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Case Notes

CASE NOTES

Admiralty—Locality Rule—Federal Maritime Jurisdiction Held to Extend to Unseaworthiness Claim of Longshoreman Injured on Pier by Shore Based Equipment.—Plaintiff was a dockworker whose duty was to ensure that cargo containers were loaded aboard ship in the proper sequence. The containers were moved by carriers along the pier to the water's edge where plaintiff directed their positioning beneath the crane which hoisted them on board. He was injured when one of the carriers ran into him. Plaintiff brought an action alleging negligence against the ship and her owner, as well as against his employer. Plaintiff also alleged unseaworthiness on the part of the vessel. The district court dismissed for lack of federal jurisdiction—there was neither diversity of citizenship, nor was the injury caused by some instrumentality of the vessel so as to invoke admiralty jurisdiction.[1] The Court of Appeals for the Ninth Circuit reversed the judgment below as to the claim for unseaworthiness. The plaintiff was "in the ship's service," and the carrier was an "appurtenance" of the ship since the carrier and the plaintiff were integral parts of the loading process. Admiralty jurisdiction was therfore authorized. *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9th Cir. 1970).

The United States Constitution provides that the federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction."[2] Pursuant to this provision, section 9 of the Judiciary Act of 1789[3] gave the federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ."[4] The Extension of Admiralty Jurisdiction Act[5] eliminated troublesome questions concerning jurisdiction over maritime torts generated by vessels on navigable waters but consummated on land. However, other questions concerning the boundaries of this ground of federal jurisdiction have been left to the courts.[6]

Admiralty jurisdiction is not dependent on an amount in controversy, nor the presence of any federal question since the substantive maritime law as applied in admiralty is an independent ground of federal jurisdiction.[7] Jurisdiction in admiralty over contract claims depends on the maritime nature of the services

1. Gebhard v. S.S. Hawaiian Legislator, 284 F. Supp. 634 (C.D. Cal. 1968), rev'd, 425 F.2d 1303 (9th Cir. 1970).

2. U.S. Const. art. III, § 2.

3. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76, as amended, 28 U.S.C. § 1333(1) (1964).

4. Id.

5. 46 U.S.C. § 740 (1964).

6. Gebhard v. S.S. Hawaiian Legislator, 425 F.2d at 1307.

7. Mr. Justice Story stated in DeLovio v. Boit, 7 F. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815), that cases of maritime jurisdiction, within the constitutional delegation, comprehend "all maritime contracts, torts, and injuries." See, e.g., Mastan Co. v. Steinberg, 418 F.2d 177 (3d Cir. 1969), cert. denied, 397 U.S. 1009 (1970); Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966). See also G. Gilmore & C. Black, The Law of Admiralty § 1-9, at 19 (1957) [hereinafter cited as Gilmore & Black].

to be performed regardless of where the contract was made or executed.[8] However, in the earlier cases, jurisdiction over tort claims was restricted by "locality" —the injury had to occur upon navigable waters.[9]

Exceptions to the locality rule are found in the seaman's statutory rights under the Jones Act,[10] and where the injured party possessed a maritime "status" or "relation." The United States Supreme Court recognized in *O'Donnell v. Great Lakes Dredge & Dock Co.*[11] that because of the seaman's maritime status, he was entitled to the traditional remedy of maintenance and cure—a limited recovery for personal injuries—from his employer, regardless of whether the injury occurred at sea or on land:[12] "[T]he admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."[13]

Longshoreman could also recover under this status theory if they were doing seaman's work. In *International Stevedoring Co. v. Haverty*[14] a stevedore, while engaged in stowing freight on board a ship, was held to be a "seaman" within the meaning of the Merchant Marine Act of 1920[15] (predecessor to the Jones Act). The Supreme Court recognized that although generally "stevedores are not 'seamen',"[16] the injured party should not be restricted in his recovery because of the title of his position. The stevedore could bring an action in negligence against his employer under this Act since "[t]he work upon which the plaintiff

8. E.g., North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119 (1919); Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1900); DeLovio v. Boit, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815); see Gilmore & Black § 1-9, at 20.

9. See The Admiral Peoples, 295 U.S. 649 (1935); The Plymouth, 70 U.S. (3 Wall.) 20 (1865); Forgione v. United States, 202 F.2d 249 (3d Cir.), cert. denied, 345 U.S. 966 (1953); Berwind-White Coal Mining Co. v. City of New York, 135 F.2d 443 (2d Cir. 1943); The S.S. Samovar, 72 F. Supp. 574 (N.D. Cal. 1947); The Vizcaya, 38 F. Supp. 1020 (D. Mass. 1941).

10. 46 U.S.C. § 688 (1964) grants to seamen a cause of action for injuries due to the negligence of their employers or fellow employees. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). See also Hopson v. Texaco, Inc., 383 U.S. 262 (1966) (per curiam). This Act has been interpreted liberally by the courts so that a longshoreman having the status of a seaman could recover under it. See notes 14-17 infra and accompanying text. However, the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-50 (1964), as amended, (Supp. V, 1970), prevented the longshoreman from asserting these rights against his employer. See notes 18-20 infra and accompanying text.

11. 318 U.S. 36 (1943).

12. For jurisdictional purposes piers were considered extensions of the land. Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946); T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928).

13. 318 U.S. at 42-43.

14. 272 U.S. 50 (1926).

15. Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007, codified as amended, 46 U.S.C. § 688 (1964), gave to "any seaman who shall suffer personal injury in the course of his employment . . . an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy . . . shall apply . . . ."

16. 272 U.S. at 52.

was engaged was a maritime service formerly rendered by the ship's crew."[17]

There are limitations, however, on the maritime rights of harbor workers with respect to their employers. In *Swanson v. Marra Brothers, Inc.*[18] a longshoreman was prevented by the Longshoremen's and Harbor Worker's Compensation Act[19] from suing his employer. The compensation statute, which was enacted subsequent to the decision in *Haverty*, provides that recovery of a compensation award is the exclusive remedy against the harbor worker's employer.[20] This exclusivity provision, however, does not affect the longshoreman's right, under the traditional maritime law of unseaworthiness, to recover from the shipowner for injuries on the ship. Unseaworthiness, a form of strict liability of shipowners, was strictly limited to seamen, *i.e.*, "men who go to sea," until well into the present century.[21] Today however, this doctrine has become the principal vehicle for personal injury recovery even for those persons not strictly classified as "seamen."[22]

The right to recover damages for breach of duty to furnish a seaworthy vessel was first stated in *The Osceola*[23] where it was recognized that both the ship and its owner were "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."[24] The warranty of seaworthiness was not implied as a term in the seamen's contract of employment, rather it was implied because it was "just to import it into the legal relations arising out of the service itself . . . ."[25]

17. Id. (citation omitted). See also Uravic v. F. Jarka Co., 282 U.S. 234, 239 (1931); Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52, 59-60 (1914).

18. 328 U.S. 1 (1946).

19. 33 U.S.C. §§ 901-50 (1964), as amended, (Supp. V, 1970). It should be noted that jurisdiction under this statute depends upon the locality test in that the injury must have occured upon navigable waters (including dry docks). Id. § 903; see Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969), noted in 38 Fordham L. Rev. 545 (1970).

20. "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability . . . ." 33 U.S.C. § 905 (1964).

21. Gilmore & Black § 6-53, at 358.

22. Id. § 6-38, at 315, see, e.g., Horn v. Cia de Navegacion Fruco, S.A., 404 F.2d 422 (5th Cir. 1968), cert. denied, 394 U.S. 943 (1969); Gibbs v. Kiesel, 382 F.2d 917 (5th Cir. 1967); In re Marine Sulphur Transp. Corp., 312 F. Supp. 1081 (S.D.N.Y. 1970); Murphy v. National Bulk Carriers, Inc., 310 F. Supp. 1246 (E.D. Pa. 1970). But see McDaniel v. The M/S Lisholt, 282 F.2d 816 (2d Cir. 1960), cert. denied, 365 U.S. 814 (1961) (warranty of seaworthiness held not to extend to fireman who was on board the vessel and who had knowledge of the condition); Talton v. United States Lines Co., 203 F. Supp. 17 (S.D.N.Y. 1962) (no duty breached as to a passenger). See also Annot., 8 A.L.R.3d 505 (1966); Grundman, Unseaworthiness and Personal Injuries Ashore, 17 Clev.-Mar. L. Rev. 481 (1968); Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L.Q. 381 (1954); 24 Wash. & Lee L. Rev. 114 (1967).

23. 189 U.S. 158 (1903).

24. Id. at 175 (citation omitted).

25. Strika v. Netherlands Ministry of Traffic, 185 F.2d 555, 558 (2d Cir. 1950), cert. denied, 341 U.S. 904 (1951). The scope of the warranty of seaworthiness was broadened in Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). The Supreme Court held that the

It was not until 1946, in *Seas Shipping Co. v. Sieracki*,[26] that a longshoreman, injured while on board a ship, recovered from the shipowner for unseaworthiness. *Swanson*, which precluded the stevedore from suing his employer directly, was distinguished because the Longshoremen's and Harbor Worker's Compensation Act only released employers from liability, while not affecting liabilities of other persons.[27] The Court in *Sieracki*, like the Court in *The Osceola*, did not rationalize the existence of liability on the basis of a contract between the longshoreman and the shipowner[28] but rather because of "the hazards of marine service which unseaworthiness places on the men who perform it."[29] The inability of the longshoreman to protect himself against these hazards combined with the severity of his having to bear the injury and financial loss justified placing liability on the shipowner,[30] who is not only in the position to avoid negligent injuries, but can also distribute the loss throughout the industry "which receives the service and should bear its cost."[31]

To justify the shipowner's liability the Court said that since historically the work of loading and unloading a ship was done by the ship's crew,[32] the owner should not be free to negate his liability by parcelling such work out to other employees.[33] Although the shipowner is at liberty to secure the benefits of specialization to conduct his business, he should not be at liberty to delegate his traditional responsibilities.[34]

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employer's duty to furnish his employees with a seaworthy ship was non-delegable and not qualified by the fellow-servant rule. As a result of the decision in Mahnich, negligence on the part of the crew would not be fatal to the seaman's claim if he could find "some handhold of unseaworthiness to cling to." Gilmore & Black § 6-39, at 320.

26. 328 U.S. 85 (1946). This case clearly illustrated the strict liability which the warranty of seaworthiness imposed. A shackle supporting a boom was found to have been forged defectively. The Court found that even though there was no duty to test the shackle on the part of the shipowner and the manufacturer was negligent in this duty, the owner's warranty of seaworthiness made him not jointly but severally liable. Id. at 89.

27. "Congress by that Act not only did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others. It expressly reserved to the stevedore a right of election to proceed against third persons responsible for his injury . . . ." Id. at 101 (footnote omitted).

28. The shipowner argued that the warranty of seaworthiness arose because of the contract relation between shipowner and seamen. The Court stated that: "[T]he norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons. But it does not follow necessarily from this fact that the liability either arose exclusively from the existence of a contractual relation or is confined to situations in which one exists." Id. at 90.

29. Id. at 93.

30. Id. at 93-94.

31. Id. at 94.

32. Id. at 96; see The Seguranca, 58 F. 908, 909 (S.D.N.Y. 1893); The Gilbert Knapp, 37 F. 209, 210 (E.D. Wis. 1889).

33. "Not the owner's consent to liability, but his consent to performance of the service defines its boundary." 328 U.S. at 96.

34. Id.

Strika v. Netherlands Ministry of Traffic[35] was relied upon by the majority in *Gebhard*, and is important for its application of seaworthiness to a shoreside injury. Judge Learned Hand concluded in *Strika* that admiralty jurisdiction existed over the unseaworthiness claim of a longshoreman injured on a pier because of defective ship's tackle.[36] Relying upon *O'Donnell* and *Swanson*, the court said: "[S]uch a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land."[37] Thus, the court held that: "[I]f a seaman can [recover], we see no reason to question the ability of a longshoreman also to recover, for that follows from the reasoning of Seas Shipping Co. v. Sieracki . . . especially when it is read with the opinion in Swanson v. Marra Bros., Inc. . . ."[38]

The court in *Gebhard v. S.S. Hawaiian Legislator*[39] held that admiralty jurisdiction would exist regardless of the locality of the injury when the basic requirements of the tort of unseaworthiness were pleaded: First, the petitioner's work must have been "in the ship's service" so that the warranty of seaworthiness extended to him; second, the equipment must have been a part of the "ship's equipment or an appurtenant appliance;" third, he must have been injured by a piece of equipment not reasonably fit for its intended use.[40] It is in the court's treatment of these elements that *Gebhard* is important in the trend to expand recovery for unseaworthiness.[41]

The plaintiff's problem in proving he was in the ship's service, the first element of the tort, was that he was further removed from the actual loading-unloading operation than those injured in prior cases.[42] His duty as a maritime clerk was

35. 185 F.2d 555 (2d Cir. 1950), cert. denied, 341 U.S. 904 (1951).

36. Id. at 558.

37. Id.

38. Id. (citations omitted). Judge Hand thought that although the plaintiff also had admiralty jurisdiction on the basis of the Extension of Admiralty Jurisdiction Act, it was not necessary to rely upon it to support this type of recovery. Id. The Supreme Court utilized the same reasoning as the Strika Court in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). Legal protection was given to a shore based carpenter based "on the type of work he did . . . . His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen . . . . All were entitled to like treatment under law." Id. at 413.

39. 425 F.2d 1303 (9th Cir. 1970). As in Strika, the court in Gebhard stated that admiralty jurisdiction need not be predicated on the Extension of Admiralty Jurisdiction Act. Id. at 1307.

40. Id. at 1310.

41. Gebhard's claim failed in the district court because it found that he did not meet two of the basic requisites for breach of the warranty of seaworthiness: his work was not in the ship's service and the equipment that injured him was not a part of the ship's equipment or appurtenant appliance. Gebhard v. S.S. Hawaiian Legislator, 284 F. Supp. 634, 639-40 (C.D. Cal. 1968), rev'd, 425 F.2d 1303 (9th Cir. 1970). Because these elements of the tort were not met, the case was dismissed for want of admiralty jurisdiction, and the third element, fitness for use, was not decided. Id. at 638-40.

42. E.g., Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963) (longshoreman injured on pier while unloading ship); Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950), cert. denied, 341 U.S. 904 (1951).

to aid in the preparation for loading by directing the straddle carrier drivers to position the cargo vans in proper sequence under the ship's crane. The district court held that "his duties were not 'the "type of work" traditionally done by seamen.' "[43]

The court of appeals approached this problem by noting that the " 'duty to provide a seaworthy ship and gear . . . applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier.' "[44] The majority thought that the test to be applied was "status"—being involved in the ship's service—not location.[45] As long as the longshoreman is an "integral part of the loading process"[46] he is "prima facie . . . in the ship's service," and thus has a cause of action for unseaworthiness.[47]

This status, or relation theory, allowed the court to view broadly the second element of the tort, that the injury was caused by a piece of the ship's equipment or an appurtenant appliance.[48] Gebhard was allegedly injured because of defects in shore-based equipment.[49] The district court had held that in the loading operation, "the doctrine of unseaworthiness extends only to equipment which is actually used to load on or into the vessel or unload from the vessel itself."[50] Again the court of appeals took a broader view of the loading process, so that the equipment used to get cargo in position to be loaded, since necessary to this process, was considered an appurtenance.[51]

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43. 284 F. Supp. at 639.

44. 425 F.2d at 1311, quoting Gutierrez v. Waterman, 373 U.S. 206, 215 (1963). Gutierrez involved the unloading of leaky bean bags which caused a longshoreman to slip on the pier, resulting in his injury. The court, relying heavily upon the logic of Strika and Sieracki, held that the shipowner becomes strictly liable for injuries caused by cargo accepted in faulty containers.

45. 425 F.2d at 1310. In prior cases the courts adhered to the locality requirement, forcing themselves to "construct metaphysical links with the ship. Not surprisingly, different circuits have clashing styles of shipbuilding." Comment, Risk Distribution and Seaworthiness, 75 Yale L.J. 1174, 1189 (1966). For examples of the confusion in the courts regarding this problem, see Spann v. Lauritzen, 344 F.2d 204 (3d Cir.), cert. denied, 382 U.S. 938 (1965); Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964), cert. denied, 380 U.S. 943 (1965); Forkin v. Furness Withy & Co., 323 F.2d 638 (2d Cir. 1963); Fredericks v. American Export Lines, Inc., 227 F.2d 450 (2d Cir. 1955), cert. denied, 350 U.S. 989 (1956); McKnight v. N.M. Paterson & Sons, Ltd., 181 F. Supp. 434 (N.D. Ohio), aff'd, 286 F.2d 250 (6th Cir. 1960), cert. denied, 368 U.S. 913 (1961).

46. 425 F.2d at 1311; see Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir.), cert. denied, 379 U.S. 913 (1964), where a longshoreman was thrown from a freight car in the process of bringing cargo to the ship's side.

47. 425 F.2d at 1312. In fact, it has been held that "[t]he work of loading and unloading the ship is, as a matter of law, the work of the ship's service, performed until recent times by members of the crew." Thompson v. Calmar S.S. Corp., 331 F.2d 657, 659 (3d Cir.), cert. denied, 379 U.S. 913 (1964) (citation omitted).

48. 425 F.2d at 1312.

49. Gebhard was struck from behind by the straddle carrier, allegedly because neither it nor the pier had lights, and the carriers were designed so that the driver's view of pedestrains was blocked. Id. at 1305.

50. 284 F. Supp. at 640.

51. 425 F.2d at 1312. On this point there is considerable authority that shore based

The court in *Gebhard* felt justified in providing the warranty of seaworthiness to longshoremen, for "[a] longshoreman's duties bring him into a zone of danger unique to maritime commerce . . . and his injury, when incurred in the ship's service by ship's equipment, is an appropriate subject of maritime jurisdiction."[52] Since Gebhard's claim satisfied the first two necessary requirements, the court concluded that admiralty jurisdiction existed.[53] The district court's dismissal was thus reversed and remanded for trial on the question of the third requirement—whether the equipment was reasonably fit for its intended use.[54]

The trend toward granting maritime jurisdiction and allowing the longshoreman to recover from the shipowner has introduced complications. The shipowner is usually entitled to indemnification from the longshoreman's employer as a result of the contract between them.[55] This has caused liability to be shifted back to the longshoreman's employer, one whom the injured person could not sue directly because of the Longshoremen's and Harbor Worker's Compensation Act.[56] The court of appeals felt that this result has not been unfortunate, for it is logical to have those responsible for the injury bear the liability, not only because they were at fault, but because of the incentive this would provide to eliminate the risk of harm.[57] The low scale of benefits to which longshoremen

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equipment is appurtenant to the ship as a necessary and integral part of the loading-unloading process, and many courts have found an appurtenance to be anything adopted by the ship to perform its service. E.g., Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), aff'd per curiam, 347 U.S. 396 (1954); Casbon v. Stockard S.S. Corp., 173 F. Supp. 845 (E.D. La. 1959). See also Reed v. The Yaka, 373 U.S. 410 (1963). However there is a sharp conflict of authority in the lower federal courts as to this point. Compare Spann v. Lauritzen, 344 F.2d 204 (3d Cir.), cert. denied, 382 U.S. 938 (1965) (shore based hopper furnished by the stevedore company was appurtenance of ship), with Forkin v. Furness Withy & Co., 323 F.2d 638 (2d Cir. 1963) (conveyer on pier not appurtenance until connected with ship), and Sherbin v. S.G. Embiricos, Ltd., 200 F. Supp. 874 (E.D. La. 1962) (grain distributor owned by stevedore company and used in ship's hold not an appurtenance).

52. 425 F.2d at 1310 (citation omitted).

53. Id. at 1311-12.

54. Id.

55. E.g., Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 324-25 (1964); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); see Comment, supra note 45, at 1184.

56. See notes 18-20 supra and accompanying text.

57. 425 F.2d at 1312; see Proudfoot, "The Tar Baby": Maritime Personal-Injury Indemnity Actions, 20 Stan. L. Rev. 423 (1968) [hereinafter cited as Proudfoot]. Proudfoot pointed out that absent indemnity actions, when the plaintiff recovered against the shipowner, the compensation carrier of the stevedore company could recoup its payments made under the Longshoremen's and Harbor Worker's Act from the judgment. Thus the incentive was removed from the stevedore to take even ordinary care. Even with indemnity actions there will be many instances where the shipowners alone will be liable. E.g., Waterman S.S. Corp. v. David, 353 F.2d 660 (5th Cir. 1965), cert. denied, 384 U.S. 972 (1966); Reddick v. McAllister Lighterage Line Inc., 258 F.2d 297 (2d Cir.), cert. denied, 358 U.S. 908 (1958); Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198 (2d Cir. 1957); Hagans v. Farrell Lines, Inc., 237 F.2d 477 (3d Cir. 1956); see Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); cf. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964); DeGioia v. United States Lines Co., 304 F.2d 421 (2d Cir. 1962).

are entitled under the Longshoremen's and Harbor Worker's Compensation Act has been an additional underlying reason for the courts to reach this result.[58]

The judicial extension of admiralty jurisdiction over unseaworthiness claims of longshoremen has been criticized as an unwarranted encroachment into the legislative area.[59] The dissent in *Gebhard* called the maritime status theory a "novel doctrine" and a theory without authority, and said that maritime jurisdiction should be limited to the rules set by Congress in the Extension of Admiralty Jurisdiction Act, for there was "no compelling reason of social policy to justify the majority's departure from settled jurisdictional rules."[60] The use of the ship as a "conduit" to circumvent the limited recovery under the federal compensation act has also been criticized.[61] "If the benefits under the Compensation Act are inadequate, the remedy lies in action by Congress, not in judicial legerdemain . . . ."[62]

Since it is doubtful that the Supreme Court will abandon its decisions expanding the scope of the warranty of seaworthiness,[63] Congress should introduce consistency and rationality into the area. An increase in benefits under the Longshoremen's and Harbor Worker's Compensation Act would encourage an injured employee to seek his remedy there and thus eliminate, in many cases, the circuity of actions which now exists. The courts have recognized the desirability of expanded recovery but in justifying that recovery have relied on fictions[64] in trying to find some connection between the injured party and the ship.[65] By doing this they "have made seaworthiness a confused and unconvincing doctrine."[66]

Gebhard is important not only in its broad application of the warranty of sea-

58. See Note, The Warranty of Seaworthiness: An Appraisal of Longshoremen's Remedies for On-the-Job Injuries, 42 N.Y.U.L. Rev. 331, 338 (1967).

59. See Alaska S.S. Co., Inc. v. Petterson, 347 U.S. 396, 401-02 (1954) (Burton, J., dissenting); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 105-06 (1946) (Stone, C.J., dissenting); Gebhard v. S.S. Hawaiian Legisator, 425 F.2d 1313, 1306-17 (9th Cir. 1970) (Wright J., dissenting in part). This view is based upon the premise that Congress can extend admiralty jurisdiction, but "from this congressional power . . . it does not follow that a court . . . can or should depart from well-settled rules and expand its jurisdiction to the very brink of the constitutional limits." Id. at 1316.

60. 425 F.2d at 1317.

61. See, e.g., Judge Friendly's dissent in Skibinski v. Waterman S.S. Corp., 360 F.2d 539, 544 (2d Cir. 1966), cert. denied, 387 U.S. 921 (1967).

62. Id.

63. See Proudfoot 445.

64. It is ironic that although the historical test is used to justify giving the remedy to longshoremen, since they are performing work traditionally done by seamen, there have been few cases where a crew member has been hurt while handling cargo. Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen, 111 U. Pa. L. Rev. 1137, 1139-47 (1963). "The courts have either misread, or have not read, the facts of history." Id. at 1152.

65. Comment, supra note 45, at 1189-90.

66. Id. at 1190.

worthiness to those within the "zone of danger unique to maritime commerce,"[67] but in its recognition of the reasonableness of this application and of its effects: the shipowner cannot isolate himself from liability, the longshoreman gets the recovery he deserves, and, as the facts warrant, liability will be placed on the party that should be responsible. The court took jurisdiction based upon judicial precedent, without being restricted by the locality rule and Congressional inaction, and in this way furthered the philosophy of Justice Rutledge in *Sieracki* that seaworthiness "is a form of absolute duty owing to all within the range of its humanitarian policy."[68]

Class Actions—Identical Violations of the Retail Instalment Sales Act Held Not to Create a "Common Question" within the Meaning of the New York Class Action Statute.—Plaintiffs, in seperate transactions, purchased carpeting from New York City merchants. They signed retail installment sales contracts which defendant, a sales finance company, had supplied to the merchants. Defendant then acquired the contracts from merchants immediately after consummation of the sales. These contracts violated section 1 of the Retail Instalment Sales Act[1] since significant portions were printed in less than eight point type.[2] Plaintiffs sought to bring a class action to recover the statutory penalty[3] on behalf of themselves and all others who had signed these form contracts. The trial court dismissed the complaint,[4] and the appellate division affirmed.[5] On appeal, a unanimous court of appeals affirmed and refused to allow

67. 425 F.2d at 1310. It was the concept that stevedoring was an extra-hazardous activity that prompted federal judges to find avenues of recovery beyond those provided by the federal compensation act. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93-96 (1946); Shields & Byrne, supra note 64, at 1152; see Note, The Warranty of Seaworthiness: An Appraisal of Longshoremen's Remedies for On-the-Job Injuries, 42 N.Y.U.L. Rev. 331, 343-44 (1967), for a discussion of extending the warranty of seaworthiness not on the basis of the status and historical tests but on the basis of strict liability for extrahazardous activities. See also Comment, supra note 45, at 1189-90, where it is said that the most rational approach would be to limit recovery to high-risk employees within the ship-dock area.

68. 328 U.S. at 95.

1. N.Y. Pers. Prop. Law §§ 402-14 (McKinney Supp. 1970).

2. N.Y. Pers. Prop. Law § 402(1) (McKinney 1962) reads: "A retail instalment contract or obligation shall be dated and in writing; the printed portion thereof shall be in at least eight point type."

3. N.Y. Pers. Prop. Law § 414(2) (McKinney 1962) provides: "In case of failure by any person to comply with the provisions of this article, the buyer shall have the right to recover from such person an amount equal to the credit service charge or service charge imposed and the amount of any delinquency, collection, extension, deferral or refinance charge imposed."

4. See Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

5. Hall v. Coburn Corp. of America, 31 App. Div. 2d 892, 298 N.Y.S.2d 893 (1st Dept. 1969), aff'd, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

the plaintiffs to bring a class action holding that the statutory prerequisite of the existence of a common question was not satisfied. *Hall v. Coburn Corp. of America*, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

At common law, if there was a possibility of individual litigation by numerous parties and the claim of these parties included a question of law or fact common to all, a court of equity would grant a bill of peace.[6] Thus, if the lord and his tenants had a dispute about some feudal duty which the lord claimed was due and the tenants resisted, the lord could ask for a bill of peace.[7] Since there would be a common question involved in each of the potential actions (*i.e.*, whether the tenants did or did not owe the particular duty to the lord), equity could take jurisdiction. The lord, then, would not have to sue each tenant individually and the courts would not be required to hear several cases involving the same questions between similarly situated parties.[8]

As equity's scope broadened, the concept of the bill of peace also broadened. In *Mayor of York v. Pilkington*,[9] the City of York claimed exclusive fishing rights in the Ouse River. However, several lords who owned riparian land also claimed the right to fish therein. Although the lords' potential rights arose from different deeds, the court allowed the Mayor to maintain a suit against all the lords, finding the situation analogous to that where a bill of peace would be allowed.[10]

The Supreme Court of the United States also followed this early recognition of the right to bring class actions. Thus, in *Smith v. Swormstedt*,[11] an action was allowed on behalf of the widows and orphans of the Methodist Episcopal Church (Southern) as well as on behalf of retired ministers, to recover the proceeds of a business enterprise which had been established to provide income for them, but which had been appropriated by northern ministers when the church split into northern and southern factions. Justice Nelson, discussing the general rule that parties may sue only in their own behalf, noted cases in which an exception had been made:

> Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. . . . Where the parties are very numerous and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court.[12]

6. See 1 J. Pomeroy, Equity Jurisprudence § 246, at 467-68 (5th ed. 1941).

7. See, e.g., Cowper v. Clerk, 24 Eng. Rep. 1010 (Ch. 1732).

8. Id.

9. 25 Eng. Rep. 946 (Ch. 1737).

10. Similarly, in Sheffield Waterworks v. Yeomans, L.R. 2 Ch. 8 (1866), a reservoir burst causing great damage. A commission was appointed to examine the damage and issue certificates to those whose property had been harmed. The injured parties could then sue Sheffield for the amount stated in the certificates. Sheffield claimed that several thousand fraudulent certificates had been issued and brought suit against some of the allegedly fraudulent certificate holders as representatives of all the fraudulent certificate holders. Equity allowed the suit because there was a common question—whether the certificates were validly issued—even though the certificate holders had no other common interest or defense.

11. 57 U.S. (16 How.) 288 (1853).

12. Id. at 302.

In *New-York & New Haven Railroad v. Schuyler*,[13] New York also recognized the broad use of class actions. Schuyler, as director of the railroad, had issued two million dollars worth of fraudulent stock. The railroad was allowed to sue, not in its own behalf, but on behalf of all the legitimate stockholders. Furthermore, the suit was against Schuyler, not in his individual capacity, but as representative of all the holders of fraudulently issued stock. The court found that "convenience and the ends of justice"[14] required that a single action be brought, and thus allowed the class action.

The state of the law in 1890, then, was best summarized by Judge Harlan in *Osborne v. Wisconsin Central Railroad*.[15] This case involved a dispute between the railroad and some homesteaders each of whom claimed a particular tract of land under different acts of Congress. The railroad had brought three unsuccessful ejectment actions against individual homesteaders. Osborne, suing on behalf of himself and all other homesteaders claiming title to the land, sued to enjoin the railroad from bringing further ejectment actions. The court noted:

> The case is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits. It belongs to the class "where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others. . . . " In such cases the plaintiffs are united by a common tie, created by identity of interest in the decision of the same questions of law and of fact, and have a common adversary.[16]

Thus it seemed that if there were numerous potential litigants all of whom shared an interest in a common question of law or fact a class action suit would be proper.

However, in 1892, the Supreme Court of Mississippi, in *Tribbette v. Illinois Central Railroad*,[17] injected confusion into an otherwise clear doctrine. Sparks from a train operated by the defendant railroad started a fire and a number of those whose property was damaged by the fire tried to sue the railroad in a single negligence action. The court, in disallowing the suit, said that although there were common questions of law and fact, there was no other community of interest between the potential plaintiffs. The court suggested that something akin to privity between the various plaintiffs would be required in order to sustain the class suit.[18] While the decision has been criticized,[19] *Tribbette*, with

13. 17 N.Y. 592 (1858).
14. Id. at 606.
15. 43 F. 824 (W.D. Wis. 1890).
16. Id. at 827 (citations omitted).
17. 70 Miss. 182, 12 So. 32 (1892).
18. Id. at 184, 12 So. at 33.
19. See, e.g., Bailey v. Tillinghast, 99 F. 801 (6th Cir. 1900) where court stated: "Nor is it necessary . . . that there should be any privity of interest . . . . It is true there are occasional cases where it seems to have been supposed that there must be some community of interest—some tie between the individuals who make up the great number; but the

its misconception of history and purpose of class actions, has had an effect. The notion of privity between the numerous litigants had been introduced, and its influence can be seen in the confusion which currently surrounds class actions in New York.

New York, in an amendment to the Field Code of 1848,[20] was the first state to recognize class actions by statute. New York, however, has vaccilated over the use of its class action statute. The statute, which has remained unchanged since the Field Code, reads:

> Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.[21]

While virtually ignoring the provision which allows a class action to be brought where "the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court,"[22] the courts have focused on the "common or general interest" requirement. In the course of this interpretation, two distinct lines of cases have developed.

The first line of cases is best exemplified by *Society Milion Athena, Inc. v.*

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great weight of authority is to the contrary . . . . And, indeed, it is difficult to find any reason why it should be thought necessary." Id. at 806-07 (citations omitted).

20. Law of April 11, 1849, ch. 438, § 119 [1849] N.Y. Laws 72d Sess. 639 (repealed 1877). Subsequently, several other states and the federal government enacted statutes or rules to provide for class actions. See, e.g., Cal. Code Civ. Pro. § 382 (West 1954); Ore. Rev. Stat. § 13.170 (1969); Wis. Stat. Ann. § 260.12 (1957); Fed. R. Civ. P. 23. The federal rule requires the court to determine as early as possible whether an action brought as a class action may be maintained. Such a determination can be made conditional on improvement of representation by the intervention of additional parties. The Rules also require the best notice possible to be given to the members of the class. In recent years there has been a trend toward allowing broad use of these class action statutes. For example, the federal courts have allowed a class action on behalf of almost four million purchasers of stock in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). California, which has a class action statute identical to that of New York, Cal. Code Civ. Pro. § 382 (West 1954), has also interpreted its statute widely. In Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967), a suit was allowed on behalf of all those who had purchased coupon books from a particular cab company, despite the fact that different sales to unrelated persons for disparate services were involved. For other examples of this broad use of class action statutes, see, e.g., City of Miami v. Keton, 115 So. 2d 547 (Fla. 1959); Robnet v. Miller, 105 Ohio 536, 152 N.E.2d 763 (1957); Peters v. International Harvester Co., 248 Wis. 451, 22 N.W.2d 518 (1946).

21. N.Y. C.P.L.R. § 1005(a) (McKinney 1963).

22. Id. Although the statute reads in the alternative, the courts have consistently held that there must be both a question of common or general interest and a multitude of parties to justify a class action. The fact that there are large numbers of persons who might be made parties is not, in and of itself, sufficient for a class action. Thus in Society Milton Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939), the court said: "Laudable desire to avoid multiplicity of actions by persons who have suffered wrong is insufficient unless those who would bring such actions are in some manner united in interest." Id. at 294, 22 N.E.2d at 377.

National Bank of Greece.[23] There, depositors had delivered money to the joint offices of two banks, one of which was a foreign bank, the other a domestic bonding corporation.

Plaintiffs contended that the receipt of money by the foreign bank had been in violation of its license and that the domestic bank had been set up to mask this fraudulent activity by the foreign bank. The crux of plaintiffs' argument was that all had been harmed in the same way pursuant to this fraudulent scheme and that a class action was, therefore, appropriate. The court of appeals rejected this contention, finding that "[s]eparate wrongs to separate persons"[24] even though perpetrated by identical means do not in themselves create a "common or general interest."

Thus, although there was a common question, *i.e.*, whether the defendant had violated the banking laws by setting up a domestic bank to mask the activities of its foreign counterpart, the court found that something more was required. Although "privity" was not mentioned, the court's emphasis on the fact that separate wrongs had been done, thus destroying a "common interest," suggests that the court felt that there must be some relation binding the members of the putative class. In effect, the "common or general interest" requirement was raised to the level of a "unity of interest" requirement.[25]

This position was reiterated in the recent case of *Onofrio v. Playboy Club, Inc.*[26] The plaintiffs had each paid twenty-five dollars to join a private club. The club was subsequently opened as a public, not a private facility. The plaintiffs brought an action on behalf of the fifty thousand persons who had paid to join this private club, alleging that the payments had been fraudulently induced. The appellate division allowed the class action.[27] The court of appeals reversed,[28] adopting the dissenting opinion in the appellate division which, in language similar to that used in *Society Milion*, stated that "[t]here must be a union or community of interest to warrant a representative action."[29]

23. 281 N.Y. 282, 22 N.E.2d 374 (1939). Other cases following the Society Milion reasoning include Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965); Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937).

24. 281 N.Y. at 292, 22 N.E.2d at 377.

25. The court stated that "[e]ach person wronged may determine for himself the remedy which he will seek . . . ." 281 N.Y. at 292, 22 N.E.2d at 377. The court also considered that the defendant might have separate defenses against the potential plaintiffs. Id. This concern with alternative remedies and varying defenses occurs throughout the court's consideration of class action cases. See, e.g., Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965); Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939); Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937).

26. 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965), rev'g 20 App. Div. 2d 3, 244 N.Y.S.2d 485 (1st Dep't 1963).

27. The appellate division had noted: "The members of the class are extremely numerous, the stake of each small, the expenses of conventional, individual litigation out of all proportion to such a stake, the issues to be litigated are common, the relief available uniform." 20 App. Div. 2d at 6, 244 N.Y.S.2d at 488.

28. 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965).

29. 20 App. Div. 2d at 7, 244 N.Y.S.2d at 489. The appellate division dissent had stated:

The second, more expansive line of decisions, is exemplified by *Guffanti v. National Surety Co.*[30] The plaintiff brought suit against a bonded merchant who had received funds for transmittal abroad, had converted the money, and was then adjudged a bankrupt. The members of the putative class had executed similar contracts with the defendant and while the amounts due were different, the terms and conditions of the contracts were similar. The court sustained a class action noting that:

> [T]he weight of authority is simply overwhelming that the jurisdiction may and should be exercised . . . on behalf of a numerous body of separate claimants against a single party . . . although there is no 'common title' nor 'community of rights,' or of 'interest in the subject-matter' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body . . . . Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy.[31]

This approach was reaffirmed in *Kovarsky v. Brooklyn Union Gas Co.*[32] The plaintiff brought an action for an injunction, declaratory relief and an accounting against the gas company, alleging that a service charge which the company proposed to levy was illegal. The court refused to allow the class action for an accounting since Kovarsky had never paid the charge,[33] but allowed a class action for declaratory and injunctive relief finding that Kovarsky, as a "consumer" of gas was representative of all such consumers and that "[a]ll consumers are interested in a declaration of the law."[34] Thus, in the words of *Guffanti*, there was a "community of interest among them in the questions of

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"The first question must be whether the issue is one of common or general interest to all persons who became members so as to empower plaintiffs to act in their behalf without express authorization. There must be a union or community of interest to warrant a representative action." Id. This is the most overt expression to be found in any of the cases that there must be something more than a common question and multiple parties to justify a class action. But, it is unclear from this opinion whether the dissent intended there must be both an "issue of common or general interest" and a "community of interests" or whether an "issue of common or general interest" is the same as a "community of interests." Since the court of appeals adopted the dissenting opinion as its own, it is difficult to determine what they thought the dissenter meant.

30. 196 N.Y. 452, 90 N.E. 174 (1909). Also typical of this line of cases are Case v. Indian Motorcycle Co., 300 N.Y. 513, 89 N.E.2d 246 (1949); Tyndall v. Pinelawn Cemetery, 198 N.Y. 217, 91 N.E. 591 (1910) (per curiam); Pfohl v. Simpson, 74 N.Y. 137 (1878).

31. 196 N.Y. at 458, 90 N.E. at 176.

32. 279 N.Y. 304, 18 N.E.2d 287 (1938).

33. In dictum, the court stated that even if the plaintiff had a cause of action for an accounting, a class action for accounting would have been improper. Id. at 314, 18 N.E.2d at 290.

34. Id. at 315, 18 N.E.2d at 291.

law and fact involved in the general controversy"[35] and a class action suit was proper.

These two lines of cases seemed to be resolved in *Lichtyger v. Franchard Corp.*[36] This was an action by the limited partners in a real estate syndicate against the general partners. Alleging a breach of fiduciary duty, plaintiffs sued for recission of several purportedly harmful contracts, and for damages. While refusing to allow a class action for recission, the court found that a class action for damages was appropriate.[37] Relying on such earlier decisions as *Kovarsky*, the court in *Lichtyger* stated that its decision did not conflict with decisions such as *Society Milion.*[38] The court found that the plaintiff's mutual interest in the rate of return on their investment was enough to create a question of "common interest" in the members of the putative class. The court, then, was possibly reaffirming the line of cases which held that the "common interest" basis for a class action must be in the wrong alleged, not necessarily in any intra group relationship.[39] This conclusion is bolstered by another statement of *Lichtyger* court that: "It is clear, then, that, if the fixed rental [was] wrongfully impaired, all of the limited partners would be injured in the same way and the matter would be of 'common or general interest' to them."[40] Thus, it is not the interest that the members of the class may have in one another that is important, it is their interest in the way they are being injured. If all are injured in the same way, their interest is "common." They are a class because they suffer a common wrong at the hands of the same wrongdoer.

However, any hope that *Lichtyger* might have resolved the problem as to what constitutes a common question, was dispelled by *Hall.* While admitting that "[t]here is some inconsistency in the cases in this court," Judge Bergan found that "an overall appraisal of them would suggest that a basis for class action is not stated in these complaints."[41] He then cited *Society Milion* and *Onofrio* to support his decision.[42] Judge Bergan then discussed *Kovarsky* briefly and concluded that "whatever might be said of that common interest the tendency of the cases which followed [chronologically] *Kovarsky* is to restrict, rather than enlarge, the scope of class actions."[43]

In discussing the line of cases which do seem to utilize a broader basis for class actions, the court continued: "The real sanction accorded by this court to class suits has been in the closely associated relationships growing out of

35. 196 N.Y. at 458, 90 N.E. at 176.

36. 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966).

37. The Lichtyger court, however, affirmed the appellate division's dismissal because the plaintiffs had asked for equitable relief to which they were not entitled. Id. at 537, 223 N.E.2d at 874, 277 N.Y.S.2d at 384.

38. Id. at 534-35, 223 N.E.2d at 872, 277 N.Y.S.2d at 382-83.

39. Id.

40. Id. at 534, 223 N.E.2d at 872, 277 N.Y.S.2d at 381-82.

41. 26 N.Y.2d at 401, 259 N.E.2d at 721, 311 N.Y.S.2d at 283.

42. Judge Bergan also cited Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965), and Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937). These cases all adopt a restrictive interpretation of the class action statute.

43. 26 N.Y.2d at 402, 259 N.E.2d at 722, 311 N.Y.S.2d at 284 (citation omitted).

trust, partnership or joint venture, and ownership of corporate stock (see, e.g., Lichtyger v. Franchard Corp. . . .)."[44] Thus, it seems that the court has returned to the requirement of some "community of interest" among the potential plaintiffs. It is not enough that they have all been wronged in an identical manner by a common wrongdoer.

The court added, however, another reason for its refusal to allow the class action: its finding that the plaintiff's claim was insignificant. The court described defendant's contract violations as a "technicality" and stated that this technicality "does not reach the base of the problem."[45]

> The real injustice, of course, is the fact the poor have to pay more for carpets and for everything else they buy on credit than people who are able to pay outright.
>
> . . . .
>
> The small type of which plaintiffs complain was not concerned with the terms of the contract of the sale itself. In large part it dealt with the remedies by repossession and recovery if the purchaser did not pay for the goods.
>
> . . . .
>
> If the type were as large as the printer's font affords it would not make the slightest difference in the execution of these costly contracts by people who need goods but are unable to pay for them. The essential thing for a purchaser to be able to see in this contract is the exact amounts which make up the price and what has to be paid.[46]

The court's decision, then, is unfortunate in two ways. Rather than clarifying the issue as to what constitutes a "common question" the court emphasized the elements in *Hall* which negated the existence of such a question:

> [A] number of persons made a number of quite different and unrelated contracts with a number of different and unrelated sellers using the same written form which is claimed to be illegal. This does not become a common question because the same finance company is the assignee of the contracts and prepared them for use by the contracting parties.[47]

Yet, clearly, there were "common questions." Did defendant print the contracts which each of the plaintiffs signed? Are portions of these contracts in less than eight point type? If the answer to both of these questions is "yes" then each person who signed one of the contracts was entitled to the same statutory relief.[48] Yet, the court suggested that there were no common questions whatsoever, and further, that there were alternative remedies.[49] The existence of alternative remedies, however, does not negate the fact that all plaintiffs were entitled to the statutory remedy.

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44. Id.

45. Id. at 403, 259 N.E.2d at 723, 311 N.Y.S.2d at 285.

46. Id. at 402-03, 259 N.E.2d at 722-23, 311 N.Y.S.2d at 284-85.

47. Id. at 400, 259 N.E.2d at 721, 311 N.Y.S.2d at 282-83.

48. N.Y. Pers. Prop. Law § 414 (McKinney 1962).

49. 26 N.Y.2d at 403-04, 259 N.E.2d at 723, 311 N.Y.S.2d 285-86. The court noted that the violation of the eight point type requirement was a misdemeanor and that the Attorney General could prosecute the defendant. Also, the Banking Department could force the defendant to change its forms to comply with the statutory requirements. Id. at 404, 259 N.E.2d at 723, 311 N.Y.S.2d at 286.

By emphasizing the negative, moreover, the court failed to deal with the real issue, *i.e.*, what does constitute a "common question." On its face *Lichtyger* appeared to suggest that the occurrence of a common wrong might be sufficent to create a question of "common or general interest." *Hall* suggested that the occurrence of a common wrong was enough only when the plaintiffs were already united in interest. Thus, while not overruling the language of *Lichtyger*, the court clearly emasculated its import.

Finally, by relying so heavily in its opinion on the relative merits of plaintiff's claim, the court has created a dilemma for consumer advocates. Should one attempt to bring a class action only when he is sure that the courts will be so outraged by defendant's conduct that a suit will be allowed because some "public good can be accomplished"?[50]

Moreover, it is inappropriate for a court to describe as a mere "technicality" that which the legislature has determined to be a crime.[51] The statute involved is clear on its face: *all* provisions of the contract must be in eight point type.

Thus, by ignoring the common law history of class actions and confusing the language of the class action statute, the court of appeals has effectively allowed the creation of a right without a remedy. If the provisions of the Retail Instalment Sales Act are unenforceable because of the expenses involved in litigation, they are really mere shadow without substance.[52] As the Association of the Bar of the City of New York has pointed out: "The results breed disrespect for law. . . . Action is urgently necessary . . . ."[53] But action, unfortunately, has not been taken.

Criminal Procedure—Guilty Plea Valid Even When Accompanied by Profession of Innocence.—Defendant was indicted in North Carolina for first degree murder, a capital offense in that state.[1] Upon consultation with counsel and after bargaining with the prosecuting attorney, the defendant decided that it would be beneficial to plead guilty to the lesser charge of second degree murder.[2] Although defendant pleaded guilty to the lesser charge, he steadfastly

50. Id at 403, 259 N.E.2d at 722, 311 N.Y.S.2d at 285.

51. N.Y. Pers. Prop. Law § 414(1) (McKinney 1962).

52. As in Hall, where the amount to be recovered is small, it often costs more to bring an action than the amount of the potential recovery. Thus, many infractions of the law are never punished because the private citizen is not in a position to enforce his statutory rights. If class actions were allowed, it would become financially possible for attorneys to get a reasonable fee while the consumer could vindicate his rights. On the general problem of counsel fees in class actions see Realty Equities Corp. v. Gerosa, 30 Misc. 2d 481, 209 N.Y.S.2d 446 (Sup. Ct. 1960).

53. Committee on Legal Assistance, Committee Report on Consumer Protection, 24 Record of The Ass'n of the Bar of the City of New York 297, 298 (1969).

1. N.C. Gen. Stat. § 14-17 (1969).

2. North Carolina prescribes a maximum penalty of thirty years imprisonment for second degree murder. Id.

maintained that he was innocent of any crime. Subsequently, his petition for habeas corpus was denied by the federal district court.[3] On appeal, the Court of Appeals for the Fourth Circuit granted relief on the ground that the plea had been coerced, as evidenced by the defendant's proclamation of innocence.[4] The Supreme Court reversed the appellate ruling, finding that the plea had been made voluntarily and knowingly in the face of strong evidence, and that the defendant had not been deprived of his constitutional rights even though he continued to profess innocence of the crime charged. *North Carolina v. Alford*, 400 U.S. 25 (1970).

The guilty plea and plea bargaining are extensively used and sanctioned throughout the United States.[5] In fact, an overwhelming majority of all defendants who are convicted are not tried, but are convicted on a plea of guilty.[6] This plea "relieves both the defendant and the prosecution of the inevitable risks and uncertainties of trial"[7] and enables many courts to handle their case loads more efficiently. Most of these pleas emanate from plea arrangements or bargaining which is "a common practice widely regarded as essential to the effective administration of criminal justice."[8]

Inherent within the plea of guilty is the waiver of certain basic constitutional rights.[9] The defendant waives the privilege against self-incrimination,[10] the right to trial by jury,[11] and the right to confront his accusers.[12] Thus, because of this waiver of rights implicit within the guilty plea, such a plea should be subjected to comprehensive examination and attended by proper safeguards before it may validly be used to convict a defendant.[13] The Supreme Court stated the basic requirements for scrutinizing the guilty plea in *Kercheval v. United States*,[14] holding that a "plea of guilty shall not be accepted unless made voluntarily after proper advice [of counsel] and with full understanding of the

3. Alford v. North Carolina, 405 F.2d 340, 341 (4th Cir. 1968).

4. Id.

5. For a general view of the subject, see D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial 76-133 (1966) [hereinafter cited as Newman]. See also People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

6. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 134 (1967) [hereinafter cited as President's Commission]. Approximately 90% of all convictions are based on guilty pleas. Newman 3.

7. President's Commission 135.

8. United States ex rel. Brown v. LaVallee, 424 F.2d 457, 463 (2d Cir. 1970).

9. Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969).

10. Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); see U.S. Const. amend. V; Malloy v. Hogan, 378 U.S. 1 (1964).

11. Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); see U.S. Const. amend. VI; Duncan v. Louisiana, 391 U.S. 145 (1968).

12. Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); see U.S. Const. amend. VI; Pointer v. Texas, 380 U.S. 400 (1965).

13. See United States ex rel. Rosa v. Follette, 395 F.2d 721 (2d Cir.), cert. denied, 393 U.S. 892 (1968).

14. 274 U.S. 220 (1927).

consequences."[15] The rule which has developed is that a defendant must have either conferred with counsel or waived his right to do so before a guilty plea can be validly accepted.[16] A plea induced by promises or threats which deprive it of voluntariness is void,[17] even if the promises emanated from the bench.[18]

Generally, a conviction based upon a guilty plea is justified by the defendant's admission that he committed the crime charged, and by his consent to dispense with a trial on the facts.[19] The plea "is an admission of all the elements of a formal criminal charge"[20] and, similar to a jury verdict, is conclusive as to the defendant's guilt.[21] When a defendant accompanies his guilty plea with a protestation of innocence he specifically negates an element necessary for conviction because admission of guilt is generally "[c]entral to the plea and the foundation for entering judgement."[22] Thus, there is a suggestion that the plea, when entered with such protestation, may not have been rendered voluntarily.

The state and lower federal courts are in conflict as to whether a guilty plea is valid when it is ambivalent. In some jurisdictions, statements which are incongruous with the admission of guilt render the plea unacceptable. In *State v. Stacy*,[23] a case decided by the Supreme Court of Washington, the defendant's guilty plea resulted from a plea bargaining agreement. During the second day of trial the defendant changed his plea from not guilty to guilty when the prosecutor agreed to drop one of the charges against him. The defendant, however, stated that he was innocent but had changed his plea on the advice of counsel. The court rejected the "equivocal" plea, holding that "the trial court should refuse to accept the plea until the equivocation therein has been eliminated . . . ."[24] Thus, the court apparently would have required the judge to delve into

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15. Id. at 223-24; see Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956).

16. See Von Moltke v. Gillies, 332 U.S. 708 (1948); Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938).

17. Machibroda v. United States, 368 U.S. 487, 493 (1962); see Mooney v. Holohan, 294 U.S. 103 (1935) (deception by prosecutor invalidated plea).

18. United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966). The court stated that "[a] guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act." Id. at 254.

19. United States ex rel. Rosa v. Follette, 395 F.2d 721 (2d Cir.), cert. denied, 393 U.S. 892 (1968).

20. McCarthy v. United States, 394 U.S. 459, 466 (1969); see Hall v. United States, 259 F.2d 430 (8th Cir. 1958), cert. denied, 359 U.S. 947 (1959); United States v. Gallagher, 183 F.2d 342 (3d Cir. 1950), cert. denied, 340 U.S. 913 (1951). See also Weir v. United States, 92 F.2d 634 (7th Cir.), cert. denied, 302 U.S. 761 (1937) (guilty plea waives all nonjurisdictional defects); Roberto v. United States, 60 F.2d 774 (7th Cir. 1932) (guilty plea valid even if indictment was insufficient in form); Kachnic v. United States, 53 F.2d 312 (9th Cir. 1931) (guilty plea waives all defenses except that indictment charged no offense).

21. Kercheval v. United States, 274 U.S. 220, 223 (1927); U.S. ex rel. Rosa v. Follette, 395 F.2d 721, 724 (2d Cir.), cert. denied, 393 U.S. 892 (1968).

22. Brady v. United States, 397 U.S. 742, 748 (1970).

23. 43 Wash. 2d 358, 261 P.2d 400 (1953).

24. Id. at 363, 261 P.2d at 402. The court went on to say that "if the defendant persists in attempting to enter such a plea, the trial court should require the defendant to stand trial

the underlying circumstances of the plea. In *State v. Reali*[25] the defendant had escaped from pretrial detention and was informed by his attorney that this factor would increase the probability of conviction. The defendant pleaded guilty, although maintaining his innocence. The Supreme Court of New Jersey, in rejecting the plea, concluded that a guilty plea accompanied by an express proclamation of innocence is invalid.[26] Still other courts have rejected guilty pleas which tended to deny elements of the charge,[27] or which contained statements inconsistent with guilt,[28] or which did not "manifest an unqualified admission of the offense charged."[29]

Other jurisdictions have, to varying degrees, accepted guilty pleas accompanied by assertions of innocence. In *McCoy v. United States*[30] the District of Columbia Circuit concluded that a "court is not required to insist that the accused concede the inevitability or correctness of a verdict of guilty were the case tried."[31] Furthermore, the defendant "might reasonably conclude a jury would be convinced of his guilt and that he would fare better . . . by pleading guilty . . . ."[32] Even in jurisdictions which have allowed the acceptance of a qualified guilty plea, the acceptance of such a plea is the "exceptional" case and the plea should be accepted only if there exists a high probability of guilt.[33] Although an ambivalent guilty plea should be accepted only with great caution,[34] such pleas have been accepted even when the defendant denied a requisite element of the

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on the offense charged." Id.; see United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 255-56 (S.D.N.Y. 1966) (dictum); People v. Morales, 17 App. Div. 2d 999, 234 N.Y.S.2d 92 (3d Dep't 1962) (mem.).

25. 26 N.J. 222, 139 A.2d 300 (1958) (per curiam).

26. Id. at 224, 139 A.2d at 302; see Kreuter v. United States, 201 F.2d 33 (10th Cir. 1952); State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

27. E.g., Hulsey v. United States, 369 F.2d 284 (5th Cir. 1966). The defendant was charged with unlawful interstate transportation of a forged check. At trial the defendant pleaded guilty, but only admitted to endorsing the check while specificially denying any knowledge that it was forged. Thus, a requisite element of the crime was missing, and, in effect, the defendant proclaimed his innocence. The court refused to accept the guilty plea because it "constitute[d] . . . little more than an ambiguous expression of qualified guilt coupled with a protestation of innocence." Id. at 287; see People v. Morrison, 348 Mich. 88, 81 N.W.2d 667 (1957).

28. E.g., People v. Serrano, 15 N.Y.2d 304, 206 N.E.2d 330, 258 N.Y.S.2d 386 (1965) (defendant's statement indicated lesser crime); People v. Nealy, 48 Misc. 2d 328, 264 N.Y.S.2d 710 (Sup. Ct. 1965), aff'd mem., 28 App. Div. 2d 1094, 284 N.Y.S.2d 849 (2d Dep't 1967).

29. Hulsey v. United States, 369 F.2d 284, 287 (5th Cir. 1966).

30. 363 F.2d 306 (D.C. Cir. 1966).

31. Id. at 308.

32. Id.

33. Griffin v. United States, 405 F.2d 1378, 1380 (D.C. Cir. 1968); Bruce v. United States, 379 F.2d 113, 119 (D.C. Cir. 1967).

34. Commonwealth v. Cottrell, 433 Pa. 177, 249 A.2d 294 (1969).

crime,[35] or denied recollection of the crime.[36] The plea may also be accepted where its rejection would compel the defendant to assert a defense he found undesirable.[37]

The Supreme Court itself has never dealt with a case specifically on point. The Court has expounded and elucidated its basic ruling in *Kercheval*,[38] adhering to the premise that a plea "is voluntary in law if, and only if, it was, in fact, voluntarily made."[39] However, a plea is not voluntary "simply because [it] . . . is the product of a sentient choice."[40] The Supreme Court has also indicated that a guilty plea which is the product of a coerced confession is invalid.[41]

In *United States v. Jackson*[42] the defendant was tried under the Federal Kidnapping Act,[43] the provisions of which allow for capital punishment only if "the verdict of the jury shall so recommend."[44] The Supreme Court found this part of the statute to be unconstitutional, because it "needlessly encourages"[45] defendants faced with the possibility of a death sentence to waive their sixth

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35. E.g., People v. Hetherington, 379 Ill. 71, 39 N.E.2d 361 (1942). Here the defendant was accused of first degree murder. He pleaded guilty but stated that there was no premeditation. Thus, there could be no first degree murder. The court, however, accepted the plea without qualification.

36. E.g., State v. Martinez, 89 Idaho 129, 403 P.2d 597 (1965) (defendant could not recall commission of the crime); State ex rel. Crossley v. Tahash, 263 Minn. 299, 116 N.W.2d 666 (1962) (defendant could not recall the crime due to his intoxication at the time of its commission).

37. Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961). In this case defendant was charged with public intoxication. Defendant pleaded guilty, but the municipal court refused to accept the plea because it felt that the defendant had a defense of insanity. Defendant was later deemed insane, and sent to a mental institution for a longer period than he would have been incarcerated for had he been convicted. The district court felt that the plea should have been accepted. See Lynch v. Overholser, 369 U.S. 705 (1962).

38. See notes 14-16 supra and accompanying text.

39. Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924).

40. Haley v. Ohio, 332 U.S. 506, 606 (1948) (Frankfurter, J., concurring). Basically the court has stated that "real notice of the true nature of the charge . . . [is] the first and most universally recognized requirement of due process . . . ." Smith v. O'Grady, 312 U.S. 329, 334 (1941).

41. Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Chambers v. Florida, 309 U.S. 227 (1940). See generally Kamisar, What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions, 17 Rutgers L. Rev. 728, 755 (1963).

42. 390 U.S. 570 (1968).

43. 18 U.S.C. § 1201 (1964), which provides in part:

"(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

44. Id. § 1201(a).

45. 390 U.S. at 583 (emphasis omitted).

amendment right to a jury trial.[46] The Court also found that the procedure tended to coerce defendants to plead guilty.[47]

In *Alford* the court of appeals agreed with the defendant's contention that his plea had been coerced by the statutory scheme relating to the imposition of the death penalty. The court felt that the distinction between the Federal Kidnapping Act, under which only the jury could impose the death penalty, and the North Carolina statute, under which death was mandatory unless the defendant either pleaded guilty or upon trial the jury recommended life imprisonment, was unimportant. In either situation, the court held, the compulsion to plead guilty to avoid the death penalty was impermissible and would render the plea involuntary.[48] The Supreme Court reversed, holding that *Jackson* had not established a new test to determine whether the plea was coerced.[49] The test remains that of voluntariness and the Court specifically disapproved the rule enunciated by the court of appeals—that a plea entered to avoid the possibility of a death sentence is generally to be considered to be coerced. The Court stated that the fact "[t]that [the defendant] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice . . . ."[50]

Having dismissed the argument based on statutory coercion,[51] the Court was

46. Id.

47. Id. at 581-85; see Brady v. United States, 397 U.S. 742 (1970), which attempted to expand the scope of Jackson by invalidating guilty pleas given under 18 U.S.C. § 1201(a) (1964).

The Jackson rationale was used to invalidate part of the Federal Bank Robbery Act in Pope v. United States, 392 U.S. 651 (1968) (per curiam), because that statute, 18 U.S.C. § 2113(e) (1964), was found to have the same constitutional infirmity. But see State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968), cert. dismissed, 397 U.S. 959 (1970); State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

48. 405 F.2d at 349.

49. 400 U.S. at 31; see Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927).

50. 400 U.S. at 31.

51. Concurring, Justice Black agreed with the Court, but noted that he still felt that Jackson had been wrongly decided. Id. at 39. In Jackson, Justice Black joined in Justice White's dissent, which stated that the death penalty provision of the Federal Kidnapping Act was not unconstitutional. 390 U.S. at 591. Rather, they would make "it clear that pleas of guilty and waivers of jury trial should be carefully examined before they are accepted, in order to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury." Id. at 592.

Justice Brennan, joined by Justices Douglas and Marshall, wrote the dissenting opinion in Alford. Justice Brennan referred to his dissent in Parker v. North Carolina, 397 U.S. 790 (1970). In Parker, the petitioner was indicted for first degree burglary, a capital offense in North Carolina. After conferring with counsel he pleaded guilty and accepted life imprisonment. He later sought post-conviction relief by asserting that the North Carolina statutes induced an accused to plead guilty so as to avoid a possible death penalty. The Court held that the plea was voluntary, and the conviction was affirmed.

The dissent, in Alford, concluded that the "Court makes clear that its previous holding

faced with the question of whether a plea of guilty accompanied by a statement of innocence would be acceptable or whether it was so indicative of coercion as to invalidate the plea. In *Alford* the defendant's guilty plea constituted a waiver of trial without the concomitant admission of guilt, and produced a question as to the propriety of convicting a person on that basis. Finding itself lacking in precedents of its own and faced with a split in authority[52] in the state and lower federal courts, the Court felt constrained to rely heavily upon two analogous cases from which it drew relevant principles.[53]

In *Lynch v. Overholser*[54] the defendant was charged with uttering a bad check, a misdemeanor with a maximum penalty of one year imprisonment. The defendant desired to plead guilty, but the trial judge refused to accept the plea because he had evidence showing that the defendant was suffering from mental illness. Ultimately, the defendant was acquitted on the basis of insanity, and was committed to a mental institution. The Supreme Court granted the defendant a writ of habeas corpus because it construed the "congressional legislation seemingly authorizing the commitment as not reaching a case where the accused preferred a guilty plea to a plea of insanity."[55] Although the *Lynch* Court specifically stated that there is no absolute right to have a guilty plea accepted,[56] the *Alford* Court inferred from *Lynch* that "there would have been no constitutional error had [Lynch's guilty] plea been accepted even though evidence before the judge indicated that there was a valid defense."[57] In extracting this rationale from *Lynch*, the *Alford* Court seems to have indicated that the defendant's objective manifestation should be accepted when to do otherwise would force a defense on the defendant that he does not wish to raise.

In *Hudson v. United States*[58] the Court dealt with the issue of whether a federal court could impose a prison sentence after accepting a plea of nolo conten-

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was intended to apply even when the record demonstrates that the actual effect of the unconstitutional threat was to induce a guilty plea from a defendant who was unwilling to admit his guilt." 400 U.S. at 40. The dissenting Justices felt that the threat of the death penalty must be given strong weight in determining whether the plea was voluntary, and that denial of guilt is also a relevant factor. Id.; see 397 U.S. at 805 (dissenting opinion). Taking these factors into consideration, the dissenters concluded that Alford's plea was not voluntary, but was "'the product of duress as much so as choice reflecting physical constraint.'" 400 U.S. at 40, quoting Haley v. Ohio, 332 U.S. 596, 606 (1948) (concurring opinion).

52. See notes 23-37 supra and accompanying text.

53. 400 U.S. at 34-35.

54. 369 U.S. 705 (1962).

55. 400 U.S. at 34, interpreting Lynch v. Overholser, 369 U.S. 705 (1962).

56. 369 U.S. at 719.

57. 400 U.S. at 35; accord, Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961). In the latter case, the district court stated that "it is a deprivation of a constitutional right to force any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which he does not desire to advance." Id. at 570.

58. 272 U.S. 451 (1926).

dere.[59] *Hudson* held that trial courts have the power to sentence after a plea of nolo has been made.[60] The *Alford* Court interpreted *Hudson* and other nolo contendere cases[61] as "recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence."[62]

The Court recognized that in *Alford,* unlike *Lynch* and *Hudson,* the defendant had not remained silent regarding his guilt, but did in fact affirmatively state his innocence. The Court dismissed this factor by concluding that "express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty."[63] The Court felt that the evidence against Alford tended to disprove his innocence[64] and that the trial judge had ample opportunity to evaluate the record.[65] Perhaps the decision would have been different had the evidence against the defendant been less convincing. The Court concluded by noting that "[t]he prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve."[66]

The Supreme Court was ensnarled in a difficult problem and, had the Court reached a different result, the expeditious administration of criminal justice could have been further hindered. Plea arrangements are of great advantage to both defendants and prosecutors, and without plea bargaining the administration of justice would be nearly impossible.[67] Pragmatically, "a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty . . . ."[68] However, there are inherent evils in plea negotiating. Unfortunately, it is possible that "the greatest pressures . . . are brought to bear on defen-

59. Nolo contendere is "a plea in a criminal action, having the same legal effect as a plea of guilty, so far as regards all proceedings on the indictment, and on which the defendant may be sentenced." Black's Law Dictionary 1198 (4th ed. 1951); see Piassick v. United States, 253 F.2d 658 (5th Cir. 1958). The plea of nolo may not be used against the defendant in a subsequent civil action. Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir.), cert. denied, 355 U.S. 892 (1957). For a concise history of the plea and its use, see 400 U.S. at 35-36 n.8.

60. 272 U.S. at 457.

61. See, e.g., Lott v. United States, 367 U.S. 421 (1961); Sullivan v. United States, 348 U.S. 170 (1954); Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938); Pharr v. United States, 48 F.2d 767 (6th Cir. 1931).

62. 400 U.S. at 36.

63. Id. at 37.

64. "[T]he testimony indicated that shortly before the killing Alford took his gun from his house, stated his intention to kill the victim, and returned home with the declaration that he had carried out the killing." Id. at 28.

65. The trial judge elicited information as to Alford's past record before sentencing, and then decided that the maximum penalty should be imposed. Id. at 29.

66. Id. at 39.

67. United States ex rel. Brown v. LaVallee, 424 F.2d 457, 464 (2d Cir. 1970).

68. H. Lummus, The Trial Judge 46 (1937).

dants who may be innocent."[69] It has been suggested that a suitable description for plea bargaining might be "composition payments to a dubious creditor"[70] for it "reflect[s] a philosophy of criminal justice which regards punishment as a payment for the crime . . . ."[71] Under this theory it is "defense counsel's responsibility to make sure that only the proper degree of guilt is acknowledged and only the fair penalty is paid."[72] Nevertheless, plea bargaining offers an advantage to the defendant in that it often "mitigate[s] the harshness of mandatory sentencing provisions"[73] and enables the defendant to avoid facing the risk of trial.[74]

Had the Supreme Court decided differently, it would have been more difficult to obtain valid guilty pleas through the process of plea bargaining. A defendant would have to either simply enter his plea, otherwise remaining silent as to the question of guilt, or fully confess to the crime charged. The maintenance of plea negotiations is of monumental importance if the criminal process is to be productive. However, it seems to be straddling the border of permissiveness when a man is convicted of a crime which he denies committing, without a jury ever determining guilt. Perhaps the best solution is to have a procedure similar to that of Rule 11 of the Federal Rules of Criminal Procedure[75] applied to *all* criminal cases.

Basically, Rule 11 reiterates the previous common law standards elucidated by the Supreme Court for accepting a guilty plea, *i.e.*, it must be voluntary, and the defendant must know the nature of the charge against him.[76] However, under the rule, the court may not accept the plea unless there is an underlying factual basis.[77] The court must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should,

69. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 60 (1968).

70. H. Silving, Essays on Criminal Procedure 254 (1964).

71. Id.

72. Polstein, How to "Settle" a Criminal Case, Prac. Law. Jan., 1962, at 35-36.

73. President's Commission 135.

74. P. Howard, Criminal Justice in England 322 (1931).

75. These rules were promulgated by the Court under its supervisory powers and necessarily govern procedure only "in the courts of the United States and before United States commissioners in all criminal proceedings . . . ." Fed. R. Crim. P. 1.

76. Fed. R. Crim. P. 11 provides: "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty . . . the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." (Emphasis deleted.)

77. Note, The Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas, 1966 Wash. U.L.Q. 306, 310; see United States v. Bentvena, 193 F. Supp. 485, 503 (S.D.N.Y. 1960), aff'd, 357 F.2d 58 (2d Cir.), cert. denied, 385 U.S. 815 (1966).

e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."[78] The court is granted discretion in making this inquiry and could, for example, determine whether the factual basis exists by conferring with the defendant's counsel or the prosecutor.[79] However, the trial court is under no obligation to accept the guilty plea, even when the prosecutor has agreed to do so.[80]

It seems most equitable that a judge should delve into the underlying factual basis of a charge, and should not accept a guilty plea unless he is convinced that there is a high probability of guilt. The Court, in *Alford*, did note the presence of independent evidence of guilt[81] and, indeed, the trial judge's behavior would seem to conform to the requirements of Rule 11;[82] however, the opportunity to make the "factual basis" test mandatory was bypassed. Its adoption would provide a flexible and fair test to be applied uniformly throughout the nation.

Securities—Extent of Civil Liability under the Federal Margin Requirements Expanded.—Plaintiff purchased bonds from the defendant, a broker, on credit, and did not pay the balance due within seven business days after the date of purchase. The defendant broker, although required by law to sell on plaintiff's account when he did not receive such payment,[1] retained

78. Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 34 F.R.D. 411, 418 (1964).

79. Id. In the recent case of United States v. Nichols, No. 23,869 (D.C. Cir. March 8, 1971), it was held that the factual basis for the plea must be made part of the record. Id. at 3.

80. Maxwell v. United States, 368 F.2d 735, 739 (9th Cir. 1966); see ABA Project on Minimum Standards for Criminal Justice, Pleas of Guilty § 1.6 (Tent. Draft 1967), which apparently adopts Rule 11.

81. See note 64 supra.

82. See notes 76-79 supra and accompanying text.

1. 12 C.F.R. § 220.4(c)(2) (1970), promulgated pursuant to the Securities Exchange Act of 1934, § 7(a), 15 U.S.C. § 78g(a) (Supp. V, 1970), amending 15 U.S.C. § 78g(a) (1964). The regulation provides in pertinent part:

"In case a customer purchases a security (other than an exempted security) in the special cash account and does not make full cash payment for the security within 7 days after the date on which the security is so purchased, the creditor shall, except as provided in subparagraphs (3) through (7) of this paragraph, promptly cancel or otherwise liquidate the transaction or the unsettled portion thereof." Id.; see Securities Exchange Act of 1934, § 7(c), 15 U.S.C. § 78g(c) (Supp. V, 1970), amending 15 U.S.C. § 78g(c) (1964), which provides in pertinent part:

"(c) It shall be unlawful for any member of a national securities exchange or any broker or dealer, directly or indirectly, to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer—

"(1) on any security (other than an exempted security), in contravention of the rules and regulations which the Board of Governors of the Federal Reserve System shall prescribe under subsections (a) and (b) of this section . . . ."

the securities. Subsequently, the defendant's efforts to collect the balance due proved fruitless. Because of the plaintiff's requests not to sell the securities, defendant did not do so until six months after the purchases.[2] After lengthy negotiations, which resulted in part payment, stipulations of settlement and a confession of judgment, plaintiff defaulted on a new payment schedule and judgment was entered against him on the confession in New York Supreme Court.[3] The securities were finally sold at a loss, and plaintiff then began this action in the Federal District Court for damages suffered as a result of defendant's failure to comply with the margin provisions of the federal securities laws.[4] He sought to recover the difference between the amount he would have received had the bonds been sold on his account on the day required by law and the amount actually received when the bonds were sold much later. The district court held that the defendant had violated section 7(c) of the Securities Exchange Act of 1934[5] and Regulation T of the Federal Reserve System[6] and that plaintiff had standing to sue under these provisions.[7] The court held, however, that plaintiff was bound by the stipulations of settlement and that the judgment of the Supreme Court of New York had the effect of res judicata.[8] The Court of Appeals for the Second Circuit reversed and remanded, holding defendant liable for losses suffered as a result of his failure to comply with the federal securities laws.[9] *Pearlstein v. Scudder & German*, 429 F.2d 1136 (2d Cir. 1970).

Since there is no explicit provision for civil liability in section 7(c) of the Securities Exchange Act (the section dealing with margin requirements),[10]

2. Pearlstein v. Scudder & German, 429 F.2d 1136, 1139 (2d Cir. 1970); Brief for Appellee at 7-10, Pearlstein v. Scudder & German, supra.

3. 429 F.2d at 1139. The confession of judgment provided that defendant could obtain judgment for the debt owed by plaintiff without further notice. Id.

4. Pearlstein v. Scudder & German, 295 F. Supp. 1197, 1199 (S.D.N.Y. 1968), rev'd, 429 F.2d 1136 (2d Cir. 1970); see Securities Act of 1933, § 17(a), 15 U.S.C. § 77q(a) (1964); Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1964); § 15(c)(1), 15 U.S.C. § 78o(c)(1) (1964); 17 C.F.R. § 240.10b-5 (1970).

5. 15 U.S.C. § 78g(c) (Supp. V, 1970), amending 15 U.S.C. § 78g(c) (1964).

6. 12 C.F.R. § 220.4(c)(2) (1970), promulgated pursuant to the Securities Exchange Act of 1934, § 7(a), 15 U.S.C. § 78g(a) (Supp. V, 1970), amending 15 U.S.C. § 78g(a) (1964).

7. 295 F. Supp. at 1202.

8. Id. at 1205-07. The court of appeals held that neither the stipulations of settlement nor the New York judgment barred a federal suit. The court stated that the settlement involved a promise by defendant of credit, illegal under the Act. If the plaintiff did waive his rights he did so as the result of the financial pressure created by this illegal continuation of credit. In any case, regardless of the above factors, to give effect to the stipulations of settlement would be to contravene public policy as set forth in Securities Exchange Act of 1934, § 29(a), 15 U.S.C. § 78cc(a) (1964), which holds void any stipulation of settlement obligating a party to waive compliance with the Act. The court further stated that it did not consider the New York judgment as effecting the merits of the federal controversy and that therefore it did not operate as res judicata. 429 F.2d at 1143-45.

9. 429 F.2d at 1145.

10. See Securities Exchange Act of 1934, § 7(c), 15 U.S.C. § 78g(c) (Supp. V, 1970), amending 15 U.S.C. § 78g(c) (1964). The Securities Exchange Act of 1934 specifically pro-

there has been considerable comment as to what the scope of that liability should be.[11] Generally, implied civil liability under a criminal statute has been justified on the theory that a statute sets a standard of conduct "for all members of the community, from which it is negligence to deviate."[12] Thus, in order to imply civil liability it is necessary to find that one of the purposes of the Act was to protect the interests of an individual in a position like the plaintiff's.[13] The courts, in interpreting section 7(c), have frequently cited the statements made in the House Reports on the Securities Exchange Bill of 1934[14] to show the purposes of Congress in enacting the margin regulations.[15] In relying on these statements the courts have recognized that the primary purpose of the margin requirements was to control the amount of credit available for investment, but have also found that the protection of the investor was a secondary aim of Congress.[16] This conclusion was first drawn in

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vides for civil liability in three sections: § 9(e), 15 U.S.C. § 78i(e) (1964); § 16(b), 15 U.S.C. § 78p(b) (1964); § 18(a), 15 U.S.C. § 78r(a) (1964). Liability has consistently been implied in certain other sections, e.g., the anti-fraud provisions, Securities Act of 1933, § 17(a)(1)-(3), 15 U.S.C. § 77q(a)(1)-(3) (1964); Securities Exchange Act of 1934, § 10(a), (b), 15 U.S.C. § 78j(a), (b) (1964); see 17 C.F.R. § 240.10b-5 (1970).

11. See, e.g., Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462 (1966); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963); Note, Implied Liability Under the Securities Exchange Act, 61 Harv. L. Rev. 858 (1948); Comment, Securities Exchange Act of 1934—Civil Remedies Based Upon Illegal Extension of Credit in Violation of Regulation T, 61 Mich. L. Rev. 940 (1963).

12. W. Prosser, Torts § 35, at 191 (3d ed. 1964). This viewpoint is supported by Restatement of Torts § 286 (1934) which states:

"The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

"(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and

"(b) the interest invaded is one which the enactment is intended to protect; and,

"(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,

"(d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

13. Remar v. Clayton Sec. Corp., 81 F. Supp. 1014, 1017 (D. Mass. 1949).

14. H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934). "Nor is the main purpose even protection of the small speculator by making it impossible for him to spread himself too thinly—although such a result will be achieved as a byproduct of the main purpose.

"The main purpose is to . . . [reduce] the aggregate amount of the nation's credit resources which can be directed by speculation into the stock market . . . ." Id. at 8.

15. E.g., Serzysko v. Chase Manhattan Bank, 290 F. Supp. 74, 85 (S.D.N.Y. 1968), aff'd mem., 409 F.2d 1360 (2d Cir.), cert. denied, 396 U.S. 904 (1969); Moscarelli v. Stamm, 288 F. Supp. 453, 458 (E.D.N.Y. 1968); Glickman v. Schweickart & Co., 242 F. Supp. 670, 673 (S.D.N.Y. 1965); Myer v. Shields & Co., 25 App. Div. 2d 126, 127, 267 N.Y.S.2d 872, 874 (1st Dep't 1966).

16. See cases cited note 15 supra.

Remar v. Clayton Securities Corp.,[17] a landmark case that the courts have since relied on to consistently imply civil liability under section 7(c).[18]

Since liability based on traditional tort concepts sounds in negligence, it would seem logical that the scope of such liability should be limited by principles of negligence law, such as proximate cause, contemplated risk and contributory negligence.[19] The courts, however, in deciding cases involving section 7(c) violations, have generally not dealt with this issue.[20] In *Remar*, the court implied that traditional negligence defenses would not bar recovery in actions brought under section 7(c), in that "[p]laintiff's right of action is not affected by his participation as borrower in the transaction . . . . Since the statute was passed for the benefit of people like plaintiff, and since the legislature regarded him as incapable of protecting himself, he is not disabled from suing for the injury he sustained."[21]

On the other hand, in a recent federal case, *Moscarelli v. Stamm*,[22] the district court interpreted *Remar* as merely holding that the plaintiff's participation in the transaction would not by itself bar recovery, and stated in dicta that the broker's implied liability was not absolute, but was subject "to the traditional tort concepts of causation and contributory negligence . . . ."[23] In other cases the courts, departing from the traditional tort defenses, have indicated that the sophistication of the investor should be considered as a possible bar to his recovery.[24] There have been no decisions, however, actually denying

17. 81 F. Supp. 1014 (D. Mass. 1949).

18. See, e.g., Junger v. Hertz, Neumark & Warner, 426 F.2d 805 (2d Cir.), cert. denied, 400 U.S. 880 (1970); Serzysko v. Chase Manhattan Bank, 290 F. Supp. 74 (S.D.N.Y. 1968), aff'd mem., 409 F.2d 1360 (2d Cir.), cert. denied, 396 U.S. 904 (1969); Moscarelli v. Stamm, 288 F. Supp. 453 (E.D.N.Y. 1968); Warshow v. H. Hentz & Co., 199 F. Supp. 581 (S.D.N.Y. 1961); cf. Goldenberg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959); Glickman v. Schweickart & Co., 242 F. Supp. 670 (S.D.N.Y. 1965); Myer v. Shields & Co., 25 App. Div. 2d 126, 267 N.Y.S.2d 872 (1st Dep't 1966).

19. See W. Prosser, Torts § 49, at 282 (proximate cause), § 50, at 288 (contemplated risk), § 64, at 426 (contributory negligence) (3d ed. 1964). See also Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462, 1471-73 (1966).

20. See, e.g., cases cited note 18 supra, where these problems were never resolved.

21. 81 F. Supp. at 1017; see Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462, 1473 (1966). See also Myer v. Shields & Co., 25 App. Div. 2d 126, 128, 267 N.Y.S.2d 872, 875 (1st Dep't 1966).

22. 288 F. Supp. 453 (E.D.N.Y. 1968).

23. Id. at 459-60.

24. Goldenberg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959); Serzysko v. Chase Manhattan Bank, 290 F. Supp. 74 (S.D.N.Y. 1968), aff'd mem., 409 F.2d 1360 (2d Cir.), cert. denied, 396 U.S. 904 (1969); E.F. Hutton v. Weinberg, [1961-1964 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,332, at 94,406 (Sup. Ct. N.Y. 1964); cf. Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962); Nash v. J. Arthur Warner & Co., 137 F. Supp. 615 (D. Mass. 1955); Carr v. Warner, 137 F. Supp. 611 (D. Mass. 1955). Support for this viewpoint can also be found in the testimony of a member of the Federal Reserve Board given at a House hearing on the Securities Exchange Bill. The testimony indicated particular concern for the small speculator as opposed to the large buyer who "very likely

recovery to an investor on the basis of either his contributory negligence or his sophistication, although some commentators have indicated that some type of contributory fault should be a valid defense.[25]

An alternative theory upon which civil liability has been implied for violation of a criminal statute, totally independent of the negligence theory is the public policy rationale.[26] Under this theory, liability would be imposed if the purposes of the statute were thereby furthered, regardless of whether the statute was actually intended to protect persons like the plaintiff, and regardless of any participation of plaintiff in bringing about the violation complained of.[27] The first decision to base recovery on this public policy rationale as an independent theory of recovery was *J.I. Case Co. v. Borak*.[28] In that case, the Supreme Court justified a private remedy to enforce the proxy rules promulgated under section 14(a) of the Securities Exchange Act,[29] on the ground that such enforcement would provide a necessary supplement to Commission action.[30] In favoring this broader theory of recovery, the Court made no mention of tort concepts. Thus the uncertainty surrounding the nature and extent of civil liability under a criminal statute has been complicated by the addition of what appears to be an independent ground for recovery, separate and apart from common law negligence, based solely on whether "the private remedy will further the broad congressional goals of the statute."[31]

This new basis for liability was given added impetus by the Supreme Court

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[is]a person who knows the game . . . ." Hearings on H.R. 9323 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 74 (1934).

25. "That the statute does not require compliance by the borrower with the margin provisions hardly suggests that he is relieved of all responsibility when he asserts a right of recovery which is based on common law negligence. The defense of contributory negligence should, then, be available . . . ." Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462, 1473 (1966). "[N]ot all margin traders are 'innocent lambs'; in fact, many are sophisticated investors . . . . The margin trader, not the broker-dealer, is a speculator, and he knowingly assumes the risk of purchasing securities on an inadequate margin. It seems doubtful that Congress intended that all margin traders be treated as a special class of persons requiring protection from their own lack of judgment." Comment, Securities Exchange Act of 1934—Civil Remedies Based Upon Illegal Extension of Credit in Violation of Regulation T, 61 Mich. L. Rev. 940, 948 (1963).

26. In one case, the Court of Appeals for the Second Circuit, while deciding the case according to traditional tort rules, discussed the general purpose of the Securities Exchange Act—the protection of the investor—as a reason for imposing civil liability. Baird v. Franklin, 141 F.2d 238, 244-45 (2d Cir.), cert. denied, 323 U.S. 737 (1944).

27. See Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963); Note, Implied Liability under the Securities Exchange Act, 61 Harv. L. Rev. 858 (1948). See also Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462, 1474-77 (1966); Comment, Private Rights and Federal Remedies: Herein of J.I. Case v. Borak, 12 U.C.L.A.L. Rev. 1150 (1965).

28. 377 U.S. 426 (1964).

29. Securities Exchange Act of 1934, § 14(a), 15 U.S.C. § 78n(a) (1964).

30. 377 U.S. at 432.

31. Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462, 1475 (1966).

decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[32] in which the defense of *in pari delicto* in anti-trust cases was undermined if not completely abandoned.[33] The Court was considering the question of the plaintiff's wrongful conduct in connection with an action for treble damages resulting from violations of a regulatory statute.[34] In refusing to accept the *in pari delicto* defense, Justice Black pointed out that the Supreme Court has often stated its disapproval of invoking "broad common-law barriers to relief where a private suit serves important public purposes."[35] He added that a "more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action . . . ."[36]

The only case that actually considered the negligence and public policy theories and, in addition, a contract theory of civil liability under a regulatory statute was *Serzysko v. Chase Manhattan Bank*.[37] The plaintiff had obtained loans from defendant bank, enabling him to purchase securities that subsequently declined in price. He sought to recover his resulting losses on the ground that the loans were made in violation of Regulation U of the Federal Reserve System.[38] The defendant, by a counterclaim, sought to recover the present unpaid balance of the loan. The court found that the plaintiff, an experienced investor, represented to the bank that he desired a loan for the purpose of purchasing bonds.[39] Since transactions involving bonds are not within the scope of Regulation U, a loan to finance their purchase would present no problem. Between Septemeber 12, 1958 and March 3, 1961, the bank made several loans to Serzysko. In each instance Serzysko signed a statement of purpose, indicating that the particular loan was "not for the purpose of purchasing or carrying any stock registered on a national securities exchange."[40] In 1965, after the stock market had declined and the bank had sold the collateral for the loan, the plaintiff filed suit against the bank, claiming that he used the proceeds of the loan "exclusively for the purpose of purchasing or carrying registered securities,"[41] and that the defendant knew or should have known "that [the plaintiff] was using the proceeds of the loans for such

32. 392 U.S. 134 (1968).

33. Mr. Justice Black wrote for only four justices in his majority opinion. Mr. Justice Harlan and Mr. Justice Stewart concurred in part and dissented in part. The three remaining justices, in concurring opinions, recognized the defense of in pari delicto in some modified form.

34. 392 U.S. at 135-36.

35. Id. at 138.

36. Id. at 139.

37. 290 F. Supp. 74 (S.D.N.Y. 1968), aff'd mem., 409 F.2d 1360 (2d Cir.), cert. denied, 396 U.S. 904 (1969).

38. 12 C.F.R. § 221.1(a) (1970). "[N]o bank shall extend any credit secured directly or indirectly by any stock for the purpose of purchasing or carrying any margin stock in an amount exceeding the maximum loan value of the collateral, as prescribed from time to time for stocks in § 221.4 . . . ." Id. § 221.1(a)(1).

39. 290 F. Supp. at 84.

40. Id. at 81.

41. Id. at 83.

purposes."[42] The defendant contended that Serzysko's conduct in deliberately misstating his purpose in borrowing, was such as to bar recovery under Regulation U and the 1934 Act.[43]

The court, having first recognized the existence of a private remedy under the margin requirements,[44] attempted to determine the nature and extent of such liability, as related to a plaintiff who had "knowingly and intentionally procured or induced the violations of which he now complains."[45] A contract theory was examined by the court as a possible basis for recovery, one that was used by a court in a case involving violation of Regulation T.[46] Then, without approving or disapproving the contract approach, the court turned to the tort theory of recovery and analyzed that approach as it related to plaintiff's misconduct.[47] In apparently choosing to rely on the tort rather than the contract theory, the court implied that the plaintiff might be barred by failing to satisfy the requirement "that the complaining party 'has not so conducted himself as to disable himself from maintaining an action.' "[48] It was stated by the court that this requirement should be considered in the light of *J.I. Case* and *Perma Life*. However, while recognizing that these two opinions enunciated a changed policy toward private lawsuits brought under federal regulatory statutes, the court continued to use traditional tort concepts in analyzing the facts of the case.[49] But in denying recovery to the plaintiff, the court stated that recovery would not further the purposes of the statute, and ignored the issue of plaintiff's misconduct.[50] Thus the court adhered to the traditional tort approach to liability, but based its holding on the principles set forth in *J.I. Case* and *Perma Life*.[51]

In *Pearlstein* there was no evidence of deceit or actual misrepresentation on

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42. Id.

43. Id. at 85.

44. Id.

45. Id. at 87.

46. Id., citing Goldenberg v. Bache & Co., 270 F.2d 675, 680 (5th Cir. 1959), which held that a private action by an investor against a broker for a violation of Regulation T could be "ex contractu, based on the contract between stockbroker and customer as affected by the federal statute and regulations . . . ." See also Warshow v. H. Hentz & Co., 199 F. Supp. 581, 582 (S.D.N.Y. 1961), in which the court refused to dismiss a complaint where the plaintiff sought either recission or damages, holding that since every contract which violates any provision of the federal securities regulations is void and unenforceable by the party who is the violator, "the other party is entitled to recission."

47. 290 F. Supp. at 88-90.

48. Id. at 88, quoting Restatement of Torts § 286(d) (1934).

49. 290 F. Supp. at 88-90. The court also distinguished Perma Life on the grounds that the action in Perma Life was based on an express statutory provision; that a plaintiff as a participant would "be subject to statutory civil and criminal penalties;" and that defendant had knowingly participated in the violation. Id. at 89.

50. Id. at 89-90. The court also denied recovery to the defendant on his counterclaim. Id. at 90.

51. See 1969 Wash. U.L.Q. 361 for a more detailed analysis of the court's opinion in Serzysko.

the part of the plaintiff, as there had been in *Serzysko*. The defendant asserted that plaintiff was "knowledgeable in the securities field."[52] and attributed to him a "conscious plan" to profit from what he knew would be an unlawful extension of credit.[53] The court dismissed these contentions stating that Pearlstein's subjective knowledge of both the margin requirements and of market operations generally would be difficult to prove, and in any event should not defeat liability on the part of the broker.[54]

The court thus did not consider common law negligence and possible defenses thereto. It utilized, instead, the "public policy" rationale of *J.I. Case*:

> [T]he danger of permitting a windfall to an unscrupulous investor is outweighed by the salutary policing effect which the threat of private suits for compensatory damages can have upon brokers and dealers above and beyond the threats of governmental action by the Securities and Exchange Commission.[55]

The *Pearlstein* decision went beyond that in *Perma Life*, for while *Perma Life* would continue to deny recovery to a plaintiff who was not coerced and who had benefited from the illegality equally with the defendant,[56] the court found that "such a defense does not appear desirable in the securities area here involved, even when the investor may be shown to have had knowledge of margin requirements."[57] The court was able to distinguish securities cases from anti-trust cases because the securities laws place the entire burden of compliance with the margin requirements on the broker, while the anti-trust laws are directed against both parties to the illegal transaction.[58] This indicated to the court that Congress intended to make the broker completely responsible for compliance with the margin requirements, at least in the absence of actual "concealment or misstatement of material facts" by the investor.[59]

Judge Friendly, in his dissent, commented that the majority opinion "shocks the conscience and wars with common sense."[60] Although accepting the public

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52. 429 F.2d at 1140.

53. Id.

54. Id. at 1141-42. The court held that most of the cases cited by the defendant were inapplicable since they dealt with the broker's right to sue for the original contract price of the securities. A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967); Billings Assoc., Inc. v. Bashaw, 27 App. Div. 2d 124, 276 N.Y.S.2d 446 (4th Dep't 1967); E.F. Hutton & Co. v. Weinberg, [1961-1964 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,332, at 94,406 (Sup. Ct. N.Y. 1964); Irving Weis & Co. v. Offenberger, 31 Misc. 2d 628, 220 N.Y.S.2d 1001 (N.Y.C. Mun. Ct. 1961). See also Bronner v. Goldman, 361 F.2d 759 (1st Cir.), cert. denied, 385 U.S. 933 (1966), where the court found there had been no violation of the margin requirements. The majority also distinguished Moscarelli and Serzysko on the ground that the facts in those cases went "beyond knowledge of the margin requirements to concealment or misstatement of material facts." 429 F.2d at 1142. See id. at 1141-42 n.9.

55. 429 F.2d at 1141, citing J.I. Case v. Borak, 377 U.S. 426 (1964).

56. 429 F.2d at 1141.

57. Id.

58. Id.

59. Id. at 1141-42.

60. Id. at 1145.

policy rationale used by the majority,[61] Judge Friendly expressed doubts that the purposes of section 7(c) would be furthered by the degree of private enforcement indicated by the majority opinion[62] and stated that "[a]ny deterrent effect of threatened liability on the broker may well be more than offset by the inducement to violations inherent in the prospect of a free ride for the customer who, under the majority's view, is placed in the enviable position of 'heads-I-win tails-you-lose.' "[63] The dissent recognized that there may be cases where it is proper to impose civil liability under section 7(c), *e.g.*, in the case of the "innocent 'lamb,' "[64] but asserted Pearlstein, as an "experienced speculator," did not fit into this category and therefore, should be denied recovery.[65]

The court in *Pearlstein* appeared to place a nearly absolute liability on the broker for failure to comply with section 7(c), viewing that section as imposing a strict duty on brokers and dealers to know and obey the margin requirements, since "[n]o broker can conscientiously claim to have been misled into extending credit beyond the seven-day limit . . . ."[66] The theory of a cause of action in negligence for the violation of a statute was thus ignored and perhaps abandoned by the court in favor of a theory of recovery based solely on public policy considerations. The one remaining area of uncertainty is whether or not these considerations would permit recovery in a situation such as the *Serzysko* case, where the defendant broker was actually and intentionally deceived by the investor.[67]

The major question raised by this decision is whether it really effectuates the purposes of the margin requirements. Judge Friendly, in his dissent, maintained that the legislative history of section 7(c) "affords scant evidence that protection of the investor loomed at all large in the Congressional mind."[68] The dissent, in basic agreement with one commentator who concluded that the beneficial effects of such liability were dubious,[69] went on to state:

> Occasional and isolated violations of Regulation T do not threaten to cause a significant alteration in the allocation of credit in the economy; only widespread or repeated violations would pose a danger. But it is in just such situations that we may confidently expect application of the administrative and criminal sanctions provided by the Act.[70]

The majority opinion in *Pearlstein* held that the best way to protect against

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61. Id. at 1147-48.

62. Id. at 1148.

63. Id.

64. Id.; see Smith v. Bear, 237 F.2d 79, 87-88 (2d Cir. 1956) (dictum).

65. 425 F.2d at 1148-49. Judge Friendly cited Moscarelli and Serzysko as supporting his conclusions. Id.

66. Id. at 1141.

67. The majority declined to either attack or follow the holdings in Serzysko and Moscarelli. Id. at 1142.

68. Id. at 1147.

69. See Comment, Securities Exchange Act of 1934—Civil Remedies Based Upon Illegal Extension of Credit in Violation of Regulation T, 61 Mich. L. Rev. 940, 954-55 (1963).

70. 429 F.2d at 1147-48.

violation of the margin requirements was to place the entire burden of compliance on the broker. Whether this responsibility should result in the nearly absolute liability impose by the *Pearlstein* court will certainly be the subject of much debate. The arguments in favor of the opinion are persuasive. The law does place the entire burden of compliance on the broker. It can hardly be argued that the broker overlooked the margin requirements—in this case from April to August. Such a flagrant violation of the law, for whatever reason, may best be prevented by the heavy financial penalty imposed by *Pearlstein*. The problems of "heads-I-win tails-you-lose," feared by the dissent, would never arise if the broker, threatened by certain civil liability, liquidated the investor's holdings at the time required by law.

Securities Regulation—Commission "No Action" Decision Held Reviewable—Proposal of a Limited Political Nature may be a Proper Subject for Shareholder Action.—A spokesman for the Medical Committee for Human Rights informed the Dow Chemical Company that the committee, as a shareholder of Dow, wished to submit a proposal to the shareholders in the management proxy statement.[1] The proposal was that the certificate of incorporation be amended to prohibit Dow from manufacturing napalm.[2] Dow notified the Securities and Exchange Commission of its intention to exclude the Medical Committee's proposal from its proxy statement, enclosing an opinion letter from its counsel containing the reasons which formed the basis of its decision.[3] The Commission's Division of Corporate Finance, in a "no action" letter, acquiesced

1. The request was made pursuant to Securities and Exchange Commission Proxy Rule 14a-8, 17 C.F.R. § 240.14a-8 (1969), which provides for the inclusion of shareholder proposals in management's proxy statement under certain circumstances.

2. The original proposal was to prohibit Dow from selling napalm unless the purchaser gave assurances that the substance would not be used against human beings. It was submitted in March of 1968, too late to be included in the 1968 proxy materials. In January, 1969, the proposal was resubmitted but when Dow's counsel objected, it was withdrawn and the proposal at issue substituted. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 661-63 (D.C. Cir. 1970), cert. granted, 39 U.S.L.W. 3409 (U.S. March 22, 1971) (No. 1162).

3. Dow's counsel claimed that the proposal was of a political nature and interfered with the company's ordinary business operations. The company relied on Proxy Rule 14a-8(c) which provides, in relevant part: "[M]anagement may omit a proposal . . . under any of the following circumstances:

"(1) If the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

"(2) If it clearly appears that the proposal is submitted by the security holder . . . primarily for the purpose of promoting general economic, political . . . social or similar causes; or

. . . .

"(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer." 17 C.F.R. § 240.14a-8(c) (1969).

in Dow's decision.[4] The Medical Committee attempted to argue the suitability of the proposal before the Commission but was unsuccessful. It then sought review in the United States Court of Appeals for the District of Columbia Circuit. The court held that direct judicial review was the most effective method of carrying out the congressional intent embodied in the Securities Exchange Act, and that exclusion of the proposal as being of a general political nature and concerning ordinary business decisions may be inconsistent with the congressional policy of corporate democracy embodied in the Securities Exchange Act. Because of the inadequate record before the court, the case was remanded to the Commission for further proceedings. *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *cert. granted*, 39 U.S.L.W. 3409 (U.S. March 22, 1971) (No. 1162).

Various statutes provide for direct review of administrative agency decisions by the circuit courts.[5] If there is no specific statutory provision providing for review, a party can seek review under the provisions of section 10 of the Administrative Procedure Act,[6] which supplements the special statutory review procedures for final orders of various agencies.[7] Even where a specific statute or the Administrative Procedure Act does not provide for review, the courts have evidenced a marked tendency to review agency decisions,[8] occasionally even disregarding statutory language to the contrary.[9]

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4. "[I]n a no-action letter, an authorized staff official may state with respect to a specific proposed transaction that the staff will not recommend to the Commission that it take enforcement action if the transaction is consummated in the manner described in the incoming letter." SEC Securities Exchange Act Release No. 8931 (July 14, 1970), [1969-1970 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,838 at 83,979.

5. E.g., 15 U.S.C. § 78y(a) (1964) (orders of the Securities and Exchange Commission under the Securities Exchange Act reviewable by the courts of appeal); 28 U.S.C. §§ 2341-51 (Supp. V, 1970) (final orders of the Federal Communications Commission, Secretary of Agriculture, Federal Maritime Commission or Maritime Administration, and Atomic Energy Commission reviewable); 29 U.S.C. § 160(f) (1964) (final orders of the National Labor Relations Board reviewable). For a list of these provisions and others see 1 W. Barron & A. Holtzoff, Federal Practice and Procedure with Forms § 58, at 313-15 (1960).

The statutes are not consistent as to the type of order reviewable and the standing required of the party seeking review. E.g., the issuance of a cease and desist order is a prerequisite before review of a Federal Trade Commission order is allowed. 15 U.S.C. § 45(c) (1964). However, other statutes only require a party to be aggrieved by agency action in order to seek review. E.g., 28 U.S.C. § 2344 (Supp. V, 1970); 29 U.S.C. § 160(f) (1964); see K. Davis, Administrative Law Treatise §§ 22.00-22.21, at 702-87 (Supp. 1970) for a discussion of the standing needed to seek review. See also L. Jaffe, Judicial Control of Administrative Action 501-31 (1965) [hereinafter cited as Jaffe]. For a critical discussion of the types of orders required before a party can request judicial review see Jaffe 418-23.

6. 5 U.S.C. §§ 701-06 (Supp. V, 1970). "[R]eview provisions [of the Act] utilize traditional equity actions for agency action not amounting to a final order, but which nonetheless directly affects [a] plaintiff's rights." Bucks County Cable TV, Inc. v. United States, 299 F. Supp. 1325, 1333 (E.D. Pa. 1969) rev'd on other grounds, 427 F.2d 438 (3d Cir.), cert. denied, 400 U.S. 831 (1970).

7. Abbott Labs. v. Gardner, 387 U.S. 136, 140-42 (1967); see Jaffe 164-65.

8. Abbott Labs. v. Gardner, 387 U.S. 136, 140-41, 146 (1967).

9. "Mere failure [of the statute] to provide for judicial intervention is not conclusive;

Section 25(a) of the Securities Exchange Act[10] provides that "[a]ny person aggrieved by an order issued by the Commission" may seek review in the court of appeals.[11] The first case arising under this section was *American Sumatra Tobacco Corp. v. SEC*.[12] In this case the petitioner sought to prevent the Commission from making public certain documents filed in connection with a license proceeding. When its efforts proved unsuccessful, petitioner sought review in the Court of Appeals for the District of Columbia Circuit. The Commission moved to dismiss claiming the only type of order reviewable was "one entered . . . after notice and opportunity for hearing, and upon a finding of facts."[13] In rejecting this contention, the court stated that it could review any Commission action which satisfied the following criteria: "[T]hat there be (a) a proceeding under the [Securities Exchange] Act, (b) to which the petitioner was a party, (c) and that he be aggrieved by the order of the Commission."[14]

Other circuits have refrained from reviewing orders which were interlocutory or informal. In *SEC v. Andrews*[15] the second circuit refused to review an order of the Commission calling for an investigation of whether or not the defendant's unlisted trading privileges should be suspended, holding that such an order was interlocutory and thus not reviewable under section 25(a) of the Securities Exchange Act.[16] The current rule in the second circuit is that preliminary determinations cannot be reviewed under section 25(a) unless they become the basis of a final order.[17]

In *Medical Committee* the petitioner sought review of the Commission decision under section 25(a) of the Securities Exchange Act. The court decided that the Medical Committee was an "aggrieved party" under the section and could seek review of the Commission decision.[18] In this regard the court noted that,

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neither is the presence of language which appears to bar it." Heikila v. Barber, 345 U.S. 229, 233 (1953). There are, however, certain matters which the courts refrain from reviewing. See, e.g., Schilling v. Rogers, 363 U.S. 666 (1960) (administrative determination involved trading with the enemy); Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969) (activation of reserve fleet not reviewable since it involved national defense strategy and was a matter within agency discretion). For a discussion of statutory and non-statutory exclusions from judicial review see Jaffe 353-76.

10. 15 U.S.C. § 78y(a) (1964).

11. Id.

12. 93 F.2d 236 (D.C. Cir. 1937).

13. Id. at 238.

14. Id. at 239.

15. 88 F.2d 441 (2d Cir. 1937).

16. Id. at 442.

17. M.G. Davis & Co. v. Cohen, 369 F.2d 360 (2d Cir.), aff'g 256 F. Supp. 128 (S.D.N.Y. 1966); Klastorin v. Roth, 353 F.2d 182, 183 n.2 (2d Cir. 1965); accord, Guaranty Underwriters, Inc. SEC, 131 F.2d 370 (5th Cir. 1942). For a similar interpretation of the provisions of the Securities Act of 1933 see Resources Corp. Int'l v. SEC, 97 F.2d 788 (7th Cir. 1938); Jones v. SEC, 79 F.2d 617 (2d Cir. 1935), cert. denied, 297 U.S. 705 (1936).

18. 432 F.2d at 667-68; see Jaffe 418-23.

The test to determine standing to review agency action is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data

at the time of the petition, the Medical Committee had already been through two stages of administrative proceedings[19] and the merits of the proposal had not yet been reached, despite the fact that time is generally of the essence in a proxy solicitation.[20] Furthermore, in any private action against Dow in a district court, the resources of the Commission would not be available to the Medical Committee which, moreover, would be handicapped by the adverse decision of the Commission.[21] The court characterized the Commission's argument that review was precluded since it had not issued a binding order but had only refused to order Dow to include the proposal, as analogous to the "negative order doctrine" which the Supreme Court had rejected in 1939 because it failed to reflect the primary considerations of judicial review.[22] The court stated that there exists a "well-established principle that there is a strong presumption in favor of the courts' power to review administrative action,"[23] and regardless of its "form," the order operated with "sufficient particularity and finality to warrant judicial review."[24] The court found no reason "why the absence of formal adjudicatory hearings in the regulatory scheme should render Commission decisions, however capricious or erroneous, utterly immune to direct judicial review or redress."[25]

Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970); see Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970).

19. The first stage was the submission of memoranda to the Commission staff and, after the no action letter, the second stage was the submission of memoranda requesting a hearing before the Commission to review the staff action. 432 F.2d at 663.

20. Id. at 667.

21. Id. Certain sections of the Securities Exchange Act authorize private actions, e.g., § 9(c), 15 U.S.C. § 78i (1964) (private suits for damages sustained as a result of securities manipulation authorized); § 16(b), 15 U.S.C. § 78p (1964) (private action to recover insider's short swing profits authorized). The Supreme Court has held that there is an implied right to bring a private action for violation of the proxy rules under § 14(a), despite the absence of explicit language in the statute. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). This has been extended to provide that damages are not necessary to establish a cause of action. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

The filing of a proxy statement shall not be deemed a finding that the Commission has passed on the merits or approved any statement contained in it. 17 C.F.R. § 240.14a-9(b) (1969). However, there are cases which have given weight to the Commission review. E.g., General Time Corp. v. Talley Indus., Inc., 403 F.2d 159 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969); Sherman v. Posner, 266 F. Supp. 871 (S.D.N.Y. 1966).

22. Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939). The negative order doctrine theorized that "when a complaint was filed with the [Interstate Commerce] Commission against a rate or other condition and the Commission—even after hearing—entered an order which found the complaint unwarranted and refused to change the status quo, the order was not reviewable by the statutory route or by any other method. It seemed to be thought that since the order commanded nothing and therefore could not be disobeyed, it was not in truth an 'order'." Jaffe 359 (footnotes omitted).

23. 432 F.2d at 666.

24. Id. at 668.

25. Id. at 671. Since the petitioner did not seek a review of the factual findings of the Commission, but only a hearing before the Commission, there was no reason for a private action to be brought in a federal district court. The necessary hearing could be ordered by an appellate court. Id. at 672.

The court concluded its discussion of reviewability by pointing out that the primary purpose of the Securities Exchange Act is the protection of investors and that this purpose is better effectuated by Commission proceedings than by private litigation.[26] Direct judicial review of such proceedings is the only way to determine whether the Commission has correctly considered the merits of the shareholder's proposal in light of congress' intent in enacting the proxy statute.[27]

Proxy rule 14a-8[28] determines when management must place a shareholder's proposal in its proxy statement.[29] The purpose of the rule is to "place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation."[30] The Commission has, by its proxy rules, eliminated certain matters from inclusion, specifically those which are not a proper subject for shareholder action under state law;[31] those of a general economic, political, or social nature;[32] and those which pertain to the ordinary business operations of the issuer or its management.[33]

Pursuant to its rules the Commission excludes a substantial number of proposals annually.[34] Although state law is supposedly determinative of the issue of whether or not certain proposals constitute a proper subject for shareholder action,[35] the various state statutes frequently do not provide a clear guideline,[36] and thus the decision is ultimately within Commission discretion.[37] Invoking other portions of the rule, the Commission has excluded such proposals as one to censure the board of directors and declare them ineligible for reelec-

26. Id.

27. Id.

28. 17 C.F.R. § 240.14a-8 (1969).

29. Id. § 240.14a-8(c). The rule does not apply to election contests or mere opposition to management proposals. Id. § 240.14a-8(a).

30. SEC Securities Exchange Act Release No. 3638 (Jan. 3, 1945), 2 CCH Fed. Sec. L. Rep. ¶ 24,102, at 17,617 (1969).

31. 17 C.F.R. § 240.14a-8(c)(1) (1969).

32. Id. § 240.14a-8(c)(2).

33. Id. § 240.14a-8(c)(5). Other sections provide for exclusion if the proposal did not receive a stated amount of the vote at a prior meeting or if it was included in a prior proxy statement and not brought up at an annual meeting. Id. §§ 240.14a-8(c)(3) & 8(c)(4).

Contrary to the provisions of the Securities Act of 1933 which authorizes the Commission to prohibit the sale of securities by its own order if the registration statement does not comply with Commission rules, the Commission must seek an injunction to prohibit proxy solicitations in violation of the proxy rules. Compare Securities Act § 8, 15 U.S.C. § 77h (1964), with Securities Exchange Act §§ 14(a), 27, 15 U.S.C. §§ 78m(a), 78aa (1964). See 2 L. Loss, Securities Regulation 931 (2d ed. 1961) [hereinafter cited as Loss].

34. See, e.g., 36 SEC Ann. Rep. 47 (1970); see also 2, 5 Loss 911, 2859 (2d ed. 1961, Supp. 1969).

35. 17 C.F.R. § 240.14a-8(c) (1969). "[M]anagement may omit a proposal . . . [if it] is, under the laws of the issuer's domicile, not a proper subject for action by security holders."

36. E.g., Mass. Ann. Laws ch. 156B, § 54 (1970) ("The directors may exercise all the powers of the corporation, except such as . . . conferred upon or reserved to the stockholders."); N.C. Gen. Stat. § 55-61(d) (1965) ("Any matter relating to the affairs of a corporation is a proper subject for action at an annual meeting of shareholders . . . .").

37. 2 Loss 905-06.

tion;[38] one directing management to institute suit against an investment advisor;[39] a variety of others complaining of double taxation of dividends;[40] another requesting revision of antitrust laws;[41] and even one to change management's investment policy.[42] Generally, the Commission has required inclusion of proposals dealing with cumulative voting,[43] pre-emptive rights,[44] and changes in the number of directors.[45]

Although the Commission's administration of the proxy rules has frequently been criticized as inconsistent,[46] the prior reluctance of the courts to review its decisions has resulted in a scarcity of judicial guidelines. The leading case involving shareholder proposals is *SEC v. Transamerica Corp.*[47] In *Transamerica* the proposals sought to be included called for: independent auditors of the corporate financial records to be selected by the shareholders; amendment of the corporate by-laws concerning the notice provisions necessary for amendment of the by-laws at annual meetings; and the adoption of a requirement that a report of the annual meeting be sent to shareholders.[48] The third circuit rejected the claim that the notice provisions contained in the by-laws allowed the directors to exclude these subjects from shareholder consideration and found all three proposals to be proper for inclusion.[49] The court also found that the notice provisions in the by-laws were being used to avoid having the shareholders vote on proposals and that this was in derogation of the congressional purpose in enacting the Securities Exchange Act, which was to give shareholders corporate suffrage and thus afford them a modicum of participation in the decision-making process.[50]

Exclusion was held proper under the proxy rules in *Curtin v. American Telephone & Telegraph Co.*,[51] which concerned a proposal to increase pensions

38. Dyer v. SEC, 289 F.2d 242 (8th Cir. 1961).

39. Clusserath, The Amended Stockholder Proposal Rule: A Decade Later, 40 Notre Dame Law. 13, 20 (1964) [hereinafter cited as Clusserath]. Examples mentioned by Mr. Clusserath in his article were not from public records but rather from his own experience while a member of the Commission staff. Id. at 14 n.7, 17.

40. 2 Loss 902 n.179.

41. Id.

42. Id.

43. 35 SEC Ann. Rep. 47 (1969).

44. Id.

45. Clusserath 25-26.

46. Id. at 39-41; see 2 Loss 906-07.

47. 163 F.2d 511 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948).

48. Id. at 517. An additional proposal to move the location of the annual meeting had become moot by the time the case was decided. Id. at 513 n.1.

49. Id. at 518. By-Law 47 provided that shareholders could amend the by-laws by a majority vote but the proposed amendment must be contained in the notice of meeting, thus if the corporation did not give the notice then the shareholders could not vote on the shareholder proposal. Id. at 516.

50. Id. at 518.

51. 124 F. Supp. 197 (S.D.N.Y. 1954).

submitted by a union which owned one share of corporate stock. The court reasoned that pensioners' rights, as part of the *ordinary business* of the corporation, were the concern of management, not of the shareholders.[52]

At issue in *Peck v. Greyhound Corp.*[53] was a shareholder proposal entitled "A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South." The Commission concurred with Greyhound that the proposal was of a *general political nature* and was therefore excludable. The shareholder then sued in the Southern District of New York and the court denied an injunction prohibiting management from soliciting proxies unless the proposal was included, deferring to the Commission's interpretation of its own rules.[54] No argument had been made by the shareholder that adoption of the proposal would result in any gain, either financial or in the terms of public relations, to the corporation. The proposal was thus viewed as purely political.[55] Furthermore the elimination of segregated seating would have been a violation of state laws which had not yet been invalidated.[56]

Other cases wherein proposals of a political nature were at issue have been decided on other grounds. In *Brooks v. Standard Oil Co. (N.J.)*,[57] for example, the proposal at issue called for the corporation to explore and develop underwater oil reserves and, in addition, to establish a "stable international regime" to oversee the proper development of these reserves. The corporation, the Commission, and ultimately the court, while praising the shareholder's motive, excluded the proposal as improper under the state law providing that the business of the corporation shall be managed by its board of directors.[58] The court thus did not consider the political nature of the proposal.

The court in *Medical Committee*, enunciating the principle that "[a] corporation is run for the benefit of its stockholders and not for that of its managers,"[59] pointed out that some shareholder proposals may affect the shareholders as owners of the corporation *notwithstanding* their political nature.[60] Dow's rejection of the Medical Committee's proposal as both of a general

52. Id. at 198.

53. 97 F. Supp. 679 (S.D.N.Y. 1951).

54. "Rules and regulations adopted by administrative agencies pursuant to Congressional authorization are best interpreted . . . by the agency which has been entrusted with the power and authority to write them." Id. at 681.

55. Id. at 679. Compare 432 F.2d at 681.

56. See, e.g., Ala. Code tit. 48, §§ 301(31a)-(31c) (1958), held unconstitutional in Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), aff'd, 352 U.S. 903 (1956); S.C. Code Ann. §§ 58-1491 to -1496 (1962), held unconstitutional in Flemming v. South Carolina Electric & Gas Co., 224 F.2d 752 (4th Cir. 1955), appeal dismissed, 351 U.S. 901 (1956).

57. 308 F. Supp. 810 (S.D.N.Y. 1969).

58. Id. at 814. The defendant had claimed the proposal was not a proper subject under state law, was of a general political nature, and interfered with ordinary business operations. Id. at 812.

59. 432 F.2d at 681, quoting SEC v. Transamerica Corp., 163 F.2d at 517.

60. 432 F.2d at 681.

political nature and as relating to ordinary business operations was characterized as impaling the Medical Committee on the "horns of [a] dilemma."[61] The court could not reconcile the claim that the proposal was too specific and too general, and therefore excludable for both reasons, with the underlying policy of the Act which sought to make proxy solicitation a vehicle of corporate democracy.[62] The court pointed out that the two exceptions, thus construed, could result in the exclusion of any shareholder proposal in total frustration of the aforementioned policy.[63]

With respect to the exception that the proposal was improper under state law, as a general rule management has the burden of showing that a proposal is thus excludable.[64] Dow argued that the proposal was improper under Delaware law, but according to the court did not sustain its burden.[65] Under Delaware law corporate by-laws can be amended for almost any purpose, even to change the nature of the business of the corporation.[66] The court reasoned that certain items which might arguably involve ordinary business operations are thus proper for shareholder action.[67]

The more substantial question was whether or not an interpretation of the proxy rules, which would permit Dow to exclude this proposal from its proxy statement because it was motivated by general political concerns, would conflict with congressional intent.[68] The court did not decide this issue, however, because the record did not support Dow's argument that this proposal was of a general political nature.[69] Moreover, this proposal could be interpreted as affecting Dow's shareholders as such since the decision to continue the manufacture and sale of napalm was not a decision made "*because* of business considerations but *in spite of* them."[70] Thus, the court concluded, the determination whether

61. Id. at 679.

62. Id. at 678-79; see S. Rep. No. 1455, 73d Cong. 2d Sess. 77 (1934).

63. 432 F.2d at 678-79.

64. Id. at 680; 17 C.F.R. § 240.14a-8 (1969); Securities Exchange Act Release No. 4979 (Jan. 6, 1954).

65. 432 F.2d at 680. Dow did not refer to any specific applicable statute.

66. Delaware Code Ann. tit. 8, 242(a)(2) (Supp. 1968). "[A] corporation may amend its certificate of incorporation . . . [t]o change, substitute, enlarge or diminish the nature of its business or its corporate powers and purposes. . . ." Id. But see id. § 141(a): "The business of every corporation . . . shall be managed by a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." A New Jersey statute similar to § 141(a) was held to exclude the proposal in Brooks v. Standard Oil Co., (N.J.), 308 F. Supp. 810 (S.D.N.Y. 1969). See text accompanying notes 57-58 supra.

67. 432 F.2d at 680. The consequence of this interpretation of the Delaware statute is significant since approximately one third of the corporations listed on the New York Stock Exchange are incorporated in Delaware. H. Henn, Corporations § 1, at 6 (2d ed. 1970).

68. 432 F.2d at 680.

69. Id. The mere mention by Dow's counsel of the protests and demonstrations against the company because of its manufacture of napalm was not, in itself, sufficient to support Dow's contention that the proposals were political in nature. Id.

70. Id. at 681 (emphasis by the court).

corporate assets should be used in a profitable or socially useful manner should not be isolated from shareholder control by resort to the Commission's proxy rules even though management is convinced that its current policy is morally or politically correct.[71]

The court's holding with respect to reviewability could result in a more significant system of judicial review. While it might be argued that a district court is better equipped to make factual findings than an appellate court,[72] certainly direct appellate review of Commission determinations would provide a less expensive and less time-consuming remedy than a private action against the corporation. In addition, appellate review would be more in accord with congressional intent[73] since it would provide a determination by Commission action rather than by inaction or, alternatively, a private suit.[74]

The effect of requiring the Commission to make a record suitable for review is to request a declaratory order, which by statute is within the discretion of the agency.[75] In addition, the extension of this requirement to all disputes concerning the inclusion of shareholder proposals would necessitate amendment of the current rules, which provide for the proposal to be submitted to management 60 days prior to management's mailing the proxy materials in order to provide time for the required hearings.[76] This factor coupled with the increased number of shareholder proposals[77] could render the Commission incapable of performing its function. The Supreme Court has already acknowledged the inability of the

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71. "We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predelictions. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in section 14(a) of the Securities Exchange Act of 1934." Id.

72. Petition of Respondent Securities and Exchange Commission for Rehearing and Suggestion for Rehearing En Banc 12, Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), cert. granted, 39 U.S.L.W. 3409 (U.S. March 22, 1971) (No. 1162).

73. See S. Rep. No. 1455, 73d Cong. 2d Sess. 77 (1934).

74. 432 F.2d at 672. However, direct review might be used to delay compliance as well as to obtain a determination of the issues involved since, despite determination by a court of appeals, Commission orders are enforced by proceedings in district courts. Securities Exchange Act § 27, 15 U.S.C. § 78aa (1964).

75. 5 U.S.C. § 554(e) (Supp. V, 1970); 17 C.F.R. § 202.1(d) (1969).

76. 17 C.F.R. § 240.14a-8(d) (1969). The corporation only needs to notify the Commission of its intention to exclude a proposal 30 days prior to its mailing of its proxy solicitation. Id.

77. 2, 5 Loss 911, 2859 (2d ed. 1961, Supp. 1969); see N.Y. Times, June 13, 1970, at 41, col. 6; id. at 45, col. 1.

Commission to efficiently examine each proxy statement filed.[78] This decision can only aggravate the situation.

Finally, although in *Medical Committee* the court's discussion of the merits was not determinative of the rights of the parties, since the case was remanded, it does indicate that shareholders may propose that corporate assets should be used in what they consider to be a socially useful manner.[79] This is merely dictum, however, since the issue was whether or not this proposal, despite its political overtones, affected the shareholders as beneficial owners of the corporation.[80] Moreover, while the decision ostensibly enhances prospects for shareholder democracy, the fact remains that the majority of shareholder proposals usually receive little or no support from other shareholders,[81] while imposing considerable cost on them.[82] Thus the decision may have limited impact on the ability of minority shareholders to effectuate implementation of their proposals.

Torts—Libel—Privilege of a Fair and True Report of Judicial Proceedings Not a Defense When the Subject Matter of the Report Is a Matrimonial Action.—Defendant newspaper chain published a series of articles based on charges made by plaintiff's wife in an affidavit filed in the course of their separation proceeding. Plaintiff claimed that such publication gave rise to causes of action in libel and invasion of privacy.[1] As an affirmative defense to both torts, defendant pleaded the privilege of a fair and true report of a judicial proceeding under section 74 of the New York Civil Rights Law.[2] The trial court denied

78. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); see SEC Securities Act Release No. 4944, Securities Exchange Act Release No. 8496 (Jan. 15, 1969), [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,645.

79. 432 F.2d at 681; see S. 4003, 91st Cong., 2d Sess. (1970) which would allow shareholder proposals of a political nature unless action was beyond the ability of the corporation.

80. 432 F.2d at 681.

81. E.g., General Motors included four shareholder proposals in the 1970 management proxy. Three failed to receive 3% of the vote and the fourth failed to receive 6% of the vote. Report of the 62nd General Motors Stockholders Meeting 6-10 (1970). See Emerson & Latcham, the SEC Proxy Proposal Rule: The Corporate Gadfly, 19 U. Chi. L. Rev. 807, 835 (1952).

82. Chilgren, A Plea for Relief from Proxy Rule 14a-8, 19 Bus. Law. 303-05 (1963).

1. "In the libel causes of action, the plaintiff allege[d] that the articles were false and defamatory and, in his invasion of privacy counts, that the articles were published 'for advertising purposes and for purposes of trade and without [his] consent', in violation of sections 50 and 51 of the Civil Rights Law." Shiles v. News Syndicate Co., 27 N.Y.2d 9, 12, 261 N.E.2d 251, 252, 313 N.Y.S.2d 104, 106 (1970); see N.Y. Civ. Rights Law §§ 50-51 (McKinney 1948).

2. N.Y. Civ. Rights Law § 74 (McKinney Supp. 1970) provides in part:

"A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other

plaintiff's motion to strike the defense and the appellate division affirmed, certifying a question to the court of appeals concerning the propriety of its determination.[3] The New York Court of Appeals reversed in a 4-3 decision, holding that since the statute was intended to protect the report of public proceedings, it had no application when the source of the objectionable matter was a nonpublic matrimonial action. *Shiles v. News Syndicate Co.*, 27 N.Y.2d 9, 261 N.E.2d 251, 313 N.Y.S.2d 104 (1970).

The privilege of a fair and true report of a judicial proceeding has long been recognized as an affirmative defense to libel in common law jurisdictions on both sides of the Atlantic.[4] At common law, it was necessary that the report be fair and true to constitute a valid defense; thus by its own terms the privilege was qualified[5] and was not allowed if the plaintiff could demonstrate that the report was garbled,[6] distorted, unfair, or an inaccurate version of the proceedings.[7] In addition, there existed the exception common to all such qualified privileges,

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official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

3. Shiles v. News Syndicate Co., 32 App. Div. 2d 744 (1st Dep't 1969) (mem.), rev'd, 27 N.Y.2d 9, 261 N.E.2d 251, 313 N.Y.S.2d 104 (1970).

4. The leading case on the subject is The King v. Wright, 101 Eng. Rep. 1396 (K.B. 1799). In that decision, the defendant was accused of criminal libel for publishing a defamatory committee report from the House of Commons. The court refused to allow the prosecution, holding that the publication of judicial proceedings "may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. . . . The same reasons also apply to the proceedings in Parliament . . . ." Id. at 1399. See generally Dorr v. United States, 195 U.S. 138, 150 (1904); Lesperance v. North Am. Aviation, Inc., 217 Cal. App. 2d 336, 31 Cal. Rptr. 873 (Dist. Ct. App. 1963); Cowley v. Pulsifer, 137 Mass. 392 (1884); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888); Lee v. Brooklyn Union Publishing Co., 209 N.Y. 245, 103 N.E. 155 (1913); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917 (1911).

5. Robinson v. Johnson, 239 F. 671, 674 (8th Cir. 1917); Lee v. Brooklyn Union Publishing Co., 209 N.Y. 245, 103 N.E. 155 (1913); Thomas v. Croswell, 7 Johns. 264 (N.Y. Sup. Ct. 1810). The Restatement of Torts § 611, at 293 (1938) defines the privilege as follows:

"The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is

"(a) accurate and complete or a fair abridgement of such proceedings, and

"(b) not made solely for the purpose of causing harm to the person defamed."

See also W. Prosser, Torts § 110, at 816 (3d ed. 1964); Annot., 52 A.L.R. 1438 (1928). For a thorough discussion of the history, application and shortcomings of the privilege, see Barnett, The Privilege of Defamation by Private Report of Public Official Proceedings, 31 Ore. L. Rev. 185 (1952).

6. Thomas v. Croswell, 7 Johns. 264, 272 (N.Y. Sup. Ct. 1810).

7. Robinson v. Johnson, 239 F. 671, 674 (8th Cir. 1917); see W. Prosser, Torts § 110, at 818-19 (3d ed. 1964).

that a publication made with malicious intent would not be protected.[8] New York's version of the privilege, section 74 of the Civil Rights Law,[9] is basically a codification of the common law rule.

Prior to 1956, section 337 of the Civil Practice Act, the predecessor to the present statute, defined the privilege as extending to the "report of any judicial, legislative or other *public* and official proceedings,"[10] a designation which the court of appeals in *Danziger v. Hearst Corp.*[11] and the appellate division in *Stevenson v. News Syndicate Co.*[12] interpreted to exclude reports of matrimonial actions.[13] *Danziger* and *Stevenson* each concerned an action against a newspaper

8. Shapiro v. Health Ins. Plan, 7 N.Y.2d 56, 60, 163 N.E.2d 333, 336, 194 N.Y.S.2d 509, 513 (1959); Andrews v. Gardiner, 224 N.Y. 440, 446, 121 N.E. 341, 343 (1918); see Saroyan v. Burkett, 57 Cal. 2d 706, 371 P.2d 293, 21 Cal. Rptr. 557 (1962). Malice sufficient to defeat a qualified privilege has been defined in New York as follows: "By actual malice is meant 'personal spite or ill will, or culpable recklessness or negligence.'" Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 106, 172 N.E. 139, 142 (1930), quoting Cherry v. Des Moines Leader, 114 Iowa 298, 300, 86 N.W. 323 (1901).

9. N.Y. Civ. Rights Law § 74 (McKinney Supp. 1970); see note 2 supra. Although the only limitation expressly contained in section 74 is that the report be fair and true, the recent case of Williams v. Williams, 23 N.Y.2d 592, 246 N.E.2d 333, 298 N.Y.S.2d 473 (1969), indicated that the common law malicious intent qualification is still recognized in New York. The Williams court held that when the sole purpose of the publication was to cause injury to the plaintiff, the defense could not be invoked. Id. at 599, 246 N.E.2d at 337, 298 N.Y.S.2d at 479. Therefore, the New York rule appears to be in accord with the common law view. See Restatement of Torts, supra note 5. In its original form, the New York statute actually contained an express provision that malice would destroy the privilege. Law of April 1, 1854, ch. 130, § 1, [1854] N.Y. Laws 77th Sess. 314 (repealed 1880). However, a 1930 amendment deleted that portion of the statute. Law of Sept. 1, 1930, ch. 619, § 1, [1930] N.Y. Laws 153d Sess. 1127 (amended 1940). Nevertheless, the courts have interpreted the amendment as having not been intended to allow the privilege for a malicious publication. For an analysis of the statute and a discussion of the Williams case, see 38 Fordham L. Rev. 369 (1969).

Several states have enacted laws similar to the New York statute. See, e.g., Cal. Civ. Code § 47(4) (West 1954); Ga. Code Ann. § 105-704 (1968); Tex. Rev. Civ. Stat. Ann. art. 5432(1) (1958).

10. Law of April 17, 1940, ch. 561, § 5, [1940] N.Y. Laws 163d Sess. 1495 (emphasis added). The law has existed under several titles since it was first passed in 1854. Law of April 1, 1854, ch. 130, § 1, [1854] N.Y. Laws 77th Sess. 314. For a complete history of the statute see 1 E. Seelman, The Law of Libel and Slander in the State of New York ¶ 211, at 261-64 (1964) [hereinafter cited as Seelman].

11. 304 N.Y. 244, 107 N.E.2d 62 (1952), noted in 27 St. John's L. Rev. 153 (1952).

12. 276 App. Div. 614, 96 N.Y.S.2d 751 (2d Dep't), aff'd on other grounds, 302 N.Y. 81, 96 N.E.2d 187 (1950), noted in 19 Fordham L. Rev. 334 (1950). Although Stevenson was not a determination by the state's highest court, it is often cited in conjunction with the Danziger decision on the subject of the report of matrimonial proceedings. E.g., Shiles v. News Syndicate Co., 27 N.Y.2d 9, 14, 261 N.E.2d 251, 253, 313 N.Y.S.2d 104, 107 (1970); Seelman, supra note 10, ¶ 211, at 263; 1956 Bill Jacket Collection ch. 891, at 5. See note 47 infra. This is apparently due to the fact that Stevenson contains a clearer and more thorough discussion of the privilege.

13. 304 N.Y. at 248-49, 107 N.E.2d at 64-65; 276 App. Div. at 618, 96 N.Y.S.2d at 755-56.

publisher which had printed the allegedly defamatory contents of an affidavit filed by the plaintiff's wife during separation proceedings.[14] In each action, the defendant invoked the privilege claiming that the affidavits were part of a judicial proceeding and therefore any publication of their contents was protected by the statute.[15] Each court, however, ruled that the statute was inapplicable when the source of the report was a matrimonial proceeding.[16] Both opinions reasoned that section 278 of the Rules of Civil Practice[17] (now section 235 of the Domestic Relations Law[18]) prohibited the examination of court files in a matrimonial action by anyone other than a party thereto, such an action was secret rather than "public" within the meaning of section 337 of the Civil Practice Act.[19] Therefore, since section 337 expressly privileged the report of "public" proceedings only, the statute afforded no protection to the publication of a non-public action between spouses.[20]

The rationale behind construing the statute against the publisher was not, however, based soley on the interpretation of the word "public." As indicated in *Stevenson*, the main objective of the privilege was to protect "the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice."[21] Ordinarily, the benefit derived from having open trials "more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."[22] However, the legislature, by enacting the secrecy provisions of section 278 of the Rules of Civil Practice, apparently decided that in divorce and separation cases the balance of convenience ought to be in favor of the

14. 304 N.Y. at 246-47, 107 N.E.2d at 63; 276 App. Div. at 614-15, 96 N.Y.S.2d at 752.

15. 304 N.Y. at 247, 107 N.E.2d at 63-64; 276 App. Div. at 615-16, 96 N.Y.S.2d at 753.

16. 304 N.Y. at 248-49, 107 N.E.2d at 64-65; 276 App. Div. at 618-19, 96 N.Y.S.2d at 755-56.

17. N.Y.R. Civ. Prac. 278, [1921] N.Y. Laws 144th Sess. 614.

18. N.Y. Dom. Rel. Law § 235 (McKinney Supp. 1970), provides in part:

"An officer of the court with whom the proceedings in a matrimonial action or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, written agreement of separation or memorandum thereof, or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court."

Other proceedings in which secrecy is maintained by statute include grand jury proceedings, N.Y. Crim Proc. Law § 190.85(3) (McKinney 1970) (effective Sept. 1, 1971), and juvenile prosecutions, N.Y. Crim. Proc. Law § 720.15 (McKinney 1970) (effective Sept. 1, 1971).

19. 304 N.Y. at 249, 107 N.E.2d at 65; 276 App. Div. at 617-18, 96 N.Y.S.2d at 755.

20. 304 N.Y. at 249, 107 N.E.2d at 65; 276 App. Div. at 617-18, 96 N.Y.S.2d at 755.

21. 276 App. Div. at 615-16, 96 N.Y.S.2d at 753, quoting Lee v. Brooklyn Union Publishing Co., 209 N.Y. 245, 248, 103 N.E. 155, 156 (1913).

22. 276 App. Div. at 618, 96 N.Y.S.2d at 755, quoting The King v. Wright, 101 Eng. Rep. 1396, 1399 (K.B. 1799).

private litigant.[23] Thus, as viewed by the *Stevenson* court, the underlying purpose for which the privilege was devised did not obtain in matrimonial suits.[24]

The doctrine announced in the *Danziger* and *Stevenson* cases remained firmly established for only a few years until an amendment to section 337 of the Civil Practice Act was passed in 1956.[25] The new version, which eventually became section 74 of the Civil Rights Law, defined the privilege as extending to the report of "any judicial proceeding, legislative proceeding or other official proceeding."[26] Since the hitherto key word "public" was deleted, it became questionable whether the doctrine still prevailed. In 1966, the judiciary interpreted the amendment in *Keogh v. New York Herald Tribune, Inc.*,[27] where plaintiff sought to recover for the publication of defamatory remarks gleaned from the record of a grand jury hearing.[28] The plaintiff contended that grand jury proceedings were protected from the public by statute in a manner similar to matrimonial actions[29] and therefore the defense of a fair and true report of judicial proceedings was inapplicable under the *Danziger* holding.[30] In denying this contention, the trial court reasoned that since the validity of *Danziger* turned on the presence of the word "public" in the statute, the removal of that word, in effect, overruled that holding.[31] Without specifically referring to the legislative history of the amendment, the court expressed its view that it was the clear intention of the legislature to have the privilege "apply to fair and true reports of judicial and other official proceedings, regardless of whether they are public or nonpublic."[32]

Notwithstanding this determination, the *Shiles* decision has proven any apparent change in the law to be illusory. The thrust of Chief Judge Fuld's majority opinion constituted a reiteration of the policy considerations under-

23. 276 App. Div. at 618, 96 N.Y.S.2d at 755.

24. Id.

25. Law of April 20, 1956, ch. 891, § 1, [1956] N.Y. Laws 179th Sess. 1914.

26. Id. (emphasis deleted).

27. 51 Misc. 2d 888, 274 N.Y.S.2d 302 (Sup. Ct. 1966), aff'd mem., 28 App. Div. 2d 1209, 285 N.Y.S.2d 262 (1st Dep't 1967), motion for leave to appeal denied, 21 N.Y.2d 955, 237 N.E.2d 235, 289 N.Y.S.2d 984 (1968).

28. Id. at 889, 274 N.Y.S.2d at 302.

29. Id. at 891, 274 N.Y.S.2d at 305. Grand Jury proceedings are subject to the secrecy provisions of N.Y. Crim. Proc. Law § 190.85(3) (McKinney 1970) (effective Sept. 1, 1971).

30. 51 Misc. 2d at 891, 274 N.Y.S.2d at 305.

31. Id.

32. Id. The Keogh court's view was shared by Seelman, supra note 10, ¶ 211, at 264. Seelman likewise saw the purpose of the amendment to be the reversal of Danziger and Stevenson: "These amendments destroyed as authority all prior determinations involving . . . the restriction on the right if the matter was official but not public." Id. It was Seelman's opinion that this immunity amounted to a right rather than a privilege. Id. ¶ 209. He therefore welcomed the amendment because it overcame what he termed the "absurd result" reached in such decisions as Danziger and Stevenson concerning the nonpublic nature of matrimonial actions. Id.

lying *Danziger* and *Stevenson*.[33] By enacting section 235 of the Domestic Relations Law, the Legislature, in the court's view, had manifested an intention that in matrimonial proceedings the individual's right to privacy should prevail over the public's interest in scrutinizing the courts.[34] Were the privilege extended to permit the unbridled publication of divorce hearings, the records of such hearings could be " 'used to gratify private spite or promote public scandal' . . . ."[35] Moreover, the proposed expansion of the privilege would, in the opinion of the court, afford one spouse the opportunity to force the other to a settlement "by threatening . . . publication of the charges and accusations contained in the pleadings or affidavits filed in the matrimonial action."[36] Therefore, the court reaffirmed the law as propounded by *Danziger* and *Stevenson*, that " 'such a publication is actionable if defamatory' . . . ."[37]

The court recognized that the authority of those cases had been called into question by the intervening deletion of the word "public" from the statute,[38] but rejected the notion that the Legislature had intended this amendment to extend the privilege to all official proceedings, whether public or nonpublic.[39] To support this contention, the court relied primarily on the memorandum written by Governor Harriman in approving the amendment. After noting the existence of numerous statutes in New York protecting the secrecy of various actions such as matrimonial and grand jury proceedings, the Governor added: "My approval of this bill cannot and should not be construed as a modification or weakening of the justifiable protections embodied in the laws mentioned. Secrecy and other safeguards where provided by our laws continue to be in

33. 27 N.Y.2d at 14, 261 N.E.2d at 253, 313 N.Y.S.2d at 107. Judges Burke, Bergan, and Gibson concurred in Chief Judge Fuld's opinion.

34. Id.

35. Id. at 15, 261 N.E.2d at 253, 313 N.Y.S.2d at 107-08 (citation omitted), quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893).

36. 27 N.Y.2d at 15, 261 N.E.2d at 253, 313 N.Y.S.2d at 108.

37. Id. (emphasis deleted), quoting Danziger v. Hearst Corp., 304 N.Y. 244, 248, 107 N.E.2d 62, 64 (1952). The majority also disallowed the privilege as a defense to the cause of action for invasion of privacy: "It follows from what we have written—with respect to an action for libel—that the statutory privilege of fair and true report of a judicial proceeding may not be invoked as a defense to invasion of privacy. Whether or not section 74, captioned and entitled, as it is, 'Privileges in action for libel', would ever be available in an action for invasion of privacy, the policy considerations underlying and embodied in section 235 of the Domestic Relations Law render section 74 unavailable in any suit based upon a report of a matrimonial action in which the disclosure of information is forbidden except by court order." 27 N.Y.2d at 18, 261 N.E.2d at 256, 313 N.Y.S.2d at 110-11 (emphasis deleted & footnote omitted). The court also granted the plaintiff's motion to strike the defense of truth as it applied to the cause of action in invasion of privacy. The Chief Judge reasoned that "[s]ince . . . injury may result even if the material published is entirely accurate, it follows that truth is irrelevant to a charge of invasion of privacy." Id. at 19, 261 N.E.2d at 256, 313 N.Y.S.2d at 111 (footnote omitted).

38. 27 N.Y.2d at 15-16, 261 N.E.2d at 254, 313 N.Y.S.2d at 108-09.

39. Id. at 16, 261 N.E.2d at 254, 313 N.Y.S.2d at 109.

effect and to be fully respected."[40] The court apparently reasoned that the Governor could not have intended the bill to expand the privilege, because such an expansion would remove the threat of tort liability, and thus a "weakening" of the statutory secrecy provisions would inevitably result.[41] However, in regarding Governor Harriman's memorandum as the "only authoritative indication of the Legislature's design,"[42] the majority disregarded the veto message written by Governor Dewey which disapproved an identical bill four years earlier for fear that it would, in effect, reverse the *Stevenson* decision.[43] Nevertheless, the court found no intention on the part of the Legislature to extend the privilege to include all nonpublic trials. Rather, "[b]y deleting the word, 'public,' the Legislature was merely extending the privilege to certain quasi-judicial and nonjudicial proceedings—such as those conducted by administrative agencies—which are not generally considered to be 'public' . . . ."[44]

In his dissenting opinion, Judge Breitel expressed his view that the purpose of the amendment was to extend the privilege to include the report of all pro-

40. 1956 N.Y. Legis. Annual 495; see 27 N.Y.2d at 17, 261 N.E.2d at 255, 313 N.Y.S.2d at 109. The entire memorandum is reprinted in an appendix to the Shiles decision. Id. at 24, 261 N.E.2d at 259, 313 N.Y.S.2d at 115-16.

41. "[S]ection 74 of the Civil Rights Law does not afford a party a license to destroy by indirection the salutary protection afforded by section 235 of the Domestic Relations Law." 27 N.Y.2d at 18, 261 N.E.2d at 255-56, 313 N.Y.S.2d at 110. Judge Breitel interpreted the Harriman memorandum quite differently in his dissent. See text accompanying notes 48 & 49 infra.

42. Id. at 16, 261 N.E.2d at 254, 313 N.Y.S.2d at 109.

43. 1952 N.Y. Legis. Annual 381-82. A copy of Governor Dewey's memorandum appears in the Appendix to the Shiles decision. 27 N.Y.2d at 22-23, 261 N.E.2d at 258-59, 313 N.Y.S.2d at 114-15. The court cited Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884 (1950), to support its contention that Governor Harriman's memorandum was "the only significant legislative history in this case." 27 N.Y.2d at 17, 261 N.E.2d at 255, 313 N.Y.S.2d at 109. However, Teeval indicated that a governor performs a legislative function by vetoing legislation as well as by approving it. 301 N.Y. at 362, 93 N.E.2d at 890. Therefore, according to the Teeval reasoning, the Shiles court should have considered Governor Dewey's earlier veto of an identical bill to be "significant" legislative history. "The governor's action in approving or vetoing a bill constitutes a part of the legislative process, and therefore the action of the governor upon a bill may be considered in determining legislative intent." 2 J. Sutherland, Statutes and Statutory Construction § 5004, at 488-89 (3d ed. 1943) (footnote omitted).

44. 27 N.Y.2d at 17, 261 N.E.2d at 255, 313 N.Y.S.2d at 110. The only authority referred to by the court in this regard was the case of Wiener v. Wientraub, 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968). There it was held that the privilege afforded by section 74 of the Civil Rights Law applied to the report of a proceeding before the Grievance Committee of the New York City Bar Association. Id. at 331-32, 239 N.E.2d at 540-41, 292 N.Y.S.2d at 668-69. However, the Wiener decision, although decided subsequent to the 1956 amendment, made no attempt to examine the legislative purpose behind the amendment. Moreover, the Shiles court's failure to point to legislative history indicating that the amendment was designed to include only "quasi-judicial and nonjudicial proceedings" further weakens its position.

ceedings, regardless of their nonpublic nature.[45] In this regard, the minority considered Governor Dewey's 1952 memorandum vetoing the earlier bill as a valid indication of legislative intent.[46] In addition, the dissent was influenced by a compilation of legislative history, containing messages from diverse legal authorities requesting that Governor Harriman veto the 1956 bill for the same reason.[47] Moreover, Judge Breitel, in disagreeing with the majority's interpretation of Governor Harriman's approval memorandum, pointed out that in his memorandum Governor Harriman "did not disagree with what Governor Dewey . . . had viewed as the effect of the earlier identical proposed legislation . . . ."[48] Nevertheless, Governor Harriman approved the bill with the expectation that "the statutory secrecy surrounding selected judical [*sic*] proceedings, would [of itself] prevent undesirable publication."[49] According to the minority, the fact that this expectation had not been fulfilled in no way detracted from the "patent and uniformly consistent legislative history."[50] Judge Breitel considered these documents persuasive but redundant "in the face of the plain statutory language."[51] The dissenting opinion concluded with the implication that the majority had overstepped its judicial function: "The result, however unfortunate it may be regarded, may not justify contradiction of the legislative command."[52]

Thus, in the absence of a clearer statement by the New York Legislature, the application of the privilege of a fair and true report of a judicial proceeding remains virtually unchanged from the time of the *Danziger* and *Stevenson* decisions, despite the 1956 amendment to the statute. The extension of the privilege to include quasi-judicial and nonjudicial hearings appears to be the only result of the amendment. Presumably, the publication of a record from any of the proceedings in which secrecy is statutorily maintained,[53] will remain actionable if defamatory. The fact that Governor Harriman's memorandum and the *Danziger* case both made reference to secrecy provisions other than those governing matrimonial actions,[54] indicates that the court may apply similar rules to other nonpublic proceedings. Although exception might be

45. 27 N.Y.2d at 20, 261 N.E.2d at 257, 313 N.Y.S.2d at 112. Judges Scileppi and Jasen concurred in Judge Breitel's dissenting opinion.

46. Id.; see 1952 N.Y. Legis. Annual 381.

47. 27 N.Y.2d at 20, 261 N.E.2d at 257, 313 N.Y.S.2d at 112. These messages are compiled in a bill jacket collection available at the New York State Library in Albany. 1956 Bill Jacket Collection ch. 891. Among the memoranda in the compilation are those of the Attorney General, id. at 14, the Association of the Bar of the City of New York, id. at 5, and the Executive Secretary and Director of Research of the Law Revision Commission, id. at 8.

48. 27 N.Y.2d at 20, 261 N.E.2d at 256-57, 313 N.Y.S.2d at 112.

49. Id., 261 N.E.2d at 257, 313 N.Y.S.2d at 112 (footnote omitted).

50. Id. at 22, 261 N.E.2d at 258, 313 N.Y.S.2d at 113.

51. Id.

52. Id.

53. See note 18 supra.

54. 304 N.Y. at 249, 107 N.E.2d at 65; 1956 Legis. Annual 494-95.

taken to the court's reasoning in reaching its conclusion,[55] it is difficult to fault the public policy that motivated it. Society would have obtained little benefit from the increase in scandalous news stories and injured reputations which would have inevitably followed an expansion of the privilege.

55. See notes 43 & 44 supra.