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Case Notes

CASE NOTES

Constitutional Law—Federal Government Prohibited From Using State Compelled Testimony or Fruits Thereof Against a Witness in a Federal Prosecution.—Petitioners were subpoenaed to appear before a hearing of the Waterfront Commission of New York Harbor, a bi-state body. After refusing to answer questions on the ground of possible self-incrimination, petitioners were granted immunity from state prosecution in New York and New Jersey. Petitioners still refused to answer the questions in view of possible federal prosecution to which the grant of immunity did not purport to extend, and they were held in civil and criminal contempt of court. The New Jersey Supreme Court reversed the criminal contempt judgment on procedural grounds, but sustained the civil contempt judgment on its merits.[1] The United States Supreme Court held that the federal government could not make use of state compelled testimony and that the witness could therefore be compelled to testify; but the Court reversed and dismissed both the civil and criminal contempt judgments on the ground that the petitioners had a reasonable fear that the federal government might use the answers against them in a federal prosecution.[2] *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

The fifth amendment guarantee that no person can be compelled to give incriminating testimony against himself is derived from English common law.[3] The English Court of Chancery held, in *King of the Two Sicilies v. Willcox*,[4] that the rule of evidence against compulsory self-incrimination did not protect a witness from disclosing offenses in violation of the laws of another country. Although this case has been followed in several American decisions,[5] it was specifically limited to its facts by the English Court of Chancery Appeals in *United States v. Mc Rae*.[6] The *Mc Rae* decision is accepted as the most authoritative anouncement of the English rule[7] which holds that

1. Application of the Waterfront Comm'n of N.Y. Harbor, 39 N.J. 436, 189 A.2d 36 (1963).

2. Feldman v. United States, 322 U.S. 487 (1944), held that testimony compelled by a state court could be introduced into evidence in the federal courts. This case has been specifically overruled by Murphy v. Waterfront Comm'n, 378 U.S. 52, 77 (1964).

3. See Brownsword v. Edwards, 2 Ves. Sen. 244, 28 Eng. Rep. 157 (Ch. 1750); East India Co. v. Campbell, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (Ex. 1749).

4. 7 State Tr. (N.S.) 1049 (1851).

5. Knapp v. Schweitzer, 357 U.S. 371 (1958); United States v. Murdock, 284 U.S. 141 (1931). Both of the above cases were specifically overruled in Murphy, 378 U.S. at 76, 77, as well as the cases upon which they relied, such as Hale v. Henkel, 201 U.S. 43 (1906).

6. L.R. 3 Ch. App. 79 (1867). The United States sued in an English Court to recover money which defendant had received as an agent of the Confederate States during the Civil War. The defendant refused to answer questions which would have exposed him to forfeiture and penalty under the laws of the United States, and the court upheld his plea.

7. "The witness is protected . . . as to crimes, penalties and forfeitures cognizable not only by English but foreign law, provided the foreign law be clearly proved or admitted." Phipson, Evidence 199 (6th ed. 1921), cited in Grant, Immunity From Compulsory Self-

the witness is now protected from answering any question which has any tendency to expose him to criminal prosecution in another jurisdiction if that danger be real and apparent.

The majority in the instant case relied on this change in the English rule to explain any inconsistency in prior rulings of the Court. There are two discernible lines of cases involving self-incrimination, but neither depends wholly upon the interpretation of the English rule. One line deals with the privilege against self incrimination in and of itself, while the other deals with immunity statutes in regard to the fifth amendment.

The Court in the instant case relied on *United States v. Saline Bank*[8] and *Ballman v. Fagin*[9] as correctly interpreting the English rule to be that any danger of incrimination in another jurisdiction is sufficient to invoke the fifth amendment privilege. In *Saline Bank*, the Government brought suit in the district court to recover certain bank deposits. Defendants resisted discovery on the ground that they would incriminate themselves under the laws of Virginia, and the Court upheld this plea. This decision was followed in *Ballman*, where petitioner, claiming possible incrimination under state law, successfully refused to answer certain questions before a federal grand jury. Both these cases defined the extent of the privilege against self-incrimination guaranteed by the fifth amendment: a witness in a federal court can invoke the privilege against self-incrimination if there is any danger of incrimination in another jurisdiction. However, *United States v. Murdock*[10] held on the authority of *King of Two Sicilies*,[11] that the privilege does not include the possibility of prosecution in another jurisdiction. The instant Court specifically overruled *Murdock* and adopted the rule of *Saline Bank* and *Ballman*.

The reverse situation, where a witness in a state court asserts the privilege because of possible federal prosecution, was before the Court in *Jack v. Kansas*.[12] There the witness refused to testify when granted immunity from state, but not federal prosecution, and was held in contempt. The Court noted that the fifth amendment privilege against self-incrimination was applicable only to a witness in a federal court and refused to apply the fifth amendment to the states through the fourteenth amendment. Under the state

Incrimination in a Federal System of Government, 9 Temp. L.Q. 57, 61-62 (1934). See also Grant, Federalism and Self Incrimination, 4 U.C.L.A.L. Rev. 549 (1957).

8. 26 U.S. (1 Pet.) 100 (1828).

9. 200 U.S. 186 (1906).

10. 284 U.S. 141 (1931). The defendant was indicted in a federal court for refusing to supply information to federal revenue agents. Defendant claimed possible state prosecution, but the Court held that fear of state prosecution did not justify a refusal to answer questions by federal officials, citing Hale v. Henkel, 201 U.S. 43 (1906), which relied on King of Two Sicilies v. Willcox, 7 State Tr. (N.S.) 1049 (1851). In Hale, the appellant was held in contempt of a federal court for refusing to answer questions on the ground that he was not protected from state prosecution. The Court stated that the only danger to be considered is the one arising within the same jurisdiction.

11. Supra note 12. But see United States v. Mc Rae, L.R. 3 Ch. App. 79 (1867).

12. 199 U.S. 372 (1905).

law the witness was protected only against giving testimony which would be incriminating in that jurisdiction. Today, however, due to *Malloy v. Hogan*[13] the fifth amendment is applicable to the states. Thus, the present Court reasoned that a witness in a state court can now refuse to testify if he fears prosecution in another jurisdiction.[14]

The Court in the instant case also dealt with the scope of a state immunity statute in relation to the fifth amendment privilege against self-incrimination. The privilege is an absolute right to remain silent; the exception is a grant of immunity. Immunity is a separate aspect of self-incrimination and is not necessarily synonymous with it. However, it has been held that the grant of immunity to be valid must be co-extensive with the privilege.[15] Although the immunity must be as broad as the privilege, a state does not have the power to grant immunity from a federal prosecution. Therefore, a state immunity statute cannot be co-extensive with the privilege against self-incrimination and on this basis a witness should not be compelled to testify.

The Court in the present case recognized the inadequacy of the state immunity statute in light of possible federal prosecution, but refused to allow the witness to remain silent. Rather, the Court stated that the introduction of evidence derived from state compelled testimony, or the fruits of it, would be inadmissible in a federal prosecution.[16] This is the first time since *Counselman v. Hitchcock*[17] that the Court considered whether the fifth amendment barred only the fruits of compelled testimony, or was an absolute bar to any future prosecution.

In *Counselman*, the Court declared a federal immunity statute unconstitutional because it prohibited only the use of the compelled testimony in a criminal proceeding and did not protect the witness against the indirect use of his compelled testimony by searching out other sources of information upon which he might be convicted. The Court stated: "We are clearly of [the] opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."[18] *Counselman* required that the immunity statute must be co-extensive

13. 378 U.S. 1 (1964).

14. 378 U.S. at 77-78. "What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities." Malloy v. Hogan, 378 U.S. 1, 11 (1964).

15. Counselman v. Hitchcock, 142 U.S. 547, 585 (1892). The Court stated that "legislation cannot abridge a constitutional privilege, and . . . cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."

16. "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits can not be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that . . . the Federal Government must be prohibited from making any such use of the compelled testimony and its fruits." Murphy v. Waterfront Comm'n, 378 U.S. at 79.

17. 142 U.S. 547 (1892).

18. Id. at 585.

with the privilege against self-incrimination and the witness must be protected against any future prosecution resulting from the use of the testimony. *Brown v. Walker*[19] sustained a federal immunity statute which prohibited any future prosecution, state or federal, concerning any matter disclosed in the compelled testimony. Subsequent federal immunity statutes have conformed to *Counselman* and *Brown* in prohibiting future prosecution.[20] Apparently the instant Court did not feel that the immunity, to be adequate, must prohibit all future prosecutions. It necessarily views *Counselman* as announcing no more than a preclusionary rule of evidence. It would then follow that, while the federal government is prohibited from using compelled testimony and its fruits, it is not precluded from all future prosecutions concerning that compelled testimony. How real the possibility of future federal prosecution is, remains to be seen. It is reasonable to expect the Court to find any evidence discovered after state compelled testimony to be the fruit of the compelled testimony.[21] Further, the Court here stated that the federal government will have the burden of proving that its evidence is untainted and unconnected with the state compelled testimony,[22] and it seems, the only conceivable situation where there would be entire freedom from suspicion is where the evidence had been acquired before the witness testified in a state court.

Thus, a state witness may be placed in the advantageous position of immunizing himself from federal prosecution. The state prosecutor may not appreciate the extent to which the federal government will be hampered if the state grants the witness immunity, since he has little chance of knowing what the witness' testimony will reveal. Testimony under a state grant of immunity for an apparently inconsequential charge may reveal a more grievous federal offense with the result that federal law enforcement may be frustrated. Realistically viewed, power is vested in the states to control or limit federal execution of federal policies. It is open to question whether this decision is consistent with the concept of federal supremacy so long espoused by the Supreme Court and, in particular, by the present bench.

Constitutional Law—Freedom of Religion—New Jersey Supreme Court Orders Pregnant Jehovah Witness To Consent to Blood Transfusion To Save Unborn Child.—Plaintiff hospital sought a determination of its rights to administer blood transfusions to the 32-week pregnant defendant, who based her refusal upon the first amendment freedom of religion guarantee. Defendant was a Jehovah Witness, a sect believing that the administration of blood is contrary

19. 161 U.S. 591 (1896).

20. See 8 Wigmore, Evidence § 2281 n.11 (McNaughton rev. ed. 1961).

21. See Hoffman v. United States, 341 U.S. 479, 486 (1951) where it is stated that "the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Accord, United States v. Trigilio, 255 F.2d 385 (2d Cir. 1958); United States v. Costello, 222 F.2d 656 (2d Cir. 1955); United States v. Doto, 205 F.2d 416 (2d Cir. 1953).

22. 378 U.S. at 79 & n.18.

to the teachings of the Bible.[1] While defendant was in no immediate danger, the evidence showed a probability that hemorrhaging would develop prior to delivery and that, in such an event, both the mother and child would die unless blood transfusions were given to the mother. The New Jersey Supreme Court, reversing a chancery division decision,[2] held that the first amendment does not prevent a state court from ordering that an expectant mother be transfused for the purpose of saving the unborn child. The case was remanded for the appointment of a special guardian for the unborn child, for an order that the guardian consent to such transfusions as the physician in charge deemed necessary to preserve the lives of the mother and child, and for an order directing the mother to submit to the transfusions. *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964) (per curiam).

The court relied upon two precedents in reaching its decision. The first was the case of *Smith v. Brennan*[3] which held that a child who was born alive could recover for any negligently inflicted prenatal injury. Insofar as that precedent is pertinent here, it merely established that an unborn child has a legally recognized "right to begin life with a sound mind and body."[4]

The second case relied upon was that of *State v. Perricone*[5] which involved an action under a "neglect" statute[6] to appoint a guardian for the "blue baby" of Jehovah Witness parents. The evidence was that the child would die in the absence of a transfusion whereas its chances of living would be greatly enhanced by transfusions. The court found that the religiously inspired refusal by the parents of permission to administer a blood transfusion constituted neglect of the child within the meaning of the statute and a guardian was appointed and ordered to consent to the recommended treatment.

In the instant case, the court reasoned that in view of *Smith v. Brennan* the

1. Jehovah Witnesses believe that a blood transfusion is comparable to eating blood which is forbidden by various passages of the Bible. See, e.g., Leviticus 17:10-14 and Genesis 9:4.

2. Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, Civil No. C-2825-63, N.J. Super. Ct., June 12, 1964.

3. 31 N.J. 353, 157 A.2d 497 (1960). Accord, Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1950); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953) and Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

4. Smith v. Brennan, supra note 3 at 364, 157 A.2d at 503. The court said that this right exists whether or not the child is viable. Compare Williams v. Marion Rapid Transit, Inc., 152 Ohio 114, 87 N.E.2d 334 (1949).

5. 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1962), 12 DePaul L. Rev. 342, 34 Miss. L.J. 219, 24 U. Pitt. L. Rev. 642, 8 Vill. L. Rev. 114, 65 W. Va. L. Rev. 184.

6. N.J. Stat. Ann. § 9:2-9 (1960). "When the parents of any minor child . . . shall neglect to provide the child with proper protection, maintenance and education . . . it shall be lawful for any person interested in the welfare of such child to institute an action in the Superior Court or the Juvenile and Domestic Relations Court . . . for the purpose of having the child brought before the court, and for the further relief provided by this chapter. The court may proceed in the action in a summary manner or otherwise."

fact that the child was unborn would not distinguish *State v. Perricone*. Since the "neglect statute" applies only to "minor children," it is implicit in the decision that an unborn child is a minor child within the meaning of the statute. This upholds a 1961 decision by the New Jersey Superior Court which awarded custody of an unborn child to a temporary guardian who was ordered to consent to blood transfusions for the child *after* it was born.[7]

The bedrock of the American legal tradition embodies two basic rights: the right to freely practice one's religion and the right of the parent to determine and direct the course of development for his child. Although both of these rights are to be accorded the highest possible respect in the law,[8] neither is without limitation.[9] The recognized right and duty of the state as *parens patriae*[10] in overseeing the welfare of its children have at times, such as in the instant case, come into conflict with these rights of the individual and the courts have traditionally attempted to strike a balance between these freedoms and the general welfare of society.[11]

The Supreme Court has made it quite clear that the constitutionally guaranteed freedom of religion has two aspects: the freedom to believe and the freedom to

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7. Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961). This case involved a pregnant Jehovah Witness whose blood was classified as Rh negative, and was incompatible with that of the unborn child. The evidence established beyond a doubt that the child would die unless a blood transfusion was administered soon after birth.

8. Board of Educ. v. Barnette, 319 U.S. 624 (1943). The Court struck down a resolution of the Board of Education requiring all teachers and pupils to salute the flag when the parents of Jehovah Witness children objected on the ground that their children were being forced to pay homage to a "graven image." See Exodus 20:4-5. See also, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Daly v. Daly, 21 N.J. 599, 604, 123 A.2d 3, 6 (1956).

9. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (statute prohibiting sale of religious magazines by children under 12 years of age held constitutional); Sadlock v. Board of Educ., 137 N.J.L. 85, 91, 58 A.2d 218, 222 (1948) (upheld statute requiring school children to be vaccinated even though contrary to the parents' religion). See Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (dictum) where the Court said that freedom of religion "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulations for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection."

10. The term "parens patriae" means "father of his country" and refers to the right and duty of the sovereign to protect any person, such as a child, who is under a disability. Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955); Lippincott v. Lippincott, 97 N.J. Eq. 517, 519-20, 128 Atl. 254, 255 (Ct. Err. & App. 1925). The term was originally used in reference to the King of England and now refers to the sovereign people. Helton v. Cawley, 241 Iowa 296, 312-13, 41 N.W.2d 60, 70 (1950). The power of the state to fulfill its duty as parens patriae is inherently vested in the courts of equity. Arnold v. Arnold, 246 Ala. 86, 91-92, 18 So. 2d 730, 734 (1944).

11. Reynolds v. United States, 98 U.S. 145 (1878); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1962); McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957).

act in accordance with that belief.[12] While the freedom to believe is absolute, the freedom to act is limited insofar as it adversely affects the public weal or the well-being of a child.[13] Similarly, the natural right of the parent to care for the child is limited by the paramount consideration for the welfare of the child.[14]

With these limitations in mind, the courts have many times ordered medical treatment for children in spite of the objections founded upon the religion of the parents.[15] Several cases involving blood transfusions are in agreement with the *Perricone*[16] case. *In re Vasko*[17] resulted in a court order for the removal of an eye when it was shown that the child's life depended upon it. Corrective surgery on a child's leg having a progressive deformity was ordered in *In re Rotkowitz*[18] where the evidence established little doubt of success in the operation. On still another occasion, a Texas court ordered a harmless treatment for arthritis.[19]

Decisions in which the courts have refused to override the parents include equally varied circumstances.[20] *In re Hudson*[21] was a case in which the court refused to order the amputation of an arm which was as large as the rest of the child's body and which would thereby prevent normal activity. There was divergent medical evidence upon the ultimate effect of no operation, and it was established that an operation would involve an appreciable risk of death. Courts

12. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Reynolds v. United States, supra note 11.

13. Cantwell v. Connecticut, supra note 12; Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961); McBride v. McCorkle, 44 N.J. Super. 463, 130 A.2d 881 (1957).

14. Lippincott v. Lippincott, 97 N.J. Eq. 517, 519-20, 128 Atl. 254, 255-56 (Ct. Err. & App. 1925); Kessler v. Kessler, 192 N.E.2d 4 (Ind. App. 1963).

15. The courts will not make a determination upon the reasonableness of the religious belief but they may question whether or not the represented belief is held in good faith. United States v. Ballard, 322 U.S. 78, 86 (1944).

16. See, e.g., People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952), cert. denied, 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97 (Kansas City Ct. App. 1952); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961).

17. 238 App. Div. 128, 263 N.Y. Supp. 552 (2d Dept. 1933).

18. 175 Misc. 948, 25 N.Y.S.2d 624 (Child. Ct. 1941).

19. Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947).

20. No case could be found where a court refused to order a medically recommended blood transfusion for a child. It is somewhat surprising to learn that there is still considerable controversy within the medical profession upon the reliability of blood transfusions. Zeitlin, Blood Transfusion Hazards, 2 Medical Science & Laws 294 (1961). A recent article on the subject indicates that 1 out of every 80 Americans will require a blood transfusion this year. N. Y. Times, Mar. 29, 1964, § 6 (Magazine), p. 38. Based upon a total population of 190 million, that means 2,375,000 Americans will be transfused annually. The same article points out that the virus of hepatitis is transmitted in about 1 out of every 200 transfusions. Id. at 40. Assuming that each of the 2,375,000 persons will receive only one transfusion, it may accordingly be estimated that some 11,875 persons will become seriously ill or die solely because of contracting hepatitis via blood transfusions this year. Over 3,000 more deaths are attributable to transfusions of incompatible blood. Id. at 42.

21. 13 Wash. 2d 673, 126 P.2d 765 (1942).

have refused to order the treatment of rachitis[22] and speech defects.[23] Whether corrective surgery on a child's cleft palate should be undertaken has been said to be discretionary with the parents.[24]

It appears that the courts have generally assessed the situation by weighing the effect upon the child if no treatment is ordered, against the effect if treatment is ordered, giving consideration to the risks of adverse effects and likelihood of success in each instance.[25] The religious beliefs of the objecting parents seem to be accorded little, if any, weight. It is quite clear that an objection based solely on religious grounds will not impede court action.[26]

Authority dealing with the medical treatment of adults is scant. A 1962 New York Supreme Court decision held that the courts were without power to order a transfusion for an elderly Jehovah Witness.[27]

Dictum of the U.S. Supreme Court indicates that:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[28]

One commentator has put it this way:

> Society and the courts seem to say: 'We are determined that a child shall grow up safely and in good health to maturity, and we will intervene when his life or health is threatened by his parents' religious or other eccentricities. But having taken the trouble so to see him into manhood, why, if he thereafter chooses foolishly to endanger his own life—and does not at the same time endanger others—then we wash our hands of him.'[29]

It would thus appear that, while the courts have little hesitancy in ordering the medical treatment of children, they will generally not follow that course with respect to competent adults. The principal case, however, does not fit directly in either of these categories; rather it contains elements of each. It is believed to be the first case in which the highest court of a state has held

22. In re Tuttendario, 21 Pa. Dist. 561 (1911). The child had a progressive deformity of the spine which would seriously interfere with the child's use of his legs. The operation was a common one although it appeared that there was a large margin of error in medical diagnosis and prognosis.

23. In re Frank, 41 Wash. 2d 294, 248 P.2d 553 (1952).

24. In re Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955). Although the physician testified that surgery at an early age was most desirable, it was admitted that the chances of success in treatment would not be significantly lessened by a lapse of several years, i.e., until the child was more able to decide for himself what course should be taken.

25. See generally 24 U. Pitt. L. Rev. 642, 644 (1963).

26. See generally 8 Vill. L. Rev. 114, 118 (1962).

27. Erickson v. Dilgard, Civil No. 11974, N.Y. Sup. Ct. Nassau County, Oct. 1, 1962.

28. Prince v. Massachusetts, 321 U.S. 158, 170 (1944). The Court gave no indication as to what would be the "age of full and legal discretion." At common law the age of discretion was 14 years for a boy, and 16 years for a girl. In re Hudson, 13 Wash. 2d 673, 690-91, 126 P.2d 765, 774 (1942).

29. Cawley, Criminal Liability in Faith Healing, 39 Minn. L. Rev. 48, 69 (1954).

that medical treatment may be administered to the parent for the purpose of saving the child.

Last year a somewhat similar case was decided in the District of Columbia. A mother of a seven-month old child had a bleeding ulcer and, being a Jehovah Witness, would not consent to a blood transfusion. The physicians in charge determined that she would die if blood were not administered to her. Judge Skelly Wright of the court of appeals, acting by the authority of Rule 62(g) of the Federal Rules of Civil Procedure,[30] reversed the district court judge and signed an order permitting the administration of blood as the physicians deemed necessary. Several independent reasons were advanced for the decision but it is clear that the welfare of the woman's child weighed heavily in the judge's decision.[31] However, the decision in the instant case is more moderate than that of Judge Wright since the continued life of the child was not dependent upon that of the mother in the latter situation. The New Jersey court gave no indication as to whether it would go as far as did Judge Wright. The court did make it clear, however, that it was not deciding the more difficult question of whether or not it would order medical treatment necessary to save an adult only.[32]

What other course could the court have taken? Once it is decided that a pregnant mother's failure to accept medical treatment which she knows to be necessary to the life of the unborn child is a legal wrong, the only decision left relates to the nature of the remedy. It is quite possible that a criminal liability would attach to such a situation[33] but the court, in providing a preventive relief, followed the only humane alternative.

30. The relevant portion of the section recognizes the "power of an appellate court or of a judge or justice thereof to . . . grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

31. Application of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1963), petition for rehearing denied, 331 F.2d 1010 (D.C. Cir. 1964). Five reasons were advanced. First, the judge felt that there was a persuasive analogy between the "child cases" and the situation before him, particularly because the patient was in extremis. Second, the patient's refusal of medical attention was comparable to attempted suicide. Third, by failing to take the recommended measures to save her own life, the woman was abandoning her child. The fourth reason set forth was that the patient became a total hospital responsibility by seeking medical attention. "The final and compelling reason . . . was that life hung in the balance." Id. at 1008-09.

32. 42 N.J. at 422, 201 A.2d at 538.

33. In 1901 the daughter of a faith healing father contracted whooping cough and when this disease was left unattended, pneumonia developed causing the girl's death. The father, who had refused to call a doctor, was convicted under Section 233 of the New York Penal Code (now N.Y. Pen. Law § 482). The New York Court of Appeals rejected the argument that the father's faith justified his violation of the statute. People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903). The New Jersey Supreme Court has indicated a contrary view, however. See the discussion of N.J. Stat. Ann. § 9:6-1.1 (1960) in State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1962).

Section 81 of the New York Penal Law provides that "a pregnant woman, who . . . uses

It is new to our law that the state's interest in a child extends to overruling the parent's decision as to what care the *parent* is to receive. A pattern of judicial thought may be discernible. It seems that the state will interfere with the parent's decision as to his own welfare if, in the eyes of the courts, that decision unreasonably threatens the welfare of the child. As the decision by Judge Wright indicates, this protection of the child may extend beyond life-or-death situations to the mere preservation of parental care. Quite obviously the adult's right of self-determination is infringed but whether or not this infringement can be justified will depend upon the restraint used by the courts in the application of this new proposition of law.

Constitutional Law—New York Procedure for Determining the Voluntariness of a Confession Declared Unconstitutional.—Petitioner was tried for murder in the first degree. His confession was introduced in evidence, without objection by his counsel. Counsel did, however, question the circumstances under which petitioner was interrogated. The conviction was affirmed by the New York Court of Appeals.[1] A petition for writ of habeas corpus was filed in the Federal District Court, urging that the conviction be set aside because the confession was involuntary and the New York procedure for determining the voluntariness of a confession is unconstitutional. The writ was denied,[2] and the court of appeals affirmed.[3] The Supreme Court granted certiorari[4] to consider the constitutional question presented. The Supreme Court reversed, overruled *Stein v. New York*,[5] and held the New York procedure unconstitutional. *Jackson v. Denno*, 378 U.S. 368 (1964).

The Supreme Court has held that it will reverse a conviction if it finds as a matter of law that a confession introduced at the trial was coerced, regardless

or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment" for one to four years. The limited number of cases dealing with the statute give no indication as to whether the "other means" referred to would include passive measures. Moreover, it is doubtful that the defendant had the requisite intent. Her primary reason for refusing transfusions was that her religious scruples so dictated. The mere fact that the same effect would probably be obtained seems to provide little basis for saying that it was intended.

1. People v. Jackson, 10 N.Y.2d 780, 177 N.E.2d 59, 219 N.Y.S.2d 621 (memorandum decision), remittitur amended, 10 N.Y.2d 816, 178 N.E.2d 234, 221 N.Y.S.2d 521, cert. denied, 368 U.S. 949 (1961).

2. 206 F. Supp. 759 (S.D.N.Y. 1962).

3. United States ex rel. Jackson v. Denno, 309 F.2d 573 (2d Cir. 1962).

4. Jackson v. Denno, 371 U.S. 967 (1963). In his dissent to the instant case, Mr. Justice Clark argued that the question of the validity of the New York procedure was not properly before the Court since there had been no objection made to the admissibility of the confession. Petitioner's counsel questioned the weight to be given the statements, and not their admissibility. 378 U.S. 368, 423 (1964) (dissenting opinion).

5. 346 U.S. 156 (1953).

of the weight or sufficiency of other evidence adduced.[6] The procedure used to determine the admissibility of confessions has, therefore, a substantial effect on defendant's rights.

There are three procedures used by state courts to determine the voluntariness of a confession: the New York rule, the Massachusetts rule, and the orthodox or Wigmore rule. Under the New York procedure, the trial judge can exclude the confession only if, as a matter of law, it was coerced.[7] If there is a question of fact, the confession may be admitted and the final determination of its voluntariness left to the jury.[8] The New York rule does not require the judge to absent the jury while he hears evidence on the coercion issue,[9] and possibly he is not allowed to do so.[10]

In jurisdictions following the Massachusetts procedure the judge hears all the evidence concerning voluntariness,[11] resolves the issues of fact, and decides whether the confession was coerced or not. Only those found to be voluntary are submitted to the jury, which also considers the issue of voluntariness, with the instruction that it must entirely disregard the confession if found to be coerced.[12]

Under the orthodox rule the judge makes the sole determination of voluntariness for purposes of admissibility; the jury considers voluntariness only as affecting the weight or credibilty of the confession.[13]

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6. E.g., Blackburn v. Alabama, 361 U.S. 199, 205 (1960); Payne v. Arkansas, 356 U.S. 560, 567-68 (1958); Malinski v. New York, 324 U.S. 401, 404 (1945).

7. People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928).

8. People v. Doran, 246 N.Y. 409, 416-17, 159 N.E. 379, 381-82 (1927).

9. People v. Brasch, 193 N.Y. 46, 54, 85 N.E. 809, 812 (1908); People v. Kent, 41 Misc. 191, 83 N.Y. Supp. 948 (1903).

10. United States ex rel. Ricco v. LaVallee, 225 F. Supp. 278, 281-82 (N.D.N.Y. 1964); People v. Randazzio, 194 N.Y. 147, 159, 87 N.E. 112, 116-17 (1909) (dictum).

11. In some jurisdictions the practice is to hold the preliminary hearing outside the presence of the jury. E.g., Presley v. State, 224 Md. 550, 168 A.2d 510 (1961), cert. denied, 368 U.S. 957 (1962); Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); Williams v. State, 93 Okla. Crim. 260, 226 P.2d 989 (1951); Wood v. State, 72 Okla. Crim. 364, 116 P.2d 728 (1941). In at least one jurisdiction, however, the court has the discretion to hold the hearing in or out of the presence of the jury. State v. Tassiello, 39 N.J. 282, 291, 188 A.2d 406, 411 (1963); State v. Walker, 33 N.J. 580, 592, 166 A.2d 567, 573 (1960).

12. The appendices to Mr. Justice Black's opinion list the jurisdictions which appear to follow the Massachusetts procedure as Alaska, Arizona, California, Delaware, Hawaii, Idaho, Maine, Maryland, Nebraska, New Hampshire, New Jersey, Oklahoma, Rhode Island. 378 U.S. at 417-20 (separate opinion). In many cases it is difficult to tell which of the two procedures is being followed. Both the majority opinion (378 U.S. at 378-79 n.9) and the dissent (378 U.S. at 436-37 n.7) point this out.

13. "The admissibility of a confession is determined by the trial judge and not the jury. The effect of the confession is to be determined by the jury after it has been held by the trial judge to be admissible." State v. Wilson, 217 La. 470, 485, 46 So. 2d 738, 743-44 (1950); 3 Wigmore, Evidence § 861 (3d ed. 1940).

The chance of a coerced confession reaching the jury seems to be slightest under the orthodox rule. Oddly enough, however, only under the orthodox procedure is it possible

In *Stein*, the Supreme Court acknowledged that there were uncertainties in the New York procedure since a general verdict of innocence or guilt is rendered with no separate decision on the coercion issue. The Court, nevertheless, upheld this procedure by making alternative hypotheses: either the jury found the confession voluntary and properly relied on it; or it found the confession coerced, ignored it, and convicted on the weight of other evidence.[14]

The Court, in the instant case, attacked both these hypotheses. With regard to the former, the majority questioned two necessary assumptions: that the jury found against the defendant on the issues of fact relating to voluntariness, and that the finding was proper if it was made.[15] As for the latter hypothesis, the Court cast doubt on the assumed capacity of the jury to disregard a confession found to be coerced where other evidence indicates the defendant's guilt.[16]

It should be noted that all the assumptions which the majority declared unsound follow from the presumption that juries follow the instructions of the court. The authority for this assumption is overwhelming.[17]

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for a jury to consider a confession involuntary and, finding it credible on the basis of other evidence, still properly use it as a basis for conviction. Burton v. State, 107 Ala. 108, 130, 18 So. 284, 290 (1895), overruled on another point, Amos v. State, 123 Ala. 50, 26 So. 524 (1899).

The appendices to Mr. Justice Black's opinion list the jurisdictions which appear to follow the orthodox or Wigmore rule: Alabama, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia. 378 U.S. at 411-14 (separate opinion).

14. 346 U.S. at 177-78. In the instant case, the Court emphasized that the Stein Court admitted that a general verdict handicapped petitioner on appeal, since he does not know what to attack on appeal, and has no assurance that a compromise verdict was not reached with different jurors treating the confession differently. 378 U.S. at 380.

Malinski v. New York, 324 U.S. 401 (1945), held that because of the introduction of a confession, found by the Supreme Court to be involuntary, "the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." Id. at 404. Petitioner is not left in doubt as to the proper ground for appeal, because he may appeal on both possibilities—introduction of a coerced confession and insufficient evidence—and if he wins on either the conviction will be set aside.

It should be noted that the Massachusetts procedure, which the Court in the instant case stated was constitutional, provides no protection against compromise verdicts.

15. 378 U.S. at 381.

16. Id. at 388-89.

17. E.g., Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367, rehearing denied, 372 U.S. 950 (1963); Delli Paoli v. United States, 352 U.S. 232, 242 (1957); United States v. Clancy, 276 F.2d 617, 636 (7th Cir. 1960); Donaldson v. United States, 248 F.2d 364, 367 (9th Cir. 1957); State v. Carito, 23 Conn. Supp. 302, 305, 182 A.2d 343, 345 (1962); State v. Ingle, — Wash. —, —, 392 P.2d 442, 448 (1964). However, the Supreme Court has long held that under certain circumstances jurors are unable to set aside preconceived opinions as to the guilt or innocence of the accused formed by prejudicial news media. E.g., Irvin v. Dowd, 366 U.S. 717 (1961); Reynolds v. United States, 98 U.S. 145 (1878). See generally Comment, Trial by Newspaper, 33 Fordham L. Rev. 61 (1964). Viewing

It may be argued that an objective appraisal of the jury system demands an acknowledgment of the existence of certain irregularities.[18] However, such a viewpoint should not be a basis for attacking the very foundation of the jury system. The majority's denial of the jury's ability to follow the court's instructions constitutes such an attack. It appears that the Court has written the first chapter of a revision of American law concerning the jury system.

The Court also stated that the failure in *Stein* to question the reliability of the jury's findings was not an oversight but a natural consequence of the premise underlying that opinion that the *sole* reason for excluding coerced confessions is their untrustworthiness.[19] It follows from this premise, the Court continued, that those confessions which are true need not be rejected, and that evidence concerning the truth of the confession and the guilt of the accused is relevant to the coercion issue.[20] Since such a conclusion would be contrary to present law, the Court in the instant case considered this an important ground for overruling *Stein*.

It would appear that the Court, in drawing these conclusions, misinterpreted *Stein*. The *Stein* Court's rationale for excluding coerced confessions had no bearing on its acceptance of jury reliability. The Court, in *Stein*, accepted the jury's reliability because it assumed that juries are willing and able to follow the instructions of the court. Also, the majority's conclusion that *Stein's* erroneous "premise" will infect the jury[21] is illogical. The jury is not instructed as to the reason for excluding confessions—thus creating the possibility that the rationale will effect the jury's findings. On the contrary, the jurors are clearly instructed that even if they find the confession to be true they must find it voluntary before they may use it.[22]

The Court also stated that the Massachusetts procedure does not deprive the

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the instant decision against that background, it seems quite possible that the Court may next attack the jury's ability to disregard a confession inadmissible against a co-defendant.

18. See, e.g., Sorensen, Compromise Verdicts in Criminal Cases, 37 Neb. L. Rev. 802 (1958).

19. 378 U.S. at 383. The Supreme Court has not been consistent in its reasoning for excluding coerced confessions. Compare Culombe v. Connecticut, 367 U.S. 568 (1961) and Rogers v. Richmond, 365 U.S. 534 (1961), with Blackburn v. Alabama, 361 U.S. 199 (1960) and Spano v. New York, 360 U.S. 315 (1959). The instant case gives untrustworthiness as one of the reasons for exclusion. 378 U.S. at 383.

20. The Court in the instant case quoted various passages from the Stein opinion in an attempt to substantiate this statement. 378 U.S. at 384 & n.11. Only one of the passages, however, could be construed to mean that the truth of a confession is a factor in determining its voluntariness, and this was dictum. "If in open court, free from violence or threat of it, defendants had been obliged to admit incriminating facts, it might bear on the credibility of their claim that the same facts were admitted to the police only in response to beating." 346 U.S. at 175. This quotation comes from a discussion of the effect of cross-examination if the defendant took the stand to testify regarding voluntariness.

21. 378 U.S. at 386-87.

22. See the charges in Stein, 346 U.S. at 173-74 n.17, and in the instant case, 378 U.S. at 425 (dissenting opinion).

accused of due process, as does the New York procedure, because "the jury does not hear all confessions where there is a fair question of voluntariness, but only those which a judge actually and independently determines to be voluntary, based upon all of the evidence."[23] How clear is this distinction and what is its importance? The majority opinion stated that under the New York rule the trial judge may only exclude a confession "if in no circumstances could the confession be deemed voluntary."[24] Mr. Justice Harlan in his dissent, however, stated that the New York rule "requires the trial judge 'to reject a confession if a verdict that it was freely made would be against the weight of the evidence.' "[25] The disparity between the majority opinion and the dissent is understandable since the New York Court of Appeals has not been completely clear on this point.

It must be assumed that there is a practical difference between a confession being coerced as a matter of law and a holding that it would be against the weight of the evidence if the jury found the confession voluntary. The New York Court of Appeals in *People v. Randazzio*[26] stated that "if there is no conflict in the evidence . . . the question of the admission of confessions is for the court, but if there is a conflict the question ultimately is for the jury."[27] Similarly, the court held in *People v. Doran*,[28] "When . . . an issue of fact is raised by conflicting testimony, the confession may be admitted and the question left to the jury whether it were the voluntary statement of the defendant."[29] In *People v. Weiner*,[30] the court seemed to treat the two phrases as if they were synonymous: "If the evidence shows without dispute that the confession was extorted by force or fear or if a verdict that it was freely made would be clearly against the weight of evidence, the judge should reject it."[31]

In *People v. Leyra*,[32] from which the dissent quoted,[33] the court's holding covered only the situation where there is no doubt. "[U]nder the circumstances here disclosed, the trial court should have so determined [that the confession was coerced] as a matter of law . . . ."[34] The court then stated in dictum that the judge should exclude confessions if a finding that they were voluntary would be against the weight of evidence.[35] It would appear that the language employed by the majority in the instant case was more accurate than that used by the dissent.

In questioning the distinction between the New York and Massachusetts pro-

23. 378 U.S. at 378 n.8 (dictum).
24. Id. at 377.
25. Id. at 428 (dissenting opinion), quoting from People v. Leyra, 302 N.Y. 353, 362, 98 N.E.2d 553, 558 (1951).
26. 194 N.Y. 147, 87 N.E. 112 (1909).
27. Id. at 156, 87 N.E. at 115.
28. 246 N.Y. 409, 159 N.E. 379 (1927).
29. Id. at 416-17, 159 N.E. at 381-82.
30. 248 N.Y. 118, 161 N.E. 441 (1928).
31. Id. at 122, 161 N.E. at 443.
32. 302 N.Y. 353, 98 N.E.2d 553 (1951).
33. See note 25 supra and accompanying text.
34. 302 N.Y. at 362, 98 N.E.2d at 558.
35. Ibid.

cedures, Mr. Justice Harlan stated that "since it is only the exclusion of a confession which is conclusive under the Massachusetts rule, it is likely that where there is doubt—the only situation in which the theoretical difference between the two rules would come into play—a trial judge will resolve the doubt in favor of admissibility, relying upon the final determination by the jury."[36] Such a statement, however, is pure conjecture; Mr. Justice Harlan's labeling of differences in the procedures as "nice theoretical distinctions"[37] seems inaccurate. There is, in fact, an important distinction between the two procedures because more damaging confessions can reach the jury under the New York procedure than under the Massachusetts. However, this will entail a deprivation of defendant's rights only if it is assumed that the jury will not, or cannot, ignore a confession which it finds coerced. Such an assumption runs counter to the tenets of the jury system, and should not be accepted. As Mr. Justice Harlan stated, "the Court has repeatedly rejected 'speculation that the jurors disregarded clear instructions of the court in arriving at their verdict,' . . . as a ground for reversing a conviction or, a fortiori, as the reason for adopting generally a particular trial practice."[38]

Mr. Justice Black, in his opinion, pointed out that the majority opinion left unanswered an important question.[39] Under New York procedure the prosecution has the burden of proving to the jury, beyond a reasonable doubt, that the confession was voluntary.[40] Does the new rule impose the same burden on the state when the judge is making the determination, or may the judge "decide voluntariness merely on a preponderance of the evidence?"[41] If the latter situation prevails, the defendant would seem to have lost some protection previously afforded him, especially since the jury will now get the confession with the "judge's explicit or implicit stamp of approval on it."[42]

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36. 378 U.S. at 438 (dissenting opinion).

37. Ibid.

38. Id. at 430 (dissenting opinion). (Emphasis omitted.) "[T]he Court's constant refusal in the past to accept as a rationale for decision the dangers of jury incompetence or waywardness . . . demonstrate[s] the lack of constitutional foundation for its decision." Id. at 436 (Harlan, J., dissenting).

39. 378 U.S. at 405 (separate opinion).

40. People v. Rogers, 192 N.Y. 331, 346, 85 N.E. 135, 140 (1908) (dictum). The Court discussed the rule that a confession is considered voluntary, and therefore admissible, until the accused comes forward with evidence to show that the confession was coerced. This is the rule followed in Massachusetts. Commonwealth v. Congdon, 265 Mass. 166, 174, 165 N.E. 467, 470 (1928); Commonwealth v. Culver, 126 Mass. 464, 465 (1879); Commonwealth v. Sego, 125 Mass. 210, 213 (1878).

In most jurisdictions the prosecution has the burden of making a preliminary showing that the confession was voluntary. E.g., State v. Tassiello, 39 N.J. 282, 188 A.2d 406 (1963); State v. Hudson, 89 Ariz. 103, 358 P.2d 332 (1960).

The jurisdictions following the New York procedure concerning admissibility do not all follow the same rule regarding the burden of making a prima facie case. The same is true of the jurisdictions following the Massachusetts procedure.

41. 378 U.S. at 405 (separate opinion).

42. Id. at 404 (separate opinion).

The appendices to Mr. Justice Black's opinion list other jurisdictions which appear to follow the New York procedure.[43] Virtually all the cases cited, however, are distinguishable from the New York cases in that the preliminary hearing was held outside the presence of the jury. Despite this difference, the Supreme Court has treated these cases similarly. On the same day that the instant case was decided, in memorandum decisions refering to it the Supreme Court vacated convictions in eleven other cases.[44] In at least one of them[45] the procedure followed was to have the preliminary hearing outside the presence of the jury.[46] Hence, it would appear that all recent convictions in those jurisdictions following the New York rule will be vacated if they may have been based on a confession whose voluntariness was a question of fact.

An important question to be considered is the effect of the instant case on prisoners heretofore convicted under the New York procedure. Mr. Justice Harlan, in his dissent, suggested that the holding would be applied retroactively.[47] This is an area in which there is authority on both sides of the question. In *Eskridge v. Washington Prison Bd.*,[48] the Supreme Court retroactively applied *Griffin v. Illinois*,[49] which held that the failure to furnish a trial transcript at the State's expense was a denial of due process, where state law required that an indigent petitioner submit a transcript with his appeal. In *Doughty v. Maxwell*,[50] the Court appeared to retroactively apply *Gideon v. Wainwright*,[51] which held that a denial of a defendant's right to counsel was a violation of the fourteenth amendment. The question is still open, however, whether *Mapp v. Ohio*,[52] which held that evidence obtained by illegal search and seizure is inadmissible in a state court as it is in a federal court, is to be applied retroactively. Many lower court decisions can be found holding each way.[53]

43. 378 U.S. at 414-17 (separate opinion). The jurisdictions are Arkansas, District of Columbia, Georgia, Iowa, Michigan, Minnesota, Missouri, Ohio, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Texas, Wisconsin, and Wyoming.

44. The cases are collected in 378 U.S. at 562-75. The jurisdictions affected are Arizona, District of Columbia, New York, Pennsylvania, and Texas.

45. Commonwealth v. Senk, 412 Pa. 184, 194 A.2d 221 (1963), vacated and remanded sub nom. Senk v. Pennsylvania, 378 U.S. 562 (1964) (per curiam).

46. 412 Pa. at 189, 194 A.2d at 224, n.1.

47. 378 U.S. at 440 (dissenting opinion).

48. 357 U.S. 214 (1958).

49. 351 U.S. 12 (1956).

50. 376 U.S. 202 (1964) (per curiam).

51. 372 U.S. 335 (1963). In the recent case of United States v. LaVallee, 330 F.2d 303 (2d Cir.), cert. denied, 377 U.S. 998 (1964), the court stated that if Gideon had left any doubt as to its retroactive application, Doughty v. Maxwell, supra note 50, conclusively answered it in the affirmative. 330 F.2d at 307. Dissenting to the denial of certiorari however, Mr. Justice Harlan stated that he did not think the question of Gideon's retroactivity had been fully considered by the Court. 378 U.S. at 998.

52. 367 U.S. 643 (1961).

53. Applied retroactively, e.g., California v. Hurst, 325 F.2d 891 (9th Cir. 1963); Hall v. Warden, 313 F.2d 483 (4th Cir.) (en banc), cert. denied, 374 U.S. 809 (1963); United States ex rel. Eastman v. Fay, 225 F. Supp. 677 (S.D.N.Y. 1963). Contra, e.g., United

It may be argued that the Supreme Court applied both *Eskridge* and *Gideon* retroactively because of a fear that innocent persons have been convicted because of a denial of their constitutional rights. In *Mapp*, however, the Court was not concerned with exclusion of evidence that is inherently unreliable, whose admission might endanger innocent people; the purpose of the holding was to discourage unconstitutional searches in the future. Although the Court in the instant case argued that *Stein* was wrong in stating that coerced confessions are inadmissible solely because of their untrustworthiness,[54] the Court admitted[55] that it was one of the reasons for exclusion. Because of the danger that innocent people may have been convicted through use of coerced confessions it has been suggested that restrictions on their admission be made retroactive.[56] If the Supreme Court follows this reasoning then the new rule will require retroactive application.

Whatever the application, the decision does not require a new trial for the defendant or, it seems, any other prisoner relying on this decision. What the Court required was a hearing in the state court to determine the coercion issue, "in a proceeding separate and apart from the body trying guilt or innocence."[57] Only if it is determined at this hearing that the confession was coerced is the prisoner entitled to a new trial (without the introduction of the confession); otherwise, the conviction stands.[58] This disposition has, at least, the advantage of reducing the state's burden of retrying defendants whose trial comes within the proscription of the present case.

Constitutional Law—Right of Attorney Defending Indigent Prisoner to Compensation Under the Fifth Amendment Upheld.—Attorney, appointed by a federal court to defend an indigent prisoner, was permitted by the court to petition against the United States to recover for his time and expenses on the theory that such was a "taking" for a "public use" and that under the fifth amendment such taking without compensation was unconstitutional. The court found that, although there were no prior federal holdings that this power was in the realm of the judiciary, it could still grant compensation, since a denial

States ex rel. Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963); Louisiana ex rel. Miles v. Walker, 222 F. Supp. 975 (E.D. La. 1963); People v. Muller, 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421, cert. denied, 371 U.S. 850 (1962), petition for rehearing denied, 372 U.S. 961 (1963). See Comment, Collateral Post-Conviction Remedies Available to New York State Prisoners, 32 Fordham L. Rev. 803, 821-22 (1964).

54. 378 U.S. at 383.

55. Id. at 385-86.

56. "[A]lthough one purpose of the coerced confession rule—to deter future coercion—might not be furthered either by general or selective retroactive application, another purpose of the rule—to assure that no person is punished on the basis of such inherently unreliable evidence—might well be served by either general or selective retroactive application." Comment, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 943 (1962).

57. 378 U.S. at 394.

58. Ibid.

of same would be violative of petitioner's constitutional rights. *Dillon v. United States,* 230 F. Supp. 487 (D. Ore. 1964).

Nabb v. United States,[1] the only federal case on point, is in line with the majority view held by the state courts that in the absence of statute, an attorney assigned to defend an indigent prisoner cannot recover judgment from the public. The *Nabb* court rejected the idea that the guarantee to the accused of assistance of counsel implies a guarantee of compensation to the appointed attorney.

During the nineteenth century it was the prevalent view that it was a poor lawyer indeed who would think of payment when honored by court appointment to defend a pauper.[2] In our century, while most states have recognized the wisdom of compensating counsel, only three have decided that it is in the province of the judiciary to remedy the situation.[3] The courts of Utah, fierce exponents of the majority view, have expanded on the older view that attorneys can be made to serve gratuitously because they are licensed by the state[4] and have held that lawyers, as officers of the court, hold their position "cum onere" and that it is one of the burdens of office to serve indigents without compensa-

1. 1 Ct. Cl. 173 (1864).

2. In Wayne County v. Waller, 90 Pa. 99, 105 (1879), the court stated: "To hold that counsel, appointed to defend insolvent prisoners, may demand compensation from the county, would be a departure from a time-honored custom to the contrary, and it is not difficult to foresee the mischief to which it would lead. It is far better to let such cases rest on the foundation which has hitherto sustained them: human sympathy and a just sense of professional obligation." See also 1 Cooley, Constitutional Limitations 700 & n.4 (8th ed. 1927), where he states: "But we think a court has a right to require the service, whether compensation is to be made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unworthy to hold his responsible office in the administration of justice."

3. Webb v. Baird, 6 Ind. 13 (1854); Hall v. Washington County, 2 Greene 473 (Iowa 1850); Carpenter v. Dane County, 9 Wis. 274 (1859).

4. Accord, Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876 (1892). Contra, Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964); Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940). In the instant case the court commented: "It needs only to be stated that today, if one holds the prescribed qualifications, he must be admitted to practice before that court as a matter of right, and the attorney, having once acquired that license, can only be deprived of it through the judicial exercise of due process." 230 F. Supp. at 493. In Knox the court refuted the older view commenting: "The Legislature may in the future require the licensing of restaurant operators and grocers as a sanitary police measure. If a law should be enacted requiring every person licensed by the state to render services, or furnish the materials of their business, to paupers gratuitously, much difficulty would be found in justifying a decision holding the law unconstitutional as depriving the green grocer or the restaurant operator of his goods, or as depriving the physician, or the barber, or the plumber, or the electrician, or the mechanical engineer of his services without compensation, while adhering to a rule that licensed attorneys' services may be taken without compensation." 217 Ind. at 510, 29 N.E.2d at 412.

tion.[5] The courts maintaining the majority view often quote provisions in the various attorney's oaths, a common one reading: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice."[6] This line of reasoning suggests that even if an attorney's appointment is compulsory, as is the case in Utah, he still is not being deprived of property without license of law.

As stated above, the minority view, adopted by the present court, has previously been followed only by the courts of Indiana, Iowa, and Wisconsin. Indiana is the leading exponent of this view as the latter states now regulate the attorneys' compensation by statute.[7] The Indiana courts have based their reasoning on three factors: (1) the wording of the state constitution that "no man's particular services shall be demanded without just compensation,"[8] and that therefore an attorney cannot be compelled, under threat of disbarment or other sanctions against him, to defend a pauper at his own expense; (2) the provision of the sixth amendment that "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."; (3) the inherent power of the court to order the payment of all expenses " 'necessary for the holding of court and the administration of its duties.' "[9] It was pointed out that "in order to conduct a legal trial, the court must have power to appoint counsel, and order that such counsel shall be compensated if necessary; and that the right to provide compensation cannot be made to depend upon the will of the Legislature . . . ."[10] Such reasoning might also be used in a federal case in the light of the fifth and sixth amendments.

While there is no federal case on point in agreement with the instant court, the holding is not without substantial foundation. In *United States v. Lynah*,[11] the Court held that "when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates."[12] This Court recognized the distinction between a proprietory and a governmental right, the former entailing the appropriation of property which the government claims as its own and the latter providing for the appropriation of property, not its own but which it may confiscate under the right of eminent domain. That property falling into the latter category is, under the fifth amendment, subject to compensation. In *Nattress v. United States*[13] the court stated that "private property is not to be

5. Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943); Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122 (1911).

6. ABA, Oath of Admission. (Emphasis omitted.)

7. Iowa Code § 775.5 (1962); Wis. Stat. § 256.49 (1961).

8. Webb v. Baird, 6 Ind. 11, 12 (1854), citing Ind. Const. art. I, § 21.

9. Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 511, 29 N.E.2d 405, 413 (1940), quoting 14 Am. Jur. Courts § 171 (1938). See also Strohbar v. Dwinnell, 29 F.2d 915 (5th Cir. 1929).

10. Knox County Council v. State ex rel. McCormick, supra note 9, at 512, 29 N.E.2d at 413.

11. 188 U.S. 445 (1902).

12. Id. at 464.

13. 186 F. Supp. 180 (D.N.M., 1960).

lightly regarded, and the sovereign should be held to a strict accountability for any taking thereof. . . ."[14] *United States v. Certain Property Located in the Borough of Manhattan*,[15] held that "just as the Government's interest 'in a criminal prosecution is not that it shall win a case but that justice shall be done' . . . so its interest as a taker in eminent domain is to pay 'the full and perfect equivalent in money of the property taken' . . . neither more nor less—not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the Amendment gives."[16] The definition of compensable property under the right of eminent domain has been extended to patents[17] and liens[18] and the present court joined the courts of Indiana in extending it to the labor of a lawyer.[19]

Had Congress remained inactive in this area, the effect of the instant case would have been to remedy an unfortunate and deteriorating situation. The injustice of the present system of non-compensation has affected the indigent as well as his counsel, so much so that it is questionable whether the mandate of the sixth amendment is being fulfilled.[20] In a recent study conducted by the *Harvard Law Review*[21] it was found that unpaid counsel, who must sacrifice time and money to appear at trial, have an interest in encouraging pleas of guilty in order to cut down on expenses. It also would seem that courts are loathe to call on lawyers of high stature who would tend to lose a great deal of money if they were to serve without compensation.[22] The courts, therefore, tend to call upon young and inexperienced lawyers who all too often gain their experience at the expense of their clients.[23]

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14. Id. at 183.

15. 306 F.2d 439 (2d Cir. 1962).

16. Id. at 452-53.

17. United States v. Palmer, 128 U.S. 262 (1888).

18. Armstrong v. United States, 364 U.S. 40 (1960).

19. The court commented: "If the work product of an inventor or a laborer claiming a lien be compensable property, so is the work product of a lawyer, and his office expenses and out-of-pocket money are such, per se." 230 F. Supp. at 492. See also plaintiff's argument in Presby v. Klickitat County, 5 Wash. 329, 331, 31 Pac. 876, 877 (1892) where, relying on the Indiana holdings it was maintained that: "To compel attorneys at law to render services gratuitously is, in effect, to cast a burden or to levy a tax upon them not borne by citizens engaged in any other profession or business; and that it is the taking of the time and labor—in other words, the property—of counsel without compensation, and without due process of law, all of which is in violation of the fundamental law of the state."

20. See Lumbard, Better Lawyers For Our Criminal Courts, The Atlantic, June, 1964, p. 86; Time, Aug. 7, 1964, p. 56. But see Taylor v. United States, 282 F.2d 16, 20 (8th Cir. 1960), where it was held that the "requirement is met whenever the accused is supplied counsel who exercises that judgment which might be expected of one trained in the law and committed to the diligent application of its principles."

21. Note, 76 Harv. L. Rev. 579, 597-98 (1963).

22. For specific examples of injustices which can arise from the present system see Ervin, Uncompensated Counsel: They Do Not Meet the Constitutional Mandate, 49 A.B.A.J. 435 (1963). See also 108 Cong. Rec. 22256 (1962) (remarks of Senator Hruska).

23. It is perhaps for this reason that a poll taken by the Harvard Law Review of the United States District Judges and United States Attorneys showed a vast majority in favor

It, therefore, is submitted that the holding of the instant case is not an example of the usurpation of power by the judiciary but is rather a filling of a void left by the inaction of Congress. Ironically, less than two months after the decision in the instant case, Congress passed the very legislation needed to alleviate the problems set forth above,[24] legislation, which, had it been enacted previously would have obviated the need for this litigation. It is now to be hoped that this legislation will solve the problems which this decision has created; for example, the measure of compensation to which the attorney is entitled.

Corporations—Fraud on Court Approving Derivative Suit Settlement Not Chargeable to Nonparticipating Director.—Defendant directors were accused in a derivative action of purchasing securities from the corporation's portfolio at a price well below actual value. After extensive hearings, a settlement of the suit was approved by a New York court.[1] Subsequently, earnings projections were found in the company's files which, although requested at the settlement hearings, had not been produced. The projections were shown to have been

of abolishing the present system of non-compensation. The actual figures were 82% in favor of change, 8% against change, 10% undecided. Note, 76 Harv. L. Rev. 579, 605-06 (1963).

24. Criminal Justice Act of 1964, Pub. L. No. 88-455, 88th Cong., 2d Sess. (August 20, 1964). This act provides a plan for the representation of indigent prisoners charged in federal courts with felonies or misdemeanors. The plan may be accepted in its entirety or it may be supplemented by the judicial councils of the several circuits. Barring a waiver by the accused, representation is provided at every stage of the judicial proceeding. The appointed attorney or the bar association or legal aid agency which provides him will be compensated "at a rate not exceeding $15 per hour for time expended in court or before a United States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred."

1. This is something of an oversimplification. Originally ten derivative suits were brought in the New York Supreme Court and others were brought in the federal courts. The state suits were consolidated under the caption Zenn v. Anzalone, Civil No. 7244, N.Y. Sup. Ct., June 28, 1954 and general counsel was appointed to handle both federal and state actions. After settlement negotiations in these suits had begun, certain shareholders who had been excluded from the proceedings obtained an injunction in the district court prohibiting use of any settlement arrived at as a defense in further proceedings by them. Breswick & Co. v. Briggs, 135 F. Supp. 397 (S.D.N.Y. 1955). The New York Supreme Court adjudicated the settlement arrived at in the proceedings before it as "fair and reasonable," but delayed entering a final order until the federal injunction might be lifted. Zenn v. Anzalone, 17 Misc. 2d 897, 191 N.Y.S.2d 840 (Sup. Ct. 1954). The federal court appointed the referee in the state court proceedings as a special master to consider an application to lift its injunction, but declined to concur in his favorable report. Subsequent renegotiations raised the settlement to about $3,000,000. At that point the federal court withdrew its injunction. The state court order was modified to include this amount, and judgment entered. See Alleghany Corp. v. Kirby, 333 F.2d 327, 332 (2d Cir. 1964). The instant court concentrated on the collateral attack upon the state proceedings. It is not entirely clear why some comment was not made upon the nondisclosure in the federal court.

in the possession of two of the directors at that time.[2] The corporation, in an action against a third director and others who, although included in the settlement, had not taken part in the hearings, sought, in the United States District Court, to have the judgment set aside for fraud.[3] On appeal from a judgment for the defendant, the court of appeals, in affirming, held that a director could not be charged with his co-director's fraudulent concealment of evidence in a settlement proceeding where the evidence would not at least have probably changed the result. *Alleghany Corp. v. Kirby*, 333 F.2d 327 (2d Cir. 1964).

Even in the absence of statutory requirements,[4] it has been customary in New York to submit settlements in derivative actions to the court for approval.[5] Where a judgment is entered upon such a settlement, and all parties have had a chance to contest the proceedings, it becomes binding upon all shareholders and cannot be attacked collaterally except for fraud or duress.[6]

The kind of fraud for which a judgment may be collaterally attacked has been limited. In *Crouse v. McVickar*,[7] the New York Court of Appeals, following the decision of the United States Supreme Court in *United States v. Throckmorton*,[8] held that a judicially approved settlement could not be attacked collaterally on the basis of "intrinsic" fraud, *i.e.*, fraud going to the merits of the action. The court noted, however, that fraud in the *mode of trying* the cause was actionable. The rationale for the difference was that, although both kinds of fraud were abhorrent to the law, it was essential that there be a point at which litigation would terminate in a "solemn judgment."[9]

2. Four items were allegedly withheld. The most crucial of these was a projection of earnings enclosed in a letter from the Controller of the company whose stock was purchased to one of the directors, and which was sent with a notation to yet another of the offending directors at about the time of the settlement hearings. Judge Moore's opinion does not indicate that there was a projection among the enclosures. Alleghany Corp. v. Kirby, supra note 1, at 330, 337, 339.

3. Alleghany Corp. v. Kirby, 218 F. Supp. 164 (S.D.N.Y. 1963).

4. Statutory requirements for judicial approval of derivative suit settlements were only recently introduced in New York with the adoption of the N.Y. Bus. Corp. Law § 626(b) (effective Sept. 1, 1963). Derivative actions in federal courts also require judicial approval for settlements. Fed. R. Civ. P. 23(c). Such settlements do not bar parties not participating in the proceedings from asserting a later action on the same cause. Gluck v. Unger, 25 Misc. 2d 554, 202 N.Y.S.2d 832 (Sup. Ct. 1960).

5. Reiter v. Universal Marion Corp., 299 F.2d 449, 451 (D.C. Cir. 1962).

6. Gerith Realty Corp. v. Normandie Nat'l Sec. Corp., 154 Misc. 615, 276 N.Y. Supp. 655 (Sup. Ct. 1933), aff'd mem. 241 App. Div. 717, 269 N.Y. Supp. 1007 (1st Dep't 1934), aff'd mem. 266 N.Y. 525, 195 N.E. 183 (1935).

7. 207 N.Y. 213, 100 N.E. 697 (1912).

8. 98 U.S. 61, 66 (1878).

9. 207 N.Y. at 217, 100 N.E. at 697. The authority of the Throckmorton case, supra note 8, as establishing the federal rule was somewhat diminished by the Court's holding in Marshall v. Holmes, 141 U.S. 589 (1891), which seems diametrically opposed. In Graver v. Faurot, 64 Fed. 241 (C.C.N.D. Ill.), rev'd, 76 Fed. 257 (7th Cir.), certificate dismissed, 162 U.S. 435 (1896), the Court utilized a technicality to avoid settling the conflict. This situation evoked the now-famous reaction of one commentator that, "the Supreme Court of the United States, to show its utter impartiality, has ruled both ways, and left the spectacle of

The district court in the instant case rested its decision on the ground that no connection had been shown between the evidence concealed and the defendant, and that even if such a connection had been demonstrated, it would have established no more than intrinsic fraud.[10] Perjury on a trial has long been regarded as intrinsic in nature,[11] and it was reasoned that the failure to produce evidence upon a trial was of the same species of fraud. This in large part followed the reasoning of *Reiter v. Universal Marion Corp.*,[12] in which a federal court held that failure by defendants in a New York derivative suit settlement to disclose certain relevant corporate opportunities which were wasted, constituted only intrinsic fraud and could not be attacked in the federal courts.

The court of appeals in the instant case declined to consider intrinsic fraud.[13] Of primary concern was whether there was a connection between the defendant and the withheld evidence as a matter of law.[14]

Two arguments were raised to support such a connection. It is accepted that, other things remaining constant, the existence of a fact gives rise to an evidentiary inference of its existence at an earlier time.[15] In *United States v. Consolidated Laundries Corp.*,[16] the defendant in a criminal antitrust prosecution discovered documents in a file after trial which had not been there when the file

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two cases, one of which holds that false evidence is a ground for reversal, the other that it is not, both of which have been followed, and neither of which has ever been overruled." 21 Colum. L. Rev. 268, 269 (1921). Whatever the rule in federal cases, Professor Moore has suggested that in diversity suits the federal courts should follow the choice of the forum as to which rule will be applied. 7 Moore, Federal Practice ¶ 60.37[3] (2d ed. 1955). This course was adopted by the district court in the instant case. Alleghany Corp. v. Kirby, 218 F. Supp. 164, 184 (S.D.N.Y. 1963).

At least one exception to the intrinsic fraud rule has been recognized in the federal courts. Following 3 Freeman, Judgments § 1235 (5th ed. 1925), the seventh circuit has noted: "'The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud for which equity may afford relief from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony and this is true whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule.'" Ferguson v. Wachs, 96 F.2d 910, 918 (7th Cir. 1938). See Earll v. Picken, 113 F.2d 150 (D.C. Cir. 1940); Smith v. Smith, 210 Fed. 947 (D. Mont. 1914), aff'd, 224 Fed. 1 (9th Cir. 1915). There do not appear to be any New York rulings on this point. Appellants in the instant case apparently attempted to rely on such an exception, 333 F.2d at 334, although the court neither considered the question, nor did it find a duty to disclose. See note 13 infra and accompanying text.

10. Alleghany Corp. v. Kirby, 218 F. Supp. at 185.

11. Jacobowitz v. Herson, 268 N.Y. 130, 197 N.E. 169 (1935); Ross v. Wood, 70 N.Y. 8 (1877); Chenu v. Board of Trustees, 12 App. Div. 2d 422, 212 N.Y.S.2d 818 (1st Dep't 1961).

12. 299 F.2d 449 (D.C. Cir. 1962).

13. 333 F.2d at 336.

14. Id. at 331.

15. Kyle v. United States, 297 F.2d 507 (2d Cir. 1961); Russell, Poling & Co. v. Conners Standard Marine Corp., 252 F.2d 167 (2d Cir. 1958); United States v. S. B. Penick & Co., 136 F.2d 413 (2d Cir. 1943); 2 Wigmore, Evidence § 437 (3d ed. 1940).

16. 291 F.2d 563 (2d Cir. 1961).

was made available to him in preparing his defense. The court there applied this rule of inference to establish that the documents ought to have been available and concluded that their absence was prejudicial. In that case, however, the court did not go so far as to infer *wilfull* concealment, as would be required here, but instead supposed mere negligence.[17] Moreover, as Judge Kaufman's concurring opinion in the instant case pointed out, the new trial in *Consolidated Laundries* was granted because of the court's continuing duty to supervise due process in the administration of criminal justice in federal courts, a duty which does not extend to the ensuring of perfect justice in civil litigation in state courts.[18]

Judge Friendly's dissent proposed a second theory connecting the immediate defendant with the nondisclosure. It has been held that conspiring directors may be liable for damages contemplated by their conspiracy, even though the damaging acts are performed by persons independent of their control. Thus, in *Bosworth v. Allen*,[19] a number of directors, who conspired to sell control of their company to known looters, were held liable for the acts of their successors, primarily on the theory that their acts were an intended consequence of the conspiracy.[20] On this premise, Judge Friendly's dissent postulated that "when one of a group of fiduciaries accused of illegal self-dealing conceals from a court facts which pertain to the liability of his associates as well as himself, a settlement so procured is voidable as to all. A partner for whose benefit the facts were concealed can no more preserve a settlement thus obtained than the one who was on the front line."[21] Judge Kaufman agreed.[22] This would seem to parallel decisions which hold that judgments procured as part of an antecedent scheme to defraud a party will not bar that party from later relief.[23] But the extension of these cases, and the *Bosworth* theory, to situations where the procuring of a fraudulent judgment was no part of an *antecedent* scheme would not seem to be without difficulties. In particular, it must be questioned whether the problem of unfaithful directors has really reached proportions sufficient to justify an *in terrorem* policy which would charge a director for unanticipated acts from which he could not extricate himself, and, indeed, of which he could well be totally ignorent.[24]

The court split widely on the weight of nondisclosed evidence required to sustain a collateral attack. Judge Moore, reasoning by analogy, concluded that it should be more than cumulative, and *at least* of sufficient weight to support

17. Id. at 570.

18. 333 F.2d at 338.

19. 168 N.Y. 157, 61 N.E. 163 (1901).

20. Id. at 168, 61 N.E. at 166.

21. 333 F.2d at 338.

22. Id. at 327.

23. Erbe v. Lincoln Rochester Trust Co., 3 N.Y.2d 321, 144 N.E.2d 78, 165 N.Y.S.2d 107 (1957); Byrnes v. Owen, 243 N.Y. 211, 153 N.E. 51 (1926); Verplanck v. Van Buren, 76 N.Y. 247 (1879); Oldham v. McRoberts, 37 Misc. 2d 979, 237 N.Y.S.2d 26 (Sup. Ct.), aff'd mem. 18 App. Div. 2d 773, 235 N.Y.S.2d 457 (4th Dep't 1962).

24. Judge Friendly's justification was that "such cases will hopefully be rare . . . ." 333 F.2d at 346.

a new trial, *i.e.*, such as would *probably* have changed the result.[25] This would seem to receive some support from the case of *Ward v. Town of Southfield*,[26] where it was said that "where fraudulent concealment of a fact is relied upon for the purpose of impeaching and setting aside a judgment regularly obtained, it must be an intentional concealment of a material *and controlling* fact . . . ."[27] Judge Friendly pointed to two New York cases in which judgments were overturned because of the concealment of evidence by fiduciaries where the evidence was only such as *might* have changed the result.[28] The cases suggested, however, do not necessarily carve out an exception applicable to the instant case. *Matter of Lautz*[29] involved an attempt on the part of a trustee to defraud his individual *cestuis* by the concealment of evidence of doubtful weight. Although some analogy has occasionally been drawn between directors and trustees,[30] the term "fiduciary" is not, of itself, a rubric,[31] and more than a little doubt may be entertained in applying to the dealings betweeen a director and his stockholders the same standards applicable to the face-to-face dealings between a trustee and his *cestuis*. *Boston & Maine R.R. v. Delaware & Hudson Co.*,[32] is factually more appropriate. There, petitioner sought to attack collaterally the appointment of a receiver for an insolvent railroad on the ground that the attorney who prosecuted the receivership proceedings concealed from the court the fact that several years earlier he had, as general counsel for petitioner, obtained a judgment from the same court declaring the "insolvent" corporation a nonentity. The receivership was part of a scheme to eject petitioner from some of its properties. It is doubtful that the appellate division, in allowing this attack, applied the standard suggested by Judge Friendly, for, while the court at one point said it was only *questionable* whether the court would have rendered a judgment without further investigation[33] had it known of the concealed judgment, at another it stated: "It seems to us, therefore, that Mr. Justice Staley was entitled to a full disclosure to the end that he might not unwit-

25. Helene Curtis Indus. v. Sales Affiliates, 131 F. Supp. 119 (S.D.N.Y 1955).

26. 102 N.Y. 287, 6 N.E. 660 (1886).

27. Id. at 293, 6 N.E. at 661-62. (Emphasis added.)

28. Boston & Maine R.R. v. Delaware & Hudson Co., 238 App. Div. 191, 264 N.Y. Supp. 470 (3d Dep't 1933); Matter of Lautz, 128 Misc. 710, 220 N.Y. Supp. 782 (Surr. Ct. 1927).

29. Supra note 28.

30. Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955); Upson v. Otis, 155 F.2d 606 (2d Cir. 1946); Continental Sec. v. Belmont, 206 N.Y. 7, 16, 99 N.E. 138, 141 (1912); People ex rel. Manice v. Powell, 201 N.Y. 194, 201, 94 N.E. 634, 637 (1911); Bosworth v. Allen, 168 N.Y. 157, 165, 61 N.E. 163, 165 (1901); Sage v. Culver, 147 N.Y. 241, 41 N.E. 513 (1895); Munson v. Syracuse, Geneva & Corning Ry., 103 N.Y. 58, 73-74, 8 N.E. 355, 358 (1886).

31. "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligation does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943) (opinion of Mr. Justice Frankfurter).

32. 238 App. Div. 191, 264 N.Y. Supp. 470 (3d Dep't 1933).

33. Id. at 196, 264 N.Y. Supp. at 477-78.

tingly give his judicial sanction to what the Court of Appeals has termed 'the unseemly spectacle of inconsistent judgments rendered by the same court.' "[34] From this it seems likely that the court felt the nondisclosed judgment would *probably* have changed the result.

Having based his decision on the ground that the documents in the instant case could not be tied to the defendant's personal knowledge, Judge Moore took up, apparently *arguendo* and in dictum,[35] the proposition that had defendant had possession of such documents, there would have been an affirmative duty to come forward in the state proceedings and present them before the court.

That interested directors have the burden of proving the fairness and good faith of questioned transactions is axiomatic.[36] In *Upson v. Otis*,[37] the court of appeals for the second circuit utilized this principle in placing upon directors in settlement proceedings a duty of disclosure with respect to defensive evidence:

> Where court approval is asked of a settlement of a suit by beneficiaries against fiduciaries, far more than a slight indication of doubt as to the likelihood of successful recovery in full against them is required; for equity closely scrutinizes settlements between fiduciaries and cestuis, and, were the suit to go to trial, the fiduciaries would usually bear a heavy burden of proof as to all crucial issues. To justify judicial sanction of such a settlement, the fiduciaries must make a fairly detailed disclosure of the evidence which, on a trial, they would use defensively.[38]

The court emphasized its determination to adhere to this rule by allowing in full a claim against a defendant who had not shown a proper defense.

In *Heddendorf v. Goldfine*,[39] disclosure requirements were carried somewhat further by a district court in Massachusetts which refused to approve a settlement before it until particulars were furnished with regard to certain transactions in spite of the fact that none of the interested parties had questioned the transactions. The court acted on its own motion as "trustee" for the absent stockholders.[40]

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34. Ibid.

35. It is difficult to determine the position of this argument in Judge Moore's opinion. At the conclusion of the opinion he states: "In the light of the concession by plaintiff's counsel that he could not tie the financial projections sought to be introduced to Kirby's personal knowledge, the district court's refusal to speculate or infer that Kirby must have seen them cannot be characterized as 'clearly erroneous.' In view of this factual finding, it is unnecessary to consider the district court's alternative conclusion . . . ." 333 F.2d at 336. From this it would seem reasonable to infer that the holding of the court was on a matter of proof, and not a question of fiduciary duties, the subject of the larger part of his opinion.

36. Pepper v. Litton, 308 U.S. 295 (1939); Ripley v. International Rys. of Cent. Am., 8 App. Div. 2d 310, 188 N.Y.S.2d 62 (1st Dep't 1959), aff'd, 8 N.Y.2d 430, 209 N.E.2d 289 (1960). The cases, however, suggest that such a burden does not arise until some strong showing of bad faith, as opposed to questionable judgment, has been made. Chelrob Inc. v. Barrett, 293 N.Y. 442, 459-60, 57 N.E.2d 825, 833 (1945); Polhemus v. Polhemus, 114 App. Div. 781, 100 N.Y. Supp. 263 (2d Dep't 1906).

37. 155 F.2d 606 (2d Cir. 1946).

38. Id. at 614-15.

39. 167 F. Supp. 915 (D. Mass. 1958).

40. Id. at 926.

In large part, the burden of proving the fairness of a settlement is placed upon directors because it is they who are usually in possession of the relevant documents and who are intimately acquainted with the questioned transactions.[41] Judge Moore, however, noted that there was a balance to be struck between the right of stockholders to know the facts relevant to a settlement offered to them, and the right of directors to protect themselves from personal liability. He pointed especially to the extensive discovery procedures and testimony taken in the instant case as an example of the sort of protection shareholders enjoy without infringing on such a right.[42] Judge Friendly, however, observed that the risks and expense of extensive litigation in the "big" case impel an early, if not altogether favorable, settlement. He further noted that in such instances, counsel for the defendants and counsel for the settling stockholders tend to "gang up" against other shareholders seeking better terms.[43] This situation tended to nullify the effect of the usual adversary devices, and was a strong argument for imposing an affirmative duty on the directors to come forward with available evidence. In this regard, it might be noted that the theory underlying the right of shareholders to bring a derivative action is that wrongdoing directors will not sue themselves or admit to their wrongful acts.[44] To require them to bear the burden of proving their own guilt—even to establish the "fairness" of a proposed settlement—would be a remarkable innovation in the light of this premise.[45]

Fundamentally, the immediate case represents a collision between two policies of considerable influence. On the one hand, there is the desire of the courts to protect corporations from the self-dealing of those who have been entrusted with their management. This desire forms the very basis of the shareholders' derivative action,[46] and underlies the complex of fiduciary obligations imposed on directors by law.[47] Here, the trust imposed upon the Allegheny board was betrayed not once, but twice. All three members of the court implied the settle-

41. 333 F.2d at 338 (dissenting opinion).

42. Id. at 333.

43. The best example, he pointed out, was the instant case: "[S]tockholders' general counsel sometimes opposed Graubard's [attorney for stockholders dissenting from settlement] efforts to gain information, although the settlement so vigorously defended before the Referee would have produced less than a quarter as much cash for Alleghany, $700,000, as the $3,000,000 ultimately secured through the efforts of the attorneys for the plaintiffs . . . ." 333 F.2d at 347 (dissenting opinion).

44. 333 F.2d at 332. "Directors could not be expected to sue themselves, on behalf of the Corporation, with any enthusiasm. Even if they wished to, the decisions are against entrusting the conduct of the litigation on a corporation's claim to the directors who would be held liable if the litigation were successful. They would 'stand in a dual relation which prevents an unprejudiced exercise of judgment.'" Winkelman v. General Motors Corp., 44 F. Supp. 960, 1023 (S.D.N.Y. 1942).

45. Judge Moore noted that there is no requirement that a settlement be accompanied by an admission of guilt, and indeed, observed that settlements are normally accompanied by vigorous denials of wrongdoing. 333 F.2d at 333.

46. See Ashwander v. TVA, 297 U.S. 288, 318-323 (1936); 13 Fletcher, Cyclopedia of the Law of Private Corporations § 5941.1 (1947).

47. See Fletcher, op. cit. supra note 46, at § 990.

ment in the initial action was somewhat inadequate.[48] Judge Friendly philosophized that in view of the extensive control of the defendants over the relevant evidence, and in view of the dynamics in derivative suits toward an early settlement, the usefulness of such actions in protecting stockholders was limited.[49] In the alternative, he suggested some form of government supervision on corporation management might be advisable.[50] While there is some appeal to this suggestion in the light of cases like the present, it must be questioned whether, on an overall view, such a drastic intervention in the domestic affairs of corporate management has yet been justified.[51] In the absence of such a procedure, however, Judge Friendly urged that only the most exacting standards of good faith be accepted from directors seeking to extinguish liability to the corporation.[52]

On the other hand, it is axiomatic that every case must come to an end. The bias in favor of the finality of a judgment so prominent in the *Throckmorton* and *McVickar* cases is certainly as appropriate to derivative suits as other actions.[53] The proceedings in the instant matter have extended over a decade.[54] Against this background, which would seem to evoke the strongest bias in favor of finality, the plaintiffs were unable to prove actual fraud and were forced to rely primarily on legal novelties.[55] From this point of view, it is submitted that the court could not have reasonably decided other than it did.[56]

48. 333 F.2d at 336 (opinion of Moore, J.); id. at 338 (Kaufman, J., concurring); id. at 342 n.3 (Friendly, J., dissenting). Judge Friendly notes: "After receiving an opinion from counsel that his potential personal liability on the IDS exchange transactions approximated $22,800,000 and his potential joint liability an additional $39,350,000, computed on a price of $1,600 per share for the stock acquired for $8.15, plus over $70,000,000 for other items, he added to the settlement [of $700,000] another $1,000,000 which he estimated would cost him only $99,000 after taxes . . . ." 333 F.2d at 343 n.3.

49. Id. at 347.

50. Ibid. He suggested some form of inspection based on the English Companies Act, 1948, 11 & 12 Geo. 6, c. 38, §§ 164, 165(b)(ii), 168, 169(4).

51. Of the reported decisions in state and federal courts in New York during 1963, only nineteen involved derelictions of duty by directors. See, e.g., Cornfeld v. Eaton, 327 F.2d 263 (2d Cir. 1963); Walsh and Levine v. Peoria & E. Ry. Co., 222 F. Supp. 516 (S.D.N.Y. 1963); Norte & Co. v. Huffines, 222 F. Supp. 90 (S.D.N.Y.), appeal dismissed, 319 F.2d 336 (2d Cir. 1963); Leibert v. Clapp, 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963); Amdur v. Meyer, 13 N.Y.2d 1089, 196 N.E.2d 63, 246 N.Y.S.2d 408 (1963) (memorandum decision); Platt Corp. v. Platt, 20 App. Div. 2d 874, 249 N.Y.S.2d 84 (1st Dep't 1963) (memorandum decision).

52. 333 F.2d at 347.

53. Gerith Realty Corp. v. Normandie Nat'l Sec. Corp., 154 Misc. 615, 276 N.Y. Supp. 655 (Sup. Ct. 1933), aff'd mem., 241 App. Div. 717, 269 N.Y. Supp. 1007 (1st Dep't 1934), aff'd mem. 266 N.Y. 525, 195 N.E. 183 (1935).

54. The first complaints were filed in 1954. 333 F.2d at 328. One of the earlier phases of these proceedings, Breswick v. Briggs, 135 F. Supp. 397 (D.C.N.Y. 1958) (see note 1 supra) has been incorporated in a standard work for students for several years. Baker & Cary, Cases on Corporations 677 (3d ed. 1959).

55. See notes 14-24 supra and accompanying text.

56. The court of appeals has granted a rehearing in the instant case for some time in October. N.Y. Times, July 25, 1964, p. 24, col. 7.

Criminal Law—Family Court Act—Indictment for Felony Assault Upon Member of Family Will Not Bar Transfer to Family Court.—Defendant had been indicted by a county court grand jury for an assault in the second degree upon his wife. Defendant's motion to transfer the proceedings from the county court to the family court was granted, and the case transferred. The people appealed on the grounds that the proceedings could not be transferred since the family court does not have felony jurisdiction and that such a transfer impaired the constitutional function of the grand jury. The appellate division dismissed the appeal on the ground that the transfer was not a final order, and therefore not appealable. However, in its opinion, the court dealt at length with the merits of the questions raised and concluded that the transfer was valid. *People v. De Jesus*, 21 App. Div. 2d 236, 250 N.Y.S.2d 317 (4th Dep't 1964).

The instant case is one of several in which questions of jurisdiction and procedure under the provisions of the Family Court Act have been raised. Section 812 of the act provides that "the family court has exclusive original jurisdiction, subject to the provisions of section eight hundred thirteen, over any proceeding concerning acts which would constitute disorderly conduct or an assault between spouses . . . ."[1] In defining "exclusive original jurisdiction," the act provides that the proceeding must be originated in the family court[2] in the manner prescribed therein.[3] The act also requires that proceedings, involving family offenses originated in courts other than the family court, be transferred to the family court.[4]

In establishing family offense proceedings the intent of the legislature was to provide a forum to which an aggrieved family member could bring a complaint, seeking conciliation rather than criminal prosecution.[5] But, if criminal prosecution is the only feasible alternative, then at the discretion of the family

1. The empowering constitutional section states: "The family court shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such family court in the manner provided by law . . . and (7) as may be provided by law . . . in conformity with the provisions of section seven of this article, [jurisdiction over] crimes and offenses . . . between spouses . . . ." N.Y. Const. art. VI, § 13(b).

2. N.Y. Family Ct. Act § 114.

3. A proceeding under the act is originated by the filing of a petition alleging the assault or disorderly conduct, seeking an order of protection or conciliation, or asking that the proceeding be transferred to a criminal court. N.Y. Family Ct. Act § 821.

4. "Any criminal complaint charging disorderly conduct or an assault between spouses . . . shall be transferred by the criminal court . . . to the family court in the county in which the criminal court is located . . . ." N.Y. Family Ct. Act § 813(a).

5. N.Y. Family Ct. Act § 811 states: "In the past, wives and other members of the family who suffered from disorderly conduct or assaults by other members of the family or household were compelled to bring a 'criminal charge' to invoke the jurisdiction of a court. Their purpose, with few exceptions, was not to secure a criminal conviction and punishment, but practical help.

"The family court is better equipped to render such help, and the purpose of this article is to create a civil proceeding for dealing with such instances of disorderly conduct and assaults. . . . If the family court concludes that these processes are inappropriate in a particular case, it is authorized to transfer the proceeding to an appropriate criminal court."

court judge the proceeding is to be transferred to a criminal court. The Joint Legislative Committee concluded that the family court should not have criminal jurisdiction, nor subject offenders to criminal penalties.[6] Despite this limitation, the Judicial Conference, discussing the degrees of assault over which the family court has jurisdiction, stated that "[it] is not limited to any particular degree of assault."[7] The effect apparently intended was to subject all degrees of assault between family members to the jurisdiction of the family court initially, subject to a transfer, if required, to the criminal courts.

In *People v Klaff*,[8] the first reported case arising under the Family Court Act, it appeared that an information had been filed in the District Court, Nassau County, alleging an act which constituted a felony assault upon the defendant's wife. The district court exercised jurisdiction, reasoning that the act was not intended to apply to felony assaults since it failed to provide for the indictment required in cases of felonies. Further, it said, no provision in the act guaranteed a prompt hearing or release from detention.[9] The absence of such provisions, it was suggested, would contravene defendant's right to due process under the New York Constitution. Upon its own motion, the court granted a rehearing and affirmed its prior decision to hold the defendant for the grand jury. The court relied on the dictum in *People v. Kaminsky*[10] that

6. "[I]t would be unwise at this time, to give the Family Court the extensive powers given the criminal courts under the Penal Law of the State of New York. . . . [C]riminal powers and procedures would be inconsistent with the proper development of the Family Court, during its formative period, as a special agency for the . . . preservation of the family." Report of Joint Legislative Committee on Court Reorganization No. 2—The Family Court Act, N.Y. Sess. Laws 3430 (McKinney 1962).

7. 8 N.Y. Judicial Conference Ann. Rep. 72 (1963). Compare this language with the following: "[A] Family Court should have jurisdiction over . . . crimes and offenses, except felonies . . . between spouses . . . ." 4 N.Y. Judicial Conference Ann. Rep. 89-90 (1959). The comment reflects a change in the original legislative intent. It is noted that the Governor vetoed S. Int. 2346, N.Y. Leg. 187th Sess. (1964), which proposed to limit the jurisdiction of the family court to assaults in the third degree.

8. 35 Misc. 2d 859, 231 N.Y.S.2d 875, aff'd on rehearing, 35 Misc. 2d 862, 231 N.Y.S.2d 875 (Dist. Ct. Nassau County 1962).

9. See N.Y. Const. art. I, § 6, note 30 infra. N.Y. Family Ct. Act § 814 was added to guarantee defendant's rights upon detention, seemingly answering the objection of People v. Klaff. It reads, "(a) Upon the making of a criminal complaint charging disorderly conduct or an assault between spouses . . . and until the proceeding is transferred . . . or dismissed . . . the criminal court in which the complaint was made may hold the defendant, admit to, fix or accept bail or parole the defendant. (b) Upon the making of a decision to transfer said proceedings to the family court, the said criminal court may hold the defendant, admit to, fix or accept bail, or parole the defendant for hearing before the family court."

10. 208 N.Y. 389, 102 N.E. 515 (1913). An eleven-year old's conviction for stealing a pocketbook, without indictment by grand jury, was held not unconstitutional. The court there noted particularly that felonies not punishable by death or life imprisonment are reduced to the grade of misdemeanors if committed by a youth under sixteen years of age. N.Y. Penal Law § 2186. In Klaff, the court analagously reasoned that the converse situation, requiring an indictment for a felony, was implied in Kaminsky. It is to be noted however, that Kaminsky held that a defendant's rights are not impaired when the grand jury has no function in the case of a non-infamous crime.

a defendant cannot be held to answer for a felony[11] except upon indictment by a grand jury.

The concern of the court in *Klaff* for the defendant's right to be indicted was misplaced. Though the New York Constitution does require that a defendant not be put in jeopardy of conviction and sentence for a felony without an indictment[12]—though not for a misdemeanor when the imprisonment authorized is one year or less[13]—it is submitted, however, that since the family court is without power to confine the defendant as a criminal,[14] no indictment is required prior to family court proceedings. The effect of the order of disposition, which may be entered in a family offense proceeding, is curative and conciliatory in scope.[15] The order of disposition, being injunctive in nature, does not involve criminal procedure, and hence defendant's rights would not be contravened by a family court proceeding, involving an otherwise felonious act, without an indictment.

In *Ricapito v. People*[16] defendant sought mandamus and prohibition in the supreme court to compel the transfer, from the county court to the family court, of an indictment charging assault in the first degree upon his wife, and to enjoin further prosecution in the county court. The supreme court declined

11. The terms "infamous crime" and "felony" are synonymous. The Court of Appeals has stated: "We are justified, therefore, on authority as well as long-continued usage and practice, in determining that the provisions of the Constitution requiring indictment . . . relate to those crimes where the punishment may be in State's prison or for a longer term than one year in any prison." People v. Bellinger, 269 N.Y. 265, 271, 199 N.E. 213, 215-16 (1935). The court held that a crime designated a misdemeanor for which the sentence authorized could have been two years in prison, or a $5000 fine, should be treated as a felony. The Court of Special Sessions was without jurisdiction to try it, and the crime had to be presented by indictment. See also, People v. Schumann, 146 Misc. 395, 262 N.Y. Supp. 486 (Ct. Gen. Sess. N.Y. County 1933), where a certificate that a charge be presented by indictment was granted, when defendant was prosecuted for the misdemeanor of conspiracy to rob. Since he could also face a prosecution for robbery, it was held that the right to be indicted should be exercised. N.Y. Penal Law § 2.

12. In People ex rel. Battista v. Christian, 249 N.Y. 314, 319, 164 N.E. 111, 112 (1928), the court said: "Article 1, section 6, proceeds far beyond the point of conferring a mere personal privilege. Unqualifiedly, it prohibits the trial of anyone charged with infamous crime except on presentment or indictment by a grand jury. Until the grand jury shall act, no court can acquire jurisdiction to try." The court held that a person could not waive the right to be indicted for a felony, and any conviction in opposition to this was invalid.

13. N.Y. Const. art. I, § 6; People v. Bellinger, 269 N.Y. 265, 199 N.E. 213 (1935).

14. The court may however hold a respondent in contempt for a failure to obey an order of disposition under section 841 of the act. Under such an event, he may be imprisoned for a term not exceeding six months. N.Y. Family Ct. Act § 846.

15. N.Y. Family Ct. Act § 841 states: "At the conclusion of a dispositional hearing on a petition under this article, the court may enter an order (a) dismissing the petition . . . or (b) suspending judgment for a period not in excess of six months; or (c) placing the respondent on probation . . . or (d) making an order of protection in accord with section eight hundred forty-two." Section 842 imposes upon the respondent an injunction to maintain "reasonable conditions of behavior" towards the petitioner. See note 19 infra.

16. 38 Misc. 2d 710, 238 N.Y.S.2d 864 (Sup. Ct.), aff'd mem. 20 App. Div. 2d 567, 245 N.Y.S.2d 846 (2d Dep't 1963).

to compel a transfer reasoning that an assault with a dangerous weapon was not within the jurisdiction of the family court.[17] The court, relying on the New York State Constitution provision that, "the power of the grand juries . . . to find indictments . . . shall never be suspended or impaired by law,"[18] argued that civil proceedings which bar a criminal proceeding unconstitutionally suspend the power of the grand jury to indict, since under the act, issuance of an order of disposition bars subsequent prosecution for the assault on which the proceeding was based.[19] It is submitted that the court, by omitting significant phrases of section six of article I of the constitution, gave it a broader application than it was intended to have. This quoted portion of the constitution deals with inquiries by the grand jury into the wilful misconduct of public officials in their office, and is a prohibition against laws preventing prosecutions for such wilful misfeasance. To apply otherwise such a broad proscription to the misconduct of private citizens, and prosecutions thereon, would render the issuance of an order of disposition unconstitutional. The court's concern with criminally prosecuting the defendant upon this basis was not justified. Had the assault upon the defendant's spouse been of such a nature as to render conciliation fruitless, then there is no question that the proceeding would have been transferred by a family court to a criminal court, in obvious preference to issuing an order of disposition.

In affirming, the appellate division held that the writ of prohibition is not available to a petitioner whose rights can be adequately preserved on appeal. It noted that there was no showing that the petitioner had previously moved for a transfer to family court. The court did not discuss the merits of petitioner's argument.[20]

A third case denying jurisdiction to the family court in family offense proceedings involving felony assaults is *People v. Radison*.[21] Defendant's motion to transfer an indictment, charging assault in the second degree upon his wife, from the supreme court to the family court was there denied. The

17. The court reasoned that a mandatory disposition of certain types of crimes (e.g., felonies committed while armed with a dangerous weapon), whereby the court is powerless to suspend sentence, makes any attempt to civilly adjudicate such a felony contrary to the legislative intent. Bennett v. Merritt, 261 App. Div. 824, 25 N.Y.S.2d 784 (2d Dep't), aff'd, 286 N.Y. 647, 36 N.E.2d 690 (1941) (memorandum decision); N.Y. Penal Law § 2188.

18. 38 Misc. 2d at 712, 238 N.Y.S.2d at 866, quoting N.Y. Const. art. I, § 6. Section 6 states in part: "The power of Grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law."

19. N.Y. Family Ct. Act § 845 states: "When the terms of an order of disposition made under this article are satisfied, no criminal proceeding may be commenced with respect to the acts which would constitute disorderly conduct or assault on which the adjudication giving rise to the order of disposition was based."

20. The appellate division indicated that a denial of a motion to transfer would have been a proper subject on appeal if there had been a conviction. 20 App. Div. 2d 567, 245 N.Y.S.2d 846 (2d Dep't 1963) (memorandum decision).

21. 40 Misc. 2d 1063, 244 N.Y.S.2d 941 (Sup. Ct. 1963).

supreme court construed section 114 to mean that the family court acquires "exclusive original jurisdiction" only when the complaint is initiated in the family court, but that a transfer of an indictment from the supreme court would be subject first to the jurisdiction of the supreme court.[22] The court emphasized the language of section 114, which states, "The provisions of this act shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of article six of the constitution . . . ." The court in *Radison* held this to bar the transfer of such a proceeding to the family court when the supreme court had jurisdiction and considered criminal proceedings to be in the best interests of justice.

To give effect to the holding in *Radison*, a complaint alleging a felony assault presented to the supreme court could result in defendant's being held for trial, while under section 813(a) of the act, one presented to a county court or other criminal court would have to be transferred to the family court for disposition.[23] Certainly, the legislature could not have intended that one defendant be prosecuted in the supreme court as a criminal, while another would be treated as an offending member of a family merely because the district attorney chose to commence the action in a county court. Section 813(a) of the act has the effect of precluding any such discretion on the part of the district attorney by requiring transfer to the family court, but it also has the effect of presenting an inconsistency that is, at present, irreconcilable, and possibly unconstitutional.[24]

In the subject case,[25] the fact that the defendant had been indicted was discussed in relation to article VI, section 19(b) of the New York Constitu-

22. N.Y. Const. art. VI, § 7(a) states: "The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment and to the family court in the city of New York jurisdiction over crimes and offenses . . . between spouses . . . ."

23. See note 4 supra. Outside New York City, the supreme court has concurrent jurisdiction with the county courts over felonies. N.Y. Code Crim. Proc. §§ 22, 39. The language of NY. Family Ct. Act § 813(a), requiring transfer, applies to all criminal courts, but, as suggested by Radison, the non-impairment clause of section 114 would create an exception to this.

24. See note 4 supra. Section 813(a) of the act, which does not exclude the supreme court from the requirements of transfer of family offense proceedings to the family court, could be interpreted as impairing the supreme court's general original jurisdiction, even though section 114 of the act says that it is not supposed to do this. This possible impairment could make section 813(a) unconstitutional.

Similar reasoning would require that the supreme court have original jurisdiction over family offenses. As suggested in the instant case, the court would then be required to act as though it were a family court. 21 App. Div. 2d at 239, 250 N.Y.S.2d at 322. It appears that a decision by the Court of Appeals is needed to clarify this problem of jurisdiction, though it may also require legislative amendment to article VI, section 13 of the constitution to cure the defect presented by the non-impairment clause.

25. 21 App. Div. 2d 236, 250 N.Y.S.2d 317 (4th Dep't 1964).

tion.[26] While suggesting that a valid indictment would bar a transfer, the court reasoned that the district attorney's power to seek indictments is limited by the constitution and the Family Court Act, and concluded that the indictment was invalid.

This line of reasoning is subject to the qualification that the Family Court Act does not make any provision for indictments, either limiting them, or excluding them from the family court procedure. Constitutionally, the power of the grand jury to indict, or to seek indictments, cannot be limited except by a clearly defined statute.[27] It similarly appears that the validity of an indictment is not affected by the failure to make a formal complaint to a magistrate or other official,[28] nor is the validity affected by the return of an indictment to a court which does not have the power to try it.[29] In other words, the grand jury could independently indict the defendant for a felony assault involving a family offense notwithstanding that the proceeding is before the family court. However, in considering the arguments raised in *Klaff*, *Ricapito*, and *Radison*, the court stated that section six of article I of the constitution was included to protect the accused, rather than to grant to a grand jury a right to indict.[30] The court reasoned that there was no conflict between the family court procedure and the function of the grand jury since the family court function was to decide whether criminal action was necessary, and thus whether the need for indictment arose.

It should be noted that the legislature did not change any relevant provisions[31] of the Penal Law or the Code of Criminal Procedure in relation to the Family Court Act. If a felony assault is not to be treated as a crime under certain circumstances, how can this be reconciled with the legislature's failure to amend

26. N.Y. Const. art. VI, § 19(b) reads: "The county court may transfer any action or proceeding, except a criminal action or proceeding involving a felony prosecuted by indictment or an action or proceeding required by this article to be dealt with in the . . . family court, to any court, other than the supreme court, having jurisdiction of the subject matter within the county provided that such other court has jurisdiction over the classes of persons named as parties." This section deals generally with classes of actions that are transferrable, and excludes family offense proceedings from being dealt with in any court other than the family court. It does not exclude the transfer of felonies prosecuted by indictment to the family court, as suggested by De Jesus.

27. See People v. Stern, 3 N.Y.2d 658, 148 N.E.2d 400, 171 N.Y.S.2d 265 (1958). A grand jury's power is constitutionally derived and statutorily defined. It can only be limited by a clearly drawn statute or a court order based upon such a statute.

28. People v. McCarthy, 168 N.Y. 549, 61 N.E. 899 (1901).

29. People v. Stern, 3 N.Y.2d 658, 148 N.E.2d 400, 171 N.Y.S.2d 265 (1958). The grand jury's function is to enquire into all crimes committed within the community, and to present the indictment to an appropriate court.

30. "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury . . . ." N.Y. Const. art. I, § 6.

31. N.Y. Penal Law § 487 (Supp. 1964) substituted the words "family court" and "family court act" in a section relating to the trial of children under sixteen. The definitions of assault remain unchanged, and presumably include assaults between spouses, since the term "assault" has a sufficiently extended meaning within the Penal Law. Section 813(b) of the act was amended, however, to extend the definition of disorderly conduct to include disturbances not in a public place.

the Penal Law? One possible answer is that the acts or omissions are not to be treated as crimes until such a determination is made by the family court judge.[32] If so, then the reason for an indictment prior to any transfer back to the criminal court does not exist.[33]

Even without change in the Penal Law however, it seems inescapable that a family court judge with jurisdiction over all family offenses can issue an order of disposition which bars further prosecution in a criminal action,[34] even where it is admitted that a family offense constituting a felony, as defined by the Penal Law, was committed. Since this can occur, it appears that the legislature must have intended simply that family offenses not be prosecuted as crimes under the Penal Law until such time as the family court decides that the interest of society in protecting life and property through criminal actions becomes paramount to the interest of society in the preservation of the family. These family court proceedings are then analogous to other proceedings which become criminal by virtue of removal.[35] For example, an act, otherwise criminal, for which the statute authorizes prosecution without indictment of a person of the age of fifteen years as a juvenile delinquent, for what would be a felony if committed by one over sixteen,[36] can be treated at the discretion of the family court judge as an indictable crime and prosecution for the felony as an adult is then authorized.

The appellate division's conclusion in the present case, that a transfer from the criminal court to the family court is mandatory, means that the criminal court can acquire jurisdiction only through the family court. If the criminal court does not have jurisdiction until such time as the family court transfers the proceeding to it, then a conviction for a family offense by the criminal court would be invalid,[37] since the failure to transfer would invalidate its own proceedings. The criminal courts, in discussing the question of misdemeanor

32. People v. De Jesus, 21 App. Div. 2d at 240, 250 N.Y.S.2d at 323.

33. E.g., People ex rel. Battista v. Christian, 249 N.Y. 314, 164 N.E. 111 (1928); People v. Kaminsky, 208 N.Y. 389, 102 N.E. 515 (1913).

34. No restriction is placed upon the decision of the family court judge to enter an order of disposition by N.Y. Family Ct. Act § 845, nor does section 811 of the act place any restriction upon his decision to transfer. Therefore, it is possible that he could retain jurisdiction, even if criminal prosecution seemed advisable to the district attorney, in order to utilize an order of disposition barring trial.

35. N.Y. Code Crim. Proc. § 312-c(c).

36. N.Y. Penal Law § 2186.

37. N.Y. Family Ct. Act § 813, stating that family offense proceedings ". . . shall be transferred by the criminal court . . . to the family court . . . ." raises a question of statutory interpretation. The word "shall" is not always mandatory. See In the Matter of State of New York, 207 N.Y. 582, 101 N.E. 462 (1913). On the other hand, those provisions concerning procedure are mandatory. It is in this respect that "shall" becomes mandatory, and proceedings ignoring this direction are invalid. People ex rel. Lawton v. Snell, 216 N.Y. 527, 111 N.E. 50 (1916). In that case the relator's statutory liability in a filiation proceeding was invalidated when the procedural requirements of the statute were not met. By implication, the statement of the appellate division in Ricapito v. People, 20 App. Div. 2d 567, 245 N.Y.S.2d 846 (2d Dep't 1963) may also be taken to support the conclusion that such a criminal conviction would be invalid for lack of jurisdiction.

assaults within the family,[38] do appear to take the position that the transfer to the family court is mandatory.

The subject case has largely reconciled the intent and purpose of the Family Court Act with the processes of criminal procedure, but it has not overcome the difficulty posed by *Radison*. The intent of the legislature to create a forum having exclusive original jurisdiction over family offenses, and to mandate a transfer to this court from any other court, does in fact impair the general original jurisdiction of the supreme court. If so, then in this respect, section 813(a) of the act is unconstitutional. This is an unfortunate consequence of what is otherwise a practical solution to the conciliation of family disputes. Certainly, access to the family court for such disposition and conciliation as it may provide would serve better the interests of society and the individual families involved in preserving family unity, than would automatic criminal prosecution.

Labor Law—Peaceful Consumer Picketing at Secondary Site Not Prohibited by Section 8(b)(4) of the Labor Management Relations Act.—Fruit & Vegetable Packers & Warehousemen, Local 760 struck twenty-four fruit packers and warehousemen represented by Tree Fruits Labor Relations Committee, Inc. In support of the strike, the union inaugurated a boycott of the product at certain retail chain stores.[1] The boycott consisted of pickets carrying placards[2] and distributing handbills requesting the public, including customers of these stores, to refrain from buying the product of the primary employers. At all times the picketing was peaceful, confined to consumer entrances and directed solely to the consumers. No appeal was made to the consumers not to patronize the stores. Neither the employees nor the ordinary operations of the secondary employer were affected at any time by the presence of the pickets. Tree Fruits charged the union with unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.[3] The National Labor Relations Board found that picketing as a means of effecting a secondary boycott was illegal

38. People v. Dugar, 37 Misc. 2d 652, 235 N.Y.S.2d 152 (Dist. Ct. Nassau County 1962). The cohabitation of parties not married to each other, which produced offspring, constituted a household for the purposes of the act. Upon arraignment, the case was transferred to family court—the court concluding that a transfer was mandatory, the family court having jurisdiction over family or household offenses. People v. Keller, 37 Misc. 2d 122, 234 N.Y.S.2d 469 (Dist. Ct. Nassau County 1962), held similarly in determining that a misdemeanor assault upon a mother-in-law was an assault within the family. The charge was transferred to family court for further disposition.

1. Two pickets each appeared at more than forty stores belonging to Safeway Stores, Inc., a national retail food chain.

2. The placard worn by each picket bore the following legend: "To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington." NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 60 n.3 (1964).

3. Labor-Management Reporting and Disclosure Act (Landrum-Griffiin Act) § 704(a), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(ii)(B) (Supp. V, 1963), amending Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4), 61 Stat. 141 (1947), 29 U.S.C.

per se under section 8(b)(4)(ii)(B) and ordered the union to cease and desist.[4] Because of constitutional reservations concerning blanket prohibitions of picketing, the Court of Appeals for the District of Columbia reversed and remanded the case to ascertain whether the secondary employer was *in fact* threatened, coerced or restrained.[5] Rejecting the conclusions of both the NLRB and the District of Columbia Circuit, the Supreme Court held that secondary consumer picketing directed solely against the primary employer is not an unfair labor practice within the meaning of section 8(b)(4)(ii)(B). *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58 (1964).

The late Senator Taft once remarked that there was no such thing as a "good" secondary boycott.[6] It was commonly believed that the legislation which bears his name was intended to outlaw this particular form of union activity.[7] Intentions notwithstanding, under the Taft-Hartley formula,[8] courts had held that picketing and other union activity at the premises of a neutral employer directed toward the consumer public and designed to solicit their aid and cooperation in not buying the products of the primary employer were not unlawful secondary activity, so long as such activity neither induced nor encouraged a concerted work stoppage by the employees of the neutral.[9]

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§ 158(b)(4) (1958), amending 49 Stat. 452 (1935). The statute reads as follows: "It shall be an unfair practice for a labor organization . . . (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . (B) forcing or requiring any person to . . . cease doing business with any other person . . . Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . ." (Emphasis omitted.)

4. Fruit & Vegetable Packers, 132 N.L.R.B. 1172 (1961). The Board found no violation of § 8(b)(4)(i)(B), and that issue was not raised in any subsequent proceeding. Fruit & Vegetable Packers, supra at 1176-77.

5. Fruit & Vegetable Packers v. NLRB, 308 F.2d 311 (D.C. Cir. 1962).

6. 93 Cong. Rec. 4198 (1947).

7. Fleming, Title VII: The Taft-Hartley Amendments, 54 Nw. U.L. Rev. 666, 681 (1960).

8. Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958). The relevant provisions are as follows: "It shall be an unfair labor practice for a labor organization . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, . . . (A) forcing or requiring any employer . . . to cease doing business with any other person . . . ."

9. It was generally held that where the picketing was restricted to entrances not used, or not likely to be used, by employees or suppliers of the secondary employer there was no violation of section 8(b)(4)(A). E.g., NLRB v. International Union of United Brewery Workers (Coors Beer), 272 F.2d 817, 819 (10th Cir. 1959); NLRB v. Business Mach. & Office Appliance Mechanics (Royal Typewriter), 228 F.2d 553, 556 (2d Cir. 1955), cert.

While both Houses were considering major labor legislation in 1958, there was strong feeling in executive and legislative circles that any new legislation must include Taft-Hartley amendments to plug loopholes revealed since 1947, including the impunity with which unions could apply pressure directly against secondary employers.[10] The House bill[11] contained amendments to the Taft-Hartley Act, including an amendment to section 8(b)(4), which went beyond any provisions of the Senate bill.[12] This amendment would have made it an unfair labor practice to "threaten, coerce or restrain any person engaged in commerce . . . where . . . an object thereof is: . . . forcing or requiring any person . . . to cease doing business with any other person . . . ."[13] It was feared that such language, standing alone, would effectively seal off all avenues of appeal for consumer aid against the struck employer.[14]

Reporting on the outcome of the conference committee, Senator Kennedy announced that the Senate conferees had been able to secure important changes "in the restrictive provisions of the Landrum-Griffin Bill," including "the right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods."[15] The conference agreement enacted into law became the present general proviso to section 8(b)(4).[16] It was generally believed [17] that the permissible areas of union activity under the new section in-

denied, 351 U.S. 962 (1956); Crowley's Milk Co., 102 N.L.R.B. 996, 997-98, enforced, 208 F.2d 444 (3d Cir. 1953). However, once the picketing was extended to entrances normally used by employees and suppliers of the secondary employer, or entrances used in common by employees and patrons or customers, such activity constituted an unfair labor practice. E.g., Dallas Gen. Drivers, 118 N.L.R.B. 1251, 1253 (1957), enforced, 264 F.2d 642 (5th Cir. 1959); Laundry, Linen Supply & Dry Cleaning Drivers, 118 N.L.R.B. 1435, 1437 (1957), enforced, 262 F.2d 617 (9th Cir. 1958).

10. This was explained by Congressman Griffin, a sponsor of one of the House Bills: "Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

"However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered." 105 Cong. Rec. 15673 (1959) (exchange between Congressmen Griffin and Brown). See also S. Rep. No. 187, 86th Cong., 1st Sess. 78-79 (1959) (minority report of Senators Goldwater and Dirksen); 105 Cong. Rec. 6667 (1959) (remarks of Senator McClellan).

11. H.R. 8342, 86th Cong., 1st Sess. (1959).

12. S. 1555, 86th Cong., 1st Sess. (1959).

13. H.R. 8400, 86th Cong., 1st Sess. 62-63 (1959). The House passed H.R. 8342 with the language of H.R. 8400 and substituted the text of H.R. 8400 into S. 1555, the bill which was enacted.

14. 105 Cong. Rec. 6232 (1959) (remarks of Senator Humphrey). See also Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 274 (1959).

15. 105 Cong. Rec. 17898 (1959).

16. For the text of the proviso see note 3 supra.

17. E.g., 105 Cong. Rec. 17899 (1959) (remarks of Senator Kennedy on the conference bill); Id. at 17882 (remarks of Senator Morse in opposition to the conference bill); Id. at

cluded passing out handbills and advertising over the radio, but excluded picketing at a secondary employer's site.

In light of the legislative history of the section generally, and particularly the language of the proviso,[18] the NLRB has consistently concluded that secondary consumer picketing is illegal per se under section 8(b)(4)(ii).[19] In the instant case, the Board decided that even though, ostensibly, the picketing was an appeal to the public to reduce its purchases of the struck product only, the "natural and foreseeable" and therefore intended result of such picketing was the curtailment of business between the struck employer and the neutral which constitutes a violation of subdivision (B).[20] Predictably, the Board issued an order to cease and desist. The District of Columbia Circuit, however, rejected the conclusion that secondary consumer picketing per se constituted coercion of the neutral employer.[21] While conceding at least some authority in the legislative history for the Board's interpretation, the court decided, as urged by the union, that a more "plausible" reading of the statute would show that section 8(b)(4)(ii) "outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer."[22] Apparently the court of appeals

17904 (remarks of Senator Goldwater in support of the conference bill); Cox, supra note 14; Goldberg & Meikeljohn, Title VII: Taft-Hartley Amendments, With Emphasis on the Legislative History, 54 Nw. U.L. Rev. 747, 757-58 (1960). See also Farmer, The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions, 48 Geo. L.J. 327, 341-42 (1959); Fleming, Title VII: The Taft-Hartley Amendments, 54 Nw. U.L. Rev. 666, 682-92 (1960). But contrary to this array of authority, it has been suggested that "without more, a simple request to customers, conveyed by a picket sign, to refrain from purchasing a particular product does not . . . violate the law. The proviso simply seeks to place . . . other publicity in a more favorable position than picketing by requiring an 'effect' in addition to the prohibited means and object." Previant, The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis, 48 Geo. L.J. 346, 354 (1959). See also Comment, The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott, 45 Cornell L.Q. 724, 731-36 (1960).

18. For the text of the proviso see note 3 supra.

19. Blueprint Employees Union, 135 N.L.R.B. 1090 (1962); Upholsterers Union (Minneapolis House Furnishing Co.), 132 N.L.R.B. 40 (1961), enforcement denied, 331 F.2d 561 (8th Cir. 1964); United Wholesale Employees (Perfection Mattress Co.), 129 N.L.R.B. 1014 (1960); International Hod Carriers (Gilmore Constr. Co.), 127 N.L.R.B. 541 (1960). The Board reasoned that peaceful picketing for an objective proscribed by section 8(b)(4) constituted "coercion and restraint" of an employer within the meaning of clause (ii) because such picketing was in the nature of "economic retaliation" against a secondary employer who failed to comply with union demands. Significantly, in each of the above cases, as distinct from the instant case, the secondary employer had been approached by the union at one time or another and had been given the opportunity to cooperate voluntarily in the union's dispute with the secondary employer. If such cooperation was forthcoming, the premises were not picketed or pickets, already installed, were removed. Blueprint Employees, supra at 1096; Upholsterers Union, supra at 43-44; United Wholesale Employees, supra at 1022; International Hod Carriers, supra at 545, n.6.

20. Fruit & Vegetable Packers, 132 N.L.R.B. 1172, 1177-78 (1961).

21. Fruit & Vegetable Packers v. NLRB, 308 F.2d 311 (D.C. Cir. 1962), 62 Colum. L. Rev. 1336, 51 Geo. L.J. 201.

22. Id. at 315.

felt constrained to avoid any interpretation of the statute which would, in its opinion, raise serious constitutional questions.[23]

In the landmark case of *Thornhill v. Alabama*,[24] the Supreme Court had held unconstitutional under the first amendment a sweeping state ban on peaceful picketing publicizing a labor dispute. However, since then the Supreme Court has recognized that "the loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."[25] In various subsequent decisions the Supreme Court has held that picketing may be enjoined where the objective of such picketing is contrary to the public policy of the state,[26] including the protection of neutrals.[27] The District of Columbia Circuit distinguished these holdings from the instant case on the ground that the former reflected a Supreme Court policy to restrict "signal" picketing, which depended for its success on union discipline and loyalty, rather than "publicity" picketing, which like "pure" speech depends on its persuasive appeal to the public.[28] The court reasoned that Congress could have intended to outlaw only that picketing which did actually threaten, coerce or restrain a secondary employer. The court of appeals remanded for a determination whether the secondary employer or any customers were actually coerced, or whether the secondary employer suffered or was likely to suffer "substantial economic injury," which might be such a serious consequence as to outweigh the first amendment protection.[29]

In a parallel situation, the appeal from the Board's decision in *United Wholesale Employees (Perfection Mattress Co.)*[30] upheld the Board's order to cease and desist from unfair labor practices in violation of section 8(b)(4)(ii)(B).[31]

23. Id. at 315, 317. Cf. International Ass'n of Machinists v. Street, 367 U.S. 740, 765-68 (1961).

24. 310 U.S. 88 (1940). See generally Farmer & Williamson, Picketing and the Injunctive Power of State Courts—From Thornhill to Vogt, 35 U. Det. L.J. 431 (1958).

25. Hughes v. Superior Court, 339 U.S. 460, 465 (1950).

26. International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 294-95 (1957) (state law making it an unfair labor practice to coerce employers to pressure employees to join a union); International Bhd. of Teamsters v. Hanke, 339 U.S. 470, 476-79 (1950) (state law protecting self-employers from organizational picketing). See generally Samoff, Picketing and the First Amendment: "Full Circle" and "Formal Surrender," 9 Lab. L.J. 889 (1958).

27. International Bhd. of Teamsters v. Vogt, Inc., supra note 26; See Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 727-28 (1942) (state anti-trust law prohibiting picketing at neutral sites). The Court has similarly allowed enforcement of federal policy. International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705 (1951) (Taft-Hartley Act making illegal secondary boycotts which induced employees to stop working).

28. Fruit & Vegetable Packers v. NLRB, 308 F.2d at 316. The distinction between "signal" and "publicity" picketing was initially proposed by Cox, Strikes, Picketing and The Constitution, 4 Vand. L. Rev. 574 (1951). But see Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 267 n.41, 274 (1959).

29. 308 F.2d at 318; see Dennis v. United States, 341 U.S. 494, 501, 509 (1951) (overthrow of the government by force and violence). The court of appeals decision in the instant case did not reach the question of what consequences were serious enough to remove secondary consumer picketing from the category of pure speech protected by the first amendment. 308 F.2d at 317 n.11.

30. 129 N.L.R.B. 1014 (1960), order amended, 134 N.L.R.B. 931 (1961).

31. Burr v. NLRB, 321 F.2d 612 (5th Cir. 1963), 77 Harv. L. Rev. 361. The Board's

Assuming the union's objective to be proscribed by subdivision (B),[32] that court specifically rejected union arguments that picketing as a means was lawful until it was shown to threaten, coerce or restrain in fact. By so holding, the Fifth Circuit declined to follow the District of Columbia Circuit. The Fifth Circuit found that the Board's interpretation embodied an appreciation of the twofold purpose of the section which was designed to protect the neutral from "possibly devastating effects as a result of a controversy in which he had no real part" and the primary employer from "cyclonic economic pressures through the loss of business . . . ."[33] In the Fifth Circuit's opinion, the District of Columbia Circuit not only ignored the plain meaning of the statute and the intent of Congress[34] because of groundless constitutional fears,[35] but also nullified the statute by requiring that "threatened damage be actually sustained, or that one feeling the pinch furnish specific answers to metaphysical inquiries as to the harm suffered."[36]

The Fifth Circuit's decision was announced slightly more than a month after the Supreme Court had granted certiorari in *Fruit & Vegetable Packers*.[37] In the instant case, the Supreme Court established at the outset that in the constitutionally sensitive realm of regulatory legislation of picketing it was the habit of Congress to proceed only against specific evils which experience had revealed were undesirable, and that it was the Court's own policy to ascribe to Congress no broader objectives than were clearly indicated in the legislative history.[38] Within this framework, the Court concluded that the evil Congress sought to proscribe by section 8(b)(4) was an appeal to the public not to patronize an innocent secondary employer rather than an appeal to the public not to buy a particular product of the struck employer.[39] A union is free to attempt a total secondary boycott against a neutral by any means other than picketing, provided the means used do not cut off deliveries or induce a work stoppage.[40] However, if a union chooses to employ pickets the boycott must be directed solely against the product of the primary employer. The Court rationalized that:

when consumer picketing is employed only to persuade customers not to buy the struck

order was enforced in part, modified in part and reversed in part. That part of the order which concerned section 8(b)(4)(ii)(B) was affirmed.

32. Burr v. NLRB, 321 F.2d at 617.

33. Id. at 619.

34. Id. at 617-18. The court relied heavily on the exchanges on the floor of Congress during the passage of the act. See notes 10-17 supra and accompanying text.

35. Id. at 621-22. See notes 24-27 supra and accompanying text. This court rejected the District of Columbia Circuit's focusing the evolution of the concepts of free speech and picketing in terms of "signal against publicity" as inappropriate in this case. "In the legislative judgment, to 'signal' persons into a sympathetic refusal to handle goods is no more obstructive than to bring about the same ultimate objective—cessation of business with the primary employer—through coercive pressures on the secondary employer. To tag one method as 'consumer picketing' does not afford a constitutional insulation denied to the other. When the purpose of the conduct is the same, it is for Congress to determine that similar restraints may be imposed." (Emphasis omitted.)

36. Id. at 621.

37. 374 U.S. 804 (1963).

38. 377 U.S. at 62-63. See NLRB v. Drivers Union, 362 U.S. 274, 284 (1960).

39. 377 U.S. at 63-64.

40. Id. at 70-71.

product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.[41]

Acknowledging that this distinction was never drawn by any member of Congress during any of the debates over the issue of consumer picketing[42] the Court went to great lengths to distinguish passages in the legislative history which were persuasive evidence of a belief by some members of Congress, at least, that this section did indeed ban all consumer picketing at neutral secondary sites.[43] Finding, in addition, that the only statements specifically dealing with the problem presented by the instant case were put on record by those opposed to the bill, the Court regarded them more as a barometer of certain zeal to defeat a bill than an accurate guide to the scope of a statute.[44] Recognition of fears in other circles[45] that the ordinary consumer may not be sophisticated enough to distinguish between a total boycott and a primary product boycott did not give the Court any authority to uphold "a broad condemnation of peaceful picketing . . . [which] has never been adopted by Congress . . . ."[46] Under the Court's reading of the section, even though the result of the picketing is to force the neutral to cease doing business with the primary employer, an objective clearly proscribed by subdivision (B), so long as the union has observed the limits marked off in this opinion for such picketing there is no violation of section 8(b)(4)(ii).[47]

The dissenting opinion in the instant case rejected "the fine distinction which the Court draws between general and limited product picketing."[48] Considering

41. Id. at 72.

42. Id. at 64. See note 17 supra and accompanying text.

43. Id. at 65-70.

44. Id. at 66. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951). On a later occasion, citing Schwegmann Bros., the Court warned that "an unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 (1956). In the former case the opposition consisted of the minority report of the Senate committee presented in debate by one senator, and in the latter of a similar minority report not even commented on in debate.

45. The Court is obviously referring to the dissenting opinion of Justices Harlan and Stewart, 377 U.S. at 82-83. The majority opinion is generally supported by Jones, Picketing and Coercion: A Jurisprudence of Epithets, 39 Va. L. Rev. 1023 (1953), while Gregory, Picketing and Coercion: A Defense, 39 Va. L. Rev. 1053 (1953), reflects the fears of the minority.

46. 377 U.S. at 71.

47. Id. at 72-73.

48. Id. at 82 (dissenting opinion).

the history of the statute, Justices Harlan and Stewart found it "indeed remarkable that the Court not only substantially acknowledges that the statutory language does not itself support this distinction . . . but cites no report of Congress, no statement of a legislator, not even the view of any of the many commentators in the area, in any way casting doubt on the applicability of section 8(b)(4)(ii)(B) to picketing of the kind involved here."[49] Concluding that this distinction was never intended, they felt the Board's order should be reinstated. This interpretation of the statute raised the constitutional question avoided by the Court; but the dissenters felt that the congressional balancing of the right of unions to publicize labor disputes, with the right of society to be free from certain undesirable effects unrelated to the communicative aspect of picketing, was within the constitutional safety zone delineated by the Court.[50]

In a concurring opinion strongly reminiscent of earlier dissents in *Carpenters Union v. Ritter's Cafe*[51] and *International Bhd. of Teamsters v. Hanke*,[52] Mr. Justice Black took exception to the conclusions of the dissenters on the constitutional issues. Construed to ban all consumer picketing, as he thought it must be, the section indicated no more than a congressional intent to "prevent dissemination of information about the facts of a labor dispute . . . ."[53] In his opinion so manifest an abridgment of the first amendment could not be sustained even though Congress left other avenues of communication open to the union.[54] Conceding that the dual nature of picketing, being at once communication and patrolling, lent itself to regulation, the Justice reminded the dissenters that it was their duty to "weigh" the reasons advanced before sustaining any encroachment on the enjoyment of the constitutional right of free speech.[55] Weighing the facts of the instant case, he found no congressional intent either to promote public order[56] or to prohibit an illegal objective[57] by regulating patrolling. Therefore, he found Congress' thinly veiled attempt to take away by degrees what it could not do outright tantamount to holding "that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations."[58]

Mr. Justice Black's reaction is predictable. Since *Thornhill*, he has consistently "insisted on a grant of constitutional immunization for peaceful picketing,"[59] unless it is an "integral" part of "conduct otherwise unlaw-

49. Id. at 83-84 (dissenting opinion).

50. Id. at 93-94 (dissenting opinion).

51. 315 U.S. 722, 729 (1942) (dissenting opinion).

52. 339 U.S. 470, 481 (1950) (dissenting opinion).

53. 377 U.S. at 78 (concurring opinion).

54. Id. at 79-80 (concurring opinion).

55. Id. at 77-78 (concurring opinion). See Thornhill v. Alabama, 310 U.S. 88, 96 (1940); Schneider v. State, 308 U.S. 147, 161 (1939).

56. See Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Thornhill v. Alabama, supra note 55, at 105; Schneider v. State, supra note 55, at 160-61.

57. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 499-500 (1949).

58. 377 U.S. at 80 (concurring opinion).

59. Farmer & Williamson, supra note 24, at 441. See International Bhd. of Teamsters v. Hanke, 339 U.S. 470, 481 (1950); Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 729 (1942). Mr. Justice Black also concurred in Mr. Justice Douglas' dissent in Teamsters

ful."[60] However, the Court in *Thornhill* overturned a state statute invalid on its face because it not only prohibited peaceful picketing but also "every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer."[61] In discussing picketing as a facet of communication generally protected under the first amendment, the Court in *Thornhill* never specifically equated picketing to free speech.[62] This often ignored aspect of *Thornhill* was referred to by Mr. Justice Black himself writing for a unanimous Court in *Giboney v. Empire Storage & Ice Co.*[63] In spite of his vigorous dissents, on other occasions the Court has declared:

> It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the States must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication.[64]

It is difficult to predict where the Court will go from here. It is even more difficult to predict where Congress can go from here. The logic of the NLRB and the opinions supporting it[65] is rooted in the theory that, "like other self-help devices of organized labor, picketing is used because it compels . . . [employers] to conform to the economic desires of the labor unions . . . because of the damage caused to the picketed enterprise . . . ."[66] In rejecting the conclusion that picketing per se implies or effects coercion, the Court restricted its consideration to an exegesis of picketing as a means without regard to motive or effect. A discussion of this tripartite aspect of picketing undoubtedly would have led the Court to a confrontation with the constitutional problems latent in the statute. It is unlikely that a decision based upon such a confrontation would be less desirable than one based upon a painstaking effort to put words into the mouth of Congress. Considering the instant case in vacuo, it cannot be denied that the result reached by the Court is just. It is unfortunate that the first case testing a statute designed to protect secondary employers was initiated solely by a primary employer. It is even more unfortunate that the Court made no attempt to confine its opinion to the unique facts of this case.

Union v. Vogt, Inc., 354 U.S. 284, 295 (1957) (dissenting opinion). Mr. Justice Douglas did not participate in the instant case.

60. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949). See Building Service Employees v. Gazzam, 339 U.S. 532 (1950); Hughes v. Superior Court, 339 U.S. 460, 469 (1950).

61. 310 U.S. at 100.

62. The first specific identification of picketing with free speech was made by Mr. Justice Frankfurter in an opinion upholding, ironically, a general injunction against picketing because of a past history of violence. Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941).

63. 336 U.S. at 499.

64. Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 727-28 (1942).

65. See notes 19, 20, & 30-36 supra and accompanying text.

66. Gregory, Peaceful Picketing and Freedom of Speech, 26 A.B.A.J. 709 (1940).

Taxation—Assessment—Valuation of Prestige Office Building Based Partially on Cost of Construction Upheld.—Appellant, owner-tenant of the Seagram Building[1] in New York City, contended that the respondent Tax Commission, which considered the cost of construction in its assessment of the building, was not justified in departing from the traditional method of valuation. The supreme court entered an order confirming the taxation assessments for the period in issue. The appellate division affirmed,[2] holding that the recent cost of construction may be considered in tax valuation where that amount differs significantly from the figure derived from the usual capitalization of net income method. In a four-to-three decision, the New York Court of Appeals affirmed, noting that in certain assessment cases the actual cost of construction may be "some evidence" of value, and holding that the hypothetical rent of the owner-tenant may be at a higher rate than that actually paid by the other tenants. *Joseph E. Seagram & Sons v. Tax Comm'n*, 14 N.Y.2d 314, 200 N.E.2d 447, 251 N.Y.S.2d 460 (1964).

The word "value" has many different meanings, which, unfortunately, is to say that it has no precise meaning.[3] New York law provides that property should be assessed at its "full value."[4] Full value, as construed by the courts, means fair market value, i.e., the price which a willing buyer would pay, and which a willing seller would accept [hereinafter referred to as "value in exchange"].[5] This value in exchange concept of market value must be distinguished from the value to the owner, or value in use. Professor Bonbright, in his treatise on valuation,[6] observed that the former is an objective standard, while the latter is subjective. However, as noted above, the question in New York is not whether the value to the owner or the value in exchange concept should be used, but rather which method of calculating the market value should be used.

1. The Seagram Building, designed by Ludwig Mies van der Rohe and Philip Johnson, and located at 375 Park Avenue in New York City, is widely acclaimed as one of the most beautiful buildings of its type in the world.

2. Joseph E. Seagram & Sons v. Tax Comm'n, 18 App. Div. 2d 109, 238 N.Y.S.2d 228 (1st Dep't 1963).

3. The Merriam-Webster New International Dictionary (2d ed. 1957) lists seventeen definitions.

4. N.Y. Real Prop. Tax Law § 306 states: "All real property in each assessing unit shall be assessed at the full value thereof." Full value has been the standard of assessment in New York since 1914. N.Y.C. Admin. Code § 158-1.0(b) provides: "The assessed valuation of each . . . parcel shall be set down . . . in two columns. In the first column shall be stated, opposite each such parcel, the sum for which such parcel would sell under ordinary circumstances if wholly unimproved; and in the second column, the sum for which such parcel would sell under ordinary circumstances with the improvements, if any thereon." These two laws are to be read together. People ex rel. Parklin Operating Corp. v. Miller, 287 N.Y. 126, 38 N.E.2d 465 (1941).

5. People ex rel. Parklin Operating Corp., supra note 4; Pepsi-Cola Co. v. Tax Comm'n, 19 App. Div. 2d 56, 240 N.Y.S.2d 770 (1st Dep't 1963); People ex rel. Gale v. Tax Comm'n, 17 App. Div. 2d 225, 233 N.Y.S.2d 501 (1st Dep't 1962); Knickerbocker Village, Inc. v. Boyland, 16 App. Div. 2d 223, 226 N.Y.S.2d 982 (1st Dep't 1962); Queensbury Hotel Corp. v. Board of Assessors, 33 Misc. 2d 302, 226 N.Y.S.2d 977 (Sup. Ct. 1962); Delaware, Lackawanna & Western R.R. v. Sims, 31 Misc. 2d 770, 219 N.Y.S.2d 689 (Sup. Ct. 1961).

6. 1 Bonbright, Valuation of Property 14-16, 67-68 (1937).

Of the various methods utilized in determining the fair market value of commercial realty,[7] capitalization of net income is the one traditionally used in New York.[8] It makes possible an accurate computation of the amount that a real estate investor would pay, in the hope of getting a reasonable return on his investment.

Simply stated, this method involves three steps: (1) determination of the annual net earnings by deducting probable maintenance and operation expenses from the expected gross rental income. Actual records from past experience, or from similar buildings provide a basis for the computation of this figure; (2) determination of the "factor" (expressed as either a whole number or as a percentage) by which to multiply the net income. In order to obtain an accurate result, this "factor" must reflect the risk involved to the investor-buyer, the current interest rates, and possible declining income from the property; and (3) multiplication of the net earnings (step 1 *supra*) by the "factor" (step 2 *supra*).[9]

7. For a general discussion of possible methods to be used in real estate valuation for mortgage purposes, see In re New York Title & Mortgage Co. (Series B-K), 21 N.Y.S.2d 575 (Sup. Ct. 1940).

Three methods are frequently discussed in tax assessment cases: (1) capitalization of net income; (2) sales of comparable property; and (3) reconstruction cost less depreciation. The first of these is discussed in the text; and, since every parcel of real estate is considered to be unique, is favored over the second due to its greater accuracy. Reconstruction cost less depreciation is used in New York as a ceiling on the valuations reached by any other methods.

See generally United States v. Tampa Garden Apartments, Inc., 294 F.2d 598 (5th Cir. 1961); United States v. Certain Interests in Property in Cascade County, Montana, 205 F. Supp. 745 (D. Mont. 1962); United States v. Certain Interests in Property in Monterey County, California, 186 F. Supp. 167 (N.D. Cal. 1960); People ex rel. Parklin Operating Corp. v. Miller, 287 N.Y. 126, 38 N.E.2d 465 (1941).

8. 14 N.Y.2d at 319, 200 N.E.2d at 449, 251 N.Y.S.2d at 463 (dissenting opinion); People ex rel. Parklin Operating Corp. v. Miller, supra note 7; In the Matter of the City of New York (James Madison Houses), 17 App. Div. 2d 317, 234 N.Y.S.2d 799 (1st Dep't 1962).

9. De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 564, 290 P.2d 544, 556 (1955). "An apt example of determining the value of property by the capitalization of net income method is [to] . . . assume that the most effective use that may be made of an item of property is the rental thereof, that the property may be rented for a period of three years (at the end of which it will be worthless) for a gross rental of $120 a year, to be paid at the end of the year, that the expenses, e.g., repairs, of the lessor incident to the property will be $20 a year, also to be paid at the end of the year, and that a 6 percent rate of return is appropriate to the amount of risk involved to the lessor. The value of the property will be determined as follows:

Annual gross income		$120.00
Annual expenses		20.00
Annual net income		$100.00
Present worth of $100 to be received:		
1 year in the future	($100x.9434)	$ 94.34
2 years in the future	($100x.89)	89.00
3 years in the future	($100x.8396)	83.96
Value of property		$267.30"

Id. at 565, 290 P.2d at 556.

Under the capitalization of net income method, the Tax Commission's valuation in the instant case could reasonably be computed only by placing a disproportionate rental value on the space occupied by the owner, i.e., a value in excess of the rate charged the regular tenants.[10] The inclusion of such an arbitrary amount in the annual gross income strikes at the essence of the objectivity of this method, and, in effect, destroys an accurate method of computing *market* value.

In an attempt to establish some basis for this hypothetical value placed on the space occupied by the owner, Chief Judge Desmond, writing for the majority, referred to the high cost of construction[11] and concluded that such cost was "some evidence of value."[12] In support of this proposition, Judge Desmond relied on *5 East 71st Street, Inc. v. Boyland*[13] and *860 Fifth Ave. Corp. v. Tax Comm'n.*[14]

In *5 East 71st Street, Inc.*, the proprietary tenants of a Manhattan luxury apartment building appealed from allegedly excessive assessments for the tax years 1949-1950 through 1956-1957. The builder purchased the land in 1946 for $325,000. The 1948 construction cost of the building was $1,499,794.64. The Tax Commission valuation for this period was approximately $1,350,000. Appellants paid a total of $1,832,000, a figure sufficiently in excess of the construction cost to provide a profit for the builder. In ultimately upholding the original assessment, the court of appeals cited the original cost of the land and building in 1946, and the "sharp increase" in values since, as sufficient evidence to sustain the valuation.

860 Fifth Ave. Corp. also involved the accuracy of a tax assessment of a recently constructed luxury co-operative and the probative value of its sale price. Neither the appellate division's nor the court of appeals' opinion gave specific figures on the cost of the land and buildings. In the last paragraph of his opinion however, Judge Van Voorhis concluded: (1) cost of new construction, or reproduction cost less depreciation, establishes the maximum allowable assessment, and is otherwise not useful unless the building would be reproduced at the time in question; (2) these figures however, may be considered as a "factor" or "some evidence of value" if the building is well suited (economically, not architecturally) to the site, and the tax years in question follow "soon after the construction" of the building; (3) "the fact that these co-operative apartments were transferred to tenant owners at prices high enough to secure a profit to the promoters after defraying costs of land and building, indicates that the promoters' capital was not wasted, and that the land and buildings were adapted to the site worth what they cost when they were acquired and constructed."[15]

In effect, the court was saying that if a businessman makes a profit in a transaction, then, the price he paid, or cost to him, is some evidence of the value

10. There was no dispute as to the factor to be applied. 14 N.Y.2d at 318, 200 N.E.2d at 448, 251 N.Y.S.2d at 462-63.

11. Id. at 317, 200 N.E.2d at 448, 251 N.Y.S.2d at 462.

12. Ibid.

13. 7 N.Y.2d 859, 164 N.E.2d 866, 196 N.Y.S.2d 994 (1959) (memorandum decision).

14. 8 App. Div. 2d 605, 184 N.Y.S.2d 669 (1st Dep't 1959) (memorandum decision), aff'd, 8 N.Y.2d 29, 167 N.E.2d 455, 200 N.Y.S.2d 817 (1960).

15. 8 N.Y.2d at 32, 167 N.E.2d at 456, 200 N.Y.S.2d at 819.

of the property. Reasoning such as this, however valid it may be as a practical matter in a particular case, does much to obscure the vital conceptual distinction between cost and market value.[16] As Professor Bonbright noted, "the courts have been ready to assume a far closer correspondence between the value of the property and its cost, especially its replacement cost, than unprejudiced experts would concede to be warranted, or than intelligent businessmen or investors have accepted as a basis for purchase and sale."[17] In dealings between businessmen, the two results may, at times, be numerically close, but they are always conceptually quite distinct.

In the instant case, the dissent appears on far firmer ground in distinguishing between value in use and value in exchange, noting that New York law specifies assessment at fair market value—thus necessarily excluding "any element that is unique to the present owner of a building."[18]

The arbitrary nature of the Tax Commission assessment and subsequent court treatment of the appeal was most clearly pointed out by Judge Burke in discussing the difficulty of distinguishing the apparently contrary holding of *Pepsi-Cola Co. v. Tax Comm'n*:[19] "Since both [buildings] are new, held for business rental, and used as headquarters for the owner, the only difference is the presumed benefit accruing to the Seagram Company from having its name associated with an architecturally superior and well-known building."[20] The appellate division in *Pepsi-Cola*, in a reference to its decision on the instant set of facts, stated that the Pepsi-Cola Building was not "in the same category as the Seagram Building, that is, a newly-erected structure built especially for prestige and advertising value as well as for the headquarters use of its owner."[21]

It would seem then, if there is any distinction between the instant case and the *Pepsi-Cola* case, it lies in the architectural evaluation made by the tax assessor, resulting in the addition of a highly unpredictable consideration to an already complex situation.[22] Rather than take this opportunity to clarify the law[23] and simultaneously promote better architecture, a majority of the New York Court of Appeals chose to confuse the former and stifle the latter.

16. 1 Bonbright, op. cit. supra note 6, at 19-22, 140-76.

17. Id. at 20.

18. 14 N.Y.2d at 320, 200 N.E.2d at 450, 251 N.Y.S.2d at 465 (dissenting opinion).

19. 19 App. Div. 2d 56, 240 N.Y.S.2d 770 (1st Dep't 1963).

20. 14 N.Y.2d at 320, 200 N.E.2d at 449, 251 N.Y.S.2d at 464 (dissenting opinion).

21. 19 App. Div. 2d at 59, 240 N.Y.S.2d at 774-75.

22. It will be interesting to observe the tax treatment of the soon-to-be-completed CBS Building, a "prestige" building designed by the late Eero Saarinen.

23. Since the Tax Commission arrived at the higher valuation in this case by assigning a higher than average rental income figure to the space occupied by Seagram & Sons, it would be interesting to see how they would "compute" this value to an owner who was not a tenant, but who would still receive the "benefit" of having its name associated with a building. Also, it would seem to follow that the less space the owner occupies, the proportionally higher the rent would have to be in order to reach the desired percentage of construction cost.