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Recent Cases

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RECENT CASES

Civil Procedure—Attorney-Client Privilege—Privilege Protects Communications Made by Corporate Employee To Secure Legal Advice and a Matter Committed to a Professional Legal Advisor Is Prima Facie Committed To Secure Legal Advice

I. Facts and Holding

The Board of Directors of petitioner corporation,[1] after learning that the corporation may have maintained a "slush fund" to bribe purchasing agents of other businesses,[2] hired a law firm[3] to investigate the business practices of the corporation and possibly make recommendations as to future conduct.[4] In subsequent litigation in the United States District Court for the Eastern District of Missouri, respondent corporation,[5] claiming that it had been harmed by the petitioner's bribery, sought to discover a written report from the law firm containing the firm's findings and recommendations.[6] After

1. Petitioner engaged primarily in manufacturing and processing nonferrous metals; its operations included interstate sales of scrap copper.

2. The possible existence of a "slush fund" came to light during two lawsuits in 1974 and 1975 arising from a proxy fight. The Securities and Exchange Commission (SEC) suhsequently conducted an official investigation of petitioner and filed suit against it for an injunction. In response to an agency subpoena during the investigation petitioner surrendered to the SEC without protest the material sought by respondent corporation.

3. The law firm, Wilmer, Cutler & Pickering of Washington, D.C., was not petitioner's regular counsel. Petitioner chose this firm because of its expertise in SEC practice. Petitioner employed the law firm in the spring of 1975, before the SEC had taken any official action.

An accounting firm, Arthur Andersen & Co., aided the law firm in its investigation, which included interviews with corporate employees and an examination of petitioner's business records.

4. A resolution by petitioner's Board of Directors authorized the engagement of the law firm "to conduct an investigation and inquiry into the matters disclosed and discussed in this regard at this meeting for the purposes of eliciting facts, making certain findings, and providing to the Board of Directors of this Corporation a report possibly containing recommendations as to course of action . . . ." Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 607 (8th Cir. 1978). The resolution also directed all directors, officers, and employees to cooperate with the investigation.

5. The Weatherhead Company filed a complaint on July 9, 1976, alleging that petitioner and Weatherhead employees had conspired to sell Weatherhead an inferior grade of copper, in return for which Weatherhead employees received bribes from petitioner's "slush fund." Weatherhead also alleged tortious interference with its employment contracts and violation of § 4 of the Clayton Antitrust Act, 15 U.S.C. § 15 (1976). *See* Weatherhead Co. v. Diversified Indus., Inc., No. 76-623C(1) (E.D. Mo., filed July 9, 1976).

6. Judge Heaney's *en banc* majority opinion described the report, dated December 1975

viewing the report in camera, the district court ordered disclosure.[7] Petitioner thereupon petitioned the Eighth Circuit Court of Appeals for a writ of mandamus,[8] arguing that the attorney-client privilege[9] protected the report. A three-judge panel denied the petition,[10] finding that the privilege did not attach[11] because petitioner had not hired the law firm to provide legal services or advice.[12] On reconsi-

as follows: "[It] summarized [the] interviews, analyzed the accounting data, evaluated the conduct of certain employees, drew conclusions as to the propriety of their conduct and made recommendations as to steps Diversified should take." 572 F.2d at 608. Judge Henley's opinion, concurring in part and dissenting in part, added the following information: the law firm determined whether funds "had in fact been surreptitiously created and used in violation of Diversified's established business procedures and internal controls;" the law firm stressed a warning by Arthur Andersen & Co. that the recommended accounting procedures would be useless if ignored by those responsible for implementing them; and the law firm recommended that the Board (1) adopt the accounting procedures proposed by Arthur Andersen & Co., (2) make personnel changes necessary to prevent recurrence of certain practices, and (3) consider whether to restore allegedly misused funds. 572 F.2d at 615.

Respondent also sought discovery of the following documents: (1) a memorandum from the law firm dated June 19, 1975, outlining how it proposed to conduct the investigation and discussing the extent to which information developed by the investigation would be immune from disclosure; (2) corporate minutes covering meetings held by petitioner's Board of Directors from early May 1975 to July 1976; and (3) a memorandum dated January 30, 1976, from the president of petitioner corporation to corporate officers and heads of company divisions and subsidiaries, revealing to some extent the results of the investigation.

7. The district court had overruled without opinion petitioner's objection to discovery and had refused reconsideration and certification for interlocutory appeal under 28 U.S.C. § 1292(b) (1970).

8. The writ was directed at Respondent James H. Meredith, Chief Judge of the United States District Court for the Eastern District of Missouri.

9. *See* note 13 *infra* and accompanying text. Petitioner also claimed that the "work product" doctrine of FED. R. CIV. P. 26(b)(3) protected the documents.

10. The court noted that while mandamus is not ordinarily available to review interlocutory discovery orders, it is available when a claim of attorney-client privilege has been raised and rejected. 572 F.2d at 599. The court therefore considered the petition on its merits.

11. The court rejected the "work product" argument because it found that the law firm had not prepared the report because of any prospect of litigation, a prerequisite of the "work product" doctrine. *See* note 13 *infra*. The court also concluded that the attorney-client privilege did not protect the June 1975 memorandum because it contained no confidential information, and that the corporate minutes were unprotected because they were not privileged in themselves and the documents they revealed—the memorandum and report—were not privileged. 572 F.2d at 603-04. Because it found the documents were not privileged, the court did not reach Weatherhead's argnment that petitioner had waived its privilege by voluntarily submitting the material to the SEC. *See* note 2 *supra*.

12. For the privilege to attach, a lawyer must be employed to render legal services or advice. *See* notes 34-61 *infra* and accompanying text. The court stated that the law firm was hired "solely for the purpose of making an investigation of facts and to make business recommendations" and that the work could have been performed "just as readily by non-lawyers." Diversified Indus., Inc. v. Meredith, 572 F.2d at 603.

Judge Heaney, concurring and dissenting, disagreed with the majority's characterization. He described the report as "detailing specific conduct considered . . . to be violative of the law" and containing recommendations on how to "avoid future violations of the law." 572 F.2d at 605.

deration by the Court of Appeals *en banc, held,* petition granted. The attorney-client privilege protects communications made by a corporate employee to the corporation's lawyer at the direction of the employee's superior if the communication concerns the employee's duties, is not disseminated beyond those persons in the corporation who need to know its contents, and is made to secure legal advice; furthermore, absent a clear showing to the contrary, a matter committed to a professional legal advisor is prima facie committed to secure legal advice. *Diversified Industries, Inc. v. Meredith,* 572 F.2d 606 (8th Cir. 1978).

II. LEGAL BACKGROUND

When the requirements of the attorney-client privilege are met,[13] the privilege is an absolute barrier against disclosure of communications from client to lawyer.[14] The privilege derives from the

13. The court in United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950), enumerated the conditions that must exist for the attorney-client privilege to apply:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 358-59. *See generally* C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 87-97 (2d ed. 1972); J. WIGMORE, 8 WIGMORE ON EVIDENCE §§ 2290-2329 (rev. ed. J. McNaughton 1961); C. WRIGHT & A. MILLER, 8 FEDERAL PRACTICE AND PROCEDURE § 2017 (1970). For a history of the privilege, see WIGMORE § 2290; Gardner, *A Re-Evaluation of the Attorney-Client Privilege* (pt. 1), 8 VILL. L. REV. 279 (1963); Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CALIF. L. REV. 487 (1928).

The proposed Federal Rules of Evidence contained thirteen rules dealing with privileges, including one, Rule 503, that covered the attorney-client privilege. Congress, however, enacted only one general rule, providing that "privilege[s] . . . shall be governed by the principles of the common law . . . ." FED. R. EVID. 501; J. WEINSTEIN & M. BERGER, 2 WEINSTEIN'S EVIDENCE ¶¶ 501[01], 503 (1977) [hereinafter cited as WEINSTEIN]. Federal Rule of Civil Procedure 26(b)(1) provides in part: "Parties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action . . . ." (emphasis added).

The related "work product" doctrine protects against disclosure of information or materials "prepared in anticipation of litigation or for trial by or for another party or his representative," unless the party seeking discovery shows "substantial need" and "undue hardship." *See generally* WRIGHT & MILLER, *supra,* at §§ 2021-2028.

14. A showing of good cause cannot defeat the attorney-client privilege, as it can the "work product" rule. *See* note 13 *supra. But see* Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).

If the opposing party claims the privilege, however, the discovering party nonetheless may question opposing counsel as to the capacity in which he was employed. Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963).

rationale that first, protection of such communications promotes freedom of consultation with and fuller disclosure to legal counsel, and second, that the benefits to justice and to society from consultation and fuller disclosure outweigh the obstacles to trial preparation for the party seeking discovery.[15] Because the second part of the rationale cannot be objectively verified, however, commentators long have argued that courts should strictly confine the privilege within the narrowest limits consistent with its logic.[16] In addition, commentators recently have questioned whether the privilege does encourage legal consultation.[17] Thus, much justification exists for restricting the privilege in areas of uncertainty.

Defining the proper scope of the attorney-client privilege is difficult when the client is a corporation,[18] for such cases present several problems that either do not exist or are greatly simplified when the client is a natural person.[19] An initial problem courts must resolve is determining which corporate employees can be said to speak for the corporation for purposes of the attorney-client privilege. If the communications of every employee could qualify for the privilege, too much information would be immune from discovery.[20] Federal courts have developed two principal tests to answer this ques-

15. WIGMORE, *supra* note 13, at § 2291; Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 425 (1970).

16. WIGMORE, *supra* note 13, at § 2291; WEINSTEIN, *supra* note 13, at ¶ 503[02].

17. Note, *supra* note 15, at 425 n.7, 428; Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 469-77 (1977) [hereinafter cited as Note, *Fixed Rules*] (arguing that clients continue to consult lawyers because there is no substitute for legal advice and because the need for advice often outweighs the consequences of disclosure to an opposing party); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962) [hereinafter cited as Note, *Functional Overlap*] (empirical study showing that of 98 laymen questioned, 53 said either they did not believe there was an attorney-client privilege or they did not know; also, that of 108 laymen questioned, 53 said either they would make full disclosure to counsel even if no privilege existed or they did not know).

That the attorney-client privilege, unlike the "work product" rule, is absolute and cannot be set aside for good cause also supports the policy of strict construction. *See* Note, *supra* note 15, at 425-26; *see* note 13 *supra*.

18. WEINSTEIN, *supra* note 13, at ¶ 503(b)[04]. Many commentators have discussed the application of the attorney-client privilege to corporate clients. An early and still important article is Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956). A number of articles provide guidance for practitioners in the area. *E.g.*, Withrow, *How to Preserve the Privilege*, 15 PRAC. LAW. 30 (Nov. 1969). A helpful bibliography appears at WEINSTEIN, *supra* note 13, at 503-8 to -10.

19. WEINSTEIN, *supra* note 13, at ¶ 503(b)[04]. For a treatment of attorney-corporate client problems in addition to those discussed below, see *id.*

20. "[W]here corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large." Simon, *supra* note 18, at 955.

tion.[21] *City of Philadelphia v. Westinghouse Electric Corp.*[22] formulated the "control group" test, which states that a communicating employee may be said to speak for the corporation if he is in a position to control or take a substantial part in a decision about any action that the corporation may take upon the advice of the attorney.[23] By restricting the privilege to communications by corporate decisionmakers, the *Westinghouse* court attempted to avoid conflict with *Hickman v. Taylor*,[24] a Supreme Court decision raising the possibility that the attorney-client privilege would not attach when lower-ranking employees merely relay information to a lawyer.[25] Though several courts have adopted the "control group" test,[26] commentators have criticized it for restricting the privilege too narrowly.[27] In *Harper & Row Publishers, Inc. v. Decker*,[28] the Seventh

21. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 608 (8th Cir. 1978); *cf.* WEINSTEIN, *supra* note 13, at ¶ 503(b)[04] (suggesting a third test set forth in United States v. United Shoe Mach. Co., 89 F. Supp. 357 (D. Mass. 1950), that would protect communications by any officer or employee of a corporation).

22. 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub. nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

23. *Id.* at 485.

24. 329 U.S. 495 (1947).

25. *See* 210 F. Supp. at 485; Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. IND. & COM. L. REV. 873, 877 (1971). The *Hickman* Court denied the privilege to witnesses who were employees of defendant partnership. Though the Court did not discuss the significance of this fact, later courts feared that the privilege would not protect information conveyed to attorneys by lower-level employees.

26. *See, e.g.*, Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975); United States v. International Bus. Mach. Corp., 66 F.R.D. 154, 178 (S.D.N.Y. 1974); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35 (D. Md. 1974); Congoleum Indus. v. GAF Corp., 49 F.R.D. 82, 85 (E.D. Pa. 1969).

27. *See* WEINSTEIN, *supra* note 13, at ¶ 503(b)[04]; Kobak, *Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 368 (1972); Weinschel, *supra* note 25, at 875-76; Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 761-62 (1971) [hereinafter cited as Note, *Inroads*]. Under the "control group" test, corporate counsel faces a dilemma: if he gathers information from employees outside the "control group" in an effort to advise his client, he may be developing evidence that an opposing party can discover and use against the corporation; if, however, he restricts his interviews to those employees who are certainly within the "control group," he may find it difficult to gather all the necessary information. Weinschel, *supra* note 25, at 875-76. This result conflicts with the rationale behind the privilege—encouraging corporations that need legal advice to make full disclosure to their counsel. *Id.* Furthermore, while the "control group" test assures that corporate employees who qualify to speak for the corporation are both "information givers" and "decision makers," as are natural clients, Note, *Evidence—Privileged Communications—The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 374 (1970) [hereinafter cited as Note, *Evidence*], writers have argued that this attempt to equate corporate and individual clients is unrealistic. Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542, 544-48 (1968).

Circuit set forth a second test under which an employee speaks for the corporation if the employee makes a communication to the corporation's attorney at the direction of a superior, and if the subject-matter of the communication concerns the performance of the employee's duties.[29] Commentators have commended the *Harper* test for expanding the scope of the privilege,[30] but several writers have suggested that the test would be less susceptible to abuse if it required that the communication be made to secure legal advice.[31] The Supreme Court's four-four affirmance of *Harper* in 1970[32] did little to resolve the conflict in the courts over the two tests.[33]

A second issue a court must resolve when considering a claim of attorney-corporate client privilege is whether the lawyer acted in

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One writer has vigorously defended the "control group" test, arguing that it provides "an easily applicable bright-line rule to facilitate judicial decisionmaking." Note, *supra* note 15, at 430; *cf.* 20 U.C.L.A. L. REV. 288, 300 (1972) ("control group" test is easily applied, but ease of application may not be primary goal in attorney-client privilege). Similarly, other commentators have asserted that certainty of application is essential to the functioning of the privilege. *E.g.*, WEINSTEIN, *supra* note 13, at ¶ 503[02]. One writer, however, has recently attacked this position, reasoning that in many situations clients will seek legal advice even when the availability of the attorney-client privilege is uncertain. Note, *Fixed Rules, supra* note 17, at 472.

28. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971).

29. *Id.* at 491-92.

30. *See* Weinschel, *supra* note 25, at 877; Note, *Inroads, supra* note 27, at 765-66; 23 VAND. L. REV. 847, 852-53 (1970); *cf.* Kobak, *supra* note 27, at 368 ("control group" test criticized because it does not encourage all corporate employees to seek legal advice).

Few courts have adopted the *Harper* test. *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 CATH. LAW. 138, 150 (1976). *But see* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1974); Hasso v. Retail Credit Co., 58 F.R.D. 425, 428 (E.D. Pa. 1973). *Cf.* Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974) (*mem.*), *aff'd without opinion*, 534 F.2d 330 (7th Cir. 1976)(finding that the attorney-client privilege attaches to a communication between counsel and corporate employees that was disseminated to other corporate employees directly concerned with the information communicated).

31. WEINSTEIN, *supra* note 13, at ¶ 503(b)[04]; Note, *Inroads, supra* note 27, at 769. *Cf.* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1974) ("control group" test is insufficient; communication must be incident to request for legal advice); Kobak, *supra* note 27, at 369 (central issue in attorney-client privilege is whether employee honestly sought legal advice).

Writers making this suggestion apparently have assumed that courts were not strictly enforcing a separate element of the privilege—that in connection with the communication legal advice be requested or rendered. *See* note 34 *infra* and accompanying text. Adding a restriction to the *Harper* test is therefore seen as a way to tighten judicial analysis of the issue of who may speak for the corporation. *Cf.* 23 VAND. L. REV. 847, 852 (1970) (noting that state courts have resolved the problem of who may speak for the corporation by strictly construing the other elements of the privilege—for example, that the communication be made to secure legal advice).

32. *See* note 28 *supra*.

33. Weinschel, *supra* note 25, at 877.

a legal capacity, a prerequisite for applying the privilege.[34] Although this problem exists when the client is a natural person,[35] it is aggravated in the corporate area because patent, house, and outside corporate counsel give much business advice as well as legal advice.[36] Because determination of the legal or nonlegal nature of advice requires an examination of individual facts and circumstances,[37] generalizations cannot easily be drawn from opinions considering this question.[38] Nevertheless, some principles do emerge from the cases.

First, courts determine whether legal advice was sought or given by analyzing the particular service rendered for the client, not by analyzing the overall relationship between the lawyer and client. The court in *United States v. United Shoe Machinery Corp.*[39] set forth and applied the "relationship" approach to communications

34. *See* note 13 *supra*. This issue can be analyzed by examining either the client's request or the attorney's product. *Cf.* United States v. International Bus. Mach. Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974) ("One of the essential elements of the attorney-client privilege is that the attorney be acting as attorney, that the communication be made for the purpose of securing legal services."). It generally does not matter which viewpoint is adopted, because in most situations the attorney will provide what the client requested. When, however, the request and the product differ, the request should control determination of the issue. This is because the rationale for the attorney-client privilege is that it encourages clients to seek legal advice; if the client did not request legal advice the privilege should not attach. *See* notes 13-17 *supra* and accompanying text.

No single article has dealt with this element of the attorney-client privilege in a comprehensive fashion. For background treatment of selected topics, see WEINSTEIN, *supra* note 13, at ¶ 503(a)(1)[01]; Heininger, *The Attorney-Client Privilege As It Relates to Corporations*, 53 ILL. B.J. 376, 378-84 (1965); Kobak, *supra* note 27, at 354-62; Petersen, *Attorney-Client Privilege in Internal Revenue Investigations*, 54 MINN. L. REV. 67 (1969); Simon, *supra* note 18, at 969-78; Note, *Functional Overlap, supra* note 17; Note, *Nature of the Professional Relationship Required Under Privileged Communication Rule*, 24 IOWA L. REV. 538 (1939); 39 FORDHAM L. REV. 281, 287-90 (1970); 4 SETON HALL L. REV. 531 (1973).

The burden of establishing the attorney-client relationship is on the party claiming the privilege. WEINSTEIN, *supra* note 13, at ¶ 503(a)(1)[01].

35. Note, *Evidence, supra* note 27, at 376.

36. "Whether they be 'outside' counsel or 'house' counsel, they can rarely confine themselves to purely legal matters. Questions of policy, as well as executive guidance for matters that are partly legal, often fall within their domain." Simon, *supra* note 18, at 969. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); WEINSTEIN, *supra* note 13, at ¶ 503(a)(2)[01]; Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 15 U. DET. L.J. 299, 354 (1963) ("most of the corporate law practice today consists largely in the giving of sound business advice").

37. American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 88 (D. Del. 1962); *see* WIGMORE, *supra* note 13, at § 2296.

38. In fact, courts often produce ad hoc decisions with conflicting results and rationales. *See* notes 57-61 *infra* and accompanying text; Petersen, *supra* note 34, at 97; 4 SETON HALL L. REV. 531, 535 (1973).

39. 89 F. Supp. 357 (D. Mass. 1950). For a discussion of the "relationship" test see Simon, *supra* note 18, at 975-76.

to and from members of a corporation's patent department.[40] Judge Wysanski found that members of the department spent their time principally on questions of business policy and competition,[41] and thus concluded that an attorney-client relationship did not exist.[42] In *Zenith Radio Corp. v. Radio Corp. of America,*[43] Judge Leahy implicitly rejected the "relationship" approach by stating that members of a patent department qualify for the privilege whenever they "act as lawyers" in a specific matter,[44] which includes applying rules of law to facts and prosecuting appeals.[45] The court in *American Cyanamid Co. v. Hercules Powder Co.*[46] expressly adopted Judge Leahy's approach, observing that by examining each document separately, a judge could avoid extending or denying unjustifiably a blanket privilege when counsel performed both legal and business functions.[47] In addition, a number of courts implicitly have rejected the "relationship" approach by determining the privilege for each document or activity in question.[48]

The second principle to be derived from opinions considering

40. United Shoe, defendant in a civil antitrust action, objected to the introduction of nearly 800 exhibits. Among those documents in issue were (1) documents to and from independent lawyers, (2) documents to and from defendant's legal department, and (3) working papers of persons in the patent department.

Eight members of the patent department did not belong to the bar of any court and 13 did not belong to the Massachusetts bar, facts considered significant by Judge Wysanski. For a discussion of this problem, see Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 465-66 (S.D.N.Y. 1956); Simon, *supra* note 18, at 971-73.

41. 89 F. Supp. at 360.

42. *Id.* at 361.

43. 121 F. Supp. 792 (D. Del. 1954)(defendant in patent infringement action seeking privilege for some 1600 documents).

44. *Id.* at 794. *See* Simon, *supra* note 18, at 976-77.

45. 121 F. Supp. at 794. The court stated that attorney-employees in a patent department do not "act as lawyers" when preparing or prosecuting patent applications because these acts are not "hallmark" activities of attorneys. Judge Leahy noted that "[a]ny citizen although not an attorney may qualify for practice before the Patent Office." *Id.* at 794 n.1.

46. 211 F. Supp. 85 (D. Del. 1962)(documents sought in patent proceeding held not protected by attorney-client privilege).

47. *Id.* at 89. *See* 121 F. Supp. at 793.

48. Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44 (N.D. Cal. 1971)(eleven page schedule of documents held to be privileged or nonprivileged); Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249 (E.D. Wis. 1963)(ruling on each document sought from defendant's patent counsel); Comercio E. Industria Continental, S.A. v. Dresser Indus., 19 F.R.D. 513 (S.D.N.Y. 1956)(privilege does not apply to transactions when attorney is acting as a general business agent rather than in his professional capacity); Pye, *Fundamentals of the Attorney-Client Privilege,* 15 PRAC. LAW. 15, 20 (Nov. 1969).

Judge Wysanski in *United Shoe* set forth a test for the attorney-client privilege that appears to follow the "particularized" approach, stating that the attorney must "in connection with this communication . . . [be] acting as a lawyer . . . ." 89 F. Supp. at 358. Judge Wysanski did not follow this language when applying the test to members of the patent department. *See* notes 39-42 *supra* and accompanying text.

the legal-nonlegal issue is that courts, when confronting either a request for or rendering of both legal and nonlegal services, have not required that the services requested or rendered be entirely legal in order to satisfy the legal capacity requirement of the privilege; instead, the requirement is satisfied if the services are "primarily" or "predominantly" legal. In suggesting the rationale for this legal test, the *United Shoe* court noted that communications from outside counsel often contain business or public relations advice as well as legal opinions.[49] Because such nonlegal advice is often in the public interest, the court reasoned that courts should not order disclosure merely because nonlegal matters are included in a communication that also includes legal advice.[50] Although the verbal formulation of the "predominance" test has varied,[51] courts have accepted the test widely[52] and commentators have approved it as embodying a flexible and realistic approach to modern corporate law practice.[53] The decisions remain unclear, however, on the extent to which courts will separate legal and nonlegal portions of a single document and extend or deny the privilege to each portion, rather than employ the "predominantly legal" test to protect the entire document. For example, in *Hercules, Inc. v. Exxon Corp.*,[54] the court noted that although business and legal advice may be "inextricably interwoven" in one document, courts must "separate out the two" in order to preserve the integrity of the privilege.[55] In its rulings on individual documents, however, the *Hercules* court extended or denied the privilege to each document as a whole, giving such reasons as "primarily business advice" or "no request for legal advice."[56]

49. 89 F. Supp. at 359. *See* note 36 *supra* and accompanying text.

50. 89 F. Supp. at 359.

51. *See* Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971) ("documents . . . primarily concerned with giving legal guidance"); Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 465 (S.D.N.Y. 1956) ("communications . . . largely concerned with opinions on law, legal services or assistance in some legal proceeding"); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954) (must give "predominantly" legal advice).

52. In addition to the cases cited at note 51 *supra*, see Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977); North Am. Mortgage Investors v. First Wis. Nat'l Bank, 69 F.R.D. 9 (E.D. Wis. 1975); Chore-Time Equip., Inc. v. Big Dutchman, Inc., 255 F. Supp. 1020 (W.D. Mich. 1966); Pye, *supra* note 48, at 21. *But see* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1147, 1167 (D.S.C. 1974) ("the attorney-client privilege does not attach where the patent attorney is giving technical or business, as opposed to legal, advice").

53. 39 FORDHAM L. REV. 281, 289 (1970); *see* WEINSTEIN, *supra* note 13, at ¶ 503(a)(1)[01].

54. 434 F. Supp. 136 (D. Del. 1977)(patent infringement action in which defendant sought discovery of 255 documents).

55. *Id.* at 147.

56. *Id.* at 148-49. *See* Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46-59 (N.D. Cal.

The last principle derived from decisions addressing the legal-nonlegal issue is that the "predominance" test is not workable until courts can agree whether to characterize as legal or nonlegal the predominant element within a communication or activity.[57] Decisions in this area have been inconsistent. For example, some courts have held that an attorney's preparation of an income tax return is not a legal activity,[58] but others have reached the opposite conclusion, viewing preparation of an income tax return as within an attorney's professional competence.[59] Courts also have given inconsistent answers to the question whether the preparation and prosecution of patent applications are legal activities.[60] In addition, courts have

1971). *But see* United States v. Aluminum Co. of America, 193 F. Supp. 251 (N.D.N.Y. 1960).

Earlier in its opinion the *Hercules* court stated that the request for legal advice need not always be express. The court wrote: "Client communications intended to keep the attorney apprised of continuing business developments, with an implied request for legal advice based thereon, or self-initiated attorney communications intended to keep the client posted on legal developments and implications may also be protected." 434 F. Supp. at 144; *accord*, Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974).

57. Most courts have resolved this question without any reference to the "predominance" test. *E.g.*, Comercio E Industria Continental, S.A. v. Dresser Indus., 19 F.R.D. 265 (S.D.N.Y. 1956). Furthermore, courts have identified a number of nonlegal roles or functions, including accountant, Olender v. United States, 210 F.2d 795 (9th Cir. 1954); business partner, Lowy v. Commissioner, 262 F.2d 809 (2d Cir. 1959); agent, United States v. Bartone, 400 F.2d 459 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969); manager, United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943); investigator, Metalsalts Corp. v. Weiss, 76 N.J. Super. 291, 184 A.2d 435 (1962); and negotiator, J.P. Foley & Co. v. Vanderbilt, 65 F.R.D. 523 (S.D.N.Y. 1974). *See generally* WEINSTEIN, *supra* note 13, at ¶ 503(a)(1)[01]; WIGMORE, *supra* note 13, at § 2296; Simon, *supra* note 18, at 973-75. Courts have not been completely successful, however, in applying these labels to difficult fact situations. *See* notes 58-60 *infra* and accompanying text.

One writer has suggested that courts use a balancing approach to resolve the legal-nonlegal issue and the other requirements of the attorney-client privilege. Note, *Fixed Rules*, *supra* note 17, at 473-79. Courts would weigh the benefits of allowing discovery of the documents in question against the harm that disclosure would cause. *Id.* at 478. For a critique of this approach, see note 92 *infra*.

58. Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954); *accord*, Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966) (in preparing tax returns attorney had acted as a "scrivener").

59. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *see* United States v. Threlkeld, 241 F. Supp. 324 (W.D. Tenn. 1965). For a discussion of the attorney-client privilege as applied to attorneys preparing tax returns, see Petersen, *supra* note 34, at 91-97.

60. *Compare* Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954)(preparing the application of patent letters and prosecuting same in Patent Office are not "primarily" legal activities) *with* Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F. Supp. 917 (D.N.J. 1958)(extending privilege to correspondence between patent attorney and client concerning claims to be made under patent application).

Sperry v. Florida, 373 U.S. 379 (1963), has complicated the patent area. In that case the Supreme Court implied that the preparation and prosecution of patent applications are legal activities. 373 U.S. at 383. Relying on this implication, the United States District Court for the District of Delaware in 1966 apparently overruled *Zenith* and held that prosecuting patent

conflicted sharply over the weight to be given a finding that a nonlawyer could have performed the activity in question.[61]

In summary, courts have not yet resolved how to determine who may qualify as the corporate client for purposes of the attorney-client privilege. Furthermore, although courts have developed flexible and realistic approaches to determine whether legal services have been sought or rendered, they continue to reach contradictory results in analyzing difficult fact situations.

III. THE INSTANT OPINION

In seeking to determine which corporate employees can speak for the corporation for purposes of the attorney-client privilege, the court adopted the test formulated by the Seventh Circuit in *Harper* because, in its opinion, the *Harper* test was better reasoned than the "control group" test. The court argued that the *Harper* test, by expanding the class of employees who may speak for the corporation, insured that counsel could develop information necessary to advise clients on complex legal issues without fear of disclosure.[62] Noting, however, that under the *Harper* test a corporation could abuse the attorney-client privilege by funneling routine documents through counsel,[63] the majority incorporated several limiting modifications. In addition to the *Harper* criteria, the court stated that the employee must make the communication for the purpose of seeking legal advice and that the communication must not be disseminated beyond those corporate personnel who need to know its contents.[64]

In determining which of petitioner's employees qualified to speak for the corporation, the court focused primarily on the first of these modifications—whether petitioner's employees had made

applications was a privileged activity. Sperti Prods., Inc. v. Coca-Cola Co., 262 F. Supp. 148, 150-51 (D. Del. 1966). *But cf.* Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546 (D.D.C. 1970)(preparing patent applications is not a privileged activity). *See generally* 4 SETON HALL L. REV. 531 (1973).

61. *Compare* Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F. Supp. 917 (D.N.J. 1958)(fact that nonlawyers could have performed services does not destroy privilege) *with* Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956)(matters that may "as easily be handled by laymen" are not privileged). *See generally* Kobak, *supra* note 27, at 360; Note, *Functional Overlap, supra* note 17, at 1234-35.

62. Diversified Indus., Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978). The court also criticized the "control group" test for trying to equate the corporate client with an individual client. *Id.* at 608.

63. *Id.* at 609. *See* note 31 *supra* and accompanying text.

64. 572 F.2d at 609. The modifications, suggested in WEINSTEIN, *supra* note 13, at ¶ 503(b)[04], also included the requirement that the employee's superior request the employee to make the communication so that the corporation could secure legal advice. 571 F.2d at 609.

the communications to secure legal advice. To resolve this issue, the court adopted Dean Wigmore's standard that absent a clear showing to the contrary, a matter committed to a professional legal advisor is prima facie committed to secure legal advice.[65] Applying this standard to the instant case, the court determined that respondent had made no such showing. To the contrary, the court found the December report "uniquely legal," reasoning that although accountants and private investigators could have carried out some of the investigation alone, "neither would have had the training, skills and background necessary to make the independent analysis and recommendations . . . ."[66] Furthermore, the court argued that extending a privilege to the present facts would encourage corporations to "seek out and correct wrongdoing in their own house[s]. . . ."[67] Finding that the other requirements of the modified test clearly were satisfied,[68] the court concluded that the attorney-client privilege protected the December 1975 report.[69]

Judge Henley in dissent[70] did not challenge the modified *Harper* test adopted by the majority,[71] but did take issue with the Wigmore standard, questioning how, apart from in camera proceedings, a party seeking disclosure could ever overcome the prima facie

65. 572 F.2d at 610. Dean Wigmore sets forth this standard in WIGMORE, *supra* note 13, at § 2296.

66. 572 F.2d at 610. The court also gave weight to the law firm's "complete autonomy" in its investigation. Furthermore, in a footnote the court stated that it was not decisive that the president of petitioner corporation characterized the relationship between petitioner and the law firm as not being one of attorney-client, and that the nonlegal matter in the report did not destroy the privilege because such matter was "insubstantial." *Id.* at 610 n.3.

67. *Id.* at 610.

68. *Id. See* note 64 *supra* and accompanying text.

69. 572 F.2d at 611. The court found that the attorney-client privilege protected the report and relevant portions of the corporate minutes and the January 30 memo because disclosure of these documents would "directly or inferentially" reveal the contents of the interviews. *Id.* at 611; *see* note 6 *supra*. The court also concluded that petitioner had given only a "limited waiver" of the documents by releasing them to the SEC. *See* notes 2 & 11 *supra*. The court reasoned that to hold otherwise would thwart investigations by outside counsel. 572 F.2d at 611.

70. Chief Judge Gibson, writing a separate opinion, agreed with the majority that the December report was privileged and that the June memo was not. He argued, however, that the attorney-client privilege should not protect the corporate minutes because stockholders could inspect them, thereby undermining the required element of confidentiality. 572 F.2d at 616.

Judge Bright in dissent argued that the case was moot because Weatherhead had obtained the desired information from the SEC files following the SEC investigation of petitioner. He stated, however, that he agreed "in the main" with Judge Henley's dissent. *Id.* at 617.

71. *Id.* at 613. Judge Henley did question whether the privilege should protect communications made by officers or employees of subsidiaries or corporate personnel who have dealt adversely with the corporate client.

case of privilege.[72] Moreover, the dissent argued that in the instant case the law firm's activities consisted of a "factual investigation and business recommendations"[73] that could have been performed by private investigators, accountants, bankers, or "any person possessing ordinary common sense and business prudence."[74] Although agreeing in principle with much of the majority's opinion, Judge Henley nevertheless concluded that the attorney-client privilege should not be extended to the facts of the instant case.[75]

IV. COMMENT

The instant decision is the first court of appeals ruling on the issue of which employees may speak for the corporate client since the Supreme Court's evenly divided affirmance of the *Harper* decision.[76] In adopting and modifying the *Harper* test, the decision may signal a reversal of the trend favoring the "control group" test.[77] More importantly, the modifications adopted create a sensible, moderate standard that does not unduly restrict or expand the class of employees who may speak for the corporation. By extending the class of clients beyond corporate decisionmakers, the modified test assures that counsel may gather information in legitimate situations without concern that an opposing party may discover the information in subsequent litigation.[78] In addition, the test precludes funneling documents through counsel to avoid disclosure by requiring that employee communications be made to secure legal advice.[79] The modified test combines two previously separate requirements of the attorney-client privilege: first, that the communicating employee be qualified to speak for the corporation and second, that the communication be made to secure legal advice. The modified test makes the second element a precondition of the first, thereby emphasizing the importance of resolving correctly the legal-nonlegal issue.

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72. *Id.* at 614.

73. *Id.*

74. *Id.* at 615. The dissent also noted that the president of petitioner corporation had indicated he did not believe that petitioner had retained the law firm as a legal advisor, *id.* at 614, and that the law firm had warned the Board of Directors that a serious disclosure problem might arise. *Id.* at 615; *see* note 6 *supra.*

75. *Id.* at 616. Judge Henley agreed with the majority that neither the June memo nor the corporate minutes were privileged except to the extent that they revealed privileged information. *Id.* at 612.

76. Since 1970, several district courts but no courts of appeal have addressed this question. *See* notes 26 & 30 *supra.*

77. *Id.*

78. *See* note 27 *supra* and accompanying text.

79. *See* notes 20, 31 & 62-64 *supra* and accompanying text.

In resolving the legal-nonlegal issue, the court adopted the Wigmore standard, which states that absent a clear showing to the contrary, a matter committed to a professional legal advisor is prima facie committed to secure legal advice. The dissent's criticism of the Wigmore standard—that a party seeking discovery will have no means available to overcome the prima facie case[80]—is exaggerated because the discovering party may always question opposing counsel about the capacity in which he was employed.[81] Nevertheless, the standard provides an inappropriate means by which to determine whether a lawyer has acted in a legal capacity. In cases in which the facts are complex and difficult to resolve, the presumption will seriously handicap the discovering party, contravening the well-reasoned policy in favor of narrow construction of the attorney-client privilege.[82] Furthermore, the Wigmore presumption conflicts with the accepted judicial method of examining each document individually to determine whether it should be privileged.[83] The presumption is a broad rule of convenience which in close cases may protect nonlegal documents, a result courts sought to avoid in rejecting the *United Shoe* "relationship" approach.[84]

The instant court did not rely solely on the Wigmore presumption to answer the question whether legal services had been sought. It went on to examine the facts of the case, and in so doing, illustrated the difficulty courts have encountered in resolving the legal-nonlegal issue in close factual situations.[85] Both the majority and dissenting opinions implicitly assumed that an activity is nonlegal if a layman could perform it.[86] The policy of strict construction justifies such a presumption.[87] If conclusive, however, the presumption would stifle involvement of lawyers in new and useful activities.[88] Therefore, the presumption should be rebuttable upon a clear

80. *See* text accompanying note 72 *supra.*

81. *See* note 14 *supra.*

82. *See* notes 16 & 17 *supra* and accompanying text.

83. *See* notes 39-48 *supra* and accompanying text.

84. The Wigmore presumption also conflicts with the established rule that the claimant of the privilege has the burden of proving the elements of the privilege. *See* note 34 *supra.* Moreover, few courts or commentators have followed the presumption. *See* Simon, *supra* note 18, at 977 n.81. *But cf.* Note, *Functional Overlap, supra* note 17, at 1235 (recommending that all communications with licensed attorneys be privileged, unless the client is "obviously" not consulting the lawyer in a professional capacity).

85. *See* notes 57-61 *supra* and accompanying text.

86. *See* notes 61, 67 & 74 *supra* and accompanying text.

87. Also justifying this presumption is the argument that it is unfair to extend the privilege if a lawyer is performing an activity and deny it if a layman is performing precisely the same activity.

88. *See* Note, *Functional Overlap, supra* note 17, at 1235 ("[t]o limit the attorney-client privilege to tasks historically performed by lawyers is to beg the question whether these

showing that lawyers should perform the activity in question.[89] In the instant case, of course, this presumption would not have operated because the majority and dissent could not agree whether a layman could have made the necessary analysis and recommendations.[90] When the factual determination is so close, a court should resolve doubts against the privilege[91] unless, as above, the party claiming the privilege can demonstrate persuasively that lawyers should perform the activity.

The suggested analysis thus should proceed in several steps. First, the court should examine each activity or communication to determine if it is legal or nonlegal, thereby resolving cases in which the material clearly falls into either category. Second, if the communication or activity contains both legal and nonlegal elements, the court should employ the "predominance" test to resolve the legal-nonlegal issue. Third, if the court cannot ascertain clearly whether a specific activity is legal or nonlegal, it should determine whether laymen could perform the activity; if so, it should be classified as nonlegal, subject to persuasive argument that lawyers should perform the activity. Finally, if the court cannot decide whether laymen could perform the activity, it should resolve doubts against the privilege, again subject to the counter policy arguments. Such an

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new functions are proper and ought to be privileged currently").

An excellent example of what might be an important new function for lawyers is the law firm's investigation in the instant case. A similar investigation occurred in 1975 when, as part of an SEC consent agreement, Gulf Oil Corporation appointed New York lawyer John J. McCloy to a fact-finding committee to investigate the political contributions Gulf had made to foreign governments. A number of attorneys from Mr. McCloy's firm aided in the investigation and the committee's recommendations were similar to those made by the law firm in the instant position. N.Y. Times, June 12, 1975, at 53, col. 4; *id.*, Dec. 31, 1975, at 35, col. 2. The SEC viewed the fact-finding committee as a way of augmenting the agency's small enforcement staff. *Id.* at 35, col. 1. *Cf.* Wall St. J., April 8, 1976, at 6, col. 3 (SEC enforcement chief Stanley Sporkin in a speech regarding bribery disclosures urges corporations to make greater use of the SEC voluntary disclosure program).

89. The majority in the instant opinion essentially argued this position. *See* text accompanying note 68 *supra*. Such an inquiry would have the added advantage of making courts recognize that in characterizing an activity as "legal" or "nonlegal" in a close situation, they are making a policy choice rather than an objective factual determination. In clear factual settings a court may determine that the activity has more "legal" than "nonlegal" characteristics; but when the activity is unclear, the legal consequences of choosing a particular label may well determine the choice of labels. *See* Simon, *supra* note 18, at 973 ("in a case where too much valuable evidence would be insulated by the privilege being accorded to house counsel, a court might be disposed to find that house counsel was actually functioning in a business capacity"). *See generally* McCoy, *Logic vs. Value Judgment in Legal and Ethical Thought*, 23 VAND. L. REV. 1277 (1970). If courts recognize that they are making a policy choice, they will be more likely to justify their conclusions with more than a conclusory statement that the activity is "legal."

90. *See* notes 66 & 74 *supra* and accompanying text.

91. Here again the justification is the policy of strict construction.

analysis would adopt existing principles that have proved useful in defining the scope of the attorney-client privilege, would comport with the policy of strict construction, and would provide a systematic framework for courts to use in analyzing the legal-nonlegal issue within the attorney-client privilege.[92]

JAMES S. HUTCHINSON

Constitutional Law—Confrontation Clause—Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Guarantee Despite Lack of Cross-Examination

I. FACTS AND HOLDING

Defendants appealed their federal convictions for distribution of heroin[1] on the ground that the trial court erred in admitting into evidence an informant's grand jury testimony.[2] The informant had assisted a Drug Enforcement Agency (DEA) investigation by purchasing heroin from defendants under police surveillance.[3] The informant attested to the veracity of prepared statements documenting the undercover transactions before the grand jury, but his subsequent murder prevented similar testimony at trial.[4] Defendants con-

92. The problem with the balancing approach described in note 57 *supra* is that it provides little guidance to courts in how to analyze the legal-nonlegal issue. The author admits this difficulty but states that "courts might in time acquire the facility with balancing that accompanies its frequent use." Note, *Fixed Rules*, *supra* note 17, at 479. But, because the legal-nonlegal issue is only one element within what is often a minor procedural issue—the question of the attorney-client privilege—it is unlikely that district courts will confront the issue often enough to acquire facility in balancing, and even less likely that courts of appeal or the Supreme Court will have occasion to clarify matters. In contrast, the approach suggested in this Recent Case suggests new methods of analysis that are easily applied and adopts analytical methods that are familiar to courts and that have proved workable.

1. The charge against defendants also included possession with intent to distribute heroin. 21 U.S.C. § 841(a)(1970) prohibits each of these acts.

2. Defendants contended that admission of grand jury testimony at trial in the absence of the declarant interfered with their right of cross-examination and deprived the jury of the opportunity to observe the demeanor of the witness. *See* note 9 *infra* and accompanying text.

3. DEA agents took elaborate measures to document the drug transactions thoroughly. The agents monitored and recorded each sale through a transmitter carried by the informant, took photographs of the purchases in progress, and prepared statements afterwards with the cooperation of the informant concerning what had been done. The agents testified at the trial about their observations.

4. The government did not charge the defendants with the murder, nor did it introduce

tended that the prepared statements attested to before the grand jury were inadmissible hearsay because they did not possess sufficient circumstantial guarantees of trustworthiness required by Federal Rule of Evidence 804(b)(5),[5] and also that the absence of cross-examination at trial violated the requirements of the confrontation clause.[6] The district court ruled the grand jury testimony admissible under rule 804(b)(5) because it was essential and trustworthy under the circumstances. On appeal to the Fourth Circuit Court of Appeals, *held,* affirmed. When the declarant is unavailable to testify at trial, the federal rules of evidence and the confrontation clause permit admission of grand jury testimony at trial if surrounding circumstances provide substantial guarantees of trustworthiness and indicia of reliability for the trier of fact to judge the credibility of the witness and the truthfulness of his testimony. *United States v. West,* 574 F.2d 1131 (4th Cir. 1978).[7]

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evidence suggesting the defendants were responsible.

5. FED. R. EVID. 804(b) defines exceptions to the hearsay rule when the declarant is unavailable to appear at trial. It provides in part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804(b) contains four other exceptions: (1) former testimony given as a witness at a prior trial or hearing when subject to cross-examination; (2) statements made under belief of impending death (dying declarations); (3) statements made against the declarant's interest; and (4) statements made by the declarant about his personal or family history. *See* FED. R. EVID. 804(b)(1)-(4).

6. U.S. CONST. amend. VI provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. . . .

7. In the companion case of United States v. Garner, 474 F.2d 1141 (4th Cir. 1978), the court found the incriminating grand jury testimony of a coconspirator admissible under FED. R. EVID. 804(b)(5) on the grounds that refusal to testify at trial constitutes unavailability and that the surrounding circumstances provided guarantees of trustworthiness. The court did not reach the confrontation issue, finding that the declarant's agreement to allow the defense to conduct cross-examination satisfied the constitutional guarantee. Judge Widener noted that he dissented on the grounds he stated in *United States v. West,* the instant case.

II. LEGAL BACKGROUND

The common-law hearsay rule prohibited the use of extrajudicial statements to show the truth of matters asserted at trial in civil and criminal cases.[8] In order to safeguard the credibility of evidence presented for proof, the rule required a witness to testify under oath at trial, in the presence of the trier of fact, and subject to cross-examination.[9] Because a literal reading of the rule would exclude many classes of reliable testimony, however, the courts developed exceptions to the hearsay rule, admitting out-of-court statements when the declarant's presence was immaterial or he was unavailable to testify at trial.[10] Modern commentators have criticized the common-law hearsay exceptions as arbitrary and have suggested that the hearsay rule be lifted whenever evidence is sufficiently trustworthy and necessary.[11] The recently adopted Federal Rules of Evidence track the common-law treatment of the hearsay rule, incorporating several of the specific exceptions recognized at common law and also including a residual exception that allows the admission of evidence having "circumstantial guarantees of trustworthiness" equivalent to evidence admitted under the established exceptions.[12] The general policy expressed by the federal rules indicates

8. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 246 (2d ed. 1972). *See generally* J. WIGMORE, 5 WIGMORE, EVIDENCE §§ 1360-94 (rev. ed. J. Chadbourn 1974).

9. *See* FED. R. EVID. Art. VIII, *Introductory Note: The Hearsay Problem* [hereinafter cited as *The Hearsay Problem*]; J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE at ¶ 800 [01] (1977) [hereinafter cited as WEINSTEIN]; MCCORMICK, *supra* note 8, at § 245; Maguire, *The Hearsay System: Around and Through the Thicket,* 14 VAND. L. REV. 741, 743-49 (1961). Professor Wigmore insisted that cross-examination provided the fundamental test of hearsay. 5 WIGMORE, *supra* note 8 at § 1362. *But see* DiCarlo v. United States, 6 F.2d 364 (2d Cir. 1925), in which Judge Learned Hand observed:

> The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

Id. at 368.

10. The exceptions developed at common law permitted admission of declarations against interest, dying declarations, statements of family history, and former testimony. *See* MCCORMICK, *supra* note 8, at § 253.

11. *See The Hearsay Problem, supra* note 9; MCCORMICK, *supra* note 8, at §§ 261, 281. *See, e.g.,* Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials,* 113 U. PA. L. REV. 741, 749-68 (1965).

12. FED. R. EVID. 804(b)(5). Recognizing the potential conflict between liberalization of hearsay standards and the constitutional guarantee of confrontation, the drafters of the rules wrote the residual exceptions in terms of exemption from the hearsay rules rather than in positive terms of admissibility. *See The Hearsay Problem, supra* note 9. *See also* FED. R. EVID. 803. Rule 803(24) employs the same language as Rule 804(b)(5) for circumstances in

a preference for live testimony before the trier of fact, but "trustworthy" hearsay is admissible if the alternative is the loss of necessary evidence.[13]

Although the trend in the law of evidence is toward greater admissibility of hearsay, the sixth amendment confrontation clause presents a countervailing consideration in the criminal law.[14] Read literally, the clause imposes an absolute bar against the presentation of testimony by an out-of-court witness against a criminal defendant. The Supreme Court, however, although addressing the confrontation clause infrequently until the last decade,[15] has never interpreted the clause as absolutely foreclosing the use of extrajudicial testimony. In *Mattox v. United States*[16] the Court held testi-

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which the availability of the declarant is immaterial. *See* WEINSTEIN, *supra* note 9, at ¶ 804(b)(5)[01].

13. *See* FED. R. EVID. 804(b), Advisory Committee's Note.

14. *See* MCCORMICK, *supra* note 8, at § 252. For theoretical studies of the right of confrontation, see 5 WIGMORE, *supra* note 8, at §§ 1395-1400; Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966).

15. The infrequency of confrontation decisions prior to 1965 is commonly explained by the inapplicability of the clause to the states prior to that date and the Supreme Court's control over rules of hearsay for the federal courts. *See The Hearsay Problem*, *supra* note 9; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 189 (1971) [hereinafter cited as *1970 Term*].

16. 156 U.S. 237 (1895). This decision contains dictum that is often cited as presenting the classical view of the confrontation clause:

> The primary object of the . . . [confrontation clause] . . . was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

Id. at 242-43. The Court in an earlier consideration of the first trial stated that the hearsay exception for dying declarations had continuing validity under federal law. *See* Mattox v. United States, 146 U.S. 140 (1892).

mony of a deceased witness in a previous murder trial admissible against the defendant on retrial because the earlier cross-examination provided sufficient confrontation. While acknowledging that the clause was intended to prevent the use of depositions or ex parte affidavits in lieu of testimony subject to cross-examination, the *Mattox* Court nonetheless found that a hearsay exception for dying declarations was a part of the common law at the sixth amendment's adoption and thus was incorporated by the confrontation clause.[17] In addition, the Court determined that prior cross-examination of a subsequently deceased witness satisfied confrontation clause requirements.[18] Under the *Mattox* Court's interpretation of the confrontation right, the hearsay rules of the early common law coexisted with the confrontation guarantee without conflict, perhaps due to the limited nature and stability of the hearsay exceptions. In *Snyder v. Massachusetts,*[19] Justice Cardozo viewed the confrontation privilege as a dynamic concept interrelated with the developing notions of procedural due process and the right to a fair trial. In holding that the trial court's refusal to allow the defendant to accompany the jury on a view did not violate the clause, the *Snyder* Court reasoned that the exceptions to the confrontation guarantee could be expanded if its basic purposes were not infringed.[20] The Court's application of due process language to confrontation issues indicated a willingness to use due process analysis to define the bottom line at which the expanding hearsay rules would violate confrontation rights.[21]

Consideration of the confrontation issue increased dramatically following *Pointer v. Texas,*[22] in which the Court identified the confrontation right as a fundamental liberty applicable to state law under the fourteenth amendment. The *Pointer* Court rejected the state court decision that a state is not obligated to produce a witness at trial who is absent from its jurisdiction,[23] ruling that the use of testimony from a preliminary hearing at which the defendant was

17. 156 U.S. at 243. *See* McCORMICK, *supra* note 8, at § 252.

18. 156 U.S. at 244.

19. 291 U.S. 97 (1934).

20. *Id.* at 107.

21. *See The Hearsay Problem, supra* note 9. *See also* Greene v. McElroy, 360 U.S. 474 (1959) (revocation of security clearance without confrontation and cross-examination held unauthorized); *In re* Oliver, 333 U.S. 257 (1948) (cross-examination ruled essential to due process in state contempt proceeding); Delaney v. United States, 263 U.S. 586 (1924) (declarations of a coconspirator found admissible under confrontation clause); Motes v. United States, 178 U.S. 458 (1900) (admission of previously cross-examined preliminary hearing testimony denied when declarant's absence caused by negligence of the government).

22. 380 U.S. 400 (1965). *See* text accompanying note 17 *supra.*

23. *See* Pointer v. State, 375 S.W.2d 293, 294 (Tex. Crim. 1964).

not represented by counsel deprived the defendant of the right of cross-examination secured by the confrontation clause.[24] The Court implied that cross-examination was a corollary requirement of the confrontation guarantee, explaining that exceptions such as those recognized in *Mattox* fell outside the scope of the constitutional rule.[25] In the companion case *Douglas v. Alabama,*[26] the Court held inadmissible an extrajudicial statement of "crucial importance" to the state's case because the declarant's subsequent refusal to testify at trial based on his privilege against self-incrimination made his cross-examination impossible.[27] In these decisions, unlike *Snyder,* the Court expressed no discernible substantive distinction in the analyses under the confrontation clause and the hearsay rule, suggesting that the Court might freeze further expansion of the hearsay exceptions by reading them into the Constitution.[28]

In subsequent decisions the Warren Court refined the *Pointer/Douglas* interpretation of the confrontation right as defined in light of defendants' interest in cross-examination. In *Barber v. Page*[29] the Court held that the state had violated the defendant's rights under the confrontation clause by failing to produce at trial a declarant who was then in prison in a neighboring state. In dictum, the Court identified two limitations on the right of confrontation. First, a witness may be ruled excusably "unavailable" at trial, provided the prosecution makes a "good-faith" effort to secure the witness' presence. Second, cross-examination of a witness by defense counsel prior to trial may be sufficient to satisfy the confrontation right if the testimony is necessary and the witness is unavailable at trial.[30] Thus, while defining the limits of the confrontation

24. Rather than addressing the confrontation issue, the Court might have reached the same result under a hearsay doctrine interpreted in light of a constitutional right to counsel. *See The Hearsay Problem, supra* note 9.

25. 380 U.S. at 407. The *Pointer* Court noted that "It cannot seriously be doubted . . . that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Id.* at 404. *Accord,* Brookhart v. Janis, 384 U.S. 1 (1966). The *Brookhart* Court stated that a denial of cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 3.

26. 380 U.S. 415 (1965).

27. The prior statement in *Douglas* was a confession by the defendant's alleged accomplice that implicated the defendant. *Id.* at 417.

28. *See* Note, *supra* note 14.

29. 390 U.S. 719 (1968).

30. *Id.* at 725. Though recognizing that such exceptions might be allowed in some cases, the Court attached strong significance to the right of cross-examination at trial. "The right to confrontation is basically a trial right . . . . A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Id.*

guarantee, the *Barber* Court also outlined constitutional limits on the expansion of hearsay exceptions in criminal trials. In *Bruton v. United States*[31] the Court reaffirmed the significance of cross-examination as a component of the confrontation guarantee[32] and again implied that the limitations placed on admissibility by the confrontation clause and the rules of hearsay were coextensive.[33]

Although insisting that its analysis was harmonious with that of prior decisions, the Court in *California v. Green*[34] challenged the position that the confrontation clause guarantee was identical in scope to the hearsay rule.[35] The Court failed, however, to provide a satisfactory distinction between the analyses under the rules.[36] The California Supreme Court had found statements made at a preliminary hearing inadmissible because the declarant's inability to recall that testimony at trial rendered cross-examination ineffective.[37] The Court reversed, holding that when such testimony is necessary, surrounding circumstances provide reasonable indicia of reliability, and the prosecution is unable to present the evidence in a more reliable form, cross-examination at trial constitutes adequate confrontation even if the witness cannot recall the prior statement.[38] The emphasis on reliability in *Green*'s confrontation analysis was similar to that of a liberalized hearsay exception, undermining the Court's assertion that the rule and the clause were different in scope. Whereas the Court previously had employed confrontation analysis to restrict expansion of the hearsay rules, *Green* utilized the

31. 391 U.S. 123 (1968).

32. *Id.* at 126. The *Bruton* Court rejected the government's argument that the admission into evidence of a codefendant's confession to a third party was not prejudicial error because of its facial unreliability. The Court held that the admission of the confession into evidence created a substantial risk that the jury would disregard the trial court's limiting instructions and find the defendant guilty on the basis of the uncross-examined confession. *Id.*

33. *Id.* at 136 n.12. *See* Graham, *supra* note 14, at 116.

34. 399 U.S. 149 (1970).

35. The Court argued that *Pointer* and *Barber* had found confrontation violations in situations in which evidence had been admitted under "arguably recognized hearsay exception[s]." *Id.* at 156.

36. *See* Graham, *supra* note 14, at 119.

37. *See* People v. Green, 70 Cal. 2d 654, 657 n.1, 451 P.2d 422, 424 n.1, 75 Cal. Rptr. 782, 784 n.1 (1969).

38. 399 U.S. at 167 n.16. Without citation, the Court enumerated several instances in which a witness would be declared "unavailable" for purposes of the confrontation clause, rendering admission of prior statements constitutional. These were loss of memory, plea of fifth amendment privilege, and refusal of the witness to answer. *Id.* at 167-68. As the majority notes, these exceptions are no different from those previously recognized under the hearsay rule. *Id.* at 168 n.17.

liberalization of hearsay rules to expand the confrontation exceptions.[39]

Continuing the emphasis on reliability articulated in *Green*, a plurality of the Burger Court in *Dutton v. Evans*[40] held the statement of an absent and previously unconfronted witness admissible because it possessed sufficient indicia of reliability and contained no information that was crucial or devastating.[41] The Court's restatement of the confrontation clause emphasized that the clause was intended to advance a practical concern for the accuracy of the truth-determining process in criminal cases by providing a satisfactory basis for the trier of fact to evaluate the truth of prior statements.[42] The *Dutton* Court additionally noted that confrontation requirements might be even less restrictive than federal hearsay requirements if the policies underlying the clause were sufficiently protected.[43] In a sharply worded dissent Justice Marshall warned

39. In concurrence, Justice Harlan rejected the equation of the confrontation and hearsay rule standards of admissibility, arguing that confrontation only supplies a minimum requirement that the prosecution must produce available witnesses whose declarations it intends to use at trial. *Id.* at 174. Thus construed, the clause does not demand cross-examination to establish reliability, but merely indicates a preference for direct testimony over hearsay evidence. *See* Westen, *supra* note 14, at 614. Reviving the due process analysis of *Snyder*, Justice Harlan indicated that due process considerations reinforce the confrontation clause, entitling defendants to a separate determination of the reliability of any hearsay evidence under those standards. 399 U.S. at 186 n.20. He noted:

> I would not permit a conviction to stand where the critical issues at trial were supported only by *ex parte* testimony not subjected to cross-examination, and not found to be reliable by the trial judge . . . . Due process also requires that the defense be given ample opportunity to alert the jury to the pitfalls of accepting hearsay at face value, and the defendant would, of course, upon request be entitled to cautionary instructions.

Id. at 186-87 n.20. Therefore, while the confrontation clause supplies a minimum constitutional hearsay requirement relating to the availability of the declarant, Justice Harlan's scheme emphasized due process considerations of reliability rather than the opportunity for cross-examination. By limiting the role of the confrontation right, Justice Harlan's framework lessened the chance for conflict between the confrontation clause and the hearsay rules and provided a significant opportunity for greater clarity of analysis.

40. 400 U.S. 74 (1970).

41. *Id.* at 87.

42. *Id.* at 89 (citing *California v. Green*).

43. *Id.* at 81. The out-of-court statements used against the defendant in *Dutton* were admitted under a Georgia statute allowing statements of a conspirater to be admissible against his coconspirators. *Id.* at 78. *See 1970 Term, supra* note 15, at 188-90.

Although continuing to insist that due process provides the appropriate constitutional standard for admissibility of evidence, Justice Harlan's concurring opinion in *Dutton* abandoned his previous position in *Green* that the confrontation clause compels the presentation of available witnesses by the prosecution. Apparently deciding that his preferential rule might produce an inflexible liberalization of the hearsay exceptions, Harlan stated that the confrontation clause merely guarantees the right to cross-examine while the rules of evidence govern admissibility standards. 400 U.S. at 94. Thus, Harlan's position in *Dutton* continued his earlier restrictive view of the scope of the confrontation clause, but additionally limited the clause by eliminating the requirement of production of available witnesses. For discussions

that admission of out-of-court statements on the basis of a lenient "indicia of reliability" standard diluted the right to confrontation and cross-examination previously afforded by the Court.[44]

Since *Dutton,* a number of United States circuit courts have considered the interplay of the hearsay rules and the confrontation clause.[45] In *United States v. Fiore*[46] the Second Circuit held the sworn statement of a narcotics informant before a grand jury inadmissible at trial when the informant refused to testify and be cross-examined. Citing *Douglas v. Alabama,* the court found that both the hearsay rule and the confrontation clause barred admission of the grand jury testimony in the absence of cross-examination.[47] Although *Fiore* was factually distinguishable from *Dutton* and *Green,* the Second Circuit's opinion indicated a reluctance to utilize a reliability standard to admit grand jury testimony into evidence at trial. In a similar case, the Eighth Circuit in *United States v. Carlson*[48] determined that rule 804(b)(5) permitted admission at trial of the challenged grand jury testimony, finding it sufficiently trustworthy.

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of Justice Harlan's change of position, see Westen, *supra* note 14, at 614-18; Baker, *supra* note 14, at 534-38, 544-46.

44. *See* 400 U.S. at 110 (Marshall, J., dissenting). Justice Marshall strenuously criticized the majority's use of an "indicia of reliability" test to resolve the question of admissibility:

> If "indicia of reliability" are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial. I believe the Confrontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination.

Id. Justice Marshall also found unacceptable Justice Harlan's view of due process "which would prohibit only irrational or unreasonable evidentiary rulings." *Id.* n.11.

Two Supreme Court cases have considered the confrontation clause since *Dutton.* In Chambers v. Mississippi, 410 U.S. 284 (1973) the Court held that the trial court had denied the defendant due process by refusing to permit the defendant to cross-examine a witness who had repudiated his own confession of the crime. *See* Natali, Green, Dutton *and* Chambers: *Three Cases in Search of a Theory,* 7 RUT.-CAM. L.J. 43, 53-54 (1975); Westen, *supra* note 14, at 601-13.

In an earlier confrontation case, the Court in Mancusi v. Stubbs, 408 U.S. 204 (1972), distinguished *Barber* in holding that Tennessee was powerless to compel the appearance of a witness who had moved permanently to Sweden prior to defendant's second trial. Because the witness was unavailable, his recorded testimony at the earlier trial was ruled admissible due to the "indicia of reliability" provided by earlier cross-examination.

45. *See also* United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977); United States v. Rogers, 549 F.2d 490 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977); United States v. Payne, 492 F.2d 449 (4th Cir.), *cert. denied,* 419 U.S. 876 (1974).

46. 443 F.2d 112 (2d Cir. 1971).

47. *Id.* at 115.

48. 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977).

The court further held that the defendant had waived his rights under the confrontation clause by causing the declarant to refuse to testify through intimidation.[49] Noting that the contours of the confrontation clause had not been "clearly defined" by previous Supreme Court decisions, the court reserved the general issue of admissibility at trial of grand jury testimony under the confrontation clause in view of its "wide ramifications in the criminal justice system."[50] Thus, while intimating that the new rules of evidence had greatly liberalized the hearsay rule, the court was hesitant to rule that the confrontation requirements had undergone similar liberalization.

III. The Instant Opinion

Although asserting that both the hearsay rule and the confrontation clause are initially concerned with the reliability of evidence, the instant court undertook separate factual analyses under each rule. In applying the hearsay rule, the court interpreted rule 804(b)(5) as sanctioning admission of the statement of an unavailable declarant if it possesses circumstantial guarantees of reliability equivalent to the guarantees of reliability provided under the recognized exceptions. Although acknowledging that the residual clause should be used only in exceptional circumstances, the court found its application proper because of the detailed verification procedures employed and the collaboration by the government agents.[51] The court thus determined that the declarant's statement need not possess guarantees of trustworthiness equivalent to the guarantees of prior testimony subjected to cross-examination, ruling the statement admissible because it easily satisfied the less demanding trustworthiness standard applicable to dying declarations and statements against penal interest.[52]

The court, in considering the confrontation issue, initially premised that the prosecution must produce available witnesses for live testimony and cross-examination by the defense.[53] The court stated that when the declarant is unavailable, extrajudicial statements are admissible under the clause only if accompanied by sufficient badges of reliability, thus requiring the court to make a second

49. *Id.* at 1357.

50. Weinstein criticizes the result in this case, warning that "Rule 804(b)(5) should not become an automatic formula for introducing uncross-examined grand jury statements." Weinstein, *supra* note 9, at 116 (Supp. 1977) (supplementing ¶ 804(b)(5)[01]).

51. United States v. West, 574 F.2d at 1135, 1137-38 (4th Cir. 1978). *See* note 3 *supra.*

52. *Id.* at 1136.

53. *Id.*

analysis of the facts.[54] Noting the presumption of previous Supreme Court decisions that cross-examined testimony is more reliable than testimony not subject to cross-examination, the court nonetheless argued that surrounding circumstances may give assurances of reliability and trustworthiness to prior recorded statements comparable to those provided by the recognized confrontation exceptions.[55] The court acknowledged the similarity between its confrontation and hearsay analyses, concluding that even in the absence of cross-examination, the instant circumstances provided the jury with a sufficient basis for judging the credibility and truthfulness of the witness under the confrontation clause as well as under the hearsay rule.[56] Finally, the court denied that *Dutton*'s emphasis on the "crucial" or "devastating" nature of the evidence in determining admissibility[57] was meant to impose a sliding standard of reliability dependent on the possible prejudicial effect on the jury. The court argued that a variable standard would be unworkable and that the basic reliability requirements imposed by the confrontation clause should apply to all evidence sought to be admitted.[58] The dissent, in addition to asserting that the grand jury testimony failed to satisfy the rule 804(b)(5) test of trustworthiness, contended that the majority had confused the hearsay and confrontation issues by treating them under the same standard.[59] Citing Supreme Court language indicating that the two rules are not identical,[60] the dissent argued that the majority had reduced the constitutional guarantee of confrontation to a mere rule of evidence.[61] The dissent interpreted the confrontation clause as providing a threshold level of protection that assures an opportunity for the defendant to cross-examine his accusers and for the jury to evaluate witnesses' demeanor, thereby preventing prosecution by ex parte affidavit.[62] Acknowledging that the Supreme Court has developed exceptions to the confrontation rule, the dissent suggested that the majority's decision would have been less objectionable had it been based on an extension of the dying declarations exception to the confrontation clause to include

54. *Id.*

55. *Id.* at 1137.

56. *Id.* at 1138.

57. *See* text accompanying note 41 *supra.*

58. The court pointed out that even hearsay evidence with only a slight prejudicial effect should not be admissible without some guarantees of reliability. 574 F.2d at 1138.

59. *Id.* at 1139 (Widener, J., dissenting).

60. *Id.* (citing Dutton v. Evans, 400 U.S. 74, 86 (1970)).

61. *Id.*

62. *Id.* at 1140 (citing Mattox v. United States, 156 U.S. 237 (1895)). *See* text accompanying notes 16-18 *supra.*

instances in which a grand jury declarant had been slain prior to trial.[63] The dissent concluded that liberalization of the hearsay exceptions had no effect on previously developed constitutional doctrines and that the majority's use of the federal rules to create new exceptions to the confrontation clause was unwarranted.[64]

IV. COMMENT

The instant decision applies *Dutton*'s "indicia of reliability" standard to reach the first unqualified holding that the admission of uncross-examined grand jury testimony against a criminal defendant does not violate the confrontation clause.[65] Unlike the evidence admitted in *Dutton*, the testimony in the instant case was crucial to the determination of guilt and devastating to the defense.[66] The significance of this testimony heightened the defendant's interest in cross-examination, demonstrating the inadequacy of the reliability standard as a substitute for the confrontation guarantee. Although the majority correctly asserted that the instant case presented exceptional circumstances sufficient to satisfy the rule 804(b)(5) hearsay exception, its adoption of hearsay analysis for the confrontation issue does not explain satisfactorily how the circumstantial reliability of the evidence adequately protects a criminal defendant's crucial interest in challenging testimony through cross-examination. Furthermore, the court has placed itself in apparent conflict with the rationale of earlier Supreme Court holdings in *Douglas* and *Bruton* that the confrontation clause guarantees the right to cross-examination.[67] Although the analysis in *Dutton*, like that in the instant case, presented inconsistencies with *Douglas* and *Bruton*, the unconfronted evidence in *Dutton* was of considerably less import than that in the instant case.

In focusing on reliability to decide both the confrontation and hearsay issues, the instant court belied its position that a separate determination of the hearsay and confrontation issues was required.[68] Indeed, the instant court intimated that the same circum-

63. *Id.* at 1140.

64. The dissent suggested that the majority's decision was in conflict with United States v. Fiore, 443 F.2d 112 (2d Cir. 1971). *See* text accompanying notes 46-47 *supra*.

65. *See* text accompanying notes 45-50 *supra*.

66. *See* text accompanying note 41 *supra*.

67. *See* text accompanying notes 26-28 and 31-33 *supra*.

68. *See* text accompanying note 54 *supra*. By insisting that the confrontation clause requires the production of available witnesses and in making a "separate determination" of the reliability of evidence, the instant court adopted a method of analysis similar to that suggested by Justice Harlan in *Green*. *See* note 39 *supra*. Whereas Justice Harlan found that constitutional due process considerations require that out-of-court testimony by an unavaila-

stances should logically suffice to meet both standards. This result renders the confrontation clause substantively meaningless in cases in which an out-of-court declarant is unavailable for trial. Clearly, however, the inclusion of the clause in the sixth amendment was intended to acknowledge and protect the interests of criminal defendants in confronting the evidence used to prosecute them. This right is based on the presumption that because of the potential life or liberty interests of the defendant, the need to guarantee reliability of evidence is greater in criminal than in civil trials. The instant court's analysis totally undermines this constitutional presumption by its application of the easily manipulated reliability requirement.

Although insisting that the majority's analysis improperly substituted a reliability standard for the sixth amendment guarantee of confrontation and cross-examination,[69] the dissent did not direct its attention to the practical effects of prohibiting the prosecution's use of uncross-examined testimony from an unavailable declarant. The dissenter's suggestion that the majority's dilemma might be resolved by engrafting the dying declaration exception onto the rule excusing prior cross-examined testimony from present confrontation at trial[70] would narrow the class of objectionable cases without resolving the underlying confrontation difficulties. Thus the dissent fosters an inaccurate perception that refusal to admit uncross-examined testimony automatically would preclude conviction. This perception, in turn, would improperly support an intuitive conclusion that the prosecution's need for such testimony would justify a substantial abrogation of the right guaranteed by the confrontation clause.

Rather than eroding the confrontation guarantee by employing reliability as a constitutional standard, the courts should find that the confrontation clause bars the admission of uncross-examined statements against criminal defendants at trial.[71] This rule would insulate defendants from the inherently prejudicial effects of prosecution by ex parte transcripts, but would not greatly diminish the

ble witness must be reliable, the instant court attributed the reliability requirement to the confrontation clause itself. By evaluating reliability of evidence under the confrontation clause, the instant court's framework, unlike Justice Harlan's, inevitably equates the hearsay rules and the confrontation clause. Neither analysis, however, provides adequate weight to the need for cross-examination in a criminal defense.

69. *See* text accompanying notes 59-61 *supra.*

70. *See* text accompanying note 63 *supra.*

71. Recognized exceptions to the confrontation right, such as the dying declarations exception, might continue to be recognized due to the extreme prosecutorial need and the extreme limitations that have been placed on the admission of such evidence. *See* text accompanying note 17 *supra.*

ability of the state to prosecute in the majority of cases. Using the instant case to illustrate this point, the court found the declarant's testimony to be reliable largely because of its corroboration by law enforcement agents who testified and were cross-examined at trial.[72] Because the agents' observations were exceedingly thorough in establishing the identity of the defendants and the fact of the transaction, the prosecution probably could have obtained a verdict without use of the unavailable declarant's testimony. In the absence of strong corroboration, the out-of-court declarant's testimony likely would be excluded under the majority's standard for reasons of its unreliability and the chance for resulting prejudice, regardless of the prosecution's need for the testimony to prove its case. Thus, when a former declarant is not available to testify at trial, the state's case should be required to rest solely on the testimony of corroborating agents in order to preserve the substantive guarantees of the confrontation clause.

JAMES ROBERT NEWSOM III

Constitutional Law—Equal Protection—Federal Statutes Differentiating Between Sentence Credit for Probation and Parole Time Satisfy Rational Basis Test

I. FACTS AND HOLDING

Petitioner, a probation violator,[1] appealed the sentence imposed[2] at his revocation hearing after the court failed to credit

72. 574 F.2d at 1135, 1137-38. *See* text accompanying note 51 *supra*.

1. Petitioner-defendant was originally convicted of altering and publishing a Treasury check with a forged endorsement in violation of 18 U.S.C. § 495 (1976). On October 11, 1974, he was sentenced to three years in prison. Pursuant to 18 U.S.C. § 3651 (1976), the United States District Court for the District of Colorado ordered that petitioner he confined in a treatment-type institution for six months, that execution of the remainder of the sentence be suspended, that petitioner be placed on probation for two years and six months, and that during probation petitioner participate in a drug abuse treatment program. Later, the sentencing judge amended the Order of Probation to require petitioner to reside and participate in a community drug treatment center. During 1976 three probation violation warrants were issued against petitioner. Following the issuance of the third warrant, the probation revocation hearing giving rise to this action was held on December 2, 1976. At the hearing petitioner offered evidence in mitigation of his failure to participate in the drug treatment program.

2. The district court revoked probation and sentenced petitioner to two years in prison with the recommendation that he participate in a drug abuse program in the institution.

against his sentence the time he had spent on probation.[3] Petitioner asserted that the failure of the federal district court to credit the time he had been on probation violated equal protection principles inherent in the fifth amendment[4] because a newly enacted federal statute required that such credit be given an individual whose parole has been revoked.[5] Respondent[6] contended that the purposes of parole and probation are different and therefore that a rational basis exists for the distinction requiring time on parole to be credited against the violator's sentence while similar credit is not required for time on probation. The United States District Court for the District of Colorado denied petitioner's motion to reduce the sentence and expressly refused to give petitioner credit for the time he had been on probation. On appeal, the United States Court of Appeals for the Tenth Circuit, *held,* affirmed. Although a federal statute grants credit for time spent on parole to parolees whose parole has been revoked, judges revoking probation may deny similar credit to probationers without violating equal protection principles because denying credit compels compliance by probationers with probation terms and because federal judges can legitimately be granted greater discretion in sentencing probationers than is given the United States Parole Commission in sentencing parolees. *United States v. Shead,* 568 F.2d 678 (10th Cir. 1978).

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3. The district court did reduce petitioner's sentence from a maximum of two years and six months to two years, recognizing that he had served six months in a treatment institution, but did not give him full credit for the sixteen months he was on probation without an outstanding probation violation warrant against him.

4. *See* Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); United States v. Kras, 409 U.S. 434, 440 (1973); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See also* Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. REV. 541 (1977).

5. 18 U.S.C. § 4210 (1976). Effectuating regulations at 28 C.F.R. § 2.52(c) (1976) provided that:

> (c) A parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision, except as provided below:
>
> (1) If the Parole Board finds the parolee failed to reasonably comply with an order of the Board, then the time during which he failed to respond is subject to forfeiture.
>
> (2) If the parolee is convicted of any crime subsequent to parole which permits any term of confinement then the credit for the entire period of parole is subject to forfeiture.

This mandatory credit treatment for time spent on parole differs from the procedure followed in probation cases. Under 18 U.S.C. § 3653 (1976), the sentencing judge has the discretion upon revocation of probation to require the defendant to serve the entire sentence or any lesser term without granting credit for time served on probation.

6. Respondent was the United States Attorney for the District of Colorado.

II. LEGAL BACKGROUND

Since its decision in *Bolling v. Sharpe*,[7] which invalidated racial segregation in the public schools of the District of Columbia, the Supreme Court has utilized the due process clause of the fifth amendment[8] to prohibit arbitrary discrimination by the federal government in much the same manner that it has employed the fourteenth amendment to limit similar state action.[9] Through the 1950's and 1960's equal protection cases challenging both state and federal action fell within two distinct analytical categories—those subjected to a rational basis test and those required to withstand strict scrutiny.

The rational basis test derives from the underlying philosophy of equal protection of the laws. Ideally, legislatures should pass laws that affect all persons equally, but in order to protect the public welfare, they often exercise their police powers to pass laws imposing special burdens upon or granting special benefits to particular groups or classes of individuals.[10] The demand for equality thus directly confronts the power to classify. In resolving this paradox, the Court has neither abandoned the principles of equality nor denied the legislature the right to classify. Taking a middle course, the Court has resolved the demands of legislative specificity and constitutional generality by adopting a doctrine of reasonable classification, which examines both the purpose of a law and the reasonableness of its classifications.[11] Thus the Court has stated that a particular classification must be reasonable, resting upon a difference having a "fair and substantial relation" to the purpose of the legislation so that all persons similarly situated will be treated alike.[12] In application, however, the rational basis test has traditionally been a very lax standard, particularly in the area of under-inclusive classifications, those categories that include fewer persons than logically would be necessary to achieve the intended governmental end.[13]

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7. 347 U.S. 497 (1954).

8. U.S. CONST. amend. V provides, "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

9. Karst, *supra* note 4, at 552.

10. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 993-94 (1978); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-44 (1949).

11. Tussman & tenBroek, *supra* note 10, at 343-44.

12. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

13. TRIBE, *supra* note 10, at 997. Tussman and tenBroek define the under-inclusive category: "All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include." Tussman & tenBroek, *supra* note 10, at 348.

Under the traditional rational basis test, the Court ordinarily has deferred to such legislative action, recognizing that legislatures are incapable of enacting laws with mathematical certainty and often must adopt piecemeal measures to achieve desired results.[14]

In applying the strict scrutiny test, a much more rigorous level of analysis, the Court has identified two situations in which the state must demonstrate a "compelling interest" to justify any unequal classification. First, whenever the class of persons disadvantaged by unequal treatment from statutory classification is designated a "suspect class," a showing of compelling interest is required.[15] The Supreme Court has specifically limited these "suspect classes" to race,[16] alienage,[17] and nationality.[18] Second, the Court will require a showing of compelling interest when the individual interest affected by the unequal classification is deemed a fundamental right. In *Skinner v. Oklahoma,*[19] which laid the foundation for the "fundamental rights" strand of equal protection analysis,[20] the Court held that a law requiring certain habitual criminals to be sterilized infringed upon the fundamental right of procreation. Thus

14. Rational basis scrutiny has been most deferential in economic regulation cases. In Railway Express Agency v. New York, 336 U.S. 106 (1949), which considered a municipal statute regulating advertising displays on vehicles, the Court demonstrated a willingness to accept any hypothetical municipal purpose sufficiently related to the classification. *Id.* at 110. Justice White argued in a concurring opinion that the Court should require a more substantial relationship between the classification and the legislative purpose. *Id.* at 115. In Williamson v. Lee Optical Co., 348 U.S. 483 (1955), a unanimous decision which upheld an Oklahoma statute regulating opticians, the Court adopted a standard of review that would, in effect, defer to any state purpose in the area of economic regulation. *Id.* at 487. The *Williamson* Court further stated that an economic classification need not purport to remedy the entire problem recognized by the legislature. Thus the Court expressly authorized "piecemeal" legislation. *Id.* at 489. In McGowan v. Maryland, 366 U.S. 420 (1961), in which plaintiffs challenged as underclassifying a state statute that required certain specified businesses to close on Sunday, the Court reaffirmed in a unanimous opinion the lenient standard of review: a statutory classification would be upheld "if any set of facts reasonably may be conceived to justify it." *Id.* at 426. *See also* Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947); Metropolitan Cas. Ins. Co. v. Brownnell, 294 U.S. 580 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

15. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class,* 28 VAND. L. REV. 987, 991 (1975). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

16. Loving v. Virginia, 388 U.S. 1 (1967).

17. Graham v. Richardson, 403 U.S. 365 (1971).

18. Oyama v. California, 332 U.S. 633 (1948). Although in Frontiero v. Richardson, 411 U.S. 677, 688 (1973), a plurality opinion held sex to be a suspect category, later opinions such as Craig v. Boren, 429 U.S. 190 (1976), and Stanton v. Stanton, 421 U.S. 7 (1975), have retreated from this formulation. In both *Craig* and *Stanton* the Court used a rational basis test with intensified scrutiny. *See* notes 28-33 *infra* and accompanying text.

19. 316 U.S. 535 (1942).

20. McCoy, *supra* note 15, at 992. *See also* TRIBE, *supra* note 10, at 1010.

the Court invoked a strict scrutiny analysis to strike down the law.[21] In the years after *Skinner* other individual rights, including voting,[22] interstate travel,[23] and criminal appeals,[24] were held to be fundamental, thereby requiring the state to demonstrate a compelling interest when infringing upon such a right through unequal classification.

In recent years, however, the Court has refused to expand further the list of fundamental rights that will trigger the higher tier of analysis. *San Antonio Independent School District v. Rodriguez*[25] illustrates the present Court's approach to the proper scope of the strict scrutiny test. *Rodriguez* rejected poverty as a suspect class because an absolute deprivation of a governmental benefit was not present.[26] Additionally, the Court has rejected education as a fundamental right, finding no express guarantee for the right to education in the Constitution.[27]

Although restricting further expansion of the cases that will invoke strict scrutiny, the Burger Court has increasingly indicated a reluctance to operate within the rigid confines of traditional, two-tiered equal protection analysis.[28] In a number of areas, including laws discriminating against aliens,[29] illegitimates,[30] gender,[31] and

21. 316 U.S. at 541.

22. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (overturning a state statute restricting voting in school district elections to parents of school children and property owners); Harper v. Virginia Bd. of Educ., 383 U.S. 663, 665 (1966) (invalidating state poll tax); Reynolds v. Sims, 377 U.S. 533 (1964).

23. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (overturning state and local residency requirements for voting); Shapiro v. Thompson, 394 U.S. 618 (1969).

24. Douglas v. California, 372 U.S. 353 (1972); Griffin v. Illinois, 351 U.S. 12 (1956).

25. 411 U.S. 1 (1973). Justice Powell, writing for the majority, analyzed a district court opinion that classified education as a fundamental right and wealth as a suspect class in overturning a Texas scheme for financing public education with local property taxes.

26. *Id.* at 36-37.

27. *Id.* at 33-34.

28. Although the Court's rejection of rigid two-tier analysis has not been expressly acknowledged by a majority of the Court, a number of individual Justices have noted the trend of recent decisions. *See* Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (the Court has employed a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause"). Justice Powell, concurring in Craig v. Boren, 429 U.S. 190 (1976), stated that "there are valid reasons for dissatisfaction with the 'two-tier' approach" and added that "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." *Id.* at 210 n.*.

29. Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (overturning law excluding aliens from practice as licensed civil engineers); *In re* Griffiths, 413 U.S. 717 (1973) (state's interest in excluding aliens from practice of law found insufficient); Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973) (while statute prohibiting employment of aliens in state civil service rested on legitimate state interest in having loyal employees, statute was "neither

when certain important, though not fundamental, interests are at stake,[32] the Court has applied scrutiny clearly more demanding than a minimum rationality test, yet less exacting than strict scrutiny. Because the evolution of this intermediate level of scrutiny has been largely unarticulated, the circumstances in which intermediate review will be applied and the specific requirements that must be satisfied under it are unclear.[33]

The Burger Court's application of rational basis scrutiny to criminal cases has produced varying results. In *Marshall v. United States*[34] the Court, in reviewing a statute denying felons with two prior felony convictions the right to participate in a drug treatment program, upheld the classification under an intensified rational basis test. The Court found that Congress could properly omit felons with two or more convictions from the program because their presence might hinder successful treatment of others and because they would constitute a greater danger to society during the nondetention treatment program. Throughout its analysis, however, the Court refused to give the traditional deference to congressional classifications but instead looked closely at the legislative history of the act, its intended purpose, the classification made, and the correspondence between the purpose and the classification. In *James v.*

narrowly confined nor precise in its application," and therefore failed); Graham v. Richardson, 403 U.S. 365 (1971) (invalidated state statutes denying welfare benefits to aliens).

30. Trimble v. Gordon, 97 S. Ct. 1459 (1977) (invalidating Illinois statute allowing illegitimate children to inherit by intestate succession only from their mothers); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (state may not deprive dependent illegitimate children of recovery for death of their father under state workmen's compensation law).

31. Craig v. Boren, 429 U.S. 190 (1976) (invalidating state statute distinguishing between sexes in setting legal ages for purchasing beer); Stanton v. Stanton, 421 U.S. 7 (1975) (holding irrational a state statute providing for parental support obligation for sons until age 21, but for daughters only until age 18); Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (invalidating a provision of the Social Security Act awarding survivor's benefits to widows, but not widowers); Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a federal statute discriminating against male spouses for purposes of military benefits); Reed v. Reed, 404 U.S. 71 (1971) (overturning state statute giving preference to selection of males as administrators of estates).

32. *See* TRIBE, *supra* note 10, at 1089-90.

33. Professor Tribe has articulated five general techniques employed by the Court in applying intermediate review. First, intermediate review initially assesses the importance of the purpose or statutory objective purporting to justify the classification or limitation on liberty. Second, intermediate review requires that a close fit must exist in that the classifications must be substantially related to the statutory purpose. Third, the purpose of the classification must be clearly articulated without requiring the Court to supply a rationale from hypothetical speculation or from legislative history. Fourth, the purpose of the law cannot be provided from afterthought—an attempt to rationalize the rule once it exists. Fifth, intermediate review requires legislatures to proceed in a less wholesale and more individualized manner when sensitive matters are at stake. *Id.* at 1082-89.

34. 414 U.S. 417 (1974).

Strange[35] the Court employed an intermediate level of scrutiny to invalidate a Kansas recoupment statute that denied certain protective exemptions to criminal debtors in actions by the state to recover legal fees.[36] The Court held that the imposition of such harsh conditions on criminal debtors constituted a violation of the equal protection clause, absent similar treatment of civil debtors.

The Supreme Court has never considered in an equal protection context laws governing sentencing of probationers and parolees upon revocation. However, these alternative modes of conditional liberty have been compared and contrasted both statutorily and judicially. Under federal law, probation may be granted by a court as part of the sentencing process upon entering a judgment of conviction.[37] The sentencing court sets the conditions of probation,[38] determines the period of probation,[39] modifies probation during its continuance,[40] issues a warrant for the probationer's arrest in the event of an alleged violation,[41] conducts the probation revocation hearing,[42] and sets the probationer's sentence upon revocation.[43] Parole, on the other hand, is a form of conditional release within the jurisdiction of the United States Parole Commission, an administrative body.[44] The United States Parole Commission has the power to grant or to deny parole to any federal prisoner,[45] to set the conditions of parole,[46] to modify parole conditions,[47] to conduct parole revocation hearings,[48] and to request probation officers to perform parole supervision.[49] The guiding purpose for the creation of the United States Parole Commission was the congressional desire to establish "fair and equitable parole procedures,"[50] to clarify the procedural steps in the parole process,[51] and to meet the Supreme Court re-

35. 407 U.S. 128 (1972).
36. The exemptions granted to civil debtors but denied criminal debtors included the right to a hearing before judgment was entered against them and any exemptions, except homestead, that a civil debtor would have enjoyed under the Kansas civil procedure code.
37. 18 U.S.C. § 3651 (1976).
38. *Id.*
39. *Id.*
40. *Id.*
41. 18 U.S.C. § 3653 (1976).
42. *Id.*
43. *Id.*
44. *See* 18 U.S.C. § 4203 (1976).
45. 18 U.S.C. § 4203(b)(1) (1976).
46. 18 U.S.C. § 4203(b)(2) (1976).
47. 18 U.S.C. § 4203(b)(3) (1976).
48. 18 U.S.C. § 4214 (1976).
49. 18 U.S.C. § 4203(b)(4) (1976).
50. 2 U.S. CODE CONG. & AD. NEWS 335, 335 (1976).
51. *Id.*

quirements of due process in the revocation of parole for technical violations of parole conditions.[52] Under the 1976 law[53] creating the Commission, the parolee is given credit against his sentence for the time he has spent on parole prior to revocation. No similar provision for credit against a subsequent sentence exists for probationers.

The Supreme Court has discussed the similarity of parole and probation in several cases. In both *Roberts v. United States,*[54] a probation revocation case, and *Zerbst v. Kidwell,*[55] a parole revocation case, the Court indicated that the primary purpose of both probation and parole is rehabilitation. In *Morrissey v. Brewer,*[56] a procedural due process challenge to a revocation of parole without a hearing, the Court found that parole was essentially a state of conditional liberty and reasoned that the revocation of parole was such a grievous loss of liberty that it invoked many of the procedural due process protections of the fourteenth amendment. Affirming this opinion in *Gagnon v. Scarpelli,*[57] in which a probationer claimed the same procedural due process rights granted parolees, the Court held that the guarantee of due process applied equally to the revocation of parole and probation. Thus the Court has made no constitutional distinctions between probation and parole practices challenged under the due process clause.[58]

The Supreme Court has never reached the question of equal protection of probationers and parolees under the equal protection clause. The Minnesota Supreme Court in *State v. Young,*[59] however, reviewed an equal protection claim brought by a probationer who had served nearly his entire sentence on probation when his probation was revoked and his entire sentence reinstated. Under Minnesota law[60] a parolee received credit for time on parole while a probationer served his entire sentence without credit upon revocation. The court stated that probationers and parolees constituted different classes, characterizing probation as a form of judicial grace and

52. 2 U.S. CODE CONG. & AD. NEWS 335, 339 (1976).

53. 18 U.S.C. § 4210 (1976); 28 C.F.R. § 2.52(c) (1976) (effectuating regulations).

54. 320 U.S. 264, 272 (1943).

55. 304 U.S. 359, 363 (1938). *See also* Alvarado v. McLaughlin, 486 F.2d 541, 545 (4th Cir. 1973).

56. 408 U.S. 471 (1972).

57. 411 U.S. 778 (1973).

58. *Id.* at 782 n.3.

59. 273 Minn. 240, 141 N.W.2d 15 (1966).

60. MINN. STAT. § 609.14 (3)(2) (1964) provides that upon revocation of probation the sentence to be imposed is the entire sentence previously imposed (no discretion given to sentencing judge). Under MINN. STAT. § 243.18 (1972), a parolee is entitled to receive credit against his sentence for the time he was on parole.

parole as an investment of discipline in a prisoner who earns the milder punishment. Furthermore, the court viewed probation as a risk to society that could be best controlled by holding a defendant fully responsible for meeting the conditions of probation, mindful that his full sentence could be imposed. Thus, prior to the instant decision, *Young* was the only case in which a court had addressed the issue of coextensive constitutional protection for probationers and parolees under the equal protection clause.

III. The Instant Opinion

The instant court applied a rational basis standard to resolve the issue whether unequal treatment of probationers and parolees in revocation sentencing violates the equal protection safeguards inherent in the fifth amendment.[61] Although substantially accepting petitioner's contention that rehabilitation is the guiding purpose of both probation and parole,[62] the court nonetheless rejected this similarity in purpose as determinative of the equal protection question.[63] Citing *State v. Young*,[64] the court reiterated the theory that denying credit in the probation context serves to maintain a responsible attitude among probationers and protects society from repeated injury.[65] The court additionally stated that Congress could legitimately allow federal judges wider discretion in sentencing probationers than it granted to the United States Parole Commission for sentencing parolees.[66] Finally, the court emphasized that due process and equal protection principles do not require total symmetry within the probation and parole systems and that valid legislative solutions must be respected if the distinctions drawn have some basis in practical experience or if some legitimate state interest is advanced.[67] Having concluded that both elements were present in the instant case, the court held that different treatment of probationers and parolees in revocation sentencing did not violate equal protection principles.[68]

61. 568 F.2d 678, 683 (10th Cir. 1978).

62. Citing Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 478 (1973), the instant court noted that the Supreme Court has recognized the similar, rehabilitative purposes of both probation and parole. 568 F.2d at 682.

63. *Id.* at 683.

64. *See* text accompanying note 59 *supra.*

65. 568 F.2d at 683.

66. *Id.* at 683-84.

67. *Id.* at 684.

68. *Id.*

IV. COMMENT

Although recent Supreme Court opinions have suggested that rational basis scrutiny should no longer be utilized to provide automatic validation of legislative classifications, but rather should require a more realistic nexus between the statutory objective and the classification made,[69] the instant court adopted a traditionally deferential test, which, as applied in this case, constituted no scrutiny whatsoever. In attempting to supply a rationale for the unequal treatment of probationers and parolees in revocation sentencing, the court engaged in hypothetical speculation as to the purposes of the parole practice[70] and employed after-the-fact reasoning to rationalize an already existing rule.[71] As noted previously, however, the Burger Court's development of an intermediate equal protection analysis has been largely unarticulated and the circumstances under which it will be invoked are unclear. Thus the instant court's decision to apply the traditionally deferential test is neither surprising nor indefensible. Nonetheless, conceding a minimum level of scrutiny to be the arguably appropriate standard of review, the factors identified by the court to satisfy minimum rationality fail to withstand logical analysis.

In attempting to justify the unique treatment of probationers, the instant court asserted that denying credit on revocation maintains a responsible attitude among probationers and protects society from repeated injury.[72] The court neglected to explain, however, why the identical rationale does not apply with equal force to parolees. Like probationers, parolees are released under strict conditions requiring certain, well-defined conduct. The denial of sentence credit to parolees would obviously encourage compliance with parole conditions. Moreover, having committed an offense deemed serious enough to warrant incarceration, parolees arguably represent a greater danger to society than do probationers. Thus the theory enunciated in *State v. Young*[73] and relied upon by the instant court

69. *See* notes 59-60 *supra* and accompanying text.

70. That Congress expressly intended to give greater discretion to federal judges than to the Parole Commission cannot be found in the legislative history. The instant court merely borrowed this argument from *State v. Young.*

71. The argument that the denial of sentence credit to probationers promotes compliance with probation terms and thus justifies the classification is clearly the product of judicial hindsight. Moreover, if such were the primary purpose of the rule, it would seemingly be best served by denying credit in all cases, rather than allowing judicial discretion. More importantly, however, this rationale provides no basis whatever for distinguishing between probationers and parolees. *See* text accompanying notes 72-73 *infra.*

72. 568 F.2d at 683.

73. *See* notes 59-60 *supra* and accompanying text.

fails to afford even a minimally rational basis for distinguishing between probationers and parolees.

Similarly, the court's argument that Congress could legitimately allow judges greater discretion in sentencing probationers than it granted to the Parole Commission in resentencing parolees[74] is questionable. Federal judges admittedly possess considerable experience in discretionary sentencing. On the other hand, unlike federal judges, who must divide their time among an enormous range of duties and responsibilities, the Parole Commission's exclusive function is to regulate the parole process. Therefore, at least on the basis of experience, the Parole Commission would seem better qualified to evaluate the relative risks and benefits involved in the decision to revoke. Additionally, the Parole Commission exercises complete discretion in making the decision whether to grant or deny parole once a prisoner becomes eligible. The factors that must necessarily be evaluated in this decision—the potential risk to society, the character of the individual, the probability of subsequent violation, the potential benefit of release to the individual, and the deterrent value of denial—are precisely those that would be crucial in determining whether an individual violating parole should be given time credit upon revocation, and that are in fact considered by federal judges making a similar decision in the probation revocation context. Thus, assuming Congress did in fact intend such a result,[75] the argument that federal judges should be allowed greater discretion must be rejected.

Finally, even if allowing greater discretion to federal judges than to the Parole Board were justified on the basis of experience and expertise, this rationale fails to address the problem created by unequal treatment of probationers and parolees. That probationers are sentenced by judges does not justify unequal treatment but simply constitutes an additional element of discrimination. In light of the acknowledged similarity of purpose between the probation and parole programs, the existence of separate sentencing bodies possessing varying discretionary powers represents a disparity in treatment that must itself be justified under fifth amendment principles. The arguments relied upon by the instant court to provide such justification, even under a minimum scrutiny standard, are plainly inadequate.

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74. 568 F.2d at 683-84.
75. *See* note 71 *supra.*

Labor Law—Taft-Hartley Section 301—Union May Be Liable for Sympathy Strike Damages When It Has Failed To Use Reasonable Care To Prevent Spread of Wildcat Strike

I. FACTS AND HOLDING

Plaintiff,[1] a coal mine owner and operator, brought suit in federal district court[2] under section 301 of the Taft-Hartley Act[3] for injunctive relief and damages against an international union and certain of its district, sub-district, and local subdivisions.[4] Plaintiff alleged that its employees had refused to cross picket lines set up by stranger pickets[5] in violation of the existing industry-wide collective bargaining contract.[6] Defendant union argued that it could not be held liable because it had neither called for, authorized, nor ratified[7] the wildcat strikes that caused the work stoppages at plain-

1. Plaintiff was Republic Steel Corporation, which owned and operated the Clyde Mine in Washington County, Pennsylvania, and the Banning Mine in Westmoreland County, Pennsylvania.

2. Plaintiff filed suit in federal district court in two districts of Pennsylvania. The two suits were consolidated on appeal.

3. Section 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1970), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 301(b), 29 U.S.C. § 185(b) (1970), provides that the labor organization "shall be bound by the acts of its agents," that it may "be sued as an entity," and that money judgments "shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

4. Defendant international was the United Mine Workers of America (UMW); the local, sub-district, and district defendants were subdivisions of the UMW.

5. The stranger pickets were members of UMW Local 6290 and were employees of the Buckeye Coal Company at its Nemacolin Mine. The record does not indicate the nature of the dispute leading to their strike against Buckeye and their subsequent picketing of Republic Steel's mines.

6. Republic Steel and the union were parties to the National Bituminous Coal Wage Agreement of 1974, which provided in Article XXIII(c):

> Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

Article XXIII(c) also provided specific grievance procedures for grievance settlement. 570 F.2d 467, 474 n.14 (3d Cir. 1978).

7. However, § 301(e) of the Taft-Hartley Act, 29 U.S.C. § 185(e) (1970), provides:

> For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the

tiff's mines. Defendant further contended that the refusal of plaintiff's employees to cross the picket lines was a sympathy strike[8] and thus not subject to the arbitration provisions of the collective bargaining contract. The district court granted summary judgment in favor of all defendants except the international union.[9] On appeal,[10] the United States Court of Appeals for the Third Circuit, *held,* affirmed and remanded for trial on the international union's liability. An international union that is a party to a collective bargaining contract providing mandatory grievance arbitration has a duty to make all reasonable efforts to stop the spread of wildcat strikes that violate the implicit no-strike agreement, and liability for damages caused by resulting sympathy strikes may be imposed on the international. *Republic Steel Corp. v. United Mine Workers,* 570 F.2d 467 (3d Cir. 1978).

II. LEGAL BACKGROUND

The Supreme Court has construed the National Labor Relations Act (the Act)[11] as enunciating a national policy that labor disputes are insulated from direct judicial intervention.[12] In *San*

question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

8. A sympathy strike is a work stoppage by the employees of an employer not involved in a dispute in support of another group of employees who are striking because of a dispute with their own employer. The strike directly resulting from the actual dispute is usually called the "underlying dispute" and the secondary work stoppage is called the "sympathy strike." When the purpose of the secondary work stoppage is to put indirect pressure on the primary employer, the activity is a "secondary boycott," which is an unfair labor practice under § 8(b)(4)(B) of the National Labor Relations Act. 29 U.S.C. § 158(b)(4)(B) (1970). *See* note 59 *infra.*

9. 428 F. Supp. 637 (W.D. Pa. 1977). The lower court distinguished between the sympathy strike by Republic's employees and the allegedly illegal wildcat strike against the primary employer, reasoning that "[w]here there is no obligation not to engage in a sympathy strike, there can be no union liability for failure to exert reasonable efforts to end a sympathy strike" but that there may exist "some obligation on the international union to prevent the spread of illegal, wildcat strikes by its members to other employers . . . with whom the international union has contracted." *Id.* at 642.

10. The international union appealed the denial of its motion for summary judgment. Republic appealed the granting of summary judgment in favor of the locals, sub-district, and district unions.

11. 29 U.S.C. §§ 101-187 (1970). The Norris-LaGuardia Act, § 4, 29 U.S.C. § 104 (1970), for example, states that "[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute" to enjoin work stoppages or union organizing unless fraud or violence are involved.

12. *See* Old Dominion Branch 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966); Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

Diego Building Trades Council v. Garmon,[13] the Court held that in any dispute involving what is arguably a protected concerted activity[14] or an unfair labor practice under the Act,[15] the National Labor Relations Board (the Board) has original jurisdiction, preempting the jurisdiction of both state and federal courts.[16] The Board's "exclusive primary competence"[17] prevails unless the state can assert a compelling need to protect its citizens[18] or the activity is of only peripheral concern to the national labor policy.[19] The judiciary's role is enforcement and review of Board rulings.[20] Section 301 of the Taft-Hartley Act carves out an exception to Board preemption: once a collective bargaining agreement is in effect, the parties to it may bring traditional breach of contract actions in federal district court to enforce its terms.[21]

13. 359 U.S. 236 (1959). In *Garmon* an employer brought suit in state court for an injunction and damages against union recognitional picketing and also filed charges with the National Labor Relations Board, which declined to exercise its jurisdiction over the dispute. The state court found violations of California law and awarded damages. The Supreme Court vacated, declaring that state and federal court jurisdiction was preempted by the Board.

14. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970), provides that certain concerted activities are lawful:

> 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 as authorized in section 158(a)(3) of this title.

15. Section 8 of the Act, 29 U.S.C. § 158 (1970), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their § 7 rights; to interfere with the formation of a labor organization by his employees or to dominate or support a labor organization to which his employees belong; to discriminate in hiring, firing, or "any term or condition of employment" so as to encourage or discourage union membership; to fire or discriminate against an employee for having filed a complaint or testified in a Board proceeding; or to refuse to bargain in good faith with the collective bargaining representatives of his employees. Section 8 also enumerates certain union activities that are unfair labor practices: restraining or coercing employees in the exercise of their § 7 rights, causing or trying to cause an employer to discriminate against an employee so as to encourage or discourage union membership, refusing to bargain in good faith with the employer, engaging in secondary boycotts and "hot cargo" agreements, requiring an employer to pay for work not actually performed ("feather-bedding"), requiring excessive dues, picketing while a collective bargaining contract is in force or within twelve months of a valid representation election, and picketing for recognition without filing a petition with the Board within thirty days of beginning such picketing.

16. 359 U.S. at 244.

17. *Id.* at 245.

18. *Id.* at 247.

19. *Id.* at 243.

20. Section 10(e)-(f), 29 U.S.C. § 160(e)-(f) (1970), provides for enforcement and review.

21. Prior to the passage of § 301, enforcement of a collective bargaining agreement against a union was difficult because of the union's status as an unincorporated association;

In *Textile Workers Union v. Lincoln Mills*,[22] the Supreme Court construed section 301 as providing a source of substantive law as well as jurisdiction.[23] The Court stated that the federal judiciary was to develop a body of law, guided by the national labor policy of promoting industrial peace, to enforce collective bargaining agreements.[24] In *Lincoln Mills* the Court ordered specific performance of a grievance arbitration provision, reasoning that the agreement to arbitrate was an enforceable contract, the consideration for which was the union's no-strike agreement.[25] The Court continued to formulate substantive law under section 301 in the *Steelworkers Trilogy*,[26] ruling that the courts were not to consider the merits of disputes for which arbitration was sought or of arbitrators' awards once given.[27] Rather, the courts were to determine whether the dispute or arbitration award fell within the terms of the contract and to grant or deny relief accordingly.

Although the Act protects the right to strike except in narrowly defined circumstances,[28] the Supreme Court held in *Local 174, Teamsters v. Lucas Flour Co.*[29] that a strike to force an employer to rehire an employee discharged for cause violated the parties' collec-

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for a discussion of this, see Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U.L.Q. 3. For the Supreme Court's interpretation of the congressional intent that collective bargaining agreements be enforced judicially as contracts, see, *e.g.*, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). For an analysis of the applicability of standard contract law to collective bargaining agreements, see Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969).

22. 353 U.S. 448 (1957). The union brought suit in *Lincoln Mills* to compel the employer to comply with a grievance arbitration provision in the collective bargaining agreement.

23. The Court had dealt with § 301 prior to *Lincoln Mills* in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), and had concluded that § 301 did not give the courts jurisdiction when unions sought to enforce "uniquely personal rights" of employees, such as a demand for unpaid wages. *Westinghouse* was subsequently overruled by *Smith v. Evening News*, 371 U.S. 195 (1962).

24. 353 U.S. at 450-52, 456.

25. *Id.* at 455.

26. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

27. In *American Mfg.* and *Warrior Navigation* the union sought to enjoin employers to arbitrate grievances that the employers argued did not merit arbitration; in *Enterprise Wheel* the union sought enforcement of an arbitration award.

28. Section 13, National Labor Relations Act, 29 U.S.C. § 163 (1970), provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

29. 369 U.S. 95 (1962). The employer's suit in *Lucas* was initially filed in state court. The Supreme Court also ruled that, though state courts have jurisdiction of breach of contract actions, if a particular state law is in conflict with federal law on this subject, federal law prevails.

tive bargaining agreement. The agreement in *Lucas* lacked an explicit no-strike clause, but the Court found that the provision for grievance arbitration created an implied contract not to strike and awarded damages to the employer.[30]

Relief against strikes in breach of contract has not been limited to damage awards. In *Boys Markets, Inc. v. Retail Clerks Union Local 770,*[31] the Supreme Court ruled that despite the Norris-LaGuardia prohibitions against enjoining strikes,[32] injunctive relief was proper when a union work stoppage violated an express no-strike agreement. The Court reasoned that the national policy in favor of arbitration mandated enjoining such strikes, noting that employers would agree to grievance arbitration only when the *quid pro quo* was a no-strike obligation and that the incentive for such bargains was diminished if direct enforcement by injunction was not available.[33] In *Gateway Coal Co. v. United Mine Workers*[34] the Court found an implied duty not to strike arising from a mandatory arbitration clause and ruled that the federal courts had the power under section 301 to enjoin violations of an implied no-strike clause.[35]

The Supreme Court, however, limited its holding in *Boys Markets,* expressly stating that injunctive relief was proper only when the collective bargaining contract contained a mandatory grievance arbitration procedure and the strike was "over a grievance which both parties are contractually bound to arbitrate."[36] The sig-

30. Justice Stewart, writing for the majority, declared that "[t]he collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration." *Id.* at 105.

31. 398 U.S. 235 (1970). This decision overruled Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), in which the Court had held that the Norris-LaGuardia anti-injunction provisions, see note 11 *supra,* precluded enjoining a strike even when that strike was a breach of a collective bargaining contract containing a binding arbitration clause.

The *Boys Markets* collective bargaining contract contained an express no-strike clause as well as arbitration provisions, but the defendant union nonetheless struck and picketed one of the supermarkets owned by the corporation in a dispute over work being assigned to non-union members.

For a discussion of judicial handling of the injunction issue between *Atkinson* and *Boys Markets* and a criticism of the *Boys Markets* rationale, see Vladeck, *Boys Markets and National Labor Policy,* 24 VAND. L. REV. 93 (1970).

32. *See* note 11 *supra.*

33. 398 U.S. at 248.

34. 414 U.S. 368 (1974). In *Gateway* the union called a strike over a safety dispute and refused the employer's requests that the employees return to work and arbitrate the conflict. The union and the employer were parties to the National Bituminous Coal Wage Agreement of 1968. The Court interpreted the provision in which the parties agreed to arbitrate all local disputes as including safety disputes and as implying a no-strike clause. *Id.* at 376.

35. *Id.* at 381-82.

36. 398 U.S. at 254. The Court further prescribed guidelines for enjoining strikes: the district court must determine that the contract does indeed require arbitration, that the

nificance of that limitation became clear with the Court's ruling in *Buffalo Forge Co. v. United Steelworkers*[37] that issuance of an injunction against a sympathy strike was improper. The sympathy strikers in *Buffalo Forge* had agreed in their collective bargaining contract to a no-strike clause, but subsequently refused to cross a picket line set up by recognition strikers.[38] The Court held that the strike did not come within the *Boys Markets* rule because the underlying dispute was a legal strike and the sympathy strike "was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract."[39]

The *Buffalo Forge* holding appeared to have significantly limited the applicability of section 301 in the sympathy strike context.[40] The federal courts successively rejected various theories that sought to show violation of an agreement to arbitrate rather than to strike in sympathy strike situations. Thus the federal district court reasoned in *United States Steel Corp. v. United Mine Workers*[41] that *Buffalo Forge* shielded sympathy strikers from an injunction because the dispute between the sympathy strikers and their employer could not be arbitrated.[42] In *Consolidation Coal Co. v. United Mine Workers*[43] the Fourth Circuit rejected the contention that *Buffalo Forge* could be circumvented by looking to the dispute between the plaintiff employer and the stranger pickets and held that this dispute was not arbitrable. The Third Circuit in *United States Steel Corp. v. United Mine Workers (U.S. Steel II)*[44] declined to take a third possible approach—that the relevant arbitrable dispute was the dispute between the employer and employees engaged in the underlying strike—and emphasized that the underlying strike could in no way have been arbitrated between plaintiff and defendant

employer will arbitrate once the strike is enjoined, that breaches of contract have in fact occurred or are certain to occur, that these breaches are such as to cause irreparable harm to the employer, and that denial of the injunction will cause greater harm to the employer than issuance of it will cause to the union.

37. 428 U.S. 397 (1976).

38. *Id.* at 400-01.

39. *Id.* at 407 (emphasis by the Court).

40. *See, e.g.*, Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of Buffalo Forge*, 45 GEO. WASH. L. REV. 633 (1977); 55 N.C.L. REV. 1247 (1977).

41. 418 F. Supp. 172 (W.D. Pa. 1976).

42. *See also* Zeigler Coal Co. v. Local 1870, UMW, 566 F.2d 582 (7th Cir. 1977); Southern Ohio Coal Co. v. UMW, 551 F.2d 695 (6th Cir. 1977); Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336 (3d Cir. 1976).

43. 537 F.2d 1226 (4th Cir. 1976).

44. 548 F.2d 67 (3d Cir. 1976).

local to which plaintiff's employees belonged.[45] The *U.S. Steel II* court found that *Buffalo Forge* precluded damages as well as injunctive relief in the absence of an arbitrable dispute.[46] The Third Circuit, however, had held earlier in *Eazor Express, Inc. v. International Brotherhood of Teamsters*[47] that unions that were parties to a contract having a no-strike clause had a duty to use all reasonable means to bring unauthorized strikes to an end and were liable for damages caused by their failure to do so.

III. THE INSTANT OPINION

The instant case presented the question left open by *U.S. Steel II:* whether an employer may obtain damages against an international union when his own employees engaged in a sympathy strike triggered by wildcat strikes against another employer in violation of an implied no-strike contract.[48] The court, having noted that the injunctive issue was now moot,[49] rejected the union's contention that it could not be held liable for damages because it had not called or ratified the strike.[50] The court also rejected the union's argument that the decisions in *Buffalo Forge* and *U.S. Steel II* immunized sympathy strikes against injunctions and damages under section 301.[51] The court distinguished the instant case from both *Buffalo Forge*[52] and *U.S. Steel II*,[53] stating that the two cases precluded relief under section 301 only when the underlying dispute was not subject to arbitration between plaintiff and defendant. In contrast, the sympathy strike at Republic Steel's two mines resulted from an underlying strike that was alleged to be illegal because the collective bargaining agreement provided for compulsory arbitration and thus created an implied obligation not to strike.[54] Therefore, relief under

45. *Id.* at 73. The Court also held that the sympathy strike, like the *Buffalo Forge* strike, was not arbitrable. *Id.*

46. *Id.* at 74.

47. 520 F.2d 951 (3d Cir. 1975). In *Eazor* union members struck over the discharge for cause of two employees. The union itself did not authorize the strike and characterized it as illegal; however, certain local officers participated in the strikes, and the union itself took no effective action to prevent the spread of the strike to the premises of a second employer or to prevent destruction of property, threats, and violence on the part of the strikers.

48. 570 F.2d at 470.

49. *Id.* at 476.

50. *Id.* at 476-77.

51. *Id.* at 477.

52. *See* text accompanying notes 37-39 *supra.*

53. *See* text accompanying notes 44-45 *supra.*

54. 570 F.2d at 477. All parties in both the sympathy strike and the underlying strike were governed by the National Bituminous Coal Wage Agreement of 1974, which provided grievance arbitration as "the exclusive and compulsory means for resolving disputes" and

section 301 was potentially available to the employer.

Citing the national policy of promoting peaceful settlement of labor disputes and avoiding the violence resulting from wildcat strikes in the coal mining industry, the court found that the international union had a duty to prevent the spread of wildcat strikes of the sort that caused the work stoppage at plaintiff's two mines.[55] The court distinguished, however, between the liability of the international union and that of the subdivisions of the union on the basis of ability to control both the underlying and sympathy strikers. In holding that only the international was liable, the court noted that the international had communication links with both groups whereas the subdivisions of the union were not shown to have had simultaneous contact with both the sympathy strikers and the roving pickets.[56] Furthermore, the court reasoned that the interaction between plaintiff's employees and the roving pickets arose from their being members of the same international union. Thus the international had a responsibility to control and discipline its members and to insure observance of the terms of the collective bargaining contract.[57] The court held that if on remand plaintiff employer established that the stranger picketing itself resulted from an enjoinable strike and that the international union knew or should have known of the wildcat strike, but failed to exhaust all reasonable efforts to prevent its spread, the international union could be held liable for damages.[58]

IV. COMMENT

Although the result reached by the instant court may well be correct, the analysis leading to that result is flawed and further confuses the sympathy strike issue. The court began by shifting its focus from the sympathy strike to the underlying dispute and ended by merging them into a single wrong on which the employer could bring suit. The only employees, however, who had a contractual obligation to arbitrate disputes with the plaintiff instead of striking were his own employees, yet those employees had no dispute that could be arbitrated. The refusal to cross a picket line sprang not

thus implied a duty not to strike. The court relied on *Gateway* in finding the implied no-strike clause.

55. 570 F.2d at 479.

56. *Id.* at 478.

57. *Id.* at 479. The court cited *Eazor*, as establishing the international's duty to insure fulfillment of the no-strike obligation; however, the no-strike clause in *Eazor* was express rather than implied. *See* note 47 *supra*.

58. 570 F.2d at 479.

from an employer-employee conflict but from the desire to demonstrate support of a separate group of employees or from the fear of retaliation by the stranger pickets. Arbitration between employer and sympathy strikers would be a futile exercise. Likewise, the plaintiff could not assert logically any contractual right as to the roving pickets; they had no dispute with plaintiff and their contractual pledge to arbitrate had been made to their own employer.

To allow an employer to sue for breach of contract when the breach occurred between a second employer and his employees simply because both employers and their respective employees are parties to a uniform industry-wide collective bargaining contract is to misconstrue the principles of contract law. A logical extension of the court's reasoning would be to allow any union local to bring suit against an employers' association because one employer breached the grievance arbitration clause by refusing to arbitrate a grievance with his own employees. The instant court has blurred the basic contractual relationships in order to find a breach of contract between plaintiff and defendant. Without such a finding, judicial intervention under section 301 would not be possible, and the Board's jurisdiction would preempt that of the court.

The desirable result of enforcing the international union's duty of reasonable care to prevent the spread of wildcat strikes should have been reached by following the Act's provisions for dealing with secondary boycotts. Any damages suffered by plaintiff resulted only indirectly from a breach of contract. The direct cause appears to have been a secondary boycott, in which employees having a primary dispute with their own employer picketed a secondary employer to induce a work stoppage by the latter's employees in order to bring pressure to bear ultimately upon the primary employer. Secondary boycotts are an unfair labor practice under the Act.[59] When a secondary boycott charge is filed with the Board, the Act provides for an expeditious preliminary investigation, and upon a finding of probable cause, the Board itself will seek injunctive relief for the secondary employer.[60] Furthermore, section 303 of the Taft-Hartley Act provides that the injured employer may bring suit in federal district court against the union for damages resulting from

59. Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970), provides in part that it shall be an unfair labor practice "to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce" to strike when the purpose of that strike is to force the secondary employer "to cease doing business with" the primary employer. The Supreme Court in *NLRB v. Local 825, Operating Engineers,* 400 U.S. 297 (1971), warned against reading the "cease doing business" language too narrowly.

60. Section 10(1), 29 U.S.C. § 160(1) (1970).

a secondary boycott.[61] Thus both injunctive relief and damages are available to an employer when his business is injured by an unfair labor practice.

Significant advantages are gained by using the unfair labor practice charge rather than the breach of contract suit. The secondary boycott charge assures that the experience and specialized knowledge of the National Labor Relations Board will be brought to bear on the conflict and that a uniform approach will be formulated. A Board-procured injunction will exacerbate any existing conflict to a lesser degree than a federal court injunction obtained directly by the employer against his own employees. Moreover, a Board investigation will provide a balanced examination of the facts relevant to any later suit for damages. Finally, the secondary boycott charge avoids the logical convolutions to which the instant court resorted in order to reach what it believed to be a proper assigning of responsibility.

The international union does have a duty to make reasonable efforts to prevent the spread of unauthorized strikes. Such strikes disrupt industrial functions and damage employer and public alike, and the international union is perhaps the sole entity that can curtail wildcat strikes with effectiveness. The international's duty of reasonable care, however, arises not from contract law but from statute. Therefore, the proper source of enforcement is the method prescribed by the National Labor Relations Act—filing of an unfair labor practice charge, Board action, and finally court enforcement. The narrow exception provided in section 301 to Board preemption of jurisdiction over labor disputes should apply only when the contractual relationship between parties is direct and primary. To distort that relationship as the instant court did is to misapply section 301 and to undercut the secondary boycott sanctions of the Act.

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61. Section 303(b), 29 U.S.C. § 187(b) (1970).

Uniform Commercial Code—Secured Transactions—Article Nine Does Not Permit Unsecured Claims To Achieve Secured and Perfected Status by a Post-Bankruptcy Assignment to a Senior Secured Creditor

I. FACTS AND HOLDING

In a bankruptcy proceeding,[1] Revlon, the secured creditor of the bankrupt debtor,[2] sought to recover both its claim against the debtor and the claims of subsidiaries assigned to Revlon after adjudication.[3] Revlon argued that the claims assigned by its subsidiaries became secured and perfected under the umbrella of Revlon's omnibus security agreement and financing statement.[4] An intervening creditor holding a perfected security interest in the debtor's inventory[5] contended that the post-bankruptcy assignments of unsecured and unperfected claims did not create perfected security interests in favor of the subsidiaries. The Bankruptcy Judge, concluding that the debtor's obligations to the subsidiaries were secured and perfected under Revlon's security agreement and financing statement,[6]

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1. On August 23, 1972, E.A. Fretz Co. filed a voluntary petition in bankruptcy, and adjudication followed.

2. E.A. Fretz Co., "Debtor," executed a security agreement with Revlon, Inc., "Secured Party," on April 3, 1971, giving Revlon a security interest in existing and after-acquired equipment and collateral. The pertinent portions of this security agreement are:

(1) All debts . . . owing by Debtor . . . to REVLON, INC. and/or all of its present and future divisions and affiliates . . . due or to become due, now existing or hereafter arising, including without limitation any debt, liability or obligation owing from Debtor and/or any of its present or future divisions and affiliates to others which REVLON, INC. and/or its present and future divisions and affiliates may have obtained by assignment or otherwise . . . .

(2) All existing and future indebtedness and liabilities of any and every kind or nature, now or hereafter owing by Debtor to Secured Party, howsoever such indebtedness shall arise or be incurred or evidenced.

3. On September 19, 1972, Revlon-Realistic Professional Products, Inc., and Cosmetic Capital Corp., both subsidiaries of Revlon, assigned their general claims against the Debtor to Revlon.

4. A financing statement signed by the Debtor and Secured Party was filed with the Texas Secretary of State on April 5, 1971. The financing statement described the collateral and designated Fretz as debtor and Revlon as the only secured party.

5. On June 30, 1971, the Debtor executed a security agreement with Republic National Bank of Dallas, "Intervening Creditor," giving the bank a security interest in various collateral including the Debtor's inventory, then existing or subsequently acquired, and all the proceeds therefrom. A financing statement sigued by the Debtor and Republic, describing the collateral, and respectively designating Fretz and Republic as debtor and secured party, was filed with the Secretary of State on August 11, 1971.

6. The Bankruptcy Judge made the following conclusions of law:

(1) The indebtedness of Fretz to Revlon-Realistic (a subsidiary), which has been as-

allowed the claims *in toto,* leaving no proceeds to pay the claim of the intervening creditor.[7] The District Court affirmed the order without opinion. On appeal, the United States Court of Appeals for the Fifth Circuit, *held,* reversed and remanded. The Uniform Commercial Code and the Bankruptcy Act do not permit general creditors to achieve perfected secured status by assigning their claims to a senior lienor after the debtor's bankruptcy. In re *E.A. Fretz Co.,* 565 F.2d 366 (5th Cir. 1978).

II. LEGAL BACKGROUND

While no court has considered the question whether the Uniform Commercial Code permits the use of "floating secured parties,"[8] the Code's provisions dealing with "floating" collateral and debt,[9] as well as Bankruptcy Act principles, serve as a framework for analysis. Article Nine clearly contemplates a scheme whereby either future indebtedness or future acquired property is secured and perfected under the umbrella of the original security agreement and financing statement.[10] Section 9-204(1) permits a security agreement to "provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral."[11] Similarly, section 9-204(3) allows "[o]bligations covered by a security agreement . . . [to] include future advances or other value whether or not the advances or value are given pursuant to commit-

signed by Revlon-Realistic to Revlon, is secured by the security interests of Revlon.

(2) The indebtedness of Fretz to Cosmetic Capital (a subsidiary), which has been assigned by Cosmetic Capital to Revlon, is secured by the security interests of Revlon.

(3) Such security interests were duly perfected by the filing of the financing statement (naming Fretz and Revlon on April 5, 1971) . . . .

7. The proceeds from the sale of the bankrupt debtor's equipment and inventory were approximately $100,000. Revlon's claim against the proceeds was about $30,000; the claims of the subsidiaries against the Debtor amounted to over $190,000. Because the Bankruptcy Judge allowed Revlon's and the subsidiaries' claims *in toto,* no proceeds were left to pay the Intervening Creditor.

8. The instant court used the term "floating secured parties" to describe the arrangement that would permit Revlon's security interest to "float" among whichever general creditors should assign their claims to Revlon. The court described floating secured parties as "an open-ended class of creditors with unsecured and unperfected security interests who, after the debtor's bankruptcy, can assign their claims to a more senior lienor and . . . secure and perfect their interests under an omnibus security agreement and financing statement." 565 F.2d at 369. This agreement is analogous to the floating lien that Article Nine creates with respect to after-acquired property and future advances. *See* note 9 *infra.*

9. Commentators find that Article Nine transactions may create a lien that "floats" from one piece of collateral to another and may secure first one debt and then another. P. COOGAN, W. HOGAN & D. VAGTS, 1 SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE §§ 7.01-.11 (rev. ed. 1977) [hereinafter cited as COOGAN].

10. U.C.C. §§ 9-204, 9-402, 9-312 (all U.C.C. references are to the 1972 version).

11. U.C.C. § 9-204(1).

ment."[12] The comments following section 9-204 reflect the Code's acceptance of the "continuing general lien" and its rejection of pre-Code judicial prejudice against floating collateral and debt.[13] The pre-Code prejudice against the floating lien was based on the fear that such a lien would encumber all of the debtor's assets with one creditor, thus hampering the debtor's ability to get credit from anyone else.[14] Pre-Code courts also feared that floating liens would deprive intervening creditors of the protection of a cushion of free assets.[15] To circumvent this judicial prejudice against floating liens, a number of pre-Code security devices such as field warehousing, trust receipts, and factor's liens were designed.[16] The draftsmen of the Code, by expressly recognizing floating collateral and debt, sought to protect creditors and debtors by reducing the inconsistency and uncertainty of pre-Code law.[17]

Article Nine further facilitates the use of floating collateral and debt by establishing a "notice-filing" and priority system under which the secured party can perfect both present and future claims by filing a single financing statement.[18] The financing statement is required to include only the names and addresses of the parties and the type of collateral.[19] The purpose of the financing statement is merely to put other creditors on notice of the prior transaction so that creditors can inquire about the details at their own discretion.[20] In *National Cash Register Co. v. Firestone & Co.*,[21] a Massachusetts court found that a single financing statement was valid

12. U.C.C. § 9-204(3).

13. "This Article accepts the principle of a 'continuing general lien.' It rejects the doctrine . . . that there is reason to invalidate as a matter of law what has been variously called the floating charge, the free-handed mortgage and the lien on a shifting stock." U.C.C. § 9-204, Comment 2.

14. *Id. See also* 1 COOGAN, *supra* note 9, at § 7.03[1].

15. U.C.C. § 9-204, Comment 2.

16. *Id.* "Despite this judicial prejudice against security interests in after-acquired property, the need for new sources of collateral led to the development of legal devices that permitted a collateral-starved debtor to obtain a loan secured not only by property presently in his possession, but also by property that he would have in the future." Kronman, *The Treatment of Security Interests in After-Acquired Property Under the Proposed Bankruptcy Act*, 124 U. PA. L. REV. 110, 118 (1975).

17. "The substantive rules of law set forth in the balance of the Article are designed to achieve the protection of the debtor and the equitable resolution of the conflicting claims of creditors which the old rules no longer give." U.C.C. § 9-204, Comment 2.

18. U.C.C. §§ 9-402 & 9-312(5).

19. No details are required with regard to the amount or other items of the transaction. U.C.C. § 9-402.

20. "This section [9-402] adopts the system of 'notice filing' . . . . The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs." *Id.*, Comment 2.

21. 346 Mass. 244, 191 N.E.2d 471 (1963).

to cover after-acquired property even though the financing statement included no reference to the after-acquired property clause of the security agreement.[22] Priority among secured parties who perfect by filing is determined by the first to file a financing statement.[23] Therefore, in *Friedlander v. Adelphi Mfg. Co.*,[24] the New York Supreme Court held that the secured party who is first to file has priority over a subsequently perfected security interest with regard to both the original advance and future advances, even though the future advances may have taken place after the intervening party obtained his security interest.

Despite the express sanctioning of floating liens by the Code, some courts nevertheless have been troubled by the use of "blanket filings"[25] to perfect later advances and the use of broadly drafted future advances clauses.[26] In *Coin-O-Matic Service Co. v. Rhode Island Hospital Trust Co.*,[27] the Rhode Island Superior Court refused to hold that later advances dated back to the time of the original filing when the security agreement had no future advances provision.[28] The Rhode Island court feared that a creditor could

22. In *National Cash Register*, the court held that the security interest of Firestone had priority over the security interest of a subsequent creditor (whose security consisted of a cash register that it sold to the debtor restaurant) when Firestone (whose security agreement covered "all contents" (present and future) of the restaurant) had first filed a financing statement. The court found that the financing statement need not refer to the security agreement's after-acquired property clause because under the Code's notice filing system the subsequent creditor had adequate information to ascertain the facts he needed to know for further inquiry. *Id.*

23. U.C.C. § 9-312(5).

24. 5 U.C.C. REP. SERV. 7 (N.Y. Sup. Ct. 1968).

25. H. KRIPE, R. BRAUCHER, P. COOGAN, G. GILMORE & R. HAYDOCK, JR., PROBLEMS OF LENDERS, BORROWERS AND SELLERS UNDER THE UNIFORM COMMERCIAL CODE 10-17 (1968). The term "blanket filing" refers to the situation in which a creditor seeks to perfect his claim to subsequently acquired assets or indebtedness under the "blanket" of the original financing statement. *See* note 27 *infra*.

26. *See* 34 U. PITT. L. REV. 691 (1973).

27. 3 U.C.C. REP. SERV. 1112 (R.I. Super. Ct. 1966).

28. In *Coin-O-Matic*, the debtor entered into a security agreement with Rhode Island Hospital Trust Co. that had no provision for future advances. Rhode Island Hospital Trust filed a financing statement prior to the time the debtor entered into a security check with Coin-O-Matic and Coin-O-Matic filed its financing statement. Rhode Island Hospital Trust subsequently loaned the debtor $1,000 from which sum the debtor satisfied his original obligation to Rhode Island Hospital Trust. Upon the debtor's bankruptcy, Rhode Island Hospital Trust claimed it was entitled to a priority with regard to its $1,000 loan based upon its original financing statement. The court ruled against Rhode Island Hospital Trust, holding that a single financing statement in connection with a security agreement in which no provision is made for future advances is not an umbrella for later advances. *Id.* at 1120.

Other courts have refused to follow the *Coin-O-Matic* doctrine and have held that priority on later advances dates from the first filing even though the original agreement contem-

unduly restrict a debtor's power to borrow if the creditor's rights to all advances dated from the original filing.[29] Furthermore, the *Coin-O-Matic* court was reluctant to give priority for later advances from the time of the first filing when the security agreement contemplated a one-shot deal instead of a series of advances.[30]

Similarly, courts have been wary of future advances provisions purporting to include all obligations of any type that a debtor may thereafter owe to his secured creditor.[31] These broad future advances provisions are known as "dragnet clauses" or Anaconda mortgages because by their broad general terms, they enwrap the unsuspecting debtor in the folds of indebtedness that he did not contemplate securing by the original agreement.[32] Despite Article Nine's apparently unrestricted sanctioning of future advances arrangements, some courts have limited the use of dragnet clauses.[33] In *John Miller Supply Co. v. Western State Bank*,[34] the Supreme Court of Wisconsin refused to enforce a broadly drafted future advances clause because the subsequent advances were so unrelated to the earlier loan transaction as to negate the inference that the debtor consented to its inclusion in the security agreement.[35] In addition to employing the "same class" test applied in *John Miller Supply Co.*, courts have struck down dragnet clauses because the subsequent indebtedness was not reasonably within the contemplation of the parties.[36]

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plated only one loan. *In re* Rivet, 299 F. Supp. 374 (E.D. Mich. 1969); Household Fin. Corp. v. Bank Comm'r, 248 Md. 233, 235 A.2d 732 (1967).

29. 3 U.C.C. REP. SERV. at 1120.

30. For a discussion of the *Coin-O-Matic* case, see J. WHITE & R. SUMMERS, THE UNIFORM COMMERCIAL CODE § 25-4 at 907-08 (1972).

31. The problem arises "when a lender, relying on a broadly drafted clause, seeks to bring within the shelter of his security arrangement claims against the debtor which are unrelated to the course of financing that was contemplated by the parties." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 35.5 at 932 (1965).

32. *See* note 26 *supra* at 692.

33. *See* notes 35 & 36 *infra*.

34. 55 Wis. 2d 385, 199 N.W.2d 161 (1972).

35. In *John Miller Supply Co.*, the original security agreement granted the creditor a security interest in certain of the debtor's property as collateral "to secure payment of such loans and all other obligations." Obligations were defined as "all Debtor's present and future debts, obligations and liabilities [to the Creditor] of whatever nature." *Id.* at 163. The creditor sought to recover the collateral in satisfaction of $5,000 loaned to the debtor pursuant to the security agreement and for $30,000 in damages for delivery of defective products pursuant to a subsequent marketing contract with the debtor. *Id.*

The court found "no evidence that the parties contemplated [that] the security interest would cover future breaches of sales contracts not directly related to the lending of money." *Id.* at 164. The court, applying the "same class" test, held that the obligation arising out of the marketing contract was not of the same nature or related to the types of indebtedness in the original financing agreement. *Id.*

36. In *In re* Sanelco, 7 U.C.C. REP. SERV. 65 (M.D. Fla. 1969), and Capocasa v. First Nat'l Bank, 36 Wis. 2d 714, 154 N.W.2d 271 (1967), the courts held that future advances

The concept of the floating lien is difficult to reconcile with the preference provisions of the Bankruptcy Act.[37] Section 60(a)(1) of the Bankruptcy Act defines a preference as:

> a transfer, . . . of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against [the debtor] of the [Bankruptcy] petition . . . the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.[38]

The purpose of section 60 is to prevent the exhaustion of the debtor's assets by a coerced or voluntary transfer of his assets to certain creditors immediately before the date of bankruptcy.[39] Thus, the Act necessarily invalidates certain transactions that have occurred prior to bankruptcy.[40] The crucial question with regard to the floating lien is whether property obtained or indebtedness incurred by the insolvent debtor pursuant to an after-acquired property or future advances clause within four months of bankruptcy constitutes a voidable preference under section 60.[41] In *Grain Merchants of Indiana, Inc. v. Union Bank and Savings Co.*[42] and *Rosenberg v. Rudnick*,[43] the courts recognized that a literal interpretation of the "transfer" language of section 60 might give the trustee power to void a transaction pursuant to a floating arrangement even absent a true economic preference that section 60 was designed to prevent. These cases reflect the courts' struggle to preserve the intent of section 60 to void secret liens and economic preferences, while preserving Article Nine floating liens that do not suffer from these ills.[44]

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arrangements are enforced only to the extent that the future transactions of liabilities sought to be secured are in the clear contemplation of the parties.

37. *See* R. HENSON, SECURED TRANSACTIONS 156-84 (1973). The conflict between the floating lien and the Bankruptcy Act is manifested in section 60 preference attacks against Article Nine security interests involving after-acquired property and future advances.

38. Bankruptcy Act § 60(a)(1), 11 U.S.C. § 96(a)(1) (1976). Under Bankruptcy Act § 60(b), 11 U.S.C. § 96(b) (1976), a trustee may avoid the transfer upon showing the creditor had reasonable cause to believe the debtor was insolvent at the time of the transfer.

39. W. COLLIER, 3 COLLIER ON BANKRUPTCY § 60.01 at 744 (rev. ed. 1977) [hereinafter cited as COLLIER]. Collier notes that if creditors and debtors could deal with impunity with the debtor's assets up to the date of bankruptcy, only tag ends and remnants of unencumbered assets would remain.

40. *Id.* at 745.

41. The Code attempts to obviate this difficulty and protect the floating lien from a preference challenge in U.C.C. § 9-108. Section 9-108 provides that a security interest in after-acquired property that the debtor acquires in the ordinary course of business shall be deemed to have been taken for new value rather than for antecedent debt, provided new value was given originally. *See also* Maio, *Secured Transactions: The Code in Bankruptcy Courts*, 85 BANKING L.J. 19 (1968).

42. 408 F.2d 209 (7th Cir. 1969).

43. 262 F. Supp. 635 (D. Mass. 1967).

44. *See* 1A COOGAN, *supra* note 9, at § 9A.02[8].

In *Rosenberg,* Judge Ford held that the time of the transfer for bankruptcy purposes was the time the security agreement was executed rather than the time at which each distinct item of inventory was acquired.[45] Thus, even though the secured creditor's lien on the after-acquired collateral was not perfected according to the Code until within four months of bankruptcy, the court nevertheless held that the transfer was not preferential.[46] Judge Ford noted that the lien should be conceived of as a "floating mass," the components of which may be constantly changing without affecting the res.[47] He further recognized that the mere substitution of collateral did not involve the evils to which section 60 is directed because there was no secret lien nor race against other creditors.[48]

In the instant case, the court faced the question whether the Code sanctions an arrangement under which an unsecured party seeks to secure and perfect his claim against the debtor pursuant to an assignment provision in a perfected secured party's umbrella security agreement. No court had considered the permissibility of floating secured parties, and such arrangements are not specifically addressed by the Code. The Code's concept of floating liens, however, and the principles of the Bankruptcy Act provide the guidelines with which to analyze this question.

III. THE INSTANT OPINION

Although recognizing that the Uniform Commercial Code sanctions floating collateral and debt, the instant court refused to recognize floating secured parties. The court rested its decision on three grounds. First, the court found that the subsidiaries were not secured parties because the security agreement created a security in-

45. *Rosenberg* involved an action by a trustee in bankruptcy to set aside an alleged preferential transfer. The District Court held that for the purpose of determining the date of the alleged preferential transfer of inventory acquired during the four months preceding bankruptcy, the transfer dated back to the date of the security agreement. 262 F. Supp. at 637.

46. *Id.* at 639. Judge Ford also noted that the intent of § 9-108 of the Code is that such a transfer not be considered preferential. *See* note 41 *supra.*

47. Judge Ford found that in applying section 60, inventory subjected to a security interest should be as a single entity and not as a mere conglomeration of individual items each subject to a separate lien. The security interest is in the entity as a whole and the transfer of property occurs when this interest in inventory as an entity is created. 262 F. Supp. at 639.

48. The purpose of section 60 is to protect creditors seeking unfair advantages during the four months preceding bankruptcy. The creditor here merely was trying to enforce a security agreement made prior to the four month preference period. The substitution of collateral during the four months prior to bankruptcy is not preferential when the collateral replaces the collateral covered by the original security agreement. *Id. See* 408 F.2d at 217.

terest only in the senior creditor.[49] Since the subsidiaries had no security interest, they were not secured parties whose interests could validly be perfected.

Second, the court reasoned that even assuming the subsidiaries were secured parties, their interests were not perfected by Revlon's financing statement because the subsidiaries were neither signatories nor named parties in the financing statement.[50] The court required strict compliance with the "simple" perfection standards of Article Nine[51] since the Code was designed to provide a simple and unified structure within which the immense variety of secured financing transactions could proceed with certainty. Noting that the use of floating secured parties would undercut Article Nine's perfection requirements, which reflect a Code policy against secret security, the court rejected the argument that the intervening creditor was obliged to ascertain the exact state of affairs through further inquiry.

Finally the court noted that priority in bankruptcy is determined as of the date of adjudication.[52] Since the subsidiaries' assignments of their claims came after the date of adjudication, the subsidiaries could only recover as unsecured creditors.[53] Recognizing the enormous potential for collusion or fraud, the court reasoned that such post-bankruptcy assignments would frustrate the purpose of the Bankruptcy Act to prevent the exhaustion of the insolvent debtor's assets.[54] Thus, the court concluded that the Code and the Bankruptcy Act do not permit general creditors through post-bankruptcy assignments to secure and perfect their claims under the umbrella of a secured party's omnibus agreement.

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49. According to TEX. BUS. & COM. CODE ANN. tit. 1, § 9.105(a)(9)(Vernon 1968) (corresponding to U.C.C. § 9-105), a secured party is "a lender, seller or other person *in whose favor* there is a security interest. . . ." (Emphasis added.) The court found the security agreement created a security interest in Revlon only, and therefore the subsidiaries were not secured parties.

50. TEX. BUS. & COM. CODE ANN. tit. 1, § 9.402 (Vernon 1968) (corresponding to U.C.C. § 9-402) provides:

> (a) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral . . . .

The 1974 amendment to § 9.402 eliminated the secured party signature requirement. Taking its place is the requirement that the secured party's name be set forth on the financing statement. TEX. BUS. & COM. CODE ANN. tit. 1, § 9.402 (Vernon Supp. 1978).

51. *See* notes 19, 20, & 50 *supra*.

52. *See* 3A COLLIER, *supra* note 39, at ¶ 64.02(7).

53. 565 F.2d 366, 374 (5th Cir. 1978).

54. *See* notes 39 & 40 *supra* and accompanying text.

IV. COMMENT

The instant court's refusal to sanction floating secured parties demonstrates the unwillingness of courts to expand permissible floating arrangements beyond those clearly allowed by the Code. This case further illustrates the struggle that courts face when confronted with the competing principles of floating arrangements, the notice requirements of the Code, and the Bankruptcy Act. The most persuasive argument advanced by the instant court in rejecting the use of post-bankruptcy assignments to create senior secured and perfected interests is the enormous potential for collusion and fraud that such assignments would create. If a subsidiary or even a complete stranger could secure and perfect a general claim against a bankrupt by means of a post-bankruptcy assignment, the Bankruptcy Act's purpose to distribute equitably the bankrupt's assets to creditors would be disrupted.[55] By assigning their claims to a senior secured party, general creditors could achieve priority for their claims, thereby exhausting the bankrupt's assets and depriving junior secured parties of their collateral.

The assignment of general claims to a senior secured party closely resembles a preferential transfer of the type section 60 of the Bankruptcy Act is designed to prevent.[56] Unlike section 60 claims with regard to floating collateral and debt that involve primarily a substitution of assets, the transfer accomplished by assignment in this case constitutes a true economic preference.[57] By assigning an unsecured claim to a senior secured creditor, a general creditor could obtain a greater percentage of his debt than other creditors of the same class, a result clearly condemned by section 60.

The instant court correctly noted that Article Nine represents a comprehensive scheme replacing pre-Code law. By requiring strict compliance with the perfection requirements of Article Nine, the court shows a proper reluctance to expand the Code to cover floating arrangements not contemplated by its drafters. Although Article

55. The Bankruptcy Act deems certain transactions occurring prior to bankruptcy invalid in order to avoid exhaustion of the bankrupt's assets. *See* notes 39 & 40 *supra* and accompanying text. The purpose of section 60 also is contradicted by permitting post-bankruptcy transactions, whereby general creditors can improve their positions by assigning claims to a senior secured party. Such assignments would allow these general creditors to obtain a greater percentage of their claims than other general creditors and junior secured parties.

56. *See* notes 38-40 *supra* and accompanying text.

57. *See* note 48 *supra*. Post-bankruptcy assignments that allow general creditors to obtain priority for their claims involve the secret lien and race-among-creditors notion that section 60 is designed to prevent.

Nine expressly provides for floating collateral and debt, no Code provision permits securing and perfecting a general claim by assignment. If a general creditor can obtain secured and perfected status by assignment under an omnibus security agreement, such an arrangement first should be explicitly sanctioned by the Code and the legislature, not by a court.

Although the instant court arrives at the correct conclusion, its analysis of the notice function of Article Nine[58] is suspect. The court places strong emphasis on the argument that an intervening creditor should not have to suffer the increased burden of uncertainty that floating secured parties impose in addition to the uncertainty provided by floating collateral and debt.[59] The instant court was troubled by the "unrelatedness" of the assignments to the normal lending and borrowing transactions covered by security agreements.[60] The court apparently reasoned that an assignment, unlike a later advance, was so unrelated to the ordinary course of borrowing and lending transactions that the intervening creditor has less reason to be suspicious. In practice, however, an intervening creditor's ignorance of the possibility of a future assignment is hardly distinguishable from the possibility that a future advance will be made. In either case, the Code's minimal notice requirements apparently are satisfied because intervening creditors are on notice of the prior transaction. In either case, the intervening creditor's secured interest may be threatened in the future by the increased interest of a senior lienor.

By rejecting the use of floating secured parties, the court has appropriately considered the collusive and inequitable results that such a scheme might entail. Because omnibus arrangements containing assignments similar to those in the instant case probably are common business practice, the draftsmen of the Code should explicitly comment on the use of such provisions. Should the draftsmen of the Code decide to sanction floating secured parties, conflicts with Bankruptcy Act principles should be considered. Perhaps the collusive and fraudulent possibilities of permitting such assignments could be prevented by stipulating a time limit prior to bankruptcy before which such assignments must be made. Furthermore,

58. *See* notes 19 & 20 *supra* and accompanying text.

59. The instant court's concern for the predicament of the intervening creditor is similar to the discomfort that the *Coin-O-Matic* court had with the notice aspects of floating liens. In *Coin-O-Matic*, the court reflected a concern for the intervening creditor who is unable to discern the nature of the debtor's prior obligations because of the Code's minimal requirements for notice. *See* note 28 *supra* and accompanying text.

60. *See* notes 31 & 35 *supra* and accompanying text.

requiring the secured party to provide notice of such an arrangement in the financing statement would alleviate the potentially harsh effects such assignments might have on intervening creditors.[61]

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61. *See* note 59 *supra*.