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# Case Notes

# CASE NOTES

**Constitutional Law—Standard of Proof Required in a Delinquency Adjudication.**—Appellant, a twelve-year old, was adjudged a juvenile delinquent under the Family Court Act[1] on a finding that he had stolen $112 from the victim's purse. The only evidence of the appellant's guilt was provided by the victim, with two witnesses testifying that the appellant was elsewhere at the time of the incident. The family court judge based his finding of delinquency on a fair preponderance of the evidence.[2] The order was affirmed by the appellate division[3] and an appeal was made to the court of appeals on the question of the constitutionality of the standard of proof required by the N.Y. Family Court Act § 744(b).[4] In a 4-3 decision, the court of appeals held that a "preponderance of evidence" was adequate to determine the status of delinquency for an infant,[5] even though the Code of Criminal Procedure requires proof beyond a reasonable doubt for the conviction of an adult.[6] The United States Supreme Court reversed, holding that proof beyond a reasonable doubt is constitutionally required in the adjudicatory stage of a delinquency proceeding. *In re Winship*, 397 U.S. 358 (1970).

The juvenile court system in the United States is an outgrowth of the chancery power as *parens patriae* to protect the child.[7] At first, courts only differentiated in the disposition of adult and youthful offenders by committing minors to reformatories rather than to prisons with adult criminals.[8] In other respects the children were treated in the same manner as adults.[9] Around the turn of the century, the guardianship principle of the court of chancery was extended to encompass all children in need of the protection of the state, including delinquent children.[10] After the establishment of the first juvenile court in Cook County, Illinois, in 1899,[11] the juvenile court movement developed rapidly, and by 1967, when *In re Gault*[12] was decided, it was noted that every state had some special machinery for dealing with juvenile offenders.[13] However, the absence of constitutional safeguards in such machinery often led to abuses.[14] In *Kent v. United*

1. N.Y. Family Court Act, art. 7 (McKinney 1963).

2. See W. v. Family Court, 24 N.Y.2d 196, 206, 247 N.E.2d 253, 260, 299 N.Y.S.2d 414, 423 (1969), rev'd, 397 U.S. 358 (1970).

3. In re W., 30 App. Div. 2d 781, 291 N.Y.S.2d 1005 (1st Dep't 1968).

4. N.Y. Family Court Act § 744(b) (McKinney 1963): "Any determination at the conclusion of an adjudicatory hearing . . . must be based on a preponderance of the evidence."

5. 24 N.Y.2d at 202-03, 247 N.E.2d at 257, 299 N.Y.S.2d at 420.

6. N.Y. Code Crim. Proc. § 389 (McKinney 1958).

7. In re Johnson, 178 F. Supp. 155, 161-62 (D.N.J. 1957); United States v. Fotto, 103 F. Supp. 430, 431 (S.D.N.Y. 1952). See Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909).

8. In re Knowack, 158 N.Y. 482, 487, 53 N.E. 676, 677 (1899).

9. Id.

10. See H. Lou, Juvenile Courts in the United States (1927).

11. E. Sutherland & D. Cressey, Principles of Criminology 398 (6th ed. 1960).

12. 387 U.S. 1 (1967).

13. Id. at 14.

14. See The Challenge of Crime in a Free Society: A Report by the President's Com-

*States*,[15] the Supreme Court noted that in some jurisdictions the child receives "the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[16]

Many state courts were conscious of these abuses to which juvenile courts were susceptible and either found the statutes giving rise to such abuses unconstitutional or interpreted their statutes in such a way as to avoid a finding of unconstitutionality.[17] In 1962, New York's Family Court Act was revised in response to constitutional theories that adjudications which threaten a youth with incarceration should provide as many procedural safeguards as possible.[18] The Act is premised on the concept that "[n]o adjudication under this article may be denominated a conviction . . . ."[19] Within this framework, the statute lists in detail the necessary steps to be taken before a youth can be adjudged a delinquent, prescribing when and how an offender may be taken into custody,[20] the nature of the preliminary, determinative and dispositional hearings,[21] and the machinery for rehearing.[22] The statute permits only material and relevant evidence to be considered,[23] and provides that no adjudicated delinquent will forfeit any rights or privileges because of such adjudication.[24] The express purpose of the Article is to provide for due process of law in juvenile delinquency hearings.[25] The Supreme Court, in *Winship*, pointed out that the application of a reasonable doubt standard will not disturb the policy of such a statute; it requires no change in the procedural differences of a delinquency adjudication.[26]

The decision by the New York Court of Appeals, in *W. v. Family Court*, typified the controversy raised over the quantum of proof required in a juvenile delinquency adjudication since the Supreme Court decided *In re Gault* in 1967.[27]

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mission on Law Enforcement and Administration of Justice ch. 3, at 83-88 (1967) [hereinafter cited as Commission Report].

15. 383 U.S. 541 (1966).

16. Id. at 556. "There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violations." Id. at 555-56 (emphasis omitted).

17. The decisions are reviewed in 43 C.J.S. Infants §§ 93-102 (1945).

18. See W. v. Family Court, 24 N.Y.2d at 200-01, 247 N.E.2d at 256-57, 299 N.Y.S.2d at 418-19.

19. N.Y. Family Court Act § 781 (McKinney 1963).

20. Id. §§ 721, 724, 726, 729 (McKinney Supp. 1970).

21. Id. §§ 731, 736, 738, 741-46, 748.

22. Id. § 761.

23. Id. § 745 (McKinney 1963).

24. Id. § 782.

25. Id. § 711.

26. 397 U.S. at 366-67.

27. 387 U.S. 1 (1967). The question had been considered in several states prior to the Gault decision. Most courts had decided that the standard of proof required to determine guilt in a delinquency proceeding was the same as the standard of proof required in an ordinary civil action. Annot., 43 A.L.R.2d 1138-40 (1955). A few courts had held that an adjudication of delinquency required proof beyond a reasonable doubt. In re Madik, 233 App. Div. 12, 251 N.Y.S. 765 (3d Dept't 1931); In re Rich, 86 N.Y.S.2d 308 (Dom. Rel. Ct. 1949); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

Prior to 1966, the Supreme Court had not considered the constitutionality of juvenile court procedures.[28] It was traditionally held that the due process safeguards applicable to criminal proceedings did not apply to proceedings in the juvenile courts because such procedures were designed to rehabilitate and protect children rather than to punish them.[29] Constitutional safeguards were excluded from juvenile proceedings because it was believed that their incorporation would interfere with the informal and non-adversarial resolution of the child's problems.[30] But in *Gault*, the Supreme Court held that juvenile delinquency hearings must measure up to the " 'essentials of due process and fair treatment' . . . which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution."[31] *Gault*, however, did not hold that all procedural guarantees applicable to an adult in criminal proceedings must be applied to a juvenile delinquency adjudication,[32] nor did it profess to consider the totality of the relationship of the juvenile to the state.[33] In emphasizing that its decision was not to be read so as to eliminate the concept of special treatment for juveniles, the Court said "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[34]

As the various state courts did consider the question of whether due process and fair treatment in a juvenile delinquency hearing required an infant's guilt to be established beyond a reasonable doubt, two distinct interpretations of *Gault* emerged. Those who would stiffen procedural requirements argued that *Gault*'s whole spirit pointed toward providing procedural safeguards in juvenile hearings particularly where the child was faced with incarceration and the adjudication for what, if not for his age, would be a criminal charge.[35] These courts maintained that the "spirit . . . of *Gault* transcends the specific issues there involved, and that, in view thereof, it would not be consonant with due process or equal

28. The Supreme Court's first major decision in the area of juvenile court procedures was Kent v. United States, 383 U.S. 541 (1966).

29. E.g., In re Perham, 104 N.H. 276, 184 A.2d 449 (1962).

30. Kent v. United States, 383 U.S. 541, 554-55 (1966). In Kent, the Court held that a juvenile court may not waive jurisdiction and remand the defendant to the criminal courts without first affording the defendant the basic requirements of due process, including a hearing, assistance of counsel, and a statement of reasons for the court's decision.

31. 387 U.S. at 30-31 (footnotes omitted).

32. Id. at 10-11 n.7 and accompanying text. In Kent, while expressing its concern for the juvenile offender, the Court commented that it was not "induce[d] . . . in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses . . . must be applied in juvenile court proceedings concerned with allegations of law violation." 383 U.S. at 556 (footnote omitted).

33. 387 U.S. at 13.

34. Id. at 21 (footnote omitted). For a discussion of the questions raised by Gault, see Arthur, Should Children Be as Equal as People?, 45 N.D.L. Rev. 204 (1969); Carver & White, Constitutional Safeguards for the Juvenile Offender, 14 Crime & Delinquency 63 (1968); Ferster & Courtless, The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender, 22 Vand. L. Rev. 567 (1969).

35. E.g., United States v. Costanzo, 395 F.2d 441 (4th Cir.), cert. denied, 393 U.S. 883 (1968); In re Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1968).

protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction."[36] On the other side were those courts which distinguished *Gault* on the grounds that the Court had specifically refused to rule on the standard of proof issue.[37] These courts held that since the purpose of juvenile courts was to free youthful offenders from the technicalities and consequences of criminal law, it was not an absence of procedural due process to have one standard of proof for delinquency adjudications, which are non-criminal status determinations, and to have quite another standard for criminal convictions.[38]

The Supreme Court in *Winship* responded to the "single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult"[39] with two distinct holdings. First, it held that in a criminal proceeding, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt,"[40] and second, it held that the reasonable doubt standard is required at the adjudicatory stage of a delinquency proceeding.[41]

There is no explicit reference in the Constitution to the standard of proof required in criminal adjudications, and although the Supreme Court had never previously held that the reasonable doubt standard was constitutionally required in state criminal cases,[42] it has historically been accepted as such.[43] The

36. In re Urbasek, 38 Ill. 2d at 541-42, N.E.2d at 719; see 72 Dick. L. Rev. 547 (1968).

37. E.g., In re M., 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969); In re Wylie, 231 A.2d 81 (D.C. Ct. App. 1967); State v. Arenas, 453 P.2d 915 (Ore. 1969); see In re Whittington, 17 Ohio App. 2d 164, 245 N.E.2d 364 (1969). See also State v. Santana, 444 S.W.2d 614 (Tex. 1969), vacated and remanded for consideration in light of In re Winship, 397 U.S. 596 (1970).

38. A California court stated that "in the absence of a specific ruling on the issue by the United States Supreme Court, we adhere to the pre-Gault view of our courts that the established standard is valid and 'No constitutional rights of the appellant have been infringed by the use of the preponderance of evidence test to determine the truth of the allegation that he had committed a crime.'" In re M., 70 Cal. 2d at 460, 450 P.2d at 305, 75 Cal. Rptr. at 10-11 (emphasis omitted). See also N.Y. Family Court Act § 781 (McKinney 1963), which states that delinquency status is not criminal and the proceedings are not criminal.

39. 397 U.S. at 359 (1970).

40. Id. at 364.

41. Id. at 368; see Note, Quantum of Proof in Delinquency Hearings, 5 Willamette L.J. 149 (1968).

42. Dorsen & Rezneck, In re Gault and the Future of Juvenile Law, 1 Family L.Q. 4, 26 (1967).

43. Historically, the standard of proof accepted in criminal cases has been "beyond a reasonable doubt." In civil cases, a preponderance of the evidence has found acceptance. Neither has a single accepted definition. See C. McCormick, Evidence § 321, at 681-82 (1954); 9 J. Wigmore, Evidence §§ 2497, 2498, at 316, 317-18 (3d ed. 1940).

Court pointed out that it had long been assumed in its own opinions that the reasonable doubt standard was constitutionally required,[44] allocating to that standard a "vital role" in American criminal procedure.[45] The Court believed that it is "a prime instrument for reducing the risk of convictions resting on factual error"[46] and that it is the "concrete substance for the presumption of innocence."[47] The Court stated that "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[48]

In determining what standard should be applied in delinquency adjudications, the Supreme Court reviewed the arguments made by the majority in *W. v. Family Court*.[49] The Court of Appeals had held that the constitutionality of the disputed section of the Family Court Act depended upon whether a delinquency hearing was a criminal or civil proceeding.[50] It stated that the juvenile court systems are an attempt, on the part of the States, to handle misbehaving youngsters apart from the traditional system of criminal justice[51] and that such delinquency proceedings are basically civil in nature because there is no finding of criminal status.[52] Thus, there is no necessity to use the standard of proof required in criminal cases.[53] The Supreme Court rejected this argument: "We made clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be "de-

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"Reasonable doubt" has been defined as "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge'." 9 J. Wigmore, Evidence § 2497, at 317-18 (3d ed. 1940).

Preponderance of the evidence is defined as " 'that evidence which, when fairly, fully and impartially considered by the jury, produces the stronger impression and has the greatest weight . . . and is more convincing as to its truth, when contrasted or weighed against the evidence in opposition thereto'." Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 417, 146 P. 861, 863 (1915).

As to the applicability of the rules of evidence in juvenile delinquency proceedings, see Annot., 43 A.L.R.2d 1128-46 (1955).

44. 397 U.S. at 362.

45. Id. at 363.

46. Id.

47. Id. It should be noted that the presumption of innocence is not explicitly mentioned in the Constitution either. See Coffin v. United States, 156 U.S. 432 (1895) where the Court stated that the presumption of innocence lies at the basis of criminal law.

48. 397 U.S. at 364.

49. 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969).

50. Id. at 203, 247 N.E.2d at 257, 299 N.Y.S.2d at 420.

51. Id. at 198, 247 N.E.2d at 254-55, 299 N.Y.S.2d at 416.

52. Id. at 203, 247 N.E.2d at 257, 299 N.Y.S.2d at 420.

53. Id.

linquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution'."[54]

The Court also rejected the argument that the requirement of a higher standard of proof would destroy the beneficial aspects of special juvenile procedures.[55] Ideally, the juvenile courts were to be a forum where the problems of the individual child could be considered with the use of the most scientific methods of investigation and treatment.[56] Any disposition of a case would be made in relationship to the needs of the particular child and on the basis of information obtained about him, and not within a predetermined frame of reference concerning offenses and punishments.[57] They were designed to provide the offender with the protection of the state, not punishment.[58]

Beneath what appear to be basic legal considerations of whether an adjudication of delinquency is a civil or criminal procedure lies the more elemental problem of what is the nature of delinquency. The reformers of the 20th century predicated their whole philosophy on the belief that delinquency was an individual aberration from the social norm and the court was a form of treatment center for the individual.[59] The courts maintain this rationale in viewing their role as rehabilitative rather than punitive despite the mounting evidence that they are in fact the latter and not the former.[60]

In his dissent, Chief Justice Burger expressed his hope that the emphasis on procedural due process decisions "will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court . . . ."[61] Implicit in Chief Justice Burger's reasoning is a belief that juvenile courts are capable of giving the youthful offender attention of superior quality to that given in regular courts, simply by virtue of the fact that they are not procedurally limited as are regular courts.

Today, however, some commentators believe that delinquency, rather than being an individual aberration, is a social and economic problem.[62] They maintain that the courts are not equipped to deal with the problem and that they shouldn't try to. The emphasis should be on change and rehabilitation before the youth comes to the attention of the courts, and the juvenile court system

54. 397 U.S. at 365-66.

55. Id. at 366.

56. E. Sutherland & D. Cressey, supra note 11, at 399.

57. Id. at 400.

58. Id. at 399.

59. See Thomas v. United States, 121 F.2d 905, 907-09 (D.C. Cir. 1941); Coats v. Markley, 200 F. Supp. 686, 687 (S.D. Ind. 1962); In re Johnson, 178 F. Supp. 155, 163-64 (D.N.J. 1957).

60. Miller, The Dilemma of the Post-Gault Juvenile Court, 3 Family L.Q. 229 (1969); Nicholas, History, Philosophy, and Procedures of Juvenile Courts, 1 J. Family Law 151 (1961).

61. 397 U.S. at 376.

62. See Commission Report, supra note 14, at 56-57. See also Spencer, Beyond Gault and Whittington—The Best of Both Worlds?, 22 U. Miami L. Rev. 906, 908-10 (1968).

should be a "last resort;"[63] a court like all others in providing Constitutional safeguards.

One can only guess at the effect of these latest theories of delinquency. As the Supreme Court has considered the problems of the juvenile courts, it has moved toward the requirements of procedural due process. However, the Court has not completely defined the outer limits of what it would consider essential. In *Gault*, the Court included as necessary notice of charges, the right to counsel, the right to examination and confrontation, and the privilege against self-incrimination. In *Winship*, the Court added the standard of proof beyond a reasonable doubt. Currently before the court is a case raising the question of the need for jury trials in delinquency adjudications.[64] Though it seems remote that the Court will decree that a juvenile should be tried by a jury of his peers, the philosophy of the proponents of the "last resort" theory is cited in *Winship* with approval,[65] and the Court concludes by voicing agreement with Chief Judge Fuld who wrote the dissenting opinion in *W. v. Family Court*: "I do not believe that a lesser standard may be justified on the theory that the proceedings . . . are designed, in the words of the court . . . 'not to punish, but to save the child.' "[66]

**Constitutional Law—State Action—Regulation of College Disciplinary Code.**—Plaintiffs were students at Wagner College, a privately supported, church affiliated college located in New York. On April 23, 1970, they entered the office of the Dean of the college to confer with him, and remained there in violation of an order of the Dean of Students requiring them to vacate. They were subsequently expelled, pursuant to the rules and regulations for the maintenance of public order adopted by the college following the enactment of New York State Education Law section 6450.[1] Plaintiffs brought suit in the United

63. "[W]here the intention was once to get the troubled child into the courts as fast as possible, the aim will now be to keep him out of court altogether, if that is possible. There is a deeper difference, however, than in the method of proceeding. Fundamentally, the conviction is no longer shared that crime can be reduced or children, in large numbers, 'saved' by the tactic of treating the individual deviant. . . . Patient attack on basic social evils, together with sorrowful, helpful but firm response to those who cause serious harm, are the actions that commend themselves . . . ." Paulsen, Children's Court: Gateway or Last Resort?, in M. Paulsen, Cases & Selected Problems in Family Law and Poverty 1006, 1011 (1969).

64. In re Terry, 438 Pa. 339, 265 A.2d 350, prob. juris. noted sub. nom. McKeiver v. Pennsylvania, 399 U.S. 925 (1970).

65. In the majority opinion, at 397 U.S. at 364, 366 n.4, there are cites to Dorsen and Rezneck, In re Gault and the Future of Juvenile Law, supra note 42. See 397 U.S. at 369 n.1 (Harlan, J., concurring) where there is reference to Paulsen, Juvenile Courts and the Legacy of '67, 43 Ind. L.J. 527, 551-52 (1968). Paulsen is a major architect of the last-resort theory. See note 64 supra.

66. W. v. Family Court, 24 N.Y.2d at 203, 247 N.E.2d at 258, 299 N.Y.S.2d at 421.

1. N.Y. Educ. Law § 6450 (McKinney Supp. 1970) provides:

"1. The trustees or other governing board of every college chartered by the regents or incorporated by special act of the legislature shall adopt rules and regulations for the main-

States District Court for the Eastern District of New York, seeking an order of the court directing the college to reinstate them pending a hearing, to satisfy the requirements of due process in its hearing procedures, and to cease racially discriminatory expulsions.[2] The district court dismissed the complaint for lack of federal jurisdiction.[3] The United States Court of Appeals, Second Circuit, reversed and remanded to the district court for a further hearing to determine whether section 6450 represents a meaningful state intrusion into the disciplinary policies of private colleges and universities, sufficient to constitute state action under the fourteenth amendment.[4] *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970).

The Supreme Court has long held that the due process clause of the fourteenth amendment does not apply to wholly private acts.[5] Out of this has arisen the

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tenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof. Such rules and regulations shall govern the conduct of students, faculty and other staff as well as visitors and other licensees and invitees on such campuses and property. The penalties for violations of such rules and regulation shall be clearly set forth therein and shall include provisions for the ejection of a violator from such campus and property, and in the case of a student or faculty violator his suspension, expulsion or other appropriate disciplinary action. Such rules and regulations shall be filed with the regents and the commissioner of education not later than ninety days after the effective date of this act. All amendments to such rules and regulations shall be filed with the regents and the commissioner of education not later than ten days after their adoption.

"2. If the trustees or other governing board of a college fails to file the rules and regulations within the time required by this section such college shall not be eligible to receive any state aid or assistance until such rules and regulations are duly filed.

"3. Nothing contained in this section is intended nor shall it be construed to limit or restrict the freedom of speech nor peaceful assembly."

In the original slip opinion (Coleman v. Wagner College, No. 34869 (2d Cir. June 22, 1970)), the court misread the text of § 6450, substituting "may" for "shall" in the clause calling for the enumeration of certain penalties to be enforced against students and faculty. No. 34869, at 3410 n.1. This error is made all the more surprising by the existence of the Governor's Memorandum (also cited by the court at 3414-15), which specifically provides that "penalties for violations . . . must include provisions for: —ejection of violators from the campus; and, —suspension, expulsion, or other appropriate disciplinary action in the case of a student or faculty violation."

Thus it may be seen that the court's suggestion that even the most lenient code would suffice under the statute is erroneous. Had the court chosen to pursue the matter further, an even stronger case of state action might have been made out, relying on a correct reading of the statute.

2. Coleman v. Wagner College, 429 F.2d 1120, 1123 (2d Cir. 1970).

3. See id. at 1123.

4. U.S. Const. amend. XIV. Factors to be explored on remand included "[t]he actions of the state officials with whom the rules are to be filed" and "[t]he attitude of the college administrators required to draft regulations by the statute." Id. at 1125.

5. See Civil Rights Cases, 109 U.S. 3 (1883). "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." 109 U.S. at 11. See also United States v. Cruikshank, 92 U.S. 542, 554-55

doctrine of "state action," which holds that, in order for a plaintiff to establish federal jurisdiction under the fourteenth amendment, he must show that he is being deprived of due process by the actions of a state, and not those of a purely private person.[6] Application of this doctrine is often found in the area of racial discrimination.[7]

It has been a matter of contention whether the acts of quasi-public bodies, such as "private" universities, are subject to due process requirements, absent the requisite indicia of "state action."[8] This question has generally been resolved in the negative by the courts[9] and argued for in the affirmative by the commentators.[10]

*Burton v. Wilmington Parking Authority*,[11] which has been called "a case without precedent,"[12] may be seen as an outpost on the frontier of state action.

(1875). "The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add any thing to the rights which one citizen has under the Constitution against another." In Virginia v. Rives, 100 U.S. 313 (1879), the court stated that "[t]he provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals." 100 U.S. at 318; accord, Ex Parte Virginia, 100 U.S. 339, 346-47 (1879).

6. The fourteenth amendment "erects no shield against merely private conduct." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

7. E.g., Reitman v. Mulkey, 387 U.S. 369 (1967); United States v. Guest, 383 U.S. 745 (1966); Evans v. Newton, 382 U.S. 296 (1966); Griffin v. Maryland, 378 U.S. 130 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Smith v. Allwright, 321 U.S. 649 (1944).

8. See, e.g., O'Neil, Private Universities and Public Law, 19 Buffalo L. Rev. 155 (1970); St. Antoine, Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination, 59 Mich. L. Rev. 993 (1961); Wilkinson & Rolapp, The Private College and Student Discipline, 56 A.B.A.J. 121 (1970); Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027 (1969); Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1054-64 (1968).

9. See, e.g., Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), rev'd in part on other grounds, dismissed in part as moot, 412 F.2d 1128 (D.C. Cir. 1969); Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962). See also Wilkinson & Rolapp, supra note 8. But cf. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), aff'd, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968).

10. Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 Cornell L. Rev. 375 (1958); Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208 (1968); O'Neil, supra note 8; St. Antoine, supra note 8; Wright, supra note 8; Note, The Scope of University Discipline, 35 Brooklyn L. Rev. 486 (1969); Note, Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings, 53 Minn. L. Rev. 301 (1968); Comment, Student Due Process in the Private University: The State Action Doctrine, 20 Syracuse L. Rev. 911 (1969).

11. 365 U.S. 715 (1961).

12. Lewis, Burton v. Wilmington Parking Authority—A Case Without Precedent, 61 Colum. L. Rev. 1458 (1961).

In *Burton* it was held, for the first time, that state inaction in preventing discrimination by a lessee of state owned property may be such state action as will give rise to a claim under the fourteenth amendment by one who is discriminated against.[13] In this respect, *Burton* goes a step beyond the classic state action cases, which typically presented the Court with a situation in which an essentially public, or state, function was being performed in a discriminatory manner by a seemingly private individual.[14] *Burton* presented a situation in which an essentially private function, the operation of a restaurant, became an action of the state, at least for fourteenth amendment purposes, by virtue of its location in a public facility.[15] This decision involved a novel twist on the theory of "state action." Rather than searching for a state function which was being performed by private individuals, the court, it seemed, was looking for a private function into which the state had "insinuated" itself to a degree susceptible of constitutional regulation.[16]

In the field of education, the courts have, until recent years, been careful to draw the line between public and private higher education.[17] While there has been gradual judicial encroachment upon the prerogatives of state universities and public school systems,[18] the trend in the private sector has not been as clear. *Guillory v. Administrators of Tulane University*[19] held that "[t]here is insufficient state involvement in the operation of the Tulane University of Louisiana to bring it within the privileges and proscriptions of the Fourteenth Amendment

13. 365 U.S. at 726.

14. E.g., Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (picketing on mall of privately-owned shopping center, which was operated as public business thoroughfare); Evans v. Newton, 382 U.S. 296 (1966) (state court appointment of park trustees under racially discriminatory will); Griffin v. Maryland, 378 U.S. 130 (1964) (deputization of amusement park's private patrolman to facilitate enforcement of park owner's private policy of racial discrimination); Terry v. Adams, 345 U.S. 461 (1953) (exclusion of Negroes from party primary in one party state); Shelley v. Kraemer, 334 U.S. 1 (1948) (state court enforcement of racially discriminatory restrictive covenant); Marsh v. Alabama, 326 U.S. 501 (1946) (private corporation-owned town posted signs prohibiting distribution of religious literature).

15. 365 U.S. at 722-25.

16. "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle [Coffee Shop] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." Id. at 725.

17. See, e.g., Greene v. Howard Univ., 271 F. Supp. 609, 612-13 (D.D.C. 1967), rev'd in part on other grounds, dismissed in part as moot, 412 F.2d 1128 (D.C. Cir. 1968).

18. E.g., Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961). See also Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969); Due v. Florida A & M Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Denno, Mary Beth Tinker Takes the Constitution to School, 38 Fordham L. Rev. 35 (1969); Wilkinson & Rolapp, supra note 8, at 121.

19. 212 F. Supp. 674 (E.D. La. 1962).

to the United States Constitution."[20] The district court was able to reach this conclusion despite the fact that state officers sat on the University's board,[21] the state had transferred property to the board,[22] all of the board's property enjoyed a state tax exemption,[23] and the state constitution sanctioned a statutory reversionary clause which set forth circumstances under which University property might revert to the state.[24] The court termed these connections between the state and the university "not so significant."[25]

*Guillory* was followed several years later by *Pennsylvania v. Brown*,[26] the most recent litigation involving the will of Stephen Girard.[27] In an earlier case the exclusion of Negroes from Girard College had been held to constitute prohibited state action, in violation of the fourteenth amendment, in that the board which operated the college was an agency of the state.[28] However, the Court had not ordered the admission of the Negro plaintiffs into the college at that time.[29] Subsequently, the Philadelphia Orphan's Court appointed substitute trustees to administer Girard College.[30] In *Brown* the district court ruled that the state had become so entwined in the administration of the trust (which operated the college) over a period of more than a century and a quarter that it could not disassociate itself by the simple device of appointing private trustees.[31] As a result, discrimination by any trustees was barred by the fourteenth amendment.[32]

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20. Id. at 687.

21. Id. at 683-84.

22. Id. at 684.

23. Id. at 684-85.

24. Id. at 685. Law of July 5, 1884, No. 43, adopted, La. Const. Ann. art. 12, § 24 states that if the Tulane Board should cease to use state property and exercise state privileges for the purposes of the act (stated in the Preamble to be the fostering of the University of Louisiana and the vesting in the Tulane Board, upon the adoption of the constitutional amendment, of the power to create, develop, and maintain a great university in the City of New Orleans) then the state shall have the right to resume the custody and control of the property and powers formerly vested in the University of Louisiana. 212 F. Supp. at 686.

25. Id. at 687. After reciting the various connections between the state and the university, the district court said: "In summary, it is the conclusion of this court that the state action or involvement in the affairs of the Tulane Board is not so significant that it may fairly be said that the actions of the Tulane Board are the actions of the State of Louisiana. To this extent the plaintiffs are not entitled to relief and this court so finds." Id. The court therefore held that the operations of Tulane University did not fall within the purview of the fourteenth amendment.

26. 270 F. Supp. 782 (E.D. Pa. 1967), aff'd, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968).

27. The earlier litigation culminated in Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (the Girard College Case).

28. Id. at 231.

29. The Court remanded "for further proceedings not inconsistent with this opinion." 353 U.S. at 231. Thus the door was opened to subsequent litigation.

30. In re Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, appeal dismissed sub nom. Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570 (1958).

31. 270 F. Supp. at 789-92.

32. Id. at 792. Compare Brown with Evans v. Newton, 382 U.S. 296 (1966), where a

In *Greene v. Howard University*[33] the District of Columbia court took a similar position to that taken in *Guillory*. Despite the evidence that a large percentage of the university's expenses were paid by annual appropriations made by Congress,[34] and the existence of a statutory provision for visitation and inspection of the University by the Secretary of Health, Education and Welfare,[35] the court held that "[i]t is clear, therefore, that the principle which counsel for the plaintiffs seek to invoke, namely, that a Government college or university may not expel its students without notice of charges and an opportunity to be heard, is not applicable to Howard University, for it is not a public institution nor does it partake of any governmental character."[36] The relationship could be terminated by the university without affording students and faculty due process.[37]

What Judge Frankel has characterized as the "grave troubles . . . experienced at Columbia University"[38] in 1968 produced, *inter alia, Grossner v. Trustees of Columbia University*.[39] Basing their jurisdictional claim on 42 U.S.C. § 1983 (1964),[40] which creates a cause of action for deprivation of civil rights by persons acting under color of law, several students sought to enjoin the disciplinary procedures instituted against them by the university. The district court rejected their contention that the state had insinuated itself into a position of interdependence with the university so as to render the university's acts state acts.[41] Examining the ties between Columbia and the State of New York and finding them wanting, the court stated that the "receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instru-

state court's appointment of trustees of a park to replace the city which had resigned as trustee to facilitate the appointment, was held to constitute "state action" where the obvious purpose of the appointment was to perpetuate policies of segregation in the park which the city itself could no longer carry out.

33. 271 F. Supp. 609 (D.D.C. 1967), rev'd in part on other grounds, dismissed in part as moot, 412 F.2d 1128 (D.C. Cir. 1969).

34. 271 F. Supp. at 612.

35. 20 U.S.C. § 122 (1964). See also id. §§ 121, 123.

36. 271 F. Supp. at 612-13; see Maiatico Const. Co. v. United States, 79 F.2d 418, 420-23 (D.C. Cir. 1935), where the court held that Howard University was a private institution.

37. 271 F. Supp. at 614. Some courts have followed a contractual approach to the relationship between students and the university. See John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Drucker v. New York Univ., 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969); cf. Samson v. Trustees of Columbia Univ., 101 Misc. 146, 149, 167 N.Y.S. 202, 204 (Sup. Ct.), aff'd mem., 181 App. Div. 936, 167 N.Y.S. 1125 (1st Dep't 1917). See also Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1145-47 (1968).

38. Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 537 (S.D.N.Y. 1968).

39. 287 F. Supp. 535 (S.D.N.Y. 1968).

40. 42 U.S.C. § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

41. 287 F. Supp. at 546-48.

mentality of the Government."[42] Also rejected was the "public function" theory of state action,[43] which would subject the university to federal constitutional requirements since it had adopted the "public function" of educating persons.[44]

The reasoning in *Grossner* was carried to its logical conclusion in *Powe v. Miles*,[45] which dealt with the disruption of a R.O.T.C. parade on the campus of Alfred University. Even though Alfred was the beneficiary of some financial assistance[46] from the State of New York, and subject to state regulation of educational standards,[47] the Second Circuit refused to find any facts sufficient to clothe the actions of the university with the mantle of "state action" in the expulsion of four liberal arts students.[48] Speaking for a unanimous court, Judge Friendly said, "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of [the] complaint."[49]

This requirement of a specific correlation between the activity regulated by the state and the injury incurred by the plaintiff appears to be new to the concept of "state action." To some extent it has been followed in *Browns v. Mitchell*[50] which dealt with the question of whether preferential tax exemptions for a

42. Id. at 547-48.

43. Id. at 549. See generally Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1060-61 (1968).

44. "[N]othing supports the thesis that university (or private elementary) 'education' as such is 'state action.' " 287 F. Supp. at 549.

45. 407 F.2d 73 (2d Cir. 1968).

46. "President Miles thought state and federal aid, excluding scholarships to students and the provision for C[ollege of] C[eramics], was only a hundred or two hundred thousand dollars a year, as against the total budget of $6.8 million." 407 F.2d at 81.

47. E.g., N.Y. Educ. Law §§ 207, 215, 305(2) (McKinney 1969). These sections set forth the functions of the regents, provide for visitation and reports, and outline general powers and duties of the commissioner of education.

48. "We perceive no basis for holding that the grant of scholarships and the financing of C[ollege of] C[eramics] imposes on the State a duty to see that Alfred's overall policies with respect to demonstrations and discipline conform to First and Fourteenth Amendment standards so that state inaction might constitute an object of attack." 407 F.2d at 81. However, the court did find state action in the expulsion of sudents of the New York State College of Ceramics at Alfred University, a state-supported institution under contract with the State of New York. Id. at 83.

49. Id. at 81. It is upon this dictum of Judge Friendly that appellants in Coleman v. Wagner College based their appeal. 429 F.2d at 1123; Brief for Appellant at 10, 12-13; Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970). Judge Friendly cited Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). "[T]he fact that New York has exercised some regulatory powers over the standard of education offered by Alfred University does not implicate it generally in Alfred's policies toward demonstrations and discipline." 407 F.2d at 81.

50. 409 F.2d 593 (10th Cir. 1969); accord, Guillory v. Administrators of Tulane Univ., 212 F. Supp. 675 (E.D. La. 1962). "[T]his court is unable to find legal support for the proposition that a simple grant of state funds to a private institution, be it in the form of a tax exemption or otherwise, is state action per se." Id. at 685.

private university will give rise to acts under "color of state law." The Tenth Circuit held that "[t]he benefits conferred, however characterized, have no bearing on the challenged actions beyond the perpetuation of the institution itself."[51] To this extent at least, *Browns* appears to be following the correlation requirement of *Powe*.

Thus it may be seen that the general weight of judicial opinion leans heavily towards finding little or no state involvement in the administration of private universities. Frequently, where a finding of such involvement is inescapable, the courts will view it as "not significant."[52]

In the present case, the circuit court considered the question of whether the state had intervened in the performance of a function traditionally entrusted to private organizations, *i.e.*, the maintenance of internal order by private universities, to such an extent as to subject the imposition of disciplinary sanctions by such private colleges and universities to scrutiny under the fourteenth amendment.[53]

The court examined the apparent legislative intent behind section 6450[54] in the context of widespread legislative "backlash" against student protestors.[55] The question presented would seem to turn upon the degree of "regulation" contemplated by the statute.[56] Judge Kaufman noted the possibility that the statutory requirements were minimal, stating that:

> One wonders whether rules and regulations consisting solely of the statement that any individual guilty of a transgression against the public order of the campus shall be required to give the Dean of the College a rose and a peppercorn on Midsummer's Day would satisfy the literal command of the statute in all respects.[57]

The court held, however, that the possibility exists that "the statute may have been intended, or may be applied, to mean more than it purports to say."[58] It may be viewed as an attempt to "coerce colleges to adopt disciplinary codes embodying a 'hard-line' attitude toward student protestors."[59] If that is the case, Judge Friendly's dictum in *Powe*[60] may well be satisfied since the action

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51. 409 F.2d at 596, citing Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

52. See, e.g., Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962). See also Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), rev'd in part on other grounds, dismissed in part as moot, 412 F.2d 1128 (D.C. Cir. 1969).

53. The court characterized this as "an interesting variation on the familiar theme of state action." 429 F.2d at 1121.

54. Id. at 1124.

55. Id. at 1125, n.5.

56. See text accompanying note 1, supra.

57. 429 F.2d at 1124.

58. Id. "The Governor's Memorandum approving section 6450 referred to an 'intolerable situation on the Cornell University Campus' and spoke of 'the urgent need for adequate plans for student-university relations' . . . ." (emphasis deleted).

59. Id. at 1125.

60. Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). "State action would be . . . present here with respect to all the students if New York had undertaken to set policy for the control of demonstrations in all private universities . . . ."

by the state would have been directly related to the petitioners' expulsion.[61] The court remanded for a further hearing to explore the manner in which section 6450 is viewed by both the state officials with whom the rules and regulations are to be filed, and the university administrators who are to file them.[62]

Judge Friendly, concurring, would have gone still further, and remanded for consideration on the merits.[63] Once the state has stepped in, as it has every right to do, he argued, the colleges, by promulgating such rules and regulations, are exercising a power emanating from the legislature, and cannot act solely on their own authority.[64] "When a state has gone so far in directing private action that citizens may reasonably believe this to have been taken at the state's instance, state action may legitimately be found even though the state left the private actors almost complete freedom of choice."[65] But even Judge Friendly recognized that, assuming arguendo, the presence of state action, "neither the First Amendment nor the due process clause of the Fourteenth prevents reasonable regulation of student protests by educational institutions, including summary suspension when that is deemed necessary to prevent a situation from getting out of hand."[66]

The possibility exists that a state may, unintentionally, "[insinuate] itself into a position of interdependence"[67] with a private university by overzealously attempting to regulate the internal disciplinary processes of that institution. The need for greater discipline may be sorely felt by the legislatures and the judi-

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61. "By enacting section 6450, [plaintiffs] argue, the state legislature did undertake to set policy for dealing with campus demonstrations and, in fact, became involved with the regulation of the very activity by which the plaintiffs claim to have been unjustly injured—the imposition of disciplinary sanctions for offenses against the public order on college campuses." 429 F.2d at 1123. "If these considerations have merit and section 6450 was intended to coerce colleges to adopt disciplinary codes embodying a 'hard-line' attitude toward student protesters, it would appear that New York has indeed 'undertaken to set policy for the control of demonstrations in all private universities' and should be held responsible for the implementation of this policy." Id. at 1125 (citation omitted).

62. "If the state officials prevented the regulations from being filed because of substantive 'inadequacies' or exercised any other influence upon their content, these officials would provide strong indicia of state action. A reasonable and widespread belief among college administrators that section 6450 required them to adopt a particular stance toward campus demonstrators would seem to justify a conclusion that the state intended for them to pursue that course. This intent would afford a basis to find state action." Headnote, Coleman v. Wagner College, 164 N.Y.L.J., July 30, 1970, at 1.

63. 429 F.2d at 1126.

64. Id. (concurring opinion); cf. Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960).

65. 429 F.2d 1127, (concurring opinion). The Rules and Regulations of Wagner College begin with a statement that they were drafted "in accordance with the newly enacted New York Public Law 129-a, which required such a document," and then set out a copy of § 6450 in full. Id. at 1126.

66. 429 F.2d at 1127.

67. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

ciary alike,[68] but the price a state may have to pay for the benefit of such deterrence in private colleges is the acceptance of the responsibility "for preventing overdeterrence by excessive sanctions and lack of fair procedure for enforcement."[69]

**Evidence—Admissibility of Declarations Against Penal Interest.**—Appellant was convicted of murder having been unable to establish his claim of self-defense. He had maintained that the victim was armed; the police, however, were unable to find the weapon alleged to have been in the victim's possession. Appellant sought to admit a statement made by a third party to the effect that the third party had picked up the gun in question immediately after the shooting and subsequently used it in committing a robbery. The third party, however, refused to testify to this declaration, invoking the privilege against self-incrimination. The appellate division sustained the trial court's ruling that the declaration was not admissible.[1] In a unanimous decision the court of appeals reversed and ordered a new trial, holding that the exception to the hearsay rule for declarations against interest includes declarations against penal interest provided that the declarant is unavailable to testify.[2] *People v. Brown,* 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970).

Traditionally, hearsay evidence has been held inadmissible since the declarant is not available as a witness and the veracity of his statement cannot be tested by cross-examination.[3] There are, however, a number of exceptions to the rule which excludes hearsay evidence,[4] one being the admission of statements classified as declarations against interest.[5] Under these exceptions, evidence, although

68. See generally General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

69. 429 F.2d at 1126 (concurring opinion).

1. People v. Brown, 28 App. Div. 2d 646, 282 N.Y.S.2d 215 (4th Dep't 1967).

2. The court, in addition, clarified the grounds of unavailability which will be sufficient to serve as a basis for the admission of the evidence; see note 36 infra and accompanying text.

3. J. Prince, Richardson on Evidence § 207, at 197 (9th ed. 1964) [hereinafter cited as Richardson]; see C. McCormick, Evidence § 224, at 458 (1954) [hereinafter cited as McCormick]; J. Wigmore, Evidence §§ 1361-62 (3d ed. 1940, Supp. 1964) [hereinafter cited as Wigmore]; Note, Declarations Against Interest—Rules of Admissibility, 62 Nw. U.L. Rev. 934 (1968).

4. For a discussion of the other exceptions to the hearsay rule see E. Fisch, Fisch on New York Evidence §§ 891-1022 (1959, Supp. 1969) [hereinafter cited as Fisch]; McCormick §§ 230-99; G. Mottla, New York Evidence §§ 156-207 (1954) [hereinafter cited as Mottla]; Wigmore § 1426.

5. United States v. Dovico, 261 F. Supp. 862 (S.D.N.Y. 1966), aff'd, 380 F.2d 325 (2d Cir.), cert. denied, 389 U.S. 944 (1967); Neely v. Kansas City Pub. Serv. Co., 241 Mo. App. 1244, 252 S.W.2d 88 (1952); Kittredge v. Grannis, 244 N.Y. 168, 155 N.E. 88 (1926); Tomkins v. Fonda Glove Lining Co., 188 N.Y. 261, 80 N.E. 933 (1907); Brennan v. Hall,

clearly hearsay is admitted when there is a justified reason for the absence of the declarant as a witness[6] and there is present an inherent "probability of trustworthiness."[7] For example, declarations against interest have been admitted in the belief that man, by his nature, would not voluntarily make a statement detrimental to himself unless he believed it to be true.[8] Without such exceptions evidence which is probably reliable might otherwise be excluded.[9]

Declarations against interest have been allowed for over two hundred years.[10]

131 N.Y. 160, 29 N.E. 1009 (1892); Alexander Grant's Sons v. Phoenix Assurance Co., 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966); Martorella v. Prudential Ins. Co. of America, 238 App. Div. 532, 264 N.Y.S. 751 (4th Dep't 1933); Massachusetts Bonding & Ins. Co. v. City of Cleveland, 187 N.E.2d 369 (Ohio 1963). See also Fisch §§ 891-903; McCormick §§ 253-57; Mottla § 158; Richardson §§ 236-47; Wigmore § 1455; Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1 (1944).

The exceptions for declarations against interest and for admissions are often confused. Carpenter v. Davis, 435 S.W.2d 382 (Mo. 1968); Brautigam v. Hoffman, 444 S.W.2d 528 (Mo. Ct. App. 1969). Unlike admissions—which require the declarant to be a party in the case or to be in privity with a party—declarations against interest require only that the words spoken be contrary to the interests of the unavailable declarant. McCormick § 253.

The exception for dying declarations is to be distinguished from that for declarations against interest. In New York, dying declarations, which are used only in homicide cases, must be made by the victim, must concern the cause or circumstances of his death and need not be against the declarant's interests. Wigmore §§ 1432-34. For the current trend in the use of dying declarations in light of constitutional issues see Comment, The Admissability of Dying Declarations, 38 Fordham L. Rev. 509 (1970).

6. Syracuse Eng'r Co. v. Haight, 97 F.2d 573 (2d Cir. 1938); United States v. Miller, 277 F. Supp. 200, 208 (D. Conn.), aff'd, 381 F.2d 529 (2d Cir. 1967), cert. denied, 392 U.S. 929 (1968); Alexander Grant's Sons v. Phoenix Assurance Co., 25 App. Div. 2d 93, 95, 267 N.Y.S.2d 220, 222-23 (4th Dep't 1966). But see Oscar Gruss & Son v. Lumbermens Mut. Cas. Co., 422 F.2d 1278, 1282-83 (2d Cir. 1970).

See Wigmore §§ 1421, 1456 on the "necessity principle." See also Note, supra note 3, at 936-41. The fact that the declarant is deceased or otherwise unavailable is insufficient in itself to justify an exception to the hearsay rule. Ellwanger v. Whiteford, 15 App. Div. 2d 898, 225 N.Y.S.2d 734 (1st Dep't 1962), aff'd, 12 N.Y.2d 1037, 190 N.E.2d 24, 239 N.Y.S.2d 680 (1963), wherein there was an accidental death of a trespassing infant while fleeing from threats of a watchman. Declarations of the watchman, since deceased, were held not sufficient to be within declaration against interest exception: it being essential that the declarant knowingly make a declaration against his proprietary or pecuniary interest. People v. Dolan, 186 N.Y. 4, 14, 78 N.E. 569, 572 (1906); Griffin v. Train, 90 App. Div. 16, 85 N.Y.S. 686 (1st Dep't 1904); Prince, Evidence, 14 Syracuse L. Rev. 377, 379-80 (1962).

7. Alexander v. State, 449 P.2d 153 (Nev. 1968); Meyer v. Mutual Serv. Cas. Ins. Co., 13 Wis. 2d 156, 108 N.W.2d 278 (1961); Wigmore §§ 1422, 1457-69, at 204, 262-78.

8. Hileman v. Northwest Eng'r Co., 346 F.2d 668 (6th Cir. 1965); Filesi v. United States, 352 F.2d 339 (4th Cir. 1965); G.M. McKelvey Co. v. General Cas. Co. of America, 166 Ohio St. 401, 142 N.E.2d 854 (1957); Wigmore § 1457, at 262-63; Proposed Fed. R. of Evidence 8-04(b)(4) and Example (4), 46 F.R.D. 161, 385-87 (1969); Model Code of Evidence rule 509, Comment C (1942).

9. Note, supra note 3, at 934-35.

10. Warren v. Greenville, 93 Eng. Rep. 1079 (K.B. 1740); Manning v. Lechmere, 26 Eng. Rep. 288 (Ch. 1737).

Prior to 1844, it would appear that declarations against penal interest were admissible.[11] In that year the House of Lords decided the *Sussex Peerage* case in which a party attempted to establish his parents' lawful marriage by the admission of a deceased person's declaration that he had married the couple, the circumstances of which act made it criminal.[12] The court held declarations against penal interest to be inadmissible expressing a general desire for care and caution before, as they viewed it, extending an exception to the hearsay rule.[13]

In 1913, this limitation was adopted by the United States Supreme Court in *Donnelly v. United States*.[14] In that case, a witness sought to introduce the confession of a third person, then deceased, made outside of the courtroom, to the murder of which defendant was accused.[15] The *Donnelly* holding is presently the rule in most American jurisdictions.[16] The majority of jurisdictions only allow the admission of declarations which are adverse to the declarant's

11. Powell v. Harper, 172 Eng. Rep. 1112, 1113 (N.P. 1833); Standen v. Standen, 170 Eng. Rep. 73, 74 (N.P. 1791). An example of the declaration against interest exception would be if a witness were allowed to relate a statement spoken by an unavailable third party declarant and if the words spoken would have been such as to open the way for a criminal prosecution against the declarant. See generally, Richardson § 241; Wigmore § 1476; Jefferson, supra note 5; Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451 (1952); Annot., 162 A.L.R. 446 (1946).

12. Sussex Peerage, 8 Eng. Rep. 1034 (H.L. 1844). The case involved an attempt by the grandson of George III to prove the lawful marriage of his parents and thereby receive the rights due an heir to the English throne. The claimant sought to admit a declaration by the marrying clergyman, since deceased, admitting the performance of the rites of the English church in Rome, an act which at that time, would have been a felony. The House of Lords excluded the declaration and denied the claim. Id. at 1041-42.

13. Id. at 1045. Compare text accompanying note 43 infra.

14. 228 U.S. 243 (1913).

15. Id. at 273. In establishing the prevailing view excluding declarations against interest, Donnelly cited decisions from 16 states including two cases from New York—People v. Schooley, 149 N.Y. 99, 43 N.E. 536 (1896); Greenfield v. People, 85 N.Y. 75 (1881).

Early federal court decisions were generally in accord with the reasoning of the Sussex Peerage case. United States v. McMahon, 26 F. Cas. 1131 (No. 15,699) (D.C. Cir. 1835) (murder); United States v. Miller, 26 F. Cas. 1255 (No. 15,773) (D.C. Cir. 1830) (illegal gambling house); United States v. Mulholland, 50 F. 413, 416 (D. Ky. 1892), appeal dismissed, 149 U.S. 782 (1893) (embezzlement); United States v. Randall, 27 F. Cas. 696 (No. 16,118) (D. Ore. 1869) (larceny).

16. See Scolari v. United States, 406 F.2d 563 (9th Cir.), cert. denied, 395 U.S. 981 (1969); Wesson v. State, 238 Ala. 399, 191 So. 249 (1939); Moya v. People, 79 Colo. 104, 244 P. 69 (1926); Cobb v. State, 219 Ga. 388, 133 S.E.2d 596, cert. denied, 311 U.S. 943 (1963); Weber v. Chicago, R.I. & Pac. R.R., 175 Iowa 358, 151 N.W. 852 (1916); Alexander v. State, 449 P.2d 153 (Nev. 1968); Petition of Winineger, 337 P.2d 445 (Okla. Crim. Ct. App. 1959); Newton v. State, 61 Okla. Crim. 237, 71 P.2d 122 (1937); Commonwealth v. Antonini, 165 Pa. Super. 501, 69 A.2d 436 (1949); McLain v. Anderson Free Press, 232 S.C. 448, 102 S.E.2d 750 (1958); 31A C.J.S. Evidence § 219, at 608-09 (1964).

17. "An exception to the general rule excluding hearsay testimony is found in the reception as against A of declarations made by B who is dead, known by him when made to be against his pecuniary interest." Kittredge v. Grannis, 244 N.Y. 168, 175, 155 N.E. 88, 90 (1926). In that case records of a deceased third party declarant were admitted to establish

pecuniary[17] or proprietary[18] interests. A number of states have codified this rule, excluding declarations involving penal interest.[19]

Although a lack of uniformity prevails, there has been a recent trend towards admitting declarations against penal interest.[20] Some courts, when admitting such declarations, have restricted admittance to cases where it is highly pertinent to the outcome.[21] Several states have adopted such a "special circumstances" rule.[22] In one such jurisdiction such declarations are apparently admitted in civil cases although excluded, with no apparent distinguishing rationale, in criminal cases.[23] In still other jurisdictions a statement against one's penal interest

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conversion of plaintiff's bonds by the third party and to deny defendant the rights accorded a holder in due course. In another case a receipt by a deceased sheriff was admitted to prove that the debt in question was satisfied on the basis that the "[o]fficer thereby charged himself with the money, and rendered himself accountable for it to the creditor." Livingston v. Arnoux, 56 N.Y. 507, 519 (1874).

18. "It is well settled that the declarations of a deceased grantor of real estate in reference to the title thereto and against his interest, made at a time when he is in the possession of the land, are admissible even in an action against a person who claims nothing under the grantor and is not strictly in privity with him." People v. Storrs, 207 N.Y. 147, 160, 100 N.E. 730, 734 (1912), citing Lyon v. Ricker, 141 N.Y. 225, 36 N.E. 189 (1894). See also Beattie v. Garrison, 204 App. Div. 335, 198 N.Y.S. 71 (2d Dep't), aff'd, 236 N.Y. 574, 142 N.E. 289 (1923).

19. See, e.g., Ga. Code Ann. §§ 38-308, -309, -405 (1954); Idaho Code Ann. § 16-408 (1963); Mont. Rev. Codes Ann. § 93-1101 (1964); Neb. Rev. Stat. § 25-1221 (1965); Ore. Rev. Stat. §§ 41.850, .860, .900 (1969); Utah Code Ann. § 78-25-8 (1953). See also P.R. Laws Ann. tit. 32, § 1678 (1968). Cf. statutes in notes 32 & 33 infra.

20. Compare Mason v. United States, 257 F.2d 359, 360 (10th Cir.) (dictum), cert. denied, 358 U.S. 831 (1958) with People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); State v. Larson, 91 Idaho 42, 415 P.2d 685 (1966); Dyson v. State, 238 Md. 398, 209 A.2d 609 (1965), vacated sub nom. Dyson v. Maryland, 383 U.S. 106 (1966); State v. Sejuelas, 94 N.J. Super. 576, 229 A.2d 659 (1967).

21. People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952); Petition of Winineger, 337 P.2d 445, 452 (Okla. Crim. Ct. App. 1958) (Nix, J., dissenting); Cameron v. State, 153 Tex. Crim. 29, 217 S.W.2d 23 (Crim. Ct. App. 1949).

22. In one instance, which involved a murder charge based upon solely circumstantial evidence, the court admitted an unavailable third party's confession to the crime based upon the special circumstances of the case. Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923). See People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952) (unavailable third party's confession to rape and murder admitted in light of special circumstances consisting of circumstantial evidence and a repudiation of a coerced confession of the defendant); Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), aff'd sub nom. Brady v. Maryland, 373 U.S. 83 (1963); Thomas v. State, 186 Md. 446, 47 A.2d 43 (1946) (accomplice confession to murder excluded by trial court held to be grounds for a new trial); Blocker v. State, 55 Tex. Crim. 30, 114 S.W. 814 (1908) (unavailable third party's confession to the murder admitted because his motive for the crime was at par with that of the defendant); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950) (unavailable third party's confession to murder admitted). See also Brennan v. State, 151 Md. 265, 134 A. 148 (1926) (admitting declaration in bastardy proceeding).

23. Compare Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945) (civil case in which declaration against penal interest was admitted) with State v. Gordon, 356 Mo. 1010, 204 S.W.2d 713 (1947) (declaration against penal interest not admitted in criminal case).

is considered to impute a loss to one's pecuniary or proprietary interest, and thus is admitted on the latter grounds.[24]

The most noteworthy of recent cases is *People v. Spriggs*.[25] In *Spriggs*, the California Supreme Court equated declarations against penal interest with those against pecuniary or proprietary interests without requiring any qualifying factors.

The Model Code of Evidence,[26] the Uniform Rules of Evidence[27] and the Proposed Federal Rules of Evidence[28] would expand the law on declarations against interest to include those declarations which are against penal interest and even those declarations that create "such a risk of making him [the declarant] an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the declaration unless he believed it to be true."[29] Whereas the Model Code sets down guidelines as to what portions of the declaration are admissible (excluding extrinsic comments),[30] the Uniform and the Proposed Rules do not contain such a statement beyond excluding unconstitutional confessions.[31] The recently prepared Proposed Fed-

24. Sucher Packing Co. v. Manufacturers Cas. Ins. Co., 245 F.2d 513 (6th Cir. 1957), cert. denied, 355 U.S. 956 (1958); Citizens' Nat'l Bank v. Santa Rita Hotel Co., 22 F.2d 524 (9th Cir. 1927) (suit to collect on a note in which declarant, unavailable, admitted to the forgery of defendant's name was liable civilly and criminally); Clark & Jones, Inc. v. American Mut. Liab. Ins. Co., 112 F. Supp. 889 (E.D. Tenn. 1953); Weber v. Chicago, R.I. & Pac. Ry., 175 Iowa 358, 151 N.W. 852 (1916) (train derailment suit for personal injury in which the unavailable declarant admitted causing the wreck and was liable civilly and criminally); G.M. McKelvey Co. v. General Cas. Co. of America, 166 Ohio St. 401, 142 N.E.2d 854 (1957); Aetna Life Ins. Co. v. Strauch, 179 Okla. 617, 67 P.2d 452 (1937). At least one writer condemns this blending of pecuniary and penal interests as a subterfuge for not admitting the problem which penal interests may involve. Morgan, supra note 11, at 475.

25. 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964). Spriggs involved a police officer's testimony upon cross-examination as to a declaration made by one of two people, the declarant being unavailable, arrested for possession of narcotics when asked whether she owned the heroin involved. If her answer was in the affirmative it could have had a material role in establishing the innocence of the appellant who was being tried for the possession.

But it should be noted that if the declarant had stated that both she and the defendant owned the heroin, that part of the testimony asserting the defendant's possession would not be admissible, there being no circumstantial probability of trustworthiness to justify the admission of such hearsay evidence. See Deike v. Great Atl. & Pac. Tea Co., 3 Ariz. App. 430, 415 P.2d 145 (1966); Moore v. Metropolitan Life Ins. Co., 237 S.W.2d 210 (Mo. Ct. App. 1951) (in statement to police that defendant was the aggressor, declarant was building a case for, and not against, her interest). See Note, supra note 3, at 954-55 for a discussion of exculpatory and inculpatory declarations against penal interest.

26. Model Code of Evidence rule 509 (1942).

27. Uniform Rule of Evidence 63(10).

28. Proposed Fed. R. of Evidence 8-04(b)(4), 46 F.R.D. 378 (1969).

29. Model Code of Evidence rule 509 (1942).

30. Id.

31. Uniform Rule of Evidence 63(10); Proposed Fed. R. of Evidence 8-04(a), 46 F.R.D. 377 (1969).

eral Rules of Evidence, unlike the Model Code and Uniform Rules, necessitate showing unavailability prior to the admission of such declarations. The reason for this is that the Proposed Rules do not consider such declarations to be of sufficient trustworthy "quality" to exclude this common law requirement for exception to the hearsay rule.

Though adopted by three states[32] and two territories,[33] there is, as yet, apparently no case law delineating the application of the Uniform Rule. Without a requirement of unavailability, a witness may be selected to testify to the declaration of another who is present and able to testify at the trial merely because the witness could express the details of the declaration more vividly than the declarant himself. Furthermore, the extension to declarations against social interest may entail problems in application. The nature of social disapproval is fluctuating, often subject to whim or fashion. It may be difficult, if not impossible in many instances, to define and assert with as much clarity and reliability as has been noted concerning pecuniary, proprietary, and penal interests—the nature of the latter interests being defined objectively.[34]

While differing on application of this exception to the hearsay rule, the Model Code, the Uniform Rules, and the Proposed Federal Rules concur that declarations against penal interests should be admitted on a par with declarations against pecuniary and proprietary interests.

Although prior to *Brown*, the New York courts had never expressly held that declarations against penal interests did not constitute an exception to the hearsay rule, such testimony had, in fact, been excluded.[35] *People v. Brown*, however, expressly rejected these precedents. In *Brown*, as in *Spriggs*, the court did not restrict the admission of such declarations to special circumstances; however, unlike *Spriggs*, *Brown* recognized the need for a finding of unavailability, clarifying the permissible criteria therefore. The court noted that:

> The rule in New York should be modernized to hold that an admission against penal interest will be received where material and where the person making the admission is dead, beyond the jurisdiction and thus not available; or where he is in court and refuses to testify as to the fact of the admission on the ground of self incrimination.[36]

32. Cal. Evid. Code § 1230 (West 1966); Kan. Stat. Ann. § 60-460(j) (1964); N.J. Stat. Ann. § 2A:84A, Rule 63(10) (Supp. 1969).

33. Canal Zone, C.Z. Code tit. 5, § 2962(10) (1963); Virgin Islands, V.I. Code, tit. 5, § 932(10) (1967).

34. Cf. United States v. Dovico, 261 F. Supp. 862, 871-76 (S.D.N.Y. 1966), aff'd, 380 F.2d 325 (2d Cir.), cert. denied, 389 U.S. 944 (1967).

35. See, e.g., People v. Bodah, 28 App. Div. 2d 744, 280 N.Y.S.2d 709 (3d Dep't 1967) (mem.) (citing Greenfield v. People, 85 N.Y. 75 (1881)). See generally Richardson § 241.

36. 26 N.Y.2d at 94, 257 N.E.2d at 19, 308 N.Y.S.2d at 829. Two years prior to Brown the appellate division admitted a declaration against pecuniary interest when the declarant claimed a privilege against self-incrimination. Alexander Grant's Sons v. Phoenix Assurance Co., 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966) (action on insurance policy for defalcations, noting an expanded scope of unavailability for New York, which includes illness, insanity, absence from the jurisdiction, and claiming the right of self-incrimination). That court could not find any authoritative New York decision requiring that the unavailability of the declarant be due exclusively to death. Id. at 95, 267 N.Y.S.2d at 222-23, citing

In *Brown* the court stated: "The ruling [of the trial court] was clearly proper upon settled authority in this State. Thus the important question presented by this appeal is whether the existing rule should be continued or abandoned in favor of a more rational view of admissibility of declarations against interest."[37] The court noted "a gradual change of viewpoint which would abolish the distinction"[38] between pecuniary and proprietary interests on the one hand and penal interest on the other, and opted for a break with the past.

After a brief discussion of the majority and the New York rule, the court, quoting from Holmes' dissent in *Donnelly* and from Wigmore, concluded that "the distinction which would authorize a court to receive proof that a man admitted he never had title to an Elgin watch, but not to receive proof that he had admitted striking Jones over the head with a club, assuming equal relevancy of both statements, does not readily withstand analysis."[39] The court reiterated the holding of *Spriggs* that not only is a declaration against penal interest as trustworthy as a declaration against pecuniary or proprietary interest, but, a declaration against penal interest will also normally involve a pecuniary loss.[40]

The lack of logic, precedent, and practicality in excluding declarations against penal interest, while admitting declarations against pecuniary or proprietary interest, was forcefully pointed out by Mr. Justice Holmes in his dissent in *Donnelly*.[41] Holmes could find no prior Supreme Court case holding against the

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Tompkins v. Fonda Glove Lining Co., 188 N.Y. 261, 264, 80 N.E. 933, 934 (1907). But see In re Estate of Lopes, 41 Misc. 2d 326, 245 N.Y.S.2d 940 (Sur. Ct. 1964). Death will suffice in New York, see Kittredge v. Grannis, 244 N.Y. 168, 155 N.E. 88 (1926); Lyon v. Ricker, 141 N.Y. 225, 36 N.E. 189 (1894).

The broad approach to unavailability by both the appellate division and the court in the instant case compels judicial discretion to determine on the facts whether unavailability exists in the particular case. As a practical matter whether a declarant is dead, beyond the jurisdiction, or in the courtroom but claiming immunity by his right against self-incrimination, he is equally unavailable. New York is not alone in this wide scope approach to unavailability; other courts have considered: insanity, Weber v. Chicago, R.I. & Pac. Ry., 175 Iowa 358, 151 N.W. 852 (1916); New Amsterdam Cas. Co. v. First Nat'l Bank, 134 S.W.2d 470 (Tex. Civ. App. 1939); as well as physical incapacity, Griffith v. Sauls, 77 Tex. 630, 14 S.W. 230 (1890); and the inability of a party to find a declarant, Pennsylvania R.R. v. Rochinski, 158 F.2d 325 (D.C. Cir. 1946). See also 15 Geo. Wash. L. Rev. 486 (1947).

37. 26 N.Y.2d at 91, 257 N.E.2d at 17, 308 N.Y.S.2d at 826. New York seems to have insisted upon the following conditions for admission of evidence as a declaration against interest: (1) The declarant must be aware that the declaration is against the pecuniary or proprietary interests. Kittredge v. Grannis, 244 N.Y. 168, 155 N.E. 88 (1926). (2) The declarant must be unavailable. For a discussion of the permissible grounds of unavailability see note 36 supra. (3) The declarant must have no motive to falsify the facts. Alexander Grant's Sons v. Phoenix Assurance Co., 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966). (4) The declarant must have competent knowledge of the facts. Id. See generally Fisch §§ 891-900; Mottla §§ 156-60; Richardson §§ 236-40.

38. 26 N.Y.2d at 92, 257 N.E.2d at 18, 308 N.Y.S.2d at 828.

39. Id. at 91, 257 N.E.2d at 17, 308 N.Y.S.2d at 827.

40. Id. at 92, 257 N.E.2d at 18, 308 N.Y.S.2d at 828. See People v. Spriggs, 60 Cal. 2d 868, 874-75, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964), See discussed in note 25 supra.

41. 288 U.S. at 277-78 (1913) (Holmes, J., dissenting).

admission of such a confession, and, disdaining those who would be manacled by the precedent of English case law, remarked that "the rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law."[42] Furthermore, Wigmore questioned the authority of the *Sussex Peerage* case. In surveying the history of declarations against interest, he noted that from 1800 to 1830 there was no question in England but that the declarations against interest exception included declarations against penal interest. He considered the *Sussex* decision to be ill-conceived, as not in line with precedent, and he doubted whether the case was still good law in England.[43]

Despite occasional dictum and dissent to the contrary, the majority of courts, until recently, had adhered to this "indefensible limitation"[44] by which monetary interest was, in effect, thought to be more important to an individual than the loss of his freedom, and therefore testimony jeopardizing the former was deemed more reliable. Thus, as in *Donnelly*, if the unavailable declarant had confessed to a debt, his declaration might well have been admitted, but since he was confessing to murder the testimony was not considered to be trustworthy.

*People v. Brown* has cautiously extended the New York law dealing with declarations against interest while not dismissing the need for, nor emasculating the effectiveness of, the hearsay rule. Although the court has extended the scope of declarations against interest, it has not stretched the exception as far as the writers of the Uniform Rules, the Model Code, and the Proposed Federal Rules would suggest. Furthermore, although the court clarified the grounds for unavailability of the declarant, it did not, as both the Model Code and the Uniform Rules appear to do, dispense with the need for unavailability. The court thus preserves the right of cross-examination where it is at all possible, and where it is not, admits evidence when it is clearly relevant and basically trustworthy.

**Labor Law—Federal Court May Enjoin Strike in Breach of a No-Strike Clause—*Sinclair Refining Co. v. Atkinson* Overruled.**—Petitioner, The Boys Markets, and respondent, Local 770 of the Retail Clerks Union, were parties to a collective bargaining agreement which provided for arbitration of all disputes, and which contained a no-strike clause. During the term of the agree-

42. Id.

43. Wigmore §§ 1476-77. McCormick, likewise, is of the opinion that the case is questionable in light of precedent. McCormick § 255.

Wigmore maintains that "the truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent." Wigmore § 1477, at 289. It is interesting to note that the 1899 Dreyfus case might not have had the same outcome had it refused to admit declarations against penal interest. It was the confession of the unavailable guilty party which vindicated Dreyfus. A majority of American courts at that time would not have permitted that confession to be admitted. Id. at 290.

44. United States v. Annunziato, 293 F.2d 373, 378 (2d Cir.), cert. denied, 368 U.S. 919 (1961).

ment, a labor dispute arose between the parties, and a strike was called by the union. The petitioner sought a temporary restraining order in California Superior Court and specific performance of the arbitration provision. The court issued the restraining order, but the union had the case removed to the federal district court and moved to have the restraining order quashed. The district court denied respondent's motion, issued a permanent injunction and ordered the parties to arbitrate.[1] The Ninth Circuit Court of Appeals reversed the district court,[2] relying on *Sinclair Refining Co. v. Atkinson*.[3] The Supreme Court reversed the Court of Appeals, overruling *Sinclair. Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

In the past, the Norris-LaGuardia Act was interpreted as severely limiting the use of injunctions to curb the breach of no-strike agreements.[4] The Act,[5] passed in response to what was deemed by Congress to be the arbitrary use of the injunction by the federal courts as allies of management,[6] provided that no federal court could issue an injunction in a labor dispute, except in certain instances.[7] An employer, however, still had recourse to the state courts for injunctive relief.[8] With passage of § 301 of the Labor Management Relations Act of 1947[9] the employer gained the additional remedy of a suit in federal court for breaches of collective bargaining agreements, without the requirements of a minimal jurisdictional amount or diversity of citizenship, and irrespective of the capacity of the

1. Boys Markets, Inc. v. Retail Clerks Local 770, 416 F.2d 368, 369 (9th Cir. 1969).

2. Id. at 370.

3. 370 U.S. 195 (1962).

4. Id.

5. 29 U.S.C. § 104 (1964) provides in pertinent part: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing . . . any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . ."

6. Wellington & Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 Yale L.J. 1547, 1553-55 (1963). See generally F. Frankfurter & N. Greene, The Labor Injunction (1930).

7. The Act, in 29 U.S.C. § 104 (1964), provides that an injunction may never be issued against certain types of labor activity (e.g., strikes, peaceful assembly, the giving of publicity in a labor dispute) and in 29 U.S.C. §§ 107-08 (1964) provides for the issuance of an injunction against any other type of labor activity only when it is found by testimony that unlawful acts have been threatened which would cause such irreparable harm that the petitioner would suffer more if the injunction were not granted than the respondent would if the injunction were granted. The respondent must have made every reasonable effort to resolve the dispute, including negotiation, voluntary arbitration or mediation. Petitioner must also have no adequate remedy at law, and the public officers charged with protecting the petitioner's property must be unable or unwilling to protect it. In addition, if an adequate bond is posted, a temporary restraining order might be granted.

8. McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958).

9. 29 U.S.C. § 185(a) (1964).

union to sue or be sued in the state court.[10] Federal courts were divided over the effect of this grant of jurisdiction, with some holding the grant merely procedural[11] and others holding that it authorized the federal courts to fashion a body of substantive law.[12] The Supreme Court resolved this conflict in *Textile Workers Union v. Lincoln Mills*,[13] by holding that Congress had authorized the federal courts to fashion a body of federal law to implement national labor policy.[14] The Court in *Lincoln Mills* ordered specific performance of a promise to arbitrate in order to implement the national labor policy favoring arbitration.[15] The Court rejected the argument that the Norris-LaGuardia Act prevented the issuance of an injunction, in the form of a specific performance order, reasoning that failure to arbitrate was not one of the acts "which had given rise to abuse of the power to enjoin."[16]

Subsequent to the decision in *Lincoln Mills* it was held that state courts could assert jurisdiction in § 301 suits,[17] but that federal law must be applied in such suits.[18] The result of these decisions was that either party could compel the other to specifically perform an arbitration agreement, in either state or federal court. However, the Norris-LaGuardia Act was designed to prevent injunctions

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10. Id. This section provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

11. United Steelworkers v. Galland-Henning Mfg. Co., 241 F.2d 323 (7th Cir.), rev'd, 354 U.S. 906 (1957) (on the basis of Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)); ILGWU v. Jay-Ann Co., 228 F.2d 632 (5th Cir. 1956); Mercury Oil Ref. Co. v. Oil Workers Union, 187 F.2d 980 (10th Cir. 1951). See also Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

12. Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), aff'd, 348 U.S. 437 (1955); United Elec. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953); Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir.), cert. denied, 340 U.S. 827 (1950).

13. 353 U.S. 448 (1957).

14. Id. at 456.

15. Id. In granting specific performance, the Court rejected the lower court's decision, which had relied on the common law rule that such a promise to arbitrate was not specifically enforceable. See Lincoln Mills v. Textile Workers Union, 230 F.2d 81, 84 (5th Cir. 1956), rev'd, 353 U.S. 448 (1957). See also Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).

16. 353 U.S. at 458. The Court noted that one of the purposes of the Norris-LaGuardia Act was to promote arbitration. Id. See 29 U.S.C. § 108 (1964).

17. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); see McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958); C.D. Perry & Sons v. Robilotto, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (3d Dep't 1965) (per curiam); Shaw Elec. Co. v. Local 98, IBEW, 418 Pa. 1, 208 A.2d 769 (1965).

18. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

against strikes.[19] If it were found that a strike could not be enjoined, the employer would find himself held to his promise to arbitrate, while unable to enforce the union's promise not to strike.[20] The lower federal courts were split on this issue.[21] *Sinclair Refining Co. v. Atkinson*[22] resolved this question, holding that § 4 of the Norris-LaGuardia Act prevented the issuance of such an injunction. The Court rejected the argument that, because it was in breach of a contractual obligation, such a strike was not within the scope of the Norris-LaGuardia Act. The Court stated that the strike was clearly a "labor dispute" within the meaning of the Act and that Congress had purposely made the scope of the term "labor dispute" broad to prevent judicial narrowing.[23] Justice Black, speaking for the Court, also rejected the argument that § 4 of the Norris-LaGuardia Act should be read together with § 301 of the Labor Management Relations Act of 1947, and that an accommodation of the two statutes should be made,[24] as had been done in *Lincoln Mills* and in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad.*[25] Justice Black distinguished *Sinclair* from *Lincoln Mills* on the grounds that while the Norris-LaGuardia Act was not intended to prevent injunctions against failures to arbitrate, it was meant to prevent injunctions against strikes.[26] *Sinclair* was distinguished from *Chicago River*

19. In Lincoln Mills, the Court had differentiated between § 4 and non-§ 4 acts. 353 U.S. at 458. In 29 U.S.C. § 104(a) (1964), the Congress had specifically stated that a federal court could not enjoin a strike even if the procedural requirements of 29 U.S.C. § 107 (1964) were met.

20. In Lincoln Mills, the Court referred to the arbitration clause as being the "quid pro quo" for a no-strike clause. 353 U.S. at 455. See also 11 Loyola L. Rev. 326 (1963).

21. For a case holding that a federal court can issue an injunction see Teamsters Local 795 v. Yellow Transit Freight Lines, Inc., 282 F.2d 345 (10th Cir. 1960), rev'd, 370 U.S. 711 (1962). For cases holding that a federal court can not issue an injunction see A.H. Bull S.S. Co. v. Seafarers' Int'l Union, 250 F.2d 326 (2d Cir. 1957), cert. denied, 355 U.S. 932 (1958); W.L. Mead, Inc. v. Teamsters Local 25, 217 F.2d 6 (1st Cir. 1954), petition for cert. dismissed, 352 U.S. 802 (1956).

22. 370 U.S. 195 (1962). In the companion case of Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962), it was held that there was a cause of action against local and international unions for damages for breach of the agreement not to strike. See generally Wellington & Albert, supra note 6; The Supreme Court, 1961 Term, 76 Harv. L. Rev. 54, 205 (1962); 4 B.C. Ind. & Com. L. Rev. 206 (1962); 31 Fordham L. Rev. 592 (1963).

23. 370 U.S. at 200-03. A later New York case, C.D. Perry & Sons, Inc. v. Robilotto, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963), aff'd, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (3d Dep't 1965) (per curiam) accepted the reasoning that a strike in violation of a no-strike clause could be enjoined despite a statute which was the prototype of the Federal Norris-LaGuardia Act, Ch. 477, [1935] N.Y. Laws 158th Sess. 1051, as amended Ch. 359, § 53 [1939] N.Y. Laws 162d Sess. 841; Ch. 837, [1961] N.Y. Laws 184th Sess. 2337 (now N.Y. Labor Law § 807 (McKinney 1965)). See also Keene, The Supreme Court, Section 301 and No-Strike Clauses: From Lincoln Mills to Avco and Beyond, 15 Vill. L. Rev. 32, 49 (1969).

24. 370 U.S. at 209-12.

25. 353 U.S. 30 (1957). In that case, the Court allowed a strike injunction despite the Norris-LaGuardia Act, because it found that the Congress in passing the Railway Labor Act intended to provide for compulsory arbitration of minor disputes. Id. at 35-39. Presented with the two statutes the Court reconciled them. Id. at 39-42.

26. 370 U.S. at 212. See 353 U.S. at 458.

because the strike there was in violation of an express statutory duty to arbitrate[27] which was part of an entire statutory scheme for the peaceful resolution of railroad labor disputes.[28] Finally, the Court rejected the argument that it should modify the Norris-LaGuardia Act in order to promote arbitration, the "kingpin of federal labor policy,"[29] noting that such repeal was for "lawmakers, not law interpreters."[30]

In dissenting, Justice Brennan argued that both the Norris-LaGuardia Act and § 301 of the Labor Management Relations Act were involved in this case and that there seemed to be a conflict between the two statutes. Therefore an accommodation had to be made so that both statutory purposes could be achieved.[31] Noting the need for an injunction to curb the breach of a no-strike clause,[32] and the previous adjustments made in *Chicago River* and *Lincoln Mills*, Justice Brennan urged an adaptation of the two statutes.[33] "[C]ongressional rejection of outright repeal [did not] imply hostility to an attempt by the courts to accommodate all statutes pertinent . . . ."[34] Justice Brennan took the position that in accommodating the Norris-LaGuardia Act's absolute ban on strike injunctions to the need for such injunctions in cases where no-strike agreements have been breached the question was not one of repeal but of interpreting "the whole statutory complex."[35]

The decision in *Sinclair* led to a disparity between state and federal remedies, for in all but fourteen states an injunction could be issued against a strike in breach of a no-strike clause.[36] Yet the availability of this remedy was threatened

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27. The Chicago River Court relied on 45 U.S.C. § 153 (1964), as amended (Supp. IV, 1968). 353 U.S. at 33-39.

28. 370 U.S. at 211. The Railway Labor Act, 45 U.S.C. § 151-88 (1964), as amended 45 U.S.C. (Supp. IV, 1968), established the National Railroad Adjustment Board under 45 U.S.C. § 153 (1964), as amended (Supp. IV, 1968), and the National Mediation Board under 45 U.S.C. § 154 (1964), as amended (Supp. IV, 1968). The purpose of the Adjustment Board is the peaceful resolution of disputes growing out of the interpretation of existing collective bargaining agreements. Slocum v. Delaware, L. & W.R.R., 339 U.S. 239, 242-43 (1950). The jurisdiction of the Mediation Board is over disputes in the negotiation of contracts. Cook v. Des Moines Union Ry., 16 F. Supp. 810, 813 (S.D. Iowa 1936). See Burstein, The Injunctive Process, Symposium on Labor Relations Law 557, 561-62 (R. Slovenko ed. 1961).

29. 370 U.S. at 213.

30. Id. at 215.

31. Id. at 215-16.

32. In stating that the injunction was necessary, Justice Brennan offered little support but noted that "[i]t is equally true in both cases that '[an injunction] alone can effectively guard the plaintiff's right,' Machinists v. Street, 367 U.S. 740, 773." Id. at 219. The entire cited quote dealt not with a strike injunction but with an injunction against the use of union funds in a political campaign, and the entire cited quote was: "courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right."

33. 370 U.S. at 216-20.

34. Id. at 220.

35. Id.

36. Keene, supra note 23, at 49. In fact, although there are 24 states with "little Norris-

by the union's right of removal to a federal court.[37] This right to remove was challenged on the grounds that the Norris-LaGuardia Act denied jurisdiction to the federal courts where the sole relief requested was an injunction.[38] Because the circuits were in conflict on the question,[39] the Supreme Court, in *Avco Corp. v. Aero Lodge 735*[40] confronted the issue, and affirmed the Sixth Circuit's decision[41] that the federal courts did have jurisdiction. The Court reasoned that the claim was one "arising under the 'laws of the United States.' "[42] The Court stated that " 'lack of jurisdiction under the Norris-LaGuardia Act,' . . . meant only that the Federal District Court lacked the general equity power to grant the particular relief."[43]

In *Boys Markets, Inc. v. Retail Clerks Local 770*,[44] the Court overruled *Sinclair*. Justice Brennan, who had written the dissent in *Sinclair*, delivered the opinion of the Court.[45] The Court rejected the argument that since Congress had been urged to modify the Court's decision in *Sinclair* and had not elected to do so, the principle of stare decisis should be applicable.[46] Justice Brennan reasoned that stare decisis is but a "policy and not a mechanical formula of adherence,"[47] and that *Sinclair* deviated from an otherwise consistent policy favoring arbitration. In light of *Avco, Sinclair* actually frustrated "realization of an important goal of our national labor policy."[48] Congressional silence, the Court added, was no indication of approval of *Sinclair*. The Court stated that the effect of the two decisions was "nothing less than to oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation,"[49] while the intent of Congress in passing § 301(a) was to supplement state jurisdiction, not to supplant it.[50] The Court also noted that while § 301 was

LaGuardia Acts," in 10 of them an injunction can be issued despite the statutes in certain instances. Id.

37. 28 U.S.C. § 1441(a) (1964) provides for such removal.

38. The challenge was found upon the statutory language: "No court of the United States shall have jurisdiction to issue any restraining order . . . ." 29 U.S.C. § 104 (1964).

39. For a case holding that the district courts have jurisdiction under 29 U.S.C. § 1441(b) see Avco Corp. v. Aero Lodge 735, 376 F.2d 337 (6th Cir. 1967), aff'd, 390 U.S. 557 (1968). For a case holding that § 1441(b) does not give the district courts jurisdiction see American Dredging Co. v. Operating Engineers Local 25, 338 F.2d 837 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965).

40. 390 U.S. 557 (1968). See also Keene, supra note 23.

41. 376 F.2d 337 (6th Cir. 1967).

42. 390 U.S. at 560, quoting 29 U.S.C. § 1441(b) (1964).

43. 390 U.S. at 561 (footnote omitted). The Court found it unnecessary to rule on the holding in the court of appeals that the states were limited to federal remedies under § 301 of the Labor Management Relations Act, or on the question whether the federal court had to dissolve the state court injunction. Id. at 560 n.2, 561 n.4.

44 398 U.S. 235 (1970).

45. Id. at 237.

46. Id. at 240-41.

47. Id. at 241.

48. Id.

49. Id. at 244.

50. Id. at 245.

designed to produce uniformity of remedies in state and federal courts and the right of removal was not designed to foreclose state relief but only to safeguard federal rights, the effect of *Sinclair* and *Avco* was to produce an entirely different result.[51] The Court noted that although these difficulties could be alleviated by making *Sinclair* applicable to the states, Congress had clearly not attempted that either in the Norris-LaGuardia Act or in § 301 of the Labor Management Relations Act.[52] The Court added that employers would be reluctant to enter into the arbitration agreement *"quid"* because a breach of the *"quo"*—a no-strike clause—could be remedied only by an action for damages, which "is no substitute for an immediate halt" to the strike.[53]

The Court accepted Justice Brennan's theory in his *Sinclair* dissent of accommodation of the Norris-LaGuardia Act to later labor statutes.[54] The Court noted that the Norris-LaGuardia Act and the later labor statutes were designed to deal with different situations. While the Norris-LaGuardia Act was designed to curb the federal courts' arbitrary use of the injunction, later statutes were designed to promote "the peaceful resolution of industrial disputes,"[55] in an era when unions were far stronger than they had been when Congress had passed the Norris-LaGuardia Act in 1932. Yet the "shift in emphasis [by Congress] was accomplished . . . without extensive revision of many of the older enactments, including . . . the Norris-LaGuardia Act. Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones."[56] The Court noted that while *Sinclair* undermined the effectiveness of arbitration, the overruling of *Sinclair* would not undermine the central purposes of the Norris-LaGuardia Act.[57]

The Court limited its holding to the situation in which there was a mandatory grievance or arbitration procedure in the collective bargaining agreement.[58] As a guideline for the issuance of an injunction the Court stated that the district court must have ordered arbitration before any injunction could be granted.[59]

In his dissenting opinion, Justice Black, who spoke for the Court in *Sinclair*, stated that he remained of the opinion that *Sinclair* was correctly decided.[60] He added that even if *Sinclair* had been incorrectly decided he would still dissent because the making or changing of laws is primarily for Congress, especially in the field of labor relations where such powerful and competing economic interests are present.[61] He noted that in *Sinclair*, Congress had been invited to change the statute if it were displeased with the Court's interpretation, and that

51. Id. at 245-47.

52. Id. at 247, quoting McCarroll v. Los Angeles Dist. Council of Carpenters, 49 Cal. 2d 45, 63, 315 P.2d 322, 332 (1957), cert. denied, 355 U.S. 932 (1958).

53. 398 U.S. at 247-48.

54. Id. at 249.

55. Id. at 251.

56. Id.

57. Id. at 252-53.

58. Id. at 253.

59. Id. at 254.

60. Id. at 256.

61. Id. at 256-57.

bills had been introduced to effect a change,[62] but that Congress did not act and therefore it would be inappropriate for the Court to "enact the amendment that Congress has refused to adopt."[63] Justice Black viewed the doctrine of stare decisis as being more than mere policy, and that in the ordinary case, precedent should be followed because of considerations of certainty and equal treatment of similarly situated litigants.[64]

In overruling *Sinclair*, the Court was seeking to promote the desirability of arbitration[65] and the enforcement of contracts[66] under § 301 of the Labor Management Relations Act by providing supplemental federal remedies for breach of collective bargaining agreements in addition to those of the states. Certainly the Court was correct in thinking that the absence of the injunctive power to curb violation of no-strike clauses would make arbitration less desirable to the employer, for the injunction is a more potent weapon than damages, in preventing strikes in breach of a no-strike agreement.[67] In addition, the use of the injunction to curb breaches of contract would do little harm to the basic purposes of the Norris-LaGuardia Act, which was designed to prevent federal courts, acting as allies of management, from enjoining fledgling union activities.[68]

Similarly, the goal of § 301 of the Labor Management Relations Act, which is the enforceability of collective bargaining agreements, would be forwarded by the availability of the injunction in federal courts. Section 301 was designed to make suits by or against unions procedurally easier[69] and *Sinclair* and *Avco*'s effect was to eliminate the state court as a forum in suits to enjoin strikes in violation of a no-strike clause.

In advancing these goals, however, the Court did not look at the *necessity* of injunctive relief as opposed to damages and the effect that the availability of

62. Id. at 258. The text of these bills, introduced by Senator Javits and Representative Reid, are contained in Dunau, Three Problems in Labor Arbitration, 55 Va. L. Rev. 427, 464 n.100 (1969). On another occasion Secretary of Labor Schultz also suggested inclusion of a provision in new labor legislation to allow the use of the injunction, 1969 Labor Relations Y.B. 541-42 (1970).

63. 398 U.S. at 259.

64. Id. at 257. Justice Black viewed stare decisis as being more important still when a statute was involved because the "reinterpretation" of a statute is equivalent to a judicial amendment of the statute, and only the Congress, which is responsive to the people, has the power to amend a statute. Id. at 257-58.

65. See id. at 247-49. See also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

66. See 398 U.S. at 247-49. See also Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

67. 398 U.S. at 248. Justice Black conceded as much: "The Court would have it that these techniques are less effective than an injunction. That is doubtless true." Id. at 261.

68. See Keene, supra note 23, at 65-67; Kiernan, Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts, 32 Albany L. Rev. 303, 304 (1968); Wellington, The No-Strike Clause and the Labor Injunction: Time for a Re-Examination, 30 U. Pitt. L. Rev. 293, 294, 306-07 (1968).

69. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957).

a court-ordered injunction may have on the unions' willingness to agree to arbitration agreements. While an injunction is more effective than damages in providing relief, the difference is one of "expediency of remedy, rather than lack of remedy."[70] The goal of damages under § 301 is to return the injured party as far as possible to the status quo.[71] In the past, the Supreme Court has held that damages are a proper remedy for breach of a no-strike clause.[72] While such relief has been termed less effective than injunctive relief, it would appear that the threat of a damage suit might be effective in discouraging a union from striking.[73] In addition, the Court did not consider the effect that the availability of a court-ordered injunction might have on a union's desire to enter into an arbitration agreement. Moreover, in allowing a federal court the injunctive power, the Court failed to consider possible alternative remedies[74] which might be more acceptable to the unions and which, at least arguably, would not violate § 4 of the Norris-LaGuardia Act.[75]

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70. Edwards & Bergmann, The Legal and Practical Remedies Available to Employers to Enforce a Contractual "No-Strike" Commitment, 21 Lab. L.J. 3, 21 (Jan. 1970).

71. See Mungin v. Florida E. Coast Ry., 416 F.2d 1169, 1177 (5th Cir. 1969). See 1963 ABA Labor Relations Section pt. II, at 237 (1964) where representatives of labor termed the damage remedy "wholly adequate."

72. Drake Bakeries, Inc. v. Bakery Workers Local 50, 370 U.S. 254 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962). Damages awarded have included the loss of profits, overhead costs and consequential damages due to loss of customers during the strike. W. L. Mead, Inc. v. Teamsters Local 25, 129 F. Supp. 313 (D. Mass. 1955), aff'd, 230 F.2d 576 (1st Cir.) appeal dismissed, 352 U.S. 802 (1956). See Operating Engineers Local 653 v. Bay City Erection Co., 300 F.2d 270 (5th Cir. 1962); United Elec. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953). See generally Edwards & Bergmann, supra note 70, at 9-11; Fairweather, Employer Action and Options in Response to Strikes in Breach of Contract, 18 N.Y.U. Conf. on Labor 129, 149-55 (1966); Spelfogel, Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline, 17 Lab. L.J. 67, 77-79 (1966).

73. See Dunau, supra note 62, at 465. However, it must be noted that few damage suits are actually brought, because the two partners, labor and management, must continue to work together after a strike is ended. Fairweather, supra note 72, at 149. In addition, the damage suit is made still more difficult because "the injury to the business cannot be measured accurately." Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 255 (1958).

74. One alternative is that of arbitral injunctive relief. This remedy would be in the form of an injunction by the arbitrator of the dispute against a strike in breach of a no-strike clause. See Edwards & Bergmann, supra note 70, at 14-15; Fairweather, supra note 72, at 168-71. Such an injunction is not normally within an arbitrator's power. See Gulf & South Am. S.S. Co. v. Maritime Union, 360 F.2d 63 (5th Cir. 1966); Aaron, The Strike and the Injunction—Problems of Remand and Removal, 18 N.Y.U. Conf. on Labor 93, 102 (1966). However, a properly drafted clause could give an arbitrator such power. See Spelfogel, supra note 72, at 76. See generally Givens, Injunctive Enforcement of Arbitration Awards Prohibiting Strikes, 17 Lab. L.J. 292 (1966).

75. In 1963 ABA Labor Relations Section pt. II, at 232-40 (1964), there was pointed disagreement with the proposed resolution favoring overruling of Sinclair and legislation to give the federal courts the injunctive power. The labor representatives put themselves on record as opposing the granting of the injunctive power to the federal courts because of the

It should also be noted that *Boys Markets* will change the unintended situation caused by *Sinclair* and *Avco*, where a state court injunction was effectively denied an employer by the union's right of removal. The decision will also bring the federal courts into conformity with the majority of the states which allow injunctions against strikes in breach of a no-strike clause despite "little Norris-LaGuardia Acts."[76] The decision will undoubtedly strengthen the arbitration clause in the collective bargaining agreement, and will make this clause more desirable to employers. However, this will be accomplished at the cost of a seeming judicial amendment. Although unions have traditionally favored arbitration,[77] the effect of this amendment may be to lessen the desirability of arbitration to labor.

**Warranty—Limitation of Actions—Personal Injury Action Against Manufacturer for Breach of Warranty Governed by Contract and Not Tort Statute.**—In 1965 plaintiff was injured when struck by a glass door manufactured by defendant glass company and installed in 1958 in the building

courts' lack of expertise in the labor field and because of the consequences of what are necessarily hasty decisions by judges inexperienced in labor matters. The labor representatives proposed arbitral injunctive relief as a more acceptable remedy to a problem that admittedly existed. Id. at 237-39. Presumably the labor representatives' more favorable attitude towards arbitration was due to the arbitrators' greater expertise. See also Givens, supra note 74, at 295.

The issuance of these injunctions against strikes by arbitrators has been upheld in two recent post-Sinclair federal cases. New Orleans S.S. Ass'n v. ILA Local 1418, 389 F.2d 369 (5th Cir.), cert. denied, 393 U.S. 828 (1968); Philadelphia Marine Trade Ass'n v. ILA Local 1291, 368 F.2d 932 (3d Cir. 1966), rev'd on other grounds, 389 U.S. 64 (1967). In both cases, the court stated that an order would not run afoul of the Norris-LaGuardia Act because the arbitration award had resolved the labor dispute in the agreed manner and an injunction was therefore not an injunction in a labor dispute. 389 F.2d at 371-72; 368 F.2d at 934. See Boys Markets, Inc. v. Retail Clerks Local 770, 416 F.2d 368, 370 (9th Cir. 1969). See also In re Ruppert, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958). But see ILA Local 1291 v. Philadelphia Maritime Trade Ass'n, 389 U.S. 64, 77-79 (1967) (Douglas, J., concurring in part and dissenting in part); Spelfogel, supra note 72, at 76.

76. See Keene, supra note 23, at 49. A "little Norris-LaGuardia Act" is a state law which prohibits the use of an injunction in a labor dispute in much the same way the federal law does. See, e.g., Conn. Gen. Stat. Ann. § 31-113 (1958); N.Y. Labor Law § 807 (McKinney 1965); Wash. Rev. Code Ann. §§ 49.32.011, .050, .072 (1962). The language is often similar to that of the federal law and often keeps the same distinction between § 4 and non-§ 4 acts. Compare N.Y. Labor Law § 807(1)(f) (McKinney 1965) and Wash. Rev. Code Ann. § 49.32.050 (1962), with 29 U.S.C. § 104 (1964). Compare also N.Y. Labor Law § 807(1)(a)-(e) (McKinney 1965) and Wash. Rev. Code Ann. § 49.32.072 (1962), with 29 U.S.C. § 107 (1964).

77. See, e.g., R. Fleming, The Labor Arbitration Process 2-3 (1965); P. Hays, Labor Arbitration: A Dissenting View 1-30 (1966); Jones & Smith, Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments, 62 Mich. L. Rev. 1115, 1117 (1964). See also Fleming, The Labor Arbitration Process: 1943-1963, 52 Ky. L.J. 817, 832 (1964).

occupied by defendant buyer. In 1967 plaintiff brought an action for personal injuries against defendant manufacturer[1] alleging a breach of implied warranty of fitness for a particular use.[2] The supreme court at special term granted defendant's motion to dismiss the causes of action for breach of warranty for the reason that the six-year statute of limitations had expired.[3] The appellate division unanimously affirmed this determination without opinion.[4] On appeal, the court of appeals affirmed in a 4-3 decision, holding that, since the action involved was one for personal injuries arising from breach of warranty, it was essentially a contract action and therefore the applicable statute of limitations was six years from the time of sale[5] rather than three years from the time of injury as would be the case in a tort action.[6] *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

The slow, cautious, and often circuitous development of the law of products liability is illustrative of the history of the common law itself.[7] Originally the harsh rule of *caveat emptor* was the generally accepted doctrine.[8] The dominance of this principle began to diminish when it was recognized that a supplier of chattels was "under a duty to exercise the care of a reasonable man of ordinary prudence to see that the goods do no harm to the buyer."[9] Although the action

1. Plaintiff also sued Central Trust Company, the owner of the building, but the breach of warranty actions were dismissed and no appeal was made. Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 342, 253 N.E.2d 207, 208, 305 N.Y.S.2d 490, 491 (1969).

2. Plaintiff also brought a negligence action but this appeal dealt only with breach of warranty. Id.

3. Mendel v. Pittsburgh Plate Glass Co., 57 Misc. 2d 45, 291 N.Y.S.2d 94 (Sup. Ct. 1967).

4. Mendel v. Pittsburgh Plate Glass Co., 29 App. Div. 2d 918, 290 N.Y.S.2d 186 (4th Dep't 1968) (mem.).

5. N.Y. Civ. Prac. § 213(2) (McKinney 1963).

6. Id. § 214(5).

7. See, e.g., E. Levi, An Introduction to Legal Reasoning 7 (1949); W. Prosser, Torts § 95, at 648 (3d ed. 1964) [hereinafter cited as Prosser]; Ehrenzweig, Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws": II, 69 Yale L.J. 794 (1960); Pound, What of Stare Decisis?, 10 Fordham L. Rev. 1, 8 (1941).

8. See, e.g., Miller v. Tiffany, 68 U.S. (1 Wall.) 298, 309 (1863); Hargous v. Stone, 5 N.Y. 73, 82 (1851). As early as the 13th century an exception to this doctrine was made with regard to food and drink. Selden Society, Leet Jurisdiction in the City of Norwich 16, 70, 72 (W. Hudson ed. 1892); Selden Society, The Court Baron 50, 80, 88, 111 (F. Maitland & W. Baildon eds. 1891); Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133, 1142-43 (1931); Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1103 (1960) [hereinafter cited as The Assault upon the Citadel]; Restatement (Second) of Torts § 402A, comment b at 348 (1965).

9. Prosser § 95, at 648; see The Assault upon the Citadel at 1099. The courts first turned away from the harsh doctrine of caveat emptor and recognized the duty of reasonable care in the so-called "public" callings, typical of which was the "common carrier." See Dickson v. Clifton, 95 Eng. Rep. 834 (K.B. 1766); Dale v. Hall, 95 Eng. Rep. 619 (K.B. 1750); Prosser § 28, at 142. See generally Arterburn, The Origin and First Test of Public Callings, 75 U. Pa. L. Rev. 411 (1927).

sounded in tort,[10] the duty of reasonable care was considered to arise from a contractual relationship between the supplier of the chattel and the injured buyer.[11] As a result, while this concept of liability was still evolving, the courts began to find liability for "deceit" and "fraud" and to speak of the requirement of "privity."[12] The use of this language created an intermingling of tort and contract which gave birth to a new concept—that of "warranty."[13] Warranty cases were based on tort[14] until 1778 when it was held that such an action properly sounded in contract.[15]

In 1842 the case of *Winterbottom v. Wright*,[16] in keeping with precedent,[17] held that there could be no action based on warranty where there was no privity of contract.[18] However, the opinion was construed to mean that there could be no product liability under *any* theory unless the requirement of privity was satisfied.[19]

During the following years "a remarkable variety of highly ingenious and equally unconvincing theories" were used to develop exceptions to the general rule requiring privity.[20] As the number of exceptions recognized by the courts

10. Prosser § 95, at 651; Ames, The History of Assumpsit, 2 Harv. L. Rev. 1, 8 (1888) [hereinafter cited as The History of Assumpsit]; Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965) [hereinafter cited as Strict Tort Liability of Manufacturers]; Note, Necessity for Privity of Contract in Warranties by Representation, 42 Harv. L. Rev. 414 (1929).

11. Boorman v. Brown, 114 Eng. Rep. 603, 609 (Ex. 1842); Prosser § 95, at 648; Poulton, Tort or Contract, 82 L.Q. Rev. 346, 351 (1966). See also W. Prosser, Selected Topics on the Law of Torts 381 (1953).

12. See, e.g., Pasley v. Freeman, 100 Eng. Rep. 450 (K.B. 1789); History of Assumpsit at 8.

13. E.g., Levy v. Langridge, 150 Eng. Rep. 1458 (Ex. 1838). "[W]arranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." Prosser § 95, at 651 (footnote omitted). "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual and at the same time came to lie mainly in contract." Note, Necessity for Privity of Contract in Warranties by Representation, 42 Harv. L. Rev. 414-15 (1929) (footnotes omitted).

14. See, e.g., Chandelor v. Lopus, 79 Eng. Rep. 3 (Ex. 1607); History of Assumpsit at 8.

15. Stuart v. Wilkins, 99 Eng. Rep. 15 (K.B. 1778).

16. 152 Eng. Rep. 402 (Ex. 1842).

17. E.g., Levy v. Langridge, 150 Eng. Rep. 1458 (Ex. 1838); Pasley v. Freeman, 100 Eng. Rep. 450 (K.B. 1789).

18. 152 Eng. Rep. at 402.

19. See, e.g., Hudson v. Moonier, 94 F.2d 132 (8th Cir. 1938); Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 P. 939 (1927). This interpretation has since been considered to be incorrect. See 1943 N.Y. Legis. Doc. No. 65(J); Prosser § 96, at 658-59; Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees, 45 L.Q. Rev. 343 (1929). The source of the difficulty was apparently dictum to the effect that "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences . . . would ensue." 152 Eng. Rep. at 405.

20. Prosser § 97, at 678 (footnote omitted); The Assault upon the Citadel at 1124. These

continued to grow the rule was gradually narrowed until, in 1916, the case of *MacPherson v. Buick Motor Co.*[21] signaled an end to privity as a necessary element in product liability actions based on negligence.[22]

Contractual privity remained a requirement, however, in actions based on a warranty theory[23] until 1960 when *Henningsen v. Bloomfield Motors, Inc.*[24] struck the death blow to the "citadel of privity."[25] *Henningsen* opened the door to a third theory of recovery—that of "strict liability, without negligence and without privity, as to the manufacturers of all types of products . . . ."[26] This new concept was expressly adopted by California in 1963 when the court in *Greenman v. Yuba Power Products, Inc.*[27] rejected contractual limitations and held that "the liability is not one governed by the law of contract warranties but by the law of *strict liability in tort.*"[28] This theory was incorporated by the American Law Institute in the second Restatement of Torts[29] and has been accepted by a growing number of courts.[30] The doctrine has been acclaimed as

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theories consisted, for the most part, of variations on the principles of agency, assignments, and third party beneficiaries. For a collection of twenty-nine theories and the cases in which they were used see Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 153-55 (1957).

21. 217 N.Y. 382, 111 N.E. 1050 (1916).

22. "There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use." Id. at 393, 111 N.E. at 1054. See generally The Assault upon the Citadel.

23. This requirement was also narrowed as the courts developed exceptions to the rule. In Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) the court accepted the theory of an implied warranty running from the supplier of food and drink to the ultimate consumer. The limitation of this exception to food products was ended in 1958 when it was extended to building materials in Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958). Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) held that where a defendant has made a positive assertion upon which the plaintiff has relied there exists an express warranty providing a basis of recovery irrespective of privity.

24. 32 N.J. 358, 161 A.2d 69 (1960).

25. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966) [hereinafter cited as Fall of the Citadel]. At the heart of the Henningsen opinion was the statement by the court that: "[O]f tremendous significance in a rapidly expanding commercial society was the recognition of the right to recover damages on account of personal injuries arising from a breach of warranty. The particular importance of this advance resides in the fact that under such circumstances strict liability is imposed upon the maker or seller of the product. Recovery of damages does not depend upon proof of negligence or knowledge of the defect." 32 N.J. at 372, 161 A.2d at 77 (citations omitted).

26. Fall of the Citadel at 794.

27. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

28. Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (emphasis added).

29. Restatement (Second) of Torts § 402A (1965).

30. See, e.g., Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Mun. Ct. App. 1962); Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963); Esborg v. Bailey Drug Co., 61 Wash. 2d 347,

dispelling some of the fog and confusion which resulted from the development of previous product liability theories[31] in the "borderland of tort and contract."[32]

The issue in *Mendel* centered around the question of whether a personal injury action for breach of warranty sounds in tort or contract. In reaching its decision, the court was faced with the dilemma of relying on one of two apparently inconsistent New York cases: *Blessington v. McCrory Stores Corp.*[33] and *Goldberg v. Kollsman Instrument Corp.*[34] The *Goldberg* case, in 1963, reinforced the trend in recent New York decisions[35] that privity of contract is no longer necessary in an action for breach of implied warranty of fitness for a particular purpose.[36] The decision further indicated that "[a] breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer."[37] Citing *Greenman* with approval the court said that "strict tort liability" was "surely a more accurate phrase" to define the liability of a supplier of chattels to a party injured by the chattels.[38] This decision had been interpreted as placing New York among those states leading the strong trend in favor of the doctrine of strict tort liability.[39]

The *Mendel* court, however, chose to rely on the earlier decision in *Blessington,* which held that the six-year contract statute of limitations was applicable in an action for personal injuries arising out of a breach of an implied warranty.[40] The *Mendel* opinion dismissed the implications in *Goldberg* rather

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378 P.2d 298 (1963). For an extensive listing see Prosser § 97, at 677-78 and cases cited therein.

31. See, e.g., Jaeger, Privity of Warranty: Has The Tocsin Sounded?, 1 Duquesne L. Rev. 1 (1963); The Fall of the Citadel; Strict Tort Liability of Manufacturers. Contra, Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View, 24 Tenn. L. Rev. 938 (1957).

32. W. Prosser, Selected Topics on the Law of Torts 452 (1953).

33. 305 N.Y. 140, 111 N.E.2d 421 (1953).

34. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

35. See, e.g., Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

36. 12 N.Y.2d at 435-36, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.

37. Id. at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.

38. Id. at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

39. E.g., Prosser § 97, at 675 n.64, 677 n.5; Noel, Strict Liability of Manufacturers, 50 A.B.A.J. 446, 448 (1964); Strict Tort Liability of Manufacturers at 12 n.44; Witherspoon, Torts or Warranties?, 73 Com. L.J. 134, 138-39 (1968); cf. 2 L. Frumer & M. Friedman, Products Liability § 16A[3], at 3-186 n.15 (1966).

40. 305 N.Y. at 147, 111 N.E.2d at 422-23. Blessington involved a warranty of fitness action against a store for selling inflammable children's clothing. The plaintiff's causes of action in negligence were barred by the Statute of Limitations and it was only by construing warranty as contract that the court was not obliged to dismiss the case.

cursorily: "While there is language in the majority opinion in *Goldberg* approving of the phrase 'strict tort liability', it is clear that *Goldberg* stands for the proposition that notwithstanding the absence of privity, the cause of action which exists in favor of third-party strangers to the contract is an action for breach of implied warranty."[41] Thus, by relying on *Blessington*, the court reversed the trend toward the strict liability doctrine suggested in *Goldberg*.

The court considered the possibility of overruling *Blessington*, and establishing a three-year statute of limitations period commencing at the time of the injury for all personal injury actions.[42] But it declined to do so because a conflict would result with the four-year provision in Article Two of the Uniform Commercial Code adopted by New York.[43] This four-year period[44] starts running for a breach of warranty upon tender of delivery,[45] and there is no requirement of privity for a breach of warranty action if the injured person[46] is a member of the buyer's family or household or a guest in his home.[47] Thus it would be possible for a plaintiff not in privity but, for example, a guest in the buyer's home

> to pick and choose between the code's four-year-from-the-time-of-the-sale, and [the proposed] three-year-from-the-time-of-the-injury, limitations period, depending upon which . . . would grant [him] the longest period of time to sue. . . . [I]t would be absurd to have two different periods of limitation applicable to the same cause of action, with the same elements of proof, complaining of the very same wrong.[48]

The majority concluded by indicating its willingness to sacrifice the small number of meritorious claims which are not brought promptly, in order to protect manufacturers from unfounded suits filed many years after a product has been sold.[49]

Judge Breitel, in his dissent, began with the conclusion that "it is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one."[50] He attacked the majority's policy consideration that a manufacturer should not be subject to a breach of warranty action

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41. 25 N.Y.2d at 343-44, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

42. Id. at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

43. N.Y. U.C.C. § 2-725 (McKinney 1964). Mendel is not governed by the UCC since the sale took place in 1958 and the UCC became effective in 1964. 25 N.Y.2d at 342 n.1, 253 N.E.2d at 208 n.1, 305 N.Y.S.2d at 492 n.1.

44. N.Y. U.C.C. § 2-725(1) (McKinney 1964).

45. Id. § 2-725(2).

46. Personal injury is listed as one of the consequential damages for which a plaintiff may sue upon a breach by the seller. Id. § 2-715(2)(b).

47. Id. § 2-318.

48. 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494-95.

49. Id. at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

50. Id., 253 N.E.2d at 211, 305 N.Y.S.2d at 495 (dissenting opinion). The Supplementary Practice Commentary to N.Y. Civ. Prac. § 214 (McKinney Supp. 1970) specifically disapproves of the possibility of a plaintiff being barred before he is injured.

for personal injuries many years after the breach for "that is precisely the possibility" in a negligence action.[51]

Judge Breitel emphasized the tortious nature of a strict liability action and pointed out that the *Goldberg* decision indicated an acceptance of this doctrine in New York.[52] He dismissed the majority's arguments concerning the UCC as "all but irrelevant to the problem at hand."[53] The UCC, according to Breitel, reflects thinking which is not up to date with that in tort law; furthermore, it was not intended to provide an exclusive remedy but is confined to contract warranty in the narrow sense of that term.[54]

Judge Breitel's conclusion was "that contract or warranty thinking in the area of strict product liability is no longer permissible. . . . Statutes of Limitations do not bar nonaccrued causes of action . . . ."[55] If such a statute is necessary, the legislature should enact one and it has not done so in the tort area.[56]

Although the court did note that the provisions of the UCC were not controlling,[57] the majority, nevertheless, relied on the UCC as an expression of legislative policy. This reliance seems to have been misplaced. There does not appear to be any evidence of legislative intent showing that the UCC was to act as an impediment to the evolving body of case law concerned with consumer protection, rather, the indications seem to show the contrary.[58]

The court endeavored to reach a solution which would adequately protect the manufacturer from suits instituted a prolonged period of time after their products entered the stream of commerce. It is possible that had the court focused on its own initial inquiry—is warranty an action in contract or tort—a substantial amount of confusion may have been avoided. The majority, rather than clarifying this issue, deemed it necessary to base its opinion on policy reasons, weighing such factors as difficulty of proof.[59] Such factors, it is assumed, were considered when the legislature established the various time limitations for

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51. 25 N.Y.2d at 347, 253 N.E.2d at 211, 305 N.Y.S.2d at 496.

52. Id. at 348, 253 N.E.2d at 212, 305 N.Y.S.2d at 497. Since the Goldberg decision, the text writers have included New York among the states adhering to the "strict tort liability" doctrine. See note 39 supra. Furthermore, the American Law Institute has recognized that the strict liability doctrine does not sound in contract, but is "purely one of tort." Restatement (Second) of Torts § 402A, comment m at 355 (1965).

53. 25 N.Y.2d at 351, 253 N.E.2d at 214, 305 N.Y.S.2d at 500.

54. Id. at 351-52, 253 N.E.2d at 214, 305 N.Y.S.2d at 500. Uniform Commercial Code § 2-318, Comment 3 states that the code is neutral with respect to expansion of warranty protection to persons beyond those enumerated in the code.

55. Id. at 353, 253 N.E.2d at 215, 305 N.Y.S.2d at 501.

56. Id.

57. Id. at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494. The sale was consummated in 1958. Id. at 342 n.1, 253 N.E.2d at 208 n.1, 305 N.Y.S.2d at 492 n.1. The UCC only applies to "transactions" and "events" after September 27, 1964. N.Y. U.C.C. §§ 2-725(4), 10-101 to -105 (McKinney 1964), as amended (McKinney Supp. 1970).

58. Cf. N.Y. U.C.C. §§ 1-103, 2-318, Comment 3 (McKinney 1964). See also Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713, 758 (1970).

59. 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

instituting different causes of action.[60] The court should have determined whether the action was tort or contract and then applied the appropriate statute of limitations as found in the Civil Practice Law and Rules[61] thus avoiding any possible usurpation of a legislative function.

In attempting to rationalize its conclusion the court was faced with an apparent obstacle. Appellant argued that the action was really based on the theory of strict tort liability akin to that delineated in section 402A of the Restatement of Torts[62] which was considered to have been substantially adopted by New York in *Goldberg*.[63] Thus the appellant argued that the action must sound in tort. The court of appeals, however, dismissed plaintiff's argument by explaining that *Goldberg* did not establish strict tort liability as an independent cause of action in New York but rather stands for the proposition that in suits brought on warranty by a contemplated user against the manufacturer privity is no longer necessary.[64] There does not seem to be any other reasonable interpretation of the court's treatment of *Goldberg* than that strict tort liability merely eliminates a requirement of privity in warranty actions. Thus, the court apparently held that strict tort liability in New York is a doctrine of contractual law and not a tort action.[65] Such an interpretation of *Goldberg* contains a certain definitional inconsistency and most definitely flies in the face of the majority of the commentators.[66]

Even assuming that a judicial exercise in public policy is a valid approach to a determination of the applicable statute of limitations, has the court arrived at a desirable answer? The decision reached gives rise to the anomoly that an injured party may be barred from a recovery before there was an injury.[67] The underlying choice in *Mendel* was which of two conflicting public policies to favor—protection against defending claims filed after an unreasonable delay, or protection from injury resulting from the introduction of defective products into

60. See, e.g., 1958 Legis. Doc. No. 13, at 43-86; 1962 Legis. Doc. No. 8.

61. N.Y. Civ. Prac. art. 2 (McKinney 1963).

62. Restatement (Second) of Torts § 402A (1965). For recent treatments of the interrelationship of warranty and strict tort liability see Titus, supra note 58; Tobin, Products Liability: Recovery of Economic Loss?, 4 N.Z.U.L. Rev. 36 (1970); Note, Statutes of Limitations: Their Selection and Application in Products Liability Cases, 23 Vand. L. Rev. 775 (1970). Compare Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), with Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) for divergent treatment of recoverable damages.

63. See authorities cited note 39 supra.

64. See text accompanying note 41 supra.

65. The majority's opinion would then seem to stand as an exception to Dean Prosser's statement that "No one doubts that, in the absence of privity, the liability must be in tort and not in contract." Prosser § 97, at 681.

66. See note 39 supra and text accompanying notes 37-39. See also Guarino v. Mine Safety Appliances Co., 31 App. Div. 2d 255, 258-9, 297 N.Y.S.2d 639, 642-43 (2d Dep't), aff'd, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969).

67. See N.Y. Civ. Prac. § 214, Supplementary Practice Commentary at 75 (McKinney Supp. 1970). See also 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495 (Breitel, J., dissenting).

the marketplace. The election by the court of the former would seem to represent a retrogression from the trend of modern legal thought in this area.[68]

The possible effect of this decision on the law of products liability in New York is undesirable. A plaintiff who is injured by a defective product after the statute of limitations for contract actions has run is barred from a claim based on implied warranty, yet he will probably be precluded from pursuing a claim based on strict tort liability since the validity of this cause of action is now doubtful under the court's interpretation of *Goldberg*. This may leave the injured party with recourse only to a cause of action in negligence dissipating for such plaintiff the benefits derived from the extensive modern developments in the field of products liability.

68. See Lascher, Strict Liability in Tort for Defective Products: the Road to and Past Vandermark, 38 S. Cal. L. Rev. 30, 46-47 (1965); Fall of the Citadel at 794-98; Strict Tort Liability of Manufacturers.