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Criminal Law—Confessions—Government Can Satisfy Its Burden of Proving Waiver of *Miranda* Rights By Showing Warnings Given, Signed Waiver, and Proof of Defendant's Capacity to Understand the Warnings

Appellant, convicted of armed robbery in federal district court, sought post-conviction relief on the ground that the trial judge erred in admitting into evidence an oral confession obtained during a police interrogation that allegedly contravened procedures set forth by the Supreme Court in *Miranda v. Arizona*.[1] Appellant specifically alleged that he had not effectively waived his fifth amendment privilege against self-incrimination. The United States Court of Appeals for the District of Columbia[2] found that the evidence raised some doubts as to appellant's understanding of the warnings and waiver dictated by the *Miranda* decision. The evidence showed that appellant would neither allow the interrogator to transcribe his statement nor agree to sign any statement prepared by the police despite having signed a police waiver form after receiving several express warnings.[3] The court of appeals remanded the case to the district court for further evidentiary findings. At the remand hearing, the prosecution produced expert testimony that appellant had the ability to comprehend the *Miranda* warnings as given in this instance,[4] but appellant contended that, without more, the government had failed to carry its heavy burden of proving waiver.[5] The court, in the absence of any direct rebuttal evidence by appellant,

1. 384 U.S. 436 (1966). Appellant also contended that his confession was inadmissible under Mallory v. United States, 354 U.S. 449 (1957), because it was obtained during a period of unnecessary delay prior to his presentment before a judicial officer.

2. Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969).

3. The relevant parts of the trial record can be found in United States v. Frazier, 476 F.2d 891, 894 n.4 (D.C. Cir.) (en banc).

4. Dr. Stammeyer, a clinical psychologist on the staff of St. Elizabeths Hospital, testified that appellant's native abilities were at least low average or possibly even higher. He further stated that in his opinion appellant unquestionably "could understand and appreciate and comprehend" the meaning of the warnings. Slip opinion at 9.

5. In *Miranda* the Court stated that if an interrogation continues without the presence of an attorney and a statement is taken, the government has a heavy burden of demonstrating that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to have counsel present. 384 U.S. at 475.

held that appellant had made a valid waiver of his rights. On appeal, the United States Court of Appeals for the District of Columbia[6] reversed, finding that the government had not satisfied its burden of proving a voluntary, knowing, and intelligent waiver. On rehearing en banc of the United States Court of Appeals for the District of Columbia, *held*, conviction affirmed. The government satisfies its burden of showing a voluntary, knowing, and intelligent waiver of the suspect's rights when it offers proof that the requisite *Miranda* warnings have been given and the purported waiver obtained and shows that the suspect is capable of understanding the warnings. *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (en banc).

Prior to the 1966 landmark decision of *Miranda v. Arizona*,[7] a multitude of exclusionary rules governed the admissibility in court of statements made during an in-custody interrogation of a suspect. The fundamental standard for judging admissibility was "voluntariness," which was determined by examining the "totality of the circumstances" surrounding each confession.[8] In a series of cases beginning with the 1936 decision in *Brown v. Mississippi*,[9] the Supreme Court held that the fourteenth amendment due process "totality of circumstances" test barred confessions obtained by physical coercion,[10] threats,[11] trickery,[12] unduly prolonged interrogation,[13] and denial of the right to consult counsel.[14] Furthermore, confessions were barred if the defendant possessed certain personal characteristics such as feeblemindedness[15] or was insane.[16] This case-by-case determination of voluntariness forced the courts to make highly subjective judgments on the basis of uncertain and disputed facts. Supplementary exclusionary rules set forth in *Massiah v. United*

6. The opinion of Court of Appeals for the District of Columbia reversing the district court is unreported; it appears in the Appendix of the instant decision. 476 F.2d at 902.

7. 384 U.S. 436 (1966).

8. Haynes v. Washington, 373 U.S. 503, 513-15 (1963).

9. 297 U.S. 278 (1936).

10. *Id.* (accused beaten with a leather strap).

11. Lynumn v. Illinois, 372 U.S. 528 (1963) (threatened loss of state financial aid for dependent children); Payne v. Arkansas, 356 U.S. 560 (1958) (threats of mob violence).

12. Massiah v. United States, 377 U.S. 201 (1964) (radio transmitter placed in car).

13. Haynes v. Washington, 373 U.S. 503 (1963) (16 hours); Watts v. Indiana, 338 U.S. 49 (1949) (beld in solitary for 6 days); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (36 hours).

14. Fay v. Noia, 372 U.S. 391 (1963).

15. Fikes v. Alabama, 352 U.S. 191 (1957).

16. Blackburn v. Alabama, 361 U.S. 199 (1960). *See also* Townsend v. Sain, 372 U.S. 293 (1963) (confession made while under the infiuence of a "truth serum").

States[17] and *Escobedo v. Illinois*[18] and the *McNabb-Mallory*[19] rule against unnecessary delay prior to arraignment proved insufficient to clarify the voluntariness standard. The controversy in this area seemingly culminated in 1966 with the *Miranda* decision when the Court attempted to create additional protections for the accused by requiring an absolute procedural prerequisite for the admission of statements obtained in a custodial interrogation. Moreover, for the first time the Court firmly established that the fifth amendment privilege against compulsory self-incrimination[20] and not the fourteenth amendment due process clause was the basis for judging the admissibility of these statements.[21] The procedural prerequisite—a four-fold warning—required by *Miranda*[22] was designed to assure that the individual's right to remain silent continued unfettered throughout the interrogation process.[23] The objective of *Miranda*, however, was not to preclude the admissibility of all confessions[24] since the Court made it clear that the defendant could, after the proper warnings, waive his rights and proceed to make a statement[25]

17. 377 U.S. 201 (1964) (incriminating statements taken by federal officers from indicted person in the absence of previously retained counsel were inadmissible as being violative of the sixth amendment right to counsel).

18. 378 U.S. 478 (1964) (accused's right to counsel attached at the interrogation stage and was not limited to the trial, preliminary hearing, or arraignment).

19. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957). This rule can also be found in the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 5(a).

20. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This part of the fifth amendment was first applied to the states in Malloy v. Hogan, 378 U.S. 1 (1964). "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . ." *Id.* at 8.

21. 384 U.S. at 460-61. Until *Miranda*, the courts had been in confusion regarding the proper constitutional basis for review of allegedly coerced confessions. Although the Supreme Court in the 1897 decision of Bram v. United States, 168 U.S. 532 (1897), had stated in dictum that the admissibility of confessions was to be tested against the fifth amendment, this interpretation was not followed due to historic barriers. The rule granting a privilege against testimonial self-incrimination had a history, scope, and development separate from the rule excluding coerced confessions and at common law did not apply to police interrogations. *See* 8 J. WIGMORE, EVIDENCE §§ 2252, 2266 (McNaughton rev. ed. 1961).

22. A suspect must be warned in "clear and unequivocal terms" that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 467-68.

23. *Id.* at 444.

24. The Court declared that any statement given freely and voluntarily without any compelling influences is admissible in evidence. *Id.* at 478.

25. *Id.* at 444. Waiver has been defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

if the waiver is made "voluntarily, knowingly and intelligently."[26] The government bears the heavy burden of proving such a waiver if the suspect has no attorney present during the interrogation in which a statement is taken.[27] The Court also indicated that its requirement of a voluntary, knowing, and intelligent waiver imposed a more rigorous standard for admissibility than the former due process voluntariness test.[28] Despite *Miranda's* attempted clarification, lower court standards for a *Miranda* waiver often appear to be indistinguishable from the previous inconsistent and confusing standard once it has been shown that the required warnings have been given.[29] *Miranda*'s application is further clouded by the Seventh Circuit's decision in *United States v. Nielsen*.[30] In *Nielsen*, the defendant, after being warned of his right to remain silent and to have an attorney present at the questioning, said he would not sign anything, including a waiver of rights form, until he talked to his attorney. He then stated, however, that he would wait until later to call the attorney and that questioning could continue. The court held his responses to later questions inadmissible, concluding that defendant's actions necessarily should have alerted the interrogator that he was assuming seemingly contradictory positions and had not exercised a valid waiver. Thus, instead of accepting defendant's invitation to continue the questioning, the police should have inquired further to determine whether his apparent change of position was the product of intelligence and understanding or of ignorance

26. 384 U.S. at 444.

27. *Id.* at 475.

28. The Court stated that in these cases it might not find the defendant's statements to have been involuntary in traditional terms. *Id.* at 457.

29. In United States v. McNeil, 433 F.2d 1109 (D.C. Cir. 1969), the court found defendant had voluntarily and knowingly waived his rights despite the fact that he had refused to sign a form acknowledging that he understood the warning. *See also* United States v. Devall, 462 F.2d 137 (5th Cir. 1972). Other courts, however, have considered such a refusal as a circumstance indicating that a purported oral waiver was not validly obtained. People v. Thiel, 26 App. Div. 2d 897, 274 N.Y.S.2d 417 (1966). The lower courts likewise are divided as to whether an affirmative statement of waiver is an absolute prerequisite to admissibility. *See, e.g.*, Sullins v. United States, 389 F.2d 985 (10th Cir. 1968) (affirmative statement necessary); United States v. Haynes, 385 F.2d 375 (4th Cir. 1967), *cert. denied*, 390 U.S. 1006 (1968) (affirmative statement is not an essential link). The *Miranda* Court indicated that it sought to avoid the case-by-case examination that was characteristic of the due process voluntariness hearings, but the ad hoc approach still enjoys continued vitality under the *Miranda* waiver rules. *See, e.g.*, Narro v. United States, 370 F.2d 329 (5th Cir. 1966), *cert. denied*, 387 U.S. 946 (1967). "[T]he cases in which it is clear that the warnings have been given must be considered on their own facts in order to determine the question of waiver. The courts must do this on an ad hoc basis, since no per se rule has thus far been adopted dealing with this problem." *Id.* at 329-30.

30. 392 F.2d 849 (7th Cir. 1968).

and confusion. In the absence of such inquiry, the court concluded it could not find that the statements were made after a knowing and intelligent waiver.[31] In *United States v. Springer*[32] the same court limited *Nielsen* by rejecting defendant's argument that the interrogator's failure to conduct a "real inquiry" into the waiver precluded the government from satisfying its heavy burden.[33] The court refused to extend the further inquiry required by *Nielsen* to any "non-self-explanatory waiver" and restricted it to situations in which the defendant's words or actions indicate misunderstanding.[34] Thus, at least in the Seventh Circuit, the government appears to have the burden of inquiring into the defendant's understanding of the warnings and waiver only if sufficient confusion on defendant's part is manifested to the interrogator. It is clear that *Miranda* has not solved all the problems in the area of the admissibility of confessions. While it is relatively easy to determine whether the requisite warnings have been given, the requirement that a waiver be voluntary, knowing, and intelligent has caused substantial conflict and confusion in the lower courts.

After initially determining that appellant's confession had occurred after his instruction to the interrogator not to transcribe his statements,[35] the court examined the transcripts from the previous hearings in this case to help establish what was needed for the government to satisfy its burden of proving waiver. The court acknowledged a prior D.C. Circuit panel's reasoning that appellant's ban on note taking was evidence against intelligent waiver, but that such an inference could be overcome by additional evidence of an understanding waiver. In the absence of such evidence, however, the panel had stated that the confession could not stand.[36] The instant

31. *Id.* at 853.

32. 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972).

33. The court concluded that the proof of the giving of the warning, the showing of a signed waiver, and the showing of defendant's stated understanding of the warning combined to raise a presumption of validity and to shift the burden of going forward with the evidence to the accused. Defendant Springer failed to produce evidence that tended to show the waiver was not voluntary or knowledgeable. *Id.* at 1349. Presumably, the burden placed on the defendant could he satisfied by showing evidence that he misunderstood his rights and that this should have been apparent to the interrogator.

34. *Id.*

35. 476 F.2d at 894.

36. 476 F.2d at 896. The panel indicated that the inference created by appellant's ban on note-taking might be overcome, for example, if Sergeant Keahon admonished him that even an oral confession would be used against him and appellant replied that he knew that but still did not want anything written down. The panel asserted, however, that additional evidence comparable in quality had not been produced. 419 F.2d at 1169.

court found that appellant had refused to testify at the remand hearing and had offered no direct evidence in explanation of his request that his statement not be written down. The court then examined the testimony of the government's expert witness that in his opinion appellant unquestionably "could understand and appreciate and comprehend" the meaning of the warnings.[37] The court characterized the expert testimony as a "highly significant and obviously relevant" piece of additional evidence—the type required by the circuit court in the decision ordering remand.[38] Because appellant had the capacity to comprehend the warnings, signified his understanding of them, expressed a desire to speak without an attorney present, and confessed to several serious crimes[39] before objecting to the note-taking by the police officer, the court concluded[40] that the government had indeed satisfied its heavy burden of proving appellant's waiver.[41]

The instant case's interpretation of *Miranda*[42] and its implicit rejection of *Nielsen*[43] call into question *Miranda*'s effectiveness in advancing the Supreme Court's apparent intent to create a more stringent standard for the admissibility of confessions through the establishment of standardized post-arrest procedures. *Miranda* required a knowing waiver, and certainly a minimum requirement for such a waiver would seem to be an awareness on the part of the suspect that his oral statements are as admissible in court as his written ones. The evidence in the instant case, however, raises an inference that appellant thought that oral statements were inadmissible. It is possible of course that there might have been explanations for appellant's ban on note-taking other than misunder-

37. 476 F.2d at 897.

38. 476 F.2d at 898.

39. In addition to several other robberies, he had already confessed to the armed robbery of a store in which he had shot an employee.

40. 476 F.2d at 899.

41. In his dissenting opinion, Judge Bazelon noted that the problem posed by this case would not arise if the *Miranda* warnings were so clear that anyone with minimal intelligence could understand them. He cited surveys, however, to the effect that many, if not most, defendants do not fully comprehend the meaning of the warnings and the effect of waiver. 476 F.2d at 900 n.3. *See* note 48 *infra*. In light of this evidence, he concluded that in the usual case a written waiver obtained without coercion after a full and accurate warning to a suspect of his rights is sufficient to meet the government's burden regardless of a defendant's claim of misunderstanding, but when the suspect says or does something sufficient to put a reasonable man on notice as to a possible misunderstanding, the interrogation must stop until the matter is clarified or all later statements will be inadmissible.

42. *See* notes 28 & 29 *supra* and accompanying text.

43. *See* note 30 *supra*. The Seventh Circuit position is also endorsed by Judge Bazelon in his dissent to the instant case. *See* note 41 *supra*.

standing of the warnings given to him. Merely pointing to another possible explanation for appellant's action,[44] however, should not satisfy the heavy burden placed by *Miranda* on the government to prove a knowing waiver of the right to remain silent. Here the government does not rely on other possible explanations but instead contends its burden has been satisfied by the introduction of expert testimony that appellant unquestionably "could understand and appreciate and comprehend" the meaning of the warning read to him.[45] Mere capacity to understand,[46] however, does not seem sufficient to show that a waiver was knowing and intelligent.[47] Furthermore, capacity to understand does not preclude a misunderstanding. A recent study[48] illustrates that a significant number of even highly intelligent suspects have failed to comprehend fully the *Miranda* warnings and indicates that perhaps something more than a mere recital of the court's warnings may be necessary to ensure the suspect's capability to make an informed choice to speak or remain silent. Because of the possibility that a recitation of the warning may be an inadequate basis upon which to make this choice, several cases have examined additional requirements for the interrogation procedure. In *Nielsen*,[49] for example, the Seventh Cir-

44. 476 F.2d at 894.

45. 476 F.2d at 895.

46. Despite the *Miranda* Court's desire to avoid an ad hoc approach to waiver cases, the lower courts have continued to weigh the particular intelligence, education, age, and experience of the accused. The *Miranda* waiver rules, however, provide little guidance for determining the emphasis tbat now should be given to these variables.

47. The requirement that a waiver be intelligent appears to he a paradox. Since it is the unanimous opinion of criminal lawyers that a client should not waive any of his rights before having an opportunity to evaluate dispassionately the entire situation, it follows that anyone who does waive such rights is acting unintelligently. People v. Lux, 46 Misc. 2d 561, 563, 289 N.Y.S.2d 66, 69 (Suffolk County Ct. 1967), *rev'd*, 34 App. Div. 2d 662, 310 N.Y.S.2d 416 (1970), *aff'd*, 29 N.Y.2d 848, 277 N.E.2d 923, 328 N.Y.S.2d 2 (1971). The New York court, however, focused its attention on the individual waiving the right, not on the waiver itself, and concluded that the intelligence that is required is that exercised by a reasonable man. *Id.* at 564, 289 N.Y.S.2d at 70. *See also* Note, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. CHI. L. REV. 413, 433-34 (1969).

48. Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967). "Even though the suspects understood that they could refuse to answer whenever they chose, they had only the vaguest intuition about how to decide whether to answer a given question. Their decision whether to waive their right to remain silent was made on hunch alone, without any of the knowledge or understanding required to make it 'knowing and intelligent.'" *Id.* at 311. In another survey, the results showed that 15% of the suspects failed to understand the right to remain silent; 18% failed to understand the right to presence of counsel; and 24% failed to understand about appointed counsel. Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1374 (1968).

49. 392 F.2d 849 (7th Cir. 1968). *See* note 30 *supra* and accompanying text.

cuit required the interrogator to make further inquiries of the suspect when the suspect assumed seemingly contradictory positions as to his desire to give a statement. In *Springer*,[50] the same court found that if sufficient evidence of confusion or misunderstanding is not made apparent to the interrogator, he is not required to go beyond the four-fold *Miranda* warnings.[51] Although this procedure would not protect every suspect who failed to comprehend the warnings,[52] it is submitted that it is all that could reasonably be required of the police department. The interrogator should not be put into the position of having to read the suspect's mind, but if the suspect's words or acts indicate a lack of understanding, then it should not tax the interrogator to halt the interrogation until the confusion is cleared up. Nonetheless, the instant court implicitly rejects the *Nielsen-Springer* rationale[53] since appellant's action arguably should have put the interrogator on notice as to some misunderstanding. Rejection of the *Nielsen-Springer* rationale clearly conflicts with *Miranda*'s policy of trying to place the accused on a more equal footing with the police at the interrogation stage and gives the accused minimal protection against a misunderstanding of the warnings. While requiring further inquiries into the suspect's comprehension of the warning is not the only possible way to create a greater assurance that a waiver is given voluntarily, knowingly, and intelligently, it is perhaps the most workable solution that has been

50. 460 F.2d 1344 (7th Cir. 1972). *See* note 32 *supra* and accompanying text.

51. "While the *Miranda*-dictated forms may be so mechanistically or slightingly used as to destroy their efficacy for their intended purpose, we are not of the opinion that a law enforcement agent has to engage in a violent argument with an in-custody subject to a point beyond that reasonably necessary to assure effective communication." 460 F.2d at 1348.

52. If a suspect did not manifest outward sigus of confusion or misunderstanding, this procedure would be of no benefit to him. Moreover, all statements taken before the manifestation of such confusion likewise would be admissible against the suspect. This also would mean an ad hoc approach and require litigating virtually every dispute, but this would not be any different than the situation as it now stands.

53. Another case that apparently rejects the *Nielsen-Springer* rationale is State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968). In that case the New Jersey Supreme Court stated that when the *Miranda* warnings are given, a waiver is made no less knowing and intelligent because a suspect thought that what he said could not be used against him in court since it was only oral. 52 N.J. at 55, 243 A.2d at 251. The court further expressed that the state should take advantage of a suspect's ignorance and misunderstanding at every opportunity in the detection process. 52 N.J. at 53, 243 A.2d at 250-51. In addition to confiicting with the policy of *Miranda*, the language also goes far beyond what was required to decide the factual situation involved. It is submitted that the same result—admission of the confession—most likely would have been reached by a court that followed the *Nielsen-Springer* rationale since the defendant in *McKnight* did not show sufficient indications of misunderstanding to the interrogator to require a halt to the interrogation and further explanations.

advanced. Some commentators[54] have suggested that the arresting or interrogating officer explain both the warnings and the nature and meaning of waiver in his own words instead of merely reciting the warnings in the language of *Miranda*. This would defeat, however, one of the primary purposes of *Miranda*—to introduce more standardized procedures into the post-arrest period and to eliminate the high degree of informality and variability that characterized pre-*Miranda* arrests and interrogations. Individual legal interpretations of the *Miranda* warnings by each interrogator would necessarily be a return to irregularity. Another possible solution might be to require all extrajudicial confessions or statements to be made in the presence of counsel after the accused has received counsel's advice. This solution is the most effective way to ensure that the suspect knows and fully understands his rights,[55] but the exorbitant cost and the myriad administrative details endemic to a system of stationhouse attorneys should render it impractical and unpopular. Other commentators[56] insist that all extrajudicial statements made by a defendant should be inadmissible regardless of warnings and waivers. The theory behind this sentiment is that an accusatory system is designed to function without the cooperation of the party accused. Moreover, according to this theory, the defendant is always free to plead guilty, a plea likely to have been entered in sober judgment upon counsel's advice with full consideration of its advantages and disadvantages. Our system, however, relies heavily on custodial statements by the accused as the frequency with which the waiver question has arisen since *Miranda* indicates, and it is doubtful that a radical change is likely in the near future. The decision in *Miranda* was prompted in part by conflicting lower court standards that had emerged under the due process rules and under the supplementary exclusionary rules, but ironically the ambiguity and incompleteness of *Miranda* itself has caused an uneven implementation of the Supreme Court's apparent goals. The instant decision, by allowing the government to prove a valid waiver by expert testimony of mere capacity to understand warnings, exhibits the failure of the courts to follow the policy behind *Miranda* when interpreting the waiver standards that *Miranda's* imprecise terminology created. Precise waiver guidelines must be established before the *Miranda*

54. *See* Note, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. CHI. L. REV. 413, 429 (1969).

55. Griffith & Ayres, *supra* note 48, at 318.

56. *See* 20 STAN. L. REV. 1269, 1280 (1968).

approach to the confessions problem can assure more stringent standards for the admissibility of confessions—the apparent intent of the *Miranda* Court.

Criminal Procedure—Grand Jury—Attorney Work Product Consisting of Written Summaries and Personal Recollections of Interviews Is Privileged Against Disclosure at Federal Grand Jury Investigations

Appellant, house counsel for Northern Natural Gas Company, was subpoenaed to appear before a federal grand jury[1] to answer questions about information acquired by him in connection with his investigation of alleged bribery payments made by Northern Natural employees to public officials. The United States Attorney also issued a subpoena duces tecum[2] directing Northern Natural to produce all memoranda, notes, or records compiled by appellant during his interviews with informants.[3] Appellant, who refused to tender the subpoenaed documents or to divulge any matter communicated to him by the interviewees,[4] contended at a district court hearing to compel disclosure that the work product doctrine precluded reve-

1. The grand jury was convened for investigating purposes rather than for the purpose of determining probable cause for charges previously made. For the distinction between the functions of an indicting grand jury and an investigatory grand jury see Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1, 2 (1972). Although the common law did not clearly authorize the grand jury to initiate an investigation on its own motion, *see* Note, 37 MINN. L. REV. 586, 592 (1953), the majority of state and federal courts sanction the initiation of an investigation even though there is merely a suspicion that a crime has been committed and without any particular suspect in mind. *See* Hale v. Henkel, 201 U.S. 43 (1906); United States v. Cohn, 452 F.2d 881 (2d Cir.), *cert. denied*, 405 U.S. 975 (1971); United States v. Smyth, 104 F. Supp. 283, 294-98 (N.D. Cal. 1952) (grand jurors may initiate an investigation on the basis of rumors, hearsay, reports, and even suspicion).

2. *See* FED. R. CRIM. P. 17(c). A grand jury subpoena duces tecum can be issued against either an individual or a corporate entity before any specific charges have been preferred against them by the Government. *In re* Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y. 1947).

3. The subpoena duces tecum required the production of, *inter alia*, "[m]emoranda reflecting interview with informants, reports, correspondence sent and received, affidavits and statements of informants, other documents prepared and compiled in conneetion with an investigation conducted by Frank Duffy and other personnel of company with respect to payments of money channeled through Rochester, Goodell, Moldovan & Spain Engineers, Inc. in connection with the construction and acquisition of premises and rights of way for the construction of the so-called 'Eight Inch Chicago Pipeline.' " Duffy v. Dier, 465 F.2d 416, 417 (8th Cir. 1972).

4. Appellant also refused to divulge the informants' names. *See* note 8 *infra*.

lation of the information sought. The Government replied that, even if the work product rule were applicable to grand jury investigations,[5] the governmental interest to be served by securing the information in the possession of appellant was sufficient to invoke the "good cause"[6] exception to the rule. Although the district court noted the probable applicability of the work product doctrine to grand jury proceedings,[7] it held that the Government had established an overriding interest in obtaining the information and therefore ordered disclosure.[8] Responding to the court order, appellant agreed to furnish the grand jury the names of all persons contacted by him, but otherwise refused to comply. The district court consequently found appellant guilty of civil contempt.[9] On appeal to the United States Court of Appeals for the Eighth Circuit, *held*, reversed. An attorney's work product, which consists of written summaries and personal recollections of interviews with informants, is protected absolutely from disclosure at federal grand jury investigatory proceedings. *Duffy v. United States*, 473 F.2d 840 (8th Cir. 1973).

The English common-law courts afforded early recognition to a "legal professional privilege" against discovery of communications

5. The Government raised 2 additional arguments against applying the work product doctrine to grand jury investigations: first, it pointed to Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956), which stated by way of dicta that the *Hickman* rule is inapplicable to grand jury investigations. *See* note 27 *infra* and accompanying text. Secondly, it relied upon the omission of the doctrine from those sections in the proposed Federal Rules of Evidence dealing with the privileges available to grand jury witnesses. 41 U.S.L.W. 4021 (Nov. 21, 1972). *See* note 35 *infra*.

6. *See* note 21 *infra* and accompanying text.

7. Duffy v. United States, 473 F.2d 840, 841 n.2 (8th Cir. 1973).

8. Appellant had argued in the alternative that the subpoenaed information was protected hy the attorney-client privilege. Because the availability of that privilege depended upon whether the informants were appellant's clients, the district court ordered appellant to disclose the identity of all informants and all matters not otherwise protected by the asserted privilege. Duffy v. Dier, 465 F.2d 416, 417 (8th Cir. 1972). *See* note 12 *infra* and accompanying text. Appellant thereupon petitioned for a writ of mandamus against the district court judge to vacate his order. In denying the writ the Eighth Circuit held that appellant must comply with the district court's order to disclose the identity of all informants in order to determine finally the issue of the asserted attorney-client privilege. *Id.* at 418 n.2.

9. Appellant was adjudged a "recalcitrant witness" pursuant to 28 U.S.C. § 1826 (1970), which provides in part: "Whenever a witness in any proceeding before . . . any . . . grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court . . . may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. . . ."

between an attorney and his client or third parties.[10] The privilege extended to all documents prepared by or for counsel with a view to litigation.[11] Although American courts uniformly have accepted the notion of privileged communication between a lawyer and his client,[12] they have offered substantially less protection to statements and documents obtained by attorneys from third parties.[13] Following the adoption of the liberal discovery provisions contained in the

10. R. CROSS, EVIDENCE 240-44 (3d ed. 1967); 4 J. MOORE, FEDERAL PRACTICE ¶ 26.63, at 346 (2d ed. 1972) [hereinafter cited as MOORE]. The original justification for the privilege was that an attorney's express or implied pledge of secrecy would be violated if he were required to divulge confidential information given to him by his client. In other words, the courts sought to preserve the "oath and honor" of the attorney. 8 J. WIGMORE, EVIDENCE § 2290, at 543 (J. McNaughton rev. ed. 1961). *See Generally* Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928). English courts later reasoned that the protection afforded the attorney-client communication creates a more confidential atmosphere in which the client will disclose more freely and completely the circumstances of his case that are necessary for the attorney to provide accurate advice. *See* C. MCCORMICK, LAW OF EVIDENCE § 87 (2d ed. 1972); 8 J. WIGMORE, *supra* at § 2290.

11. *See* 4 MOORE, *supra* note 10, ¶ 26.63, at 346 n.2. For a discussion and collection of cases see Gardner, *A Re-evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 297 n.60, 300 (1963).

12. *See* 4 MOORE, *supra* note 10, ¶ 26.60[z], at 229. American courts have denominated the protection given to confidential communications between a lawyer and client in the course of their professional relationship the "attorney-client privilege." Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958); Appeal of Turner, 72 Conn. 305, 44 A. 310 (1899); 8 WIGMORE, *supra* note 10, at § 2290. The privilege generally is regarded as being personal to the client. MCCORMICK, *supra* note 10, at § 92; *see* Magida v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1951); *cf.* Canon 4, ABA CODE OF PROFESSIONAL RESPONSIBILITY. Moreover, the courts are in general agreement that the fact that the client is a corporation does not vitiate the privilege. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd.*, 400 U.S. 348 (1971) (corporate employee's communication to house counsel is privileged); Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa.), *mandate denied sub nom.*, General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). *Contra*, Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill.), *adhered to*, 209 F. Supp. 321 (1962), *rev'd. on other grounds*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963) (noting fact that client is a corporation does not affect the claim of an attorney to his work product privilege). *See generally* Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 368 (1967); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970). *See also* MODEL CODE OF EVIDENCE rule 209(a) (1942); UNIFORM RULE OF EVIDENCE 26(3)(A).

13. Gardner, *supra* note 11, at 300; *see, e.g.*, King v. Ashley, 179 N.Y. 281, 72 N.E. 106 (1904) (information acquired by counsel from persons and sources other than his client is not privileged). *Contra, In re* Aspinwall, 2 F. Cas. 64 (No. 591) (S.D.N.Y. 1874). Some states, however, recognize a broad privilege similar to the English view. *See, e.g.*, Robertson v. Commonwealth, 181 Va. 520, 25 S.E.2d 352 (1943) (statement obtained by employer from employee to be used by employer's attorney in connection with threatened litigation is a privileged communication between the attorney and employer-client); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942) (statement obtained from employee by employer's attorney in anticipation of litigation is a privileged communication between attorney and employer-client).

Federal Rules of Civil Procedure,[14] the district courts articulated differing limitations on the permissible scope of inquiry into materials gathered by an adverse party in anticipation of trial.[15] The Supreme Court resolved much of the uncertainty in the 1947 case of *Hickman v. Taylor*[16] when it established a general rule of nondiscoverability of an attorney's pretrial preparations, or "work product."[17] In *Hickman*, respondent had been retained to represent the owners of a tugboat in litigation that might arise over a fatal accident. Petitioner, administrator of the estate of a deceased crew member, subsequently brought an action against the tugboat owners and sought to discover the contents of all written and oral statements taken by respondent during his interviews with surviving crewmen. The Third Circuit, reversing a district court judgment for petitioner,[18] held that the statements were privileged[19] and therefore not

14. The primary discovery devices provided in the Federal Rules of Civil Procedure are contained in Rule 26 (depositions pending action), Rule 27 (depositions before action), Rule 33 (interrogatories to parties), Rule 34 (discovery and inspection of documents), Rule 35 (physical and mental examination of persons), and Rule 36 (admission of facts and genuineness of documents). Former Rule 26(b) provided in part: "[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

15. *Compare* McCarthy v. Palmer, 29 F. Supp. 585 (E.D.N.Y. 1939) (discovery disallowed because it would penalize the diligent and place a premium on laziness), *with* Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942), *aff'd on other grounds*, 318 U.S. 109 (1943) (need for ascertainment of the facts of the case outweighs potential unfairness to the diligent attorney). The courts have consistently held, however, that the information must have been obtained in anticipation of litigation to qualify for any protection. *See, e.g.*, Arney v. Hormal & Co., 53 F.R.D. 179, 181 (D. Minn. 1971); Rediker v. Warfield, 11 F.R.D. 125 (S.D.N.Y. 1951).

16. 329 U.S. 495 (1947).

17. The *Hickman* case and the implications of work product protection have received extensive commentary. *See, e.g.*, Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269 (1969); Fortenbaugh, *Hickman versus Taylor Revisited*, 13 DEFENSE L.J. 1 (1964); Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958); Note, *Discovery and the Hickman Case: A Decade Later*, 37 N.D.L. REV. 67 (1961); Annot., 35 A.L.R.3d 412 (1971).

18. The district court held that statements of a third party obtained by a lawyer do not come within the attorney-client privilege and are therefore discoverable. 4 F.R.D. 479, 482 (E.D. Pa. 1945).

19. 153 F.2d 212 (3d Cir. 1945). The Third Circuit admitted that the traditional rule of attorney-client privilege as applied in the United States would not encompass the statements. *See* note 12 *supra* and accompanying text. However, it found the statements "privileged" within the meaning of Rule 26 (b). *See* note 14 *supra*. The court reasoned that the word "privileged" as used in the federal rules was not equivalent to an evidentiary privilege. Although the Supreme Court in *Hickman* impliedly found contrary to the Third Circuit on this point, the Court explicitly held later that "privileged" as used in the discovery rules is to be given the same meaning that it has in the law of evidence. United States v. Reynolds, 345 U.S. 1, 6 (1953).

discoverable. The Supreme Court rejected the Third Circuit's privilege analysis, but affirmed on the ground that the discovery rules were not intended to provide unrestricted access to opposing attorneys' files and thought processes.[20] Speaking for a unanimous Court, Mr. Justice Murphy delineated two categories of work product: first, the signed statements and affidavits of witnesses, which are exempt from discovery absent a showing of good cause;[21] and secondly, an attorney's personal recollections, mental impressions, and summarizing notes of statements by witnesses, which are exempt from discovery abent a demonstration of extraordinary circumstances.[22] The *Hickman* rule, as well as subsequent case law clarifications,[23] were incorporated into Rule 26(b) (3) and (4) when the Federal Rules of Civil Procedure were amended in 1970. Notwithstanding its genesis in federal civil procedure, the work product doctrine has been utilized by a number of state courts to support a denial of discovery in criminal cases.[24] Moreover, work product pro-

20. Proponents of work product protection argue that the rule (1) prevents a lazy attorney from profiting by his opponent's diligence, (2) encourages the development of facts and legal tactics without fear of discovery by the adverse party, (3) encourages lawyers to reduce their preparations to writing, (4) precludes the possibility of counsel having to testify as to prior inconsistent statements of a witness, and (5) preserves counsel as an effective advocate and officer of the court. *See* F. JAMES, CIVIL PROCEDURE § 6.9, at 205-07 (1965); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1028-29 (1961).

21. As examples of what might constitute a sufficient showing of "good cause," the Court mentioned the unavailability of the witness making the statements, the admissibility in evidence of the information sought, and the utility of the statements for purposes of impeachment or corroboration. 329 U.S. at 511. A substantial number of post-*Hickman* cases dealing with the issue of "good cause" often reached conflicting results. For a summary of these decisions see 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 652.4 (C. Wright rev. ed. 1961). In the 1970 amendments to the Federal Rules of Civil Procedure, the "good cause" requirement was inserted into Rule 26(b) (3) & (4). Discovery of work product is allowed "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." A "good cause" showing is made unnecessary, however, for statements previously made by the discovering party concerning the action. FED. R. CIV. P. 26(b) (3). It is also unnecessary for facts known or opinions held by an expert specially employed by an adverse party for purposes of testimony at trial. FED. R. CIV. P. 26(b) (4) (A).

22. Referring to the oral statements of witnesses, the Court said: "[w]e do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production." 329 U.S. at 512.

23. *See* 4 MOORE, *supra* note 10, ¶ 26.63[10], at 410.

24. *See, e.g.*, People v. Boehm, 270 Cal. App. 2d 13, 75 Cal. Rptr. 590 (1969) (notes made by prosecutor from interview with witness constitute prosecutor's work product and are not discoverable); Colebrook v. State, 205 So. 2d 675 (Fla. App. 1968), *vacated and remanded on other grounds sub nom.* Jones v. Florida, 394 U.S. 720 (1969) (statements of rape victim were work product of prosecution and not discoverable after victim's testimony on direct examination); Rose v. State, 427 S.W.2d 609 (Tex. Crim. App. 1968) (unsigned narrative

tection has been extended to both the prosecutor and defendant in federal criminal litigation by virtue of Rule 16 of the Federal Rules of Criminal Procedure.[25] Prior to 1973, only two federal courts had addressed the question of the availability of work product protection

account of theft is work product of prosecution). *But see* State *ex rel.* Polley v. Superior Court, 81 Ariz. 127, 302 P.2d 263 (1956) (stenographic transcript taken from defendant in murder case is not prosecution's work product). At early common law, in both England and the United States, discovery was unavailable in criminal cases. *Compare* Rex v. Holland, 100 Eng. Rep. 1248, 1249 (K.B. 1792) (discovery would tend to "subvert the whole system of criminal law"), *with* People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927). *See generally* Norton, *Discovery in the Criminal Process,* 61 J. CRIM. L.C. & P.S. 11, 11-13 (1970). Although many states still adhere to the common-law doctrine of nondiscoverability in criminal cases, a growing number of jurisdictions have adopted procedural rules that specifically provide for discovery. *See* Note, *"Work Product" in Criminal Discovery,* 1966 WASH. U.L.Q. 321, 326-34. For a discussion of the competing considerations involved in allowing discovery in criminal proceedings see Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U.L.Q. 279, and Flannery, *The Prosecutor's Case Against Liberal Discovery,* 33 F.R.D. 74 (1963).

25. Rule 16, similar to Rule 26 of the Federal Rules of Civil Procedure, defines the general scope of discovery in criminal cases and embodies work product limitations on discoverability. An order of discovery in favor of the defendant is within the trial judge's discretion and may be conditioned upon an allowance of discovery by the prosecution. The prosecution, however, may not discover or inspect "reports, memoranda, or other internal defense documents made by the defendant, or his attorney or agents in connection with the investigation or defense of the case, or of statements made by the defendant . . . or defense witnesses, or by prospective . . . defense witnesses, to the defendant, his agent or attorneys." FED. R. CRIM. P. 16(c). Subsection (b) precludes "discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500." FED. R. CRIM. P. 16(b). Unlike the qualified privilege from discovery of work product in civil cases, Rule 16 contains no wording that suggests that the immunity can be defeated upon a showing of "good cause." *See* Rezneck, *The New Federal Rules of Criminal Procedure,* 54 GEO. L. J. 1276, 1280-82 (1966) (argues that the creation of such an extensive work product exemption for the Government was not only unwise, but unnecessary in view of the protection afforded by the doctrine of governmental privilege). The American Bar Association, however, has proposed that only prosecutorial work product be immunized from discovery and only to the extent that it contains the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff. AMERICAN BAR ASS'N STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.6 (Approved Draft 1970). *See also Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts,* 48 F.R.D. 553, 587 (1970). Proposed Rule 16 would enlarge the scope of discoverable items, make prosecutorial discovery independent of discovery by the defendant, and reduce the extent of work product protection for both parties. For a criticism of Proposed Rule 16 see Note, *Prosecutorial Discovery Under Proposed Rule 16,* 85 HARV. L. REV. 994 (1972).

The Jencks Act, 18 U.S.C. § 3500 (1970), which is incorporated by reference into FED. R. CRIM. P. 16(b), provides that the Government in a criminal proceeding need not produce the "statement" of a witness until he has testified on direct examination, at which time production of relevant statements is required. The word "statement" is defined in subsection (e) of the Act to include: "(1) a written statement made by said witness and signed or

in the context of grand jury proceedings.[26] In the first of these cases, *Schwimmer v. United States*,[27] the Eighth Circuit summarily dismissed appellant's work product claim by stating simply that the *Hickman* rule is relevant solely to discovery in civil litigation. In a later federal district court decision, *In re Terkeltoub*,[28] it was held, however, that an attorney may assert the *Hickman* rule to protect his work product from disclosure. In that case, a defense lawyer was summoned before an investigating grand jury to respond to allegations that he and his client had attempted to induce a third party to testify favorably in the client's pending perjury trial. The attorney refused to answer the grand jury's questions primarily on the ground that to do so would constitute a violation of his client's fifth amendment due process rights and sixth amendment right to effective assistance of counsel. The district court passed over the constitutional issues raised by the attorney and relied upon *Hickman* as authority for denying the Government's request for compulsory disclosure.[29]

The instant court initially observed that the subpoenaed material consisted solely of appellant's personal recollections and summarizing notes made in connection with his preparation for anticipated litigation. Concluding therefore that the information sought constituted appellant's work product,[30] the court addressed itself to

otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness . . . or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury." 18 U.S.C. § 3500(e). For a comparison of the work product doctrine and the Jencks Act see Cleary, *Hickman v. Jencks: Jurisprudence of the Adversary System,* 14 VAND. L. REV. 865 (1961). Several states have similar statutory or procedural rules that require the prosecutor to disclose the identity of witnesses who have testified before grand juries. *See, e.g.,* CAL. PENAL CODE § 995a (West 1970); IOWA CODE ANN. § 772.3 (1950); KY. R. CRIM. P. 6.08; ORE. REV. STAT. § 132.580 (1971).

26. Courts traditionally have recognized certain common-law privileges against compulsory disclosure at grand jury proceedings. *See, e.g.,* Blau v. United States, 340 U.S. 332 (1951) (husband-wife privilege); United States v. Judson, 322 F.2d 460 (9th Cir. 1963) (privilege against self-incrimination); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956) (attorney-client privilege). *See also In re* Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970); Comment, *The Rights of a Witness Before a Grand Jury,* 1967 DUKE L.J. 97, 121; Comment, *The Grand Jury Witness' Privilege Against Self-Incrimination,* 62 NW. U.L. REV. 207 (1967). For a discussion of the statutory immunities available to a witness see Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L.J. 1568 (1963).

27. 232 F.2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956).

28. 256 F. Supp. 683 (S.D.N.Y. 1966).

29. Citing *Hickman,* the court left open the possibility that "still more rare circumstances could justify a demand of the kind here in question." 256 F. Supp. at 686. *Compare* note 22 *supra.*

30. The court noted that the fact that appellant's client was a corporation in no way affected appellant's claim to work product immunity. *See* note 12 *supra.*

the threshold question whether the work product doctrine is applicable to grand jury proceedings. The court explained that the *Terkeltoub* case was "direct and convincing authority"[31] supporting the application of the doctrine to the instant case and therefore supporting a reversal of the district court's contempt ruling.[32] Although it recognized that language in its earlier decision in *Schwimmer* had rendered doubtful the applicability of the *Hickman* rule to grand jury proceedings, the court reasoned that the summary treatment accorded the issue in *Schwimmer* was evidence that it had not been fully considered. Because of the absence of other direct authority, the instant court attempted to buttress its conclusion by examining several decisions that excused a grand jury witness from testifying on matters protected by a constitutional, statutory, or common-law privilege.[33] Tracing the origin of work product immunity to the legal professional privilege of early English law,[34] the court concluded that the work product rule is an established common-law privilege that, on the authority of the examined cases, may be invoked in a grand jury investigatory proceeding.[35] Moreover, the court reasoned that the policy considerations underlying the work product doctrine in civil litigation[36] are even more forceful in the context of criminal proceedings. The court then turned to the Government's assertion that the good cause exception to the *Hickman* rule justified compelled disclosure of the information in appellant's possession. Adverting to the second category of work product outlined in *Hickman*,[37] the court held that appellant's personal recollections and summarizing notes were absolutely,

31. 473 F.2d at 843.

32. In *Terkeltoub* the grand jury investigation was prompted by allegations of lawyer misconduct. The absence of such allegations in the instant situation was treated by the court as a significant factor in favor of giving appellant work product immunity. 473 F.2d at 843.

33. One case examined by the court was Branzburg v. Hayes, 408 U.S. 665 (1972), *noted in The Supreme Court, 1971 Term*, 86 HARV. L. REV. 137, 137-48 (1972), which held that the first amendment does not afford newsmen a privilege against compulsory disclosure to a grand jury of information gathered from confidential sources. The court's reference to *Branzburg* is puzzling since the Supreme Court's rejection of a newsman's arguably valid constitutional claim would tend to defeat the common-law privilege asserted in the instant case. *See also* Gravel v. United States, 408 U.S. 606 (1972) (the speech or debate clause does not extend immunity to a Senator's aid from testifying before a federal investigating grand jury), *noted in* 26 VAND. L. REV. 327 (1973).

34. *See* note 9 *supra* and accompanying text.

35. The court summarily dismissed the Government's argument that the omission of the work product doctrine from the privileges made applicable to grand jury proceedings by the proposed Federal Rules of Evidence was intended to affect the scope of the doctrine.

36. *See* note 20 *supra*.

37. *See* note 22 *supra* and accompanying text.

rather than conditionally privileged, and therefore concluded that the good cause exception was inapposite. Furthermore, the court noted that, even if appellant's work product were not absolutely privileged, the fact that the persons contacted by appellant were known and accessible to the grand jury tended to vitiate a possible showing of good cause by the Government.[38]

The instant decision marks the first time that an unqualified immunity from discovery of an attorney's work product has been extended to federal grand jury investigations.[39] As originally conceived by the *Hickman* Court, however, the work product rule was intended to restrict the scope of discovery available to opposing counsel after an action had been initiated. Unlike an indicting grand jury, the function of which is to determine the existence of probable cause for an arrest or charges previously made, an investigating grand jury inquires into the possibility that criminal offenses may have occurred.[40] Since a grand jury investigation precedes the return of an indictment and docketing of the case for trial, the discovery provisions of Rule 16 are inoperative and there is accordingly no discovery attempt to which work product limitations can attach.[41] Although the *Terkeltoub* court utilized the work product rule to uphold an attorney's refusal to answer grand jury questions, that case is distinguishable from the instant controversy on the ground that the attorney in *Terkeltoub* was summoned after his client had been indicted and while he was engaged in preparing for the pending trial. Compulsory disclosure would have permitted the prosecutor to circumvent the work product limitations of the discov-

38. The court further pointed out that if the statements involved in the instant case had been made to the Government, they would not have been discoverable by appellant since they did not fall within any of the categories set forth in subsection (e) of the Jencks Act. *See* note 25 *supra*. The court reasoned that it would be inequitable to require appellant to disclose statements that would not be discoverable by him if they were in the hands of the prosecution.

39. The *Hickman* Court itself avoided establishing a rule that would have the effect achieved by the instant decision of elevating work product protection to the status of a privilege. *See* note 22 *supra* and accompanying text.

40. *See* note 1 *supra*.

41. The instant court's awareness of this argument is evidenced by its apparent attempt to rebut it. The court argued that "[t]he test of whether the work product doctrine applies is not whether litigation has begun but whether documents were prepared or obtained in anticipation of litigation." 473 F.2d at 847. The court, however, confuses two issues: the inclusiveness of the definition of "work product" and the circumstances in which work product protection may be asserted. Although the definition of "work product" comprehends materials acquired at a time when litigation is still a contingency, the assertion of the doctrine is not made until after suit is filed and discovery by an adverse litigant is attempted. *See* Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82, 86 (E.D. Pa. 1969).

ery rules by use of the grand jury subpoena power.[42] Moreover, the *Terkeltoub* holding is weakened by the fact that the attorney himself was under investigation for possible obstruction of justice charges and therefore could have interposed his own fifth amendment objection to disclosure. There are valid policy considerations, however, that make the result in the instant case a desirable one. Perhaps implicit in the court's analysis was an awareness that a grand jury investigation is a de facto discovery device in favor of the prosecutor.[43] The United States Attorney not only is permitted to be present during the grand jury investigation, but often directs the focus of its inquiry.[44] If in addition he were able to compel disclosure of work product, he could acquire information that otherwise would be unobtainable by him through the regular discovery process.[45] A defense attorney faced with the possibility of having to apprise the Government of the results of his research might elect to postpone his investigative efforts until an indictment against his client had been returned. By that time, however, witnesses' memories might have faded and potential sources of information become unavailable.[46] Since a defense attorney has no correlative right to discover

42. Several courts have held that the subpoena power authorized by FED. R. CRIM. P. 17(c) has only the limited function of procuring the production of papers and documents for inspection and use in evidence at trial, and that it is wholly unavailable for use as a pre-trial discovery device. Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951); United States v. Marcello, 423 F.2d 993 (5th Cir.), *cert. denied,* 398 U.S. 959 (1970); United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952) (sets forth a list of requirements for pre-trial inspection under Rule 17(c)). *See generally* 2 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 17:91 (1966).

43. *See* E. WILLIAMS, ONE MAN'S FREEDOM 166 (1962) (characterizes the grand jury as "the most superb engine for discovery ever invented by the mind"). A number of federal courts have dealt with the propriety of using the grand jury subpoena power as an investigating tool of the Government. *See, e.g.,* United States v. Procter & Gamble Co., 356 U.S. 677, 684 (1958); *In re* April 1956 Term Grand Jury, 239 F.2d 263, 272 (7th Cir. 1956); Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); United States v. Pack, 150 F. Supp. 262, 264 (D. Del. 1957); *cf.* United States v. Dardi, 330 F.2d 845, *cert. denied,* 379 U.S. 845, *rehearing denied,* 379 U.S. 986 (1964) (held that it was improper for the Government to use the grand jury for the sole or dominant purpose of preparing an already pending indictment for trial); Application of Myers, 202 F. Supp. 212 (E.D. Pa. 1962) (misuse of administrative subpoena power). *See also* 8 MOORE, *supra* note 9, at ¶ 6.02[1][b]; Boudin, *The Federal Grand Jury,* 61 Geo. L. J. 1 (1972); Rief, *The Grand Jury Witness and Compulsory Testimony Legislation,* 10 AM. CRIM. L. REV. 829, 847-48 (1972). The misuse of grand jury inquisitorial powers by the Government has been criticized especially in investigations of dissident groups. *See* Note, *Federal Grand Jury Investigations of Political Dissidents,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 432 (1972).

44. 1 L. ORFIELD, *supra* note 42, at § 6:74.

45. *See* note 25 *supra.*

46. "By the time [the defendant] is charged and a private investigator retained, the scene has changed, and trails, if there were any, have been obliterated." State v. Tate, 47 N.J. 352, 354, 221 A.2d 12, 14 (1966).

the identity of Government informants[47] nor access to their grand jury tesimony prior to direct examination,[48] he would have to rely to a greater extent upon the discretionary discovery orders of the trial judge to acquire the needed information.[49] In addition to hindering preparations, requiring an attorney not only to identify his client[50] but also to divulge information that might provide a sufficient basis for a subsequent indictment by the grand jury would place him in the anomalous position of being a witness against his own client. Moreover, the knowledge that the attorney-witness has been retained to prepare for possible criminal charges might give rise to an inference of client guilt consciousness that would render the grand jurors less capable of making an objective determination of the occurrence of a criminal violation and the complicity of the client.[51] Thus it is arguable that the client's act of retaining counsel before charges against him have been filed is testimonial in nature and, because retention of counsel might readily be construed by the grand jurors as an admission of guilt, the attorney cannot be compelled to testify without infringing his client's fifth amendment

47. There is a well-established governmental privilege against disclosure of the identity of informants who have given information about supposed crimes to a prosecuting or investigating officer. *See* Scher v. United States, 355 U.S. 251, 254 (1958) (public policy prohibits disclosure of the identity of government informants); Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951) (although government may be required to disclose the contents of communications received from informers, it is not required to disclose the informer's identity). Disclosure of the informant's identity is required, however, when the identity is important to the establishment of a defense. Roviaro v. United States, 353 U.S. 53 (1957); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937).

48. The Jencks Act prohibits discovery of a Government witness's grand jury testimony until after he has testified on direct examination. *See* Dennis v. United States, 384 U.S. 855, 870-71 (1966). For a discussion of the relative pretrial advantages of the prosecution and defense see Everett, *Discovery in Criminal Cases—In Search of a Standard,* 1964 DUKE L.J. 477; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CALIF. L. REV. 56 (1961); Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U.L. REV. 228 (1964).

49. *See* note 25 *supra.*

50. The attorney might argue successfully, however, that because disclosure of the identity of his client would lead ultimately to disclosure of the client's motive for seeking legal advice and because the client's motive is within the purview of communications protected by the attorney-client privilege, *see* 8 WIGMORE, *supra* note 10, § 2313, at 609-10, the client's identity need not be revealed. *See* Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965) (client's identity is within the attorney-client privilege when that identity is the essence of the confidential communication). *See also* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

51. Although the investigating grand jury frequently does not itself indict, but merely presents the results of its investigation to an indicting grand jury, the danger of prejudice would not seem to be decreased significantly. See Note, *Discretionary Power in the Judiciary to Organize a Special Investigating Grand Jury,* 111 U. PA. L. REV. 954, 957 (1963).

privilege against self-incrimination.[52] A final objection to compelled work product disclosure is the danger that the attorney's statements will be used against him unfairly at trial. If the defense lawyer before the grand jury fails to recall the exact statements of his interviewees, or if the interviewees themselves forget on cross-examination what they had related to the interviewing lawyer while their memories were fresh, the prosecutor could use the attorney's grand jury testimony both to impeach the credibility of the witness and to call into question the integrity of the attorney.[53] The foregoing objections to compulsory work product disclosure appear equally persuasive when applied either to an attorney's personal recollections and written summaries of conversations with informants or to the signed statements of those informants in the possession of the attorney. Accordingly, the instant court's implied limitation of its holding to the former category of work product seems unnecessary. The facts encountered in the instant case, however, are not likely to occur frequently. In the typical situation, a lawyer will not have been retained before a grand jury has been convened to investigate his client's conduct. Nevertheless, when the circumstance arises, an unqualified protection of the attorney's work product is justified.

52. The privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial* or communicative nature. . . ." Schmerber v. California, 384 U.S. 757, 761 (1966) (emphasis added). *See* WIGMORE, *supra* note 10, § 2265, at 386. It might be contended that the communication would be from the attorney rather than from the client and that therefore the client would not be compelled to disclose incriminating information. In analogous cases, however, the courts have held that the attorney has standing to assert on behalf of his client the client's privilege against self-incrimination. In United States v. Judson, 322 F.2d 460 (9th Cir. 1963), for example, an attorney representing a taxpayer under investigation by the Internal Revenue Service was held to have standing to suppress a grand jury subpoena duces tecum for cancelled checks and a bank statement given to him by the taxpayer by invoking the taxpayer's privilege against self-incrimination. *Accord,* Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).

53. "Whenever the testimony of the witness would differ from the 'exact' statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's 'inexact' statement could lose nothing by saying, 'Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not. . . .' The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his chief witness, or possibly even his client." Hickman v. Taylor, 329 U.S. 495, 517 (1947) (Jackson, J., concurring).

Public Employees—Freedom of Association—Discharge of Non-policy-making Public Employees on Ground of Political Affiliation Infringes Employees' Freedom of Association

Plaintiffs,[1] former employees of the State of Illinois who were not protected by the state's civil service laws,[2] brought an action for reinstatement and backpay[3] alleging that they had been discharged from public employment for failing to maintain membership in the political party of the newly elected state administration.[4] Plaintiffs contended that defendant, Secretary of State, by conditioning continued employment on political party affiliation, abridged their first amendment freedom of association.[5] Denying that the dismissals were politically motivated,[6] defendant argued that because plaintiffs could claim no constitutional or statutory right to public employment they could be discharged at will.[7] The district court

1. The complaint was filed on behalf of the entire class of union members employed by defendant, as Secretary of State. In remanding the instant case the court left the determination of the appropriate class, if any, to the district court. Affidavits of 94 employees discharged by the Republicans following the election were in the record. According to one report, 4,000 employees were dismissed in the Secretary of State's office when Secretary Lewis was appointed by Governor Ogilvie. *Taking Politics Out of the Paycheck*, BUS. WEEK, May 22, 1971, at 22.

2. The positions held by plaintiffs, which did not bear policy-making responsibilities, included such jobs as building employees, clerical workers, license examiners and the like.

3. Plaintiffs additionally sought to enjoin future dismissals for partisan reasons. Federal jurisdiction was invoked under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970).

4. All plaintiffs were employed in the Secretary of State's office under Democrat Paul Powell. It is not clear whether plaintiffs were registered Democrats or not, but all alleged that their discharges were "politically motivated." Five of the affiants in the case stated that they had been requested to change their affiliations to the Republican Party. There was no allegation that any plaintiffs belonged to a subversive organization.

5. Plaintiffs also alleged that they could not be discharged without first being afforded the procedural due process rights of prompt notice and hearing. The instant court rejected this aspect of plaintiffs' claim by relying on Board of Regents v. Reth, 408 U.S. 564 (1972), to find that a patronage employee does not have a "legitimate claim of entitlement" that would give him "property" interests that are protected by the due process clause of the fourteenth amendment.

6. Defendant alleged that the basis for the discharge was the widespread inefficiency and confusion that he found to exist in the office when he was appointed by Republican Governor Richard Ogilvie. In addition, defendant raised 3 objections to the court's consideration of the merits: patronage dismissals constitute a nonjusticiable political question; the federal courts are without power to impose a civil service code on a state; and the long-standing tradition of patronage dismissals is a matter for legislative, not judicial determination.

7. Defendant raised 3 separate justifications for the dismissals: since each discharged employee was a patronage appointee with knowledge that he would be fired if a new party

granted defendant's motion for summary judgment on the pleadings. On appeal to the United States Court of Appeals for the Seventh Circuit, *held*, reversed and remanded. A state's dismissal of non-policy-making employees who are not protected by state civil service laws on grounds of political affiliation constitutes an infringement of the employee's freedom of association under the first amendment. *Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

The practice of allocating public employment positions on the basis of political patronage[8] has existed on the federal, state, and local levels of government since the inception of the Republic.[9] In order to mitigate the harshness of the spoils system and improve morale and efficiency in the public service, Congress enacted the first civil service statute in 1883.[10] This legislation expressly provided that federal employees could not be dismissed on political party grounds and that all future hirings, firings, and promotions were to be made on a merit basis without regard to political affiliation. Many state and local governments have followed the federal model,[11] and today, for purposes of analyzing various rights, public

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were elected, plaintiffs should be regarded as waiving any right to object to their dismissal; political affiliation may be a relevant and proper qualification for certain positions; and effective administration of departments of government requires public executives to have broad latitude in appointing, replacing, and discharging personnel.

8. The scope of the practice in recent years is indicated by several specific instances of large-scale firings of public employees after an incumbent party loses and a new party takes over. During the early 1960's Pennsylvania Republicans under Governor William Scranton "laid off" some 7,800 Democrats in the Department of Transportation and replaced them with Republicans. In the instant case some 4,000 workers were fired by Secretary of State Lewis in Illinois. The 1970 Pennsylvania election of Democrat Milton Shapp was followed by the dismissal of some 3,500 Republicans in a "highway department reorganization." *Taking Politics Out of the Paycheck*, BUS. WEEK, May 22, 1971, at 22.

9. In 1829 during the administration of President Andrew Jackson, this practice, commonly known as the "spoils system," was championed by the elected representatives who had the spoils (jobs) to distribute and loathed by the "outs" who lost their jobs and their power. Aside from mere partisan criticism, mid-nineteenth century reformers stressed the undue hardships to public employees that resulted from hiring, firing, and promoting based on party affiliation without due consideration to the employees' competence and effectiveness. *See generally* P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 30-59 (1958). As a result, morale in government service was low and job security was nonexistent. *See generally* A. HOOGENBOOM, OUTLAWING THE SPOILS 8 (1961).

10. Civil Service Act, 22 Stat. 403, 404 (Jan. 16, 1883), *as amended* 5 U.S.C. § 7321 (1970), provided "that no person in the public service is for that reason under any obligations to contribute to any political fund, or render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so." *See generally* P. VAN RIPER, *supra* note 9, at 96-112.

11. In 1958, 39 states, all cities of more than 500,000, all but one city between 250,000 and 500,000, most cities between 100,000 and 250,000, and many smaller cities were under civil service laws. H. KAPLAN, THE LAW OF CIVIL SERVICE 22-29 (1958).

employees are divisible into two distinct categories:[12] middle level bureaucrats who are covered by civil service legislation;[13] and lower level, non-policy-making employees who are not protected by statute. Unlike those employees within the purview of civil service legislation, the non-policy-making employees generally have been subject to dismissal on party affiliation grounds.[14] Analogizing non-civil service public employment to private employment,[15] most pre-1952 courts concluded that public employees were not protected constitutionally from arbitrary dismissals in situations in which the government acts in a proprietary role as employer.[16] Before 1952, the due process clause of the fifth and fourteenth amendments constituted a principal avenue of constitutional attack against employee dismissals. Rejecting a due process claim in the case of *Bailey v. Richardson*,[17] the District of Columbia Court of Appeals focused on the question whether there was a right to public employment[18] that

12. *Cf.* 3 E. McQUILLIN, MUNICIPAL CORPORATIONS § 12.27 (3d ed. 1963). A third category—high level policy makers with broad discretionary powers—can be included. This group generally is appointed by the chief elected official—mayor, Governor, or President—at the local, state, or federal level and may be dismissed at will by the appointing official. The unhampered right to dismiss employees at this level is justified by the elected executive's need for loyalty, responsibility, responsiveness, and accountability to carry out his program and policies. *See* Note, *A Constitutional Analysis of the Spoils System—The Judiciary Visits Patronage Place*, 57 IOWA L. REV. 1320, 1321 n.12 (1972).

13. The rights of public employees covered by civil service statutes are largely determined by local, state, or federal legislation. Generally, civil servants cannot be dismissed on grounds of political affiliation. *See, e.g.*, 5 U.S.C. § 7321 (1970).

14. Judge Prettyman stated this view in the case of Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court*, 341 U.S. 918 (1951): "But the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations." 182 F.2d at 59. *See generally* Note, *Constitutional Limitations on Political Discrimination in Public Employment*, 60 HARV. L. REV. 779 (1947).

15. For a critical examination of this analogy see Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A.L. REV. 751, 752-53 (1969).

16. *See* Heim v. McCall, 239 U.S. 175 (1915), *criticized in* Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916); Scopes v. State, 154 Tenn. 105, 112, 289 S.W. 363, 365 (1927) ("In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States."); Note, *Constitutional Limitations on Political Discrimination in Public Employment*, 60 HARV. L. REV. 779, 781 (1947).

17. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court*, 341 U.S. 918 (1951).

18. Perhaps the most famous and often-quoted statement on this issue is by Justice Holmes, speaking for the Massachusetts Supreme Judicial Court in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). He dismissed the petition of a policeman who had been fired for violating a regulation that restricted his political activities. "The petitioner may have a constitutional right to talk politics, but he has no constitutional right

is protected under the "property" or "liberty" clauses of the amendments. The court concluded that because public employment could not be construed to involve a right to property or liberty, due process protections did not encompass public employees;[19] instead, public employment was regarded as a privilege bestowed by the state and subject to recall at the unfettered discretion of the state.[20] Then, in the 1952 case of *Wieman v. Updegraff*,[21] the Supreme Court shifted the focus to first amendment rights of the individual public employees. Departing from the *Bailey* view,[22] the Court declared that constitutional protection does not depend on whether a "right" to public employment exists,[23] and, more importantly, the Court emphasized that constitutional protections do extend to public employees.[24] When *Wieman* was decided, freedom of association was regarded only as an implied first amendment right indispensable to the exercise of the express first amendment rights of speech and assembly.[25] In 1958, the Supreme Court in *NAACP v. Alabama*[26] finally recognized freedom of association as a first amendment right

to be a policeman. . . . There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain as he takes the employment on the terms which are offered him." 155 Mass. at 220, 29 N.E. at 517-18. *See generally* Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 HASTINGS L.J. 129, 164-66 (1969); Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U.L. REV. 287, 316-22 (1968); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

19. "It bas been held repeatedly and consistently that Government employ is not 'property'. . . . We are unable to perceive how it could be held to be 'liberty.' Certainly it is not 'life'. . . . [T]he due process clause does not apply to the holding of a Government office." 182 F.2d at 57.

20. *See id.* at 58.

21. 344 U.S. 183 (1952).

22. The right-privilege distinction espoused in *Bailey* has been rejected by the Supreme Court in a line of opinions dating from 1952. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Wieman v. Updegraff, 344 U.S. 183 (1952). Mr. Justice Blackmun speaking for the Court in 1971 stated unequivocally: "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 364, 374 (1971).

23. "We need not pause to consider whether an abstract right to public employment exists." 344 U.S. at 192.

24. "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.*

25. *See* Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74, 76-84.

26. 357 U.S. 449 (1958).

of independent status. The scope of the protection accorded individuals and groups by this right is unclear.[27] In analyzing the scope of this protection, however, the Court has adopted a balancing of interests test, weighing the individual's interest in freedom of association against the state's interests in restricting its exercise.[28] Moreover, because the individual's right to associate is regarded as a "fundamental"[29] interest, the courts must strictly scrutinize[30] the state's interests in imposing its restrictions.[31] The Supreme Court's application of this balancing process has occurred almost exclusively in cases of dismissals of public employees with alleged Communist associations. These cases have been evaluated in light of the state's legitimate interest in protecting itself from subversion.[32] In 1967, the Supreme Court in *Keyishian v. Board of Regents*[33] enunciated a rationale that had been developing since *Wieman* in 1952: public employees cannot be dismissed on grounds of association with the Communist Party unless there is a demonstration of an employee's "specific intent" to pursue actively the unlawful activities of the organization.[34] The Supreme Court has not yet considered this prin-

27. For a comprehensive discussion of the relationship of the right of association to other first amendment rights see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 563-92 (1970). For a discussion of the scope of the right of freedom of association see Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

28. 357 U.S. at 466.

29. Williams v. Rhodes, 393 U.S. 23 (1968).

30. "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

31. In effect, the states must show that the restriction on an individual's right to associate is necessary to achieve a compelling state interest and that no less burdensome alternative is available. "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

32. Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967) ("There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion.")

33. *Id.*

34. Although the Court ostensibly was balancing interests, its attention seems to have been focused on the relationship between an individual employee, an association, and unlawful activities of the association. These relationships can be categorized depending upon knowledge of unlawful activity: "innocent" association, "knowing" association, and association with "specific intent." If the relationsbip of the individual to the group can be characterized as merely innocent association because the group engages in no unlawful activities or because the individual does not know of any unlawful group activities, then the individual's right to associate is constitutionally protected from governmental interference even if the organization or certain members in fact conduct unlawful activities, and even when weighed against substantial goverumental interests. Wieman v. Updegraff, 344 U.S. 183, 190 (1952) ("[M]embership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes."). If the relationship of the individual to the group

ciple's application to patronage dismissals resulting from an employee's affiliation with a non-Communist political party. In recent decisions, however, the Second Circuit Court of Appeals[35] and the Supreme Court of Pennsylvania[36] did not apply a constitutional analysis to patronage dismissals. Both courts reverted to the pre-1952 *Bailey* approach and held that public employees have no constitutional protections against dismissals.

The instant court initially rejected defendant's claim that plaintiffs had no constitutional right to public employment[37] by finding that plaintiffs were not asserting such a right, but rather were basing their claim solely on the first amendment. Interpreting the first amendment freedom of association to encompass membership in a particular political party as well as affiliation with Communist organizations, the court focused on prior decisions regarding freedom of association. Pursuant to this examination, the court distinguished between those cases in which the state had exacted complete surrender of an employee's first amendment rights as a condition of employment and other cases in which the state merely had

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can be characterized as knowing association on the basis of the individual's knowledge of the group's unlawful activities absent his participation or specific intent to participate, then the individual's right to associate generally is constitutionally protected from governmental interference even in the face of substantial state interest. Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967) ("Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from [public teaching positions]."). Finally, if the relationship of the individual to the group can be characterized as association with specific intent on the basis of the individual's knowledge of the group's unlawful activity and of his participation or specific intent to participate, then the individual's associational rights are not protected from governmental interference because of the overriding state interest in preventing and punishing unlawful conduct. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961). In summary, the *Keyishian* Court seems to have adopted a position that constitutional protection encompasses "innocent" and "knowing" associations, but no constitutional protection is accorded association with "specific intent" to engage in unlawful activities.

35. Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972).

36. American Fed'n of State, County & Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

37. The court rejected the jurisdictional objections raised by defendant. *See* note 6 *supra*. Finding that the issue is not one to be decided by a coequal political branch of government and that judicially manageable standards were available for resolving the dispute, the court decided that patronage dismissals do not present a nonjusticiable political question. The court rejected defendant's assertion that recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State by distinguishing the grant of tenure to an employee from the prohibition of a discharge for a particular impermissible reason. Finally, the court rejected defendant's contention that patronage dismissals were a matter for legislative, not judicial determination. The court's concern was alleged infringement by the State of the first amendment rights of a public employee, and this was an appropriate matter for judicial review.

inhibited the free exercise of these rights by its employees. This distinction produced a finding that, although a total surrender of rights has never been tolerated, curtailment has been permitted on proof of a commanding state interest.[38] Moreover, the court determined that the discharge of non-policy-making employees along party lines tended to stifle the employees' freedom to choose among competing political philosophies—a chilling effect that is impermissible unless the state can meet the heavy burden of proof that a discharge was necessary for the furtherance of a significant state interest. In light of this reasoning and assuming for purposes of the appeal that plaintiffs' dismissals were politically motivated,[39] the court held that defendant's motion for summary judgment was granted improvidently by the district court and therefore remanded the case for trial.[40] In a concurring opinion, Judge Campbell warned against converting the federal courts into "super civil service commissions" for all state and local employees not covered by civil service legislation. Moreover, he expressed doubt as to whether the courts were as well qualified as the legislatures to define what constitutes a "non-policy-making" position. Judge Campbell also questioned the practical effects of the majority decision in view of the probable difficulty the dismissed employee will have in proving that party affiliation was the actual basis for his dismissal.[41]

38. The court seems to derive the distinction between "curtailment" and "surrender" from Pickering v. Board of Educ., 391 U.S. 563 (1968) (dealing with freedom of speech, not association), as construed by the Seventh Circuit in Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972). For the notion of "curtailment" the court relies upon United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), which upheld the Hatch Act's restriction on the political activities of public employees.

To help define the meaning of "surrender," the court offers these examples: "no state interest could justify a requirement that an employee falsely swear allegiance to an offensive religious or political faith, or a requirement that he actively work for, or speak out in favor of, a political cause deemed obnoxious." 473 F.2d at 572.

If the conditions merely involve some "curtailment," the court declared, then the interests of the State must be strong enough to justify the condition.

39. The court based its analysis of the law on two other assumptions: the employees were doing competent jobs, and they did not hold jobs with policy-making responsibilities.

40. In commenting upon the justifications raised by the State that might be subject to further consideration on remand, the court recognized the State's interest in providing its executives with broad discretion in the performance of their managerial functions in order to promote efficient and effective government; but the court suggested that political dismissals, especially on a large scale, hinder efficiency rather than promote it. The court agreed with the State that political affiliation might be a relevant qualification at the public executive level, but suggested that it might not be relevant for non-policy-making employees. To the State's argument that these employees, as beneficiaries of patronage, should be held to have waived their rights of objection for dismissal, the court replied that the courts will indulge every reasonable presumption against waiver of constitutional rights.

41. In a dissenting opinion, Judge Kiley espoused the *Bailey* view that there is no

The instant decision, by extending constitutional freedom of association protections to public employees who have been dismissed on the basis of political party affiliation, marks the first judicial acceptance of a constitutional attack on the spoils system. The court's holding is consistent not only with previous authority recognizing protection of public employees' constitutional rights against unreasonable state infringement,[42] but also with the job security that civil service legislation accords other public employees.[43] In evaluating the court's ruling, the benefits and limitations of the decision must be considered in conjunction with its potential impact on the political process. Although the instant court was correct in its rejection of the right-privilege approach and in its adoption of a more typical first amendment balancing test,[44] the decision is not without its flaws. The court emphasized the distinction between state-induced surrender as opposed to curtailment of the employee's rights as determinative of whether the state's infringement absolutely is prohibited or will be permitted under certain limited conditions, but the court failed to provide any definitive guidelines for making such a distinction. The court did not even explain why it construed patronage dismissals as curtailment rather than surrender. Since a state, by threatening dismissal, may attempt to prohibit an employee from associating with another party for political purposes such as registration, campaigning, and voting, these attempted prohibitions would seem to be at least arguably tantamount to forcing a surrender of rights. A second definitional problem is created by the court's restriction of the decision's scope to non-policy-making employees. Perhaps, as was noted by Judge Campbell, the difficulties inherent in delineating any workable standards for making this characterization of public employees are

constitutional probibition against the dismissal of governmental employees because of their political beliefs, activities, or affiliations. *See* notes 17-20 *supra*. He would have followed the Second Circuit in Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971).

42. *See* notes 21-24 & 33-34 *supra*.

43. *See* notes 10-11 *supra*.

44. Altbougb tbe complaint in the instant case apparently was framed on association grounds only, political party dismissals should be vulnerable to attacks under the equal protection clause as well. *See* Schoen, *Politics, Patronage, and the Constitution*, 3 IND. L.F. 35, 75-82 (1969). The employees could argue that classification on the basis of party affiliation for purposes of determining competency is arbitrarily discriminatory and a denial of the employee's right to equal protection of the laws. Because freedom of association necessarily involves a fundamental right, courts in confronting this issue would apply a strict standard of review and would not utilize a balancing approach. Thus, reliance on the equal protection argument probably would result in greater insurance against erosion of first amendment rights than would reliance on the first amendment itself.

such that they should be resolved legislatively. Furthermore, the strict requirements of proof enunciated in the instant decision may render the federal courts less effective in protecting individual employees than the informal, less costly, and more easily accessible administrative tribunals established under civil service statutes. Although the decision undoubtedly will lessen pressure on public employees to devote time and money to political parties, its potential effect may be obviated appreciably by the difficulty that discharged employees are likely to encounter in proving that party affiliation actually was the reason for their dismissal. Mass firings of members of the losing political party will be precluded by the instant decision, but a state employer who wants to fire a nonparty employee on an individual basis probably can circumvent the constraints of the decision by discreetly compiling complaints and unfavorable fitness reports against the employee prior to the discharge.[45] Nevertheless, the expanded scope of protection accorded individual liberties by the Supreme Court in recent years may thwart individual discharges, with the courts looking to the substance of the dismissal rather than to the form. Turning to the practical ramifications of the decision on the political process, it is doubtful that the instant holding will have any significant adverse effects on the state's ability to ensure effective and efficient governmental service for its citizenry; on the contrary, the removal of party affiliation as a determinative factor in hirings, firings, and advancements should improve governmental effectiveness as evidenced by the civil service's record.[46] Moreover, administrative efficiency should be augmented further by the absence of large-scale employee turnovers after elections. Of course, from a practical standpoint, political affiliation can never be removed totally from hiring considerations, but its impact can be lessened significantly. If the holding of this decision is adopted widely, a traditional source of political party workers may be depleted. The necessity of patronage to politi-

45. An illustration of how unconstitutional grounds for public employee dismissals may be circumvented can be found in companion cases decided by 5 to 4 votes: Lerner v. Casey, 357 U.S. 468 (1958), and Beilan v. Board of Educ., 357 U.S. 399 (1958). Plaintiffs were public employees who refused on fifth amendment grounds to answer questions concerning their alleged Communist affiliations. The majority in each case stressed that the dismissals rested on other than unconstitutional grounds; the basis for the dismissals was regarded as "lack of candor" in refusing to answer relevant questions during an inquiry into job fitness. The dissenting justices argued that it is impermissible for the State to dismiss an employee for exercising his constitutional rights.

46. *See generally* P. VAN RIPER, *supra* note 9, at 333-64.

cal party effectiveness, however, is subject to present doubt.[47] Several generations ago when patronage flourished, the promise of government jobs could attract the political allegiance of urban workers, especially the unemployed and dissatisfied; today, growth in economic prosperity and the attendant expansion of educational opportunity has greatly diminished the benefits of patronage jobs. Moreover, poor pay and dismal prospects of job security, which are characteristic of most patronage jobs, discourage many potential jobholders.[48] Also, special interest groups, particularly labor unions, have begun to provide alternate sources of political party manpower. Finally, the government, through its expanded social welfare programs, has decreased many of the social and charitable benefits to be gained by patronage employment. The declining importance of distributing government jobs by the parties has been recognized for some time, and the political parties appear to be adjusting; therefore, it is unlikely that the impact of the instant decision on the political process will cause any unanticipated results.

Torts—Wrongful Death—Common-Law Cause of Action for Wrongful Death Exists Under Massachusetts Law

Plaintiff, widow of decedent who was killed when his car collided with a tractor-trailer driven by defendant,[1] instituted an action for wrongful death on behalf of decedent's three minor children[2] when she was appointed administratrix of the estate three years after his death. The trial court granted defendant's pretrial motion to dismiss on the ground that the statute of limitations had run.[3]

47. Sorauf, *Patronage & Party*, 3 MIDWEST J. POL. SCI. 115, 118-19 (1959). *See also* Sorauf, *The Silent Revolution in Patronage*, in URBAN GOVERNMENT 376 (Banfield ed. 1969); Sorauf, *State Patronage in a Rural County*, 50 AM. POL. SCI. REV. 1046 (1956).

48. Sorauf, *Patronage & Party*, 3 MIDWEST J. POL. SCI. 115, 120 (1959).

1. Defendant Webb was the driver of the tractor-trailer and allegedly was engaged in the business of the 2 corporate defendants at the time of the accident.

2. At the same time plaintiff also brought an action for conscious suffering as decedent Gaudette's personal representative. *See* MASS. ANN. LAWS ch. 228, § 1 (1955); MASS. ANN. LAWS ch. 260, § 4 (1968).

3. The wrongful death statute in effect at the time of Gaudette's death provided that "[a]n action to recover damages under this section shall be commenced within one year from the date of death or within such time thereafter as is provided by sections four, four B, nine or ten of chapter two hundred and sixty." MASS. ANN. LAWS ch. 229, § 2 (Supp. 1966). Section 4 requires commencement of tort actions arising out of auto accidents "within two years next after the cause of action accrues." MASS. ANN. LAWS ch. 260, § 4 (1968).

Plaintiff asserted on appeal that the statute of limitations had not run since the general statute of limitations provides for tolling if the claimant is a minor when the cause of action accrues.[4] Defendant contended, however, that since the action for wrongful death was purely statutory and the wrongful death statute contained its own time limits with no tolling provision, the general statute of limitations tolling provisions were not available to plaintiff.[5] The Supreme Judicial Court of Massachusetts, *held*, reversed. The right to recover for wrongful death is a product of common-law, not statutory origin, and thus the tolling provisions of the general statute of limitations are available in a wrongful death action. *Gaudette v. Webb*, 284 N.E.2d 222 (Mass. 1972).

In the 1607 case of *Higgins v. Butcher*,[6] an English court denied recovery in an action brought by a husband for the wrongful death of his wife. Although the legal reasoning of this case is unclear,[7] *Higgins* came to be cited for the proposition that the defendant's tort liability for a wrongful death merges into and thus is redressed completely by his liability for the felony that he has committed.[8] This felony-merger doctrine was a logical outgrowth of the Crown's custom of seizing all of a felon's goods, leaving nothing to satisfy a

4. MASS. ANN. LAWS ch. 260, § 7 (1968). Plaintiff also contended that the time was extended by MASS. ANN. LAWS ch. 260, § 10 (1968), which provides, "If a person entitled to bring . . . any action before mentioned dies before tbe expiration of the time hereinbefore limited . . . and the cause of action by law survives, the action may be commenced by the executor or administrator at any time within the period within which the deceased might have brought the action or within two years after his giving bond for the discharge of his trust . . . ." The instant court summarily held that § 10 applies only to actions that the deceased might have brought, and since wrongful death actions may only be brought by the executor or administrator of the deceased, § 10 does not apply.

5. The Massachusetts Supreme Court had held previously that the time limitation in tbe wrongful death statute is a limitation on the right as well as the remedy and that the tolling provisions of the general statute of limitations, therefore, are not applicable in a wrongful death action. *See* Bickford v. Furber, 271 Mass. 94, 97-99, 170 N.E. 796, 798 (1930).

6. Yelv. 89, 80 Eng. Rep. 61 (K.B. 1607).

7. Whether the action was brought for a personal tort to the wife and thus would have died with her, or whether the action was brought by the husband in his own right for loss of consortium cannot be determined. *See* Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1056 (1965). *Compare* Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 252 (1929), *with* Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431. 434-35 (1916).

8. *See* F. TIFFANY, DEATH BY WRONGFUL ACT § 2 (2d ed. 1913); Smedley, *Wrongful Death-Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 611-13 (1960); Voss, *The Recovery of Damages For Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TUL. L. REV. 201, 203 (1932). In Noy's report of *Higgins*, however, the court is quoted as stating that although the action for the wife died witb her, an action for the death of a servant would have survived. *See* Higgins Case, Noy 18, 74 Eng. Rep. 989 (K.B. 1607).

tort claim.[9] After *Higgins* no wrongful death case was reported in England[10] until 1808 when Lord Ellenborough[11] sitting at nisi prius declared in *Baker v. Bolton*[12] that the common law did not recognize an action for the wrongful death of a person. Although Lord Ellenborough cited no authority and gave no reason for his decision,[13] subsequent courts interpreted the holding of *Baker v. Bolton* to be based on either the felony-merger doctrine or the rule that a personal right of action does not survive its holder.[14] Recognizing that the nonrecovery rule of *Baker* was harsh, Parliament enacted Lord Campbell's Act,[15] which permitted executors to bring actions on behalf of families of persons killed in accidents.[16] The existence of this Act and of similar statutes in the United States accounted in part for the failure of subsequent courts to examine the holding of *Baker*.[17] In 1848, the Massachusetts Supreme Court followed *Baker*—although expressly rejecting the felony-merger doctrine—in

9. *See* Holdsworth, *supra* note 7, at 433.

10. Malone, *supra* note 7, at 1057 & n.76.

11. Dean Prosser has stated that Lord Ellenborough's "forte was never common sense." W. PROSSER, TORTS § 127, at 901 (4th ed. 1971). Two courts, however, have commented on the weight of Lord Ellenborough's name. *See* Green v. Hudson River R.R., 28 Barb. 9 (N.Y. 1858); Admiralty Comm'rs v. S.S. Amerika, [1917] A.C. 38 (1916).

12. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

13. In a 1675 proposed statute on wrongful death, William Shepherd had stated that there was no common-law right of action for wrongful death. *See* W. SHEPHERD, ENGLAND'S BALME 148 (1657). Lord Ellenborough, therefore, might have thought that the proposition went without saying.

14. For a criticism of *Baker* see 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 676-77 (3d ed. 1923); Holdsworth, *supra* note 7, at 431-37; Smedley, *supra* note 8, at 613-16; Winfield, *supra* note 7, at 252-53.

15. The Fatal Accidents Act, 9 & 10 Vict., c. 93, §§ 1-6 (1846). The preamble of the Act acknowledged the *Baker* holding by stating, "Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Negligence, or Default, may have caused the Death of another Person."

16. For a discussion of the Act see F. POLLOCK, TORTS 54-57 (15th ed. 1951), and Voss, *supra* note 8, at 205-08. Pollock stated that "[i]nstead of abolishing the barbarous rule of *Baker* which was the root of the mischief complained of, it created a new and anomalous kind of right and remedy by way of exception." F. POLLOCK, *supra*, at 55.

17. *See* Malone, *supra* note 7, at 1059, 1069, 1073-76. In England, the first reexamination of *Baker* was made in an 1873 action to recover burial expenses that were not compensable under Lord Campbell's Act. The majority of the court followed *Baker*, also citing the preamble to Lord Campbell's Act as authority. *See* Osborn v. Gillett, L.R. 8 Ex. 88 (1873). In an often quoted dissent, however, Bramwell pointed out that the right to recover seemed "broad, plain, and clear" and that the majority should have given more convincing proof than a mere citation to *Baker* and the few American cases that followed it. *Id.* at 93-99. Nine years later a Canadian court also followed *Baker*. *See* Monaghan v. Horn, 7 Can. S. Ct. 409 (1882). An English court quoted *Monaghan* 24 years later in upholding *Baker*. *See* Clark v. London Gen. Omnibus Co., [1906] 2 K.B. 648, 652-53. For a discussion of these cases see Holdsworth, *supra* note 7, at 431-32, 435.

the case of *Carey v. Berkshire Railroad.*[18] Similarly, in *Insurance Co. v. Brame*[19] the United States Supreme Court found that there was no common-law action for wrongful death and stated that the *Baker* principle was not even open to question.[20] Nine years later in an admiralty case, *The Harrisburg*,[21] the Supreme Court applied the *Brame* decision to maritime law.[22] The *Harrisburg* decision, however, was overruled in 1970 by *Moragne v. States Marine Lines, Inc.*,[23] in which the Supreme Court declared that the rule denying a right of action was a striking departure from elementary principles of the law of remedies[24] and should be retained only if founded on sound reason.[25] Any factors that might have justified the rule in England never existed in the United States, according to the Court, and hence *Baker* probably was adopted in America solely because

18. 55 Mass. (1 Cush.) 475 (1848). For a discussion of *Carey v. Berkshire R.R.* see Hay, *Death As a Civil Cause of Action in Massachusetts*, 7 HARV. L. REV. 170 (1893).

Several earlier American decisions had recognized a right of action. *See* Plummer v. Webb, 19 F. Cas. 894 (No. 11,234) (D. Me. 1825), *dismissed on appeal for lack of admiralty juris.*, 19 F. Cas. 891 (No. 11,233) (C.C.D. Me. 1827); Cross v. Guthrey, 2 Root 90, 1 Am. Dec. 61 (Conn. 1794); Ford v. Monroe, 20 Wend. 210 (N.Y. Sup. Ct. 1838). For a discussion of these cases see TIFFANY, *supra* note 8, at 8-9; Malone, *supra* note 7, at 1066-67.

19. 95 U.S. 754 (1877).

20. The Court stated, "The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found." *Id.* at 756-57. *Brame* was decided when there was still a general federal common law under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

21. 119 U.S. 199 (1886).

22. In 1959 the Supreme Court followed its *Harrisburg* decision in The Tungus v. Skovgaard, 358 U.S. 588, 590 (1959). In 1914 the English House of Lords also reaffirmed the principle in *Baker* and applied it to an admiralty case. *See* Admiralty Comm'rs v. S.S. Amerika, [1917] A.C. 38 (1916). The House of Lords stated that although the reasons for denying a cause of action were purely historical, it was unwilling to disturb *Baker*. For a discussion of *The Amerika* see 3 W. HOLDSWORTH, *supra* note 14, at 676-77; F. POLLOCK, *supra* note 16, at 54. In Rose v. Ford, [1937] A.C. 826, 833-34, the House of Lords emasculated the rule in *Baker* and criticized the decision in *The Amerika*. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 388-89 (1970).

23. 398 U.S. 375 (1970).

24. The Court stated, "Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. . . . Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter." *Id.* at 381-82.

25. Professor Bauer has stated that "the principle has been recognized by American courts more because of the fact that it is firmly established hy precedent than because it is based upon any sufficient reason." R. BAUER, DAMAGES 414 (1919). *See also* Holmes v. O. & C. Ry., 5 F. 75, 78 (D. Ore. 1880), in which the court stated, "It is also admitted that the weight of authority in this country is with the English rule. But it is not admitted that the rule is founded in reason or is consonant with justice."

of its age. Furthermore, the Court found that the existence of state and federal wrongful death statutes[26] indicated a present public policy of overwhelming support for allowing recovery. Since these statutes had now become part of the general law, the Court concluded that a common-law cause of action for wrongful death exists in admiralty.[27] The Court, however, did not determine the availability of this right of action outside of maritime law.

Recognizing *Baker v. Bolton*[28] as the foundation of the nonrecovery rule, the instant court carefully examined this early decision. Although Lord Ellenborough had offered no reason for his holding in *Baker*, the instant court stated that the case was believed to rest on two grounds: the felony-merger doctrine and the the rule that a personal right of action does not survive its holder. The instant court discredited the felony-merger doctrine as a basis for the *Baker* decision since that case involved simple negligence rather than a felony; the nonsurvival rule was also rejected as a basis since a right to sue for wrongful death would have vested not in the decedent but in a third party. Consequently, the court refused to recognize *Baker* as declaratory of the common law. The court also overruled its own prior decision in *Carey v. Berkshire Railroad*,[29] a case denying wrongful death recovery that had relied on *Baker* and the theory that damages in a wrongful death action are a mere legislative gratuity. The court pointed out that there is no element of "gratuity" in the payment of damages by a wrongdoer. Having rejected the precedent for nonrecovery, the court looked to *Moragne v. States Marine Lines, Inc.*,[30] which held that there was a right of action in admiralty, and cited it as an affirmative basis for allowing the action. The instant court stated that since the reasoning in *Moragne* was primarily in reference to nonmaritime statutory and common law, its logic should be applicable to Massachusetts law. The court, therefore, found a common-law right of action for wrongful death to exist under Massachusetts law but declared that its application is

26. Statutes exist in all 50 states and in the territories of the United States. Three federal statutes provide for recovery in particular situations, and the Warsaw Convention provides for recovery when the death results from international travel. *See* Note, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 402-03 (1966).

27. For a discussion of *Moragne* see Comment, *The General Maritime Action for Wrongful Death: Pleading and Practice in the Wake of Moragne*, 10 HOUSTON L. REV. 101 (1972); Comment, *Wrongful Death on State Waters: A Remedy under General Maritime Law*, 44 TEMP. L.Q. 292 (1971); 24 ARK. L. REV. 526 (1971); 49 TEXAS L. REV. 128 (1970).

28. 1 Camp. 493, 17 Eng. Rep. 1033 (1808).

29. 55 Mass. (1 Cush.) 475 (1848).

30. 398 U.S. 375 (1970).

subject to all restrictions already placed on the statutory right. The court stated, however, that because the right was of common-law origin, its time limitations would now be subject to the tolling provisions of the general statute of limitations.

The court in the instant case is the first to extend the principle of *Moragne* beyond maritime law and to find a general common-law cause of action for wrongful death. This holding, however, was precipitated not by a scholarly analysis of the history of wrongful death actions,[31] but by the equities of a hard case. The court was faced with the prospect of barring three innocent, minor children from recovery if it followed its earlier decisions that had refused to apply general tolling provisions to the wrongful death statute. Therefore, in order to provide relief for the children, the court felt compelled to overrule 164 years of common-law tradition by finding a right of action independent of the statute. In light of its limited objective, however, the court subjected the newly created right to all of the constraints that had bound the statutory right except the time limit that would have barred recovery in the instant case. Looking beyond the court's immediate desire to do equity, it is important to determine whether this decision, considered in conjunction with *Moragne*,[32] will create enough secondary authority for other state supreme courts to declare a common-law right of recovery. Most wrongful death statutes contain many limitations on recovery and are in great need of revision; and since the equities in a wrongful death action normally weigh on the side of granting relief,[33] other courts are certain to be faced with situations similar to the instant one. Plaintiffs may seek to circumvent other constraints on the statutory right such as the prescribed group of beneficiaries or the statutory ceiling on the amount of recovery.[34] If they succeed, the

31. For a disscussion of the propriety of the court's overturning 164 years of precedent see B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66, 152 (1921). For a discussion of the propriety of the court's basing its decision on the existence of statutes see Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213-14, 226-27 (1934); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 406-07 (1908); Pound, *Comments on Recent Important Admiralty Cases*, 13 NACCA L.J. 162, 189 (1954); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13-14 (1936).

32. 398 U.S. 375 (1970).

33. A clear example of the equities of a case conflicting with the limits on a statutory right to recover can be seen in Hance v. Haun, 216 Tenn. 176, 391 S.W.2d 621 (1965). In *Hance*, a child brought a wrongful death action against his stepfather who had killed the mother. The Tennessee Supreme Court held that the child had no right of action under Tennessee's survival type statute because intrafamily immunity would have barred the mother from bringing any action if she had lived.

34. Other possible reasons for evading the statute are: to avoid a statute of limitations;

locus of activity will shift to the state legislatures, which probably will take action in reply to judicial revision of statutory law. If legislative reexamination of wrongful death statutes does occur, the courts will have accomplished at least part of their goal—achieving a long-needed revision of the right to recover for wrongful death.

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to have damages computed by a different means; to avoid the infirmities of a survival statute; to recover from the wrongdoer's estate if he has died; to recover hospital and funeral expenses that are not compensable under the statute; or to avoid contributory negligence as a bar. *See* Note, 44 N.C.L. REV., *supra* note 26.