trial was perhaps understanda-

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[23] *Id.* at 1960.

[24] *Id.*

[25] State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966).

[26] Pearce was originally sentenced by Judge Williams. Having successfully appealed this convicion, Pearce was given an increased sentence on retrial by Judge McLaughlin. State v. Pearce, 268 N.C. 707, 709, 151 S.E.2d 571, 572 (1966). The North Carolina Supreme Court in *State v. Sparrow* noted this fact but still argued that the *Pearce* rule should not apply to trial *de novo*. 276 N.C. 499, 505, 173 S.E.2d 897, 901 (1970).

[27] 92 S. Ct. at 1960.

ble, the trial *de novo* court's attitude was "much more likely" to recognize the fact that the inferior courts were not designed to offer error-free trials.[28] The conclusion of this argument would seem to be that therefore the trial *de novo* court will not become impatient with a defendant who has appealed from the inferior courts since he has probably not been afforded all of his constitutional protections.

The reason that Pearce was retried at all, however, was because the North Carolina Supreme Court determined that he had not received a trial that was consistent with constitutional procedures.[29] It seems, then, that the court that retried Pearce was in the same position as a trial *de novo* court. Neither court should have become impatient with a defendant who was before the court because he had not been afforded all of his constitutional rights in his first trial. Yet the *Pearce* Court acknowledged the possibility of judicial impatience, while the *Colten* Court did not.

Moreover, the Court's argument assumes that the trial *de novo* court will act appropriately: that the court will recognize the deficiencies of the inferior courts and will render a fair decision unaffected by the knowledge of defendant's prior trial. Both Pearce and Colten, however, asserted that their respective judges had not acted appropriately in imposing sentence. The *Pearce* Court accepted the possibility that this had occurred, and having recognized the extreme difficulty of proving that a judge had been motiviated by vindictiveness towards a defendant in determining his sentence,[30] the Court acted to eliminate the danger. The standard of proof required to formulate the *Pearce* rule, therefore, was something less than actual proof of judicial vindictiveness. There should be grave concern in light of *Pearce* as to whether the *Colten* Court was warranted in assuming that the trial *de novo* court will be "much more likely"[31] to recognize the deficiencies of the inferior courts and act appropriately. Nevertheless, the Court's critical conclusion was based on that assumption:

> We see no reason, and none is offered, to assume that the *de novo* court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior

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[28] *Id*; *see* Aplin, *supra* note 8, at 458-59.

[29] State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1966).

[30] 395 U.S. at 725 n.20.

[31] 92 S. Ct. at 1960.

> court and who choose to put the State to its proof in a trial subject to constitutional guarantees.[32]

At least one commentator has reached a contrary conclusion:

> Procedural complication also increases the pressure on officials to dispose of cases with the acquiescence of the accused. An ironic result of over-reliance on discretionary disposition is that, however compassionate its intent, the need to gain this acquiescence leads officials to place a heavy price in the form of enhanced severity on those who invoke the formal process but do not succeed in avoiding punishment.[33]

Yet one recent study dramatically supports the Court's conclusion.[34] The results of this survey show that forty-four percent of the defendants who had appealed their convictions in the inferior courts of Boston, Massachusetts, were given lighter sentences in the superior courts, while only one percent of those defendants were given increased sentences.[35] These figures seem to support the conclusion that trial *de novo* courts do not, as a general policy, impose more severe sentences on defendants who appeal from the inferior courts. Yet *Pearce* was not based on a finding that courts followed such a policy, but only on the finding that increased sentences did occur with sufficient frequency to require protection of defendant's rights.[36] Conversely, the *Colten* Court did not base its decision on the infrequency of increased sentences in the superior court. *Colten* thus cannot be distinguished from *Pearce* on this basis.

Colten also argued that Kentucky's two-tier court system placed an unconstitutional burden on defendant's right to a fair trial.[37] A defendant who is charged with a misdemeanor in Kentucky is generally required to stand trial in a court which was not designed to afford the defendant a trial consistent with constitutional requirements. When the defendant seeks such a trial, however, he is told that he may suffer a more severe sentence than that received in the inferior court. Colten

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[32]*Id.*

[33]Rosett, *Discretion, Severeity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 26 (1972).

[34]*See* Note, *Abolition of Trial De Novo—An Error in Judgment*, 6 SUFFOLK U.L. REV. 919, 923 (1972).

[35]*Id.*

[36]395 U.S. at 725. *See also* 92 S. Ct. at 1960.

[37]Brief for Appellant at 46-47.

argued that this was contrary to fundamental notions of procedural fairness. Thus defendant was unduly disadvantaged in seeking a fair trial.

The Court concluded that Kentucky's two-tier court system did not disadvantage defendants as long as a trial in a court of general jurisdiction was available to them.[38] The Court noted the advantages a defendant received in the inferior court: simple and speedy proceedings, lenient sentences, the opportunity to learn about the prosecution's case, the aid of counsel if confronted with the realistic threat of a prison sentence, and the opportunity to dispense with the inferior court trial by pleading guilty and then promptly receiving a trial *de novo* in a superior court.[39] The state had none of these options. The Court characterized the inferior court trial as merely "an offer in settlement" of defendant's case which the defendant was free to accept or refuse.[40]

It is clear that the defendant does suffer some disadvantages in being tried in the inferior court. The defendant does not have the option of electing whether he will receive an inferior court trial.[41] Therefore some defendants who want a trial in the inferior court do not receive one, while other defendants are forced to go into the inferior court when they have no intention of waiving their right to a trial fully protected by constitutional safeguards. A defendant who is represented by a lawyer in both the inferior and superior courts will suffer an increase in attorney's fees. Also, defendant may suffer a greater delay in receiving a final determination of his case than if he were permitted to go directly to the superior court. Further, in order to bypass an inferior court trial the defendant must plead guilty. The Court believed that these disadvantages were balanced by the advantages available to the defendant in the two-tier system. Since any burden on defendant's right to appeal was offset by the benefits he received, there was no violation of due process.[42]

The Court also concluded that if the *Pearce* rule were applied to the trial *de novo*, inferior court judges might cease imposing lenient

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[38]92 S. Ct. at 1961. The Court seems here to adopt implicitly the view that a burden on defendant's right to appeal does not violate due process as long as that burden is a reasonable one. *See* Lemieux v. Robbins, 414 F.2d 353, 355-56 (1st Cir. 1969); Mann v. Commonwealth, ___ Mass. ___, 271 N.E.2d 331, 334-35 (1971).

[39]92 S. Ct. at 1961.

[40]*Id*; *see* Lemieux v. Robbins, 414 F.2d 353, 355 (1st Cir. 1969).

[41]The arresting officer in the Kentucky system has the option of selecting the court in which defendant is to stand trial. *Id.* at 1958.

[42]*Id.* at 1960-61.

sentences in order to allow superior court judges full discretion in sentencing defendants on reconviction.[43] This is one possible result of applying the *Pearce* rule to trial *de novo*. Another possibility is that nearly all defendants might exercise their right to a trial *de novo* if they were protected from the threat of increased sentences in the superior courts. Defendants then would have nothing to lose by appealing. Either of these possibilities would result in so many appeals to the superior courts that the existence of the inferior courts would be threatened.

These predictions, however, conflict with actual experience. In Minnesota application of the *Pearce* rule to trial *de novo* did not result in an undue burden on the superior courts.[44] Also, New Mexico has had a statute since 1968 which prohibits increased sentences in the superior court.[45] Apparently the inferior courts of New Mexico are still operating effectively to relieve the caseload burden of the superior courts despite the fact that defendants have nothing to lose by appealing the sentence of the inferior courts. Perhaps the best explanation of this experience is that the majority of criminal defendants in the inferior courts are guilty.[46] For many of these defendants the only question is the severity of the sentence to be imposed.[47] Since sentences in the inferior courts are not characteristically severe,[48] the defendant realizes that while he has nothing to lose by demanding an appeal he does not really have anything to gain.

The question still remains, however, as to why the Court in *Colten* rejected the same argument that was successful in *Pearce*. One answer concerns the relative increase in severity of the sentences. In *Pearce* the sentence of one defendant was increased from ten to twenty-five years.[49] The *Pearce* Court felt that this great increase in punishment by itself was sufficient to compel a recognition of possible judicial vindictiveness absent other mitigating evidence.[50] Apparently, the fatal deficiency in Colten's case was that his original fine of ten dollars when increased to

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[43]*Id.* at 1961; *see* State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

[44]Brief for Respondent at 20-21, North Carolina v. Rice, 404 U.S. 244 (1971).

[45]N.M. STAT. ANN. § 36-15-3(B)(2) (Supp. 1972).

[46]*See* Note, 6 SUFFOLK U.L. REV., *supra* note 34, at 930. *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Tent. Draft, 1967) [hereinafter cited as ABA].

[47]ABA 1.

[48]Note, 6 SUFFOLK U.L. REV., *supra* note 34, at 929.

[49]395 U.S. at 714.

[50]*Id.* at 725-26.

a fine of fifty dollars by the superior court was not shocking enough by itself to compel the conclusion that the increased sentence had been motivated by judicial vindictiveness. The *Colten* Court therefore required some evidence indicating why the superior court had treated the defendant any differently or more severely than defendants originally before the court.[51] In *Pearce* the increased sentence itself was sufficient. In *Colten* the Court found the increased sentence insufficient without more evidence. Whether the Court was motivated by the factual distinctions between the two types of appeals or by the belief that such a decision was required to preserve the effectiveness of the inferior court system, the rationale for the decision is debatable.

The effects of *Colten* on the practical operation of the inferior court system remain to be seen. Whether a criminal defendant convicted in an inferior court will now more readily accept the sentence of the lower court or whether inferior court judges will become more disposed to offer lenient sentences as an incentive to defendants to accept their judgment as final cannot be predicted. Yet two effects of this decision are certain: the benefits of the inferior court system in terms of facilitating the efficient administration of criminal justice have been protected from one possible threat of erosion, and the potential threat of isolated instances of vindictive sentencing in less serious criminal cases has not been eradicated.

ROBERT LOUIS QUICK

Criminal Procedure—Use of the Reasonable Doubt Standard in Ruling on a Motion for Judgment of Acquittal

Rule 29(a) of the Federal Rules of Criminal Procedure instructs the trial judge to "order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."[1] For many years the various federal courts of appeals set different standards for a trial judge in ruling on motions for judgment of aquittal. However, the recent decision in *United States*

[51] 92 S. Ct. at 1960.

[1] FED. R. CRIM. P. 29(a).

v. Taylor[2] has brought uniformity[3] among all of the circuits with regard to the judicial standard of evidence necessary to allow jury consideration of a criminal charge.[4] In that case Judge Friendly writing for the Second Circuit overruled the so-called "Second Circuit doctrine,"[5] promulgated by Judge Learned Hand, which provided that the standard of evidence necessary for a trial judge to deny a motion for a directed verdict in a civil suit and to disallow a motion for judgment of acquittal in a criminal case were identical.

A motion for judgment of acquittal can be made after the prosecution closes, after both sides rest, or after the jury returns an adverse verdict.[6] The trial judge is then compelled to rule as a matter of law[7] on the sufficiency of the prosecution's evidence.[8] The issue in controversy among the various Courts of Appeals[9] had been the proper standard to apply in assessing whether the prosecution had produced a sufficient quantum of evidence to justify presentation of the case to the jury. The standard now uniformly adopted was announced by Judge Prettyman in *Curley v. United States*:[10]

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; . . . .

By 1967, all the courts of appeals except the Second Circuit had adopted this standard.[11]

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[2]464 F.2d 240 (2d Cir. 1972).

[3]*See* text accompanying note 11 *infra*.

[4]Actually, the overruling of the "Second Circuit doctrine," *see* text accompanying note 5 *infra*, was dictum as the defendant's conviction was affirmed on the ground that the evidence against him was sufficient to pass the newly adopted and more stringent test. 464 F.2d at 245.

[5]*See* text accompanying note 12 *infra*.

[6]FED. R. CRIM. P. 29(a), (c).

[7]*See, e.g.*, FED. R. CRIM. P. 29(a); 5 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE §§ 2073, 2076 (1957).

[8]FED. R. CRIM. P. 29(a).

[9]*See, e.g.*, Hays v. United States, 231 F. 106, 108 (8th Cir. 1916), *aff'd*, 242 U.S. 470 (1917).

[10]160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947).

[11]*See, e.g.*, Parker v. United States, 378 F.2d 641 (1st Cir.), *cert. denied*, 389 U.S. 842 (1967); United States v. Allard, 240 F.2d 840 (3d Cir.), *cert. denied*, 353 U.S. 939 (1957); United States v. Sherman, 421 F.2d 539 (4th Cir.) (per curiam), *cert. denied*, 398 U.S. 914 (1970); United States v. Crane, 445 F.2d 509 (5th Cir. 1971); United States v. Collon, 426 F.2d 939 (6th Cir. 1970);

The "Second Circuit doctrine" was most notably expressed in *United States v. Feinberg*:[12]

> [T]he standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and . . . , given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, the jury must decide, and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt.

The doctrine became fixed as the only applicable standard in the Second Circuit in *United States v. Valenti*[13] and *United States v. Feinberg*,[14] decided in 1943 and 1944 respectively.[15] The latter opinion, written by Judge Learned Hand, became the leading authority for the doctrine, perhaps because of its distinguished author and its original expression of justification for the standard.[16] Judge Hand reaffirmed this standard in *United States v. Andolschek*:[17] "The accused at bar do not argue that the evidence was not strong enough to support a verdict in a civil case, and it certainly was; that being true, our review ends." The tenor of this statement confirms the conclusiveness of the acceptance of the "Second Circuit doctrine" by its namesake court. Nevertheless, the issue was continually reviewed[18] and attacked.[19] Finally, in *United States v. Taylor*[20] the Second Circuit overruled *Feinberg* and

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United States v. Williams, 311 F.2d 721 (7th Cir.), *cert. denied*, 374 U.S. 812 (1963); Conaway v. United States, 349 F.2d 907 (8th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); United States v. Brown, 436 F.2d 702 (9th Cir. 1970); United States v. Parrott, 434 F.2d 294 (10th Cir. 1970), *cert. denied*, 401 U.S. 979 (1971); United States v. Harris, 435 F.2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971).

[12]140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[13]134 F.2d 362 (2d Cir.), *cert. denied*, 319 U.S. 761 (1943).

[14]140 F.2d 592 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[15]This doctrine had its origins in Looker v. United States, 240 F. 932 (2d Cir. 1917); Felder v. United States, 9 F.2d 872 (2d Cir. 1925), *cert. denied*, 270 U.S. 648 (1926); and United States v. Rowe, 56 F.2d 747 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932). However, a standard more like the *Curley* rule had apparently been adopted in Fraina v. United States, 255 F. 28 (2d Cir. 1918). Even after the "Second Circuit doctrine" had been in effect, the Second Circuit sometimes appeared to revert back to the *Fraina* criterion. *See, e.g.*, United States v. Silva, 109 F.2d 531 (2d Cir. 1940); United States v. Wishnatzki, 77 F.2d 357 (2d Cir. 1935).

[16]United States v. Masiello, 325 F.2d 279, 288 (2d Cir. 1956) (Frank, J., concurring).

[17]142 F.2d 503, 505 (2d Cir. 1944).

[18]*E.g.*, United States v. Costello, 221 F.2d 668, 671 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956).

[19]United States v. Masiello, 235 F.2d 279, 284-85 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring).

[20]464 F.2d 240 (2d Cir. 1972).

insured uniformity[21] among the circuits by adopting the *Curley* test.

An examination of the rationale behind the "Second Circuit doctrine" clearly supports the decision of the court in *Taylor* to abandon the doctrine. Judge Learned Hand had offered two reasons for refusing to differentiate "between evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt."[22] The first was that "courts—at least federal courts—have generally declared that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases . . . ."[23] The

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[21]A caveat must be entered about the uniformity of standard that now prevails. Some circuits hold that a special rule must be applied to cases involving circumstantial evidence. This standard, enunciated most clearly in Isbell v. United States, 227 F. 788, 792 (8th Cir. 1915), *quoting* Union Pacific Coal Co. v. United States, 173 F. 737, 740 (8th Cir. 1909), is as follows: "Unless there is substantial evidence of facts which excludes every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

There are interpretations of this statement which indicate that a more stringent standard than the *Curley* rule has been established. For example, the *Isbell* test could mean that the trial judge must grant a motion for acquittal unless the evidence excludes the hypothesis of innocence. The standard could be defined as requiring a reversal of all convictions rendered in cases in which a reasonable mind could reach either a guilty or innocent verdict. However, neither of these interpretations are plausible because of their impracticality. *See* Curley v. United States, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). They must be dismissed on the further ground that such interpretations would force the trial judge to preempt the functions of the jury by becoming a trier of fact before submission of the case to the jury, which would then become merely a device for checking the judge. The Supreme Court has held that it was "confusing and incorrect" to use the *Isbell* rule in a jury instruction in a circumstantial evidence case. Holland v. United States, 348 U.S. 121, 139-40 (1954).

In spite of the Court's adverse ruling on the use of this formula as a jury instruction, several circuits have continued to use the *Isbell* test as the proper judicial standard by which to assess the sufficiency of circumstantial evidence when deciding upon a motion for judgment of acquittal. *See, e.g.*, Cohen v. United States, 363 F.2d 321, 327 (5th Cir. 1966), *cert. denied*, 385 U.S. 957 (1966); LaConte v. United States, 330 F.2d 700, 701 (10th Cir. 1964). *But see* Early v. United States, 394 F.2d 117, 118 (10th Cir. 1968). The explanation has two facets: first, the holding in *Holland* dealt with the formula's use as a jury instruction; and secondly, the *Isbell* test has been interpreted to mean not that the evidence must be inconsistent with every hypothesis of innocence, but rather that reasonable minds must be able to decide that it is. The Fifth Circuit, the most tenacious adherent of the *Isbell* rule (*see* Panci v. United States, 256 F.2d 308, 312 (5th Cir. 1958)) has interpreted the test in this manner: "[T]he test to be applied on motion for judgment of acquittal and on review of denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude." Vick v. United States, 216 F.2d 228, 232 (5th Cir. 1954). So interpreted, the *Isbell* test becomes almost indistinguishable from that enunciated in *Curley*. *See* McCORMICK ON EVIDENCE § 338, at 791 (2d ed. E. Cleary 1972).

[22]United States v. Feinberg, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[23]*Id.*

second justification was that "[w]hile at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use."[24] A later decision opined that mandatory consideration of the reasonable doubt standard by the judge would add nothing to the judicial process but confusion.[25]

This "too thin for day to day use"[26] argument has been attacked as illogical and patently untrue.[27] It is illogical because it implies that judges are incapable of distinguishing between evidence which merely preponderates and that which is capable of persuading reasonable minds beyond a reasonable doubt, while untrained laymen who comprise the jury are saddled with that very responsibility.[28] This justification for the "Second Circuit doctrine" is irrational because judges are required to make this same distinction when they sit in a criminal case without a jury.[29] Judges must also make a similar distinction in civil cases in which the clear, cogent, and convincing standard of proof is employed.[30]

Some proponents of the "Second Circuit doctrine" contend that the *Curley* standard requires that a trial judge preempt the function of the jury by forcing him to decide that the defendant is guilty beyond a reasonable doubt before he can send the case to the jury.[31] This argument not only fails to consider a basic procedural rule of law but is based on a fundamental misconception of the *Curley* test. First, the trial judge in a jury trial is not the trier-of-fact; therefore he may not properly consider the credibility of the witnesses.[32] In applying the *Curley* stan-

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[24]*Id.*

[25]United States v. Wapnick, 202 F. Supp. 712, 715 (E.D.N.Y. 1962), *aff'd per curiam*, 315 F.2d 96 (2d Cir.), *cert. denied*, 374 U.S. 829 (1963). *See also* 9 WIGMORE, EVIDENCE §§ 2497-98 (3d ed. 1940).

[26]United States v. Feinberg, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[27]*See, e.g.*, United States v. Masiello, 235 F.2d 279, 285 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring).

[28]United States v. Masiello, 235 F.2d 279, 291 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 809 (2d Cir. 1956) (Frank, J., concurring).

[29]United States v. Masiello, 235 F.2d 279, 291 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 809 (2d Cir. 1956) (Frank, J., concurring).

[30]United States v. Masiello, 235 F.2d 279, 291 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 809 (2d Cir. 1956) (Frank, J., concurring); *see, e.g.*, Baumgartner v. United States, 322 U.S. 665 (1944) (government's case must fail in a denaturalization proceeding if proof is sufficient only to meet the preponderance standard); Schneiderman v. United States, 320 U.S. 118 (1943) (same); Deering v. Winona Harvester Works, 155 U.S. 286, 301 (1894) (judge's decision as to prior use of a patented device must be based on proof which leaves no reasonable doubt).

[31]*E.g.*, United States v. Masiello, 235 F.2d 279, 284-85 (2d Cir. 1956).

[32]*E.g.*, United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969). *See also* United States v. Scarpellino, 431 F.2d 475 (8th Cir. 1970) (noting that the same rule applies to appellate courts).

dard, he must evaluate the sufficiency of the prosecution's evidence in the light most favorable to the state,[33] unless a particular piece of testimony is manifestly incredible,[34] and must leave the establishment of testimonial inferences to the jury.[35] The trial judge is thereby prohibited from preempting the fact-finding function of the jury. Secondly, the *Curley* test does not require the judge to find that the defendant is guilty beyond a reasonable doubt before he can submit the case to the jury; he must only be able to conclude that reasonable minds could find the defendant guilty beyond a reasonable doubt.[36]

Perhaps the most serious shortcoming[37] of the "Second Circuit doctrine" is its emasculation of the presumption of innocence and the reasonable doubt standard. The presumption of innocence is the cornerstone of our accusatorial system of criminal justice,[38] which requires that the state prove the guilt of the defendant by independent evidence obtained through police investigation rather than by compelled confession, as under an inquisitorial system.[39] Although it has been generally accepted that the presumption of innocence no longer has any direct evidentiary significance,[40] the presumption has spawned development of the reasonable-doubt standard of evidence necessary to sustain a criminal conviction.[41]

There are several viable reasons for requiring that guilt be proved

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[33]*E.g.*, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969).

[34]*See* Rodgers v. United States, 402 F.2d 830 (9th Cir. 1968).

[35]*E.g.*, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969).

[36]*See* United States v. Masiello, 235 F.2d 279, 286 (2d Cir. 1956).

[37]There are two other possible constitutional consequences of the "Second Circuit doctrine," full consideration of which is prohibited by the strictures of time and space. First, the fifth amendment's proscription against coerced self-incrimination could arguably be breached by the use of this rule in conjunction with the "waiver doctrine" on appeal. *See* Comment, *The Motion For Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151, 1152-56 (1961). Secondly, the defendant might be coerced into abandoning his right to a jury trial by the desire to compel the trial judge to apply the reasonable doubt standard himself in a bench trial. *See* text accompanying note 29 *supra*.

[38]The accusatorial nature of our system of criminal justice is documented by various provisions of the Bill of Rights. *See, e.g.*, U.S. CONST. amend. V (privilege against self-incrimination), amend. VI (right to confrontation and compulsory process), amend. VIII (right to bail).

[39]Watts v. Indiana, 338 U.S. 49, 54-55 (1949).

[40]J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 566-76 (1898); 9 WIGMORE, EVIDENCE § 2511(2) (3d ed. 1940).

[41]*In re* Winship, 397 U.S. 358, 363 (1970); MCCORMICK ON EVIDENCE, *supra* note 23, § 341(c). For a definition of the reasonable doubt standard which distinguishes it from the preponderance standard, *see* United States v. Masiello, 235 F.2d 279, 286 (2d Cir. 1956) (Frank, J., concurring).

beyond a reasonable doubt in criminal trials. The very nature of the criminal process mandates adoption of a more stringent standard of guilt than in a civil action. While an erroneous judgment for one party in a civil case is no worse than an incorrect decision for his adversary, the conviction of an innocent man is a loss for all society. Not only does the convicted innocent defendant suffer an unjust loss of liberty, but the state's interest in a precise judicial system is defeated,[42] and the legitimacy and popular support of that system is undermined.[43] In addition, the criminal sanction of imprisonment and concomitant stigmatization is much more serious than the pecuniary consequence of a civil action.[44] Finally, there is a basic imbalance in resources, prestige, and power—all in favor of the state.[45] For these reasons, the Supreme Court explicitly held in *In re Winship*[46] that the fourteenth amendment's due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

The "Second Circuit doctrine" did not directly remove the reasonable doubt standard from the criminal trial, as the jury was always instructed that they must find the defendant guilty beyond a reasonable doubt.[47] However, the rule did have the effect of preventing judicial consideration of the reasonable doubt standard.[48] Judge Frank characterized this result as a reduction of the criminal standard "to little more than a verbal ritual, a ceremonial set of words included in the judge's charge."[49] As a later Second Circuit opinion noted, "the requirement of proof beyond a reasonable doubt is a direction to the jury" which "can-

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[42]*Cf.* Comment, 70 YALE L.J., *supra* note 40, at 1158.

[43]*In re* Winship, 397 U.S. 358, 364 (1970).

[44]*Id.* at 363. MCCORMICK ON EVIDENCE, *supra* note 23, § 341(c), at 798: "The consequences to the life, liberty and good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case."

[45]*See* Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22, 40 (1955): "To prosecute is far easier than to defend. The prosecutor is normally assumed to represent right and justice, and on top of that he almost invariably enjoys far more investigative assistance and resources generally." For a contrary opinion by a principal in the "Second Circuit doctrine" debate, *see* United States v. Garsson, 291 F. 646. 649 (S.D.N.Y. 1923) (L. Hand, J.).

[46]397 U.S. 358, 364 (1970).

[47]*See* United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (per curiam); United States v. Feinberg, 140 F.2d 592, 594 (2d Cir. 1944); United States v. Valenti, 134 F.2d 362, 364 (2d Cir. 1943).

[48]United States v. Masiello, 235 F.2d 279, 287 (2d Cir. 1956) (Frank, J., concurring).

[49]*Id.* at 288.

not be accorded a quantitative value other than as a general cautionary admonition."[50] Consequently, under the "Second Circuit doctrine" there was no viable means of judicial evaluation of the application of the reasonable doubt standard by the jury. The judge was denied the opportunity to prevent the jury from operating beyond its province, for he no longer had any efficient means to prevent the jury from reaching a verdict based on conjecture, speculation, passion, or prejudice.[51]

Application of the "Second Circuit doctrine" presented the trial judge with two anomalous situations.[52] First, when the prosecution's case was sufficient to pass the civil preponderance test, he had to submit it to the jury to apply the reasonable doubt standard even though he was thoroughly convinced that no reasonable mind could possibly determine that the defendant was guilty beyond a reasonable doubt.[53] Secondly, he had to refuse to grant a judgment n.o.v. if the jury returned a guilty verdict in spite of his conviction that the jury's verdict was unreasonable.[54] These situations were forced upon the trial judge because the "Second Circuit doctrine" effectively precluded him from using the reasonable doubt standard as "either a pre-verdict or post-verdict check on the jury."[55] As Judge Frank said: "This means . . . that a man may be jailed or put to death, although the trial judge and the upper court are clearly convinced that the man's guilt has not been proved beyond a reasonable doubt (*i.e.*, they are sure that no reasonable men would believe that his guilt has been thus proven)."[56]

The rejection of the "Second Circuit doctrine" was not only wise, it was inevitable in light of recent developments. As previously noted, the Second Circuit, at the time of the *Taylor* decision, was the only federal Court of Appeals not employing the *Curley* test.[57] The natural evolution toward uniformity among the circuits dictated the result in *Taylor*.[58]

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[50]United States v. Valenti, 134 F.2d 362, 364 (2d Cir. 1943).

[51]*See* United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring); Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947).

[52]*See* United States v. Masiello, 235 F.2d 279, 287 (2d Cir. 1956) (Frank, J., concurring); United States v. Wapnick, 202 F. Supp. 712, 714-15 (E.D.N.Y. 1962).

[53]*See* United States v. Masiello, 235 F.2d 279, 287 (2d Cir. 1956) (Frank, J., concurring); United States v. Wapnick, 202 F. Supp. 712, 714-15 (E.D.N.Y. 1962).

[54]*See* United States v. Masiello, 235 F.2d 279, 288 (2d Cir. 1956) (Frank, J., concurring); United States v. Wapnick, 202 F. Supp. 712, 714-15 (E.D.N.Y. 1962).

[55]United States v. Masiello, 235 F.2d 279, 288 (2d Cir. 1956) (Frank, J., concurring).

[56]United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring).

[57]*See* note 11 *supra*.

[58]The injustice of having two different standards within the same judicial system is obvious.

Furthermore, the Supreme Court had indicated its disapproval of the "Second Circuit doctrine" in a number of cases.[59] In a slightly different context[60] in *In re Winship*,[61] the Court expressed disagreement with the "too thin for day to day use" argument:

> "[W]e reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference' between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt."

In *United States v. Vuitch*,[62] the Court had stated that "a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt." The significance of this dictum is enhanced in light of the holding in *In re Winship*[63] that the due process clause requires proof beyond a reasonable doubt for conviction in a criminal case and the Court's rejection of the justification for the "Second Circuit doctrine" as "singularly unpersuasive."

The next logical step for the Supreme Court would have been to declare that the Constitution mandates the application of the reasonable doubt standard by the trial judge in assessing the sufficiency of the prosecution's evidence in a criminal case so that due process is not denied to a criminal defendant by a jury verdict based on mere conjecture, speculation, passion or prejudice. The decision in *Taylor* makes Supreme Court consideration of this issue unnecessary.

JOHN MICHAEL KOPS

A defendant should not be sent to prison in the Second Circuit when the identical case against him in the Fifth Circuit would result in a directed verdict of acquittal.

[59]*See, e.g.*, Mortensen v. United States, 322 U.S. 369, 374 (1944):

> But we have never hestiated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. *Cf.* Abrams v. United States, 250 U.S. 616, 619. Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that petitioners [were guilty].

In American Tobacco Co. v. United States, 328 U.S. 781, 787 (1946), the Court stated: "The verdict in a criminal case is sustained only when there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt,' that the accused is guilty."

[60]Here, there was a bench trial in a New York State juvenile court.

[61]397 U.S. 358, 367 (1970).

[62]402 U.S. 62, 72 n.7 (1971).

[63]397 U.S. 358, 367 (1970).

Evidence—How Some Courts Have Learned to Stop Worrying and Love the Polygraph

Courts have traditionally viewed the polygraph or "lie detector" with suspicion. Although the polygraph is widely used in non-judicial areas and in pre-trial investigation, test results have not been admissible as evidence in court.[1] However, three recent trial court decisions—*United States v. Ridling*,[2] *United States v. Zeiger*,[3] and a paternity proceeding styled *A v. B*[4]—have reexamined the issue and have ruled that expert testimony interpreting polygraph results is admissible.

Ridling was a prosecution for perjury.[5] Defendant sought to have admitted into evidence the results of a polygraph test he had taken voluntarily. After a pre-trial evidentiary hearing, the court ruled that polygraph results were admissible on the limited issue of the defendant's veracity.[6] However, the court conditioned admissibility on defendant's subjecting himself voluntarily to a second test to be conducted by a polygraph examiner appointed by the court.[7]

Defendant in *Zeiger* was charged with committing an assault with intent to kill while armed and other related offenses.[8] After granting a hearing on the admissibility of the results of a polygraph test given by the police but favorable to defendant, the court ruled in favor of its general admission and allowed the expert to testify on the substance of defendant's answers to factual questions about the crime as well as to defendant's truthfulness on each answer.[9]

In *A v. B*, a paternity proceeding, the court had ordered that both parties submit to a polygraph test before trial, but the results were not to be given to the court.[10] When the mother testified that respondent was the father, respondent sought to introduce the results of the polygraph

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[1]*See generally* Bailey, Book Review, 1 SUFF. L. REV. 137, 138 (1967), in which the author strongly argues that the time has come for the courts to allow admission of polygraph evidence.

[2]350 F. Supp. 90 (E.D. Mich. 1972).

[3]350 F. Supp. 685 (D.D.C. 1972).

[4]___ Misc. 2d ___, 336 N.Y.S.2d 839 (Fam. Ct., Niagara Co. 1972).

[5]350 F. Supp. at 92.

[6]*Id.* at 98.

[7]*Id.* at 96-97.

[8]350 F. Supp. at 686.

[9]*Id.* at 691.

[10]___ Misc. 2d at ___, 336 N.Y.S.2d at 840. Since the respondent's only defense was that the mother had had relations with other men, the trial court apparently hoped that if the polygraph results showed the mother was truthful in her allegation that the respondent was the only conceivable father, the parties would settle. *Id.* at ___, 336 N.Y.S.2d at 844.

test. After a hearing, the court allowed the polygraph examiner to testify that the polygraph indicated that the mother was telling the truth when she admitted during the examination to having sexual relations with other men at the approximate time of conception.[11]

The purpose of this note is to analyze these cases to discern the probative value of polygraph results, the evidential standard that should control admissibility of polygraph evidence, and the issues on which polygraph evidence may be particularly helpful to the trier of fact.[12]

The modern polygraph[13] measures various physiological responses[14] of the subject on graphs which run continually throughout the course of the examination.[15] These responses do not automatically ap-

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[11] *Id.* at ____, 336 N.Y.S.2d at 841-42.

[12] The issue of fifth amendment guarantees against self-incrimination was not of immediate concern in the context of these cases. In both *Ridling* and *Zeiger* the defendants were seeking to introduce the evidence; *A v. B* was a civil action. Consequently, this note does not attempt to discuss fifth amendment issues which would be involved in criminal actions in which the prosecution is seeking to introduce polygraph results unfavorable to a defendant. However, it should be pointed out that *Ridling* stated that the prosecution could introduce unfavorable polygraph evidence which was obtained under the proper conditions when the character of a defendant was in issue. *See* note 60 *infra*.

[13] The development of the modern polygraph can be traced back to 1895 when Cesare Lombroso experimented with the correlation between lying and changes in blood pressure and pulse by means of a "hydrosphymograph." J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE 1 (1966) [hereinafter cited as REID & INBAU]. This is the first recorded use of a scientific device to measure deception. However, there are existing reports that Indians used a deception test based on the premise that lying inhibited the secretion of saliva in the mouth—an accused was ordered to chew rice and if it stuck to his gums he was considered guilty. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 696 (1961).

[14] The present polygraph records not only blood pressure and pulse but also respiration and galvanic skin reflex or electrodermal response. REID & INBAU 2-3. In 1945 it was discovered that blood pressure changes sufficient to upset the accuracy of the test could be caused by unobserved muscle activity. An instrument was then devised for recording this activity in addition to the previously mentioned physiological responses. *Id.* at 3.

[15] A typical polygraph examination takes about one hour. Highleyman, *The Deceptive Certainty of the "Lie Detector,"* 10 HAST. L. J. 47, 55 (1958). This is the approximate length for the entire examination; each separate test usually lasts only five minutes. Note, *The Polygraphic Technique: A Selective Analysis*, 20 DRAKE L. REV. 330, 332 (1971). Since the detection of veracity depends on the variations in the subject's physical reactions, care must be taken to insure that extraneous factors such as unexpected noises do not cause false readings. REID & INBAU 5-6. The examination itself consists of a series of oral questions to which the subject must answer "yes" or "no." Questions concerning the matter under investigation are interspersed with irrelevant questions. The examiner places the number of the question and a symbol indicating the answer given on the recording graph as each question is asked so that later the reactions corresponding to each type of question can be readily compared. *Id.* at 27. Several runs of the test are made to insure that a responsive norm for the subject is established and to allow the examiner to adapt his

pear on the graph labelled as "truth" or "lie"; a determination of truth or deception can only be made by a competent examiner's analysis of these responses. Such determinations are based on the premise that variations in these physiological responses as questions are answered by the subject are an indication of his truthfulness:

> [T]he act of lying leads to conscious *conflict*; conflict induces *fear* or *anxiety*, which in turn results in clearly measurable physiological change. . . . The theory contains two fundamental assumptions: first, a regular relationship between lying and certain emotional states; second, a regular relationship between these emotional states and changes in the body.[16]

Those who oppose admission of polygraph evidence have argued that the premise is invalid.[17] In support of their argument they state that erroneous interpretations can be caused by such factors as mental or physical abnormalities; subject unresponsiveness; emotional tension, fear, or anxiety; and unqualified examiners.[18] Although these contentions probably explain the causes for the errors made in some tests, they do not contradict the high degree of accuracy that the polygraph has been shown to possess. Furthermore, although critics have generally argued that the accuracy of the test is no better than seventy to eighty percent,[19] other studies have shown an accuracy rate of over ninety percent.[20] Witnesses testifying in favor of admission in *Zeiger* all

questioning to prior responses of the subject. Reruns are continued until the subject's responses consistently indicate either truth or deception. Highleyman, *supra* at 55-57.

[16]Skolnick, *supra* note 13, at 699-700 (emphasis in original).

[17]*Id.* at 701-02.

[18]*See generally* Highleyman, *supra* note 15, at 57-61. *But see* REID & INBAU 168-203. The observation of the subject by the examiner and the recordings on the graph itself help to prevent any errors due to an abnormality of the examinee. *Id.* at 202. However, an experiment using groups of "normal," "neurotic," and "psychotic" subjects tended to show that polygraph examiners are less likely to correctly interpret, much less identify, persons suffering from severe mental abnormalities. Heckel, Brokaw, Salzberg, & Wiggins, *Polygraphic Variations in Reactivity Between Delusional, Non-Delusional, and Control Groups in a "Crime" Situation*, 53 J. CRIM. L.C. & P.S. 380, 383 (1962). This has led some commentators to suggest that additional controls be used to guard against error due to subject eccentricity. *See* note 58 *infra*. The repetition and length of the testing procedure tend to reduce excess anxiety or tension. REID & INBAU 174. Since the proper functioning of the polygraph depends on a conscious awareness of the truth and fear of detection, any lack of such consciousness is likely to produce only an inconclusive result. *Id.* at 168.

[19]MCCORMICK ON EVIDENCE § 207, at 506-07 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

[20]For example, the authors of the leading study on polygraphic technique report that in over 35,000 actual cases the percentage of known error was less than one percent and that about five percent of the remainder constituted inconclusive tests. REID & INBAU 234.

claimed that their tests had produced very accurate results; one testified that there were only six errors in the 2,400 tests he had conducted that were subject to verification.[21] Even the psychologist who testified for the prosecution in *Zeiger* admitted that he would place the accuracy of the polygraph at a minimum of eighty-five percent.[22] Furthermore, a large part of the ten to twenty-five percent comprising non-accurate results represents not erroneous determinations but merely tests that produced inconclusive results.[23]

Despite the concurrence of opinion that polygraph evidence is reliable enough to be of some probative value, it has met almost unanimous exclusion in court. The first attempt to introduce such evidence came in 1923 in *Frye v. United States*.[24] In that case defendant sought to introduce an expert to testify to the results of a systolic blood pressure deception test,[25] a forerunner to the modern polygraph. The court, in excluding the evidence, said:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs*.[26]

Since *Frye*, virtually all other courts across the country have reached the same result, and most of these have relied on the polygraph's failure to meet the *Frye* standard of "general acceptance."[27]

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[21]350 F. Supp. at 689.

[22]*Id.* at 689-90.

[23]Note 20 *supra*.

[24]293 F. 1013 (D.C. Cir.1923).

[25]*Id.* at 1013.

[26]*Id.* at 1014 (emphasis added). It is of interest to note that another person subsequently confessed to the crime for which the defendant in *Frye* was convicted. *See* Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711, 715 (1953).

[27]*See, e.g.*, United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); Marks v. United States, 260 F.2d 377 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); People v. York, 174 Cal. App. 2d 305, 344 P.2d 811 (1959); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 342 U.S. 898 (1951); Grant v. State, 213 Tenn. 440, 374 S.W.2d 391 (1964); Davis v. State, 165 Tex. Crim. 456, 308 S.W.2d 880 (1957); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). The only *reported* exception was a trial court decision, People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d

Furthermore, courts have not allowed the use of polygraph evidence in civil cases[28] and have found reversible error when collateral references are made to the test.[29] The only exception is that some courts have allowed the opposing parties to stipulate before the test is administered that the results could be admitted into evidence.[30]

Although *Zeiger* reiterated the rule in *Frye*, its restatement of that rule amounted to a decision not to apply it.[31] *Ridling* referred to the "general acceptance" rule explicitly but refused to apply that standard.[32] *A v. B* did not refer to the rule at all. The refusal of all three courts to apply the *Frye* standard stemmed from the interpretation that it had received in subsequent cases. The courts have interpreted "general acceptance" as requiring proof that the reliability of the polygraph is so high that a court would be justified in taking judicial notice of the validity of the polygraph test.[33] Furthermore, the failure of the "general acceptance" standard to enumerate any guidelines for admission has been criticized:

> The *Frye* standard . . . tends to obscure . . . proper considerations by asserting an undefinable general acceptance as the principle [sic] if not sole determinative factor. The ultimate purpose of the *Frye* rule, the prevention of the introduction into evidence of specious and unfounded scientific principles or conclusions based upon such principles, is certainly unobjectionable. It is questionable, however, whether the *Frye* rule, with its introduction of a basic inconsistency into the law of evidence, is essential to the purpose. Most of the considerations which have apparently moved the courts to apply the *Frye* doctrine to various scientific principles may be adequately accomodated within the usual rules . . . .[34]

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348 (Queens Co. Ct. 1938), but this decision was impliedly overruled by People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938). For a discussion of numerous *unreported* trial decisions that have allowed admissibility, see Ferguson, *Polygraph v. Outdated Precedent*, 35 TEX. B.J. 531 (1972).

[28]*E.g.*, Aetna Ins. Co. v. Barnett Bros., Inc., 289 F.2d 30 (8th Cir. 1961); Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951).

[29]*E.g.*, State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962) (mentioning that defendant refused to take test); Leeks v. State, 95 Okla. Crim. 326, 245 P.2d 764 (1952) (mentioning that defendant took lie detector test).

[30]*E.g.*, State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948). *But see* Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961).

[31]350 F. Supp. at 686-88.

[32]350 F. Supp. at 94-95.

[33]*See* MCCORMICK § 203, at 491; Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence*, 10 WAYNE L. REV. 381, 385-86 (1964).

[34]Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 14 (1970).

Thus, critics of the *Frye* standard have urged that the traditional standards of expert qualification and of balancing logical relevancy against exclusionary policy considerations not only are sufficient safeguards but also enable the courts to determine under what circumstances the admissibility of polygraph evidence would be proper.[35] As *Ridling* pointed out, under traditional standards a proper foundation in a particular case would require a showing that: (1) the premise on which the evidence is based rests on a valid principle of science so that the introduction of such evidence would be of aid to the trier of fact; (2) the expert witness testifying is sufficiently qualified in the particular field of concern; (3) the application of the polygraph test in the specific case under consideration properly followed all applicable procedures to insure that the particular test is reliable; and (4) the probative value of the polygraph evidence in the particular case in which it is sought to be introduced overcomes any policy reasons for exclusion.[36] This sequential approach enables a court to consider objectively the separate factors involved in a decision on the admissibility of polygraph evidence instead of forcing it to consider the whole problem at one time as the "general acceptance" standard has required.

Ridling stated that the admissibility of polygraph evidence in general "requires that the opinion of the expert be relevant to the issue before the Court. The acceptance of the basic theory is a part of the process of making the evidence relevant."[37] *Zeiger* interpreted *Frye* as demanding only "general acceptance among the experts that current polygraph technique possesses a degree of reliability which satisfies the courts of its probative value."[38] Thus, both the *Ridling* and *Zeiger* courts required preliminary proof that the general theory of the polygraph be "accepted." By requiring such proof, however, neither court was demanding that the polygraph be demonstrably infallible. The proof required was only that necessary to show that the introduction of polygraph evidence makes "the desired inference more probable than it would be without the evidence."[39] Since both courts found the polygraph to be reliable, both held it to be of probative value.[40]

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[35]*See* MCCORMICK § 203, at 491. *See generally* Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 395-98 (1952).

[36]350 F. Supp. at 94-95.

[37]*Id.*

[38]350 F. Supp. at 688.

[39]MCCORMICK § 185, at 437 (emphasis omitted).

[40]350 F. Supp. at 690; 350 F. Supp. at 95.

After determining that polygraph evidence in general can be of probative value, *Ridling, Zeiger*, and *A v. B* then balanced the particular relevancy of polygraph evidence in the cases before them against the policy reasons for excluding the evidence—fear that the trier of fact will take the evidence as conclusive,[41] dislike for testimony that usurps the traditional function of the jury,[42] and concern that collateral material likely to cause jury distraction and to waste time will be introduced. The courts' fear of the effect of polygraph evidence on the minds of the triers of fact is what originally led them to require, in effect, that the polygraph be infallible.[43] But the *Ridling* and *Zeiger* courts decided that by using limiting instructions and by permitting extensive cross-examination pointing out to the jury the polygraph's shortcomings, the trial judge could adequately control the jury's perception of the polygraph's reliability.[44]

As to the usurpation question, *Zeiger* noted that, although the government in *Frye* had argued the point on appeal, the court "made no comment in agreement with this position, but on the contrary, indicated that at some point 'the evidential force of the principle must be recognized.' "[45] Furthermore, as Professor Strong pointed out:

> Traditionally, even ordinary expert testimony on "ultimate issues" has been judicially frowned upon. If incursion upon the jury function is viewed as a serious objection, many scientific principles suffer from the liability that they are commonly and necessarily incorporated into devices or tests the results of which, unlike expert opinion, cannot be broken down into less conclusory but still helpful data.[46]

The fear of causing jury distraction to unnecessary collateral issues does not truly arise by the mere admission of polygraph evidence; when analyzed, the fear is that the main issue would take a back seat as the parties attempt to prove or disprove the utility of the polygraph and that

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[41]*See, e.g.*, Highleyman, *supra* note 15, at 63: "[T]he use of 'lie detector' evidence invites confusion between (1) the reliability of the objective physiological facts which are recorded by the polygraph, and (2) the reliability of the subjective inferences of truth or deception which are drawn from those facts by the examiner."

[42]*See* Strong, *supra* note 34, at 13.

[43]*See, e.g.*, People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955) (seventy-five to ninety percent accuracy held insufficient); People v. Forte, 279 N.Y. 204, 206, 18 N.E.2d 31, 32 (1938) ("Can [the lie detector] be depended upon to operate with complete success on persons of varying emotional stability?").

[44]350 F. Supp. at 691: 350 F. Supp. at 98.

[45]350 F. Supp. at 691-92 n.32.

[46]Strong, *supra* note 34, at 13.

the admission of polygraph results with respect to one witness would necessitate that all witnesses be subjected to it. The first consideration is valid only in the sense that the introduction of any complicated and disputed testimony will be followed by other supporting or contradicting evidence; however, the court has the power to minimize this result by limiting the extent of supporting or contradicting testimony.[47] The second concern—that all witnesses testifying would be required to submit to a polygraph test—is one that has been raised by several courts.[48] Considering the waste of time and marginal usefulness of such evidence, *Ridling* stated that it would not allow such a wide use of the polygraph:

> It is argued that polygraph use will result in the injection of many collateral issues in the trial. This could be the case if the Court were to permit its use on all witnesses as has been urged by the defendant in this case. This Court is not willing to go so far.[49]

The trial court in *A v. B*, also, would not have allowed such a broad application of the polygraph on the trial process; it held that polygraph use was limited to the parties to the proceeding who testified.[50] *Zeiger* did not even refer to this objection.

Since the reliability of the polygraph depends largely on the examiner who gives the test and interprets the physiological responses recorded,[51] the court in *Ridling* was especially concerned about the interpreter's qualifications.[52] Although *Zeiger*[53] and *A v. B*[54] both discussed the qualifications of the polygraph expert who had given the particular test in each case, neither court expressed the concern that *Ridling* did. This can be explained, at least in part, by the fact that, unlike *Ridling* in which the defendant had personally chosen his examiner,[55] the polygraph experts in *Zeiger* and *A v. B* were not chosen by the defendants and thus were not likely to be partial to them.[56]

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[47]350 F. Supp. at 691.

[48]*See, e.g.*, State v. Lowry, 163 Kan. 622, 627, 185 P.2d 147, 150 (1947); Henderson v. State, 94 Okla. Crim. 45, ___, 230 P.2d 495, 504, *cert. denied*, 342 U.S. 898 (1951).

[49]350 F. Supp. at 96.

[50]___ Misc. 2d at ___, 336 N.Y.S.2d at 844.

[51]*See, e.g.*, REID & INBAU 235; Skolnick, *supra* note 13, at 705; Comment, *The Polygraph Revisited: An Argument for Admissibility*, 4 SUFF. L. REV. 111, 119-20 (1969).

[52]350 F. Supp. at 96.

[53]350 F. Supp. at 690.

[54]___ Misc. 2d at ___, 336 N.Y.S.2d at 842.

[55]350 F. Supp. at 96-97.

[56]In *Zeiger* the examiner was a member of the police force at the time the test was given. 350

As *Ridling* pointed out, the problem of expert qualification was accentuated in that case because the polygraph profession has not as yet developed sufficient standards by which to police itself.[57] Consequently, *Ridling* concluded that "[b]ecause it may not be easy for the Court to determine the quality of the polygraph experts tendered by the defendant, it seems proper in such cases to cause polygraph experts of the Court's own choosing to be appointed who should be directed to test the defendant."[58] In addition, *Ridling* limited the admissibility of evidence of polygraph results, whether by the testimony of the court-appointed expert or by that of the defendant's expert, to those cases in which the court-appointed expert can definitely conclude that the subject is or is not telling the truth.[59] If the court-appointed expert can make such a conclusion, then the evidence is admissible, the trial court said, whether his interpretation agrees with that of the defendant's expert or not.[60]

No judicial procedures designed to minimize the importance of the objectionable features of polygraph evidence, short of exclusion, can altogether eliminate the risk of admitting unreliable results. Thus the court must ultimately balance the probative value of the polygraph evidence in the light of the particular circumstances in which it is sought to be introduced against the considerations that argue for exclusion. The courts in *Ridling* and *A v. B* stated that they favored limiting the admis-

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F. Supp. at 686. In *A v. B* the expert was the official polygraph examiner for the county. ___ Misc. 2d at ___, 336 N.Y.S.2d at 842.

[57]350 F. Supp. at 96. Because of the problem of a lack of standards among the polygraph profession, REID & INBAU at 257 suggested that:

> Before permitting the results [of a polygraph test] to be admitted as evidence in any case, however, the court should require the following: (1) That the examiner possess a college degree. (2) That he has received at least six months of internship training under an experienced, competent examiner or examiners with a sufficient volume of case work to afford frequent supervised testing in actual case situations. (3) That the witness have at least five years' experience as a specialist in the field of Polygraph examinations. (4) That the examiner's testimony must be based upon Polygraph records that he produces in court and which are available for cross examination purposes.

[58]350 F. Supp. at 96-97. Because of the particular danger of polygraph error caused by the examiner's inability in some cases to interpret the results correctly when the subject is psychologically abnormal, some commentators have suggested that obtaining a competent examiner is not enough. Instead, they recommend using a psychologist who can more readily observe the subject's behavior in addition to the examiner. Comment, 4 SUFF. L. REV., *supra* note 51, at 122 n.60.

[59]350 F. Supp. at 97.

[60]*Id.* Since truth was a substantive issue in the case, *Ridling* stated that the results of the test could be used by either party. *Id.* at 98. Furthermore, because a polygraph test requires the voluntary consent of the subject, the court felt that any privilege against self-incrimination could be waived if adequate warnings were given. *Id.* at 97.

sibility of polygraph evidence to those instances in which the question of truthfulness is of extraordinary importance.[61] As *Ridling* pointed out:

> A perjury case is based on "willfully" or "knowingly" giving false evidence. The experts all agree that the polygraph examination is aimed exactly at this aspect of truth. A subject . . . may be honestly mistaken as to a fact and, if he answers according to his honest belief, the operator will interpret the results as being a truthful answer.[62]

The court in *A v. B* allowed polygraph testimony for the purpose of attacking the credibility of the mother who had testified.[63] The trial court opinion noted that on this issue the polygraph was far more reliable than many kinds of evidence, such as past conviction of crime or reputation for truthfulness, that courts have normally allowed on the question of credibility.[64] Thus, *Ridling* and *A v. B* both held that the usefulness of polygraph evidence outweighed the exclusionary considerations when a person's truthfulness is a direct issue in the case or has been put in issue by his own testimony. But both courts were careful to distinguish credibility issues from questions of mere accuracy in order to prevent the introduction of polygraph evidence under circumstances in which the jury might interpret favorable polygraph results as signifying the accuracy of a witness's recollection of facts.[65]

In contrast to *Ridling* and *A v. B*, *Zeiger* placed no limitation on the use of the polygraph; instead, the court stated it would allow the polygraph examiner "to assess the truthfulness of the defendant's answers to factual questions concerning the crime [of assault with intent to kill while armed] . . . ."[66] If this means that the polygraph results were admissible only to show the defendant's subjective intent, then the scope of admissibility is probably no wider in *Zeiger* than in *Ridling*.[67]

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[61]350 F. Supp. at 98; ___ Misc. 2d at ___, 336 N.Y.S.2d at 843.

[62]350 F. Supp. at 93.

[63]___ Misc. 2d at ___, 336 N.Y.S.2d at 842.

[64]*Id.* at ___, 336 N.Y.S.2d at 843-44.

[65]350 F. Supp. at 98; ___ Misc. 2d at ___, 336 N.Y.S.2d at 843.

[66]350 F. Supp. at 691.

[67]The element of intent in the crime charged against the defendant in *Zeiger* is the same as the knowledge requirement for a perjury conviction in *Ridling*. Both are subjective, as opposed to objective, elements of a crime. The ability of the polygraph to accurately detect the subject's veracity on each element is not conditioned on the subject's being able to recollect the actual facts. *See* text accompanying note 62 *supra*. At least one court, however, has excluded polygraph evidence which a defendant sought to introduce on the issue of criminal intent because the defendant was intoxicated at the time of the crime and because the defendant could have rationalized his intentions between the time of the crime and the time of the polygraph test five months later. State v. Hollywood, 138 Mont. 561, 575, 358 P.2d 437, 444 (1960).

However, the quoted language is just as capable of being interpteted to permit the polygraph evidence to show the defendant's belief as to how the crime occurred. Such a decision is disturbing on at least two counts. First, the polygraph only detects deception when there is a conscious conflict.[68] It is possible for the subject to be honestly mistaken in his memory of the events that occurred[69] or for the subject to have so rationalized the crime[70] that there is no conflict. In such a case the polygraph is incapable of detecting the mistaken recollection. Secondly, the polygraph examiner cannot be cross-examined as to any fine but crucial distinctions between the way the events actually occurred and the way the facts were posed to the subject during the polygraph examination.[71] Since the examiner's opinion is limited to his interpretation of the actual responses given to the test questions, any statement by him on the effect that such distinctions would have on the polygraph results is no more than an unsupportable opinion. Only the defendant can furnish the needed answer; however, since he has a constitutional privilege against self-incrimination, he can refuse to testify and leave the jury only to guess whether or not any crucial distinctions exist.[72]

The high reliability of the polygraph cannot be denied. Neither can it be gainsaid that the polygraph intrudes on the traditional function of the jury and is subject to the possibility of jury misuse. For too long, however, the courts have preempted a rational consideration of these countervailing points by the use of the nebulous "general acceptance" standard. *Ridling, Zeiger*, and *A v. B* have removed this obstacle to objective analysis. By so doing, these courts were able at least to begin to formulate guidelines under which polygraph evidence can be properly admitted. This is a welcome approach, regardless of what one may think of the courts' resolutions of the issues they have raised. *Ridling* and *A v. B* were careful in limiting the issues to which they thought polygraph testimony would be of more than marginal utility. *Zeiger*, on the other

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[68]*See* text accompanying note 16 *supra*.

[69]*See* text accompanying note 62 *supra*.

[70]This reason led the court in State v. Hollywood, 138 Mont. 561, 575, 358 P.2d 437, 444 (1960), to exclude the test results of an examination given over five months after the commission of the crime. *But see* REID & INBAU 179-80.

[71]*See* Boeche v. State, 151 Neb. 368, 377, 37 N.W.2d 593, 597 (1949).

[72]*See* State v. Bohner, 210 Wis. 651, 659, 246 N.W. 314, 318 (1933). However, since this issue has not actually been presented to the courts, it is possible that the introduction by a defendant of favorable polygraph results may be held to constitute a waiver, at least as to those matters raised directly by the polygraph evidence, of his fifth amendment privilege against self-incrimination.

hand, did not so limit the circumstances of admission. The usefulness of polygraph evidence on the *Zeiger* facts is not so apparent, and the evidence should have been excluded. However, the usefulness of the evidence in the narrow circumstances under which *Ridling* and *A v. B* allowed admissibility is apparent. The experience gained from such admissions may then be used to guide the courts in determining whether the admissions door should be opened wider.

L. JAMES BLACKWOOD

Evidence—Testimony of Government Informers in Narcotics Cases

The practice of using informers in an effort to apprehend narcotics peddlers and as a source of information is openly admitted by prosecutors and police officials.[1] This standard technique is considered "essential" in combating the drug traffic since there are no complaining witnesses or victims—only willing sellers and willing buyers—a fact that forces law enforcement officers to "initiate cases" to combat the drug trade.[2] It has been estimated that almost ninety-five percent of all federal narcotics convictions are obtained as the result of the work of informers[3] and that any government success in penetrating large selling organizations has been possible only through the use of informers and undercover agents.[4]

In order for the government to infiltrate the illicit drug traffic, it must use leverage to obtain the cooperation of reluctant participants in the traffic.[5] An informant usually is a person who is facing criminal charges and who is induced into cooperating with the government in order to receive a "break" in the criminal process.[6] If an informant is

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[1]A. LINDESMITH, THE ADDICT AND THE LAW 36 (1965) [hereinafter cited as LINDESMITH]; U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 8 (1967) [hereinafter cited as TASK FORCE REPORT].

[2]TASK FORCE REPORT 8.

[3]Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 403 (1959).

[4]*Id.*; LINDESMITH 43. The Bureau of Narcotics operates on the premise that the more "buys" set up and the more violators enlisted as informers, the deeper the government will penetrate into organized crime. Comment, *Informers in Federal Narcotics Prosecutions*, 2 COLUM. J.L. & SOC. PROB. 47 (1966).

[5]LINDESMITH 35.

[6]TASK FORCE REPORT 8. The "break" given informants is usually a reduction in charges.

not facing criminal charges, his motivation for supplying information may arise out of revenge or monetary reward.[7]

Because drug addicts are considered crime-prone[8] and are directly involved in the drug trade, they make up a large percentage of the government's informers.[9] Although drug addiction itself is not a crime,[10] the addict cannot maintain his habit without violating some criminal laws against purchase and possession of narcotics. Thus the addict is in perpetual violation of one or several criminal laws,[11] and the government has enormous leverage in securing his cooperation through the threat of heavy mandatory penalties.[12] Additionally, arrests of addicts, whether based on legitimate charges or for harassment purposes,[13] provide the government with an extremely persuasive means of "inducing" cooperation by bribing the addict with drugs[14] or forcing the beginnings of withdrawal symptoms.[15]

A danger arises, however, in the fact that the addict-turned-informer is useless unless he provides meaningful tips or arranges sales that lead to prosecution. Therefore, an informer whose primary interest is in obtaining drugs to support his habit and avoiding punishment might commit perjury, "frame" another addict, or make a false identification to make a case.[16] Since the informer is usually motivated by his own self-interest, the problem is further complicated when the government prosecutor relies heavily on the testimony of such an informer. The credibility of the informer is questionable, and the need for protecting the defendant's rights through impeachment and jury instructions as to the informer's credibility raises several difficult questions: to what extent should the court allow the defense to impeach the credibility of the informer, when should cautionary instructions be given about the informer's credibility, and what should be included in such instructions? The answer to these questions must recognize the government's need to use informers effectively in narcotics cases and the defendant's right to be protected against fabricated charges and entrapment.

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[7] *Id.*

[8] *Id.* at 10.

[9] *E.g.*, LINDESMITH 35-36; TASK FORCE REPORT 8.

[10] Robinson v. California, 370 U.S. 660 (1962).

[11] TASK FORCE REPORT 10.

[12] LINDESMITH 35.

[13] *Id.* at 36-38.

[14] T. DUSTER, THE LEGISLATION OF MORALITY 194-95 (1970).

[15] *Id.*; LINDESMITH 38.

[16] LINDESMITH 50; Comment, 2 COLUM. J.L. & SOC. PROB., *supra* note 4, at 48-49.

The Supreme Court in *On Lee v. United States*[17] recognized that the government's use of informers may give rise to serious questions of credibility entitling a defendant "to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."[18] In a recent federal decision, *United States v. Kinnard*,[19] the approach put forth in *On Lee* was further examined by the District of Columbia Circuit as to paid addict informers.

In *Kinnard* two defendants, Kinnard and Payne, were convicted for possession and sale of heroin and failure to pay tax through the efforts of a government informer who had arranged a sale between government agents and the defendants.[20] The informer admitted that he was a narcotics user and that prior to the time he became an informer he was in custody in the District of Columbia charged with four counts of possession of narcotics, sale of narcotics, and burglary. After he became an informer, the charges were reduced to two misdemeanors to which the informer pleaded guilty and received two years probation. The informer also received at least two hundred dollars, and his family was relocated at the government's expense.

After his release, the informer arranged a sale with the defendant Payne for the benefit of the informer's friend, who in reality was a narcotics agent. There was no evidence as to the nature of the negotiations between the informer and Payne except the informer's account, which indicated that Payne was a willing seller.[21] The actual sale transpired at a parking lot in which Payne, the informer, and his "friend" met with Payne's source, Kinnard, who brought the heroin and consummated the sale. This transaction was witnessed by the undercover agent acting as the informer's friend and another agent who observed from a distance and identified the two defendants.[22]

Although neither defendant testified in his own behalf, they both raised the defense of entrapment by impeachment of the government's informer on cross-examination.[23] The trial judge precluded cross-examination of a narcotics agent as to the general reliability of addicts and refused to give any special instructions on the unreliability of ad-

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[17]343 U.S. 747 (1952).
[18]*Id.* at 757 (dictum).
[19]465 F.2d 566 (D.C. Cir. 1972) (per curiam).
[20]*Id.* at 568 (Bazelon, C.J., concurring).
[21]*Id.* at 576.
[22]*Id.* at 569.
[23]*Id.*

dicts. Defense counsel then sought to impeach the credibility of the informer, who denied being an addict, by examining the needle marks on the informer's arms and by introducing extrinsic evidence to prove the frequency of his drug use. Since the informer admitted being a user, the trial judge denied a request for a dermatology examination as raising collateral issues.

Although each judge wrote his own opinion, the majority of the court agreed that the trial judge erred in denying defense counsel the opportunity to develop extrinsic evidence as to whether the government informer was an addict.[24] The majority reasoned that although extrinsic evidence ordinarily may not be used to impeach a witness's general credibility or his specific testimony on a collateral matter, when the government relies on the testimony of a paid informer about whom there is suspicion of narcotic addiction, the evidence is probative of a special motive to lie or fabricate a case against the defendant[25] and is therefore admissible.[26]

Judge Bazelon in his concurring opinion argued that the defendants should automatically be entitled to a special cautionary instruction as to the unreliability of addict informers once the informer's status as an addict is established.[27] He would not require that a request for special instruction be made by counsel but would make it mandatory for the court to submit such instructions to counsel as a routine set of instructions once the status of the informer is established.[28] Since the cross-examination that might have established status was erroneously excluded, the majority assumed for purposes of appeal that the informer was an addict. In Judge Bazelon's view, the trial court's failure to provide the special instructions constituted error.[29] Judge Leventhal on the other hand would not find the defendants entitled to special instructions even if addict status were established unless counsel made a request for such instructions and the informer's testimony was not corroborated in any material aspect.[30] Although the special cautionary instructions had not been requested by counsel in accordance with Rule

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[24] *Id.*

[25] *Id.* at 574 (Bazelon, C.J., concurring), 579-80 (Leventhal, J., concurring).

[26] *Id.* at 573-74 (Bazelon, C.J., concurring), 579-80 (Leventhal, J., concurring).

[27] *Id.* at 569.

[28] *Id.* at 573.

[29] *Id.* at 575.

[30] *Id.* at 577.

30 of the Federal Rules of Criminal Procedure,[31] the majority of the court recognized that the trial judge as a practical matter had foreclosed a request from defense counsel by announcing his intention to refuse to give such instructions during the trial in anticipation of counsel's later request.[32]

The court held that the trial judge's failure to give the cautionary instruction did not constitute reversible error unless it worked a "substantial prejudice" on the defendants.[33] Judge Bazelon applied the following test: "Failure to give the instruction is prejudicial when the addict-informer's testimony contributes a material aspect of the prosecution's case, and it is not fully corroborated by other witnesses."[34] Under this test, the majority found that there was sufficient corroboration of the informer's testimony as to Kinnard's involvement for the jury to have found he was not induced but was predisposed to commit the crimes.[35] The majority also found that the only evidence that Payne was a willing seller was the informant's account of his negotiations with Payne to make the sale. Since it took several attempts to get Payne to make the sale, the court concluded that Payne could have been induced against his will and therefore failure to give the cautionary instruction was prejudicial error calling for reversal of Payne's conviction and a new trial.[36]

Judge Adams, dissenting, would have affirmed Payne's conviction as well. Despite the limitations on cross-examination, the dissent felt that defense counsel had developed a considerable amount of evidence to impeach the informant's credibility and that the trial judge did not

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[31]Rule 30 provides that any party may file a written request for court instructions to the jury at the end of the evidence or as the court reasonably directs. The requests must be written and no party may assign as error "any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." FED. R. CRIM. P. 30.

[32]465 F.2d at 567-69. The dissent rejected the argument that a request in accordance with Rule 30 for a cautionary instruction would have been futile because of defense counsel's statement that he was not requesting an instruction on addicts or their reliability. Assuming that the issue of adequacy of instructions was properly preserved for appeal, the dissent felt the addict-informer instruction was properly withheld because it had not been established that the informer was an addict. *Id.* at 583 (Adams, J., dissenting).

[33]*Id.* at 575 (Bazelon, C.J., concurring).

[34]*Id.* The only difference in Judge Leventhal's test for determining reversible error appears to be one of semantics. Judge Bazelon determines if there is error and then if it is reversible error while Judge Leventhal just determines if there is reversible error leaving out the intermediate step.

[35]*Id.* at 577 (Bazelon, C.J., concurring).

[36]*Id.* at 576-77 (Bazelon, C.J., concurring), 580 (Leventhal, J., concurring).

abuse his discretion to limit the scope of cross-examination since it did not harm the defendants' cases.[37] The defense counsel's inquiry regarding the informant's needle marks was excludable as collateral,[38] according to the dissent, because it tended to show only that he lied about the frequency of his use of narcotics and did not go "directly to defendants' commission of the prescribed acts, their willingness to commit such acts, or to the informer's credibility . . . ."[39] Had the trial judge allowed the defense to bring in an expert to interpret the needle marks on the informer's arms, the dissent felt that the prosecutor would have brought in an expert to give a different interpretation. Such "a trial-within-a-trial [is] the very result the collateral impeachment rule is designed to prevent . . . ."[40]

Both concurring opinions that made up the majority were based on judicial opinions that supported the necessity of a cautionary instruction when paid government informers testify in criminal cases.[41] Both opinions relied on an earlier District of Columbia Circuit decision, *Fletcher v. United States*,[42] in which the court recognized that paid informers have a self-interest motive to lie that creates the need for a special cautionary instruction on their credibility in order to protect the defendant's rights. The *Fletcher* court reversed the defendant's conviction that had been based on the uncorroborated testimony of a paid government informer who was also an addict and a narcotics peddler who had previously been convicted and sentenced for violating the narcotics laws. The court held that the trial judge's refusal to grant defendant's request for a special cautionary instruction as to the testimony of a paid informer was a prejudicial error:

> [W]here the entire case depends upon [a paid informer's] testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interest. Here, admittedly, the usefulness of the witness—and for which he received pay-

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[37] *Id.* at 581-82.

[38] The general rules of evidence prohibit extrinsic evidence to contradict a witness on collateral matters. MCCORMICK ON EVIDENCE § 47, at 98 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; 3A J. WIGMORE, EVIDENCE § 1001 (J. Chadbourn rev. 1970) [hereinafter cited as WIGMORE].

[39] 465 F.2d at 582.

[40] *Id.*

[41] *Id.* at 570 (Bazelon, C.J., concurring), 577 (Leventhal, J., concurring).

[42] 158 F.2d 321 (D.C. Cir. 1946).

> ment from the agent—depended wholly upon his ability to make out a case. No other motive than his own advantage impelled him in all that he did.[43]

The *Fletcher* court further noted the fact that the informer was an addict and stated that it was a "well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned . . . ."[44] Considering that the informer was both an addict and paid by the government, the court held that the defendant's rights could only be protected by either corroboration of the informer's testimony or a special cautionary instruction to the effect that the testimony should be "received with suspicion" and "acted upon with caution."[45] Although the District of Columbia Circuit later interpreted *Fletcher* as applying to paid informers generally whether or not they are addicts,[46] one circuit appears to have limited *Fletcher* to its facts.[47]

Other federal circuits have followed the basic principles set forth in *Fletcher*,[48] which were similarly expressed by the later Supreme Court decision, *On Lee v. United States*,[49] and have applied them to informers whose testimony may have been influenced by various sources of bias such as narcotics addiction[50] or use,[51] being paid,[52] subjection to pending criminal charges,[53] and numerous combinations of these sources of bias.[54] Although most decisions in this area have turned on whether the

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[43]*Id.* at 322.

[44]*Id.*

[45]*Id.*

[46]Godfrey v. United States, 353 F.2d 456 (D.C. Cir. 1965) (per curiam).

[47]*See* United States v. Green, 327 F.2d 715 (7th Cir. 1964).

[48]*See*, e.g., Orebo v. United States, 293 F.2d 747 (9th Cir. 1961); Joseph v. United States, 286 F.2d 468 (5th Cir. 1960); United States v. Masino, 275 F.2d 129 (2d Cir. 1960).

[49]343 U.S. 747 (1952). Although *On Lee* dealt with a "wired for sound" informer who did not testify at the trial of defendant, the dictum noted in the text accompanying note 18 *supra* has provided courts with guiding principles by which to deal with the testimony of any government informer.

[50]*See, e.g.*, United States v. Gilbert, 447 F.2d 883 (10th Cir. 1971); Young v. United States, 297 F.2d 593 (9th Cir. 1962).

[51]*See, e.g.*, Todd v. United States, 345 F.2d 299 (10th Cir. 1965) (informer also had been convicted of armed robbery, escaped from prison and associated with men of lewd character).

[52]*See, e.g.*, Sartain v. United States, 303 F.2d 859 (9th Cir. 1962); Orebo v. United States, 293 F.2d 747 (9th Cir. 1961).

[53]*See, e.g.*, United States v. Green, 327 F.2d 715 (7th Cir. 1964) (unindicted co-conspirator); United States v. Masino, 275 F.2d 129 (2d Cir. 1960) (issue raised as to informer's use of narcotics). All cases in which an accomplice testifies for the government as an informer would fall within this area.

[54]*See, e.g.*, United States v. Griffin, 382 F.2d 823 (6th Cir. 1967) (paid and addict); Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 984 (1965) (paid

informer's testimony is corroborated or not,[55] some decisions have divided on the issue of whether or not a request for a cautionary instruction must be properly submitted by counsel and refused by the trial judge before there are grounds for reversal.[56] In *United States v. Griffin*[57] the Sixth Circuit held that a cautionary instruction was mandatory when the testimony of a paid government informer, who was also a narcotics addict, was crucial and uncorroborated even though the defense failed to make a request for the special instruction. Although the District of Columbia Circuit has held in a case involving a paid-addict-informer that a cautionary instruction must be given when requested unless there is corroboration of the informant's testimony,[58] it has urged trial courts to caution the jury about the unreliability of informant testimony even in absence of a request.[59] In *Kinnard* Judge Bazelon indicated that the better rule in the case of an addict informer would be to have the court give the cautionary instruction on its own motion.[60] This view provided the major difference between the concurring opinions in *Kinnard*, for Judge Leventhal followed the view that only upon a proper request should a special cautionary instruction be available.[61] Since the United States Supreme Court has held that the conviction of a defendant based solely on the testimony of a government informer would be allowed to stand even in absence of substantial corroboration,[62] a mandatory cautionary instruction would add a condition on the use of government

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and addict); Joseph v. United States, 286 F.2d 468 (5th Cir. 1960) (paid and serving a prison term for narcotics violations).

[55]*See, e.g.*, Todd v. United States, 345 F.2d 299 (10th Cir. 1965); Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 984 (1965). The concern over corroboration of the informer's testimony stems in many cases from the possibility of the defendant being forced or entrapped into committing a crime. Where the government merely affords opportunities or facilities for the commission of an offense, it does not defeat the prosecution; however, when the criminal design originates not with the accused, but is conceived in the mind of government officials and the accused is, by persuasion, deceitful representation or inducement, lured into commission of the criminal act, the government is precluded from prosecuting. *See* Sorrells v. United States, 287 U.S. 435 (1932). *See also* Williams, *supra* note 3.

[56]*See, e.g.*, Young v. United States, 297 F.2d 593 (9th Cir. 1962); Joseph v. United States, 286 F.2d 468 (5th Cir. 1960).

[57]382 F.2d 823, 829 (6th Cir. 1967).

[58]Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 984 (1965).

[59]Cratty v. United States, 163 F.2d 844 (D.C. Cir. 1947).

[60]465 F.2d at 569, 572.

[61]*Id.* at 577.

[62]*See* Hoffa v. United States, 385 U.S. 293 (1966); On Lee v. United States, 343 U.S. 747 (1952).

informers that the Supreme Court has not required. The dictum in *On Lee* acknowledges only that the defendant is "entitled" to have the issue of the informant's credibility submitted to the jury, not that it "must" be submitted automatically without request.[63]

Although most federal cases in this area have not been faced with the issues involving the scope of impeachment on cross-examination of an informant that were raised in *Kinnard*, such problems were examined in *United States v. Masino*.[64] In that case the defendant's conviction was based almost entirely upon the uncorroborated testimony of a paid informer and the defendant's accomplice. The defendant contended on appeal that the trial court erred in restricting cross-examination of the two witnesses, in admitting improper rebuttal testimony, and in refusing to give a cautionary instruction to the jury.[65]

The informer admitted that he was a former addict on cross-examination but claimed that he was no longer a user. The defense sought to show that the informer was still a user, that the informer was arrested and charged with possession of a syringe and hypodermic needle, and that the charges against the informer were subsequently dropped on request of the prosecutor. However, the trial judge excluded both the proffered evidence of the charge and its subsequent disposition. The appellate court held that the trial judge committed substantial error in restricting cross-examination of the informer since the testimony sought was highly relevant to the informer's motives for testifying as a government witness.[66] As in *Kinnard*, the court in *Masino* recognized that cross-examination that is directed at revealing bias or interest on the part of the witness is proper and that the widest possible latitude should be allowed in cross-examination where a witness is being questioned as to possible motives for testifying falsely.[67] The *Masino* court also found substantial error in the trial judge's failure to give a requested cautionary instruction as to the credibility of the informer and the accomplice since the government's case depended almost entirely upon the testimony of the two witnesses and was uncorroborated.[68]

In both *Masino* and *Kinnard* the trial judges felt that cross-examination of the informant as to his addiction and use of narcotics

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[63]See text accompanying note 18, *supra*.
[64]275 F.2d 129 (2d Cir. 1960).
[65]*Id.* at 131.
[66]*Id.* at 132.
[67]*Id.*
[68]*Id.* at 133.

was collateral to the issues in the case. A court's fear of undue delay and a trial-within-a-trial on collateral issues is a very legitimate concern, as the dissent in *Kinnard* noted.[69] However, by the classical approach to determining what is collateral, the appellate court reversals in both cases were correct. Whether the defense counsel's theory of impeachment is based on impeachment by contradiction, as the dissent in *Kinnard* indicated,[70] or by prior inconsistent statements, the test for collateralness provides that facts which are independently provable by extrinsic evidence to impeach a witness are not "collateral."[71] One type of facts which meet this test are those which show bias or self-interest.[72]

Courts have long recognized that facts introduced to impeach credibility by showing bias are admissible and provable by extrinsic evidence,[73] but have divided as to the foundation required before extrinsic evidence can be introduced to show bias. The majority approach requires that before a witness can be impeached by calling other witnesses to prove acts or declarations showing bias, the witness under attack must first be asked about these facts on cross-examination.[74] A minority of courts does not impose this requirement.[75] The reason for the majority approach is often said to be based on fairness to the witness, for he might be able to explain the facts without extrinsic evidence.[76] However, the most logical reason is the time saved by making extrinsic evidence unnecessary if the witness adequately explains the acts or declarations.[77] It is acknowledged, however, that when the main circumstances from which the bias proceeds have been proved, the trial judge has discretion to determine how far the details, whether on cross-examination or by other witnesses, may be allowed to be brought out.[78]

The dissent in *Kinnard* recognized this discretion in the trial judge and argued that enough evidence had been introduced on cross-examination of the informant to have impeached the informant's credibility and that any further questions into the area would have been

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[69]465 F.2d at 582.

[70]*Id.*

[71]McCORMICK § 36, at 70-71, § 47, at 98 & n.49; WIGMORE §§ 1003, 1020.

[72]McCORMICK § 36, at 71, § 47, at 99; WIGMORE §§ 1005, 1022.

[73]McCORMICK § 40, at 78; WIGMORE § 948.

[74]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[75]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[76]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[77]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[78]McCORMICK § 40, at 81; WIGMORE § 951.

merely cumulative. However, the numerous sources of bias brought out on cross-examination of the informant—prior drug use, being paid, and pending criminal charges[79]—would not justify limiting cross-examination as to the informant's addiction. Each source of bias is different, and to say that establishing the informer's addiction after his admitting prior use of drugs would be merely cumulative completely ignores the major difference between an addict, who must have drugs to exist,[80] and a user who may exist without them. A number of courts, in emphasizing the need for a cautionary instruction, have noted that an addict (not merely a user) is an inherent perjurer when it comes to his own interest.[81]

Although it may be argued that court rules should not tamper unduly with the system of using informers to combat today's drug problems for fear of sacrificing the security of society, the serious unreliability problems which government informers create require that the balance be struck in favor of protecting the rights and liberties of the defendant. In order to protect the rights of the defendant, the courts should allow a wide latitude on cross-examination of the informer in the area of impeachment by bias. The more facts brought out relating to different sources of bias, the greater the informant's motive to fabricate or lie and therefore the defendant should be allowed increasing flexibility to reveal these facts to the jury.

The fact that an informant is paid or is subject to pending criminal charges provides motive to fabricate or lie, but the fact that the informant is an addict creates a far greater motive to fabricate or lie because his habit, of necessity, requires that he remain free and out of jail. Rarely would an addict not be subject to pending criminal charges when he is induced into providing his services, so this double factor provides an awesome threat to the rights of a defendant to a fair trial. The mandatory cautionary instruction requirement advocated by Judge Bazelon would provide the best means of protecting the defendant's rights. As pointed out by Judge Bazelon,[82] the cautionary instructions should be mandatory in the sense that the trial judge would automatically

[79]465 F.2d at 581-82. Informer also lied at an identification hearing, sold drugs and had a prior conviction for robbery.

[80]TASK FORCE REPORT 10.

[81]*E.g.*, United States v. Griffin, 382 F.2d 823, 828 (6th Cir. 1967); Fletcher v. United States, 158 F.2d 321, 322 (D.C. Cir. 1946).

[82]465 F.2d at 572-73.

submit such instructions to the defense counsel as a part of the trial court's routine set of instructions, and at this point the defendant could object to the instructions if they in any way prejudiced his defense.[83] A mandatory cautionary instruction rule would be easy for the trial judge to apply because the question of adequacy of corroboration would not be an issue he would have to resolve in determining whether to give the special instructions upon a request from defense counsel. In addition, as also pointed out by Judge Bazelon,[84] the problem of court-appointed attorneys who may not specialize in criminal cases and are not familiar with criminal rules of procedure would not work to the defendant's disadvantage if there was a failure to request special instructions in accordance with procedural rules.[85]

Under Judge Bazelon's approach, special instructions would become mandatory once the addiction status of a paid informer under pending criminal charges was established. However, regardless of whether an informer is an addict or not, the fact that the informer is either paid or under pending criminal charges should be sufficient to activate the mandatory cautionary instruction rule since there is sufficient motive to fabricate or lie without combination of all these sources of bias. The cautionary instructions should instruct the jury to scrutinize the informant's testimony closely for the purpose of determining whether it tends to place guilt upon a defendant in furtherance of the informer's own interest by noting the different sources of bias brought out on cross-examination that would supply such interest.

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[83]For example, where the defendant himself is an addict or all his witnesses are addicted to drugs, a cautionary instruction as to the unreliability of addict informers may prejudice his case. *See* Godfrey v. United States, 353 F.2d 456, 458 (D.C. Cir. 1966).

[84]465 F.2d at 573.

[85]It should be noted that the mandatory cautionary instruction approach does not provide for the strategical move which could be used by an experienced criminal attorney, having knowledge of his defendant's rights, of deliberately failing to request a cautionary instruction after realizing the trial judge has forgotten to submit the cautionary instruction to him and then upon return of the verdict arguing for a new trial based on the trial judge's oversight. However, if it could be shown that the attorney deliberately failed to request the instruction after realizing the trial judge's oversight, he may be estopped from claiming error on appeal. Proof of knowledge would be difficult to show but could be inferred from the attorney's background and experience in criminal law. In addition, the trial judge's oversight might not be reversible error on appeal due to substantial corroboration of the informant's testimony.

Income Tax—Dominant Motivation Test Adopted For Business Bad Debts

The United States Supreme Court, in *United States v. Generes*,[1] has attempted to provide a suitable test for distinguishing business bad debts from nonbusiness bad debts sustained by the individual taxpayer.[2] The distinction is an important one for the taxpayer because of the wide divergence in the tax treatment of the two; the business bad debt receives by far the greater tax benefits.[3] However, the Court has provided a test that will prove to be one of great difficulty in practice for the taxpayer.

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[1]405 U.S. 93 (1972).

[2]INT. REV. CODE OF 1954, § 166 provides in part:

(a) GENERAL RULE.—

(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

. . . .

(d) NONBUSINESS DEBTS.—

(1) General rule.—In the case of a taxpayer other than a corporation—

. . . .

(B) where any nonbusiness debt becomes worthless within the taxable year, the losses resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months.

(2) Nonbusiness debt defined.—For purposes of paragraph (1), the term "nonbusiness debt" means a debt other than—

(A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer; or

(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

Section 166(f), which deals with the categorization of business and nonbusiness debts in connection with the guarantor of certain noncorporate obligations, does not apply here since the obligation was clearly corporate.

Treas. Reg. § 1.166-5(b)(2) (1959) provides in part:

(2) . . . . The question whether a debt is a nonbusiness debt is a question of fact in each particular case. . . . For purposes of subparagraph (2) of this paragraph, the character of the debt is to be determined by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a *proximate* one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt comes within the exception provided by that subparagraph.

(Emphasis added.)

[3]A nonbusiness bad debt is treated as a short-term capital loss subject to restrictions of § 166(d)(1)(B) and §§ 1211 and 1212 of the Internal Revenue Code of 1954. Nonbusiness debts are also restricted by § 172(d)(4) of the Code for carryback purposes. Business bad debts, on the other hand, may be deducted against ordinary income; and the taxpayer is allowed to assert net operating loss carrybacks under section 172 of the Code for the unused portion of the claimed bad debt deduction. 405 U.S. at 95-96.

The test, which focuses on the "dominant motivation"[4] of the taxpayer, calls for a complex and difficult assessment by the trier of fact—an assessment that may be set aside on review only if found clearly erroneous.[5]

The *Generes* case involves the gray middle ground of the business and nonbusiness classifications under federal tax law. Generes was both an employee and a shareholder in a family-owned and -operated construction business. He thus had both a business and a nonbusiness interest in the corporation. The taxpayer's status as an employee qualified his interest as a business interest, while his role as a shareholder gave him a nonbusiness interest.[6] But the debt, for tax purposes, must be classed as either business or nonbusiness—it may not be apportioned.[7]

The taxpayer, who was president of the corporation, owned forty-four percent of its stock (on an original investment of 38,900 dollars). His employment with the business paid him 12,000 dollars a year for a work week of no more than six to eight hours. The taxpayer's work included reviewing bids and jobs, seeking and obtaining bank financing, making cost estimates, and assisting in securing bid and performance bonds. Other members of his family, including a son and two sons-in-law, owned the remainder of the stock in the corporation. Generes' total income averaged about 40,000 dollars a year from 1959 to 1962; some 19,000 dollars of this was received annually from a full-time position Generes held as president of a savings and loan association.[8]

In 1958 the taxpayer signed a personal agreement with a surety to indemnify the surety for any loss suffered by it in underwriting the corporation's contractual obligations.[9] The construction corporation in

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[4]*Id.* at 103-05.

[5]INT. REV. CODE OF 1954, § 7482(a), provides that decisions of the Tax Court shall be reviewed by the United States Court of Appeals "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury . . . ." Thus, findings of fact by the Tax Court will not be disturbed on review unless they are clearly erroneous. FED. R. CIV. P. 52(a).

[6]405 U.S. at 100-01. Since salary as an employee generates ordinary income and is taxed as such, a loss suffered by the taxpayer in protecting his salary will be allowed to offset ordinary income. On the other hand, an investor realizes capital gains on the appreciation of his investment. Due to the more favorable tax treatment allowed capital gains, as compared with ordinary income, bad debts incurred to protect an investment will correspondingly be treated as capital losses and offsets to ordinary income will be restricted under § 1211. *See* note 3 *supra.*

[7]405 U.S. at 96.

[8]*Id.* at 97-98.

[9]It is a common practice for shareholders of a close corporation, as here, to be required to pledge their own credit in borrowing funds. W. CARY, CASES AND MATERIALS ON CORPORATIONS 23 (1969).

1962 defaulted on two project contracts, and the taxpayer indemnified the surety to the extent of 162,104.57 dollars. The corporation went into receivership before the taxpayer was reimbursed, and the debt was not repaid. On his 1962 tax return the taxpayer claimed the loss as a business bad debt and deducted it from his ordinary income. Later he filed claims for refunds for the years 1959-1961, asserting net operating loss carrybacks under section 172 of the Internal Revenue Code of 1954 for the unused portion of the claimed bad debt deduction.[10] The Internal Revenue Service disallowed the claims, and Generes brought them before a jury in a suit for refunds in federal district court. At trial the taxpayer testified that his sole motive in making the indemnity agreement was to protect his employment with the corporation. The district court charged the jury, over the government's objection, that a "significant motivation" satisfied the requirement of the regulations that a business bad debt be "proximately related to" the trade or business of the taxpayer at the time the debt becomes worthless.[11] Judgment for the taxpayer resulted, and the government appealed. The Fifth Circuit approved the significant motivation standard and affirmed.[12]

A writ of certiorari was granted by the Supreme Court to resolve a conflict among the circuits as to whether a significant or dominant motivation test should be applied.[13] The Court rejected the significant motivation test adopted by both the Second and Fifth Circuits and ruled with the Seventh Circuit in adopting a test of dominant motivation for determining the proximity of the relationship between the debt and the taxpayer's trade or business. Using this test, the Court found that the debt sustained by the taxpayer Generes was a nonbusiness bad debt[14] and must treated as a short-term capital loss.[15] The distinction between

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[10]405 U.S. at 98-99.

[11]*Id.* at 99. The Regulation is reproduced in part in note 2 *supra.*

[12]United States v. Generes, 427 F.2d 279 (5th Cir. 1970). *See generally* 3 SW. U.L. REV. 135 (1971); 2 TEX. TECH L. REV. 318 (1971); 28 WASH. & LEE L. REV. 161 (1971).

[13]405 U.S. at 96.

[14]The Court ordered a judgment n.o.v. to be entered, stating:

> The conclusion we have reached means that the District Court's instructions, based on a standard of significant rather than dominant motivation, are erroneous and that, at least, a new trial is required. We have examined the record, however, and find nothing that would support a jury verdict in this taxpayer's favor had the dominant motivation standard been embodied in the instructions. Judgment n.o.v. for the United States, therefore, must be ordered.

The Court dismissed the taxpayer's own testimony as self-serving. *Id.* at 106.

[15]*Id.* at 96.

business and nonbusiness bad debts meant a difference of over 40,000 dollars in taxes for Generes.

In his opinion for the Court, Justice Blackmun noted the difference between the business and nonbusiness interests of the taxpayer. As a shareholder Generes had a nonbusiness interest. "It was capital in nature and it was comprised initially of tax-paid dollars. Its rewards were expectative and would flow not from personal effort, but from investment earnings and appreciation."[16] Generes' status as an employee was a business interest: "Its nature centered in personal effort and labor, and salary for that endeavor would be received. The salary would consist of pre-tax dollars."[17]

The Court cited the factors that led it to approve the dominant motive test: consistency with other sections of the Internal Revenue Code that deal with a business-nonbusiness distinction,[18] consistency with the Code's objectives and with an earlier decision of the Court,[19] and the superior workability of the dominant motivation standard. In attributing workability to the test, the Court noted that "[t]he trier . . . may compare the risk against the potential reward and give proper emphasis to the objective rather that to the subjective."[20] The Court added:

> By making the dominant motivation the measure, the logical tax consequence ensues and prevents the mere presence of a business motive, however small and however insignificant, from controlling the tax result at the taxpayer's convenience. This is of particular importance in a tax system which is so largely dependent on voluntary compliance.[21]

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[16]*Id.* at 100-01.

[17]*Id.* at 101.

[18]The Code, Justice Blackmun said, carefully distinguishes between business and nonbusiness items. In §§ 165, 162, and 166, the Code allows particular benefits for business losses, business expenses, and business bad debts, respectively. Many of these benefits are not available for nonbusiness losses, expenses, and bad debts. Justice Blackmun concluded that application of the significant motivation test to bad debts would have the effect of obliterating or blunting the meaningful distinction Congress intended between business and nonbusiness bad debts. *Id.* at 103-04. The Court also contended that the dominant motivation test strengthens and is consistent with the mandate of § 262 that " 'no deduction be allowed for personal, living, or family expenses' except as otherwise provided." The dominant motivation test, the Court added, "prevents personal considerations from circumventing this provision." *Id.* at 104-05.

[19]The Court asserted that the significant motivation test would "undermine and circumscribe" an earlier decision by the Court in Whipple v. Commissioner, 373 U.S. 193 (1963). The Court noted that *Whipple* emphasized that a "shareholder's mere activity in a corporation's affairs is not a trade or business." 405 U.S. at 104.

[20]405 U.S. at 104.

[21]*Id.*

The Court summarily rejected arguments that this decision is inconsistent with the Court's approval of a significant motivation standard for liability for the accumulated earnings tax under section 531 and for inclusion in the gross estate of a transfer made in contemplation of death under section 2035.[22] The Court also rejected definition of the term "proximate" in the tort sense.[23]

In applying the test of dominant motivation to the *Generes* situation, the majority evaluated the taxpayer's salary and his investment in light of the surety obligation he assumed. The Court concluded that "reasonable minds could not ascribe . . . a dominant motivation . . . to the preservation of the taxpayer's salary . . . ."[24]

Justice Douglas, in dissent, contended that the adoption of the dominant motivation test was an improper use of the Court to iron out ambiguity in the regulations. Repeating an argument he had made several times before,[25] Justice Douglas urged that the responsible remedy for ambiguity in the regulations or the Act was not judicial.[26]

No test or guide is offered in section 166 of the Code for determin-

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[22]*Id.* at 105. The Court cited in substantiation United States v. Donruss Co., 393 U.S. 297, 303 (1969), and Farmers' Loan & Trust Co. v. Bowers, 98 F.2d 794 (2d Cir. 1938), *cert. denied*, 396 U.S. 648 (1939). The application of a significant motivation standard in both § 531 and § 2035 favors the Government. Under *Donruss*, if tax avoidance is a significant purpose of an unreasonable accumulation of corporate earnings, then there will be a § 531 inclusion. *Bowers* provides that if a motive to avoid estate taxes played a "substantial" part in motivating pre-death transfers, then there will be inclusion in the gross estate under the "in contemplation of death" criterion of § 2035. The Court stated in *Generes* that: "Sections 531 and 2035 are Congress' answer to tax avoidance activity." 405 U.S. at 105.

[23]405 U.S. at 105.

[24]*Id.* at 107. In a concurring opinion, Justice Marshall added emphasis in the area of legislative history, concluding that the significant motivation test is wholly at odds with the goals of Congress. *Id.* at 107-12.

[25]Justice Douglas cited as indicative his dissent in United States v. Skelly Oil Co., 394 U.S. 678, 690-91 (1969).

[26]Justice Douglas explained that the ironing out of ambiguity in the Regulations or the Act requires "either a recasting of the Regulations by Treasury or presentation of the problem to the Joint Committee on Internal Revenue Taxation which is a standing committee of the Congress that regularly rewrites the Act and is much abler than are we in forecasting revenue needs and spotting loopholes where abuses thrive." 405 U.S. at 114-15. Justice Douglas added that "[r]esort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a larger purse and more endurance than any taxpayer." 405 U.S. at 115.

Justice Douglas also noted that Generes' assumption of the obligation was "proximately" related to his trade or business as the Regulations require. The bond was essential for the continued operation of the enterprise, and therefore the bond's assumption was required for Generes to maintain his job. "Whether it was a prudent act is not our concern. Nor is it our concern whether with the benefit of hindsight we can now say that signing the bond entailed risks wholly disproportionate to the stake Generes had in maintaining a job with a $12,000 a year salary." *Id.* at 114.

ing when a bad debt is a business bad debt. However, the regulations, as previously noted, do provide that the debt must be "a proximate one in the trade or business in which the taxpayer is engaged at the time the debt becomes worthless"[27] in order to qualify as a business bad debt. In 1963 the Supreme Court, in *Whipple v. Commissioner*,[28] indicated its approval of the proximate-relation test of the regulations by refusing to recognize a debt as a business bad debt where there was "no proof (which might be difficult to furnish where a taxpayer is the sole or dominant stockholder) that the loan was necessary to keep his job *or was otherwise proximately related* to maintaining his trade or business as an employee."[29] The Court in *Whipple*, as the Court's opinion in *Generes* points out,[30] also noted the special difficulty of distinguishing between business and nonbusiness bad debts where the taxpayer is both an employee and a shareholder:

> Even if the taxpayer demonstrates an independent trade or business of his own, care must be taken to distinguish bad debt losses arising from his own business and those actually arising from activities peculiar to an investor concerned with, and participating in, the conduct of the corporate business.[31]

Whipple has been interpreted in various ways: lower courts by turns have used it to justify the application of both the dominant and the significant motivation standards. The Second Circuit in late 1963 endorsed the test of significant motivation in *Weddle v. Commissioner*,[32] in which the majority pointed out that a requirement that the business motivation be primary was simply not present in either the statute or the regulations. Looking to the law of torts, which often uses the term "proximate," the majority determined that a cause may be proximate even though it is "secondary."[33] In a concurring opinion,[34] Chief Judge Lumbard endorsed the primary motivation standard. He contended that the test of significant motivation would always yield a judgment for the taxpayer, and he rejected the analogy to tort law.

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[27]Treas. Reg. § 1.166-5 (1959), quoted note 2 *supra*.
[28]373 U.S. 193 (1963); *see* note 19 *supra*.
[29]373 U.S. at 204 (emphasis added).
[30]405 U.S. at 102.
[31]373 U.S. at 202.
[32]325 F.2d 849 (2d Cir. 1963).
[33]*Id.* at 851.
[34]*Id.* at 852.

Despite this attempt in *Weddle* to determine the proper test for gauging the proximity of the relationship between the debt and the taxpayer's trade or business, many of the cases decided after *Weddle* did not invoke any particular test to analyze proximity.[35] But in 1969, in *Niblock v. Commissioner*,[36] the Seventh Circuit adopted the dominant motivation standard, stating that it was the only test capable of injecting sufficient certainty into the interpretation of section 166. The *Niblock* court cited *Whipple* to substantiate its adoption of the dominant motivation standard.[37]

The Supreme Court's endorsement in *Generes* of the Seventh Circuit's dominant motivation standard involves the federal judiciary in the complex inquiry into taxpayer motivation. The newly adopted standard, despite the statement of Justice Blackmun attributing "workability"[38] to it, may well prove to be more difficult to apply and may result in many inconsistent judgments. Motivation is highly elusive of effective evaluation. Men act and react for a multitude of reasons on the basis of stimuli that even they themselves often fail to recognize or appreciate fully. The more the courts are required to rely on the fact finder's assessment of the effect of these stimuli on taxpayer behavior, the more unsatisfactory become the dispositions that necessarily rely on that assessment. It is much easier to discover the presence or absence of a substantial business motivation than to determine whether a motivation is sufficiently substantial to be "dominant."

A further complication in the balancing of the motives is the definition of the key word "dominant." The Court does not define the term, and the trier of fact is left with a term that is just as ambiguous as the term "proximate" used in the regulations.[39] Does "dominant" mean the largest motive,[40] as for example a thirty percent motive with three

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[35]*See, e.g.*, Stratmore v. United States, 420 F.2d 461 (3d Cir. 1970); Lundgren v. Commissioner, 376 F.2d 623 (9th Cir. 1967); United States v. Clark, 358 F.2d 892 (1st Cir. 1966); Kelly v. Patterson, 331 F.2d 753 (5th Cir. 1964).

[36]417 F.2d 1185 (7th Cir. 1969).

[37]*Id.* at 1187.

[38]405 U.S. at 104.

[39]*See* note 2 *supra*.

[40]While there are only two categories of interest, business and nonbusiness, there are a multitude of motives that may be classified under each. It is not just the weighing of the two categories which is necessary. Were this the case the term dominant could only mean fifty-plus percent. Rather, the trier of fact is confronted in actuality with the various motives themselves, unclassified, and must proceed from there to find the dominant motivation. *Generes* leaves unanswered the question of whether the trier of fact is obligated to classify motivational forces into the two

other lesser ones of twenty-five, twenty-five, and twenty percent magnitude? Or must a motive be fifty-plus percent, dwarfing all other motives regardless of number? What if two motives—one business and one nonbusiness—are so closely related in size as to be indistinguishable, with neither one "dominant"? The difficulty inherent in such an undertaking is obvious.

The most credible reason the Court gives for the stricter test is its fear of loopholes. But the Court's remedy for potential abuse may deny some taxpayers deductions to which they should be entitled.[41] The taxpayer, as noted in *Whipple*,[42] has the burden of establishing that the relationship to his trade or business is proximate. The dominant motivation standard as a practical matter requires him to explain away any motive that is not strictly business. As in *Generes*, the taxpayer's testimony that a nonbusiness interest did not figure in his decision will often be deemed self-serving, so the taxpayer must be able to adduce other evidence to explain his motives. In such a situation, the taxpayer's dominant motivation might in fact be a business one—to protect his job—while a jury might find his primary motivation to be the protection of his investment in the business. Numerous inconsistent judgments may result. Two separate triers of fact faced with two identical fact situations may reach opposing results because of the ambiguity of the test. A taxpayer attempting to determine in advance if his loan or assumption of debt for his corporation will later be classified as business-motivated for tax purposes will find little guidance in previous cases in which the standard has been applied.[43] Since a finding of dominant motivation is

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categories and then reach a decision, or whether the decision may be based on the raw factors themselves unclassified. In the latter situation, with three factors or more, the trier might look to the largest of the factors rather than the larger of the two categories.

[41]In essence, the Court has simply made a judicial determination that in cases involving employee-shareholder bad debts, as here, the taxpayer is going to lose in the majority of the cases. This result, which is achieved by the application of the harsher dominant motivation standard, makes it easier for the Commissioner to achieve a favorable ruling in cases of this nature due to the heavier burden placed on the taxpayer. However, it is doubtful that such an approach may be justified in regard to any concept of fair and equitable taxation. Without apportionment and with the burden weighing so heavily on the taxpayer, the probable result is that taxpayers will often be denied in fact those tax benefits which are due them in theory.

[42]373 U.S. at 202.

[43]Advance rulings or determination letters would probably not be available due to the inherently factual nature of any determination of dominant motivation. Rev. Proc. 72-9(2), 1972-1 CUM. BULL. 28 provides in part:

> It is the policy of the Service to answer inquiries of individuals and organizations, whenever appropriate in the interest of sound tax administration, as to their status for

factual, the taxpayer's opportunity to obtain reversal on appeal will be greatly diminished.

The Court's justification for adopting the dominant motivation standard pales considerably in light of the difficulty and uncertainty inherent in its application. The "workability" attributed to the new standard by the Court is not likely to materialize. The idea that the "trier . . . may compare the risk against the potential reward and give proper emphasis to the objective rather than the subjective"[44] may have merit in clear-cut situations, but it is an oversimplification in the majority of cases, which will involve closer questions.

The Court's view that the dominant motivation test makes section 166 consistent with other sections of the Tax Code is of minimal significance in view of the prospect of mass inconsistency among section 166 decisions themselves. But the significance of the *Generes* decision is much broader than its section 166 application. In *Leonard F. Cremona*,[45] a tax court case decided in the wake of *Generes*, two concurring judges suggested that the *Generes* dominant motivation test be applied to differentiate between business and nonbusiness expenses under section 162. Perhaps most important of all are the implications of *Generes* for the "business purpose" requirement of tax-free corporate reorganizations and divisions. To qualify as tax-free, these corporate realignments in addition to satisfying statutory mechnical requirements must meet judicially imposed conditions that include a requirement that there be a "business purpose" motivating the transaction.[46] A change in the character of this requirement from some business purpose to a dominant business purpose would place both the corporate taxpayer and its shareholders in a quandary similar to that of the shareholder-employee in *Generes*. The problem is intensified by the much larger

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tax purposes and as to the tax effects of their acts or transactions, prior to their filing of returns or reports as required by the revenue laws.

There are, however, certain areas where, because of the inherently factual nature of the problems involved, or for other reasons, the Service will not issue advance rulings or determination letters.

The areas in which no advance rulings will be issued are enumerated in Rev. Proc. 72-9. Expansion of this list to include the determination of the dominant motivation of a shareholder-employee bad debt seems an inevitable occurrence.

[44]405 U.S. at 104.

[45]58 T.C. 219 (1972).

[46]The "business purpose" requirement was first articulated in Gregory v. Helvering, 293 U.S. 465 (1935). For a discussion of the "business purpose" requirement see J. SCOTT, FEDERAL INCOME TAXATION OF CORPORATE REORGANIZATIONS AND DIVISIONS 97-101 (1972).

sums involved in these corporate transactions. The injection of this element of uncertainty into corporate planning would result in a severe impediment to the effective use of these tax-free corporate reorganizations and divisions.

EDGAR M. ROACH JR.

Labor Law—Union Discipline of Supervisor Members

Section 8(b)(1) of the National Labor Relations Act, as amended,[1] (hereinafter called the Act) provides the statutory framework within which labor unions exercise disciplinary control over their members.[2] The general rule, based upon *NLRB v. Allis-Chalmers Manufacturing Co.*,[3] is that such discipline is a legitimate, internal union matter rarely subject to interference from the courts.[4] A trend[5] in the courts of appeals indicates, however, that the *Allis-Chalmers* doctrine does not apply where the disciplined member happens to be a supervisor.[6] In two recent

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[1]National Labor Relations Act §§ 1-18, 29 U.S.C. §§ 151-68 (1970) [hereinafter cited as NLRA].

[2]NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1) (1970) provides in part:

> It shall be an unfair labor practice for a labor organization or its agencies—
>
> (1) to restrain or coerce (a) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

NLRA § 7, 29 U.S.C. § 157 (1970) provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

[3]388 U.S. 175 (1967).

[4]In *Allis-Chalmers* the union had imposed fines upon employee members who had crossed picket lines and continued to work during a strike in support of new contract demands. In finding that the fines did not violate § 8(b)(1)(A), the Court concluded that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195.

The *Allis-Chalmers* doctrine had a slight gloss put on it in 1969. In Scofield v. NLRB, 394 U.S. 423 (1969), the Supreme Court added that union fines of members would not violate § 8(b)(1)(A) "unless some impairment of a statutory labor policy [could] be shown." *Id.* at 432.

[5]*See* text accompanying notes 31-35 *infra*.

[6]*See* note 18 and accompanying text *infra*, regarding supervisors as union members.

decisions the Court of Appeals for the District of Columbia Circuit has interpreted section 8(b)(1)(B)[7] of the Act as severely limiting—if not completely proscribing—union discipline of supervisor members.

In *Meat Cutters Local 81 v. NLRB*,[8] Safeway Stores, Inc., the intervenor, operated several retail stores in the Seattle, Washington, area. These stores contained meat markets at which meat products were cut, packaged, and sold. The meat market employees, including supervisors, were covered by contracts between the petitioner union and a multi-employer bargaining association to which Safeway belonged. In July of 1968 Safeway instituted a policy directing its managers, including a supervisor, Hall, to obtain certain meats pre-processed from a central warehouse. The result of this procedure was to eliminate some union work, for these meats previously had been processed by employee union members on the premises of the retail outlets.

The union objected to the new policy and ordered its supervisor members not to follow the directive. Hall disregarded the union's instructions and implemented Safeway's policy. For this conduct the union fined him fifty dollars.[9] Safeway promptly filed a section 8(b)(1)(B) charge with the National Labor Relations Board (NLRB). The Board issued a cease-and-desist order, thus holding that the union's disciplinary action against Hall restrained and coerced Safeway in the selection of its representative for the adjustment of grievances. The Board further ordered rescission of the disciplinary action, reinstatement to membership, and retroactive effect to any lost benefits.[10] The Court of Appeals for the District of Columbia Circuit affirmed the Board's findings and enforced the order.[11]

A few months later the same court again considered a possible violation of section 8(b)(1)(B) in *International Brotherhood of Electrical*

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[7]NLRA § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1970) provides in part: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . ."

[8]458 F.2d 794 (D.C. Cir. 1972).

[9]The union also imposed an additional $10 fine for failure to appear, as requested, before the Union Executive Board and ultimately expelled Hall for refusal to pay the fine. This resulted in a loss of his rights to sickness and death benefits provided through his membership. Although the bargaining agreement contained a union-shop clause under which the supervisors were required to become and remain union members, there was no contention that this clause had been breached by Hall's expulsion. 458 F.2d at 796 n.3.

[10]Meat Cutters Local 81, 185 N.L.R.B. 130 (1968).

[11]458 F.2d at 802.

Workers v. NLRB.[12] In 1968 Illinois Bell Telephone Company had a collective bargaining agreement with Local 134, International Brotherhood of Electrical Workers (IBEW), AFL-CIO, similar to that in *Meat Cutters*, under which all employees and certain foremen were required to become union members. During an economic strike IllinoisBell advised the foremen members that it would like them to cross the picket line and perform non-supervisory work during the strike. The company left the decision as to whether to honor the work stoppage to the discretion of each individual foreman. Illinois Bell made it clear that those who chose to honor the strike would not be penalized. Conversely, the union advised its membership that any member who chose to work would be subject to union discipline.

Because of the union threat several of the foremen formed the Bell Supervisor's Protective Association for the dual purpose of encouraging other foremen to work and protecting the rights of those who did so. After the strike the union fined each foreman who worked five hundred dollars and imposed an additional fine of one thousand dollars on each of the five foremen who were instrumental in the formation of the Association. The disciplined members filed a charge with the NLRB and, as in *Meat Cutters*, the Board found the fines to be a violation of section 8(b)(1)(B).[13] The Court of Appeals for the District of Columbia followed its prior decision in *Meat Cutters* and affirmed.[14]

To appreciate fully the reasoning of the NLRB and the court of appeals in both these cases, it is necessary first to examine briefly the historical status of supervisors under the law and the development of section 8(b)(1)(B). The original National Labor Relations Act (the Wagner Act)[15] did not except supervisors from the definition of employee. They enjoyed all the rights and protection of other employees under the Act. Unions of supervisory employees such as the Foremen's Association of America and the United Technical and Supervisory Employees began to use the new protection to expand membership greatly.[16] Following passage of the Taft-Hartley Amendment to the Act in 1947,[17] which specifically exempted supervisors,[18] the supervisor un-

[12]No. 71-1559 (D.C. Cir., Sept. 22, 1972).

[13]International Bhd. of Electrical Workers, 192 N.L.R.B. No. 17 (July 14, 1971).

[14]No. 71-1559, at 35.

[15]NLRA (Wagner Act), ch. 372, § 2(3), 49 Stat. 450 (1935).

[16]*See* Moore, *The National Labor Relations Board and Supervisors*, 21 LAB. L.J. 195, 205 (1970).

[17]Labor Management Relations Act (Taft-Hartley Act) § 2(3), 29 U.S.C. § 152(3) (1970).

ions began to wither. Supervisory employees began to view themselves as a part of management.[19] Nevertheless, some employees, particularly those who had been promoted from the rank and file, took advantage of section 14(a) of the Act, which permitted them to become or remain union members, albeit without statutory protection.[20]

While an estimate of the current number of supervisors who are union members is unavailable, one may presume that it is sufficiently large to warrant substantial union interest in maintaining and controlling such members. It is also safe to say that the *Meat Cutters* and *IBEW* interpretation of section 8(b)(1)(B) will seriously undermine this interest.

The District of Columbia Circuit, interpreting legislative history, stated in both decisions that Congress enacted section 8(b)(1)(B) in recognition of the fact that unions had begun to pressure management not to appoint representatives who would be too strict in dealing with union members.[21] While section 8(b)(1)(B) proscribes direct restraint or coercion against employers in the selection of bargaining representatives, the court felt it was Congress' intent that indirect interference accomplished through union discipline of an employer's representative also would be prohibited.[22] This shift of attention to indirect restraint or coercion is a departure from earlier cases that proscribed direct interference with the employer's ability to choose his representatives in actual bargaining situations.

The first reported decision in which a union was found to have violated section 8(b)(1)(B) was *American Newspaper Publishers Association v. NLRB*.[23] The union had threatened to strike for a contract

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[18]NLRA § 2(3), 29 U.S.C. § 152(3) (1970) provides in part: "The term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . ." This exempts supervisors from the protections afforded employees by the Act. However, NLRA § 14(a), 29 U.S.C. § 164(a) (1970) states: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

[19]*See* Moore, *supra* note 16, at 203-04.

[20]*See* note 18 *supra*. The reasons for retention of union membership by a supervisor are several, including obtaining additional benefits, maintaining active status in the event of a demotion or change of jobs requiring union membership, or simply a sense of closeness to members associated with in the past. *See* Gould, *Some Limitations upon Union Discipline under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1129 (1970).

[21]No. 71-1559, at 13; 458 F.2d at 798 n.11.

[22]No. 71-1559, at 9; 458 F.2d at 798.

[23]193 F.2d 782 (7th Cir. 1951).

clause that would compel the employer to hire only foremen who were union members. The Seventh Circuit, in affirming the Board's finding of a violation, was primarily concerned that the union's objective was to further an illegal closed-shop scheme.[24] However, in 1958 in *Typographers Local 38*,[25] the NLRB found a strike to obtain a similar clause to be a violation in itself, absent any other illegal objective. The decision was subsequently affirmed on this point by an equally divided Supreme Court.[26]

The few NLRB and courts of appeals decisions handed down during the next decade found that the following conduct violated section 8(b)(1)(B): striking to procure the discharge of a labor relations consultant hired by the company to prepare for negotiations;[27] threatening a work stoppage to force the employer to accept a multi-employer association as his bargaining representative;[28] threatening to strike to force the employer to abandon such an association;[29] and bypassing the representative selected by the employer and requiring him to select another.[30] In every case the violation involved direct action by the union against the employer and the actual selection of a bargaining representative. Not until 1968 did the NLRB turn its attention to a union's use of its disciplinary machinery over supervisor members.

In *San Francisco-Oakland Mailers No. 18*[31] the Board found a violation of section 8(b)(1)(B) where the union had called two supervisors to appear before a union investigative committee on charges that the supervisors had violated the labor agreement by using supervisory and non-union personnel to do work covered by the agreement. On the employer's instructions the supervisors refused to appear and were fined. The Board rejected the union's argument that *Allis-Chalmers* was controlling, distinguishing that case as protecting only legitimate internal union affairs. Here, though, "the relationship primarily affected [was] one between the union and the employers."[32] The Board also held that the proviso to section 8(b)(1)(A) was limited to that section and not applicable to section 8(b)(1)(B).

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[24] *Id.* at 805.
[25] 123 N.L.R.B. 806 (1959).
[26] Typographers Local 38 v. NLRB, 365 U.S. 705 (1961).
[27] ILGWU, Los Angeles Cloak Joint Bd., 127 N.L.R.B. 1543 (1960).
[28] Painters Dist. Council No. 36, 155 N.L.R.B. 1013 (1965).
[29] Painters Local 823, 161 N.L.R.B. 620 (1966).
[30] Plasterers Local 739, 157 N.L.R.B. 823 (1966).
[31] 172 N.L.R.B. 252 (1968).
[32] *Id.* at ____.

San Francisco-Oakland Mailers was not appealed, and the first similar decision by the NLRB to be considered by a court of appeals was *NLRB v. Sheet Metal Workers Local 49*.[33] Citing *San Francisco-Oakland Mailers*,[34] the Tenth Circuit upheld a Board decision that fining a supervisor for working before the regular work day began was a violation of section 8(b)(1)(B). Several similar holdings have been issued by the NLRB, and each has been affirmed by various circuits.[35] *Meat Cutters* and *IBEW*, however, go further than any of the previous cases in analyzing the intent of Congress in prohibiting indirect as well as direct interference and distinguishing the application of *Allis-Chalmers*.

The majority in *IBEW* reiterated the earlier proposition in *Meat Cutters* that section 8(b)(1)(B) proscribes "*indirect* union restraint or coercion of an employer, accomplished through the imposition of discipline upon the employer's representatives for actions performed by them within the general scope of their supervisory or managerial responsibilities."[36] The court did not believe this to be too broad a view of the meaning Congress intended for the statutory language.[37] The majority perceived this Congressional intent by examining legislative history surrounding not only the enactment of section 8(b)(1)(B) but the other 1947 amendments to the Act as well, particularly section 2(3).[38]

The court reasoned that " 'Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount.' "[39] The court thus rejected a union contention that section 14(a) of the Act evidenced Congressional intent that supervisors be controlled by the union that they join. The court felt that section 14(a) "does not detract from the undivided loyalty [supervisors] owe to their

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[33]430 F.2d 1348 (10th Cir. 1970).

[34]*Id.* at 1350 n.2.

[35]*See, e.g.*, Mailers Local 143, 181 N.L.R.B. 286 (1970), *enforced* Mailers Local 143 v. NLRB, 445 F.2d 730 (D.C. Cir. 1971); Carpenters Dist. Council, 177 N.L.R.B. 500 (1970), and Carpenters Dist. Council, 176 N.L.R.B. 797 (1969), both *enforced* NLRB v. Carpenters Dist. Council, 454 F.2d 1116 (10th Cir. 1972); Lithographers Local 15-P, 175 N.L.R.B. 1072 (1969), *enforced* NLRB v. Lithographers Local 15-P, 437 F.2d 55 (6th Cir. 1971).

[36]No. 71-1559, at 9 (emphasis by the court).

[37]*Id.* at 9-10.

[38]*See* note 18 *supra*.

[39]No. 71-1559, at 13, *quoting* Carpenters Dist. Council v. NLRB, 274 F.2d 564, 566 (1959).

employer under section 8(b)(1)(B) . . . . Similarly the fact that an employer may have consented to the compulsory union membership of his supervisors . . . does not negate his right to the full protection of section 8(b)(1)(B)."[40]

As to the effect of *Allis-Chalmers*, the union urged (and the dissent agreed) that, inasmuch as the conduct for which the discipline was imposed, *i.e.*, working during a strike, was the same in both *Allis-Chalmers* and *IBEW*, the former decision should control. The majority distinguished the two cases by stating that the Supreme Court in *Allis-Chalmers* drew " 'cogent support' for its decision"[41] from the proviso to section 8(b)(1)(A), which applies only to *internal*, union-employee relationships. The court noted that the proviso does not apply to section 8(b)(1)(B), the disputed section in *IBEW*, which regulates the *external*, union-employer relationship.[42]

Both the majority and the dissent viewed *Scofield v. NLRB*[43] as standing for the principle that unions may discipline members only when such discipline impairs no national labor policy.[44] The majority, however, found that Congress had expressed a policy in section 8(b)(1)(B) of protecting employers against union interference with their supervisors.[45] The dissent, on the other hand, argued that the policy was not violated when a union merely insured "strike solidarity among its members."[46]

The majority's interpretation of section 8(b)(1)(B) and the intent of Congress undoubtedly reaches the correct result. It seems unlikely that Congress would, on the one hand, legislatively recognize that supervisors are different from employees and, at the same time, intend that unions might treat them the same as employees, when such treatment would interfere with their status as supervisors. Indeed, the limited language of section 14(a) itself demonstrates Congress intended that

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[40]*Id.* at 15-16. The dissent, on the other hand, argued that §§ 2(3) and 14(a) merely give the employer the option to keep his supervisors out of the union or allow them to join and when he elects the latter course he bargains away his right to their loyalty. *Id.* at 55-56 (Wright, J., dissenting).

[41]*Id.* at 17.

[42]*Id.* at 16-19.

[43]394 U.S. 423 (1969).

[44]No. 71-1559, at 19, 54.

[45]*Id.* at 20.

[46]*Id.* at 54 (Wright, J., dissenting).

supervisor membership in unions would be something less than that of protected employees.[47]

There is little question that Congress intended to prevent union interference with management's right to designate its bargaining representatives,[48] and it would be specious to suggest that, once selected, the representatives permissibly could be hindered by union discipline in performing the duties for which they were selected. On the other hand, it is doubtful Congress intended to prohibit legitimate enforcement of union rules simply because the disciplined member may be a supervisor rather than a rank-and-file employee. Nevertheless, the legislative language selected by Congress to implement the former intent has been stretched by the *Meat Cutters* and *IBEW* court to the point that the latter intent is imperiled.

While section 8(b)(1)(B) does act as a limitation upon union discipline of supervisor members, whether it operates as an absolute bar is not clear. The court in both *Meat Cutters* and *IBEW* stated that not all supervisor discipline will be proscribed,[49] but it gives no workable guidelines with which to determine what discipline will be permitted. The lone example cited by the court was a Board decision, *Painters Local 453*,[50] in which the NLRB found no violation of section 8(b)(1)(B) where one local union fined a supervisor member of a sister local for violating a rule that required members of sister locals to register with the fining local when working in its jurisdiction. Clearly, failure to register was conduct outside the managerial duties of the supervisor. It can be argued, however, that the rule did interfere with his work as a supervisor in the jurisdiction of the fining local and with management's right to select him to work in that capacity.

Another question left unanswered by *IBEW* or *Meat Cutters* is whether the nature of the conduct for which discipline was imposed is the decisive factor in determining whether there has been a violation of section 8(b)(1)(B). In *IBEW* the court held that the conduct need not

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[47]*See* note 18 *supra*. This language also negates the *IBEW* dissenting argument that any employer who agrees to compulsory union membership for his supervisors gives up all rights to their loyalty. *See* note 40 *supra*. If an employer need not recognize supervisors as employees for the purpose of any collective bargaining law he certainly waives no rights in that respect under the very terms of section 14(a).

[48]*See* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 427 (1948); 2 *Id.* at 1012, 1077.

[49]No. 71-1559, at 15 n.28; 458 F.2d at 798-99 n.12.

[50]183 N.L.R.B. 24 (1970).

be in the actual application of a bargaining agreement provision or adjustment of a particular grievance; the discipline is proscribed any time "a supervisor is disciplined by a union because of the manner in which he exercised his supervisory or managerial authority . . . ."[51] This language would seem to suggest that the intent of a union is important and that a court should determine if a union intended to coerce management by its action or merely intended to discipline a member. The court later stated, however, that it is immaterial " 'whether the coercion succeeded or failed[;] . . . the test is whether the . . . conduct . . . tend[ed] to interfere with . . . [the rights protected] under the Act.' "[52] Thus even unintentional interference is seemingly proscribed if it has the requisite effect.

The controlling question appears to be whether the conduct the union seeks to restrain is essential to the supervisory function, but, as the dissent in *IBEW* pointed out, a supervisor, by the very nature of his alignment with management in opposition to labor, can commit few acts to which the union would object that would not be construed as the performance of his managerial duties.[53]

While *IBEW* held that it is not necessary that the conduct for which a supervisor is disciplined be restricted to acts committed in the actual administration of the bargaining agreement or adjustment of grievances, it is not clear whether a supervisor must have authority to perform such duties. It is possible, though perhaps rare, for a supervisor to administer matters not covered by the bargaining agreement and to have no role in the grievance process. For example, a union-member foreman might have unlimited authority to allocate over-time work among employees, a subject not covered by the bargaining agreement. He also might not serve a designated function in the grievance procedure. May the union order him to allocate over-time according to a particular union-determined formula and permissibly fine him for refusal to do so, or is any conduct performed as a representative of man-

[51]No. 71-1559, at 14.

[52]*Id.* at 24, *quoting* Mine Workers Local 167 v. NLRB, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

[53]*E.g.*, a supervisor may be required by management to cross picket lines; work during a strike (indeed, perform the duties of the striking workers as in *IBEW*); seek out permanent replacements for the striking workers; implement lockouts; campaign against the union during a representation election, or resolve jurisdictional disputes in opposition to the union's jurisdictional claim. In short, union discipline is generally imposed to sanction conduct in opposition to the union's interest, and opposing the union comprises a substantial amount of the supervisory function.

agement exempt from discipline so long as the actor is a supervisor? The NLRB, in a recent decision,[54] has taken the latter view, stating that "[a]ll persons who are 'supervisors' within the meaning of Section 2(11)[55] of the Act are employer's 'representatives for the purposes of collective bargaining or the adjustment of grievances' within the purview of Section 8(b)(1)(B) of the Act . . . ."[56] This can be viewed as an outright ban on discipline of supervisor members.

Neither *Meat Cutters* nor *IBEW* considered the situation of temporary supervisors. In some industries (most notably construction) an employee member of the union may work as a supervisor for a short period of time, or for only one project, and then return to non-managerial status either temporarily or permanently. It can be argued that if he is no longer a supervisor, he no longer has the protection of section 8(b)(1)(B), even against discipline for acts committed while he was in a supervisory status. If he is permanently returned to non-supervisory status, it is difficult to see how such discipline could coerce or restrain employers in any future selection of their representatives. On the other hand, a temporary supervisor who knows that his fine will be merely suspended until he returns to non-supervisory status will be reluctant to carry out management's directives.

What effect the limitation on discipline will have on continued supervisor membership in unions is speculative. Unions may lose interest in representing members they cannot discipline, or supervisors may become more interested in the benefits of membership without the hazards of discipline. The limitation should have some effect, however, upon the negotiation of union-shop clauses covering supervisors in future bargaining. Management's primary reasons for not agreeing to such a clause, that it would allow union control over management representatives, has been virtually eliminated and there is little reason for resistance. The union, on the other hand, may seek the clause as a valuable aid to the acquisition of membership, but could not insist upon

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[54]Engineers Local 501, 199 N.L.R.B. No. 91.

[55]NLRA § 2(11), 29 U.S.C. § 152(11) (1970) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[56]199 N.L.R.B. No. 91 at ____.

its inclusion under the interpretation of *Typographers Local 38 v. NLRB*.[57] Management negotiators will be able to condition agreement to the benign clause only upon receipt of a valuable concession by the union.

JOHN O. POLLARD

Securities Regulation—The Reincarnation of the Deception Requirement

Rule 10b-5[1] has been used to develop a corpus of federal law relating to fiduciary obligations of directors, officers, and majority shareholders[2] in an area that has traditionally been a subject for state rather than federal regulation.[3] Due to its broad language, the rule creates an almost undefined liability. Absent definitive legislative action, courts have assumed primary responsibility for defining the extent of liability. In the recent case of *Popkin v. Bishop*,[4] the Second Circuit clearly rejected imposition of rule 10b-5 liability in the absence of an allegation of nondisclosure or deception in connection with the purchase or sale of securities. This holding, reiterating nondisclosure as a fundamental element in such an action, represents a significant restriction on the expansion of rule 10b-5 into the area of corporate fiduciary obligations.

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[57] *See* notes 23-26 and accompanying text *supra*. Attention should be called to the fact that *Typographers Local 38* was affirmed by an equally divided Supreme Court. However, an opposite decision in the near future seems unlikely.

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[1] 17 C.F.R. § 240.10b-5 (1971):

It shall be unlawful . . .

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to [make a misleading omission] . . . or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

[2] *See* Pappas v. Moss, 393 F.2d 865 (3d Cir. 1968); Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964); Entel v. Allen, 270 F. Supp. 766 (S.D.N.Y. 1965).

[3] Some commentators have expressed concern about this intrusion. *Compare* Fleischer, *"Federal Corporation Law": An Assessment*, 78 HARV. L. REV. 1146 (1965), *with* Lohf, *The Corporation Law of the Securities Acts: Federal Rights of Corporations*, 36 U. COLO. L. REV. 76 (1963).

For a discussion of the fiduciary responsibilities of corporate management, see H. HENN, CORPORATIONS §§ 235-41 (2d ed. 1970).

[4] 464 F.2d 714 (2d Cir. 1972).

Popkin, a shareholder of Bell Intercontinental Corporation, brought a derivative action[5] to enjoin the proposed corporate merger of Bell and its two subsidiaries into the Equity Corporation, the majority shareholder of Bell.[6] Injunctive relief was sought on the ground that the exchange ratios in the proposed merger agreement were unfair to the minority shareholders of Bell and its subsidiaries as well as to the companies themselves. Popkin alleged that by proposing those exchange ratios, Equity and various officers and directors of Bell breached a variety of fiduciary duties and that such breaches entitled him to relief despite a complete disclosure of the merger terms. In affirming dismissal of the complaint, the Second Circuit held that in view of the adequate disclosure, which is the principal federal interest served by rule 10b-5,[7] the appropriate remedy of minority shareholders to test the fairness of the merger terms is a suit for injunction in the state courts.[8] Furthermore, the court reiterated that "non-disclosure [is] a key issue in rule 10b-5 cases" and noted that plaintiff's "complaint contains no allegation or hint of any misrepresentation . . . or of a failure . . . to disclose any material fact in connection with the merger proposal."[9] The basic problem thus presented in the case was whether rule 10b-5 is violated when a breach of fiduciary duty is at issue in the sale or purchase of stock[10] even though there has been full and fair disclosure of the terms of the proposed merger.

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[5]Although neither § 10(b) of the Securities Exchange Act of 1934 nor the implementing rule 10b-5 provides explicitly for a private remedy, such a right was implied early in the history of the section. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). The Supreme Court recently noted that "[i]t is now established that a private right of action is implied under § 10(b)." Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

[6]Bell owned 66% of the common stock of one of its subsidiaries and 81% of the other. Equity Corporation controlled Bell and through Bell the two subsidiaries. 464 F.2d at 716.

[7]*Id.* at 720. The Supreme Court recently remarked that "the 1934 Act and its companion legislative enactments embrace a 'fundamental purpose ... to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* . . . .'" Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972) (footnote omitted).

[8]The court noted that the merger terms had been included in a judicially approved settlement to other litigation and as a result a question of estoppel exists. However, serious doubt was expressed that estoppel applies under the circumstances presented. 464 F.2d at 720-21.

[9]*Id.* at 718-19. Indeed, plaintiff conceded that a full and fair disclosure had been made. *Id.* at 718.

[10]The SEC originally took the position that an exchange of stock as a result of a merger did not constitute a "sale." Since 1951, however, this position has been reversed. Mader v. Armel, 402 F.2d 158, 161 (6th Cir. 1968). Under the theory of Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967), a merger involving an exchange of stock is a "sale", thus allowing a 10b-5 action either by the corporation or by its shareholders in a derivative capacity.

A logical starting point in analyzing the relevance of rule 10b-5 to an alleged breach of fiduciary obligation is the landmark decision of *Birnbaum v. Newport Steel Corp.*[11] In that case the president and controlling stockholder of Newport passed up a merger which would have been beneficial to the minority stockholders and instead sold his stock at a premium to another company. Plaintiffs' theory of injury was that this sale of control stock at a premium, together with certain misrepresentations made to them to facilitate the sale, constituted fraudulent practices in connection with the purchase and sale of securities. The court, in denying relief to the plaintiffs[12] concluded:

> (1) that Section 10(b) was directed solely at that type of misrepresentation or fraudulent practice usually associated with the purchase or sale of securities,
> (2) that it extended protection only to the defrauded purchaser or seller, and
> (3) that it was not intended to provide a remedy for fraudulent mismanagement of corporate affairs.[13]

While both the "usually associated with"[14] and the purchaser-seller[15] requirements enunciated in *Birnbaum* are significant isues in the area of securities regulation, the third aspect of the opinion will be the focus of this discussion.[16]

Although it is apparent that the *Birnbaum* court excluded fraudulent mismanagement of corporate affairs from the scope of rule 10b-5, it is by no means certain that other courts would likewise construe the section. In *McClure v. Borne Chemical Co.*[17] the Third Circuit observed by way of dictum that rule 10b-5 "imposes broad fiduciary duties on

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[11]193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

[12]The Birnbaum defendants were subsequently held liable to the shareholders under state law in Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

[13]193 F.2d at 464.

[14]A significant erosion occurred in the case of A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967). In that case the court held that rule 10b-5 prohibits *all* fraudulent schemes in connection with the purchase or sale of securities whether involving a unique form of deception or a "garden variety" type. *Id.* at 397.

[15]For discussion of the standing problem, *see generally* Lowenfels, *The Demise of The Birnbaum Doctrine: A New Era for Rule 10b-5*, 54 VA. L. REV. 268 (1968); Ruder, *Current Developments in the Federal Law of Corporate Fiduciary Relations—Standing to Sue Under Rule 10b-5*, 26 BUS. LAWYER 1289 (1971).

[16]*See generally* Lowenfels, *Rule 10b-5 and the Stockholder's Derivative Action*, 18 VAND. L. REV. 893 (1965).

[17]292 F.2d 824 (3d Cir. 1961).

management vis-a-vis the corporation and its individual stockholders."[18] Subsequently, other courts have emphasized that the fact that a securities transaction was part of a broader scheme involving corporate mismanagement does not bar a rule 10b-5 action. As stated by the court in *Pettit v. American Stock Exchange*,[19] the mere fact "that the fraud was perpetrated by insiders does not render Section 10(b) inapplicable, if the transaction represents an abuse of the securities trading process, and should be properly subject to SEC regulation for an adequate remedy."[20] A contrary interpretation would import its own demise: "[C]orporate officers and directors would possess an immunity from the consequences of their fraud under . . . Rule 10b-5 which outsiders who may have collaborated with them in defrauding the corporation would not possess . . . ."[21] Such an expansive reading of rule 10b-5 as enunciated by the *Pettit* court encouraged further development in the application of rule 10b-5 to management misconduct.

In 1964 the Second Circuit had before it the similar cases of *Ruckle v. Roto American Corp.*[22] and *O'Neill v. Maytag*[23] but reached different results. In *Ruckle* plaintiff's derivative claim alleged that the majority directors, in authorizing issuance of shares to insiders at an inadequate price, withheld from the minority directors the latest financial information relating to a proposed stock issue. In upholding plaintiff's claim, the Second Circuit held that the majority directors' failure to disclose material information to the minority directors constituted deception upon the corporation.[24] In dictum *Ruckle* went further and suggested that even full disclosure to all the directors does not necessarily preclude rule 10b-5 liability.[25]

In *O'Neill* the same court affirmed the dismissal of the complaint by the lower court. After observing that there was "[n]o serious claim of deceit, withheld information or misstatement of material fact in this

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[18] *Id.* at 834.

[19] 217 F. Supp. 21 (S.D.N.Y. 1963) (stock issued for inadequate consideration and subsequently distributed publicly).

[20] *Id.* at 25.

[21] New Park Mining Co. v. Cranmer, 225 F. Supp. 261, 266 (S.D.N.Y. 1963) (corporate officers acquired stock interests in properties in which their corporations were interested and caused the corporation to purchase and sell its own and other stock at unfair prices).

[22] 339 F.2d 24 (2d Cir. 1964).

[23] 339 F.2d 764 (2d Cir. 1964).

[24] 339 F.2d at 27.

[25] *Id.* at 29.

case,"[26] the court held that "where the duty allegedly breached is only the general duty existing among corporate officers, directors, and shareholders, no cause of action is stated under rule 10b-5 unless there is an allegation of facts amounting to deception."[27] In *O'Neill* plaintiff had charged that the directors set an exchange ratio that was detrimental to the minority for the purpose of retaining control. It was alleged that all board members were participants. Although seemingly falling within the dictum of *Ruckle*, the *O'Neill* court distinguished *Ruckle* as involving "a clear allegation of deception"[28] whereas no such allegation existed in *O'Neill*.[29] The *Ruckle* dictum was later followed, however, by the Third Circuit in a rule 10b-5 derivative suit in which the directors were unanimous in defrauding the corporation.[30] By viewing the minority shareholders as the defrauded corporate entity, the Third Circuit had no difficulty in finding "deception."[31]

In 1968 the "deception" requirement was further analzyed by the Second Circuit in *Schoenbaum v. Firstbrook*.[32] Plaintiff sued derivatively, alleging that his corporation (Banff Oil, Ltd.) issued securities to Aquitaine, a controlling corporation, and to an outsider at prices that, because of undisclosed material information, did not represent the true value of the shares. This issuance was allegedly part of a conspiracy to defraud the remaining Banff stockholders. On these facts the Second Circuit dismissed the complaint as to the outsider, but held that the issuance of securities to Aquitaine presented a triable issue under rule

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[26]339 F.2d at 767.

[27]*Id.* at 767-68.

[28]*Id.* at 768.

[29]One judge offered this explanation:

> The only possible material difference I can perceive between *Ruckle* and *O'Neill* is that in *Ruckle* there were directors who were not participants in the transaction and thus could be deceived in the ordinary sense. In either case, however, the failure of the defendant directors to perform their duty presumably injured the corporation, and I do not believe it is sound to differentiate between situations where the directors were unanimous in wrongdoing and those where less than all were involved.

Dasho v. Susquehanna Corp., 380 F.2d 262, 270 (7th Cir.) (Fairchild, J., concurring), *cert. denied*, 389 U.S. 977 (1967).

[30]Pappas v. Moss, 393 F.2d 865 (3d Cir. 1968) (defendant insiders sold shares to themselves at an unfair price).

[31]*Id.* at 869.

[32]405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969). For a detailed analysis, *see* Comment, *Schoenbaum v. Firstbrook: The "New Fraud" Expands Federal Corporation Law*, 55 VA. L. REV. 1103 (1969).

10b-5.[33] The allegedly improper exercise of a "controlling influence" by Aquitaine over the Banff board of directors was itself within the proscription of rule 10b-5:

> If it is established that the transaction took place as alleged it constituted a violation of Rule 10b-5, subdivision (3) because Aquitaine engaged in an "act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Moreover, Aquitaine and the directors of Banff were guilty of deceiving the stockholders of Banff (other than Aquitaine).[34]

If indeed *Schoenbaum* stands for the proposition that a violation of rule 10b-5 is established upon the showing of an improper exercise of control, as suggested by at least one commentator,[35] then by eliminating the traditional "fraud" or "deception" requirement, the *Schoenbaum* decision gives impetus to the further broadening of federal law relating to fiduciary duties of directors, officers, and majority shareholders.[36]

Thus the stage was set for clarification of the role of deception in rule 10b-5 cases involving breaches of fiduciary duties. The Second Circuit responded with the decision in *Popkin v. Bishop*.[37] After observing that it had focused on improper self-dealing in *Schoenbaum*, the Second Circuit nonetheless concluded that such emphasis "did not eliminate nondisclosure as a key issue in Rule 10b-5 cases."[38] The justification for the emphasis was that since state law does not demand prior shareholder approval in most situations involving self-dealing in securities transactions, full and fair disclsoure will rarely occur. Thus, "it makes sense to concentrate on the impropriety of the conduct itself rather than on the 'failure to disclose' . . . ."[39] However, where merger transactions are involved that require shareholder approval under state law, the principal design of rule 10b-5 (imposing a duty of disclosure) has special relevance. Indeed, it is apparent that this renewed emphasis

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[33]The critical difference appeared to be that Aquitaine could exercise controlling influence over the board of directors.

[34]405 F.2d at 219-20.

[35]Ruder, *"Challenging Corporate Action Under Rule 10b-5"*, 25 BUS. LAWYER 75, 86 (1969).

[36]Subsequently, the Fifth Circuit held that deception is not a necessary element of a 10b-5 claim. Shell v. Hensley, 430 F.2d 819, 827 (5th Cir. 1970).

[37]464 F.2d 714 (2d Cir. 1972).

[38]*Id.* at 719. The decision is careful to point out that the court in *Schoenbaum* "suggested" that self-dealing itself constituted a rule 10b-5 violation.

[39]*Id.*

on disclosure only applies in those rare situations of self-dealing where the law mandates prior shareholder approval. This, plus full and fair disclosure (or concession thereof by plaintiff) will arise infrequently due to the nature of corporate self-dealing. Accordingly, the court reasoned that since Popkin "admitted that defendants fully and fairly disclosed all material facts surrounding the merger to all interested parties, including the minority shareholders,"[40] the federal interest under rule 10b-5 had been satisfied.[41] The court rejected plaintiff's argument that where the minority shareholders are powerless to prevent the merger, additional protection should be afforded them. The court noted that such disclosed information placed them in a position to sue under state law to enjoin the merger as unfair.[42] Even should such action fail, the disclosed information would enable shareholders intelligently to exercise their appraisal rights. One should note, however, that although appraisal rights mitigate against the unfairness of such a merger by permitting a minority shareholder to sell his shares for cash at a fair price, an unfair merger forecloses a choice of retention of ownership in the surviving corporation.

If the *Popkin* situation were held to be within the ambit of rule 10b-5 without the "disclosure" requirement, federal courts would in effect be called upon to regulate many areas of internal management traditionally in the state realm. Such an intrusion would present the danger of disruption of state policies on corporate management as well as a possible conflict in standards of conduct. This factor becomes especially acute when, as presently, state court decisions are redefining the fiduciary duties of corporate directors and officers[43] and the responsibility of majority shareholders to the minority shareholders.[44] Seen in this

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[40]*Id.* at 720.

[41]Injury to the corporation as a result of nondisclosure takes several forms: (1) it may permit the defendants to position themselves so as to commit further mismanagement, Vine v. Beneficial Fin. Co., 374 F.2d 627, 637 (2d Cir.) (by implication), *cert. denied*, 389 U.S. 970 (1967); (2) it may encourage mismanagement, Globus, Inc. v. Jaroff, 271 F. Supp. 378, 381 (S.D.N.Y. 1967); (3) it may preclude others from seeking derivative relief, Barnett v. Anaconda Co., 238 F. Supp. 766, 766 n.7 (S.D.N.Y. 1965) (dictum).

[42]464 F.2d at 720. Equity Corporation's ability, as majority shareholder, to accomplish the merger with or without any other shareholder's approval could not by itself defeat a 10b-5 claim. *See* Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967).

One writer has suggested that many 10b-5 merger cases pose essentially a question of fairness. Ruder, *supra* note 35, at 77-78.

[43]*See, e.g.*, Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969).

[44]*See, e.g.*, Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).

perspective, *Popkin's* reincarnation of the "disclosure" limitation in rule 10b-5 actions involving alleged breaches of fiduciary obligations seems a salutary conclusion. On the other hand, a merger often involves self-dealing and, because of the complexity of the transaction, "enhances the opportunities for fraud and thus increases the need for antifraud protection."[45]

In view of the special provisions under rule 10b-5 for venue,[46] choice of forum,[47] and nationwide service of process[48] and the opportunity it provides for escape from the state security-for-costs statutes in derivative suits[49] and a more restrictive state substantive law,[50] it is apparent why the scope of rule 10b-5 has been continuously tested in private actions. But before expansion beyond the current precariously defined limits, comprehensive congressional policy seems preferable to the present *ad hoc* decisional approach supported by administrative rules.[51]

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[45]Argument of Commissioner's Counsel quoted in Dasho v. Susquehanna Corp., 380 F.2d 262, 267 (7th Cir.), *cert. denied*, 389 U.S. 977 (1967). Due to inability to agree upon a position, the SEC declined to file an amicus brief in *Popkin*. 464 F.2d at 719 n.15.

[46]15 U.S.C. § 78aa (1970).

[47]*See* Zorn v. Anderson, 263 F. Supp. 745, 747-48 (S.D.N.Y. 1968).

[48]15 U.S.C. § 78aa (1970).

[49]*See* McClure v. Borne Chemical Co., 292 F.2d 824 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961).

[50]*See generally* Comment, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 YALE L.J. 1120, 1123-33 (1950).

[51]For discussion of a current attempt at codification of rule 10b-5, *see generally* Loss, *The American Law Institute's Federal Securities Code Project*, 25 BUS. LAWYER 27 (1969).