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Case Notes

CASE NOTES

Administrative Law—Immigration and Naturalization Service—Service Held Estopped From Denying Preference Classification.—Applicant, Gestuvo, was a Philippine citizen who had sought to immigrate to the United States as a preference immigrant.[1] The necessary labor certificate was granted,[2] and shortly thereafter the Immigration and Naturalization Service approved Gestuvo's preference classification. Before he had learned of that approval, he obtained, and entered the United States with a nonimmigrant visitor's visa.[3] After arrival in the United States, having learned of the approval of his petition, Gestuvo applied for adjustment of his status to that of permanent resident. However, because more than one year had passed since the date of labor certification, Gestuvo was required to petition for revalidation of the Service's approval of his preference classification.[4] The request was denied by the

1. With respect to Eastern Hemisphere aliens (see 8 U.S.C. §§ 1101(a)(27), 1151(a) (1970)), a system of priorities has been established consisting of eight basic preference categories. 8 U.S.C. § 1153(a) (1970). The appellant sought classification as a third preference alien as a member of the "banking profession." The section provides that "[v]isas shall next be made available, in a number not to exceed . . . [17,000], to qualified immigrants who are members of the professions . . . ." 8 U.S.C. § 1153(a)(3) (1970); see 8 C.F.R. § 204.1(c)-(d) (1971); see also Hamburg-American Line v. United States, 65 F.2d 369 (2d Cir. 1933), aff'd, 291 U.S. 420 (1934), which held that regulations promulgated by the Immigration and Naturalization Service pursuant to the immigration laws, and not in conflict with federal law, have the force and effect of law.

2. The certification was issued pursuant to 8 U.S.C. § 1182(a)(14) (1970), which provides:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . .

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor had determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

See 8 C.F.R. § 212.8 (1971) which parallels this section.

3. A nonimmigrant alien is defined generally at 8 U.S.C. § 1101(a)(15) (1970). Of particular relevance here is subsection (B) which defines a nonimmigrant alien as "an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B) (1970).

4. 8 C.F.R. § 204.4(c) (1971); 8 U.S.C. § 1154(e) (1970); see Vilos, 12 I. & N. Dec. 61 (1967), where it was held that what is now 8 C.F.R. § 205 (1971) was "sufficiently broad to encompass an alien . . . who is already in the United States . . ." (12 I. & N. Dec. at 61), thereby precluding the argument that the Service lacked the statutory power to revoke.

Service on the ground that Gestuvo lacked the intent to pursue his profession.[5] Reviewing that decision, the regional commissioner held that the preference had been improperly granted in the first instance, and so dismissed the petition.[6] Upon appeal, the United States District Court for the Central District of California reversed the Immigration Service's denial of preference classification on the ground that applicant's detrimental reliance on what may have been an inaccurate ruling by the Service was sufficient to work an estoppel, at least since there would be no detrimental effect on national policy. *Gestuvo v. Immigration and Naturalization Service, District Director*, 337 F. Supp. 1093 (C.D. Cal. 1971).

The Immigration and Nationality Act of 1953,[7] popularly known as the McCarren-Walter Act, charges the Attorney General with enforcement of the immigration laws.[8] His responsibilities thereunder are discharged through the Immigration and Naturalization Service, a bureau of the Department of Justice. The majority of individuals deal with the Service through its district offices, the directors of which have primary authority to grant or deny many of the applications submitted.[9] Decisions to expel or exclude particular aliens are reviewable within the Service on several levels,[10] and, statutorily since 1961, by the federal courts.[11]

Traditionally, courts have assumed a reserved role in the review of immigration decisions.[12] Indeed, their profile in this area is noticeably lower than that

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5. See Semerjian, 11 I. & N. Dec. 751 (1966) where it was held that the phrase "for the purpose of performing" in what is now 8 U.S.C. § 1182(a)(14) (1970), clearly indicates that an immigrant alien within that section "must establish a bona fide intent to engage immediately or in the foreseeable future in his profession or a related field." 11 I. & N. Dec. at 753 (italics omitted).

6. 8 U.S.C. § 1154(e) (1970) provides in part: "Nothing in this section shall be construed to entitle an immigrant, in behalf of whom a petition under this section is approved, to enter the United States as a preference immigrant . . . if upon his arrival . . . in the United States he is found not to be entitled to such classification."

7. 8 U.S.C. §§ 1101-1157 (1970).

8. Id. § 1103(a).

9. 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.9c (rev. ed. 1971) [hereinafter cited by volume as Gordon & Rosenfield].

10. See 8 C.F.R. §§ 3.1-.8 (1970); 11 Gordon & Rosenfield §§ 1.9d-1.10h; Practicing Law Institute, Immigration and Naturalization Institute 377-84 (Address by Professor Gordon) (Commercial Law and Practice Transcript Series No. 3, 1971) [hereinafter cited as Address by Professor Gordon]. But see Rosenfield, Necessary Administrative Reforms in the Immigration and Nationality Act of 1952, 27 Fordham L. Rev. 145 (1958); Rosenfield, Consular Non-Reviewability: A Case Study in Administrative Absolutism, 41 A.B.A.J. 1109 (1955).

11. See 8 U.S.C. § 1105a (1970). For a discussion of the legislative intent of this section see 1961 United States Code Cong. & Admin. News 2950; see K. Davis, Administrative Law Treatise § 23.03, at 795-99 (Supp. 1970) [hereinafter cited by volume as Davis]. Prior to the enactment of this section, actions of the Service were reviewable by the courts (see Ceballos v. Shaughnessy, 352 U.S. 599 (1957)), though both the procedures and scope of review were more circumscribed. See note 55 infra.

12. Compare, e.g., Heikkila v. Barber, 345 U.S. 229 (1953) and Fok Yung Yo v. United

assumed in reviewing other administrative actions.[13] This general reticence has been due in part to recognition by the courts of a more or less exclusive power in Congress and the executive to control immigration—a theory with the clear imprimatur of international law.[14] The Supreme Court, for example, has pointedly discouraged judicial entanglement:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. . . . [N]othing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress.[15]

Implicit in such a statement, however, is the notion that findings of the Service *are* subject to judicial review if there has been abuse of discretion or lack of basic fairness. This view has often been expressed by the courts.[16] Today, notes one commentator, "[v]irtually every immigration determination is . . . subject to . . . limited judicial review . . . ."[17]

In several instances Congress has directed the Attorney General to exercise discretion,[18] as for example, where a petitioner seeks relief such as stay or suspension of deportation, or adjustment of status.[19] In terms of judicial review of immigration decisions, this discretionary element is a significant factor:

> In 80 per cent of the cases, the sole claim of the person involved . . . is a request for discretionary relief. Thus, in those cases where he is unhappy with the administrative result, what he is doing is challenging the denial of discretionary relief. . . . The general rule is that the courts will not substitute their discretion for the discretion of the agency

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States, 185 U.S. 296 (1902), with Costello v. United States, 365 U.S. 265 (1961) and McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960).

13. See generally Gordon, Finality of Immigration and Nationality Determinations—Can the Government be Estopped?, 31 U. Chi. L. Rev. 433(1964); 2 Gordon & Rosenfield § 8.2, at 8-7.

14. See Ekiu v. United States, 142 U.S. 651 (1892).

15. Harisiades v. Shaughnessy, 342 U.S. 580, 588-90 (1952) (footnote omitted). The Court drew support for this stance from such cases as United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). See cases cited at 342 U.S. 589 n.16. The Court recognized that these cases did not control its decision, yet did consider them pertinent. Id. at 589-90.

16. "The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion." United States ex rel. Adel v. Shaughnessy, 183 F.2d 371, 372 (2d Cir. 1950) (footnotes omitted); accord, Tang v. District Director, 298 F. Supp. 413 (C.D. Cal. 1969); see Jaffe, Judicial Control of Administrative Action 181-82 (1965); Comment, Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance, 115 U. Pa. L. Rev. 40 (1966).

17. 2 Gordon & Rosenfield § 8.23, at 8-126; accord, Address by Professor Gordon 404. But see 2 Gordon & Rosenfield § 8.14; Davis § 28.11 (Supp. 1970).

18. See Turcotte, 12 I. & N. Dec. 206 (1967); 2 Gordon & Rosenfield § 10.4-.5.

19. 2 Gordon & Rosenfield § 8.14, at 8-92; see 8 C.F.R. § 244.1 (1971) ("[A] special inquiry officer in his discretion may authorize the suspension of an alien's deportation . . . ."); 8 C.F.R. § 244.2 (1970); 8 C.F.R. §§ 245.1-.2 (1971).

which, on its face, sounds quite reasonable and accurate. As a matter of fact, in practice this rule is not quite as rigid as it seems.[20]

Thus, even though the discretionary nature of many immigration decisions is also taken by the courts to weigh against judicial review, and even though courts will not substitute their view for that of the Service, courts will remand when they have found what they consider to be an abuse of discretion.[21] It is important to note, however, the limited nature of such review.

Section 245 of the Immigration and Nationality Act[22] is representative of the delegation of discretionary power. That section provides that the Attorney General may adjust the status of an alien in the United States to that of permanent residence "in his discretion and under such regulations as he may prescribe . . . ."[23] Interpreting this language quite literally, the United States Court of Appeals for the Ninth Circuit has characterized the provision as granting "extraordinary" discretionary power. Yet at the same time, the court has not completely foreclosed judicial review. It has said that it would review if an appellant could sustain the burden of establishing that " 'his application . . . merit[ed] favorable consideration.' "[24] Such a statement can be read not only as an assertion of the power to review—*reviewability*—but also as a reluctance to exercise that power.

Once a court has answered in the affirmative the question of *reviewability*, it must then determine the standard to apply to the decision of the Service. The answer to this question is usually framed in terms of abuse of discretion[25] or application of an improper rule of law[26]—factors which have often led courts to reverse administrative determinations. Another principle, however, has received little attention in judicial review of immigration decisions—that of estoppel.

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20. Address by Professor Gordon 400-01; accord, United States ex rel. Adel v. Shaughnessy, 183 F.2d 371 (2d Cir. 1950); see note 16 supra.

21. See Astudillo v. I & NS, 443 F.2d 525 (9th Cir. 1971); Ameeriar v. I & NS, 438 F.2d 1028 (3d Cir. 1971), petition for cert. dismissed, 404 U.S. 801 (1972); Thomaidis v. I & NS, 431 F.2d 711 (9th Cir. 1970), cert. denied, 401 U.S. 954 (1971); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968); Massignani v. I & NS, 313 F. Supp. 251 (D. Wis. 1970), aff'd, 438 F.2d 1276 (7th Cir. 1971); Wan Ching Shek v. Esperdy, 304 F. Supp. 1086 (S.D.N.Y. 1969); 2 Gordon & Rosenfield § 8.14, at 8-93.

22. Immigration and Nationality Act of 1952, ch. 477, § 245, 66 Stat. 166, 217, as amended, 8 U.S.C. § 1255 (1970).

23. 8 U.S.C. § 1255(a) (1970).

24. Santos v. I & NS, 375 F.2d 262, 264 (9th Cir. 1967) (citing Ortiz-Prieto, 11 I. & N. Dec. 317 (1965) (emphasis omitted); In re A—, 9 I. & N. Dec. 249 (1961); In re G—, 9 I. & N. Dec. 38 (1960); what is now 8 C.F.R. § 242.17(d) (1970)); see Vosough-Kia v. District Director, 441 F.2d 545 (9th Cir. 1971); cf. Jay v. Boyd, 351 U.S. 345 (1956) (the Court characterized the Attorney General's discretionary power to suspend deportation as "unfettered." Id. at 354).

25. E.g., Dong Yup Lee v. United States, 407 F.2d 1110 (9th Cir. 1969); see Jiminez v. District Director, 441 F.2d 1149 (9th Cir. 1971) (per curiam).

26. McGrath v. Kristensen, 340 U.S. 162 (1950); Kessler v. Strecker, 307 U.S. 22

In the abstract, estoppel raises the issue of whether detrimental reliance on the government's wrongful or unconscientious representations should move, and will move, courts to estop the government from asserting a statutory or factual norm. There have been many authoritative statements to the effect that the government may not be estopped at all, not the least of which was the Supreme Court speaking in the case of *Federal Crop Insurance Company v. Merrill*.[27] In that case two brothers had applied for Federal Crop Insurance Company (FCIC) insurance for their wheat crop, fully disclosing to the FCIC's representative that the wheat was reseeded. The application was prepared by the representative and forwarded to the FCIC without disclosing that the wheat was reseeded.[28] When the crop was destroyed and the brothers attempted to collect, the FCIC refused, claiming that it had decided not to insure reseeded wheat and had duly published that decision in the Federal Register.[29] The Supreme Court of Idaho held the corporation estopped from denying the validity of the insurance contract,[30] but was reversed by the Supreme Court which said: "[R]ecovery could be had against a private insurance company. But the Corporation is not a private insurance company."[31]

Historically, the rationale for such a decision has been the theory that "the King can do no wrong."[32] Practically, the courts have considered the possibility of a mistaken administrative official binding the government to act or refrain from acting in a manner contrary to a clear statutory mandate.[33] The danger of such a possibility has, for the most part, been held to outweigh the inequity to which individual plaintiffs might occasionally be subjected.[34] However, it has been recognized of late that "[e]ven though the courts commonly assert without qualification that equitable estoppel does not apply to governmental units, and even though numerous holdings are based upon such assertions, still the number of holdings in which governmental units are estopped is substantial and growing . . . ."[35]

One of the most striking of the cases which, in effect, estopped the government

(1939); Miyagi v. Brownell, 227 F.2d 33 (D.C. Cir. 1955); see United States ex rel. Partheniades v. Shaughnessy, 146 F. Supp. 772 (S.D.N.Y. 1956).

27. 332 U.S. 380 (1947). But see Moser v. United States, 341 U.S. 41 (1951).

28. 332 U.S. at 382.

29. Id.; see Wheat Crop Ins. Regs., 10 Fed. Reg. 1586 (1945). See also 44 U.S.C. § 307 (1970).

30. Merrill v. Federal Crop Ins. Corp., 67 Idaho 196, 174 P.2d 834 (1946), rev'd, 332 U.S. 380 (1947).

31. 332 U.S. at 383. Four Justices dissented, saying: "[O]ne should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all." Id. at 387.

32. Moser v. United States, 341 U.S. 41 (1951).

33. See, e.g., Utah Power & Light Co. v. United States, 243 U.S. 389, 410 (1917); United States ex rel. Lapides v. Watkins, 165 F.2d 1017, 1019 (2d Cir. 1948); California-Pacific Utilities Co., 194 Ct. Cl. 703 (1971).

34. See, e.g., Lee v. Munroe, 11 U.S. (7 Cranch) 366, 368-69 (1813).

35. 2 Davis § 17.09, at 541.

is a Supreme Court case, *Moser v. United States*.[36] Moser was a Swiss citizen, residing in the United States, who had served in the Swiss army and held a reserve commission therein. He knew that he could avoid being drafted by submitting an application for exemption on the basis of his neutral-alien status.[37] On the other hand, he was afraid that in so doing he would forego his opportunity to become a United States citizen. He turned to the Swiss Legation which informed him that by taking the exemption he would " 'not waive [his] right to apply for American citizenship papers,' "[38] and that the final decision regarding his naturalization would " 'remain solely with the competent Naturalization Courts.' " The statute, quoted in clear and understandable terms on the application he signed, provided the contrary.[39] Without using the precise term "estoppel," the court held that Moser had not waived his right to apply for citizenship since he had sought the answer to his question from the highest available source, and since he had been thereby "lulled . . . into misconception of the legal consequences . . . ."[40]

Since the time of *Moser*, an increasing number of courts have been willing to use estoppel explicitly,[41] or in theory,[42] against the government. Fifteen years ago Professor Davis predicted that cases estopping the government represented the law of the future,[43] though then still exceptional in light of the history of the sovereign immunity doctrine.[44] The case law since that time can well be read in support of this theory.[45] In tax cases, for example, courts now seem far more willing to estop the Commissioner of Internal Revenue than they have in the past.[46] A similar trend is discernable in view of cases which have

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36. 341 U.S. 41 (1951), rev'g 182 F.2d 734 (2d Cir. 1950), rev'g 85 F. Supp. 683 (E.D.N.Y. 1949).

37. See Selective Service Act of 1940, § 3(a), ch. 720, 54 Stat. 885 (expired Mar 31, 1947). The applicable section is now 50 U.S.C. § 454(a) (1970).

38. 341 U.S. at 44.

39. Id. Previously, the Swiss government had objected to the statutory language as a violation of the 1850 Treaty between Switzerland and the United States, and a revised form for Swiss nationals had been prepared, although Moser executed the earlier form anyway. Id.

40. Id. at 46.

41. See, e.g., Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); Nager Elec. Co. v. United States, 396 F.2d 977 (Ct. Cl. 1968); Simmons v. United States, 308 F.2d 938, 945 (5th Cir. 1962) (Jones, J., dissenting).

42. See Moldoveanu v. Dulles, 168 F. Supp. 1, 7 (E.D. Mich. 1958); Lee Hong v. Acheson, 110 F. Supp. 60 (N.D. Cal. 1953); cf. In re S—, 8 I. & N. Dec. 226 (1958). See generally United States v. Anastasio, 226 F.2d 912 (3d Cir. 1955), cert. denied, 351 U.S. 931 (1956).

43. 2 Davis § 17.09, at 541.

44. Id.

45. See, e.g., notes 67-76 infra and accompanying text.

46. Compare, e.g., Walsonavich v. United States, 335 F.2d 96, 101 (3d Cir. 1964), with Couzens v. Commissioner, 11 B.T.A. 1040, 1049-51 (1928). See Manning, The Application of the Doctrine of Estoppel Against the Government in Federal Tax Cases, 30 N.C.L. Rev. 356 (1952).

estopped the Secretary of the Interior,[47] the Selective Service,[48] the FHA[49] and the FTC.[50]

However, efforts to use the theory of estoppel against the Immigration and Naturalization Service[51] have, with the possible exception of the *Moser* case,[52] proven unsuccessful.[53] One of the first immigration cases to examine the theory of estoppel—though not in explicit terms—was *Pearson v. Williams*.[54] There the Court granted certiorari to review a denial of a writ of habeas corpus.[55] The relators sought to avoid deportation on the ground that the Commissioner of Immigration of the Port of New York, acting under the authority of the Secretary of Commerce, had previously examined them and found they were entitled to land.[56] The Court stated that the "United States admits aliens conditionally, and preserves that condition notwithstanding a preliminary decision in their favor by a board which it provides."[57]

In 1948 the United States Court of Appeals for the Second Circuit rejected the applicability of the estoppel theory as against the Immigration and Naturalization Service.[58] Judge Chase, writing the opinion of the court in *United States ex rel. Lapides v. Watkins*, said that "no United States consul has any power to waive the provisions of the immigration laws. . . . The issuance of the certificate or any statements made by the consul in connection therewith could not create an estoppel against the Government."[59]

The United States District Court for the District of Columbia rejected the

47. Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); Seaton v. Texas Co., 256 F.2d 718 (D.C. Cir. 1958); Chapman v. El Paso Natural Gas Co., 204 F.2d 46 (D.C. Cir. 1953).

48. Cf. United States v. Hayden, 445 F.2d 1365 (9th Cir. 1971).

49. E.g., United States v. Fox Lake State Bank, 366 F.2d 962, 965-66 (7th Cir. 1966); Krupp v. FHA, 285 F.2d 833, 834, 836 (1st Cir. 1961).

50. E.g., United States v. American Greetings Corp., 168 F. Supp. 45 (N.D. Ohio 1958), aff'd, 272 F.2d 945 (6th Cir. 1959).

51. See, e.g., notes 54-65 infra and accompanying text.

52. 341 U.S. 41 (1951). Actually, there were two elements of the Moser decision which distinguished it factually from the decisions referred to. Note 49 supra. First there was a treaty with Switzerland which the Court considered. There was also the fact that the issue was really one of "citizenship" and not entry into or deportation from the United States. See Address of Professor Gordon at 402-03.

53. See notes 52-62 infra and accompanying text.

54. 202 U.S. 281 (1906).

55. Id. at 282. The writ of habeas corpus has always played an important role in terms of reviewability of decisions under the immigration laws. For a discussion of its particular relevance see Address of Professor Gordon at 397; 2 Gordon & Rosenfield §§ 8.6-.7.

56. 202 U.S. at 282.

57. Id. at 284. The court goes on to cite the Japanese Immigration Case, 189 U.S. 86 (1903); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Ekiu v. United States, 142 U.S. 651 (1892).

58. United States ex rel. Lapides v. Watkins, 165 F.2d 1017 (2d Cir. 1948). The relator unsuccessfully attempted to use a "certificate of identity" issued by the American Consulate General in Palestine, to attack the Immigration Service's contesting of his citizenship. Id. at 1017-18.

59. Id. at 1019 (citation omitted).

applicability of the estoppel theory in *Mannerfrid v. Brownell*,[60] a case factually similar in several respects to *Moser*. In *Mannerfrid*, review was sought of a deportation order on the ground that a statement by a federal court in a prior naturalization proceeding—to the effect that appellant had lawfully been admitted for permanent residence[61]—would act to estop the government from contesting the legality of his entry.[62] The district court stated:

> While the inequities of this case are patent, the law as it now stands provides no relief. . . . [A] redetermination of plaintiff's . . . admission cannot be held to have been foreclosed . . . .
>
> In contemplation of law, if plaintiff was not entitled to be admitted legally . . . no law of the case or estoppel can be asserted as a defense against the sovereignty of the United States.[63]

The United States Court of Appeals for the District of Columbia Circuit, noting the district court's regretful rejection of the estoppel theory, affirmed, calling the decision of the lower court a clear and concise memorandum of the law.[64]

At the same time the courts were refusing to apply the theory of estoppel to the Immigration and Naturalization Service, they were continually liberalizing their posture towards *reviewability*.[65] This trend, vis-à-vis several obviously strained decisions where the courts seemed extremely close to breaking with precedent by applying estoppel to the Service,[66] indicated that the time was drawing near when the theory would, in fact, be applied.

The indications proved correct when, in 1971, the United States District Court for the Central District of California, in the present case,[67] became the first court explicitly to estop the Service. According to the court, for the Service to hold that Gestuvo was ineligible for the preference classification in 1970, even though he had been eligible two years earlier, and even though the employment experience he had gained since leaving the Philippines was comparable to that which formed the basis of his original application, "would be so arbitrary as to constitute an abuse of discretion."[68] The court, however, was willing to relegate this rationale to the subjunctive, at least for the purpose of the instant appeal, in light of the regional commissioner's "contention" that Gestuvo's petition was "not approvable in the first instance."[69] Instead, the issue of estoppel was faced squarely.

Great weight was given to an earlier decision by the United States Court

60. 145 F. Supp. 55 (D.D.C.), aff'd, 238 F.2d 32 (D.C. Cir. 1956).
61. Id. at 56.
62. Id.
63. Id.
64. 238 F.2d at 34.
65. See 4 Davis § 28.11; Gordon, Finality of Immigration and Nationality Determinations—Can the Government be Estopped?, 31 U. Chi. L. Rev. 433 (1964).
66. See cases cited at note 42 supra.
67. Gestuvo v. I & NS, 337 F. Supp. 1093 (C.D. Cal. 1971).
68. Id. at 1097.
69. Id.

of Appeals for the Ninth Circuit, *Brandt v. Hickel*,[70] which estopped the Secretary of the Interior from denying appellant's priority over several other gas lease offers. The *Gestuvo* court apparently focused on the following language: "We conclude that the collateral estoppel doctrine can properly be applied in this situation where the erroneous advice was in the form of a crucial misstatement in an official decision. . . . [A]dministrative regularity must sometimes yield to basic notions of fairness."[71] The court interpreted this language to mean that estoppel could be applied "even if the government is acting in a capacity that has traditionally been described as sovereign . . . ."[72]

The test enunciated in *Gestuvo* consists of several elements: wrongful conduct by the government; detrimental reliance on that conduct (to the extent that a serious injustice would result if estoppel were not to be applied); and no serious damage to national policy or public interest by application of the estoppel theory.[73] When applied to the Service's conduct towards Gestuvo, the presence of these elements was deemed striking.[74]

It is difficult to say what the effect of the *Gestuvo* decision will be. There is no doubt that the decision will not completely harmonize the disagreement that has heretofore existed. Yet it does represent the trend of case law, and at the very least will preclude a court's dismissal of the estoppel argument on the grounds that there are "*no* cases in which the government has been held to be estopped under the Immigration Laws."[75] Furthermore, it is encouraging to note the weight given to the argument in favor of applicability by an open-minded court. Objectively, and equitably, the argument that the government *can* be held "to the same standards of rectitude and conscientiousness to which the government itself seeks to hold the private parties with whom it deals,"[76] is indeed compelling.

70. 427 F.2d 53 (9th Cir. 1970). Other courts have estopped the Secretary of the Interior. See note 47 supra and accompanying text.

71. Id. at 57.

72. 337 F. Supp. at 1099. The Court also felt that in such a case the fact that the official whose actions formed the basis of the estoppel exceeded his authority would not act to bar application of the theory. Id.

73. "The national interest lies in a conscientious review by the Service of the applications that are submitted to it . . . not . . . in sacrificing a man's efforts and hopes to a mechanical and inhuman application of administrative regulations. People like Gestuvo rely on the Service to reach accurate rulings on which they can base their plans. It was the Service that led Gestuvo down the path toward permanent residence. Having done so, it should not have shoved him into a ditch along the way." Id. at 1102-03.

74. Id. at 1101-02.

75. Tang v. District Director, 298 F. Supp. 413, 420 (C.D. Cal. 1969) (emphasis added).

76. Gestuvo v. I & NS, 337 F. Supp. 1093, 1098 (C.D. Cal. 1971).

Constitutional Law—Criminal Procedure—Post-Indictment Photographic Lineup Requires Presence of Defendant's Counsel.—Defendant was indicted for the armed robbery of a bank. After his indictment but without notice to, or presence of, defense counsel, the government presented photographs of five individuals, including defendant Ash, to witnesses of the robbery. The trial court, over the objections of defendant's counsel, allowed the jury to view these photographs. The defendant was subsequently convicted.[1] On appeal, the United States Court of Appeals for the District of Columbia reversed and remanded. The court held that the defendant's sixth amendment right to counsel[2] had been violated when the witnesses examined the photographs without the presence of defendant's counsel[3] and that the trial court had committed prejudicial error in allowing the prosecutor to show the photographs to the jury. *United States v. Ash*, 461 F.2d 92 (1972), *cert. granted*, 41 U.S.L.W. 3007 (U.S. July 11, 1972) (No. 71-1255).

Since the 1932 decision in *Powell v. Alabama*[4] there has been a marked judicial trend toward the expansion of the sixth amendment right to counsel.[5] In *Powell*, the Supreme Court decided that a defendant charged with a capital offense and unable to employ counsel or adequately make his own defense must be *effectively* assigned counsel during arraignment.[6] Six years later the Court held that the sixth amendment required the furnishing of counsel by the federal government to federal indigent defendants.[7] *Betts v. Brady*[8] temporarily halted this trend by holding that the sixth amendment applied only to trials in the federal courts. *Betts*, however, was overruled in *Gideon v. Wainwright* which held that the due process clause of the fourteenth amendment incorporated the sixth amendment right to counsel and thereby extended this constitutional protection to defendants in state courts.[9]

The test for determining when this right to counsel attached was formulated

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1. Ash v. United States, 461 F.2d 92 (D.C. Cir. 1972), cert. granted, 41 U.S.L.W. 3007 (U.S. July 11, 1972) (No. 71-1255).

2. U.S. Const. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." See notes 4-9 infra and accompanying text.

3. According to the court the photographic presentation constituted a "critical stage" of the proceedings requiring the presence of defense counsel. United States v. Ash, 461 F.2d 92, 99 (D.C. Cir. 1972), cert. granted, 41 U.S.L.W. 3007 (U.S. July 11, 1972) (No. 71-1255). See notes 10-14 infra and accompanying text.

4. 287 U.S. 45 (1932). Powell was one of seven persons charged with forcible rape, a capital crime in Alabama.

5. See United States v. Bennett, 409 F.2d 888, 899 (2d Cir. 1969), cert. denied, 366 U.S. 852 (1969); 43 N.Y.U.L. Rev. 1019 (1968); 21 Syracuse L. Rev. 1235 (1970).

6. The Court found that the appointment by the trial judge of "all the members of the bar for the purpose of arraigning the defendants . . ." did not constitute an effective appointment. 287 U.S. at 53.

7. Johnson v. Zerbst, 304 U.S. 458 (1938), wherein the Court remanded to determine if defendant had completely and intelligently waived his right to counsel. Id. at 469.

8. 316 U.S. 455 (1942).

9. 372 U.S. 335 (1963). See generally A. Lewis, Gideon's Trumpet (1964).

in *Hamilton v. Alabama*.[10] In *Hamilton*, the Court found that under Alabama law an arraignment constituted a "critical stage" of the proceedings and thus required the presence of defense counsel.[11] According to the Court, "[a]vailable defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes."[12] The "critical stage" criteria laid down in *Hamilton* was embellished in *Massiah v. United States*[13] which held that incriminating statements made by the defendant and obtained surreptitiously by federal agents could not be used against him as evidence since the defendant had been denied the assistance of counsel.[14] In *Escobedo v. Illinois*,[15] the Court held that, in view of its accusatorial nature, the pre-indictment interrogation constituted a "critical stage" requiring the presence of the defendant's counsel.[16]

In 1967 the Supreme Court decided a trilogy of cases, *United States v. Wade*,[17] *Gilbert v. California*,[18] and *Stovall v. Denno*,[19] which dealt with a defendant's right to counsel at pre-trial identification proceedings. In *Wade*, the defendant was accused of robbing a bank. Fifteen days after the appointment of defense counsel authorities arranged for two witnesses to view a lineup of Wade and six others. Since notice of the lineup was not given to Wade's counsel, he did not appear. The Court, concerned with the vagaries of eyewitness identification[20] and the "grave potential for prejudice . . . [at] the pretrial lineup,"[21] concluded that the lineup constituted a "critical stage" requiring the presence

10. 368 U.S. 52 (1961).

11. Id. at 53-54. The Court noted that in Alabama the defense of insanity had to be pleaded during the arraignment or the opportunity was lost. Id. at 53.

12. Id. at 54.

13. 377 U.S. 201 (1964). See notes 70-71, 83 infra and accompanying text.

14. Id. at 206. The Court was careful to note that the incriminating words were procured by the federal agents after the defendant had already been indicted. Id. at 201. See also Kirby v. Illinois, 406 U.S. 682 (1972); White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

15. 378 U.S. 478 (1964).

16. Id. at 484, 492. For a further development of Escobedo see 51 A.B.A.J. 175 (1965); 64 Mich. L. Rev. 832 (1966); 19 Rutgers L. Rev. 111 (1964); 40 St. John's L. Rev. 51 (1965); 32 U. Chi. L. Rev. 560 (1965).

17. 388 U.S. 218 (1967).

18. 388 U.S. 263 (1967).

19. 388 U.S. 293 (1967).

20. 388 U.S. at 235. Commentators have long been critical of eyewitness identifications. See, e.g., F. Frankfurter, The Case of Sacco and Vanzetti 30 (1927); P. Wall, Eye-Witness Identification in Criminal Cases 27 (1965); 3 J. Wigmore, Evidence § 786a (3d ed. 1940). See also Borchard, Convicting the Innocent (1932). According to the court in Wade, one means of minimizing the dangers inherent in eyewitness identification would be to implement a model statute with procedural safeguards. 388 U.S. at 236 n.26.

21. 388 U.S. at 236. See Williams, Identification Parades, 1955 Crim. L. Rev. 525; Williams & Hammelmann, Identification Parades (pts. I-II) 1963 Crim. L. Rev. 479-490, 545-555. The Court was concerned that such prejudice "may not be capable of reconstruction at trial . . . ." 388 U.S. at 236. See Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Colum. L. Rev. 94, 98-99 (1966).

of defense counsel.[22] However, the Court did not automatically exclude in-court identifications of the accused by the witnesses provided that the prosecution could establish by clear and convincing evidence that the identification had an independent basis untainted by the illegal lineup.[23]

In *Gilbert*, the second case in the trilogy, the Court held that the taking of a handwriting exemplar did not constitute a "critical stage" of the proceeding and, therefore, did not require the presence of defendant's counsel.[24] According to the court the possibility of taking an unrepresentative exemplar constituted a "minimal risk" which was adequately compensated for by the adversary process at trial.[25] Although denying defendant's motion for the exclusion of the exemplars, the court did adopt a "per se exclusionary rule"[26] as to in-court testimony of identifications of the accused made at an illegal, *i.e.* uncounseled, lineup.

The final case in the trilogy, *Stovall*, involved a "show up"[27] without the presence of the defendant's counsel. In upholding the in-court identification of the defendant, the Court ruled that *Wade* was not to be applied retroactively.[28] The Court acknowledged the possibility of a denial of due process of law because of the suggestive nature of the "show up,"[29] but found no constitutional infringement of defendant's rights under the "totality of the circumstances."[30]

Wade, *Gilbert*, and *Stovall* all involved the right to counsel at corporeal identifications and the Supreme Court has never directly considered the question of whether the sixth amendment right to counsel extends to photographic identifica-

22. 388 U.S. at 237. Interestingly, the court found that the analysis of defendant's "blood sample, clothing, hair, and the like" did not constitute "critical stages," since they could be adequately challenged at trial. Id. at 227-28.

23. Id. at 239-41. The Court applied the exclusionary test set out in Wong Sun v. United States, 371 U.S. 471 (1963), i.e., "[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 388 U.S. at 241. The Court in Wong Sun relied on Maguire, Evidence of Guilt 221 (1959), in formulating its exclusionary test. See also Hoffa v. United States, 385 U.S. 293, 309 (1966).

24. 388 U.S. at 266-67. See note 75 infra and accompanying text.

25. Id at 267. "Thus, 'the accused has the opportunity for a meaningful confrontation . . . at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts.'" Id., citing Wade, 388 U.S. at 227-28. See note 22 supra.

26. 388 U.S. at 273. "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." Id. (italics omitted).

27. 388 U.S. at 295. In a "show up" the accused is presented face-to-face with a witness or victim. See P. Wall, supra note 20, at 27. This type of identification is particularly susceptible to abuse. See United States v. Wade, 388 U.S. at 234; Hall & Mueller, Criminal Law and Procedure 910 (2d ed. 1965); Inbau, Self-Incrimination 30-31 (1950).

28. 388 U.S. at 296, citing Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966); and, Linkletter v. Walker, 381 U.S. 618 (1965). But see 43 N.Y.U.L. Rev. 1019, 1026 (1968).

29. 388 U.S. at 302.

30. Id. The Court emphasized that the "showing of Stovall to [the injured victim] Mrs. Behrendt in an immediate hospital confrontation was imperative." Id.

tions.[31] A majority of the circuit courts[32] have considered the problem and have concluded that the right to counsel does not extend to pre-trial photographic identifications.[33] The United States Court of Appeals for the District of Columbia departed from this majority view in *United States v. Ash*.[34]

Ash was indicted for the robbery of a bank. Although there were four witnesses to the robbery none was able to give the police a facial description of the gunman who had worn a stocking mask.[35] Five months after the crime, these witnesses were each shown a group of black and white photographs.[36] All selected the photograph of Ash but none identified him positively.[37] Nearly three years after the robbery,[38] and only one day prior to trial, the witnesses were shown five color photographs from which they again identified Ash as the rob-

31. The Supreme Court has, however, recognized photographic identifications as an effective law enforcement technique. See, e.g., Simmons v. United States, 390 U.S. 377 (1968), which involved a pre-arrest, pre-indictment photographic display at which defendant's counsel was not present. The Government did not introduce the photographs at trial but relied upon in-court identification by witnesses who had seen the photographs. In Simmons, however, the defendant did not base his appeal on sixth amendment grounds but upon a fifth amendment claim which the court found to be without merit. Id. at 382-83. See also United States v. Robinson, 432 F.2d 1348, 1350 (D.C. Cir. 1970).

32. See, e.g., United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Collins, 416 F.2d 696 (4th Cir. 1969), cert. denied, 396 U.S. 1025 (1970); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969), cert. denied, 396 U.S. 970 (1970); United States v. Bennett, 409 F.2d 888 (2d Cir.), cert. denied, 396 U.S. 852 (1969); United States v. Robinson, 406 F.2d 64 (7th Cir.), cert. denied, 395 U.S. 926 (1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), cert. denied, 394 U.S. 908 (1969). See also People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971); Baldwin v. State, 5 Md. App. 22, 245 A.2d 98 (1967). Contra, United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970), overruled in part by United States ex rel. Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972). For a critical discussion of the majority position see 43 N.Y.U.L. Rev. 1019 (1968); 21 Syracuse L. Rev. 1235 (1970).

33. In United States v. Ballard, 423 F.2d 127 (5th Cir. 1970), the court followed the Tenth, Seventh, and Second Circuits in holding that ". . . Gilbert and Wade [do not] . . . require [that] counsel for an accused be present at the time of any out-of-court photographic identification, regardless of whether the accused is in custody or not." Id. at 131.

34. 461 F.2d 92 (D.C. Cir.), cert. granted, 41 U.S.L.W. 3007 (U.S. July 11, 1972) (No. 71-1255).

35. Id at 95-96. According to the majority, the witnesses' descriptions were given only in terms of height, weight, age and build. Compare the findings of the dissent. Id. at 131.

36. It is generally conceded that black and white photographs are less accurate than color photographs. See 43 N.Y.U.L. Rev. 1019 (1968); 21 Syracuse L. Rev. 1235, 1238 n.30 (1970). Compare W. Ringel, Identification and Police Line-ups 51 (1968).

37. 461 F.2d at 95. "Asked if any of them was positive, he [FBI agent Markowvich] cited Mr. Taylor—who had seen the gunman before he donned his mask—and testified that 'Mr. Taylor said that to the best of his belief' Ash was the gunman 'but he could say positively if he could see him in person.'" Id.

38. The court explained the long delay by referring to the absence of government counsel on a number of occasions and noted that the appellant had changed counsel "no fewer than four times." Id. at 95 n.3.

ber.[39] At a pre-trial hearing testimony concerning these photographic identifications was given by FBI agents who were present at the interviews.[40] One of the witnesses also testified, but stated that she could not positively identify anyone.[41] At trial the court, over defense counsel's objections,[42] admitted the color photographs into evidence and allowed the four witnesses to make in-court identifications of the defendant.[43] The court found that the identifications were "based on observation of the suspect other than the intervening photographic presentation."[44] These in-court identifications were crucial to Ash's conviction since the only other evidence in the case was the testimony of an informer who was under indictment for other offenses.[45]

Ash appealed his conviction, basing his arguments on both fifth[46] and sixth[47] amendment grounds. Ash claimed that his fifth amendment right to due process had been violated because the pre-trial identifications had tainted the in-court identifications by the witnesses.[48] Though the court was receptive to this claim, finding "at the very least strong elements of suggestiveness,"[49] it did not base its holding on the fifth amendment.[50]

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39. The fourth witness was shown the same photographs on the morning of the trial but was unable to make an identification. The court noted that "[o]f the five color photographs, only appellant's and Bailey's were full-length . . . ." Id. at 96, 97. See note 48 infra and accompanying text.

40. Id. at 95.

41. Id. The dissent states that there were two witnesses who testified. Id. at 121 n.60.

42. Id. at 97 n.6. Circuit Judge Wilkey, in his lengthy dissenting opinion, maintained that the majority erred in finding that the objection of Ash's counsel to the admission of the color photographs was not waived. Id. at 124.

43. Id. at 96.

44. Id. at 96 n.5.

45. Id. at 95. The court noted that a U.S. Attorney had indicated to McFarland, the informer, that he would testify before the parole board in McFarland's behalf. McFarland had been before the grand jury with regard to five separate offenses and had not been indicted on any of them, including one in which he had confessed guilt. Id. at 97 n.7.

46. U.S. Const. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

47. See note 2 supra.

48. 461 F.2d at 97. A showing of denial of due process on this ground requires that "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). See Stovall v. Denno, 388 U.S. 293 (1967); Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966); note 39 supra.

49. 461 F.2d at 98. The court noted that the color photographs showed Ash and Bailey as tall and slender, while the other three men whose photographs were used had stocky builds. According to the court this point was significant since "the only description at the time of arrest was in terms of being tall and . . . thin . . . ." Id. According to the dissent, this caused the photographs to be impermissibly suggestive but still admissible since there had been an adequate showing of independent origin for the witnesses' in-court identification. Id. at 133. (MacKinnon, J. dissenting.)

50. Id. at 98.

Instead, the majority held that the photographic presentation subsequent to Ash's arrest was a violation of his sixth amendment right to counsel since it "was like a lineup as being a critical stage of the prosecution, requiring presence of counsel . . . ."[51] The court noted that the majority of circuit courts have found to the contrary,[52] but dismissed these precedents as "conclusionary, rather than analytical, and to some extent based on erroneous premises."[53] The only contrary decision discussed by the majority was *United States v. Bennett*[54] in which Judge Friendly had concluded that the sixth amendment was not applicable to "out-of-court proceedings where the defendant himself is not present."[55] *Bennett* reflected Judge Friendly's view that a major purpose behind the right to counsel was the protection of a defendant from errors he himself might commit if he appeared alone in court.[56] From this premise the Second Circuit concluded that the sixth amendment has no relevance to situations such as a photographic identification where the defendant himself was not physically present.[57] The majority in *Ash* found this to be too narrow a reading of the sixth amendment.[58]

Refusing to follow *Bennett*, the majority relied heavily on *United States v. Zeiler*[59] wherein the Third Circuit had held that once a defendant was taken

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51. Id. at 99. The court determined that "the dangers of mistaken identification . . . set forth in Wade are applicable . . . to photographic . . . identifications." Id. at 100. According to the court, these dangers included the possibility of suggestive influence or mistake, the difficulty of reconstructing suggestivity, and the tendency of a witness's identification, once given under these circumstances, to be frozen. Id. See United States v. Wade, 388 U.S. at 232, 233 (1967); United States v. Brown, 461 F.2d 134, 140 (D.C. Cir. 1972).

52. 461 F.2d at 99. See note 32 supra and accompanying text.

53. Id. at 101. See note 85 infra and accompanying text.

54. 409 F.2d 888 (2nd Cir.), cert. denied, 396 U.S. 852 (1969).

55. 461 F.2d at 101, citing United States v. Bennett, 409 F.2d at 899.

56. 409 F.2d at 900. See Massiah v. United States, 377 U.S. 201 (1964); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

57. 409 F.2d at 900. This view is supported in Wade where the majority found the right to counsel to attach only at a "confrontation . . . between the accused and the victim or witnesses to a crime . . . ." 388 U.S. at 228. Judge Wilkey, writing for the dissent in Ash, found that a photographic presentation, in the absence of defense counsel, did not constitute a "confrontation" within the meaning of Wade. 461 F.2d at 108.

58. 461 F.2d at 101. The court did not elaborate on this point except to say that prejudice could develop even in the absence of the defendant. Id. See note 84 infra and accompanying text.

59. 427 F.2d 1305 (3d Cir. 1970), overruled in pertinent part, United States ex rel. Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972). Zeiler was arrested for the alleged commission of eleven bank robberies as the "Commuter Bandit." While in custody, and after the appointment of counsel, but before a scheduled lineup was held, the FBI privately confronted each eyewitness with a series of photographs for identification. Zeiler was indicted and convicted of the robberies at two trials. On appeal, the court held that reversal for both trials was required since the defendant had been denied the presence of counsel at the pre-indictment photographic presentation. 427 F.2d at 1307. In reaching this deter-

into custody he was entitled to have counsel present at any subsequent photographic lineup.[60] The *Ash* court "agree[d] with *Zeiler's* analysis that the dangers of mistaken . . . identifications set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications."[61] Though the majority found *Zeiler* to be persuasive, its reliance on that case must now be viewed in light of *United States ex rel. Reed v. Anderson*[62] in which the Third Circuit repudiated its earlier position and overruled *Zeiler*.[63]

While reading *Wade* to apply to photographic as well as corporeal lineups,[64] the *Ash* court did admit that there may be a limited exception to the requirement of counsel at post-arrest photographic identifications.[65] This limited exception would only obtain in a case of special circumstances "where even the slight delay involved in the attendance of counsel or substitute counsel would not be feasible without jeopardizing the effectiveness and fairness of continuing investigation."[66] However, this special circumstances exception could not be invoked in *Ash* because of the government's unexplained failure to arrange a corporeal lineup.[67] Under the majority's reasoning this failure to stage a corporeal lineup not only prevented *Ash* from coming within the special circumstances exception[68] but also established a requirement of counsel independent of that in

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mination the court relied on United States v. Marson, 408 F.2d 644, 651 (4th Cir. 1968) (Winter, J., concurring and dissenting), cert. denied, 393 U.S. 1056 (1969). The majority in Marson found the defendants sixth amendment claim to be barred by the retroactive rule laid down in Stovall, and thus did not decide whether counsel was required at photographic presentations. 408 F.2d at 649-50. See note 27 supra and accompanying text. But see 43 N.Y.U.L. Rev. 1019, 1026 (1968).

60. 427 F.2d at 1307.

61. 461 F.2d at 100. See note 51 supra and accompanying text.

62. 461 F.2d 739 (3d Cir. 1972). Reed was argued en banc. In its opening paragraph the court announced its determination to re-examine the holding in Zeiler. Id. at 740. Thus, it appears clear that the court was dissatisfied with its analysis in that case.

63. Id. at 745. "We therefore conclude that the principles which dictated the per se exclusionary rule in Wade and Gilbert should not have been made applicable to a pretrial photographic identification as we did in Zeiler." Id. (footnote omitted), citing, inter alia, United States v. Bennett, 409 F.2d 888 (2d Cir. 1969). See notes 54-57 supra and accompanying text; accord, United States v. Conway, 415 F.2d 158 (3d Cir. 1969), decided one year prior to Zeiler.

64. 461 F.2d at 99.

65. Id. at 102.

66. Id. See Stovall v. Denno, 388 U.S. 293 (1967).

67. 461 F.2d at 102-03. See United States v. Zeiler, 427 F.2d 1305, 1308 (3d Cir. 1970); United States v. Collins, 416 F.2d 696 (4th Cir. 1969); United States v. Marson, 408 F.2d 644, 649 (4th Cir. 1968). However, there was no showing that the photographic identification procedure was undertaken with the conscious purpose of evading the requirements of Wade and Gilbert as in People v. Lawrence, 4 Cal. 3d 273, 281, 481 P.2d 212, 217, 93 Cal. Rptr. 204, 210-11 (1971) (Sullivan, J. dissenting). And, as the dissent in Ash stated, "[t]here is yet no court decision holding a lineup is constitutionally required." 461 F.2d at 114 (emphasis omitted).

68. 461 F.2d at 102.

Wade.[69] The court found that under *Massiah v. United States*[70] police authority to continue investigations "becomes subject to a constitutional obligation that precludes the use of evidence gained from [the accused] after indictment in the absence of his counsel."[71] Thus, according to the *Ash* court, both *Massiah* and *Wade* require counsel to be present at a post-indictment photographic identification.[72] Deprivation of counsel at that "critical stage" entitled Ash to a new trial at which the prosecution evidence of the pre-trial identification must be excluded.[73]

Judge Wilkey, in a lengthy dissenting opinion, concluded that the sixth amendment rationale of *Wade* was not applicable in *Ash* since the post-indictment photographic identification did not constitute a "critical stage" of the proceedings.[74] The dissent argued that the showing of the photographs in *Ash* was analogous to the taking of handwriting samples which had been held to be a non-critical stage in *Gilbert*.[75] Under the dissent's reading of the *Wade-Stovall-Gilbert* trilogy, "where the circumstances of the identification procedure are simple of reconstruction, as is the case with a photographic identification, there is no need for counsel's presence, and the pre-trial hearing at which defense counsel can fully explore all avenues is sufficient to equip counsel to protect his client at trial."[76]

In *Ash* the uncounseled photographic presentation occurred after Ash had been indicted.[77] However, the majority opinion did not restrict itself to the post-

69. Id. at 102-03.

70. 377 U.S. 201 (1964). See note 14 supra and accompanying text.

71. 461 F.2d at 103. This appears to be an excessively broad reading of Massiah. In that case the Court stated that "[a]ll that we hold is that the defendants' own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." 377 U.S. at 207 (emphasis omitted). Massiah has generally been considered the highwater mark in the expansion of the sixth amendment right to counsel. See United States v. Bennett, 409 F.2d 888, 899 (2d Cir. 1969). See also Spano v. New York, 360 U.S. 315 (1959). The differences between a photographic presentation and the surreptitious interrogation conducted against Massiah (see note 14 supra) are obvious and it is doubtful whether such photographs constitute "evidence" within the meaning of Massiah. See generally, Enker & Elsen, Counsel For the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47 (1964); 50 A.B.A.J. 985 (1964); 78 Harv. L. Rev. 217 (1964); 26 Pitt. L. Rev. 151 (1964).

72. 461 F.2d at 101-03.

73. Id. at 105.

74. Id. at 108 (dissenting opinion). See note 57 supra.

75. 461 F.2d at 108. See notes 24-26 supra and accompanying text. It is true that like exemplars "the accused can make an unlimited number of additional [photographs] for analysis and comparison by government and defense . . . experts." Gilbert v. California, 388 U.S. at 267. However, photographs have characteristics which distinguish them from handwriting samples. See 21 Syracuse L. Rev. 1235, 1240 (1970). See also P. Wall, supra note 20, at 66-89; 43 N.Y.U.L. Rev. 1019 (1968).

76. 461 F.2d at 115-16 (dissenting opinion).

77. Id. at 94.

indictment phase of the proceeding, deciding that a photographic presentation "subsequent to arrest" was a critical stage of the prosecution requiring the presence of counsel.[78] This dicta must be viewed in light of the Supreme Court's recent decision in *Kirby v. Illinois*[79] which held that prior to indictment there is no sixth amendment right to counsel.[80] The potential impact of *Ash* should also be considered in light of *United States v. Brown*,[81] a companion case to *Ash*, in which it was held that there was neither a sixth amendment right to counsel violation nor a fifth amendment due process violation in the post-indictment showing of a photograph of a counseled corporeal lineup to a witness in the absence of defendant's counsel.[82]

The reasoning of the court in *Ash* is susceptible to a number of criticisms. First, the court's reliance on *Zeiler* and *Massiah* was ill-placed.[83] Second, while condemning the conclusionary approach of the other circuit courts,[84] the court's analysis in *Ash* was something less than analytical.[85] Finally, the court's interpretation of *Wade* is suspect, especially in light of *Kirby*.[86] Despite these criticisms, the court's holding, however ill-conceived, does not lack significance. To require counsel at a pre-trial photographic presentation would not only affect the machinery of the criminal justice system, but would require a re-thinking on the part of counsel and the courts as to what constitutes a "critical stage" of the proceedings. It was probably with this in mind that the Supreme Court granted certiorari. Precedent[87] suggests that the Court, in deciding *Ash*, will balance any risks inherent in a pre-trial photographic presentation without defense counsel against the opportunity to meet such dangers in the adversary proceed-

78. Id. at 99.

79. 406 U.S. 682 (1972). According to the Court, the right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Id. at 689.

80. Id. at 690.

81. 461 F.2d 134 (D.C. Cir. 1972).

82. Id. at 142-43. Judge Wilkey, who dissented in Ash, wrote the majority opinion in Brown. He concluded that the photograph of the lineup was a "completely neutral and wholly exact reproduction" and, therefore, attendance of defense counsel at the photographic presentation was not required. Id. at 141. (footnote omitted). Accord, United States v. Collins, 416 F.2d 696 (4th Cir. 1969). In Collins a photograph of the lineup was shown to two witnesses who could not attend. 416 F.2d at 697. However, in Brown, the witness who viewed the photograph had also attended the lineup. 461 F.2d at 137. According to at least one authority, the latter type of photographic presentation should never be allowed. P. Wall, supra note 20, at 84. See also 21 Syracuse L. Rev. 1235, 1238 (1970).

83. See notes 59-62, 71 supra and accompanying text.

84. 461 F.2d at 101.

85. The statement by the court that "[t]he presentation of color photographs subsequent to arrest . . . was like a lineup . . . requiring presence of counsel" is conclusionary in the extreme and constitutes one of the weakest links in the court's analysis. Id. at 99.

86. See note 79 supra and accompanying text.

87. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

ing at trial. Hopefully, the Court will take advantage of this opportunity to fully clarify its holding in *Wade*. Thus, it appears that regardless of the Court's final determination, *Ash* will have played an important role in the evolution of the sixth amendment right to counsel.

Constitutional Law—Religious Freedom—State May Authorize Forced Medical Treatment of a Competent Adult to Prevent Death Despite Religious Objection.—Delores Heston, age twenty-two, was severely injured in an automobile accident and was taken to plaintiff hospital. There it was determined that an operation was necessary to save her life, and that if operated upon death would result unless whole blood were administered. Miss Heston and her parents were Jehovah's Witnesses, and a tenet of their faith forbade blood transfusions. Because Miss Heston was in shock on admission to the hospital,[1] her mother was asked to consent to the operation and transfusions. Adamantly opposing the latter on religious grounds, her mother refused to consent and signed a release of liability for the hospital and medical personnel. The hospital, having determined that death was imminent, made application to a superior court judge for appointment of a guardian for Miss Heston with directions to consent to transfusions as needed to save her life. The court appointed a guardian with the necessary authority to consent, and the operation was performed with transfusions of whole blood. Miss Heston survived and upon recovery moved to vacate the order. The trial court refused to vacate, and on appeal the Supreme Court of New Jersey affirmed, holding that the state's compelling interest in the preservation of life justified authorization of force to prevent death despite religious objection. *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971).

Prior to *Heston*, there were two New Jersey supreme court cases which dealt with the issue of court authorized transfusions. In *State v. Perricone*,[2] the supreme court upheld a finding that parents had been guilty of neglect in refusing to consent to blood transfusions for their infant son. The parents, Jehovah's Witnesses, had objected to transfusions on religious grounds despite knowledge that their son was suffering from a chronic lack of oxygen and that transfusions were necessary to save his life.[3] Conceding that "not every refusal to consent to treatment for an infant constitutes evidence of unfitness,"[4] the court

1. John F. Kennedy Mem. Hosp. v. Heston, 58 N.J. 576, 578, 279 A.2d 670, 671 (1971). Miss Heston insisted her refusal to accept blood had been expressed, but the trial court found that she was in shock and was incoherent on admission. The court surmised that she did not execute a release because she could not. Id. at 578-79.

2. 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962).

3. Id. at 466-67, 181 A.2d at 753-54.

4. Id. at 478, 181 A.2d at 759. See In re Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955) (resfusal to permit corrective surgery for an infant's cleft palate); In re Tuttendario, 21 Pa. Dist. 561 (1911) (refusal to allow corrective surgery for rachitis); In re Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942) (refusal to permit corrective surgery for a congenital arm deformity).

nevertheless found neglect in this instance because the transfusions presented no added danger to the child and were necessary to preserve his life.[5] Also discerned was the existence of a "public interest" in preserving the child's life —an interest sufficient to overcome objections based upon the free exercise clause of the first amendment and the due process clause of the fourteenth amendment to the United States Constitution.[6] Consequently the court upheld the appointment of a guardian for the purpose of consenting to the blood transfusions.[7]

In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,[8] a hospital sought court authority to administer blood transfusions in the event that they should become necessary to preserve the lives of a mother and her unborn child. Mrs. Anderson's condition indicated a probability of severe hemorrhaging during pregnancy which, it was feared, would prove fatal both to herself and her unborn unless such transfusions were available.[9] As a Jehovah's Witness, Mrs. Anderson had nevertheless notified the hospital that she should not be transfused because of her religious beliefs.[10] The Supreme Court of New Jersey found that the unborn child was entitled to the law's protection[11] and, "because the welfare of the child and the mother [were] so intertwined and inseparable,"[12] ordered transfusions where necessary to save both the child's and the mother's lives.[13] Having rendered its decision in terms of the child's welfare, the court found it unnecessary to decide the more difficult question "whether an adult may be compelled to submit to . . . medical procedures [over religious objections] when necessary to save his life."[14] In *Heston* the same court addressed this issue squarely.

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5. 37 N.J. at 479-80, 181 A.2d at 760.

6. Id. at 474, 181 A.2d at 755-57.

7. Id. at 480, 181 A.2d at 760.

8. 42 N.J. 421, 201 A.2d 537 (per curiam), cert. denied, 377 U.S. 985 (1964).

9. Id. at 423, 201 A.2d at 538.

10. Id. at 422, 201 A.2d at 537-38.

11. It is an open question what effect a law such as New York's law on abortion, N.Y. Penal Law § 125.05 (McKinney 1970), will have on a state's interest in preserving the life of an unborn child over a mother's religious objection to the medical procedure employed. If a woman can consent to abortion, how then can the state impose medical treatment with the rationale that its refusal is tantamount to abortion?

12. 42 N.J. at 423, 201 A.2d at 538. It has been firmly established that courts may compel medical treatment for children. See In re President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1007-08 (1964), cert. denied, 377 U.S. 978 (1964); Annot., 30 A.L.R.2d 1138 (1953) (power of public authorities to order medical care for a child over objection of parent or custodian). Adults can also be required to submit to compulsory treatment for contagious diseases. 331 F.2d at 1008. See also Annot., 93 A.L.R. 1413 (1934) (power of municipal or school authorities to prescribe vaccination or other health measures as a condition of school attendance); Annot., 22 A.L.R. 1189 (1923) (compulsory examination for venereal disease); Annot., 8 A.L.R. 836 (1920) (general delegation of power to guard against spread of contagious diseases).

13. 42 N.J. at 424, 201 A.2d at 538.

14. Id. at 423, 201 A.2d at 538.

The first question encountered in *Heston* was that of mootness.[15] Since at the time of the appeal Miss Heston was well and had left the hospital, the court decided that there was no existing controversy and ruled that the case, in fact, was moot.[16] In addition, declaratory relief was thought inappropriate because "[t]he prospect of her return at some future day in like circumstances [was] too remote . . . ."[17] Nevertheless, the court decided to reach the merits because the issues involved were of public importance.[18]

Noting that attempted suicide is classified as a disorderly persons offense in New Jersey,[19] the court ruled that there is "no constitutional right to choose to die."[20] Appellant's suggestion that it is not suicide to refuse a transfusion because there is a difference "between passively submitting to death and actively seeking it"[21] was brushed aside. The court noted, "[i]f the State may interrupt one mode of self-destruction, it may with equal authority interfere with the other."[22] The only qualification it placed on the state's right of interference

15. The issue of mootness is often raised in cases concerning the refusal of medical treatment. E.g., Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965), where the court decided the issue was moot but reached the merits anyway, saying: "'when the issue presented is of substantial public interest, a well-recognized exception exists to the general rule that a case which has become moot will be dismissed upon appeal. . . . Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.'" Id. at 364, 205 N.E. 2d at 437-38. A corollary to the question of mootness is whether there is a justiciable controversy. Judge Burger, now Chief Justice, dissenting in In re President & Directors of Georgetown College, Inc., 331 F.2d 1010 (D.C. Cir.) (en banc), denying rehearing to 331 F.2d 1000 (D.C. Cir. 1964), found it difficult to construct an actionable or legally protected right out of the hospital-patient relationship, and thus he believed the hospital's suit did not meet the standards of justiciability. Id. at 1016.

16. 58 N.J. at 579, 279 A.2d at 671.

17. Id., 279 A.2d at 671.

18. Id., 279 A.2d at 671. The reasoning of the court was probably that without a resolution of this problem, hospitals would be reluctant to perform necessary treatment on emergency patients. See note 15 supra.

19. N.J. Stat. Ann. § 2A:170-25.6 (1971). See State v. Carney, 69 N.J.L. 478, 55 A. 44 (Sup. Ct. 1903), where it was held that suicide was a common law felony and thus indictable as a misdemeanor because all common law offenses not otherwise provided for by legislative enactment were misdemeanors. Law of June 14, 1898, ch. 235, § 215 (now N.J. Stat. Ann. § 2A:85-1 (1971)). However, in some states there are no laws against suicide or attempted suicide. See Comment, The Right to Die, 7 Houston L. Rev. 654, 656 (1970). See also Cawley, Criminal Liability in Faith Healing, 39 Minn. L. Rev. 48 (1954).

20. 58 N.J. at 580, 279 A.2d at 672.

21. Id. at 581, 279 A.2d at 672. See Comment, The Right to Die, 7 Houston L. Rev. 654 (1970), which discusses the right to die, and makes a distinction between "mercy killing," or euthanasia, and antidysthanasia, where a person facing death from disease or injury hastens it by refusing medical attention. Id. at 654, 657-62.

22. 58 N.J. at 581-82, 279 A.2d at 673. The distinction may have merit. In the case of suicide or euthanasia death results from affirmative action by the person or his physicians,

was said to arise where the "medical option itself is laden with the risk of death or of serious infirmity . . . ."[23] Since the transfusions posed no serious danger to life or limb, the state's interest in sustaining life was considered paramount.[24]

This interest the court also considered sufficient to overcome the religious objections. "Religious beliefs are absolute, but conduct in pursuance of religious beliefs is not wholly immune from governmental restraint."[25] For Miss Heston's religious objections to be overridden, the court stated, it was necessary to show a " 'compelling State interest' justifying the State's refusal to permit [her] to refuse vital aid."[26] The state's interest in preserving life was a sufficiently compelling interest, in the court's opinion, to take precedence over Miss Heston's right to follow the dictates of her religion.[27]

In addition, the outcome in *Heston* was influenced by the court's concern for the dilemma in which hospitals and their staffs are placed when they become involuntary hosts to emergency patients who refuse vital aid: "The hospital and its staff should not be required to decide whether the patient is or continues to be competent to make a judgment upon the subject [of refusing vital aid], or whether the release tendered by the patient or a member of his family will protect them from civil responsibility."[28] A hospital exists to cure illness, the

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whereas in antidysthanasia death is met from disease or injury and it is only the refusal to lift a hand which hastens it. See note 21 supra. The distinction becomes more apparent if one speculates about the possible advances in the retardation of the aging process and in transplantation of organs. If a means is developed of safely transplanting vital organs to an emergency patient or if retardation of aging is possible in a person dying of old age, will the courts force a person to have transplants or undergo the retardation process? If so, the courts in effect would be outlawing natural death. See the corollary in Annot., 35 A.L.R.3d 692 (1971) (transplantation: power of parent, guardian, or committee to consent to surgical invasion of ward's person for benefit of another). These cases also suggest the question of who is to pay for court ordered medical treatment. If a patient is "factually incompetent" and the family of the patient would prefer that he die a natural death, is it fair to make them pay the expenses of maintaining that patient after a court ordered operation prolongs his life contrary to his and their wishes?

23. 58 N.J. at 582, 279 A.2d at 673.

24. Id.

25. Id. at 580, 279 A.2d at 672. See Reynolds v. United States, 98 U.S. 145 (1878) (polygamy outlawed); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, appeal dismissed for want of substantial federal question sub nom. Bunn v. North Carolina, 336 U.S. 942 (1949) (the use of snakes in a religious ceremony); Mountain Lakes Bd. of Educ. v. Maas, 56 N.J. Super. 245, 152 A.2d 394 (App. Div. 1959), aff'd, 31 N.J. 537, 158 A.2d 330, cert. denied, 363 U.S. 843 (1960) (vaccination of children); Baer v. City of Bend, 206 Ore. 221, 292 P.2d 134 (1956) (fluoridation of drinking water).

26. 58 N.J. at 584, 279 A.2d at 674.

27. 58 N.J. at 584-85, 279 A.2d at 674.

28. 58 N.J. at 582, 279 A.2d at 673. A hospital has a legal responsibility for the proper care of its patients. See Jones v. U.S., 308 F.2d 307, 310 (D.C. Cir. 1962). See also In re President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), cert.

court concluded, and the refusal of a patient prevents the hospitals from exercising the medical procedure necessary to meet this objective.[29]

Since the issue reserved in *Raleigh*[30] had never expressly been decided in the New Jersey courts, guidance was sought from precedent in other jurisdictions.[31] Few cases were found to be relevant, however,[32] and none was precisely on point. In *In re President and Directors of Georgetown College, Inc.*,[33] an emergency patient had refused blood transfusions because she was a Jehovah's Witness. The transfusions were necessary to save her life and an application was made to a federal court for authorization of the transfusions.[34] Judge Wright, in authorizing the transfusions, relied principally on the fact that the patient had desired to live and had intimated that she would feel relieved of responsibility for the decision if the court ordered the transfusions.[35] Another factor was that the patient was the mother of a minor, and "[t]he state as *parens patriae*, will not allow a parent to abandon a child . . . so it should not allow this most ultimate of voluntary abandonments."[36]

Powell v. Columbia Presbyterian Medical Center,[37] a New York decision, was factually similar to *Georgetown*. Mrs. Powell, a mother of six children, lay in danger of death from extensive bleeding following a Caesarian section.[38] She refused to give a prior written authorization for blood transfusions because she was a Jehovah's Witness. "She did not object to receiving the treatment involved

denied, 377 U.S. 978 (1964). In addition, criminal liability may attach for death which results from breach of this duty regardless of a waiver of liability. Id. at 1009 & n.18.

29. 58 N.J. at 582, 279 A.2d at 673.

30. See notes 8-14 supra and accompanying text.

31. The court, inter alia, relied on the New York case of Collins v. Davis, 44 Misc. 2d 622, 254 N.Y.S.2d 666 (Sup. Ct. 1964), where an order was granted which permitted a surgical operation on a comatose patient. The patient was going to die without the operation, but the patient's wife refused to consent for reasons that were medically unsound. In granting the authority, the court emphasized the difficult position in which the patient and his wife had placed the hospital: "Without a consent, the hospital doctors had the choice of performing the operation or letting him die for want of consent." Because life hung in the balance, consent was given to avoid the dilemma. Id. at 623, 254 N.Y.S.2d at 667.

Since Collins did not deal with a transfusion ordered over religious objection, the court apparently erred in citing it as supporting authority.

32. Of peripheral importance are cases discussed in the following annotations: Annot., 25 A.L.R.3d 1439 (1969) (mental competency of patient to consent to surgical operation or medical treatment); Annot., 139 A.L.R. 1370 (1942) (consent as condition of right to perform surgical operation).

33. 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964); see Annot., 9 A.L.R.3d 1391 (1966). Judge Burger dissented, preferring to reach the merits because he wanted to inquire into "where an assumption of jurisdiction over such matters could lead us." 331 F.2d at 1017.

34. Id. at 1001-02.

35. Id. at 1007-09.

36. Id. at 1008.

37. 49 Misc. 2d 215, 267 N.Y.S.2d 450 (Sup. Ct. 1965).

38. Id., 267 N.Y.S.2d at 451.

—she would not, however, direct its use."[39] Since Mrs. Powell did not want to die, the court gave the necessary authorization.[40]

In *United States v. George*,[41] a district court decision, the father of four children also received court authorized transfusions. George, a Jehovah's Witness, had voluntarily gained admittance to a hospital for treatment of a bleeding ulcer.[42] Despite a serious loss of blood he refused to allow blood transfusions, and he and his wife signed releases for the hospital and its employees.[43] His condition became critical, and without blood transfusions he would probably have died.[44] George stated that he would not consent to transfusions, but he also indicated that he would not resist them if court ordered because his conscience would then be clear.[45] In addition to the reasons outlined in *Georgetown*, the court authorized the transfusions because the conscience of the doctors would be imperiled:[46] "To require these doctors to ignore the mandates of their own conscience, even in the name of free religious exercise, cannot be justified under these circumstances."[47]

A New York and an Illinois court, on the other hand, have refused to authorize blood transfusions to competent adults over objection. In the New York Supreme Court case of *Erikson v. Dilgard*,[48] a voluntary adult patient was willing to allow a necessary gastrointestinal operation but was unwilling to submit to blood transfusions.[49] The petitioner hospital argued that this decision was equivalent to suicide.[50] The court did not agree, however, because in its opinion "it is always a question of judgment whether the medical decision is correct."[51] Authorization to transfuse was denied on the premise that:

[I]t is the individual who is the subject of a medical decision who has the final say and

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39. Id. at 216, 267 N.Y.S.2d at 451.

40. Id., 267 N.Y.S.2d at 452. The court stated, "This woman wanted to live. I could not let her die." Id.

41. 239 F. Supp. 752 (D. Conn. 1965).

42. Id. at 753.

43. Id.

44. Id.

45. Id.

46. Id. at 754.

47. Id. It is noteworthy that "[t]he Court advised George it had no power to force a transfusion upon him, and he was free to resist the transfusion, even by the rather simple physical maneuver of placing his hand over the area to be injected by the needle." Id. at 753. This presents an interesting question as to how far a court can go in ordering and "forcing" treatment. For example, what would the court have done in Heston if Miss Heston had placed her hand over the place to be injected?

48. 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962).

49. Id. at 27-28, 252 N.Y.S.2d at 706.

50. Id. at 28, 252 N.Y.S.2d at 706. The superintendent testified that "there was a very great chance that the patient would have little opportunity to recover without the blood." Id.

51. Id., 252 N.Y.S.2d at 706. This may be another distinction between suicide and anti-dysthanasia. See notes 21 & 22 supra.

. . . this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires.[52]

The Illinois Supreme Court in *Estate of Brooks*[53] held that appointment of a conservator and authorization of transfusions to an adult patient violated her constitutional rights. Mrs. Brooks, a Jehovah's Witness, was in a hospital with a a peptic ulcer and had informed her doctor that she would not accept blood transfusions because of her religious beliefs.[54] She and her husband signed releases, and had been assured that no further effort would be made to persuade her to accept blood.[55] These representations notwithstanding, the doctor and state's attorney, without notice to Mrs. Brooks, appeared in probate court to have a conservator of her person appointed with authority to consent to a blood transfusion.[56] The orders were granted, and Mrs. Brooks sought to have them expunged.[57]

As in *Erickson*,[58] the court was impressed with the fact that the patient was a competent adult who fully realized the hazards involved in refusing treatment and who had no minor children.[59] Additionally, the court stated that the "clear and present danger" test was to be used in determining whether to override a refusal of vital aid based upon religious objection:[60]

It seems to be clearly established that the First Amendment of the United States Constitution as extended to the individual States by the Fourteenth Amendment . . . protects the absolute right of every individual to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals.[61]

The court found no overt or affirmative act of Mrs. Brooks which offered any "clear and present danger" to society.[62]

The New Jersey Supreme Court in *Heston* relied on the cases discussed above,[63] stating that "[w]ith one exception, *Erickson v. Dilgard* . . . transfusions for

52. 44 Misc. 2d at 28, 252 N.Y.S.2d at 706.

53. 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

54. Id. at 362-63, 205 N.E.2d at 436.

55. Id. at 363, 205 N.E.2d at 437.

56. Id., 205 N.E.2d at 437.

57. Id. at 363-64, 205 N.E.2d at 436.

58. See note 48 supra and accompanying text.

59. 32 Ill. 2d at 372-73, 205 N.E.2d at 438.

60. Id. at 372, 205 N.E.2d at 441. Note that in Heston the New Jersey Supreme Court rejected the "clear and present danger" test in favor of the "compelling state interest" test. Therefore it remains in doubt which test should be applied in overriding a religious refusal of necessary medical treatment. 58 N.J. at 584, 279 A.2d at 674.

61. 32 Ill. 2d at 372, 205 N.E.2d at 441.

62. Id. at 373, 205 N.E.2d at 442.

63. In re President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964); Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (Sup. Ct. 1965); Collins v. Davis, 44 Misc. 2d 622, 254 N.Y.S.2d 666 (Sup. Ct. 1964).

adults were ordered despite their religious tenets."[64] The problem presented by the court's reliance on these cases is that they can readily be distinguished from *Heston*. *Powell, George*, and *Georgetown* each involved patients who were parents of dependent children.[65] Because of the *parens patriae* doctrine, the state had a strong interest in keeping them alive. In *Heston*, on the other hand, there were no children involved.[66] In *George* and *Georgetown*, moreover, the patients had indicated that court ordered transfusions would unburden their consciences,[67] while Miss Heston had evidenced no such feelings.[68] *Erickson* and *Brooks*, which the court rejected, were therefore factually closer to *Heston* because both involved adults who were without children[69] and who had indicated nothing which would lead a court to believe that court ordered transfusions would unburden their consciences.[70] The danger of *Heston* is that it justifies interference by the state with a person's right to observe his religious beliefs, and with his right to prevent interference with his body.[71] These rights are not absolute, but unless a compelling state interest is contravened, they should be upheld.[72] When an adult is rational, competent, and fully conscious,[73] when he has had time to reflect on the consequences of his refusal of vital aid and has released the hospital and its personnel from civil liability, and finally, when he has no dependents,[74] the court should not interfere with his decision. The compelling state interest, the preservation of life, is satisfied then when the court insures that the above factors have been considered.

That the *Heston* decision may be of limited applicability is evidenced by the court's statement that "we find that the interest of the hospital and its staff, as well as the State's interest in life, warranted the transfusion of blood *under*

64. 58 N.J. at 583, 279 A.2d at 673. Brooks was considered separately.

65. See notes 36, 38 & 41 supra and accompanying text.

66. See note 1 supra and accompanying text.

67. See text accompanying notes 35 & 45 supra.

68. See text accompanying note 1 supra.

69. See text accompanying notes 48 & 59 supra.

70. See text accompanying notes 48 & 53 supra.

71. The integrity of the body has been protected in civil and criminal law in actions for assault and battery. See Schloendorff v. New York Hosp., 211 N.Y. 125 (1914), overruled on other grounds, Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957), where Judge Cardozo said: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages. . . . This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained." Id. at 129-30.

72. For the sake of discussion the New Jersey test is used.

73. Although Miss Heston was not fully conscious the court chose not to base its decision on this fact. Instead, the court emphasized the physical danger which existed because of the emergency, and the state's interest in preserving life. See text accompanying notes 27 supra, and 78 infra.

74. An example would be a situation where the patient's spouse is disabled and would become a burden on the state if the patient died.

the circumstances of this case."[75] Those circumstances were that Miss Heston was an emergency patient who was thrust upon the hospital, and that "the evidence indicate[d] she was in shock on admittance to the hospital and in the judgment of the attending physicians and nurses was then or soon became disoriented and incoherent."[76] She had not executed a release, and whether she herself, while coherent, stated a religious objection to the transfusion was questionable.[77] But the decision is disquieting because the language is broad:

When the hospital and staff are thus involuntary hosts and their interests are pitted against the belief of the patient, we think it reasonable to resolve the problem by permitting the hospital and its staff to pursue their functions according to their professional standards. . . . A prior application to a court is appropriate if time permits it, although in the nature of the emergency the *only* question that can be explored satisfactorily is whether death will probably ensue if medical procedures are not followed.[78]

If an emergency patient is rational, conscious, and competent, and the other conditions[79] are met, should a hospital be given free reign to override his decision? Admittedly the hospital is in a difficult situation, and perhaps there should exist a presumption in favor of the hospital that in an emergency situation a patient who refuses vital aid is acting irrationally. Nevertheless, where it is clear[80] that a patient is rational his decision should be paramount.[81] As Mr. Justice Brandeis wrote in *Olmstead v. United States*:[82]

The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men.[83]

75. 58 N.J. at 584-85, 279 A.2d at 674 (emphasis added).

76. Id. at 578, 279 A.2d at 671.

77. Id. at 578-79, 279 A.2d at 671.

78. Id. at 583, 279 A.2d at 673 (emphasis added). Inquiry should not be limited to the question of whether death will probably ensue if medical procedures are not followed. Certainly if the medical option is laden with risk of death or serious injury this should be considered. In re Nemser, 51 Misc. 2d 616, 273 N.Y.S.2d 624 (Sup. Ct. 1966). See text accompanying note 23 supra. But there are other factors which should be evaluated by the court. Simply because an emergency exists the state should not be given the right to act on a person's body without his consent. See text accompanying notes 73 & 74 supra.

79. See text accompanying notes 72-74 supra.

80. By "clear" it is meant that the patient is able to answer questions intelligently, and that this be demonstrated to doctors and to the court if the court is able to interview the patient at the hospital.

81. This should be a matter of first or fourteenth amendment rights, whether based upon religious reasons or not.

82. 277 U.S. 438 (1928) (dissenting opinion), Annot., 66 A.L.R. 376 (1930). The majority was overruled in Katz v. United States, 389 U.S. 347 (1967).

83. 277 U.S. at 478 (emphasis added).

Negligence—Apportionment of Damages Among Joint Tortfeasors—Right of a Party Actively Negligent to Implead a Co-Wrongdoer.—The George Urban Milling Company ordered an employee, Ralph L. Dole, to clean a barn which had been fumigated with methyl bromide manufactured by the Dow Chemical Company. Exposure to this highly poisonous chemical[1] resulted in Dole's death. His widow commenced an action in negligence against Dow for failing to properly label the fumigant. Dow impleaded Urban as third-party defendant, and a motion to dismiss this pleading was denied.[2] On an interlocutory appeal, the appellate division, invoking the common law rule that a tortfeasor charged with active negligence may not implead an alleged co-tortfeasor, unanimously reversed the denial of Urban's motion and dismissed the third-party action.[3] Dow appealed, and the New York Court of Appeals, reinstating the third-party complaint,[4] ruled that whenever a defendant in a negligence action alleges that a third party is responsible for a part of the negligence with which the prime defendant has been charged, that third party may be brought into the action by impleader, and the fact-finder may apportion contribution among all co-defendants in proportion to their share in the negligence.[5] *Dole v. Dow Chemical Company*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

Merryweather v. Nixan[6] established the common law rule that one compelled to pay damages for the joint tort of himself and another could not seek contribution from his co-wrongdoer for any part of the sum he had paid. Since the law considered it against public policy to settle a dispute between two wrongdoers, or to allow one to plead his own tort as an element of his cause of action,[7] a defendant in a tort case could neither implead a third party whom he alleged to be liable with himself to the plaintiff, nor could he, after satisfying judgment, bring a separate suit against his co-tortfeasor to recover a pro rata share of the amount of the judgment.[8] New York traditionally accepted this strict rule[9] and recognized only two exceptions to it: the first under the principle of indemnity and the second under section 1401 of the Civil Practice Law and Rules. The

1. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 145-46, 282 N.E.2d 288, 290, 331 N.Y.S.2d 382, 384-85 (1972).

2. Id. at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.

3. Dole v. Dow Chem. Co., 35 App. Div. 2d 149, 152, 316 N.Y.S.2d 348, 352 (4th Dep't 1970), rev'd, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

4. 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 392.

5. Id. at 148-49, 153, 282 N.E.2d at 292, 295, 331 N.Y.S.2d at 387, 391-92.

6. 101 Eng. Rep. 1337 (K.B. 1799). But see Knell v. Feltman, 174 F.2d 662, 666 (D.C. Cir. 1949), for the view that "tort" in 1799 meant an intentional act only, and that the "brevity of the report and a misleading headnote" resulted in the Merryweather case being cited for more than it held; accord, Reath, Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan, 12 Harv. L. Rev. 176, 177 (1898).

7. Manowitz v. Kanov, 107 N.J.L. 523, 527, 154 A. 326, 328 (1931); Gilbert v. Finch, 173 N.Y. 455, 462, 66 N.E. 133, 134-35 (1903). Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 131 (1932).

8. 30 N.Y.2d at 148, 282 N.E.2d at 291, 331 N.Y.S.2d at 386.

9. Epstein v. National Transp. Co., 287 N.Y. 456, 458, 40 N.E.2d 632 (1942); Gilbert v. Finch, 173 N.Y. 455, 460, 66 N.E. 133, 134 (1903).

indemnity exception allows a "passively" negligent defendant, i.e., one who has not himself committed a negligent act, but to whom the law imputes negligence because of the wrongful act of another, to recover from that wrongdoer, either by impleader under New York Civil Practice Law and Rules section 1007,[10] or by a separate action,[11] full reimbursement[12] for the damages he is compelled to pay.[13] The policy underlying this exception is that one must answer for all the results of his tort.[14] For example, if an employer has been obliged, under the doctrine of *respondeat superior*, to compensate a party injured by his employee's negligence, that employee must respond in damages for the harm he has done to his employer.[15] New York recognized no right of indemnity, however, for one charged with "primary negligence in his own independent conduct,"[16] that is, "participation 'in the wrong which created the damage.' "[17] The complaint

10. N.Y. C.P.L.R. § 1007 (McKinney 1963) provides: "After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him, by serving upon such person a summons and third-party complaint and all prior pleadings served in the action. A defendant serving a third-party complaint shall be styled a third-party plaintiff and the person so served shall be styled a third-party defendant. The defendant shall also serve a copy of such third-party complaint upon the plaintiff's attorney."

11. Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 180, 15 N.E.2d 567, 569 (1938).

12. "Contribution is a portion of what, in a proper case, can be recovered by way of indemnity." Perlbinder v. D'Aquilla Bros. Contracting Co., 12 Misc. 2d 790, 792, 177 N.Y.S.2d 878, 880 (Sup. Ct. 1958), aff'd mem., 7 App. Div. 2d 968, 183 N.Y.S.2d 988 (1st Dep't 1959).

13. Anderson v. Liberty Fast Freight Co., 285 App. Div. 44, 45, 135 N.Y.S.2d 559, 560-61 (3rd Dep't 1954). Indemnity was allowed, for example, where a plaintiff recovered against a defendant "who was under a nondelegable duty to furnish a safe place to such plaintiff," but where "the primary and affirmative wrong was occasioned by another defendant against whom indemnity was sought." McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 330-31, 107 N.E.2d 463, 472 (1952).

14. "The right to indemnity stands upon the principle that everyone is responsible for the consequences of his own negligence, and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him." Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola, 134 N.Y. 461, 468, 31 N.E. 987, 989 (1892); accord, McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952); Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 217, 67 N.E. 439 (1903).

15. Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 257, 164 N.E. 42, 43 (1928), citing Oceanic Steam Navigation Co. v. Compagnia Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987 (1892).

16. Brady v. Stanley Weiss & Sons, 6 App. Div. 2d 241, 245, 175 N.Y.S.2d 850, 855 (4th Dep't 1958).

17. Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 430, 174 N.E.2d 516, 518, 214 N.Y.S.2d 428, 431 (1961), citing Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987 (1892). See also Schwartz v. Merola Bros., 290 N.Y. 145, 48 N.E.2d 299 (1943); Scott v. Curtis, 195 N.Y. 424, 88 N.E. 794 (1909); Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903); Tipaldi v. Riverside Memorial Chapel, 273 App. Div. 414, 78 N.Y.S.2d 12 (1st Dep't), aff'd

against such a defendant was said to allege "active" or "primary" negligence,[18] and he was not permitted to seek relief against a co-wrongdoer because the law deemed him to be *in pari delicto*[19] with his fellow tortfeasor. Thus, a defendant's right to full reimbursement by way of indemnity against his co-wrongdoer depended not on the relative gravity of their respective faults, but rather on whether the defendant seeking contribution was charged only with "passive" negligence.[20]

The second exception to the *Merryweather* rule in New York is embodied in section 1401 of the Civil Practice Law and Rules.[21] This section provides that where a money judgment is entered against joint tortfeasors in a property damage or personal injury action, each defendant is entitled to contribution, i.e., partial reimbursement,[22] from the other defendants for their pro rata shares of the judgment. Since this statute permits one "active" tortfeasor to recover from another it is in derogation of the common law rule. Therefore it and its predecessor, section 211(a) of the Civil Practice Act,[23] have been interpreted strictly by the courts.[24] In *Fox v. Western New York Motor Lines Inc.*,[25] the court of

298 N.Y. 686, 82 N.E.2d 585 (1948); Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 92 N.Y.S. 855 (2d Dep't 1905), aff'd mem., 185 N.Y. 580, 78 N.E. 1110 (1906).

18. Bush Terminal Bldgs. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 432, 174 N.E.2d 516, 519 (1961), citing Gray v. Boston Gas Light Co., 114 Mass. 149, 154 (1873).

19. Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 116, 192 N.E.2d 167, 169, 242 N.Y.S.2d 210, 214 (1963), citing Bush Terminal Bldgs. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961).

20. Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 116, 192 N.E.2d 167, 169, 242 N.Y.S.2d 210, 214 (1963). The terms "active negligence" and "passive negligence" became much litigated phrases. See, e.g., Colon v. Board of Educ., 11 N.Y.2d 446, 184 N.E.2d 294, 230 N.Y.S.2d 697 (1962); Employers' Liab. Assur. Corp. v. Post & McCord, Inc., 261 App. Div. 242, 25 N.Y.S.2d 52 (1st Dep't), rev'd, 286 N.Y. 254, 36 N.E.2d 135 (1941). One case has even held that there is no difference at all between the two. Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942).

21. N.Y. C.P.L.R. § 1401 (McKinney Supp. 1972-73) provides: "Where a money judgment has been recovered jointly against defendants in an action for personal injury or property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his own pro rata share of the entire judgment. Recovery may be had in a separate action or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action."

22. See note 12 supra.

23. Laws of New York, 1928, ch. 714, § 211(a). There is no change in substance between the text of this statute and the present section. N.Y. C.P.L.R. § 1401 (McKinney Supp. 1972-73).

24. Hadcock v. Wiggins, 147 Misc. 252, 263 N.Y.S. 583 (Sup. Ct. 1933).

25. 257 N.Y. 305, 178 N.E. 289 (1931). The court in Dole stated that Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938), "overruled the substantive basis of Fox" by allowing a claim for indemnity to be brought after judgment. 30 N.Y.2d at 149, 282 N.E.2d at 292, 331 N.Y.S.2d at 388.

appeals held that section 211(a) only applied to actions where the defendant seeking contribution had actually paid a judgment after the plaintiff had joined as defendants all the tortfeasors against whom contribution was sought, and had prosecuted the case and entered the judgment against all of them;[26] the court ruled that the legislature had not given a defendant tortfeasor the right to bring into the action on his own motion a party alleged to be a co-wrongdoer.[27] Therefore, a plaintiff could sue as few or as many co-tortfeasors as he saw fit, and the defendants joined, as long as they were charged with "active" negligence, had no recourse against this partial and unequal treatment.[28]

By further strict construction of this contribution statute, the New York courts held that it did not give a defendant standing to move to set aside a verdict of "no cause of action" against a co-defendant,[29] nor did it give him standing to appeal from a dismissal as to the co-defendant[30] or to complain of the plaintiff's decision not to appeal a reversal of a judgment against a co-defendant.[31] In each of these instances it was manifest that the defendant had an interest in holding the co-defendant in the case in order to protect his possibility of contribution; but in each the court ruled that the very letter of the law would control and that a tortfeasor had no legally protected interest in contribution against his co-defendant until a judgment had actually been entered against both defendants and paid by the party seeking contribution.[32] New York,[33] therefore, for forty-one years, permitted a party guilty of simple active negligence only a most tightly circumscribed and sharply curtailed right against a co-wrongdoer, a right entirely dependent upon the plaintiff's "willingness or

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This might be an over-statement since Westchester and Fox are distinguishable. Fox involved a two vehicle automobile collision in which the owner of one vehicle sought to bring into the action the driver of the other vehicle. The court did not permit him to do this. Westchester involved a public utility's suit against the employer of a person to whom it had been forced to pay damages. Thus the party seeking contribution in Fox was in the position of an "active" tortfeasor, and the one seeking redress in Westchester may be classified as "passive." While the Westchester case is important in regard to procedural remedies, it would seem that the premise in Fox, that one charged with negligence in his own conduct may not seek redress against a co-wrongdoer, was one element not impaired by the Westchester ruling.

26. Fox v. Western N.Y. Lines, 257 N.Y. 305, 308, 178 N.E. 289, 289-90 (1931).

27. Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 453, 158 N.E.2d 691, 694, 186 N.Y.S.2d 15, 19-20 (1959).

28. Id. This arbitrariness has been called "absurd." Gregory, Tort Contribution Practice in New York, 20 Cornell L.Q. 269, 271 (1935).

29. Hughes v. Parkhurst, 284 App. Div. 757, 134 N.Y.S.2d 798 (4th Dep't 1954).

30. Baidach v. Togut, 7 N.Y.2d 128, 164 N.E.2d 373, 196 N.Y.S.2d 67 (1959).

31. Ward v. Iroquois Gas Corp., 258 N.Y. 124, 179 N.E. 317 (1932).

32. Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959); Fox v. Western N.Y. Motor Lines, 257 N.Y. 305, 178 N.E. 289 (1931).

33. Other jurisdictions allowed a broader right of contribution. See, e.g., Lottman v. Cuilla, 288 S.W. 123 (Texas Comm'n App. 1926). It is also to be noted that the 1939 original version of the Uniform Contribution Among Joint Tortfeasors Act contained an optional provision allowing a defendant to implead a co-wrongdoer not joined as a party defendant

ability"[34] to sue that co-wrongdoer. This inequity was one of the considerations that impelled the court to depart from stare decisis and to proceed in a new direction in *Dole v. Dow Chemical Company*.[35]

Judge Bergan, writing for the majority in *Dole*, recognized that Dole was barred from suing Urban by the Workmen's Compensation Law, and that this fact had compelled Dow to attempt impleader to bring Urban into the suit.[36] The court also recognized that the appellate division was in accord with the existing law in ruling that plaintiff Dole's allegations of failing to properly label a dangerous chemical charged Dow with "active" negligence and therefore barred it from impleading a third party.[37]

The court of appeals, noting the widespread dissatisfaction with the active-passive test, pronounced it "useful" to "re-examine" that doctrine.[38] Citing much scholarly authority[39] for the proposition that the active-passive test was an artificial distinction developed by the courts " ' in the unnatural surroundings of an inflexible rule against contribution,' "[40] the court concluded that a refusal to allow contribution among joint tortfeasors was contrary " 'to tort policy goals of deterrence, . . . effective loss distribution over a large segment of society, and rapid compensation of the plaintiff . . . .' "[41]

Holding that a defendant charged with negligence may implead, or sue in a separate action, any third party alleged to be responsible for a portion of the negligence with which the prime defendant has been charged, the court ruled that Dow, if adjudged liable to the plaintiff, could recover from Urban contribution for that part of the damages for which the latter was responsible.[42] The court

by the plaintiff. 9 U.L.A. § 7 (1957). This optional section, however, was eliminated from the 1955 revision of that act. 9 U.L.A. §§ 1-9 (Supp. 1967).

34. 30 N.Y.2d at 148, 282 N.E.2d at 291, 331 N.Y.S.2d at 381.

35. Id.

36. Id. at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390. N.Y. Workmen's Comp. Law § 10 (McKinney 1965) provides: "Every employer subject to this chapter shall in accordance with this chapter, . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault . . . ." Section 11 of the Act further provides: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death . . . ." N.Y. Workmen's Comp. Law § 11 (McKinney 1965).

37. 30 N.Y.2d at 146-47, 282 N.E.2d at 290-91, 331 N.Y.S.2d at 385.

38. Id. at 148, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

39. Id. at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389; e.g., Comment, Contribution and Indemnity in California, 57 Calif. L. Rev. 490 (1969); Comment, Contribution Among Joint Tort-Feasors, 44 Texas L. Rev. 326 (1965); 65 Colum. L. Rev. 123 (1965); 52 Cornell L.Q. 407 (1967).

40. 30 N.Y.2d at 150, 282 N.E. 2d at 293, 331 N.Y.S.2d at 388, citing 65 Colum. L. Rev. 123, 126 (1965).

41. 30 N.Y.2d at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389, citing Comment, Contribution and Indemnity in California, 57 Calif. L. Rev. 490, 516 (1969).

42. 30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

further decided that in order to determine the amount of contribution, the fact-finder must apportion the fault between the co-wrongdoers, Dow and Urban, on a percentage basis.[43] The court rejected the argument that such a system of apportionment[44] would be prejudicial to the original plaintiff's case, seeing "no major difficulty in keeping apart the separable issues of liability of the defendant to the plaintiff and of the third-party defendant to defendant-third-party plaintiff . . . ."[45]

Moreover, the court disposed of any objection based on section 11 of the Workmen's Compensation Law which barred any cause of action by the administratrix against decedent's employer Urban, and any recovery by her against that company.[46] The court noted that the cause of action was asserted not by Dole against Urban, but by Dow against Urban. The claim was for indemnity and was based on a "separable legal entity of rights" distinct from the main claim, and to be adjudicated separately from it.[47]

Some of the ramifications of allowing a defendant to demand that his co-wrongdoer also answer in damages can already be seen in those recent cases which have quickly followed *Dole*. The court of appeals itself, in *Kelly v. Long Island Lighting Company*[48] logically extended the *Dole* rule by holding that a defendant may cross-claim for apportioned contribution against a co-wrongdoer already joined as a party-defendant by the plaintiff. But the court made clear that *Dole* does not change the defendants' joint and several liability to the plaintiff; the apportionment rule only concerns the defendants in their relation to each other, and in no way relieves each tortfeasor of his liability to the plaintiff for the full amount of the judgment.[49] The impact of *Dole* may also be seen in the lower court decisions in *Sanchez v. Hertz Rental Corporation*,[50] and *Sorrentino v. United States*.[51] The former was an action involving a collision between an automobile owned by the defendant, Hertz, and one owned and operated by Victor Sanchez in which his family were passengers. Victor Sanchez sued Hertz for his own personal injuries, and as administrator of the estate of his son Javier, who was killed in the crash. His wife sued for her own personal injuries and as mother of two injured infants. On the eve of trial Hertz moved for an order permitting it to serve a cross-complaint against the plaintiff, Victor Sanchez, as co-tortfeasor. Justice Kalina granted the motion, citing *Dole*, and

43. Id. at 153, 282 N.E.2d at 292-95, 331 N.Y.S.2d at 391-92. The adoption of apportionment based on the facts rather than divided on a strict pro rata basis is a distinct departure from previous New York law.

44. As a corollary of these holdings, the court ruled that when apportionment had been made in an action on the basis of fault, no further contribution under C.P.L.R. § 1401 may follow. 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391.

45. Id. at 153, 282 N.E.2d at 294, 331 N.Y.S.2d 391.

46. Id. at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390-91.

47. Id. at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390.

48. 31 N.Y.2d 25, — N.E.2d —, — N.Y.S.2d — (1972).

49. Id. at 30, — N.E.2d at —, — N.Y.S.2d at —.

50. 70 Misc. 2d 449, 333 N.Y.S.2d 699 (Sup. Ct. 1972).

51. 344 F. Supp. 1308 (E.D.N.Y. 1972).

thus asserted the right of a defendant to force contribution from a plaintiff for injuries to a co-plaintiff.[52]

In the *Sorrentino* case, an action was brought in United States District Court for the Eastern District of New York for personal injuries sustained by an infant plaintiff when the bicycle he was riding was struck by a motor vehicle owned by the defendant. By statute[53] in New York the contributory negligence of the parent in allowing the child to ride a bicycle in a public highway may not be pleaded as a defense to the infant's action. The defendant moved, however, for leave to amend its answer to claim over against the infant's parents, alleging that their negligence in failing to supervise the infant plaintiff was causative of the accident. Citing *Dole* and *Kelly*, District Judge Dooling granted the motion. The clear purport, then, of these two recent decisions, *Sanchez* and *Sorrentino*, is that any person guilty of delinquent conduct may be called upon to respond in damages regardless of his prior status in the law suit, or the plaintiff's reluctance to have him brought into the suit.[54]

At least four other areas of practice may also be affected by *Dole*. First, since *Mills v. Gabriel*[55] held that a permissive user's contributory negligence will not be imputed to the owner of a motor vehicle who is suing the owner or driver of a second vehicle for property damage, it probably will now be standard procedure in these cases for the defendant to implead the plaintiff's driver. Second, effective September 1, 1972, the New York General Obligations Law[56] provides that a release given to one co-tortfeasor will, in the absence of express words to the contrary, release only the party named, and not his fellow wrongdoers. *Dole* therefore makes it imperative for the tortfeasor to have express words releasing his co-wrongdoers written into the document. Otherwise, the injured party might sue the other wrongdoers, who might implead the releasee, and thus he might still be held liable for some part of the judgment. Third, although it remains to be seen whether the court of appeals will overrule *Baidach v. Togut*[57] and give

52. Id. Contra, Korman v. Soshnick, 21 N.Y.S.2d 857 (Sup. Ct. 1940). A parent of a loosely knit family might now be reluctant to bring a suit in his child's behalf which could result in the infant's recovery against one tortfeasor, and a judgment over for that tortfeasor against the parent for contribution. An infant who reaches majority while the suit is pending might leave home with the proceeds, and the parent would have nothing to show for his efforts but a judgment outstanding against him.

53. N.Y. Gen. Oblig. Law § 3-111 (McKinney 1964).

54. The Sorrentino case contains a dictum directing the attorneys for the parties against whom the counterclaim was brought to consider the ethics of continuing to represent their clients in their clients' two roles of plaintiffs and tortfeasors. This federal court dictum does not mention the decision in Barlas v. Johnson Elec. Corp., 44 Misc. 2d 918, 255 N.Y.S.2d 350 (Sup. Ct. 1964) which held that a party may only be represented by one counsel even if a counterclaim is interposed against him. It will be interesting to see whether the New York courts follow Judge Dooling's reasoning and overrule Barlas as the procedural aspects of Dole are implemented.

55. 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't), aff'd mem., 284 N.Y. 755, 31 N.E.2d 512 (1940).

56. N.Y. Gen. Oblig. Law § 15-108 (McKinney Supp. 1972-73).

57. 7 N.Y.2d 128, 164 N.E.2d 373, 196 N.Y.S.2d 67 (1959).

a wrongdoer standing to appeal a trial court's dismissal of the plaintiff's action against the co-defendant, the policy behind the *Dole* decision would seem to impel such a ruling. Fourth, the *Dole* rule has been applied in the area of product liability. In *Walsh v. Ford Motor Company*,[58] fault for breach of implied warranty was apportioned on a three-fourths to one-fourth basis between the manufacturer of an automobile and the dealer who sold it to the plaintiff.

But the most important question posed by the court's reasoning is whether *Dole v. Dow Chemical Company* presages the establishment of the comparative negligence doctrine in New York. The *Sorrentino* case, and *Yarish v. Dowling*[59] contain dicta[60] in which the respective judges conclude from their analyses of *Dole* that contributory negligence as a complete defense cannot survive, and that New York is moving through these cases to a position in which a plaintiff who is negligent will be assigned a certain percentage of the fault by the fact finder, and will have recovery for the percentages of fault assigned to the various defendants.[61] Dean Joseph M. McLaughlin, a leading commentator on New York practice, agrees that *Dole* "will lead inexorably to a judicial adoption of the doctrine of comparative negligence."[62] Moreover, on September 27, 1972 Honorable Anthony J. Crecca charged a civil court jury in accordance with the comparative negligence doctrine. The jury returned a verdict that the plaintiff was damaged in the amount of $8,000 but was twenty-five per cent negligent and, therefore, entitled to $6,000. If this action[63] reaches the New York Court of Appeals, that tribunal will have to decide if the *Dole* right of apportionment extends to plaintiffs as well as defendants. Therefore, while certain ramifications[64] of the Court's ruling in *Dole* remain unsettled, the core meaning of the decision is clear: a tortfeasor is not a pariah. The fact that a person has been negligent with others in a particular instance does not prevent him from seeking a just and equitable distribution of the blame for the harm that has been caused.

58. 168 N.Y.L.J., July 27, 1972, at 11, col. 4 (Sup. Ct. 1972).

59. 70 Misc. 2d 467 (Sup. Ct. 1972).

60. 344 F. Supp. at 1310; 70 Misc. 2d at 469.

61. Wisconsin moved in the opposite order, first adopting comparative negligence and later fault-based contribution. See Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

62. McLaughlin, Dole v. Dow Chemical Co.—Impleader, 167 N.Y.L.J., May 12, 1972, at 1, col. 1. The end of contributory negligence as a complete defense would remove one of the chief objections to the present "fault" system of compensating victims of automobile accidents. Therefore, the judicial adoption of comparative negligence in New York would decrease the likelihood of a legislative enactment of a "no-fault" system.

63. Murray v. Lidell, Index No. 1221-69 (Richmond Co. Civ. Ct., Sept. 27, 1972).

64. To see some of the retroactivity problems raised by Dole compare McLaughlin's article, supra note 58, with Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964) and Satta v. City of New York, 272 App. Div. 782, 69 N.Y.S.2d 653 (2d Dep't 1947).

NLRB—Jurisdiction—Standards for Deferral to Arbitration Where No Award Has Issued.—A labor union filed an unfair labor practice charge[1] with the National Labor Relations Board, alleging that the employer had initiated unilateral changes in certain wage schedules and working conditions.[2] The employer claimed that the changes were sanctioned by the terms of the parties' collective bargaining agreement and the course of performance thereunder.[3] He therefore urged that the controversy be settled through the grievance-arbitration machinery created by the agreement as the exclusive forum for the adjustment of contractual disputes. A majority of the full Board, noting the essentially contractual nature of the dispute, the apparent absence of anti-union animus on the part of the employer, and the long tradition of amicable bargaining by the parties,[4] chose to defer in favor of the parties' own problem-solving machinery.[5] However, the Board did retain jurisdiction for the limited purpose of rehearing the case should the parties fail to proceed to a private settlement, or should there be exceptions to the procedural regularity and statutory adequacy of the anticipated arbitral award. *Collyer Insulated Wire*, 192 N.L.R.B. No. 150 (Aug. 20, 1971).

Labor disputes must be settled with a minimum of expense, delay, and hostility.[6] To this end, nearly 95% of all collective bargaining agreements provide for grievance-arbitration machinery for the adjustment of controversies arising out of the agreement.[7] Such arbitration clauses are subject to specific enforcement in the federal courts.[8] Moreover, the Supreme Court has ruled that

1. Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" concerning wages, hours and other terms and conditions of employment. 29 U.S.C. § 158(a)(5) (1970).

2. The employer instituted an upward adjustment of wage rates for maintenance employees, directed that the weekly maintenance of certain equipment be performed by one machinist, rather than the usual team of two, and instituted a new incentive wage rate for extruder operators. Collyer Insulated Wire, 192 N.L.R.B. No. 150, at 3-7 (Aug. 20, 1970).

3. "The contract provid[ed] for a job evaluation plan and for the adjustment of rates, subject to the grievance procedure, during the term of the contract. Throughout the bargaining relationship, [the employer] has routinely made adjustments in incentive rates to accommodate new or changed production methods." Id. at 3. See note 50 infra.

4. 192 N.L.R.B. No. 150, at 18.

5. Id. at 22-23.

6. See NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

7. Collyer Insulated Wire, 192 N.L.R.B. No. 150, at 22 n.17 (1971); see United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960). See generally Fuller, Collective Bargaining and the Arbitrator, 1963 Wis. L. Rev. 3; Goldberg, A Supreme Court Justice Looks at Arbitration, 20 Arb. J. 13 (1965).

8. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Agreements to arbitrate future disputes were generally not enforceable at common law. See Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 112 (1924); United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007-08 (S.D.N.Y. 1915). In Lincoln Mills, the Court held "that federal courts should enforce [agreements to arbitrate] on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." 353 U.S. at 455. The Court based its holding on its construction of Section 301 of the Labor Management

no particular grievance is excluded from the scope of an arbitration clause unless the exclusion has been made in express terms.[9] The arbitral process has been sanctioned by Congress as a vital aspect of the collective bargaining system—the cornerstone of the national labor policy.[10] Section 203(d) of the Labor Management Relations Act states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.[11]

A dispute involving the administration of a labor contract, however, may concern conduct that arguably constitutes an unfair labor practice.[12] Congress

Relations Act, which provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . . ." 29 U.S.C. § 185(a) (1970). See generally, R. W. Fleming, The Labor Arbitration Process 21-23 (1965); Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L.J. 167 (1956).

9. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584-85 (1960). The Warrior & Gulf decision was addressed to the problem of judicial examination of the merits of a controversy when one party denied the arbitrability of an issue. The Supreme Court declared that any court faced with the problem of the arbitrability of a labor dispute "should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement . . . when the alternative is to utilize the services of an arbitrator." Id. at 585. In the opinion of the Court, "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." Id. at 582. See generally Aaron, Arbitration In the Federal Courts: Aftermath of the Trilogy, 9 U.C.L.A.L. Rev. 360 (1962); Davey, The Supreme Court and Arbitration: The Musings of an Arbitrator, 36 Notre Dame Law. 138 (1960); Wellington, Freedom of Contract and the Collective Agreement, 14 Lab. L.J. 1016 (1963).

10. The Labor Management Relations Act (Taft-Hartley Act) of 1947 restated the declaration of federal labor policy contained in the Wagner Act: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . ." 29 U.S.C. § 151 (1970).

11. Id. § 173(d) (1970); see id. §§ 171(a) & (b) (1970).

12. The concern of the Board with the administration of a contract may be direct, as where the agreement in effect prohibits an unfair labor practice, such as an unauthorized modification in terms or conditions of employment. See C & S Indus., Inc., 158 N.L.R.B. 454, 458 (1966); notes 31-38 infra and accompanying text. There are cases, however, where the very existence of an unfair labor practice depends on whether or not the contract justifies the conduct giving rise to the complaint, as where an employer initiates a unilateral change in working conditions under an alleged claim of contractual right. See also Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); note 46 infra. Unilateral action that is not sanctioned by the terms of the parties' contract may amount to a refusal to bargain, and thus a violation of section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5) (1970). Where a collective bargaining contract is in effect, section 8(d) of the Act specifies that the duty to bargain collectively "mean[s] that no party to such [a] contract shall . . . modify [the] contract" without offering to negotiate with the other party, and without observing certain notification procedures. Id. § 158(d) (1970).

has given jurisdiction to restrain unfair labor practices to the National Labor Relations Board, and has provided that the Board's authority "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ."[13] As enforced by the courts, the Board's jurisdiction is in no way circumscribed by the availability of private procedures of dispute settlement,[14] or by the prior adjudication of a controversy and the issuance of an award by an arbitrator.[15] Moreover, the Supreme Court has upheld the primacy of the Board's authority even where the Board must interpret the terms of the parties' contract in order to adjudicate an unfair labor practice complaint.[16] Although the courts have not considered the Board's jurisdiction to be limited by the explicit statutory policy in favor of arbitral remedies for contract disputes,[17] the Board itself has acknowledged its responsibility to exercise its unfair labor practice jurisdiction in a way that will accommodate that policy.[18]

As the Board explained in *International Harvester Co.*,[19] it has "considerable

13. 29 U.S.C. § 160(a) (1970).

14. NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967); NLRB v. Walt Disney Prod., 146 F.2d 44 (9th Cir. 1944).

15. NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953); NLRB v. Local 291, UAW, 194 F.2d 698 (7th Cir. 1952); see Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964) ("The superior authority of the Board may be invoked at any time.").

16. NLRB v. Strong, 393 U.S. 357 (1969); NLRB v. Acme Indus. Co., 385 U.S. 432 (1967); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967). "The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up [its right to bargain]." Id. at 428. See generally Bloch, The NLRB and Arbitration: Is the Board's Expanding Jurisdiction Justified? 19 Lab. L.J. 640, 652-59 (1968); 14 U.C.L.A.L. Rev. 692 (1967).

17. The Supreme Court does not consider the arbitrator to be deprived of power where the subject matter of a dispute may involve an unfair labor practice. In Smith v. Evening News Ass'n, 371 U.S. 195 (1962), the Court upheld the authority of the courts under section 301(a) of the Act to compel arbitration or affirm an arbitral award even though the activity complained of may also constitute an unfair labor practice. For the text of section 301(a) see note 8 supra. In Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), the Court encouraged "the therapy of arbitration" even in the face of possible Board preemption. The Court said: "By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' and which may be dispositive of the entire dispute, are encouraged." Id. at 272 (citation omitted). One commentator, argues that Carey was an inappropriate case for the encouragement of arbitration, because it involved a representational dispute where not all the unions claiming the work had agreed to be bound by the award. Bond, The Concurrence Conundrum: The Overlapping Jurisdiction of Arbitration and the National Labor Relations Board, 42 S. Cal. L. Rev. 4, 13-14 n.49, 16-17 (1969). But see Abodeely, Compulsory Arbitration and the NLRB 74 (1968).

18. See notes 19-26 infra, and accompanying text. See generally Bond, supra note 17; Harris, The National Labor Relations Board and Arbitration—The Battle of Concurrent Jurisdictions, 16 Syracuse L. Rev. 545 (1965); Wollet, The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction? 10 Lab. L.J. 477 (1959).

19. 138 N.L.R.B. 923 (1962), enforced sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964).

discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental purposes of the Act."[20] The standards pursuant to which the Board may honor an arbitral award concerning an issue within its jurisdiction were described by the Board in 1955 in *Spielberg Manufacturing Co.*[21] The Board announced at that time that it would not upset an award if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the abitration panel is not clearly repugnant to the purposes and policies of the Act."[22]

In cases where no award has issued, on the other hand, the Board's deferral policy has been much less clear. There is an early line of "refusal to bargain" cases where the Board dismissed unfair labor practice complaints if the charging party had failed to exhaust his contractual remedies before filing with the Board, or where any ruling the Board might have made would have been based strictly on an interpretation of the parties' contract.[23] In *Consolidated Aircraft Corp.*,[24] for example, the employer established working hours for a third shift, and adopted a job classification schedule, without notifying or offering to confer with the union. The Board dismissed the union's section 8(a)(5) charge on the ground that the union had failed to utilize the arbitration machinery established by the parties' agreement to settle contractual disputes.[25] The Board explained that it was unwilling to "police" the administration of labor contracts because such a practice would contravene "the statutory policy of 'encouraging the practice and procedure of collective bargaining . . . .' "[26]

20. 138 N.L.R.B. at 926. The court of appeals, in enforcing the Board's order, confirmed that "the Board has the discretion to defer to the decision of an arbitrator." 327 F.2d at 787. The Supreme Court has never expressly considered the Board's right to decline jurisdiction in favor of arbitration. However, in Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), it quoted with apparent approval the Board's language in International Harvester Corp. Id. at 271.

21. 112 N.L.R.B. 1080 (1955).

22. Id. at 1082. See generally Cummings, NLRB Jurisdiction and Labor Arbitration: "Uniformity" vs. "Industrial Peace," 12 Lab. L.J. 425 (1961). In Cummings' opinion, "[i]n effect, although the Board protests that such is not the case, an award will be allowed to stand if the Board agrees with it, and will be struck down if the Board disagrees . . . ." Id. at 432 n.31. Accord, Abodeely, supra note 17, at 14; Bond, supra note 17, at 51. Board Chairman Edward B. Miller recently said of the Spielberg standards: "[T]here . . . appeared to be some reluctance on the part of the Board to apply the . . . Spielberg deferral policy, and some critics asserted that the Board was too ready to find some reason why an arbitration in any particular case should not be deemed to meet the Spielberg standards." Address by NLRB Chairman Edward B. Miller to the Conference of Western States Employer Association Executives, Aug. 27, 1971, in 78 Lab. Rel. Rep. 28, 32 (1971).

23. E.g., National Dairy Prods. Corp., 126 N.L.R.B. 434 (1960); United Tel. Co., 112 N.L.R.B. 779 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943), enforced in pertinent part, 141 F.2d 785 (9th Cir. 1944).

24. 47 N.L.R.B. 694 (1943), enforced in pertinent part, 141 F.2d 785 (9th Cir. 1944).

25. Id. at 705-06.

26. Id. at 706. In Consolidated Aircraft Corp. and similar non-intervention cases, the Board took special note of the apparent absence of anti-union animus on the part of the

In recent years, however, the Board has asserted that it "is not precluded from resolving an unfair labor practice issue . . . simply because as an incident to such violation it may be necessary to construe the scope of a contract which an arbitrator is also empowered to construe."[27] As the Board explained in one recent unilateral action case,[28] where a dispute turns on the alleged denial of a statutory right, a dismissal of the case "would amount to an abdication of [the Board's] responsibilities under the Act."[29] Thus, the Board of late has chosen to intervene even in cases where the subject matter of a dispute is covered by the terms of a collective bargaining agreement.[30] One example is *C & S Industries, Inc.*[31] The union's charge in *C & S* alleged that the employer had breached a provision of the parties' agreement that expressly prohibited a "change in the method of payment of any employee covered by this agreement without prior negotiations and written consent of the Union."[32] The employer's refusal to arbitrate the grievance, contended the union, amounted to a refusal to bargain. The majority of the Board based its decision to assert jurisdiction on the ground that the issue was primarily statutory, rather than contractual, in nature.[33] There was no issue falling within "the special competence of an arbitrator," the majority asserted, because the language of the contract on the matter of wage-hour rates was clear and unambiguous.[34] Since the employer had made significant changes without fulfilling the notification and bargaining formalities prescribed in section 8(d),[35] the majority found that its conduct constituted an unfair labor practice.[36]

The legislative history of the Taft-Hartley amendment clearly indicates that Congress intended that mere breaches of collective bargaining contracts should not constitute unfair labor practices.[37] The majority in *C & S* avoided the

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alleged offender. Id. at 705; United Tel. Co., 112 N.L.R.B. 779, 781 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930, 934 (1954); Crown Zellerbach Corp., 95 N.L.R.B. 753, 753-54 (1951).

27. Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1415 (1964). See notes 30-45 infra and accompanying text. The contrast between this approach to contract interpretation and the apparent non-intervention policy of the Board in earlier cases caused the trial examiner in one recent case to conclude that Consolidated Aircraft Corp. had, in effect, been overruled. Dresser Indus., Inc., 178 N.L.R.B. 317, 322 (1969). The Board expressly rejected this finding. Id. at 317 n.1.

28. Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964).

29. Id. at 1509.

30. See C & S Indus., Inc., 158 N.L.R.B. 454 (1966); Clifton Precision Prods., 156 N.L.R.B. 555 (1966); Century Papers, Inc., 155 N.L.R.B. 358 (1965); International Shoe Co., 151 N.L.R.B. 693 (1965); Ador Corp., 150 N.L.R.B. 1658 (1965); Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964).

31. 158 N.L.R.B. 454 (1966).

32. Id. at 455.

33. Id. at 459-60.

34. Id. at 460.

35. 29 U.S.C. § 158(d) (1970); see note 12 supra.

36. 158 N.L.R.B. at 460.

37. At the time of the passage of the Amendments, Congress rejected a proposal that

implications of that policy by demonstrating that the parties' dispute was, in effect, extra-contractual in nature. "[T]here can be little doubt," said the majority,

that where an employer unilaterally effects a change which has a continuing impact on a basic term or condition of employment, wages for example, more is involved than just a simple default in a contractual obligation. Such a change manifestly constitutes a "modification" within the meaning of Section 8(d).[38]

In *C & S* and in similar unilateral action cases,[39] the Board's paramount interest appeared to be the "stabiliz[ation] during [the] contract term [of] agreed-upon conditions of employment"[40] rather than the promotion of contractually established methods of dispute settlement.[41] The Board did not foreclose the possibility of deferral in such cases, but indicated that deferral would be appropriate only where "the special competence of an arbitrator" might be required to construe an unclear or unambiguous specific contract term.[42]

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the Board be given the power to remedy breaches in collective bargaining agreements. See H.R. Conf. Rep. No. 510, 80th Cong., 2d Sess. 42 (1947). "Once parties have made a collective bargaining contract," it was decided, "the enforcement of that contract should be left to the usual processes of law and not to the NLRB." Id. Congress apparently had expected that the Board would "develop by rules and regulations, a policy of entertaining under these provisions only such cases . . . as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration." S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947). See also Vaca v. Sipes, 386 U.S. 171, 187 (1967) ("[T]o remedy injuries arising out of a breach of contract [is] a task which Congress has not assigned to [the Board] . . . .").

38. 158 N.L.R.B. at 458.

39. See T.T.P. Corp., 190 N.L.R.B. No. 48 (1971); American Cyanimid Corp., 185 N.L.R.B. No. 135 (1970); Consolidated Foods Corp., 183 N.L.R.B. No. 78 (1970); Macy's California, 183 N.L.R.B. No. 47 (1970); Union Carbide Corp., 178 N.L.R.B. 504 (1969); Wisconsin So. Gas Co., 173 N.L.R.B. 480 (1968); Gravenslund Operating Co., 168 N.L.R.B. 513 (1967); cases cited note 30 supra.

40. C & S Indus., Inc., 158 N.L.R.B. 454, 457 (1966). According to the Board, this was the statutory intent underlying the passage of section 8(d). But see NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 487 (1960) ("[I]t remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of . . . . collective bargaining agreements."); Abodeely, supra note 17, at 12-17.

41. See Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964). The great majority of unilateral action cases decided on the merits by the Board involved changes made by the employer. However, the same policy of intervention was applied in cases in which the union's action was the subject of the complaint. See Painters Dist. Council, 186 N.L.R.B. No. 140 (Nov. 11, 1970), enf'd, 453 F.2d 783 (2d Cir. 1971), cert. denied, 408 U.S. 930 (1972). In this case, the union unilaterally imposed a 10-room weekly limit for some of its journeymen painters. Since the term was not provided for in the parties' contract, the Board found the union's action to be in violation of section 8(d). Dissenting from the enforcement order, Judge Hays protested that "[t]he Board cannot take over enforcement of collective agreements by the device of holding that any violation constitutes a unilateral change in the agreement and therefore the unfair labor practice of refusal to bargain." 453 F.2d at 789.

42. C & S Indus., Inc., 158 N.L.R.B. 454, 460 (1966); Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1416 (1964).

The Board's rulings in unilateral action cases were often based on a literal interpretation of the parties' contract by the Board or trial examiner[43] without reference to the past practice of the parties under their agreement, or to the attempted reservation of rights by the employer.[44] Moreover, in these "refusal to bargain" cases, the Board did not always examine the motives of the alleged offender because bad faith on the part of the respondent was not necessarily an element of a technical section 8(a)(5) violation.[45]

In light of the Board's policy of intervention in recent contract modification cases, the decision in *Collyer Insulated Wire*[46] is notable in several respects. The majority in *Collyer* conceded that the right of the employer to make certain changes in wage rates and maintenance duties may have been "intended to be reserved to the management, subject to later adjustment by grievance and arbitra-

43. See, e.g., T.T.P. Corp., 190 N.L.R.B. No. 48 (May 3, 1971); Westinghouse Elec. Corp., 150 N.L.R.B. 1574 (1965); Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964). The Board's approach to contract interpretation in such cases is reminiscent of the discredited "Cutler-Hammer" doctrine, which dictated that no arbitrable dispute existed if the contract on its face permitted only one tenable construction. See Local 402, IAM v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dep't), aff'd, 297 N.Y. 519, 74 N.E.2d 464 (1947). The Supreme Court, in United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), expressly rejected the doctrine as "a principle that could only have a crippling effect on grievance arbitration." Id. at 566-67. In arbitration proceedings, the "common law of the shop" is said to give substance to the written terms of a labor contract, and thus to inform the judgment of an arbitrator. See United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960). See generally Cox, Reflections upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1492 (1959); Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Colum. L. Rev. 52 (1957); Summers, Collective Agreements and the Law of Contracts, 78 Yale L.J. 525, 529-30, 548-56 (1969).

44. The Board had originally honored "zipper" or "wrap-up" clauses—abbreviated waiver provisions reserving to management any rights not expressly ceded in a collective bargaining agreement. See The Bordon Co., 110 N.L.R.B. 802 (1954). But see Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410, 1412 (1964) (Waiver must be "clearly and unmistakably" expressed in the contract to be effective); The Beacon Journal Publ. Co., 164 N.L.R.B. 734 (1967); Master Appliance Corp., 164 N.L.R.B. 1189 (1967); New York Mirror, 151 N.L.R.B. 834 (1965). See generally Fairweather, The NLRB—Implementer of the National Labor Policy or Vice Versa? 22 Lab. L.J. 294 (1971); Loomis & Herman, Management's Reserved Rights and the NLRB—An Employer's View, 19 Lab. L.J. 695 (1968).

45. See NLRB v. Katz, 369 U.S. 736, 747 (1962); Generac Corp., 149 N.L.R.B. 980 (1964). Cf. note 26 supra.

46. 192 N.L.R.B. No. 150 (Aug. 20, 1971). In 1969, the Board, through a three-member panel, reached a result comparable to that in Collyer in Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969). The majority in Collyer quoted extensively from Schlitz, and noted a striking similarity of the disputes in each of the cases. 192 N.L.R.B. No. 150, at 17-19. The dispute in Schlitz involved a change in the employee relief system, requiring all employees to break for lunch at the same time. The two-member majority ruled that the issue was properly a matter for contract interpretation since the "situation [was] wholly devoid of unlawful conduct or aggravated circumstances of any kind . . . ." 175 N.L.R.B. at 142. Member Jenkins concurred on the grounds that the case should be dismissed on the merits.

tion . . . ."[47] The very presence of an unfair labor practice, acknowledged the majority, depended on whether or not the contract did "sanction Respondent's right to make the disputed changes,"—a "threshold determination" which "is clearly within the expertise of a mutually agreed-upon arbitrator."[48] Significantly, the majority found it to be

> consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed-upon procedures.[49]

It is not difficult to distinguish *Collyer* factually from the non-deferral cases[50] and to view it as a case where the dispute was so clearly a matter for contract interpretation[51] that the Board could consider its statutory implications to be *de minimis*. However, an examination of the decision in the light of the factual similarities between *Collyer* and the intervention cases reveals more about the real import of the decision. Although certain clauses in the *Collyer* contract could be construed in a way that would support the employer's initiative,[52] the trial examiner had found that there was no explicit contractual authority for the changes made by the employer, and that the contract was silent with respect to at least one of the changes.[53] Moreover, the employer had adjusted certain wage rates even though on several occasions the union had expressly rejected proposals

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Id. In his Collyer dissent, Member Jenkins denied that Schlitz stood for deferral to arbitration, and asserted that "on the issue of arbitration, the majority in Schlitz was opposed to deferral, and there was a majority only for the result of dismissal." 192 N.L.R.B. No. 150, at 62.

47. 192 N.L.R.B. No. 150, at 11.

48. Id. at 19.

49. Id. at 22.

50. The majority opinion in Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964), in fact seemed to anticipate the Collyer situation to some extent when it explained its decision to intervene in that case. The Adams case, it asserted, was not one "involving an alleged unfair labor practice, the existence of which turns primarily on an interpretation of specific contractual provisions, unquestionably encompassed by the contract's arbitration provisions, and coming to [the Board] in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act." Id. at 1416 (footnote omitted). See C & S Indus., Inc., 158 N.L.R.B. 454, 459-60 (1966).

51. Article IX, section 2 of the parties' agreement permitted adjustments in individual wage rates "to remove inequalities or for other proper reasons," but it prohibited any "change in the general [wage] scale of pay . . . during the term of this Agreement." 192 N.L.R.B. No. 50, at 8. One question for arbitration, therefore, was whether the unilateral change in incentive rates could be considered an adjustment of individual rates, rather than of the general wage scale. Id. at 11. Another arbitrable issue was the extent to which a clause providing for a job evaluation program gave the employer the right to initiate the skill factor increase, subject to review through grievance and arbitration procedures. Id. at 8, 11.

52. See note 51 supra.

53. 192 N.L.R.B. No. 150, at 9-10.

for an increase.[54] Nevertheless, the majority in *Collyer* was willing to base its finding that the employer's acts were not patently erroneous on extraneous circumstances, such as the parties' past practice under the contract, and their bargaining history.[55] The majority was also influenced by the apparent good faith of the employer, as evidenced by his attempts to win union approval for some of the changes, and by his willingness to arbitrate when the union protested the changes he later made.[56] Finally, the *Collyer* majority found that, if necessary, the arbitral machinery established by the parties' agreement could provide "a fully effective remedy for any breach of contract which occurred," and that the Board's "obligation to advance the purposes of the Act [could be] best discharged by the dismissal of this complaint."[57] What is striking about the *Collyer* decision, in short, is not that the dispute was characterized as an essentially contractual, as opposed to statutory, issue, but that the majority acknowledged, by its attention to the realities of contract administration, that responsible industrial self-government is as much a goal of the statute as the curtailment of unfair labor practices.

It is clear that the *Collyer* majority did consider its decision to be an important policy statement on the problem of Board involvement in the area of contract administration.[58] "Our decision," it declared,

> represents a developmental step in the Board's treatment of these problems and the controversy here arose at a time when the Board decisions may have led the parties to conclude that the Board approved dual litigation of this controversy before the Board and before an arbitrator.[59]

The General Counsel of the Board, whose duty it is to investigate and prosecute alleged violations of the National Labor Relations Act,[60] has already unofficially discussed the general procedural guidelines he "intend[s] to follow in proceeding with 'Collyerable' cases" in order to implement the Board's new deferral policy.[61] The unofficial comments made by Board Chairman Miller[62] within a week of the *Collyer* decision offer perhaps the best indication of the policy implications of the case. Miller confirmed that "the decision makes clear that

54. Id. at 4. In C & S Indus., Inc., 158 N.L.R.B. 454 (1966), the Board ruled that the unilateral institution of wage changes was a statutory violation "even though [the employer] ha[d] previously offered to bargain with the union about the change[s] and the union ha[d] refused." Id. at 457 (footnote omitted).

55. 192 N.L.R.B. No. 150, at 11, 18-19.

56. Id. at 18; see note 26 supra.

57. 192 N.L.R.B. No. 150, at 10.

58. The dissenting members also recognized the importance of the majority opinion. Member Fanning called it "a novel decision with far-reaching implications . . . ." Id. at 35. Member Jenkins considered it to be a "complete reversal of Board precedent . . . ." Id. at 47.

59. Id. at 23.

60. 29 U.S.C. § 153(d) (1970).

61. Address by NLRB General Counsel Peter G. Nash before the FMCS-AAA Regional Conference on Labor Arbitration, October 15, 1971, in BNA Lab. Rel. Yearbook-1971 at 151, 157.

62. Address by NLRB Chairman Miller, supra note 22, at 32.

[deferral] will be [the Board's] policy in similar cases in the future,"[63] and characterized the case as a break from precedent and an affirmative change in Board policy.[64] After a brief summary of the growth of the arbitration system, he explained:

> External factual and legal developments over which the [Board] had no control have changed to such [a] degree that it seemed to a majority of us that we ought to accommodate our processes to those changes.[65]

Like the *Spielberg* standards in the analogous award cases,[66] the Board's language in *Collyer* will no doubt be invoked in future unfair labor practice cases to support the defense that an arbitral solution is available.[67] However, as in the *Spielberg* case, the Board's "hospitable acceptance" of arbitration is a completely discretionary policy that is likely to be applied only where the Board is persuaded that a private remedy can " 'resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. . . .' "[68]

In the *Collyer* case, the majority noted a number of circumstances that combined to urge deferral,[69] and it may be assumed that the Board will base future deferral decisions on the concurrence of similar factors or standards. A prime consideration was the duration and general quality of the disputants' bargaining relationship. For thirty-five years the parties in *Collyer* had "mutually and voluntarily resolved the [disputes] which inhere in collective bargaining," apparently without recourse to the courts or the Board.[70] In a future case where the parties' association may be relatively new or marked by disputes requiring judicial or Board intervention, the Board may have less confidence in the effectiveness of a private method of settlement.[71] A related factor that should, as in *Collyer*, influence future dismissals by the Board is the willingness of the party who is urging deferral to arbitrate the dispute.[72] As in earlier cases, the Board is likely to view repeated attempts to frustrate arbitration as evidence of over-reaching or anti-union animus on the part of the alleged offender.[73]

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63. Id. at 33.

64. Id. at 35.

65. Id.

66. See notes 19-22 supra and accompanying text.

67. See address by NLRB General Counsel Nash, supra note 61, at 157-58.

68. 192 N.L.R.B. No. 150, at 17 (quoting Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 142 (1969)).

69. 192 N.L.R.B. No. 150, at 18-19. See notes 70-75 infra and accompanying text.

70. 192 N.L.R.B. No. 150, at 18.

71. In Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964), for example, the Board noted a history of futile arbitration between the disputants, and concluded on that basis that arbitration would again be futile. Id. at 1416 n.17.

72. "Respondent here has credibly asserted its willingness to resort to arbitration under a clause . . . unquestionably broad enough to embrace this dispute." Collyer Insulated Wire, 192 N.L.R.B. No. 150, at 18.

73. In LeRoy Mach. Co., 147 N.L.R.B. 1431 (1964), for example, the Board asserted that the employer, charged with a section 8(a)(5) violation because of a unilateral change

Another criterion for deferral in *Collyer* was the essentially contractual nature of the controversy.[74] The *Collyer* majority was persuaded that the conduct giving rise to the complaint was " 'based on a substantial claim of contractual privilege,' " that could be tested by means of " 'substantive contract interpretation.' "[75] The *Collyer* dispute, in part, concerned the employer's right under specific contract terms to make certain changes in wage rates.[76] In such a case, an arbitrator's construction of those clauses, in light of the parties' practice thereunder, may be dispositive of the issue. This is so whether it is found that the contract did in fact sanction the unilateral action, or that the alleged offender misapplied the contract terms. The *Collyer* decision indicates at least that the Board may be willing to entrust clearly textual controversies to arbitration, absent evidence of anti-union animus or other aggravating circumstances.

However, a contract may be silent with respect to the subject matter of a controversy, or may seem on its face to preclude change; or the acting party may have depended upon a general reserved rights clause to justify his initiative. In such a case, although an arbitrator is not without authority and expertise to effectuate the intent of the contracting parties, the increased possibility that new, unbargained-for rights are at stake will probably decrease the likelihood of deferral by the Board. As Member Brown pointed out in his concurring opinion in *Collyer*:

> [A]rbitration properly serves the function of resolving differences about agreements previously reached, and [is not] a means for the "acquisition of future rights"; . . . arbitration [is not] a substitute for collective bargaining.[77]

Because the Board must avoid the danger of compulsory arbitration,[78] it is certain to require in future deferral cases a strong showing that there is some contractual basis for the right that is asserted by the respondent, and that the parties had voluntarily agreed beforehand to submit the subject matter of the dispute to arbitration.[79] A cautious deferral policy such as this would not constitute an abdication of the Board's statutory duty to restrain unfair labor practices, as suggested by the dissenting members in *Collyer*,[80] but rather an accommodation of

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he had made, had no standing to urge deferral because on three prior occasions he had attempted to frustrate the arbitral process. Id. n.2.

74. 192 N.L.R.B. No. 150, at 18.

75. Id. at 17, quoting from Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 142 (1969).

76. See note 51 supra.

77. 192 N.L.R.B. No. 150, at 28; see Hilton-Davis Chem. Co., 185 N.L.R.B. No. 58 (Aug. 27, 1970).

78. See 192 N.L.R.B. No. 150, at 20.

79. See Tulsa-Whisenhunt Funeral Homes, Inc., 195 N.L.R.B. No. 20 (Feb. 1, 1972). In this post-Collyer discharge case, the Board emphasized that it would consider deferral only where the dispute was quite clearly encompassed by a compulsory arbitration provision in the parties' agreement. Here, unlike Collyer, it was only by ad hoc agreement of the parties that the arbitral procedure could be invoked, and so the Board ruled out deferral. Id. at 1-2 n.1.

80. 192 N.L.R.B. No. 150, at 35 (Member Fanning, dissenting), 48 (Member Jenkins, dissenting).

an alternate method of achieving the national goal of stable and responsible industrial self-government.

Contrary to the expectations of the dissenters,[81] deferral by the Board will not be an automatic procedure in any case where arbitration is available, but would result only where the Board is assured that an arbitral remedy could effectuate the policies of the Act. In addition, the majority in *Collyer* indicated that deferral would not be a final dismissal of an unfair labor practice complaint. "In order to eliminate the risk of prejudice to any party," the majority announced that it would

> retain jurisdiction over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.[82]

Thus, a system of checks prior to, and after an attempt by the parties to settle their dispute can assure that a policy of deferral will not mean the denial of statutory protection to any claimant.[83]

The exact nature of the Board's intended accommodation to voluntarism must

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81. According to Member Fanning, the Collyer decision means that the Board "will strip the parties of statutory rights merely on the availability of [arbitration]." Id. at 44 (emphasis omitted). Member Jenkins protested that "[t]he majority is reading out of our jurisdiction the statutory protection against all unfair labor practices which may involve in part, and perhaps distantly, the interpretation of a contract provision, where the contract contains an arbitration clause. . . . [The decision] will also permit unions and employers to contract themselves almost entirely out of the Act by writing into their agreements a provision that neither will violate any provision of the Act, and [that] any alleged such violation will be arbitrated." Id. at 66-67 (footnotes omitted).

82. Id. at 23 (footnote omitted). The General Counsel for the NLRB considered it possible that the Board's retention of jurisdiction may be merely a transitional measure, designed to prevent unfairness in the Collyer situation itself, and in similar cases that "arose at a time when, under existing precedent, the charging party could have reasonably expected a Board ruling on the merits of the dispute . . . ." Nash, supra note 61, at 157 (see 192 N.L.R.B. No. 150, at 23). However, the majority's assurances that its decision does not modify the Spielberg standards, and that its retention of jurisdiction was meant to effectuate "the salutary policy announced in Spielberg," seem to indicate that the availability of retrospective review by the Board will not be withdrawn once Collyer becomes settled law. 192 N.L.R.B. No. 150, at 19-21. Although the Collyer decision may well encourage a fuller use of arbitral procedures, it is unlikely that the Board would in effect exempt from its ultimate jurisdiction any case that concerns a possible statutory violation.

83. The majority in Collyer seemed confident "that in the overwhelming majority of cases, the utilization of [arbitration] will . . . make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute." 192 N.L.R.B. No. 150, at 20-21. The majority noted that "years of experience with labor arbitration have now made clear" that the possibility of an unacceptable arbitral award "is a remote hazard." Id. at 20.

be clarified by the Board in future cases.[84] It is unclear, for example, to what extent the Board's earlier construction of the *Spielberg* standards[85] will control the Board's review of challenged awards in deferral cases, and especially, whether an arbitrator, in adjudicating a deferred dispute, will be expected to specifically consider the statutory issues raised by the complaint.[86] Furthermore, except for the reminder that the Board has discretion to withhold its jurisdiction " 'if to do so will serve the fundamental aims of the Act,' "[87] the *Collyer* decision does not indicate the likelihood of deferral in discharge[88] or representation cases,[89] or in

84. One factor that is likely to influence future Board policy is the mounting number of unfair labor practice cases facing the Board. See Samoff, The Case of the Burgeoning Load of the NLRB, 22 Lab. L.J. 611 (1971); see generally Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess. (1971). Member Jenkins points out in his Collyer dissent that arbitral procedures, as well, are becoming increasingly expensive and lengthy. 192 N.L.R.B. No. 150, at 62-63. To this contention Board Chairman Miller responded: "If we make clear to the parties that we are not going to rescue them from the imperfections of their own system, we will encourage rather than discourage them in taking necessary action to improve the processes which they will now be obliged to follow without our serving as an easily available alternative." Address by Chairman Miller, supra note 22 at 34.

85. See note 22 supra and accompanying text.

86. Under Spielberg, the Board has rejected as "repugnant to the Act" arbitral awards that were not made with explicit reference to alleged statutory violations underlying contractual disputes. E.g., Osage Mfg. Co., 173 N.L.R.B. 458 (1968); Tex-Tan Welhausen Co., 159 N.L.R.B. 1605 (1966); Raytheon Co., 140 N.L.R.B. 883 (1963), enforcement denied, 326 F.2d 471 (1st Cir. 1964). According to arbitrator Peter Seitz, the virtue of arbitration lies in its private nature and its voluntarism. This could be ruined, he asserts, if arbitrators should be expected to effectuate public policy. Seitz, The Limits of Arbitration, 88 Monthly Lab. Rev. 763, 764 (1965). Accord, Abodeely, supra note 17, at 82-84; Kamholz, The Impact of the NLRB Decisions on Arbitration, 15 Lab. L.J. 620, 622 (1964). However, Bond, supra note 17, at 51-53, argues that the arbitral procedure is inseparable from its statutory context.

87. 192 N.L.R.B. No. 150, at 13 (emphasis omitted) (quoting International Harvester Co., 138 N.L.R.B. 923, 925-26 (1962), enforced sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964)).

88. In Tulsa-Whisenhunt Funeral Homes, Inc., 195 N.L.R.B. No. 20 (Feb. 1, 1972), a discharge case, the Board chose not to defer, distinguishing Collyer on the basis of arbitrability. See note 78 supra. The Board explained, however, that it was not reaching the question of "whether and in what circumstances the principles relied on in Collyer" would be applicable in cases involving alleged acts of unlawful discrimination. 195 N.L.R.B. No. 20, at 2 n.1.

More so than in unilateral action cases, there has been a strong Board policy against deferral in discharge cases. As explained by the Board in one such case, "the right of an employee not to be discriminated against because he engages in activity protected by the Act is not a contract right but a public right . . . . The fact that a major purpose of the Act is to encourage collective bargaining does not mean that Congress intended the Board to abdicate to private parties its duty to protect public rights . . . ." Greenwood Farms, Inc., 140 N.L.R.B. 649, 665 (1963). See Producers Grain Corp., 169 N.L.R.B. 466 (1968); Adelson, Inc., 163 N.L.R.B. 365 (1967); Flasco Mfg. Co., 162 N.L.R.B. 611 (1967); Pontiac Motors, 132 N.L.R.B. 413 (1961); Bond, supra note 17, at 43-44.

89. In representation cases, the possibility that arbitration may affect the rights of a

cases where a union demands information of an employer.[90] Even if confined to the facts of *Collyer,* however, the Board's new deferral policy can entrust a wide range of substantive contractual problems to the flexible and localized arbitral system. Thus, *Collyer Insulated Wire* represents an important "developmental step" in the recognition of the status of arbitration in the statutory scheme of the NLRB.

Taxation—Employer's Payments to Widow of Deceased Employee Held to be Gifts, Not Compensation, and Excludable from Gross Income under I.R.C. § 102(a).[1]—A partnership, the employer of petitioner's deceased husband, made payments to her in a total amount equal to that which her husband would have earned had he lived until the end of the firm's fiscal year. The payments were not made pursuant to a regular plan nor were they made out of any legal or moral obligation. In voting for the payments the firm's managing partners expressed their intention to make the payments as a gift. The partners in their individual returns deducted rateable portions of the payments as death benefits, but the Commissioner disallowed the deduction.[2] The widow treated the payments as a gift and excluded the amount from gross income in her return. When the Commissioner disallowed the exclusion, deeming the payments to be compensation, the widow petitioned the Tax Court which upheld the Commissioner.[3] The Court of Appeals for the Second Circuit reversed, holding as a matter of law that the facts indicated the intention of the partnership to make a gift despite the fact that the partners had claimed an income tax deduction.

third party who had not agreed to be bound may be a factor which will weigh against deferral. But see Raley's Inc., 143 N.L.R.B. 256 (1963), where the Board extended the Spielberg policy to representation cases, explaining "that the same considerations which moved the Board to honor arbitration awards in unfair labor practice cases are equally persuasive to a similar acceptance of the arbitral process in a representation proceeding . . . ." Id. at 258-59. See also note 18 supra.

90. The right of a union to receive information from an employer concerning practices or decisions which may affect a union's right to bargain has been considered essentially a statutory privilege, rather than a matter for arbitration, since the Supreme Court judgment in NLRB v. Acme Indus. Co., 385 U.S. 432 (1967). In Acme, the Court upheld the right of the Board to order the employer to furnish information, reasoning that the Board's threshold determination of the potential relevance of the information did not amount to "a binding construction" of the labor contract. Id. at 437; see Timken Roller Bearing Co., 138 N.L.R.B. 15, 16 (1962), enforced, 325 F.2d 746 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964) ("[T]he mere existence of a grievance machinery does not relieve [the employer] of its obligation to furnish a union with information needed to perform its statutory functions." (footnote omitted)).

1. Int. Rev. Code of 1954, § 102(a). "General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance." Id.

2. See Carter v. Commissioner, 453 F.2d 61 (2d Cir. 1971).

3. Estate of Sydney J. Carter, 29 CCH Tax Ct. Mem. 1407 (1970), rev'd, 453 F.2d 61 (2d Cir. 1971).

Thus, the payments were excludable from gross income under section 102(a) of the Internal Revenue Code of 1954.[4] *Carter v. Commissioner*, 453 F.2d 61 (2d Cir. 1971).

Since the passage of the sixteenth amendment[5] and the first federal revenue act[6] in 1913 there has been a continuous debate over whether a payment of money to another constitutes a non-taxable gift or taxable compensation. Though this controversy has arisen in different factual settings, one of the most frequent fact patterns to emerge is that of an employer making voluntary payments to the widow of a deceased employee. In 1914 such payments were considered as gifts by the Internal Revenue Service and hence tax free to the widow.[7] The Commissioner reaffirmed this position in 1921 in Office Decision (O.D.) 1017.[8]

However, in the thirties, as a result of the Supreme Court decision in the landmark case of *Bogardus v. Commissioner*[9] and the promulgation of Income Tax Ruling (I.T.) 3329,[10] a problem arose because such payments were being treated in a logically inconsistent manner since they were deductible by the employer and yet excludable by the widow. In *Bogardus*, the Unopco Corporation, at the request of its shareholders, had paid a sum of money to the employees of the Universal Oil Products Company as a "gift or 'honorarium' "[11] for their services. Most of Universal's assets, including its corporate name, had been acquired by the United Gasoline Corporation; but the remainder of the assets were bought by Unopco, a corporation formed by all the former shareholders of Universal especially for this purpose. After the acquisition of Universal by United Gasoline, none of the Unopco shareholders were shareholders either of the parent, United Gasoline, or of its subsidiary Universal. However, in order to show their appreciation, Unopco's shareholders voted the "gift of honorarium" to sixty-four employees of Universal. The Board of Tax Appeals concluded that the payments were "additional compensation in consideration of services rendered to Universal and were not tax-free gifts."[12] The court of appeals affirmed the Board,[13] but the Supreme Court reversed, holding that the question presented was a mixed one of both law and fact and thus it might substitute its own judgment for that of the Board.[14] In overturning the lower court's decision the Court relied heavily

4. See note 1 supra.

5. U.S. Const. amend. XVI.

6. Tariff Act of Oct. 3, 1913, ch. 16, § IIB, 38 Stat. 167. Indeed the first case of the Board of Tax Appeals concerned a gift-compensation dispute. John H. Parrott, 1 B.T.A. 1 (1924), rev'd, 8 F.2d 368 (E.D. Va.), rev'd, 15 F.2d 669 (4th Cir. 1926). See Hauser, Voluntary Corporate Payments to Widows, 44 Taxes 110 (1966) [hereinafter cited as Hauser].

7. T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 267-68 (1914) (unpublished).

8. O.D. 1017, 5 Cum. Bull. 101 (1921).

9. 302 U.S. 34 (1937).

10. 1939-2 Cum. Bull. 153.

11. 302 U.S. at 42.

12. Bogardus v. Commissioner, 302 U.S. 34, 38, rev'g 88 F.2d 646 (2d Cir. 1937), aff'g 34 B.T.A. 1310 (1936).

13. Bogardus v. Helvering, 88 F.2d 646 (2d Cir.), rev'd 302 U.S. 34 (1937).

14. 302 U.S. at 39 & 44.

on the fact that Unopco was under no legal or moral obligation to the recipients,[15] and that "the disbursements were *not made or intended to be made* for any services rendered or to be rendered . . . ."[16] The Court disregarded the fact that the shareholders had described the payments as an "honorarium"[17] and that the resolutions had called them a "bonus."[18] The majority, per Mr. Justice Sutherland, concluded that the shareholders had shown a clear intention to make gifts, and since intention must govern "we must consider the word [bonus] used in the light of the intention."[19]

Justices Brandeis, Stone, Cardozo and Black dissented on two grounds: first, the categories of gift and compensation were not mutually exclusive; and second, since intention was solely a question of fact and opposing inferences were possible, the Board should have been upheld.[20]

Thus, *Bogardus*, which remained the focal case in the gift-compensation area until 1960,[21] had the double impact of making the intention of the payor the test and laying a broad basis for appellate review by labelling the question as a mixed one of law and fact.[22]

In 1939 the Commissioner issued I.T. 3329.[23] This ruling was an interpretation of the regulations governing section 23(a) of the Internal Revenue Code of 1939[24] and dealt with deductions from gross income. The regulations provided that "[w]hen the amount of the salary of an officer or employee is paid for a limited period after his death to his widow or heirs, in recognition of the services rendered by the individual, such payments may be deducted."[25] I.T. 3329 expanded these regulations by providing that "[w]hen an allowance is paid by an organization to which the recipient has rendered no service, the amount is deemed to be a gift or gratuity and is not subject to Federal [I]ncome [T]ax in the hands of the recipient."[26] The import of this ruling, *i.e.*, that "[The Service] had created an item which was deductible by a payor without providing that it

15. Id. at 41.

16. Id.

17. Id. at 42-43.

18. Id.

19. Id. at 43.

20. Id. at 44-45.

21. In that year the Supreme Court decided Commissioner v. Duberstein, 363 U.S. 278 (1960). See Hauser 111-16; text accompanying notes 50-59 infra.

22. See Note, Payments to Widows of Corporate Executives and Employees—Gifts or Income?, 49 Va. L. Rev. 74, 79 (1963); text accompanying notes 54-59 infra.

23. 1939-2 Cum. Bull. 153.

24. The Revenue Act of 1936, ch. 690, § 23(a), 49 Stat. 1658-59 provides: "In computing net income there shall be allowed as deductions: (a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered . . . ." The substance of this section was carried over into Revenue Act of 1938, ch. 280, § 23(a)(1), 52 Stat. 460, Int. Rev. Code of 1939, ch. 2, § 23(a)(1), 53 Stat. 12, and into Int. Rev. Code of 1954, § 162(a).

25. Treas. Reg. 101, art. 23(a)-9 (1938); Treas. Reg. 94, art. 23(a)-9 (1936).

26. 1939-2 Cum. Bull. 153, 154.

should be taxable to the recipient . . . ."[27] only became apparent ten years later in the case of *Louise K. Aprill*.[28]

In that case the board of directors of a close corporation decided to take advantage of I.T. 3329 and passed a resolution bestowing on the widow of a deceased employee, who was also the majority shareholder, a gift equal in amount to fifteen months of her late husband's salary. The company treated the payments as expenses. Deductions for them were allowed except for the last five months. At the end of the fifteen months the widow was put on the payroll of the company. When the widow did not report as income the gratuitous payments to her, the Commissioner notified her of a deficiency and she in turn petitioned the Tax Court.[29]

Judge Opper, pursuant to the majority opinion in *Bogardus*, sought out the intention of the corporation in making the payments[30] and concluded:

> Any services for which compensation could have been intended must have been those of petitioner or her husband. We cannot perceive even a remote connection between the payments and services rendered by petitioner, who began employment only after all the payments in issue had been made. . . . And no obligation of any kind existed to compensate petitioner further for her husband's past services.[31]

The Commissioner exhibited his displeasure at the *Aprill* decision by issuing I.T. 4027[32] which revoked O.D. 1017 and modified I.T. 3329. Whereas in *Aprill* and I.T. 3329 the criteria had been whether the *recipient* had rendered service, under I.T. 4027 "the essential factor [was] whether services were rendered to the employer . . . ."[33] Furthermore I.T. 4027 left no room for ambiguity by stating:

> It is the position of the Bureau that irrespective of a "plan," voluntary or involuntary, definite or indefinite, payments of the type herein considered constitute taxable income, and it is held that payments made by an employer to the widow of a deceased officer or employee, in consideration of services rendered by the officer or employee, are includible in the gross income of the widow for Federal income tax purposes.[34]

The Revenue Act of 1951 amended section 22(b)(1) of the 1939 Code and thus softened the impact of I.T. 4027 by allowing an exclusion from gross income for payments not in excess of $5,000 made by an employer to the beneficiary of a deceased employee.[35] But such an exclusion was limited to cases where the employer made the payment pursuant to a contractual agreement.

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27. Hauser 113.
28. 13 T.C. 707 (1949).
29. Id. at 709-10.
30. Id. at 711.
31. Id.
32. 1950-2 Cum. Bull. 9.
33. Id. at 10.
34. Id. at 10-11.
35. Revenue Act of 1951, ch. 521, § 302(a), 65 Stat. 483. This equalized to an extent the tax treatment of such payments with that of life insurance proceeds under § 302(a). Int. Rev. Code of 1939, ch. 2, § 22(b)(1), 53 Stat. 10. See text accompanying notes 42-43 infra.

Thus where there was a pre-existing contractual obligation, the widow could exclude up to $5,000. If there were no such contractual obligation, payments from gross income could be excluded as gifts only after passing the tests of *Bogardus* and I.T. 4027. That is, the employer must not have intended the disbursements as payments for any services rendered or to be rendered.

This scheme was again disrupted in 1955 by the case of *Arthur W. Hellstrom*.[36] Addressing itself to facts virtually identical to those in the *Aprill* case, the court brushed aside I.T. 4027, noting that "[t]he respondent, obviously, cannot by administrative ruling [I.T. 4027] tax as ordinary income a payment which the payor made and intended as a gift."[37] Moreover, as in *Aprill*, no weight was afforded the fact that the corporation had deducted the gift as an expense.[38] In the final paragraph of its opinion the court set forth explicitly the five factors it thought significant: first, that the gift was paid to the widow not the estate; second, that there was no obligation to compensate the deceased; third, that the corporation derived no benefit; fourth, that the widow performed no services for the corporation; and fifth, that the husband had been fully compensated.[39]

As a result of the *Hellstrom* decision, from 1956 to 1959 the Commissioner lost almost every case litigated under this provision of the 1939 Code.[40] In 1958 the Commissioner capitulated by issuing Revenue Ruling 58-613,[41] wherein he announced his intention to forego challenging this question under the 1939 Code.

With the Internal Revenue Code of 1954, however, section 101(b)[42] changed what had been the substance of section 22(b)(1) of the 1939 Code to allow the $5,000 death benefit exclusion where an employer's payments to a beneficiary were not made pursuant to contractual obligation.[43] The intent of Congress in making this change was far from clear[44] and two conflicting theories as to classification of such payments evolved. The first theory categorized payments as either taxable compensation or "death benefits," excludable up to $5,000. Under no circumstances, however, could they be a totally excludable gift. The second theory differed from the first in that it did allow for the possibility of total exclusion of such a payment as a gift.

Dicta in two cases supported the first theory,[45] but in *Reed v. United States*[46]

36. 24 T.C. 916 (1955).

37. Id. at 919.

38. Id.

39. Id. at 920.

40. See Note, Payments to Widows of Corporate Executives and Employees—Gifts or Income?, 49 Va. L. Rev. 74, 86-87 & nn. 58-59 (1963).

41. Rev. Rul. 58-613, 1958-2 Cum. Bull. 914.

42. Int. Rev. Code of 1954, § 101(b).

43. See text accompanying note 35 supra.

44. H.R. Rep. No. 1337, 83d Cong., 2d Sess. 14 (1954) The House Ways and Means Committee spoke of "[r]estricting the exemption to benefits paid under a contract . . . ." Id.; S. Rep. No. 1622, 83d Cong., 2d Sess. 14 (1954); see Pelisek, Tax Treatment of Payments to the Widows of Corporate Officers and Employees, 44 Marq. L. Rev. 16, 28-32 (1960).

45. Bounds v. United States, 262 F.2d 876, 878-79 n.2 (4th Cir. 1958); Rodner v. United States, 149 F. Supp. 233, 237 (S.D.N.Y. 1957).

46. 177 F. Supp. 205, 209 (W.D. Ky. 1959), aff'd, 277 F.2d 456 (6th Cir. 1960).

a Federal District Court, affirmed by the Court of Appeals for the Sixth Circuit, adopted the second. Thereafter the Commissioner issued Revenue Ruling 60-326[47] wherein he voiced both his opposition to the decision and his resolve that it would not be followed as precedent. Just two years later, however, after losing in three decisions which accepted the reasoning and holding of *Reed*,[48] the Commissioner again decided not to question such payments, admitting defeat in Revenue Ruling 62-102.[49]

In the face of this adversity, the Supreme Court decision in *Commissioner v. Duberstein*[50] gave new impetus to the Commissioner to contest employers' payments to widows. *Duberstein* involved a gift by a businessman to a business contact, Mose Duberstein, who had, upon the businessmen's request, provided him with sales leads for non-competitive products. The sales leads were so productive that the businessman gave a surprised Duberstein a Cadillac.[51] The donor's corporation deducted the cost of the gift as a business expense, but Duberstein excluded its value from gross income on his return.[52] The Commissioner assessed a deficiency against Duberstein, a decision subsequently upheld by the Supreme Court.[53] However, the Court rejected a new test proposed by the Commissioner, that gifts could only be made for personal and not business reasons,[54] and stood by the "intention" test of *Bogardus*.[55] But the Court did overturn *Bogardus* in one aspect, namely, the proper scope of appellate review. The majority agreed with the dissent in *Bogardus* that the gift versus compensation question was one of fact stating "that appellate review of determinations in this field must be quite restricted,"[56] while "primary weight in this area must be given to the conclusions of the trier of fact."[57] And how was the trier of fact

47. Rev. Rul. 60-326, 1960-2 Cum. Bull. 32.

48. Wilner v. United States, 195 F. Supp. 786 (S.D.N.Y. 1961); Frankel v. United States, 192 F. Supp. 776 (D. Minn. 1961), aff'd, 302 F.2d 666 (8th Cir. 1962), cert. denied, 371 U.S. 903 (1962); Cowan v. United States, 191 F. Supp. 703 (N.D. Ga. 1960).

49. Rev. Rul. 62-102, 1962-2 Cum. Bull. 37, 38.

50. 363 U.S. 278 (1960).

51. Id. at 280-81. Duberstein already had two cars, a Cadillac and an Oldsmobile. Id.

52. Id.

53. Id. at 283.

54. Id. at 284-85.

55. "This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a 'gift' within the meaning of the statute. . . . [T]he mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. . . . And, importantly, if the payment proceeds primarily from 'the constraining force of any moral or legal duty,' or from 'the incentive of anticipated benefit' of an economic nature, . . . it is not a gift. And, conversely, '[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it.' . . . A gift in the statutory sense, on the other hand, proceeds from a 'detached and disinterested generosity,' . . . 'out of affection, respect, admiration, charity or like impulses.' . . . And in this regard, the most critical consideration, as the Court was agreed in the leading case here, [*Bogardus*] is the transferor's 'intention.'" Id. at 285-86.

56. Id. at 290.

57. Id. at 289.

to arrive at his conclusions? According to the majority he was to apply his "experience with the mainsprings of human conduct to the totality of the facts of each case."[58] The vagueness of the standard was apparent to the majority[59] and seized upon by Justice Frankfurter, who remarked prophetically in his dissent, "[w]hat the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences."[60]

The prophecy was fulfilled in the legion of post-*Duberstein* cases specifically involving an employer's payments to a widow of a deceased employee. While since *Duberstein* the Tax Court has held almost uniformly against the widow, the district courts have steadfastly reached the opposite conclusion where the facts have been analogous to those in the *Hellstrom* case.[61] The courts of appeals have even reversed the Tax Court on occasion, where the five *Hellstrom* factors were present, holding that the findings of fact were clearly erroneous.[62] *Duberstein*'s effect in the Tax Courts has been the initiation of broad inquiry into the facts of each case extending beyond those held determinative in *Hellstrom.* Usually the finding has been that the widow has not met the burden of proof.[63] The district courts, on the other hand, for the most part have viewed *Duberstein* as approving *Hellstrom* and expanding it to allow consideration of additional factors.[64]

Now, with the Second Circuit's decision in *Carter v. Commissioner*[65] the factors deemed determinative in *Hellstrom* have again been held conclusive. In *Carter,* the partnership of Salomon Bros. & Hutzler voted payments to the wife of a deceased employee.[66] The amount paid to the widow equaled what her husband would have earned both under his employment contract and by his participation in a profit sharing plan, had he lived to the end of the fiscal year. The firm had no obligation to do this, nor did it have an established plan to make such payments. The widow did not include the payments as income, and the partnership, possibly due to an accounting oversight, treated the payments inconsistently. They failed to file a withholding return (Form

58. Id.

59. Id. at 290. "If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter . . . ." Id.

60. Id. at 297 (Frankfurter, J., dissenting).

61. See Comment, The Tax Treatment of Voluntary Death Benefits, 35 Fordham L. Rev. 696, 703-07 (1967); Note, Payment to Widows of Corporate Executives and Employees —Gifts or Income?, 49 Va. L. Rev. 74, 97-124 (1963); text accompanying notes 68-73 infra.

62. See text accompanying notes 83 & 87-97 infra.

63. E.g., Estate of Irving B. Cooper, 20 CCH Tax Ct. Mem. 774 (1961); Estate of Martin Kuntz, Sr., 19 CCH Tax Ct. Mem. 1379, rev'd, 300 F.2d 849 (6th Cir.), cert. denied, 371 U.S. 903 (1962); Estate of Mervin G. Pierpont, 35 T.C. 65 (1960), vacated and remanded sub nom. Poyner v. Commissioner, 301 F.2d 287 (4th Cir. 1962).

64. E.g., Falk v. United States, 277 F. Supp. 129 (C.D. Cal. 1967); Corasaniti v. United States, 212 F. Supp. 229 (D. Md. 1962); Taylor v. United States, 62-2 U.S. Tax Cas. 86,319 (E.D. Tenn. 1962).

65. 453 F.2d 61 (2d Cir. 1971).

66. Id. at 62.

W-2), but did file an information return Form (1099).[67] The partners also deducted the pro rata shares of the payments from their individual returns, a deduction which the Commissioner disallowed.

In reviewing the recent inconsistent treatment of payments by the tax and federal courts[68] Judge Friendly, writing for the majority, expressed his belief that the substantive test of *Hellstrom* was approved by *Duberstein*[69] and that the Tax Court improperly interpreted the Supreme Court's opinion in that case as restricting the older *Hellstrom* notion of what constitutes a gift.[70] Having summarized the latest decisions on the matter, Judge Friendly noted the dichotomy between the Tax Court and district court decisions.[71] He concluded that such a discrepancy was never intended by the Supreme Court[72] and since the facts in *Carter* so paralleled those of *Hellstrom* and its progeny that for the sake of even-handed justice the Tax Court's decision must be overturned.[73]

However, Judge Friendly both noted and dismissed four factors in *Carter* that weakened the case for the widow:

> (1) the claim of a tax deduction by the payor, which the Supreme Court in *Duberstein*, . . . this court in *Fanning*,[74] and the Tenth Circuit in *Kasynski*,[75] have held to be without material probative significance; (2) the alleged failure to inquire into Mrs. Carter's financial condition, which was unnecessary in light of what the firm knew; (3) the reference to continuation of Carter's salary as a measure of the payment, a factor present in the great bulk of these cases and ruled by us not to be material in *Fanning*, . . . and (4) the filing—by someone not identified, . . . of a form 1099 return with respect to the bonus portion of the payment. This last factor was outweighed by the inconsistent failure to file such a form with respect to the salary portion and the failure to denominate the payments as compensation in the partnership return.[76]

In particular it should be noted, that even though *Duberstein* clearly decided

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67. Id. at 63.

68. Id. at 64-68.

69. Id. at 65. This appears to be solely the judgment of Judge Friendly since the Court in Duberstein nowhere stated that it approved of the Hellstrom test nor did it so much as cite the case since, though both Duberstein and Hellstrom concern the gift-compensation controversy, Duberstein and Hellstrom are worlds apart factually (see text accompanying notes 50-53, 36-38 & 28-29 supra). However, the conclusion of Judge Friendly may be drawn from the fact that Hellstrom was decided on the basis of Bogardus's intention test which Duberstein did approve (see text accompanying notes 16 & 54-55 supra). Furthermore this is not a novel view of the Duberstein holding. See Poyner v. Commissioner, 301 F.2d 287, 292 (4th Cir. 1962) and cases cited in note 64 supra.

70. 453 F.2d at 65.

71. Id. at 67.

72. Id. at 69.

73. Id. at 70.

74. Fanning v. Conley, 357 F.2d 37 (2d Cir. 1966).

75. United States v. Kasynski, 284 F.2d 143 (10th Cir. 1960).

76. 453 F.2d at 69-70 (footnotes added).

that a tax deduction by the payor was not *determinative*,[77] it is by no means clear that the holding was that such a factor was irrelevant or "without material probative significance."[78] Such a statement also appears to be contra the Second Circuit's own decision in *Gaugler v. United States*.[79] As to both the *Fanning* and *Kasynski* cases, cited above by Judge Friendly, it should be pointed out that they were *affirmances* of a district judge's decision in favor of the widow. Thus their findings relative to the weight (or lack of it) given by the lower court to such a tax deduction by the payor was that it was merely not clearly erroneous.[80] In addition to this, section 274(b) of the 1959 Code specifically disallows deductions by the payor of gifts (in an amount greater than $25) as expenses under section 162 (business expenses) or section 212 (expenses for the production of income).[81] Logically interpreting the Code one could say that a payor who claims such a deduction was not intending to make a gift since if it were truly a gift he could not claim the deduction. Thus the grounds for the holding in *Duberstein* that the tax liability of the donor on the payment was not determinative of the donee's tax liability have been somewhat undercut.[82] Judge Friendly does not mention or discuss the effect of section 274(b) and implies that declaring the payment to Mrs. Carter a gift will not necessarily determine Salomon Bros.' tax liability.[83] Therefore

77. Commissioner v. Duberstein, 363 U.S. 278, 287-88 (1960).

78. 453 F.2d at 69. Indeed the Duberstein Court in discussing the importance of a claim by a payor of a tax deduction said "[I]t is doubtless relevant to the over-all inference that the transferor treats a payment as a business deduction, or that the transferor is a corporate entity. But these inferences cannot be stated in absolute terms. Neither factor is a shibboleth." 363 U.S. at 287. Although semantically there may be a difference between "irrelevance" and "without material probative significance," Judge Friendly did not draw such a distinction, and if such evidence was irrelevant or without material probative significance, either way it would be excluded.

79. 312 F.2d 681 (2d Cir. 1963). "In reaching his decision Judge Levet considered a number of clearly relevant factors: (1) the inconsistent accounting and tax treatment by the Company . . . ." Id. at 684, citing Commissioner v. Duberstein, 363 U.S. 278, 287 (1960). See note 78 supra.

80. Fanning v. Conley, 357 F.2d 37, 42 (2d Cir. 1966); United States v. Kasynski, 284 F.2d 143, 146 (10th Cir. 1960). Judge Davis, dissenting in Carter also felt that "Affirmances of a trier's finding of a gift . . . are, it goes without explanation, in quite a different class." 453 F.2d at 72.

81. Int. Rev. Code of 1954, § 274(b) (enacted by the Revenue Act of 1962, 76 Stat. 974).

82. One of the reasons the Supreme Court had for holding that the donee's liability should not be predicated on the donor's liability was that it "would summon one difficult and delicate problem of federal tax law as an aid to the solution of another." Commissioner v. Duberstein, 363 U.S. 278, 288 (1960). However, the difficulty and delicacy of the problem would now appear to be solved by § 274(b) of the Int. Rev. Code of 1954 since under that section if the taxpayer makes a gift, he cannot claim a deduction.

83. 453 F.2d at 70. "[I]ts case for a deduction—on the merits of which we do not pass—would have stood better if the payments to the widow were in fact added compensation for Mr. Carter's services." Id.

at least one question raised is whether despite section 274(b), such a payment can be a non-taxable gift under section 102(a) and still be taken as a deduction by the payor-employer.[84]

Judge Davis in his dissent stressed a different view of *Duberstein*. Because of the Supreme Court's mandate that appellate review must be restricted, he concluded that, since the facts presented allowed the trier of fact to arrive at an opposite conclusion, the decision could not be upset.[85] As to the rash of conflicting cases in the field, Judge Davis also countered that in *Duberstein* the Supreme Court "contemplated lack of 'symmetry' between 'the variety of forums in which federal income tax cases can be tried.' "[86]

The impact of the *Carter* decision is that it undoubtedly goes beyond any prior post-*Duberstein* court of appeals decision in re-establishing the authority of the five factors test in *Hellstrom*. Though several circuits had affirmed the lower courts' finding of a gift,[87] only the sixth[88] and eighth[89] had outright reversed, while the fourth[90] had vacated and remanded, a lower court's decision that the payments were compensation. *Carter* surpasses both the sixth circuit's *Kuntz v. Commissioner*[91] and the eighth circuit's *Olsen v. Commissioner*[92] decisions. In the former the sole foundation of the Tax Court's finding was a strict interpretation of the corporate resolution and in the latter the Tax Court insisted that the payment " 'proceed[ed] primarily from "the constraining force of any moral or legal duty," ' "[93] despite the presence of all the *Hellstrom* factors. In both cases reversal was predicated more on the lower court's solitary reliance on these single factors which the higher court found insufficient.[94]

The *Poyner v. Commissioner*[95] decision in the fourth circuit, though it unequivocally stated that "The Supreme Court in Duberstein did not destroy the authority of the earlier Tax Court cases and the guides enunciated in them for discovering motivation,"[96] remanded the case with instructions that consideration now be given to "those additional factors which since Duberstein

84. For opposing theories as to the effect of § 274(b) compare Hauser 120-22 with Perel, Corporate Payments to Widows: The Tax Consequences, 46 Taxes 567, 582-85 (1968).

85. 453 F.2d at 70-72.

86. Id. at 72.

87. Fanning v. Conley, 357 F.2d 37 (2d Cir. 1966); United States v. Pixton, 326 F.2d 626 (5th Cir. 1964); United States v. Frankel, 302 F.2d 666 (8th Cir.), cert. denied, 371 U.S. 903 (1962); United States v. Kasynski, 284 F.2d 143 (10th Cir. 1960).

88. See note 91 infra and accompanying text.

89. See note 92 infra and accompanying text.

90. See note 94 infra and accompanying text.

91. 300 F.2d 849 (6th Cir.), cert. denied, 371 U.S. 903 (1962).

92. 302 F.2d 671 (8th Cir.), cert. denied, 371 U.S. 903 (1962).

93. Estate of W. R. Olsen, 20 CCH Tax Ct. Mem. 807, 809 (1961), citing Bogardus, 302 U.S. at 41.

94. 302 F.2d at 674; 300 F.2d at 852.

95. 301 F.2d 287 (4th Cir. 1962).

96. Id. at 292.

have [become] important."[97] Thus, none of the circuits has gone as far as the second in maintaining that *Hellstrom* is still good law. But of even greater consequence is Judge Friendly's emphasis on the need for consistent treatment of similar cases.[98] This implies a narrower interpretation of the Supreme Court's command of restricted appellate review and less reliance on the trier of fact's experience with the mainsprings of human conduct. Whether the Commissioner and other courts will accept this position is naturally a matter of conjecture.

97. Id. Two of the additional factors now considered relevant are the widow's stock holdings and the directors' knowledge (or lack of it) of her financial condition. See text accompanying note 76 supra.

98. 453 F.2d at 69.