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Case Notes

CASE NOTES

Domestic Relations—Concealment of Radical Political Beliefs Held Grounds for Annulment.—In an action to annul a marriage for fraud, the wife alleged that her husband concealed the fact that he had been an officer in the German Army and a Nazi committed to the extermination of the Jews;[1] that, as his wife, she would be required to "weed out" her Jewish friends; and that she relied on her husband's apparent normal character and absence of fanatic anti-Semitism in consenting to marry. The supreme court denied a motion to dismiss the cause of action.[2] The appellate division reversed on the ground that her husband's non-disclosure did not concern a matter which was vital to the marriage.[3] In a four to three decision, the court of appeals held that the wife's amended complaint stated a cause of action. *Kober v. Kober*, 16 N.Y.2d 191, 211 N.E.2d 817, 264 N.Y.S.2d 364 (1965).

Marriage is viewed as a civil contract,[4] the essential of which is: "consent by . . . parties having statutory capacity to give it."[5] If either party's consent is induced by fraud, there is not actual consent, and the marriage may be annulled.[6]

Fraud is not defined by statute.[7] The judicial test of fraud[8] is confusing be-

1. Plaintiff's religion was not alleged in complaint. It appears that she is not Jewish.
2. Kober v. Kober, 22 App. Div. 2d 468, 256 N.Y.S.2d 615, 616 (1st Dep't 1965).
3. Ibid.
4. See N.Y. Dom. Rel. Law § 10.
5. Shonfeld v. Shonfeld, 260 N.Y. 477, 479, 184 N.E. 60, 61 (1933).
6. Ibid.
7. See N.Y. Dom. Rel. Law § 140(e). A misrepresentation is actionable fraud if the defendant knew that the statement was false when made, see Smith v. Smith, 44 N.Y.S.2d 826 (Sup. Ct. 1943), if the statement was calculated to influence the action of the deceived party, Libman v. Libman, 102 Misc. 443, 169 N.Y. Supp. 900 (Sup. Ct. 1918), and if the deceived party relied on the false representation, Kronman v. Kronman, 247 App. Div. 186, 286 N.Y. Supp. 627 (1st Dep't 1936) (per curiam). Actual damage is not necessary to establish fraud in an annulment action, except insofar as such damage would effect the consent of a reasonable man in consenting to marriage. See Note, 48 Colum. L. Rev. 900, 903 (1948).

In addition, it is not enough that the fraud had in fact induced plaintiff's consent; but rather, it must concern facts which would have a detrimental effect on the social status created by the marriage contract. Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 512-13, 104 N.E.2d 877, 880 (1952); Kingsley, Fraud As a Ground for Annulment of a Marriage, 18 So. Cal. L. Rev. 213 (1945); see Fearon v. Treanor, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936) (dictum), appeal dismissed, 301 U.S. 667 (1937) (state's interest in marriage relationship as affecting the general welfare).

8. The crucial question is not merely whether a misrepresentation occurred, but also defendant's state of mind at the time of the misrepresentation. See Harris v. Harris, 3 App. Div. 2d 892, 161 N.Y.S.2d 647 (4th Dep't 1957) (memorandum decision) (emotional inability to assume role of mother); Chavias v. Chavias, 194 App. Div. 904, 184 N.Y. Supp. 761 (2d Dep't 1920), 21 Colum. L. Rev. 99 (1921), 6 Cornell L.Q. 199 (1921) (false but innocent

cause the annulment statute has been liberally construed to ameliorate the effect of a strict divorce law.[9] As a result, the decisions determining the misconduct which should justify the termination of a marriage are inconsistent.

Prior to 1903, the fraud had to concern consortium or cohabitation, considered the only essentials of a marriage.[10] *Di Lorenzo v. Di Lorenzo*[11] abandoned this limited view, but it failed to provide a specific definition of fraud. In *Shonfeld v. Shonfeld*,[12] the court of appeals followed the rationale of *Di Lorenzo* and stated that any fraud is sufficient to void a marriage contract if it is material to the consent of the deceived party and also offers " 'a motive sufficient to influence the conduct of a man of average intelligence and prudence.' "[13] Despite what appears to be a markedly liberal rule permitting an annulment for a fraud concerning any matter sufficiently important to influence a prudent man in his decision to marry, the *Shonfeld* court based its decision on a misrepresentation which subjectively induced the plaintiff's consent and which materially affected the performance of a legal duty imposed upon the husband by the marriage itself.[14] There, it appeared that the plaintiff-

misrepresentation that husband was able to have children); Schroter v. Schroter, 56 Misc. 69, 106 N.Y. Supp. 22 (Sup. Ct. 1907) (wife did not know she was unable to conceive). Compare Brillis v. Brillis, 4 N.Y.2d 125, 149 N.E.2d 510, 173 N.Y.S.2d 3 (1958), and Punger v. Punger (N.Y. Sup. Ct. April 23, 1964) in N.Y.L.J., April 24, 1964, p. 18, col. 6, with Cart v. Cart, 28 N.Y.S.2d 61 (Sup. Ct. 1941). In these cases, each of the defendants broke his promise to have a religious ceremony following a civil one. Annulment was granted in the former cases where the promise was fraudulent when made, but not in the latter where the promise was made in good faith. A misrepresentation without intent to deceive is not fraudulent and will not be the basis for annulment. Hallock v. Hallock, 62 N.Y.S.2d 558 (Sup. Ct. 1946); see Claps v. Claps, 285 App. Div. 847, 136 N.Y.S.2d 851 (4th Dep't 1955) (memorandum decision).

9. See generally Note, Annulments for Fraud—New York's Answer to Reno?, 48 Colum. L. Rev. 900 (1948).

10. See generally Crouch, Annulment of Marriage for Fraud in New York, 6 Cornell L.Q. 401 (1921); Note, 48 Colum. L. Rev. 900, 904 (1948); 26 Brooklyn L. Rev. 305, 306 n.4 (1960).

11. 174 N.Y. 467, 67 N.E. 63 (1903). Defendant wife induced plaintiff's consent to marriage by her false claim that she gave birth to his child. The court granted an annulment, enunciating the principle later adopted by the Shonfeld court. See Shonfeld v. Shonfeld, 260 N.Y. 477, 481, 184 N.E. 60, 61 (1933). Here, however, there was gross fraud in that the defendant had never given birth, but procured a child to induce the fraud.

12. 260 N.Y. 477, 184 N.E. 60 (1933).

13. Id. at 481, 184 N.E. at 61. See Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 483, 67 N.E. 63, 65 (1903).

14. See Longtin v. Longtin, 22 N.Y.S.2d 827 (Sup. Ct. 1940). Annulment decisions turn on the materiality of the particular representation to a reasonable man. Misrepresentations of education, Cervone v. Cervone, 155 Misc. 543, 280 N.Y. Supp. 159 (Sup. Ct. 1935), and wealth, Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 104 N.E.2d 877 (1952); Olivia v. Olivia (N.Y. Sup. Ct. Jan. 20, 1963) in N.Y.L.J., Jan. 21, 1963, p. 20, col. 5, were held irrelevant to the consent of a reasonable man, although they may well have induced the individual spouse to consent to marriage. New York courts have held that a

husband had postponed marriage because he could not support a wife,[15] that the defendant had fraudulently represented that she had enough money to establish him in his own business, and that the plaintiff learned, subsequent to the marriage, that the money did not exist. Since the obligation of a husband to support his wife is implied by law in any marriage,[16] the fraud met the test of relevance to the marriage contract.

Lower courts adopted the liberal language of *Shonfeld*,[17] relying on the dictum of the case that the courts are "free" in each case to apply a test of fair dealing to determine whether or not defendant's conduct warranted granting an annulment.[18] The broad implications of *Shonfeld* were narrowed by *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*.[19] The effect of the latter decision was to constrict the area of materiality to those matters which were "'*vital*' to the marriage relationship *only*."[20] Misrepresentation of character was specifically excluded from the list of factors "vital" to the marriage,[21] although defendant was labelled "a fortune hunter, a sluggard, [and] a hypochondriac."[22] While a prudent person would not accept as a spouse one of mean character, nevertheless one's character does not necessarily prevent one from performing those legal duties inherent in marriage, such as the duty to support a wife. Thus stated, the defendant had no duty to reveal his true character, and, inferentially, his failure to do so was not fraudulent.[23]

Sophian v. Von Linde,[24] which held that a misrepresentation of age, origin, and ancestry was material to the marriage relationship, tempered the *Woronzoff-Daschkoff* rule.[25] Here the purpose of the annulment suit was to prevent an

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breach of the promise to have children was material fraud, e.g., Schumer v. Schumer, 205 Misc. 235, 128 N.Y.S.2d 119 (Sup. Ct. 1954); Accardi v. Accardi, 129 N.Y.S.2d 114 (Sup. Ct. 1952); Thurber v. Thurber, 186 Misc. 1022, 63 N.Y.S.2d 401 (Sup. Ct. 1946). However, a breach of a promise to have a specific number of children was not grounds for annulment in Bohok v. Bohok, 186 Misc. 991, 63 N.Y.S.2d 560 (Sup. Ct. 1946). Nor was a breached promise to practice birth control in Frost v. Frost, 15 Misc. 2d 104, 181 N.Y.S.2d 562 (Sup. Ct. 1958).

15. 260 N.Y. at 480, 184 N.E. at 61.

16. Id. at 482, 184 N.E. at 62.

17. See, e.g., Siecht v. Siecht, 41 N.Y.S.2d 393 (Sup. Ct. 1943); Shapiro v. Shapiro, 36 N.Y.S.2d 532 (Sup. Ct. 1942).

18. 260 N.Y. at 479, 184 N.E. at 61.

19. 303 N.Y. 506, 104 N.E.2d 877 (1952), 5 Baylor L. Rev. 313 (1953), 19 Brooklyn L. Rev. 140 (1953).

20. 303 N.Y. at 511, 104 N.E.2d at 880. (Emphasis added.)

21. Id. at 512-13, 104 N.E.2d at 880.

22. Id. at 511, 104 N.E.2d at 880.

23. Id. at 512, 104 N.E.2d at 880.

24. 16 N.Y.2d 785, 209 N.E.2d 823, 262 N.Y.S.2d 505 (1965), affirming 22 App. Div. 2d 34, 253 N.Y.S.2d 496 (1st Dep't 1964).

25. The appellate division in the instant case followed Woronzoff-Daschkoff in dismissing the complaint. 22 App. Div. 2d 468, 469, 256 N.Y.S.2d 615, 617 (1st Dep't 1965). However, the court of appeals treated the Woronzoff-Daschkoff holding (that the fraudulent

imposter[26] from inheriting a fortune from his deceived bride, who had died in Haiti thirteen days after the marriage.[27] *Sophian* contradicted the rule that "mere nondisclosure as to birth, social position, fortune, good health and temperament [would not] . . . vitiate the marriage contract,"[28] and offered no discussion of the criteria of *Woronzoff-Daschkoff* that the fraud must concern "vital" matters.[29]

In the instant case, the court contended that the defendant's fanatical objective was so clearly inimical to *this* marital relationship that it was fraudulent not to disclose the belief. It made no attempt to follow the *Woronzoff-Daschkoff* construction that the fraud must fall within a set of pre-established categories,[30] but instead relied on the more flexible guidelines suggested in the *Shonfeld* opinion,[31] that a material fraud may depend upon the particular

promise of the husband to find a job did not induce the consent of a rich woman) as a minor corollary to Shonfeld. 16 N.Y.2d 191, 194-95, 211 N.E.2d 817, 818-19, 264 N.Y.S.2d 364, 366-67 (1965).

26. Robert Dent, born in Birmingham, Alabama, represented that he had been born in Germany, a member of the nobility, and heir to estates in Germany. 22 App. Div. 2d 34, 35, 253 N.Y.S.2d 496, 497-98 (1st Dep't 1964).

27. Where the purpose of the action is to determine the inheritance rights of the parties, as opposed to dissolving a marriage, it is the policy of the state to prevent the guilty spouse from benefiting from his fraud. In the Matter of Haney's Will, 14 App. Div. 2d 121, 124-25, 217 N.Y.S.2d 324, 327-28 (4th Dep't 1961). By statute, N.Y. Dom. Rel. Law § 140(e), the cause of action for annulment based on fraud survives the death of the innocent party, thereby preventing the perpetrator of the fraud from sharing in the estate of the deceived spouse. Ibid.

28. Lapides v. Lapides, 254 N.Y. 73, 80, 171 N.E. 911, 913 (1930).

29. 22 App. Div. 2d at 469, 253 N.Y.S.2d at 499. The defendant in the Sophian case also misrepresented his intent to consummate the marriage, which is, in itself, a ground for annulment even under a strict interpretation of the Woronzoff-Daschkoff holding. The court of appeals opinion in Sophian dealt with the question of evidence to sustain a cause of action, holding that there was sufficient evidence to sustain each cause of action in fraud. In the instant case, the majority wrote that the court of appeals in the Sophian case stressed that it affirmed "notwithstanding the dissent of two Justices at the Appellate Division based on Lapides v. Lapides . . . and other decisions holding or purporting to hold that misrepresentations of the nature alleged in the Sophian first cause of action [age, national origin, and ancestry] were not vital to the marriage relationship." 16 N.Y.2d at 196, 211 N.E.2d at 820, 264 N.Y.S.2d at 368. (Citation omitted.)

30. Compare the appellate division opinion which presupposed a distinction between vital and non-vital kinds of fraud. 22 App. Div. 2d at 470, 256 N.Y.S.2d at 617. Lower court interpretations of Woronzoff-Daschkoff have so defined the phrase "vital fraud" as to require the misrepresentation to fall within areas "such as the capacity and the desire to have sexual intercourse, and that one does not have venereal disease, and that one is not addicted to gross antisocial habits . . ." to justify annulment. Pankiw v. Pankiw, 45 Misc. 2d 206, 207, 256 N.Y.S.2d 448, 449-50 (Sup. Ct. 1965) (dictum). See Frost v. Frost, 15 Misc. 2d 104, 181 N.Y.S.2d 562 (Sup. Ct. 1958); see also 16 N.Y. Jur., Domestic Relations §§ 850-66 (1961). But see Sophian v. Von Linde, 22 App. Div. 2d 34, 36, 253 N.Y.S.2d 496, 498-99.

31. The court stated that disclosure of defendant's fanatic anti-Semitism might have prevented this plaintiff from marrying him. 16 N.Y.2d at 197, 211 N.E.2d at 821, 264

facts surrounding the fraud. Defendant's anti-Semitic beliefs reflect the type of person he is, rather than the type of husband he would be. His beliefs would not prevent him from functioning as a husband, whereas a desire not to have normal marital relations, or not to have children, would affect a right of his wife which is inherent in her status as a wife. These latter attitudes are peculiarly relevant to the marital relationship as distinct from any other social relationship, and although anti-Semitism affects the personal relations of the individual husband and wife, it does not impair the husband's ability to perform those marital duties imposed by law. The court rejected the appellate division's finding that defendant's beliefs were a collateral matter which would not affect the consent of a reasonable person.[32] The traditional concept of what is material to a marriage has thus been enlarged to include matters which do not concern each and every marital relationship,[33] but which affect the particu-

N.Y.S.2d at 370. Thus, to sustain a cause of action it was sufficient that the misrepresentation induced plaintiff's consent. This paralleled the grounds of Shonfeld, wherein it was held that had the truth been indicated, the plaintiff would not have consented to marriage. Ibid.

32. The appellate division would have required one concerned with a collateral matter to make an inquiry or at least make known his concern. 22 App. Div. 2d at 470, 256 N.Y.S.2d at 618. See also Zagorski v. Zagorski (N.Y. Sup. Ct. Nov. 30, 1964) in N.Y.L.J., Dec. 1, 1964, p. 17, col. 3. Under a technical definition of the term fraud, unless defendant had actual knowledge that his misrepresentation was material to plaintiff, there would be no scienter on his part and hence his non-disclosure would not be fraudulent. The appellate division also noted that "many fraudulent misrepresentations, not sufficient to ground an annulment, would be sufficient to warrant relief by way of separation if the consequences of the fraud are projected into postmarital conduct." 22 App. Div. 2d at 470, 256 N.Y.S.2d at 618. Defendant's character or temperament alone would not be a ground for separation in New York unless there were also conduct amounting to cruel and inhuman treatment. Averett v. Averett, 189 App. Div. 250, 170 N.Y. Supp. 405 (1st Dep't), aff'd, 232 N.Y. 519, 134 N.E. 554 (1921) (memorandum decision); McClinton v. McClinton, 200 N.Y.S.2d 987 (Sup. Ct. 1960); Gluckstern v. Gluckstern, 148 N.Y.S.2d 391 (Sup. Ct. 1955), modified per curiam, 2 App. Div. 2d 744, 153 N.Y.S.2d 184 (1st Dep't), appeal dismissed, 2 N.Y.2d 780, 139 N.E.2d 423, 158 N.Y.S.2d 324 (1956). "Neither a religious belief (or the lack of such belief) nor a political or social opinion is of itself . . ." the equivalent of cruel and inhuman treatment, Donaldson v. Donaldson, 38 Wash. 2d 748, 758, 231 P.2d 607, 612 (1951), unless " 'because of . . . devotion to . . . the Communist Party [there is an attempt] . . . to interfere with and prevent [a spouse] . . . from associating with or meeting with any person or persons not connected with the Communist Party.' " Ondrejka v. Ondrejka, 4 Wis. 2d 277, 278, 90 N.W.2d 615, 616 (1958). Where defendant "became obsessed with his new-found religion and cut off his wife from all her Jewish friends . . . ." his conduct was held to constitute cruelty. Golden v. Arons, 36 N.J. Super. 371, 373, 115 A.2d 639, 640 (Super. Ct. 1955). Cf. Di Croce v. Di Croce, 209 N.Y.S.2d 624 (Sup. Ct. 1961). See also Sharp, Is Communism a Ground for Divorce?, 3 J. Family L. 201 (1963).

33. The court reasoned that almost any fraud might be sufficient for granting annulment depending on the particular circumstances of the case, and thus inferred that it would not be concerned with whether the fraud itself would have been vital to marriage in general. 16 N.Y.2d at 195, 211 N.E.2d at 819, 264 N.Y.S.2d at 367. For example, concealment of a lack of love and affection in and of itself is not material, e.g., Feig v. Feig, 232 App. Div. 172, 249 N.Y. Supp. 695 (1st Dep't 1931); Avery v. Avery, 236 N.Y.S.2d 379 (Sup. Ct.

lar marriage. To sustain a cause of action it is now sufficient that the misrepresentation reasonably induce the plaintiff's consent,[34]—*i.e.*, although defendant is willing and able to function generically as "a husband," he is not the type of person which plaintiff would choose as "a husband."

By extending the outer limits of materiality, the court correspondingly increased the defendant's affirmative duty of disclosure.[35] But a subjective test of materiality does not indicate the scope of this duty.[36] It is unclear whether defendant must disclose fanatical beliefs which could make a marriage unworkable if not shared by his spouse, or whether this duty is limited to reprehensible beliefs. It is significant that although defendant concealed Nazi party membership, anti-Semitism, and that he would not let his wife have Jewish

1962), but, if this concealment is part of a scheme to take plaintiff's money and leave, e.g., Feynman v. Feynman, 168 Misc. 210, 4 N.Y.S.2d 787 (Sup. Ct. 1938); Ryan v. Ryan, 156 Misc. 251, 281 N.Y. Supp. 709 (Sup. Ct. 1935), or to evade United States immigration laws, e.g., Miodownik v. Miodownik, 259 App. Div. 851, 19 N.Y.S.2d 175 (2d Dep't 1940); Nickols v. Nickols, 138 N.Y.S.2d 651 (Sup. Ct. 1955), an annulment will be granted. But cf. Novick v. Novick, 17 Misc. 2d 350, 185 N.Y.S.2d 388 (Sup. Ct. 1959).

34. 16 N.Y.2d at 197-98, 211 N.E.2d at 821, 264 N.Y.S.2d at 369-70.

35. In annulment cases, the term concealment had been limited generally to a failure to disclose any inability to perform the duties implied by law to the status of marriage—i.e., procreation, or something which would cause monetary or personal injury to the deceived spouse. Previously Svenson v. Svenson, 178 N.Y. 54, 70 N.E. 120 (1904), where defendant concealed the fact that he had venereal disease, was the single instance in which the court of appeals granted annulment for fraud not based on actual misrepresentation. See also Fundaro v. Fundaro, 272 App. Div. 825, 70 N.Y.S.2d 510 (2d Dep't 1947) (memorandum decision) (refusal to live as man and wife); Williams v. Williams, 11 N.Y.S.2d 611 (Sup. Ct. 1939) (sterility). Non-disclosure of diseases which "make marital intercourse dangerous to the innocent party, as well as to possible issue of such marriages" is a ground for annulment. Kingsley, supra note 7, at 217. See Alter v. Alter, 250 App. Div. 428, 294 N.Y. Supp. 195 (2d Dep't 1937) (per curiam) (concealment of judicial commitment for insanity); Schaeffer v. Schaeffer, 20 Misc. 2d 662, 192 N.Y.S.2d 275 (Sup. Ct. 1959) (schizophrenia); cf. Yelin v. Yelin, 142 Misc. 533, 255 N.Y. Supp. 708 (Sup. Ct. 1929) (tuberculosis); N.Y. Dom. Rel. Law § 140(c) (insanity at time of marriage as grounds for annulment); N.Y. Dom. Rel. Law § 141 (incurable insanity for five years as grounds for annulment). But cf. Rodgers v. Rodgers, 279 App. Div. 640, 107 N.Y.S.2d 927 (1st Dep't 1951) (colitis, arthritis, and old age).

The following subjects have been held to be material matters requiring disclosure: drug addiction, see, e.g., O'Connell v. O'Connell, 201 App. Div. 338, 194 N.Y. Supp. 265 (1st Dep't 1922); Courreges v. Courreges, 229 N.Y.S.2d 73 (Sup. Ct. 1961); criminal record, e.g., Lockwood v. Lockwood, 29 Misc. 2d 114, 220 N.Y.S.2d 719 (Sup. Ct. 1961); Courreges v. Courreges, supra. Contra, Trefry v. Trefry, 189 Misc. 1013, 76 N.Y.S.2d 323 (Sup. Ct. 1947). It has been held that a prior marriage must be disclosed. See, e.g., Smith v. Smith, 273 App. Div. 987, 77 N.Y.S.2d 902 (3rd Dep't 1948) (memorandum decision); Shaffer v. Shaffer, 17 Misc. 2d 428, 185 N.Y.S.2d 67 (Sup. Ct. 1959). But cf. Vanderhorst v. Vanderhorst, 282 App. Div. 312, 123 N.Y.S.2d 115 (1st Dep't 1953). Unchastity of the wife requires disclosure. See, e.g., Beard v. Beard, 238 N.Y. 599, 144 N.E. 908 (1924) (memorandum decision); Yucabezky v. Yucabezky, 111 N.Y.S.2d 441 (Sup. Ct. 1952).

36. A subjective test replaces the prior formula that the fraud must be inferred from the very assumption of the marriage relationship itself.

friends, the court pounced upon the allegation that defendant "put on a false front . . . in that he dissembled his genocidal beliefs . . . ."[37] If genocidal beliefs had not been alleged, in light of the emotional tone of the court's opinion, it is questionable whether the court would have sustained the cause of action. The court, however, left the question open as to how much less than "genocidal" a belief need be to be so abhorrent as to clearly make a marriage unworkable and thus justify an annulment. The problem suggested by the appellate division, that "the law could not lay down a viable line of separation" between political views so extreme as to impair the agreement to marry and those which are not,[38] is yet unanswered. Such a line could have been drawn between membership in a political party for philosophical or economic reasons, and the endorsement of murder of the Jewish people as an instrument for social change. Because the instant opinion intimated that defendant's belief approached lunacy,[39] it was unnecessary for the court of appeals to state where it would draw the line, or whether there was a need to do so.

Evidence—Search and Seizure—Analysis of a Blood Sample Withdrawn From an Accused Over His Objection Held Admissible—Petitioner was convicted of driving while intoxicated.[1] He had been arrested at a hospital while undergoing treatment for injuries sustained in an accident involving the automobile which he had been driving. Over his objection, made on the advice of counsel, the police directed a physician to withdraw a sample of blood from petitioner's body. At the trial, the report of the analysis of the blood sample was admitted into evidence, over petitioner's objection, as proof of intoxication. The appellate division of the California superior court upheld the conviction[2] and the California court of appeals denied certification.[3] The United States Supreme Court granted certiorari[4] and upheld the conviction. *Schmerber v. California*, 384 U.S. 757 (1966).

The issue of the admissibility into evidence of the results of a blood test was first before the Court in *Breithaupt v. Abram*.[5] In that case, petitioner was involved in an automobile collision which resulted in three deaths. While lying unconscious in the hospital, the smell of liquor was detected on his breath.

37. 16 N.Y.2d at 196-97, 211 N.E.2d at 820, 264 N.Y.S.2d at 369.
38. 22 App. Div. 2d at 471, 256 N.Y.S.2d at 618.
39. 16 N.Y.2d at 197, 211 N.E.2d at 820-21, 264 N.Y.S.2d at 369.

1. Cal. Vehicle Code § 23102(a) provides in part: "It is unlawful for any person who is under the influence of intoxicating liquor . . . to drive a vehicle upon any highway . . . ." New York has a similar statute, N.Y. Vehicle & Traffic Law § 1192(2), which reads: "Whoever operates a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a misdemeanor . . . ."
2. Schmerber v. California, 384 U.S. 757, 759 (1966).
3. Id. at 759 n.3.
4. 382 U.S. 971 (1966).
5. 352 U.S. 432 (1957).

This prompted a state patrolman to request that a sample of blood be withdrawn from his body. The sample revealed that he was intoxicated. At petitioner's trial for involuntary manslaughter, the results of the test were, despite his objection, admitted into evidence.

One of the arguments advanced by the petitioner in *Breithaupt* was that the admission into evidence of the results of the blood test violated the fifth amendment's self-incrimination clause. The Court, however, was not yet ready to apply the self-incrimination clause to the states and it disposed of the objection on the authority of *Twining v. New Jersey*.[6] A similar disposition was made of petitioner's reliance on the fourth amendment.[7]

Petitioner's final claim, based on *Rochin v. California*,[8] was that the withdrawal of the blood without his consent was violative of due process in that the conduct of the police offended a "sense of justice." In *Rochin*, deputy sheriffs having some information that the accused was selling narcotics entered through the open door of his house, forced open the door to his bedroom, and forcibly attempted to extract capsules which the accused had swallowed. Unable to retrieve the capsules, the deputies then took the accused to a hospital, where a physician forced an emetic solution through a tube into the accused's stomach, producing vomit wherein were found two capsules of morphine. The Court held that the use of the capsules to obtain the conviction of the accused violated due process. The Court said that:

> we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism . . . . This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[9]

In dismissing petitioner's due process claim, the *Breithaupt* Court concluded that the taking of a blood sample under the direction of a competent physician was neither "brutal" nor "offensive." In holding the "absence of conscious consent"[10] irrelevant, the Court noted that many states have statutes whereby a driver consents in advance to the taking of a blood sample.[11]

6. The law at that time, as expressed in Twining v. New Jersey, 211 U.S. 78 (1908), was that the full protections of the fifth amendment were not included within the fourteenth amendment.

7. 384 U.S. at 759.

8. 342 U.S. 165 (1952).

9. Id. at 172. Compare Rochin with Matter of the Application of Woods, 154 F. Supp. 932 (N.D. Cal. 1957); see also United States v. Michel, 158 F. Supp. 34 (S.D. Tex. 1957); see generally Annot., 25 A.L.R.2d 1407 (1952).

10. 352 U.S. at 435.

11. Id. at 436. See, e.g., Kan. Gen. Stat. Ann. §§ 8-1001 to -1007 (1964). See Annot., 87 A.L.R.2d 370 (1963) for a discussion of the admissibility of evidence establishing that accused refused to submit to a blood test. These statutes have been held constitutional and have been working effectively, and the instant decision will do nothing to alter that situation. See generally Annot., 25 A.L.R.2d 1407 (1952).

Observing that blood tests are a routine and accepted procedure and that they are given at many colleges and in the military service, the *Breithaupt* Court concluded,

> a blood test taken by a skilled technician is not such "conduct that shocks the conscience". . . . nor such a method of obtaining evidence that it offends a "sense of justice" . . . . This is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such "brutality" as would come under the *Rochin* rule.[12]

The petitioner in the instant case raised the same constitutional arguments raised in *Breithaupt*.[13] Developments since *Breithaupt* required the Court to give these arguments fuller evaluation.[14] *Malloy v. Hogan*[15] made the fifth amendment's self-incrimination clause fully applicable to the states. Could it be said that blood tests violate the privilege? The Court concluded that the privilege was not violated. Mr. Justice Brennan, for the majority, wrote: "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question . . . did not involve compulsion to these ends."[16] The Court narrowly construed the terms "testimonial" and "communicative" to include only oral testimony[17] or some other testimony which evokes "the spirit and history of the Fifth Amendment."[18]

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12. 352 U.S. at 437-38.

13. Petitioner here also claimed that he was denied the right of counsel as guaranteed by the sixth amendment. This was easily disposed of by the Court. It commented that "since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. . . . No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." 384 U.S. at 766.

14. One of the reasons the Court granted certiorari was to determine the effect of the holdings in Malloy v. Hogan, 378 U.S. 1 (1964), Mapp v. Ohio, 367 U.S. 643 (1961), and Escobedo v. Illinois, 378 U.S. 478 (1964).

15. 378 U.S. 1 (1964).

16. 384 U.S. at 761. For a comprehensive study of the history of the privilege, see 8 Wigmore, Evidence §§ 2250-52 (McNaughton rev. ed. 1961).

17. There are numerous authorities that uphold the Court's interpretation of the fifth amendment. See, e.g., 8 Wigmore, Evidence § 2263 (McNaughton rev. ed. 1961) where it is said: "The history of the privilege [against self-incrimination] . . . —especially the spirit of the struggle by which its establishment came about—suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the persons own lips an admission of guilt, which would thus take the place of other evidence." (Emphasis omitted.) The Court was careful to note, however, that it did not adopt the Wigmore formulation as its own. 384 U.S. at 763 n.7.

18. 384 U.S. at 764. The Court stated that the privilege only protects "communications" or "testimony," as distinguished from "real or physical evidence," but noted that the distinction is not clear-cut. As an example, it pointed out that lie detector tests which are seemingly directed to obtain "physical evidence" are in reality "directed to eliciting responses which are essentially testimonial." Id. at 764. For cases discussing this problem, see Annot., 23 A.L.R.2d 1306 (1952); Annot., 16 A.L.R.2d. 1322 (1951); Annot., 164 A.L.R. 967 (1946).

Mr. Justice Black, in dissent, was especially critical of the Court's narrow construction of the fifth amendment.[19] He found it inconsistent with the spirit and rationale of both *Counselman v. Hitchcock*[20] and *Boyd v. United States*.[21] In the latter cases, as Justice Black pointed out, the Court declared that the fifth amendment should be liberally construed in order to afford individuals the full and substantive protections that the Constitution guarantees.[22] He believed that the Court had "departs from the teachings of *Boyd*," and had not given that decision the effect it deserved.[23]

The *Boyd* Court had said that "to require . . . an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself."[24] Justice Black saw it as "a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers."[25]

The instant Court might well have feared the ramifications implicit in an extension of the fifth amendment along these lines. As Mr. Justice Brennan pointed out, the contention was made in *Holt v. United States*[26] that forcing a defendant to put on a blouse over his protest was a violation of the fifth amendment. But Justice Holmes characterized the contention as an "extravagant extension of the Fifth Amendment."[27] Justice Holmes went on to say that were defendant's argument upheld, then a jury might, for example, be forbidden to compare a prisoner with his features in a photograph offered as proof.[28]

The petitioner in the present case also contended that the blood was obtained

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19. 384 U.S. at 774 (Black, J., dissenting). Justice Black concluded that there was no precedent for the Court's narrow interpretation of the fifth amendment, other than Wigmore's treatise, which he believed is incorrect.

20. 142 U.S. 547 (1892).

21. 116 U.S. 616 (1886).

22. 384 U.S. at 776 (Black, J., dissenting). Justice Black reiterated the Court's language in Boyd v. United States: "A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Id. at 776-77, citing Boyd v. United States, supra note 21, at 635.

23. 384 U.S. at 777 (Black, J., dissenting).

24. 116 U.S. at 637.

25. 384 U.S. at 775 (Black, J., dissenting). Mr. Justice Douglas joined in this dissent. His reasoning in the Rochin case was to the effect that there was no difference between "words taken from his lips [or] . . . blood taken from his veins" as long as they were taken without the suspect's consent. 342 U.S. at 179.

26. 218 U.S. 245 (1910).

27. Id. at 252.

28. For a discussion concerned with the constitutionality of requiring suspects to try on or wear particular clothes, see Annot., 18 A.L.R.2d 796 (1951); Annot., 171 A.L.R. 1144 (1947).

as the result of an unconstitutional search and seizure. *Mapp v. Ohio*[29] required the Court to re-evaluate this argument. It concluded that:

> once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.[30]

Justice Brennan concluded that a search warrant is necessary to make an intrusion into the human body,[31] but that emergency circumstances would obviate the need for a warrant. "The officer in the present case . . . might reasonably have believed that he was confronted with an emergency . . . ." since it is a fact that the percentage of alcohol in the blood declines rapidly and delay might well have resulted in the loss of the evidence.[32]

Considering the petitioner's claim that due process was violated, the majority held that *Breithaupt* was still controlling. The only factual difference between *Breithaupt* and the present case is that in the latter, petitioner voiced his objection, and in *Breithaupt* petitioner was unconscious—a distinction which, the majority noted, Chief Justice Warren in his *Breithaupt* dissent found insignificant. In *Breithaupt*, the Chief Justice wrote: "I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest."[33] He argued that both cases should come within the *Rochin* rule.

> The Court's opinion suggests that an invasion is "brutal" or "offensive" only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—the references to a "considerable struggle" and the fact that the stomach pump was "forcibly used"—the Court finds *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.[34]

Since the entire Court professed to believe that, without affirmative consent, physical protest is irrelevant, the result of the present case necssarily follows.

29. 367 U.S. 643 (1961), holding that evidence obtained as a result of an unconstitutional search or seizure, as defined in the case of Weeks v. United States, 232 U.S. 383 (1914), is inadmissible in state courts, as well as in federal courts. See, e.g., Annot., 84 A.L.R.2d 959 (1962).

30. 384 U.S. at 768.

31. The Court recognized the principle "that there is an unrestricted 'right on the part of the Government . . . to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.'" However, this principle has "little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. . . . Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where instrusions into the human body are concerned." 384 U.S. at 769-70.

32. Id. at 770.

33. 352 U.S. at 441 (Warren, C.J., dissenting).

34. Ibid.

The *Breithaupt* Court had decided that the circumstances there were not so "shocking" so as to put it within *Rochin's* condemnation. The pertinent facts of the instant case are the same. The question presented, therefore, is the difference between *Rochin* and the two blood test cases.[35]

It is true that in *Rochin* the defendant concealed the capsule in his stomach, a much more sensitive area than a vein, and the Court itself noted that blood tests are quite commonplace.[36] It may well be that were medical science to develop a less painful and perhaps less repulsive method to extract items from the stomach, the use of the stomach pumps might cease to shock the judicial sense of decency. But the fact is that *Rochin* did not condemn the use of a stomach pump per se. Indeed, in all of the opinions written in *Rochin*, *Breithaupt*, and the present case, the nature of stomach pumping is mentioned only once, and then in a dissenting opinion which stated that both blood tests and stomach pumping are medically approved, safe, and quite commonplace.[37]

There are, however, other factors which distinguish *Rochin* from the blood test cases. The Court in *Rochin* noted, for example, that the police " 'were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room . . . .' "[38] The police had no warrant nor did they attempt to arrest the defendant before forcibly trying to stop him from swallowing the capsule. In both *Breithaupt* and the present case, however, the blood tests were given as incident to a lawful arrest. And, finally, there was a physical struggle in *Rochin* which was absent in both *Breithaupt* and the present case.

There are also pragmatic values and pressures which might have influenced the majority's holding.[39] One of these is the nation's increasing concern over auto-

35. Although there is no established standard for determining what constitutes "shocking methods" that offend a "sense of justice," Professor Wigmore stated: "The basic question of what constitutes 'shocking methods' can be answered only by looking at the facts of the particular case. The following considerations should be relevant: How important was the evidence to the government? What alternative methods of getting the evidence were available, and how effective and objectionable would they have been? Did the government have good cause in advance for believing that the defendant had committed a crime and that the sought-after evidence was there? Did the methods used involve physical suffering or especially sensitive areas of privacy? Were experts employed with a view to minimizing the discomfort and permanent harm to the defendant? Was extraction of the evidence necessary for reasons other than the obtaining of evidence (e.g., to save the life of the defendant himself, or to prevent damage to a valuable chattel)? Was defendant's objection to the procedure made unmistakably clear? Was the evidence a chattel which the defendant had no right to possess? To what extent did the defendant in effect invite resort to shocking methods, for example by his knowing choice of a place to secrete the evidence?" 8 Wigmore, Evidence § 2184a, at 50 (McNaughton rev. ed. 1961).

36. See note 12 supra and accompanying text.

37. 352 U.S. at 442 (Warren, C.J., dissenting).

38. 342 U.S. at 166-67.

39. For an excellent discussion on the value of blood tests, see Heise, Chemical Tests for Intoxication—Scientific Background and Public Acceptance, 41 Marq. L. Rev. 296 (1958). But see Murphey, Constitutional Law—Fourteenth Amendment Due Process—Involuntary Blood Taking as Judged by a Socio-Legal Court, 34 Dicta 341 (1957) for a criticism of the

mobile safety and traffic fatalities.[40] Through the use of blood tests, which have become scientific,[41] fairly commonplace,[42] and usually reliable,[43] violators may be more easily convicted. Yet, however much factual or policy differences are sought, it is in the end difficult to distinguish *Rochin*. Although *Rochin* has not been overruled, it would now seem to be limited to its narrow facts. This results in a somewhat anomalous situation in light of the Court's adherence to *Boyd*. The Court is apparently willing to provide an individual with greater protection for his private papers than it would provide to an individual for his bodily integrity. It is, as Justice Black noted, a "strange hierarchy of values."[44]

Labor Law—Action for Wrongful Expulsion From Union Membership Dismissed by State Court and Held To Be Exclusively Within the Jurisdiction of the NLRB.—Plaintiff had been removed from her union position as business agent and ousted from union membership. She brought suit for loss of union wages and loss of other wages which resulted from subsequent employment discrimination. Her suit was dismissed by the Philadelphia court of common pleas.[1] On appeal, the supreme court of Pennsylvania affirmed,[2] holding that the action came within the exclusive jurisdiction of the NLRB.[3] *Spica v. ILGWU*, 420 Pa. 427, 218 A.2d 579 (1966).

Section 8 of the Taft-Hartley Act[4] was enacted for the purpose of eradicating unfair labor practices by employers and unions.[5] It provides in part that it is

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theory that blood tests are in the public interest. For a criticism of English and other jurisdictions' legislation on this subject, see generally Chemical Tests for Intoxication, 1961 Crim. L. Rev. 77.

40. "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." 352 U.S. at 439. See generally, e.g., Clark, Moral Aspects of Traffic Safety, J. Ins. Information Sept.-Oct. 1964, p. 34.

41. For a scientific analysis covering the use of chemical tests for proof of intoxication, see Chemical Tests for Intoxication, 1961 Crim. L. Rev. 5.

42. For a history of the use of chemistry to determine blood alcohol intoxication, see Slough & Wilson, Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing, 44 Minn. L. Rev. 673 (1960).

43. The reliability of chemical tests as a standard for the determination of alcoholic intoxication is acknowledged by most experts today. Symposium—Problems of Alcohol and Intoxication, 1 J. For. Sci. pt. 2, p. 27 (1956). But for a consideration of some of the technical factors that might influence the accuracy of these tests, see Note, 25 U. Kan. City L. Rev. 36, 43-44 (1957).

44. 384 U.S. at 775 (dissenting opinion).

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1. Spica v. ILGWU, 420 Pa. 427, 218 A.2d 579 (1966).

2. Ibid.

3. The court so held because the activity was subject to Labor Management Relations Act (Taft-Hartley Act) §§ 8, 10, 61 Stat. 140, 146 (1947), as amended, 29 U.S.C. §§ 158, 160 (1964).

4. 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (1964).

5. Labor Management Relations Act (Taft-Hartley Act) § 1b, 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1964).

an unfair labor practice for an employer to discriminate against an employee because of membership or non-membership in a union.[6] A union which causes or attempts to cause such employer discrimination is also committing an unfair labor practice under this section.[7] Upon the finding of such a violation, a cease and desist order will be issued by the NLRB to the responsible parties, and, generally, reinstatement to employment may be ordered and lost wages awarded.[8] In order to promote the development of a uniform national law on these matters, section 10(a) of the act gives the NLRB exclusive jurisdiction over cases in which they arise.[9]

In the instant case, then, the most important question for decision was whether the plaintiff's alleged injury was a result of the employment-discrimination prohibited by section 8. The court's holding relied heavily on its finding that the core of the plaintiff's complaint was that as a result of her dismissal from the union she was unable to obtain employment.[10] Therefore, the court reasoned that the complaint alleged the commission of an unfair labor practice. The facts having been thus analyzed, it was decidedly simple for the court to follow the doctrine set down in the leading Supreme Court case of *San Diego Bldg. Trades Council v. Garmon*:[11] "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[12] In the *Garmon* case, a number of unions, representing some of the plaintiff's employees, picketed plaintiff's place of business and thereby caused a loss of business. The picketing was done with the intention of coercing the plaintiff to sign a union shop agreement. Although the NLRB, in a parallel proceeding, had dismissed plaintiff's complaint because it did not meet the jurisdictional standards of the board,[13] the Supreme Court ruled that both state and federal courts must defer to the

6. Labor Management Relations Act (Taft-Hartley Act) § 8 (a)(3), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964). However, this section does not bar a union shop agreement and recognizes an exception where the employee fails to pay his initiation fees or periodic dues.

7. Labor Management Relations Act (Taft-Hartley Act) § 8(b)(2), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964).

8. Labor Management Relations Act (Taft-Hartley Act) § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

9. National Labor Relations Act (Taft-Hartley Act) § 10(a), 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964), generally empowers the NLRB to prevent unfair labor practices. However, it contains wording that has led the courts to make the NLRB's jurisdiction exclusive in such matters: "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Ibid.

10. "It is thus obvious that the heart of her complaint is the injury done to her employment relationship." 420 Pa. at —, 218 A.2d at 581 (1966).

11. 359 U.S. 236 (1959).

12. Id. at 245.

13. For a listing of the monetary jurisdictional yardsticks applicable to the several industries, see 1 CCH Lab. L. Rep. ¶ 1610 (1966). In Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), the Supreme Court similarly dismissed plaintiff's cause of action although the NLRB had already made it impossible for him to find a remedy other than in the courts.

exclusive jurisdiction of the NLRB and dismissed the case. Therefore, although the plaintiff had a substantive right, the decision left him without a remedy.

The majority opinion in the instant case, however, in concluding that the activity involved was arguably subject to section 8 of the act, did not discuss the fact that the plaintiff also complained of wrongful discharge from union membership.[14] In a separate opinion,[15] Mr. Justice Roberts reasoned that this disruption of the union-member relationship was the core of the injury.[16] Therefore, he concluded that the court should follow the precedent of *International Ass'n of Machinists v. Gonzales*[17] and assume jurisdiction. Indeed, that case was extremely similar to the instant case. Gonzales had been wrongfully expelled from the defendant union and, as a result of his expulsion, had been unable to acquire subsequent employment. He was reinstated to union membership by the state court whose authority to reinstate him was unquestionable since his expulsion was an internal union matter, not within the scope of sections 7 and 8. The state court also granted recovery of lost wages and damages for physical and mental suffering. The Supreme Court, affirming, observed that the unfair labor practices involved in the case were not central to the plaintiff's cause of action. The Court, in making its decision, categorized the union-member disruption as "internal" and the employment-relationship disruption as "external" and held only the latter to be an unfair labor practice subject to section 8.

This process of weighing the union-member disruption aspect of the complaint against the employment-relationship disruption aspect to determine the "core" of the complaint is an artificial one and can lead only to confusion and disharmony in the courts' decisions.[18] Although the Supreme Court has been fairly uniform in affirming the exclusive jurisdiction of the NLRB in the unfair labor practice cases,[19] except in those cases involving section 301(a) of the act, the

14. See 420 Pa. at —, 218 A.2d at 581, where the court refers to Wax v. International Mailers Union, 400 Pa. 173, 161 A.2d 603 (1960). In the Wax case, the Court had discussed International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), and urged that it should not be applied in a case of this nature. 400 Pa. at 181, 161 A.2d at 607. The instant court, however, never squarely faced the issue.

15. 420 Pa. at —, 218 A.2d at 582.

16. "We are here confronted not with a labor-management dispute, or what is sometimes termed the 'employment relationship', but rather with an internal union dispute not covered by the National Labor Relations Act." Ibid. (Footnote omitted.)

17. 356 U.S. 617 (1958).

18. A similar attempt to distinguish such injuries as public (unfair labor practice by employment discrimination) and private (the tort of interference with the employment contract) was criticized as follows in Garner v. Teamsters Union, 346 U.S. 485 (1953): "Whatever purpose a classification of rights as public or private may serve, it is too unsettled and ambiguous to introduce into constitutional law as a dividing line between federal and state power or jurisdiction." Id. at 500.

19. Local 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Perko, 373 U.S. 701 (1963); Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Union, 346 U.S. 485 (1953). For a summary see Annot., 10 L. Ed. 2d 1200 (1964). The decision in Weber v. Anheuser-Busch, supra, gives a good summary of the pre-1955 cases.

Gonzales case remains to trouble the advocates of uniformity. It has never been overruled.[20] However, it has been so distinguished in subsequent decisions, that it has on occasion been interpreted as being restricted to its facts.[21]

The supreme court of Pennsylvania has been equally uniform in affirming the Board's exclusive jurisdiction. The great majority of cases on the point have refused jurisdiction when the activity involved was arguably subject to section 7 or 8 of the NLRA.[22] However, Pennsylvania courts[23] and other state courts[24] have, on occasion, followed *Gonzales* and assumed jurisdiction. And, therefore, the desired uniformity has not been attained.[25]

An understandable exception to this rule is found in those cases in which the unfair labor practice involved violence. There, the maintenance by the states of their internal domestic peace assumed paramount importance, and the Supreme Court allowed the state courts to assume jurisdiction. International Union, UAW v. Russell, 356 U.S. 634 (1958); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954); Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

20. 420 Pa. at —, 218 A.2d at 582-83.

21. See Mr. Justice Cohen's dissent in International Organization Masters, Local 2 v. International Organization Masters, 414 Pa. 277, 288, 199 A.2d 432, 437, cert. denied, 379 U.S. 840 (1964).

22. Young v. United Steelworkers, 413 Pa. 90, 196 A.2d 313 (1964); Terrizzi Beverage Co. v. Local 830, Brewery & Beer Distrib. Drivers, 408 Pa. 380, 184 A.2d 243 (1962); Baker v. Shopmen's Local 755, 403 Pa. 31, 168 A.2d 340 (1961); Navios Corp. v. National Maritime Union, 402 Pa. 325, 166 A.2d 625 (1960), cert. denied, 366 U.S. 905 (1961); Bailer v. Local 470, Int'l Teamsters, 400 Pa. 188, 161 A.2d 343 (1960); Wax v. International Mailers Union, 400 Pa. 173, 161 A.2d 603 (1960); Elisco v. Rockwell Mfg. Co., 387 Pa. 274, 128 A.2d 32 (1956); Garner v. Teamsters Union, 373 Pa. 19, 94 A.2d 893, aff'd, 346 U.S. 485 (1953); Pennsylvania Labor Relations Bd. v. Frank, 362 Pa. 537, 67 A.2d 78 (1949). Other cases, when violence was involved, have followed United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1956), and have recognized state court jurisdiction. E.g., Great Leopard Mkt. Corp. v. Amalgamated Meat Cutters, 413 Pa. 143, 196 A.2d 657 (1964); Smith's Transfer Corp. v. Voice of Teamsters Democratic Organizing Comm., 409 Pa. 217, 185 A.2d 563 (1962); Taylor Fibre Co. v. Textile Workers Union, 395 Pa. 535, 151 A.2d 79 (1959). Even there, however, the principle of exclusive jurisdiction has often been affirmed, as when violent picketing was enjoined, but the issue of reinstatement to employment, Smith's Transfer Corp. v. Voice of Teamsters Democratic Organizing Comm., supra, or of enjoining all picketing, Great Leopard Mkt. Corp. v. Amalgamated Meat Cutters, supra, was left to the NLRB.

23. International Organization Masters, Local 2 v. International Organization Masters, 414 Pa. 277, 199 A.2d 432, cert. denied, 379 U.S. 840 (1964) (holding Gonzales to be completely controlling); see MacDonald v. Feldman, 393 Pa. 274, 142 A.2d 1 (1958) (decided on an interference with contract theory).

24. See, e.g., Division 1478, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Ross, 90 N.J. Super. 391, 217 A.2d 883 (1966). The facts in that case did not constitute an unfair labor practice as defined in §§ 7 and 8 of the NLRA, but the court's reliance on Gonzales indicated that Gonzales may be followed in unfair labor practice cases in the future.

25. The confusion is further compounded by the fact that suits on collective bargaining agreements may be brought in the federal courts, even if an unfair labor practice is also involved. Labor Management Relations Act (Taft-Hartley Act) § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964). For a discussion of the area of overlap of unfair labor practices

Because the holdings of the Supreme Court are in conflict on this point, the state courts have exercised what amounts to broad discretion in accepting or rejecting jurisdiction in these cases. This is especially evidenced by a comparison of the instant case with *International Organization Masters, Local 2 v. International Organization Masters*.[26] In that case, the plaintiffs sought reinstatement to union membership following an alleged wrongful expulsion. The plaintiffs also sought damages for loss of wages as a result of their inability to obtain employment as non-union members. The supreme court of Pennsylvania ruled that the crux of the plaintiffs' complaint was an internal union-member disruption and that the state court, following *Gonzales*, could assume jurisdiction. Mr. Justice Cohen, in his dissent, strenuously objected that this was a case of employment-relationship disruption and, thus, an unfair labor practice.[27] The majority opinion dismissed this objection[28] and permitted the lower court to exercise jurisdiction. In the instant case, however, with the composition of the court unchanged,[29] the court decided a strikingly similar combination of union-member and employment-relationship disruption in a completely contrary fashion.

In *Guss v. Utah Labor Relations Bd.*,[30] the Supreme Court denied jurisdiction to the state court even though the NLRB had previously refused to excercise its jurisdiction. This refusal by the Board was based on the grounds that the employer did not satisfy the Board's monetary jurisdictional standards. As a result, a no-man's land was created where there were plaintiffs with rights but no remedies.

The plaintiff in *Gonzales* had not requested relief from the Board, and there was no showing that relief would have been denied by the Board. However, the *Gonzales* Court's decision affirming the state court's assumption of jurisdiction can be set in marked contrast with the very strict *Guss* doctrine of exclusive jurisdiction.[31] In any event, the *Gonzales* decision generated two very real problems[32] which will not be easily solved.

The first such problem is one facing a plaintiff who has been wrongfully dis-

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and breaches of collective bargaining agreements, see Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 14 Lab. L.J. 111 (1963). The leading case on section 301(a) is Smith v. Evening News Ass'n, 371 U.S. 195 (1962). See also Shaw Elec. Co. v. International Bd. Elec. Workers, 418 Pa. 1, 208 A.2d 769 (1965).

26. 414 Pa. 277, 199 A.2d 432, cert. denied, 379 U.S. 840 (1964).

27. Id. at 286, 199 A.2d at 436.

28. Id. at 282, 199 A.2d at 434.

29. Mr. Justice Musmanno, who wrote the majority opinion in the instant case, dissented in International Organization Masters, and Mr. Justice Roberts, dissenting in part in the instant case, wrote the majority opinion there. Four of the other five justices changed sides for the decision in the instant case.

30. 353 U.S. 1 (1957).

31. 43 Cornell L.Q. 308 (1957). See also Comment, 10 Hastings L.J. 306 (1959).

32. It has been argued that the Gonzales decision merely points out that the state courts will be permitted to exercise jurisdiction when a state cause of action only incidentally comes within the framework of the NLRA. 47 Geo. L.J. 189 (1958). The above discussion of the inadequacies of the "weighing process," however, discredits this theory. See also 10 Hastings L.J. 306 (1959).

charged from union membership and subsequently discriminated against in maintaining employment. Since either the Board or the state court might dismiss the complaint, the selection of the forum presents a problem. Therefore, despite the duplication of time and expense involved, many have found it safest to petition both.[33]

The second problem created is that fragmented jurisdiction, which has resulted from the state courts' lack of consistency in accepting or rejecting jurisdiction, has destroyed the uniformity sought by Congress. This, it is submitted, is the real matter for consideration. In *Garmon*, the Supreme Court held that the states would interfere with the national labor policy if they were permitted to usurp the NLRB's jurisdiction.[34] Several legal commentators[35] have suggested that if the state courts are permitted to assume jurisdiction in cases involving employment-discrimination or other activities within the NLRB's jurisdiction and to decide them differently than would the Board,[36] the development of a uniform federal labor policy would be inhibited. If Congress, on the other hand, wishes to further the development of a uniform federal labor policy, the Board's powers should be broadened to afford a complete remedy to the complaining party. For example, the Board should be given the power to reinstate those wrongfully expelled from union membership.[37] This dismissal from union membership is, of course, an element of every case involving subsequent employment discrimination. Although the injured party, as long as he continues to proffer his dues, does not need official union membership to retain or obtain employment, he may justifiably desire the return of the internal benefits offered by the union. If he does seek reinstatement, he must, at present, then undertake the additional time and expense involved in bringing another action in the state court.[38] The state court can also give collateral damages in tort above the back

33. See, e.g., San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

34. Id. at 243.

35. See, e.g., Comment, 10 Hastings L.J. 306 (1959).

36. "The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent." Garner v. Teamsters Union, 346 U.S. 485, 498-99 (1953).

37. This power is not among those granted to the NLRB by the Labor Management Relations Act (Taft-Hartley Act) § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964), while the state courts now do have that power. See International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 628 (1958) (Warren, C.J., dissenting). The NLRB does have this power, however, if the expulsion of the union member was done via improper procedure. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 101(5), 73 Stat. 523, 29 U.S.C. § 411(5) (1964).

38. The question of whether such discrimination in union membership is an unfair labor practice in itself has not yet been resolved by the courts. Either a definitive holding by the Supreme Court or a positive enactment by Congress will be needed to clarify this point. There are other state court advantages which could be adopted by the NLRB—for example, the state courts are often more conveniently located than the local NLRB offices. See Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690, 699 (1963) (Douglas, J., dissenting). See also Silverberg, How to Take a Case Before the National Labor Relations Board, Appendix D, 353-62 (rev. ed. 1959).

pay the NLRB is authorized to grant.[39] Some liberalization of the Board's powers in this important area should also be considered.

Once the powers of the Board had been thus extended, the state courts would be more likely to defer to the Board's jurisdiction in all cases arguably subject to the act, in view of the fact that they could mete out no better justice than could the Board. It has not been enough to allow the state courts jurisdiction when the Board has refused it—a solution proposed by congressional enactment[40]—because the state courts have continued to try cases where a strong argument could have been made that the activity involved was subject to the act.[41] Nor would it be sufficient to overrule *Gonzales*, for *Gonzales* is a symptom of the problems raised by the act rather than the problem itself. The cure must instead be applied to the remedies the NLRB is empowered to grant.

Securities Regulation—Conversion of Securities Held Not to Constitute a "Sale" Under Section 16(b).—Defendants,[1] after acquiring convertible preferred securities, converted the preferred to common shares in a series of transactions. All of these transactions occurred within six months of the original acquisition of the preferred. Plaintiff, in a stockholder's derivative suit, sought to have the "profits" from these transactions inure to the corporation under section 16(b) of the Securities Exchange Act.[2] The district court, holding for the plaintiff, awarded $1,297,419.76 to the corporation.[3] The court of appeals reversed, finding that the transaction was not a "sale" within the contemplation

39. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

40. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 701, 73 Stat. 541, 29 U.S.C. § 164 (1964).

41. See, e.g., International Organization Masters, Local 2 v. International Organization Masters, 411 Pa. 277, 199 A.2d 432, cert. denied, 379 U.S. 840 (1964) (Cohen, J., dissenting).

1. One of the defendants was a director of the issuer, Air-Way Industries, Inc. The other defendant, a corporation, owned more than 10% of Air-Way securities. The Securities Exchange Act of 1934, § 16(a), 78 Stat. 579, as amended, 15 U.S.C. § 78p(a) (1964), provides that a director, an officer or any individual who owns more than 10% of stock of any corporation must file any change of ownership in such company.

2. Section 16(b) provides: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction . . . ." 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1964).

Section 16(b) was originally applicable only to transactions involving securities listed on a national security exchange. Ibid. In 1964, the scope of the statute was enlarged through the amendment of § 12 of the Securities Exchange Act of 1934. 78 Stat. 565, 15 U.S.C. § 78l (1964). Section 16(b) is now applicable to most issuing corporations which have assets exceeding $1,000,000 and a stated number of stockholders of record. 78 Stat. 567, 15 U.S.C. § 78l(g) (1964). One may reasonably assume that, as a result of this extension, there will be an increase in litigation involving convertible securities and 16(b) liability.

3. 242 F. Supp. 151 (S.D.N.Y. 1965).

of section 16(b). *Blau v. Lamb*, CCH 1966 Fed. Sec. L. Rep. ¶ 91710 (2d Cir. June 27, 1966).

The instant decision and its analysis of 16(b) in regard to convertible securities is a significant development over prior law in three respects. First, it unequivocally adopts the "any possibility of abuse" test as the law for the Second Circuit. Secondly, the decision is the first to postulate a systematic approach for determining whether any possibility of abuse exists. Thirdly, it indicates that 16(b) liability may be incurred in a transaction in which a purchase of convertible securities is followed within six months by a conversion.

In *Park & Tilford v. Schulte*,[4] Judge Clark, writing for the Second Circuit court of appeals, left no doubt that section 16(b) may be applicable to certain conversion transactions.[5] The court held that a conversion of preferred to common, coupled with a sale of common within six months of the conversion, constituted a 16(b) violation. *Park & Tilford* has been the subject of considerable controversy,[6] and conflicting interpretations of it have produced two methods for determining whether 16(b) liability should be imposed in a particular conversion case.

These two approaches have been crystallized by *Ferraiolo v. Newman*[7] and *Heli-Coil Corp. v. Webster*.[8] In *Ferraiolo*, the court adopted the so-called "subjective" approach,[9] requiring the court to determine whether 16(b) is applicable by deciding "if the transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16(b)."[10] The *Heli-Coil* approach has been termed "objective."[11] Under this approach, the court will automatically impose 16(b) liability whenever a conversion is followed within six months by a sale of the common stock.[12] The *Heli-Coil* court reasoned that

4. 160 F.2d 984 (2d Cir.), cert. denied, 332 U.S. 761 (1947).

5. Id. at 987. "Whatever doubt might otherwise exist as to whether a conversion is a 'purchase,' is disspelled by definition of 'purchase' to include, 'any contract to buy, purchase, or otherwise acquire . . . .'" Ibid.

6. For negative criticism, see Blau v. Lamb, CCH 1966 Fed. Sec. L. Rep. ¶ 91710 at 95612-13 (2d Cir. June 27, 1966). Professor Loss put it most succinctly when he noted that the language of the opinion was "unduly broad." 2 Loss, Securities Regulation 1067 (2d ed. 1961). See Cole, Insiders' Liabilities Under the Securities Exchange Act of 1934, 12 Sw. L.J. 147, 160-61 (1958); Comment, 59 Yale L.J. 510 (1950); 59 Harv. L. Rev. 998 (1946). For positive reactions to the case, see Heli-Coil Corp. v. Webster, 352 F.2d 156, 164 (3d Cir. 1965); Meeker & Cooney, The Problem of Definition in Determining Insider Liabilities Under Section 16(b), 45 Va. L. Rev. 949, 958-59 (1959); Note, 19 Rutgers L. Rev. 151 (1964); 42 Ill. L. Rev. 658, 659-60 (1948).

7. 259 F.2d 342 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959), 11 Stan. L. Rev. 358 (1959), 107 U. Pa. L. Rev. 719 (1959).

8. 352 F.2d 156 (3d Cir. 1965). See Note, 19 Rutgers L. Rev. 151 (1964).

9. The Heli-Coil court observed that the Ferraiolo case determined 16(b) liability as a question of fact and, therefore, termed that decision as "subjective." 352 F.2d at 164. The instant court observed that the Ferraiolo decision did not investigate subjective intent at all, but merely looked at external facts. CCH 1966 Fed. Sec. L. Rep. ¶ 91710, at 95612-13.

10. 259 F.2d at 345.

11. The instant court intimated that the approach of the Heli-Coil court was "automatic" rather than objective. CCH 1966 Fed. Sec. L. Rep. ¶ 91710, at 95613.

12. 352 F.2d at 165.

the congressional purpose in enacting section 16(b) was to eliminate any necessity of searching for the motives of the defendant.[13] Congress, according to *Heli-Coil*, felt that insider abuse could be curbed only via a "hard and fast rule" providing that any insider who obtains profits within the statutory period is subject to 16(b) liability regardless of whether he made use of inside knowledge.[14]

Prior to the instant case, two Second Circuit decisions had indicated that the "any possibility of abuse" test was to be applied.[15] These cases suggested that the holding in *Park & Tilford* should be restricted to its facts. Therefore, the court in the instant case, adopting the *Ferraiolo* approach, noted that the Second Circuit was not compelled to follow the "objective" standards of *Park & Tilford*.[16] It could, therefore, conclude that there was no "sale" within the meaning of 16(b) since there was no possibility of abuse.[17] It is submitted that this selection of the so-called subjective approach is supported by the fact that the congressional purpose was merely to prevent the abuse of inside knowledge and not to entirely prohibit insider trading.[18]

Obviously, the selection of the "any possibility of abuse" test did not complete the court's task; there remained the work of defining the criteria to be used in determining whether there was any possibility of abuse. In *Ferraiolo*, the court focused on the concept of economic equivalence.[19] Under this doctrine, there is no violation of 16(b) if the preferred and the common into

13. Ibid.

14. Ibid. Justification for this interpretation of congressional intent may be found, for example, in a remark made before Congress by Mr. Corcoran, a participant in the drafting of the Securities Exchange Act of 1934: "You hold the director, irrespective of any intention or expectation to sell the security within six months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing." Hearings on S. 84, S. 56 & S. 97 Before the Senate Committee on Banking and Currency, 72d Cong., 2d Sess. and 73d Cong., 1st & 2d Sess. 6557 (1934).

15. In Roberts v. Eaton, 212 F.2d 82 (2d Cir.), cert. denied, 348 U.S. 827 (1954), the court refused to impose 16(b) liability because, "the reclassification at bar could not possibly lend itself to the speculation encompassed by § 16(b)." Id. at 86. Accord, Blau v. Mission Corp., 212 F.2d 77 (2d Cir.), cert. denied, 347 U.S. 1016 (1954); see also Blau v. Lehman, 286 F.2d 786 (2d Cir. 1960), aff'd, 368 U.S. 403 (1962); Shaw v. Dreyfus, 172 F.2d 140 (2d Cir.), cert. denied, 337 U.S. 907 (1949).

16. CCH 1966 Fed. Sec. L. Rep. ¶ 91710, at 95613.

17. See notes 19-30 infra and accompanying text.

18. See Ferraiolo v. Newman, 259 F.2d 342, 344-45 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959).

19. The court reasoned that the market place kept the value of the preferred equal to the value of the common into which it could be converted. This, the court felt, was due to both a provision allowing for an adjustment in the conversion ratio should there be any change in the number of outstanding shares of common and to trading akin to arbitrage trading. Id. at 345. "Arbitrage is buying and selling the same security or closely related securities . . . in two different markets at about the same time." 2 Loss, op. cit. supra note 6, at 1108 n.276.

which it is converted are economic equivalents.[20] A second criterion which has been advanced may be termed the "continuity of investment" standard. In *Blau v. Max Factor & Co.*,[21] the court of appeals for the Ninth Circuit held that a conversion was not a 16(b) transaction when the continuity of the insider's investment position was unchanged by the conversion.[22] *Max Factor* was, therefore, concerned with the manner in which the conversion affected the speculative value of the insider's investment.[23] Judge Browning, writing for the majority, noted that "to hold that the exchange . . . constituted a 'purchase' within section 16(b) would ignore the distinction which Congress drew between long-term investment and short-term speculation."[24]

While the *Ferraiolo* decision searched merely for economic equivalence, and *Max Factor* examined only investment positions, the court in the present decision carefully scrutinized both of the aforementioned criteria.[25] In finding for the plaintiff, the district court in the instant case decided that the transaction lent itself to opportunities for the abuse of insider information.[26] In disagreeing with this contention, the court of appeals concluded that the conversion in no way presented the defendants with even the slightest opportunity to speculatively profit with the use of inside information.[27] Although the court recognized that the conversion increased defendants' control over the issuer and that this could lead to abuse, it held that only speculative abuse was within the contemplation of 16(b).[28] Therefore, in the Second Circuit, at least, the element of corporate control is irrelevant in applying the "continuity of investment" standard.

The economic equivalence standard was the second ground upon which the court of appeals based its decision. Indeed, the price of the preferred shares was equivalent to the price of the total number of shares of common into which

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20. 259 F.2d at 346.

21. 342 F.2d 304 (9th Cir.), cert. denied, 382 U.S. 892 (1965).

22. Id. at 308. The investment position of the defendants was not changed, the court held, because there was no speculative advantage in holding the common instead of the Class A stock. Moreover, the commitment of the defendants to the company was assumed many years before the conversion, and was in no way affected by it. Ibid.

23. Id. at 309.

24. Ibid. Because Congress has drawn such a distinction, an insider with the best intentions may incur liability if he trades within six months. On the other hand, an insider with the worst intentions can escape liability if he trades after six months and one day. See note 2 supra. This feature of § 16(b) has caused considerable criticism. See, e.g., Comment, 64 Mich. L. Rev. 474, 475 (1966).

25. CCH 1966 Fed. Sec. L. Rep. ¶ 91710, at 95615-18.

26. 242 F. Supp. at 157. The court reasoned that the investment positions of the defendants were changed because their voting power was increased, there was greater marketability of the common, and the common shares awarded greater dividends than the preferred. Furthermore, the district court noted that there was no economic equivalence of the preferred and common simply because they were different securities with different risks. Id. at 157-58.

27. CCH 1966 Fed. Sec. L. Rep. ¶ 91710, at 95614-15.

28. Ibid. Accord, Yourd, Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act, 38 Mich. L. Rev. 133, 148 (1939).

it was converted.[29] This equivalence, the court felt, was not destroyed by increased voting power, higher dividends or increased marketability afforded defendants by the conversion.[30]

This comprehensive search for speculative abuse provides more adequate guidelines than were available in the past for predicting the imposition of 16(b) liability. Although no speculative abuse was found in the instant case, it is obviously possible to envision such abuse in other conversion-sales. This can be illustrated by way of a simple example. Assume that an insider holding convertible securities, absent an anti-dilution clause,[31] learns of an ensuing common stock split. Suppose further that the insider converts the securities within six months of the original acquisition. Since the value of the preferred will not, following the split, be supported by the value of the common due to the absence of an anti-dilution clause, a possibility of abuse might be found. It is suggested that in such a case, even under the instant case, 16(b) liability could be incurred.

The vast majority of cases in this area have considered only whether the conversion constituted a "purchase" of common. In fact, Professor Loss noted that this is "the first reported case in which the plaintiff attempted to match a conversion against a *prior purchase of preferred* [calling the conversion a 'sale' instead of the traditional purchase] . . . rather than a subsequent sale of common . . . ."[32]

In any event, the court here, in determining whether the conversion constituted a 16(b) "sale," applied the same reasoning as they would in determining whether a conversion is a 16(b) "purchase."[33] However, the *Heli-Coil* court, when it also considered the question of a conversion constituting a 16(b) "sale,"[34] held that the insider could never incur liability because no profits were "realized"[35] on the conversion. The SEC, in an amicus curiae brief in the present case, advocated

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29. CCH 1966 Fed. Sec. L. Rep. ¶ 91710, at 95615-16.

30. Ibid.

31. There was such a clause in the instant case. "In the event of any stock dividend, or split-up by reclassification, or by any other method, of the shares of . . . Common, the number of shares into which the shares of . . . Preferred were convertible would be appropriately adjusted." Id. at 95608.

32. 2 Loss, op. cit supra note 6, at 1071. It should be noted here, however, that prior to the instant case, the Heli-Coil court also considered the question of whether a conversion was a "sale" of preferred as well as a "purchase" of the common. 352 F.2d at 167-68.

33. CCH 1966 Fed. Sec. L. Rep. ¶ 91710, at 95612. A conversion, therefore, can be both a sale of the preferred and a purchase of the common. Since this sale and purchase occur at the same instant, they constitute a purchase and a sale within a period of six months. Logically, therefore, 16(b) liability could be incurred simply by a conversion (even in the absence of any other transactions). However, the Securities and Exchange Commission, pursuant to the power vested in it by § 16(b), has exempted such a situation from 16(b) liability. Securities Exchange Act Release No. 7826, Feb. 17, 1966.

34. See note 32 supra and accompanying text.

35. 352 F.2d at 167-68. This "realized profits" argument was suggested by a student comment in 59 Yale L.J. 510, 524 (1950), fifteen years prior to the Heli-Coil decision.

the rule adopted by that court.[36] The court, however, was not concerned with the question of "realized profits," since it concluded that there was no sale in any event.[37]

The importance of the adoption of the "any possibility of abuse" test should not be minimized. However, its major contribution is that it has synthesized the criteria used in applying that test. The treatment of conversion situations in the federal circuit courts remains unsettled; if the Supreme Court ultimately considers the issue, it is hoped that the approach adopted here will be accepted. This would leave unchanged the liability of insiders who are perhaps profiting by virtue of their positions, while not extending section 16(b) coverage to areas not in need of regulation.

Unemployment Insurance—Suspension of Benefits—Signing of Memorandum of Understanding Terminates Strike and Thereby Entitles Workers to Unemployment Benefits Until Full Plant Operations Resume.— As a result of a labor dispute over national and local issues, employees went on strike in the General Motors plants at Buffalo, Tonawanda, and Massena, New York. Memoranda of understanding[1] were signed on the local level at each of the plants, and within ten days,[2] operations were fully resumed at each of the three locations. The employees filed claims for unemployment insurance for the period between the signing of their local memoranda and the resumption of operations at their respective plants.[3] General Motors contested the claims, contending that under section 592(1) of the New York Labor Law, the employees were barred from receiving benefits during this period. The appellate division held that a strike is terminated within the meaning of section 592(1) when an agreement is signed, and therefore allowed the claims. *Matter of Acquisto*, 25 App. Div. 2d 326, 269 N.Y.S.2d 567 (3d Dep't 1966).

Section 592 of the New York Labor Law provides:

36. Brief for the SEC as Amicus Curiae, pp. 16-17, Blau v. Lamb, CCH 1966 Fed. Sec. L. Rep. ¶ 91710 (2d Cir. June 27, 1966). The SEC felt that the defendants had only realized "paper" profits. Id. at 18.

37. Another issue which is present in all cases considering 16(b) applicability to convertible securities is whether the conversion is a voluntary one. It has been suggested that a "forced" conversion would not incur 16(b) liability. See Blau v. Lamb, 242 F. Supp. 151, 157 (S.D.N.Y. 1965), rev'd on other grounds, CCH 1966 Fed. Sec. L. Rep. ¶ 91710 (2d Cir. June 27, 1966); Blau v. Hodgkinson, 100 F. Supp. 361, 373 (S.D.N.Y. 1951).

1. Memoranda of understanding are writings which mark an agreement between management and labor leaders.

2. At Buffalo the agreement was signed on September 16, 1961, and the plant was fully operative by September 26. At Tonawanda the agreement was signed on the 24th and operations were fully resumed by the 28th. At Massena the memorandum was signed on the 20th and full operations were restored by the 27th. Matter of Acquisto, 25 App. Div. 2d 326, 327, 269 N.Y.S.2d 567, 568-69 (3d Dep't 1966).

3. Benefits were awarded by the State Industrial Commissioner and the award was affirmed by the Unemployment Insurance Appeal Board. Id. at 327, 269 N.Y.S.2d at 568.

Suspension of accumulation of benefit rights. 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.

General Motors, attempting to show that the benefits had been improperly awarded, contended that the national agreements[4] which followed the local settlements marked the end of the controversy and that prior to this national settlement, no benefits could accrue. The court rejected this argument by holding that "we are not concerned with what developed nationally, but only with what transpired locally."[5] In so ruling, the court elected to treat the workers in each plant as employees of a different establishment. This treatment is in accord with the New York cases which have interpreted "establishment" as it is used in section 592(1) of the New York Labor Law.[6]

The second contention by General Motors was that the controversy was not terminated until normal production resumed. This contention, which was also rejected by the court,[7] presented a question of first impression in New York.[8] What must happen before a strike or controversy is considered terminated within the meaning of section 592(1)? Is it sufficient that an agreement has been signed? Or must the workers be back at their jobs?

This problem has been before several courts in other jurisdictions. The majority rule would deny benefits until such time as employment is resumed or reasonably could be resumed.[9] Thus, in the recent case of *Pickman v.*

4. The national settlement came on October 2, when the full agreement was ratified. Id. at 327, 269 N.Y.S.2d at 569.

5. Id. at 328, 269 N.Y.S.2d at 569.

6. In the case of In the Matter of Machcinski, 277 App. Div. 634, 643, 102 N.Y.S.2d 208, 216 (3d Dep't 1951), the court noted that the courts of this state have held that an "establishment" should be defined as a geographic unit rather than as a production complex. In Matter of Ferrara, 10 N.Y.2d 1, 176 N.E.2d 43, 217 N.Y.S.2d 11 (1961), the court of appeals held that the National Airlines hanger facilities, city offices, and airport offices were all independent and separate establishments. In Matter of Curatalo, 10 N.Y.2d 10, 176 N.E.2d 48, 217 N.Y.S.2d 18 (1961), the court held the manufacturing plant of a steel fabrication company and the construction site at which the steel was being used to be separate establishments. A strike by the construction workers at the construction sites did not prevent the fabrication workers at the plant from collecting unemployment benefits when they were laid off.

For a discussion of the development of New York law concerning "establishment," see 26 Albany L. Rev. 116 (1962).

7. 25 App. Div. 2d at 328, 269 N.Y.S.2d at 570.

8. Ibid.

9. E.g., American Steel Foundries v. Gordon, 404 Ill. 174, 88 N.E.2d 465 (1949); Carnegie-Illinois Steel Corp. v. Review Bd., 117 Ind. App. 379, 72 N.E.2d 662 (1947); Saunders v. Maryland Unemployment Compensation Bd., 188 Md. 677, 53 A.2d 579 (1947); Leach v. Republic Steel Corp., 176 Ohio St. 221, 199 N.E.2d 3 (1964); Bako Unemployment Compensation Case, 171 Pa. Super. 222, 90 A.2d 309 (1952).

Weltmer,[10] it was held that "the claimant remains ineligible for benefits during the entire period of his unemployment even though a period of time is required after the settlement of the dispute for the employer to resume normal operations."[11] The court felt that benefits should be awarded, however, when the period of unemployment following the strike exceeded what was normally and reasonably required to resume operations.[12]

In *Matter of Vingoe*,[13] a New York court refused benefits during the reactivation period which followed President Truman's seizure of the steel mills during the Korean war. The appellate division determined that the workers' "unemployment was directly and proximately caused by the underlying labor controversy," which was not terminated by the presidential seizure.[14] "The claimants lost work after the seizure and until their mills were again ready for their services because of the labor controversy."[15] *Matter of Vingoe* was distinguished in the present case because in *Vingoe* there was no termination of the labor dispute. The presidential seizure averted a further work stoppage but it did not terminate the controversy.[16]

The court in the instant case found the holding in *Matter of George*[17] more persuasive. In *George* the slack period following the strike was occasioned by a lack of supplies from other General Motors plants still on strike. The appellate division denied benefits, reasoning that the workers should have anticipated this unemployment period when they went on strike.[18] The New York court of appeals, however, reversing, reasoned that the post-strike unemployment was

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In Chrysler Corp. v. Review Bd., 120 Ind. App. 425, 92 N.E.2d 565 (1950), a strike was called by employees in an automobile manufacturing plant. When the strike was settled the workers remained out of work for an additional week during which the plant was reactivated for operations. The appellate court of Indiana denied unemployment benefits, holding that employees are not eligible for benefits during the time in which repairs have to be made following a work stoppage occasioned by a labor dispute. Id. at 432, 92 N.E.2d at 569.

10. 191 Kan. 543, 382 P.2d 298 (1963). Claimants were employed in the machine shop of a steel plant which had been on strike. Following the termination of the strike, they remained unemployed while awaiting materials on which to begin work. Benefits, however, were denied the workers by the Supreme Court of Kansas, which reasoned that the unemployment resulted from a labor dispute. The statute which controlled the awarding of benefits was Kan. Gen. Stat. Ann. § 44-706 (1964), which reads: "An individual shall be disqualified for benefits . . . (d) For any week with respect to which the commissioner finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed . . . ."

11. 191 Kan. at 548, 382 P.2d at 303.

12. Ibid.

13. 285 App. Div. 160, 136 N.Y.S.2d 893 (3d Dep't 1954).

14. Id. at 163, 136 N.Y.S.2d at 896.

15. Id. at 163, 136 N.Y.S.2d at 897.

16. 25 App. Div. 2d at 328, 269 N.Y.S.2d at 570.

17. 14 N.Y.2d 234, 199 N.E.2d 503, 250 N.Y.S.2d 421, modified mem., 14 N.Y.2d 960, 202 N.E.2d 378, 253 N.Y.S.2d 997 (1964).

18. 15 App. Div. 2d 308, 223 N.Y.S.2d 326 (3d Dep't 1962).

not the result of any voluntary act of the workers, but rather of unforeseen causes.[19]

Section 501, the legislative guide for construction of the New York Labor Law, provides in part that "the legislature . . . declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed *through no fault of their own.*"[20] Any interpretation of the word termination as used in section 592(1) should be made in light of the purpose set forth by section 501.

The *George* decision is in accord with this purpose of the Labor Law. The workers had been called back to work and were soon thereafter laid off due to the continuing strike in other plants of the company. The workers were unemployed through no fault of their own.[21] In the present case there was, however, no lack of parts. The lag period was no more than the normal time required to call back the workers and resume production. The post-strike unemployment, though concededly not desired by the workers, should have been anticipated by them and was inescapable once the strike had taken place. It is difficult to say that the unemployment was occasioned "through no fault of the workers."

Matter of Burger[22] gave an oft-quoted[23] statement of the policy behind section 592(1). "The state is to stand aside for a time, pending the settlement of differences between employer and employees, to avoid the imputation that a strike may be financed through unemployment insurance benefits."[24] It is intended to reflect a "hands off" policy by the state until the labor dispute is terminated.[25] In the instant case, while it is true that the state did "stand aside . . . pending the settlement of differences between employer and employee . . ." the fact remains that the lag period following a strike is a cost reasonably to be anticipated by the striking employee. Within the reasoning of *Vingoe*, it is "proximately caused by the . . . labor controversy . . . ."[26]

A further policy consideration was not discussed by the instant court.

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19. 14 N.Y.2d at 239, 199 N.E.2d at 505, 250 N.Y.S.2d at 424.

20. N.Y. Lab. Law § 501. (Emphasis added.)

21. 14 N.Y.2d at 239, 199 N.E.2d at 505, 250 N.Y.S.2d at 424. The court expressly disagreed with the lower court's contention that "the claimants ought to have foreseen the consequences of idleness in some plants of an integrated industrial enterprise." Ibid.

22. 277 App. Div. 234, 98 N.Y.S.2d 932 (3d Dep't 1950), aff'd, 303 N.Y. 654, 101 N.E.2d 763 (1951).

23. E.g., Matter of Klein, 15 App. Div. 2d 201, 203, 222 N.Y.S.2d 672, 674 (3d Dep't 1961), aff'd, 12 N.Y.2d 678, 185 N.E.2d 909, 233 N.Y.S.2d 471 (1962) (memorandum decision); In the Matter of Cohen, 283 App. Div. 143, 145, 126 N.Y.S.2d 648, 650 (3d Dep't 1953).

24. 277 App. Div. at 236, 98 N.Y.S.2d at 934.

25. Division of Employment, N.Y. State Dep't of Labor, 1963-1964 Handbook for Employers 39. See 25 App. Div. 2d at 328, 269 N.Y.S.2d at 570.

26. 285 App. Div. 2d at 163, 136 N.Y.S.2d at 896.

In New York, an employer is given an "experience rating" and must maintain a minimum balance in his "experience rating account." All benefits paid to his employees are deducted from the account, thereby requiring the employer to increase his contributions.[27] Even if the state's policy does not prohibit benefits during a foreseeable lag period, the court has not considered the substantive rights of the employer. It seems inequitable to require the employer to finance the result of a strike against him.

The possible impact of this award, which would be unavailable in a majority of jurisdictions,[28] on future labor-management controversies in New York cannot be overlooked.[29] The policy enunciated in section 501 patently cannot be reconciled with the policy of section 592(1), as expressed in *Burger*.[30] Upon appeal,[31] consideration of employer rights as well as clarification of the state's policy, is in order.

27. Division of Employment, N.Y. State Dep't of Labor, 1963-1964 Handbook for Employers 20-27.

28. See Lewis, The Law of Unemployment Compensation in Labor Disputes, 13 Lab. L.J. 174 (1962).

29. The extent of the award can only be appreciated when it is realized that the strike at the Buffalo plant lasted for only five days but the ensuing lag period lasted for another ten. Thus, two-thirds of the total "out of work time" in this controversy was supported financially by unemployment insurance benefits.

30. 277 App. Div. 234, 98 N.Y.S.2d 932.

31. A motion for leave to appeal has been made. Letters From Arnold Weiss, of counsel for employer-appellant, to the Fordham Law Review, August 12, 1966.