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The Federal Conflicts of Interests Statutes and the Fiduciary Principle

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our foreign policy dictates that investment should be encouraged, whereas taxes imposed on income from other areas should be handled by the deduction approach.[74] Thus the loss of revenue through investment in heavily industrialized areas (with stable governments and relatively little risk-taking) with high tax rates would end, but there would exist the flexibility, through treaties, to encourage investment in underdeveloped areas.

STANLEY L. RUBY

THE FEDERAL CONFLICTS OF INTERESTS STATUTES AND THE FIDUCIARY PRINCIPLE

Three events of recent months have concurred to focus public attention on conflict of interests in the federal service. The most significant of these events is the appointment by President Kennedy of a committee to inquire into the problems of ethics in government. It is to be hoped that the projected inquiry will amount to more than a footnote in a law review article, which seems to have been the fate of its predecessors.[1] The most spectacular event was the decision in the *Dixon-Yates* case,[2] in which the Supreme Court held unenforceable a government contract because of the dual interests of a government agent. The least publicized event, yet the one which best indicates the confusion and uncertainty in this area, arose in the Senate consideration of the President's cabinet, notably Secretary of Defense Robert S. McNamara. As a condition of committee approval, Mr. McNamara was forced to sell all his interests in the Ford Motor Company so as to avoid violating any conflict of interest statute.[3] The proposal to place

74. If the credit is retained, Congress would do well to examine carefully the "tax-sparing" concept first adopted in the Pakistan Tax Treaty of 1957. "Tax sparing" refers to tax concession granted through treaties by foreign countries to encourage certain activities. The result for a United States taxpayer is credit through the treaty provision for a tax not paid to the foreign country. Assistant Secretary of the Treasury Surrey is on record as firmly opposing the concept. Surrey, *The Pakistan Tax Treaty and Tax Sparing*, 11 NAT'L TAX J. 156 (1958). *But see* Rev. Rul. 56-635, 1956-2 CUM. BULL. 501.

1. Though no action was taken on the recommendations resulting from earlier investigations, the reports are nonetheless valuable studies of the problem. The best source in this respect is the report of the subcommittee headed by Senator Paul Douglas: SUBCOMM. OF SENATE COMM. ON LABOR AND WELFARE, 82D CONG., 1ST SESS., REPORT ON ETHICAL STANDARDS IN GOVERNMENT (1951). See also STAFF OF SUBCOMM. No. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON FEDERAL CONFLICT OF INTEREST LEGISLATION, pts. III-V (Comm. Print 1958).

2. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), *reversing* 175 F. Supp. 505 (Ct. Cl. 1960).

3. Precedent for requiring disclosure of financial interests by appointees subject to Senate confirmation is considerable. The requirement of disclosure

the receipts of the sale in a trust for investment purposes was unacceptable. Eventually, the appointee agreed to make any disposition of his interests which the committee deemed suitable.

Popular awareness of the conflict of interest[4] problem is significant and interesting. Conflict of interest has been said to be a "luxury issue,"[5] a matter that only a secure and stable society can afford to be concerned about. Certainly the present-day citizen has little to worry about in comparison with his earlier counterpart. Larcenies in government are no longer so blatantly gross as they were in earlier periods of our history. Most commentators agree that the basic integrity of federal government employees and officials today is relatively high and that the standards are rising. One writer argues, however, that the trend is downward. While noting that few can make a fortune nowadays, he feels that thousands can and do wrest something less than that from the government and deplores the present day "democratization of corruption."[6] Assuming the trend to be upward, it should be realized nonetheless that we are living in the 1960's, not a hundred years past, and that the need for high standards of integrity has grown faster than any coordinate rise in ethical standards generally.

This note will relate and compare common law fiduciary principles

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of interests or transfer as in the case of Mr. McNamara, while having no statutory basis, is the most spectacular participation of Congress in the area of executive conflict of interests. The public mind probably identifies the restrictions imposed by these confirming committees with conflict of interest regulation more than in any other publicized situation. The earliest example of such Senate action occurred in 1925 when Mr. Charles Warren, President Coolidge's nominee for Attorney General, was rejected by one vote after refusing to dispose of the interest under dispute. The best known example is that of Mr. Charles E. Wilson who was confirmed as Secretary of Defense after disposing of his stock in General Motors.

4. Relatively little has been written in this field and consequently the pertinent law is not well known. The most recent and best work in the field is a study made by the New York City Bar, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE (1960), hereinafter cited as BAR STUDY. For general treatments of the subject see Davis, *The Federal Conflict of Interest Laws*, 54 COLUM. L. REV. 893 (1954); McElwain & Vorenburg, *The Federal Conflict of Interest Statutes*, 65 HARV. L. REV. 955 (1952). See also STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON FEDERAL CONFLICT OF INTEREST LEGISLATION, pts. I-II (Comm. Print 1958); Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 RUTGERS L. REV. 666 (1958); Dembling & Forrest, *Government Service and Private Compensation*, 20 GEO. WASH. L. REV. 174 (1951). For discussion of the problem in regard to municipal corporations see Eisenberg, *supra;* Kaplan & Lillich, *Municipal Conflicts of Interests: Inconsistencies and Patchwork Prohibitions*, 58 COLUM. L. REV. 157 (1958); Lillich, *Municipal Conflict of Interest: Rights and Remedies Under an Invalid Contract*, 27 FORDHAM L. REV. 31 (1959); Note, *Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation*, 107 U. PA. L. REV. 985 (1959); Note, *The Doctrine of Conflicting Interests Applied to Municipal Officials in New Jersey*, 12 RUTGERS L. REV. 582 (1958).

5. BAR STUDY 6.

6. BOLLES, HOW TO GET RICH IN WASHINGTON 4 (1952).

to conflict of interest situations. Of necessity such a project must be general in nature. Therefore no attempt will be made to correlate the many aspects of the conflicts question to the various theories of trusts, agency, and so forth. Three situations will be considered: (1) acceptance of compensation from private sources for government related services; (2) post-employment activities; and (3) the transaction of business with entities in which a personal interest is held. These situations will be examined first in relation to the pertinent federal statutes, then each will be considered in relation to applicable fiduciary principles. The basic policies underlying this area and how well they have been fulfilled will thus be brought to light.

The problem of conflict of interest evolved along with man's capacity for rational thought. Even before Christ warned against attempting to serve two masters,[7] Plato had forbidden his philosopher kings to hold any personal economic interests whatsoever.[8] In this country the problem was recognized early when the first Congress prohibited the Secretary of the Treasury from investing in government securities.[9] At various times, usually during or after periods of national peril, the problem has risen from its dormant state to shock and disillusion the public and to embarrass the administration in power. The periodic changes in administrations, accompanied by all the political overtones, aggravates the problem. It ofttimes seems that the situation is no more serious at one time than another, but that the cover is lifted and the rottenness exposed only when most expedient.

The particular federal statutes to be examined have been selected partly because of general interest and partly because of their value in pointing up certain fiduciary principles. These statutes cover the three areas of conflict of interest mentioned above. Four of the statutes deal with the acceptance of compensation from private sources for government related services; two relate to post-employment activities; the last prohibits a government official from acting for the government in transactions with a business entity in which he has an interest. Four of these statutes were enacted in the mid-nineteenth century, and their historical background helps to place the entire problem in perspective.

Public morality in the mid-1800's was low. Under Jackson's spoils system, each new administration brought into office masses of untrained political appointees. The concept of the professional "public servant" was unheard of while blatant self-dealing was the order of

7. *Matt.* 6:24.
8. PLATO, THE REPUBLIC 543.
9. 1 Stat. 67 (1789), as amended, REV. STAT. § 243 (1875), 5 U.S.C. § 243 (1958).

the day. But conscious wrongdoing was not the only problem. Among men of the highest motives there was disagreement over what could and what could not be done. Perhaps the best example of the contemporary standards of the day is given by the correspondence between Senator Daniel Webster and Nicholas Biddle, President of the Bank of the United States. In October, 1833, Webster suggested in a "private" letter that Biddle might wish the Senator to bring before Congress the matter of President Jackson's proposed withdrawal of United States' deposits from the bank. A later letter shows that Webster's interest was more than political:

> Sir: Since I have arrived here, I have had an application to be concerned professionally, against the Bank, which I have declined, of course, although I believe my retainer has not been renewed, or *refreshed* as usual. If it be wished that my relation to the Bank should be continued, it may be well to send me the usual retainer.[10]

Self-dealing took many forms. It was a common thing for members of Congress to be paid for appearing as counsel before the Supreme Court, other courts, or federal agencies, representing parties having claims against the government. Claims were handled by private act of Congress or by the particular department involved. These departmental claims were frequently conducted *ex parte* with no elements of an adversary proceeding. The advocates of the system found historical support for their activities. Representative Stephens of Georgia noted that "such a connection has never been deemed improper, that there is no legislation against it. . . . The position of General Jackson, and of the party then in power . . . was, that there was no law against it. . . ."[11]

The spoils system and the indifferent claims procedure created serious enough problems in time of peace. In time of war the two systems in combination produced outright fraud, dishonesty, and theft. The history of military procurement frauds during the Civil War is familiar.[12] So grave was the problem that the New York, Ohio, and Michigan legislatures requested Congress to act so as to prevent speculation and frauds in providing supplies for the federal armies.[13] Congress responded with the first conflict of interests statutes.

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10. Letters from Daniel Webster to Nicholas Biddle, October 29, 1833, December 21, 1833, in MCGRANE, THE CORRESPONDENCE OF NICHOLAS BIDDLE 216-17, 218 (1919).

11. CONG. GLOBE, 32d Cong., 2d Sess. 289-90 (1853).

12. See, *e.g.*, RANDALL, THE CIVIL WAR AND RECONSTRUCTION (1937).

13. BAR STUDY 36.

I. Private Compensation for Government Related Services

A. 18 U.S.C. § 283: Uncompensated Assistance to Claimants

The principal, and perhaps basic, instance of conflict of interests is the acceptance of compensation from private sources for government related services. Activities encompassed within this area involve the myriad uses of influence and position to obtain special privilege or gain. A bill passed in 1853, entitled "An Act to Prevent Frauds in the Treasury of the United States," contained the predecessor of section 283, the oldest of the statutes on conflict of interests. Of the eight sections of the original omnibus bill, only section 2 appears in the present law.

The section is succinct.[14] It is directed at the government officer who works for the government and simultaneously works against it by assisting others in their claims against the United States. In essence, section 283 prohibits a government employee from assisting or acting as agent or attorney in the prosecution of any claim against the United States. This particular statute, unlike later enactments, is applicable whether or not the employee receives compensation for services rendered, though it also forbids the receipt of any gratuity or interest in a claim in return for assisting in prosecuting it. A section of the original statute included in its scope members of Congress; this was repealed in 1873.[15] The statute is restricted to "claims" against the United States. A court construing similar language in a similar statute held that a "claim" was limited to demands for money or property.[16] "Prosecution," however, is broadly defined as including not only prosecutions at law, but also all activities that aim at the affirmance or collection of a claim.[17] Though over a hundred years old, only a few cases and a few opinions of the Attorney General have arisen under the statute. Section 283 is a sweeping statement of policy, applicable to all employees of the executive branch alike, striking with criminal sanctions at abuses of government prevalent in the nineteenth century.

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14. The statute now reads:
"Whoever, being an officer or employee of the United States or any department or agency thereof, or of the Senate or House of Representatives, acts as an agent or attorney for prosecuting any claim against the United States, or aids or assists in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties, or receives any gratuity, or any share of or any interest in any such claim in consideration of assistance in the prosecution of such claim, shall be fined not more than $10,000 or imprisoned not more than one year, or both." 18 U.S.C. § 283 (1958).

15. 10 Stat. 170 (1853).

16. United States v. Bergson, 119 F. Supp. 459 (D.D.C. 1954).

17. See 18 U.S.C.A. § 283 (1950).

B. 18 U.S.C. § 281: Compensated Assistance to Others in Executive Forum

A statute similar to section 283 in scope and application was enacted in 1864[18] and is now contained in section 281 of title 18.[19] This section again is designed to prevent government employees from assisting outsiders in their dealings with the government. Section 281, however, is broader than section 283 in two respects. (1) Its prohibition extends far beyond assisting in "claims." (2) The employee is forbidden to render services in relation to any matter in which the United States is a party or is directly or indirectly interested. Moreover, it includes members of Congress. Section 281 is narrower, however, than section 283 in that it forbids only services rendered for compensation.[20] And it applies only to the proceedings or matters enumerated in the statute which, oddly enough, do not include court proceedings.[21] Actual services must be rendered,[22] but any activity, though normal and customary, may be sufficient.[23] The necessity for the 1864 enactment is not clear; it overlaps the earlier law considerably. Apparently the abuses had continued or grown worse with the war, and Congress was spurred to some sort of action.

Section 281, the most litigated of the laws on conflict of interest, has been called the keystone of the statutes in this field. But in its ninety and more years of existence, only ten cases have been reported along with some opinions by the Attorney General. Two cases which indicate the scope of the statute are noteworthy. *United States v. Quinn*[24] held the statute to be violated if the government employee receives income, with knowledge of its source, arising from activities proscribed but performed solely by his nongovernmental partner. This decision particularly affects the legal profession. The other case, *Burton v. United States*,[25] held that the government may be "directly

18. 13 Stat. 123 (1864).
19. 18 U.S.C. § 281 (1958) reads as follows:
"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court-martial, officer, or any civil, military or naval commission shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."
20. United States v. Booth, 148 Fed. 112 (C.C.D. Ore. 1906).
21. United States v. Adams, 115 F. Supp. 731 (D.N.D. 1953).
22. United States v. Reisley, 35 F. Supp. 102 (D.N.J. 1940).
23. United States v. Booth, 148 Fed. 112 (C.C.D. Ore. 1906).
24. 141 F. Supp. 622 (S.D.N.Y. 1956).
25. Burton v. United States, 202 U.S. 344 (1906).

or indirectly" interested according to section 281 though the United States has no pecuniary interest in the matter. Section 281, all in all, has a broader impact than section 283.

C. 18 U.S.C. § 216: Compensation for Assistance in Procurement of Government Contracts

In 1862, after a full year of continuous investigations and scandals concerning procurement contracts, Congress enacted an unworkable statute[26] requiring each War, Navy, and Interior contract to be filed in a special office along with an affidavit from the contracting officer that he had made the contract fairly and without corrupt influence. The needs of war made necessary an almost immediate suspension of the act.[27] A day earlier, however, a more general criminal statute became effective.[28] This statute was the parent of the present section 216,[29] which specifically forbids a government employee from receiving payment for procuring, or assisting to procure, a government contract. Moreover it provides for penalties against those persons who make such payments. Applicable to contracts only, the statute covers members of Congress, as well as executive personnel. The President is authorized to void any contract arising from a violation of this statute.

It is to be noted that section 216 is both a conflict of interest statute and a bribery statute. As to those employees whose official duties relate to the contracting process, section 216 supplements the general bribery statutes. There has been little litigation under this law. Because of the blanketing affect of section 281 and the general bribery statutes, section 216 has been neither a source of trouble nor assistance in the area of governmental ethics.

D. 18 U.S.C. § 1914: Outside Compensation

The fourth statute considered in this problem area does not share

26. 12 Stat. 412 (1862).
27. 12 Stat. 600 (1862).
28. 12 Stat. 577 (1862).
29. The statute now reads as follows:

"Whoever being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or being an officer, employee, or agent of the United States directly or indirectly takes, receives, or agrees to receive, any money or thing of value, for giving, procuring or aiding to procure to or for any person, any contract from the United States or from any officer, department or agency thereof; or

"Whoever, directly or indirectly, offers, gives, or agrees to give any money or thing of value for procuring or aiding to procure any such contract—

"Shall be fined not more than $10,000 or imprisoned not more than two years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

"The President may declare void any such contract or agreement." 18 U.S.C. § 216 (1958).

the historical prestige of its fellow statutes. Its history and objectives vary considerably from earlier enactments. Though passed in the year 1917, section 1914 was not an outcrop of World War I. The statute was designed to restrict the activities of dollar-a-year employees of the Bureau of Education. Apparently, some sort of alliance had been effected between the Bureau and certain private organizations, notably the Rockefeller and Carnegie Foundations, for the purpose of studying and promoting such projects as Negro education and kindergarten programs.[30] This was too much for the opponents of national interference in educational policy; the result was a bill with sweeping provisions.

Essentially, section 1914 provides that no private entity is to pay a government employee for performing his governmental duties. The wording is rather peculiar.[31] The first paragraph prohibits the receipt of any "salary" by an employee other than his government pay. The second paragraph forbids any non-governmental source to make a "contribution" for the services performed by the employee in his official capacity. The statute excepts payments received from state and local government sources and is implemented by criminal sanctions. Section 1914 is the first statute examined which is, in a technical sense, a conflict of interest statute. That is, the employee does not have to act improperly to violate the statute; receipt of outside compensation for his government work plus his status as a federal employee is sufficient.

There are no cases under section 1914, but there are opinions by the Attorney General and the Comptroller General.[32] While the latter's views tend to be generally restrictive, the Attorney General seems to find nothing wrong when the financial arrangement involved is not harmful to the United States. Because no wrongdoing is necessary for its violation, this section contains inherent difficulties of application and enforcement. Moreover, it is clearly questionable on policy grounds in that it cuts off a fertile source of good men for federal service.

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30. See BAR STUDY 54.

31. 18 U.S.C. § 1914 (1958) reads as follows:
"Whoever, being a government official or employee, receives any salary in connection with his services as such an officer or employee from any source other than the government of the United States, except as may be contributed out of the treasury of any State, county or municipality; or
"Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any government official or employee for the services performed by him for the government of the United States—
"Shall be fined not more than $10,000 or imprisoned not more than six months, or both."

32. See, *e.g.*, 33 OPS. ATT'Y GEN. 273 (1922); 37 DECS. COMP. GEN. 776 (1958).

II. Post-Employment Activities

A. 5 U.S.C. § 99: The Civil Post-Employment Statute

It was only a matter of time until it became obvious that the legislation related to the assistance of outside claimants, sections 281 and 283, was inadequate. The aid that a government employee was forbidden to render while an employee became legal upon termination of the employment status. Hence, without supplemental legislation directed at post-employment activities, much of the effect of the earlier law was negated. Consequently, in 1872, Congress passed a law[33] which forbade an employee of an executive department to act as counsel, or agent, for a period of two years after leaving office, in the prosecution of claims pending in a department while he was in office. The provisions of this statute are now embodied in section 99 of title 5.[34]

Passage of the bill was preceded by considerable debate. The more important issues discussed involved who should be included; for what period of time should the activities be proscribed; should the law extend to all claims, claims pending only in the employee's department while he was in service, or only those on which he had worked; what sanctions should be imposed. In answering these questions, the ultimate wording of the statute was determined by three main objectives: (1) the desire to protect the government from fraudulent claims; (2) the desire to save money and to stop the switching of sides; and (3) the desire to avoid the evil of continuing personal influence in government. A conflicting attitude, manifest in 1872, and not yet dead and buried, was that governmental service was "demeaning," that if an employee "can gain a more independent livelihood by the use of the knowledge which he acquired in government employ . . . , one person at least would be saved from its pernicious influence."[35]

The most interesting facet of section 99 is that it has no provision for punishment for its violation. It was thought then, as some think now, that the panacea for the evils in government service lay in the "integrity and intelligence" of the employees themselves. One senator remarked that he could not envision an official acting "in the face

33. 17 Stat. 202 (1872).
34. The section now reads:
"It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee." Rev. Stat. § 190 (1875), 5 U.S.C. § 99 (1958).
35. Bar Study 47.

of an official pronouncement of illegality."[36] The original phrasing of section 99 seemed clearly to forbid the officer's participation only when the claim involved had been pending in that officer's particular department. When the amended version came out in 1874, its scope was less clear than that of its ancestor. The accepted interpretation now is that the prohibition extends to the ex-officer's participation in a claim pending before *any* department while he was in office.[37]

Coverage of the statute, in view of present day governmental structure, is absurd. The language includes only "departments," impliedly excluding agencies. This arises, of course, from the fact that when the section was enacted, no independent federal agencies existed. When the question arose in 1903 as to whether agencies were included, the Attorney General answered that "department" means "department."[38]

There are no federal cases under section 99. However, in three state cases, a violation of the statute has been asserted as a ground for holding a contract unenforceable. In two of the cases the court implied that a violation of the statute would render unenforceable a contract based on such violation, but the holdings were limited in that the claims involved had never reached the required adjectival status of "pending."[39]

B. 18 U.S.C. § 284: The Criminal Post-Employment Statute

Immediately after World War I, the federal government was besieged with contract claims, many being prosecuted by former military officers. Secretary of War Newton Baker sought an interpretation from the Attorney General that such officers were within the scope of section 99. The Attorney General, however, was of the opinion that "an officer of the United States Army is not by virtue of that fact alone in the Department of War within the meaning of" section 99.[40] The Secretary then turned to the Congress, and that body responded with a new statute designed to supplement section 99.[41] This legislation fell far short of the need, but it did serve to draw the attention of Congress to the inadequacies of section 99. Nevertheless, recommendations of congressional committees resulted in no further action until 1942.

Upon the outbreak of World War II, section 99 operated as a bar to

36. *Ibid.*
37. 20 OPS. ATT'Y GEN. 696 (1894).
38. 25 OPS. ATT'Y GEN. 6 (1903).
39. See Day v. Laguna Land & Water Co., 115 Cal. App. 221, 1 P.2d 448 (Dist. Ct. App. 1931); Ludwig v. Raydure, 25 Ohio App. 293, 157 N.E. 816 (1927); Day v. Gera Mills, 133 Misc. 220, 231 N.Y. 235 (Sup. Ct. 1928), *aff'd*, 229 App. Div. 771, 242 N.Y.S. 812 (1930).
40. 31 OPS. ATT'Y GEN. 471, 474 (1919).
41. 41 Stat. 131 (1914).

recruitment of personnel for government service. To overcome this there was attached to the Renegotiation Act of 1942 a rider exempting employees of certain departments from the restrictions of that section.[42] There was, however, a counter-proviso that no such employee should *ever* prosecute a claim against the United States which arose from any matter with which he was directly connected while in office. In its ultimate effect, the apparent exemption extended post-employment restrictions beyond a "department" for the first time. Moreover, it placed emphasis on the direct connection between the particular officer and the claim. In 1944, the rider to the Renegotiation Act, after being amended twice, became the predecessor of the present section 284.[43]

Section 284 is very similar to section 99, but differs in three respects. Section 284 provides a criminal penalty; it covers all agencies of the federal government; and it tests the claim included in its coverage by the direct relationship of the officer to the claim. There is little case law under section 284. In *United States v. Bergson*,[44] the court held that the term "claim" was limited to actions to recover money or property from the United States. This would seem to say that an ex-officer could act as counsel in a case arising from the refusal to pay taxes, but that he would be barred from so acting in a suit to recover taxes paid under protest. Whether the restriction of section 284 extends to the partners of a covered ex-officer is not clear, nor is the scope of the phrase "subject matter directly connected with which" the former employee was "employed or performed duty." There are no cases on this point but a case arising under the Canons of Professional Ethics offers an interesting analogy. This case, *United States v. Standard Oil Co.*,[45] will be discussed at length below.

III. Business Transactions With Entities in Which the Employee Holds a Personal Interest

A. 18 U.S.C. § 434: Disqualification

The last area of conflict of interests to be considered involves only one statute, section 434 of title 18. This section's predecessor was

42. 56 Stat. 982, 985 (1942).
43. 18 U.S.C. § 284 (1958) reads as follows:
"Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time such employment has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than $10,000 or imprisoned not more than one year, or both."
44. 119 F. Supp. 459 (D.D.C. 1954).
45. 136 F. Supp. 345 (S.D.N.Y. 1955).

enacted in 1863 and was a product of the wartime procurement frauds noted earlier. There is almost no legislative history to this section but it is clear that it was designed to meet the matter of dual interests which had been brought to the attention of Congress. Section 434, since its inception, has been unique in its method of regulation. This section, like section 1914, is a true conflict of interest statute and is perhaps the best example of this type statute in the books.[46]

Rather than restrict what an employee does outside his official capacity, section 434 operates as a bar beyond which a government employee is forbidden to act in an official capacity. In substance the statute prohibits an employee from acting as an officer or agent for the government in the transaction of business with any business entity in which he holds a direct or indirect interest. In effect, section 434 is a disqualification statute; it does not forbid the outside interest, contrary to much popular thinking, but requires the government employee to refrain from acting for the government with the entity in which the interest is held.

Before 1961, only six cases had been reported under section 434.[47] In January of this year the Supreme Court gave the widest possible operative force to section 434 in reversing the Court of Claims in the celebrated *Dixon-Yates* case.[48] The decision marked the end of a prolonged game of political football.

The case arose out of a situation wherein the federal government was pressed with increased demands for electrical power facilities. President Eisenhower had expressed the administration's preference for private, as opposed to public, facilities. Pursuant to this expressed preference, the government entered negotiations with Dixon-Yates, the sponsor-predecessor of the plaintiff contractor, in an attempt to reach agreement on proposals upon which a contract could be based. Specifically as an expert in money costs, and generally as an expediter of the negotiations, the government utilized Adolphe Wenzell, an employee of First Boston Corporation, a large investment firm which had handled the financing of the Ohio Valley Electric Corporation some years earlier. The Bureau of the Budget, which had requested Wenzell's aid, and the Tennessee Valley Authority were aware of

46. 18 U.S.C. § 434 (1958) reads as follows:
"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm, or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

47. See 18 U.S.C.A. § 434 (1950).

48. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), *reversing* 175 F. Supp. 505 (Ct. Cl. 1959).

Wenzell's principal employment as a director and vice-president of First Boston and that the final contractor might well select First Boston to finance the project. First Boston continued to pay Wenzell's salary; he received only per diem expenses from the government. Wenzell owned no stock in and was never employed by Dixon-Yates. However, he did receive a commission on any business he brought to First Boston. At one stage of the proceedings, Wenzell was advised by counsel for Dixon-Yates to withdraw from the negotiations. This warning was brushed aside by the Director of the Budget and Wenzell continued to render services. After weeks of negotiation and shortly after Wenzell had terminated his relationship with the government, proposals were submitted which eventually resulted in a fair, good-faith contract, a point conceded by the government in the later litigation. First Boston was selected by the contractor to finance sixty per cent of the project but declined to accept a fee. The contract was cancelled almost immediately, but not before substantial costs were incurred. Upon suit for these costs, the government defended on the ground that Wenzell's activities rendered the contract unenforceable because of his dual interests. This argument, rejected by a three-two decision in the Court of Claims, was accepted by a divided Supreme Court.

Several aspects of the case are worthy of note. The statute, the Court said, was not limited to the higher echelons of government, or only to those having a direct financial interest in the business entity, or to a narrow class of business transactions. "Rather, it applies, without exception to 'whoever' is 'directly or indirectly interested in the pecuniary profits or contracts of a business entity with which he transacts any business as an officer or agent of the United States.' "[49] Further, the reasonableness or unreasonableness of the contract ultimately negotiated is immaterial. The statute does not require corruption or that there be any "actual loss suffered by the government . . . . The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. . . . [I]t is more concerned with what might have happened in a given situation then with what actually happened."[50] Wenzell's efforts and activities as a negotiator were held to be the "transaction of business" within the meaning of the statute. And the Court found that Wenzell had an indirect interest in the contract, a bit tenuous perhaps, but nonetheless an interest:

> [I]f a contract . . . was ultimately agreed upon, there was a *substantial probability* that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing for

49. 364 U.S. at 549.
50. *Id.* at 549-50.

> the proposed Memphis project; *if* First Boston did receive the [financing] contract, it *might* not only profit directly from that contract, but it would also achieve great prestige and would thereby be *likely* to receive other business of the same kind in the future; therefore, Wenzell . . . could expect to benefit from any agreement that might be made . . . .[51]

Finally, while it appears that Congress can impliedly authorize activities which would otherwise be forbidden by section 434,[52] the knowledge and approval of the employee's superiors is not sufficient to legitimize the employee's activities. Few would argue that Wenzell could be convicted in a criminal action brought under this statute, and this is the most striking fact concerning section 434. In its ninety-seven years on the books, which period included five wars, not a single person has been convicted of its violation. The statute has only been used for rendering government contracts unenforceable and, until now, it has not been effective even in that respect.

The decision of the Court could hardly have been any other. But in view of the secondary policy underlying the conflict of interest problem, that is, the desire for effective recruitment of competent personnel, was the decision a wise one? A cautious man might view the prospect of government service with alarm. It might fairly be said of *Dixon-Yates* that the government requested the aid of a man expert in his field; this man did his job in good faith; upon inquiry he was told by his superior that his activities were proper; subsequently the Supreme Court determined that his activities violated a criminal statute for which the expert could have been indicted, convicted, and imprisoned. The impact of this decision on many honest but cautious men can be measured only by future events.

B. Exemptions: An Additional Complicating Factor

In order to evaluate the statutes as a whole it is important that attention be focused on the fact that there are exemptions to their provisions. These exemptions have been used as a ground for attacking the statutes as inadequate.[53] Three broad categories are to be noted. The first category of exemption is contained in the statute itself. Sections 281 and 283 exclude from their coverage members of the National Guard of the District of Columbia and partially exclude retired officers of the Armed Forces. A second type exemption is the "spot" type. Congress recognized early that the inflexibility of the statutes made them unworkable in regard to intermittent employees and certain government positions.[54] The last type exemption is found

51. *Id.* at 555. (Emphasis added.)
52. Muschany v. United States, 324 U.S. 49 (1944).
53. See Davis, *The Federal Conflict of Interest Laws,* 54 COLUM. L. REV. 893, 911 (1954).
54. For examples of these "spot" type exemptions, see BAR STUDY 67 n.97.

in the "emergency" category. In time of national crises, the statutes have been stretched, ignored, or avoided by exemption. A few such exemptions are currently on the books.[55] These statutes vary according to a number of factors: the seriousness of the crisis; the particular programs involved; availability of trained personnel; the employment status of the employee, whether a W.O.C. (without compensation employee), expert, or consultant; and the current political atmosphere with respect to government ethics in general.

> [I]t is sufficient for the general observer to know that there are some statutory exceptions from the conflict of interest laws, that there are not very many of them, that their provisions are highly technical . . . [and] erratic . . . . To some government appointees these exemptions are of vital concern, to the lawyers asked to track down and construe them, a source of despair.[56]

IV. The Public Officer as a Fiduciary

It would be superfluous to criticize to any greater extent the statutes considered above. This has been done before,[57] and substantial changes in this area of the law seem imminent. What is needed is a basis in principle from which a statutory framework could be constructed to bring order into this chaotic area. Such a basis is to be found in the general rules applicable to fiduciaries. "A fiduciary," according to Professor Austin Scott, "is a person who undertakes to act in the interest of another person."[58] Present day enumerations of fiduciary relationships generally include trustee and beneficiary, guardian and ward, agent and principal, attorney and client, executor or administrator and legatees, directors and their corporation, and partner and partner. To these current lists might well be added the relationship of public officer and the public. Such a relationship at one time was high on any list of fiduciaries, the terms "public officer," "agent," and "trustee" being used almost synonymously. Modern day categorization and emphasis on doctrine have tended to blunt what formerly was a sharp and powerful tool in dealing with misbehavior in public office.

The same rule is shared by the American and English courts: A public officer occupies a position of trust and as such the officer is bound by the duties of a fiduciary. It is awkward to call it a rule of law. The early American cases talk of public officer, agent and trustee in an off-hand manner, and the early English cases use the terms interchangeably.[59] Eventually, through that process of evolution pecu-

55. *Id.* at 67-68.
56. *Id.* at 69.
57. See materials cited note 4 *supra.*
58. Scott, *The Fiduciary Principle,* 37 Calif. L. Rev. 539, 540 (1949).
59. The leading case is York Bldgs. Co. v. Mackenzie, 8 Br. P.C. 42, 3 Eng.

liar to the common law, the phrase "No man can serve two masters" became an authoritative rule of law. It is not the intent of the writer to take issue with so imminent a commentator as the author of that statement, but it seems that the phrase has been too literally construed. A more realistic approach is in order. The conflict of interest situation is inherent in modern government; it can be controlled but not eradicated. The statutes discussed earlier are not helpful in this respect. They are simply patches cut out of the broad cloth of public policy. They overlap in certain areas to a great degree while leaving other important areas quite uncovered. Sometimes the statutes act as blinders on the court; they fail to see beyond the words of the statute to the underlying policy.[60]

What is involved in a conflict of interest situation? Every person's identity can be said to exist in the relationships of his interests in persons and things. These interests are more properly called *loyalties* and are the ties which relate him to others. When a conflict in these loyalties presents itself, it is normally a personal matter as to how the conflict is resolved. The great percentage of these differences are resolved automatically. Other conflicts, somewhat more serious, are resolved by conscious choice. While critical loyalty conflicts may threaten a person's equilibrium, the sorting and sifting of these interrelated loyalties rarely affects the public generally. When, however, this process becomes a matter of public concern, the thumb of the law may be put to the scales so as to require the resolution of the loyalty conflict in a certain way. Such a situation obtains in fiduciary relationships.

One who undertakes to act in the interest of another is a fiduciary. The energizing force connecting a fiduciary and his principal is a duty

Rep. 432 (H.L. 1795). However, the best statement of the principle is that of Lord Mansfield in The King v. Bembridge, 3 Doug. 327, 99 Eng. Rep. 679 (K.B. 1783):

> "Here there are two principles applicable: first that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the king for misbehavior in his office; this is true, by whomever and in whatever way the officer is appointed. . . . Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable." 3 Doug. at 332, 99 Eng. Rep. at 681.

The *Bembridge* case involved a receiver and paymaster general of the armed forces who wilfully concealed certain shortages in his accounts. Wilfulness was an essential element of the offense. This was not so in *York* in which there was no evidence of fraud or wrongdoing: the sale therein was avoided solely because of the disability incurred by virtue of the fiduciary capacity of the common agent who was an officer of the court. It is to be noted that the *York* case cites only cases involving fiduciaries other than public officials. See Keech v. Sandford, 1 Eq. Ca. Abr. 741, 22 Eng. Rep. 629 (Ch. 1726); Whelpdale v. Cookson, 1 Ves. Sen. 9, 27 Eng. Rep. 856 (Ch. 1747). An excellent review of authorities is found in Gardner v. Ogden, 22 N.Y. 327 (1860).

60. *E.g.*, see Muschany v. United States, 324 U.S. 49 (1944).

of loyalty. Some fiduciary duties are more intense than others. The duty of loyalty imposed is proportional to the independent authority which the fiduciary may exercise. Thus, a trustee is under a stricter duty than an agent upon whom limited authority is conferred. Similarly, the head of a governmental agency is bound by a stricter duty of loyalty than his subordinate. A conflict of loyalty (or interest) arises when this duty of loyalty is endangered, that is, when a second loyalty or interest creates a situation in which the fiduciary's primary duty of loyalty is frustrated or prevented. A public officer, as a fiduciary, owes a primary duty of loyalty to his principal, the public. This fundamental loyalty should be the touchstone in constructing preventive measures to meet the problem. Further, it is submitted that the principles applicable to fiduciaries form a ready framework on which to build.

What are the policies underlying the conflict of interests statutes? Promoting government efficiency? This is true only in a limited sense; a corrupt government can be as efficient as an honest one. To promote public confidence? The confidence of its people is essential to the survival of any government, but the confidence is directed at the governmental system, not the system's employees. The American people are confident of the democratic system, but their distrust of politicians and public officers is notorious.[61] Two other policies seem more practical in their objectives: to insure that every citizen is treated equally and to prevent the use of public office for private gain. It would seem that the conflicts laws are a preventive device. Thus, when the public places a man in a position of power, which is peculiarly subject to abuse, the disposition of power must be limited by certain disabilities.

Are statutes needed? What do statutes add that the common law of fiduciaries lacks? These questions can best be answered by reference to the conflict of interest situations previously considered.

A. Compensation From Private Sources for Government Related Activities

In this problem area, three rules of agency are particularly applicable. First, any one acting as an agent must not use his position for

61. "A recent poll by the National Opinion Research Center disclosed that five out of every seven Americans believed it impossible for a professional politician to be honest, and only eighteen per cent of America's parents were willing to let their sons enter political careers." Becker, *Ethics in Public Life —A Challenge to the Lawyer*, 2 DE PAUL L. REV. 194, 204 (1953). Much of the public seems to have adopted as their own the rationalization of Tammany chief George Washington Plunkitt, who said, "There is an honest graft and I am an example of how it works. I might sum up the whole thing by saying, 'I seen my opportunities and I took 'em.'" Quoted in Becker, *op. cit. supra* at 199 n.11.

his own profit, *regardless of his motives,* and regardless of whether actual harm is suffered by the principal. Second, if such a fiduciary does act for his own interests, he holds the profits in trust for his principal. Last, these profits can be "traced" and recovered from any third person except a bona fide purchaser.[62] These three rules have found application in a recent English case, *Reading v. King.*[63]

Reading was a British Army sergeant who took £20,000 in bribes for escorting smuggled goods through Cairo so as to avoid inspection by civil authorities. The money was impounded by the military. Upon suit to recover possession, *held,* petition dismissed. In holding that the Crown was entitled to the money, Mr. Justice Denning said:

> There are many cases in the books where a master has been held entitled to the unauthorized gains of his servant or agent. At law, the action took the form of money had and received. In equity there was said to be a constructive trust due to a fiduciary relationship. Nowadays it is unnecessary to draw a distinction between law and equity. . . . The claim here is for restitution of moneys which in justice, ought to be paid over. It matters not that the master has not lost any profit, nor suffered any damage. Nor does it matter that the master could not have done the act himself. It is a case where the servant has unjustly enriched himself by virtue of his service without his master's sanction. It is money which the servant ought not to be allowed to keep, and the law says it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as servant of his master.[64]

The United States Supreme Court reached a similar result in a 1910 case.[65] There the defendant was a brilliant and rising army officer who had been placed in charge of improvements in Savannah Harbor. The construction company reaped a profit of some two millions, and the defendant allegedly received one half million of this in exchange for manipulating contract options and competitive bidding. Using fiduciary principles, the Court found the defendant a constructive trustee for the benefit of the government. And though any of several conflicts of interests statutes would seem appropriate, the Court made no mention of them at all. The same result has been obtained in several federal and state court cases.[66]

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62. See Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office,* 54 COLUM. L. REV. 214, 215 (1954).

63. [1948] 2 K.B. 268, *aff'd,* [1949] 2 K.B. 232.

64. [1948] 2 K.B. 268 at 275.

65. United States v. Carter, 217 U.S. 286 (1910).

66. In United States v. Pan-American Petroleum Co., 55 F.2d 753 (9th Cir.) *cert. denied,* 287 U.S. 612 (1932), which arose out of the Teapot Dome scandals, the Court said that

> "when [Secretary of the Interior] Fall accepted the 'loan' . . . he became thereafter incapable of properly representing the United States in any dealings with his benefactor. The fact that the defrauded principal occasionally may be benefited by certain transactions entered into in his name

There is no reason why the above statement of principles should not apply to situations arising under the conflict of interest statutes. In *Reading* the money was obtained from bribes, but the principles are applicable in cases where so blatant an offense is not involved. Note the following observation by Professor Scott:

> The conduct of the fiduciary may involve a violation of his duty of loyalty where he receives some benefit for himself, even though it does not concern something so crass as a bribe. This is the case, for example, where he receives a commission in connection with what is otherwise a *perfectly proper business* transaction entered into by him on behalf of the principal. Thus a fiduciary has been held accountable for commissions which he received . . . in buying or selling or insuring property of the trust. It is immaterial that the same commission would have been payable to a third person acting as such broker or agent.[67]

The third fiduciary principle mentioned earlier—that profits realized by an agent through a breach of loyalty can be traced and recovered from takers with knowledge of such breach—is a powerful tool. Mr. Harold L. Ickes' observation that he had "never known a public official to corrupt himself"[68] must be conceded to have a large measure of truth. A public servant may not take the initiative in a corrupt scheme, but he may well acquiesce in it, especially where the scheme is so designed that no actual harm is experienced by the government. It is paradoxical that public indignation and judicial sanction should concentrate on the public official, while ignoring the equally guilty private party. Tracing and recovering corrupt profits from the private party would be a powerful remedy to official wrongdoing. This is the sort of tool that courts will wield effectively once it is placed in their hands by competent lawyers. Since in all cases the private corrupter has actual or constructive knowledge of the officials' status and authority, which prevents his taking in good faith, it would be almost

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by the disloyal agent does not deprive the principal of his right to repudiate the bargain."

Similar phraseology was used in an earlier case, United States v. Mammoth Oil Co., 14 F.2d 705 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927):

> "If a government official, engaged in making contracts for the government, receives pecuniary favor from one with whom such contracts are made, a fraud is committed on the government, and it matters not that the government is subjected to no pecuniary loss, or that the contract might have been an advantageous one to it. The entire transaction is tainted with favoritism, collusion, and corruption, defeating the proper and lawful function of the government. . . . Nothing is so essential to the perpetuity of representative government as fidelity of public officials. That the highest degree of fairness and honesty is required of them goes without saying, and the same standards apply to those with whom they deal." 14 F.2d at 717.

See also Jersey City v. Hague, 18 N.J. 584, 115 A.2d 8 (1955); City of Boston v. Santosuosso, 307 Mass. 302, 30 N.E.2d 278 (1940).

67. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 546 (1949).

68. Quoted in DOUGLAS, ETHICS IN GOVERNMENT 23 (1952).

impossible to defend an action in restitution successfully.[69]

B. Post-Employment Activities

The issue in this problem area is whether the duty of loyalty once established ends with the termination of the fiduciary relationship or whether the duty has a continuing operative force for certain purposes. A situation closely analogous to this arises where the fiduciary takes advantage of confidential information obtained by virtue of his fiduciary status.[70] The general rule controlling in both situations finds expression in canons 36 and 37 of The American Bar Association's Canons of Professional Ethics:

> 36. . . . A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.
>
> 37. It is the duty of a lawyer to preserve his client's confidence. *This duty outlasts the lawyers' employment, and extends as well to his employees* . . . .[71]

The principle is found again in the *Restatement of Agency*.[72] It applies not only to agents and attorneys but also to trustees, corporate officers and other fiduciaries. So also does it apply to former public officers who have occasion to render service to private interests in regard to matters with which they dealt as government employees. The best illustration of this situation arose in *United States v. Standard Oil Co.*[73]

The federal government had instituted suit against Standard Oil in an attempt to recover alleged over-charges on oil purchased by the government under the Marshall Plan in Europe at prices greater than the limits established by the Economic Cooperation Administration. ECA price regulation was administered at Washington while the direct operations were a function of the Paris office. For all practical purposes the two offices were independent. Among counsel for Standard Oil was a former ECA employee who had worked in the Paris office. No conflict of interest statutes were applicable because of a two year time lapse. The lawyer became a partner while the litigation was in process. When the case came on for trial the government

69. See Lenhoff, *supra* note 62.

70. There are a few federal statutes relating to the disclosure of confidential information which were not used in this article. 18 U.S.C. § 1905 (1958) contains a general prohibition of disclosing confidential information. 18 U.S.C. §§ 1906-08 (1958) contain specific prohibitions.

71. ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 35-36 (1957).

72. RESTATEMENT (SECOND), AGENCY § 395 (1958).

73. 136 F. Supp. 345 (S.D.N.Y. 1955).

moved that Standard's counsel be disqualified because of his former employment with ECA, the basis of the motion being the professional canons quoted above. Since the evidence showed that the lawyer had not in fact had any personal contact with the case while working for ECA, the issue became one of imputing the acts and knowledge of the employees of the Washington office to those of the Paris office. If the lawyer was disqualified it was clear that his firm was disqualified also. The court took a realistic approach and refused to impute the knowledge. The court distinguished between what it called the "vertical" and "horizontal" theories of imputation of knowledge.[74] While knowledge of a subordinate will be imputed readily to a superior, such is not the case as regards imputation between officials of coordinate rank and function.

The force of the principle embodied in these canons was ably expressed by Judge Weinfeld in a leading case:[75]

> A lawyer's duty of absolute loyalty to his client's interest does not end with his retainer. He is enjoined *for all time,* except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Related to this principle is the rule that where *any substantial relationship* can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.
>
> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented . . . the former client. The Court *will assume* that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.[76]

It may safely be said that in the area of post-employment activities, the conflict of interests statutes add very little that the law of fiduciaries does not already cover rather effectively.

C. Business Transactions With Entities in Which the Employee Holds a Personal Interest

At the common law a fiduciary was forbidden to have a personal interest in the business transactions conducted for his principal. Or, if he had a personal interest in a business entity, he suffered a legal disability to transact business with such entity. The rule varied as to whether consummated transactions were void or only voidable. The situation to which this rule applies is the most clear cut in the conflict

74. *Id.* at 362.
75. T.C. & Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953), *aff'd,* 216 F.2d 920 (2d Cir. 1954).
76. 113 F. Supp. at 268. (Emphasis added.)

of interest field. Its history is ancient and may be traced to the Roman civil law. The earliest case found involving a public official or employee is *York Building Co. v. Mackenzie*.[77]

The defendant in *Mackenzie* was a common agent, a solicitor in court employed by creditors of a bankrupt estate. In the process of satisfying the creditors by sale of the estate, the defendant made purchases of the bankrupt's property which were confirmed by order of court. Eleven years later, after defendant had expended large sums on improvements and when the property value had greatly increased, the bankrupt's successors in interest sought to have the sale set aside on the grounds of fraud and that defendant, because of his capacity as common agent, was disabled from making a valid purchase. The court held the sale to be

> void and null, because the respondent, from his office of common agent, was under a disability and incapacity, which precluded him from being the purchaser. The office infers a natural disability of which *ex vi termini* imports the highest quality of legal disability. A law which flows from nature, and is founded in the reason and nature of the thing, is paramount to all positive law. . . . [I]t is the constitution of nature itself, and is as old as the formation of society, and of course it must be universal. It proceeds from nature, and is silently received, recognized, and made effectual wherever any well regulated system of civil jurisprudence is known.[78]

Mackenzie is apparently the first case to treat public officers in the same manner as other fiduciaries. In earlier cases a public office was treated as a position of trust,[79] but *Mackenzie* drew no distinction at all in trustees and public officers. Significantly, the cases cited for authority in *Mackenzie* all concern trustees rather than public officers.[80]

The United States Supreme Court in *Michoud v. Girod*[81] followed the propositions laid down in *Mackenzie*. The case involved a private agent, but the Court in a dictum noted that "the general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private . . . ."[82] The doctrine suffered a temporary set back in *Muschany v. United States*[83] but was vigorously reasserted in the *Dixon-Yates* case.[84]

77. 8 Br. P.C. 42, 3 Eng. Rep. 432 (H.L. 1795).
78. 3 Eng. Rep. at 445.
79. King v. Bembridge, 3 Doug. 327, 99 Eng. Rep. 679 (K.B. 1783).
80. Keech v. Sandford, 1 Eq. Ca. Abr. 741, 22 Eng. Rep. 629 (Ch. 1726); Whelpdale v. Cookson, 1 Ves. Sen. 9, 27 Eng. Rep. 856 (Ch. 1747).
81. 45 U.S. (4 How.) 503 (1846).
82. *Id.* at 555.
83. 324 U.S. 49 (1944).
84. 364 U.S. 520 (1961). In *Muschany* a representative of the War Department agreed that one McDowell should undertake to secure options to buy

From the above review of cases it may be seen that the conflict of interest statutes add nothing to the basic law of fiduciaries. It is true that all save one of the statutes provide criminal sanctions for their violations. It perhaps speaks well for the ethical standards of our government employees that so few of them have been convicted under the statutes, but it is more realistic to conclude that the criminal provisions are ineffective. Nor do the statutes provide an external standard by which an employee might measure his conduct. The statutes are almost unintelligible on this point. And *query:* Is not the standard of duty required of a fiduciary an external standard?

V. Conclusion

As was said earlier, no purpose is served by an elaborate criticism of the conflict of interest statutes. Rather, attention should be focused on how the inevitable revision is to be made. The discussion of the statutes and the correlated fiduciary principles raised the pertinent issues and posed some of the problems involved. The variables to be considered in solving the problem are infinite, but some observations would seem applicable to any program.

First, no program will provide all the answers. The problem of conflict of interest is inherent in organized government. Moreover, the problem is aggravated by extensive non-governmental activities (*e.g.,* public power projects, public transportation), such as exist at all levels of government today. And any program must give prime consideration to the connected problem of recruiting competent personnel for government service. This problem is co-equal with that of conflict of interest. Neither problem can be considered as subservient to the other.[85]

The writer is one of those who believes that detailed statutory revision is not the answer to the problem.[86] Of course, statutes are essential to a degree, but a code of ethics similar to the professional canons would seem more beneficial. An independent group should be established to which inquiries could be directed as to whether certain

land for the United States. McDowell's remuneration was a commission of five per cent of the gross sale price, *i.e.,* the higher the price the government paid, the more money McDowell made. It would seem that an irreconcilable conflict of interest existed but the Court found that the agent's activities were authorized by statute and did not in any event come within the purview of any of the conflict of interest laws. It is difficult to resolve the narrow view of *Muschany* with the very broad holding of *Dixon-Yates.*

85. Bar Study 3.

86. Becker, *Ethics in Public Life—A Challenge to the Lawyer,* 2 De Paul L. Rev. 194 (1953); Davis, *The Federal Conflict of Interest Laws,* 54 Colum. L. Rev. 893, 914 (1954); Douglas, W. O., *Honesty in Government,* 4 Okla. L. Rev. 279 (1951); Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office,* 54 Colum. L. Rev. 214 (1954); Pepper, *Morality in Government,* 1 J. Pub. L. 335 (1952).

conduct is proper in given fact situations. This group should have authority to bind the government by its decisions. After approval had been given that a government employee might act in a certain situation, the employee should not be subject to later indictment for his activities nor should the legal result of this activity be voidable at the option of the government. As it now stands, an employee who is unsure of a course of action has no person or authority to whom he may go for a legally effective answer. The rule that no agent can bind the government by his acts is a carry-over from the idea that "the King can do no wrong." It is an anachronism where the government plays so great a part in the business and economic activities of the country. It may be said that if the employee is aware of the conflict of interest, he is already disqualified from acting, but this assumes that all employees have the same "awareness" threshold. Honest minds can differ on what amounts to a conflict of interest. Loyalty is a two-way affair, and it is not too much to ask that the government offer some protection to its employees who act in good faith. Collusion is a possible objection to delegating authority to a group to bind the government, but it is not thought to be prohibitive.

The ultimate solution of the problem of conflict of interest must be essentially an ethical one. Thus the suggestion of fiduciary principles as guide posts. Governmental ethical standards can not be set apart from society's general moral atmosphere. Yet there does exist a double standard of ethical conduct; one for government personnel and another for those outside government. This is more what the public thinks "ought" to be as opposed to what "is." We all like to impose on certain groups (ministers, teachers, doctors) a higher set of standards than need be followed by ordinary folk. This is no more than a form of self-deception, a rationalization of a person's own lack of self-discipline. This paper has suggested that a government employee be held to the standard of conduct of a fiduciary, but this standard should be no higher than that required of non-governmental fiduciaries.

What seems to be needed is a restatement of the fundamentals of integrity and morality which can then be applied by the body proposed above. The following summary of the three great domains of human conduct by Lord Moulton would be an appropriate beginning to such a restatement.

> First comes the domain of Positive Law, where our actions are prescribed by laws binding upon us which must be obeyed. Next comes the domain of Free Choice, which includes all those actions as to which we claim and enjoy complete freedom. But between these two there is a third large and important domain in which there rules neither Positive Law nor Absolute Freedom. In that domain there is no law which inexorably determines our course of action, and yet we feel that we are not free to

choose as we would. The degree of this sense of a lack of complete freedom in this domain varies in every case. It grades from a consciousness of a Duty nearly as strong as Positive Law, to a feeling that the matter is all but a question of personal choice. Some might wish to parcel out this domain into separate countries, calling one, for instance, the domain of Duty, another the domain of Public Spirit, another the domain of Good Form; but I prefer to look at it as all one domain, for it has one and the same characteristic throughout—it is the domain of Obedience to the Unenforceable. The obedience is the obedience of a man to that which he cannot be forced to obey. He is the enforcer of the law upon himself. . . .

In the changes that are taking place in the world around us, one of those which is fraught with grave peril is the discredit into which this idea of the middle land is falling. . . .

[T]here is a widespread tendency to regard the fact that they can do a thing as meaning that they may do it. There can be no more fatal error than this. Between "can do" and "may do" ought to exist the whole realm which recognizes the sway of duty, fairness, sympathy, taste, and all the other things that make life beautiful and society possible. . . .

I am not afraid to trust people—my fear is that people will not see that trust is being reposed in them. Hence, I have no wish that Positive Law should annex this intermediate country. On the contrary, I dread it. Instead of the iron rule of law being thrown over it I would rather see it well policed by the inhabitants. I am too well acquainted with the inadequacy of the formal language of statutes to prefer them to the living action of public and private sense of duty.[87]

JAMES E. HOLMES*

HYPNOTISM AND THE LAW

I. INTRODUCTION

In 1890 St. Clair Thomson, noted London physician, defined hypnotism as "a disease which effects the nervous system."[1] In 1943 Professor George Estabrooks, of Colgate University, defined hypnotism

87. Moulton, *Law and Manners,* 134 THE ATLANTIC MONTHLY 1 (1924), reprinted in CHEATHAM, CASES ON THE LEGAL PROFESSION 124-25 (4th ed. 1955).

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1. Thompson, *The Dangers of Hypnotism,* 9 WESTMINSTER REV. 624, 626 (1890). The Supreme Court of California accepted this definition in 1894 in People v. Worthington, 105 Cal. 166, 38 Pac. 689, 691 (1894). Dr. Thomson was also of the opinion that only a very small portion of the people could be hypnotized, that ignorant peasants and ex-soldiers who are accustomed to blind obedience made the best subjects, and that if a person was subject to hypnosis he was a neurotic with an "unstable equilibrium" and a "frail nervous organization." Thomson, *supra* at 628-29. Today we know that practically any person free from intoxication, extremely low mentality, or mental disorder can be hypnotized. See Note, 31 NEB. L. REV. 577 (1952) (citing authorities). Some doctors have hypnotized between 80 and 96% of their patients. Professor Baudouin, of Geneva, stated that 98% of the people are hypnotizable. Susceptibility is perhaps more dependent on concentration than anything else. Allen, *Hypnotism and Its Legal Import,* 12 CAN. B. REV. 14, 16 (1934).

simply as "exaggerated suggestibility."[2] While this change in definition vividly illustrates the scientific advances made in the area of hypnosis, the legal approach has remained stagnant and immutable. The law can no longer hide behind the language of Commissioner Searls in *People v. Eubanks* that "the law of the United States does not recognize hypnotism."[3] Hypnosis has most assuredly "come of age."[4] It is used for psychotherapeutic purposes;[5] as an aid for stuttering, alcoholism, skin diseases, allergies, asthma, digestive disorders, muscular aches and pains, sex difficulties, and obstetric problems;[6] as an anesthetic;[7] as a weight-reducing aid;[8] and in crime detection and warfare.[9] Hypnosis demands legal recognition and control.

The purpose of this Note is to point out the more important areas in which the phenomenon of hypnosis has impinged upon the law, and then to suggest some necessary changes in the legal approach to the problems encountered. The subject matter has been categorized into three main divisions and various subdivisions having to do with the relation between hypnosis and the criminal law, hypnosis and the law of evidence, and with the current and suggested regulation of hypnosis.

II. RELATION OF HYPNOSIS TO THE CRIMINAL LAW

The problems encountered in dealing with hypnosis and criminal law can be subdivided into two main categories: (1) crimes committed upon the hypnotized subject, and (2) crimes committed by, or through, the hypnotized subject. The core of the problem involved in these crimes is the allocation of responsibility between the hypnotist and his subject for the wrongful conduct.

Before discussing the specific place hypnotism occupies in criminal

2. Estabrooks, *Mobs Ruled by Hypnotism,* Science Digest, Oct. 1943, p. 41. The accepted legal definition of hypnosis appears to be, "a condition, artificially produced, in which the person hypnotized, apparently asleep, acts in obedience to the will of the operator . . . ." Austin v. Barker, 110 App. Div. 510, 96 N.Y.S., 814, 818 (1906). The scientist would say that a hypnotic state exists whenever "an individual reaches a state of hypersuggestibility measured by a standard scale of trance depth and equal to the degree of hypersuggestibility he is known to attain under the influence of trance-inducing suggestions." WEITZENHOFFER, HYPNOTISM: AN OBJECTIVE STUDY IN SUGGESTIBILITY 74 (1953).

3. 117 Cal. 652, 49 Pac. 1049, 1053 (1897).

4. See WOLFE & ROSENTHAL, HYPNOTISM COMES OF AGE (1948); Miller, *Hypnotism Comes of Age,* Reader's Digest, Oct. 1943, p. 11.

5. See WOLBERG, HYPNOANALYSIS (1945).

6. LECRON & BORDEAUS, HYPNOTISM TODAY 163-266 (1947).

7. Sears, *Experimental Study of Hypnotic Anesthesia,* 15 J. EXPERIMENTAL PSYCHOLOGY 1 (1943).

8. Pierce, *Grow Slim by Hypnotism?,* Science Digest, Oct. 1951, p. 36.

9. Estabrooks, *Mobs Ruled by Hypnotism,* Science Digest, Oct. 1943, p. 41.

law, it seems appropriate to consider the following issues relating to the phenomenon itself:

(a) *Can a hypnotized person be induced to commit or to submit to a crime that is against his moral feelings?* There appears to be a decided conflict of opinion on this matter and authorities can be found to support either position. Some authorities believe that every conceivable crime will be committed by, or can be committed upon, a hypnotized subject provided a high degree of hypnosis is attained.[10] Others take the position that a person under hypnosis can not be induced to do or say anything which he would consider indecent or harmful.[11] The latter view is indeed an extreme position since everyone has occasionally committed what he considered immoral or harmful acts even when in a completely sober state. Liegeois, a pioneer in the field of hypnosis, attempted to prove the power of suggestion over an individual's morals by means of numerous experiments. He gave a young girl whom he had hypnotized a powder consisting of sugar telling her that it was arsenic and that he desired her to poison her aunt. The next day as a result of Liegeois' post-hypnotic suggestion the girl put the sugar in her aunt's lemonade. Liegeois also induced a girl to fire a pistol which she believed loaded at her mother.[12] On the other hand, Davis, an English scientist, reported that his experiments indicated that a person would not submit to suggestions contrary to his moral framework no matter how deep the somnambulism.[13] A recent legal writer on the subject has concluded from his study of the authorities that "the more modern and seemingly scientifically accurate view is that such a result (*i.e.*, the induced commission of a crime) is highly probable, if suggested under the proper circumstances and in the appropriate manner."[14] The truth is possibly somewhere between the two extremes. Often times a law-abiding citizen is shocked by the subconscious desires expressed in his dreams. Perhaps under hypnotic suggestion the normal restraints on such desires could be overcome, but it is doubtful that without the presence of a subconscious desire most people could be induced to commit a wrongful act. Since, however, the law must provide for the exception as well as the norm, it is submitted that jurists should not close their eyes to the *possibility* that any criminal suggestion may be accepted

10. FOREL, HYPNOTISM OR SUGGESTION AND PSYCHOTHERAPY 250 (1905).
11. Miller, *Hypnotism Comes of Age,* Reader's Digest, Oct. 1943, p. 11.
12. Ladd, *Legal Aspects of Hypnotism,* 11 YALE L.J. 173, 180 (1902).
13. Allen, *Hypnotism and Its Legal Import,* 12 CAN. B. REV. 14, 18 (1934). The experiments have been attacked from both sides on the ground the subject is usually aware of the desired result, and that during the laboratory experiment he is vaguely conscious that he is acting a part. Ladd, *Legal Aspects of Hypnotism,* 11 YALE L.J. 173, 181 (1902).
14. Levy, *Hypnosis and Legal Immutability,* 46 J. CRIM. L., C. & P.S. 333, 357 (1955).

under hypnosis. This is especially true since it is possible for the subject to be tricked into a crime by suggestions which make it appear that he would be doing a meritorious act. For example, a hypnotized subject has been persuaded to fire an empty pistol, which he believed loaded, at a servant under the suggestion that the subject was being attacked by robbers who would endeavor to take his life.[15] Likewise, a man who would not steal would not hesitate taking an item which he believed was his property. Such misleading suggestions will be readily accepted by a person under hypnosis.

These principles must be kept in mind in fixing the criminal responsibility of both the subject and the hypnotist.

(b) *Can a person be hypnotized against his will?* The majority and perhaps the more accurate view is that a person can be hypnotized without his consent, especially after the first time.[16] There are numerous techniques the hypnotist may employ in order to get the attention and cooperation of the subject without conveying the idea that hypnosis is being attempted.[17]

(c) *Will the subject always forget what occurred during hypnosis?* Here again the authorities seem to be in conflict. Gray states that the "subject always has amnesia for what occurred during the trance."[18] On the other hand, a New York court in *Austin v. Barker* accepted the view that "upon awakening there may be a vivid recollection of all that happened during the apparent sleep."[19] From a legal standpoint the better position would seem to recognize the possibility of either occurrence depending upon the individual hypnotized, the degree of hypnosis obtained, and the suggestions of the hypnotist.[20] If there is a memory loss immediately following the trance it may be revived by subsequent hypnosis.[21]

A. Crimes Committed Upon the Hypnotized Subject

1. Sexual Offences.—The more common types of crimes committed upon a hypnotized person are those of a sexual nature. There appears

15. Ladd, *Legal Aspects of Hypnotism,* 11 YALE L.J. 173, 180 (1902).
16. WOLFE & ROSENTHAL, HYPNOTISM COMES OF AGE 94 (1948); Allen, *Hypnotism and Its Legal Import,* 12 CAN. B. REV. 14, 17 (1934); Note, 31 NEB. L. REV. 575, 577 (1952). *Contra,* Miller, *Hypnotism Comes of Age,* Reader's Digest, Oct. 1943, p. 11.
17. See *Hypnotism as a Weapon,* Newsweek, July 19, 1943, p. 70 (quoting from Dr. George H. Estabrooks).
18. 1 GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE § 96.17 (3d ed. 1958).
19. 110 App. Div. 510, 96 N.Y.S. 814, 818 (1906).
20. See WOLFE & ROSENTHAL, HYPNOTISM COMES OF AGE 91-93 (1948), for a recognition of the importance of the degree of hypnosis attained and the suggestions of the operator as to what the subject will remember of the events which took place during the trance.
21. Allen, *Hypnotism and Its Legal Import,* 12 CAN. B. REV. 14, 18 (1934).

to be little doubt that a hypnotized female can not only be made to submit to sexual abuse, but can be made an active participant in the sexual act.[22]

The most famous case of this nature was that of *Czynski*,[23] tried in Bavaria in 1894. Czynski was convicted under an indictment charging that he had resorted to hypnotic suggestion in order to obtain illicit intercourse. Another famous continental case occurred in France in 1865 when a roving beggar named Castellan was sentenced to twelve years penal servitude for seducing a young girl by means of hypnosis.[24]

Among American cases *State v. Donovan*,[25] a criminal prosecution for seduction, held that evidence of a seduction accomplished either by hypnotism or love-making, or both, was sufficient to warrant a conviction. *Austin v. Barker*,[26] a civil seduction case, recognized that seduction could be accomplished by hypnosis but found the evidence of hypnosis insufficient to sustain a verdict.

The question of whether intercourse procured by hypnosis would support a conviction for rape was before the California Supreme Court as early as 1878.[27] The court held that since force is a necessary element in the crime of rape, the employment of arts and devices, without violence, by which the moral nature of the female is corrupted so that she is no longer able to resist the temptation to yield to sexual desire is not sufficient to constitute rape. The court by dicta classified such acts under seduction.

Since there are two variations of wording in American rape statutes, those which define rape as obtaining intercourse without the woman's consent, and those which define it as having intercourse against the woman's will, it has been argued that the wording of the statute is determinative as hypnosis vitiates consent but not the will.[28] Such a

22. Note, 31 NEB. L. REV. 575, 581 (1952) (citing authority).
23. The case is reported in Ellinger, *The Case of Czynski*, 14 MED. L.J. 150 (1897).
24. MOLL, HYPNOTISM 403 (Hopkirks transl. 1909). Moll refers to the case as one of rape by hypnosis although there was doubt as to whether Castellan's influence over the girl actually reached the point of hypnosis. For other European cases prior to 1909, see MOLL, *supra* at 402-44.
25. 128 Iowa 44, 102 N.W. 791 (1905).
26. 11 App. Div. 510, 96 N.Y.S. 814 (1906). The same court set aside an earlier verdict for the plaintiff on the same grounds. 90 App. Div. 351, 85 N.Y.S. 465 (1904). The plaintiff, a poor witness, was subjected to an able and rigorous cross-examination, and the court felt that the record did not support the verdict. To bolster their conclusion the court took the position that there is usually a vivid recollection of all that happens during the trance, thus casting suspicion upon plaintiff's testimony that she remembered nothing of the occasion until later hypnotic examination.
27. People v. Royal, 53 Cal. 62 (1878).
28. Note, 31 NEB. L. REV. 575, 582 (1952). The note also hypothesizes that in those states that have abolished the criminal actions for seduction or in those requiring a promise to marry and having the consent type rape statute

conclusion presupposes that hypnosis is an absolute and ignores the fact that a great deal is still unknown about the phenomenon itself.[29]

2. *Theft.*—Similar problems are suggested by a holding of an Alabama court that the requisite force necessary to support a conviction for common law robbery did not exist where defendant enticed a woman to part with her money by means of hypnotism.[30] The case has been criticized[31] by analogy to the seduction cases and to *State v. Snyder*,[32] in which the producing of unconsciousness by a drug to obtain money in the custody of the person so rendered unconscious was held a sufficient exercise of force within the meaning of common law robbery.

3. *Undue Influence in Testamentary Schemes.*—It would also seem that hypnosis could be an effective conduit of undue influence in testamentary schemes and that such use of hypnosis should come within the scope of criminal statutes. Although there are no reported American cases directly in point, the writers on undue influence have recognized the possibility and coined the phrase "hypnotic influence" in dealing with the problem.[33] "Hypnotic influence" has been discussed more fully in opinions in non-criminal cases. In a will contest in France in 1893, the court set aside a will leaving all of testatrix's property to a professional magnetist when it was shown that the magnetist had hypnotized her and that he had complete control over her mind and body.[34] Sir Edward Marshall Hall, a famous English barrister, however, failed to upset a will even though the legatee admitted putting testatrix in a hypnotic trance on several occasions.[35]

4. *Homicide.*—Hall also handled the famous murder case of George Smith who was sentenced to death for the bathtub drownings of three of his wives. At the trial the Crown had a difficult time explaining the lack of evidence of violence. Hall, in his private cor-

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there is a loophole in the law which would permit sexual abuses by means of hypnosis to go unpunished.

29. For instance in cases involving sexual crimes by the aid of hypnosis the courts must be careful not to confuse hypnotic influence with intense sexual excitement. Allen, *Hypnotism and Its Legal Import*, 12 CAN. B. REV. 82 (1934).

30. Louis v. State, 24 Ala. App. 120, 130 So. 904 (1930).

31. 22 J. CRIM. L., C. & P.S. 279 (1931). The writer of this comment felt that the conviction could be supported by the doctrine of constructive force.

32. 41 Nev. 453, 172 Pac. 364 (1918).

33. Note, 31 NEB. L. REV. 575, 584 (1952) (citing authority). The writer feels that Fyan v. McNutt, 226 Mich. 406, 254 N.W. 146 (1934) and Griffith v. Scott, 128 Okla. 125, 261 Pac. 371 (1927) strongly suggest that factually a hypnotic influence could have existed, but the opinions do not mention the possibility. Experiments indicate that one can be hypnotically influenced to leave all his property to a total stranger. MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 175-78 (1930).

34. Note, 40 L.R.A. 269, 270 (1897).

35. MARJORIBANKS, FOR THE DEFENSE: THE LIFE OF SIR EDWARD MARSHALL HALL, 104-05 (1929).

respondence, expressed the view that the deaths were hypnotically induced suicides.[36] Other commentators agree that suicide may be accomplished by hypnotism.[37]

5. *Subornation of Perjury.*—Falsification of testimony can theoretically be obtained by hypnosis since retroactive hallucinations can be firmly cemented in a subject's mind during hypnosis.[38]

6. *Conclusions.*—It would seem that most of the problems involved in the various crimes committed upon the hypnotized subject are adequately governed by our present law, with the exception of the sexual assault and theft cases. Until more is known about the phenomenon of hypnosis the writer feels that the lawmakers should not bring the hypnotic sexual assault cases within the legal definition of rape. As to the theft cases, both robbery and larceny require an absence of consent, and the procurement of consent by hypnosis would not seem to fit the definitions. It is suggested that the extortion statutes be amended to expressly encompass the hypnotic theft cases.

B. Crimes Committed by or Through the Hypnotized Subject

1. *Homicide.*—The most celebrated case in which hypnosis was interposed as a defense to murder occurred many years ago in France when Gabriele Bompard claimed that she participated in the murder of her husband while under the hypnotic influence of her lover. The court disallowed the defense declaring that "an honest subject resists a dishonest suggestion," and that if he obeys "it is not because his will is subjugated, but because he consents."[39] An American court[40] went to the other extreme, acquitting the subject and executing the hypnotizer. One McDonald shot and killed deceased. He was acquitted, however, upon a plea that he had been hypnotically influenced to commit his crime by Gray.[41] Gray was tried separately and found guilty of murder in the first degree. On appeal[42] the court sustained the conviction.

In *People v. Worthington,*[43] an 1894 California case, the defendant

36. MARJORIBANKS, *op. cit. supra* note 35, at 311-44.
37. Allen, *Hypnotism and Its Legal Import,* 12 CAN. B. REV. 80, 83 (1934); Ladd, *Legal Aspects of Hypnotism,* 11 YALE L.J. 173 (1902).
38. Allen, *supra* note 37, at 88. An able and rigorous cross-examination can minimize the danger of falsified testimony by means of hypnosis.
39. Ladd, *supra* note 37, at 183.
40. State v. Gray, 55 Kan. 135, 39 Pac. 1050 (1895).
41. Ladd, *supra* note 37, at 183.
42. State v. Gray, 55 Kan. 135, 39 Pac. 1050 (1895).
43. 105 Cal. 166, 38 Pac. 689 (1894). Another American case of murder by a hypnotized person is mentioned in Note, 40 L.R.A. 269, 271 (1897). "[I]n 1895 Hayward was hanged in St. Paul, Minnesota, accused of having induced Blitz by hypnotic suggestions to murder Miss Ging. Blitz was sent to the penitentiary for life."

was indicted for second degree murder in the pistol slaying of her lover. Her defenses were insanity and hypnotism. The court refused to admit evidence of the effect of hypnosis since the only evidence of hypnosis was the testimony of the accused that another had told her to commit the crime.

2. Theft.—Although no reported cases have been found in which theft was accomplished by or through a hypnotized subject, successful experiments have been conducted in this area, and the authorities are in accord that it is possible, either by misleading suggestion or by overcoming the moral barrier, to induce a hypnotized subject to steal.[44]

3. Forgery.—It has been suggested that a person under hypnosis can not only be induced to commit forgery but can simulate signatures with great accuracy. Experiments, however, have been conducted in which it was found that the handwriting of a person under hypnosis retains all its normal characteristics,[45] that attempted fabrications of other signatures are no better than when the individual attempts the fabrication in a normal state, and that a hypnotized person cannot simulate his own handwriting of an earlier age.[46]

4. The Problem of Collective Suggestibility.—Before discussing the criminal responsibility of the hypnotist and the subject, it is necessary to mention the concept of "collective suggestibility."[47] The courts have frequently had self-confessed lynchers before them and refused to convict on the theory that the accused had become so excited by the collective suggestibility of the mob action, that they lacked the requisite criminal intent.[48] The power of collective suggestibility, however, although very persuasive is not actually hypnotism though often referred to as such.

5. Criminal Responsibility.—Returning now to a consideration of criminal responsibility, it seems beyond dispute that the hypnotist, who induces his subject to commit a crime, should be held responsible to the full extent of the law for the actions of the subject.

The legal liability of the hypnotized subject is a more difficult question. The decision of the *Bompard* case that a person who commits a crime under hypnosis is gnilty because he is a criminal anyway cannot be sustained. Such an over-simplification fails to take into account the complexity of the psychic make-up that controls one's

44. Allen, *supra* note 37, at 85.
45. Lacy, *Handwriting and Forgery Under Hypnosis,* 34 J. CRIM. L., C. & P.S. 338, 339 (1944) (citing AMES, FORGERY (1901)).
46. *Ibid.*
47. See Estabrooks, *Mobs Ruled by Hypnotism,* Science Digest, Oct. 1943, p. 41 in which Hitler is referred to as "the world's greatest hypnotist."
48. Note, 31 NEB. L. REV. 575, 588 (1952).

personality. Also, as previously stated, modern science recognizes that a person can be induced by misleading suggestions to commit a crime while believing that he is performing a meritorious act.

It has been suggested that a person who voluntarily submits to hypnosis and thereby aids the hypnotist by placing himself in a vulnerable position should, for having surrendered the control of his will, incur liability for all his acts committed while in a state of hypnosis.[49] Although this has been referred to as the majority view,[50] it too appears to be an oversimplification. As to crimes committed solely by the subject without suggestion by the hypnotist, there exists an analogy to the legal liability of a person who voluntarily enters a state of intoxication. But no such case can be found, and the above rule was intended to apply to cases where the crime is suggested by the hypnotist—that is, to crimes committed through the subject. The intoxication analogy breaks down with the intervention of another personality. Surely a person who submits to hypnotic examination by a reputable psychiatrist cannot be said reasonably to anticipate that he would be used as a pawn for the criminal purposes of the psychiatrist. He is not to be compared to the person who willfully consumes an excessive amount of alcohol.

Of course, a person who voluntarily submits to hypnosis in order to avoid liability for a premeditated criminal act or who suspects beforehand that he will be used for criminal purposes should be held to the same degree of accountability as if he were in a perfectly normal state. But, if a person is hypnotized against his will or enters the trance without suspecting the possibility of foul play, resort should be had to expert testimony in order to determine the appropriate liability commensurate with the degree in which the individual's will power is subdued. This degree of liability may on occasion exonerate him, but more often it will fall somewhere in between complete subjugation and complete responsibility. It is submitted that an application of the irresistible impulse test to all cases of hypnotic crime would be the most desirable way to handle the problem.

III. Relation of Hypnosis to the Law of Evidence

The phenomenon of hypnosis appears in the law of evidence in two main areas. First, there is the question of post-hypnotic influence on the credibility of a witness; and second, the problem of the admissi-

49. Levy, *Hypnosis and Legal Immutability,* 46 J. Crim. L., C. & P.S. 333, 339 (1955). *Contra,* Allen, *Hypnotism and Its Legal Import,* 12 Can. B. Rev. 80, 86 (1934); Ladd, *Legal Aspects of Hypnotism,* 11 Yale L.J. 173 (1902). Ladd is erroneously cited by Levy as supporting the view of ipso facto liability.

50. Levy, *op. cit. supra* note 49.

bility of statements made while the declarant is under hypnosis.

1. Credibility.—The possibility that hypnosis can be used to falsify testimony by means of retroactive hallucinations and post-hypnotic suggestions has already been mentioned. The North Carolina court showed that it was aware of this possibility in *State v. Exum*[51] in which it was held that evidence that defendant had hypnotized his wife on several occasions was admissible, since it was relevant to the credibility of her testimony in his behalf. The court felt that this tended to show that defendant's influence over his wife was greater than is normally attributable to such a relationship. The decision has found support in recent legal articles on hypnosis.[52]

2. Hypnotic statements.—It is believed by some scientists that a hypnotized person will unconsciously reveal truths that he would otherwise conceal in a normal state.[53] Yet there is also the danger that a person under hypnosis may be able to weave subtle webs of falsehood or yield to mistake or fantasy.[54] In view of this, and the added danger that the hypnotist may intentionally or unintentionally mold the examination with his suggestions,[55] the authorities have unanimously agreed that the reliability of hypnosis has not yet been sufficiently established to merit the admissibility of statements made while the subject is in the trance.[56] Moreover, when the statements are of an incriminating nature such as a confession, there remains the constitutional barrier of the privilege against self-incrimination.[57]

For similar reasons, the courts have refused to admit evidence obtained exclusively from hypnotic drugs[58] or the lie detector,[59] although these devices are widely used for detection purposes, in order to obtain leads by which legally admissible evidence may be obtained.[60]

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51. 138 N.C. 599, 50 S.E. 283 (1905).

52. Levy, *Hypnosis and Legal Immutability,* 46 J. CRIM. L., C. & P.S. 333, 340 (1955); Note, 31 NEB. L. REV. 575, 593 (1952).

53. See Note, *supra* note 52, at 590 (citing authority).

54. WOLFE & ROSENTHAL, HYPNOTISM COMES OF AGE 104 (1948); Ladd, *Legal Aspects of Hypnotism,* 11 YALE L.J. 173, 188 (1902).

55. Allen, *Hypnosis and Legal Immutability,* 12 CAN. B. REV. 80, 90 (1934). It is possible hypnotically to suggest to an innocent person that he is guilty and thereby obtain a confession.

56. 3 WIGMORE, EVIDENCE 998 (1940); Allen, *Hypnosis and Legal Immutability,* 11 YALE L.J. 173, 188 (1902); Levy, *Hypnosis and Legal Immutability,* 46 J. CRIM. L., C. & P.S. 333, 341 (1955).

57. Levy, *supra* note 56.

58. On hypnotic drugs and their reliability see Despres, *Legal Aspects of Drug-Induced Statements,* 14 U. CHI. L. REV. 601 (1946); Dession, Freedman, Donnelly & Redbook, *Drug Induced Revelation and Criminal Investigation,* 62 YALE L.J. 315 (1953); Muehlberger, *Interrogation Under Drug Influence: The So-Called "Truth Serum" Technique,* 42 J. CRIM. L., C. & P.S. 513 (1951).

59. Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923) (offer by defendant); People v. Wochnick, 98 Cal. App. 2d 124, 219 P.2d 70 (Dist. Ct. App.), *cert. denied,* 342 U.S. 888 (1950) (offer by prosecution).

60. In Cornell v. Superior Court of San Diego, 52 Cal. App. 2d 99, 338 P.2d

The question of whether statements made during hypnosis could be admitted as evidence was first before the American courts in 1897. In *People v. Eubanks*[61] the Supreme Court of California affirmed the trial court's refusal to admit evidence of an expert hypnotist that he had hypnotized the defendant and that while under hypnosis the defendant had denied his guilt. In 1950 the North Dakota Supreme Court likewise excluded evidence of a hypnotic examination offered in defendant's behalf at a murder prosecution.[62]

The case most frequently cited for the proposition that statements made under hypnosis are not admissible in evidence is *Rex v. Booher*,[63] a 1928 Canadian case. The Crown had employed one Dr. Langsner, a criminologist, to learn the whereabouts of the murder weapon and ultimately to obtain a confession from the defendant. After frequent visits to defendant's cell, Dr. Langsner was successful in both respects. Although he admitted being capable of hypnotizing people, Langsner denied that he had used hypnotism or even talked with the defendant. He stated that he effectuated the results by "feeling the defendant's thoughts." The court refused to admit the confession, holding that the Crown had failed to establish that it was not exacted by means of mental suggestion; the murder weapon, the whereabouts of which had been learned as a result of Langsner's examination, was allowed to be introduced in evidence.

In a very similar case the Supreme Court of the United States dodged an opportunity to pass on the admissibility of hypnotically induced statements.[64] In a murder case the district attorney employed a psychiatrist to question the defendant. After an examination, defendant confessed to the hammer-slaying of his parents but at the trial he objected to the introduction of the confession on the ground that it was hypnotically induced. The doctor emphatically denied

447 (Sup. Ct. 1959), the defendant who was awaiting trial for murder was unable to remember his movements on the night in question. Cornell, his attorney, sought to induce memory recall through hypnosis and, upon the refusal of the sheriff to allow the hypnotist to accompany him for that purpose, petitioned the San Diego Superior Court. Upon denial of his petition, Cornell brought mandamus in the Supreme Court. The court held that, irrespective of the admissibility of such evidence as statements made by the defendant during the examination, hypnosis was recognized by medical authorities for the desired purpose which was the revival of a memory lapse, and the defendant had a constitutional right to such examination in order to prepare his defense.

61. 117 Cal. 652, 49 Pac. 1049 (1897).

62. State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950). In this case an expert on the subject of hypnosis had hypnotized defendant on several occasions and questioned him while he was in such a trance for the purpose of ascertaining whether the defendant was telling the truth or whether he was guilty of the charge made against him. The court affirmed the trial judge's refusal to admit in evidence the statements made during the examination.

63. 50 Can. Crim. Cas. Ann. 271, 4 D.L.R. 795 (1928).

64. Leyra v. Denno, 347 U.S. 556 (1954).

that he had hypnotized the defendant. One expert testified after listening to a recording of the examination, that the psychiatrist's actions could have been nothing but hypnotism.[65] The issue of hypnotism was submitted to the jury, and they found adversely to defendant. The court of appeals[66] refused to interfere with the jury's findings on hypnosis, since it was one of fact concerned largely with the credibility of the defendant as against the doctor. The confession, however, was found to be coerced and was held inadmissible on that ground.[67] After the case was remanded for a new trial,[68] it reached the Supreme Court on the issue of whether the coercion extended to subsequent confessions made the same evening.[69] The Court held that all of the confessions made following the examination were involuntary and mentally coerced, but refused to pass on the effect of hypnosis as such.

Thus it has been seen that although the science of hypnosis has not yet attained sufficient reliability to merit the admissibility of hypnotic statements, its use as a detection device for the exaction of "leads" has been fully recognized and occasionally utilized. Yet, even if its trustworthiness as an inquisitional device is someday established, the admissibility of hypnotic statements in legal proceedings will still be in doubt because of the constitutional privilege against self-incrimination. Also, it appears that such inquisitional devices may not be entirely consistent with our adversary system.[70]

IV. THE REGULATION OF HYPNOSIS

The present legislation dealing specifically with hypnosis is dangerously inadequate. The statutory law is almost entirely devoid of any recognition of the legal problems inherent in the phenomenon of hypnotism.

Nebraska,[71] Oregon,[72] and South Dakota[73] have passed laws forbid-

65. See Levy, *Hypnosis and Legal Immutability,* 46 J. CRIM. L., C. & P.S. 333, 342-43 n.61 (1955) (quoting parts of the examination from the appellate brief).

66. 302 N.Y. 353, 98 N.E.2d, 553 (1951).

67. It seems that the defendant was not informed that the psychiatrist had been called in by the district attorney or that anything he might say during the examination might be held against him, that the district attorney and the police had wired the examination room without defendant's permission and were recording the conversation, and that the psychiatrist played upon defendant's natural hopes and fears. A long series of legal battles followed.

68. 304 N.Y. 468, 108 N.E.2d 673 (1952), *motion to amend remittitur granted,* 304 N.Y. 844, 109 N.E.2d 714 (1952), *cert. denied,* 345 U.S. 918 (1952), *petition for rehearing denied,* 345 U.S. 946 (1952); 113 F. Supp. 556 (S.D.N.Y. 1953); 208 F.2d 605 (2d Cir. 1953), *cert. granted,* 347 U.S. 926.

69. Leyra v. Denno, 347 U.S. 556 (1954).

70. Note, 31 NEB. L. REV. 575, 592-93 (1952).

71. NEB. REV. STAT. § 28-1111 (1956). The Nebraska statute does not forbid public shows of hypnotism unless they are conducted for gain. See Dill v.

ding public shows of hypnotism. Kansas forbids the public hypnotism of a minor under eighteen years of age,[74] and South Dakota forbids the hypnotism of any minor, whether in public or private, unless consent in writing is first obtained from the minor's parent or guardian. Physicians who regularly employ psychotherapy in their practice are exempted from operation of the statute.[75] Virginia has enacted an absolute prohibition against hypnosis unless performed by a licensed physician or surgeon.[76] Maine[77] and Massachusetts[78] have exempted hypnotists from their medical licensing laws. The Wyoming legislature recently repealed the most punitive statute of all,[79] which, in contrast to the above misdemeanor statutes, made it a felony to hypnotize any person under twenty-one years of age in any public show or exhibition[80] and a misdemeanor to hypnotize anyone under twenty-one years of age for any purpose other than medical or surgical treatment with the consent of the parent or guardian.[81] The Tennessee legislature has viewed the problem as a revenue measure and seen fit to require all "fortune tellers, clairvoyants, hypnotists, spiritualists, palmists, phrenologists, etc." to pay an annual $250 privilege tax.[82]

The only legislation closely resembling an attempt to meet the problem of hypnosis as a criminal defense are the statutes requiring consciousness of the criminal act as an element of criminal capacity.[83] These statutes were not passed with an intent to meet the problems of the hypnotic crime (only the Idaho statute is indexed under hypnosis), and it is doubtful if they will ever be sufficient to meet the problems. As previously stated, the irresistible impulse test could best handle the defense of hypnotism.

It is submitted that the public exhibition of hypnotic subjects should be forbidden in all states, if for no other reason than it tends to degrade an important facet of medical science. "The average person, hearing the word hypnotism, envisages a grotesque stage character

Hamilton, 137 Neb. 723, 291 N.W. 62 (1940) (upholding constitutionality of the statute).

72. ORE. REV. STAT. § 167.705 (1959). The Oregon statute does not require that the show be for gain in order to be forbidden.

73. S. D. CODE § 13.3502 (1939). Mere public display of a hypnotized person irrespective of gain is forbidden.

74. KAN. GEN. STAT. ANN. § 38-703 (1949).

75. S. D. CODE § 13.3501 (1939).

76. VA. CODE ANN. § 18.1-414 (1960).

77. ME. REV. STAT. ANN. c. 66, § 8 (1954).

78. MASS. ANN. LAWS c. 112, § 6 (1957).

79. Repeated by Wyoming Laws 1959, c.100, § 1.

80. WYO. COMP. STAT. ANN. § 14-8 (1957).

81. WYO. COMP. STAT. ANN. § 14-9 (1957).

82. TENN. CODE ANN. § 67-4203-47 (1956). *Query:* Would this privilege tax apply to a licensed psychiatrist who utilizes hypnosis for therapeutic purposes?

83. See, *e.g.*, IDAHO CODE ANN. § 18-201 (5) (1947).

with piercing eyes demonstrating a wicked power of black magic."[84] The abolition of these stage performances would go a long way toward restoring hypnosis to its rightful place as an effective tool of science. As early as 1902 it was advocated that public displays of hypnotism in America should be forbidden[85] as they were in Italy, Switzerland, and Portugal.[86]

Another reason for forbidding public performances of hypnotism is that too many stage hypnotists lack scientific or medical training and are totally unaware of the serious consequences that can flow from a single mishap. They are interested in sensationalism at the expense of caution. The subject who is on the verge of a serious maladjustive reaction or of a nervous breakdown should be hypnotized only by the clinically trained hypnotist who is aware of the subject's condition since the cathartic effect of hypnosis produces extremely high tension.[87] A precaution that is always taken by the therapeutic or experimental hypnotist is to remain with the subject fifteen or twenty minutes after bringing him out of the trance to make sure that he has fully returned to a waking state and that only the desired suggestions will have a post-hypnotic effect.[88] It is doubtful if many stage hypnotists take these precautions.

All authorities seem to agree that hypnotism in the hands of amateurs can result in serious consequences,[89] although they would not go to the extremes of the experts consulted in the *Spurgeon Young* case.[90] In this case an autopsy was performed following the death of a young lad in New York. The coroner put the following hypothetical question to a number of leading medical jurists throughout the country:

> [W]hether in a case of youth, seventeen years of age, who had for approximately six months been a chronic sensitive subject, having been protractedly and repeatedly hypnotized many times by amateurs and irresponsible and reckless youthful dabblers in hypnotism,—would physical injury or organic impairment, directly or indirectly, follow from the psychic or emotional disturbances or derangement of nerve function, involved in or due to, the morbid innervation incident to such hypnotic practice, or experimentation in mesmerism, or alleged animal magnetism?[91]

84. Note, 31 NEB. L. REV. 575 (1952).
85. Ladd, *Legal Aspects of Hypnotism,* 11 YALE L.J. 173, 191 (1902).
86. Thomson, *The Dangers of Hypnotism,* 9 WESTMINSTER REV. 624, 628 (1890).
87. WEITZENHOFFER, GENERAL TECHNIQUE OF HYPNOTISM 354-55 (1957).
88. *Id.* at 227-28.
89. MUNSTERBERG, ON THE WITNESS STAND 204 (1930). "[H]ypnotism is not without serious consequences and is therefore certainly not a plaything." On the dangers of hypnosis see DUBOR, THE MYSTERIES OF HYPNOSIS 67-75 (1924).
90. The case is reported in Note, 31 AM. L. REV. 440 (1897).
91. *Id.* at 440.

The scientists with only one dissent voiced an affirmative answer to the question. The coroner's jury recommended that the state legislature pass a law prohibiting the practice of hypnotism.

In 1952 an English jury awarded $8,490 to a girl who charged that as the result of hypnotism by defendant during a music-hall performance she went into a deep psychological depression that lasted almost three years.[92]

In states which do not have statutes like those of Massachussetts and Maine exempting hypnotists from the medical licensing laws, the question has frequently arisen whether a person practicing hypnotism or a similar form of mental suggestion is subject to these laws. The Delaware court has held that under their statute requiring a license for the "prescribing of remedies" the practice of mere hypnotism and message, either alone or in combination, was not practicing medicine within the licensing laws.[93] On the other hand, in an Indiana case a "magnetic healer" was found to be subject to the licensing laws.[94]

Either by statute[95] or court decision[96] many states have exempted the practice of the tenets of any religion from the licensing laws regardless of the degree of mental suggestion employed. The religious practices, however, must be carried out in good faith and not as a guise for a business undertaking.[97] It is not within the purview of this paper to discuss the conflict between freedom of religion and the police power of the state to define the practice of medicine, but it is felt that there would be no constitutional barrier to bringing the practice of hypnosis or other forms of mental suggestion within the licensing laws.

Along the same lines, it is therefore submitted that the practice of hypnosis, public or private, should be limited to a qualified group.

92. See *Entrancing Trial,* Time, Apr. 7, 1952, p. 31.

93. State v. Lawson, 65 Atl. 593 (Del. 1907).

94. Parks v. State, 159 Ind. 211, 64 N.E. 862 (1902); *accord,* Smith v. State, 8 Ala. App. 352, 63 So. 28, *aff'd,* 183 Ala. 116, 63 So. 70 (1913) (mental suggestion); People v. Mulford, 140 App. Div. 716, 125 N.Y.S. 680, *aff'd,* 202 N.Y. 624, 96 N.E. 1125 (1910) (suggestive therapeutics); State v. Pratt, 80 Wash. 96, 141 Pac. 318 (1914) (suggestive therapeutics).

95. See, *e.g.,* COLO. REV. STAT. ANN. § 91-5-17 (1953).

96. Bennett v. Ware, 4 Ga. App. 293, 61 S.E. 546 (1908). Five years later the Georgia legislature enacted a typical religious exemption statute. "Nothing in this Chapter [relating to the licensing of physicians] shall be construed to prohibit . . . the practice of the religious tenets or general beliefs of any church *whatsoever* . . . ." GA. CODE ANN. § 84-906. Tennessee does not have such a broad exemption but does exempt the practice of Christian Science. TENN. CODE ANN. § 63-608 (1956). Nebraska and Ohio have held the practice of Christian Science treatment for a fee to be within the licensing laws. State v. Buswell, 40 Neb. 158, 58 N.W. 728 (1894); State v. Marble, 72 Ohio St. 21, 73 N.E. 1063 (1905).

97. Smith v. People, 51 Colo. 270, 117 Pac. 612 (1911); People v. Wendel, 68 N.Y.S.2d 267 (App. Div. 1946), *aff'd,* 272 App. Div. 1067, 75 N.Y.S.2d 302 (1947); State v. Pratt, 92 Wash. 200, 158 Pac. 981 (1916).

This would certainly be difficult and at first rather arbitrary but indeed desirable. Perhaps a good place to start would be to limit the practice to physicians, psychiatrists, psychologists, and dentists. Once the practice of hypnotism is limited to qualified persons, a privilege to prevent the use as evidence of statements made to such persons should be created. Finally, the law should forbid the hypnotism of anyone without his consent, or the consent of his legal guardian, whatever the purpose—experimental, therapeutic, or otherwise.

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