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RECENT CASES

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—CENSORSHIP OF MOVIE WHICH PRESENTS IMMORALITY AS A PROPER PATTERN OF BEHAVIOR

Petitioner, a motion picture distributor, was refused a license for the film "Lady Chatterley's Lover" on the ground that its theme was immoral within the meaning of New York's motion picture licensing statute.[1] In affirming the ruling of the licensing authority, the New York Court of Appeals held that, since the harmful effect of motion pictures which convey immoral ideas outweighs any positive merit they may have, such films are not within the guarantee of freedom of speech and may be subjected to prior restraint.[2] The court further held that the factors of vividness and mass appeal justified censorship of movies through a licensing system even though this means of restraint might not be valid in other areas of communication. On certiorari to the Supreme Court of the United States, *held,* reversed. A statutory provision which authorizes censorship of motion pictures because they present immorality as a proper pattern of behavior constitutes a restraint on the free advocacy of ideas and is unconstitutional under the first and fourteenth amendments. *Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York,* 360 U.S. 684 (1959).

1. The statute provides that "it shall be unlawful to exhibit, or to sell, lease or lend for exhibition . . . any motion picture film . . . unless there is at the time in full force and effect a valid license or permit therefor of the education department . . . ." N. Y. EDUC. LAW § 129. A license may not be withheld "unless such film is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime . . . ." N. Y. EDUC. LAW § 122. A film is immoral within the statutory definition when its "dominant purpose or effect . . . is erotic or pornographic;" or when it "portrays acts of sexual immorality, perversion, or lewdness, or it . . . expressly or impliedly presents such acts as desirable, acceptable or proper standards of behavior." N. Y. EDUC. LAW § 122a. Petitioner was refused a license because the Motion Picture Division of the New York Department of Education found that the film contained certain scenes which were immoral within the meaning of the statute. The board of regents upheld this refusal, but it did so on the broader ground that the entire theme of the picture was objectionable for the reason that it presented adultery "as a desirable, acceptable, and proper pattern of behavior." This determination was annulled by the supreme court, appellate division, which held the term "immoral" void for vagueness in spite of the extended definition given it in the statute. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 4 App. Div. 2d 348, 165 N.Y.S.2d 681 (1957).

2. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958). The court based its holding largely on the reasoning in Roth v. United States, 354 U.S. 476 (1957), which held that obscene utterances were not "speech" within the meaning of the first amendment. The New York court held that the effect of movies which attractively present immoral ideas is identical to the effect produced by obscenity and that, therefore, the former should be excluded from first amendment protection along with the latter.

The constitutional boundaries of motion picture censorship are vaguely defined, not only because of the uncertainty which surrounds the question of prior restraints in general, but also because the constitutional status of motion pictures in relation to other forms of communication has never been definitely established. Motion pictures have only recently been included within the category of constitutionally protected speech,[3] and it is not yet clear whether their special "capacity for evil" will be held to justify a greater measure of control—either as to form or substance—than is imposed in other areas of communication. In these other areas the prohibition against prior restraint is nearly absolute,[4] the significant exceptions being the application of the doctrine of "clear and present danger"[5] and the restraint of obscenity.[6] It has been contended that the unique vivid-

3. The Supreme Court of the United States originally held that movies were primarily a business enterprise, that they did not constitute a significant organ of public opinion, and that, therefore, they were not entitled to any protection under the first amendment. Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915). Thirty-three years later, in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the Court indicated by way of dictum that the *Mutual* holding would no longer be followed, although it was subsequently invoked by a federal court. RD-DR Corp. v. Smith, 183 F.2d 562 (1950), *cert. denied*, 340 U.S. 853 (1950). Motion picture communication was finally held to constitute "speech" in Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

4. *E.g.*, Thomas v. Collins, 323 U.S. 516 (1945) (speech); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931) (newspapers). The practice of declaring legislation invalid simply because it is deemed to impose a prior restraint has received much criticism. "The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957), (quoting Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951)). See also Desmond, *Legal Problems Involved in Censoring Media of Mass Communication*, 40 MARQ. L. REV. 38, 42-3 (1956).

5. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.). For many years the "present" element in this doctrine was emphasized. Bridges v. California, 314 U.S. 252, 263 (1941) ("the degree of imminence [must be] extremely high"); Whitney v. California, 274 U.S. 357, 377 (1927) ("only an emergency can justify repression"). More recently, however, the Court has not considered this element to be essential, Yates v. United States, 354 U.S. 298 (1957), and has adopted a "grave and probable danger" doctrine; "in each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Dennis v. United States, 341 U.S. 494, 510 (1951) (quoting Judge Learned Hand in Dennis v. United States, 183 F.2d 201, 212 (1950)). The background of this doctrine is discussed in Lancaster, *Judge Hand's Views on the Free Speech Problem*, 10 VAND. L. REV. 301 (1957).

6. Although the Supreme Court had frequently indicated by way of dictum that obscenity is not entitled to constitutional protection, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Chaplinsky v. New Hampshire, 315 U.S. 586 (1942); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931), it's first holding to his effect was in Roth v. United States, 354 U.S. 476 (1957). The test applied by the Court for determining whether the material was obscene was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Prurient interest, as defined by the Model Penal Code, is "an exacerbated, morbid, or perverted" interest in sex. MODEL

ness of motion picture communication warrants the imposition of restraints beyond the narrow limits of these exceptions,[7] but the Supreme Court has so far reserved decision on the matter.[8] The Court has also failed to indicate which forms of restraint are permissible in cases where some restraint is justified from a substantive standpoint.[9] Advocates of motion picture censorship have contended that licensing systems, while probably invalid as applied to publications, are justified in the case of movies because of the greater rapidity with which they reach greater masses of people. It has been said that since a movie may affect many people before injunctive relief is obtained, prior licensing is the only adequate means of protecting public morality.[10] Much of the uncertainty in this area is attributable to the Supreme Court's practice of deciding censorship cases by means of uninformative per curiam decisions.[11] Some of these decisions cite only *Burstyn, Inc. v. Wilson,* a rather ambiguous opinion in which it is not entirely clear whether the statute is held invalid for vagueness, or because of improper substantive content.[12] Further-

PENAL CODE § 207.10, comment at 29 (Tent. Draft No. 6, 1957). Although the principal application of obscenity and "clear and present danger" has been in the field of criminal prosecution, the Supreme Court has consistently recognized, from the moment it established the general prohibition against prior restraints, that obscenity and incitement to crime constitute valid exceptions to that prohibition. Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 716 (1931) (dictum). Recently, the Court invoked the obscenity exception as the basis for holding valid an injunction against the sale of a certain book. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). For discussions of these exceptions in relation to censorship, see Desmond, *Legal Problems Involved in Censoring Media of Mass Communication,* 40 MARQ. L. REV. 38 (1956); Comment, 59 COLUM. L. REV. 337 (1959); Note, *The Supreme Court and Obscenity,* 11 VAND. L. REV. 585 (1958); Note, *Entertainment: Public Pressures and the Law,* 71 HARV. L. REV. 326 (1957).

7. Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (concurring opinion by Frankfurter, J.) (semble); Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 4 N.Y.2d 349, 364, 151 N.E.2d 197, 205, 175 N.Y.S.2d 39, 51 (1958).

8. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684, 689-90 (1959); Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("capacity for evil may be relevant in determining the permissible scope of community control"; but held sacrilegious films not subject to control.)

9. *Ibid.* It is assumed that the term "prior restraint" applies to both licensing systems and injunctive relief. *But see* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

10. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958). Apparently licensing would not be valid in other areas of communication. "Where ordinances order the censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement." Kovacs v. Cooper, 336 U.S. 77, 82 (1949). See also Superior Films, Inc. v. Dept. of Education, 346 U.S. 587 (1954) (concurring opinion by Douglas, J.); Thomas v. Collins, 323 U.S. 516 (1945). The relative merits of the various methods of controlling motion picture content are discussed in Note, *Entertainment: Public Pressures and the Law,* 71 HARV. L. REV. 326, 340 (1957).

11. Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957) (per curiam); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955) (per curiam); Superior Films, Inc. v. Dept. of Education, 346 U.S. 587 (1954) (per curiam); Gelling v. Texas, 343 U.S. 960 (1952) (per curiam). For a criticism of this practice, see Note, *Supreme Court Per Curiam Practice: a Critique,* 69 HARV. L. REV. 707, 719-21 (1956).

12. 343 U.S. 495 (1952). Much of the opinion discusses substance: "the

more, the decisions do not indicate whether the statutes themselves are being rejected or whether they are simply being held inapplicable to the films in question. As a result, some courts have been led to assume that licensing statutes may be valid if carefully worded and restricted to proper objects of prior restraint;[13] other courts have concluded that no effective censorship will be permitted.[14]

The majority opinion reduces the constitutional issue in the instant case to very simple terms by the interpretation which it gives to the court of appeals' construction of the New York licensing statute.[15] The court of appeals' decision is interpreted as holding "Lady Chatterley's Lover" immoral within the statutory definition, not because it is obscene or because it incites viewers to criminal action, but because it presents an idea—adultery—"as being right and desirable for certain people under certain circumstances."[16] The Court concludes that, since the *Burstyn* case has already established the right of motion pictures to *some* protection under the first amendment, and since "the First Amendment's *basic*[17] guarantee is of freedom to advocate ideas,"[18] the censorship in the instant case is invalid on the basis of *Burstyn* alone. Thus, it was unnecessary to determine whether motion pictures warrant a broader substantive basis for control than other media, and also unnecessary to determine whether licensing statutes are invalid per se.

Although the Supreme Court has once again reserved formal decision on the vital issues of motion picture censorship, it has, in spite of itself, conveyed a fairly definite outline of the limits beyond which

state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views," 343 U.S. at 505, but most courts have interpreted the decision as holding the term "sacrilegious" void for vagueness. See cases cited in Note, 37 TEXAS L. REV. 339, n. 20 (1959).

13. *E.g.*, Paramount Film Distrib. Corp. v. City of Chicago, 172 F. Supp. 69 (1959); American Civil Liberties Union v. City of Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954).

14. *E.g.*, Capitol Enterprises v. Regents, 1 App. Div. 2d 990, 149 N.Y.2d 920 (1956); Hallmark Productions, Inc. v. Carroll, 384 Pa. 348, 121 A.2d 584 (1956).

15. All members of the Court were agreed that their decision must rest on the interpretation given the statute by the state court.

16. In concurring opinions Mr. Justice Frankfurter and Mr. Justice Harlan contended that the statute was valid, but improperly applied. Both felt that the majority had erroneously interpreted the phrase "the presentation of adultery as right and desirable" to mean that abstract discussions of the desirability of adultery were prohibited. Mr. Justice Harlan contended that the lower court decision was based on both obscenity and incitement to crime; what was proscribed was "the corruption of public morals, occasioned by the inciting effect of a particular [obscene] portrayal." 360 U.S. at 706. Mr. Justice Frankfurter felt that the statute was intended to advance a legitimate state interest in protecting public morality and criticized the majority for attempting to escape the burden of making case-by-case judgments as to the validity of individual applications of such a statute. The position of Mr. Justice Black and Mr. Justice Douglas was simply that censorship on any basis is untenable.

17. Italics added.

18. 360 U.S. at 688.

such censorship may not go. The majority opinion implies that licensing statutes, if valid at all, are so only to the extent that they are directed toward the elimination of obscenity and incitement to crime.[19] This impression is reenforced by the fact that New York's statutory provision is held invalid under the construction given it by the court of appeals, in spite of that court's extended discussion of the similarity between the interests protected by this provision and those protected by obscenity and "clear and present danger" provisions.[20] It is difficult to conceive of a ground for censorship broader than that imposed by these latter standards, and yet narrower than that imposed by the construction here held invalid. It is submitted that none exists. The Court was almost certainly justified in rejecting the censorship provision applied by the court of appeals. It is assumed that the basic issue in censorship cases should always be whether the individual interest in freedom of speech is outweighed by some greater public interest.[21] On this basis, movies which merely make immorality attractive should probably not be subjected to censorship even though it is conceded that the state has an interest in preventing the general deterioration of public morality.[22] The causal relationship between such movies and an immoral social climate has probably not been demonstrated with sufficient certainty[23] to establish a public interest in their suppression adequate to overcome the individual interest in expressing whatever ideas they may contain. Censorship of obscene films or films which incite illegal conduct is somewhat easier to support. Where movies are obscene, and therefore have no appreciable positive content,[24] it is arguable that the

19. Although the opinion makes no definite statement to this effect, much of its discussion is directed toward distinguishing "the presentation of adultery as right and desirable" from obscenity and incitement to crime. Thus, the impression is conveyed that the latter standards represent the maximum control which could be imposed. Mr. Justice Harlan explicitly states that this is his view: "advocacy of adultery, unaccompanied by obscene portrayal or actual incitement to such behavior, may not constitutionally be proscribed by the State . . . ." 360 U.S. at 705 (concurring opinion).

20. See note 2 *supra.*

21. *Cf.* United States v. Harriss, 347 U.S. 612, 622 (1954); Breard v. Alexandria, 341 U.S. 622, 644-45 (1951); Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

22. In support of the proposition that moral deterioration is a proper matter for state action, see Desmond, *Legal Problems Involved in Censoring Media of Mass Communication,* 40 MARQ. L. REV. 38, 42-3 (1956).

23. Authorities have been unable to agree as to whether obscenity is causally related to immoral action. Note, 71 HARV. L. REV. 326, 349 (1957). The framers of the Model Penal Code are not satisfied that such a relationship exists. See MODEL PENAL CODE § 207.10, comment at 28 (Tent. Draft No. 6, 1957). If the relationship is unclear with regard to obscenity, it must be at least equally so with regard to material which merely make immorality attractive. See Lockhart & McClure, *Obscenity in the Courts,* 20 LAW & CONTEMP. PROB. 587, 593-96 (1955). *But see* Katzev v. County of Los Angeles, 336 P.2d 6 (Calif. 1959), wherein the court in a very thorough and persuasive opinion holds that crime comic books are a clear cause of juvenile delinquency.

24. "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Roth v. United States, 354 U.S. 476, 484 (1957).

individual interest is so small as to be outweighed by the public interest, however vaguely defined. Where movies incite imminent criminal action, the public interest is definite and may be sufficiently great to prevail. However, this line of reasoning assumes that censors will apply the statutory criteria with some degree of accuracy. In the light of practical experience, it is as least as reasonable to assume that censors will tend to restrain films which offend their personal moral codes, regardless of whether obscenity or incitement to crime is technically present.[25] If so, carefully worded statutory provisions will become mere vehicles for the imposition of the moral judgments of a few men upon the rest of society. At any rate, it is clear that the decision in the instant case is directed toward that which cannot be done in the way of censorship, rather than with that which can be done. The opinion does not state that censorship would be valid if confined to obscenity and incitement to crime—it merely implies that it is invalid if not so confined. Thus, this decision seems to leave state legislatures with two narrow[26] standards for censorship, and no assurance that even these may validly be invoked.[27]

25. "Mr. Binford barred from Memphis showings of pictures starring Charles Chaplin and Ingrid Bergman because of personal distaste for their morals; he refused to pass any films showing train robberies, apparently because he was himself robbed while on a train in his youth . . . . During the trial of the *Times Film* case . . . the censor was presented with a definition of obscenity which was the same as that given by the state supreme court. Despite the fact that she was supposed to follow this definition, the censor stated that she did not consider it adequate, apparently having never heard the court's definition before." Note, 71 HARV. L. REV. 326, 338 nn. 87, 88 (1957). One authority, after an exhaustive enumeration of literary and scientific works which have been censored as "obscene," concludes that "[I]t is inevitable, given a system of censorship, that the censor himself apply the criterion of censorship, whatever that criterion may be; and it comes close to the nature of bureaucracy, if not the nature of man, to expand jurisdictional criteria and thus jurisdiction and power. Censors cannot easily be controlled . . . . [J]udicial review comes only after the fact." de Grazia, *Obscenity and the Mail: a Study of Administrative Restraint,* 20 LAW AND CONTEMP. PROB. 608, 616 (1955).

26. These standards do not seem to have the same relevance to motion pictures produced for public consumption as they have in other forms and levels of communication. Movies submitted for licensing will seldom be so devoid of content as to descend to the level of the obscene. See notes 6 and 24 *supra.* As to incitement, the majority in the instant case shows an inclination to apply the "clear and present danger" test to motion pictures, rather than the "grave and probable" test discussed in note 5 *supra:* "Advocacy of conduct proscribed by law is not . . . 'a justification for denying free speech where advocacy falls short of incitement and *there is nothing to indicate that the advocacy would be immediately acted on.*'" 360 U.S. at 689, quoting Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion) (emphasis added). It seems doubtful whether any commercially produced pictures could be found which would come within such a proscription. A possible exception is the danger of public riot resulting from the exhibition of "rock and roll" and other highly stimulating types of movies. *But see* Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 722 (1931), indicating that the danger of civil riot is not a justification for the prior restraint of newspapers.

27. At present, only Mr. Justice Frankfurter and Mr. Justice Harlan have definitely committed themselves in favor of motion picture censorship. On the other hand, only Mr. Justice Black and Mr. Justice Douglas have un-

CONSTITUTIONAL LAW—PRE-EMPTION—FEDERAL COMMUNICATIONS ACT OF 1934 DOES NOT INVALIDATE STATE WIRETAPPING STATUTE

An attorney was convicted of eleven counts of wilfully aiding and employing others to wire tap in violation of the New York Penal Law.[1] The trial court excluded "malice" as an element of "wilfulness" in its jury charge. Upon appeal, defendant contended that in excluding malice the court had construed the statute as a protection against invasions of privacy instead of a malicious mischief statute intended to protect property. Therefore, defendant insisted the statute was pre-empted by the enactment of section 605 of the Federal Communications Act of 1934,[2] a primary purpose of which was to protect against invasions of privacy.[3] Defendant therefore concluded that the statute was contrary to the supremacy clause[4] of the federal constitution. On appeal to the Court of Appeals of New York, *held,* affirmed. Section 605 of the Federal Communications Act of 1934 does not pre-empt state laws which make wire tapping a criminal offense. *People v. Broady,* 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230, *appeal dismissed,* 80 Sup. Ct. 57 (1959).

Federal pre-emption or "occupation of the field" is a unique concept engendered by the federal form of government. Developed primarily for the commerce clause,[5] the Supreme Court has relied upon it also to invalidate state legislation in the areas of sedition[6] and inter-

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qualifiedly opposed it. However, there is strong reason to believe that Mr. Justice Warren and Mr. Justice Brennan are in accord with this latter position. See their dissenting opinions in Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

1. The statute renders guilty of a felony any person who
"shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument. . . or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned . . . ." N.Y. PENAL LAW § 1423(6).

2. "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted commnnication to any person . . . ." 48 Stat. 1103 (1934); 47 U.S.C. § 605 (1952).

3. United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957).

4. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, para. 2.

5. The court has acted to prevent partitioning of the United States by locally erected trade barriers in many cases. *E.g.,* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). See also Pennsylvania v. Nelson, 350 U.S. 497, 513 (1956).

6. 350 U.S. 497, 509 (1956). The Smith Act of 1940, as amended in 1948, 18

national relations.[7] Where the constitutional grant of power to Congress is not exclusive and where the state action is based on traditional police powers, the Court has been more reluctant to apply the exclusion doctrine.[8] And where Congress by its acts occupies only a portion of a field[9] in which the states have concurrent powers, the congressional action will not be implied to supersede state action on matters not covered by the federal legislation unless a conflict exists.[10] Of course, Congress by express provision may permit state action in a field.[11] Absent explicit pre-emption of state law, congressional intent to "occupy the field" to the exclusion of state law must be otherwise clearly manifested.[12] The Supreme Court, in determining whether Congress intended to pre-empt a field, has established three criteria: pervasiveness of federal regulation, dominance of federal interest, and potential state-federal administrative conflict.[13] If any of the three exist federal pre-emption has occurred and federal law supersedes state law even though the state statute merely supplements rather than conflicts with the federal law.[14]

The instant case represents the initial decision on the question of federal pre-emption of state wire tapping statutes. The court was faced with two important questions: Whether the state penal pro-

U.S.C. § 2385 (1958), was held to pre-empt a similar Pennsylvania statute making sedition against the United States a crime.

7. Hines v. Davidowitz, 312 U.S. 52 (1941). The Court held a Pennsylvania statute which increased registration requirements for aliens was pre-empted by federal statute, the regulation of aliens being in the area of international relations and therefore an area of exclusive national concern.

8. UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956) (violence); California v. Zook, 336 U.S. 725 (1949) (highway regulation); Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942); Mintz v. Baldwin, 289 U.S. 346 (1933) (health); Reid v. Colorado, 187 U.S. 137 (1902) (health).

9. Kelly v. Washington, 302 U.S. 1, 10 (1937). See also Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); South Carolina Highway Dep't v. Barnwell Bros. Inc., 303 U.S. 177 (1938); Townsend v. Yeomans, 301 U.S. 441 (1937).

10. Atchison, T. & S.F. Ry. v. Railroad Comm'n, 283 U.S. 380 (1931).

11. Justice Burton, in his dissenting opinion in California v. Zook, 336 U.S. 725, 753 (1949) stated: "Where there is legislative intent to share the exclusiveness of the congressional jurisdiction, appropriate language can make that intent clear." See U.S. CONST., amend. XVIII, § 2: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

12. UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266, 275 (1956); California v. Zook, 336 U.S. 725, 733 (1949); Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E.2d 854 (1946); People v. Fury, 279 N.Y. 433, 18 N.E.2d 650 (1939); People v. Welch, 141 N.Y. 266, 36 N.E. 328 (1894).

13. Pennsylvania v. Nelson, 350 U.S. 497, 502-05 (1956).

14. "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." Mr. Justice Holmes in Charleston & W. C. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915). See Pennsylvania v. Nelson, 350 U.S. 497, 504, (1956); International Shoe Co. v. Pinkus, 278 U.S. 261, 265-66 (1929); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 617-18 (1842). *But see* California v. Zook, 336 U.S. 725, 730 (1949).

vision against wire tapping impinged on federal constitutional jurisdiction under the commerce clause or on federal criminal jurisdiction under section 605, and, if so, had the federal act "occupied the field" to the exclusion of state action? Viewing the state statute as a "local police measure" designed to protect against invasions of privacy, the court held that there was no infringement of constitutional jurisdiction under the commerce clause.[15] Likewise, the court pointed to the doctrine of *United States v. Marigold*[16] and the difference in offenses[17] punished by the two statutes and held that there was no appearance of any impingement upon federal criminal jurisdiction.[18] But even if there was infringement upon federal criminal jurisdiction, the court, using the criteria of the *Nelson* case,[19] held that as to all three criteria[20] there was a failure to show a clear intent on the part of Congress to "occupy the field" of wire tapping to the exclusion of the state.

Several factors tend to negate any presumption of a federal intent to "occupy the field" of wire tapping. The statute itself contains no direction or language manifesting such intent.[21] The federal govern-

15. 5 N.Y.2d at 509, 158 N.E.2d at 822, 186 N.Y.S.2d at 238.

16. "[T]he same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." 50 U.S. (9 How.) 560, 569 (1850). See Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

17. "It is clear. . . that subdivision 6 of section 1423 is violated by interception alone, whether or not there is a divulgence of the communication and/or its fruits." 5 N.Y.2d at 510, 158 N.E.2d at 823, 186 N.Y.S.2d at 239. The Supreme Court has never decided whether both interception and divulgence are necessary under the Federal act. Benanti v. United States, 355 U.S. 96, 100 n.5 (1957). This court seems to believe that they are both necessary. 5 N.Y.2d at 510, 158 N.E.2d at 823, 186 N.Y.S.2d at 239.

18. 5 N.Y.2d at 510, 158 N.E.2d at 823, 186 N.Y.S.2d at 239.

19. Pennsylvania v. Nelson, *supra* note 6.

20. (1) Pervasiveness of federal regulation: "[W]hen the single clause of section 605 is compared with the broad sweep of the Smith Act . . . and the Communist Control Act . . . the Nelson case is hardly persuasive authority for holding the States pre-empted from punishing wire tapping." 5 N.Y.2d at 512, 158 N.E.2d at 824, 186 N.Y.S.2d at 240. (2) Dominance of federal interest: The court finds that protection of the individual's right of privacy "is an area primarily entrusted to the care of the States . . . falling logically within the ambit of the State's police power. In any case, the field of wire tapping would not appear to be so peculiarly affected with a Federal interest that State regulation 'must be assumed' to be precluded." 5 N.Y.2d at 513, 158 N.E.2d at 824, 186 N.Y.S.2d at 241. (3) Potential state-federal administrative conflict: "Entirely lacking. . . is the evidence of any requests to local authorities, by the President or the Director of the Federal Bureau of Investigation . . . to turn over to Federal authorities all information concerning wire-tapping activities so as to 'avoid a hampering of uniform enforcement of its program by sporadic local prosecutions'. . . . The sparsity of prosecutions under section 605 . . . indicates the absence of any 'federal program' to combat wire tapping. . . ." 5 N.Y.2d at 513, 158 N.E.2d at 824-25, 186 N.Y.S.2d at 241-42.

21. Brief for Respondent, p.46, People v. Broady, 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230 (1959).

ment has made only one prosecution[22] under section 605, an indication that punishment for wire tapping is almost exclusively a state matter. The Supreme Court in two recent decisions[23] involving the federal statute failed to find pre-emption although such a holding would have been supportable in either case. In addition Pennsylvania and Illinois have recently enacted comprehensive wire tapping statutes[24] and the Maryland Supreme Court[25] has held no federal "occupancy of the field," all of which are indications that states do not consider themselves excluded by section 605 from a traditional area of state control. A strong possibility exists that population growth and improved methods of communication will result in increased pressure for uniform federal legislation in areas of traditional state control. The result will be increased litigation and continued dissatisfaction with the decisions if the present methods of determining federal pre-emption are used. Only congressional action[26] can insure a satisfactory solution.

CONSTITUTIONAL LAW—SCHOOLS—UNCONSTITUTIONALITY OF STATUTE REQUIRING BIBLE READING IN PUBLIC SCHOOLS

Plaintiffs, a husband, his wife and three children, sought a federal court injunction prohibiting compulsory reading of the Bible and recitation of the Lord's Prayer in the Pennsylvania schools attended by the children.[1] Under a Pennsylvania statute, verses from the Bible

22. Note, 67 YALE L.J. 932 & n.2 (1958).

23. Benanti v. United States, 355 U.S. 96 (1957) (New York statute authorizing wire tap by state officers invalid as *conflicting* with § 605); Schwartz v. Texas, 344 U.S. 199 (1952) (admission of wire tap evidence in state court not precluded by § 605). Texas has recently enacted a statute providing that all evidence obtained in violation of § 605 is inadmissible in Texas courts. Note, 67 YALE L.J. 932, 934 & n.4 (1958).

24. Note, 67 YALE L.J. 932 (1958).

25. Robert v. State, 151 A.2d 737 (Md. 1959).

26. A congressional enactment similar to a bill which passed the House (104 CONG. REC. 12808), but failed in the Senate in 1958 would practically solve the problem.

> "No Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all State laws in the same subject matter, unless such Act contains an express provision to that effect, or unless there is a direct and positive conflict between such Act and a State law so that the two cannot be reconciled or consistently stand together." H.R. 3, 85th Cong., 2d Sess. (1958).

However, the bill as written, does not prevent a retroactive application which could result in mass confusion. Congress should eliminate this possibility by providing that the rule should apply only to Congressional legislation enacted following the passage of this bill.

1. The parents are members of the Unitarian Church which they attend with their three children. Two of the children are in junior high school. The

are required to be read in the public schools on each school day.[2] Plaintiffs contended that this practice constituted an "establishment of religion and a prohibiting of the free exercise thereof"[3] in violation of rights protected under the first amendment to the United States Constitution and made applicable to the states by the fourteenth amendment.[4] The defendants maintained that daily reading of Bible

oldest child, a son of eighteen, was a high school senior at the time the action was filed, but inasmuch as he had been graduated prior to the trial, all parties agreed that the application for an injunction as to him was moot. Nevertheless, the court considered the evidence he gave relevant to the practices in the schools. 177 F. Supp. at 399. See note 3 *infra.*

2. PA. STAT. ANN. tit. 24, § 15-1516 (1950) provides:

> "At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge: Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.
>
> "If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged."

3. Plaintiffs made a similar complaint on the same grounds against the daily practice of recitation of the Lord's Prayer immediately following the scripture reading. Prayer is not mentioned in the statute, but the practice had been employed for a number of years in the school. The court considered separately the issue raised by (1) the Bible reading and (2) the Bible reading followed by recitation of the Lord's Prayer. 177 F. Supp. at 403-04.

One of the plaintiff children testified that "during the reading of the Bible a standard of physical deportment and attention of higher caliber than usual was required of the students." *Id.* at 400. The plaintiff-father testified that the Bible was read in a manner of authority in excess of ordinary school authority. The three children and their father testified as to matters of religious doctrine presented by a literal reading of the Bible in school which were opposed to the religious beliefs held by their family. Although the father did not complain to the school authorities concerning the practices he sought to have enjoined, the decision relates the manner in which the oldest child, Ellory Schempp, demonstrated his objections and the actions of the school authorities in response, as follows:

> "Ellory Schempp, however, did complain of the practices, and demonstrated his objection first in November of 1956 by reading to himself a copy of the Koran while the Bible was being read, and refusing to stand during the recitation of the Lord's Prayer. He testified that his home room teacher stated to him that he should stand during the recitation of the Lord's Prayer, and that he then asked to be excused from 'morning devotions.' Afterwards he was sent to discuss the matter with the Vice-Principal and the School Guidance Counsellor. As a result, for the remainder of the year, Ellory spent the period given over for 'morning devotions' each day in the Guidance Counsellor's office. At the beginning of the next academic year . . . he asked his then home room teacher to be excused from attendance at the ceremony. After discussing the matter with the Assistant Principal, that official told Ellory that he should remain in the home room and attend the morning Bible reading and prayer recitation period as did the other students. This he did for the remainder of the year." *Id.* at 401.

4. The first amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Supreme Court brought the first amendment guaranties of religious freedom within the rights protected against infringement by state action under the fourteenth amendment. The plaintiffs in the instant case cited Murdock v. Pennsylvania, 319

verses without comment does not favor or establish religion or prohibit the free exercise thereof but is an aid to mental and moral training of pupils which the state has a right to utilize. The defendants further asserted that in respect to religious practices there was no compulsion upon the plaintiffs. *Held,* for the plaintiffs. Reading from the Bible in the public schools as required by the Pennsylvania statute is an unconstitutional establishment of religion and an interference with the free exercise thereof. *Schempp v. School Dist. of Abington Township,* 177 F. Supp. 398 (1959).

The constitutionality of Bible reading in the public schools under both the federal and state constitutions has been widely litigated in the state courts, and the majority of jurisdictions considering the question have upheld the practice.[5] The issue usually involved is whether the Bible or the particular version of the Bible used is sectarian literature.[6] The Supreme Court has never ruled on the constitutionality

U.S. 105 (1943) for the same principle.

5. Decisions sustaining compulsory Bible reading: Spiller v. Inhabitants of Woburn, 94 Mass. (12 Allen) 127 (1866); Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908). Decisions holding compulsory Bible reading invalid: People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); State *ex rel.* Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929). Compulsory attendance but not the Bible reading itself was held invalid in People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927).

Decisions sustaining Bible reading with no direct legal compulsion: People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1921); Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Billard v. Board of Educ., 69 Kan. 53, 76 Pac. 422 (1904); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); Pfeiffer v. Board of Educ., 118 Mich. 560, 77 N.W. 250 (1898); Kaplan v. Independent School Dist., 171 Minn. 142, 214 N.W. 18 (1927); Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed,* 342 U.S. 429 (1952); Lewis v. Board of Educ., 247 App. Div. 106, 286 N.Y. Supp. 174 (1936); Nessle v. Hum, 2 Ohio Dec. 60 (Mahoning County C.P. 1894); Stevenson v. Hanyon, 7 Pa. Dist. 585 (Lackawanna Co. C.P. 1898); Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956). Decisions holding Bible reading with no direct legal compulsion invalid: Herold v. Parish Bd. of Educ., 136 La. 1034, 68 So. 116 (1915); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890). Use of the Bible as a textbook rather than a religious exercise was sustained in Donahoe v. Richards, 38 Me. 379 (1854).

Less than a month before the instant case was decided, the New York Supreme Court upheld the constitutionality of a board of education resolution directing that a nonsectarian prayer be recited each day in the public schools. However, the court conditioned its approval on the board's adoption of a procedure to insure that the parents are notified of the prayers and asked to indicate if their children should participate in them. In a well documented and scholarly opinion, Justice Meyer reviewed the history of the problem of separation of church and state in America stressing the constitutional issue. Engel v. Vitale, 191 N.Y.S.2d 453 (Sup. Ct. 1959). For a survey of the state court Bible reading cases, see *Id.* at 487-90.

6. Cushman concludes that the wording of the various state constitutional provisions for religious freedom appears unimportant in affecting the outcome of the Bible reading cases in the state courts, for courts confronted with substantially the same facts under practically identical constitutional provisions have sustained opposite results. To substantiate this conclusion he cites the similarities between the constitutional provisions of Texas (under which compulsory Bible reading was sustained) and Illinois (under which compul-

of public school Bible reading, having rejected the opportunity to decide this question in *Doremus v. Board of Education.*[7]

The history of the adoption of the first amendment indicates that the drafters primarily intended the "establishment of religion" clause to prohibit the establishment of a national church.[8] Although the Court has incorporated Jefferson's "wall of separation between Church and State" doctrine[9] into its interpretation of the clause, it subsequently held[10] that a congressional appropriation for an addition to a hospital operated by a religious order was not a law respecting the establishment of religion. Not until 1947 in *Everson v. Board of Education,*[11] did the Court indicate an intent to enforce rigidly the

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sory Bible reading was held invalid), and between Colorado (under which voluntary Bible reading was sustained) and Wisconsin (under which it was held invalid). Cushman, *The Holy Bible and the Public Schools,* 40 CORNELL L.Q. 475, 477 & n.12 (1955).

In two cases Catholics objected to compulsory reading of the King James version of the Bible in public schools as restricting their freedom of conscience. The practice was held invalid: People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); State *ex rel.* Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929).

In all of the cases listed in note 5 *supra,* where Bible reading with no direct legal compulsion was sustained, it was found that the versions or portions of the Bible used were not sectarian. In the following cases, however the Bible readings were held to be sectarian: People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Bd. of Educ., 136 La. 1034, 68 So. 116 (1915) (New Testament); State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed,* 343 U.S. 429 (1952); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890) (King James version). On sectarian instruction in the public schools, see Punke, *Religious Issues in American Public Education,* 20 LAW & CONTEMP. PROB. 138 (1955); Sutherland, *Due Process and Disestablishment,* 62 HARV. L. REV. 1306, 1338-44 (1949); Comment, *Bible Reading in the Public Schools,* 22 ALBANY L. REV. 156 (1958); Note, *Bible Reading in Public Schools,* 9 VAND. L. REV. 849 (1956).

Statutes requiring Bible reading in the public schools: ALA. CODE ANN. tit. 52, §§ 542-44 (1940); ARK. STAT. ANN. § 80-1606 (1947); DEL. CODE ANN. tit. 14, § 4102 (1953); FLA. STAT. ANN. § 231.09(2) (1943); GA. CODE ANN. § 32-705 (1952); IDAHO CODE ANN. § 33-2705 (1948); KY. REV. STAT. ANN. § 158.170 (1955); MASS. ANN. LAWS c. 71, § 31 (1945); N.J. STAT. ANN. § 18:14-77 (1940) (Old Testament only); PA. STAT. ANN. tit. 24, § 15-1516 (1950); TENN. CODE ANN. § 49-1307 (1956). Statutes permitting but not requiring Bible reading in the public schools: IOWA CODE ANN. § 280.9 (1949); KANS. GEN. STAT. ANN. § 72-1722 (1949); N.D. REV. CODE § 15-3812 (1943).

7. The Court refused to hear the merits of this case since the appellant's interest as a taxpayer was insufficient to constitute a justiciable controversy while the question of the rights of the child in the case became moot with her graduation from school. 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed,* 342 U.S. 429 (1952).

8. See 1 BENTON, ANNALS OF CONGRESS 729-31 (1858); BRADY, CONFUSION TWICE CONFOUNDED 5-49 (1955). See also notes 11 & 14 *infra.*

9. Reynolds v. United States, 98 U.S. 145, 164 (1879). See note 11 *infra* for origin of "wall of separation" doctrine.

10. Bradfield v. Roberts, 175 U.S. 291 (1899).

11. 330 U.S. 1 (1947). The majority opinion delivered by Mr. Justice Black traced the history of the development of the movement for separation of church and state from the religious persecutions of Europe and colonial America to the views on religious freedom expressed by Jefferson and Madison, which influenced the drafting of the first amendment. For additional historical survey of separation of church and state, see Engel v. Vitale, 191

"wall of separation" doctrine. Although the Court in that case unanimously agreed that the first amendment prohibits state aid to religion, five of the justices considered transportation of children to parochial schools at public expense to be aiding the children, not religion.[12] A year later the Court in *Illinois ex rel. McCollum v. Board of Education*[13] rejected as an unconstitutional aid to religion a public school "released time" program whereby religious groups were permitted to conduct religious instruction on school property during school hours for students released from part of their regular studies at their parents' requests.[14] In *Zorach v. Clauson*[15] the Court qualified its position

N.Y.S.2d 453 (Sup. Ct. 1959); Lardner, *How Far Does the Constitution Separate Church and State?*, 45 AM. POL. SCI. REV. 110 (1951).

The Court in the *Everson* case found the "establishment of religion" clause of the first amendment to mean:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" 330 U.S. at 15-16.

The "wall of separation" doctrine has its origin in a phrase used by President Jefferson in a letter to a group of Baptists in 1802. In Reynolds v. United States, 98 U.S. 145, 164 (1879), Chief Justice Waite, expressing the unanimous opinion of the Court on the meaning of the religious freedom clause of the first amendment, declared this phrase to be "almost an authoritative declaration of the scope and effect of the amendment."

12. The New Jersey statute under which the parochial school students were transported was held not to violate the first amendment, which "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U.S. at 18. Mr. Justice Rutledge, in his dissent also discussed Madison and Jefferson on religious liberty and concluded that the first amendment prohibits "not simply an established church, but any law respecting an establishment of religion . . . ." *Id.* at 31. For a criticism of the reasoning of the majority opinion and the dissent, which approves of the result in *Everson*, see O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 189-218 (1949).

13. 333 U.S. 203 (1948). A voluntary association, the Champaign Council on Religious Education, had received permission from the Board of Education to offer religious classes for less than an hour each week. The instructors were employed by the council at no expense to the schools but were subject to approval and supervision by the superintendent of schools. The religious instructors made absentee reports to the secular teachers. Students not desiring to undertake the religious instruction were required to go from their classrooms to other parts of the school to continue their secular studies. The complainant, an atheist parent and taxpayer, sought relief against continued use of the school buildings for the purposes of this program. *Id.* at 208-09.

14. Counsel for the Board of Education maintained that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." The Court, however, rejected this contention. *Id.* at 211. Mr. Justice Black, who delivered the opinion concluded: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve

in *McCollum,* upholding a New York "released time" program in which the cooperation of the schools was found to be an accommodation rather than an aid to religion since the religious classes were not conducted on school property and the only assistance given by the schools was the release of pupils to take religious studies at the request of their parents.[16] *Zorach* seems to represent a partial relaxation of the "wall of separation" doctrine, which had reached its zenith in *McCollum.*

Study of the Bible in the public schools for its historical, moral, literary or artistic merit if divorced from religious indoctrination, the

their lofty aims if each is left free from the other within its respective sphere." *Id.* at 212. In a concurring opinion Mr. Justice Frankfurter presented a documented survey of the decreasing sectarianism of the American public schools and their increasing secularization. *Id.* at 212-32. Mr. Justice Reed, dissenting, took issue with the majority's interpretation of the phrase "an establishment of religion":

"The phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, 'Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.' Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion." *Id.* at 244, quoting from 1 BENTON, ANNALS OF CONGRESS 730 (1858). See Cushman, *Public Support of Religious Education in American Constitutional Law,* 45 ILL. L. REV. 333, 349-56 (1950). For criticisms of the *McCollum* rationale, see O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION, 219-53 (1949). See also Corwin, *The Supreme Court as National School Board,* 14 LAW & CONTEMP. PROB. 3 (1949), for sounder criticisms. For a discussion of *Everson* and *McCollum,* see BRADY, CONFUSION TWICE CONFOUNDED, 51-161 (1955); Lardner, *How Far Does the Constitution Separate Church and State?,* 45 AM. POL. SCI. REV. 110, 127-32 (1951).

15. 343 U.S. 306 (1952).

16. The New York Court of Appeals distinguished the New York "released time" program from the one found unconstitutional in *McCollum* as follows:

> "In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There must be no announcement of any kind in the public schools relative to the program and no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction. All that the school does besides excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason." Zorach v. Clauson, 303 N.Y. 161, 168-69; 100 N.E.2d 463, 465 (1951).

Mr. Justice Douglas, expressing the majority opinion of the United States Supreme Court invited attention to the ways in which government recognizes and accommodates religion by Thanksgiving Day proclamations, prayers in legislative assemblies, courtroom oaths and other examples of recognition of God. He recognized the strong religious spirit in our population:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make

court in the instant case held not objectionable. Primarily, however, the court found that the Bible is a book of worship[17] and reading it daily to children as the Pennsylvania statute requires amounts to religious instruction even if the religious concepts may vary from child to child or are not instilled at all.[18] The statute was held to aid all religions—specifically Christianity—in violation of the first amendment as interpreted by the Supreme Court in the *Everson* case.[19] Finding that the scripture reading and prayer recitation periods were often called "morning devotions" and that more respectful behavior than usual was required of the students during these periods, the court concluded that these exercises were of a religious nature.[20] Even if the evidence establishes that the religion promulgated is sectless, that

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room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here." 343 U.S. at 313-14.

Mr. Justice Black dissented on the ground that in accordance with the *McCollum* decision government must maintain complete neutrality toward religion, and the New York "released time" program did not cure the weakness of the Illinois plan in that both systems used compulsory school machinery to channel pupils into sectarian classes by releasing students attending the religious classes from part of their academic studies. *Id.* at 315-20. Mr. Justice Frankfurter and Mr. Justice Jackson expressed rather similar dissenting views. *Id.* at 320-25. For comment on *Zorach*, see Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 488-94 (1955) (comparing *Everson, McCollum*, and *Zorach*). See also Engel v. Vitale, 191 N.Y.S.2d 453, 483-86 (Sup. Ct. 1959). Compare Perry v. School Dist. No. 81, 344 P.2d 1036 (Wash. 1959), sustaining a released time program similar to the one in *Zorach*.

17. The court heard the testimony of two expert witnesses, a Jewish theologian who testified for the plaintiffs that portions of the New Testament were offensive to Jews if read to children without explanation, and a Protestant minister, a defense witness, who stated the opinion that excluding the New Testament from Bible reading would be a sectarian practice. Scheinpp v. School Dist. of Abington Township, 177 F. Supp. 398, 401-04 (1959).

18. *Id.* at 404-05.

19. 330 U.S. at 15-16.

20. 177 F. Supp. at 405-06.

Protestant, Catholic and Jewish versions of the Bible have all been read at various of the daily exercises, or that different religions have been equally established, the practices are nevertheless unconstitutional[21] under the *McCollum* rationale.[22] Moreover, since the Bible was found to be an "essentially religious text,"[23] a state requirement of daily reading in public schools is proscribed by the first amendment and the *McCollum* doctrine regardless of whether the practice is considered a religious ceremony.[24] Although the statute does not compel the pupils to attend the Bible reading exercises, their attendance at school is required by law, and the teachers who are compelled by the statute to conduct these exercises will naturally use every effort to assure that their students are present.[25] Because of such indirect or subtle compulsion the statute was held to restrict the free exercise of religion.[26]

In its enthusiasm for protecting the rights of the plaintiffs, the court took an unnecessarily extreme step in ruling the Pennsylvania statute unconstitutional. The court altered the meaning of "compulsion" by including within its definition subtle pressures and social suasion. Assuming the court was correct in its finding that the attendance of the school children at the Bible reading and prayer exercises was compulsory, it was not shown that this compulsion was required by the statute. The statute does not expressly compel the attendance of public school students at the Bible reading exercises, and although the statute does not set forth procedures for allowing those children to be excused whose parents disapprove of the practice, it seems that the statute would permit such procedures to be employed.[27] The court could, therefore, have condemned the compulsory practices

21. *Id.* at 406.
22. 333 U.S. at 212.
23. 177 F. Supp. at 406.
24. *Ibid.*
25. *Id.* at 406-07. The court noted that the statute imposed the sanction of discharge from office on teachers who fail to observe the required exercises. It was shown that the plaintiff Ellory Schempp was told to attend the exercises by the Assistant Principal, acting under official authority, see note 3 *supra.* Ellory's home room teacher also directed him on one occasion to stand while the Lord's Prayer was recited. The court recognized the tendency of children to imitate and conform to the behavior of their associates.
26. The argument that subtle pressure constitutes compulsion was rejected by Justice Meyer in the *Engel* case: "To recognize 'subtle pressures' as compulsion under the [First] Amendment is to stray far afield from the oppressions the Amendment was designed to prevent; to raise the psychology of dissent, which produced pressure on every dissenter, to the level of governmental force; and to subordinate the spiritual needs of believers to the psychological needs of nonbelievers. The equality of treatment which the Amendment was designed to produce does not require, indeed proscribes, so doing." 191 N.Y.S.2d 453, 492 & n. 172. See also Mr. Justice Jackson's concurring opinion in the *McCollum* case, 333 U.S. at 232.
27. For text of the Pennsylvania statute, see note 2 *supra.* No language in the statute indicates that a procedure allowing nonparticipation in the exercises by children of objecting parents would violate any provision of the statute. Nonparticipation procedures could be instituted in various ways, by

found to exist in the instant case without holding the statute unconstitutional. As the *Zorach*[28] opinion noted and approved, government recognition of God and a religious spirit are an important part of the American heritage. Thanksgiving Day proclamations, prayers in Congress, and chaplains in the armed forces are but a few examples of this recognition. Including public school Bible reading in this category of government recognition of religion seems desirable if it can be insured that participation in the exercises is voluntary. This would be in accord with the original meaning of the first amendment. It is submitted that the rationale of the recent New York case of *Engel v. Vitale*[29] is better reasoned than the holding in the instant case and is more likely to be followed in future decisions in the area of religious instruction in public schools. Nevertheless, the Bible reading statutes most likely to survive future constitutionality attacks are those which expressly safeguard against compulsory participation or attendance.

CRIMINAL LAW—BRIBERY—OFFER TO GIVE MONEY TO CONGRESSMAN'S POLITICAL PARTY

Defendant allegedly made an offer to his Congressman to contribute $1,000 per year to the Republican party in exchange for the Congressman's use of influence to procure a federal postmastership for defendant. The government charged defendant with having offered a bribe to procure an appointive public office in violation of section 214 of the federal anti-bribery statute.[1] The district court granted defendant's motion to dismiss, holding that the information did not state facts sufficient to constitute an offense against the United States.[2] On appeal to the Supreme Court of the United States, *held,* reversed. An offer to a Congressman to pay money to his political party in exchange for his use of influence in securing an appointive position for the offeror is a crime under the statute. *United States v. Shirey,* 359 U.S. 255 (1959).

Section 214 is similar in terminology to the definition of bribery at

school boards, principals and teachers. For a discussion of alternative procedures, see Engel v. Vitale, 191 N.Y.S.2d 453, 492-93 (Sup. Ct. 1959).

28. 343 U.S. 306, 313-14 (1952). See note 16 *supra.*

29. 191 N.Y.S.2d 453 (Sup. Ct. 1959). See note 5 *supra.*

1. 18 U.S.C. 214 (1952) provides:

"Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure an appointive office or place under the United States for any person, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

2. United States v. Shirey, 168 F. Supp. 382 (D.C. Pa. 1958).

common law[3] and under state statutes.[4] Generally "the bribe may be in the form of money, property, services or *anything else of value.*"[5] But it "must be something real, substantial, and of value to the receiver, as distinguished from something imaginary, illusive, or amounting to nothing more than the gratification of a wish or hope on his part."[6] When confronted with third-party beneficiary situations such as that in the instant case, the state courts have usually theorized that a bribee can receive a *thing of value* even though the stated consideration flows from the bribor to a third party. It has been held that a payment to a campaign fund may be a bribe[7] even though the bribee is not a candidate for public office;[8] a promise to an alderman to reinstate a city employee is a promise of a thing of value to the alderman;[9] and a promise by a candidate for public office to work for less than his statutory salary is a promise of a thing of value to the voters.[10] No case involving a violation of section 214 has previously been considered by any of the federal courts,[11] and out of the four cases arising under section 215 (soliciting bribes) only one comes close to the third-party beneficiary problem.[12] It is of little value as precedent, however, since the defendant was also charged with soliciting money for his own personal benefit.[13]

In the instant case the Court took no notice of any of the federal or state court bribery decisions, but confined itself to interpretation of

3. "Bribery, at common law, is defined to be 'the receiving or offering any undue reward by or to any person whatever whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity.' " Walsh v. People, 65 Ill. 58, 65, 16 Am.Rep. 569, 575 (1872).

4. See, *e.g.*, N.Y. PENAL LAW § 378; TENN. CODE ANN. § 39-801 (1956).

5. Perkins, *Sampling the Evolution of Social Engineering,* 17 U. PITT. L. REV. 362 (1956).

6. People v. Hyde, 156 App.Div. 618, 141 N.Y.Supp. 1089, 1093 (1913), 13 COLUM. L. REV. 643.

7. State v. Smagula, 39 N.J.Super. 187, 120 A.2d 621 (1956), 55 A.L.R.2d 1132 (1957).

8. *In re* Crum, 55 N.D. 876, 215 N.W. 682 (1927), 55 A.L.R. 220 (1928).

9. People *ex rel.* Dickenson v. Van de Carr, 87 App.Div. 386, 84 N.Y. Supp. 461 (1903).

10. State *ex rel.* Church v. Dustin, 5 Ore. 375 (1875); State *ex rel.* Newell v. Purdy, 36 Wis. 213 (1874).

11. 168 F. Supp. at 384.

12. United States v. Hood, 200 F.2d 639 (5th Cir. 1953).

13. "Several of the paragraphs of the indictment alleged to be prejudicial and surplusage charge that it was a part of the conspiracy to pretend that the contributions would be used by the Mississippi Democratic Committee and that the Committee was in need of funds to meet office expenses, and then to fail to maintain books and records maintaining the amount of contributions and money received by said Committee and to fail to report to the Mississippi Democratic Committee the amount of money received. *Such averments go to show that there was no necessary repugnancy between soliciting and receiving money as political contributions and doing so for the personal emolument of the defendants.*" 200 F.2d at 642. (Emphasis added.)

the federal statute. The majority[14] felt that either of two possible constructions would serve to condemn the activities of the defendant. Under one reading, "even though the Republican Party was to be the ultimate recipient of the money, this was a promise to Stauffer of money . . . ."[15] Under the other reading, "the word 'person' in the statute is broad enough to include the Republican Party . . . ."[16] The majority ignored the government's contention that an offer to make a contribution to the political party was an offer of a "thing of value" to the Congressman.[17] The four dissenting justices felt that it was a "remarkable construction of the language of § 214 to find that an offer to X to pay money to Y, with whom X is not claimed to have any financial relationship, is an offer of money to X."[18] They experienced further difficulty in understanding the statement that the Republican Party is a person, particularly since the majority had first described it as an " 'amorphous group of individuals.' "[19]

It appears that the majority reached the correct result but by a somewhat novel approach. The correct approach would seem to be that insisted upon by the government, *i.e.*, that an offer to a Congressman to make a contribution to his political party is an offer of a "thing of value" to the Congressman. This conclusion would be a little easier to justify, of course, had the Congressman solicited the contribution for his party.[20] But both theories advanced by the majority present some difficulties. The statement that an offer to X to pay money to Y is an offer of *money* to X is somewhat contradictory. The money was not to be paid to X; it was to be paid to Y. And to say that an offer to X to pay money to Y would always constitute a bribe might lead to embarrassing consequences, particularly if Y in this case had been the *Democratic* party or the defendant's aged mother. This leaves only one logical approach, and that is to determine whether a "thing of value" has been offered to the bribee.

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14. Only four justices joined in the majority opinion, and one filed a concurring opinion.
15. 359 U.S. at 256.
16. *Id.* at 257.
17. *Id.* at 264.
18. *Id.* at 268.
19. *Id.* at 269.
20. "That the thing the defendant asked on this occasion was desirable to himself, there is ground to believe from the evidence. Since he asked for it, and offered in return for it official protection, the consideration evidently was desirable to him." Scott v. State, 107 Ohio St. 475, 141 N.E. 19, 23 (1923).

CRIMINAL LAW—CONFESSIONS—REQUIREMENT OF CORROBORATION OF EXTRAJUDICIAL CONFESSION

Defendant confessed extrajudicially to the arson of a church rectory which resulted in the deaths of three persons.[1] On the basis of this confession, he was indicted and convicted of first degree murder under the New Jersey felony-murder statute. On appeal, defendant argued that, in view of the trial court's charge that the *corpus delicti* must be proved independently of the confession and beyond a reasonable doubt, the prosecution failed for lack of sufficient corroboration of the confession.[2] *Held,* affirmed. The lower court's charge placed a greater burden on the state than the law required since corroborative proof need only establish the trustworthiness of the confession, plus independent proof of loss or injury, and not the *corpus delicti.*[3] *State v. Lucas,* 30 N.J. 37, 152 A.2d 50 (1959).

Though not without distinguished critics,[4] the rule that extrajudicial

1. Nine months after the fire, the defendant aroused the suspicion of a police officer who stopped the defendant and had him empty his pockets. The search disclosed seven packs of matches, numerous religious pamphlets and a newspaper photograph of the monsignor who died in the fire. The confession to the rectory fire came after the defendant had confessed to starting several other fires in the vicinity. It appeared that the defendant was determined to be converted to Catholicism and had been taking instruction in anticipation of the fulfillment of this aim. This determination ceased shortly after the fire along with defendant's habit of crossing himself when passing the cathedral. The reason, later contradicted, for starting the fire was that the defendant was angry as a result of an argument with a priest who told him that he had learned his catechism incorrectly.

2. The only other significant point raised on appeal was the question of insanity. In that regard, the court found sufficient evidence to sustain the finding of the jury that the defendant was legally sane under the *M'Naghten* rule at the time of the fire.

3. There are three elements to any crime: (1) an actual loss or injury, *e.g.,* in homicide, a person deceased; in arson, a house burned; (2) a criminal agency, as opposed to accident; and (3) the accused's identity as the guilty person. Dean Wigmore suggests that the correct view of the term *corpus delicti* signifies only the first element. He notes, however, that most courts include the second element. A third view advanced, "too absurd to argue with," would include the last element. 7 WIGMORE, EVIDENCE §§ 2070-72 (3d ed. 1940). "The finding of a dead body establishes only the *corpus.* The finding of such body under circumstances that indicate a crime would establish the *delicti* or felonious intent." 1 WHARTON, CRIMINAL EVIDENCE § 325 (10th ed. 1912). From the foregoing, it may be observed that the court's overall holding in the principal case is contradictory. This results from the use of two conflicting definitions of the term *corpus delicti.* At one point the court says that independent proof of the actual loss or injury is required; this loss or injury is usually considered to be the first element of the *corpus delicti.* Later the court says that the corroborative proof need establish only the trustworthiness of the confession and not the *corpus delicti.* It is felt that the court in the latter case meant that both elements need not be proved, *i.e.,* actual loss must be proved but not the criminal agency. For judicial interpretations of the term *corpus delicti,* see 9 WORDS AND PHRASES 749 (Supp. 1959). See Note, 103 U. PA. L. REV. 638, 649 (1955).

4. "That the rule has in fact any substantial necessity in justice, we are much disposed to doubt. . . . [I]t seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial." Daeche v. United States, 250 Fed. 566, 571 (2d Cir. 1918) (L. Hand, J.). The Massachusetts

confessions must be substantiated by corroborative proof in order to sustain a conviction[5] is firmly entrenched in American statutory and common law.[6] The purpose of the rule originally was to prevent convictions based on false confessions where there was in fact no actual loss or injury, *e.g.*, in a confession to murder, no death in fact. Coincident with this initial purpose, corroborative proof of criminal agency was not required.[7] Today, the purpose of the rule is to prevent convictions based on any false confession, whether obtained through mistake, illegal inducement, coercion or mental incompetence of the accused.[8] The courts are in conflict regarding the nature[9] and the quantum[10] of corroborative proof the state must introduce before the

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Supreme Court has called it "an artificial quantitative rule." Commonwealth v. Kimball, 321 Mass. 290, 73 N.E.2d 468, 470 (1947). See also 3 WIGMORE, EVIDENCE §§ 865-67 (3d ed. 1940); MCCORMICK, EVIDENCE at 320, n. 5 (1954).

5. The rule originated in England, where, at the early common law, a naked confession was sufficient to support a conviction. After a few courts experienced the shock of the reappearance of a supposed murder victim after his murderer had been executed, the British began to question this sufficiency. No clear rule ever evolved, however, and this country was left free to develop its own doctrine. Whereas the English rule had been restricted to murder and bigamy, the American versions have extended to almost all crimes. And from the original requirement that corroboration need establish only the actual loss, as espoused by Wigmore, the additional corroborative proof of criminal agency became necessary. Wigmore states that the historical causes of this "sentimental irrationality" were threefold: (1) the meek, acquiescent attitude of the lower classes, where the large portion of crimes arose; (2) the overly cautious tendency of the Nisi Prius judges in admitting doubtful testimony; and (3) the common law disability of the defendant to testify for himself or have counsel. 3 WIGMORE, EVIDENCE § 867 (3d ed. 1940). See generally Note, 103 U. PA. L. REV. 638 (1955); 56 MICH. L. REV. 636 (1958); 31 TUL. L. REV. 361 (1957); 1956 WASH. U.L.Q. 483. For the rule in American military law, see Beale, *The Corpus Delicti*, 1959 JAG J. 11. For the Canadian view, see Borins, *Confessions*, 1 CRIM. L.Q. 140 (1959); Cooper, *Admissibility of Confessions, Id.* at 46.

6. Massachusetts is the only jurisdiction that has categorically stated that it does not follow the general corroboration rule. Commonwealth v. Kimball, 321 Mass. 290, 73 N.E.2d 468 (1947). The court gave no reason for its position and a search of earlier cases reveals none. Perhaps it is based on the unanswerable logic of the dictum handed down in Commonwealth v. Killion, 194 Mass. 153, 80 N.E. 222, 223 (1907): "And so far as the danger of conviction for a crime that may not have been committed is concerned, it is to be observed that innocent persons do not confess to crimes which they have not committed . . . ." Wisconsin has been joined with Massachusetts as not adhering to the general rule; it is believed that this is a result of a misinterpretation of the cases. See State v. Bronston, 7 Wis. 2d 627, 97 N.W.2d 504 (1959); Potman v. State, 259 Wis. 234, 47 N.W.2d 884 (1951); State v. Dehart, 242 Wis. 562, 8 N.W.2d 360 (1943). New Hampshire and South Dakota have been silent on the subject. See Note, 103 U. PA. L. REV. 638, 641 (1955).

7. See, *e.g.*, note 13 *infra*.

8. See Note, 103 U. PA. L. REV. 638 (1955); 56 MICH. L. REV. 636 (1958); 31 TUL. L. REV. 361 (1957); 1956 WASH. U.L.Q. 483.

9. The overwhelming majority of the courts require that the corroborative proofs relate to the *corpus delicti*. But then, it is difficult to see what useful evidence the state could introduce that would not relate to the *corpus delicti*. A few courts seem to require that the extrinsic evidence lend credence to the confession while not necessarily proving the *corpus delicti*. See Annot., 45 A.L.R.2d 1316 (1956); Note, 103 U. PA. L. REV. 638, 641, nn. 21, 22, 137 (1955).

10. Pennsylvania is the only state that requires that the *corpus delicti* be proved *aliunde* the confession and beyond a reasonable doubt. Mississippi

confession may be considered evidential. In general, evidence of corroboration must relate to and tend to establish the *corpus delicti,* but this corroborative evidence need not prove the *corpus delicti,* or the defendant's guilt, beyond a reasonable doubt.[11] In New Jersey, the basic requirement of corroboration may be traced back to 1818.[12] In the next century and a half the rule never became fixed and the courts lapsed into a state of confusion which continues to the present time.[13]

Relying on Dean Wigmore, the court concluded that the evil at which the rule was aimed was the improper conviction of a person based on his false confession where no actual loss had occurred.[14] This evil, the court felt, is overcome by the requirement of independent proof of the fact of loss or injury—in the instant case, the burned rectory and the bodies of the deceased. Further, this independent proof of actual loss or injury, coupled with proof of facts and circumstances tending to establish the trustworthiness of the confession, is the rule best designed to allow efficient administration of the criminal law while affording the accused ample protection of his rights. The danger is somewhat greater, the court believes, that persons will confess falsely to actual crimes where both elements of the *corpus delicti* are already apparent. Thus a person is more likely

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requires proof by a preponderance of the evidence. The remainder of the states vary from a flexible requirement of proof to a requirement of prima facie proof. Variation in proof often depends upon the nature of the crime. Normally, less evidence is needed to satisfy the requirement of corroborative proofs of the criminal agency as compared to that required for the actual loss or injury. See Annot., 45 A.L.R.2d 1316 (1956); Note, 103 U. PA. L. REV. 638, 659 (1955).

11. Annot., 45 A.L.R.2d 1316 (1956).

12. "The law then . . . seems to be pretty well settled, that upon the naked confession of such an infant, he cannot be convicted of a capital crime." State v. Aaron, 4 N.J.L. 263, 272 (1818) (twelve year old slave convicted of murder of a two year old child).

13. The rule as applied in the instant case was said by the court to have been first enunciated in State v. Guild, 10 N.J.L. 163 (1828). This is not correct. In the *Guild* case, the court said in dictum that when, as was true in that case, the *corpus delicti* is proved independently of the confession, no further corroboration is necessary. Almost a full century later the Court of Errors and Appeals ignored the *Guild* case and looked to New York and Massachusetts for authority. "Full proof of the . . . corpus delicti . . . is not required. It may be proved by the confession itself, corroborated by other evidence." State v. Banusik, 84 N.J.L. 640, 64 Atl. 994, 996 (E. & A. 1906). Six years afterwards, the same court, citing *Guild,* held that the only limitation on the use of a confession was the want of proof of the *corpus delicti.* State v. Kwiatkowski, 83 N.J.L. 650, 85 Atl. 209 (E. & A. 1912). In State v. James, 96 N.J.L. 132, 114 Atl. 553 (E. & A. 1921), the court graciously recognized both rules. This delightful situation reached its climax in State v. Cooper, 10 N.J. 532, 92 A.2d 786 (1952), wherein the court compressed the rules back together. Apparently the court in the present case thought it best to start all over.

14. "[F]or example, a man has disappeared . . . . To find that he is in truth dead, yet not by criminal violence—*i.e.* to find the second element lacking, is not the discovery against which the rule is designed to warn and protect us." 7 WIGMORE, EVIDENCE 401 (3d ed. 1940).

to confess to the killing of a victim found dead with a gunshot wound in the back than to an event not in itself criminal. In such a situation, it is the court's opinion that the rule adopted provides the accused with greater protection than a requirement of independent proof of the *corpus delicti*.

Having no clear precedent to follow,[15] the court, taking two divergent concepts, grafted a part of one to the whole of another, forming a hybrid.[16] While theoretically adequate, the rule will surely encounter practical difficulties in its implementation by trial judges. Generally, the requirement of corroboration of extrajudicial confessions is a desirable thing, but the courts have exaggerated its importance and have succeeded in obscuring the true problem behind a veil of semantics.[17] It is felt that a flexible requirement of corroboration, integrated with other rules of evidence and proper instructions from the court, should be sufficient to protect a defendant in all his rights.[18]

EVIDENCE—EXPERT TESTIMONY—INADMISSIBILITY OF EXPERT TESTIMONY THAT A NARCOTIC ADDICT IS UNWORTHY OF BELIEF

Defendant was convicted in a New York court of selling narcotics.[1] The principal witness for the prosecution, who testified that he had purchased heroin from defendant, admitted having been a drug addict

15. See note 10 *supra*.

16. From the rule which requires the state to introduce independent proof of the *corpus delicti*, the court has removed any requirement as to the criminal agency element. This abbreviated rule was joined with a minority view whereby the corroborative proofs need not touch on the *corpus delicti* but must be such as to strengthen and bolster the confession. See Annot., 45 A.L.R.2d 1316 (1956); Note, 103 U. PA. L. REV. 638, 647 (1955).

17. The case involving a serious crime in which there is no evidence other than a confession is extremely rare. Moreover, the rule protects only those defendants who confess and later repudiate their confessions; if a person is bent on judicial suicide, he can always confess in the courtroom. The most persuasive factor in favor of the rule is the danger that the false confession was the result of police methods. The rule prohibiting involuntary confessions is adequate protection against this, however. Wigmore believes that, ordinarily, the problem is reduced to a question of whether or not to give one more piece of evidence to the jury. 3 WIGMORE, EVIDENCE § 867 (3d ed. 1940).

18. See Judge Learned Hand's remarks, note 3 *supra*. Dean Wigmore advocates receiving all well proved confessions in evidence, leaving them to the jury, subject to all discrediting circumstances, to receive such weight as may seem proper. 3 WIGMORE, EVIDENCE § 867 (3d ed. 1940). Flexibility of the rule is particularly desirable in those cases involving crimes in which scienter is a necessary element, *e.g.*, uttering a forged instrument, knowingly receiving stolen goods. There the proof is almost solely within the knowledge of the defendant, and a fixed rule becomes a judicial obstruction rather than a safeguard.

1. N.Y. Penal Law § 1751(1).

until four months prior to the trial.[2] To impeach the credibility of this witness the defense counsel called a physician to testify concerning the addict's supposed propensity to lie. The trial judge refused to admit in evidence the doctor's opinion that an addict such as the witness was not worthy of belief.[3] Claiming that this exclusion was error, defendant brought this appeal before the Court of Appeals of New York, after an adverse decision in the appellate division.[4] *Held,* affirmed. Expert testimony by a physician that narcotic addicts are not worthy of belief is inadmissible unless there is general recognition that such is the consensus of scientific and medical opinion. *People v. Williams,* 6 N.Y.2d 18, 187 N.Y.S.2d 750, 159 N.E.2d 549 (1959).

All American courts agree that a witness may be impeached by a showing that he was under the influence of narcotics[5] when he testified or when he observed the events concerning which he gives evidence.[6] In the absence of a showing that the witness was influenced by drugs at either of these times, a slight majority of jurisdictions exclude testimony which shows the witness to be a drug addict.[7]

2. Police officers followed the witness from defendant's home and arrested him while he had a package of heroin in his possession. Following his arrest, the witness remained in custody until the trial four months later. By his own confession a "mainliner" (one who injects narcotics directly into his veins) before this time, the witness denied at trial that he had received any drugs whatever since a series of two injections given him the day after his arrest. People v. Williams, 6 N.Y.2d 18, 22, 187 N.Y.S.2d 750, 753, 159 N.E.2d 549, 551 (1959).

3. Counsel specifically asked for an "opinion on the 'characteristics' and 'personality changes' of an addict, and on whether 'a person addicted to drugs is—as a mainliner—can testify to facts in a normal manner.'" 6 N.Y.2d at 22, 187 N.Y.S.2d at 753, 159 N.E.2d at 551.

4. 5 App. Div. 2d 993, 173 N.Y.S.2d 296 (per curiam 1958).

5. See generally on the admission of evidence that a witness is a narcotics addict, and of its influence on the powers of the witness 3 WHARTON, CRIMINAL EVIDENCE §§ 905, 932 (12th ed. Anderson 1955); 3 WIGMORE, EVIDENCE § 934 (3d ed. 1940); Hale, *Narcotics as Affecting Credibility,* 16 So. CAL. L. REV. 333 (1943); Rossman, *The Testimony of Drug Addicts,* 3 ORE. L. REV. 81 (1924); Annot., 52 A.L.R.2d 848 (1957).

6. Wilson v. United States, 232 U.S. 563, 568 (1914); People v. Crump, 5 Ill.2d 251, 125 N.E.2d 615 (1955); People v. Webster, 139 N.Y. 73, 34 N.E. 730, 734 (1893); Commonwealth v. Morrison, 157 Pa. Super. 366, 43 A.2d 400 (1945); State v. Smith, 103 Wash. 267, 174 Pac. 9, 10 (1918). These cases are frequently susceptible of being interpreted as setting forth rules broader than those actually enunciated. For instance, People v. Webster, *supra,* holds that evidence of a habit of addiction may be given if it goes to prove that the witness was under the influence of drugs at the time the event testified to took place. It has been cited, however, for the more general proposition that evidence of the fact of general addiction and expert testimony as to its effect are both generally admissible. People v. Crump, 5 Ill.2d 251, 125 N.E.2d 615, 620 (1955).

7. Kelly v. Maryland Cas. Co., 45 F.2d 782 (D.C.W.D. W. Va. (1929) (lengthy discussion), *aff'd on other grounds,* 45 F.2d 788 (4th Cir. 1930); Williams v. United States, 6 Indian Terr. 1, 88 S.W. 334, 337-38 (1904); Standard Oil Co. v. Carter, 210 Ala. 572, 98 So. 575, 577 (1923); Webb v. People, 97 Colo. 262, 49 P.2d 381, 383 (1935); Nelson v. State, 99 Fla. 1032, 128 So. 1, 3 (1930); Eldridge v. State, 27 Fla. 162, 9 So. 448, 453 (1891); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007, 1008 (1914); McDowell v. Preston, 26 Ga. 528, 535 (1858)

Although few of these courts have explained their position precisely, those which have done so normally justify it by suggesting that to allow impeachment by a showing of general addiction might unduly divert the attention of the court from more central issues.[8] One court has refused to admit such evidence because of the confusion existing in medical opinion.[9] On the other hand, a vigorous minority of courts regard evidence of general addiction as a proper basis for impeachment.[10] This position is grounded either on the principle that any evidence is admissible which shows an impairment of testimonial powers,[11] or on judicial notice of the supposed fact that addicts are generally untruthful.[12] If a court is willing to permit a witness to be impeached by showing that he is an addict, it is often also willing to admit expert testimony concerning the effect addiction may have on the witness' mental and moral characteristics.[13] Admission of

(leading case; basis for ruling not given); State v. King, 88 Minn. 175, 92 N.W. 965, 968 (1903); State v. Gleim, 17 Mont. 17, 41 Pac. 998, 1001 (1895); Katleman v. State, 104 Neb. 62, 175 N.W. 671 (1919); State v. Juliano, 103 N.J.L. 663, 138 Atl. 575, 582-83 (1927); Franklin v. Franklin, 90 Tenn. 44, 49-50, 16 S.W. 557, 558 (1891).

This view is somewhat analogous to the rule excluding evidence of recurrent instances of intoxication unless it is shown that the witness was inebriated while observing the event sworn to, or while testifying. See, *e.g.*, State v. Milosowitch, 42 Nev. 263, 175 Pac. 139, 141 (1918); State v. Edwards, 106 Ore. 58, 210 Pac. 1079, 1082 (1922); State v. Sorenson, 34 Wyo. 84, 241 Pac. 707 (1925). *But see* Winn v. Modern Woodmen of America, 138 Mo. App. 701, 119 S.W. 536, 539-40 (1909).

8. Webb v. People, 97 Colo. 262, 49 P.2d 381, 383 (1935) (witness' addiction wholly unrelated to the issue being tried); State v. King, 88 Minn. 175, 92 N.W. 965, 968 (1903) (whether witness was an opium eater a collateral matter).

9. Kelly v. Maryland Cas. Co., *supra* note 7.

10. Chicago & N.W. Ry. v. McKenna, 74 F.2d 155, 158-59 (8th Cir. 1934); State v. Fong Loon, 29 Idaho 248, 158 Pac. 233, 236 (1916); People v. Hamby, 6 Ill.2d 559, 129 N.E.2d 746, 748 (1955) (witness' own admission of addiction important on issue of credibility); State v. Prentice, 192 Iowa 207, 183 N.W. 411, 414-15 (1921); Markowitz v. Markowitz, 290 S.W. 119, 122 (Mo.App. 1927); Effinger v. Effinger, 48 Nev. 209, 239 Pac. 801, 802-03 (1925); Beland v. State, 86 Tex. Crim. 365, 144 S.W. 281 (1912); Lankford v. Tombari, 35 Wash. 2d 412, 213 P.2d 627, 632 (1950); State v. Concannon, 25 Wash. 327, 65 Pac. 534, 537 (1901).

11. The *Tombari* decision, *supra* note 10, is based on this reasoning, and cites 3 WIGMORE, EVIDENCE § 934 (3d ed. 1940), which expounds the principle.

12. State v. Fong Loon, 29 Idaho 248, 158 Pac. 233, 236 (1916) (habitual users of opium notorious liars, citing WHARTON & STILLÉ, MEDICAL JURISPRUDENCE § 1111 (3d ed.)); Effinger v. Effinger, 48 Nev. 209, 239 Pac. 801, 803 (1925) (impairment of an addict's moral character an established fact of medical research, citing *Fong Loon* decision *supra*); State v. Concannon, 25 Wash. 327, 65 Pac. 534, 537 (1901) (habitual use of opium known to utterly deprave the addict). *Contra*, Weaver v. United States, 111 F.2d 603, 606-07 (8th Cir. 1940) (untruthfulness of addicts not so general that court would be warranted in taking judicial notice thereof); Kelly v. Maryland Cas. Co., 45 F.2d 782 (D.C.W.D. W.Va. 1922) (inspection of medical treatises and reports reveals no consensus on addicts' veracity).

13. Chicago & N.W. Ry. v. McKenna, 74 F.2d 155, 158-59 (8th Cir. 1934); Markowitz v. Markowitz, 290 S.W. 119, 122 (Mo. App. 1927); Effinger v. Effinger, 48 Nev. 209, 239 Pac. 801, 802-03 (1925); Anderson v. State, 65 Tex. Crim. 365, 144 S.W. 281, 282 (1912); State v. Smith, 103 Wash. 267, 174 Pac. 9, 10 (1918) (expert testimony as to effect of drug on witness under influence at time of event testified to).

expert testimony is, however, an issue distinct from that of admitting evidence of addiction, and not all courts agreeing on the latter also agree on the former.[14] Even in those jurisdictions which admit evidence of general addiction, there are holdings that a judge may not charge that an addicted witness is untrustworthy.[15] In general, the divergent views of the various jurisdictions, the reluctance of many courts to explain their reasoning on these matters, and the conflict existing in medical opinion[16] have left this area of the law in a chaotic state.[17]

In deciding that expert testimony on the truthfulness[18] of addicted witnesses should not be admitted, the New York court stresses three factors. First, the court points out that counsel may discredit the witness by calling attention to the fact of addiction and any attendant disreputable behavior,[19] and thus he is not unduly circumscribed in

14. A recent California decision permitted addiction to be shown but limited expert testimony to the effect of addition on memory and perception, excluding testimony on veracity. People v. Bell, 138 Cal. App. 2d 7, 291 P.2d 150, 153 (1955). The court draws an analogy to the refusal of California courts to admit expert testimony that a witness is mentally deficient. The deficiency can be shown only by cross-examination.

15. Weaver v. United States, 111 F.2d 603 (8th Cir. 1940); Commonwealth v. Farrell, 319 Pa. 441, 181 Atl. 217 (1935) (jury question); State v. Smith, 103 Wash. 267, 174 Pac. 9, 10 (1918). These cases should be read with caution. A charge to the jury that an addict's testimony should be weighed lightly amounts to a comment upon the evidence. The jurisdictions are divided on whether a judge should be permitted to make comments generally, and a number of states have enacted constitutional or statutory provisions to forbid it. See 3 WHARTON, CRIMINAL EVIDENCE § 983 (12th ed. Anderson 1955). A state constitutional provision forbidding a judge to comment upon matters of fact may explain the *Smith* case. WASH. CONST. art. 4, § 16. However, the same provision apparently did not bother the court in State v. White, 10 Wash. 611, 39 Pac. 160 (1895) where a judge was permitted to warn a jury that an addict's testimony is unreliable. The Pennsylvania decision is more compelling, perhaps, since that state permits comments on evidence. See Commonwealth v. Watts, 358 Pa. 92, 56 A.2d 81, 83 (1948). It is possible to read the *Weaver* case as approving a charge on the weight to be given an addict's testimony if proper foundation is made. Normally one would suppose that courts taking judicial notice of the general untruthfulness of addicts would permit such a charge, in the absence of a statute.

16. For illustrations of the division of medical opinion, see *infra* note 28.

17. The confusion is so pronounced that so highly respected a treatise as WHARTON ON CRIMINAL EVIDENCE has been led to make the following two statements at different points in the text: "Nor can evidence of the use of opium be introduced to impair credibility, unless it is shown that the witness was under the influence of opium when examined, or that his powers of recollection were affected by the habit." 3 WHARTON, CRIMINAL EVIDENCE § 905 (12th ed. Anderson 1955) (citing Mcdowell v. Preston, *supra* note 7). "It is competent to show, for the purpose of impeaching the credibility of a witness, that he is a habitual user of morphine." 3 WHARTON, CRIMINAL EVIDENCE § 932 (12th ed. Anderson 1955).

18. The dissenting justices feel that the majority errs in limiting its consideration to the issue of admitting testimony as to the witness' propensity for veracity. Those in dissent believe that the record would justify considering the problem to be one of admitting expert testimony on the general effect of addiction on mental and moral capacity. 6 N.Y.2d at 30, 187 N.Y.S.2d at 759, 159 N.E.2d at 556.

19. Certainly, counsel does still have considerable latitude within which to impair a witness' standing. In the instant case, defense attorneys attacked

his attack on the addicted witness. Secondly, it emphasizes that credibility is a collateral matter, rather than a principal issue.[20] However, the court makes it clear that this fact alone would not preclude the admission of expert evidence if it were not for the third and most significant barrier to this evidence:[21] discord among scientific experts.[22] Since medical authorities seem unable to agree on the effects of addiction, the court feels it would be unfair to allow the jury to be swayed by the impact of a single expert opinion, giving only one view on the problem.[23] But if counsel should attempt to counteract the opposition's showing by calling other experts holding a divergent opinion, the trial might degenerate into the "frequently observed spectacle of battle between expert witnesses."[24] Therefore, the court concludes, it is best for the jury to perform its traditional function of assessing credibility[25] without having been influenced or confused by the varying opinions of individual experts.

It has been aptly said that exclusion of evidence "is particularly desirable when the trier is unskilled . . .[and] where this evidence . . . will confuse the issues."[26] Certainly it is possible that the issues would become clouded and the trier confused if the courts were to accept contested medical opinion as evidence, and become ensnared in a parade of contradictory witnesses. Furthermore, decisions based upon the acceptance of scientific opinion not generally regarded as valid by scientists themselves are unlikely to further the cause of justice.[27]

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this witness vigorously by pointing out an inconsistency in his statements, cross-examining him at length as to his addiction and his personal history. When summarizing their case before the jury, counsel referred to the witness as "an 'ex-convict', a 'drug addict of the first class', a 'first class bum', a 'liar', 'cheat', 'thief', 'ex-procurer of men'" and implied that he aided the police in "framing" the defendant. 6 N.Y.2d at 29, 187 N.Y.S.2d at 759, 159 N.E.2d at 556.

20. 6 N.Y.2d at 26, 187 N.Y.S.2d at 757, 159 N.E.2d at 554.

21. 6 N.Y.2d at 27, 187 N.Y.S.2d at 757, 159 N.E.2d at 555.

22. 6 N.Y.2d at 27-28, 187 N.Y.S.2d at 757-58, 159 N.E.2d at 555.

23. "Such expert testimony would unquestionably have great impact upon a jury and, to some unknowable extent, replace their judgment by the opinion of the expert . . . ." 6 N.Y.2d at 26-27, 187 N.Y.S.2d at 757, 159 N.E.2d at 554.

24. MORGAN, BASIC PROBLEMS OF EVIDENCE 320 (1954). Such a battle, it is pointed out, not only consumes considerable time, but tends to confuse and mislead jurors who are equally unfamiliar with the medical problem and the legal principles involved. 6 N.Y.2d at 27, 187 N.Y.S.2d at 757-58, 159 N.E.2d at 554.

25. "Credibility is, as the cases have repeated and insisted from the dawn of the common law, a matter solely for the jury." 6 N.Y.2d at 26, 187 N.Y.S.2d at 757, 159 N.E.2d at 554.

26. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 256 (1937).

27. A demand for greater certainty before accepting scientific testimony on truthfulness is nothing new for the courts. Complaining of the absence of certainty in this crucial area, Professor Wigmore has queried: "[W]here *are* the practical psychological tests, which will detect specifically the memory-failure and the lie on the witness stand? There must first be proof of general scientific recognition that they are valid and feasible." 3 WIGMORE, EVIDENCE § 875 (3d ed. 1940). Because the familiar polygraph (lie detector) examina-

Even cursory research reveals considerable variance of opinion on the relation of addiction to truthfulness.[28] Therefore, the reluctance of

tion has not yet achieved general scientific acceptance as a reliable means of ascertaining truth or falsehood, the vast majority of courts reject its results. People v. Wochnick, 98 Cal. App. 2d 124, 219 P.2d 70, *cert. denied* 342 U.S. 888 (1950); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); State v. Cole, 354 Mo. 181, 188 S.W.2d 43, (1945); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949). See Annot., 23 A.L.R.2d 1306 (1952), which discusses a number of cases on polygraph tests and also treats the rejection of "truth serum" and hypnosis tests.

28. For an excellent comprehensive bibliography on various problems related to drug addiction and its effect on the mind and character, see the topical listing of books and articles which is appended to DE ROPP, DRUGS AND THE MIND (1957). Ranging briefly through materials on the subject, one can find a number of statements which would support the *Fong Loon* and *Concannon* approach. *E.g.*, speaking of a series of reports describing the case history of an addict, it has been said: "These reports show the typical reaction of the drug addict who is unwilling, or perhaps unable, to face squarely the facts of his addiction. Here we find the usual lying, evasion, and rationalization with which all who deal with drug addicts are familiar." YOST, THE BANE OF DRUG ADDICTION 39 (1954). (In the opening pages of his book, however, Yost is careful to point out that generalizations as to addicts are dangerous.) Another source proclaims: "'While the marihuana habit leads to physical wreckage and mental decay, its effects upon character and morality are even more devastating. The victim frequently undergoes such degeneracy that he will lie and steal without scruple; he becomes utterly untrustworthy . . . .'" INTERNATIONAL NARCOTIC EDUCATION ASSOCIATION, MARIHUANA OR INDIAN HEMP AND ITS PREPARATIONS (1936), quoted in MAYOR'S COMMITTEE ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK 4 (1944). "The fully developed morphine addict is not only incapable of heroic acts; his altruistic or moral sense is impaired in all relations." WILLIAMS, DRUGS AGAINST MEN 146 (1935). The addict "will lie, steal, beg, cheat or do *anything* to get the coveted drug . . . . He becomes infinitely crafty and utterly untrustworthy." RICE & HARGER, EFFECTS OF ALCOHOLIC DRINKS, TOBACCO, SEDATIVES, NARCOTICS 274 (1949). *Cf.* ANSLINGER & TOMPKINS, THE TRAFFIC IN NARCOTICS 225 (1953).

On the other hand, some noted authorities are equally convinced that addicts cannot be regarded as generally unreliable. "It will be found upon careful examination that they are average individuals in their mental and moral fundamentals. Among them are many men and women of high ideals and worthy accomplishments." BISHOP, THE NARCOTIC DRUG PROBLEM 3 (1920). Similar but more lengthy statements of like nature appear on pages 17, 23 and 24 of this book. "With the exception of this area [drug addiction] the addict shows great moral indignation at outrages committed in society . . . ." NYSWANDER, THE DRUG ADDICT AS A PATIENT 62 (1956). "'The change produced in mature individuals [by the drug habit] is usually so slight that it cannot be demonstrated or cannot be classed as "moral deterioration."'" DE ROPP, DRUGS AND THE MIND 148 (1957), quoting Dr. Lawrence Kolb. "But the concept of what opiate addiction actually involves has become very gravely distorted in the public mind . . . . The narcotics addict is not a criminal, though the criminal may become a narcotics addict. Heroin and morphine do not necessarily destroy life or impair intellect." *Id.* at 149. Like statements can be found in NOYES & KOLB, MODERN CLINICAL PSYCHIATRY 567 (1958); MAURER & VOGEL, NARCOTICS AND NARCOTIC ADDICTION 238 (1955); Felix, *An Appraisal of the Personality Types of the Addict,* 100 AMERICAN J. OF PSYCHIATRY 462 (1944).

A most striking illustration of the disagreement concerning the effects and treatment of addiction is a recent publication of the Federal Bureau of Narcotics, COMMENTS ON NARCOTIC DRUGS: INTERIM REPORT OF THE JOINT COMMITTEE OF THE ABA AND THE AMA ON NARCOTIC DRUGS (1958). This booklet is a vigorous criticism of conclusions concerning the narcotic problem announced by the ABA-AMA Joint Committee. Topically arranged, with articles by a number of legal and medical authorities selected by Federal Narcotics Commissioner Anslinger, the booklet should be read in its entirety to be fully understood. Especially relevant to the instant discussion are pages

the New York court to accept testimony from a physician that drug addicts are unreliable *per se* is justifiable. The skilled attorney will not be unduly hampered by this exclusion. If addiction has in fact led the witness into a pattern of conduct that would render him unworthy of belief, counsel will doubtless be able to impeach him on this ground.

72-94, where the ideas of Dr. Lawrence Kolb, and the so-called "Lindesmith-Kolb" school of thought are subjected to severe criticism, and pages 156-57 which deplore the ABA-AMA report for minimizing the effects of addiction.

In order to obtain current opinion from medical workers who are daily confronted with addicts, questionnaires were sent by the *Vanderbilt Law Review* to the staffs of the United States Public Health Service hospitals for treatment of narcotics patients at Fort Worth, Texas and Lexington, Kentucky. These forms questioned staff members as to their opinions on the effect of addiction on moral character. Without attempting to present a single definitive statement of the opinion of those replying, the following results from examination of the returned questionnaires can be stated:

(1) The majority of those replying consider addicts capable of normally accurate observation of external events, *unless:* (a) the addict was grossly intoxicated at the time; or (b) was experiencing a deep-set emotional problem of the type which might affect perception; or (c) was experiencing withdrawal symptoms during the event.

(2) Similarly, most of those replying regarded the addict's powers of recollection to be equal to or only slightly inferior to those of the non-addict.

(3) There was unanimous disapproval of the following statements: "The habitual use of opium . . . is known to utterly deprave the victim of its use, and render him unworthy of belief." (Taken from State v. Concannon, 25 Wash. 327, 65 Pac. 534, 537 (1901)) "Habitual users of opium, or other like narcotics, become notorious liars. The habit of lying comes doubtless from the fact that the users of those narcotics pass the greater part of their lives in an unreal world, and thus become unable to distinguish between images and facts, between illusions and realities." (Taken from State v. Fong Loon, 29 Idaho 248, 158 Pac. 233, 236 (1916)).

(4) There was a sizable minority, including 3 of the 5 psychiatrists replying, who approved the following statement: "There is at present so considerable a divergence of opinion on the issue of whether an addict is untrustworthy and untruthful that no accurate statement can be made which would represent a consensus of authority on the issue." This is the general rationale of the instant case.

(5) In general, the majority of medical personnel who expressed a personal opinion on the propensity of the addict to lie indicate this: The addict, while he may have fewer inhibitions against lying than the non-addict, will be truthful or not for much the same reasons as other persons. He should not be thought of as untrustworthy simply because of his addiction, but only on the basis of the same individual criteria applicable to any other witness.

The following sampling of individual replies should reveal something of the range of answers: "An addict, like other persons of socially deviant behavior, would lie in order to insure or to obtain a supply of his drugs." In reply to a request for personal opinion on the propensity of addicts to lie, one simply stated: "Generalizations are not justified."

"The type of person who becomes addicted has a propensity for lying—I doubt whether significant increase occurs after addiction, except that there is more opportunity for gainful lying (to get narcotics)." "The moral character of the addict is not impaired, per se, by the use of drugs, but the addict may feel compelled to steal or rob in order to obtain money to support his habit."

In answer to the question: Is the moral character of the addict generally impaired by his use of the drug? one replied: "Yes, to the extent that control of function is related to drug seeking motivation; and subsequently moral standards commensurate with this distorted society."

"Some addicts lie, some volunteer information that most people would lie about. I don't think that use of the drug makes them any less capable

FEDERAL RULES CIVIL PROCEDURE—DECLARATORY JUDGMENTS—RIGHT OF COUNTERCLAIMING DEFENDANT TO TRIAL BY JURY

Fox West Coast Theatres, Inc., instituted an action[1] in the United States District Court for the Southern District of California for a declaratory judgment that a grant of clearance[2] between its theatres and those of the defendant, Beacon Theatres, Inc., was not in violation of the antitrust laws and for an injunction *pendente lite* restraining defendant from instituting any action against the plaintiff under the antitrust laws. Defendant filed a counterclaim asserting a violation of the antitrust laws and asking for treble damages. The court rejected defendant's demand for a jury trial of the factual issues involved and ordered that the issues raised by the complaint, being essentially equitable, be tried to the court prior to determination by a jury of the issues presented by the counterclaim. Defendant petitioned the court of appeals for a writ of mandamus directing the district court to vacate this order. This petition was denied.[3] Certiorari to the United States Supreme Court was granted because the " 'maintenance of the jury as a fact-finding body . . . occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right . . . should be scrutinized with utmost care.' "[4] *Held,* reversed. A claim formerly cognizable in equity because of inadequacy of a

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of telling the truth. They are probably no more or less truthful than are many other behavior types."

From the most extended statement made comes this comment: "I can well understand that [my] position will not provide any 'rules-of-thumb' which may be applied easily. Scientific investigation might establish various conditions under which high reliability of statement could be expected, just as such inquiry might be made of non-addicts' statements. A mean or average reliability might then be estimated for various classes of individuals. While such an investigation might help in understanding motivations, it would be of little aid in court, since here reliability is an individual matter."

All the answers given above were referring to the addict as a person who has used heroin or a like drug for a period of two years or more. The most compelling conclusion to which one is driven on examining all the replies is that those who are continually confronted by the addicts are overwhelmingly unwilling to offer any concrete generalizations. This being true, the courts should hardly feel any more willing to give its sanction to a single medical opinion.

1. Fox West Coast Theatres, Inc., hereinafter called "Fox," alleged in substance that Beacon Theatres, Inc., hereinafter called "Beacon," had infringed upon its right to negotiate for exclusive first-run contracts by using threats of antitrust actions to coerce distributors not to grant clearance to Fox. This is alleged to be an interference with defendant's property right for which it has no adequate remedy at law, the theory being that Fox would have to await a suit by Beacon in order to determine whether a grant of clearance to Fox was a violation of the antitrust laws.

2. The term "clearance" in the motion picture industry refers to a specified period of time during which no theater in a particular area is permitted to show a film except that theatre which is granted this clearance.

3. Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958).

4. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959).

legal remedy is, in the absence of unusual circumstances,[5] converted to a legal claim by reason of the adequate remedies afforded by the Declaratory Judgment Act and the Federal Rules and is therefore triable of right by a jury. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

The seventh amendment guarantees the right to trial by jury as it existed at common law. Since at common law there was no right to a jury trial in courts of equity, the orthodox view is that the Constitution confers no such right.[6] The Federal Rules of Civil Procedure neither expand nor contract this right.[7] Hence, under the present fused system, a decision as to the right of jury trial depends upon whether the action was formerly cognizable at law or in equity. If both equitable and legal issues are presented in one controversy, a right to a jury trial exists as to the legal issues only.[8] The court is given discretion as to the order of trial in such a case.[9] The Declaratory Judgment Act merely provides a new statutory remedy.[10] This remedy is neither legal nor equitable, and the courts have generally held that the right to a jury trial is determined by the legal or equitable nature of the context in which the issues are presented.[11] The act, in other words, effects no change in procedure existing at the time of its enactment.

In the instant case, the Supreme Court did not *directly* overturn the foregoing principles. Fox's petition, as conceded by the Court, stated a claim "traditionally" coguizable in equity—wrongful interference with a property right and inadequacy of legal remedy.[12] This would seem to warrant the conclusion that the issues thus raised

5. The Court said that, because of the flexibility of the Federal Rules, it could not anticipate any circumstances in which the legal remedy would be inadequate. 359 U.S. at 510, 511.

6. United States v. Louisiana, 339 U.S. 699 (1950); Barton v. Barbour, 104 U.S. 126 (1881); Shields v. Thomas, 59 U.S. (18 How.) 253 (1856).

7. FED. R. CIV. P. 38, 39; Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62 (3d Cir.), *cert. denied,* 320 U.S. 777 (1943); Dottenheim v. Emerson Elec. Mfg. Co., 7 F.R.D. 343 (E.D.N.Y. 1947); Bynum v. Prudential Life Ins. Co., 7 F.R.D. 585 (E.D.S.C. 1947); Arnstein v. Twentieth Century Fox Film Corp., 3 F.R.D. 58 (S.D.N.Y. 1943).

8. To hold that by joining equitable and legal causes of action, or by interposing a legal counterclaim, a party waives his right to trial by jury, would be to deprive a party of a right to jury trial in view of the fact that he is forced, in some instances, to plead a cause of action or a counterclaim in that particular case or lose it completely. Ring v. Spina, 166 F.2d 546 (2d Cir. 1948); FED. R. CIV. P. 13; 2 MOORE, FEDERAL PRACTICE ¶ 2.02(6) (2d ed. 1948); 5 MOORE, FEDERAL PRACTICE ¶¶ 38.13, 38.14 (2d ed. 1951). Even where such pleading is permitted rather than required, to hold otherwise would be contrary to the spirit of the Federal Rules. *Cf.* Di Menna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917).

9. FED. R. CIV. P. 42(b).

10. Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1959); FED. R. CIV. P. 57.

11. BORCHARD, DECLARATORY JUDGMENTS 399-403 (2d ed. 1941); 5 MOORE, FEDERAL PRACTICE ¶ 38.29 (2d ed. 1951).

12. *Supra* note 1.

by the complaint were equitable and therefore triable by the court; and, if the trial judge so decided,[13] in advance of the legal issues raised by the counterclaim. But the Court then decided that the Federal Rules and the Declaratory Judgment Act had the effect of giving Fox an adequate remedy at law when Beacon pleaded his counterclaim, and therefore the situation is identical to that which would have existed had Beacon brought its legal action first. Thus it was not decided that there is a right to trial by jury of equitable issues, but rather that, because of the Federal Rules and Declaratory Judgment Act, equitable issues will rarely be presented when an equitable action is met by a legal counterclaim.

Generally, in a case of this type, the same result could be reached without such a drastic departure from traditional theory. If a declaratory judgment proceeding is actually an attempt to circumvent a jury trial by bringing an action before the defendent—a race to the court house, in other words—the basic issue will still be that raised by the counterclaim, it being the basis of the actual controversy.[14] This would be true even though plaintiff requested an injunction or other incidental relief. However, where, as here, the plaintiff alleges meritorious grounds for equitable relief, the basic issue must be termed equitable even though this issue is also raised by the counterclaim. This being true, the trial judge exercised his discretion in the manner provided by the Federal Rules[15] when he ordered trial of the equitable issues raised by the complaint in advance of the legal issues raised by petitioner's counterclaim. The "basic issue" theory being inapplicable, the Court granted petitioner a jury trial by declaring that the modern procedure provided an adequate remedy at law.[16] In theory, at least, this holding seems clearly erroneous in two respects. First of all, the Federal Rules expand neither substantive law nor the right to trial by jury. Yet this decision attributes to them that effect. Secondly, if this holding is based upon the idea that the requirement of a counterclaim arising out of the same transaction makes Fox's legal remedy adequate,[17] the Court overlooks the hereto-

13. FED. R. CIV. P. 42(b), 57.

14. Dickinson v. General Acc. Fire & Life Assur. Corp., 147 F.2d 396 (9th Cir. 1945); 5 MOORE, FEDERAL PRACTICE ¶ 38.16, 38.29 (2d ed. 1951).

15. FED. R. CIV. P. 42(b), 57.

16. Some courts have enlarged the right to jury trial by saying that in cases where legal and equitable issues are presented, the trial judge is very narrowly restricted in exercising his discretion as to the order of trial as provided by the Federal Rules. The theory behind such a policy is that the Constitution guarantees a jury trial but not a trial to the court, and therefore every effort should be made to protect a jury trial. If a common issue is tried first by the court, the jury may thereby be precluded from considering it on principles of collateral estoppel. See Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952). Other courts give the trial judge a wide discretion, as provided by Rule 42(b). *E.g.*, Tanimura v. United States, 195 F.2d 329 (9th Cir. 1952); Orenstein v. United States, 191 F.2d 184 (1st Cir. 1951).

17. FED. R. CIV. P. 13(a).

fore settled proposition that "equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter."[18]

In spite of its novelty and departure from precedent, this case may well be approved by some practitioners in the federal courts in that it prevents a possible circumvention of a jury trial by means of an ingenious use of declaratory judgment proceedings and affords a prompt recourse to litigation. Approval or disapproval must necessarily depend upon one's social philosophy as to the merits of the jury system and the desirability of its expansion. Whether the orthodox practice should be abandoned is a subject upon which honest men differ. All agree that it is not perfect. It is often asserted that juries actually change the law, although ostensibly leaving it unaltered; that they are expensive; that they are the cause for the backlog of cases on the calendars of many courts. Advocates of the jury system answer that it is a necessary means of injecting adaptability into a sometimes rigid framework of legal rules, or that the combination of judge and jury is the best available method of determining truth in a lawsuit. Thus the argument rages on. One thing remains clear, however—right to trial by jury cannot be constitutionally restricted. The question of whether it should be expanded by opinions such as *Beacon* depends upon a decision as to the desirability of the jury system.

PROFESSION OF LAW—UNAUTHORIZED PRACTICE—CORPORATION MAY ENGAGE IN ACTIVITIES CONSTITUTING PRACTICE OF LAW IF SUCH ACTIVITIES ARE INCIDENTAL TO ITS PRINCIPAL BUSINESS

Plaintiff bar association sought an injunction[1] to restrain defendant title guaranty companies[2] from engaging in the unauthorized practice of law. The alleged practices consisted of preparing legal instruments and giving advice in connection therewith, of holding itself

18. American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937).

1. Although a quo warranto action is frequently used to question a corporation's right to practice law, it is not the exclusive remedy, and an injunction is available as a proper proceeding. Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934); Depew v. Wichita Retail Credit Ass'n, 141 Kan. 481, 42 P.2d 214 (1935); Stewart Abstract Co. v. Judicial Comm'n, 131 S.W.2d 686 (Tex. Civ. App. 1939). *Contra,* Birmingham Bar Ass'n v. Phillips & Marsh, 239 Ala. 650, 196 So. 725 (1940) (quo warranto is the exclusive remedy for determining encroachments upon the practice of law).

2. The suit was brought against Union Planters Title Guaranty Company, Commerce Title Guaranty Company and Mid-South Title Company. While the case was pending in the lower court, the Union Planters Title Guaranty

out as performing legal services, and of serving as a conduit for channeling legal business to both staff and independent attorneys. Defendant denied both preparing the instruments and giving legal advice. In the alternative defendant pleaded that even if it had followed an improper procedure, an injunction should not be issued since the public interest was best served by permitting the same attorney who examined the title to prepare the instruments, and also since the defendant was the "real party in interest" it was entitled to prepare the documents. Considering the case as one of first impression in Tennessee, the chancellor granted the injunction.[3] The Court of Appeals of Tennessee, *held,* reversed. While some of the activities of the defendant constitute the "practice of law" or the doing of "law business," they are all legitimately incidental to the main or principal business of defendant, which is title insurance; and consequently, they should not be adjudged to constitute the unlawful practice of law, nor enjoined as such. *Bar Ass'n of Tennessee v. Union Planters Title Guar. Co.*, 326 S.W.2d 767 (Tenn. App. 1959), *cert. denied,* (Tenn. Sup. Ct., June 5, 1959).

The right to practice law, whether designated a property right or a franchise,[4] is limited to those persons[5] who have complied with the

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Company disposed of its assets to the Commerce Title Company and discontinued its former activities. The bill was therefore dismissed by consent as to the Union Planters Title Guaranty Company. The chancellor also dismissed the bill as to the defendant Commerce Title Guaranty Company since it did not engage directly in any of the acts complained of. Prior to the filing of the bill, Mid-South and Commerce Title entered into a contract for twenty-five years, whereby Mid-South became the exclusive agent for Commerce Title in the issuance of title policies. The plaintiff bar association argued that any relief to which it was entitled should be directed against both defendants because of their relationship of principle and agent. The court of appeals, however, felt that the case was complicated enough without involving what it viewed to be an unnecessary party; and the suit as to Commerce Title was therefore dismissed—Mid-South remaining as the only defendant.

3. The chancellor thereby enjoined the defendant Mid-South Title Company from "Preparation of conveyancing or related instruments, and/or giving of legal advice relative thereto, when such acts are performed for, or on behalf of, parties to a real estate transaction, by any person, lawyer or other, in the salaried employment of the defendant, and/or when performed in its office or place of business, whether such acts are compensated for by defendant corporation, by the parties to the transaction or are uncompensated." 326 S.W.2d at 769.

4. Dworken v. Apartment House Owners Ass'n, 38 Ohio App. 265, 176 N.E. 577 (1931) (valuable right in the nature of a property right or franchise); State v. Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S.W.2d 918 (1931) (in the nature of a franchise from the state, conferred only for merit).

5. The rigid requirements imposed by the courts upon those who seek permission to practice law can only be met by a human being. *In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910). Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law. State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958). Nor can they hire lawyers to carry on the business of practicing law for them. People v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926).

state's requisites for obtaining a license.[6] Licensing requirements are imposed to protect the public from those who are unqualified and unskilled in giving legal service and advice, and are not designed to eliminate competition.[7] In order to determine whether specific acts of a layman or a corporation constitute the unauthorized practice of law, the courts are compelled first of all to determine what activities constitute "the practice of law," and then they must decide whether or not the accused is "authorized" to do these acts. While the oft-defined[8] term "the practice of law" may not be capable of any exact definition,[9] the courts have used several "tests"[10] to determine whether the activities are unauthorized. Although certain activities may actually be within the scope of what is traditionally thought of as being "the practice of law," where a party has "substantial interest" in the subject matter so that he may be said to be acting for himself, his performance of services will not be enjoined.[11] The preparation of legal instruments or the rendition of services usually performed by an attorney may be permissible if "incidental" to the layman's regular business.[12] Also, if no "compensation" is received, certain services

6. See Otterbourg, *A Study of Unauthorized Practice of Law*, UNAUTHORIZED PRACTICE NEWS (sp. issue, Sept. 1951) for a complete listing of state statutes which prohibit the unauthorized practice of law. The relevant Tennessee statutes are TENN. CODE ANN. §§ 29-302 to -303 (1956).

7. Bump v. Barnett, 235 Iowa 308, 16 N.W.2d 579 (1944); New Jersey State Bar Ass'n v. Northern N.J. Mtg. Ass'n, 22 N.J. 184, 123 A.2d 498 (1956); Auerbacher v. Wood, 142 N.J.Eq. 484, 59 A.2d 863 (Ct. Err. & App. 1948).

8. See 33 WORDS & PHRASES, *The Practice of Law* 193-208 (1940); *Practicing Law, id.* at 226-29. For a discussion of what constitutes the practice of law, see Annots., 151 A.L.R. 781 (1944), 125 A.L.R. 1173 (1940), 111 A.L.R. 19 (1937).

9. Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940).

10. For a complete listing of these "tests" or "theories" and for an extensive compilation of source material see AMERICAN BAR FOUNDATION, UNAUTHORIZED PRACTICE SOURCE BOOK (Sp. project 1958).

11. The "substantial interest" theory seems to be derived from the idea that a person may be his own lawyer. The problem arises in attempting to determine just how far the courts are going to permit this idea to be carried. See Title Guar. Co. v. Denver Bar Ass'n, 135 Colo. 423, 312 P.2d 1011 (1957) (corporation lending money prepared notes, deeds of trust, and mortgages to secure notes); Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954) (title insurance company effecting transfer of title in order to issue policy). The interest of the lay party was held to be insufficient in the following cases: Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. 48, 273 S.W.2d 408 (1954) (bank acting as trustee); Carter v. Brien, 309 S.W.2d 748 (Ky. 1956) (pecuniary interest of county court clerk insufficient to permit drawing of wills); *In re* Brotherhood of Railroad Trainmen, 13 Ill.2d 391, 150 N.E.2d 163 (1958) (interest of railway union in claims of its members).

12. Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954) (title insurance company may use standard form conveyances to accomplish insurable title); Ingham County Bar Ass'n v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955) (conveyancing proper incident to real estate brokerage). The theory was rejected in the cases following: Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951) (such a rule ignores the interest to the public); Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958) (question should be whether services are necessary rather than incidental).

performed in connection with a regular occupation may be allowed.[13] Although some legal services may be condoned when incidental to a layman's business, if these involve "complex questions of law" they are wholly within the practice of law and consequently forbidden to the layman.[14] In addition to using these various technical justifications for engaging in the practice of law, the defendant frequently has attempted to justify his acts on a policy basis by contending that he has become a "specialist" in his field and therefore that the public is aided by his services which are alleged to be more expert in character and lower in cost than those obtainable from an attorney.[15] It has been contended that certain activities should be permissible because they have "customarily" been performed by laymen.[16] "Convenience to the public" has also been combined as a defense with the previous justification of "custom."[17]

After rejecting the defenses of "no compensation"[18] and "public

13. Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940) (brokers allowed to draft instruments without compensation); Auerbacher v. Wood, 139 N.J.Eq. 599, 53 A.2d 800 (1947) (no separate charge allowable with incidental legal advice); Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939) (mere filling in of blanks on writ of replevin by corporation's credit manager without receiving any valuable consideration did not violate statute regulating practice of law). *Contra,* Grievance Comm. v. Coryell, 190 S.W.2d 130 (Tex. Civ. App. 1945) (wrong legal advice equally injurious whether paid for or not); Grievance Comm. v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945) (compensation does not determine classification).

14. Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951) (layman enjoined from preparing tax return requiring resolution of complex question); *In re* Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), *aff'd,* 299 N.Y. 728, 87 N.E.2d 451 (1949) (accountant advising on tax questions). The test of complexity of subject matter was rejected in Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958) on the ground that the exercise of judgment by the company rather than the simplicity or complexity of the service should determine whether the specific acts were the practice of law. See People v. Title Guar. & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919) for a variation of the "complexity" theory which was repudiated in a famous statement by Pound, J. (concurring opinion).

15. Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951); State *ex rel.* Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941) (qualifying as an expert insufficient to practice law without a license).

16. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919) (judicial notice taken of widespread custom of lay practices).

17. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Liberty Mut. Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945 (1939).

18. The court was not impressed by defendant's offer to furnish the instruments and advice without charge. Such an offer was held to be "kidding the public" since it would probably require an increase in title premiums. The court pointed out that the defendant could compensate its own attorneys for the loss of instrument fees by adjusting their salaries. Defendant might also pay the outside attorneys a flat fee and thereby offer its services as being free of charge. Yet the total effect of such an offer was held to be merely a "come-on" to induce the prospective customers to transact other business which would render sufficient profit to the defendant to pay it to use such an incentive. 326 S.W.2d at 777. *Accord,* Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944).

economy,"[19] the Tennessee court approached the problem by examining the public interest involved. It was felt that the same principle involved in a statute[20] permitting real estate brokers to draft certain legal documents should apply equally to title guaranty companies, inasmuch as the statute is an indication of the public policy of Tennessee. Decisions from other jurisdictions[21] were used as further evidence to fortify the court's conception of the basic issue of public interest; but the cases cited do not seem to be authority for the ultimate conclusions reached by the Tennessee court.[22] It appears that the court in the instant case combined the frequently-used defenses of "substantial interest"[23] and "incidental to business"[24] with the determining issue of "public interest" to arrive at an unusual result. The instant case and a recent Colorado decision[25] stand alone in holding that corporations and laymen, respectively, may under cer-

19. The court failed to accept defendant's plea that preparation of instruments by staff attorneys was more economical and that therefore the public was better served. The profits and commissions made by defendant were not based on economy to the public, but upon what would be fair compensation for its services. 326 S.W.2d at 775.

20. TENN. CODE ANN. § 62-1325 (1956) provides: "Any person (real estate broker) licensed hereunder that engages in drawing any legal document other than contracts to option, buy, sell, or lease, real property, may have his or her license revoked or suspended as provided in this chapter." The majority of the court interpreted this section as preserving the right to real estate brokers to draw legal documents if such documents pertain to real property. The dissent, however, did not so construe § 62-1325. Avery, J., felt that the above statutory provision only gives the real estate broker the right to prepare contracts which allow him to bind his client "to option, buy, sell, or lease, real property." The preparation of the deeds and other documents necessary for compliance with the executed contract which the broker draws are, in his opinion, matters which must be done either by a lawyer or by the client himself. The majority opinion was viewed as having given no effect to the preposition "to" immediately following the word "contracts."

21. Since the instant case is one of first impression in Tennessee, the court relied on the following cases to show what the public policy of other jurisdictions has been in cases of this character: State Bar Ass'n v. Connecticut Bank & Trust Co., 20 Conn. Supp. 248, 131 A.2d 646 (Sup. Ct. 1957); Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940); Auerbacher v. Wood, 139 N.J.Eq. 599, 53 A.2d 800 (1947), *aff'd*, 142 N.J.Eq. 484, 59 A.2d 863 (Ct. Err. & App. 1948).

22. No decision quoted from in the majority opinion, *supra* note 21, reached the conclusion that the alleged unauthorized acts would be permissible even though they constituted the "practice of law." In the two title guaranty cases cited: La Brum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948); Cooperman v. West Coast Title Guar. Co., 75 So.2d 818 (Fla. 1954), the acts complained of were construed as not being "the practice of law." In the prior case, a Pennsylvania statute pertaining to title insurance companies was interpreted as authorizing the acts complained of. In the latter case, there was no reference to any statute whatsoever which defined "the practice of law." For a discussion of the distinguishing facts of the "supporting" decisions cited by the majority, see 326 S.W.2d 767, 785-87 (dissenting opinion).

23. See note 10 *supra*.

24. See note 11 *supra*.

25. In the case of Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957), the Supreme Court of Colorado held that the preparation of instruments by real estate brokers in transactions which were incidental to their brokerage business was not unlawful even though it constituted the practice of law.

tain circumstances perform services which are designated as constituting the practice of law. The facts of the present case present even less of a basis for such a holding than did the Colorado case, for the practical necessity of having someone do the legal work in counties where no lawyers were available, as was the situation in Colorado,[26] is entirely absent in the Tennessee decision.

While the court could have reached the same result by declaring that defendant's activities were not "the practice of law,"[27] it chose to expressly label them as constituting "the practice of law" or the doing of "law business." As was pointed out in a forceful dissent,[28] such a holding is in direct conflict with a Tennessee statute which requires a license to practice law.[29] It seems strange also, that after holding that the defendant corporation drafted the instruments, the court never mentioned the generally accepted view that a corporation may not practice law.[30] The majority opinion correctly states that the controlling factor in determining the case should be the public interest;[31] but having said this, it seems that their conclusion is shortsighted.[32] Although the usual danger of the unauthorized person be-

26. In three counties in Colorado there are no lawyers; in each of ten other counties there is only one lawyer; and in each of seven other counties there are only two attorneys. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, *supra* note 25, 312 P.2d at 1007.

27. The court could have held that the activities of defendant were not the "practice of law" since the judicial department is the sole arbiter of what constitutes the practice of law. See, *e.g.,* West Virginia State Bar v. Earley, 109 S.E.2d 420 (W.Va. 1959).

28. 326 S.W.2d at 788 (Avery, J. dissenting).

29. TENN. CODE ANN. § 29-303 (1956) provides: "No person shall engage in the 'practice of law' or do 'law business,' or both . . . unless he shall have been duly licensed therefor . . . ."

30. See note 5 *supra. Accord,* State v. Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S.W.2d 918 (1931) (interpreting TENN. CODE ANN. § 29-108 (1956)).

31. 326 S.W.2d at 778, where the court states: "[W]e should consider of primary importance the effect which it (the ruling of the court on the question presented by this case) will have in protecting the rights and interests of the public, rather than the benefits which may accrue to lawyers of this State . . . ."

32. In holding that the defendant corporation would be permitted to carry on these alleged unauthorized activities, the court made no ruling which required that licensed attorneys should continue to be used by the defendant in drafting the instruments and giving advice thereto. This would imply that so long as the activities are "incidental to the principal business of guaranteeing titles" they could be performed for the corporation by any of its lay employees. But even if the court's ruling was restricted to activities performed by licensed attorneys employed by the defendant corporation, such a ruling violates the ethical principle that the attorney-client relationship must remain an individual and impersonal one. AMERICAN BAR ASS'N, CANONS OF PROFESSIONAL ETHICS No. 35 (1933). The fact that the public is not served when attorneys do not act in an impersonal and individual capacity is clearly demonstrated in *In re* Brotherhood of Railroad Trainmen, 13 Ill.2d 391, 150 N.E.2d 163 (1958) where the court felt that the interest of injured trainmen and the representatives of the deceased trainmen in receiving legal advice at reasonable fees (the Brotherhood established its legal aid department whereby regional counsel were paid a percentage, fixed by the Brotherhood, of the judgment or settlement recovered; and in return all expenses in connection with the action were paid by the attorneys) was insufficient to over-

ing incompetent is not present here,[33] the court fails to recognize the very real danger of a conflict of interest.[34] The Tennessee court viewed an absence of any statutory provision allowing title insurance companies to draft certain legal documents as indicating that the public policy of Tennessee required that a statute providing such a right to real estate brokers, should, by analogy, be applied to title guaranty companies.[35] It is submitted that by failing to expressly

ride the principles which govern the legal profession in their relations with clients. Where the person performing legal services is not an attorney, the public is not given the protection of court supervision. Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951) (protection of the public set at naught where laymen, who are not subject to court supervision, are permitted to practice law).

33. The alleged unauthorized activities in the instant case were performed by licensed attorneys, and their ability was not questioned. The following cases are illustrative of areas where laymen, attempting to perform legal services, have proved to be incompetent: Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958) (will prepared by notary not admitted to probate); L. B. Laboratories, Inc. v. Mitchell, 39 Cal.2d 56, 244 P.2d 385 (1952) (penalty assessed against client where C.P.A. was negligent in filing tax return); Esposito v. Esposito, 294 N.Y. 737, 61 N.E.2d 521 (1945) (deed prepared by real estate broker set aside). See Houck, *Drafting of Real Estate Instruments: The Problem From the Standpoint of the Bar*, 5 LAW & CONTEMP. PROB. 66 (1938).

34. In the instant case the plaintiff bar association alleged that when staff attorneys represent the parties to a real estate transaction, as well as their employer-guaranty company, a situation arises where the interests of the parties could be adverse. See AMERICAN BAR ASS'N, CANONS OF PROFESSIONAL ETHICS No. 6 (1908). In such circumstances the interests of defendant would be paramount since defendant controls the services of its lawyers in violation of Canon 35, *supra* note 32. The reply of the court to plaintiff's complaint was as follows: "Actually, there isn't much possibility of adverse interest appearing in these transactions, but if they did, defendant would no doubt insist that the parties obtain separate counsel." 326 S.W.2d at 774. It would seem from the very nature of the transaction that not only might an adverse interest appear, but that there actually exists a conflicting interest between the client and the defendant title guaranty company. The desire of the client is to obtain a marketable title, guaranteed by a policy of insurance, whereby any possible defect would be covered by his policy. The interest of the defendant guaranty company is to have a perfect title to insure or to except from the policy those defects which subsequently might cause liability to arise. Thus it would seem that the interests of the client and the defendant insurance company do not coincide. A situation similar to that in the instant case arose in Texas in San Antonio Bar Ass'n v. Guardian Abstract & Title Co., 156 Tex. 7, 291 S.W.2d 697 (1956) where the title company was intimately affiliated with a firm of lawyers who did little practice of any kind except for the services rendered to the defendant abstract and title company. The relationship was described as follows: "[The attorneys] were in reality acting as agents for the corporation—thinking of themselves as primarily working for it, and as they themselves largely admitted, *not* thinking of themselves as 'representing' the individual 'clients' concerned." 291 S.W.2d at 702. The opinion of the Court of Civil Appeals of Texas in the same case recognized that the first loyalty of the attorneys was to the title company. Although no damage or loss was sustained by any party, it was pointed out that there were some instances in which an exception as to the liability of the title company concerning area and boundary were inserted in the title insurance policy. Guardian Abstract & Title Co. v. San Antonio Bar Ass'n, 278 S.W.2d 613 (Tex. Civ. App. 1955). This certainly points to a present conflict of interest and demonstrates clearly that the client in such a situation is in need of independent legal advice.

35. "In Tennessee, the right of real estate brokers to draw documents appertaining to the business of real estate brokers is expressly preserved by statute, which, to some extent, in our opinion, indicates what the public policy of Tennessee should be in the instant case." 326 S.W.2d at 779.

provide any such rights to title guaranty companies, the intent of the legislature could be interpreted as forbidding title guaranty companies from drafting such instruments.[36] No panacea has yet been discovered to resolve the conflicting interests of the legal profession and the layman in activities which lie in the penumbra of both fields; but it is suggested that the solution should be sought by informing the public that independent legal advice from a duly qualified lawyer is essential in any legal transaction rather than by inviting them to rely on unlicensed corporations who may as of now practice law in Tennessee.

STATE AND LOCAL TAXATION—INVALID ASSESSMENTS—JUDICIAL REVIEW AFTER FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Plaintiff owned subdivision lots which, prior to any construction in the area, had been assessed at values ranging from $150 to $400. In preparing the 1956 tax rolls, the assessing officer failed to consider that certain of plaintiff's lots remained vacant and gave them the improved-lot valuation of $5500. The tax became due in July, 1956; plaintiff took no action until April, 1957, at which time he attempted to pay the tax under protest. The county treasurer, on the basis of a statute prohibiting payment of delinquent taxes under protest,[1] refused to accept payment so tendered, but did accept an unconditional payment. It was conceded that the plaintiff did not appear before the board of review to contest the assessment but filed this action in equity for a declaration that its previous payment of the assessment be considered as made under protest and that it be declared "excessive, invalid, and illegal."[2] The taxpayer was denied relief in the lower court. On appeal to the Supreme Court of Michigan, *held,* reversed. Where a mistake of an assessor is of such significance that it constitutes constructive fraud, equity has power to grant a taxpayer relief even though he has not exhausted the administrative remedy provided. *Spoon-Shacket Co. v. County of Oakland,* 356 Mich. 151, 97 N.W.2d 25 (1959).

States are not required, as a matter of due process of law, to afford judicial review of the actions of tax assessors;[3] however, administrative review, consisting of reasonable notice and an opportunity to be

36. See Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS 213 (1934).

1. MICH. STAT. ANN. § 7.102 (1950).

2. Plaintiff does not contest the sufficiency or validity of notice of assessment and the opportunity afforded for hearing on the assessment.

3. Hodge v. Muscatine County, 196 U.S. 276 (1905); Hagar v. Reclamation Dist., 111 U.S. 701 (1884).

heard, must be afforded at some point before the assessment becomes final.[4] Courts early began to encroach upon this administrative function by utilizing the common law writ of certiorari to review actions in which an assessor acted beyond the scope of his authority or was guilty of misconduct regardless of failure to exhaust administrative remedies.[5] Subsequently, the courts assumed power to set aside assessors' actions on the fictional basis of constructive fraud where such actions resulted in flagrant inequalities or over-assessments.[6] This additional judicial activity was taken advantage of by taxpayers through suits in equity to enjoin illegal collections and actions of assessors, defenses against suits to seize property or foreclose a tax lien, and actions under statutes providing remedies for aggrieved taxpayers. From these various remedies, three general approaches to the role of judicial review in property taxation have evolved. The most restricted approach is that of those courts which refuse to review alleged assessment errors unless the assessing officer has proceeded capriciously, arbitrarily and in wilful disregard of the law.[7] Courts adopting a broader concept of review powers often substitute their judgment for that of the assessing officer in determining the value of property.[8] The intermediate view is that only errors of law are to be reviewed and that actions of the administrative body will not be set aside on the basis of mistakes of fact.[9] Equity has often assumed juris-

4. *Ibid.* In Michigan the Board of Review meets annually on the first and second Tuesdays in March. "[T]hey shall correct all errors in the names of persons, in the descriptions of property, and in the assessment and valuation of property thereon . . . ." MICH. STAT. ANN. § 7.29 (1950).

5. Hellerstein, *Judicial Review of Property Tax Assessments,* 14 TAX L. REV. 327 (1959); Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies,* 28 MICH. L. REV. 637 (1930).

6. *Ibid.*

7. For courts adopting similar restricted views, see Sparks v. McCluskey, 84 Ariz. 283, 327 P.2d 295 (1958); McClelland v. Board of Supervisors, 30 Cal. App. 2d 124, 180 P.2d 676 (1947); Citizens' Comm. for Fair Property Taxation v. Warner, 127 Colo. 121, 254 P.2d 1005 (1953); Appeal of Sears, Roebuck & Co., 74 Idaho 39, 256 P.2d 526 (1953); People *ex rel.* Callahan v. Gulf, Mobile & Ohio R.R. Co., 8 Ill.2d 66, 132 N.E.2d 544 (1956); Rogan v. County Comm'rs, 194 Md. 299, 71 A.2d 47 (1950); Naph-Sol Refining Co. v. Township of Muskegon, 346 Mich. 16, 77 N.W.2d 255 (1956); May Dep't. Stores Co. v. State Tax Comm'n, 308 S.W.2d 748 (Mo. 1958); State *ex rel.* Goza v. District Court, 125 Mont. 296, 234 P.2d 463 (1951); McCord v. Nashville, Chattanooga & St. L. Ry., 187 Tenn. 277, 213 S.W.2d 196 (1948); State v. Whittenberg, 153 Tex. 205, 265 S.W.2d 569 (1954); *In re* Assessment of Metropolitan Bldg. Co., 144 Wash. 469, 258 Pac. 473 (1927).

8. Some statutes, *e.g.,* ALA. CODE ANN. tit. 51, § 140 (1940), authorize the courts to "decide all questions both as to the legality of the assessment and the amount thereof." For decisions adopting the broader view, see Monroe Bond & Mortgage Co. v. State *ex rel.* Hybart, 254 Ala. 278, 48 So. 2d 431 (1950); Davis v. City of Clinton, 55 Iowa 549, 8 N.W. 423 (1881); People *ex. rel.* Hotel Paramount Corp. v. Chambers, 298 N.Y. 372, 83 N.E.2d 839 (1949); Traylor v. City of Allentown, 378 Pa. 489, 106 A.2d 577 (1954); *In re* Jepsen's Appeal, 76 S.D. 421, 80 N.W.2d 76 (1956).

9. Boston Gas Co. v. Assessors, 334 Mass. 549, 137 N.E.2d 462 (1956); Oliver Iron Mining Co. v. Comm'r of Taxation, 247 Minn. 6, 76 N.W.2d 107 (1956); W. L. Harper Co. v. Peck, 161 Ohio St. 300, 118 N.E.2d 643 (1954); State *ex rel.* Hein v. City of Barron, 3 Wis. 2d 127, 87 N.W.2d 785 (1958).

diction where grave inequities arise out of excessive assessments but will not entertain suits where there is an adequate remedy at law.[10] An adequate remedy at law is said to exist if there is appeal to the courts, a statutory action, or a defense to an action to collect the tax.[11] In states that have provided remedies for aggrieved taxpayers, it is generally held that failure to exhaust one's administrative remedies precludes judicial review[12] unless the tax is void.[13]

The instant case arose in a jurisdiction which provided review of assessment errors by a board[14] and which had a statute that permitted a taxpayer to pay a non-delinquent tax under protest and sue for recovery within thirty days of payment if the tax was found illegal.[15] The court here was called upon to decide whether or not an over-assessed taxpayer, who had not paid the tax under protest nor proceeded under the administrative or statutory remedy, could be granted relief in equity. It is conceded by the court that in the "ordinary case of error of assessment of property taxes, the remedy provided by hearing before the board of review is final and exclusive."[16] The court holds, however, that where the mistake is of such significance that it constitutes constructive fraud, equity's door is open to the innocent though careless victim. The court construes this holding as not affording an additional or alternative remedy but designates it as the "known remedy" provided by equity in favor of those actually or constructively defrauded. The dissent recognized the line of Michigan

10. Lackey v. Pulaski Drainage Dist., 4 Ill.2d 72, 122 N.E.2d 257 (1954). See 4 COOLEY, TAXATION § 1646 (4th ed. 1924) for compilation of cases.

11. Narehood v. Pearson, 374 Pa. 299, 96 A.2d 895, *cert. denied*, 346 U.S. 866 (1953); Illinois Cent. R.R. Co. v. Garner, 193 Tenn. 91, 241 S.W.2d 926, *appeal dismissed*, 342 U.S. 900, *rehearing denied*, 342 U.S. 934 (1951); Todd v. County of Elizabeth City, 191 Va. 52, 60 S.E.2d 23 (1950). See 4 COOLEY, TAXATION § 1647 (4th ed. 1924) for discussion and additional cases.

12. Gorham Mfg. Co. v. State Tax Comm'n, 266 U.S. 265 (1924); Security-First Nat'l Bank v. Los Angeles County, 35 Cal.2d 319, 217 P.2d 946, *cert. denied*, 340 U.S. 891 (1950); Weidenhaft v. Board of County Comm'rs, 131 Colo. 432, 283 P.2d 164 (1955); *In re* Felton's Petition, 79 Idaho 325, 316 P.2d 1064 (1957); Burley v. Lindheimer, 367 Ill. 425, 11 N.E.2d 926 (1937); County Board of Review v. Kranz, 224 Ind. 358, 66 N.E.2d 896 (1946); Security Trust & Sav. Bank v. Mitts, 220 Iowa 271, 261 N.W. 625 (1935); Blair v. Potter, 132 Mont. 176, 315 P.2d 177 (1957); Boettcher v. County of Holt, 163 Neb. 231, 79 N.W.2d 183 (1956); Lairmore v. Board of County Comm'rs, 200 Okla. 436, 195 P.2d 762 (1948).

13. Ogden City v. Armstrong, 168 U.S. 224 (1897); Graves v. McDonough, 264 Ala. 407, 88 So. 2d 371 (1956); Stafford v. Riverside County, 155 Cal. App. 2d 474, 318 P.2d 172 (1957); Jewett Realty Co. v. Board of Supervisors, 239 Iowa 988, 33 N.W.2d 377 (1948); Rapid Ry. Co. v. Schroeder, 190 Mich. 684, 157 N.W. 422 (1916); Ainsworth v. County of Fillmore, 166 Neb. 779, 90 N.W.2d 360 (1958); City of Houston v. Union City Transfer, 307 S.W.2d 645 (Tex. 1957). For a discussion of erroneous taxes classified as "void" but not subject to collateral attack unless all administrative appeals have been taken see Stason, note 5 *supra* at 652.

14. This statute required, however, that the tax be shown illegal for the reasons given in the protest filed at the time of payment under protest. MICH. STAT. ANN. § 7.29 (1950).

15. MICH. STAT. ANN. § 7.97 (1950).

16. 97 N.W.2d at 33.

cases which applied the principle that unless a taxpayer has exhausted his administrative remedy he is estopped to seek relief in the courts. It is generally held that exhaustion of the administrative remedies is not mandatory where the tax is classed as "void." A tax falls within this class when the taxing authority lacks jurisdiction over the property taxed, where the property is exempt from taxation, or where actual fraud exists.[17] It does not appear that the tax levied in this case falls into any of these groups of tax errors which render a tax void since the court labels this mistake as only "constructive fraud."[18]

Adoption of the broad concept of review undoubtedly gives greater protection to the individual, unsuspecting taxpayer who is the victim of an administrative or clerical error or mistake of fact. This view is criticized on the grounds that it tends to increase litigation thereby slowing down the entire judicial machinery and that it subjects the financial structure of the local tax unit to continuous alteration.[19] The advocates of the restricted view contend that administrative functions delegated by the legislature should be subject only to limited review, that is, review of improprieties in procedure or violations of substantive rules of law. This approach is supported by reasoning that such review insures prompt complaint by taxpayers who are aggrieved and relieves courts of the burden of passing on trivial errors that could be disposed of in administrative proceedings.[20] As pointed out by an eminent writer in the field,[21] the nature and scope of judicial review must depend upon the character of administrative review afforded. If competent, impartial, and independent persons administer this function, then it becomes difficult to justify judicial review for matters other than problems of law, errors of method and impropriety of procedure. However, the administrative machinery of most states does not measure up to this degree of independence or impartiality.

17. Stason, note 5 *supra* at 651.

18. This holding brings Michigan into the camp of states following the broad concept of judicial review and gives plaintiff the benefit of a statute passed after this action was commenced which provides: "Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest." MICH. STAT. ANN. § 7.97(1) (1958).

19. Stason, note 5 *supra* at 662.

20. Hartman, *State and Local Taxation—1959 Tennessee Survey*, 12 VAND. L. REV. 1335 (1959).

21. Hellerstein, note 5 *supra* at 349.

TAXATION—INCOME—INCLUSION IN GROSS INCOME OF FUNDS RECEIVED FOR A RESEARCH PROJECT AT A UNIVERSITY

Respondent determined a deficiency in the income tax of petitioner for the taxable year 1954. Petitioner, the holder of a doctorate, was on the faculty of Vanderbilt University.[1] Under the terms of his employment he devoted one-fourth of his time to teaching and three-fourths to participation in a project of economic research.[2] The funds for this project were granted to Vanderbilt by the Rockefeller Foundation.[3] Of petitioner's salary for the tax year in issue, one-fourth was paid from general University funds; the remainder came from funds given Vanderbilt University by the Rockefeller Foundation for the direction of this research. Petitioner contended that three-fourths of the amount he received at Vanderbilt during that year[4] was excludable from gross income as a fellowship grant under section 117 of the Internal Revenue Code of 1954.[5] The Commissioner treated the entire amount as

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1. "Vanderbilt University is an educational institution within the meaning of section 151(e)(4) of the 1954 Code, and an organization described by section 501(c)(3), and exempt from tax under the provision of subsection (a) of that section." 32 T.C. No. 103, 3096 (1959).

2. The Rockefeller Foundation made a grant to Vanderbilt University to be used for a specific research project in economics. A senior professor in the Vanderbilt Department of Economics directed the taxpayer's project.

3. "The Rockefeller Foundation is an organization qualifying under section 401(c)(3) of the Internal Revenue Code of 1954, and exempt from tax under subsection (a) of that section." 32 T.C. No. 103, 3096 (1959).

4. Taxpayer's employment at Vanderbilt began September 1, 1954.

5. The statute reads:

"SEC. 117. SCHOLARSHIPS AND FELLOWSHIP GRANTS.

(a) General Rule.—In the case of an individual, gross income does not include—

(1) any amount received—

(A) as a scholarship at an educational institution (as defined in section 151(e)(4)), or

(B) as a fellowship grant, including the value of contributed services and accommodations; and

(2) any amount received to cover expenses for—

(A) travel,

(B) research,

(C) clerical help, or

(D) equipment,

which are incident to such a scholarship or to a fellowship grant, but only to the extent that the amount is so expended by the recipient.

(b) Limitations.—

(1) Individuals who are candidates for degrees.—In the case of an individual who is a candidate for a degree at an educational institution (as defined in section 151(e)(4)), subsection (a) shall not apply to that portion of any amount received which represents payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or the fellowship grant. If teaching, research, or other services are required of all candidates (whether or not recipients of scholarships or fellowship grants) for a particular degree as a condition to receiving such degree, such teaching, research, or other services shall not be regarded as part-time employment within the meaning of this paragraph.

taxable income. After exhausting his administrative remedies, the taxpayer,[6] refusing to pay the alleged deficiency, filed a petition in the Tax Court of the United States contesting the assessment. *Held,* for the Commissioner. Where payments to an individual, not a candidate for a degree, are made primarily for carrying out a research project undertaken by a university and directed by one of its departments, the payments are not excludable from gross income as a fellowship grant under section 117 of the Internal Revenue Code of 1954. *Frank Thomas Bachmura,* 32 T. C. No. 103 (Aug. 24, 1959).

Prior to 1954 there was no separate provision in the Internal Revenue Code concerning fellowship grants; they were excludable from gross income only if they could be considered gifts.[7] In *George W. Stone, Jr.*,[8] the Tax Court held that a fellowship granted to a professor of English literature to enable him to devote his full time to a research project, on which he had been working in his spare time, was nontaxable. The court stated that since the grant was to facilitate the further education or training of the recipient, since the work was his own and not that of the grantor, and since he was not under the direction or control of the grantor, the amount received was a gift and not payment for services.[9] The Tax Court held fellowships taxable in three other cases[10] on the ground that the grants did not meet the requirements of a gift. In each of those cases the recipient was ex-

(2) Individuals who are not candidates for degrees.—In the case of an individual who is not a candidate for a degree at an educational institution (as defined in section 151(e)(4)), subsection (a) shall apply only if the condition in subparagraph (A) is satisfied and then only within the limitations provided in subparagraph (B).

(A) Conditions for exclusion.—The grantor of the scholarship or fellowship grant is an organization described in section 501(c)(3) which is exempt from tax under section 501(a), the United States, or an instrumentality or agency thereof, or a State, a Territory, or a possession of the United States, or any political subdivision thereof, or the District of Columbia.

(B) Extent of exclusion.—The amount of the scholarship or fellowship grant excluded under subsection (a)(1) in any taxable year shall be limited to an amount equal to $300 times the number of months for which the recipient received amounts under the scholarship or fellowship grant during such taxable year, except that no exclusion shall be allowed under subsection (a) after the recipient has been entitled to exclude under this section for a period of 36 months (whether or not consecutive) amounts received as a scholarship or fellowship grant while not a candidate for a degree at an educational institution (as defined in section 151(3)(4))." INT. REV. CODE OF 1954, § 117.

6. Dr. Bachmura appeared *pro se* in the Tax Court proceedings.

7. INT. REV. CODE OF 1939, § 22(b)(3). It has been stated that to establish a gift, "there must be an intention to make a gift, a transfer of possession in accordance therewith, and an acceptance by the donee." Also there could be no consideration or compensation for the transfer. Robert E. Binger, 22 B.T.A. 111, 113 (1943).

8. 23 T.C. 254 (1954).

9. *Id.* at 262-63.

10. Ti Li Loo, 22 T.C. 220 (1954); Ephraim Banks, 17 T.C. 1386 (1952); Robert F. Doerge, 11 CCH Tax Ct. Mem. 475 (1952).

pected to use his skill in research on some particular project designated by the grantor, thereby, it was held, returning consideration for the grant. In 1951 the Bureau of Internal Revenue took the position that fellowship grants were non-taxable if "made for the training and education of an individual, either as part of his program in acquiring a degree or in otherwise furthering his educational development, no services being rendered as consideration therefor. . . ."[11] In the Internal Revenue Code of 1954, section 117 was enacted to provide a statutory basis for determining the tax status of fellowship and scholarship grants.[12] Under this section in order for a grant to be excludable from the gross income of an individual, not a candidate for a degree, it must be a fellowship grant and it must be received from a tax exempt organization.[13] The statute also limits the amount of the exclusion to $300 a month for a period not exceeding thirty-six months.[14]

The decision in the instant case is the first judicial interpretation of section 117 since its enactment in 1954. Here the taxpayer claimed he was the recipient of a fellowship grant from a tax exempt grantor, had otherwise met the requirements of section 117(b) (2),[15] and was thus entitled to the exclusion. He contended that in denying the exclusion the Commissioner contravened the intent of Congress in enacting section 117 by relying on the pre-1954 criterion of gift.[16] The taxpayer further argued that although section 117(b) (1),[17] relating to individuals who are candidates for degrees, states that where certain services are required as a condition to the grant, the compensation will not be excludable from gross income, there is no comparable provision in section 117(b) (2),[18] relating to individuals who are not candidates for degrees, and that therefore fellowship grants are excludable even though they represent compensation for services. The Commissioner, on the other hand, contended that the compensation received by the taxpayer could not be considered a fellowship grant

11. I. T. 4056, 1951-2 Cum. Bull. 8, 10. In the same opinion the Department held four post-doctorate fellowships taxable because the recipients had completed their educational development and the use of their previously acquired skills was deemed to be consideration for the grants.

12. See note 5 *supra.*

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. Senate and House Committee reports indicate that § 117 was enacted to eliminate the confusion which existed in the 1939 Code as to whether scholarship and fellowship grants were to be treated as income. There is no indication, however, that Congress intended to abolish the requirement that to be excludable these grants must qualify as gifts. S. REP. No. 1662, 83d Cong. 2d Sess. 188 (1954).

17. See note 5 *supra.*

18. See note 5 *supra.*

under the applicable Treasury Regulation[19] and that these Regulations are entirely consistent with section 117. The Commissioner urged that the arrangement between the taxpayer and Vanderbilt University was primarily one of employment and therefore was taxable[20] as a pay-

19. The applicable Regulation states:

"§ 1.117-2 Limitations.—(a) *Individuals who are candidates for degrees.*—(1) In general.—Under the limitations provided by section 117(b)(1) in the case of an individual who is a candidate for a degree at an educational institution, the exclusion from gross income shall not apply (except as otherwise provided in subparagraph (2) of this paragraph) to that portion of any amount received as payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or fellowship grant. Payments for such part-time employment shall be included in the gross income of the recipient in an amount determined by reference to the rate of compensation ordinarily paid for similar services performed by an individual who is not the recipient of a scholarship or a fellowship grant. A typical example of employment under this subparagraph is the case of an individual who is required as a condition to receiving the scholarship or the fellowship grant, to perform part-time teaching services. A requirement that the individual shall furnish periodic reports to the grantor of the scholarship or the fellowship grant for the purpose of keeping the grantor informed as to the general progress of the individual shall not be deemed to constitute the performance of services in the nature of part-time employment.

(2) *Exception.*—If teaching, research, or other services are required of all candidates (whether or not recipients of scholarships or fellowship grants) for a particular degree as a condition to receiving the degree, such teaching, research, or other services on the part of the recipient of a scholarship or fellowship grant who is a candidate for such degree shall not be regarded as part-time employment within the meaning of this paragraph. Thus, if all candidates for a particular education degree are required, as part of their regular course of study or curriculum, to perform part-time practice teaching services, such services are not to be regarded as part-time employment within the meanimg of this paragraph.

. . . .

"§ 1.117-4. Items Not Considered as Scholarships of Fellowship Grants.—The following payments or allowances shall not be considered to be amounts received as a scholarship or a fellowship grant for the purpose of section 117:

. . . .

"(c) *Amounts paid as compensation for services or primarily for the benefit of the grantor.*

(1) Except as provided in § 1.117-2(a), any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present, or future employment services or represents payment for services which are subject to the direction or supervision of the grantor.

(2) Any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research primarily for the benefit of the grantor. However, amounts paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research are considered to be amounts received as a scholarship or fellowship grant for the purpose of section 117 if the primary purpose of the studies or research is to further the education and training of the recipient in his individual capacity and the amount provided by the grantor for such purpose does not represent compensation or payment for the services described in subparagraph (1) of this paragraph. Neither the fact that the recipient is required to furnish reports of his progress to the grantor, nor the fact that the results of his studies or research may be of some incidental benefit to the grantor shall, of itself, be considered to destroy the essential character of such amount as a scholarship or fellowship grant." Treas. Reg. § 1.117 (1956).

20. See note 19 *supra*.

ment representing compensation for "employment services" under Regulation section 1.117-4(c). The court, in adopting the views of the Commissioner, held the Regulations valid since the taxpayer had not shown that they were unreasonable and inconsistent with the statute.[21]

In deciding whether a grant to an individual, not a candidate for a degree, is entitled to the section 117 exclusion it is necessary to determine the manner in which the grant was made. The methods by which a foundation interested in education makes funds for research available may vary somewhat as follows:

1. Grants may be made to a university upon application by it for the purpose of undertaking a research project which the university defines. Such a project will normally be under the supervision of some university administrator and the university will employ personnel to work under him.
2. Grants may be made directly to an individual scholar upon his application with the foundation defining the research project and supervising the work of the recipient.
3. Grants may be made to a university upon application by it. The university then may make grants from the fund to an individual scholar upon his application with the scholar choosing his own research project and working unsupervised.
4. Grants may be made directly to an individual scholar upon his application with the scholar choosing his own research project and working unsupervised.

The method by which the grant in the instant case was made is identical to that shown in example 1, above. The decision in this case states that such a grant will not be excludable under section 117. The decision also indicates that a grant such as that in example 2, above, will not be excludable by the individual recipient. The court considers such grants as compensation for "employment services"[22] and non-excludable since the research project is defined by either the foundation or the university and the individual's efforts are supervised by them. On the other hand the court recognizes that if the grant is made primarily to encourage individual scholars to pursue research on their own initiative the amount of the grant will be excludable. This is true even though the funds are used by the recipient to take the place of his teaching salary for a period of time. It would therefore seem that if the grant is made in the manner shown in either

21. The court states that statutory grants of special tax exemption are to be strictly construed and that the Regulation will be considered valid unless unreasonable and inconsistent with the statute. 32 T.C. No. 103 (Aug. 24, 1959).
22. 32 T.C. No. 103.

example 3 or 4, above, the individual recipient will be entitled to the section 117 exclusion. In such cases it is questionable whether the grant to the scholar can be said to be "compensation" as argued by petitioner in the instant case and to which the Tax Court agreed.[23] But in any event it will be treated differently from compensation for "employment services."

TORTS—LIBEL AND SLANDER—ABSOLUTE IMMUNITY OF EXECUTIVE GOVERNMENT OFFICIALS FROM DEFAMATION SUITS

Defendant, Acting Director[1] of Rent Stabilization,[2] issued a press release announcing his intention of suspending certain employees for activities which had resulted in severe criticism of the agency by Congress and the press.[3] Plaintiff-employees brought suit against defendant charging that the press release had libeled them.[4] Defendant

23. 32 T.C. No. 103.

1. Defendant's official title at the time of the press release was Deputy Director of Rent Stabilization. However, he had been appointed Acting Director to become effective four days later and was "acting" in the position of the director by virtue of the retiring director being out of town. 360 U.S. at 583, n. 10.

2. The office of Rent Stabilization was a branch of the Economic Stabilization Agency, whose head was the Director of Economic Stabilization. Barr v. Matteo, 244 F.2d 767, 768 (D.C. Cir. 1957). The Director of Economic Stabilization was appointed by the President and was directly responsible to him in policy matters, so his position might be comparable to that of a cabinet member for purposes of determining immunity from civil suit. 360 U.S. at 583. However, even if we assume defendant to be the head of Rent Stabilization, it can easily be seen that he was below the rank of a cabinet member.

3. In 1950, the plaintiffs were executives in the Office of House Expediter, the predecessor agency of the Office of Rent Stabilization, and defendant was it's general manager. The statutory existence of the office was about to expire, and it was questionable whether Congress would extend it. However, there was a large sum of money available to the agency earmarked for terminal-leave payments of employees for that year. Plaintiffs presented a plan calculated to utilize those funds by discharging employees, paying their accrued terminal-leaves from the fund, rehiring them immediately as temporary employees and restoring them to permanent status when and if the life of the agency was extended. The purpose of the plan was to prevent the agency from having to make these terminal-leave payments out of its general funds when the employees were actually terminated if the life of the agency was extended. Defendant opposed the plan because he felt it was wrong in spirit, though technically legal, but was not in a position to keep it from being used in connection with about fifty employees. In 1953 a senator sent a letter to the Office of Rent Stabilization inquiring about the plan. Plaintiffs, who were also executives in the successor agency, made no effort to present the letter to defendant, but drafted a reply defending the plan in a manner which definitely gave the impression that defendant was in full accord with it. Criticism of the agency from the Senate and the press followed. Defendant served notice upon plaintiffs that they were to be suspended from office and ordered the issuance of a press release which contained an account of the controversy and his action. 360 U.S. at 565-67.

4. The suit was brought in the United States District Court for the District of Columbia.

contended the issuance of the press release was within his official duty and therefore protected by a qualified or absolute immunity. The jury found defendant's statement libelous and the federal district court entered judgment for the plaintiffs, overruling defendant's contention that an immunity existed. The court of appeals held that the defendant was entitled only to a qualified immunity.[5] On certiorari to the Supreme Court of the United States, *held,* reversed. A government official is absolutely immune from liability for defamatory statements made within the scope of his duty. *Barr v. Matteo,* 360 U.S. 564 (1959).

The privileges or immunities[6] of public officials in defamation suits have been largely developed by the judiciary.[7] It has long been recognized in Anglo-American law that legislative[8] and judicial[9] officers are protected by an absolute immunity for statements made in their official capacity.[10] However, the absolute immunity of executive officers has developed more slowly.[11] In the latter part of the nineteenth century, the English courts held that military officers[12] and high ranking cabinet members[13] were absolutely immune from liability for statements made in interdepartmental communications. In 1896, in *Spalding v. Vilas,*[14] the Supreme Court of the United States, relying upon the English cases and extending those principles, held that cabinet members were absolutely immune from liability for com-

5. Barr v. Matteo, 256 F.2d 890 (D.C. Cir. 1958).

6. "Privilege" and "immunity" are used interchangeably by the Court. However, since "privilege" carries with it the connotation that there is a class of people which the law gives a special treatment, "immunity" seems to be the more accurate term. See PROSSER, TORTS 607, n. 1 (2d ed. 1955); Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 COLUM. L. REV. 463, 469 (1909).

7. 360 U.S. at 569; Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 COLUM. L. REV. 463, 471 (1909).

8. The history of legislative immunity in England is largely the history of the struggle between parliament and the crown for supremacy. It was first recognized as a custom of parliament in the fourteenth century, but during the Tudor and Stuart reigns (1485-1688) the extent of the immunity was uncertain. Parliament finally established its supremacy in 1689 and absolute immunity was guaranteed to its proceedings by the Bill of Rights. See Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings,* 10 COLUM. L. REV. 131, 132 (1910).

9. The absolute privilege of judicial officers seems to have been a product of the judiciary's struggle for independence in England. See Spalding v. Vilas, 161 U.S. 483, 495 (1896); Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 COLUM L. REV. 463, 474 (1909); *Defamation—Absolute Immunity,* 15 OHIO ST. L.J. 330, 337 (1954).

10. The main difference between qualified and absolute immunity is that with a qualified immunity, there will be recovery if actual malice (as distinguished from malice implied-by-law where there is no immunity) is alleged and proven, while if there exists an absolute immunity no inquiry into malice will be allowed even though it is alleged. PROSSER, TORTS 507 (2d ed. 1955).

11. Comment, *Defamation Immunity for Executive Officers,* 20 U. CHI. L. REV. 677, 678 (1953).

12. Dawkins v. Paulet, L.R. 5 Q.B. 94 (1869).

13. Chatterton v. Secretary of State for India, [1895] 2 Q.B. 189.

14. 161 U.S. 483.

munication to former employees of the cabinet member's department.[15] While the Supreme Court has had no occasion to extend the *Spalding* doctrine, the lower federal courts have broadened the immunity of cabinet officers to include press releases[16] and have extended the absolute immunity for interdepartmental communications to lower officials.[17] Statements which lower officials are required to make to fulfill affirmative duties have likewise been afforded absolute immunity.[18] In some states absolute immunity has been extended to lower state officials[19] while others have granted only a qualified immunity to officials below the rank of a state cabinet member.[20]

In the instant case the Court was presented with two problems: was the press release made by defendant within the scope of his official duty, and, if within the scope of his duty, should it be protected by an absolute or a qualified immunity.[21] Eight members of the Court found that the press release was within the scope of defendant's duty[22] on the theory that the press release was at least "an appropriate exercise of the [defendant's] discretion"[23] and the fact that issuing

15. Since the communications in *Spalding* were made only to former employees of the postal department who had a direct interest in the subject matter, its holding might well have been limited to interdepartmental communications. However, the courts have never chosen to so limit it. Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied,* 311 U.S. 718 (1941) (press release by Secretary of Interior); Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927), *cert. denied,* 275 U.S. 530 (1927) (press release by Secretary of the Treasury).

16. Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied,* 311 U.S. 718 (1941); Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927), *cert. denied,* 275 U.S. 530 (1927).

17. Taylor v. Glotfelty, 201 F.2d 51 (6th Cir. 1952) (psychiatrist of medical center for Federal prisoners); Farr v. Valentine, 38 App. D.C. 413 (Ct. App. 1912) (commissioner of Indian Affairs); De Arnaud v. Ainsworth, 24 App. D.C. 167 (Ct. App. 1904), *appeal dismissed,* 199 U.S. 616 (1904) (chief of record and pension office of War Department); Carson v. Behlen, 136 F. Supp. 222 (R.I. 1955) (chief of dietetic service of veterans' hospital); Miles v. McGrath, 4 F. Supp. 603 (Md. 1933) (naval officer).

18. Parravicino v. Brunswick, 69 F.2d 383 (D.C. Cir. 1934) (United States Consul required by law to make report).

19. Catron v. Jasper, 303 Ky. 598, 198 S.W.2d 323 (1946) (county sheriff); Schlinkert v. Henderson, 331 Mich. 284, 49 N.W.2d 180 (1955) (member of state liquor control commission); Hughes v. Bizzell, 189 Okla. 472, 117 P.2d 763 (1941) (president of state university); Montgomery v. City of Philadelphia, 392 Pa. 178, 140 A.2d 100 (1958) (deputy commissioner of Public Property of Philadelphia and city architect of Philadelphia).

20. Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954) (mayor of Des Moines); Peeples v. State, 179 Misc. 272, 38 N.Y.S.2d 690 (C.C.N.Y. 1943) (state examiner).

21. In a companion case, Howard v. Lyons, 360 U.S. 593 (1959), the Court, by a six-to-three majority, held that defendant, a captain in the United States Navy and Commander of the Boston Naval Shipyard, was absolutely immune for an alleged defamatory report sent to members of the Massachusetts congressional delegation.

22. 360 U.S. at 564 (majority opinion by Harlan, J.), 576 (concurring opinion by Black, J.), 578 (dissenting opinion by Warren, C.J.), 586 (dissenting opinion by Brennan, J.).

23. 360 U.S. at 575.

press releases was standard agency practice.[24] Mr. Justice Stewart thought the issuance of the press release was unrelated to defendant's official duty because it was for the sole purpose of defending his own individual reputation.[25]

Six justices were of the opinion that defendant's duties entitled him to an absolute immunity[26] while the other three justices felt that only a qualified immunity was justified.[27] Mr. Justice Harlan, writing an opinion adopted by three other justices, concluded that the desirability of compensating the defamed plaintiffs for injuries to their reputation was outweighed by the public interest in having executive officers discharge their duties without fear of defamation suits.[28] Mr. Justice Stewart[29] and Mr. Justice Black accepted this rationale, but Mr. Justice Black thought more emphasis should be placed upon the necessity that government officials be able to freely comment upon the activities of other government officials in order to create a better informed public opinion.[30] In a dissenting opinion adopted by Mr. Justice Douglas, Mr. Chief Justice Warren contended that the need to allow private citizens to criticize actions of government officials without fear of completely protected retorts, and in addition the desirability of allowing defamed plaintiffs redress, outweighed the danger of compelling government officials below the rank of cabinet members to occasionally defend their motives in defamation suits.[31] Mr. Justice Brennan argued in a separate dissent that even if the Court's balancing process was the correct method to be applied, the determination should be left to Congress because it was better equipped to handle the "imponderables" involved and to consider possible alternatives.[32]

The result of the instant case seems to be that liability for defamation cannot be predicated on any statement, no matter how malicious, made by any government official acting within the discretion afforded by his position.[33] The major objection to this holding is that its basic premise is conjectural: the extent to which fear of vexatious litigation interferes with the effective functioning of government officials has

24. *Id.* at 574.
25. 360 U.S. at 592 (Stewart, J., dissenting).
26. 360 U.S. at 564 (majority opinion of Harlan, J.), 576 (dissenting opinion by Stewart, J.).
27. 360 U.S. at 578 (dissenting opinion by Warren, C.J.), 586 (dissenting opinion by Brennan, J.).
28. 360 U.S. at 571.
29. 360 U.S. at 592 (Stewart, J., dissenting).
30. 360 U.S. at 577 (Black, J., dissenting).
31. 360 U.S. at 584 (Warren, C.J., dissenting). Mr. Chief Justice Warren would apparently distinguish between those officials who are appointed directly by the President and those who are not on the basis of the first group partaking of presidential immunity. See 360 U.S. at 582-83 (Warren, C.J., dissenting).
32. 360 U.S. 591 (Brennan, J., dissenting).
33. 360 U.S. at 573. See also 360 U.S. at 587 (Brennan, J., dissenting). The protection given to higher officials is broader than that given to lessor officials only because the discretion of the higher official is broader. 360 U.S. at 573.

never been determined. Beyond the assumptions made by the courts and writers on the subject there appear to be no conclusive data. Such an important right of citizens—the right to be secure from malicious injury to their reputations—should not be withdrawn without a concrete demonstration of its harmful consequences. In the absence of such a showing, and in view of some recent evidence, referred to by Mr. Justice Brennan, indicating that an absolute immunity may be abused,[34] perhaps the extension of the immunity is unwarranted. Should evidence appear indicating that the qualified privilege is insufficient to give the needed protection to government officials, Congress in any event will be better able to provide the solution than the courts.[35] Until such evidence appears it seems that the qualified privilege, which protects the official against all but malicious conduct, is more desirable. Furthermore, even if it is true that government officials are actually restrained in the performance of their duties by fear of defamation suits to an extent which warrants the denial of redress to plaintiffs who have been defamed, this result is still open to question. Under prior Supreme Court decisions, the existence of the immunity was determined by a reasonably specific test—the official's status in the executive hierarchy. It is now to be granted on a functional basis to any official making statements within the proper discretion afforded by his position. Whatever the theoretical merits of a functional test, it remains that in this context any uncertainty about the existence of the privilege in a given case (was the statement made within the proper discretion of the official?) renders doubtful the value of the immunity as an incentive to fearless executive action.[36]

TORTS—WRONGFUL DEATH—LIABILITY OF CONVERTER OF CHATTEL WHICH RESULTS IN OWNER'S SUICIDE

Plaintiff's testator, a diamond broker, took possession of a diamond with the understanding that the stone or its stated value was to be surrendered upon demand. He consigned the diamond on the same terms to the defendants, diamond dealers, in order that they might find a prospective purchaser. Defendants, knowing such consignments

34. 360 U.S. at 590 (Brennan, J., dissenting).

35. 360 U.S. at 590 (Brennan, J., dissenting). For a good article proposing that the government should be held liable for the malicious torts of its officials, see Davis, *Administrative Officers' Tort Liability,* 55 MICH. L. REV. 201 (1956). Another possible solution to the problem is for Congress to modify our federal summary judgment procedure so as to allow the court to determine the issue of malice on the basis of the pleadings, depositions, discovery and affidavits. Comment, *Absolute Immunity: Too Broad a Protection for the "Public Interest"?* 10 STAN. L. REV. 589, 594 (1958).

36. 360 U.S. at 576 (Warren, C.J., dissenting).

were customary in the diamond trade, intentionally converted the jewel. The complaint alleged defendants intended thus to injure deceased's business reputation, and that their wrongful act caused the decedent such extreme emotional distress that he committed suicide. On motion to dismiss plaintiff's action for wrongful death on the ground that it failed to state a cause of action, *held,* for plaintiff. An allegation that defendants' intentional and malicious conversion provoked insanity in the deceased so that he took his own life states a cause of action within the wrongful death statute.[1] *Cauverien v. DeMetz,* 188 N.Y.S.2d 627 (Sup. Ct. 1959).

Tort liability attaches only if a defendant's wrongful conduct was the proximate cause[2] or a substantial factor[3] in bringing about the harm of which plaintiff complains. But courts are more ready to recognize a connecting link between the act of the defendant and the harm complained of when the act is intentional, rather than negligent.[4] Courts have allowed damages for mental anguish where it

1. "The executor or administrator . . . of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who . . . would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death." N.Y. Deced. Est. § 130.

2. Because there are innumerable causes in every case, the term "proximate cause" includes two pertinent questions: first, was the defendant's conduct a factual cause of the damage? and second, did this conduct play such an appreciable part as to make him responsible? See generally GREEN, PROXIMATE CAUSE 132 (1927).

3. "If the actor's conduct is intended by him to bring about bodily harm to another which the actor is not privileged to inflict, it is the legal cause of any bodily harm of the type intended by him which it is a substantial factor in bringing about." RESTATEMENT, TORTS § 279 (1934). This rule is applicable "to determine liability for conduct intended to invade other interests of personality . . . ." *Id.* at § 280. See also RESTATEMENT, TORTS § 455 (1934).

4. "[T]he moral aspect of the case . . . not infrequently has directed the course of the law. . . . Causation, as distinguished from duty, is purely a matter of producing a subsequent event. In determining how far the law will trace causation and afford a remedy, the facts as to the defendant's intent, his imputable knowledge, or his justifiable ignorance are often taken into account. The moral element is here the factor that has turned close cases one way or the other. For an intended injury the law is astute to discover even very remote causation. For one which the defendant merely ought to have anticipated it has often stopped at an earlier stage of the investigation of causal connection. And as to those where there was neither knowledge nor duty to foresee, it has usually limited accountability to direct and immediate results.

"This is not because the defendant's act was a more immediate cause in one case than in the others, but because it has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault were present. Treating all these cases as turning upon an issue of immediateness of causation has resulted in much confusion of ideas and made the conflict of decision appear to be greater than it is. . . . The decisions do not turn on remoteness of causation alone, but upon such remoteness plus freedom from moral fault." Derosier v. New England Tel. & Tel. Co., 81 N.H. 456, 463-64, 130 Atl. 145, 152-53 (1925). See generally Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability,* 81 U. PA. L. REV. 586 (1933).

accompanies physical injury, and in recent years the intentional infliction of emotional distress has become an independent ground of recovery.[5] While consequential damages awarded for conversion have traditionally included the value of the property with interest, there is no substantial reason why they should be limited[6] so as to exclude recovery for mental suffering,[7] but there is little authority supporting this proposition. Whether consequential damages for mental suffering will encompass death by suicide has arisen in contexts other than conversion actions,[8] and the consensus is that suicide is a new and independent act for which the defendant is not civilly responsible.[9] But according to many dicta an action under the death

5. United States v. Hambleton, 185 F.2d 564 (9th Cir. 1950); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925); Herman Saks & Sons v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934). PROSSER, TORTS § 11 (2d ed. 1955). See note 11 *infra.*

6. MCCORMICK, DAMAGES 466 (1935). It is not unusual for consequential damages to include an award for loss of use during any period of detention. See, *e.g.*, Food Specialties, Inc. v. John C. Dowd, Inc., 162 N.E.2d 276 (Mass. 1959).

7. In Brian v. Wilson, 81 So. 2d 145 (La. 1955) a conditional vendor repossessed two trucks from plaintiff and sold them to a third person. Plaintiff recovered $100 for humiliation and embarrassment. The persuasiveness of this decision in a common law jurisdiction is questionable.

8. The cases in which civil recovery for suicide has been sought may be roughly categorized as: (1) suits authorized by civil damage statutes for death caused by use of intoxicating liquors (see Annot., 11 A.L.R.2d 751, 765 (1950)); (2) claims under workmen's compensation statutes (see 1 LARSON, WORKMEN'S COMPENSATION §§ 36.00 to .40 (1952)); (3) suicide following intentional torts (see Bauer, *Suicide as Intervening Cause in Case of Wilful Torts,* 5 ILL. L.Q. 239 (1923), Bauer, *Suicide as Intervening Cause in Workmen's Compensation Cases as Compared with Suicide in Cases of Wrongful Death,* 5 B.U.L. REV. 229 (1925)); and (4) where decedent took his own life after being harmed by defendant's negligence. Liability is predicated on causal relationship in all of these situations, but the extent of liability differs.

9. Scheffer v. Railroad, 105 U.S. 249 (1882) (demurrer sustained in wrongful death action where passenger committed suicide eight months after being injured in a collision of two trains); Salsedo v. Palmer, 278 Fed. 92 (2d Cir. 1921) (demurrer to complaint sustained where suicide followed physical and mental torture); Stevens v. Steadman, 140 Ga. 680, 79 S.E. 564 (1913) (error to overrule demurrer to complaint alleging a letter requesting resignation caused suicide); Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N.E. 80 (1909) (directed verdict on re-trial where suicide followed physical injury and employer negligent *per se*); Riesbeck Drug Co. v. Wray, 111 Ind. App. 467, 39 N.E.2d 776 (1942) (drug store not liable where father sent eight year old child to purchase poison he used to commit suicide); Daniels v. New York, N.H. & H. R.R., 183 Mass. 393, 67 N.E. 424, 426 (1903) (plaintiff did not sustain his burden of proving that negligently inflicted physical injury caused decedent's suicide); Long v. Omaha & C.B. St. Ry., 108 Neb. 342, 187 N.W. 930 (1922) (demurrer sustained in a wrongful death action where complaint alleged defendant's negligently inflicted physical injury); Koch v. Fox, 71 App. Div. 288, 75 N.Y.S. 913 (1902) (evidence did not justify jury's verdict that suicide resulted from an insane impulse caused by negligent infliction of physical injury); Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324 (1948), 2 VAND. L. REV. 330 (1949); Jones v. Stewart, 183 Tenn. 176, 191 S.W.2d 439 (1946) (demurrer to complaint alleging accusation of crime led to suicide sustained). Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 Pac. 436 (1930) (evidence did not show that negligently inflicted physical injury caused a frenzy or uncontrollable impulse during which decedent took his

statute may be maintained when insanity caused by defendant's negligent act or omission prevents the decedent from realizing the nature of his act or controlling his conduct.[10] In such a case the intervening act is considered that of an irresponsible agent.

The intentional infliction of injury or damage may be a basis for an action in tort even though the act is not within a traditional tort category.[11] The court in the instant case noted that "where the defendant's act is intentional, recovery has been allowed for emotional distress and physical harm resulting therefrom even in the absence of direct physical injury."[12] Therefore the court reasoned that "special damages should also be allowed for mental suffering resulting from a malicious and wilful conversion."[13] In deciding whether or not the special damages should include compensation for death by suicide the court elected to follow the minority opinion in *Salsedo v. Palmer*.[14] The dissenting judge in that case argued that whether or not suicide breaks the chain of causation is a question of fact to be decided by the jury. If a complaint shows a state of facts which fairly implies that death was the proximate result of defendants' acts a demurrer should be overruled.[15]

The decision in this case that the allegations of the complaint state a cause of action is justified. Civil liability for death by suicide has been denied as a matter of law[16] in an effort to prevent undeserved

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own life); *But cf.* Stephenson v. State, 205 Ind. 141, 179 N.E. 633 (1932), 45 HARV. L. REV. 1261 (defendant convicted of murder where girl committed suicide after attempted rape).

10. Elliott v. Stone Baking Co., 49 Ga. App. 515, 176 S.E. 112 (1934) seems to be the only case deciding this point. But it is asserted by dicta in these cases: Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N.E. 80 (1909); Riesbeck Drug Co. v. Wray, 111 Ind. App. 467, 39 N.E.2d 776 (1942); Daniels v. New York, N.H. & H. R.R., 183 Mass. 393, 67 N.E. 424 (1903); Long v. Omaha & C.B. St. Ry., 108 Neb. 342, 187 N.W. 930 (1922); Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 Pac. 436 (1930). See also Trumbaturi v. Katz & Besthoff, 180 La. 915, 158 So. 16 (1934) (decision predicated on LA. CIV. CODE ANN. art. 2315 (West 1953)).

11. For treatment of this prima facie tort doctrine see generally Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196 (1946); 21 ALBANY L. REV. 308 (1957); 20 BROOKLYN L. REV. 122 (1953-54); 8 BUFFALO L. REV. 305 (1959).

12. 188 N.Y.S.2d 627, 631 (1959).

13. *Ibid.*

14. 278 Fed. 92 (2d Cir. 1921). In construing the New York wrongful death statute the court held that no civil liability results where a person is wrongfully imprisoned and tortured in consequence of which he becomes suicidally despondent and mentally irresponsible for his own conduct and kills himself, because suicidal mania is not a natural or reasonable result of physical and mental torture.

15. Salsedo v. Palmer, 278 Fed. 92, 99 (2d Cir. 1921) (dissenting opinion). See also Koch v. Fox, 71 App. Div. 288, 75 N.Y.S. 913, 920-21 (1902) (dictum).

16. See Scheffer v. Railroad, 105 U.S. 249 (1882); Salsedo v. Palmer, 278 Fed. 92 (2d Cir. 1921); Stevens v. Steadman, 140 Ga. 680, 79 S.E. 564 (1913); Long v. Omaha & C.B. St. Ry., 108 Neb. 342, 187 N.W. 930 (1922); Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N.E. 80 (1909) (semble); Daniels v. New York, N.H. & H. R.R., 183 Mass. 393, 67 N.E. 424 (1903) (semble).

recoveries.[17] But the fear of opening the door to baseless claims is a poor reason for denying recovery when suicide is the result of defendant's conduct. The probability of succeeding on a false claim diminishes to the extent that advances in medical science and knowledge of mental illness make it possible to establish causal relationship. Moreover, the court under this ruling still retains a degree of control over the result. After careful scrutiny of the evidence, a verdict for the defendant may yet be directed or granted notwithstanding a jury's verdict.[18] Thus the facts of this case when fully before the court may not warrant recovery, but the instant decision is to be commended for making possible a rational choice on this ultimate issue.

17. This is connoted in several of the opinions, see note 15 *supra*. It is most apparent in Salsedo v. Palmer, 278 Fed. 92, 98-99 (1921) and Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 Pac. 436, 444 (1930).

18. English cases have held that premeditated suicide under the impulse of insanity does not break the chain of causation. See, *e.g.*, Pigney v. Pointers Transp. Serv., Ltd. [1957] 2 All E.R. 807, 75 S.A.L.J. 99 (1958) (defendants negligently injured decedent who committed suicide eighteen months later); *cf.* workmen's compensation cases: Marriott v. Maltby Main Colliery Co. [1920] 37 T.L.R. 123 (A.C.); Withers v. London, B. & S.C. Ry. [1916] 2 K.B. 772; Grime v. Fletcher [1915] 1 K.B. 734.