Fordham Law Review

Volume 38 | Issue 2 Article 7

1969

Case Notes

CASE NOTES

Constitutional Law—New York Procedure for Commitment of Prisoners Who Become Mentally Ill While Serving Sentence Violates the Equal Protection Clause.—In 1931 Roy Schuster was convicted of the second degree murder of his wife, and was sentenced to from twenty-five years to life imprisonment.[1] He began serving his sentence in Sing-Sing Prison, but was transferred to Clinton State Prison in 1935. While at Clinton, Schuster was a model prisoner and at one time received a letter from the New York State Board of Higher Education commending him for his work there. In 1941, he became convinced of corruption in the administration of the prison. In that year and largely because of this belief, Schuster was transferred from Clinton to Dannemora State Hospital for the Criminally Insane pursuant to section 383 of the New York Correction Law.[2] After three unsuccessful petitions to the New York courts for habeas corpus,[3] Schuster was finally given a hearing in 1963 and found insane.[4] He then petitioned the United States District Court for the Northern District of New York for habeas corpus, alleging that he was

1. At the trial, Schuster's defense was based on the contention that he was in a state of panic at the time of the shooting and was not aware of what happened. To refute this defense, the state introduced expert testimony to show that Schuster was not, at that time, suffering from a mental disease or defect. United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1074 (2d Cir.), cert. denied, 90 S. Ct. 81 (1969).

2. N.Y. Correc. Law § 383 then read: "Whenever the physician or the psychiatrist of any one of the state prisons . . . shall certify to the warden or superintendent thereof, that a male prisoner confined therein and sentenced or committed thereto for a felony, is, in his opinion insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora state hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. . . . At the time of such transfer, there shall be transmitted to the superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician or psychiatrist, which shall be filed in the office of such superintendent who shall file a notice of such transfer in the office of the department of correction." Law of March 28, 1939, ch. 136, § 1, [1939] N.Y. Laws 167 (repealed 1962).

Schuster was transferred to Dannemora upon the recommendation of the one physician at Clinton, after one conversation. The doctor's summary of Schuster's mental health was that "'[h]e was circumstantial in his conversation, very talkative, complained bitterly. He was paranoid and suspicious. . . . This man was reported for writing letters regarding cowardly attacks made against him by the personnel and requested that something be done about it. In his letters he has shown the paranoid idea that members of the personnel are against him.'" United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1075 (2d Cir.), cert. denied, 90 S. Ct. 81 (1969).

3. Schuster petitioned for habeas corpus in 1950, 1960 and 1962. New York, however, did not recognize the right of an insane convict to challenge his confinement by this method until 1961. People ex rel. Brown v. Johnston, 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

4. People ex rel. Schuster v. Herold, 22 App. Div. 2d 762, 253 N.Y.S.2d 534 (3d Dep't 1964), aff'd, 15 N.Y.2d 968, 207 N.E.2d 527, 259 N.Y.S.2d 856 (1965).

sane and that the procedure by which he had been transferred to Dannemora was unconstitutional. The district court dismissed the petition.[5] On appeal, the court of appeals remanded for a hearing to determine whether Schuster's original transfer to Dannemora was corruptly motivated. The district court found Schuster insane, and again dismissed the petition. On appeal from the dismissal, the Court of Appeals for the Second Circuit held that the differences between the procedures established for the involuntary commitment of the civilly and criminally insane violated the equal protection clause of the fourteenth amendment.[6] *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 90 S. Ct. 81 (1969).

New York operates two state hospitals for prisoners who become mentally ill while serving their sentences.[7] Originally, transfer to either of these institutions was on a purely administrative basis.[8] Thus, based solely on a finding by the prison physician that Schuster was insane, the warden had him examined[9] and then ordered him committed to Dannemora. In the same year, an involuntarily committed civil patient would have been entitled to examination by two doctors, notice of the commitment proceeding, a hearing before a judge, and a court order of commitment.[10]

In 1943, section 408 was added to allow transfer to Matteawan only after a hearing with proper notice.[11] In 1962, such safeguards were also given to prisoners transferred to Dannemora.[12] Thus, at the present time, a prisoner cannot be transferred to either Dannemora or Matteawan without certification by two physicians, notice to the prisoner and a family member or friend, and a judicial order of commitment. Further, if any person entitled to notice requests a hearing, one must be held within five days. Witnesses may be presented, the prisoner examined, and the judge must render a decision in writing.[13]

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5. United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1077 (2d Cir.), cert. denied, 90 S. Ct. 81 (1969).

6. U.S. Const. amend. XIV, § 1. In relevant part, it provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

7. They are Matteawan and Dannemora. See generally Ass'n of the B. of the City of N.Y., Special Comm. on the Study of Commitment Procedures and the Law Relating to Incompetents, Mental Illness, Due Process and the Criminal Defendant, Appendix A (1968).

8. See note 2 supra.

9. It is unclear from the record whether the committing doctor had any psychiatric training. 410 F.2d at 1075.

10. Law of April 24, 1933, ch. 395, § 10, [1933] N.Y. Laws 930, as amended, N.Y. Mental Hygiene Law § 76 (Supp. 1969).

11. Law of April 8, 1943, ch. 382, § 1, [1943] N.Y. Laws 901, as amended, N.Y. Correc. Law § 408 (1968).

12. Law of April 9, 1962, ch. 393, § 1, [1962] N.Y. Laws 2210, as amended, N.Y. Correc. Law § 383 (1968).

13. See N.Y. Correc. Law §§ 383 (transfer to Dannemora), 408 (transfer to Matteawan) (1968).

There has been a corresponding growth in the procedural rights of the involuntarily committed civil patient.[14] Today, he is entitled to the rights he had in 1941, plus judicial review after the first sixty days of commitment, at the end of the first year, and periodically every two years thereafter. He may demand *de novo* review by a jury and is entitled to use the services of the Mental Health Information Service.[15]

By 1969, then, the rights of both the civilly and criminally mentally ill had been greatly expanded. Yet the rights of the involuntarily committed civil patient are far more extensive than those of the involuntarily committed prisoner. As the *Schuster* court noted:

> Thus, it is true, as a sage commented, that time is what we want most but use worst, for there remains today almost as wide a chasm between the roads traveled by non-prisoners and prisoners as existed in 1941 when Schuster first arrived at Dannemora.[16]

The court rejected the State's argument that Schuster's transfer was a mere administrative matter, not open to judicial review.[17] It noted that because of his transfer Schuster had been deprived of significant rights,[18] and the case was thus reviewable under *Johnson v. Avery*,[19] which held that:

> [D]iscipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.[20]

Among the rights which Schuster had been unable to exercise were the right to attack his conviction via *coram nobis*,[21] and, until 1962, the right to bring a petition for habeas corpus.[22] The court was also disturbed by the fact that, had he not been transferred to Dannemora, Schuster would have been eligible

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14. In 1965, New York revised many of its laws relating to the involuntary commitment of mental patients. This was done largely in response to a study by the New York City Bar Association. See Ass'n of the B. of the City of N.Y., Special Comm. to Study Commitment Procedures, Mental Illness and Due Process (1962).

15. N.Y. Mental Hygiene Law §§ 72-74, 88 (Supp. 1969).

16. 410 F.2d at 1083.

17. The state relied on People ex rel. Sacconanno v. Shaw, 4 App. Div. 2d 817, 164 N.Y.S.2d 750 (3d Dep't 1957) and Urban v. Settle, 298 F.2d 592 (8th Cir. 1962). Both of these cases held that transfer from a prison to a mental institution was an administrative matter not open to judicial scrutiny.

18. The court noted that confinement at Dannemora "significantly increased the restraints upon him, exposed him to extraordinary hardships, and caused him to suffer indignities, frustrations and dangers, both physical and psychological, he would not be required to endure in a typical prison setting." 410 F.2d at 1078.

19. 393 U.S. 483 (1969).

20. Id. at 486.

21. The court of appeals held in People v. Booth, 17 N.Y.2d 681, 216 N.E.2d 615, 269 N.Y.S.2d 457 (1966) that a prisoner may not attack his conviction via coram nobis until he has been declared sane.

22. See note 3 supra.

for parole in 1948, some 21 years ago.[23] In view of what the court called "the substantial deprivations, hardships and indignities such a move may produce,"[24] it found that the transfer was far more than an administrative matter, and was, therefore, reviewable.

In the past decade, many courts have taken cognizance of these procedural differences and their constitutional implications.[25] Thus, in the 1961 decision in *United States ex rel. Carroll v. McNeill*,[26] the Second Circuit struck down section 412 of the New York Correction Law.[27] Carroll had been convicted of robbery in 1934, and served a four year sentence. In 1949, Carroll was civilly committed to Pilgrim State Hospital. He later escaped, criminally assaulting a guard in the process. Upon recapture, he was returned to Pilgrim and immediately transferred to Matteawan pursuant to section 412, which allowed transfer of an ex-convict who had been civilly committed after serving his sentence if he still manifested criminal tendencies. The transfer was to be without a hearing, solely upon the written order of the Commissioner of Mental Hygiene. At the same time, however, a civilly committed patient who manifested dangerous tendencies but who had no criminal record was entitled to a hearing before transfer.[28] The court found this difference so arbitrary as to be constitutionally defective as a violation of both the due process and equal protection clauses of the Constitution.[29]

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23. The New York Parole Board has a policy of not paroling prisoners directly from Dannemora. 410 F.2d at 1080. In light of Schuster's excellent behavior prior to the transfer, it seems likely he would have received parole.

24. 410 F.2d at 1080. The court then went on to state that "judicial scrutiny is necessary to ensure that the procedures preceding the transfer adequately safeguard the fundamental rights of the prisoner." Id.

25. The courts have relied mainly on due process and equal protection grounds. However, in People ex rel. Cirrone v. Hoffmann, 255 App. Div. 404, 8 N.Y.S.2d 83 (3d Dep't 1938), the court relied in part on the prohibition against cruel and unusual punishment as grounds for granting a writ of habeas corpus where a prisoner was transferred from a prison to Napanoch Institution for Male Defective Delinquents.

26. 294 F.2d 117 (2d Cir. 1961), appeal dismissed as moot, 369 U.S. 149 (1962).

27. N.Y. Correc. Law § 412 then read: "The commisioner [sic] of mental hygiene may, by order in writing, transfer to the Matteawan state hospital any insane inmate of another state hospital, who was held under any other than a civil process, committed thereto upon the order of a court of criminal jurisdiction or of a judge or justice of such court; or any patient who has previously been sentenced to a term of imprisonment in any correctional institution, and who still manifests criminal tendencies, or any such patient who has previously been an inmate of the Matteawan state hospital." Law of April 8, 1959, ch. 264, § 1, [1959] N.Y. Laws 1016 (repealed 1965).

28. See Law of April 7, 1944, ch. 666, § 40, [1944] N.Y. Laws 1434 (repealed 1963).

29. The court noted: "A state may, of course, in the interests of effectuating its valid governmental policies, make reasonable classifications among its citizens whereby those in one class may be treated differently from those in another. . . . However, in so doing, a state must guard against classifications which are so arbitrary that they are repugnant to the equal protection clause of the Fourteenth Amendment." 294 F.2d at 121-22 (citations omitted).

In *People ex rel. Brown v. Johnston*,[30] also decided in 1961, the New York Court of Appeals for the first time allowed the use of habeas corpus to challenge the legality of a transfer from a prison to a mental institution.[31] Brown was given an indeterminate sentence of from one day to life and sent to Attica State Prison. He was later transferred to Dannemora and thereafter brought a petition for habeas corpus alleging that he was sane and that the transfer was illegal. The appellate division did not discuss the issue of sanity, but denied the writ on the ground that the place of confinement was an administrative matter, not subject to judicial review.[32] The court of appeals rejected this position, noting that while a prisoner ordinarily cannot challenge his place of confinement by a writ of habeas corpus, transfer from a regular prison to a facility for the mentally ill presented different problems. The court said: "we do not feel that the courts should sanction, without question, removals, in cases of alleged insane prisoners, which can conceivably be uncontrolled and arbitrary."[33] Noting that there was a difference between confinement in a prison and confinement in a mental institution "with deranged persons who are liable to harm and/or adversely affect him,"[34] the court continued,

> [I]t seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry. An individual, once validly convicted and placed under the jurisdiction of the Department of Correction . . . is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society.[35]

In 1966, the Supreme Court recognized that classifications between criminals and non-criminals for purposes of determining commitment procedures are unconstitutional. In the landmark case of *Baxstrom v. Herold*,[36] a unanimous Court struck down section 384 of the New York Correction Law[37] which

30. 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

31. Prior to this decision, the courts had refused to entertain a habeas corpus proceeding in such cases, holding that a prisoner could do so only after he had been declared sane by the Dannemora authorities.

32. 11 App. Div. 2d 819, 203 N.Y.S.2d 353 (3d Dep't 1960), rev'd, 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

33. 9 N.Y.2d at 484, 174 N.E.2d at 726, 215 N.Y.S.2d at 45.

34. Id. at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 45.

35. Id. at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 45-46. Thus, it appears that the New York courts have also rejected the proposition that transfer to a state hospital for the criminally insane is not subject to judicial review.

36. 383 U.S. 107 (1966).

37. N.Y. Correc. Law § 384 then read in part: "Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues mentally ill, the director shall make application for his commitment. Application for commitment shall be made to a court of record or judge thereof . . . . The application shall be made by a petition accompanied by the certificate of two examining physicians certifying to the defendant's need for institutional care and treatment. Three days notice of the application, together with a copy of the

allowed a prisoner transferred to Dannemora during his sentence pursuant to section 383 to be civilly committed to Dannemora when his sentence expired. In *Baxstrom*, the Director of Dannemora filed a petition in the Surrogate's Court requesting that the prisoner be civilly committed to Dannemora. A hearing was then held, and two physicians testified that Baxstrom was mentally ill and in need of hospitalization. The Surrogate signed an order committing him to the care of the Department of Mental Hygiene.[38] Thus, although he was officially under the care of the civil Department of Mental Hygiene, Baxstrom was in fact incarcerated in a facility run by the Department of Correction. The Supreme Court held that this procedure violated the equal protection clause, as any civilly committed person other than a sentence-expired prisoner was entitled to a jury trial and a judicial determination that he was dangerously mentally ill before he could be transferred to a facility run by the Department of Correction.[39] In so holding, the Court said:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.[40]

This trend has been followed by the New York courts, which have narrowed the gap between the civilly and criminally committed in several areas.[41] In the leading case of *People v. Lally*,[42] the defendant pleaded not guilty by reason of insanity and was acquitted. He was then committed to the care of the Commissioner of Mental Hygiene, who had him sent to Matteawan pur-

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petition, shall be served upon the prisoner and upon his nearest relative or, if none, upon any known friend within the state.

"If there is no demand for a hearing, the court to which application is made may, if satisfied that the prisoner is in need of institutional care and treatment immediately issue an order for the commitment of the prisoner to the custody of the commissioner of mental hygiene . . . .

"If a hearing is demanded, the court shall, or it may upon its own motion, issue an order directing a hearing upon the application at a time not more than five days from the date of such order." See Law of June 28, 1965, ch. 540, § 4, [1965] N.Y. Laws 1458 (repealed 1966).

38. The Surrogate and Baxstrom's family had no objection to Baxstrom's transfer to a civil state mental hospital, but the Department of Mental Hygiene had already, pro forma, decided that Baxstrom was not suitable for a civil hospital. 383 U.S. at 108-09.

39. Id. at 115.

40. Id. at 111.

41. See People v. Fuller, 24 N.Y.2d 292, 248 N.E.2d 17, 300 N.Y.S.2d 102 (1969) (a convicted addict is entitled to a separate hearing on the question of addiction before being involuntarily committed for treatment); People v. Bailey, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d 943 (1968) (a convicted sex offender is entitled to a separate hearing on the question of mental illness before being sentenced to an indefinite term); People ex rel. Goldfinger v. Johnston, 53 Misc. 2d 949, 280 N.Y.S.2d 304 (Sup. Ct. 1967) (a youth transferred from a correctional school to a home for defective delinquents is entitled to a hearing).

42. 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

suant to section 454 of the Code of Criminal Procedure.[43] That statute allows the judge in any proceeding in which the defendant is acquitted by reason of insanity to commit him to the custody of the Commissioner of Mental Hygiene who places the person in an appropriate facility. Thereafter, the defendant can be released only upon application of the Commissioner to the committing court or upon application of the defendant supported by a statement of the Commissioner, a court then ordering a hearing and the judge determining whether to release, conditionally release or recommit the defendant. The court of appeals found this section constitutional only by reading into it the requirement that all the guarantees of sections 74[44] and 85[45] of the Mental Hygiene Law, applicable in civil commitment cases, be observed. The court did this to "provide defendant with protection equal to that of other persons under the New York State statutes"[46] and "[t]o comply with the spirit if not the express language of the *Baxstrom* decision."[47]

In the face of these decisions, the district court in *Schuster* tried to distinguish *Baxstrom* on the ground that in the latter case, the prisoner was nearing the end of his sentence when he was committed and therefore should be entitled to the same safeguards as a civilly committed person. On the other hand, Schuster was serving an indeterminate sentence and was still a prisoner at the time of his transfer to Dannemora.[48] The Second Circuit rejected this distinction. It felt that *Baxstrom* stood for the broader proposition that "a finding of dangerous or criminal behavior does not obviate the necessity for a separate and adequate determination of commitability."[49]

In light of the recent decisions applying the *Baxstrom* doctrine,[50] the court of appeals would seem to be correct in this regard. As the District of Columbia Circuit noted:

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43. See N.Y. Code Crim. Proc. § 454 (1958), as amended, N.Y. Code Crim. Proc. § 454 (Supp. 1969).

44. N.Y. Mental Hygiene Law § 74 (1965), as amended, N.Y. Mental Hygiene Law § 74 (Supp. 1969). This section sets out the procedure for review of commitment at the request of the committed person, a relative, or a friend.

45. N.Y. Mental Hygiene Law § 85 (1965), as amended, N.Y. Mental Hygiene Law § 85 (Supp. 1969). This section sets out the procedure under which a civilly committed patient can be transferred to Matteawan.

46. 19 N.Y.2d at 35, 224 N.E.2d at 92, 277 N.Y.S.2d at 660.

47. Id.

48. 410 F.2d at 1081.

49. Id. at 1082.

50. See Specht v. Patterson, 386 U.S. 605 (1967) (a convicted sex offender is entitled to a hearing to determine illness before sentence to an indefinite term); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (a defendant found not guilty by reason of insanity is entitled to a separate determination before commitment); Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967) (the same); United States ex rel. Carroll v. McNeill, 294 F.2d 117 (2d Cir. 1961), appeal dismissed as moot, 369 U.S. 149 (1962) (an ex-convict who became insane after release is entitled to the same rights before commitment as one who had no criminal record). See also cases cited in note 41 supra.

The Supreme Court struck down the New York system not because Baxstrom was reaching the end of his sentence, but because it held dangerousness is not relevant to the *procedures* for determining whether a "person is mentally ill *at all. . . .*" *Baxstrom* thus might be said to require the conclusion that while prior criminal conduct is relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination.[51]

Schuster then, like *Lally*, is also in "the spirit of *Baxstrom*." In fact, the court noted that *Baxstrom* "sparked an awareness that we cannot tolerate two classes of insane persons—criminal and non-criminal,—when we are asked to examine commitment procedures available to both."[52] Thus the court concluded that section 383 violated the equal protection clause and held that:

> [B]efore a prisoner may be transferred to a state institution for insane criminals, he must be afforded substantially the same procedural safeguards as are provided in civil commitment proceedings, including proper examination, a hearing upon notice, period- [sic] review of the need for commitment, and trial by jury.[53]

The court then remanded the case, directing the district court to hold such a hearing unless the state courts held a hearing within sixty days in accordance with the specified procedures.

Finally, the court discussed, although it did not rule upon, Schuster's alleged "right to treatment"[54] while confined at Dannemora. Noting that the statutory language under which Schuster was committed "contemplates that a prisoner will be committed to Dannemora only if he is mentally ill *and* in need of treatment,"[55] the court reasoned that the legislature must have presumed that one so committed would receive the treatment "the need for which justified the commitment."[56]

One of the first cases to recognize such a right to treatment was *Rouse v. Cameron*.[57] There, Rouse was acquitted of possession of a dangerous weapon and was committed to a state mental hospital. He brought a petition for habeas corpus, claiming his confinement was illegal because he was not receiving treatment. Citing its previous decision in *Ragsdale v. Overholser*,[58] the court noted:

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51. Cameron v. Mullen, 387 F.2d 193, 201 (D.C. Cir. 1967).

52. 410 F.2d at 1081.

53. Id. at 1073. It should be noted that the court said "substantially" and not "exactly" the same rights. The court noted that some differences could be tolerated. Among those noted was that a determination that a prisoner was dangerous might not be required before transfer to Matteawan. Although a civil patient is entitled to such a determination before he can be transferred, the fact that security at Matteawan and Dannemora is better and would thus discourage possible escape would be adequate grounds for different treatment. Id. at 1084.

54. The "right to treatment" philosophy was first expounded in Birnbaum, The Right to Treatment, 46 A.B.A.J. 499 (1960).

55. 410 F.2d at 1087.

56. Id.

57. 373 F.2d 451 (D.C. Cir. 1966).

58. 281 F.2d 943 (D.C. Cir. 1960).

Absent treatment, the hospital is "transform[ed] . . . into a penitentiary where one could be held indefinitely for no convicted offense, and this even though the offense of which he was previously acquitted because of doubt as to his sanity might not have been one of the more serious felonies."[59]

The court went on:

Had appellant been found criminally responsible, he could have been confined a year, at most, however dangerous he might have been. He has been confined four years and the end is not in sight. Since this difference rests only on need for treatment, a failure to supply treatment may raise a question of due process of law. It has also been suggested that a failure to supply treatment may violate the equal protection clause.[60]

In *Nason v. Superintendent*,[61] the Supreme Judicial Court of Massachusetts reached a similar conclusion. There, Nason had been charged with the murder of his wife, adjudged incompetent to stand trial and committed to Bridgewater State Hospital, a facility operated by the Massachusetts Department of Correction. The court examined a report which stated that although treatment at Bridgewater was substantially inferior to that provided in the state's other mental hospitals and that Nason's treatment had been almost non-existent, attempts were being made to improve the quality of the treatment. It therefore remanded the case to allow Bridgewater to improve generally and to give Nason treatment in particular.

If [adequate] treatment is not available on a reasonable, nondiscriminatory basis, there is substantial risk that constitutional requirements of equal protection of the laws will not be satisfied . . . .

. . . .

[I]f adequate treatment for Nason is not provided there within a reasonable time, the legality of his further confinement may be presented to the county court.[62]

Although the decisions which have recognized a right to treatment have not involved a person currently under penal sentence, the *Schuster* court noted, "it may be that this difference in and of itself does not provide an adequate basis for denying him the same protections."[63] However, since Schuster did not raise this question in the state courts, and since the state courts might wish to examine the application of a prior ruling to one in Schuster's situation,[64] the court declined "to consider whether Schuster may be further confined in

59. 373 F.2d at 453 (footnote omitted).

60. Id. (footnotes omitted).

61. 353 Mass. 604, 233 N.E.2d 908 (1968).

62. Id. at 612, 614, 233 N.E.2d at 914, 915.

63. 410 F.2d at 1088. The protection might be granted on equal protection grounds.

64. In People ex rel. "Anonymous" No. 1 v. La Burt, 17 N.Y.2d 738, 217 N.E.2d 31, 270 N.Y.S.2d 206 (1966), the court held that petitioner was mentally ill and denied his petition for habeas corpus. The court noted that if petitioner conceded his illness, he would have a remedy under N.Y. Mental Hygiene Law §§ 86, 88 to investigate the adequacy of his treatment.

Dannemora absent adequate treatment until he has presented his claims to a state court."[65]

In his strong dissent, Judge Moore characterized the majority opinion as "judicial legislation by the federal courts."[66] While he agreed with the majority in its conclusion that injustice had apparently been done and also agreed that the situation should be remedied, Judge Moore felt that the remedy should be left to the courts of New York. He viewed the majority opinion as, in fact, enacting a law for New York as to the precise procedure which must be afforded mentally ill prisoners.

He also took issue with the right to treatment argument as analyzed by the majority. Although he agreed that there was a constitutional basis for such a right, he noted:

> How shocked would be the draftsmen of the Constitution if they had known that they were protecting the right to treatment of the mentally ill exclusively for ultimate federal court decision. Rather, in my opinion, they would have said that such questions should be reserved for the States.[67]

Judge Moore agreed with the majority that the issue should be decided by the state courts and, further, he believed that the state courts would give Schuster a hearing on the issue of sanity.

Finally, Judge Moore's dissent hit the opinion where it is probably most vulnerable—the form of relief granted. He found a substantial inconsistency in "telling Schuster to present his claims to a State court and remanding his case to the district court"[68] for a hearing if the state court did not hold one.

The procedural aspects of the opinion, then, should come as a surprise to no one. They follow both legislative and judicial precedent and were probably inevitable in light of *Baxstrom*.[69] It should also be noted that the court's decision implements the recommendations of the Association of the Bar of the City of New York.[70]

The more interesting aspect of the opinion, then, is that yet another court has added its voice to the defenders of the right to treatment philosophy.[71] Moreover, in denying certiorari, the Supreme Court has allowed *Schuster* to remain as the strongest opinion in favor of the right to treatment in the country.

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65. 410 F.2d at 1089.

66. Id. at 1091.

67. Id. at 1093.

68. Id. at 1094.

69. The court, moreover, indicated that the effect of its decision would probably be slight. However, even if all the prisoners in Department of Correction hospitals should demand their full procedural rights guaranteed by the decision, the court noted that "[i]f we open any 'floodgate' today . . . it is only to provide a flood of long-overdue relief." Id. at 1087.

70. See note 7 supra.

71. See Morris, The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York, 17 Buffalo L. Rev. 651 (1968).

Further, the District of Columbia Circuit, in a strong opinion by Judge Skelly Wright, has cited *Baxstrom* with approval.[72]

Other courts have recognized that, given all the procedural safeguards possible under the equal protection clause, a mental patient may still find himself in a "mental prison"[73] and not a mental hospital. As long as the state insists that such persons be committed and separated from society, then it takes on the corresponding obligation to see that these persons are adequately treated. The *Schuster* court suggests that even those "twice cursed"[74] have the right to such treatment.

Constitutional Law—Requirement That a Convicted Indigent Reimburse County for Assigned Counsel as a Condition of Probation Held to Violate Sixth Amendment.—Plaintiff, an indigent, had been convicted of possession of a dangerous drug without a prescription. She was put on probation, a condition of which was that she reimburse the county for her assigned counsel. Plaintiff sought a writ of habeas corpus on the ground that this condition was unconstitutional. The Supreme Court of California granted the writ holding that the condition was a violation of plaintiff's right to counsel and therefore unconstitutional. *In re Allen*, 71 Cal. 2d 409, 455 P.2d 143, 78 Cal. Rptr. 207 (1969).

The court's decision was based on the contention that the condition would have a chilling effect on the exercise of the constitutionally protected right to have counsel appointed. In four areas, courts have consistently refused to permit legislation or procedures which might penalize a person for exercising his constitutional rights. It was for this reason that the Supreme Court struck down the death penalty provision of the Federal Kidnapping Act.[1] According to that provision, a defendant could only receive the death penalty if the jury so decided. He could thus, by waiving a jury trial, insure, at worst, a life sentence. The Supreme Court found that the effect of this statute was to deter a suspect from requesting a jury trial,[2] a right guaranteed him under the sixth amendment.[3]

In a second case[4] the Supreme Court found that a defendant who invoked

72. Matthews v. Hardy, — F.2d — (No. 22,315 D.C. Cir. Aug. 29, 1969).

73. See Morris, supra note 71, at 652.

74. 410 F.2d at 1073.

1. 18 U.S.C. § 1201(a) (1964). Under this statute a jury's recommendation was required for the imposition of the death penalty. See also Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938); Robinson v. United States, 264 F. Supp. 146 (W.D. Ky. 1967), aff'd per curiam, 394 F.2d 823 (6th Cir. 1968), cert. denied, 393 U.S. 1057 (1969).

2. United States v. Jackson, 390 U.S. 570 (1968). "[T]he death penalty provision of the Federal Kidnapping Act imposes an impermissible burden upon the exercise of a constitutional right . . . ." Id. at 572.

3. U.S. Const. amend. VI.

4. Griffin v. California, 380 U.S. 609 (1965). In referring to comment on the failure to

the fifth amendment and would not testify in his own behalf should not have his silence commented upon by judge[5] or prosecutor.[6] The Court reasoned that if such comment were permitted, a defendant might feel compelled to testify, in contravention of his right not to incriminate himself.[7]

The third situation[8] involved a state statute which provided that a public employee must waive his right not to testify before a grand jury under threat of discharge.[9] The Court found that the fear of losing his employment might well cause the employee to forego his absolute constitutional right against self-incrimination.[10]

In still another set of circumstances,[11] the Court ruled that legislation providing that teachers could not be hired unless they first submitted a list of all associations and organizations to which they belonged[12] was an unconstitutional infringement on the teachers' freedom of association.[13]

In all of these cases the Court's rationale was that "[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."[14] It is readily understandable that once a condition is placed on a constitutional right, this right ceases to be absolute and is thus subject to arbitrary limits and restraints.[15] In speaking of the motivating forces which prompt such legislation to be enacted at the expense of the rights of the accused, the Court said, "[w]hatever might be said of Congress' objectives, they cannot be pursued by means that *needlessly chill the exercise of basic constitutional rights.*"[16]

The right to counsel is secured for every person by the sixth amendment. Only recently, however, has it been established that this amendment contemplates not only those who can afford counsel, but those who are indigent.[17]

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testify the Court said, "[i]t is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Id. at 614. See also Murphy v. Waterfront Comm., 378 U.S. 52 (1964).

5. 380 U.S. at 610.

6. Id. at 615.

7. Id.

8. Gardner v. Broderick, 392 U.S. 273 (1968). The Supreme Court said, "[i]n any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." Id. at 279. See also Uniformed Sanitation Men Ass'n v. Commissioner, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967).

9. N.Y. Const. art. 1, § 6; N.Y. City Charter §1123 (1963).

10. See U.S. Const. amend. V.

11. Shelton v. Tucker, 364 U.S. 479 (1960).

12. No. 10 [1958] Ark. Acts (2d Ex. Sess.) at 2018.

13. "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." 364 U.S. at 490.

14. Miranda v. Arizona, 384 U.S. 436, 491 (1966).

15. Id. at 478-79.

16. United States v. Jackson, 390 U.S. 570, (1968) 582 (emphasis added).

17. Gideon v. Wainwright, 372 U.S. 335 (1963).

In the case of the indigent, the state and the private attorney must bear the financial burden.[18] Even though this idea is comparatively new, it is rarely opposed.[19] It is recognized that ". . . reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[20] The reasoning is simple: a fair trial is essential to due process and the assistance of counsel is essential to a fair trial.[21] The right of the indigent to counsel is as constitutionally protected as that of the wealthy.

The practice of compelling repayment to the county for assigned counsel as a condition of an indigent's probation must be examined in light of the previously mentioned line of cases.[22] If an indigent is aware that the legal services offered him gratuitously in the beginning of the proceedings might later result in his not being released on probation, will not his right to the assistance of counsel be affected? If he is guilty and feels he will be convicted, will he be inclined to add to his problems the dilemma of reincarceration or repayment? And if he is innocent, why should he risk indebtedness if he believes that he could be exonerated without additional expense simply by cooperating?

Finally, there is the question of fairness in making the indigent defendant responsible for a contract when he was a party neither to the process of the attorney's selection nor to the agreement as to the attorney's fee. This certainly is not in accord with the well-settled contract principle[23] that one who was not a party to a contract is not liable on that contract.[24]

The foregoing was the reasoning of the Supreme Court of California. On the peculiar facts of the *Allen* case, the reasoning is not open to serious question. Since the financial status of the indigent did not improve between the date counsel was first appointed and the date of probation, the attaching of the reimbursement condition tended to render the idea of "free counsel for the indigent" somewhat hollow. Even if, as in the *Allen* case, the defendant did not understand the court's intention until it was too late to affect his decision as to whether or not to exercise his right to have counsel appointed, the effect would be to deter others who later learned of the practice.[25]

One problem which the Supreme Court of California did not consider was whether the condition constituted a denial of equal protection. The California Penal Code required that probation conditions be reasonable and that they

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18. See the rates provided for by the Criminal Justice Act, 18 U.S.C. § 3006A(d) (Supp. IV, 1969).

19. Cf. Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); Nielsen v. Turner, 287 F. Supp. 116 (D. Utah 1968).

20. Gideon v. Wainwright, 372 U.S. at 344.

21. Id.

22. See text accompanying notes 4-12 supra.

23. See 1 S. Williston, Contracts § 36 (3d ed. W. Jaeger 1957).

24. Indeed, it would undermine the integrity of the court since the court seemingly has acted inconsistently with its promise to make counsel available gratuitously.

25. In re Allen, 71 Cal. 2d at 413, 455 P.2d at 145, 78 Cal. Rptr. at 210 (1969).

be designed for the rehabilitation of the probationer.[26] It may indeed be reasonable to require a non-indigent to pay his attorney in that his compliance with such a condition would evidence a rehabilitative state of mind. But the same test applied in the case of an indigent would show that the condition cannot stand. In this case, it is not reasonable, since the court in assigning counsel has already determined that the indigent is unable to pay. Furthermore, although in the case of a non-indigent, his compliance with such a condition would indicate a rehabilitative state of mind, in the case of an indigent, his compliance would indicate nothing, since it is not unwillingness but inability which causes his failure to comply. The elements of rehabilitation and reasonableness then would only be present in the case of a person capable of complying.[27] A denial of equal protection of the laws is certainly a valid finding in any situation where the poor defendant is at a disadvantage as compared to the rich one.[28]

The problem with the *Allen* decision lies in the broad language of the opinion. The court did not restrict its reasoning to the particular facts—a probation situation with an indigent whose financial position has not changed. The court implied that once counsel is appointed for the indigent with the understanding that he will not have to pay for it, under no circumstances would it be constitutional to order him to pay all or part of the counsel fees. This would seemingly include a situation where the person ceases to be indigent.

The Criminal Justice Act of 1964 provides that each district court with the approval of the circuit shall place in operation a plan for furnishing representation for defendants who are financially unable to obtain an adequate defense.[29] The Second Circuit has such a plan, which contains the following provision:

> If at any time after the appointment of counsel the District Judge finds that the defendant is financially able to obtain counsel or to make partial payment for his representation, the District Judge may terminate the appointment of counsel or he may direct that payment be made to the appointed counsel or to the bar association which made such counsel available for appointment or to the Legal Aid Society.[30]

A simple illustration will show that in given circumstances the case under discussion would require a different result than the above provision. Suppose *A*, an indigent defendant accused of a felony, is assigned counsel for what proves to be a lengthy and costly proceeding. After several months, the trial nearing conclusion, *A* inherits a large sum of money. The judge orders *A* to pay his own fees for the entire proceeding. *A* objects citing *Allen*.

26. Cal. Penal Code § 1203.1 (West Supp. 1968). For an analysis of other state's requirements see Note, Judicial Review of Probation Conditions, 67 Colum. L. Rev. 181 (1967).

27. Rehabilitation may be indirectly present to the extent that payment of the debt would probably necessitate finding employment which itself is considered rehabilitative.

28. See Griffin v. Illinois, 351 U.S. 12 (1956). The Court found a requirement that would-be appellants pay for a transcript to be a denial of equal protection of the laws to those who could not afford it.

29. 18 U.S.C. § 3006A(a) (1964).

30. Plans Under the Criminal Justice Act of 1964 (18 U.S.C. § 3006(A)) (Second Circuit 1968).

The court's direction in this hypothetical case is certainly consistent with the Second Circuit provision. But the broad language of the court in the *Allen* case suggests that perhaps the provision violates the sixth amendment. To resolve the apparent conflict, it is necessary to examine *A*'s initial choice and his motives—both of which are relevant to the constitutional theory underlying assignment of counsel for the indigent.

A's right to have counsel appointed is predicated on his indigency. But this does not entitle him to any greater right than a non-indigent. Once it is determined that he qualifies as indigent, it must be asked what is really being protected by affording him the right to have counsel made available at the expense of others. Is it *A*'s right to have counsel assigned merely because he qualifies, even though he would not have hired a lawyer himself had he sufficient funds? It would seem that what is guaranteed is that if *A* is willing to pay but cannot, then his inability is not permitted to affect his chance of a fair trial. In the normal situation, however, it cannot be ascertained whether a given indigent would hire a lawyer if he were of limited but adequate funds.[31] But if it could be ascertained, it would be unfair and indeed a denial of equal protection of the laws to those of modest means who must shoulder the burden themselves, to permit *A* to avoid paying when and if he subsequently becomes able to do so. For it is ability and not willingness that is determinative.[32]

The *Allen* case is consistent with the line of cases previously discussed[33] because freedom, in the form of probation, is at stake. The indigent is risking the penalty of incarceration by exercising his right to have counsel assigned.[34] The fear of such penalty is indeed likely to have a chilling effect on this exercise. But the hypothetical case is distinguishable from that line of cases. It is no penalty for the indigent to be required to pay his attorney's fees. This is a just debt, payment of which is due when the indigent becomes able. The right to have counsel appointed endures only so long as the condition of indigency endures. Fear of payment being exacted would only deter an indigent from exercising his right to have counsel appointed where, were he not indigent, he would not wish to hire and pay an attorney. It is arguable that courts should not recognize this as a chilling effect.

In practice the courts rarely make further inquiry as to the financial status of the indigent once counsel has been appointed.[35] Also, a recent study of the spending habits of indigent or near indigent consumers has disclosed a penchant on their part for purchasing on credit.[36] This might lead to the

31. As provided in the Criminal Justice Act, the determination of indigency is to be made by a commissioner and the suspect is required to sign an affidavit of indigency.

32. Here the rights of the poor are equal to those of the rich; they are not superior.

33. See text accompanying notes 4-12 supra.

34. See Siegal, Gideon, and Beyond: Achieving an Adequate Defense for the Indigent, 59 Crim. L.C. & P.S. 73 (1968).

35. See P. Martineau, Social Classes and Spending Behavior, in Understanding Consumer Behavior (M. Grossack ed. 1964).

36. See Note, Adequate Representation for Defendants in Federal Criminal Cases: Appointment of Counsel Under the Criminal Justice Act of 1964, 41 N.Y.U.L. Rev. 758, 773

conclusion that further debt or obligation would not necessarily act as a deterrent. A suggestion which might be drawn from the case, however, is that in those districts which have provisions for recovery and reimbursement[37] the defendant should be advised of that possibility. This would alleviate the objection as to contractual liability raised earlier.

Thus, in those few instances that an indigent subsequently becomes able to pay, and the court becomes aware of this ability, the exacting of repayment does not appear to be repugnant to the Constitution. The Second Circuit provision and others like it should be followed with the *Allen* decision restricted to its facts.

Constitutional Law—Residence Requirements for Tuition Purposes Held Not Violative of Equal Protection.—Petitioner, an Ohio resident, married a California resident on July 1, 1967, and moved to California with her husband on July 13, 1967, with the intent of making that state her permanent home. When she enrolled in the University of California in the fall of 1967, she was classified as a nonresident student according to the California statute, which contained a one year residence requirement,[1] and was charged the higher nonresident tuition fee. She brought an action alleging that the one year residence requirement infringed on her right to travel and was therefore unconstitutional according to the rule of *Shapiro v. Thompson*.[2] The trial court dismissed her complaint.[3] On appeal, the California Court of Appeal held that residence requirements for tuition purposes did not affect the right to travel, and therefore did not fall within the purview of *Shapiro*. The court held such requirements to be neither arbitrary nor unreasonable, thus not violating the equal protection clause.[4] *Kirk v. Board of Regents*, 273 Cal. App. 2d 463, 78 Cal. Rptr. 260 (Dist. Ct. App. 1969).

Prior to *Shapiro*, the courts had considered the constitutionality of residence requirements in three major areas: voting, tuition at state universities, and welfare. In most of these cases, the basic inquiry was whether or not such statutes were reasonably related to a legitimate state interest or purpose. This test is what the Supreme Court has called the "traditional" equal protection test.[5]

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n.113 (1966) (mentioning among others, Plan 9th Cir. 8(a); Plan D. Mass. (F); Plan D. N.J. C(1)(k)).

37. See text accompanying note 27 supra.

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1. Cal. Educ. Code § 23054 (West 1969) reads in part: "A 'resident student' means any person who has been a bona fide resident of the State for more than one year immediately preceding the opening day of a semester during which he proposes to attend the university."

2. 394 U.S. 618 (1969).

3. See Kirk v. Board of Regents, 273 Cal. App. 2d 463, 466, 78 Cal. Rptr. 260, 261 (Dist. Ct. App. 1969).

4. U.S. Const. amend. XIV, § 1.

5. 394 U.S. at 638. See Walters v. St. Louis, 347 U.S. 231 (1954); Lindsley v. Natural

In *Drueding v. Devlin*,[6] one of the early voting cases, a federal district court held that a one year state and six month's county residence requirement for voting purposes was reasonably connected with the legitimate state interests of protecting Maryland citizens against voter fraud, and in insuring that all its voters have a stake in their community.[7] However, in *Carrington v. Rash*,[8] a provision of the Texas constitution prohibiting nonresident members of the Armed Forces from ever becoming residents of Texas for voting purposes was struck down. The Supreme Court held that the absolute presumption of nonresidence for a tenuous administrative advantage[9] created an invidious classification denying servicemen equal protection of the laws.[10]

Statutes imposing residence requirements for lower tuition at state universities have also been upheld as being rationally related to the purpose of financing the state's higher educational facilities.[11] In *Clarke v. Redeker*,[12] a federal district court held that a regulation of the State University of Iowa classifying students as residents or nonresidents for tuition purposes was "not arbitrary and unreasonable and bears a rational relation to Iowa's object and purpose of financing, operating and maintaining its educational institutions."[13] Where, however, such statutes created an absolute presumption of nonresidence for all out of state students, *i.e.*, the student was not afforded the opportunity to prove his subsequent residence, they have been held to be arbitrary, unreasonable, and violative of equal protection.[14]

Unlike the decisions with respect to voting and tuition, there was a decided split in authority in those cases dealing with residence requirements for

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Carbonic Gas Co., 220 U.S. 61 (1911); American Commuters Ass'n v. Levitt, 279 F. Supp. 40 (S.D.N.Y. 1967).

6. 234 F. Supp. 721 (D. Md. 1964), aff'd mem., 380 U.S. 125 (1965).

7. 234 F. Supp. at 724. See also Hall v. Beals, 292 F. Supp. 610 (D. Colo. 1968), vacated per curiam as moot, 38 U.S.L.W. 4006 (1969), where a three judge district court, citing Drueding v. Devlin, held that a Colorado statute imposing a six month residence requirement for voting for President and Vice-President of the United States was not so unreasonable as to constitute a denial of equal protection.

8. 380 U.S. 89 (1965).

9. The state of Texas alleged that it was too difficult to determine whether or not a serviceman stationed in that state (who is necessarily a transient due to the nature of military assignments) has become a "true" resident. The advantage of the constitutional provision is that it obviously does away with the necessity of making this determination. 380 U.S. at 94-95. The Court pointed out that other persons in similar situations (e.g., students, hospital patients and civilian employees of the United States government) were given the opportunity to prove Texas residence for voting purposes. Id. at 95. Furthermore, Texas had determined residence for servicemen for purposes other than voting (e.g., divorce jurisdiction). Id. at 95-96. Thus, the alleged administrative advantage of the constitutional provision was described by the Court as "remote." Id. at 96.

10. Id. at 96.

11. Bryan v. Regents, 188 Cal. 559, 205 P. 1071 (1922).

12. 259 F. Supp. 117 (S.D. Iowa 1966).

13. Id. at 123.

14. Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960).

obtaining welfare benefits. Such requirements have been upheld as being reasonable methods to provide relief to bona fide state residents;[15] to protect the taxpayer;[16] and to place conditions on benefits which the states (or Congress) are not obligated to provide.[17] On the other hand welfare residence statutes have been declared arbitrary and unreasonable as being contrary to the purpose of the state's welfare laws;[18] as not being reasonable methods to accomplish their avowed purposes (either to keep out of the state those who would enter solely to obtain welfare or to protect the budget);[19] and as having no purpose whatsoever.[20]

The early court decisions usually limited their constitutional consideration solely to the issue of reasonableness. *Shapiro v. Thompson*,[21] a landmark welfare decision, provided the United States Supreme Court with its first opportunity to consider the effect of residency requirements on the constitutional right of interstate travel.[22] In *Shapiro*, respondents were residents of Connecticut, the District of Columbia, and Pennsylvania. They all applied for welfare in their respective jurisdictions, and were denied aid since they had not been residents for at least a year prior to their applications for welfare assistance. They brought actions alleging that such requirements were unconstitutional interferences with their right to travel, and, as such, constituted a denial of equal protection of the law.[23]

On appeal the Supreme Court held that the right to travel was fundamen-

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15. People ex rel. Heydenreich v. Lyons, 374 Ill. 557, 566, 30 N.E.2d 46, 51 (1940). See 8 U. Chi. L. Rev. 544 (1941).

16. Harrell v. Board of Comm'rs, 269 F. Supp. 919, 921 (D.D.C. 1967).

17. Id. at 921; People ex rel. Heydenreich v. Lyons, 374 Ill. 557, 565, 30 N.E.2d 46, 51.

18. Robertson v. Ott, 284 F. Supp. 735, 738 (D. Mass. 1968); Harrell v. Tobriner, 279 F. Supp. 22, 27 (D.D.C. 1967); Green v. Department of Pub. Welfare, 270 F. Supp. 173, 177 (D. Del. 1967).

19. "Even if we assume, however, that some people move in order to enjoy a greener welfare pasture, and that a state may properly deny aid payments to persons who come with that intent, we think the one year residence requirement is not reasonable in the light of such purpose. It has the effect of a conclusive presumption that all people who need aid within a year have come for that purpose." Ramos v. Health and Social Services Bd., 276 F. Supp. 474, 478 (E.D. Wis. 1967) (note the parallel between this argument and the reasoning in Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960), where a conclusive presumption that all students who had not resided within the state of Idaho for one year were in the state solely for educational purposes, was similarly held as unreasonable).

20. Smith v. Reynolds, 277 F. Supp. 65, 67 (E.D. Pa. 1967).

21. 394 U.S. 618 (1969).

22. The right to travel is not explicitly mentioned in the Constitution. For a summary of the various constitutional arguments utilized by the courts to justify this right, see 394 U.S. at 630 n.8. For a more complete discussion of these justifications, see 394 U.S. at 666-71 (dissenting opinion); 36 Fordham L. Rev. 612, 613-14 (1968).

23. Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967). Thompson v. Shapiro, supra, has been the subject of extensive comment in the Law Reviews. See, e.g., 36 Fordham L. Rev. 612 (1968); 53 Iowa L. Rev. 491 (1967); 52 Minn. L. Rev. 561 (1967); 29 U. Pitt. L. Rev. 138 (1967).

tal,[24] and that the welfare residence statutes were a penalty on the exercise of this right.[25] As a result of this infringement, the Court rejected the contention that a showing of a rational relationship between the statutes and legitimate state objectives would be sufficient to satisfy the equal protection clause,[26] and went on to hold that only a compelling governmental interest could justify the waiting period requirement.[27] Employing this "compelling interest" test, the Court found that neither the protection of the state's fiscal integrity,[28] the facilitation of budget predictability,[29] administrative efficiency,[30] nor protection against fraud[31] were sufficient "compelling interests" to justify the existence of residency requirements. In addition, the purpose of keeping indigents seeking welfare out of the state was held to be constitutionally impermissible in the light of this test.[32] The Court also stated that § 402(b) of the Social Security Act[33] was unconstitutional to the extent that the statute may authorize the imposition of such requirements.[34] Chief Justice Warren, joined by Justice Black dissented. The Chief Justice reasoned that whatever burden was imposed on the right to travel, that burden was imposed on interstate commerce,[35] that Congress had consented to state regulation of this commerce,[36] and that Congress had a rational basis for doing so.[37] The restriction on the right to travel was also thought by the

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24. 394 U.S. at 629.
25. Id. at 634.
26. Id.
27. Id.
28. Id. at 633.
29. Id. at 634.
30. Id. at 636.
31. Id. at 637.
32. Id. at 631.
33. 42 U.S.C. § 602(b) (1964). This statute requires the Secretary of Health, Education and Welfare to disapprove any state plan for aid which imposes a residence requirement of greater than one year.
34. 394 U.S. at 641. The Court also expressed the opinion that it did not think that § 402(b) authorized such requirements but rather that the statute merely allowed the states to set them up without risking the penalty of losing federal aid. Id. at 639. In holding the statute unconstitutional to the extent that it might have authorized residence requirements, the Court was obviously attempting to cover all possibilities. This seems to be a departure from the rule expressed in Crowell v. Benson, 285 U.S. 22, 62 (1932) where it was stated that "[w]hen the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Under this rule, the holding of unconstitutionality of § 402(b) would seem unnecessary.
35. 394 U.S. at 648 (dissenting opinion). The transportation of persons has long been regarded as "commerce." See Hoke v. United States, 227 U.S. 308, 320 (1913). In Caminetti v. United States, 242 U.S. 470, 491 (1917) the Supreme Court held that the congressional prohibition of the transportation of persons interstate for immoral purposes "has its constitutional sanction in the power of Congress over interstate commerce."
36. 394 U.S. at 644-45 (dissenting opinion).
37. Id. at 651 (dissenting opinion).

Chief Justice to be insubstantial.[38] He warned of the effect of the decision on other state laws[39] involving residency requirements such as professional licensing, voting and attendance at state universities.[40]

In each of the lower court cases, it was determined whether or not residence requirements were *reasonable* prerequisites for voting, tuition or welfare grants. If the statute was reasonable, it passed constitutional scrutiny. *Shapiro* changed the emphasis in residency cases from "reasonableness" to a demand that the state prove a compelling governmental interest.[41]

The application of the *Shapiro* holding to other areas was not specifically considered by the Court. In a footnote to its opinion the Court did state that "[w]e imply no view of . . . residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel."[42] In *Kirk* the California Court of Appeal was required to interpret the tuition residence requirement in terms of the right to travel and the "compelling interest" test dictated by *Shapiro*. At this point, the court was at a crossroads in the law. It could find that the tuition residence requirement either infringed on the right to travel, in which case the coverage of the rules set forth in *Shapiro* would be extended, or it could hold that the right to travel was not affected, and that the equal protection standards utilized in residence cases prior to *Shapiro* would control. The California court chose the second of these alternatives. It held that the tuition residence classification "does not deter any appreciable number of persons from . . . moving into the state."[43] The increasing population of the state of California was cited to support this conclusion.[44] Since the right to travel was held not to be affected, the court stated that the tuition residency requirement did not have to be justified by a "compelling state interest," and that the "ordinary" (pre-*Shapiro*) "reasonableness" test could be applied.[45] The court went on to say that "[t]he higher tuition charged nonresident students tends to distribute more evenly the cost of operating and supporting the University of

38. Id. at 650 (dissenting opinion).

39. "If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote." 394 U.S. at 654 (dissenting opinion).

40. Id. at 655 (dissenting opinion).

41. Id. at 634, 638. It is probable that the welfare residence requirements would not have passed even the traditional test in that "appellants in these cases do not use and have no need to use the one-year requirement . . . . Thus, even under traditional equal protection tests . . . [a one year residence classification] would seem irrational. . . ." Id. at 638.

42. 394 U.S. at 638 n.21.

43. 273 Cal. App. 2d at 473, 78 Cal. Rptr. at 266.

44. Id. 474 n.10, 78 Cal. Rptr. at 266 n.10.

45. Id. at 474, 78 Cal. Rptr. at 267.

California between residents and nonresidents attending the university. . . . [I]t appears to be a reasonable attempt to achieve a partial cost equalization . . . ."[46] The court also held that the residence statute was neither arbitrary nor unreasonable since, although all out of state students are presumed to be in California solely for educational purposes, this presumption is rebuttable, and can be controverted by sufficient evidence of residence.[47] Thus, the durational residence requirement was held to be reasonable and rationally related to a legitimate state interest, thereby satisfying the "traditional" equal protection test.[48]

The distinction drawn by the California court is a realistic one. The patent purposes of establishing residence requirements for welfare benefits was, at least in part, to prevent an influx of indigents from entering the enacting state to receive aid.[49] In contrast, the purpose of California with respect to its tuition residency requirements was merely the equitable distribution of costs.[50] There was certainly no obvious inhibition on migration into the state. It is possible, however, to find, despite the absence of an inhibitory purpose, that the inevitable effect of the tuition residence requirement is to penalize interstate travel.[51] If so, then the state would be required to satisfy

46. Id. at 474, 78 Cal. Reptr. at 269.

47. Id. at 477, 78 Cal. Rptr. at 268-69. The applicable statute contains no mention of such a presumption. See supra note 1. In Murphy v. Traveler's Ins. Co., 92 Cal. App. 2d 582, 207 P.2d 595 (Dist. Ct. App. 1949) the court stated that "[a] domicile once acquired is presumed to continue until it is shown to have been changed, and to constitute the new domicile two things are indispensable: First, residence in the new locality; and second, the intention to remain there." Id. at 587, 207 P.2d at 597. It is possible that the reasoning behind this case formed the basis for the similar conclusion in Kirk. If, in fact, the statute does not contain a rebuttable presumption, i.e., there is no way to establish residency in the case of out of state students, then the statute is clearly arbitrary and unreasonable, and constitutes a deprivation of equal protection. See notes 8, 14 & 19 supra.

In Kirk, the petitioner was afforded the opportunity to prove her residence, subsequent to her marriage, by Cal. Gov't Code § 244(e) (West, 1966) which reads: "The residence of the husband is the residence of the wife, provided that a married woman who is separated from her husband may establish her own residence." This statute would not help the petitioner win her case, however, since she had not been married for at least one year prior to her admission to the University of California, and the court held that she could not "tack on" the period of her husband's residence in California prior to their marriage. 273 Cal. App. 2d at 469-70, 78 Cal. Rptr. at 263-64.

48. 273 Cal. App. at 478, 78 Cal. Rptr. at 269.

49. "There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions." 394 U.S. at 628.

50. 273 Cal. App. 2d at 477-78, 78 Cal. Rptr. at 269.

51. The argument used by the court in Kirk, that the increasing California population leads to the conclusion that the tuition residency requirement does not affect the right to travel, is particularly weak. Welfare residence requirements did not affect the right to travel of the general population, rather they only affected a limited class of persons, i.e. indigents. Still, the Court held that the residence classifications were a penalty on the right to travel interstate. Similarly, although tuition residence requirements may not affect the travel of the general population, they could be struck down as inhibiting the right to travel of a limited class—students. "Residence tests impose a severe burden on interstate

the compelling interest test. *Shapiro* is a landmark case. Whether it is but the first of many future landmarks which will lead to the complete nullification of residency requirements in all areas of the law remains to be seen. Mr. Justice Brennan's footnote in *Shapiro* may indicate that the Court will travel slowly and cautiously along that road.

Criminal Law—Third Party Consent—Implied Coercion—Exception to General Rule That Search Warrant Has Coercive Effect on Subsequent Consent.—Police had obtained a search warrant authorizing the search of defendant, a high school student, and his school locker. The warrant was presented to the school vice-principal and, during a brief interrogation in the vice-principal's office, defendant was asked if he had marijuana in his locker. Defendant merely nodded in an uncertain manner, but after some persistence replied either "I guess so" or "Maybe." Defendant, the vice-principal, and a police detective then went to defendant's locker which the vice-principal opened with his master key. Marijuana was found in the locker inside defendant's jacket. Subsequently, the court of special sessions held the warrant to be ineffective insofar as the search of the locker was concerned and convicted defendant, upon his guilty plea, of unlawful possession of a narcotic drug.[1] The Supreme Court, Appellate Term, Second Department, reversed on the ground that the vice-principal's consent was not binding on defendant.[2] The court of appeals reinstated the holding of the court of special sessions.[3] Upon rehearing ordered by the United States Supreme Court,[4] the New York court again found defendant guilty on the grounds that the vice-principal had sufficient control over defendant's locker to consent to a search and such consent was not coerced by the fact that the police claimed to have a warrant. *People v. Overton*, 24 N.Y.2d 522, 249 N.E. 2d 366, 301 N.Y.S.2d 479 (1969).

The importance of procuring a search warrant lies in the fact that the Supreme Court has held that a search, in order to be *reasonable*,[5] must normally be conducted pursuant to a warrant.[6] However, not every search

movement, if severity is judged from the standpoint of the relevant citizens . . . ." Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 589 (1966).

1. See People v. Overton, 51 Misc. 2d 140, 273 N.Y.S.2d 143 (App. T. 1966).
2. Id.
3. People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967).
4. Overton v. New York, 393 U.S. 85 (1968).
5. Mr. Justice Frankfurter saw two protections emerging from the fourth amendment's broad proscription against official invasion: the right to be secure from intrusion into personal privacy and the right of self protection. He observed that "evidence of criminal action may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant." Frank v. Maryland, 359 U.S. 360, 365 (1959).
6. E.g., Chapman v. United States, 365 U.S. 610, 613 (1961); Johnson v. United States, 333 U.S. 10, 14 (1948); Gouled v. United States, 255 U.S. 298, 303-04 (1921).

requires a warrant. Searches and seizures may also be conducted pursuant to a lawful arrest[7] or as a result of a free and voluntary consent.[8]

The courts have held that "consent is the weakest possible basis for a search and must be shown to have been freely and voluntarily given."[9] The weakness of a consent search is more pronounced when a third party consents since the voluntariness aspect must be combined with the actual ability of the third party to consent.[10]

The Supreme Court has said little with regard to the relationships necessary for third parties validly to give their consent to a search.[11] The Court has, however, set up a broad outline for the lower courts to follow by its strong emphasis on the protection of personal rights. In *Jones v. United States*[12] the Court indicated that the right to object to a search is based on the protection of the individual rather than just the property right of the owner of the searched premises.[13] Accordingly, *Jones* was cited as authority in *Stoner v. California*[14] and *Chapman v. United States*[15] to support the holding that it is the individual's personal rights which are protected by the fourth amendment. In *Chapman*, a landlord gave police permission to enter a tenant's leased premises for the purpose of searching for illegally distilled alcohol. The permission was held invalid by the Court, which concluded that there was an invasion of the tenant's *personal* right of protection under the fourth amendment.[16] Similarly, in *Stoner*, a hotel clerk's consent to the search of a guest's room was struck down by the Court. Here the Court said, "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's or the hotel's."[17] However, the Court did not preclude the possibility of a defendant consenting through

7. People v. Loria, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 466 (1961), overruled on other grounds, People v. McQueen, 18 N.Y.2d 337, 344, 221 N.E.2d 550, 553, 274 N.Y.S.2d 886, 890 (1966).

8. McCray v. State, 236 Md. 9, 14, 202 A.2d 320, 323 (1964).

9. People v. Gonzalez, 50 Misc. 2d 508, 509, 270 N.Y.S.2d 727, 728 (App. T. 1966); accord, Amos v. United States, 255 U.S. 313 (1921); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Gregory, 204 F. Supp. 884 (S.D.N.Y. 1962).

10. In New York, the burden of proving voluntariness is on the state. People v. Austin, 53 Misc. 2d 963, 964, 280 N.Y.S.2d 433, 435 (Nassau Dist. Ct. 1967).

11. Note, Third Party Consent to Search and Seizure, 1967 Wash. U.L.Q. 12, 36. The Supreme Court has ruled a landlord cannot consent for a tenant, Chapman v. United States, 365 U.S. 610 (1961), and that a hotel clerk cannot consent for a guest, Stoner v. California, 376 U.S. 483 (1964). It has never passed on the right of a father to consent for his son, State v. Kinderman, 271 Minn. 405, 410, 136 N.W.2d 577, 581 (1965), nor considered the possibility of a wife waiving her husband's right to be protected from unreasonable searches and seizures, Amos v. United States, 255 U.S. 313 (1921).

12. 362 U.S. 257 (1960).

13. See 41 St. John's L. Rev. 82 (1966) for a discussion of the relationship between Jones v. United States, Stoner v. California and Chapman v. United States.

14. 376 U.S. 483 (1964).

15. 365 U.S. 610 (1961).

16. Id. at 617.

17. 376 U.S. at 489.

an agent.[18] Thus, without enumerating the exact relationships which would be necessary, the Supreme Court has held that a third party can consent to a search, provided that the defendant's personal rights are protected at all times.

The state and lower federal courts have reached varying decisions as to who can consent, ranging from the holding that there can be no third party consent[19] to the holding that there is a reasonable search even where police are mistaken as to the third person's authority.[20] In attempting to classify the majority of holdings which fall between these extremes, commentators have stressed two theories: the implied or apparent authority of third persons and the property right of control.[21] These theories, however, would seem to be too rigid to encompass the protection of personal rights emphasized in *Chapman* and *Stoner* and, in fact, the courts have increasingly utilized a "reasonableness" element in reaching their decisions.[22] Nevertheless, such theories are valid in that the majority of cases can basically be grouped into one or the other classification.

The implied or apparent authority theory "is utilized by courts to legitimatize a search and seizure consented to by a third party whose legal interest in the property . . . is inferior to the interest of the person against whom the search is directed and the evidence used."[23] In *State v. Cook*,[24] a caretaker given a key and told to care for the property for 10 to 15 days was deemed to have sufficient control to consent to a search of the premises. In *Morris v. Commonwealth*,[25] the court held that "the head of a house, *or the one in charge of the house at the time a search is made*, may consent to its search . . . ."[26] Also, the belief that a marine officer had authority to consent

18. See 376 U.S. 483. The Supreme Court of Hawaii carried this statement of the Court (supra note 16) to an extreme in State v. Matias, 451 P.2d 257, 260 (Hawaii 1969), when it held, "the Fourth Amendment right may be waived only by the individual entitled to the right." However, the Court in Stoner expressly stated that a person could consent through an agent. 376 U.S. at 489.

19. E.g., State v. Matias, 451 P.2d 257 (Hawaii 1969); Maxey v. State, 244 N.E.2d 650 (Ind. 1969); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952).

20. People v. Shepard, 212 Cal. App. 2d 697, 28 Cal. Rptr. 297 (Dist. Ct. App. 1963).

21. E.g., 41 St. John's L. Rev. 82, 83-84 (1966); 33 U. Chi. L. Rev. 797, 801 (1966). See generally 113 U. Pa. L. Rev. 260, 272 (1964); 2 U. San Francisco L. Rev. 141 (1967).

22. See note 34 infra.

23. 41 St. John's L. Rev. 82, 84 (1966). The Stoner case tended to limit the apparent authority theory when it stated: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" 376 U.S. at 488. This statement would not seem to eliminate all implied or apparent authority relationships, but simply is further evidence of the Court's desire to protect the individual by eliminating strained applications of agency and unrealistic doctrines of apparent authority. See 33 U. Chi. L. Rev. 797, 802 (1966).

24. 242 Ore. 509, 411 P.2d 78 (1966).

25. 306 Ky. 349, 208 S.W.2d 58 (1948).

26. Id. at 352, 208 S.W.2d at 60 (emphasis added).

to a search of a sailor's locker was deemed sufficient to make the search reasonable in *People v. Shepard*.[27] Other courts have held that where one gives complete and unrestricted freedom over his property he will be held to have assumed the risk that such third person will consent to a search.[28] Thus, it appears that the implied or apparent authority theory is an important factor in state and lower federal court decisions.

The second major theory is the property right of control theory. "The rationale . . . is that, since both [defendant and the third party] are entitled to possession and control, either can validly consent to a search in which the evidence seized may be used against the non-consenting party."[29] The vast majority of jurisdictions rely on this doctrine, and hence consent by a third person has been held valid where the third person has a superior right of control[30] and where the right of control is equal.[31]

Cognizant of the fact that these theories deemphasize the personal aspect of the rights involved,[32] the courts have been using a reasonableness test in dealing with the third party consent. In *United States v. Roberts*[33] it was said that "courts are not concerned ultimately with whether the person giving the consent . . . was the agent of such person or had authority from him, but rather with the question of whether the officers making the search and ef-

27. 212 Cal. App. 2d 697, 28 Cal. Rptr. 297 (Dist. Ct. App. 1963).

28. E.g., Sartain v. United States, 303 F.2d 859 (9th Cir.), cert. denied, 371 U.S. 894 (1962); United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962). See generally 2 U. San Francisco L. Rev. 141 (1967).

29. 41 St. John's L. Rev. 82, 84 (1966).

30. E.g., Maxwell v. Stephens, 348 F.2d 325 (8th Cir.), cert. denied, 382 U.S. 944 (1965); United States ex rel. McKenna v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964), aff'd mem., 342 F.2d 998 (3d Cir.), cert. denied, 382 U.S. 857 (1965); Rees v. Peyton, 225 F. Supp. 507 (E.D. Va. 1964), aff'd, 341 F.2d 859 (4th Cir. 1965); Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937); Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58 (1948); McCray v. State, 236 Md. 9, 202 A.2d 320 (1964); State v. Kinderman, 271 Minn. 405, 136 N.W. 2d 577 (1965).

31. E.g., Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968), cert. denied, 395 U.S. 981 (1969); Commonwealth ex rel. Craig v. Maroney, 348 F.2d 22 (3d Cir. 1965), cert. denied, 384 U.S. 1019 (1966); People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 216 (1963); People v. Sapienza, 51 Misc. 2d 786, 274 N.Y.S.2d 32 (Nassau County Ct. 1966). Contra, State v. Matias, 451 P.2d 257 (Hawaii 1969); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952). See generally 33 U. Chi. L. Rev. 797 (1966). In Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965), defendant and his mother lived with defendant's sister. The mother consented to a search of defendant's room but the court held that the search was unreasonable. Here a mother consented for her son but since she had no property right of control of the things searched, her consent was invalid.

32. The Supreme Court in Stoner warned of the dangers of the implied or apparent authority theory. The property right of control theory also carries its dangers. For example, a father who bought the furniture in his son's room could consent to the search of "the father's" bureau drawer. The courts have attempted to deal with this by holding that the owner of property cannot consent to a search of "papers and effects." See Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). See also note 59 infra.

33. 223 F. Supp. 49 (E.D. Ark. 1963), aff'd, 332 F.2d 892 (8th Cir. 1964), cert. denied, 380 U.S. 980 (1965).

fecting the seizure acted fairly and reasonably on the one hand, or unfairly, oppressively, or unreasonably on the other hand."[34] Many jurisdictions, while discussing the theories of apparent authority or a property right of control, ultimately make some mention of the fact that their decision is based on the issue of reasonableness.[35] It would seem that if the implied or apparent authority and property right of control theories are used as aids in determining the reasonableness of a third party consent along with other significant factors,[36] the Supreme Court's broad guidelines suggested in *Jones*, *Stoner*, and *Chapman* can be effectively followed.[37]

Another major problem in third party consent cases is the question of implied coercion. *Amos v. United States*,[38] the leading case on this issue, noted the aura of police authority and its effect on the voluntariness of a wife's consent given to police to search for contraband whiskey. "[I]t is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."[39] In *United States v. Elliott*[40] a government agent appeared at defendant's house with an invalid warrant, but was admitted by defendant who said, " 'You don't need any warrant.' "[41] Despite the defendant's apparent consent, the court held, "[o]rderly submission to law-enforcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understanding, intentional and voluntary waiver by the defendant . . . ."[42]

Because of the emphasis on the requirement of a search warrant and the relative weakness of consent, especially third party consent, the courts seem to find coercion if the consent does not possess the strict requirements of voluntari-

34. Id. at 59. In State v. Matias, 451 P.2d 257 (Hawaii 1969), the court objected to third party consents because "a third party consent is unreasonable and hence violative of the spirit and meaning of the constitutional prohibition." Id. at 260.

35. E.g., Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968); People v. Shepard, 212 Cal. App. 2d 697, 28 Cal. Rptr. 297 (Dist. Ct. App. 1963); State v. Kinderman, 271 Minn. 405, 135 N.W.2d 577 (1965); State v. Cook, 242 Ore. 490, 411 P.2d 78 (1966).

36. Such significant factors were outlined in Gurleski v. United States, 405 F.2d at 262. These factors were: (1) voluntariness of the consent; (2) the premises were under the third party's immediate and complete control; (3) the search did not extend to "personal effects"; and (4) reasonableness of the search.

37. But cf. 41 St. John's L. Rev. 82, 90 (1966); 33 U. Chi. L. Rev. 797, 812 (1966); 113 U. Pa. L. Rev. 260, 277 (1964).

38. 255 U.S. 313 (1921).

39. Id. at 317.

40. 210 F. Supp. 357 (D. Mass. 1962).

41. Id. at 359.

42. Id. at 360. In Wilkerson v. State, 37 Okla. Crim. 43, 256 P. 63 (1927), the police represented that they had a search warrant, as they did in the Overton case, but it also was void. There the court refused to recognize the consent, holding, "[i]t is well settled that when officers, desiring to make a search of premises, inform the person in charge of the premises that they had a search warrant, and such person then gives consent, it is not a waiver of the unlawful character of the search . . . ." Id. at 44, 256 P. at 63.

ness.[43] The *Elliott* court would in all probability find coercion present in all cases where a third party consents after being informed that the police had a warrant which subsequently proved to be invalid.[44] Other jurisdictions, however, have reached different conclusions. In *State v. Kinderman*,[45] a police officer went to defendant's father's house, explained why he was there, told him he might find the evidence for which he was looking, and explained that it was not necessary that defendant's father give permission. The ambiguity of this statement was noted by the court, but since defendant neither testified to being misled nor noted the ambiguity, the court interpreted it in a light favorable to the government.[46] *Kinderman* is not without support.[47]

The Supreme Court had the opportunity to draw a clearer distinction between the voluntariness of consent and implied coercion in *Bumper v. North Carolina*.[48] There defendant was tried and convicted of rape. A rifle which was introduced at the trial was obtained by a search of defendant's grandmother's home, where he resided. Before defendant's arrest, four white law enforcement officers went to the grandmother's house and announced to her, a Negro, that they had a search warrant. The grandmother consented to the search. The search warrant had never issued and the state, therefore, relied on Mrs. Leath's consent to validate the search. The Supreme Court framed the issue in terms of "whether a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant."[49] Here the Court was concerned with implied coercion and not with the question of whether Mrs. Leath could, in fact, consent.[50] In deciding the question of coercion, the Court held that "[w]hen a law enforcement officer claims authority to search a home under warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. *Where there is coercion there cannot be consent.*"[51]

43. 1967 Wash. U.L.Q. 12, 15.

44. Courts have often interpreted the facts of a case as they affect voluntariness in a way favorable to the defendant, e.g., Johnson v. United States, 333 U.S. 10 (1948); Channel v. United States, 285 F.2d 217 (9th Cir. 1960); United States v. Rutheiser, 203 F. Supp. 891 (S.D.N.Y. 1962); Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940).

45. 271 Minn. 405, 136 N.W.2d 577 (1965).

46. Id. at 406-07 n.1, 136 N.W.2d at 578-79 n.1 which reads: "We construe [the officer's] statement . . . to mean that the elder Kinderman had a right to deny him admittance. We do not infer the officer was asserting a right to enter with or without permission since Kinderman, Sr., did not take the stand to suggest he was in any way misled, and no point is made of the ambiguity by defendant."

47. E.g., Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965); Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769 (1923).

48. 391 U.S. 543 (1968).

49. Id. at 548.

50. However, the Court's notes indicate that the property right of control theory is valid in that one with a superior right of control can consent for another to a search of his property. See id. at 548 n.11, 556 n.4.

51. Id. at 550 (emphasis added).

On the question of third party consent, New York decisions have turned largely on the property right of control theory. In *People v. Mosley*[52] the court held that a third party may give consent if he occupies the premises searched or has possession of the property seized.[53] New York has also made use of the implied or apparent authority theory.[54] However its courts have been extremely conscious of the implied coercion created by the presence and demand of a police officer to search. The District Court for the Southern District of New York has held that consent based on misrepresentations is not valid[55] and that submission to authority "is not that consent which constitutes an unequivocal, free and intelligent waiver of a fundamental right."[56] The New York courts, however, treat consent as a question of fact.[57] It is with this background that *Overton* was originally decided.[58] However the Supreme Court subsequently vacated the judgment and remanded it for further consideration in light of *Bumper*.[59] Upon rehearing the New York Court of Appeals distinguished *Bumper* and reinstated its original decision.[60]

The court of appeals emphasized that the vice-principal had a superior proprietory interest in the property involved.[61] In such third party consent cases where a superior or equal right of control exists the tendency of the courts has been to hold that a search of a person's personal effects is reasonable.[62] How-

52. 26 App. Div. 2d 668, 272 N.Y.S.2d 493 (2d Dep't 1966).

53. Id. at 669, 272 N.Y.S.2d at 494. See People v. Kortwright, 236 N.Y.S.2d 385 (Sup. Ct. 1962); People v. Sapienza, 51 Misc. 2d 786, 274 N.Y.S.2d 32 (Nassau County Ct. 1966).

54. United States v. Heine, 149 F.2d 485 (2d Cir.), cert. denied, 325 U.S. 885 (1945); Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958).

55. Bolger v. United States, 189 F. Supp. 237, 253 (S.D.N.Y. 1960), aff'd sub nom. Bolger v. Cleary, 293 F.2d 368 (2d Cir. 1961), rev'd on other grounds, 371 U.S. 392 (1963).

56. United States v. Gregory, 204 F. Supp. 884, 885 (S.D.N.Y. 1962). See People v. Gonzalez, 50 Misc. 2d 508, 509, 270 N.Y.S.2d 727, 728 (App. T. 1966); People v. Sapienza, 51 Misc. 2d at 789, 274 N.Y.S.2d at 34.

57. People v. Austin, 53 Misc. 2d 963, 964, 280 N.Y.S.2d 433, 435 (Nassau Dist. Ct. 1967); People v. Kortwright, 236 N.Y.S.2d at 387. See also Maxwell v. Stephens, 348 F.2d 325, 336 (8th Cir. 1965); United States v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962); People v. Harvey, 48 Ill. App. 2d 261, 265, 199 N.E.2d 236, 238 (1964); McCray v. State, 236 Md. 9, 14, 202 A.2d 320, 322 (1964). See also State v. Kinderman, 271 Minn. 405, 406-07 n.1, 136 N.W.2d 577, 578-79 n.1 (1965).

58. People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1969).

59. Overton v. New York, 393 U.S. 85 (1968).

60. People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969).

61. The New York Court of Appeals established this interest by stating, "in the City of Mount Vernon [defendant's hometown], title to all school buildings and properties is in the Board of Education. The administrators of the various schools operate them as representatives of the owner. Dr. Panitz [the vice-principal] . . . is that representative in the Mount Vernon High School. Under his direction and supervision, desks and lockers are assigned to students for their use, under predetermined conditions, one of which prohibits the storage of material which violates the law." Id. at 525, 249 N.E.2d at 368, 301 N.Y.S.2d at 481-82. The vice-principal was thus the authorized agent of the property owner and, as such, it was reasonable for him to consent.

62. See, e.g., cases cited notes 29 & 30 supra.

ever, where the defendant's possession is exclusive, a third party's consent is usually held to be unreasonable.[63] Thus, in *United States v. Blok*,[64] the consent of an employer to the search of an employee's desk was held invalid, the court saying, "[A]ppellee's exclusive right to use the desk assigned to her made the search of it unreasonable."[65] The search in *Overton*, however, can be distinguished from such intrusions into personal effects. Not only did Dr. Panitz have a superior proprietory interest, but he had the apparent authority to consent.[66] But, perhaps most important, the consent resulted in a *reasonable* search in that the search of student lockers for marijuana is a safeguard for the school community as a whole.[67] Thus the non-exclusive nature of defendant's possession, the superior proprietory right, and the apparent authority of the vice-principal to search contributed to the reasonableness of the search.

The major conflict occurs, however, in the area of implied coercion. The trial court in *Bumper* had found Mrs. Leath's consent to be voluntary and free of coercion.[68] Mr. Justice Black, in a strong dissent, agreed with the trial court. He felt that Mrs. Leath's testimony showed a voluntary consent to the search and objected to the majority's overruling the trial judge's findings.[69] However, the majority found Mrs. Leath's testimony to be contradictory.[70] Because of this the Court looked again at the entire sequence of events and found Mrs. Leath to have consented in a coercive atmosphere.[71] However, the Court does

63. E.g., Cunningham v. Heinze, 352 F.2d 1, 5 (9th Cir. 1965), cert. denied, 383 U.S. 968 (1966); Reeves v. Warden, 346 F.2d 915, 924-25 (4th Cir. 1965); Holzhey v. United States, 223 F.2d 823, 826 (5th Cir. 1955).

64. 188 F.2d 1019 (D.C. Cir. 1951).

65. Id. at 1021.

66. In the original Overton decision the court expressed this by saying, "the students at Mount Vernon are well aware that the school authorities possess the combinations of their lockers. It appears understood that the lock and the combination are provided in order that each student may have exclusive possession of the locker vis-à-vis other students, but the student does not have such exclusivity over the locker as against the school authorities." 20 N.Y.2d at 363, 229 N.E.2d at 598, 283 N.Y.S.2d at 25.

67. The court in the prior Overton decision discussed the susceptibility of students at the high school level to suggestion of antisocial behavior. The parents of these children "have a right to expect certain safeguards" by school officials. Id. at 362, 229 N.E.2d at 597, 283 N.Y.S.2d at 24.

68. 391 U.S. at 548 n.9. See note 55 supra.

69. 391 U.S. at 557 (Black, J., dissenting).

70. Id. at 547 n.8. This footnote reads in part, "[t]he transcript of the suppression hearing comes to us from North Carolina in the form of a narrative; i.e., the actual questions and answers have been rewritten in the form of continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys. In the cases of an obviously compliant witness like Mrs. Leath, the result is a narrative that has the tone of decisiveness but is shot through with contradictions." Id. (emphasis deleted).

71. The contradiction in Mrs. Leath's testimony involved her attitude toward the police. At one point she testified, " 'He [the police officer] said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word . . . .' " Id. at 547. At another point she testified, " 'I had

not seem to be going so far as to preclude all testimony relating to consent. The Court sustained the general rule that the prosecution has the burden of proving the voluntariness of consent and cannot discharge this burden by showing no more than submission to authority.[72] There is thus an inference of coercion. The Court's concern with the true meaning of Mrs. Leath's testimony and its reiteration of the principle that the government has the burden of proving consent leads one to believe that testimony regarding the consent would be admissible but would have to be of an extraordinarily clear and convincing nature to override this strong inference.

The New York Court of Appeals felt that such testimony was present in *Overton*. The vice-principal, Dr. Panitz, was in charge of the high school and had the duty of enforcing its rules and regulations. At the trial Dr. Panitz testified, " 'Being responsible for the order, assignment, and maintenance of the physical facilities, if *any* report were given to me by *anyone* of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker.' "[73] In fact, what Dr. Panitz did was perform a duty delegated to him by the Mount Vernon Board of Education.[74] The implied coercion of a search warrant with which the Supreme Court in *Bumper* was concerned cannot be found where a public official is performing a duty. In such a situation "[c]oercion is absent . . . having been displaced by the performance of a delegated duty."[75]

The dissent based its objections on the fact that Dr. Panitz testified he was honoring the search warrant in permitting the search.[76] Hence, "if the bad search warrant played an effective role in the invasion of defendant's privacy, the result is unlawful even though the vice-principal also gave his 'consent' to the search and had a general authority in the school premises."[77] However, the vice-principal had the duty of inspecting defendant's locker and it is not inconsistent to say he voluntarily consented to the search while at the same time "honoring" an invalid warrant.[78]

New York thus seems to be putting a necessary limit on the interpretation of *Bumper*. There is obviously a vast difference between the consent of an educated, intelligent school official in the face of police authority and that of an illiterate grandmother confronted in her backwoods home with the presence of four armed law enforcement officials. To say that the former does not have the ability to consent because his consent is necessarily coerced, regardless of later

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no objection to them making a search of my house. . . . I let them search, and it was all my own free will. Nobody forced me at all.' " Id. at 547 n.8.

72. Id. at 548-49.

73. 24 N.Y.2d at 526, 249 N.E.2d at 368, 301 N.Y.S.2d at 482 (emphasis added).

74. See note 58 supra.

75. 24 N.Y.2d at 526, 249 N.E.2d at 368, 301 N.Y.S.2d at 482.

76. Id. at 527, 249 N.E.2d at 369, 301 N.Y.S.2d at 483 (dissenting opinion).

77. Id.

78. In other words, Dr. Panitz freely consented to the search and would have done so regardless of who informed him of the probability of marijuana being in the locker (see note 67 supra) as it was his duty. Yet, at the same time, he was honoring the authority of the police although it played no part in his decision.

testimony and surrounding facts, is to put a deterrent on police effectiveness which could not possibly have been forseen by the Court in *Bumper*.[79]

Thus *Bumper* stands for the proposition that the showing of an invalid search warrant will normally render a subsequent consent invalid because of the inherent coerciveness of the warrant. *Overton* is the limited exception where the evidence of free and voluntary consent, unaffected by the coercive effect of the warrant, is so strong that the overwhelming inference of coercion is overridden. Any other interpretation would go far towards destroying in every instance the effect of consent as a waiver of the protections of the fourth amendment.

Criminal Procedure—Self-Incrimination—Witness Who Voluntarily Testified Before the Grand Jury Waived His Privilege Against Self-Incrimination for Purposes of Trial at Which He Was Not a Defendant.—Government's witness, after voluntarily testifying before the grand jury which indicted the defendants for arson and possession of dangerous weapons, refused to testify at the subsequent trial, claiming his privilege against self-incrimination. The witness was an accomplice of the accused, and had not been granted immunity from prosecution. However, the trial judge overruled his claim of privilege and ordered the witness to testify, and the defendants were subsequently convicted. The court of appeals, although it found that the trial judge had erred in his reasons for compelling the witness to testify,[1] and furthermore that the

79. That the Overton decision is a limited exception is evidenced by a subsequent New York holding. In People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Nassau Dist. Ct. 1968), a college official who had implied authority to enter dormitory rooms was held to be unable to consent to a search by police. This case might be more analogous to the landlord-tenant cases than to Overton. However, it suggests that New York still holds the individual's rights protected by the fourth amendment to be superior to any purely proprietory right. The proprietory right in Overton was combined with a reasonable consent and resulted in a reasonable search.

1. The trial judge rejected the contention of the prosecutor that the witness' waiver of the privilege against self-incrimination before the grand jury carried over to the defendants' trial, but he nevertheless overruled the witness' claim of privilege and ordered him to testify on the ground that Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), protected the witness from the subsequent use of his testimony against him. In Murphy, petitioners had been held in contempt for refusing to testify before a state investigatory commission. They contended that, although granted immunity under a state statute, their answers might tend to incriminate them by revealing federal offenses against which they had not been immunized. In other words, the petitioners argued that the immunity granted them from prosecution by state officials was not "co-extensive" with their constitutional privilege. See, e.g., Counselman v. Hitchcock, 142 U.S. 547 (1892). The Court, however, held that the petitioners could be compelled to answer, since the scope of the privilege against self-incrimination prohibited federal officials from making use of the testimony or its fruits. 378 U.S. at 77-80. Judge Leventhal, author of the Ellis opinion, distinguished Murphy by finding that while in Murphy the order to testify was preceded by a grant of immunity pursuant to statute, there was no such statute utilized in the present litigation, but simply an order that erroneously overruled a witness' claim of privilege. Ellis v. United

defendants had standing to raise the issue on appeal,[2] nevertheless affirmed the defendants' convictions, holding that the witness' waiver of the privilege against

States, 416 F.2d 791, 795 (D.C. Cir. 1969). Nevertheless, Judge Leventhal held that the witness was protected by "the approach and principle underlying Murphy" (Id.), citing in support of this statement Garrity v. New Jersey, 385 U.S. 493 (1967) (forfeiture-of-office statute induced police officers to forgo reliance on the privilege against self-incrimination and rendered the resulting statements involuntary and inadmissible in state criminal proceedings); Adams v. Maryland, 347 U.S. 179, 181 (1954) ("[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection."); and 8 J. Wigmore, Evidence § 2270, at 417 (3d ed. 1961) (an erroneous overruling of the claim of privilege will render the testimony inadmissible against the witness in any subsequent proceeding). Thus, Judge Leventhal in effect agreed with the trial judge that the witness was protected under the Murphy rule, even in the absence of an immunity statute. He found, however, that the result of the trial judge's erroneously compelling a witness to testify would in effect grant immunity to the witness—an unjustified result—since this would mean that a judge could independently, without statutory authority, confer immunity upon a witness. Judge Leventhal correctly pointed out that Congress has restricted the power to grant immunity to a limited group of federal officials, and, therefore, it was outside the scope of judicial authority for the trial judge to grant immunity by the circular method of compelling the witness to testify and thereby making him immune under the Murphy doctrine. 416 F.2d at 795. Despite the validity of this reliance upon the Murphy rule by both Judge Leventhal and the trial judge, such reliance might well have been unnecessary in view of the fact that any erroneous overruling of a witness' privilege against self-incrimination may be said to result in a coerced confession which would then be inadmissible in any subsequent prosecution of that witness. See generally Malloy v. Hogan, 378 U.S. 1 (1964). Judge Danaher dissented from this part of the decision. He found that the trial judge correctly interpreted the scope of the Murphy decision in balancing the public's interest in the truth regarding the defendants guilt or innocence against their rights. 416 F.2d 807. Judge Wright, while dissenting from the affirmance, joined in Judge Leventhal's reasoning concerning the issue of judicial compulsion of privileged testimony. Id. at 808.

2. The general rule is that the privilege against self-incrimination is a personal right and as such cannot be asserted by a third party. See, e.g., Rogers v. United States, 340 U.S. 367 (1951); Goldstein v. United States, 316 U.S. 114 (1942); Hudson v. United States, 197 F.2d 845 (5th Cir. 1952); Ziegler v. United States, 174 F.2d 439 (9th Cir.), cert. denied, 338 U.S. 822 (1949); United States v. Steffen, 103 F. Supp. 415 (N.D. Cal. 1951). Thus, a defendant generally has no standing to complain of an erroneous ruling by a trial judge regarding the scope of a witness' privilege. See, e.g., Long v. United States, 360 F.2d 829, 834 (D.C. Cir. 1966); Bowman v. United States, 350 F.2d 913, 916 (9th Cir. 1965), cert. denied, 383 U.S. 950 (1966); Note, 30 Colum. L. Rev. 686, 692 (1930). While Judge Leventhal recognized these basic rules, 416 F.2d at 495, he found that it would have been unrealistic to expect the witness to raise the issue on appeal, since the trial judge and the Ellis court had decided that the Murphy rationale provided the witness immunity from prosecution based on his incriminating statements. While conceding that in an exceptional situation a witness whom the trial judge had erroneously compelled to testify might risk contempt and appeal such a ruling, rather than testify under the immunity offered, Judge Leventhal found that the defendants should be given standing to appeal since the trial judge's error would have been realistically foreclosed from review. Judge Leventhal relied on Barrows v. Jackson, 346 U.S. 249 (1953), and Griswold v. Connecticut, 381 U.S. 479 (1965), for the proposition that the rule against granting standing to parties to

self-incrimination at the grand jury hearing carried over to the trial at which he was not a defendant. *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969).

The general rule concerning the waiver of the privilege against self-incrimination is that the witness waives his privilege only with respect to the particular proceeding at which he volunteers to testify.[3] The basis for this general rule may be extracted from two early Virginia decisions. In *Cullen v. Commonwealth*[4] it was held that a witness who voluntarily testified at a coroner's inquest did not waive his privilege against self-incrimination for purposes of a subsequent grand jury hearing. Similarly, in *Temple v. Commonwealth*,[5] a witness who voluntarily testified before a grand jury was held not to have waived his privilege at the trial of the indicted party. The overwhelming majority of decisions, in both state and federal courts, are in accord with the rule enunciated in these two cases.[6] Only a minority of jurisdictions have held that a waiver of the privilege against self-incrimination carried over from one hearing to another.[7]

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raise the rights of others was subject to significant exceptions. In Barrows, it was found that a white defendant who had been a party to a racially restrictive covenant and who was subsequently sued by the covenantors because she had conveyed her property to Negroes, had standing to raise the issue of whether enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection. In Griswold, it was held that the director of the Planned Parenthood League and a licensed physician had standing to assert the constitutional rights of married persons with whom they had maintained a professional relationship. The argument in favor of granting standing would certainly have been more convincing had the ultimate decision been for reversal. In order to justify a departure from the general rule on standing, some "fundamental" right of the party seeking to assert the privilege of another would have to be violated if the court did not permit review. Thus, the Supreme Court in Barrows found the standing rule to be outweighed by the "need to protect the fundamental rights" of the party raising the issue. 346 U.S. at 257. In Ellis, however, if some fundamental right of the defendants had been violated by the trial judge's compulsion of the witness's testimony, it would seem that the result would have been a reversal of their convictions. Judge Danaher, concurring in the affirmance, would not have granted the appellants standing, following the general rule. 416 F.2d at 807. Judge Wright, dissenting from the affirmance, of course agreed with Judge Leventhal that the defendants had standing. Id. at 808.

3. C. McCormick, Evidence § 130, at 274 (1954); 8 J. Wigmore, Evidence § 2276, at 470 (3d ed. 1961).

4. 65 Va. (24 Gratt.) 624 (1873).

5. 75 Va. 892 (1881).

6. See, e.g., United States v. Miranti, 253 F.2d 135 (2d Cir. 1958); In re Neff, 206 F.2d 149 (3d Cir. 1953); Poretto v. United States, 196 F.2d 392 (5th Cir. 1952); United States v. Vadner, 119 F. Supp. 330 (E.D. Pa. 1954); United States v. Malone, 111 F. Supp. 37 (N.D. Cal. 1953); Overend v. Superior Ct., 131 Cal. 280, 63 P. 372 (1900); People v. Walker, 28 Ill. 2d 585, 192 N.E.2d 819 (1963); Samuel v. People, 164 Ill. 379, 45 N.E. 728 (1896); Duckworth v. District Ct., 220 Iowa 1350, 264 N.W. 715 (1936); Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949); People v. Cassidy, 213 N.Y. 388, 107 N.E. 713 (1915); Hummell v. Superior Ct., 100 R.I. 54, 211 A.2d 272 (1965); Miskimins v. Shaver, 8 Wyo. 392, 58 P. 411 (1899). See also Note, 73 Dick. L. Rev. 80 (1968).

7. See State v. Burrell, 27 Mont. 282, 70 P. 982 (1902), aff'd, 194 U.S. 572 (1904). In this decision it was held that a bankrupt who waived the privilege against self-incrimination by testifying before a referee was precluded from objecting to cross-examination in a

Nevertheless, in spite of its widespread acceptance, the waiver limitation has been criticized,[8] and it is the reasoning of its critics that the *Ellis* court adopted.[9] The court found that since the "paramount interest" protected by the privilege against self-incrimination is "the right to remain silent rather than make disclosures that may in fact lead to prosecution,"[10] once a witness has voluntarily testified, he should not be allowed to reclaim the privilege at a subsequent proceeding, so long as he is not compelled to disclose new incriminating evidence.[11] Thus, the court noted with approval the waiver rule proposed in the *Model Code of Evidence* and the *Uniform Rules of Evidence*.[12]

The *Ellis* opinion considered four arguments frequently advanced that favor retention of the prevailing rule that a waiver is not carried over from a prior to a subsequent proceeding. The first was that it has been the policy of the courts to protect the witness' privilege, and not to lightly assume a waiver.[13] In response, the court pointed out: "The Supreme Court has plainly tried to strike a balance between the policy of the privilege and the requirement for information."[14] While the court admitted that the balance is usually weighted heavily in favor of the privilege,[15] it contended that some danger of "legal harm" must exist

subsequent criminal case concerning incriminating admissions made in that testimony. In State v. Fary, 19 N.J. 431, 440, 117 A.2d 499, 504-05 (1955) the court concluded: "[h]ere the appellants did not claim the privilege when testifying before the first grand jury, and it is not suggested that different questions were asked at the second inquest. In that circumstance, a waiver barring their right to assert the privilege at the second inquiry may be constructed."

8. C. McCormick, Evidence § 130, at 274 (1954): "A mechanical limitation has been placed upon the application of this doctrine of waiver. This limitation is calculated to encourage culprits to bribe and intimidate witnesses against them to change their testimony. This is the restriction that the waiver by disclosure of incriminating facts is strictly confined in effect to the very proceedings in which the first testimony is given. . . . The rule . . . protects chiefly the person accused of crime, and gives very little protection to the witness. If he has already given material evidence of his own guilt, such evidence, in the form of a transcript of his testimony, or of a signed affidavit, can readily be proved against him if he is tried for the crime. The present testimony will not add to his hazard except as additional facts or details are brought out." (footnotes deleted).

9. 416 F.2d at 800.

10. Id.

11. Id. at 801. See note 27 infra.

12. 416 F.2d at 801. Model Code of Evidence rule 231 (1942); Uniform Rules of Evidence rule 37: A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has:

. . . .

(b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one." This rule, of course, would include a waiver given at such previous hearings as a coroner's inquest, bankruptcy proceedings, prior trial, and, as in Ellis, a grand jury hearing.

13. See Smith v. United States, 337 U.S. 137, 150 (1949); Poretto v. United States, 196 F.2d 392, 394 (5th Cir. 1952); United States v. Hoag, 142 F. Supp. 667, 673 (D.D.C. 1956).

14. 416 F.2d at 802.

15. Id. On the liberality with which the Supreme Court has construed the priv-

before the privilege can be invoked.[16] Since the witness has already incriminated himself where he has voluntarily testified at a prior proceeding, his present testimony concerning the same facts can do him no further harm.[17]

The second argument invoked against a broadening of the waiver rule is that the repetition of incriminating testimony may serve to add credibility to such testimony, and therefore be more incriminating.[18] However, as the court responded: "If reiteration alone is sufficient for realistic new incrimination that would also prohibit a subsequent appearance before the same tribunal, and that plainly is not the law."[19] Thus, the court found that the mere repetition of incriminating evidence could not be more incriminating.

The third argument, adopted by the *Ellis* dissent,[20] involved particularly the question of waiver before a grand jury. Since the grand jury is a secret hearing, while a trial is public, it was contended that a witness should be allowed to reclaim his privilege at the trial, since he may choose to waive his right to remain silent in private, but may choose not to do so in public.[21] At least one other federal court has adopted this reasoning.[22] The majority, however, stated in rejoinder that this "privacy interest . . . is not the crucial interest [with regard to the privilege against self-incrimination], for it does not survive to protect the privilege once the fear of prosecution is gone, as in case of granted immunity."[23]

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ilege against self-incrimination see, e.g., Gardner v. Broderick, 392 U.S. 273, 276 (1968); Albertson v. S.A.C.B., 382 U.S. 70, 81 (1965); Arndstein v. McCarthy, 254 U.S. 71 (1920); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

16. 416 F.2d at 802.

17. Id. at 801. The court extracted this idea from Rogers v. United States, 340 U.S. 367 (1951), where the Supreme Court held that a witness who had waived his privilege could not refuse to answer further questions at the same hearing concerning identical matter which would not further incriminate him. In order for a witness to claim the privilege, Ellis found that Rogers required that there exist "a real danger of legal detriment," 340 U.S. at 373, and that there was no such "legal detriment" to a witness in merely repeating the incriminating statement he had previously made before the grand jury.

18. See United States v. Miranti, 253 F.2d 135, 140 (2d Cir. 1958); United States v. Steffen, 103 F. Supp. 415, 417 (N.D. Cal. 1951).

19. 416 F.2d at 802; see Rogers v. United States, 340 U.S. 367 (1951); note 17 supra. See also United States v. Hoag, 142 F. Supp. 667 (D.D.C. 1956); United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955); United States v. Johnson, 76 F. Supp. 538 (M.D. Pa. 1947).

20. 416 F.2d at 808.

21. Judge Wright, in the Ellis dissent, argued that the "Fifth Amendment . . . establishes a right to abstain from the demeaning ritual of public self-accusation." Id. He found support for such a position in Justice Douglas' statement in Ullmann v. United States, 350 U.S. 422, 440 (1956) (dissenting opinion).

22. See In re Neff, 206 F.2d 149, 152 (3d Cir. 1953): "The grand jury is not a judicial tribunal but rather an informing or accusing body. While an appendage of the court it does not conduct its proceedings judicially and when after its secret ex parte investigation it finds and returns to the court an indictment against a defendant its function with respect to that defendant is ended. It is clear, therefore, that the investigation of a grand jury is a proceeding which is wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant in the district court."

23. 416 F.2d at 802 (footnotes deleted).

The fourth argument that the court rejected was that it was possible that a witness who voluntarily testified at the prior judicial proceeding might have a cogent reason for refusing to repeat such testimony at the subsequent hearing. It was therefore contended that a witness should always be permitted to claim the privilege at a subsequent hearing, since in the interval between it and the prior hearing, it was always possible that "new material" or "new conditions"[24] could arise, such as the passage of new criminal statutes, which could materially change the position of the witness and cause his answers to be more incriminating.[25] While recognizing the validity of this argument,[26] the court found that such facts are extraordinary and therefore should merely be treated as exceptions to the rule that the waiver should carry over from one proceeding to another.[27]

Proponents of a change in the waiver doctrine have criticized it as a "mechanical" rule which serves primarily to protect the defendant and not the witness, who is the intended beneficiary of the privilege's protection.[28] If a witness, who cooperated by testifying before a grand jury, refused to testify at the trial, the prosecution's case may be destroyed and the public interest suffer. Thus, proponents of change argue that "the force of the machinery of government once set in motion should not be nullified by permitting a witness to withhold essential testimony."[29] Advocates of a change also point to the danger that a claim of privilege may be spurious, since all that is required is that it be evident from the implications of the question and the setting in which it is asked that to reply could result in injury to the witness.[30] While obviously the danger that the claim of privilege might be spurious is always present, that danger would certainly be greater in a situation where the witness sought to reclaim the privilege in a context apparently of no benefit to himself, but only to the defendant.[31]

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24. Id. at 805.

25. See, e.g., United States v. Miranti, 253 F.2d 135 (2d Cir. 1958); In re Neff, 206 F.2d 149 (3d Cir. 1953).

26. 416 F.2d at 805.

27. Ellis distinguished many of the cases which appear contrary to its holding on the ground that, in light of the particular circumstances in those cases, to require the witness to answer would have meant compelling him to disclose new incriminating evidence. Thus, the court distinguished In re Neff, 206 F.2d 149 (3d Cir. 1953), since in this case there was a conviction of the witness for perjury in the time between the grand jury investigation and the trial. The court found that such a conviction could constitute a "new condition," and thereby cut off the waiver. Such "new material" or "new conditions" might also come about as a result of a long time lapse between hearings, since such a time lapse could result in the passage of new criminal laws creating new grounds for the witness to apprehend that his answers might be self-incriminating. See United States v. Miranti, 253 F.2d 135 (2d Cir. 1958). The Ellis court found that only where such "new material" or "new conditions" can be shown to exist should the waiver of the privilege against self-incrimination be held inapplicable. See 416 F.2d at 805.

28. See C. McCormick, Evidence § 130, at 274 (1954); see note 8 supra.

29. 32 Ill. L. Rev. 117, 118 (1937).

30. Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

31. See State v. De Cola, 33 N.J. 335, 164 A.2d 729 (1960). While the New Jersey Supreme Court chose to follow the established rule against finding a waiver, the court

While *Ellis* recognized that the interest which the community has in law enforcement cannot be used to justify "trampling on the Constitution,"[32] the court found that such an interest should be taken into account in determining the scope of constitutional protections, and that such protections, "are not to be extended by 'mechanical rules' that serve no meaningful freedom, but interfere with and hamper sound law enforcement."[33] Thus, the court proposed a balancing test to cope with the assertion of a personal privilege, and it found that in the present context, contrary to the normal situation, the balance weighed heavily against the granting of such a right. Surely, if justice is to be measured on a scale balancing freedom against security, as the court indicated it must,[34] then regardless of the degree to which the scale is tilted in favor of individual freedom, there must be some counterweight that will tip it in favor of security. The court found such a counterweight in the "community's interest in law enforcement" when the individual privilege serves "no meaningful freedom."[35] However, *Ellis* emphasized that its decision would not apply where the witness himself was the accused or was under indictment,[36] nor would it apply when an answer would require disclosure of new incriminating evidence.[37] Thus, in disallowing a valueless claim of the privilege against self-incrimination, the court sought to promote justice while protecting individual rights by substantially decreasing the possibility that by means of threats or bribes a guilty defendant would be able to destroy the case against him. Thus, *Ellis*, has attempted to correct a procedural rule which has often served only to enable disreputable individuals to pervert a valuable constitutional right.

Domestic Relations—Return of An Engagement Ring Given By a Married Man.—Plaintiff, a married man living apart from his wife and contemplating divorce, presented defendant with an engagement ring[1] upon her promise to marry him. Plaintiff alleged that the promises of both parties were conditioned on his success at obtaining a divorce. Defendant broke the engagement but failed to return the ring. Plaintiff sued for restitution of the ring and defendant

voiced the concern of the rule's critics: "The problem is confounded by the thought that the claim of privilege may be spurious; that because of bribe, threat, or a purpose to favor another, a witness who speaks before a grand jury may later assert the privilege to cloak nothing but a refusal to repeat the truth. To anyone familiar with the knavery in this area, the fear is not academic. And the greater the original insult to the public, the greater will be the inducement to 'persuade' the witness to seek the sanctuary of a fabricated claim." Id. at 447, 164 A.2d at 736.

32. 416 F.2d at 801.
33. Id.
34. Id.
35. Id.
36. Id. at 802.
37. Id.

1. The ring involved was ten and one-half carats and valued at sixty thousand dollars. Lowe v. Quinn, 32 App. Div. 2d 269, 271, 301 N.Y.S.2d 361, 364 (1st Dep't 1969).

appealed from an order of the Supreme Court at Special Term which denied her motion for a summary judgment. The appellate division ruled that section 80-b of the Civil Rights Law[2] had removed the bar to an action for recovery of an engagement ring which was imposed by the Civil Practice Act of 1935.[3] The court reversed the order, however, with one dissent, on the grounds that a gift can not be conditioned on a contract which is void as against public policy, *i.e.*, married individuals can not enter into a contract to marry another; the gift was absolute. *Lowe v. Quinn*, 32 App. Div. 2d 269, 301 N.Y.S.2d 361 (1st Dep't 1969).

The rights of the parties in an engagement ring upon the failure of the anticipated marriage to occur has an interesting and somewhat confused history under New York law. The common law was based upon the responsibility for the termination of the engagement.[4] When the termination was due to the gentleman's reluctance, caused by no fault of the lady, the ring remained the property of the lady.[5] If, however, the lady caused the termination, the ring was to be returned,[6] as it was if the termination was mutual.[7]

Although the courts had little difficulty determining the result to be reached, there was great confusion as to the theory upon which to base the decisions. Earlier cases rested on a pledge theory, taking the position that absolute ownership of the ring did not pass until the marriage occurred, or until the donor caused its failure to occur, thus forfeiting the pledge.[8] The pledge theory was based on the significance of the ring and was not extended to allow recovery of other engagement gifts. One New York case allowed recovery where the engagement was mutually rescinded on the theory that the ring was consideration and that the parties should be returned to the status quo.[9] It is improbable, however, that the donor intends the ring as consideration for a promise to marry.[10]

2. N.Y. Civ. Rights Law § 80-b (Supp. 1969).

3. Laws of N.Y., 1935, ch. 263, art. 2-A.

4. Roman law imposed no penalties for a broken engagement but the betrothal gifts (arrae sponsalitiae) were to be returned if the engagement had been mutually dissolved or if the gifts had been received by the party at fault. English common law developed as a response to a social oddity in England, a constant shortage of men. The fear of spinisterhood caused a strictness in enforcing promises to marry. See generally 2 C. Sherman, Roman Law in the Modern World 45 (1924); Annot., 24 A.L.R.2d 576, 582 (1952); Cohen v. Sellar, [1926] 1 K.B. 536.

5. Beer v. Hart, 153 Misc. 277, 274 N.Y.S. 671 (Mun. Ct. 1934).

6. Beck v. Cohen, 237 App. Div. 729, 262 N.Y.S. 716 (1st Dep't 1933); for cases involving antenuptial gifts other than rings see Antaramian v. Ourakian, 118 Misc. 558, 194 N.Y.S. 100 (App. T. 1922); Cushing v. Hughes, 119 Misc. 39, 195 N.Y.S. 200 (Sup. Ct. 1922).

7. Wilson v. Riggs, 243 App. Div. 33, 276 N.Y.S. 232 (1st Dep't 1934), aff'd mem., 267 N.Y. 570, 196 N.E. 584 (1935).

8. Beck v. Cohen, 237 App. Div. 729, 730-31, 262 N.Y.S. 716, 718 (1st Dep't 1933); Jacobs v. Davis, [1917] 2 K.B. 532, 533.

9. Unger v. Hirsch, 180 Misc. 381, 39 N.Y.S.2d 965 (N.Y. City Ct. 1943).

10. See Note, Quasi-contract: Gifts: Effect of New York anti-heart balm statute, 29 Cornell L.Q. 401, 402 (1944) [hereinafter cited as 29 Cornell L.Q.]. Contra as to other antenuptial gifts, Antaramian v. Ourakian, 118 Misc. 558, 194 N.Y.S. 100 (App. T. 1922).

One court allowed plaintiff to proceed on a theory of a quasi-contractual recovery to prevent unjust enrichment.[11] In one very unusual case the plaintiff was allowed a recovery on a theory of bailment.[12]

The most popular theory is that an engagement ring is a conditional gift,[13] dependent upon a condition subsequent.[14] The ring, when transferred, becomes the property of the donee subject to the occurrence of the condition. However, the cases demonstrate that confusion exists as to the exact nature of the condition. The courts have used various terms, *e.g.*, "breach of the marriage engagement,"[15] "breach the contract,"[16] "if the parties did not wed,"[17] and similar phrases to describe the condition upon which the gift depends. Normally, distinctions might be merely an exercise in semantics, but in several instances the consequences are important, *e.g.*, if the parties mutually rescind the contract to marry, there is no breach and yet a recovery is allowed on a conditional gift theory.[18] The proper interpretation would seem to be that the condition attached to the gift is the failure of the marriage to occur without any fault of the donor.

In 1935, the New York legislature decided that public policy favored the abolition of the remedies previously available for breach of promise to marry due to the "grave abuses" of such causes of action,[19] and enacted article 2-A of the Civil Practice Act, which said in part, "[t]he rights of action heretofore existing to recover sums of money as damage for . . . breach of contract to marry are hereby abolished."[20] "No contract to marry . . . shall operate to give rise . . . to any cause or right of action for the breach thereof."[21] The engagement ring cases decided in the years subsequent to the enactment of article 2-A relied upon the earlier case law without mention of any statutory change.[22] In *Andie v. Kaplan*,[23] the plaintiff gave defendant a ring and other gifts "in connection with a mutual promise of marriage" and brought an action to recover them. For the first time the appellate division affirmed a dismissal on the grounds that

11. Zawadzki v. Vandetti, 255 App. Div. 932, 9 N.Y.S.2d 219 (4th Dep't 1938). Such a recovery theory was urged in 29 Cornell L.Q.

12. Benedict v. Flannery, 115 Misc. 627, 189 N.Y.S. 104 (App. T. 1921).

13. Wilson v. Riggs, 243 App. Div. 33, 34, 276 N.Y.S. 232-33 (1st Dep't 1934); Beck v. Cohen, 237 App. Div. 729, 262 N.Y.S. 716 (1st Dep't 1933). "That it is a conditional gift seems inherent in its very purpose." Id. at 730, 262 N.Y.S. at 718; Beer v. Hart, 153 Misc. 277, 278, 274 N.Y.S. 671, 672 (Mun. Ct. 1934); Jacobs v. Davis, [1917] 2 K.B. 532, 533.

14. Wilson v. Riggs, 243 App. Div. 33, 34, 276 N.Y.S. 232 (1st Dep't 1934); Annot., 24 A.L.R.2d 576, 589 (1952).

15. Beck v. Cohen, 237 App. Div. 729, 731, 262 N.Y.S. 716, 718 (1st Dep't 1933).

16. Id. at 732, 262 N.Y.S. at 720.

17. Wilson v. Riggs, 243 App. Div. 33, 34, 276 N.Y.S. 232 (1st Dep't 1934).

18. Id.

19. Laws of N.Y., 1935, ch. 263, art. 2-A, § 61-a.

20. Id. § 61-b.

21. Id. § 61-d.

22. Zawadzki v. Vandetti, 255 App. Div. 932, 9 N.Y.S.2d 219 (4th Dep't 1938) (dissent believes statute is applicable); Hutchinson v. Kernitzky, 23 N.Y.S.2d 650 (App. T. 1940).

23. 263 App. Div. 884, 32 N.Y.S.2d 429 (2d Dep't 1942).

such an action was barred by article 2-A. Two justices dissented because they did not believe such a case was within the spirit of the legislative prohibition.[24] The court of appeals unanimously affirmed without an opinion[25] and followed the decision in a later case.[26] In most subsequent cases it became impossible for a man to reclaim an engagement gift regardless of his fault or lack of it in causing the failure of the marriage to occur.[27]

Criticism of these decisions was widespread.[28] Some lower courts attempted to circumvent the issue through alternative theories.[29] In 1947, the legislature passed a bill which would have allowed recovery of an engagement ring in certain circumstances.[30] However, the bill was vetoed by the Governor.[31]

Sections 61-b and 61-d of the Civil Practice Act were incorporated into section 80 of the Civil Rights Law in 1962, and the new statute was amended in 1965 by section 80-b to allow recovery of engagement rings when "justice so requires."[32]

In *Goldstein v. Rosenthal,*[33] the only case reported since the enactment of section 80-b and prior to *Lowe,* the court looked to the law before the enactment of article 2-A and, basing its decision on *Beck v. Cohen,*[34] awarded plaintiff the return of the engagement ring or its value.[35] The result is that New York now allows the recovery of an engagement ring if such a recovery was allowed under common law.

The jurisdictions which do not have applicable statutes generally reach the same results as did the New York courts prior to the *Andie* decision.[36] Only one

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24. Id.

25. 288 N.Y. 685, 43 N.E.2d 82 (1942).

26. Josephson v. Dry Dock Sav. Inst., 292 N.Y. 666, 56 N.E.2d 96 (1944).

27. Morris v. Baird, 269 App. Div. 948, 57 N.Y.S.2d 890 (2d Dep't 1945); Hecht v. Yarnis, 268 App. Div. 771, 50 N.Y.S.2d 170 (1st Dep't 1944).

28. See Note, Domestic Relations: The Heart Balm Act and Ante-Nuptial Gifts, 13 Brooklyn L. Rev. 174 (1947); Note, Breach of Contract to Marry: New York Civil Practice Act Article 2-A: Recovery of Antenuptial Gifts, 48 Cornell L.Q. 186 (1962); 29 Cornell L.Q.

29. Unger v. Hirsch, 180 Misc. 381, 39 N.Y.S.2d 965 (N.Y. City Ct. 1943); accord, Spitz v. Maxwell, 186 Misc. 159, 59 N.Y.S.2d 593 (Sup. Ct. 1945).

30. Proposed amendment to the Civil Practice Act § 61-j: "This article shall not be deemed to prevent a court in a proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry which is not performed." 1947 Law Revision Comm'n Rep. 227; 1947 Leg. Doc. No. 65(J).

31. 1947 Public Papers of Thomas E. Dewey at 286.

32. N.Y. Civ. Rights Law § 80-b (Supp. 1969): "Nothing in this article contained shall be construed to bar a right of action for the recovery of a chattel . . . when the sole consideration for the transfer of the chattel . . . was a contemplated marriage which has not occurred . . . ." Id.

33. 56 Misc. 2d 311, 288 N.Y.S.2d 503 (Civil Ct. of City of N.Y. 1968).

34. 237 App. Div. 729, 262 N.Y.S. 716 (1st Dep't 1933).

35. Goldstein v. Rosenthal, 56 Misc. 2d 311, 288 N.Y.S.2d 503 (Civil Ct. of City of N.Y. 1968).

36. E.g., Schultz v. Duitz, 253 Ky. 135, 69 S.W.2d 27 (1934); Ruehling v. Hornung, 98

case has held that the donor may recover the ring regardless of which party breaks the engagement.[37] Most states proceed upon the theory that the ring is a conditional gift[38] and is to be returned if the engagement is dissolved by agreement[39] or if the donee unjustifiably breaks the engagement.[40]

A few states have enacted statutes which determine the property rights in the engagement ring upon the dissolution of the engagement.[41] Fifteen states[42] other than New York have statutes similar to section 80-a of the Civil Rights Law, but only the Pennsylvania act has been extended to bar an action to recover an engagement ring.[43] Four other states have construed their statutes as not barring such a recovery.[44]

Unlike the cases described above, the plaintiff in *Lowe* was a married man, living apart from his wife, at the time that he gave the defendant the engagement ring. Under common law, a contract to marry was against public policy if one of the participants was married to another and such an attempt to contract was void.[45] The reasoning behind such a policy is that a man (or woman) who is presently married does not enjoy the right to contract to a future marriage.[46] Such a contract being void, there could be no suit for breach of promise based upon the contract.[47]

The majority opinion in *Lowe v. Quinn* reaffirms the position stated in *Gold-*

Pa. Super. 535 (1929); Shaw v. Christie, 160 S.W.2d 989 (Tex. Civ. App. 1942); Cohen v. Sellar, [1926] 1 K.B. 536; Jacobs v. Davis, [1917] 2 K.B. 532.

37. Albanese v. Indelicato, 25 N.J. Misc. 144, 51 A.2d 110 (Dist. Ct. of Jersey City 1947).

38. Ruehling v. Hornung, 98 Pa. Super. 535 (1929); accord, other antenuptial gifts, Shaw v. Christie, 160 S.W.2d 989 (Tex. Civ. App. 1942).

39. Ruehling v. Hornung, 98 Pa. Super. 535 (1929); Cohen v. Sellar, [1926] 1 K.B. 536.

40. Schultz v. Duitz, 253 Ky. 135, 69 S.W.2d 27 (1934); Shaw v. Christie, 160 S.W.2d 989 (Tex. Civ. App. 1942); Jacobs v. Davis, [1917] 2 K.B. 532.

41. Cal. Civ. Code § 1590 (1954) (recovery if donee breaks or mutual rescission); La. Civ. Code Ann. art. 1740, 1897 (1952) (recovery even if donor at fault).

42. Ala. Code tit. 7, § 114 (1958); Cal. Civ. Code § 43.5(d) (1954); Colo. Rev. Stat. Ann. § 41-3-1 (1963); Fla. Stat. Ann. §§ 771.01-08 (1964); Md. Ann. Code art. 75C, § 2 (1957); Mass. Ann. Laws ch. 207, § 47A (1969); Mich. Comp. Laws Ann. § 600.2901(4) (1968); Nev. Rev. Stat. § 41.380 (1967); N.H. Rev. Stat. Ann. § 508:11 (1955); N.J. Rev. Stat. § 2A:23-1 (1951); Pa. Stat. Ann. tit. 48, §§ 171-73 (1965); Wis. Stat. Ann. §§ 248.01-02(Supp. 1969); Wyo. Stat. Ann. §§ 1-727 to 1-731 (1957).

43. A.B. v. C.D., 36 F. Supp. 85 (E.D. Pa. 1940), aff'd 123 F.2d 1017 (3d Cir.), cert. denied, 314 U.S. 691 (1941) (gifts in contemplation of marriage). Contra, Pavlicic v. Vogtsberger, 390 Pa. 502, 136 A.2d 127 (1957).

44. Stienback v. Halsey, 115 Cal. App. 2d 213, 251 P.2d 1008 (Dist. Ct. App. 1953); Priebe v. Sinclair, 90 Cal. App. 2d 79, 202 P.2d 577 (Dist. Ct. App. 1949); De Cicco v. Barker, 339 Mass. 457, 159 N.E.2d 534 (1959); Gikas v. Nicholis, 96 N.H. 177, 71 A.2d 785 (1950); Morris v. MacNab, 25 N.J. 271, 135 A.2d 657 (1957).

45. Haviland v. Halstead, 34 N.Y. 643 (1866); Williams v. Igel, 62 Misc. 354, 116 N.Y.S. 778 (N.Y. City Ct. 1909); accord, Davis v. Pryor, 112 F. 274 (8th Cir. 1901).

46. Williams v. Igel, 62 Misc. 354, 356, 116 N.Y.S. 778, 779-80 (N.Y. City Ct. 1909).

47. Haviland v. Halstead, 34 N.Y. 643 (1866).

stein v. Rosenthal[48] that section 80-b does not create a new cause of action, but does remove the bar to recovery under common law as it existed prior to the anti-heart balm act.[49] The majority appears to be saying that although engagement rings are recoverable when the donee breaks the engagement, they are not recoverable when the contract to marry is void because it is against public policy.[50]

The dissent argued that regardless of the invalidity of the contract to marry, the plaintiff in equity should recover the ring in order to prevent unjust enrichment.[51] There is authority in New York which would allow a quasi-contractual recovery of an engagement ring in a case not involving a married participant.[52] However, the majority in *Lowe* relied upon cases from other jurisdictions where recovery was denied because of the doctrine of unclean hands.[53] The dissent, pointing out that both parties have unclean hands, attempted to circumnavigate the doctrine by arguing that although the remedies of equity should be denied one with unclean hands, unclean hands should not bar recovery when recovery is necessary to prevent unjust enrichment.[54]

The holding of the court assumed that the condition upon which the gift is dependent is a breach of the contract to marry. The court reasoned that the contract was void and therefore could not be the basis of a condition and thus the ring must have been an absolute gift. The assumption appears erroneous. It is the failure of the marriage to occur without any fault of the donor, and not the breach of the contract to marry, which conditions the gift. All situations would be encompassed by this rule and there would be no need for separate rules when there is no breach as in the case of mutual rescission of the contract. Furthermore, the inclusion of the problem within the sphere of the actual contract of marriage would meet the same criticisms that the *Andie* decision met when it extended the anti-heart balm act to bar an action for recovery because of the ring's connection with the contract. Treating the giving of the ring as only contemporaneous to the contract would seem more in line with the legislative intent behind section 80-b; public policy may void contracts to marry where one of the parties is married but public policy does not favor the apparent deception used by the donee to enrich herself. The condition attached to the gift having arisen, *i.e.*, the failure of the marriage to occur, the gift should be returned.

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48. 56 Misc. 2d 311, 314, 288 N.Y.S.2d 503, 507 (Civil Ct. of City of N.Y. 1968).

49. Lowe v. Quinn, 32 App. Div. 2d 269, 270, 301 N.Y.S.2d 361, 362-63 (1st Dep't 1969).

50. Id. at 271, 301 N.Y.S.2d at 363.

51. Id. at 272-73, 301 N.Y.S.2d at 364.

52. Zawadzki v. Vandetti, 255 App. Div. 932, 9 N.Y.S.2d 219 (4th Dep't 1938).

53. Malasarte v. Keye, 13 Alas. 407 (1951); Morgan v. Wright, 219 Ga. 385, 133 S.E.2d 341 (1963) (unclean hands by man who gave an engagement ring to a married woman); Armitage v. Hogan, 25 Wash. 2d 672, 171 P.2d 830 (1946) (plaintiff was a married man).

54. 32 App. Div. 2d at 272-73, 301 N.Y.S.2d at 364-65.

Evidence—Scope of Cross-Examination Not Restricted to Matters Covered by Direct Examination.—Plaintiff sought to recover damages for loss of society and companionship after her husband had been killed in an automobile accident. On direct examination she testified that she and her husband had been happily married and had enjoyed a close relationship. On cross-examination, plaintiff was asked if she were aware of an extramarital affair her husband had with another woman. The trial court sustained plaintiff's objection to this line of questioning as improper cross-examination beyond the scope of direct examination. The court went on to find that the husband was contributorily negligent and denied plaintiff recovery. On appeal, the Supreme Court of Wisconsin affirmed but ruled that the lower court had erred in excluding the question concerning the alleged affair since it was directly related to and in impeachment of the plaintiff's testimony on direct examination. The court went further in dictum, however, and ruled that the limits of cross-examination should be left to the discretion of the trial judge, and not necessarily restricted to matters covered by direct. *Boller v. Cofrances*, 42 Wis. 2d 170, 166 N.W.2d 129 (1969).

The majority rule is that cross-examination must be restricted to those matters which were raised on the direct examination[1] unless the cross-examiner wishes to impeach the credibility of the witness.[2] This rule was not derived from the English common law or early American decisions[3] but was first adopted by a Pennsylvania state court in *Ellmaker v. Buckley*.[4] In that case, the plaintiff proved, through the testimony of three referees, the existence and subsequent loss of an award granted to him by the referees in a prior nuisance suit. The defendant, before he had opened his defense, wished to examine the referees on the subject matter of the prior suit. The court ruled that a "witness may not be cross-examined to facts which are wholly foreign to the points in issue . . . for the purpose of contradicting him by other evidence."[5] Eventually, the rule was unequivocally approved by the Supreme Court of the United States in *Philadelphia & Trenton R.R. v. Stimpson*,[6] where certain statements were held to be inadmissible "upon the broader principle, now well established, although sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination."[7] On the strength of these two leading cases the majority of the states began to follow this restrictive rule of

1. Houghton v. Jones, 68 U.S. (1 Wall.) 702 (1863). See also People v. Watson, 46 Cal. 2d 818, 299 P.2d 243 (1956), cert. denied, 355 U.S. 846 (1957); Bunselmeyer v. Hill, 179 Neb. 140, 137 N.W.2d 354 (1965). This is the New York law as well. See Hall v. Allemonnia Fire Ins. Co., 175 App. Div. 289, 161 N.Y.S. 1091 (4th Dep't 1916).

2. Lyda v. United States, 321 F.2d 788 (9th Cir. 1963); Mendez v. Dorman, 151 Conn. 193, 195 A.2d 561 (1963); State v. Musack, 254 Iowa 104, 116 N.W.2d 523 (1962).

3. Fulton Bank v. Stafford, 2 Wend. 483, 485 (N.Y. 1829).

4. 16 S. & R. 71 (Pa. 1827).

5. Id. at 77.

6. 39 U.S. (14 Pet.) 448 (1840).

7. Id. at 460.

evidence,[8] more commonly referred to as the American rule.[9] The most logical and practical explanation for the rule is that it serves to promote order and regularity in a trial proceeding where each side separately presents and develops his own case. In other words "a plaintiff's witness should not be expected to help make the defendant's case on cross-examination."[10]

The American rule displays a wide degree of flexibility in application. In a great number of cases the courts have not hesitated to extend the limits of cross-examination by exercising a sound discretion where the situation warrants it.[11] In a recent typical case, *People v. Swingle*,[12] the defendant's wife on direct examination testified that her husband was a good provider for his family, as evidence of his good character. The court held it proper for the district attorney on cross-examination to question the witness in regard to an assault committed by the defendant against his wife, even though it had not been referred to on direct examination: "The manner and extent of the cross-examination lies largely within the discretion of the Trial Judge and, although there may be room for a difference of opinion as to the scope and extent of cross-examination, in the absence of 'plain abuse and injustice,' such discretion should not be disturbed."[13] Since trial courts have broad discretionary powers over the mode of conducting trials and the order of introducing the evidence,[14] any deviation or relaxation of the American rule will rarely be reversed unless there was a clear abuse of discretion[15] or unless the deviation worked a serious injury to the adverse party.[16]

In practice the American rule is rarely given a narrow or technical interpretation.[17] Cross-examination may encompass the general subject matter inquired into on direct.[18] It may include questions relating not only to all the facts elicited on direct, but also all facts connected therewith[19] or any parts of a general or continuous subject which was mentioned on direct.[20] Cross-examina-

8. For a complete sketch of the development of the rule in various jurisdictions over the 19th and 20th centuries, see 6 J. Wigmore, Evidence (3d ed.) § 1890, at 548 (1940 & Supp. 1964) [hereinafter cited as Wigmore].

9. 98 C.J.S. Witnesses § 393 (1957).

10. Boller v. Cofrances, 42 Wis. 2d 170, 181, 166 N.W.2d 129, 134. Wigmore lists five reasons for the rule in § 1887, at 537-39.

11. See cases cited in C. McCormick, Evidence § 24, at 47 nn.5 & 6 (1954) [hereinafter cited as McCormick]. McCormick is careful to point out, however, that some courts still apply the scope of the direct test as a strict standard and appellate courts, though often giving lip service to discretion, reverse a large number of cases in application of the test. Id. § 24, at 47.

12. 28 App. Div. 2d 1063, 284 N.Y.S.2d 133 (3d Dep't 1967) (mem.).

13. Id. at 1064, 284 N.Y.S.2d at 136 (citation omitted).

14. Wills v. Russell, 100 U.S. 621, 626 (1879).

15. Abel of Arkansas, Inc. v. Richards, 263 Ark. 281, 365 S.W.2d 705 (1963).

16. 100 U.S. at 626.

17. Marut v. Costello, 34 Ill. 2d 125, 214 N.E.2d 768 (1965).

18. Butler v. New York Central R.R., 253 F.2d 281 (7th Cir. 1958); State Roads Comm. v. Wyvill, 244 Md. 163, 223 A.2d 146 (1966).

19. State v. Carns, 136 Mont. 126, 345 P.2d 735 (1959).

20. Kaminski v. Meadows, 264 F.2d 53 (7th Cir. 1959).

tion has also been extended to include questions which would explain, contradict, or discredit[21] any deductions or conclusions[22] formulated from the direct testimony. Similarly, where the direct examination creates an inference as to the existence of a fact not directly testified to, a witness may be cross-examined to rebut such an inference.[23] Other courts have relied on a "reasonable theory," that is, anything *reasonably* within the scope of direct would be proper on cross-examination.[24]

In other jurisdictions adhering to the American rule, the scope of cross-examination has been extended, where the witness is a party to the action, to include all matters pertinent to the case regardless of whether they were touched upon on direct examination.[25] In other cases the courts have exercised their discretion more liberally where parties themselves are testifying.[26] This is especially true where the direct testimony is evasive or indefinite or where alleged fraudulent transactions are involved.[27] Generally, however, the rule still prevails that cross-examination must be confined to the subject matter covered in direct regardless of who is testifying.[28]

The English rule,[29] followed in a minority of jurisdictions,[30] permits cross-examination to extend to all relevant matters in the proceeding even though they were not raised on direct.[31] This "wide open" practice enables a cross-examiner to introduce his case and offer grounds of defense before his opponent

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21. Laffoon v. Kantor, 373 P.2d 252 (Okla. 1962).

22. Parente v. Dickenson, 391 Pa. 162, 137 A.2d 788 (1958).

23. Wheatly v. Heideman, 251 Iowa 695, 102 N.W.2d 343 (1960). See also Crawford v. Nilan, 264 App. Div. 46, 35 N.Y.S.2d 33 (3d Dep't 1942), rev'd 289 N.Y. 444, 46 N.E.2d 512 (1943).

24. State v. King, 37 N.J. 285, 181 A.2d 158 (1962); State v. Kozukonis, 100 R.I. 298, 214 A.2d 893 (1965).

25. Geelan v. Pennsylvania R.R., 400 Pa. 240, 161 A.2d 595 (1960); Morse v. Morse, 126 Vt. 290, 229 A.2d 228 (1967). Before Wisconsin adopted the wide open rule for witnesses in general, it had adopted the wide open rule where parties are cross-examined. See Abbot v. Truck Ins. Exch. Co., 33 Wis. 2d 671, 148 N.W.2d 116 (1967).

26. Decker v. Everson, 14 N.J. Misc. 860, 187 A. 783 (Sup. Ct. 1937); People v. Ramistella, 306 N.Y. 379, 118 N.E.2d 566 (1954).

27. Zuber v. Northern Pac. Ry., 246 Minn. 157, 74 N.W.2d 641 (1956).

28. E.g., Sima v. Skaggs Payless Drug Center, Inc., 82 Idaho 387, 353 P.2d 1085 (1960); Davis v. Kansas Elec. Power Co., 159 Kan. 97, 152 P.2d 806 (1944); Davis v. Lenhoff, 74 S.D. 190, 50 N.W.2d 213 (1951). See also Fed. R. Civ. P. 43(b).

29. The only precedent in England for the restrictive American practice was in the Chancery Court. The common law practice in England was clearly to the contrary. See generally Wigmore § 1885, at 533-34.

30. The minority rule is now more or less followed in 14 states: Alabama, Arizona, Georgia, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas and Wisconsin.

31. Moody v. Rowell, 34 Mass. (17 Pick.) 490 (1835) (leading case). See also Coward v. McKinney, 277 Ala. 513, 172 So. 2d 538 (1965); Rush v. State, 254 Miss. 641, 182 So. 2d 214 (1966). Naturally cross-examination is similarly extended if the witness happens to be one of the litigants in the action. See Jones v. Terminal R.R. Ass'n, 363 Mo. 1210, 258 S.W.2d 643 (1953).

has finished presenting his side.[32] In effect, this system of cross-examination empowers counsel to extract all of the damaging facts from the witness immediately after the witness has testified for his opponent, without any regard to the scope of direct—as long as his questions are not immaterial or collateral to the issues.[33] This is in contrast to the American rule, where the cross-examiner must make the witness his own if he wishes to ask pertinent questions not covered on direct,[34] thereby losing the power to discredit[35] the witness and to ask him leading questions.[36]

Undoubtedly, the liberal English rule is the better reasoned and more sensible practice. Both Wigmore and McCormick stress the importance of cross-examination as a vehicle for getting at the truth and that such an examination should not be hampered by any restrictive measures which produce only confusion, delays and continual bickering over what is within the scope of direct.[37] It is obvious from the number of cases that courts have had more trouble interpreting and applying the restrictive American rule than the relatively simple English rule.

In practice, the American rule has undergone a gradual but steady erosion by the implementation of the trial court's discretion in extending the scope of cross-examination.[38] With this background, the proposed Federal Rules of Evidence has adopted the American rule, but it permits, in the judge's discretion, inquiry into additional matters as if on direct examination.[39] The Advisory Committee noted that the American rule had merit in that a "limited cross-examination promotes orderly presentation of the case."[40] However, the Committee also recognized that the rule of limited cross-examination is within the

32. Willoughby v. Northwestern Ry., 32 S.C. 410, 11 S.E. 339 (1890). Missouri has a statute which recognizes the full scope of cross-examination but prevents a cross-examiner from questioning the witness in regard to a counterclaim or setoff until he has made the witness his own. Mo. Ann. Stat. § 491.070 (1952). In Arizona, a defense established on cross-examination is admissible but the questions must be within the scope of direct. See Podol v. Jacobs, 65 Ariz. 50, 173 P.2d 758 (1946).

33. Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818 (1966); Monts v. State, 214 Tenn. 171, 379 S.W.2d 34 (1964).

34. Houghton v. Jones, 68 U.S. (1 Wall.) 702, 706 (1863).

35. Pollard v. State, 201 Ind. 180, 166 N.E. 654 (1929). But this rule has been liberalized in many jurisdictions. See, e.g., N.Y. C.P.L.R. 4514: "In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath."

36. People v. Court of Oyer & Terminer, 83 N.Y. 436, 459 (1881).

37. McCormick § 27, at 51; Wigmore §§ 1885-90, at 532-60.

38. Supra note 11.

39. Rules of Evidence for the United States District Courts & Magistrates, Rule 6-11(b) at 130. (Preliminary Draft 1969): "Scope of Cross-Examination: Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may in the exercise of discretion permit inquiry into additional matters as if on direct examination."

40. Id. at 132.

judge's general control over the manner and order of interrogating witnesses and presenting evidence, and therefore, appellate courts need not become involved in the issue.[41] Perhaps the strongest indication of the wide freedom accorded to the judge under the new proposed rule is contained in the committee's comment that "the rule is phrased in terms of a *suggestion* rather than a mandate to the trial judge."[42]

By and large, states have not deemed it necessary to move away from the restrictive rule and to adopt a more liberal rule.[43] The only states to adopt the English rule had previously followed a modified form of the American rule where the cross-examiner could question the witness about any relevant facts in the action except those facts relating to his own affirmative case.[44] Instead, the trend in recent years has been toward a discretionary liberalization of the American rule.[45] The proposed Federal Rules, in recognition of this development, encourage full use of the judge's discretion to eliminate some of the unfairness which may result from a strict application of the American rule.[46]

Torts—Libel—Privilege of Fair and True Report of Judicial Proceedings Held Inapplicable to Litigant Who Had Persuaded His Corporation to Commence Suit Based on Allegedly False Allegations and Circulated Copies of the Summons and Complaint Among Members of the Trade.—Plaintiff and defendant were brothers and principals of the Universal Oven Corporation. After the plaintiff had terminated his employment with the corporation, the defendant persuaded Universal to commence an action charging that the plaintiff had conspired to misappropriate the corporation's trade secrets and assets. The defendant then circulated printed copies of the summons and complaint, together with a covering letter signed by Universal's chairman of the board, among members of the trade.[1] Plaintiff subsequently

41. Id.

42. Id. (emphasis added).

43. Supra note 8.

44. Michigan and Arizona were the leading states following this practice and now have adopted the English rule although the Michigan cases are not quite clear. McCormick § 21, at 45 n.14. "Ohio seems to be the principal, if not the only, present-day stronghold of this practice." Id. § 21, at 45 n.13.

45. Supra note 11.

46. Supra note 39.

1. The covering letter stated: "We enclose for your information a copy of the summons and complaint on file in the office of the Clerk of The County of New York in our suit against former employees and consultants of the Universal Oven Company." Williams v. Williams, 23 N.Y.2d 592, 595, 246 N.E.2d 333, 335, 298 N.Y.S.2d 473, 476 (1969). Defendants alleged that their purpose was to put the industry on notice that they could be held liable to Universal for damages for loss of profits should they deal with the plaintiff regarding these matters. However, this could only be accomplished if other members of the trade were chargeable with knowledge that the plaintiff was misusing its trade secrets

commenced an action charging that the defendant's allegations in the conspiracy suit were false and that his conduct in circulating the summons and complaint among members of the trade amounted to abuse of process and libel. Defendant alleged that plaintiff had failed to set forth a cause of action for abuse of process, and furthermore that section 74 of the New York Civil Rights Law provided a complete defense to "any person" who published a fair and true report of a judicial proceeding.[2] The trial court denied defendant's motion to dismiss,[3] and on appeal the appellate division affirmed by stating that the complaint sufficiently pleaded misuse of legal process and libel.[4] However, its decision was modified by the New York Court of Appeals which held that the complaint failed to state a cause of action for either abuse of process or malicious prosecution, since the gravamen of these actions entailed interference with person or property which was not alleged by the plaintiff.[5] Nevertheless, the court held that a cause of action for libel had been stated since "it was never the intention of the Legislature in enacting section 74 to allow 'any person' to maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute."[6] *Williams v. Williams*, 23 N.Y.2d 592, 246 N.E.2d 333, 298 N.Y.S.2d 473 (1969).

On the theory that the interests of society and justice require complete freedom of expression without regard to motive whenever men seek redress from the courts, it is universally held that statements by participants,[7] if

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and violating his contract. Id. at 606 n.2, 246 N.E.2d at 341 n.2, 298 N.Y.S.2d at 484-85 n.2. See, e.g., Colgate-Palmolive Co. v. Carter Prods., Inc., 230 F.2d 855, 864-65 (4th Cir. 1956).

2. "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof." N.Y. Civ. Rights Law § 74 (Supp. 1969).

3. The New York Supreme Court stated that the complaint was sufficient to state a cause of action, and that the defendant had not submitted sufficient "documentary evidence" to sustain a defense under section 74 of the Civil Rights Law. The court further noted that, as a matter of law, it could not be stated that the publications complained of constituted a "fair" report of a judicial proceeding. Privilege in this matter was a defense to be pleaded and proven. Williams v. Williams, 49 Misc. 2d 1016, 268 N.Y.S.2d 596 (Sup. Ct. 1966).

4. Williams v. Williams, 27 App. Div. 2d 550, 275 N.Y.S.2d 425 (2d Dep't 1966) (mem.).

5. 23 N.Y.2d at 599, 246 N.E.2d at 335, 298 N.Y.S.2d at 479. But see notes 41-42 infra.

6. Id. at 599, 246 N.E.2d at 337, 298 N.Y.S.2d at 479.

7. Participants have been defined to include the judge, grand and petit jurors, witnesses

relevant to the issues and made during the course of judicial proceedings, are absolutely privileged.[8] It is equally well established that there exists a qualified privilege of fair comment in reporting judicial proceedings.[9] However, not all jurisdictions agree as to what exactly is encompassed by judicial proceedings. The vast majority follow the leading Massachusetts case of *Cowley v. Pulsifer*[10] and hold that the privilege to report court proceedings does not extend to papers already filed by a party, but which have not been brought before a magistrate for official action.[11] Nevertheless, New York and a minority of other jurisdictions hold that the mere filing of pleadings is an official act and a matter of public record, thereby including such documents within the privileged scope of a fair and true report of judicial proceedings.[12]

Prior to 1854, the common law of England with regard to the privilege of fair and accurate comment was in effect in New York. Thus, a report was privileged if it were a fair report of a trial or legislative proceeding made in good faith without malice.[13] In 1854, the first New York statute on the

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(whether voluntary or involuntary), counsels, and the parties themselves. See W. Prosser, Torts § 109, at 796-98 (3d ed. 1964) [hereinafter cited as W. Prosser].

8. An absolute privilege insulates the author and publisher from liability for an otherwise defamatory communication, regardless of their motives. See id. § 109, at 796; cf. Pierson v. Ray, 386 U.S. 547 (1967). In Great Britain, the statements of the participants are absolutely privileged, regardless of the relevancy to the issue involved. In the majority of jurisdictions in the United States, however, the privilege is limited to the extent that the statement must be in some way relevant to the issues involved in the case. See W. Prosser § 109, at 798-99; 1 E. Seelman, The Law of Libel and Slander in the State of New York ¶ 191, at 233 (rev. ed. 1964) [hereinafter cited as 1 E. Seelman].

9. A qualified privilege confers immunity upon the author or publisher, "conditioned upon publication in a reasonable manner and for a proper purpose." W. Prosser § 110, at 805. "Since it obviously is to the interest of the public that information be made available as to what takes place in public affairs, a qualified privilege is recognized under which a newspaper or anyone else may make such a report to the public. The privilege rests upon the idea that any member of the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye—this, together with the obvious public interest in having public affairs made known to all." Id. § 110, at 816 (footnotes omitted); see 53 C.J.S. Libel & Slander § 127 (1948).

10. 137 Mass. 392 (1884).

11. See W. Prosser § 110, at 818.

12. The leading New York case is Campbell v. New York Evening Post, Inc., 245 N.Y. 320, 157 N.E. 153 (1927). The other jurisdictions that follow the New York rule are California, Kentucky, South Carolina, and Tennessee. See W. Prosser § 110, at 818. A federal court interpreting Illinois law in American Dist. Tel. Co. v. Brink's, Inc., 380 F.2d 131 (7th Cir. 1967), held that Illinois followed the New York rule, but the courts of that state have never decided a case exactly on point. The federal court relied on dictum in Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 73-74, 213 N.E.2d 1, 5 (1965) which stated that once a suit is filed, the privilege of fair comment attaches.

13. 1 E. Seelman ¶¶ 209-10.

subject provided that "[n]o reporter, editor or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, of any statement, speech, argument or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication."[14] The statute was subsequently upheld in *Salisbury v. Union & Advertiser Co.*,[15] where the court held that the publication of a fair and true report of any judicial proceedings, without malice, was privileged. Thus, the statute was construed as a codification of the prior English common law and was held not to enlarge the privilege.[16] In 1930, the legislature significantly amended the law by deleting the provision that malice could defeat the privilege.[17] Finally, in 1940 an amendment was passed extending the privilege of fair comment to "any person, firm or corporation."[18]

Notwithstanding the fact that the 1930 amendment specifically deleted the exception that malice could destroy the privilege, and that the 1940 amendment enlarged the privilege to include "any person, firm or corporation,"[19] the New York courts have consistently refused to apply the law where manifest injustice would result. That the courts would refuse to read malice out of the statute was clearly demonstrated in 1937 in *Oglesby v. Cranwell*,[20]

14. Law of April 1, 1854, ch. 130, § 1, [1854] Laws of N.Y. 314 (repealed 1880). The second section provided that the privilege did not extend to "libelous comments or remarks super-added to and interspersed or connected with such report." Id. § 2.

15. 9 N.Y. St. Rep. 465 (Sup. Ct. 1887).

16. 1 E. Seelman ¶ 211, at 264. However, the English common law rule that ex parte applications were not judicial proceedings was overturned in 1874. Ackerman v. Jones, 37 N.Y. Super. 42 (Super. Ct. 1874).

17. The amendment also extended the privilege to any headnote of the report which is "a fair and true headnote of the Article Published." Law of Sept. 1, 1930, ch. 619, § 1, [1930] Laws of N.Y. 1127 (amended 1940).

18. Law of April 17, 1940, ch. 561, § 5, [1940] Laws of N.Y. 1496 (amended 1956). The judiciary committee of the assembly in reporting this bill stated: "This amendment confers upon all persons the same privilege now accorded to newspapers and radio broadcasters by sections 337 and 337-a of the civil practice act, which privilege, by decision of the court of appeals is accorded to all persons (see Lewis v. The Chemical Foundation Inc., et al., 262 N.Y. 489 (1933); Seelman, Libel and Slander in the state of New York, Sec. 213.)." 1 N.Y. Assembly J. 1022 (1940) (emphasis deleted). The law was again amended in 1956 by striking out the word "proceedings" after "judicial" and "legislative", as well as other minor changes. Law of April 20, 1956, ch. 891, § 1, [1956] Laws of N.Y. 1914, now N.Y. Civ. Rights Law § 74 (Supp. 1969). See note 2 supra.

19. See Kelley v. Hearst Corp., 2 App. Div. 2d 480, 157 N.Y.S.2d 498 (3d Dep't 1956); Stevenson v. News Syndicate Co., 276 App. Div. 614, 96 N.Y.S.2d 751 (2d Dep't), aff'd 302 N.Y. 81, 96 N.E.2d 187 (1950); Jacobs v. Herlands, 51 Misc. 907, 17 N.Y.S.2d 711 (Sup. Ct.), aff'd mem., 259 App. Div. 823, 19 N.Y.S.2d 770 (2d Dep't 1940).

20. 250 App. Div. 720, 293 N.Y.S. 67 (2d Dep't 1937).

where the court sustained a plea by the defendant that the alleged defamation was a fair and true report of a judicial proceeding which was published *without actual malice*. In speaking of *Oglesby* the appellate division in *Williams* stated: "[W]e held that this defense was sufficient as a matter of pleading, primarily because of the allegation that the publication was in good faith and *without malice*."[21] In *Seltzer v. Fields*,[22] involving a previous action for dissolution of a partnership, plaintiff alleged that defendant caused the complaint in the prior action to be " 'left indiscriminately in mailboxes, shoved under doors and otherwise broadcast for the purpose of publication, but not for the prosecution of the action.' "[23] Although the court granted the defendant's motion to dismiss,[24] it noted that the plaintiff might be able to "allege and prove a cause or causes of action based upon some unconnected publications."[25] Thus, the court was in effect inviting the plaintiff to show that the publication was not made in furtherance of the public interest, but solely to injure the plaintiff, *i.e.*, *with malice*.

Judge Jasen, writing for the majority in *Williams*,[26] summarily dismissed the cause of action for abuse of process, stating that "there must be an unlawful interference with one's person or property under color of process in order that action for abuse of process may lie."[27] The court then addressed itself to the principal issue raised by the plaintiff, *i.e.*, section 74 of the Civil Rights Law as a defense to the ex parte publication of defamatory material by a party-litigant. In holding that section 74 is no defense to malicious publication of defamatory pleadings in such a situation, Judge Jasen relied heavily upon judicial interpretation of legislative intent. He noted that the reason for the privilege lies in the " 'public interest in having proceedings of courts of justice public, not secret, for the greater security thus given the proper administration of justice.' "[28] Having thus established as his major premise that the public interest is the primary reason for the privilege, and noting the purposes of the 1930 and 1940 amendments,[29] Judge Jasen then methodically

21. 27 App. Div. 2d at 551, 275 N.Y.S.2d at 427 (emphasis added).

22. 20 App. Div. 2d 60, 244 N.Y.S.2d 792 (1st Dep't 1963), aff'd, 14 N.Y.2d 624, 198 N.E.2d 368, 249 N.Y.S.2d 174 (1964).

23. Id. at 64, 244 N.Y.S.2d at 797.

24. Id. at 60, 244 N.Y.S.2d at 794.

25. Id. at 64, 244 N.Y.S.2d at 797.

26. Judge Jasen noted at the outset that, since this was a motion to dismiss plaintiff's complaint under N.Y. C.P.L.R. 3211 (1963), plaintiff's allegations were presumed to be true. 23 N.Y.2d at 595-96, 246 N.E.2d at 335, 298 N.Y.S.2d at 476.

27. Id. at 596, 246 N.E.2d at 335, 298 N.Y.S.2d at 476-77. He dismissed malicious prosecution for the same reason, citing Burt v. Smith, 181 N.Y. 1, 73 N.E. 495 (1905), appeal dismissed, 203 U.S. 129 (1906). Id. at 596 n.2, 246 N.E.2d at 335 n.2, 298 N.Y.S.2d at 477 n.2. But see note 41 infra.

28. 23 N.Y.2d at 597, 246 N.E.2d at 336, 298 N.Y.S.2d at 477. Judge Jasen quoted from an earlier case, Lee v. Brooklyn Union Pub. Co., 209 N.Y. 245, 248, 103 N.E. 155, 156 (1913).

29. Judge Jasen noted: "The apparent reason for removing the malice limitation was

moved to the conclusion that the legislature could not possibly have intended the privilege to be applicable to these circumstances.[30]

Judge Burke, in his concurring opinion, agreed that the term "any person" in the statute could not be literally construed to include the defendant, but arrived at this conclusion by a different interpretation of the legislative history of section 74 of the Civil Rights Law. After noting that as early as 1850 it had been held beyond doubt in New York that a party in a judicial proceeding possessed an absolute privilege,[31] he turned to a discussion of the prior statute and its subsequent amendments.[32] Judge Burke argued that the legislature by the 1940 amendment did not intend "to expand the rights of the litigants to the point where they could both commence a suit with impunity and then publish a true and fair report of that suit—albeit with actual

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to afford the news media a greater freedom to publish news of public interest without fear of suit." 23 N.Y.2d at 597, 246 N.E.2d at 336, 298 N.Y.S.2d at 478. He cited the New York Assembly Journal which had cited Lewis v. Chemical Foundation, Inc. and E. Seelman; see note 18 supra. However, he then proceeded to discuss only Lewis, making no further mention of Seelman. It may be interesting to note, as Chief Judge Fuld pointed out in his dissent, that Judge Jasen cited Lewis as standing for the proposition that the judiciary has never read malice out of the statute when, in fact, the court of appeals in that case was ruling on a cause of action which had accrued prior to the 1930 amendment deleting the malice exception. See 23 N.Y.2d at 605, 246 N.E.2d at 341, 298 N.Y.S.2d at 484 (Fuld, C. J., dissenting in part); see note 36 infra.

30. "The purpose of section 74 . . . is the protection of reports of judicial proceedings which are made in the public interest. In light of this purpose, it is impossible to conceive of the Legislature's intending to protect the defendant's perversion of judicial proceedings. It would be contrary to reason to say that the Legislature considered it necessary to protect such defamation in order to implement the salutary aims of the statute." 23 N.Y.2d at 599, 246 N.E.2d at 337, 298 N.Y.S.2d at 479.

31. The statements however, must have been in some way relevant to the issues involved. See note 8 supra.

32. Judge Burke noted that even prior to the 1940 amendment, there was serious doubt as to whether the privilege of publishing a fair and true report of a judicial proceeding was limited to newspapers. Citing Stuart v. Press Pub. Co., 83 App. Div. 467, 82 N.Y.S. 401 (1st Dep't 1903), and Robinson v. Battle, 148 App. Div. 230, 133 N.Y.S. 57 (1st Dep't 1911) (both cases cited by E. Seelman, supra note 18), he argued that publication of a fair and accurate report was a right enjoyed equally by all. 23 N.Y.2d at 601-02, 246 N.E.2d at 339, 298 N.Y.S.2d at 481-82. In Stuart, it was held that the plaintiff had a cause of action in libel when a newspaper printed reports of a divorce proceeding. Along with the complaint it printed colorful editorial comments which were in no way contained in the judicial proceeding. The court said that in this regard the press had no greater privilege than any individual. In Robinson, the defendant-attorney was charged with libel for composing a newspaper article involving a previous matrimonial action in which he had represented the plaintiff's wife. Defendant argued that the statement was a fair and true report of a judicial proceeding. The court, after reviewing the facts of the previous action, agreed and sustained the defense. These cases, although distinguishable from Williams since they involved newspaper publications, mildly supported Judge Burke's contention that the public also enjoyed the privilege prior to the 1940 amendment.

malice—and escape liability. . . . The purpose . . . was to extend to all *disinterested* persons the privilege then possessed by the press—to publish true and fair reports of judicial proceedings without fear of liability."[33] Thus, anyone *interested* in the litigation, *i.e.*, a party to the action, who circulated a complaint under these circumstances, was precluded from seeking asylum under the confines of section 74.

Chief Judge Fuld, in a vigorous partial dissent, argued that the plaintiff's cause of action in libel was without merit and should be dismissed in its entirety.[34] He pointed out that the statute "contains no exception or qualification, either express or implied, for persons who initiated or were parties to the judicial proceeding, and no such exception or qualification is indicated in the legislative history."[35] Arguing for a literal application of the statute, the Chief Judge indicated that the court in the past had literally interpreted "all persons" to include all parties, whether interested in the proceeding or not.[36] He was unconcerned that under his interpretation an "occasional libel [may]

33. 23 N.Y.2d at 603, 246 N.E.2d at 339, 298 N.Y.S.2d at 482 (emphasis added). Judge Burke arrived at this conclusion by the somewhat tenuous proposition that since the legislative bill jacket accompanying the 1940 amendment quoted a paragraph in E. Seelman (¶ 213) to the effect that all persons should have the privilege then afforded to newspapers, the legislators were obviously aware of a previous paragraph in E. Seelman (¶ 191) affording participants absolute privilege in judicial proceedings. Judge Burke then reasoned that the crucial question was whether the amendment enlarged the rights of the participant, or merely those of the reporter who published a fair and true report. Since the participant was already absolutely privileged as to utterances in a judicial proceeding, Judge Burke concluded that the legislature could not have intended to enlarge the participant's privilege, but only that of the disinterested publisher. Id. at 601-04, 246 N.E.2d at 339-40, 298 N.Y.S.2d at 481-83.

34. Id. at 605, 246 N.E.2d at 341, 298 N.Y.S.2d at 484.

35. Id. at 606, 246 N.E.2d at 341, 298 N.Y.S.2d at 485.

36. In Lewis v. Chemical Foundation, Inc., 262 N.Y. 489, 188 N.E. 33 (1933), where defendant had privately circulated 200,000 copies of an alleged defamatory deposition made in an earlier proceeding, the Chief Judge pointed out that the defense of fair report of judicial proceeding was sustained despite the fact that one of the defendants was a party to the earlier proceeding. However, this case is distinguishable from Williams, since defendants in Lewis circulated copies of a newspaper story and not the complaint itself. Chief Judge Fuld also cited Robinson v. Battle, 148 App. Div. 230, 133 N.Y.S. 57 (1st Dep't 1911), and Oglesby v. Cranwell, 250 App. Div. 720, 293 N.Y.S. 67 (2d Dep't 1937) as authority for the proposition that the court in the past has held that any person, even one interested in the proceedings, was protected by the privilege. See 23 N.Y.2d at 605, 246 N.E.2d at 342, 298 N.Y.S.2d at 486. Lewis, however, was cited by the majority as authority that malice can defeat the privilege. See note 29 supra. In addition, Robinson was cited by the concurring opinion as authority that even prior to 1940 the privilege of fair report was not confined to newspapers. See note 32 supra. While the Chief Judge is correct in his interpretation of Robinson and Oglesby, the courts in these cases sustained the defense principally because of the absence of any malice on the part of the defendants, and not because they fell within the technical meaning of the statute.

go uncompensated,"[37] since the interest of society " 'must prevail over the incidential harm to the individual. ' "[38]

The dissent, however, failed to find the plaintiff remediless in such a situation. Noting that section 74 extends its privilege only to the *publication* of a fair and true report of a judicial proceeding, and not to the *commencement* of that proceeding, the Chief Judge thought that an action in malicious prosecution was appropriate.[39] He stated that the protected publication "is an act entirely separate and distinct from that (earlier committed) of maliciously initiating a false and baseless lawsuit. Since the commencement of such a suit, wholly apart from any subsequent publication relating to it, is itself a cognizable and actionable tort, neither reason nor logic would prevent the plaintiff from seeking damages for malicious prosecution if he were ultimately to prevail in the original conspiracy litigation."[40] Nor was he in sympathy with the majority that such an action must be barred because of lack of interference with the plaintiff's person or property.[41] Notwithstanding language to the contrary in the lower New York courts, he argued, the court of appeals has never stated that interference with person or property was a necessary element of malicious prosecution based upon a prior civil action.[42]

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37. 23 N.Y.2d at 608, 246 N.E.2d at 343, 298 N.Y.S.2d at 487.

38. Id.

39. Id. at 609, 246 N.E.2d at 343, 298 N.Y.S.2d at 487-88.

40. Id. (citations and footnote omitted).

41. Id. at 609, 246 N.E.2d at 343, 298 N.Y.S.2d at 488. There is a wide divergence of opinion in American jurisdictions in regard to the propriety of allowing an action for malicious prosecution based upon a prior civil action maliciously instituted without probable cause. A distinct minority of American courts continue to follow the English rule that malicious prosecution will lie only if based upon a prior criminal action. Of those jurisdictions that do allow a cause of action for malicious prosecution to arise out of a civil suit, the numerical majority do not require interference with person or property. An important minority, however, including New York, hold that interference with person or property is a necessary element of the tort. See W. Prosser § 114, at 871-73; Annot., 150 A.L.R. 897 (1944); 54 C.J.S. Malicious Prosecution § 12 (Supp. 1969). Nevertheless, the Chief Judge, citing Burt v. Smith, 181 N.Y. 1, 73 N.E. 495 (1905), appeal dismissed, 203 U.S. 129 (1906), and Munoz v. City of New York, 18 N.Y.2d 6, 218 N.E.2d 527, 271 N.Y.S.2d 648 (1966), argued that the court of appeals has previously defined malicious prosecution as "one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure." 181 N.Y. at 5, 73 N.E. at 496. Both Chief Judge Fuld and Judge Jasen cited Burt as authority for their conflicting views on malicious prosecution. See note 27 supra. Judge Jasen merely cited the case without comment, but the Chief Judge argued that Burt specifically allowed a cause of action for malicious prosecution to be maintained without interference with person or property, although recovery might be nominal. "Damages are rarely recovered, however, for the malicious prosecution of a civil action, unless person or property is interfered with. . . ." Id.

42. There are several cases in the lower New York courts holding that interference with person or property is a necessary element of malicious prosecution based upon a civil

Therefore, he concluded, malicious prosecution is not only not barred, but is the correct and proper remedy under these circumstances.[43]

In the light of past decisions, however, it is not surprising that the court of appeals in *Williams* has affirmed that the plaintiff has stated a cause of action in libel. By its long justification of its holding in relation to section 74 of the Civil Rights Law, the court tacitly admitted that it holds a different standard than that of the statute: "We will not blindly apply the words of a statute to arrive at an unreasonable or absurd result."[44] It is interesting to note that a federal district court, in interpreting New York Law in *Phillips v. Murchison*,[45] held that the mailing of a complaint by the defendant directly to named individuals fell within the privilege of section 74 of the Civil Rights Law and dismissed the cause of action.[46] The federal court of appeals, however, after *Williams* had been decided in the appellate division, reversed the lower court on that issue by noting: "The case [*Williams*] is also important here because it draws the distinction, a distinction not apparent on the face of the New York Civil Rights Law . . . § 74, between, on the one hand, a litigant's publication of a complaint to news media . . . and, on the other, his direct publication of a complaint to private individuals."[47] Perhaps New York is moving closer to the sole purpose test of the Restatement of Torts.[48] According to the Restatement, any publication of a judicial proceeding is privileged if it is a fair and accurate report and is not made solely for the purpose of causing harm to the person defamed.[49] Given its

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action. See 36 N.Y. Jur. Malicious Prosecution § 10 (1964). Chief Judge Fuld may be correct in his statement that the court of appeals has never definitively spoken upon the question, but in Metromedia, Inc. v. Mandel, 21 App. Div. 2d 219, 249 N.Y.S.2d 806 (1st Dep't), aff'd mem., 15 N.Y.2d 616, 203 N.E.2d 914, 255 N.Y.S.2d 660 (1964), the court unanimously affirmed without opinion the appellate division ruling which contained the following language: "If there was wrong in the issuance of the process and malicious interference with the property of the plaintiff so as to constitute malicious prosecution. . . . [t]he pleading would have to claim interference with person or property in connection with the bringing of the civil action, or by injunction, attachment, arrest or other provisional remedy." 21 App. Div. 2d at 223, 249 N.Y.S.2d at 810 (citations omitted).

43. 23 N.Y.2d at 610, 246 N.E.2d at 344, 298 N.Y.S.2d at 488.

44. Id. at 599, 246 N.E.2d at 337, 298 N.Y.S.2d at 479.

45. 252 F. Supp. 513 (S.D.N.Y. 1966), modified, 383 F.2d 370 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968).

46. 252 F. Supp. at 523.

47. 383 F.2d at 372.

48. Restatement of Torts § 611 (1938): "The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is (a) accurate and complete or a fair abridgement of such proceedings, and (b) not made solely for the purpose of causing harm to the person defamed."

49. Id.

most narrow construction, *Williams* states a cause of action in libel when a complaint is circulated maliciously to named individuals by a party-litigant, the *sole* purpose of the publication being to ruin the good name and reputation of the person defamed. Whether the court will broaden this to include malicious publication of a complaint to the news media when the sole purpose is to defame, and not to prosecute a suit, remains at present an open question.