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Case Notes

CASE NOTES

Constitutional Law—State Action—Tax Exemption and Attendant Government Regulation Held Sufficient to Constitute State Action Under the Civil Rights Act.—Plaintiff, a Buffalo, New York, minister, distributed form letters to approximately fifteen thousand foundations throughout the United States each year for a period of three years, requesting that each "name him to its board of directors, give scholarships to his children and give grants to his foundations."[1] Alleging that thirteen tax-exempt, charitable foundations in the Buffalo area had refused to meet his demands for racial reasons, plaintiff brought action under the Civil Rights Acts,[2] seeking damages as well as injunctive and declaratory relief. In addition, he requested the court to revoke the foundations' tax-exempt status and to order the surfender of their assets to the United States Treasury.[3] The district court dismissed the complaint, ruling that "insofar as appellant's claims were based on [the Civil Rights Act] § 1983, Moose Lodge No. 107 v. Irvis . . . precluded a finding of 'state action' and thus required dismissal . . . ."[4] and that the complaint failed to state a cause of action under Civil Rights Act sections 1981 and 1985.[5] The Court of Appeals for the Second Circuit reversed in part and reinstated the complaint, holding that activities of the private tax-exempt foundations would constitute state action within the meaning of the Civil Rights Act if a sufficiently close connection were found between such organizations and federal authorities. *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1973).

By its terms, the fourteenth amendment[6] prohibits states from infringing

1. Jackson v. Statler Foundation, 496 F.2d 623, 626 n.1 (2d Cir. 1973).

2. 42 U.S.C. §§ 1981, 1983, 1985 (1970). Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 was enacted to implement the first section of the fourteenth amendment. Mitchum v. Foster, 407 U.S. 225, 238 (1972); Monroe v. Pape, 365 U.S. 167, 180 (1961). Traditionally, the phrase "under color of" state law, as used in § 1983, and the state action requirement of the fourteenth amendment have been interpreted identically. See Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656 n.4 (1974).

3. The court of appeals denied plaintiff's request that foundation assets be forfeited. 496 F.2d at 636 (citing Wolkstein v. Port of N.Y. Authority, 178 F. Supp. 209 (D.N.J. 1959)).

4. 496 F.2d at 625. The district court decision in Jackson is unreported. Moose Lodge is reported at 407 U.S. 163 (1972).

5. 496 F.2d at 625. Section 1981 provides that all non-whites shall have the same rights in civil suits, and shall be subjected to the same penalties and liabilities therein, as whites. 42 U.S.C. § 1981 (1970). Section 1985 prohibits conspiracies to violate the civil rights of any person and gives the injured party a private right of action against the conspirators. Id. § 1985.

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

upon individual rights.[7] It does not apply to such injurious acts caused by citizens acting in a purely private capacity.[8] Under certain circumstances, however, actions by essentially private citizens and corporations may constitute "state action" within the meaning of the amendment.[9] The necessity of determining what constitutes, for the purpose of the doctrine, a sufficient connection between the private person and the state makes the application of state action most difficult.[10] Before the court will allow a claimant to invoke the doctrine to void or redress an act by a private party, he must show the minimum requirement of state action, namely, that the defendant was acting "under color of" state law or with the approval of a state agency.[11] When a government official[12] or agency[13] actually participates in the activity, even if

7. For an historical analysis of the early state action decisions and the development of the doctrine see Bassett, The Reemergence of the "State Action" Requirement in Race Relations Cases, 22 Catholic U.L. Rev. 39, 41-48 (1972); Silard, A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee, 66 Colum. L. Rev. 855, 856-58 (1966).

8. E.g., Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."); United States v. Harris, 106 U.S. 629, 640 (1883); Virginia v. Rives, 100 U.S. 313, 318 (1880); United States v. Cruikshank, 92 U.S. 542, 554-55 (1876); B. Schwartz, Constitutional Law 317 (1972).

9. Where public performance of a discriminatory activity is taken over by private individuals to prevent judicially decreed integration, there will continue to be state action where the "momentum it acquired as a public facility is . . . not dissipated . . . ." Evans v. Newton, 382 U.S. 296, 301 (1966) (racially discriminatory operation by private trustees of formerly public park found to be state action); see Gilmore v. City of Montgomery, 94 S. Ct. 2416, 2423 (1974) (continuation, with governmental involvement, of public policy of "separate-but-equal" swimming facilities by YMCA held to be state action); Nixon v. Condon, 286 U.S. 73, 88-89 (1932) (segregated primary held by political party found to be state action); Pennsylvania v. Brown, 270 F. Supp. 782, 792 (E.D. Pa. 1967), aff'd, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968) (racially discriminatory operation by private trustees of a boys' school requiring unique state supervision found to be state action). But see Palmer v. Thompson, 403 U.S. 217 (1971) (racially discriminatory operation by YMCA, without allegation of continuing governmental involvement, of pool formerly leased by city found not to be state action), analyzed in Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95.

When private citizens conspire to use the public laws to deprive a person of his rights, state action will be found. United States v. Guest, 383 U.S. 745 (1966) (construing 18 U.S.C. § 241 (1970), the criminal counterpart to 42 U.S.C. § 1985 (1970)). State action was found where a private company suppressed free speech on the streets of a company-owned town because maintenance of the community was a "public function" performed by the company as a surrogate for the state. Marsh v. Alabama, 326 U.S. 501 (1946). See also Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656, 694-98 (1974).

10. See Black, The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967).

11. E.g., Moose Lodge v. Irvis, 407 U.S. 163, 172-73 (1972); Shelley v. Kraemer, 334 U.S. 1, 14 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883). See also B. Schwartz, Constitutional Law 317 (1972).

12. Ex Parte Virginia, 100 U.S. 339, 347 (1880).

13. E.g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 257-58 (1934) (state university board of trustees);

only as a token trustee,[14] the requisite state action is easily found. Early cases involved obvious governmental violation of constitutionally protected rights.[15] In recent years, however, the "murky waters of the 'state action' doctrine"[16] have begun to flow into uncharted areas.[17]

A recent attempt by the Supreme Court to set out the limits of state action in essentially private conduct was *Moose Lodge v. Irvis,*[18] where the Court adopted a narrow interpretation of the doctrine. In *Moose Lodge,* the plaintiff, a black, was refused service at a private fraternal lodge which possessed a state-granted liquor license. He brought an action,[19] asserting that the granting of the license by the Pennsylvania Liquor Control Board constituted state action so as to invoke the equal protection clause of the fourteenth amendment inasmuch as the licenses were limited in number and the selection of licensees involved an element of discretion (and, therefore, approval of the licensee's activities).[20] The Court rejected this argument,[21] finding that the

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Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 295 (1913) (municipal corporation); Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35-36 (1907) (tax board); see Gibson v. Berryhill, 411 U.S. 564 (1973) (optometric licensing board); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894) (public service commission).

14. Illustrative is the involved and lengthy history of the Girard College case, from the first Supreme Court decision in Pennsylvania v. Board of Directors, 353 U.S. 230 (1957) (per curiam), through Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), aff'd, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968). But see Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962) (insufficient governmental involvement for purposes of state action where 17 member board of trustees contained three public officials who seldom attended board meetings). For a discussion of the Girard College case see Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979 (1957). See also Jackson v. Statler Foundation, 496 F.2d 623, 634-35 (2d Cir. 1973) (activities of the Buffalo Foundation constitute state action because of the presence on its board of trustees of several persons appointed by public officials).

15. Buchanan v. Warley, 245 U.S. 60 (1917) (municipal ordinance prohibiting occupancy of certain property by blacks); Ex Parte Virginia, 100 U.S. 339 (1880) (county court judge excluding blacks from juries).

16. McGlotten v. Connally, 338 F. Supp. 448, 455 (D.D.C. 1972) (footnote omitted), discussed in notes 59-60 infra and accompanying text.

17. For a general analysis of the current status of the state action doctrine see Burke & Reber, State Action, Congressional Power, and Creditors' Rights: An Essay on the Fourteenth Amendment, 46 S. Cal. L. Rev. 1003, 1041-1114 (1973). The authors propose that state action can arise in any of six situations: first, where a state agent is the initiator of the action; second, where the state and a private party act in concert; third, where a distinctly public function is performed by private parties; fourth, where the state compels the action; fifth, where the private actor is regulated by the state; and sixth, where state law authorizes or encourages the private action. Id.

18. 407 U.S. 163 (1972). This decision was noted by a number of law reviews. E.g., 77 Dick. L. Rev. 157 (1972); 41 Fordham L. Rev. 695 (1973); 47 Tul. L. Rev. 906 (1973). One perceptive commentator foresaw not only the issue raised in Moose Lodge but also its resolution by the Court. Note, The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion, 44 N.Y.U.L. Rev. 1112, 1131-32 (1969).

19. 407 U.S. 163, 164-65 (1972).

20. Id. at 171.

21. The Court did not attach any significance to the fact that the case involved alleged racial

activities did not "sufficently implicate the State" in the defendent's racial policies, and that no state action was present.[22]

Moose Lodge was based upon discrimination by a private fraternal order, and therefore could be viewed as analogous to but not controlling on cases involving other types of organizations. While there is no precedent for applying state action to private foundations,[23] strong analogies may be found in cases involving private tax-exempt hospitals and educational institutions. A case which deals with many of these issues is *McCabe v. Nassau County Medical Center,*[24] recently decided by the Second Circuit, in which the court illustrated the public-private dichotomy which is at the essense of the state action doctrine. In *McCabe,* plaintiff claimed that a state-funded community medical center refused to perform a voluntary sterilization because the patient did not meet certain requirements.[25] The court held that because the medical center was a public facility operated with state funds, plaintiff had made sufficient allegations of state action to proceed to the merits of a section 1983 claim.[26] Generally, when the act complained of was performed by a person or an organization which the court perceived to be a public official[27] or a public

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discrimination rather than another type of injury. This raises the question of whether the courts have employed two different standards for finding state action in cases dealing with tax-exempt organizations depending on the gravamen of the complaint. The majority in Jackson asserted that "[w]here racial discrimination is involved, the courts have found 'state action' to exist; where other constitutional claims are at issue (due process, freedom of speech), the courts have generally concluded that no 'state action' has occurred." Jackson v. Statler Foundation, 496 F.2d 623, 628 (2d Cir. 1973). In Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y. 1974), where no state action was found in defendant private hospital's refusal to renew a doctor's hospital staff privileges, the court followed Jackson in noting that the Second Circuit recognizes a higher burden for showing state action in cases in which there is no allegation of racial discrimination. Id. at 797-98, 806; see Bright v. Isenbarger, 314 F. Supp. 1382, 1394 (N.D. Ind. 1970), aff'd per curiam, 445 F.2d 412 (7th Cir. 1971). But see Sams v. Ohio Valley Gen. Hosp. Ass'n, 257 F. Supp. 369, 371 (N.D. W. Va. 1966), rev'd on other grounds, 413 F.2d 826 (4th Cir. 1969) ("[T]he Court sees no logical reason for distinguishing . . . a case where non-Negroes seek redress for the possible deprivation of their Fourteenth Amendment rights, from a case where the plaintiffs are members of the Negro race.").

22. 407 U.S. at 177. One of the Board's regulations conditioned the grant of a license on observance by private clubs of their own constitutions and by-laws. The Court found that enforcement of this regulation would "place state sanctions behind" Moose Lodge's discriminatory policies and, therefore, held that plaintiff was entitled to a decree enjoining enforcement of the regulation by the Board. Id. at 177-79.

23. "This appears to be the first case in which the issue of the status of tax-exempt 'private foundations' has been raised." Jackson v. Statler Foundation, 496 F.2d 623, 627 (2d Cir. 1973) (footnote omitted); id. at 636 (Friendly, J., dissenting).

24. 453 F.2d 698 (2d Cir. 1971).

25. Hospital rules specified that sterilization operations would be performed only on patients with a minimum number of children. Id. at 700.

26. Id. at 703. One member of the panel dissented, reasoning that, without at least color of state statute, there could be no state action within the meaning of § 1983. Id. at 706-08 (Moore, J., dissenting).

27. E.g., Monroe v. Pape, 365 U.S. 167 (1961) (city police); Williams v. United States, 341 U.S. 97 (1951) ("special police officer"); United States v. Classic, 313 U.S. 299 (1941) (state

institution,[28] the courts have decided that the state itself was the actor and, consequently, that the plaintiff had satisfied his burden of showing state action without recourse to the "under color of state law" formulation.

When the facility is a private hospital operated without any state funding, courts have isolated a wide variety of other factors to show sufficient governmental involvement to render the hospital's acts actionable under section 1983. An important decision was *Simkins v. Moses H. Cone Memorial Hospital*[29] in which plaintiff alleged that the hospital practiced racial discrimination in extending services. Plaintiff sought to establish state action not because of the hospital's tax exemption, but rather because of its use of public funds granted under the Hill-Burton Act, a massive federal program designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health.[30] The court concluded that "the most significant contacts compel the conclusion that the necessary 'degree of state [in the broad sense, including federal] participation and involvement' is present as a result of the participation by the defendants in the Hill-Burton program."[31] Thus, the *Simkins* test looked to the amount of state involvement, not to its particular nature.[32]

The court in *Simkins* also recognized a narrower basis for its finding of state action, which has been adopted by the more recent decisions in lieu of its broad approach.[33] The court, referring to the effect of state and federal statutes and regulations which specifically permitted segregated facilities for whites and blacks,[34] stated that "the challenged discrimination has been affirmatively sanctioned by both the state and the federal government . . . ."[35]

election officials); Ex Parte Virginia, 100 U.S. 339 (1880) (county court judge); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), discussed in notes 41-48 infra and accompanying text.

28. See, e.g., Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967).

29. 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

30. Hospital Survey and Construction Act, ch. 958, § 622(f), 60 Stat. 1040, 1043 (1946).

31. 323 F.2d at 967, quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

32. A recent decision which follows the Simkins test is Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972). In Sams v. Ohio Valley Gen. Hosp. Ass'n, 257 F. Supp. 369 (N.D. W. Va. 1966), rev'd on other grounds, 413 F.2d 826 (4th Cir. 1969), the court declared: "If a hospital's involvement in the Hill-Burton program denotes 'state action' in the one case [Simkins], then . . . it must also do so in the other. In neither case [Simkins and Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966)] does the finding of 'state action' rest upon what group the plaintiffs are members [of] or of what 'state action' discrimination they specifically complain." Id. at 371. Sams, however, seems to misconstrue both Simkins and Smith (which found state action in a situation analogous to Simkins).

33. See, e.g., Allen v. Sisters of St. Joseph, 361 F. Supp. 1212, 1213 (N.D. Tex. 1973), appeal dismissed, 490 F.2d 81 (5th Cir. 1974); cases discussed in notes 36, 57 infra and accompanying text.

34. The court cited figures from a report by the Medical Care Commission which dramatically showed the results in North Carolina (where Simkins brought the action) of the "nondiscriminatory" separate-but-equal facilities sanctioned by the Hill-Burton program. The report showed that in the two all-white area hospitals a total of 702 beds were available, while in the area's non-white hospital only 91 beds were available. 323 F.2d at 965.

35. Id. at 968 (citations omitted).

In *Ward v. St. Anthony Hospital,*[36] the Tenth Circuit recently stated the reasoning behind its rejection of *Simkins'* broad approach:

> There is little doubt that under the Hill-Burton Act and state law, hospitals in Colorado are subject to intricate state regulation. This alone, however, is not sufficient to invoke federal jurisdiction. State action does not arise merely because private hospitals receive governmental aid; more is required than that.[37]

The trend toward a narrower approach to state action is more dramatically illustrated in the recent cases dealing with educational institutions, which have completely rejected the broad *Simkins* approach. When public educational officials such as school boards[38] and state college representatives[39] are the actors, the courts consistently have found state action to exist. The courts have been hesitant, however, to so label the activities of private educational institutions, notwithstanding the varying degrees of state involvement which may exist.[40]

A Second Circuit decision which has influenced subsequent state action decisions is *Powe v. Miles.*[41] *Powe* involved the disciplinary action taken by the school administration against student demonstrators at Alfred University, a private institution which received substantial state funding used primarily to support a state college of ceramics situated on the Alfred campus. The court held that the suspension of the university's liberal arts students did not involve state action,[42] but that the concurrent suspension of students of the state college of ceramics, arising from the same incident, was within the doctrine.[43] Judge Friendly, speaking for the court, succinctly stated the narrow approach to state action established in *Powe*:

> The contention that New York's regulation of educational standards in private schools, colleges and universities . . . makes their acts in curtailing protest and disciplining students the acts of the State is . . . unpersuasive. It overlooks the essential point—that the State must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint.[44]

The genesis of the *Powe* decision can be found in a phrase in *Burton v. Wilmington Parking Authority,*[45] where the Supreme Court held the opera-

36. 476 F.2d 671 (10th Cir. 1973).

37. Id. at 675.

38. Bomar v. Keyes, 162 F.2d 136 (2d Cir.), cert. denied, 332 U.S. 825 (1947); Martin v. Davison, 322 F. Supp. 318 (W.D. Pa. 1971); Westley v. Rossi, 305 F. Supp. 706, 709 (D. Minn. 1969) ("It has long been settled that actions of a school board are 'state action' within the meaning of [section 1983].").

39. James v. West Virginia Bd. of Regents, 322 F. Supp. 217 (S.D. W. Va.), aff'd, 448 F.2d 785 (4th Cir. 1971).

40. E.g., Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), aff'd, 445 F.2d 412 (7th Cir. 1971).

41. 407 F.2d 73 (2d Cir. 1968).

42. Id. at 81; see text accompanying note 44 infra.

43. 407 F.2d at 82-83; see text accompanying note 48 infra.

44. 407 F.2d at 81 (citations omitted).

45. 365 U.S. 715 (1961).

tion of a racially segregated private restaurant in conjunction with a public facility to be so intermingled as to make the state a "joint participant in the challenged activity."[46] Such participation is at the root of the *Powe* test which looks to whether the state is involved in the "activity that caused the injury."[47] In addition to setting forth the causal relation test, the court illustrated the public-private dichotomy which had been utilized in the hospital cases:

> [R]egulation of demonstrations by and discipline of the students in the New York State College of Ceramics at Alfred University by the President and the Dean of Students constitutes state action, for the seemingly simple but entirely sufficient reason that the State has willed it that way. *The very name of the college identifies it as a state institution.*[48]

Thus, *Powe* set forth two different standards for state action. Under the first, if the allegedly injurious acts were committed by a state official, the court need look no further for state involvement.

Most recently, in *Wahba v. New York University,*[49] the Second Circuit rejected a claim of state action made under the first *Powe* standard in a situation in which the alleged discriminatory actions arose in connection with the administration of a National Institute of Health research grant. While in *Powe* the court found that the university president, as administrator of a state college of ceramics, was acting directly as a representative of the state, in *Wahba* it determined that the grant of money for a research program was not sufficient, by itself, to make the project director a state agent.[50] The court noted in *Wahba* that there was "no partnership or joint venture . . . . The venture was to be that of New York University and [the project administrator], undertaken with government support. What NIH wanted least was to share responsibility for its administration."[51] Although the court in this instance might have found an analogy to the agent-of-the-state theory which is the essence of the first of the *Powe* tests, it insisted on looking for a nexus, thereby employing the second *Powe* test. Thus, it seems that, even within the confines of the first of the alternative *Powe* standards, courts may look for some minimal nexus—or significant relationship—between the governmental involvement and the activity alleged to have caused the injury.

Applying the second *Powe* standard to the type of situation found in hospital cases such as *McCabe,* it is clear that if the administrators had been found to be acting as officials of a private medical center rather than agents acting directly for the government, *Powe* would require that the plaintiff show not only state involvement in the center—a Hill-Burton grant or other

46. Id. at 725.
47. 407 F.2d at 81.
48. Id. at 82 (emphasis added).
49. 492 F.2d 96 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974).
50. See id. at 102-03.
51. Id. at 100.

subsidy—but also a significant connection between that involvement and the injurious acts.[52]

In the case of a private educational institution, the nexus test would have been satisfied in *Powe* with respect to the university's liberal arts students if the university adminstrators had ordered the suspensions pursuant to a statute or ordinance which required such measure to be taken.[53] This would have satisfied the "under color of state law" requirement of section 1983. Thus in *Coleman v. Wagner College,*[54] a progeny of *Powe*, a private college promulgated disciplinary regulations expressly to comply with a state law providing therefor. The court held that the actions of the college were undertaken under color of state law within the meaning of section 1983 and, hence, were within the concept of state action under the fourteenth amendment.[55] There can be no question that a proper nexus was established in *Coleman*: the injury emanated from an action directly predicated upon a state statute.

An examination of the hospital and the education cases shows that plaintiffs must show more than general governmental involvement for a court to find state action within the meaning of section 1983.[56] Both lines of authority emphasize the fact that the type and extent of the involvement must be scrutinized. As one court pointed out:

> The quest is not for a scintilla of State action, for State action is ubiquitous and pervasive. The inquiry is properly directed to the type of State action involved, the extent to which the State thereby associates itself or is in the public view associated with invidious discriminatory purposes and policies, and, accordingly, the extent to which responsibility for the perpetuation of those invidious designs may be justifiably ascribed to the State itself.[57]

Thus, it is not surprising that tax exemptions have never been considered to be a sufficient basis for finding state action.[58]

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52. See, e.g., Ward v. St. Anthony Hosp., 476 F.2d 671, 676 (10th Cir. 1973).

53. 407 F.2d at 81.

54. 429 F.2d 1120 (2d Cir. 1970), noted in 39 Fordham L. Rev. 127 (1970).

55. 429 F.2d at 1125. In another student discipline case, Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), aff'd, 445 F.2d 412 (7th Cir. 1971), a federal district court recently applied the reasoning of Powe in the following terms: "There can be no doubt that [busing, licensing, supervision of curriculum] and tax exemption constitute action by the State, but the question is whether it constitutes the 'significant involvement' of the State in the challenged activity so that these actions may be justifiably ascribed to the State itself." Id. at 1396 (emphasis deleted). The court decided that, where these factors were present, the expulsion of two sophomores for repeated violations of the school's regulations regarding tardiness and leaving school during class hours was not such action as could be ascribed to the state.

56. See notes 37, 44 supra and accompanying text.

57. Pennsylvania v. Brown, 270 F. Supp. 782, 789 (E.D. Pa. 1967), aff'd, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968).

58. See, e.g., Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971). In Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) the court stated: "Assuming that the special tax exemption is tantamount to a financial contribution and that it was intended to and does generally promote

On the other hand, within the past few years, a court has found tax-exempt status supportive but not determinative of state action with regard to certain groups. In *McGlotten v. Connally,*[59] the court refused to find state action in the simple extension of tax exemptions granted to nonprofit clubs, reasoning that the governmental involvement was insufficient to imply governmental approval where only a tax exemption had been granted.[60]

To fashion a precise, universally applicable formula for finding state action would be "an impossible task"[61] since, as the Supreme Court noted in *Burton*, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[62]

In order to determine whether state action was present in the activities of the defendant foundations in *Jackson v. Statler Foundation,* the court enumerated five factors which it considered to be of primary significance:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.[63]

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public education there is nothing in the record to indicate that this bounty is or can be utilized in any way to dictate or influence the administration of University affairs. . . . The benefits conferred, however characterized, have no bearing on the challenged actions beyond the perpetuation of the institution itself." Id. at 596. See also Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973) (refusal by religious order to allow private charitable hospital's facilities to be used for voluntary sterilization operation).

59. 338 F. Supp. 448 (D.D.C. 1972).

60. "Encouragement of discrimination through the appearance of governmental approval may also be sufficient involvement to violate the Constitution. But here the necessary involvement is not readily apparent. . . . [T]here is no mark of Government approval inherent in the designation of a group as exempt. Congress has simply chosen not to tax a particular type of revenue because it is not within the scope sought to be taxed by the statute. . . . [C]ongress does not violate the Constitution by failing to tax private discrimination where there is no other act of Government involvement. To find a violation solely from the State's failure to act would, however laudably, eliminate the 'state action' doctrine and that must come from the Supreme Court." Id. at 458 (emphasis and footnote omitted). The court did find, however, that another provision of the same section of the Internal Revenue Code, Int. Rev. Code of 1954, § 501(c)(8), did give rise to sufficient governmental approval of the activities of fraternal orders because of the manner in which the exemption was administered. 338 F. Supp. at 459. See id. at 458 n.53 for an analysis of the fundamental problems with the state action doctrine in relation to the original purposes of the fourteenth amendment.

61. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947), quoted in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). One commentator has found the applications of the state action doctrine to be so pervasive that it becomes difficult to conceive of situations where it is not present. See Williams, The Twilight of State Action, 41 Texas L. Rev. 347, 367 (1963).

62. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1971).

63. 496 F.2d at 629. In Barrett v. United Hosp., 376 F. Supp. 791, 797 (S.D.N.Y. 1974), the

The court found the first factor easily met, reasoning that the tax exemptions were indispensable to the continued existence of the foundations.[64] The second factor, regulation, was found to be both detailed and intrusive.[65] Third, the court stated that tax-exempt status for private foundations is not granted routinely and does connote governmental approval of the foundation's activities.[66] On the fourth factor the court made no clear finding, because the record was insufficient on the point.[67] Finally, the court rejected defendants' contention that they had a constitutional claim to recognition as a private organization such as might be available to a private club.[68]

These five factors show a judicial attitude on the part of the court in *Jackson* more similar to the repudiated *Simkins* approach than to the prevailing *Powe* standards. The court emphasized the *fact* of the aid and the *fact* of the state regulation more than the connection between the aid and the challenged activities. It is beyond question that the *Powe* standard applicable to defendants who are, in fact, directly acting for the government is inapplicable to the facts of *Jackson*. Therefore, unless the court intended to create a discrete set of standards to be used only in cases involving private charitable foundations, the court's decision must be reconciled with the narrow standards for determining state action developed by the Second Circuit in *Powe* and by the Supreme Court in *Moose Lodge*.

Until *Jackson*, no case held that tax-exempt status, without more, could

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court sets forth its understanding of the test applied by the Second Circuit: "[I]n order to subject 'private' institutions to the limitations of § 1983 and the constitutional amendments it must be shown (1) that the state's involvement with the private institution is 'significant,' (2) 'that the state must be involved not simply with some activity of the institution . . . but with the activity that caused the injury' (. . . the 'nexus' requirement) and (3) that the state's involvement must aid, encourage or connote approval of the complained of activity." (footnotes omitted & emphasis deleted). Other earlier tests for state action demonstrate the factors considered important by other judges and commentators. One of the least complicated and most frequently cited tests was formulated by Judge Lord in Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), aff'd, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968): "[F]irst, what was and is the nature of the State involvement . . . ?" Id. at 789. "[Second,w]hat is the nature of the institution . . . in terms of the services it performs in the community?" Id. at 791. Another analysis of the doctrine concluded that three questions must be answered before state action may be found: "(1) Precisely what is the nature of the challenged conduct? (2) What is the relationship, if any, of the state to that conduct? (3) If a relationship is found, what is the character and significance of that relationship?" Burke & Reber, supra note 17, at 1042. See also Black, supra note 10, at 89, where the author notes the futility of devising any tests at all, suggesting that a better approach may be to clarify each factual situation on an ad hoc basis.

64. 496 F.2d at 629.

65. Id. at 630-33.

66. Id. at 633-34; see Norwood v. Harrison, 413 U.S. 455, 466 (1973) (textbooks given as aid to segregated private schools found unconstitutional insofar as the grant fostered segregation). But see Gilmore v. City of Montgomery, 94 S. Ct. 2416, 2424-25 (1974) (nonexclusive use by segregated schools and organizations of city facilities not found to be unconstitutional per se).

67. 496 F.2d at 634.

68. Id. at 633; see Moose Lodge v. Irvis, 407 U.S. 163 (1972), discussed in notes 18-22 supra and accompanying text.

support a finding of state action. Indeed, even in cases in which the defendant actually had received government subsidies necessary for continued operation,[69] this additional measure of involvement did not suffice to transform private conduct into state action.[70]

The hospital and education cases[71] show that regulation or supervision of activities by a governmental agency—either by itself or in connection with an affirmative grant of funds—does not raise the level of state involvement to that which is required to invoke the state action doctrine and section 1983. Neither of the first two factors in *Jackson* approaches the significant causal relationship which has characterized the recent decisions.[72]

The third factor in *Jackson*—the connotation of approval by a governmental body of the challenged activity—is nearest to the nexus required by *Powe* and *Moose Lodge*. The court indicated that in granting tax exemptions to the defendant foundations under the Tax Reform Act of 1969[73] the Internal Revenue Service[74] approved the method of administering foundation funds, which plaintiff alleged to have been awarded on a discriminatory basis.[75] There is no indication that Congress intended IRS supervision of tax exemptions to prevent racial discrimination.[76] While the tax exemption statute requires that foundations make awards "on an objective and nondiscriminatory basis,"[77] this provision, as Judge Friendly explained, was simply intended to prevent discrimination "among the members of the designated charitable class."[78] Apparently recognizing that the dispensing authority of charitable foundations frequently is limited to specified categories of beneficiaries, the majority in *Jackson* admitted that "[t]here is no evidence to

69. See, e.g., Wahba v. New York Univ., 492 F.2d 96 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974); Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973). (10th Cir. 1973).

70. See notes 37, 44 supra and accompanying text.

71. See notes 36-37, 41-47 supra and accompanying text.

72. See text accompanying notes 22, 56-57 supra.

73. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (codified in scattered sections of 26 U.S.C.).

74. An Internal Revenue Service memorandum entitled "Internal Revenue Commitments to Congress on Exempt Organizations" spells out the "Service commitments" for the scrutiny of exempt organizations. Among its objectives were an expanded staff of investigators and regular reviews of the files of all exempt organizations. The memorandum is reprinted in full in Jackson v. Statler Foundation, 496 F.2d at 630-31 n.11.

75. Id. at 630-33.

76. Congress passed the Tax Reform Act of 1969 to eliminate self-dealing, grants without legitimate bases, and to limit lobbying and other political influences by private foundations. S. Rep. No. 91-552, 91st Cong., 1st Sess. 28-29, 47-49 (1969). The House Report states: "It is expected that this provision will encourage the further development of systematic nondiscriminatory grant-making and it should not interfere with the proper use of private foundation funds for encouraging charitable purposes." H.R. Rep. No. 91-413 (Part I), 91st Cong., 1st Sess. 35 (1969). The Senate expressed the purpose of the legislation in similar terms. S. Rep. No. 91-552, 91st Cong., 1st Sess. 49-50 (1969); see Jackson v. Statler Foundation, 496 F.2d at 638-39 (Friendly, J., dissenting).

77. 26 U.S.C. § 4945(g) (1970).

78. 496 F.2d at 639 n.4 (Friendly, J., dissenting).

the effect that Congress sought to prevent foundations from choosing on the basis of race between two public uses of foundation assets."[79]

As to the last two factors set forth in *Jackson* for determining state action, it is clear that the defendant private foundations did not perform public functions as or on behalf of state agencies. Nor did the court rely on this test in reaching its decision that plaintiff had alleged sufficient facts to allow him to proceed to the merits of his section 1983 claim.[80] Since neither the court in *Jackson* nor any other court has presented the fifth factor as relevant to the state action determination, it is unclear whether this criterion was intended to, or will have the effect of altering the method of analysis employed in finding state action in future cases.[81]

The significance of the *Jackson* decision lies in the fact that the court has abandoned, at least for cases involving private foundations, the causal relationship test developed in *Powe* and employed in *Moose Lodge*. As Judge Friendly noted, the implications of *Jackson* are "staggering:"

> Simply because of tax exemptions, private social agencies, community centers, institutions of higher education, homes for the young and the aged, endowed by private donors for the sole or preferential benefit of particular creeds or races, must open their doors equally to all, with every decision subject to judicial reexamination, even though this may impair or destroy the very purpose which led the donor to endow them. Beyond this, if the tax exemption given to charitable foundations converts their giving into government action, I see no really tenable basis for distinguishing the tax deductions allowed individuals and corporations.[82]

The majority, however, minimized the potential impact, saying that it doubted "that the fruits of charity will wither on the vine as a result of a decision barring racial discrimination."[83]

There can be no question that *Jackson* will profoundly affect private philanthropic activities.[84] Moreover, the opinion departs from the trend in judicial decisions which have construed the state action doctrine more narrowly by requiring that plaintiff establish a significant causal relationship between the alleged government involvement in defendant's activities and the injurious acts.[85] It is true that no case is precisely on point with the facts of

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79. Id. at 633 (footnote omitted).

80. See id. at 635-36.

81. The practicalities of each situation will dictate whether or not the actor will be "let alone." Whether the actor can assert a claim to be let alone, as the fifth factor in Jackson allows by way of a defense to an allegation of state action, would depend on such practical considerations. Judge Friendly stated in Jackson: "As we said in Wahba v. New York University . . . courts should pay heed, in testing for government action, to the 'value of preserving a private sector free from the constitutional requirements applicable to government institutions.' . . . The interest in preserving an area of untrammeled choice for private philanthropy is very great." Id. at 639 (Friendly, J., dissenting) (citation omitted).

82. Id. at 638 (Friendly, J., dissenting).

83. Id. at 635.

84. On the related subject of charitable trusts and the dilemma which would be created in that area by a finding of state action see Clark, supra note 14, at 1009-14.

85. See text accompanying notes 18-21, 33-40 supra.

Jackson.[86] *Powe* involved an educational institution, *McCabe* concerned a medical facility and *Moose Lodge* dealt with a fraternal order. Judge Friendly, in his dissent in *Jackson*, thought such decisions to be controlling[87] and stated that the majority's finding of state action purely on the basis of tax-exempt status and attendant IRS supervision to be "unsound, dangerously open-ended and at war with controlling precedent . . . ."[88]

To the extent that the earlier decisions can be distinguished according to the type of organization involved, precedent may not be controlling. It is hoped, however, that the decision in *Jackson* does not represent either a shift in trend or the creation of a unique class of activities to be governed by rules inconsistent with those applied to the most closely analogous situations. If the Second Circuit has occasion to re-examine the contours of its holding after trial of this case on the merits, the court should require that plaintiff demonstrate a nexus between the government involvement and the racial discrimination alleged.

Arthur P. Lowenstein

Contracts—Employee's Discharge Motivated by Bad Faith, Malice, or Retaliation Constitutes a Breach of an Employment Contract Terminable at Will.—Plaintiff Monge sued her former employer for breach of an oral contract of employment. After she had been employed in defendant's factory for three months, the foreman asked her to go out with him and she refused. Thereafter, the foreman, with the "apparent connivance"[1] of the personnel manager, began a program of demotion and harassment[2] that culminated in the plaintiff's discharge eight months later.[3] The jury found her dismissal to have been malicious and awarded her damages. On appeal, the Supreme Court of New Hampshire announced that "termination by the employer of a contract of employment at will which is motivated by bad faith or malice or

86. See note 23 supra.

87. 496 F.2d at 636, 638-39 (Friendly, J., dissenting).

88. Id. at 636. One commentator addressed the issue of tax exemptions for charitable institutions and found that such state involvement would not be sufficient to characterize it as state action. Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1108 (1960). More recently, another author argued generally that tax exemptions should be treated as affirmative grants of aid; fitting more closely the concept of state action. Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656, 675-77 (1974).

1. Monge v. Beebe Rubber Co., — N.H. —, —, 316 A.2d 549, 552 (1974).

2. A vigorous dissent disputed the adequacy of the evidence to support the jury's finding that the plaintiff was harassed. It noted among other things that the plaintiff did not use the union grievance procedures, nor did she deny that she was a "voluntary quit" when refused unemployment compensation on that ground. Id. at —, 316 A.2d at 552-53 (Grimes, J., dissenting).

3. The plaintiff was notified by the defendant that she was considered a "voluntary quit," because she was absent for three days allegedly without informing the company. Id. at —, 316 A.2d at 551. The jury was permitted to find that this notice was a discharge. Id. at —, 316 A.2d at 552.

based on retaliation . . . constitutes a breach of the employment contract."[4] *Monge v. Beebe Rubber Co.*, — N.H. —, 316 A.2d 549 (1974).

The majority rule in this country[5] is that a hiring for an indefinite term is prima facie a hiring terminable at the will of either party[6] in the absence of a contract, custom, or statute fixing different terms or conditions.[7] Calling employment "permanent" does not change the fact that it is presumed to be terminable at will.[8] Nor will setting the compensation at a weekly, monthly, or yearly rate ordinarily create a contract for the same term.[9]

Various theories have been offered in support of this approach. First, there is the natural aversion to forcing one to keep employed anyone he despises.[10] When coupled with the influences of laissez-faire capitalism in the second half of the nineteenth century,[11] the argument became:

4. Id. at —, 316 A.2d at 551.

5. The English rule was that a general hiring for no particular term was presumed to be a contract for one year's service. 1 C. Labatt, Master Servant § 156, at 504-05 (1913) [hereinafter cited as Labatt]; see 9 S. Williston, Contracts § 1017, at 128 n.8 (3d ed. 1967) [hereinafter cited as Williston].

6. Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 393, 153 N.W.2d 587, 589 (1967); 1 Labatt § 159, at 516-17; see Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335, 346 (1974) [hereinafter cited as Job Security]. But see Blumrosen, Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report, 18 Rutgers L. Rev. 428, 432 (1964).

7. Cales v. Chesapeake & O. Ry., 300 F. Supp. 155, 157 (W.D. Va. 1969). Obviously an employee can negotiate a contract of employment fixing a term, subject to the usual rules of contract law. J. Calamari & J. Perillo, Contracts § 23, at 32 (1970) [hereinafter cited as Calamari & Perillo]. An industry custom may play a role in setting a definite term in what would otherwise be a contract terminable at will. See Still v. Lance, 279 N.C. 254, 259, 182 S.E.2d 403, 406-07 (1971) (since teachers in the district were customarily employed until the end of the school year, plaintiff was held to have proven a contract until that time).

In the majority of American jurisdictions, collective bargaining agreements are held to create contractual rights in the individual employee when the provision in question was intended to benefit him. See, e.g., Associated Teachers v. Board of Educ., 33 N.Y.2d 229, 234, 306 N.E.2d 791, 794, 351 N.Y.S.2d 670, 674 (1973); Gulla v. Barton, 164 App. Div. 293, 149 N.Y.S. 952 (3d Dep't 1914); 9 Williston § 1020, at 248 n.12. This rule generally applies to collective agreements in industries covered by the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (1970). See Vaca v. Sipes, 386 U.S. 171 (1967); Smith v. Evening News Ass'n, 371 U.S. 195 (1962). See generally Jaeger, Collective Labor Agreements and the Third Party Beneficiary, 1 B.C. Ind. & Com. L. Rev. 125 (1960).

8. Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 392-93, 153 N.W.2d 587, 589 (1967); Calamari & Perillo § 23, at 32.

9. Calamari & Perillo § 23, at 32; 1 A. Corbin, Contracts § 70, at 292-93 (1963) [hereinafter cited as Corbin]; Restatement (Second) of Agency § 442, comment b at 339 (1958). Georgia has changed the presumption by statute: when wages are payable by stipulated period, the hiring is for that period. Ga. Code Ann. § 66-101 (1966). This approach was also adopted in the Restatement (Second) of Contracts § 32, illus. 6 at 156 (Tent. Draft No. 1, 1964).

10. Johnson v. Shrewsbury & Birmingham Ry., 43 Eng. Rep. 358, 363 (Ch. 1853); see Brill v. Brenner, 62 Misc. 2d 102, 104, 308 N.Y.S.2d 218, 220 (N.Y.C. Civ. Ct. 1970), modified, 66 Misc. 2d 501, 321 N.Y.S.2d 467 (App. T. 1971) (per curiam); 9 Williston § 1017, at 134.

11. Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise

May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? . . .

. . . .

. . . All may dismiss their employes at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.[12]

A second theory is that employment for an indefinite term is not a contract per se, but rather an offer looking to a series of unilateral contracts in which the employer is the offeror and the employee is the offeree who accepts by performing the requested services.[13] Under this view, when discharging the employee, the employer is simply withdrawing a revocable offer.[14]

A third justification evolves from the country's early history of job abundance and labor scarcity. It was to the advantage of the employee to be free to change his employment at will.[15] In a bilateral contract, if the employee were free to terminate his employment agreement, then the doctrine of mutuality of obligation[16] would require that the employer have the same freedom.[17]

In certain circumstances, there are statutory limitations on the right of the employer to terminate a hiring for an indefinite term.[18] These, however, do not otherwise change the employer's right to fire as he chooses those whose

of Employer Power, 67 Colum. L. Rev. 1404, 1416-19 (1967) [hereinafter cited as Blades]; Job Security 340-43.

12. Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-20 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). The freedom to terminate an at-will employment agreement was so highly valued that it resulted in early twentieth century holdings that the employer's freedom could not be limited by statutes protecting union activity. Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); cf. St. Louis Sw. Ry. v. Griffin, 106 Tex. 477, 171 S.W. 703 (1914). On the freedom of contract, see Williston, Freedom of Contract, 6 Cornell L.Q. 365 (1921).

13. 1 Corbin § 70, at 292-93. The offer the employer makes is to pay "the promised salary in proportion to the work actually done." Id. at 292-93.

14. See id. at 293. It is now the general rule that if an offer looks to a unilateral contract, part performance by the offeree will make the offer irrevocable. 1 id. § 49.

15. See 9 Williston § 1017, at 131 n.12.

16. Calamari & Perillo § 67. See also note 37 infra.

17. Calamari & Perillo § 67; see 9 Williston § 1017, at 129 n.11.

18. State and federal laws prohibit discharges for union activity. E.g., 29 U.S.C. § 158(a) (1970); N.H. Rev. Stat. Ann. § 275:1 (1966) (prohibits discharge for becoming a union member). Discharges involving discrimination on the basis of race, color, religion, sex, or national origin have been forbidden. E.g., 42 U.S.C. § 2000e-2(a)(1) (1970); Cal. Labor Code § 1420(a) (West Supp. 1974). Other statutes prohibit discharges because an employee's wages have been garnished. 15 U.S.C. § 1674 (1970); Cal. Labor Code § 2929(b) (West Supp. 1974). In a few states, the employer cannot discharge employees for political activities. Note, California's Controls on Employer Abuse of Employee Political Rights, 22 Stan. L. Rev. 1015, 1019 n.28 (1970). The first amendment itself does not prevent a private employer's discharging individuals for their political activities. Elders v. Consolidated Freightways Corp., 289 F. Supp. 630, 635 (D. Minn. 1968) (discharge alone is not a denial of free speech). But see Thornton v. Department of Human Resources Dev., 32 Cal. App. 3d 180, 183, 107 Cal. Rptr. 892, 894 (1st Dist. 1973). It is not always necessary that the employer intend the act prohibited. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1970), as amended, 42 U.S.C. §§ 2000e et seq. (Supp. II 1972), "practices, procedures, or tests neutral on their face, and even neutral in terms of intent,

employment is terminable at will.[19] The employer is prohibited only from discharging for the reasons specified in the applicable statute.[20]

Practically speaking, an employer's exercise of this freedom to terminate "without cause or reason or for any cause or reason,"[21] absent a controlling contract provision, custom, or statute, often has harsh results.[22] In *Comerford v. International Harvester Co.*,[23] the plaintiff's employment agreement permitted termination on five days' notice.[24] He was given that notice allegedly because his superior was unable to win the affections of the plaintiff's wife.[25] The court refused to allow the plaintiff to recover, declaring:

"If one does an act which is legal in itself and violates no right of another, the fact that this rightful act is done from bad motives or with bad intent toward the person so injured thereby does not give the latter a right of action against the former."[26]

Since the defendant had the right to fire the plaintiff, why he chose to do so was irrelevant.

That an employee has given long and faithful service will not affect the employer's right to fire.[27] *Pearson v. Youngstown Sheet & Tube Co.*[28] concerned a discharge resulting from a mistaken diagnosis of plaintiff's health by defendant's company doctor. The plaintiff argued that

because his employment continued for [twenty-eight-and-one-half] years, his suitability for employment elsewhere had been destroyed, and . . . such tenure constituted a sufficient consideration to support a contract of permanent employment.[29]

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cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). Employment practices that have the unintended effect of discrimination against minority group members must be shown to be justified by business necessity. Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); see Gregory v. Litton Syss., Inc., 472 F.2d 631 (9th Cir. 1972).

19. Odell v. Humble Oil & Ref. Co., 201 F.2d 123, 128 (10th Cir.), cert. denied, 345 U.S. 941 (1953).

20. See Portable Elec. Tools, Inc. v. NLRB, 309 F.2d 423 (7th Cir. 1962) (because the employee failed to prove her discharge was designed to discourage union activity, the discharge was upheld); Gerstle v. Continental Airlines, Inc., 358 F. Supp. 545 (D. Colo. 1973) (plaintiffs failed to show that sex bias was the reason for dismissal). Unemployment insurance laws may indirectly curb both parties, since, unless the discharge was for just cause, an employee can collect such insurance and an employer's reserve will be charged. See Cal. Unep. Ins. Code § 1026 (West 1972); id. § 1256 (West Supp. 1974); Ohio Rev. Code Ann. §§ 4141.24(D)(1), 4141.29 (Page 1973).

21. Odell v. Humble Oil & Ref. Co., 201 F.2d 123, 128 (10th Cir.), cert. denied, 345 U.S. 941 (1953).

22. Blades 1406-10.

23. 235 Ala. 376, 178 So. 894 (1938).

24. Id. at 377, 178 So. at 895.

25. Id., 178 So. at 895.

26. Id. at 378, 178 So. at 895, quoting Tennessee Coal, Iron & Ry. v. Kelly, 163 Ala. 348, 352, 50 So. 1008, 1010 (1909). See note 81 infra and accompanying text.

27. Blumrosen, Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season, 24 Rutgers L. Rev. 480, 482 (1970).

28. 332 F.2d 439 (7th Cir.), cert. denied, 379 U.S. 914 (1964).

29. Id. at 441.

Rejecting this contention, the court declared:

> This theory overlooks the important fact that at any time during those years either of the parties had a right to terminate plaintiff's employment, and that he received all the compensation which defendant promised to pay.[30]

Therefore, in discharging the plaintiff, the employer was within his rights.

Other cases exhibit equal harshness resulting from the discharge of one whose employment was terminable at will,[31] and such "abuses" have not gone unnoticed or uncriticized.[32]

To support a change in the rule it has been suggested that although it is reasonable for an employer to have the right to discharge a personal valet or domestic servant for any reason, it is inappropriate to apply the same rule to the miner, the railway worker, or the file clerk in the large office,[33] who is hardly working for the personal comfort of his employer.[34] Furthermore, the average employee has limited bargaining power in negotiations with large corporate employers, which increasingly dominate the job market.[35] To remedy the inequities often resulting from application of the traditional rule, various approaches have been suggested.

Commentators have urged the courts to abandon the presumption[36] that a

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30. Id.

31. E.g., Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (employee for 43 years lost all rights to pension fund except for refund of his contributions); Mitchell v. Stanolind Pipe Line Co., 184 F.2d 837 (10th Cir. 1950) (employee discharged for filing tort claim against fellow employee).

32. See Blades, supra note 11; Blumrosen, Seniority and Equal Employment Opportunity: A Glimmer of Hope, 23 Rutgers L. Rev. 268, 272 (1969); Blumrosen, Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report, 18 Rutgers L. Rev. 428 (1964); Comment, Employment at Will and the Law of Contracts, 23 Buffalo L. Rev. 211 (1973); Job Security, supra note 6; Note, California's Controls on Employer Abuse of Employee Political Rights, 22 Stan. L. Rev. 1015 (1970).

33. See Blades 1416.

34. Id.

35. Job Security 337-38. This unequal bargaining power is one of the reasons commentators urging reform have not suggested that the employee also be required to terminate for just cause only. See sources cited in note 32 supra. To insist that the employee be bound by the same limits as the employer would be to commit the error of demanding "mutuality of obligation." Blades 1419; Job Security 367 n.209. As most commentators agree, "mutuality" is simply a misleading way of saying that both parties must supply consideration (e.g., Calamari & Perillo § 67), and the employee's promise to render services "at will" could be viewed as sufficient consideration to support many employer promises. See text accompanying notes 38-41 infra. In fact, courts have traditionally enforced contracts wherein the employer had to supply employment permanently, but the employee was not obligated to work permanently, although in some cases consideration greater than services "at will" was required of the employee. Chatelier v. Robertson, 118 So. 2d 241, 244 (Fla. App. 1960) (additional consideration supplied by plaintiff's sale of his factory to the defendant); accord, Ag-Chem Equip. Co. v. Hahn, Inc., 480 F.2d 482, 486 (8th Cir. 1973). But the extra consideration is needed only when the intent to enter into a contract for permanent employment is unclear. Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169, 173-74 (5th Dist. 1972); Calamari & Perillo § 23, at 33; 9 Williston § 1017, at 132.

36. See note 6 supra and accompanying text.

hiring for an indefinite term is "at will" and to look at all the circumstances of each case.[37] Since one consideration can support many promises,[38] it could also be argued that the employee's services for an indefinite term are sufficient to support both wages and either an implied promise[39] not to be dismissed for an "abusive" reason[40] or an option to remain as long as his services are satisfactory and needed.[41] In addition the employer's power to discharge can be viewed as impliedly limited to circumstances in which its exercise would not be "unconscionable."[42]

Using yet another approach, two courts attempted to circumvent the rule. Both involved "retaliatory" discharges. The first, *Frampton v. Central Indiana Gas Co.*,[43] concerned retaliation for the filing of a workmen's compensation claim; the second, *Petermann v. Teamsters Local 396*,[44] for refusing to commit perjury at the employer's request.

Judicial prohibition of certain types of retaliatory action has occurred in various areas,[45] although most often in landlord-tenant cases particularly

37. 1 Labatt § 160; Job Security 341 n.50; see Buian v. J.L. Jacobs & Co., 428 F.2d 531, 534 (7th Cir. 1970) (dissenting opinion).

38. Calamari & Perillo § 75.

39. Cf. Blades 1420-21. Of course, as the author points out, courts usually regard the employee as fully compensated by his wages alone, leaving no consideration to support such a promise. Id. at 1420.

40. A "non-abusive" reason could be good reason or none.

41. In Harrison v. Jack Eckerd Corp., 342 F. Supp. 348 (M.D. Fla.), aff'd, 468 F.2d 951 (5th Cir. 1972), a similar theory was urged. The plaintiff argued that his stock option constituted an offer looking to a unilateral contract, the terms of which required him to continue working until his option ripened. He appeared to argue further that he had accepted the offer with his services and thereby, under the doctrine of part performance, rendered the offer irrevocable; therefore, the employer could not revoke by discharging the plaintiff unless he had legal cause. The court declined to hold that the existence of a stock option altered the terminable-at-will employment relationship. Id. at 350. On the effects of part performance, see 1 Corbin § 49, at 187.

42. Comment, Employment at Will and the Law of Contracts, 23 Buffalo L. Rev. 211, 236-40 (1973); see Job Security 369 n.218 (where the parties have unequal bargaining power, it would be possible to apply the theories of adhesion contracts or unconscionability). Of course, this borrows a concept from the Uniform Commercial Code § 2-302, which provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." See generally Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

43. — Ind. —, 297 N.E.2d 425 (1973).

44. 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

45. For example, there are procedural and substantive limitations imposed by the Constitution on government as employer. The government may not deny a person a benefit, such as a job, "on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." Perry v. Sindermann, 408 U.S. 593, 597 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); see Lanzarone, Teacher Tenure—Some Proposals for Change, 42

where a tenancy from month to month is involved.[46]

Analogizing to the landlord-tenant cases, *Frampton*[47] held, first, that the defendant could not discharge an employee whose employment was terminable at will for filing a workmen's compensation claim without violating the workmen's compensation laws,[48] and, second, that such violation gives the employee a private cause of action because of the strong public policy of employee protection that is embodied in the statute.[49] To refuse the plaintiff a cause of action for wrongful discharge would leave the employee vulnerable to retaliation. Just as fear of retaliation for reporting housing code violations inhibits reporting, the court declared, the fear of retaliation for filing a workmen's compensation claim "ultimately undermines a critically important public policy."[50] It should be noted that the plaintiff in *Frampton* had been proceeding on tort theory,[51] but in granting a cause of action the Supreme Court of Indiana did not state its nature.

In *Petermann,*[52] a contract action in California, the employer had solicited the employee to commit perjury and fired him for failing to do so.[53] Unlike the workmen's compensation laws in *Frampton,* the proscription of perjury[54] was clearly not for the "express benefit"[55] of employees as such. Nevertheless,

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Fordham L. Rev. 526 (1974). See also Wellington, The Constitution, The Labor Union and "Governmental Action," 70 Yale L.J. 345 (1961). In addition, private persons have been forbidden to terminate other at-will relationships when the reason for doing so would contravene a statutory policy. See United States v. Bruce, 353 F.2d 474 (5th Cir. 1965) (defendants could not exclude plaintiff from their property to prevent his participation in voter registration drives because of the policy against intimidation of voters in 42 U.S.C. § 1971(b) (1970)); L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968) (defendant could not cancel plaintiff's medical malpractice insurance for testifying against another dentist insured by defendant because of the policy underlying a statute against intimidation of witnesses).

46. See Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). See also Comment, The Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?, 48 St. John's L. Rev. 546, 562 (1974).

47. — Ind. —, —, 297 N.E.2d 425, 428 (1973).

48. Id. at —, 297 N.E.2d at 427. The discharge was considered to be in violation of Ind. Ann. Stat. § 22-3-2-15 (1974), which forbids the use of any device by the employer to avoid his obligations under the workmen's compensation laws.

49. See Ind. Ann. Stat. §§ 22-3-2-1 et seq. (1974).

50. — Ind. at —, 297 N.E.2d at 428.

51. The plaintiff had asked for actual and exemplary damages. Id. at —, 297 N.E.2d at 427. Exemplary damages are not characteristic of a contract action. Calamari & Perillo § 204; 5 Corbin § 1077. The Monge dissent characterized Frampton as a tort case. Monge v. Beebe Rubber Co., — N.H. —, —, 316 A.2d 549, 553 (1974) (Grimes, J., dissenting).

52. 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

53. Id. at 189, 344 P.2d at 28.

54. Cal. Penal Code §§ 118 & 653f (West 1970).

55. Cf. Odell v. Humble Oil & Ref. Co., 201 F.2d 123 (10th Cir.), cert. denied, 345 U.S. 941 (1953), which involved a statute making it a crime to obstruct justice, 18 U.S.C. § 1503 (1970). Viewing this statute as intended by Congress to benefit the general public and not to change the

the court held that to effectuate fully a vital policy,[56] the discharge of an employee for refusing to commit perjury would constitute a breach of the employment contract.[57]

There are interesting parallels in *Petermann* and *Frampton*. Both purport to implement a statutory policy. In *Petermann* it is the policy against perjury; in *Frampton* it is the policy against employer interference with the filing of workmen's compensation claims. Both courts thought that the policy would have been undermined had the employee been denied a cause of action.[58]

In contrast, in the later California case of *Mallard v. Boring*,[59] an employee discharged for notifying the authorities that she was available for jury duty was held to have no cause of action against the employer. The court stated that it was for the legislature to protect employees who volunteered for jury duty; in the absence of such protection, and notwithstanding the desirability of encouraging jury duty, an employer who discharged an employee for volunteering would not be held to have breached an employment contract terminable at will.[60] This holding is distinguishable from *Petermann*. The public policy in favor of jury duty is not as strong as the public policy against perjury. In addition, although in *Petermann* there was a statutory prohibition of solicitation of perjury, in *Mallard* there was no statutory enactment against interfering with prospective jurors.[61] Similarly in *Frampton* there was a clear legislative enactment intended for the benefit of the employee.[62] Furthermore, in both *Frampton*[63] and *Petermann*,[64] it was clear that absent the policy considerations, the employer could have discharged the employee without reason or cause.

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common law relationship between employer and employee, the court denied the existence of a cause of action for plaintiffs who had been fired in retaliation for their grand jury testimony against their employer. 201 F.2d at 127-28.

56. See note 62 infra.

57. The plaintiff in Petermann also had alleged that the term of employment was to be as long as his services were satisfactory. The court's discussion of this point clearly is a makeweight argument. In essence, the court said two things: first, the employment contract terminable at will could not be terminated for an employee's failure to commit perjury; second, a satisfaction contract for employment could not be terminated for that reason, but the employer also must have been dissatisfied in good faith with the services. 174 Cal. App. 2d at 188-89, 344 P.2d at 27-28.

58. "The public policy of this state requires that every impediment, however remote to the above objective [of encouraging truthful testimony], must be struck down when encountered." Id. at 189, 344 P.2d at 27. Likewise, in Frampton, "[t]he fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a [workmen's compensation] claim, ultimately undermines a critically important public policy." — Ind. at —, 297 N.E.2d at 428.

59. 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (4th Dist. 1960).

60. Id. at 396, 6 Cal. Rptr. at 175.

61. Accord, Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (2d Dist. 1961).

62. — Ind. at —, 297 N.E.2d at 427-28.

63. Id. at —, 297 N.E.2d at 428.

64. 174 Cal. App. 2d at 188-89, 344 P.2d at 27.

In effect, *Frampton* and *Petermann* took a statutory policy and made available to the employee an unprecedented[65] civil remedy to implement it further. This kind of judicial action has been criticized,[66] but it is modest when compared to the New Hampshire decision in *Monge v. Beebe Rubber Co.*[67]

Monge declared that termination of any employment contract terminable at will could not be motivated by retaliation, malice, or bad faith.[68] The court based its decision on the *Frampton* and *Petermann* holdings, as well as on a conviction that contemporary conditions required a new rule.[69]

Unlike *Frampton* and *Petermann,* however, *Monge* involved no legislative policy prohibiting the employer's acts.[70] Additionally, both "precedents" had carved out exceptions to the common law rule, whereas *Monge* clearly intended to establish a *new* general rule.[71] Furthermore, the at-will employment contract is breached according to the court, not only by "retaliatory" discharges, but also by those motivated by malice or bad faith.[72]

Malice has been defined as "a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another."[73] On the other hand,

> "[b]ad faith" is a general and somewhat indefinite term. . . . It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or illwill.[74]

What bad faith means in a given case will depend on the circumstances.[75] Contrasting the definition of "good" faith lends only circularity to the analysis

65. Frampton v. Central Indiana Gas Co., — Ind. —, —, 297 N.E.2d 425, 428 (1973). Two commentaries on the Petermann case approving the decision agreed that it was unprecedented. 14 Rutgers L. Rev. 624 (1960); 14 Vand. L. Rev. 397, 400 (1960).

66. See 82 Harv. L. Rev. 932, 934 (1969). "[T]he court's assumption of power . . . in accordance with pressing social needs violates the accepted canon of construction that statutes will not be interpreted to effect a change in right-duty relationships well established at common law in the absence of specific statutory language to that effect."

67. — N.H. —, 316 A.2d 549 (1974).

68. Id. at —, 316 A.2d at 551. The overwhelming majority of cases have held that one who intentionally interferes with a master-servant relationship can be held liable, even if the employment contract was terminable at will. W. Prosser, Torts § 129, at 932-33 (4th ed. 1971).

69. "The law governing the relations between employer and employee has . . . evolved over the years to reflect changing legal, social and economic conditions." — N.H. at —, 316 A.2d at 551. The court does not specify the changed conditions, but the commentaries it cites see them as: the decreasing mobility of the job force, the shrinking area of union protection, the decline in self-employment, and the various fringe benefits, such as pension plans, that tend to make the employee more dependent and vulnerable to the whims of the employer and thus increase the possibilities for abuse of employees. See sources cited in note 32 supra.

70. See notes 65-66 supra and accompanying text.

71. — N.H. at —, 316 A.2d at 551.

72. Id. at —, 316 A.2d at 551.

73. Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1, 2 (1894).

74. Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 416, 8 N.E.2d 895, 907 (1937).

75. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 202-03 (1968).

since that phrase has meaning primarily insofar as it "exclude[s] a wide range of heterogeneous forms of bad faith."[76]

Before *Monge,* it was well established that the motives of an employer acting within his contractual rights in discharging an employee were immaterial.[77] Since the employer always has been within his contractual rights when firing an individual whose employment is terminable at will,[78] it would follow that a discharge motivated by malice or resulting from bad faith would give rise to no cause of action.

Although it has been suggested that discharge out of purely malicious motives could give rise to recovery under a prima facie tort theory,[79] *Monge* proceeded under a contract theory[80] and the plaintiff's discharge was at least partially motivated by her absence from work.[81]

Good faith has been required in the dismissal of one employed under a different kind of employment relationship—a satisfaction contract[82]—whether or not the agreement is for a definite period.[83] When artistic taste and personal fancy are involved, the employer must be dissatisfied with the employee's services in good faith,[84] although there is an additional requirement of reasonableness when mechanical or commercial fitness is in question.[85] But the *Monge* court did not find the plaintiff to have worked

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76. Id. at 201.

77. McNamar v. Baltimore & O. Chi. Terminal R.R., 153 F. Supp. 835, 839 (N.D. Ind. 1957), aff'd, 254 F.2d 717 (7th Cir. 1958); Barisa v. Charitable Research Found'n, 287 A.2d 679, 682 (Del. Super.), aff'd, — Del. —, 299 A.2d 430 (1972) (per curiam); 5 Williston § 744, at 531; 6 id. § 839, at 143; 9 id. § 1017, at 134.

78. See text accompanying note 6 supra.

79. Reale v. IBM Corp., 34 App. Div. 2d 936, 311 N.Y.S.2d 767 (1st Dep't 1970) (mem.), aff'd mem., 28 N.Y.2d 912, 271 N.E.2d 565, 322 N.Y.S.2d 735 (1971); see Forkosch, An Analysis of the "Prima Facie Tort" Cause of Action, 42 Cornell L.Q. 465, 477-78 (1957); Annot., 16 A.L.R.3d 1191 (1967).

80. — N.H. at —, 316 A.2d at 551.

81. Id. at —, 316 A.2d at 551.

82. Bondi v. Jewels by Edwar, Ltd., 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 (2d Dist. 1968); Associated Teachers v. Board of Educ., 33 N.Y.2d 229, 306 N.E.2d 791, 351 N.Y.S.2d 670 (1973); Smith v. Robson, 148 N.Y. 252, 42 N.E. 677 (1896); Calamari & Perillo § 153. Without the good faith requirement, the satisfaction contract would be illusory since a party could terminate because of unhappiness with the bargain rather than dissatisfaction with the performance. Thompson-Starrett Co. v. La Belle Iron Works, 17 F.2d 536, 541 (2d Cir.) (opinion of L. Hand, J.), cert. denied, 274 U.S. 748 (1927); Calamari & Perillo § 153, at 240.

83. Bondi v. Jewels by Edwar, Ltd., 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 (2d Dist. 1968) (satisfaction contracts with no fixed duration but requiring that an employee be retained as long as his services are satisfactory are enforceable). However, the courts require a clear expression that the employer intends such an open-ended commitment, treating it as analogous to permanent employment. Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 704-05, 101 Cal. Rptr. 169, 174-75 (5th Dist. 1972). See note 35 supra.

84. Gibson v. Cranage, 39 Mich. 49 (1878); Brill v. Brenner, 62 Misc. 2d 102, 308 N.Y.S.2d 218 (N.Y.C. Civ. Ct. 1970), modified, 66 Misc. 2d 501, 321 N.Y.S.2d 467 (App. T. 1971) (per curiam); 3A Corbin § 646.

85. 5 Williston § 675A-B; see Smith v. Robson, 148 N.Y. 252, 42 N.E. 677 (1896). See also

under such an agreement.[86] Furthermore, whereas other courts have read a requirement of good faith into contracts when termination would cause the employee to lose commissions or stock options, they have done so under the guise of establishing the intent of the parties.[87]

Nevertheless, there is much merit in the court's resolution of the issue before it. The common law regarding the relationship of master and servant appears to have little relevance to the modern relationship of employer-employee, and it likewise seems eminently fair to hold an employer liable for damages when he discharges an employee out of "bad faith or malice or based on retaliation."[88]

However, the *Monge* holding leaves two issues unresolved. First, it exposes the employer to a lawsuit every time he discharges an employee with a contract terminable at will. Second, and more significant still, the court leaves open the possibility that the ordinary employment contract for an indefinite term will be transformed into a contract in which the employer's right to terminate is severely restricted. The court suggests that a rule is acceptable if it affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.[89] Thus, it seems to be transforming the terminable at will contract into a hybrid need-satisfaction contract[90] under which the employee cannot be discharged unless he does unsatifactory work or his services are no longer needed.

John Willis

Criminal Law—Attorney's Lack of Pre-Trial Investigation Constitutes Ineffective Assistance of Counsel But Burden Is on Defendant to Prove Prejudice Requiring Reversal—Petitioner, Roger Lee McQueen, shot and killed George Francis at Francis's apartment in St. Louis, Missouri, on October 23, 1963.[1] McQueen left Missouri after the shooting and was arrested two days later in Kentucky. He was sent to the Jefferson County, Missouri, jail where he remained until transferred to the St. Louis city jail in June, 1964.[2] The Jefferson County magistrate appointed Hale W. Brown to

Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 668 (1963).

86. The plaintiff in Monge argued to no avail that she was to be employed for as long as her work was satisfactory. Brief for Plaintiff at 7, 8, Monge v. Beebe Rubber Co., — N.H. —, 316 A.2d 549 (1974).

87. "[I]t can hardly be assumed . . . that a bad faith discharge, without cause, and for the purpose of depriving plaintiff of commissions reasonably certain to accrue to him, was within the mutual contemplation of the parties." Rees v. Bank Bldg. & Equip. Corp. of America, 332 F.2d 548, 551 (7th Cir.), cert. denied, 379 U.S. 932 (1964).

88. — N.H. at —, 316 A.2d at 551.

89. Id. at —, 316 A.2d at 552.

90. Job Security 366-68.

1. McQueen v. Swenson, 498 F.2d 207, 208 (8th Cir. 1974).

2. Id. at 210–11.

represent McQueen in connection with a separate first-degree murder charge then pending against McQueen in Jefferson County.[3] Brown voluntarily undertook to represent McQueen in the St. Louis case as well, although he was not appointed to do so until a few days before the trial in September, 1964.[4] McQueen alleged self-defense but was convicted of second-degree murder in the Circuit Court of the City of St. Louis and sentenced to life imprisonment.[5]

Appeals and collateral attacks in the Missouri courts were unsuccessful. On initial appeal to the Missouri Supreme Court the conviction was affirmed.[6] The affirmance was subsequently set aside because McQueen had not been furnished counsel on appeal but upon resubmission with counsel, the conviction was reaffirmed.[7] Prior to resubmission of the appeal, McQueen filed a motion collaterally attacking the conviction on the ground that he was denied effective assistance of counsel.[8] Testimony at the hearing on the motion conflicted as to how many times Brown visited McQueen at the Jefferson County and St. Louis city jails.[9] It was undisputed, however, that Brown spent four-fifths of his time working on the separate Jefferson County murder charge, that he did not interview any of the 41 prosecution witnesses who endorsed the indictment and that he did not visit the scene of the crime.[10] The lower court nevertheless concluded that Brown was not negligent in his preparation of the St. Louis case and denied the motion.[11] The Missouri Supreme Court affirmed.[12]

McQueen petitioned for a writ of habeas corpus[13] in forma pauperis in the

3. Id. In December, 1963 McQueen was indicted for a murder that occurred in Jefferson County. Earlier in the fall of 1963 Brown was appointed to represent McQueen in connection with the Jefferson County charge. McQueen v. Swenson, 357 F. Supp. 557, 558 (E.D. Mo. 1973), rev'd, 498 F.2d 207 (8th Cir. 1974).

4. 498 F.2d at 210–11.

5. Id. at 208. McQueen relied on a theory of self-defense. However, the prosecution produced 26 witnesses and "spun a web of circumstantial evidence" around McQueen, destroying his justification. Id. at 209.

6. State v. McQueen, 399 S.W.2d 3 (Mo.), cert. denied, 384 U.S 977 (1966).

7. State v. McQueen, 431 S.W.2d 445 (Mo. 1968).

8. 498 F.2d at 208 n.l.

9. Id. at 211. According to McQueen, Brown spoke with him twice while he was confined in the Jefferson County jail and neither of these interviews related to the St. Louis case. McQueen also testified that he did not see Brown while he was in St. Louis until the time of the actual trial. Brown testified that he spoke with McQueen in Jefferson County about seven times and in St. Louis one or two times. Id.

10. Id. at 211 & n.8; 357 F. Supp. at 562.

11. 498 F.2d at 212.

12. McQueen v. State, 475 S.W.2d 111 (Mo. 1971) (en banc).

13. "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1970). The writ of habeas corpus is used to raise questions of jurisdiction. Where a person, in a state criminal proceeding, is denied a procedural right protected by the due process clause of the fourteenth amendment, there results a jurisdictional defect for which a writ of habeas corpus is the remedy. However, the petitioner

United States District Court for the Eastern District of Missouri. There, his primary contention was that he received ineffective assistance of counsel because of Brown's less than diligent trial preparation.[14] The district court accepted the premise adopted in the Missouri state courts that Brown's consultations with the defendant were sufficient to make an adequate presentation of the defense, and denied the petition.[15]

On appeal, the Court of Appeals for the Eighth Circuit reversed the judgment of the district court, and remanded,[16] holding that under the "mockery of justice" standard, lack of pre-trial investigation amounted to ineffective assistance of counsel[17] but that ineffective assistance of counsel did not automatically require a reversal.[18] *McQueen v. Swenson,* 498 F.2d 207 (8th Cir. 1974).

The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[19] The right to the assistance of counsel[20] has been recognized as one of "peculiar sacredness";[21] "it affects [an accused person's] ability to assert any other rights he may have."[22] Although the Supreme Court has not promulgated any standard for evaluating claims of ineffective assistance of counsel, several of its decisions have indirectly guided the development of the right to effective assistance of counsel.

In *Powell v. Alabama,*[23] the Court first held the assistance of counsel to be one of the " 'fundamental principles of liberty and justice which lie at the base

must exhaust all his then existing state remedies before submitting his petition. Id. § 2254(b). See Fay v. Noia, 372 U.S. 391 (1963).

14. 357 F. Supp. at 558.

15. Id. at 559–60, 564; see 475 S.W.2d at 114.

16. 498 F.2d at 220.

17. Id. at 214–15.

18. Id. at 218.

19. U.S. Const. amend. VI. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1970) requires each United States district court to adopt a plan whereby representation is furnished for defendants who are financially unable to retain counsel. It also requires that the Judicial Council of each circuit provide for representation on appeal. See Shafroth, The New Criminal Justice Act, 50 A.B.A.J. 1049, 1051 (1964); Note, Adequate Representation for Defendants in Federal Criminal Cases: Appointment of Counsel under the Criminal Justice Act of 1964, 41 N.Y.U.L. Rev. 758 (1966); Note, Judicial Problems in Adminstering Court-Appointment of Counsel for Indigents, 28 Wash. & Lee L. Rev. 120 (1971). See generally Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227, 237 (1973).

20. This Case Note is concerned solely with effective assistance of appointed counsel. Whether retained counsel are to be held to the same standards is a difficult and distinct issue, not treated here. See United States v. Marshall, 488 F.2d 1169, 1192–93 (9th Cir. 1973); West v. Louisiana, 478 F.2d 1026, 1032–34 (5th Cir. 1973); Polur, Retained Counsel, Assigned Counsel: Why the Dichotomy?, 55 A.B.A.J. 254 (1969); Comment, Incompetency of Counsel, 25 Baylor L. Rev. 299, 308 (1973); Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434, 1437–38 (1965).

21. Avery v. Alabama, 308 U.S. 444, 447 (1940).

22. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

23. 287 U.S. 45 (1932).

of all our civil and political institutions . . . .' "[24] The Court stated that the need for defendants to have the assistance of counsel during the pre-trial period when "consultation, thoroughgoing investigation and preparation"[25] should take place was vitally important and that if this need were not satisfied the defendant would be denied effective assistance of counsel.[26] Six years later, in *Johnson v. Zerbst,*[27] the Court held that, absent the accused's waiver, the failure of a federal court to appoint counsel for an indigent defendant deprived the court of jurisdiction to proceed.[28] The Court there recognized that the right guaranteed by the sixth amendment

> embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.[29]

In *Avery v. Alabama,*[30] a case decided under the fourteenth amendment, the Court stated that the constitutional guarantee of assistance of counsel "cannot be satisfied by mere formal appointment"[31] of counsel for an accused and indicated that appointed counsel must perform his " 'full duty intelligently and well.' "[32] In *McMann v. Richardson,*[33] a case involving allegedly coerced confessions, the Supreme Court came close to enunciating a standard of "effective" representation. There the Court stated that the advice given the accused should be "within the range of competence demanded of attorneys in criminal cases."[34] Although the Court indicated that the standard for judging counsel's performance should be the reasonably competent attorney,[35] it would go no further at that time, leaving the matter "for the most part" to the discretion of the trial courts.[36]

The Court's failure to enunciate a definitive standard of effective representation has left the circuit courts divided. The Third, Fifth and Sixth Circuits have adopted the standard of normal or reasonable competency suggested in

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24. Id. at 67 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)). See Gideon v. Wainwright, 372 U.S. 335, 341 (1963).

25. 287 U.S. at 57.

26. Id. at 53. "[S]uch designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." Id.

27. 304 U.S. 458 (1938).

28. Id. at 467-68.

29. Id. at 462-63. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that, as a matter of fairness to the defendant, the adversary system requires that the states supply counsel to indigent defendants even in non-capital cases. Id. at 343-44.

30. 308 U.S. 444 (1940).

31. Id. at 446.

32. Id. at 450 (quoting Avery v. State, 237 Ala. 609, 611, 188 So. 391, 392 (1939), aff'd, 308 U.S. 444 (1940)). The sixth amendment right to effective assistance of counsel was made applicable to the states in Powell v. Alabama, 287 U.S. 45 (1932).

33. 397 U.S. 759 (1970).

34. Id. at 771.

35. Id. at 770.

36. Id. at 771.

McMann.[37] The Fourth and District of Columbia Circuits also have adopted that standard, but have added specific guidelines defining the duties owed by appointed counsel to his client.[38]

The First, Second, Seventh, Eighth, Ninth and Tenth Circuits have adopted the mockery of justice standard.[39] This standard means that a claim of ineffective assistance of counsel cannot prevail unless " 'it can be said that

37. Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (en banc) (untimely appointment of counsel); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973) (counsel conferred with defendant for no more than an hour, conducted no investigation and rested the case after the close of the prosecution's case) reaffirming MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (counsel failed to interview any res gestae witnesses or to call alibi witnesses; in addition, he advised defendant to waive a jury trial). The Fifth Circuit in MacKenna has interpreted the reasonable counsel standard to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." 280 F.2d at 599 (emphasis omitted).

38. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968); United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973). The Court of Appeals for the District of Columbia Circuit has divided the duties owed by appointed counsel to clients into three categories: (1) Conferring with Client: "Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client." Id. at 1203 (footnote omitted); (2) Legal Advice: "Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action. The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination . . . and rights at a line-up . . . . Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared . . . to make motions for a pre-trial psychiatric examination or for the suppression of evidence." Id. (citations deleted) (footnotes omitted); (3) Investigation: "Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . [A] defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research." Id. at 1204 (footnotes omitted).

39. Allen v. VanCantfort, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971) (counsel advised defendant to plead guilty); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973) (counsel failed to investigate defendant's psychiatric history); United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950) (counsel did not study statute under which defendant was charged and conferred with defendant for only 15 minutes); United States v. Stahl, 393 F.2d 101 (7th Cir.), cert. denied, 393 U.S. 879 (1968) (alleged conflict of interest); United States ex rel. Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948) (71 year old attorney alleged incompetent); Cardarella v. United States, 375 F.2d 222 (8th Cir.), cert. denied, 389 U.S. 882 (1967) (counsel failed to appeal errors and lacked diligence in discovering evidence); Pineda v. Craven, 465 F.2d 999 (9th Cir. 1972), cert. denied, 410 U.S. 932 (1973) (counsel failed to present evidence); Reid v. United States, 334 F.2d 915 (9th Cir. 1964) ("aggressive and sincere" but inexperienced counsel); Hanks v. United States, 420 F.2d 412 (10th Cir.), cert. denied, 398 U.S. 913 (1970) (counsel testified against defendant); Frand v. United States, 301 F.2d 102 (10th Cir. 1962) (counsel did not cross-examine witness and did not object to hearsay evidence).

what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court.' "[40]

Several arguments are urged in favor of the mockery of justice standard. First, it is contended that few criminal trials are free from error by defense counsel and that there is no test which can effectively indicate when such errors render the assistance ineffective. Therefore, the only practical standard should be whether "judicial character" is present in the proceedings taken as a whole.[41] Second, to adopt a more liberal standard than the mockery of justice standard would place every defense attorney "at the mercy of a disappointed client";[42] the risk of being charged with incompetence, and consequent danger to the professional and personal integrity of the attorney, might well result in increased unwillingness to defend indigents.[43] Third, if a prisoner successfully reverses his conviction, he may be tried again; but if changed circumstances have made it impossible to reproduce evidence, the reversal is tantamount to acquittal even though the prosecution's original case was strong.[44] Finally, it is contended that the increased burden on the system from a more liberal rule would be too great: to permit a convicted defendant to try the issue of whether he received ineffective assistance of counsel under a liberal standard "is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear."[45]

The circuits have, in recent years, moved away from the mockery of justice standard toward a standard of reasonable competency.[46] The reasons for this movement are twofold. First, some circuits have reasoned that since the sixth and fourteenth amendment rights of assistance of counsel have been extended so as to entitle a defendant not only to representation but to representation by a reasonably competent and effective counsel, there should be a standard

40. Cardarella v. United States, 375 F.2d 222, 230 (8th Cir.), cert. denied, 389 U.S. 882 (1967) (quoting O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961)). The mockery of justice standard was derived from the due process clause of the fifth amendment. Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970). In order to prevail on a claim of denial of due process of law, a defendant must show that his counsel was so incompetent or indifferent as to warrant intervention by the prosecutor or trial judge—the representation afforded being nearly equivalent to no representation. United States ex rel. Darcy v. Handy, 203 F.2d 407, 427 (3d Cir.), cert. denied, 346 U.S. 865 (1953).

41. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

42. United States v. Edwards, 152 F. Supp. 179, 186 (D.D.C. 1957), aff'd, 256 F.2d 707 (D.C. Cir.), cert. denied, 358 U.S. 847 (1958).

43. Id.

44. Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L. Rev. 927, 932 n.29 (1973) [hereinafter cited as Bines].

45. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

46. See notes 37 & 38 supra and accompanying text. The Eighth Circuit has expressly declined to decide whether to follow the trend. McQueen v. Swenson, 498 F.2d at 214. See United States v. Yanishefsky, No. 74-1117 at 5057 n.2 (2d Cir., July 30, 1974).

reflecting this extension.[47] The second reason for the trend is the vigorous criticism leveled at the mockery of justice standard by legal commentators.[48]

The deficiency of the mockery of justice standard is its failure to reflect a level of performance owed by appointed counsel to his client.[49] Courts adhering to this standard have focused their concern on the fairness of the proceedings taken as a whole rather than on the obligations of counsel. The mockery of justice standard emphasizes the importance to the judicial process of finality in criminal cases, which, in turn, dictates that only egregious errors by defense counsel will be held to deprive an accused of a fair trial.[50]

A recent Second Circuit case is in point. In *United States ex rel. Marcelin v. Mancusi,*[51] appointed counsel failed to investigate his client's psychiatric history which investigation might have produced evidence of defendant's incompetence at the time of the commission of the crime. Such evidence (under New York law)[52] would have placed on the state the burden of proving petitioner's sanity beyond a reasonable doubt.[53] However, the court denied petitioner's habeas corpus petition on the basis of the "stringent requirements" of the mockery of justice standard[54]: " 'A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. . . .' "[55] The court emphasized the importance of finality to the judicial process. It admitted that in evaluating a claim of ineffective assistance of counsel it must, initially, consider the strength of the prosecution's case rather than the merits of petitioner's allegations.[56]

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47. See Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970); United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1213 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970); Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967).

48. The mockery of justice standard has been attacked as overly permissive because it often accepts slipshod representation as sufficient to satisfy the requirements of the Constitution. Bines 928; see Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1 (1973). This standard has also been criticized as vague and thus difficult to apply. Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1077, 1078 (1973). See generally Beasley v. United States, 491 F.2d 687, 692-96 (6th Cir. 1974); McQueen v. State, 475 S.W.2d 111, 119 (Mo. 1971) (en banc) (Donnelly, J., dissenting).

49. Frand v. United States 301 F.2d 102, 103 (10th Cir. 1962); Bines 928-29; see United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); Note, The Right to Counsel and the Neophyte Attorney, 24 Rutgers L. Rev. 378, 380-81 (1970); cf. Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970).

50. Bines 929.

51. 462 F.2d 36 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973).

52. N.Y. Penal Law § 30.05 (McKinney 1967).

53. 462 F.2d at 43.

54. Id. at 42-45. See United States v. Yanishefsky, No. 74-1117 at 5057 (2d Cir., July 30, 1974).

55. 462 F.2d at 42 (quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950)); accord, United States v. Yanishefsky, No. 74-1117 (2d Cir., July 30, 1974).

56. 462 F.2d at 43. As the dissent pointed out, by detailing the "virtually airtight" case of the

This approach, as its critics state, does not speak to the true issue of how the defendant was served by counsel.[57] It may lead to rigid categorization of precedents nominally based on ineffective assistance of counsel, but actually founded on another issue—the overall fairness of the proceedings. *United States ex rel. Johnson v. Vincent*[58] illustrates this type of case. There the district court divided representative Second Circuit cases of ineffective assistance of counsel into three categories: counsel not inept, counsel inept but not shockingly so and counsel shockingly inept.[59] In *Johnson,* the court granted a writ of habeas corpus on the ground that counsel's failure to raise improper jury instructions on appeal amounted to shockingly ineffective assistance *in the face of the prosecution's weak case.*[60]

In *McQueen,* the Eighth Circuit did not apply the mockery of justice standard literally. The court interpreted the standard to mean that a petitioner must shoulder the heavy burden of overcoming the presumption that counsel is competent.[61] In evaluating McQueen's claim, the court scrutinized cases in circuits adopting the reasonable counsel standard and found that lack of pre-trial investigation usually was found to justify relief.[62] The court concluded that outside investigation was absolutely crucial, especially where the only live witness to the crime was the defendant. His version of the incident could not otherwise be corroborated.[63] The court found it unnecessary to invoke the reasonable counsel standard to find Brown's pre-trial investigation inadequate; his lack of diligence amounted to ineffec-

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state, the court essentially stated that the trial court's decision is final—whether or not defendant was effectively represented—unless the prosecution's case is weak. Id. at 47 (Kaufman, J., dissenting).

57. See Bines 928.

58. 370 F. Supp. 379 (S.D.N.Y. 1974).

59. Id. at 385-86. Included in the last category was a case in which counsel falsely informed his client that the court had promised to sentence him to 15 to 16 years imprisonment in return for a guilty plea. The defendant actually received a 40 to 60 year sentence. (Mosher v. LaVallee, 491 F.2d 1346 (2d Cir.), cert. denied, 94 S. Ct. 1611 (1974)). As an example of inept, but not shockingly inept, assistance the court cited incorrect advice by counsel that New York law permitted withdrawal of a guilty plea as of right. (United States ex rel. Scott v. Mancusi, 429 F.2d 104 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971)). The court cited failure to interview or call witnesses as an example of assistance that was not inept. (United States ex rel. Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974)). 370 F. Supp. at 386-87 & n.8.

60. 370 F. Supp. at 387-88.

61. 498 F.2d at 214.

62. Id. at 215-16. See King v. Beto, 429 F.2d 221 (5th Cir. 1970), cert. denied, 401 U.S. 936 (1971).

63. 498 F.2d at 217. See ABA Standards Relating to the Prosecution Function and the Defense Function, Defense Function § 4.1 (Approved Draft 1971): "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty."

tive assistance even under the mockery of justice standard, at least as that standard was interpreted by the Eighth Circuit.[64]

It appears that the Eighth Circuit does not emphasize the overall character of the proceedings to the same extent as does the Second Circuit. Rather, the Eighth Circuit, in *McQueen,* presumed that counsel was competent,[65] but allowed that presumption to be overcome by a showing that actions of counsel demonstrated abdication of his professional duty to his client.[66] The Eighth Circuit never intended its definition of the mockery of justice standard to be used to avoid a "searching evaluation" of possible constitutional violations.[67] In its search for possible violations the Eighth Circuit will consider both pre-trial and trial conduct in determining whether counsel could be considered derelict in his obligation to represent his client fairly.[68] It is this willingness to consider possible violations of the right to the effective assistance of counsel occurring at any stage of the representation process (rather than stressing the general fairness of the proceedings) which places the Eighth Circuit's mockery of justice standard nearer to the reasonable counsel standard than to the nominally similar standard of the Second Circuit.

Having found the pre-trial investigation to be constitutionally inadequate, the Eighth Circuit remanded the case to the district court for the second and final step—to determine whether Brown's ineffective assistance prejudiced McQueen's defense.[69] The court found this second step to be necessary even though there was a constitutional error, on the ground that such an error might be harmless and thus might not justify granting habeas corpus relief.[70] The court stated that ineffective assistance of counsel was not the sort of error envisioned by the Supreme Court in the leading case of *Chapman v. California,*[71] and thus was not entitled to the benefit of the harmless error rule

64. 498 F.2d at 215.

65. Id. at 216.

66. Id. See Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947).

67. 498 F.2d at 214. See Brown v. Swenson, 487 F.2d 1236, 1240 (8th Cir. 1973), cert. denied, 94 S. Ct. 1952 (1974).

68. 498 F.2d at 217; Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947).

69. 498 F.2d at 218.

70. Id.

71. 386 U.S. 18 (1967). The defendants in Chapman had been convicted of murder, kidnapping and robbery. At trial the prosecutor took advantage of a provision in the California constitution which permitted him to comment on the defendants' failure to testify. Id. at 19. In addition, the trial court instructed the jury that adverse inferences may be drawn from the defendant's silence. Id. Shortly after the trial the Supreme Court decided Griffin v. California, 380 U.S. 609 (1965), which held unconstitutional prosecutorial comment on an accused's silence. The California Supreme Court nonetheless affirmed the conviction in Chapman, but the Supreme Court reversed the state court. 386 U.S. at 26. The Court held that state violations of constitutionally guaranteed rights are to be evaluated as federal questions. Id. at 21. Second, it held that constitutional errors could be harmless under certain circumstances. Id. at 23. Finally the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. One commentator has suggested that a verdict should stand unless there is a reasonable possibility of

enunciated therein " 'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' "[72] It refused to apply the *Chapman* rule: "To impose automatically the initial burden of proof on the state as described in *Chapman* would penalize the prosecution for acts over which it can have no control."[73] Thus the district court was instructed to place on McQueen the initial burden of proving Brown's dereliction prejudicial.[74]

Development of the harmless error doctrine began with *Bram v. United States*[75] wherein the Supreme Court found the introduction into evidence of a coerced statement of a defendant in a criminal trial was not harmless. *Bram* introduced a rule of automatic reversal where constitutional errors occurred in a criminal trial.[76] In *Motes v. United States,*[77] the Court apparently retreated from *Bram* by holding harmless the introduction into evidence of written statements of an absent co-defendant in violation of the defendant's sixth amendment right to be confronted by witnesses against him.[78] The decision did not elucidate the standard to be applied.

More recently, in *Fahy v. Connecticut,*[79] the Supreme Court reversed a conviction where a state misapplied its own harmless error rule because the error, the introduction of illegally seized evidence, could not have been harmless. The Court saw the issue to be "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[80] The *Chapman* Court interpreted *Fahy* to mean that not all constitutional errors were harmful and explicitly retreated from the rule of automatic reversal.[81] The Court noted, however, that under its prior decisions certain constitutional violations, such as coerced confessions, failure to

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prejudice. Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 1021 (1973) [hereinafter cited as Saltzburg].

72. 498 F.2d at 218 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

73. 498 F.2d at 219.

74. Id. at 220.

75. 168 U.S. 532 (1897).

76. Saltzburg 1000. The Supreme Court summarized the need for the development of a harmless error rule in Kotteakos v. United States, 328 U.S. 750, 759 (1946): harmless error rules "grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was . . . that courts of review 'tower above the trials of criminal cases as impregnable citadels of technicality.' . . . [C]riminal trial became a game for sowing reversible error in the record . . . ." (quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A.J. 217, 222 (1925)).

77. 178 U.S. 458 (1900).

78. Id. at 476. Motes's own testimony at the trial was sufficient to convict him: "[E]nough was stated to require a verdict of guilty as to him, even if the jury had disregarded [the co-defendant's] statements altogether." Id. at 475-76.

79. 375 U.S. 85 (1963).

80. Id. at 86-87.

81. 386 U.S. at 23; Saltzburg 1014. For applications of the harmless error rule as outlined in Chapman see Schneble v. Florida, 405 U.S. 427, 432 (1972); Harrington v. California, 395 U.S. 250 (1969).

furnish counsel and lack of an impartial judge, could never be harmless errors.[82] Thus the *Chapman* Court exempted certain constitutional errors from the harmless error rule, but failed to delineate those errors not to be exempted.[83] Lower courts still must determine whether the denial of effective assistance of counsel merits the application of the harmless error rule.[84]

Proponents of the *Chapman* view that constitutional errors may sometimes be harmless must take into account the Supreme Court decisions in the analogous area of the right to counsel.[85] The Supreme Court, in *Gideon v. Wainwright,*[86] established that a conclusive presumption of prejudice exists whenever a defendant is deprived of counsel. The probability of prejudice is great and it is difficult to measure the actual amount of prejudice where it exists.[87] It is arguable, by analogy, that ineffective assistance of counsel should be accorded a similar conclusive presumption of prejudice.[88] In *Beasley v. United States,*[89] the Sixth Circuit adopted this reasoning. There the court, having held that the petitioner was denied effective assistance of counsel, vacated the conviction, refusing to apply a harmless error test.[90]

The opposite view is that denial of effective assistance of counsel does not warrant a conclusive presumption of prejudice. It is argued that appellate courts can examine the record and determine whether a defense counsel's error was prejudicial.[91] It is further argued that the penalty of automatic reversal is unlikely to deter failures of defense counsel,[92] and that the price paid in lost convictions is too high.[93]

Those circuits that endorse a harmless error rule divide on the issue of burden of proof: does the state bear the burden of proving that the error was not prejudicial or does the defendant bear the burden of proving that it was.[94]

82. 386 U.S. at 23 & n.8.

83. Id. at 44-45 (Stewart, J., concurring).

84. Where the delinquency alleged is merely belated appointment of counsel, automatic reversal is not warranted. Chambers v. Maroney, 399 U.S. 42, 53 (1970).

85. See Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434, 1435-36 (1965) [hereinafter cited as Assistance of Counsel].

86. 372 U.S. 335 (1963).

87. Assistance of Counsel 1436.

88. Id. " 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' " Chapman v. California, 386 U.S. 18, 43 (1967) (Stewart, J., concurring) (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)).

89. 491 F.2d 687 (6th Cir. 1974).

90. Id. at 696-97.

91. Saltzburg 1018; see Assistance of Counsel 1436. This argument gains support if one believes that a conclusive presumption of prejudice should be reserved for interference with constitutional rights such as the right to counsel, where the impact of violation is so pervasive that it would be difficult to conclude that the defendant was not prejudiced. Id.

92. See Bines 943-44.

93. Id. at 944. A rule of automatic reversal applied at every instance of ineffectiveness of counsel would create an unnecessary burden on the judicial system by requiring retrial where the original result would be unchanged after the error had been corrected. Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519 (1969).

94. Three circuits place the burden on the state. United States v. DeCoster, 487 F.2d 1197,

The circuits that cast the burden on the defendant reason that shifting the burden to the state, when the state was not responsible for the error, would be unfair.[95] It is also noted that the defendant, rather than the state, has better knowledge of, or may readily obtain, facts which would show prejudice.[96]

Proponents of shifting the burden to the state offer several justifications. First, they contend that since the burden is on the government to prove the defendant's guilt beyond a reasonable doubt, "[a] requirement that the defendant show prejudice [after his constitutional right has been violated] shifts the burden to him and makes him establish the likelihood of his innocence."[97] Second, ineffective assistance of counsel may itself make it impossible to determine the presence or absence of prejudice.[98] Finally, even if the record contains some proof of prejudice, placing the burden on the defendant is still unfair because, in the case of counsel's failure to investigate, the defendant would have to show not only that new evidence could have been obtained, but also that its introduction would have changed the course of the trial.[99]

The court's decision in *McQueen* to cast the initial burden on the defendant[100] is inconsistent with the liberal standard it used to judge counsel's performance. As discussed above, the court did not apply a literal interpretation of the mockery of justice standard.[101] Rather it appears that the court

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1204 (D.C. Cir. 1973) (inadequate preparation); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (no attempt to interview witnesses); cf. Mosely v. Dutton, 367 F.2d 913, 916 (5th Cir. 1966), cert. denied, 387 U.S. 942 (1967) (counsel assigned three days before trial). Aside from the Eighth Circuit only the Third Circuit places the burden of proof on the defendant. United States ex rel. Taylor v. Rundle, 456 F.2d 1245, 1246 n.2 (3d Cir. 1972) (insufficient time to prepare the case); United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (counsel failed to subpoena employment records or call alibi witnesses); cf. Moore v. United States, 432 F.2d 730, 735 (3d Cir. 1970) (failure to challenge selection of jurors or to aid appeal).

95. 498 F.2d at 219. "In such circumstances [where ineffective assistance of counsel exists] a more equitable sharing of the burden of proof seems appropriate." Id. See Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968). "Switching the burden of proof does . . . put upon the state the exceedingly awkward, if not unbearable, burden of proving the negative." Id. at 230 (Craven, J., dissenting). Judge MacKinnon, dissenting on the issue of the burden of proof in United States v. DeCoster, 487 F.2d 1197, 1205 (D.C. Cir. 1973), declared that proving non-prejudice "would place an unfair burden on the Government . . . ."

96. United States v. DeCoster, 487 F.2d 1197, 1205 (D.C. Cir. 1973) (MacKinnon, J., concurring and dissenting).

97. Id. at 1204. The burden on the state to prove a defendant's guilt beyond a reasonable doubt helps to assure the reliability of verdicts. In re Winship, 397 U.S. 358, 362-63 (1970).

98. United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973); McQueen v. State, 475 S.W.2d 111, 123 (Mo. 1971) (en banc) (Seiler, J., dissenting). This situation is especially likely where counsel has failed to interview witnesses, as in McQueen, because such a failure leaves the record barren of possible defenses that could have been raised.

99. Assistance of Counsel 1438-39.

100. 498 F.2d at 219-20.

101. See notes 61-64 supra and accompanying text. Had the McQueen court applied a literal mockery of justice test, it might well have affirmed the conviction. United States ex rel. Walker

relaxed its standard while not deciding whether to adopt the reasonable counsel standard. However, in dealing with the harmless error question, the court appeared to attempt to compensate for its relaxation of the substantive standard.[102] Until the Supreme Court speaks on the two issues involved in the evaluation of a claim of ineffective assistance of counsel, confusion and inconsistency will continue to exist, which will serve neither to protect the defendant nor to preserve the integrity of criminal proceedings in the judicial process.

Samuel Feldman

Products Liability—Statute of Limitations—Tort Statute of Limitations Applied in Strict Products Liability Actions.—In 1967, plaintiff, an eight-year-old, was injured severely when he attempted to remove laundry from a centrifugal laundry extractor after a malfunction had caused the extractor's lid to spring open before its cycle was completed.[1] The defective extractor, manufactured by defendant Bock Laundry Machine Company (Bock), was purchased by defendant Berkeley Super Wash in 1959. In 1967, plaintiff brought the action alleging negligence, and, as amended, breach of warranty and strict liability in tort.[2] Defendant Bock moved for summary judgment on the ground that plaintiff's action, as amended, was barred by the six-year contract statute of limitations, which began to run at the time of the sale of the machine.[3] Basing its decision on two recent New York

v. Henderson, 492 F.2d 1311 (2d Cir. 1974) presents close factual parallels to Brown's conduct in McQueen. In Walker, the petitioner was convicted, inter alia, of rape. Counsel did not interview the complaining witness prior to the day of trial. Moreover, counsel tried only "to some extent" to pursue potentially "vital" leads furnished by the petitioner. The court, admitting that diligent counsel would have done more, nevertheless accepted counsel's investigation as adequate, declaring that "one cannot say that the investigation which was undertaken accomplished nothing at all." Id. at 1313.

102. Of course, it is arguable that the burden placed on the defendant is not great. To justify retrial, all he must show is "the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial." 498 F.2d at 220. Alternatively, he only need prove changed circumstances in order to shift the burden to the state to show a lack of prejudice. Id.

1. Rivera v. Berkeley Super Wash, Inc., 44 App. Div. 2d 316, 318, 354 N.Y.S.2d 654, 656-57 (2d Dep't 1974), appeal docketed, No. 256, Ct. App., Aug. 20, 1974. The action was instituted to recover damages for the child's personal injuries and for the parent's loss of the child's services. Id. at 318-19, 354 N.Y.S.2d at 657.

2. Plaintiffs originally alleged negligence in the design, manufacture and maintenance of the extractor. In March 1973 they amended the complaint to add causes of action for breach of the implied warranties of merchantability and of fitness for use; in September 1973 they moved for and were granted leave to further amend in order to include a cause of action against Bock based on strict liability in tort. Id. at 319, 354 N.Y.S.2d at 657.

3. N.Y. C.P.L.R. § 213(2) (McKinney 1972). A breach of warranty action based on a sales contract now would be covered by N.Y. U.C.C. § 2-725(2) (McKinney 1964), barring the action four years after the date of delivery.

decisions,[4] the court held that since strict products liability actions are grounded in tort, the personal injuries or tort statute of limitations, running three years from time of injury, should be applied.[5] *Rivera v. Berkeley Super Wash, Inc.*, 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974), *appeal docketed*, No. 256, Ct. App., Aug. 20, 1974.

The New York courts had recognized two basic theories of recovery against manufacturers for injuries caused by their defective products. The first or "negligence" theory, grounded in tort, required proof that the manufacturer failed to exercise due care in the production, inspection, or design of the product.[6] The second or "breach of warranty" theory, grounded in contract, simply required proof that the product was defective when purchased by the plaintiff.[7] Although the breach of warranty theory originally required that the injured plaintiff be in privity with the manufacturer,[8] this requirement gradually was abandoned by the courts.[9] In *Codling v. Paglia*[10] the New York Court of Appeals held for the first time that a manufacturer may be liable under a theory of strict products liability.[11] The existence of three

4. Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1974); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

5. Rivera v. Berkeley Super Wash, Inc., 44 App. Div. 2d at 324, 354 N.Y.S.2d at 662. N.Y. C.P.L.R. § 214(5) (McKinney 1972).

6. See MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

7. " 'While the burden is upon the plaintiff to prove that the product was defective and that the defect existed while the product was in the manufacturer's possession, plaintiff is not required to prove the specific defect, especially where the product is complicated in nature.' " Codling v. Paglia, 32 N.Y.2d 330, 337, 298 N.E.2d 622, 625, 345 N.Y.S.2d 461, 465 (1973). See also Poretz v. R.H. Macy & Co., 119 N.Y.S.2d 211 (Sup. Ct. 1953) where the court held that "[l]iability for breach of warranty does not exist where the object functions properly for the purpose for which it was designed and which is not inherently dangerous and has no hidden defects." Id. at 213.

8. Pearlman v. Garrod Shoe Co., 276 N.Y. 172, 11 N.E.2d 718 (1937); Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923) (no warranty, express or implied, without privity of contract).

9. See, e.g., Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane manufacturer held liable for wrongful death of a passenger); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (manufacturer of a defective chemical used to prevent fabric shrinkage held liable to remote purchasers); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961) (infant plaintiff injured by sharp metal found in a can of salmon purchased by his father). For a discussion of the privity erosion in other jurisdictions see Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases, 18 Stan. L. Rev. 974 (1966); Jaeger, Privity of Warranty: Has the Tocsin Sounded?, 1 Duquesne U.L. Rev. 1 (1963); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966). N.Y. U.C.C. § 2-318 (McKinney 1964) provides that: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."

10. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

11. Id. at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469. Earlier appellate division opinions, however, had already extended recovery to non-user injured parties. See, e.g., Ciampichini v. Ring Bros., 40 App. Div. 2d 289, 339 N.Y.S.2d 716 (4th Dep't 1973) (defective coupler caused a trailer to unhitch from towing truck and collide with plaintiff's automobile); Singer v. Walker, 39

theories of recovery in products liability actions has resulted in problems concerning which statute of limitations to apply.

Prior to *Codling*, courts applied a tort statute of limitations in products liability actions based on the negligence theory,[12] and a contract statute of limitations in products liability actions based on the breach of warranty theory.[13] In applying a statute of limitations, "courts look for the reality and the essence of the action, and not to its mere name."[14] Thus, while a particular liability may appear to be based on a contractual obligation, the statutory period of limitations for personal injury actions may be applied.[15] However, because the cause of action in strict products liability evolved from the breach of warranty theory and because of the subsequent erosion of its contractually oriented privity requirement, it has been unclear which limitations period—tort or contract—would apply.

In New York the applicable statute of limitations for any personal injury action, such as those based on negligence, requires that the action be commenced within three years from the date the injury occurred.[16] The six-year contract/breach of warranty limitation period[17] begins to run at the

App. Div. 2d 90, 331 N.Y.S.2d 823 (1st Dep't 1972), aff'd, 32 N.Y.2d 786, 298 N.E.2d 681, 345 N.Y.S.2d 542 (1973) (per curiam) (geologist's defective hammer resulted in eye-loss to non-user plaintiff). New York officially adopted a strict products liability theory only recently. See note 10 supra. Many jurisdictions have adopted the Restatement (Second) of Torts § 402A(1), at 347-48 (1965), under which a seller of "any product in a defective condition unreasonably dangerous to the user or consumer or to his property" is strictly liable for resulting harm. See Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), noted in 42 Fordham L. Rev. 943 (1974) (a defective rack in a bread truck caused bread trays to slide forward and injure plaintiff; held that plaintiff need only prove that the product was defective without proof that it was unreasonably dangerous); Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). See also the jurisdictions cited in W. Prosser, Torts § 98, at 657-58 (4th ed. 1971); Miller, Significant New Concepts of Tort Liability—Strict Liability, 17 Syracuse L. Rev. 25 (1965); Note, The Expanding Scope of Enterprise Liability, 69 Colum. L. Rev. 1084 (1969); Note, Strict Products Liability and the Bystander, 64 Colum. L. Rev. 916 (1964).

12. Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 216-17, 188 N.E.2d 142, 143-44, 237 N.Y.S.2d 714, 716-17, remittitur amended, 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896 (1963).

13. Liberty Mut. Ins. Co. v. Sheila-Lynn, Inc., 185 Misc. 689, 57 N.Y.S.2d 707 (App. T. 1945), aff'd mem., 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946); Outwater v. Miller, 215 N.Y.S.2d 838 (Sup. Ct. 1961).

14. King v. King, 13 App. Div. 2d 437, 439, 218 N.Y.S.2d 230, 232 (2d Dep't 1961) (wife recovered half share of joint savings account under a quasi-contractual action rather than a tort action which would have been barred by the statute of limitations).

15. See, e.g., Oroz v. American President Lines, Ltd., 259 F.2d 636, 639 (2d Cir. 1958), cert. denied, 359 U.S. 908 (1959) (New Jersey "two-year provision applies to all personal injury claims, whether based upon tort or contract"); Zellmer v. Acme Brewing Co., 184 F.2d 940, 945 (9th Cir. 1950) (plaintiff injured drinking beer containing a dead mouse); Finck v. Albers Super Mkts., Inc., 136 F.2d 191, 193 (6th Cir. 1943) (plaintiff drank from a contaminated soft drink); Martucci v. Koppers Co., 58 F. Supp. 707, 709 (D.N.J. 1945) (injuries were caused by defendant's first-aid superintendent); Burns v. Bethlehem Steel Co., 20 N.J. 37, 118 A.2d 544 (1955) (plaintiff's hearing was damaged while employed pursuant to a union contract).

16. N.Y. C.P.L.R. § 214(5) (McKinney 1972).

17. Id. § 213(2), applying to actions based on contractual obligations. Those actions relating

time the defective product is sold and delivered,[18] regardless of whether the plaintiff was aware of the breach at that time.[19]

In *Blessington v. McCrory Stores Corp.*,[20] the New York Court of Appeals first applied the six-year contract statute of limitations in a products liability action to recover for personal injuries. Though plaintiff could have brought the action in negligence,[21] his claim would have been barred under the three-year tort statute of limitations.[22] The court held that the gravamen of the cause of action actually was breach of warranty[23] and found that the requirement of privity between the plaintiff and the vendor of the defective merchandise was satisfied.

The *Blessington* approach was reaffirmed in *Mendel v. Pittsburgh Plate Glass Co.*[24] Plaintiff sought recovery for injuries caused by the collapse of a defective door manufactured by defendant and installed seven years prior to the accident in a building owned by a third party.[25] The court applied the six-year contract limitation period, which, because it began to run when the door was sold and delivered, barred plaintiff's action, since that transpired before her injury occurred.[26] In reaching this decision the court in *Mendel* observed that, *Goldberg v. Kollsman Instrument Corp.*,[27] did not establish a new action in tort, and stated:

> While there is language in the majority opinion in *Goldberg* approving of the phrase "strict tort liability", it is clear that *Goldberg* stands for the proposition that notwithstanding the absence of privity, the cause of action which exists in favor of third-party strangers to the contract is an action for breach of implied warranty.[28]

This result is explainable on the ground that the court was then unwilling to

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to a breach of a "sales" contract are presently governed by the four-year limitation period set forth in N.Y. U.C.C. § 2-725. This section became effective on September 27, 1964, and was thus not applicable to the Rivera action. Id. § 2-725(4).

18. Outwater v. Miller, 215 N.Y.S.2d 838, 839 (Sup. Ct. 1961).

19. Citizens Util. Co. v. American Locomotive Co., 11 N.Y.2d 409, 416, 184 N.E.2d 171, 174, 230 N.Y.S.2d 194, 198 (1962) ("the limitation runs from the date of sale and present inability to ascertain quality or condition is irrelevant").

20. 305 N.Y. 140, 111 N.E.2d 421 (1953) (plaintiff injured when clothing sold by defendant ignited).

21. Later decisions reached similar conclusions. See Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 217-18, 188 N.E.2d 142, 144-45, 237 N.Y.S.2d 714, 718, remittitur amended, 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896 (1963) (loss of an eye caused by a manufacturer's product injected into plaintiff's sinuses to make them perceptible on x-rays); Munn v. Security Controls, Inc., 23 App. Div. 2d 813, 258 N.Y.S.2d 475 (4th Dep't 1965) (mem.) (plaintiff injured by malfunctioning electronic safety device).

22. N.Y. C.P.L.R. § 214(5) (McKinney 1972).

23. 305 N.Y. at 147, 111 N.E.2d at 423. At the time Blessington was decided, it was still necessary to show a contractual privity relationship in order to recover under a breach of warranty theory. See notes 8-9 supra.

24. 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

25. The door was installed in 1958 and the injury occurred in 1965. Id. at 341-42, 253 N.E.2d at 208, 305 N.Y.S.2d at 491.

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

27. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

28. 25 N.Y.2d at 343-44, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

choose between limiting a products liability claim to a negligence action —with attendant difficulties of proof[29]—and expanding such a plaintiff's claim to an action based on the strict products liability theory.[30] The court believed that the latter alternative would subject manufacturers to an oppressive number of claims brought many years after the product's manufacture.[31]

The court also noted that although section 2-725 of the Uniform Commercial Code[32] did not apply in the *Mendel* case, it must be interpreted as a legislative intention that the section would exclusively apply to personal injury actions involving breach of warranty.[33]

The *Mendel* decision has been criticized[34] for ignoring the trend in other jurisdictions toward expanding the opportunities for recovery available to products liability plaintiffs.[35] These jurisdictions have recognized the essentially tortious nature of such personal injury actions[36] and have refused to

29. The breach of warranty theory was developed to expand plaintiff's opportunities to recover by eliminating the difficulty of proving lack of reasonable care on the part of the seller, particularly because in most sales by wholesalers and retailers "there is simply no negligence to prove." W. Prosser, Torts § 97, at 650 (4th ed. 1971) (footnote omitted).

30. Judge Breitel, in his dissent, recognized the action as essentially one for strict liability in tort. In a lengthy analysis of the development of this doctrine in New York and other jurisdictions, he concluded that it would be anachronistic to maintain contract or warranty thinking in the area of strict product liability. 25 N.Y.2d at 353, 253 N.E.2d at 215, 305 N.Y.S.2d at 501 (dissenting opinion).

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

32. N.Y. U.C.C. § 2-725 (McKinney 1964) which states: "(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . . (2) A cause of action accrues when the breach occurs . . . . A breach of warranty occurs when tender of delivery is made . . . ."

33. 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

34. See, e.g., Symposium on Mendel v. Pittsburgh Plate Glass Co., 45 St. John's L. Rev. 62 (1970); 39 Fordham L. Rev. 152, 156-60 (1970). See also Rivera v. Berkeley Super Wash, Inc., 44 App. Div. 2d 316, 322 n.7, 354 N.Y.S.2d 654, 660 n.7 (2d Dep't 1974), appeal docketed, No. 256, Ct. App., Aug. 20, 1974.

35. By the time Mendel was decided, New York courts had recognized a cause of action against manufacturers brought by non-privity plaintiffs, without actually adopting strict products liability theory. See Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 594 (1963). For discussions of this policy trend in other jurisdictions, see, e.g., Lascher, Strict Liability in Tort for Defective Products: The Road to and Past Vandermark, 38 S. Cal. L. Rev. 30 (1965); Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965); Note, The Expanding Scope of Enterprise Liability, 69 Colum. L. Rev. 1084 (1969).

36. See Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970) (vision impairment due to use of drug); Abate v. Barkers of Wallingford, Inc., 27 Conn. Supp. 46, 229 A.2d 366 (C.P. New Haven 1967); Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 755, 168 N.W.2d 177, 180 (1969). A New York court has reached a similar conclusion. Wilsey v. Sam Mulkey Co., 56 Misc.2d 480, 289 N.Y.S.2d 307 (Sup. Ct. 1968) (personal injury action against manufacturer of defective hay elevator held to be governed by tort statute of limitations). See also 3 L. Frumer & M. Friedman, Products Liability § 40.01(2) (1973). But see Ohio Cas. Ins. Co. v. Ford Motor Co., No. 73-1435 (6th Cir. Aug. 23, 1974) (contract statute of limitations was applied in an action involving personal injuries by an insurance company seeking indemnification against an automobile manufacturer).

allow the contract statute of limitations to be invoked to shield a manufacturer from his responsibility in creating the danger.[37]

In *Codling v. Paglia,*[38] the New York Court of Appeals stated that the proliferation of exceptions to the privity concept mandated the establishment of a broad new principle.[39] The court held that responsibility must be laid on the manufacturer if a defect in his product was a substantial factor in causing injury or damage to any person regardless of privity.[40] It concluded, therefore, that a manufacturer would be liable "under a doctrine of strict products liability" to any such plaintiff not guilty of contributory negligence.[41] The New York court thus came full circle not only by establishing an action in favor of those not in privity with the manufacturer, but by doing so under the name of strict products liability. The decision thus went well beyond *Mendel* which had adhered to the breach of warranty concept.

Until the decision in *Rivera,* the New York courts followed *Mendel.* The court in *Rivera* did not, primarily because *Codling* and *Velez v. Craine & Clark Lumber Corp.,*[42] which adopted a strict products liability theory, were thought to have "overruled *Mendel*'s reliance on the Uniform Commercial Code when . . . [they] . . . provided an alternative remedy sounding in tort."[43] The court noted that Uniform Commercial Code section 2-318,[44] which extends products liability recovery to plaintiffs not in privity, does not provide the exclusive remedy in such cases, and that the Code's four-year statute of limitations, section 2-725, was explicitly directed to a "genuine breach of contract situation."[45] The court noted that under the negligence theory, manufacturers are liable many years after the product is manufactured and sold because the statute of limitations runs from time of injury; they are thus subject to the inconvenience of a lawsuit long after records and evidence have become inaccessible.[46] Under the strict products liability theory, although the plaintiff does not have to allege or prove negligence, he

37. Nelson v. Volkswagen of America, Inc., 315 F. Supp. 1120, 1122 (D.N.H. 1970). See also Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183 (D. Mont. 1970); Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973). In Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968), a strict liability action to recover for injury to property, the tort statute of limitations was applied because the court found the manufacturer more capable of protecting against loss than the innocent injured party. Id. at 145, 238 A.2d at 176.

38. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

39. Id. at 339, 298 N.E.2d at 626, 345 N.Y.S.2d at 467.

40. Id. at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

41. Id., 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

42. 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973) (plaintiff injured by defective scaffold plank; court reaffirmed the doctrine of strict products liability).

43. 44 App. Div. 2d at 324, 354 N.Y.S.2d at 662.

44. N.Y. U.C.C. § 2-318 (McKinney 1964). See note 9 supra.

45. 44 App. Div. 2d at 324, 354 N.Y.S.2d at 662. This view was based on an interpretation of the Official Comment to Uniform Commercial Code § 2-318. Justice Benjamin in his dissent, however, disagreed with this reading, stating: "There is nothing in that comment which indicates that the code does not provide the exclusive remedy in strict liability cases." 44 App. Div. 2d at 329, 354 N.Y.S.2d at 667 (dissenting opinion).

46. Id. at 324, 354 N.Y.S.2d at 661.

must nevertheless show that there was a defect in the product at the time of manufacture and sale, and that this defect caused the injury.[47] Thus passage of time did not appear to the court to be an adequate basis for denying a personal injury claim, especially when a plaintiff is denied access to the court before the injury has even occurred.[48] In *Rivera*—as in *Mendel*—the contract statute of limitations would have barred the claim before the accident.[49]

After examining the development of the law in New York and other jurisdictions, the court in *Rivera* concluded that the manufacturer's liability was primarily tortious.[50] The court stated that "irrespective of the particular terminology employed, the clear intent of the recent decisions is to protect a party injured—be he purchaser, user or innocent bystander—by a defective product . . . ."[51] The court observed that since the strict product liability theory had emerged as part of a policy favoring injured parties,

> it would appear that more harm is done by refusing to recognize its essential character as based in tort than by intentionally misapprehending it for the sake of protecting against false claims and thereby potentially blunting its usefulness and obscuring its socially desirable goals in cases in which there is merit.[52]

The New York courts by adopting three distinct theories of recovery in products liability actions have clearly embraced principles which favor the injured party. Lower courts now seem to be free to use whichever theory, with its concomitant statute of limitations, allows recovery.

Courts, however, are a poor substitute for the legislature[53] in dealing with

47. Id. at 320-21, 354 N.Y.S.2d at 658-59.

48. Id. at 325, 354 N.Y.S.2d at 662. See Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 351, 253 N.E.2d 207, 213-14, 305 N.Y.S.2d 490, 499 (1969) (Breitel, J., dissenting). "[I]n either negligence or strict liability plaintiff must prove the defect and proximate cause of the injuries . . . . [T]he passage of time has the effect of making quite difficult the proof that the defect was due to the manufacturer rather than to circumstances, passage of time, users, and repairers of the product since sale and delivery. In short, strict liability is not absolute liability and the burden of proof is heavy rather than light . . . ."

49. The machine was sold and delivered in 1959 and under the six-year contract statute of limitations it would be barred in 1965. The accident occurred in 1967. 44 App. Div. 2d at 318, 354 N.Y.S.2d at 656.

50. Id. at 325, 354 N.Y.S.2d at 662. In his dissent Justice Benjamin rejected this notion and stated that Codling removed the last privity barrier by "extending to 'any' person injured by a defective product the full benefits of the express and implied warranty protection contained in the Uniform Commercial Code . . . ." Id. at 327, 354 N.Y.S.2d at 665. Thus, "liability for a breach of warranty is 'strict' only in the sense that no element of fault is involved." Id. at 328, 354 N.Y.S.2d at 665.

51. Id. at 321, 354 N.Y.S.2d at 659.

52. Id. at 325, 354 N.Y.S.2d at 662.

53. Some legislatures have addressed specifically the problem of limitations of product liability actions by providing a separate limitation period for personal injury actions. These states include Alabama, Ala. Code tit. 7A, § 2-725(2) (1966) ("a cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs."); Maine, Me. Rev. Stat. Ann. tit. 11, § 2-725(2) (Supp. 1973) ("A cause of action for personal injuries under this Article for breach of warranty occurs when the injury takes place and is governed by the limitation of action period under Title 14, section 752"). In South Carolina, S.C. Code Ann.

such complicated and rapidly developing issues of fact, policy and economics. The resolution of the issues raised in *Codling* and *Rivera* by application of traditional jurisprudential categories can only be an inadequate approach. The legislature should decide whether the tort or breach of warranty statute of limitations should apply in strict products liability actions. Since the purpose of the statute of limitations is to force injured parties to bring their action within a reasonable time after it *accrues,* the courts or the legislature should adopt an approach which will effectuate this purpose.

Joanne Harper

Taxation—IRS Fishing Expeditions—Third Party Summons Invalid Where No Specific Individual Is Under Investigation.—In the course of a research project on taxpayer compliance with Internal Revenue Service regulations regarding surrender of mineral leases, an IRS agent issued a section 7602 summons[1] ordering Humble Oil Company to produce records that would provide names and information regarding one to two hundred of Humble's lessors whose identities were unknown to the IRS. Humble refused to comply, contending that such use of the summons exceeded the statutory authority granted to the IRS and that the summons was too broad. The district court denied an IRS petition to enforce the summons[2] and the Court of Appeals for the Fifth Circuit affirmed, holding that the IRS is without authority to issue a section 7602 third party summons for purposes of research or data gathering when no specific individuals are under investigation. *United States v. Humble Oil & Refining Co.,* 488 F.2d 953 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3680 (U.S. June 4, 1974) (No. 73-1827).

Section 7601(a)[3] of the Internal Revenue Code establishes the general rule that the IRS should inquire, to the extent practicable, in each internal revenue district for taxable persons and objects.[4] The section has been read by the Supreme Court to impose "upon the Secretary the duty to canvass and

§ 10.2-725(2) (1966), the cause of action for breach of warranty accrues when the breach is or should be discovered, which is often when the injury occurs.

1. Int. Rev. Code of 1954, § 7602.

2. United States v. Humble Oil & Ref. Co., 346 F. Supp. 944, 947 (S.D. Tex. 1972), aff'd, 488 F.2d 953 (5th Cir. 1974), petition for cert. filed, 42 U.S.L.W. 3680 (U.S. June 4, 1974) (No. 73-1827).

3. Int. Rev. Code of 1954, § 7601(a). Section 7601(a) provides: "The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed."

4. Id. Provisions comparable to § 7601 were contained in the major revenue acts since the Revenue Act of 1864, ch. 173, § 12, 13 Stat. 225; Walters, IRS Intelligence Division Operating Procedures: From 1040 Through Criminal Trial, 2 N.Y.U. 32d Inst. on Fed. Tax. 1195, 1205 (1974) [hereinafter cited as Intelligence Division Procedures].

to inquire."[5] Thus, it is the broad language of section 7601(a) that contains the congressional grant of authority for IRS research to obtain information regarding the payment of taxes.

The sections of the Code that follow 7601(a) elucidate the Service's power to investigate specific taxpayers. The plainest restriction on that power is found in section 7605(b),[6] which states that "[n]o taxpayer shall be subjected to unnecessary examination or investigations . . . ."[7] However, in *United States v. Powell,*[8] the Supreme Court broadly construed this phrase in favor of IRS discretion, holding that no examination is "unnecessary" if the Commissioner wishes to examine taxpayer records not already in his possession in order to determine the existence or non-existence of fraud.[9]

Congress has provided the IRS with a civil summons power, set forth in section 7602,[10] to aid in the determination of "the liability of *any person* for any internal revenue tax . . . ."[11] The extent to which the particular language of section 7602 constitutes a further limitation on IRS methods of inquiry is unclear.[12] The role of the courts is to delineate the permissible scope of IRS power when a person refuses to comply voluntarily with an IRS section 7602

5. Donaldson v. United States, 400 U.S. 517, 523 (1971).

6. Int. Rev. Code of 1954, § 7605(b).

7. Id.

8. 379 U.S. 48 (1964).

9. Id. at 53. The courts have feared that any narrower interpretation would defeat the purpose of Congress in establishing the IRS duty to inquire. Id. at 53-54; De Masters v. Arend, 313 F.2d 79, 87-88 (9th Cir.), petition for cert. dismissed, 375 U.S. 936 (1963). A second tax inspection without written notice is forbidden by § 7605(b). United States v. Interstate X-Ray Corp., CCH 1973 Stand. Fed. Tax Rep., U.S. Tax Cas. (73-2) ¶ 9667 (N.D. Ala. 1973) (applying § 7605(b)); United States v. Avila, 227 F. Supp. 3, 7 (N.D. Cal. 1963) (suppression of illegally obtained evidence). On occasion, courts have bypassed the express statutory prohibition by finding that the "second" inspection was merely a continuation of the first. United States v. Giordano, 419 F.2d 564, 567-68 (8th Cir. 1969), cert. denied, 397 U.S. 1037 (1970); Geurkink v. United States, 354 F.2d 629 (7th Cir. 1965). There have been fears that the availability of repeated inspections will lead to abuse of investigatory powers by lower level officials. United States v. Schwartz, 469 F.2d 977, 985-86 (5th Cir. 1972) (dissenting opinion). The IRS can summon numerous third persons in aid of one investigation. See Geurkink v. United States, 354 F.2d 629, 631 (7th Cir. 1965); In re Magnus, 299 F.2d 335, 337 (2d Cir.), cert. denied, 370 U.S. 918 (1962). For a discussion of ways to litigate the re-examination objection see Bray, Production of Documents and Seizure of Evidence, 2 N.Y.U. 32d Inst. on Fed. Tax. 1223, 1226-28 (1974) [hereinafter cited as Production of Documents].

10. Int. Rev. Code of 1954, § 7602. Section 7602 provides in pertinent part: "For the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax . . . the Secretary or his delegate is authorized—(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; (2) To summon the person liable for tax . . . or any person having possession, custody, or care of books of account . . . or any other person the Secretary or his delegate may deem proper . . . ." The subpoena power of the IRS is the oldest of any federal agency. Rogge, Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—I, 47 Minn. L. Rev. 939, 964 (1963).

11. Int. Rev. Code of 1954, § 7602 (emphasis supplied).

12. See notes 59-61 infra and accompanying text.

summons.[13] Federal district courts have jurisdiction to accept petitions for enforcement from the IRS and to compel testimony or production of subpoenaed materials.[14]

The IRS can request any person voluntarily to give information regarding taxable persons and objects.[15] When the IRS has a taxpayer under investigation it can issue a summons to any third person in order to gain data relevant and material to the tax liability of the taxpayer under inquiry.[16] Procedural obstacles imposed by the courts make it extremely difficult for the taxpayer to participate in any effort to contest the propriety of the third party contact. First, the IRS is not obligated to notify a taxpayer under investigation that a third party will be summoned about a tax matter that relates to him.[17] Even if the taxpayer learns that such a summons has been issued, he does not have standing to intervene as of right.[18] Permissive intervention, however, may be granted by the trial judge.[19]

Taxpayers occasionally have induced the third party to resist a section 7602 summons;[20] but the third party is free to comply with the summons rather

13. Reisman v. Caplin, 375 U.S. 440, 448-49 (1964) (IRS has no authority to compel compliance; no penalty may be imposed for a good faith objection to IRS summons).

14. Int. Rev. Code of 1954, §§ 7402(b), 7604(a). The district courts provide hearings for determining challenges to IRS summonses. United States v. Powell, 379 U.S. 48, 58 (1964). After the hearing, a party must appeal or comply with the court's order. United States v. Secor, 476 F.2d 766, 771 (2d Cir. 1973). The appealability of an adverse ruling is beyond the scope of this case note. See generally Cobbledick v. United States, 309 U.S. 323 (1940).

15. See Int. Rev. Code of 1954, § 7601(a).

16. Id. § 7602(2).

17. Scarafiotti v. Shea, 456 F.2d 1052, 1053 (10th Cir. 1972) (denial of writ of mandamus); In re Cole, 342 F.2d 5, 7-8 (2d Cir.), cert. denied, 381 U.S. 950 (1965). There is presently no register of IRS summonses for taxpayers' inspection; the A.B.A. Section on Taxation is considering a recommendation that one be established. Production of Documents 1234.

18. Donaldson v. United States, 400 U.S. 517, 529 (1971) (no mandatory right to intervene); United States v. Union Nat'l Bank, 371 F. Supp. 763, 767-68 (W.D. Pa. 1974) (third party bank); cf. In re Magnus, 299 F.2d 335, 336 (2d Cir.), cert. denied, 370 U.S. 918 (1962) (denial of motion to quash third party summons served on corporation and certain individuals on ground that taxpayer had no standing to intervene); Perkal v. Rayunec, 237 F. Supp. 102 (N.D. Ill. 1964) (taxpayer held to have no standing to intervene to contest summons issued to auditor of bank).

19. Donaldson v. United States, 400 U.S. 517, 529 (1971). Permissive intervention under Fed. R. Civ. P. 24(b) can be based on a claim of proprietary interest in the summoned records, a legally privileged or at least a confidential relationship between taxpayer and third party custodian, or a claim that the evidence leading to the records was illegally obtained. Production of Documents 1234; see Couch v. United States, 409 U.S. 322, 327 (1973); Reisman v. Caplin, 375 U.S. 440, 445 (1964).

20. United States v. Northwest Pa. Bank & Trust Co., 355 F. Supp. 607, 610 (W.D. Pa. 1973) (taxpayer threat to sue third party bank); see LeValley & Lancy, The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers, 89 Banking L.J. 979, 987 (1972). In fact, a bank is free to surrender records requested by the IRS without protest and without consulting the taxpayer who is the subject of the investigation. Brunwasser v. Pittsburgh Nat'l Bank, CCH 1964 Stand. Fed. Tax Rep., U.S. Tax Cas. (64-2) ¶ 9871 (W.D. Pa. 1964), aff'd per curiam, 351 F.2d 951 (3d Cir. 1965), cert. denied, 384 U.S. 986 (1966).

than require the IRS to seek judicial enforcement.[21] If the third party does comply, the taxpayer's suit to restrict IRS access is moot.[22]

In *United States v. Powell,*[23] the IRS issued a section 7602 summons to the president of a corporate taxpayer, seeking a second inspection of the taxpayer's records in order to investigate possible fraud.[24] The Court held that the Commissioner was not required to show probable cause for suspecting fraud. The Court set forth "standards the Internal Revenue Service must meet to obtain judicial enforcement of its orders . . . ."[25] Under the Court's four-part test, the Commissioner

must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought, is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . .[26]

Later, in *Donaldson v. United States,*[27] the Court clarified and limited the criminal purpose objection—the claim that the section 7602 summons was being used improperly by the IRS in conjunction with a criminal investigation. *Donaldson* held that "an [IRS] summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."[28]

The principal extrinsic limitations on the power of the IRS, those which are not imposed by sections of the Code, are the common law and statutory testimonial privileges, the fifth amendment, and the fourth amendment

21. A telephone user is "not entitled to assume that the telephone company will require a warrant before submitting its records in response to an IRS summons." DiPiazza v. United States, 415 F.2d 99, 103-04 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971) (giving telephone records to IRS held no violation of the Communications Act, 47 U.S.C. § 605 (1970)). See also United States v. Valley Bank, CCH 1974 Stand. Fed. Tax Rep., U.S. Tax Cas. (74-1) ¶ 9395 (D. Idaho 1974). Of course, if grounds exist for a good faith objection, the third party may be persuaded to forego voluntary compliance and to assume the financial hardship of resisting enforcement of the summons.

22. United States v. Lyons, 442 F.2d 1144 (1st Cir. 1971).

23. 379 U.S. 48 (1964).

24. Id. at 49.

25. Id. at 50-51.

26. Id. at 57-58.

27. 400 U.S. 517 (1971).

28. Id. at 536; see Comment, Use of the Summons, Intervention and Constitutional Rights, 2 Hofstra L. Rev. 135, 142-52 (1974). "The Donaldson decision obviates any necessity of discussing the many pre-Donaldson cases cited by taxpayers . . . ." United States v. National State Bank, 454 F.2d 1249, 1252 (7th Cir. 1972). For a case in which a criminal purpose objection was upheld after Donaldson see United States v. Zack, 375 F. Supp. 825 (D. Nev. 1974). See also Production of Documents 1228-31. The impact of the Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as 5 U.S.C. (1970)), as a limitation on IRS discretion seems to be limited to the manner in which tax rulings are conducted. Charles A. Alfieri, 60 T.C. 296, 299, aff'd mem., 487 F.2d 1393 (2d Cir. 1973) (IRS failure to send copy of notice to taxpayer's attorney held to be harmless violation of 5 U.S.C. § 500 (1970)); see Sugarman, Tax Ruling Procedure Revisited, 9 Wm. & Mary L. Rev. 1011, 1037-38 (1968).

guarantees of privacy and protection against unreasonable searches and seizures.

In the past, the taxpayer's principal defenses to IRS investigatory power have been his personal privileges against self-incrimination and against revelation of confidential communications.[29] One commentator has noted, however, that "[i]n recent years there have been some startling erosions to both of these privileges."[30] Except for a narrow attorney-client privilege,[31] the fifth amendment will not shield even a taxpayer's own records in the possession of his accountant or another third party.[32] Beyond these testimonial privileges, there is no fifth amendment defense available to the taxpayer to defeat a summons served on a third party.[33]

The fourth amendment right of privacy is limited to areas in which an individual may reasonably expect to be left alone.[34] It is unlikely that a privacy claim by the taxpayer would prevail since financial records of the type usually sought by the IRS are not sufficiently personal to be immune from government inspection. Nor could the third party assert a privacy defense on behalf of the taxpayer.[35]

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29. Mahon, Privileged Communications and Self-Incrimination, 2 N.Y.U. 32d Inst. on Fed. Tax. 1251, 1253-54 (1974).

30. Id. at 1253.

31. For an extensive discussion of the scope of the attorney-client privilege in tax matters see id. at 1270-84; Comment, The Attorney-Client Privilege, 2 Hofstra L. Rev. 185 (1974). Of some importance is the question of whether an attorney may refuse to divulge the identity of his client. As a general rule, the identity of a client is unprivileged. Frank v. Tomlinson, 351 F.2d 384 (5th Cir. 1965), cert. denied, 382 U.S. 1028 (1966); Colton v. United States, 306 F.2d 633 (2d Cir. 1962). In two instances where taxpayers paid sums of money to the IRS anonymously through attorneys, however, a privilege was sustained to protect the client's name. Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965) (discussed in notes 48-49 infra and accompanying text), Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); see United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974) (dictum).

32. Couch v. United States, 409 U.S. 322, 331 (1973).

33. Id.; Johnson v. United States, 228 U.S. 457, 458 (1913) (fifth amendment held inapplicable to papers in possession of another); United States v. White, 477 F.2d 757, aff'd en banc on rehearing, 487 F.2d 1335 (5th Cir. 1973) (per curiam), cert. denied, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974) (fifth amendment held inapplicable to accountant's work papers), noted in 42 Fordham L. Rev. 197 (1973); Rigby v. IRS, CCH 1974 Stand. Fed. Tax Rep., U.S. Tax Cas. (74-1) ¶ 9427 (D. Utah 1973) (fourth and fifth amendments held not assertible to prevent discovery of records kept by bank). Regarding the related question of Miranda warnings against self-incrimination see Comment, Exclusion of Confessions Obtained Without Miranda Warnings in Civil Tax Fraud Proceedings, 73 Colum. L. Rev. 1288 (1973). A corporate entity has no self-incrimination privilege in any event. Wilson v. United States, 221 U.S. 361 (1911); United States v. Richardson, 469 F.2d 349 (10th Cir. 1972) (corporate officer owning substantially all stock); see United States v. White, 322 U.S. 694 (1944) (unincorporated labor union); cf. Bellis v. United States, 94 S. Ct. 2179 (1974) (partner called by grand jury).

34. United States v. Dionisio, 410 U.S. 1, 8 (1973) (grand jury summons of voice exemplar held constitutional, citing Terry v. Ohio, 392 U.S. 1, 9 (1967)).

35. United States v. Cleveland Trust Co., 474 F.2d 1234, 1235 (6th Cir.), cert. denied, 414

A vague or overbroad summons, however, imposes a burden on the person summoned which violates the fourth amendment prohibition on unreasonable searches and seizures.[36] A vagueness claim rests on the long-standing prohibition against the "general warrant," *i.e.*, one that is too sweeping in its terms.[37] An overbroad summons is one which demands such a large range of material, not all of which is clearly relevant to the inquiry, that to require compliance would constitute a constitutionally impermissible search. However, the courts seldom have limited an IRS summons on that ground.[38] A principal limitation on IRS summons power which is closely related to overbreadth, and which bears constitutional overtones to which the Court alluded in *Powell,*[39] is the requirement in section 7602 that the material sought be relevant and material.[40] A summons "so unrelated to the matter properly under inquiry as to exceed the investigatory power"[41] should not be enforced. The favored "test" in evaluating the materiality and relevancy of an IRS summons "is essentially the same as grand jury investigations, *i.e.*, whether the inspection sought would throw light upon the correctness of the taxpayer's returns."[42] According to *Powell,* the IRS has the same range of

U.S. 866 (1973); cf. California Bankers Ass'n v. Shultz, 94 S. Ct. 1494, 1512 (1974) (Bank Secrecy Act held constitutional).

36. United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 131 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968); Schwimmer v. United States, 232 F.2d 855, 861 (8th Cir.), cert. denied, 352 U.S. 833 (1956) (a "subpoena . . . may be so broad . . . as to go substantially beyond the bounds of apparent relevance . . . . [o]r it may be so onerous in its burden as to be out of proportion to the end sought."); Miller, Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service, 6 B.C. Ind. & Com. L. Rev. 657, 685-93 (1965); see Dunn v. Ross, 356 F.2d 664, 667 (5th Cir. 1966) (dictum).

37. Hale v. Henkel, 201 U.S. 43, 76 (1906) (grand jury subpoena); United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 131 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968) ("The Government is not entitled to go on a fishing expedition . . . . It must identify with some precision the documents it wishes to inspect."); Schwimmer v. United States, 232 F.2d 855, 861 (8th Cir.), cert. denied, 352 U.S. 833 (1956); McMann v. SEC, 87 F.2d 377, 379 (2d Cir.) (dictum), cert. denied, 301 U.S. 684 (1937).

38. United States v. Bremicker, 365 F. Supp. 701, 703 (D. Minn. 1973) (bank records of six taxpayers over five year period not an unreasonable burden); United States v. Jones, 351 F. Supp. 132, 134 (M.D. Ala. 1972) (reasonable expense); United States v. Third Northwestern Nat'l Bank, 102 F. Supp. 879, 883 (D. Minn.), appeal dismissed per stipulation, 196 F.2d 501 (8th Cir. 1952) (bank not required to check 58,577 items without "some factual indication" that relevant papers will be discovered).

39. 379 U.S. at 57-58.

40. Int. Rev. Code of 1954, § 7602(1).

41. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (dictum) (FTC summons); United States v. Harrington, 388 F.2d 520, 523 (2d Cir. 1968) (dictum).

42. United States v. Ryan, 455 F.2d 728, 733 (9th Cir. 1972) (obstruction of justice conviction reversed on other grounds); United States v. Shlom, 420 F.2d 263, 265 (2d Cir. 1969), cert. denied, 397 U.S. 1074 (1970) (summons of third party attorney); Foster v. United States, 265 F.2d 183, 186-87 (2d Cir.), cert. denied, 360 U.S. 912 (1959) (third party bank); United States v. Acker, 325 F. Supp. 857, 862-63 (S.D.N.Y. 1971) (summons of corporate minutes); In re Commissioner, 216 F. Supp. 90, 93 (E.D. Mich. 1963). But see United States v. Matras, 487 F.2d 1271 (8th Cir. 1973) (summons seeking company budgets as "road map" to guide routine

inquiry as a grand jury and, therefore, " 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' "[43]

In view of the broad scope of this language, there would appear to be few, if any, intrinsic limits on the power of the IRS other than those imposed by sections 7605(b) and 7602 as construed in *Powell*,[44] the *Donaldson* criminal purpose objection and its further requirement of good faith,[45] and the reservation by Congress to the courts of the power to compel compliance.[46] This is particularly true in the context of a third party summons, where the recipient seldom can interpose a valid constitutional defense.[47]

The courts have granted enforcement of IRS summonses directed to third parties even when the name of the taxpayer under investigation was not known to the IRS. In *Tillotson v. Boughner*,[48] a special agent sought the name of the source of a check for $215,499.95 from an attorney who had forwarded the money to the IRS on behalf of the unnamed taxpayer. The Court of Appeals for the Seventh Circuit approved the summons, stating that section 7602 is meant to implement the section 7601(a) authority to investigate taxpayers, implying that the two sections are coextensive. The court reasoned that, although the taxpayer's "name and whereabouts are not known . . . the fact [is] that *a* taxpayer exists whose tax liability the [IRS] has statutory authority to investigate."[49] The IRS Tax Preparers Project[50] led to IRS

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investigation held irrelevant). For an example of the "throw light" standard as applied to a grand jury subpoena see United States v. United States Dist. Court, 238 F.2d 713, 719 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957). See also Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590, 592-93, 600 (1961).

43. 379 U.S. at 57, citing United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (FTC investigatory power). In CAB v. Hermann, 353 U.S. 322 (1957), rev'g per curiam 237 F.2d 359 (9th Cir. 1956), the Court gave indirect approval to a CAB summons of over a million documents despite claims that the agency's demands were oppressive, irrelevant and an invasion of privacy. Note, Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look at CAB v. Hermann, 69 Yale L.J. 131, 135 (1959).

44. See notes 8-9, 26 supra and accompanying text.

45. See notes 27-28 supra and accompanying text.

46. Int. Rev. Code of 1954, §§ 7402(b), 7604(a).

47. See notes 30-43 supra and accompanying text.

48. 333 F.2d 515 (7th Cir.), cert. denied, 379 U.S. 913 (1964).

49. Id. at 516. Subsequently, the attorney's right to refuse to comply was upheld on the basis of the attorney-client privilege. 350 F.2d 663 (7th Cir. 1965); see note 31 supra. However, in the companion case, Schulze v. Rayunec, 350 F.2d 666 (7th Cir.), cert. denied, 382 U.S. 919 (1965), the bank that issued the check, unable to avail itself of the attorney-client privilege, was compelled to reveal to the IRS information in its possession relating to the name of the drawer. See United States v. Armour, 376 F. Supp. 318, 326-27 (D. Conn. 1974) (bank required to supply IRS with names of beneficial owners of particular stock relating to investigation of allegedly taxable transaction).

50. The Tax Preparers Project is aimed at commercial tax preparers not enrolled with the IRS. An undercover IRS agent requests the preparation of a return based on a standard set of facts. If the return is inaccurate, the Service may seek to examine other returns prepared by the preparer under investigation. United States v. Turner, 480 F.2d 272, 274 (7th Cir. 1973).

investigation of persons and commercial agencies which prepare allegedly inaccurate tax returns. Through section 7602 summonses, the Service frequently has sought the identity of taxpayers on whose returns the tax preparer had worked, as well as copies of the returns and workpapers. Four circuit courts have held that the tax preparer must surrender at least the names of taxpayers that are not already available to the IRS.[51]

In *Bisceglia v. United States,*[52] the IRS learned of bank deposits that included $40,000 in deteriorated hundred dollar bills, which it suspected to be income not properly reported by a taxpayer. In an attempt to identify the source of the money, the Service issued a summons to a vice president of the bank, ordering the production of certain deposit tickets for a specified period. On appeal, the Sixth Circuit refused enforcement of the summons, holding that the IRS had failed to meet its burden of proving "that it seeks third party records pertaining to the income tax liability of a *particular taxpayer* in whom it is interested."[53] In *Bisceglia,* the court distinguished *Tillotson,*[54] where the tax liability of an unnamed person was clearly established, since the taxpayer had arranged the payment, through his attorney, expressly to satisfy back taxes.[55] In *Bisceglia,* however, the existence of old currency was not equally clear evidence that the owner or owners of the money had failed to pay taxes on the income.

In *Humble Oil* the facts demonstrated that no particular taxpayer was under investigation at the time the summons was issued.[56] At the enforcement hearing in the district court, an IRS agent testified that the primary purpose of the summons was to gather research data "in order to keep the district

51. United States v. Carter, 489 F.2d 413, 415 (5th Cir. 1973); United States v. Berkowitz, 488 F.2d 1235, 1236 (3d Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3451 (U.S. Jan. 30, 1974) (No. 73-1175); United States v. Turner, 480 F.2d 272, 279 (7th Cir. 1973) ("[T]he government made a sufficient showing of its reasons to scrutinize the tax returns of particular unnamed persons . . . ."); United States v. Theodore, 479 F.2d 749, 755 (4th Cir. 1973) ("[T]he Commissioner has been granted by Congress ample power to inquire and obtain the names of these taxpayers . . . ."). Two district courts have differed on the merits of the tax preparers' self-incrimination defenses. Compare United States v. Kahn, 373 F. Supp. 145, 149 (W.D. Mo. 1973) with United States v. Lubus, 370 F. Supp. 695 (D. Conn. 1974); see Comment, The Expanding Rights of Third Parties Under the Internal Revenue Service's Tax Preparers Project: A Limit on Internal Revenue Fishing Expeditions?, 5 St. Mary's L.J. 773 (1974); 40 J. Tax. 266 (1974).

52. 486 F.2d 706 (6th Cir. 1973), cert. granted, 94 S. Ct. 1931 (1974).

53. Id. at 712-13 (emphasis supplied).

54. Id. at 713. The court also distinguished Schulze v. Rayunec, discussed in note 49 supra, on the same reasoning.

55. 486 F.2d at 713. The controlling factor in the Bisceglia decision has been said to be the fact that "the IRS lacked any knowledge of the sort of tax liability which the depositor(s) might possibly have incurred . . . ." United States v. Armour, 376 F. Supp. 318, 323 (D. Conn. 1974). A possible flaw in the court's argument in Bisceglia is the reliance placed on Teamsters Local 174 v. United States, 240 F.2d 387 (9th Cir. 1956), which, according to the Second Circuit, was overruled by CAB v. Hermann, 353 U.S. 322 (1957). Foster v. United States, 265 F.2d 183, 188 (2d Cir.), cert. denied, 360 U.S. 912 (1959).

56. 488 F.2d at 954.

director informed . . . [and] to allow the [IRS] to keep up-to-date on its tax enforcement."[57]

Research—as distinguished from investigation—conducted under section 7601(a) is essentially unrestricted and arbitrary,[58] and taxpayers as a class are not likely to complain about it. The court in *Humble Oil,* while not condemning such research projects, refused to allow the IRS to employ its summons power to require other persons to aid in that research. Its ruling was based on a comparison of the research and the summons statutes, which the court found not to be coextensive, noting that "the canvass power can be employed rather cavalierly while the summons power can be utilized only when IRS scrutiny of a taxpayer or a group thereof becomes particularized or focused."[59] This difference is characterized as the "Research—Investigation Dichotomy."[60] It rests in part on the differing language of the two sections:

> Section 7601 empowers the Secretary of the Treasury or his delegate to *make inquiries* concerning all persons who may be liable to pay any internal revenue tax. Section 7602, on the other hand, authorizes the IRS to *examine* books and records for the purpose of ascertaining the correctness of any return and the making of a return where none has been filed. The distinction between a section 7601 inquiry and a section 7602 examination, though perhaps elusive . . . becomes more salient when one considers first, that the inquiries are to be conducted of "all persons" while examinations are to be made of "any person," and second, that the inquiries may occur to the extent the Secretary deems it practicable and from time to time while the examination may occur for the purpose of ascertaining the correctness of any return.[61]

57. 346 F. Supp. at 946. Thus, in Humble Oil the IRS was not engaged in "ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person . . . ." as required by § 7602. 488 F.2d at 962-63; see Bisceglia v. United States, 486 F.2d 706, 710 (6th Cir. 1973), cert. granted, 94 S. Ct. 1931 (1974) (discussed in notes 52-55 supra and accompanying text); Mays v. Davis, 7 F. Supp. 596 (W.D. Pa. 1934). Contra, United States v. Anderson Clayton & Co., 369 F. Supp. 6 (S.D. Miss. 1973). The § 7601 duty to examine would justify a good faith decision by the IRS to place Humble Oil under investigation. Thereafter, the IRS would have little difficulty in prevailing at an enforcement hearing. See notes 3-9 supra and accompanying text. Although the holding in Humble Oil could be defeated by the initiation of an investigation of a particular taxpayer to conceal the true intention of conducting a research project, to do so presumably would constitute an abuse of the court's process. United States v. Powell, 379 U.S. 48, 58 (1964). The party objecting to use of the summons on grounds of bad faith bears the burden of proof. Id.

58. The selection of a return for examination is often done by computer. At least in some sense such a procedure is arbitrary. See Intelligence Division Procedures 1198. A significant fact in Humble Oil was that the summons was served by a regular agent, one charged with research rather than investigation. 488 F.2d at 957 n.8. Absent specific present objective harm or a threat of a specific future harm, a taxpayer would lack standing to complain of IRS research methods. See Doe v. Boyle, 494 F.2d 1279 (4th Cir. 1974); cf. Laird v. Tatum, 408 U.S. 1 (1972) (class action plaintiffs lacked standing to complain of the existence of the Army's intelligence-gathering system).

59. 488 F.2d at 960. For an example of an acceptable research method see United States v. Chikata, 427 F.2d 385 (9th Cir. 1970) (pharmacist's name selected at random from telephone directory).

60. 488 F.2d at 958.

61. Id. at 960; accord, Bisceglia v. United States, 486 F.2d 706, 710-711 (6th Cir. 1973), cert.

Humble Oil also found significant the fact that the summons was issued not by a special agent but by an agent from the auditing division.[62] Although the court did not question the authority of the regular agent to issue a summons, the Code associates the subpoena power with the duty to enforce the criminal provisions of the internal revenue laws, a function reserved mainly to the special agents of the Intelligence Division.[63]

The court in *Humble Oil* concluded that "*Powell* is not the sole measure of the summons power of the IRS . . . ."[64] The court stated:

> [T]he Internal Revenue Service is not empowered by section 7602 to issue a summons in aid of its section 7601 research projects or inquiries, absent an investigation of taxpayers or individuals and corporations from whom information is sought. Section 7602 simply cannot be read to give the IRS an unrestricted license to enlist the aid of citizens in its data gathering projects.[65]

In view of the breadth of the language of section 7601(a), the court's holding in *Humble Oil* provides an equitable result, which the court reached by a literal interpretation of the language of section 7602.[66] Whether *Humble Oil* is to be considered a reasonable extension of the *Powell* "legitimate purpose" restriction or as an aberrational decision among the many cases granting the broadest possible investigatory powers to the IRS under the statutes, the *Humble Oil* research-investigation dichotomy assures that the citizen's serious duty to aid the IRS in its collection of revenue and enforcement of the law will only be required as part of a genuine tax investigation. Furthermore, it provides large corporations with a basis for opposing investigations which could be extremely burdensome and expensive for them.

Richard J. Klein

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granted, 94 S. Ct. 1931 (1974) (third party bank); United States v. Theodore, 479 F.2d 749, 754-55 (4th Cir. 1973) (Tax Preparers Project). Contra, United States v. Anderson Clayton & Co., 369 F. Supp. 6, 7 (S.D. Miss. 1973).

62. 488 F.2d at 961.

63. See Int. Rev. Code of 1954, § 7608(b); Intelligence Division Procedures 1204-08; cf. United States v. First Nat'l City Bank, CCH 1974 Stand. Fed. Tax Rep., U.S. Tax Cas. (74-1) ¶ 9361 (S.D.N.Y. 1974) (authority of Estate Tax Attorney to issue summons was not revoked by Treasury decision limiting summons power).

64. 488 F.2d at 959. The court noted that prohibitions against harassment, contravention of recognized privileges, and the criminal purpose limitation would "conveniently fit under the legitimate purpose concept, [but] very few courts have even cited Powell in applying the aforementioned proscriptions." Id. at 959 n.14. Thus Humble Oil is not unique in adding to the Supreme Court's list of standards as given in Powell.

65. Id. at 962-63.

66. Despite recurring statements by courts that the Code must be liberally construed so that the tax-collecting function will not be impaired, see, e.g., United States v. Giordano, 419 F.2d 564, 569-70 (8th Cir. 1969), cert. denied, 397 U.S. 1037 (1970), it would seem somewhat less necessary that the IRS have the power to require citizens to aid it in its research preliminary to an investigation.