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Case Notes

CASE NOTES

Antitrust—Sherman Act and Competitive Business Torts—Acts of Unfair Competition with Intent to Injure Competitor Held a Per Se Violation.—Plaintiff sued certain of its former employees under section 1 of the Sherman Act[1] for alleged acts of unfair competition injurious to plaintiff in interstate commerce. The complaint alleged, *inter alia*,[2] that defendants[3] had hired away plaintiff's key personnel both to cripple plaintiff and to acquire its confidential information, had appropriated plaintiff's job orders, bid estimates and specifications, had intentionally confused suppliers, customers and the public by using a deceptively similar corporate name, had falsely advised plaintiff's personnel that plaintiff would go out of business, and had subverted plaintiff's employees to violate their fiduciary duties to plaintiff.[4]

The jury awarded plaintiff $400,000 before trebling.[5] Denying defendant's motion for a judgment notwithstanding the verdict and for a new trial on the issue of damages,[6] the district court held that "acts of unfair competition with the intent to injure the plaintiff as a competitor . . . in interstate commerce [violate] Section 1 . . . ."[7] The court further stated that "[c]onspiracies are *per se* unreasonable when they are accompanied with a specific intent to accomplish a forbidden result."[8] *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973), *appeal dismissed pursuant to Rule 42(b) of Federal Rules of Appellate Procedure*, No. 73-2003 (3d Cir., Apr. 4, 1974).

The *Sauter* decision poses the question whether a private federal action for treble[9] damages under the Sherman Act is the appropriate remedy for plaintiff's

1. Section 1 of the Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." 15 U.S.C. § 1 (1970).

2. Other complaints arising from the same occurrences were based on state unfair competition claims. C. Albert Sauter Co. v. Richard S. Sauter Co., 368 F. Supp. 501, 504 n.1 (E.D. Pa. 1973), appeal dismissed pursuant to Rule 42(b) of Federal Rules of Appellate Procedure, No. 73-2003 (3d Cir., Apr. 4, 1974).

3. Defendants opened a business in competition with plaintiff for the manufacture and sale of packages and packaging material primarily for pharmaceuticals. Id. at 504.

4. Id. at 504-05.

5. The jury had answered affirmatively the following interrogatory: "Do you find that any of the defendants conspired, agreed or had an understanding to engage in acts of unfair competition with the intent to injure the plaintiff as a competitor by impairing plaintiff's ability to compete in interstate commerce?" Id. at 505.

6. Other motions included plaintiff's motions for a permanent injunction and for allowance of counsel fees and defendant's motion for a stay of execution of the money judgment. Id. at 504.

7. Id. at 513.

8. Id. at 514. The court alternatively denied the motion for judgment notwithstanding the verdict on the grounds that defendants had "waive[d] the issues raised in their motion for judgment n. o. v...." Id. at 512.

9. These rights arise from section 4 of the Clayton Act which, by its terms, applies to

injuries. Although a business tort may give cause for an antitrust suit, unfair competition of the type alleged in *Sauter* has traditionally been viewed as a "garden variety"[10] competitive business tort.[11] The *Sauter* decision also raises a second question: is the test used by the court—*intent* to injure a competitor in interstate commerce—a proper or desirable criterion of a per se violation of the Sherman Act?

The Supreme Court has never considered the propriety of using the Sherman Act to redress the type of wrongs presented in *Sauter*. "Instances where [lower] courts have been called upon to apply Section 1 of the Sherman Act to conspiracies to injure or destroy a competitor in interstate commerce have been rare—only three or four reported cases in almost a century."[12]

Relying on the reasoning of those cases,[13] the *Sauter* court reached not only a decision in favor of the plaintiff, but also a per se ruling. It is a conclusion of this Case Note that a review of the legislative and judicial history of the purposes and objectives of the Sherman Act throws serious doubt on the appropriateness of the decision. It is questionable whether defendants' acts constitute a Sherman violation at all, let alone a per se violation. Nor is the per se ruling a good policy decision. As this Case Note will show, a test so broad as "intent to injure a competitor" has harmful and undesirable consequences.

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the Sherman Act: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1970).

10. The term is borrowed from Vogue Instrument Corp. v. Lem Instruments Corp., 40 F.R.D. 497, 499 (S.D.N.Y. 1966).

11. See text accompanying notes 106-16 infra.

12. 368 F. Supp. at 512. The court, noting that only the First and Tenth Circuits had considered the issue, cited and discussed: Perryton Wholesale, Inc. v. Pioneer Distrib. Co., 353 F.2d 618 (10th Cir. 1965), cert. denied, 383 U.S. 945 (1966); Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879 (1st Cir. 1960); Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96 (1st Cir.), cert. denied, 286 U.S. 552 (1932). 368 F. Supp. at 512-13. Analogous cases include: Metal Lub. Co. v. Engineered Lub. Co., 411 F.2d 426, 431-32 (8th Cir. 1969) (complaint similar to Sauter; court found no intention to eliminate competitor and therefore no violation of Sherman Act); duPont Walston, Inc. v. E.F. Hutton & Co., 368 F. Supp. 306, 307-08 (S.D. Fla. 1973) (court distinguished Sauter because duPont Walston did not allege conspiracy to destroy a competitor); Motorola, Inc. v. Fairchild Camera & Instrument Corp., 366 F. Supp. 1173, 1182 (D. Ariz. 1973) (court found "no facts which would support a claim under the antitrust laws on any theory ...."). See also ITT v. Westron Corp., Civil No. 71-4972 (S.D.N.Y., Feb. 1, 1974) (summary judgment denied) (a motion was filed on Mar. 4, 1974 to substitute Lustre Lighting Corp. as plaintiff); Erie Tech. Prod., Inc. v. Centre Eng'r, Inc., 52 F.R.D. 524, 529 (M.D. Pa. 1971) (summary judgment denied); Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 846-47 (E.D.N.Y. 1971) (denying motion for preliminary injunction, court stated: "Though conduct amounting to unfair competition can also be a per se violation of the antitrust laws, it is not necessarily so.") (italics deleted); Vogue Instrument Corp. v. Lem Instruments Corp., 40 F.R.D. 497, 500 (S.D.N.Y. 1966) (summary judgment denied).

13. 368 F. Supp. at 512-13.

Despite or because of its simplicity, the meaning of the Sherman Act[14] and the sphere of its applicability have been issues subject to conflicting views throughout the eighty-three years of the Act's existence. One commentator offered the following explanation:

> It should not be surprising . . . that although the Sherman Act was passed by a virtually unanimous vote, and although its language is disarmingly clear, the administrations and courts charged with enforcing it have experienced so much difficulty in settling its meaning. For the Sherman Act reflects not only the uncertainty present in every general law because its authors cannot foresee the particular cases that will arise, but also the ambiguity that colors many democratic laws because the authors cannot completely resolve the divergent opinions and cross purposes that call it forth.[15]

In attempting to determine the meaning and scope of section 1 of the Sherman Act, the courts have focused on the phrase "restraint of trade."[16] The earliest Supreme Court and court of appeals decisions interpreting the Act ranged from the literalist view of Justice Peckham, who initially asserted that *every* restraint was forbidden,[17] to one rule of reason espoused by then Judge Taft[18] and another rule of reason advocated by Chief Justice White.[19] Today, courts determine whether particular conduct restrains trade in contravention of the Sherman Act either by applying the rule of reason (which is usually an interpretation of the rule of reason that evolved from Chief Justice White's opinions) or by finding that the conduct falls within a category that has become a traditional per se violation.[20] An examination of these concepts follows.

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14. For discussion of the social, political, and economic forces which gave rise to the Sherman Act, and a general discussion of purposes, see Apex Hosiery Co. v. Leader, 310 U.S. 469, 490-501 (1940); Standard Oil Co. v. United States, 221 U.S. 1, 49-70 (1911); A. Neale, The Antitrust Laws of the United States of America 11-18 (2d ed. 1970) [hereinafter cited as Neale]; H. Thorelli, The Federal Antitrust Policy (1955); 1 H. Toulmin, A Treatise On The Anti-Trust Laws of the United States §§ 1.1-.19, 4.1-.8 (1949); Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221 (1956). For an overview of the development of antitrust legislation in general see J. Burns, Antitrust Dilemma: Why Congress Should Modernize the Antitrust Laws 6-8 (1969); Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1140, 1148-50 (1952) [hereinafter cited as Oppenheim].

15. Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221, 222 (1956).

16. See note 1 supra.

17. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897). Professor Handler pointed out that Justice Peckham was quickly caught in his own narrow net since all business restrains trade in one way or another. 1 M. Handler, Twenty-Five Years of Antitrust 4-6 (1973) [hereinafter cited by volume as Handler].

18. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). After a comprehensive review of the common law on restraint of trade, Judge Taft concluded that unreasonable ancillary restraints and all non-ancillary restraints were prohibited. Id. at 283-84. See note 22 infra.

19. See notes 21-23 infra and accompanying text. Chief Justice White also reviewed the common law comprehensively, but reached a different conclusion than Judge Taft. Id.

20. See, e.g., Report of the Attorney General's National Committee To Study the Antitrust Laws 12-42 (1955); Antitrust Developments 1955-1968, at 2-24 (1968, Supp. 1968-70)

Chief Justice White's famous decision in 1911, *Standard Oil Co. v. United States*,[21] applied the rule of reason to both ancillary and direct restraints.[22] Chief Justice White reasoned that since the Sherman Act did not define restraint of trade and because not all restraints were prohibited,

> it follows that it was intended that the standard of reason which has been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for . . . determining whether . . . a particular act had or had not brought about the wrong against which the statute provided.[23]

As Professor Handler pointed out, Chief Justice White, in announcing the rule of reason, "was more concerned with having the rule recognized than in defining its content."[24] The latter, Handler noted, was done by Justice Brandeis[25] in *Chicago Board of Trade v. United States*:[26]

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

(supplements to Attorney General's Report); 1 Handler, supra note 17, at 119-35; Neale, supra note 14, at 20-29; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775 (1965) & 75 Yale L.J. 373 (1966) [hereinafter cited by publication as Bork]; Oppenheim, supra note 14. As Bork noted with respect to the rule of reason, any classification is somewhat artificial and different judges, and sometimes the same judge at different times, have different economic, social and/or political theories. Bork, 74 Yale L.J. at 781.

21. 221 U.S. 1 (1911).

22. An ancillary restraint of trade is a restriction which is merely incidental or ancillary to some legitimate object, e.g., a restrictive covenant not to compete as part of the terms of sale of a business or an agreement among partners to charge the same fees. See, e.g., Neale, supra note 14, at 23.

23. 221 U.S. at 60. In another decision the same year, the Chief Justice stated: "Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing . . . trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts . . . injuriously restrained trade . . . ." United States v. American Tobacco Co., 221 U.S. 106, 179 (1911) (italics deleted).

24. 1 Handler, supra note 17, at 8.

25. Id. at 29-30. Professor Bork, on the other hand, asserted that Chief Justice White gave content to the rule of reason. Bork, supra note 20, 75 Yale L.J. at 388. Cf. note 23 supra.

26. 246 U.S. 231 (1918).

This is not because a good intention will save an otherwise objectionable regulation *or the reverse*; but because knowledge of intent may help the court *to interpert facts and to predict consequences*.[27]

In contrast to the rule of reason violation,[28] a per se violation requires no inquiry into the actual effects of a particular activity.[29] Certain conduct is presumed to restrain trade unreasonably and is, therefore, labelled a per se violation of the Sherman Act. Good intentions are immaterial.[30] It is no defense, for instance, that the forbidden conduct was undertaken to protect the public from the ill effects of monopolistic practices of the plaintiff.[31] In general, the only defenses seem to be: the conduct is an acceptable ancillary restraint, such as price agreements among partners in a partnership;[32] the conduct is necessary because of the requirements of another statute;[33] or the defendant falls within an exempt category.[34]

Whereas the rule of reason is a rule of construction which involves an examination of the nature and effect of the restraint,[35] the per se rule is a rule of

27. Id. at 238 (emphasis added). Justice Brandeis' formulation of the rule of reason is criticized by Professor Bork as blurry. 74 Yale L.J. at 815-20. The alleged effect leaves one in a "'sea of doubt.'" Id. at 820. The passage from Chicago Board of Trade was recently paraphrased with approval by the Supreme Court in United States v. Topco Associates, Inc., 405 U.S. 596, 607 (1972).

28. Neale suggested that the rule of reason and per se rule are not in conflict as some literature suggests; rather the per se rule arises out of the rule of reason. Neale, supra note 14, at 28, 439. Oppenheim thought the rule of reason was "diametrically opposed" to the per se approach. Oppenheim, supra note 14, at 1151.

29. See text accompanying notes 44-47 & note 48 infra.

30. E.g., United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972); United States v. General Motors Corp., 384 U.S. 127, 146-47 (1966); United States v. Masonite Corp., 316 U.S. 265, 274-75 (1942).

31. Albrecht v. Herald Co., 390 U.S. 145, 153-54 (1968).

32. E.g., United States v. Columbia Pictures Corp., 189 F. Supp. 153, 178-79 (S.D.N.Y. 1960); see United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (dictum), aff'd, 175 U.S. 211 (1899); United States v. Huck Mfg. Co., 227 F. Supp. 791, 803-04 (E.D. Mich. 1964) (patent arrangement), aff'd by an equally divided Court, 382 U.S. 197 (1965).

33. Silver v. New York Stock Exchange, 373 U.S. 341, 348-49, 360-61 (1963) (self-regulation by national securities exchange pursuant to Securities Exchange Act of 1934 will not violate antitrust laws in some circumstances).

34. 1 R. Callmann, The Law of Unfair Competition, Trademarks and Monopolies § 15.2 (3d ed. 1967) (the author lists eight exempt categories).

35. Sometimes an examination of intent will aid in determining the nature and effects, i.e., the reasonableness of the restraint. See note 23 & text accompanying note 27 supra; cf. Neale, supra note 14, at 437-40. Neale's language regarding intent is written in the context of violations which fall within the traditional per se categories, see id. at 432-36, and must therefore be read in this light. Thus, when he uses the term "restrictive intent," it appears that he means intent to restrict by conduct that falls within a per se category.

It has been argued with respect to attempted violations of § 2 of the Sherman Act, 15 U.S.C. § 2 (1970) (monopolization or attempts to monopolize), that intent is both an irrelevant and improper vehicle for determining liability; evaluation of defendant's conduct

evidence.[36] In the years since the rule of reason was announced in *Standard Oil*,[37] only certain defined categories of activities have been labelled per se violations: price fixing,[38] tying arrangements,[39] collective boycotts,[40] market sharing or division,[41] certain restrictive practices regarding patents[42] and conduct by monopoly groups intended to foreclose competition.[43]

The Court seems to have developed the per se rule in response to cases involving complex economic situations where the Court either has felt ill-equipped to assess in each instance the actual market consequences of particular conduct[44] or has determined that examination of economic results was not its function.[45] The per se rule is meant to provide an absolute standard of conduct for both the courts and potential violators.[46]

Some of the other advantages of the per se rule have been described as follows:

> The gains of per se rules in terms of administrative simplicity are great since they are relatively clear, they are self-enforcing to a much greater extent than prohibitions which depend on the evaluation of effects in complex market conditions, and they

in light of market structure was recommended as the proper test. Hawk, Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine, 58 Cornell L. Rev. 1121, 1124-25, 1170-71 (1973).

36. Neale, supra note 14, at 27.

37. See notes 21-23 supra and accompanying text.

38. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927). Justice Stone stated in the latter case that the fact that prices are reasonable does not mean that agreements to fix prices are reasonable. Id. at 396-97. See also Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386 (1951).

39. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); International Salt Co. v. United States, 332 U.S. 392, 394-96 (1947).

40. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 625 (1953).

41. See United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-99 (1951). For a case that pre-dated Standard Oil see Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241-43 (1899).

42. Brulotte v. Thys Co., 379 U.S. 29, 32 (1964); International Salt Co. v. United States, 332 U.S. 392, 394-96 (1947).

43. See United States v. Griffith, 334 U.S. 100, 105-06 (1948); American Tobacco Co. v. United States, 328 U.S. 781, 808-15 (1946).

44. United States v. Topco Associates, Inc., 405 U.S. 596, 609-10 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). See Neale, supra note 14, at 435.

45. United States v. Topco Associates, Inc., 405 U.S. 596, 611-12 (1972) (Brennan, J., concurring) (making judgments regarding relative values to society of competitive activities is function of Congress).

46. "Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act." Id. at 609 n.10 (opinion of the Court) (italics deleted). See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); note 47 infra. Professor Handler criticized this quest for certainty. 1 Handler, supra note 17, at 63-65.

therefore lessen the volume of proceedings necessary to achieve a given level of enforcement.[47]

Yet these practical advantages should not obscure the important fact that in announcing the various categories of per se violations, the Court was responding to conduct and facts from which it could validly infer, after considerable experience with the conduct,[48] that the resulting restraint on trade was or would be unreasonable. In short, it has always been conduct or practices, not intent, which has been categorized per se.[49]

Nor should the advantages of the per se rule overshadow the disadvantages. Several Supreme Court Justices have criticized the mechanistic application of the rule and have urged use of the rule of reason,[50] even in situations where it first appears that the conduct falls within a traditional per se category.[51] As Justice Marshall has pointed out:

> *Per se* rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.[52]

Examples of two related situations—one where application of the per se rule

47. C. Kaysen & D. Turner, Antitrust Policy 142 (1959). The authors were careful to note: "The administrative logic of a per se rule requires that it fulfill two conditions. First, it must be addressed to business conduct .... Second, the class of practices (or line of conduct) which is forbidden must be readily identifiable." Id. For other requirements which the authors thought must be met to justify labelling conduct or a practice a per se violation see id. at 142-43.

48. See text accompanying notes 78-80 infra. "Per se involves a conclusive presumption that a specified course of action is in violation of the law. It is a refusal to examine the effects. The application of such a rule makes economic sense when—and only when—the facts, i.e., the market situation or course of conduct complained of, permits a legitimate inference as to the effects." Mason, Market Power and Business Conduct: Some Comments, 46 Am. Econ. Rev. 471, 476 (1956).

49. See text accompanying notes 38-43 supra.

50. United States v. Topco Associates, Inc., 405 U.S. 596, 613-15, 619-24 (1972) (Burger, C.J., dissenting); United States v. Container Corp. of America, 393 U.S. 333, 338-40 (1969) (Fortas, J., concurring); id. at 340-47 (Marshall, J., dissenting); Albrecht v. Herald Co., 390 U.S. 145, 154-56 (1968) (Douglas, J., concurring); id. at 158-68 (Harlan, J., dissenting); id. at 168-170 (Stewart, J., dissenting); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382, 388-94 (1967) (Stewart, J., dissenting). Some of the commentators are in accord. E.g., 1 Handler, supra note 17, at 62-65, 100-01, 125-39. See generally Neale, supra note 14, at 26-29.

51. See text accompanying notes 53-56 infra.

52. United States v. Container Corp. of America, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

can be justified and one where it can be argued that it is not justified—were set out in Justice Harlan's dissenting opinion in *Albrecht v. Herald Co.*[53] Both situations involve price fixing—in the one case establishing price floors (minimums) and in the other price ceilings (maximums). Price floors, Justice Harlan argued, "are properly considered *per se* restraints" because "no proffered justification is an acceptable defense,"[54] since price floors have been shown to be invariably unreasonable and counter to the Sherman Act.[55] On the other hand, Justice Harlan continued, price ceilings can be reasonable and justified; therefore, they should be analyzed in each instance to determine whether they are reasonable.[56]

Some other possibly harmful results of automatic resort to per se rulings include: 1) overextension of the per se rule could be detrimental to the welfare of consumers;[57] 2) the rule could be used indiscriminately to invalidate "competitive and anticompetitive, reasonable and unreasonable" activities and systems;[58] 3) the defendant's right to a fair and full hearing on questions of fact might be jeopardized, denying him procedural due process;[59] 4) the court might become "the prisoner of its own untested slogans which can only hamper a painstaking examination of new fact situations in the light of fresh experience;"[60] and 5) "[t]he warmth and security that sweeping, absolutist formulations offer is likely to prove here, as in other areas of the law, the forerunner of icy intellectual demise."[61]

The *Sauter* court declared a per se violation of section 1 of the Sherman Act grounded on a finding that the defendants intended to harm the plaintiff in interstate commerce. The court found it unnecessary to examine the effects of the defendants' activities.

> [T]here are several types of conspiracies in restraint of trade which are *per se* unreasonable [citing as examples *United States v. Trenton Potteries Co.* and *United States v. Socony-Vacuum*]. Conspiracies are *per se* unreasonable when they are accompanied with a specific intent to accomplish a forbidden result. *United States v. Columbia Steel Co.* . . . . This case falls clearly within the *per se* unreasonable category. The

53. 390 U.S. 145, 156-68 (1968) (Harlan, J., dissenting).

54. Id. at 157.

55. Id.

56. Id. at 157-66.

57. United States v. Topco Associates, Inc., 405 U.S. 596, 623 n.11 (1972) (Burger, C.J., dissenting).

58. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 394 (1967) (Stewart, J., dissenting).

59. Oppenheim, supra note 14, at 1157.

60. 1 Handler, supra note 17, at 103. Justice Blackmun's concurring opinion in United States v. Topco Associates, Inc., 405 U.S. 596 (1972), provides an example: "The conclusion the Court reaches has its anomalous aspects, for surely . . . today's decision . . . will tend to stultify Topco members' competition with the great and larger chains. . . . [R]eality seems at odds with the public interest. The per se rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it." Id. at 612-13 (Blackmun, J., concurring) (italics deleted).

61. Bork, 75 Yale L.J. at 377.

The Attorney General's 1955 National Committee strongly advocated use of the rule of

jury found by their answer to interrogatory 1(a) that the defendants "conspired, agreed or had an understanding to engage in acts of unfair competition with the *intent* to injure the plaintiff as a competitor by imparing [sic] plaintiff's ability to compete in interstate commerce." In our opinion nothing is more inimical to free competition. See *Standard Oil Co. v. United States* . . . . Where a restraint on trade is *per se* unreasonable, it is unnecessary for the Court to charge on the "rule of reason." *United States v. Trenton Potteries Co.* . . . .[62]

None of the activities alleged in the *Sauter* plaintiff's complaint falls within the traditional per se categories.[63] Nor do the Supreme Court cases relied upon by the court provide a proper basis for ruling that "*intent* to injure a competitor" constitutes a per se violation. The *Trenton Potteries* and *Socony-Vacuum* cases involved price fixing.[64] *United States v. Columbia Steel Co.*[65] was a suit to enjoin United States Steel from acquiring Consolidated Steel Corporation, the largest independent steel fabricators. The Court, holding that the proposed acquisition violated neither section 1 nor section 2 of the Sherman Act,[66] stated that vertical integrations without more do not violate the Act.[67] With regard to intent, the *Sauter* court's reliance upon *Columbia Steel* is totally unwarranted. The Supreme Court's statement must be read in context. It was made with specific reference to *United States v. Yellow Cab Co.*,[68] wherein the complaint charged that defendants had conspired to restrain and *monopolize* the cab industry in certain cities.[69] Regarding this, the *Columbia Steel* Court stated:

> Where a complaint charges such an *unreasonable* restraint as the *facts* of the *Yellow Cab* case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged. A restraint may be unreasonable either because a restraint otherwise reasonable [corporate integration in this case] is accompanied with a specific intent to accomplish a forbidden restraint [monopoly in this case] *or* because it falls within the class of restraints that are illegal *per se*.[70]

The key words are "specific intent to accomplish a *forbidden restraint*." The conduct discussed by Justice Reed—monopoly in *Yellow Cab*—clearly can be classified as "forbidden restraint." Monopolies and attempted monopolies are spe-

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reason, in all but a limited number of per se cases. Report of the Attorney General's National Committee To Study the Antitrust Laws 11 (1955). Faith in the rule of reason has been reaffirmed in recent supplements to the Attorney General's Report prepared by the American Bar Association. Antitrust Developments 1955-1968, supra note 20, at 1-2.

62. 368 F. Supp. at 514 (emphasis supplied by court).

63. See text accompanying notes 38-43 supra.

64. See note 38 supra and accompanying text. Neale analyzed Socony-Vacuum as a case of planned removal of surplus from the market rather than a price-fixing case. Neale, supra note 14, at 64.

65. 334 U.S. 495 (1948).

66. Id. at 507-08.

67. Id. at 525.

68. 332 U.S. 218 (1947).

69. Id. at 220-24.

70. 334 U.S. at 522 (emphasis added).

cifically prohibited by section 2 of the Sherman Act. It is not so clear that competitive torts of the *Sauter* variety fall within the "restraints of trade" forbidden by the Sherman Act. The rule of reason should have been applied to make that determination.[71]

In citing *Standard Oil* for the statement that "nothing is more inimical to free competition" than agreeing to engage in unfair competition with intent to injure a competitor, the *Sauter* court ignored not only the vastly different fact patterns of the two cases[72] but also the fact that the Court in *Standard Oil* applied the *rule of reason* to the *facts* of the case to reach the conclusion that vast accumulations of capital which result in monopolistic power injure the public and unreasonably restrain trade.[73]

The *Sauter* court, citing *Northern Pacific Railway Co. v. United States*,[74] also referred to the rule of reason.[75] Had the court applied this rule and examined the nature and effect of the restraint on the market, it might or might not have found a substantial restraint of trade or tendency toward monopoly.[76] But the court refused to examine these elements, simply stating that intent to injure a competitor in interstate commerce is a per se violation. Such a broad statement contains inherent difficulties,[77] the most obvious of which is that most business decisions are made with a view to causing a negative commercial effect upon the competition. Indeed, "beating" the "opponent" is the essence of competition.

"It is only after *considerable experience* with certain business relationships that courts classify them as *per se* violations of the Sherman Act," Justice Marshall stated in a recent opinion[78] citing a law review article by Jerrold Van Cise.[79] In that article, the author noted that the per se cases "show that generally a restraint of trade in the past has been declared to be *per se* unlawful only after a cumulative series of rulings—adverse to the practice—has given the courts a *solid basis* for arriving at the *per se* condemnation."[80]

The three cases relied upon by Judge Broderick in *Sauter* hardly qualify as a cumulative series of rulings. None is a Supreme Court decision. In addition, the

71. In Columbia Steel, Justice Reed indicated that the rule of reason was applicable in Yellow Cab. Id. at 521-23 & n.19.

72. Standard Oil involved an oil trust composed of some 40 oil companies which dominated the industry and was eventually converted into a holding company which assumed financial control of its properties, including the railways, thereby forcing the smaller competitors to either join them or go out of business. 221 U.S. 1, 31-46, 70-79 (1911).

73. Id. at 70-78.

74. 356 U.S. 1 (1958).

75. 368 F. Supp. at 514. Although the Court in Northern Pacific reiterated the rule of reason in dictum, it held that tying arrangements are per se violations. Northern Pac. Ry. v. United States, 356 U.S. at 8-9.

76. See text accompanying notes 127-29 infra.

77. See text accompanying notes 50-61 supra. Cf. text following note 123 infra.

78. United States v. Topco Associates, Inc., 405 U.S. 596, 607-08 (1972) (emphasis added).

79. Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165 (1964).

80. Id. at 1172 (emphasis added).

cases should not have been followed because they too extend the Sherman Act beyond its appropriate scope.[81]

In *Albert Pick-Barth v. Mitchell Woodbury Corp.*,[82] plaintiff was engaged in interstate business in kitchen equipment and utensils. It was alleged that defendants, formerly employed by plaintiff, took with them customer lists, cost records, plans and other data necessary for business, solicited plaintiff's customers, and induced other employees of plaintiff to enter defendant's business.[83] Although the jury found that the " 'defendant's acquisition of the plaintiff's business [did not] effect an unreasonable restraint of trade,' " the trial court entered judgment on the verdict for the plaintiff.[84] The court of appeals affirmed,[85] stating that "intent . . . to eliminate a competitor in interstate trade and thereby suppress competition . . . is a violation of section 1 of the Sherman Act."[86]

In *Atlantic Heel Co. v. Allied Heel Co.*,[87] the allegations were similar to, but went beyond, those in *Sauter*.[88] Ruling on plaintiff's appeal of the trial court's dismissal for failure to state a claim, the Court of Appeals for the First Circuit announced a per se rule based on intent.[89] Judge Hartigan, discounting any significance in the fact that the corporate defendant in *Pick-Barth* had been the "largest and dominating" factor in the trade in the United States,[90] endorsed the *Pick-Barth* rule.[91] He also relied on *Klor's, Inc. v. Broadway-Hale Stores*[92]

81. Compare this Case Note with Boone, Single-Corporation Competitive Torts and the Sherman Act: A Projection Based Upon A Review of the Albert Pick, Atlantic Heel and Perryton Cases, 2 Ga. L. Rev. 372 (1968). Boone (1) questions whether a single firm can constitute the duality required to form a conspiracy and (2) asserts that the use of the per se rule for intra-corporate conspiracies to participate in competitive torts is an attempt to " 'simplify what is not simple.' " Id. at 390-91.

82. 57 F.2d 96 (1st Cir.), cert. denied, 286 U.S. 552 (1932).

83. Id. at 97-98.

84. Id. at 99.

85. Id. at 103. Neither the trial court nor the court of appeals used the term per se.

86. Id. at 102. In their complaint, plaintiffs alleged that defendant corporation "was one of a combination of corporations controlled by allied interests engaged in the same trade... as the plaintiff, and constituted the largest and a dominating factor in that trade throughout the United States...." Id. at 97-98. The court found that the evidence supported this allegation. Id. at 100.

87. 284 F.2d 879 (1st Cir. 1960).

88. The allegations included: defendants, former employees of plaintiff, had enticed plaintiff's employees away, acquired trade secrets, disparaged plaintiff's product, instituted a suit against plaintiff to injure plaintiff in relations with customers, interfered with plaintiff's source of raw supplies, falsely misrepresented affiliation with plaintiff in order to obtain credit, interfered with plaintiff's employees in performing their duties, and breached their fiduciary duties to plaintiff. Id. at 879-80. Plaintiff also alleged that it was a leading concern in the supply of leather and leatherboard heels. Id. at 879.

89. Id. at 884.

90. Id. at 881.

91. Id. In their concurring opinion, the two other judges declined to endorse the Pick-Barth rule, stating that it may be good law but "it was unique on its facts in 1932 and so far as we can determine it stands alone today." Id. at 885.

92. 359 U.S. 207 (1959).

and *Northern Pacific Railway v. United States*[93]—ignoring the fact that the conduct complained of in each of these cases fell within a traditional per se category[94]—to conclude that the complaint alleged a conspiracy by means so inimical to free interstate trade as to constitute a per se violation.[95]

Perryton Wholesale, Inc. v. Pioneer Distributing Co.[96] involved a rack jobber[97] who left plaintiff's employ after many years as a trusted employee and became sales manager for defendant-competitor, induced other employees of plaintiff to follow and with them solicited plaintiff's customers.[98] Without using the term per se, the court stated that an unreasonable restraint of trade occurs when "a conspiracy exists to suppress competition in interstate trade through the elimination of a competitor by unfair means."[99] The court relied on *Pick-Barth* and *Atlantic Heel*.[100] Stressing the importance of the nature of the restraint as opposed to the amount of commerce affected, the *Perryton* court cited[101] *United States v. Yellow Cab Co.*[102] and *Apex Hosiery Co. v. Leader*.[103] The court did not, however, mention that the nature of the restraint in *Yellow Cab* was monopolistic[104] and that in *Apex Hosiery* the Court defined restraint of trade in common law terms: the Sherman Act was enacted in an era of trusts to prevent monopolistic practices.[105] Forgetting that not every restraint of trade is forbidden by the Sherman Act, the *Perryton* court glossed over the significant difference in nature between unfair competition which is monopolistic and unfair competition in the nature of petty business torts.

Common to *Sauter* and the three cases on which the court based its rulings is the fact that liability was grounded on the finding that competitive business torts which arose from a conspiracy were accompanied by intent to injure or eliminate a competitor.

"Intent" and "motive" are key concepts in the law of torts.[106] As Dean Prosser noted, the defendant's motive "may in itself determine whether he is to be held liable."[107] "It is in the cases where motive is called into question that

93. 356 U.S. 1 (1958).

94. See notes 39-40 supra and accompanying text.

95. 284 F.2d at 884.

96. 353 F.2d 618 (10th Cir. 1965), cert. denied, 383 U.S. 945 (1966).

97. A rack jobber is one who sells non-food items from display racks which he keeps supplied and which are located in various retail shops and stores. Id. at 620.

98. Id. at 620-21.

99. Id. at 621.

100. Id. at 622. See notes 82-95 supra and accompanying text.

101. 353 F.2d at 622.

102. 332 U.S. 218 (1947).

103. 310 U.S. 469 (1940).

104. 332 U.S. at 220-28; see text accompanying note 70 supra.

105. 310 U.S. at 492-95.

106. The Sauter court used the term "intent" but the court clearly was referring to "motive," i.e., injuring the competitor. The two terms are recognized as distinct elements in tort law. See W. Prosser, Torts § 5, at 23-26, § 8, at 31-34 (4th ed. 1971) [hereinafter cited as Prosser]. See Restatement of Torts § 8A (Tent. Draft No. 1, 1957) (Intent).

107. Prosser § 5, at 25. "Prima facie tort," recognized as a separate doctrine by some courts, is defined in terms of motive—" 'intentionally to do that which is calculated in the

it becomes most clearly apparent that the law of torts is a battlefield of the conflict . . . between business competitors . . . ."[108]

Prosser devoted almost forty pages to the areas of tort law relevant to the issues raised in *Sauter*,[109] classifying them into two broad areas: Interference with Contractual Relations[110] and Interference with Prospective Advantage.[111] In both categories, he noted, action motivated solely by intent to harm or destroy a competitor (malice) gives rise to liability.[112] However, tort law also recognizes that businessmen have a privilege to compete and, therefore, have great leeway with respect to legitimate competitive practices.[113]

More specifically, the actions complained of in *Sauter* fall into the following tort classifications: interference with employment contracts;[114] inducing breach of confidence and of fiduciary duty for the purpose of obtaining plaintiff's confidential information;[115] and "palming off" by using deceptively similar names and copying such things as job orders, bid estimates and specifications, thereby creating confusion as to source of goods and services.[116]

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ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse.'" Id. at 26 (quoting Lord Bowen in Mogul S.S. Co. v. McGregor, Gow & Co., 23 Q.B.D. 598, 613 (1889)).

108. Prosser § 5, at 26.

109. Id. §§ 129-30; see M. Handler, Business Torts (1973); Developments in the Law—Competitive Torts, 77 Harv. L. Rev. 888 (1964).

110. Prosser § 129; see Restatement of Torts § 766 (Tent. Draft No. 14, 1969).

111. Prosser § 130; see Restatement of Torts § 766A (Tent. Draft No. 14, 1969).

112. E.g., Prosser § 129, at 943; id. § 130, at 955-56. See Restatement of Torts § 709 (1939) (Engaging in Business for Purpose of Causing Harm); cf. id. § 708 (Engaging in Business in Good Faith).

113. Prosser § 129, at 946; id. § 130, at 954. "[M]ore in the way of justification is required to establish the privilege of group interference [in plaintiff's economic interests]." Id. § 129, at 938.

114. Dean Prosser distinguished contracts for a specific term from contracts at will and the liabilities in each area. Id. § 129, at 932-33, 946; see Restatement of Torts §§ 766, 766A, 767-68, 774A (Tent. Draft No. 14, 1969); cf. Republic Sys. & Programming, Inc. v. Computer Assistance, Inc., 322 F. Supp. 619 (D. Conn. 1970), aff'd, 440 F.2d 996 (2d Cir. 1971) (per curiam) (solicitation of plaintiff's employees by plaintiff's former employees permissible where employees did not serve pursuant to contracts and where solicitation occurred after solicitors had terminated their employment).

115. Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954); Prosser § 130, at 956; cf. Republic Sys. & Programming, Inc. v. Computer Assistance, Inc., 322 F. Supp. 619 (D. Conn. 1970), aff'd, 440 F.2d 996 (2d. Cir. 1971) (per curiam). Solicitation of customers and use of trade secrets are related tort areas. See Town & Country House & Homes Serv. Inc. v. Evans, 150 Conn. 314, 189 A.2d 390 (1963); Restatement (Second) of Agency §§ 393-96 & comment e to § 393 (1957); cf. Midland-Ross Corp. v. Yokana, 293 F.2d 411 (3d Cir. 1961) (defendant copied drawings and accepted orders for new business while still employed by plaintiff but court found no breach of fiduciary duty and no trade secrets involved).

116. Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1957). Defendants in this case had used deceptively similar cards, order books and forms. The court

Whereas intent to injure a competitor, followed by acts of unfair competition which in fact injure the competitor, provide a sufficient basis for liability in tort, it is questionable whether the same elements—alone—are adequate for liability under the Sherman Act. This issue draws into consideration the debate as to whether the Act was designed to protect competitors or competition.[117] On the one hand, it could be argued that these are inconsistent goals; on the other hand, it could be said that they are complementary.[118] But this does not mean that the Sherman Act should be used by every injured competitor regardless of whether the acts also harm competition and thereby restrain trade.

The courts have repeatedly stated that the goal of the Sherman Act is to promote competition because absence of competition has harmful effects on the public, *e.g.*, higher prices and lower quality.[119] Although the Supreme Court has ruled that it is no longer necessary to allege and prove public injury or that more than one competitor was affected by defendant's conduct, the leading cases—*Klor's, Inc. v. Broadway-Hale Stores*[120]and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*[121]—can be distinguished from a *Sauter*-type case. Both involved traditional per se violations and the defendants in each were large, established companies which had combined to boycott one small competitor. In

stated: "The trading on another's business reputation by use of deceptive selling practices or other means is enjoinable on the grounds of unfair competition. If the particular use in question is reasonably likely to produce confusion in the public mind, equity will restrain the unfair practice and compel an accounting of the profits gained thereby." Id. at 635, 136 A.2d at 848 (citations omitted). See Prosser § 130, at 956-57; Restatement of Torts §§ 711-13, 716-17, 720, 729, 731-32 (Tent. Draft No. 8, 1963).

Prosser classified all the torts referred to in notes 114-16 and accompanying text in the category of "unfair competition": "Though trade warfare may be waged ruthlessly . . . there are certain rules of combat which must be observed. . . . In the interests of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as "unfair" competition, for which, in general, a tort action will lie in favor of the injured competitor, although very often the tort is given some other name. These practices are a full subject for a treatise in themselves . . . ." Prosser § 130, at 956 (footnotes omitted). See M. Handler, Business Torts 47 (1973) (Note on Unfair Competition).

117. See The Goals of Antitrust: A Dialogue on Policy, 65 Colum. L. Rev. 363 (1965) (Compare arguments of Blake & Jones, In Defense of Antitrust, id. at 377, with those of Bork & Bowman, The Crisis In Antitrust, id. at 363); cf. 1 R. Callmann, The Law of Unfair Competition, Trademarks and Monopolies § 15.1(c), at 286-87 (3d ed. 1967) ("From the standpoint of their respective goals, the antitrust laws are designed to achieve and preserve freedom of competition while the law of unfair competition strives to promote and maintain fairness in competition; phrasing it in accordance with the law, the former seeks to prevent any restraint of trade or lessening of competition and the latter to prohibit any unfair competitive conduct.").

118. See Callmann, Unfair Competition and Antitrust: Coexistence Within Complementary Goals, 12 Idea 137, 138-40 (Conference 1968).

119. See, e.g., Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940); United States v. American Tobacco Co., 221 U.S. 106, 179-80 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

120. 359 U.S. 207 (1959).

121. 364 U.S. 656 (1961) (per curiam).

both cases, the Court was concerned with the fact that such boycotts have inherent monopolistic tendencies.[122] In *Klor's*, the Court stated:

> [The boycott by a combination of manufacturers, distributors and retailers] clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,' " whether "the tendency is a creeping one" or "one that proceeds at full gallop."[123]

The circumstances of the *Sauter* case did not justify a per se ruling for several reasons. It cannot be said that every intention to harm a competitor is unjustified; such a conclusion would mean that all competition is illegal. Nor can it be stated that wrongful intent coupled with a business tort can justify the presumption in every case that there has been an unreasonable restraint of trade. One example illustrates: if one corporation steals a customer list from another corporation, it is tortious whether the list is used or not. If it is not used, it obviously does not restrain trade. If it is used, it may or may not restrain trade. This introduces an element of uncertainty into the *Sauter* rule—contrary to one of the justifications for the use of the per se rule[124]—because it is not known when intent coupled with a business tort constitutes a per se violation. In addition, the *Sauter* rule cannot be justified by the argument[125] that the acts resulted in complex economic consequences which courts are ill-equipped to handle.

Use of the per se rule in a *Sauter* situation could, in fact, result in some of the injustices and undesirable consequences outlined above.[126] In addition, it might open the floodgates of litigation and result in windfall judgments. If the Sherman Act is to be used at all in cases involving small business torts, the rule of reason is the only appropriate standard.

In applying the rule of reason the court should examine not only the nature of the conspiracy and unfair competition but also such effects as the following: does the defendants' conduct give him the power to raise or lower prices arbitrarily, to control quality and supply or to force his competitors out of business; is the conduct solely in the interest of the defendants or is it also in the interest of the public; does the defendants' conduct cause the public, in effect, to boycott defendants' competitors; does it result in chronic losses to most or many of their competitors?

Applying the rule of reason to the facts of the *Sauter* case might or might not result in liability under the Sherman Act. The court stated that in the aggregate,

122. 364 U.S. at 657-60; 359 U.S. at 212-14; cf. Radovich v. National Football League, 352 U.S. 445, 453-54 & n.10 (1957); Rogers v. Douglas Tobacco Bd. of Trade, Inc., 266 F.2d 636, 644 (5th Cir.), cert. denied, 361 U.S. 833 (1959).

123. 359 U.S. at 213-14 (citations and footnotes omitted).

124. See note 46 supra and accompanying text.

125. See notes 44-45 supra and accompanying text.

126. See notes 50-61 supra and accompanying text.

the acts clearly warranted the jury's finding of a violation of section 1 of the Sherman Act.[127] The court outlined substantial evidence of damage to the plaintiff,[128] but it did not indicate what effects, if any, the conduct had on competition in the market generally, on prices, quality of product, supply or the potential for monopoly power. If any of these results had occurred, it would appear to have been an unreasonable restraint of trade. In the absence of these effects, the plaintiff should recover under tort rather than under antitrust laws.[129]

The Sherman Act was designed, and throughout its more than 80 years of existence has been used, to attack wrongful use of power and unreasonable restraints of trade against which businessmen and the public were powerless. As an instrument of great strength, the Act simply was not designed to remedy wrongs for which milder but adequate remedies already existed.

In view of the historical, judicial and philosophical considerations relevant to application of the Sherman Act and particularly of the per se rule, the per se holding of the *Sauter* court should not be followed. Rather, if the Sherman Act is to be employed at all in such cases, the rule of reason should be applied. Clearly, the conduct in *Sauter* did not fall within one of the traditional per se categories; a per se rule based on intent to injure a competitor by a competitive business tort is an inadequate and inappropriate standard; and the Sherman Act is not the proper source of remedy unless it can be shown that the defendants unreasonably restrained trade.

Harriet Friday Leahy

Criminal Law—Antiwar Activists Charged with Attempting to Smuggle Mail from Federal Prison May Not Assert Defense of Discriminatory Prosecution, But Succeed in Claim that Offense Was Impossible Where Warden Knew of Scheme.—Father Phillip Berrigan and Sister Elizabeth McAlister were convicted[1] on seven counts of violating 18 U.S.C. § 1791[2] as implemented by 28 C.F.R. § 6.1,[3] which, taken together, make it a crime to send, or

127. 368 F. Supp. at 507.

128. Id. at 506-08.

129. See 1 R. Callmann, The Law of Unfair Competition, Trademarks and Monopolies § 15.1(c), at 39 (3d ed., Supp. 1973) (author bemoans clouding of remedies and states that the failure of courts to evolve a "sound concept of unfair competition" has caused plaintiffs to resort to antitrust laws).

1. United States v. Ahmad, 347 F. Supp. 912 (M.D. Pa. 1972), modified sub nom. United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).

2. 18 U.S.C. § 1791 (1970) provides: "Whoever, contrary to any rule or regulation promulgated by the Attorney General, introduces or attempts to introduce into or upon the grounds of any Federal penal or correctional institution or takes or attempts to take or send therefrom anything whatsoever, shall be imprisoned not more than ten years."

3. In accordance with 18 U.S.C. § 1791 (1970), 28 C.F.R. § 6.1 (1973) was promulgated and provides: "The introduction or attempt to introduce into or upon the grounds of any Federal penal or correctional institution or the taking or attempt to take or send

attempt to send, anything into or out of a federal penal institution without the knowledge and consent of the warden. Of the seven counts upon which appellants were convicted,[4] only one (Count IV) was for commission of the substantive offense.[5] The remaining counts (Counts V-X) were for attempts[6] to violate § 1791. Father Berrigan and Sister McAlister appealed from the district court's denial[7] of their post trial motions in arrest of judgment and for judgment of acquittal. The Court of Appeals for the Third Circuit reversed the convictions on the counts charging criminal attempt on the ground that commission of the crimes was legally impossible. *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973).

At the time the acts were committed, Father Berrigan was serving a prison sentence at Lewisburg Federal Penitentiary[8] for his part in the destruction of Selective Service System files.[9] The government charged that he and Sister McAlister smuggled letters through the prison security with one of Father Berrigan's fellow inmates, Boyd Douglas, acting as courier.[10] Douglas was participating in a study-release program which gave him the freedom to carry letters out of the prison and mail them. He also received letters from Sister McAlister at an outside address, recopied them into his notebook and delivered them to Berrigan.[11] Unbeknown to the appellants, he informed the warden and the Federal Bureau of Investigation of his activities and turned over copies of all the correspondence which had been entrusted to him.[12]

The appellants' challenges to the convictions were many,[13] but only two will

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therefrom anything whatsoever without the knowledge and consent of the warden or superintendent of such Federal penal or correctional institution is prohibited."

The requirement that the acts be committed without the knowledge and consent of the warden is a product of the Attorney General's regulation and was not specifically provided for by Congress in 18 U.S.C. § 1791 (1970).

4. Appellants were originally indicted on ten counts. The jury could not reach a verdict on Count I (conspiracy to destroy the underground heating system in Washington, D.C., and to kidnap presidential advisor Henry Kissinger), or on Counts II and III (sending through the mails letters that contained a threat to kidnap Henry Kissinger in violation of 18 U.S.C. § 876 (1970)). United States v. Berrigan, 482 F.2d 171, 173 (3d Cir. 1973).

5. The court of appeals affirmed this conviction. 482 F.2d at 190.

6. Id. at 184.

7. 347 F. Supp. at 936.

8. Id. at 917.

9. N.Y. Times, Jan. 14, 1971, at 30, col. 5.

10. 347 F. Supp. at 917.

11. Id.

12. Id. at 926.

13. Appellants asserted that: (a) the discriminatory prosecution defense should have been submitted to the jury, 482 F.2d at 174-76; (b) a defense of discriminatory prosecution had been established, id. at 176-80; (c) the district court abused its discretion by refusing to allow discovery of evidence necessary to establish discriminatory prosecution, id. at 180-182; (d) delegation of legislative power to the Attorney General under 18 U.S.C. § 1791 was invalid, 482 F.2d at 182-83; (e) 18 U.S.C. § 1791 was unconstitutionally vague and overbroad, 482 F.2d at 183-84; (f) the government failed to establish all ele-

be discussed herein. The first dealt with several aspects of utilizing discriminatory prosecution as a defense to the application of a penal statute;[14] the second involved the contention that the prosecution had failed to prove an essential element of the offense in connection with the counts charging criminal attempt.[15]

No extended analysis of the development of the discriminatory prosecution defense is intended herein. However, a consideration of the factual distinctions between *Berrigan* and *Yick Wo v. Hopkins*,[16] the landmark case establishing such a defense, illustrates the potential difficulties to be encountered in establishing discriminatory prosecution. *Yick Wo* involved the application of the fourteenth amendment's equal protection clause to the discriminatory *administration* of a state law.[17] There the Supreme Court said:

> [T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that... they are applied by the public authorities charged with their administration... with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws....[18]

While *Yick Wo* involved the enforcement of the decision of a state administrative body, *Berrigan* involved the enforcement of a federal penal statute. The administrative-penal distinction is important.[19] When an administrative body applies an ordinance in an allegedly arbitrary manner the constitutional

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ments of the crime, id. at 184-90; (g) the trial court failed to include a phrase requested by the defense in its charge to the jury, id. at 190; (h) the trial court refused to grant immunity to certain defense witnesses, id; (i) the district court verdict was the product of mental and physical fatigue or judicial coercion, id.

14. The court easily disposed of the defense's contention that the existence of discriminatory prosecution was a question for the jury. In reviewing the authority cited by the defense, the court found that it either did not address the issue or sustained a contrary proposition. 482 F.2d at 174-75.

The court also noted that such a contention ran flatly contrary to Fed. R. Crim. P. 12(b)(2), which provides: " 'Defenses and objections based on defects in the institution of the prosecution... may be raised only by motion before trial.' " 482 F.2d at 175.

15. See text accompanying notes 35-56 infra.

16. 118 U.S. 356 (1886).

17. In Yick Wo a municipal ordinance made it illegal to carry on a laundry business, except in brick or stone buildings, without first obtaining a license from the board of supervisors. Defendant, Yick Wo, violated the ordinance and was jailed for failure to pay the fine. His constitutional challenge rested upon the proposition that the ordinance had been administered in such a manner as to discriminate against persons of Chinese origin. Id. at 369.

18. Id. at 373.

19. There is also a state law-federal law distinction between the facts in Yick Wo and in Berrigan. At one time this might have been regarded as of crucial importance because the equal protection clause of the fourteenth amendment does not apply to the federal government. It is recognized now that in the area of arbitrary classifications the fifth amendment's due process clause makes the principles of equal protection applicable to the federal government. See Bolling v. Sharpe, 347 U.S. 497 (1954).

issue raised is whether the administrative action rests on a purely arbitrary classification.[20]

Likewise, in the case of a penal statute, the ultimate issue is whether or not the decision to prosecute was based upon an arbitrary classification. However, with regard to the enforcement of the penal laws, the government historically has been accorded wide discretion in making the decision to prosecute.[21] This discretion tends to cloud the issue because, to a certain degree, the exercise of discretion may conceal the implementation of an invalid arbitrary classification. The task then becomes one of determining whether the prosecution has exceeded the constitutional bounds of its discretion.

This is a task which the judiciary undertakes with great reluctance. Any judicial inquiry into the motives underlying a decision to prosecute raises the specter of infringement upon governmental separation of powers.[22] In questioning such motives the court is not exercising any inherent judicial power to supervise the administration of justice. Its authority to proceed on such an inquiry exists only in the judicial branch's constitutional duty to insure that nothing in the decision-making process violates the constitutionally protected rights of a defendant. As a result, the courts have been slow to recognize discriminatory prosecution as a defense to the enforcement of a penal law.[23]

Another distinction between *Yick Wo* and *Berrigan* lies in the ability of the prosecuted party to discover and produce evidence sufficient to prove discrimina-

20. Yick Wo v. Hopkins, 118 U.S. 356 (1886); see Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Norris v. Alabama, 294 U.S. 587, 594-96 (1935); cf. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (dictum) (equal protection clause applies when state's power to classify is exercised in purely arbitrary fashion).

21. See United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965); Swepston v. United States, 289 F.2d 166, 170 (8th Cir. 1961), cert. denied, 369 U.S. 812 (1962). See generally Kaplan, The Prosecutorial Discretion—A Comment, 60 Nw. U.L. Rev. 174 (1965).

22. Chief Justice Burger, while sitting on the Court of Appeals for the District of Columbia Circuit, expressed his opinion concerning judicial review of the prosecutorial decision: "It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse... deviations from his duty as an agent of the Executive are to be dealt with by his superiors.

"... [I]t is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers." Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967) (footnote omitted).

23. Acceptance of discriminatory prosecution as a defense to enforcement of a penal statute has not been universal. See Buxbom v. City of Riverside, 29 F. Supp. 3, 8 (S.D. Cal. 1939) (motion to dismiss bill for injunctive relief against alleged discriminatory enforcement of a city ordinance regulating handbill distribution granted); People v. Darcy, 59 Cal. App. 2d 342, 351-54, 139 P.2d 118, 124-26 (1st Dist. 1943) (discriminatory prosecution not a valid defense to enforcement of perjury law); Society of Good Neighbors v. Mayor of Detroit, 324 Mich. 22, 28, 36 N.W.2d 308, 309-10 (1949) (injunctive relief against alleged discriminatory enforcement of the state lottery laws denied).

tion. The burden in a situation similar to that presented in *Berrigan* makes the establishment of such a defense difficult, if not impossible. While *Yick Wo* involved an individual discriminated against as a member of an identifiable class, *Berrigan* presented the problem of discrimination against an individual as an individual; in *Yick Wo* there was an opportunity to obtain objective statistical evidence, while in *Berrigan* such evidence was not available.[24]

The appellants could not argue that there had been few or no prosecutions under the statute.[25] Rather, they argued that the manner in which they violated the regulation normally did not give rise to a criminal prosecution, and that the motives underlying the decision to prosecute were other than simply to enforce the penal laws.[26] In considering this issue, the district court openly admitted that:

> [c]ould these motives, attributed to the Department of Justice, be sustained there would be no doubt in our mind that prosecution here would fall outside of the proscribed limits of the discretionary control of the executive over the prosecution of criminal cases.[27]

Thus, the district court recognized that improper motive could serve as the basis for a discriminatory prosecution defense where the motive relates to the defendant as an individual and not as a member of a definable class.

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24. Such evidence would be admissible in order to show a pattern of discriminatory enforcement. See Ah Sin v. Wittman, 198 U.S. 500, 507 (1905) (dictum) (an offer of specific evidence showing exclusive prosecution of a particular race or lack of prosecution of other races required); People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (App. Dep't, Super. Ct. 1960) (evidence consisting of racial population statistics, arrest statistics broken down into racial categories, and failure to arrest known violators held admissible). But see People v. Darcy, 59 Cal. App. 2d 342, 351-54, 139 P.2d 118, 124-26 (1st Dist. 1943) (court rejected an offer to prove "hundreds of thousands" of similar errors which did not result in prosecution).

25. Most of the prosecutions under 18 U.S.C. § 1791 (1970) involved the introduction of narcotics into the prisons. E.g., United States v. Levine, 457 F.2d 1186 (10th Cir. 1972) (conspiracy to introduce narcotics into a prison); United States v. Hazeltine, 444 F.2d 1382 (10th Cir. 1971) (inmate introduced currency and narcotics into prison); United States v. Cordova, 414 F.2d 277 (5th Cir. 1969) (per curiam) (introduced narcotics into prison). However, one conviction was for the introduction of such innocuous "contraband" as five jars of dirt. Carter v. United States, 333 F.2d 354 (10th Cir. 1964).

Even if there had been few prosecutions under the statute, "the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962). "[M]ere laxity of enforcement, although it may result in the unequal application of the law to those who are entitled to be treated alike, is not a denial of equal protection in the constitutional sense . . . ." Wade v. City & County of San Francisco, 82 Cal. App. 2d 337, 339, 186 P.2d 181, 182 (1st Dist. 1947). Cf. Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 U.C.L.A.L. Rev. 1, 17 (1971).

26. 482 F.2d at 177. The appellants argued that the decision to prosecute was motivated by a general dislike of their position in the antiwar movement and by a desire to vindicate the reputation of the then director of the FBI, J. Edgar Hoover. Id. at 176-77.

27. 347 F. Supp. at 928.

However, it will be virtually impossible for a defendant to meet any reasonable standard of proof[28] when he attempts to show that a motive other than enforcement of the penal laws was the primary factor in the decision to prosecute. It seems unlikely that the executive branch would allow those charged with the responsibility for making the prosecutorial decision to take the stand as witnesses for the defense.[29] The district court in *Berrigan* made it clear that the defendant may not inspect the prosecutor's files to obtain real evidence of improper conduct unless he first establishes to the court's satisfaction that such evidence exists.[30] While the court acknowledged that the government might be in possession of evidence which the defendant had no means of obtaining, it would not "require the government to come forward with evidence unless the record indicates the existence of invidious discrimination."[31]

The defendant has the overall burden of proving the defense.[32] In the *Berrigan* situation this is a twofold burden because *all* of the direct evidence necessary to establish improper motive is likely to be within the sole possession or knowledge of the prosecutor. In the first instance, before the defendant may have access to this evidence, he must independently establish that "invidious discrimination" exists.[33]

It must be concluded that discriminatory prosecution is, in reality, an illusory defense when an individual, who is not a member of a definable class of persons suffering similar discrimination, is being prosecuted under the penal laws.[34]

A second problem considered by the court in *Berrigan* was the failure of the government to prove "all elements of the crime" charged in the attempt counts.

28. There is no clear consensus as to the standard of proof which the defendant must meet. See Tieger, Police Disecretion and Discriminatory Enforcement, 1971 Duke L.J. 717, 740; Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103, 1125-31 (1961). Compare City of New Orleans v. Levy, 233 La. 844, 98 So. 2d 210 (1957) (a showing of failure to enforce zoning laws in other instances sustained the defense) with Boynton v. Fox W. Coast Theatres Corp., 60 F.2d 851 (10th Cir. 1932) (injunction restraining plaintiff from showing pictures on Sunday despite evidence of failure to prosecute similar activities in 40 other cities within the state sustained).

29. The difficulty of obtaining direct evidence is illustrated by the paucity of cases where such evidence has been introduced. See Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103, 1122 (1961).

30. 347 F. Supp. at 928.

31. Id.

32. See People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 18, 225 N.Y.S.2d 128, 134 (4th Dep't 1962).

33. "In light of the impracticality, if not impossibility of proving prosecutorial motive, the method of direct defense is an ineffective tool against discriminatory prosecution, unless perhaps, the selective prosecution pattern reveals clear cut racial discrimination." Comment, Prosecutorial Discretion—A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse, 21 De Paul L. Rev. 485, 508 (1971).

34. Given the proper fact pattern, any generalization is subject to exceptions. See Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968) (dictum) (equal protection clause would bar government prosecution which was reinstituted because of defendant's refusal to drop his complaint of police misconduct).

In essence, the appellants claimed that the warden was aware of Father Berrigan's activities and that the lack of such knowledge on the warden's part was an essential element of the crime as defined in 28 C.F.R. § 6.1.[35] The court of appeals agreed and reversed the convictions, holding that the state of the warden's knowledge made conviction for criminal attempt legally impossible.[36]

The concept of an attempt to commit a crime as constituting a separate and distinct crime is not easily grasped. At common law an attempt could be defined as "an intent to do a particular crime, with an act toward it falling short of the thing intended."[37] The essential circumstance, which served as the basis for the court's reversal of the convictions in *Berrigan,* was a statutory addition to these common law requirements. It will prove useful to analyze the facts of *Berrigan* in accordance with a common law understanding of criminal attempt, and then to consider the effect of the statutory addition—lack of knowledge on the warden's part—upon that common law analysis.

Not just any act will fulfill the common law requirement for "an act" in proving criminal attempt. The act must be of a particular quality, or, as the courts frequently say, it must be something more than mere preparation. "Of course it is elementary that mere preparation to commit a crime, not followed by an overt act done toward its commission, does not constitute an attempt."[38] Whether a particular act constitutes mere preparation or criminal attempt is a question of fact and depends, to a large degree, on how far the individual has gone towards completion of the substantive offense.

> "The overt act must be sufficiently proximate to the intended crime to form one of the natural series of acts which the intent requires for its full execution"....
> Proximity to the consummation of the target crime is a matter of degree, ranging from remoteness on one end, to "dangerously close to success" on the other.[39]

The acts of Father Berrigan and Sister McAlister must be measured on this or some similar scale.[40]

The writing of letters was the first act in a series of acts completed by the appellants. If this had been the only act engaged in, it would be difficult to find a criminal attempt.[41] The substantive offense defines as illegal a manner of convey-

35. 482 F.2d at 184 & n.17; see note 3 supra.

36. 482 F.2d at 190.

37. J. Bishop, Criminal Law 518 (9th ed. 1923) (footnote omitted). Most statutory definitions are similar with the exception that some do not require a failure to commit the substantive offense. E.g., N.Y. Penal Law § 110.00 (McKinney 1967).

38. Lemke v. United States, 211 F.2d 73, 75 (9th Cir.), cert. denied, 347 U.S. 1013 (1954). See Wooldridge v. United States, 237 F. 775, 777-79 (9th Cir. 1916).

39. W. Clark & W. Marshall, A Treatise on the Law of Crimes 235 (7th ed. 1967) (footnotes omitted).

40. E.g., J. Hall, General Principles of Criminal Law 577-78 (2d ed. 1960). "In the decisions on the subject, the one point of universal agreement is that no definite line can be drawn between criminal attempts and states of preparation. '[E]ach case,' we are informed, 'must be determined upon its own facts.' " Id. at 577.

41. The quality of the act has a very definite relationship with the intent element that is required to prove criminal attempt. Evidence tending to establish the act also serves as

ing material into, or out of, a federal prison. Without a means to effect that type of transmittal, the act of writing is not sufficiently proximate to the completion of the substantive offense.[42]

Next in the series of acts was Berrigan's solicitation of a courier who had access to the public mails. At this point the contraband existed and the means to convey it had been devised. Although the proximity to a commission of the substantive offense had greatly increased, it could be argued that appellants still were engaged in preparation at this stage. There remained only one additional step which they were capable of taking towards the commission of the substantive offense. Both took that step by placing the letters in their courier's possession. The appellants now had done everything within their power to violate the statute. At this point they had reached that dangerous proximity to success where their actions would have constituted criminal attempt *at common law.* As the district court said in denying their post trial motion for aquittal:

> They wrote long, detailed letters to each other, sealed them, and saw to it that their courier obtained possession of them. . . . [T]he defendants not only completed a violation of the crime by their own acts, but completed all the essential elements of an attempt prior to using the services of Boyd Douglas.[43]

Under a common law definition of criminal attempt, the appellant's conviction certainly would have been sustained.[44] However, the court of appeals reversed the convictions and found that the requirement in 28 C.F.R. § 6.1—that the acts be "without the knowledge and consent of the warden"—had not been met, thus making conviction legally impossible.[45]

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circumstantial evidence in establishing the requisite intent. As a particular act brings a defendant nearer to consummation of a substantive offense, the inference correspondingly becomes stronger that he entertains the requisite intent. Cf. Enker, Impossibility in Criminal Attempts—Legality and the Legal Process, 53 Minn. L. Rev. 665, 676-83 (1969).

42. The act of writing does not provide a strong inference that the appellants intended to effect an illegal transmittal. See note 41 supra.

43. 347 F. Supp. at 921.

44. United States v. Robles, 185 F. Supp. 82 (N.D. Cal. 1960), provides a good analogy to Berrigan because it deals with an attempt to violate a federal statute where the defendant's only acts were the writing and mailing of a letter. Robles was convicted for violating § 1403 of the Act of July 18, 1956, Ch. 629, tit. II, § 201, 70 Stat. 573, which made it illegal to utilize communication facilities in an attempt to import narcotics. Robles committed only two acts in furtherance of a plan to import heroin: (1) he wrote a letter to a Mexican citizen inquiring about the availability of narcotics, and (2) he placed that letter in the public mails.

The proximity of success in Robles on the substantive offense was not nearly as immediate as in Berrigan. Nothing in the opinion indicated that the Mexican citizen was willing to provide the narcotics; nor, was there any indication that Robles had developed a means by which the drugs could have been smuggled into the United States. Yet, the court in Robles said: "He [Robles] took the first step in the furtherance of this plan by writing and mailing the letter . . . to find a source of supply. When defendant wrote the letter, and mailed it, he began a course of conduct designed to culminate in the unlawful importation of a narcotic drug into the United States." 185 F. Supp. at 85.

45. 482 F.2d at 190; see note 3 supra.

At the outset of its analysis the court rejected a common law approach, stating that "the interstices of federal criminal law cannot be filled by resort to common law precedents."[46] Neither 18 U.S.C. § 1791 nor 28 C.F.R. § 6.1 defines attempt; "[i]ndeed, there is no comprehensive statutory definition of attempt in federal law."[47] Without a statutory definition, the entire concept of criminal attempt becomes meaningless when removed from its common law background.

The court's approach in *Berrigan* ignored the nature of attempt and cast the central issue in terms of whether or not the warden had knowledge of the appellants' acts prior to the completion of a substantive offense.[48] The flaw in this approach is that it considered the effect of the warden's knowledge in relation to the wrong crime. The attempt counts charged the appellants with a criminal *attempt* to violate the statute, not with commission of the substantive offense. The central issue presented by these counts should be whether or not the warden had specific knowledge of the appellants' acts prior to the point at which those acts constituted a criminal attempt.

Under a common law definition, a criminal attempt had been committed when the letters were placed in the possession of the courier.[49] The only effect of the statutory requirement in 28 C.F.R. § 6.1 on this common law analysis is that under the statute the warden may not have knowledge of the appellant's acts leading up to this point.

The warden testified that he knew that letters were being exchanged after having "intercepted the first letter." The court said:

> Hendricks [the warden] reaffirmed this statement several times during his testimony, eventually admitting that after June 3, 1970, he knew Douglas was carrying letters in and out of the prison. All of the letters involved in Counts V to X [the attempt counts] were exchanged after June 3.[50]

At first glance the warden's testimony creates the impression that he had knowledge of all of the appellants' acts involved in the attempt counts. This is inaccurate. The warden specifically knew that "Douglas was carrying letters." However, it would seem that he did not know, and probably could not have known, of appellants' acts respecting a particular letter until sometime *after* Douglas was given possession of that letter.[51] The actions necessary to constitute an attempt at common law—(1) writing a letter (2) soliciting a courier and (3) transferring possession—had occurred prior to the warden's learning of the exis-

46. 482 F.2d at 186.

47. United States v. Heng Awkak Roman, 356 F. Supp. 434, 437 (S.D.N.Y.), aff'd, 484 F.2d 1271 (2d Cir. 1973) (per curiam).

48. See text accompanying notes 52-56 infra.

49. See text accompanying notes 37-42 supra.

50. 482 F.2d at 184-85 n.17.

51. There was some indication in the district court's opinion that the warden knew about one of the letters before Father Berrigan had the opportunity to pass it to Douglas. 347 F. Supp. at 926. As to that particular letter this analysis would not apply. However, it remains highly unlikely that the warden could have obtained the same type of information with respect to Sister McAlister.

tence of that particular letter. While the knowledge of the appellants' acts which the warden acquired after Douglas was given possession may have made conviction under the substantive offense legally impossible, a criminal attempt to violate the regulation already had taken place.

The conclusion that must be drawn is that there is no problem of legal impossibility in *Berrigan*. The essential circumstances required by the regulation—lack of knowledge and consent on the warden's part—existed at the same instant as did all of the affirmative elements required for the crime of attempt. The appellants' convictions for their attempts to violate 18 U.S.C. § 1791 as implemented by 28 C.F.R. § 6.1 should have been upheld.

There are two related reasons which could explain the court's failure to reach this conclusion. First, it appeared that the court desired to use *Berrigan* as a vehicle to reject the modern trend of eliminating legal impossibility as a defense to a criminal attempt charge.[52] This desire caused the court to focus its attention exclusively on the nature of the legal impossibility,[53] rather than on the crime of attempt. In determining whether or not the defense should apply, it is critical to discover the point at which all of the acts required for the crime of attempt have been completed. This, of course, would have required the court to analyze the crime of attempt before it considered the applicability of the defense.

Closely related to the court's desire to criticize this trend of eliminating the defense of legal impossibility was its refusal to use any common law precedents in its analysis.[54] Although the court approached the legal impossibility issue in this manner to avoid much of the confusion inherent in the defense's common law development,[55] the effect was to cut the entire concept of attempt free from its

52. "Congress has not yet enacted a law that provides that intent plus act plus conduct constitutes the offense of attempt irrespective of legal impossibility." 482 F.2d at 190.

The trend toward eliminating the defense has found expression in the Model Penal Code. Model Penal Code § 5.01(1)(a) (Proposed Official Draft 1962). See note 55 infra. The trend also is reflected in recent state penal code revisions. E.g., Ill. Ann. Stat. ch. 38, § 8-4 (Smith-Hurd Supp. 1974); La. Rev. Stat. Ann. § 14:27(A) (Supp. 1974); N.Y. Penal Law § 110.10 (McKinney 1967).

53. In the recent case of United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y.), aff'd per curiam, 484 F.2d 1271 (2d Cir. 1973), the district court took a view contrary to that expressed in Berrigan. In response to the defendant's claim of a defense of legal impossibility, Judge Bryan said: "I hold that however this impossibility may be characterized, since the defendants' objective here was criminal, impossibility is no defense. This is in accord with the proposed revision of the federal criminal code . . . and with the Model Penal Code . . . ." Id. at 438 (citations omitted). The court of appeals affirmed and expressly endorsed the district court's reasoning by saying: "We see no purpose in adding to the scholarly discussion and survey of the authorities by Judge Bryan on this rather esoteric question." 484 F.2d at 1272.

54. 482 F.2d at 186. See text accompanying notes 46-48 supra.

55. The major source of confusion in the development of the legal impossibility defense has been distinguishing when a set of facts will constitute legal impossibility as opposed to mere factual impossibility. Legal impossibility is said to exist where the actor engages in conduct he believes to be criminal, but which, in fact, is not. With factual impossibility the actor also engages in conduct he believes to be criminal, but he is prevented from commission

common law background. Having rejected a common law approach, and without any statutory definition in federal law, the court lacked the analytical tools with which to undertake an analysis of criminal attempt.

The concept of criminal attempt is an abstract one which relies for substance on its common law development.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[56]

Contrary to the court's approach and in the absence of legislative guidance, "the interstices of federal criminal law" created by statutory terminology can only be filled by resort to common law precedents.

Wm. Douglas McDougall

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of the substantive offense by circumstances unknown to him—not by virtue of his conduct failing to form part of a criminal offense. The courts generally have not regarded factual impossibility as a defense to a charge of criminal attempt. People v. Lee Kong, 95 Cal. 666, 30 P. 800 (1892); State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902); Regina v. Ring, 17 Cox Crim. Cas. 491 (Cr. Cas. Res. 1892); Regina v. Brown, 16 Cox Crim. Cas. 715 (Cr. Cas. Res. 1889) (alternative holding). The Berrigan case bears witness as to the difficulty inherent in making this factual-legal distinction. If the court's reasoning in Berrigan is accepted, it can be seen that the appellants intended to commit a crime, and would have fulfilled that intention except that a lack of knowledge on the warden's part was a requisite circumstance of the crime. Without that lack of knowledge what the appellants did could not be criminal—legal impossibility.

An equally compelling argument can be made that the Berrigan case dealt with factual impossibility. The state of the warden's knowledge was a factual circumstance unknown and beyond the control of the appellants. It was the existence of that factual circumstance that made commission of the substantive offense impossible—factual impossibility.

The Model Penal Code's approach avoids the difficulty inherent in drawing this distinction by rejecting any type of "impossibility" as a defense and concentrating on the circumstances as the actor believed them to be. Model Penal Code § 5.01(1)(a), Comment (Tent. Draft No. 10, 1960).

The theoretical problems inherent in the concept of criminal attempt in general, and specifically in drawing the factual-legal distinction, are ones which have intrigued legal writers for many years. See generally Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale L.J. 53 (1930); Beale, Criminal Attempts, 16 Harv. L. Rev. 491 (1903); Elkind, Impossibility in Criminal Attempts: A Theorist's Headache, 54 Va. L. Rev. 20 (1968); Enker, Impossibility in Criminal Attempts—Legality and the Legal Process, 53 Minn. L. Rev. 665 (1969); Hall, Criminal Attempt—A Study of Foundations of Criminal Liability, 49 Yale L.J. 789 (1940); Keedy, Criminal Attempts at Common Law, 102 U. Pa. L. Rev. 464 (1954); Perkins, Criminal Attempt and Related Problems, 2 U.C.L.A.L. Rev. 319 (1955); Sayre, Criminal Attempts, 41 Harv. L. Rev. 821 (1928); Strahorn, The Effect of Impossibility on Criminal Attempts, 78 U. Pa. L. Rev. 962 (1930).

56. Morissette v. United States, 342 U.S. 246, 263 (1952).

Evidence—Child Abuse—Expert Medical Testimony Concerning "Battered Child Syndrome" Held Admissible.—Following the death of their four-year-old son from acute bilateral bronchial pneumonia, defendants were convicted of criminally negligent homicide[1] and endangering the welfare of a child.[2] Evidence introduced at trial indicated outrageous neglect and actual aggravation of the child's condition by the parents.[3] The court of appeals affirmed the convictions,[4] specifically upholding the admission into evidence of the defendants' prior conduct toward the child, and basing admissibility on the tendency of such evidence to negative the defense interposed that the child's injuries were caused by accidents.[5] In addition, the court held that expert medical testimony on the "battered child syndrome" is admissible in criminal prosecutions as circumstantial proof that the child's injuries were not accidental.[6] *People v. Henson,* 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973).

Child maltreatment is not a new phenomenon,[7] nor has it subsided with the technological maturing of society.[8] In this country, the problem of maltreatment has been confronted chiefly in the courts[9] and by privately-financed humanitar-

1. N.Y. Penal Law § 125.10 (McKinney 1967).

2. Endangering the welfare of a child is defined as "knowingly [acting] in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old...." Id. § 260.10(1) (McKinney Supp. 1973). Defendant Marlene Henson was also convicted of third-degree assault. Id. § 120.00 (McKinney 1967).

3. People v. Henson, 33 N.Y.2d 63, 66-67, 70-71, 304 N.E.2d 358, 359-61, 349 N.Y.S.2d 657, 659-60 (1973). The court found that the parents often beat the child and also tied him in bed on his back, thus keeping him from coughing up the mucus which had accumulated in his throat and mouth. Id. at 67, 70, 304 N.E.2d at 360-61, 349 N.Y.S.2d at 660, 662.

4. Id. at 74, 304 N.E.2d at 364, 349 N.Y.S.2d at 666.

5. Id. at 71-73, 304 N.E.2d at 362-63, 349 N.Y.S.2d at 663-64.

6. Id. at 73-74, 304 N.E.2d at 363-64, 349 N.Y.S.2d at 664-66.

7. See V. Fontana, Somewhere a Child is Crying 4-5 (1973) [hereinafter cited as Fontana]; Brown, Fox & Hubbard, Medical and Legal Aspects of the Battered Child Syndrome, 50 Chi.-Kent L. Rev. 45, 53 (1973) [hereinafter cited as Brown]; Thomas, Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives, 50 N.C.L. Rev. 293, 294-99 (1972).

8. In 1869, in New York City, over 1,000 children were abandoned in the streets. Fontana 7-10. Even today, glaring examples of child maltreatment focus public attention on the problem. See, e.g., N.Y. Post, Mar. 29, 1974, at 3, cols. 3-6. However, the reported incidents do not even hint at the scope of the problem. In House debate on a child abuse bill recently passed into law, Pub. L. No. 93-247 (Jan. 31, 1974), it was noted that for the year 1973, not including the month of December, there were over 13,000 reported cases of abuse or suspected abuse in New York City alone, and as a number of legislators put it, this was only the tip of the iceberg. Debate on S. 1191, 119 Cong. Rec. H 10,490 (daily ed. Dec. 3, 1973) (remarks of Rep. Brademas).

9. In New York, virtually all removals of children from their parents are accomplished through the courts. See N.Y. Family Ct. Act § 1011 (McKinney Supp. 1973) (state acts "through its family court" in abuse cases). Although there is a provision in the Family

ian groups,[10] with government only recently entering the picture.[11] In spite of their efforts, these agencies, particularly the courts, have been hampered by a number of factors,[12] including a difficulty in proving actual abuse.

The diagnosis of the "battered child syndrome" admitted into evidence in

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Court Act allowing for temporary emergency removal of a child from a home by an agency other than the court, id. § 1024, even in these cases the court makes the final determination as to the continuance of such removal. See id. §§ 1024(b), 1026-27.

10. The earliest efforts of such groups perhaps are exemplified best by the New York Foundling Hospital, created in 1869 to salvage what it could from the results of child mistreatment. By the late 19th and early 20th centuries, groups such as the Society for the Prevention of Cruelty to Children began to appear, whose purpose was to seek out and protect maltreated children. See Thomas, Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives, 50 N.C.L. Rev. 293, 310-13 (1972), concerning such organizations and their differing philosophies on how to handle the problem.

11. Commentators generally divide child abuse legislation into four categories—reporting laws, protective agencies, juvenile court acts, and criminal laws. See generally Comment, An Appraisal of New York's Statutory Response to the Problem of Child Abuse, 7 Colum. J. Law & Social Prob. 51, 59-73 (1971); Comment, The Battered Child—Louisiana's Response to the Cry, 17 Loyola L. Rev. 372, 379-90 (1971); Note, The Battered Child: Logic in Search of Law, 8 San Diego L. Rev. 364, 376-92 (1971).

In New York, the reporting law, recently amended, is found in Title 6 of the Social Services Law. N.Y. Soc. Serv. Law §§ 411-28 (McKinney Supp. 1973). New York also has provided legislation for a central recording registry. Id. § 422. Thus a parent can no longer avoid building a history of child abuse simply by taking the child to different hospitals each time he is injured, one of the weaknesses of the prior reporting laws.

Protective agencies of course are vital in finding, investigating, and bringing to the courts their reports of abuse. Recognizing this, the state legislature has acted to establish child protective services in local departments of social services to effectuate the reporting laws. Id. § 423. These departments have even been granted the power to take a child into protective custody without court approval in an emergency. Id. § 417. See also N.Y. Family Ct. Act § 1024 (McKinney Supp. 1973).

In New York, the juvenile court act provision is the Family Court Act. The Family Court has exclusive and original jurisdiction "over substantially all aspects of family life, except actions for separation, annulment, or divorce." 8 N.Y. Judicial Conference Rep. 69 (1963); see N.Y. Family Ct. Act § 115 (McKinney Supp. 1973). The Act was amended in 1970, creating a new part of the court to deal with all abuse-related cases (N.Y. Family Ct. Act § 117(a) (McKinney Supp. 1973)) and establishing new procedures for the protection of children. Id. art. 10; see Comment, An Appraisal of New York's Statutory Response to the Problem of Child Abuse, 7 Colum. J. Law & Social Prob. 51, 59-73 (1971). The Act provides courts with the remedies and jurisdiction to be an effective force in combating child abuse, and it is through this system that perhaps the most effective deterrent effects can be achieved. See note 55 infra.

On the federal level, the most significant action is the recently passed Child Abuse Prevention and Treatment Act, which establishes an office under HEW auspices to act more or less as an information clearinghouse for private and state pilot programs dealing with child abuse. Pub. L. No. 93-247 (Jan. 31, 1974).

12. Much difficulty has been experienced with coordinating the agencies involved in child protective proceedings. See note 51 infra.

The judiciary has shown a reluctance to interfere with the sanctity of the family and an inherent bias against protecting the rights of the child over those of his parents. Courts tend

Henson was established only recently.[13] Dr. John Caffey[14] first reported in 1946 on the frequency of subdural hematoma[15] in infants combined with multiple fractures of the long bones.[16] Dr. Caffey and his colleagues did not attempt to discover the source of these injuries, which they apparently assumed to be traumatic[17] in origin, but rather concentrated on the physical condition itself.[18] The first interest in *how* these injuries came about was shown in 1953, when Dr. Frederic N. Silverman[19] confirmed that these fractures were due to trauma, citing parental carelessness as a possible explanation of the injuries.[20] This cautious explanation of the injuries was replaced in an article by Dr. Paul V. Woolley, Jr.[21] two years later, which denoted willful parental abuse as the cause of the injuries.[22]

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to approve removal of a child from home "only in grave and urgent circumstances" (Matter of L., 37 App. Div. 2d 629, 630, 325 N.Y.S.2d 265, 266 (2d Dep't 1971)), viewing the parents' right to custody of their children as "cardinal" (Matter of Vulon, 56 Misc. 2d 19, 20, 288 N.Y.S.2d 203, 205 (Fam. Ct. 1968)).

While courts recognize a limit to the parental privilege of discipline (see Johnson v. State, 21 Tenn. 283 (1837)), protecting the child from abuse as opposed to discipline has been quite difficult, particularly since children formerly could not sue their parents in tort. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905); see 25 Ark. L. Rev. 368 (1971); 38 Mo. L. Rev. 699 (1973). In New York, the parental immunity doctrine was rejected in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

Another problem is the inherent difficulty of proving abuse. See note 35 infra. While courts have expressed a desire to protect the welfare of the child (see, e.g., Matter of Edwards, 70 Misc. 2d 858, 859-60, 335 N.Y.S. 2d 575, 578-79 (Fam. Ct. 1972); Matter of T., 64 Misc. 2d 28, 34, 314 N.Y.S.2d 480, 486 (Fam. Ct. 1970)), they frequently have given more weight to other factors such as those discussed above.

13. For an excellent discussion of the history of the diagnosis, in much more detail, see McCoid, The Battered Child and Other Assaults Upon the Family: Part One, 50 Minn. L. Rev. 1, 3-19 (1965) [hereinafter cited as McCoid].

14. Dr. Caffey is a distinguished specialist in the field of pediatric radiology, and former Professor of Clinical Pediatrics at the College of Physicians and Surgeons, Columbia University. McCoid 4.

15. Subdural hematoma is a collection of blood beneath the dura matter, the outermost protective covering of the brain. Brown, supra note 7, at 45 n.3.

16. Caffey, Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma, 56 Am. J. Roentgenology 163 (1946); see McCoid 4.

17. Traumatic is defined as "relating to an injury or wound caused by infliction of force such as a blow or fall." P. Palew & I. Halpern, The Attorney's Guide to Medical Terms 151 (1937).

18. McCoid 4.

19. Dr. Silverman is full professor and head of the department of pediatric radiology at the University of Cincinnati Medical School. Brown 46 n.4.

20. Silverman, The Roentgen Manifestations of Unrecognized Skeletal Trauma in Infants, 69 Am. J. Roentgenology 413 (1953). This explanation is perhaps indicative of most people's disbelief that any parent would purposely beat his child.

21. Dr. Woolley is Pediatrician-in-Chief, Children's Hospital of Michigan, in Detroit. Brown 46 n.6.

22. Woolley & Evans, Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin, 158 J.A.M.A. 539 (1955). Dr. Vincent J. Fontana feels this combination of

By 1962, many radiologists had recognized an additional phenomenon in their X-rays: the existence of a number of the traumas first noted by Dr. Caffey in various stages of repair.[23] Dr. C. Henry Kempe[24] sought to explain these recurrent phenomena. The result was a report in which Dr. Kempe first coined the phrase "battered child syndrome" and proffered the diagnosis.[25] This report was the most comprehensive analysis of the child abuse problem of its time,[26] and alerted the medical community to the fact that parental child abuse was much more common than had been thought.[27] Since the Kempe report, there has been a sharp increase in reported child abuse cases and public concern over the problem.[28]

Apparently the first jurisdiction officially to admit the diagnosis into evidence was California. In *People v. Jackson*,[29] a criminal prosecution for child beating, the appellate court brushed aside the contention that the diagnosis was beyond the scope of legitimate expert testimony:

> An expert medical witness may give his opinion as to the means used to inflict a particular injury, based on his deduction from the appearance of the injury itself. A medical diagnosis based on probability—as is the case with the "battered child syndrome" diagnosis—is admissible; the lack of scientific certainty does not deprive the medical opinion of its evidentiary value.[30]

While using a legal pretext to explain its holding,[31] the effect of the decision was to give the prosecutor an effective weapon to combat child abuse.[32]

In *Henson*, New York adopted the rule of admissibility established in *Jackson*.[33] By admitting the diagnosis, the jury is supplied with an explanation of

injuries is highly suspicious, "a sinister combination of injuries and scarcely one likely to have resulted from accident." Fontana, supra note 7, at 14.

23. Fontana 14.

24. Dr. Kempe is a pediatrician in Denver, Colorado, and has been a pioneer in research and legislation concerning the battered child. Fontana 14-15.

25. Kempe, Silverman, Steele, Droegemueller & Silver, The Battered-Child Syndrome, 181 J.A.M.A. 17 (1962). For an excellent discussion of this article see McCoid 9-12.

26. McCoid 9.

27. Dr. Fontana termed the article "an eye-opener." Fontana 20. See Comment, The Battered Child—Louisiana's Response to the Cry, 17 Loyola L. Rev. 372, 374 (1971).

28. For a view of some of the recent legislation on child abuse, focusing on New York State, see note 11 supra.

29. 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (4th Dist. 1971).

30. Id. at 507, 95 Cal. Rptr. at 921 (citations omitted).

31. The objection to the admission of the evidence had not been raised at trial, and thus the court did not have to pass judgment on the point. However, the court's discussion was prefaced in terms of anticipating a collateral attack of inadequate counsel on appeal. Id. at 505, 95 Cal. Rptr. at 920.

32. Following Jackson, the next jurisdiction to admit the diagnosis into evidence was Minnesota. State v. Loss, 295 Minn. 271, 279, 204 N.W.2d 404, 408-09 (1973). The court there admitted the diagnosis in a similar manner, since counsel for the defendant did not object to its admission. However, the court did not discuss the theory of admission in depth, but rather approved of it in an off-handed manner.

33. 33 N.Y.2d at 73-74, 304 N.E.2d at 363-64, 349 N.Y.S.2d at 664-66.

the cause of the child's injury, with the added weight of the medical profession's opinion, in opposition to the parents' explanation of the injury. Formerly, the doctor's testimony as to the injuries was confined to description of the injuries themselves, and this was treated as circumstantial evidence to be used against the parents.[34] The difficulty with the latter approach is that often it can be interpreted as supporting the parents' defense of "accident," in which case it comes down to a battle of their word against the opinion of one doctor.[35] Parents' stories are most convincing, if only because many people, including doctors, do not believe that parents would actually beat their children.[36]

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34. See, e.g., Commonwealth v. Paquette, 451 Pa. 250, 301 A.2d 837 (1973). For a discussion of the various types of circumstantial evidence available in child abuse cases see Brown, supra note 7, at 70-75. In the New York Family Court, the principle of res ipsa loquitur is used to create an inference of maltreatment which the parents must overcome. N.Y. Family Ct. Act § 1046(a)(ii) (McKinney Supp. 1973). However the expert testimony involved does not include a finding of "battered child syndrome" by the doctor. As one Family Court judge noted: "The medical testimony . . . was usually that the child's fracture or other injury was clearly due to a blow, as distinguished from a disease. However, on the crucial issue of whether the blow was received in the accidental fall alleged by the parent, the strongest testimony by any physician was that it was 'unlikely' that the injury occurred in that manner...." Dembitz, Child Abuse and the Law—Fact and Fiction, 24 Record of N.Y.C.B.A. 613, 617 (1969) (emphasis omitted) [hereinafter cited as Dembitz]. This was because it was the judge who determined whether the "battered child syndrome" existed. See, e.g., Matter of Santos, 71 Misc. 2d 789, 336 N.Y.S.2d 817 (Fam. Ct. 1972); Matter of Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250 (Fam. Ct. 1966); Matter of S., 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Fam. Ct. 1965). It is interesting to note that the court in Henson, and at least two commentators apparently believed that the "battered child syndrome" diagnosis was already being used in the Family Court. 33 N.Y.2d at 73, 304 N.E.2d at 363, 349 N.Y.S.2d at 664-65; E. Marks & L. Paperno, Criminal Law in New York under the Revised Penal Law § 600, at 672 (2d ed. 1967). Apparently both sources were referring to the actual appearance of the child to the judge, rather than the medical diagnosis. Marks and Paperno noted that "Family Court judges and social workers have come to recognize a deplorable situation that comes so repeatedly to their attention . . . that it has been denominated the 'battered child syndrome.'" Id. Thus, the "battered child syndrome" in the Family Court was a finding by the judge based on what he saw by viewing the child; the syndrome in Henson allows of a finding by a doctor based on his professional expertise in the field of medicine, often involving injuries not discernible by looking at the child. This is a much more far-reaching and effective diagnosis in protecting the maltreated child.

35. Direct evidence is almost impossible to get, due to the private nature of child abuse. Parents generally lie to protect each other, and children usually refuse to testify against their parents, primarily from fear of being removed from a parental figure. See Dembitz 618-19; Comment, An Appraisal of New York's Statutory Response to the Problem of Child Abuse, 7 Colum. J. Law & Social Prob. 51, 56-58 (1971). While some techniques have been used to try to get around these problems, such as having the child testify in chambers, or admitting hearsay evidence of the child's prior statements (Dembitz 618-19), they generally have proven unsuccessful. Admission of the "battered child syndrome" diagnosis is a far stronger means of proving parents' guilt circumstantially than these other techniques.

36. "Often the [parents'] attitude of absolute innocence was so convincing that we [the doctors examining the child] nearly were convinced until we saw the X-rays. It was appar-

The effect of this evidence on a jury undoubtedly will be stronger in proving guilt beyond a reasonable doubt than was prior permissible medical testimony. While the evidence is still termed circumstantial,[37] it now carries the weight of an entire profession, as opposed to the opinion of one doctor, which could be contradicted by another doctor. Moreover, if this rule of evidence is adopted by the Family Court,[38] it could effectively close the issue of whether or not the child is in fact a battered child,[39] thereby expediting the proceedings. Any time saved in proceedings is important, due to the child's sense of time and need for continuity of relationships.[40] Often, a delay of more than a month can result in psychological harm to a young child,[41] and in a majority of Family Court cases where the temporary removal provisions of the Family Court Act were utilized, the removals lasted more than three months due to the length of the proceedings.[42] Thus, this evidentiary device could be quite effective for the protection of the child, as well as for the punishment of the parent.

However, as much as the admission of the diagnosis into evidence is a significant step in child protection, it could also be prejudicial to the rights of the parents. For example, the emotional appeal of such an evidentiary presentation, particularly in the fevered pitch of a criminal prosecution, could be particularly strong—perhaps to the point of unduly influencing a jury. The court in *Henson*, therefore, held the diagnosis relevant but admissible only in the trial court's discretion.[43]

A second danger involved in the admission of the diagnosis is the one fore-

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ent to us that many, many physicians must have been fooled time and time again." Fontana, supra note 7, at 27 (emphasis omitted).

37. 33 N.Y.2d at 73, 304 N.E.2d at 664, 349 N.Y.S.2d at 363. This, of course, recognizes that the evidence concerns how the child's injuries came about, not who inflicted them.

38. Since the criminal rules of evidence are stricter than those of the civil courts and evidence of the "battered child syndrome" is now admissible in criminal prosecutions in New York, this evidence should also be admissible in civil proceedings such as those in the Family Court, even though that court has its own procedural rules.

39. Admission of this testimony would virtually preclude the issue of the nature of the injuries, enabling judges to make decisions supported by indisputable medical evidence in a much shorter amount of time than before.

40. See J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 31-49 (1973).

41. Id. at 40. For most children under five, an absence of a real parental figure for a period exceeding two months is "beyond comprehension," and the same holds true for a young school-aged child after six months. Id. at 41.

42. For the 1972-73 period in New York, temporary removals of children from their homes in child abuse proceedings lasted more than three months in 54 percent of the cases, and more than six months in 27 percent of such removals. 19 N.Y. Judicial Conference Rep. 327 (1974). Unfortunately, these statistics were not subdivided into age groups.

43. 33 N.Y.2d at 74, 304 N.E.2d at 363-64, 349 N.Y.S.2d at 665. This is essentially the same approach taken in Jackson. 18 Cal. App. 3d at 507, 95 Cal. Rptr. at 921.

As with all relevant evidence, the danger of emotional appeal to the jury must be weighed before its admission into evidence. "[W]e must not fall into the error of supposing that relevancy, logical connection, real or supposed, is the only test of admissibility .... Some things are rejected as being of too slight a significance, or as having too conjectural and remote a

seen in the analogous case of *People v. Crooks*,[44] where a prostitute was convicted of robbing one of her clients largely on the testimony of a police officer concerning a modus operandi of local prostitutes known as "the creeper."[45] The appellate court, in affirming the conviction, took note of the danger involved in admitting this kind of testimony:

> [I]f [the holding in this case] is interpreted too broadly, the use of expert testimony would convict defendants not of what they have done, but of what others are doing.[46]

Thus, if the "battered child syndrome" diagnosis were used indiscriminately, a parent might be convicted for a beating administered by another person,[47] or for injuries resulting from accident, but which looked like child-battering. Foreseeing the first problem, the *Henson* court in dictum indicated it would require that the expert testimony be "coupled with additional proof—for instance, that the injuries occurred while the child was in the sole custody of the parents . . . ."[48] Concerning the latter problem, where accidental injury might lead to prosecution, the *Henson* court apparently had enough faith in the diagnosis to meet its standards of certainty for medical opinions on causation.[49] Judging from one doctor's view on the reliability of the diagnosis,[50] the court's faith seems well-founded.

Generally, then, *Henson* represents an evidentiary holding that doubtlessly

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connection; others, as being dangerous, in their effect on the jury, and likely to be misused or overestimated by that body . . . ." J. Thayer, A Preliminary Treatise on Evidence at the Common Law 266 (1898).

44. 250 Cal. App. 2d 788, 59 Cal. Rptr. 39 (2d Dist. 1967).

45. This technique involved two prostitutes working in concert, one soliciting a client and occupying him in one room of an apartment, while the other rifled his clothes in the other room.

46. 250 Cal. App. 2d at 792, 59 Cal. Rptr. at 41. The court in Crooks had memories of the controversial Sacco-Vanzetti case, and wanted to protect against the overbroad use of circumstantial evidence. Id. n.1, 59 Cal. Rptr. at 41 n.1.

47. When the recently enacted Child Abuse Prevention and Treament Act (see note 11 supra) was passed by the House of Representatives, one of the objections to it concerned its limitation to study of abuse by persons responsible for the child's welfare, rather than including outsiders to the family. It was pointed out that approximately 25 percent of abuse cases involve a stranger to the child. 119 Cong. Rec. H 10,493 (daily ed. Dec. 3, 1973) (remarks of Rep. Heckler). However, apparently the supporters of the bill felt that "other authority" could better handle these problems; in addition the legislators did not want to become entangled in state and federal criminal law problems. Id. (remarks of Rep. Brademas).

48. 33 N.Y.2d at 74, 304 N.E.2d at 364, 349 N.Y.S.2d at 665. There is a shortcoming to this requirement in that it does not take into account the possibility of a relative or sibling having inflicted the beating while the child was in parental custody. See, e.g., Adelson, The Battering Child, 222 J.A.M.A. 159 (1972); Brown, supra note 7, at 50. This determination, however, is best left to the jury's discretion.

49. See New York Law on the Admissibility of Medical Opinions on Causal and Prognostic Relationships Between Accident and Injury: The Case Law and a Proposal for Reform, 8 Trial Law. Q. 32 (1971). See also Martin, The Uncertain Rule of Certainty: An Analysis and Proposal for a Federal Evidence Rule, 20 Wayne L. Rev. 78 (1974).

50. Dr. Fontana termed the package of symptoms involved in the diagnosis "a dead giveaway to a physician, if not to the law." Fontana, supra note 7, at 26.

will ease problems in the proof of child abuse. Perhaps more importantly, it represents a joining of the legal and medical professions in an effort to more effectively protect the maltreated child. There is a great need for coordination between fields in this area,[51] and this case indicates the court's cognizance of this fact. Finally, it seems to continue a trend among state courts of officially sanctioning admission of the "battered child syndrome" diagnosis.[52] Nevertheless, the ameliorative effect of this holding is limited due to, *inter alia*, age limitations in the diagnosis. As the court in *Henson* noted, the diagnosis is usually applied "in connection with very young children, around three or four years old . . . ."[53] Additionally, many children are maltreated in ways that do not show up on X-rays.[54] A third limitation, concerning the deterrent effect of this holding, is that it probably will do very little by itself to solve the problem of abuse.[55] Nonetheless, *Henson* represents a strong step in the right direction. A further realization by the courts of their importance in the child protection process, and a continued and expanded policy of coordination with other groups involved in the process could lead to significant results in the confrontation of the problem of child maltreatment.

Russell C. Prince

51. Perhaps the need for this cooperation is best illustrated by Dr. Fontana's example of the case of Laura Butera. There, a judicial proceeding was delayed for six months because of extended continuances granted by the court, failure of a social worker who petitioned the court to appear at one hearing, failure of the parents to appear at other hearings, and failure of warrant officers to locate the parents and bring them before the court when a warrant was finally issued by the court. By the time the parents were brought into court they had killed the child. Fontana 149-56. Dr. Fontana refused to blame any one group, however, noting that "[a]s to the larger question of how we had managed to let another child slip through our fingers, it was once again a matter of the cumbersome system, of delays and information gaps between the various pieces of people-operated machinery involved with child protection." Id. at 156. While corrective steps were taken following this case in an attempt to alleviate this problem, apparently it still exists today. See id. at 193-209.

52. See notes 29-32 supra and accompanying text.

53. 33 N.Y.2d at 74, 304 N.E.2d at 364, 349 N.Y.S.2d at 665; see People v. Jackson, 18 Cal. App. 3d 504, 506, 95 Cal. Rptr. 919, 921 (4th Dist. 1971); State v. Loss, 295 Minn. 271, 278, 204 N.W.2d 404, 408 (1973).

54. Some parents are experts at hitting the child in places that don't show the effects of the beating and where there are no bones to break; others will never take their child to a doctor who could recognize the symptoms; and yet others are adept at making the beatings so similar to accidental injuries that the diagnosis cannot be made with any degree of certainty.

55. Most of the commentators in the field are in general agreement that criminal sanctions do not act as a deterrent, and in fact do more harm than good in abuse cases. Among the reasons cited are interference with the family's life, lack of available social services after a conviction, reduction of family finances due to fines, renewal of abuse with even more intensity once the parent is free, and the reluctance of doctors to get involved if they know a criminal prosecution will follow. See generally Dembitz 623-24; Comment, An Appraisal of New York's Statutory Response to the Problem of Child Abuse, 7 Colum. J. Law & Social Prob. 51, 62-63 (1971); Comment, The Battered Child—Louisiana's Response to the Cry, 17 Loyola L. Rev. 372, 382-83 (1971); Note, The Battered Child: Logic in Search of Law,

Products Liability—"Unreasonable Danger" Eliminated from the Theory of Strict Liability—The Restatement Restated.—According to section 402A of the Restatement (Second) of Torts,[1] in order for a plaintiff to make out a prima facie case in strict liability for product-related injuries, he must prove that the product was in a "defective condition unreasonably dangerous to the user or consumer"[2] and that this defective condition caused the injury.[3] Two recent cases have modified the Restatement formulation of strict liability by eliminating the

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8 San Diego L. Rev. 364, 382-83 (1971). In addition to these problems is the liberal attitude courts adopt in allowing the parents a chance to be reunited with their child. The celebrated Baby Lenore case in New York City is a good example of this. Dr. Fontana noted one case in which a mother was convicted and spent time in jail for beating her daughter, was released and given visitation privileges with the child, and finally kidnapped her. Fontana 1-3. This factor takes on importance in light of the penalties New York has for abusing a child. In addition to the homicide and manslaughter provisions, always applicable if the child dies, there are the various assault provisions (N.Y. Penal Law §§ 120.00-.10 (McKinney 1967)) and a section entitled "Endangering the welfare of a child." Id. § 260.10 (McKinney Supp. 1973). The maximum penalty for the latter is one year's imprisonment, a $1,000 fine, or both; the penalties for assault can range up to 15 years' imprisonment, or be as slight as those for endangering the welfare of a child. In Henson, where the acts of assault involved were somewhat typical of a battering situation, the charge was third degree assault, carrying with it the minimum penalty for assault crimes. These penalties are hardly a strong deterrent, and also raise the possibility of the parent's being released from jail within a short period in a nonfatal case of abuse. Stiffer sanctions are a possibility, but they would not alleviate all the problems inherent in criminal penalties, as noted above. The conclusion seems to be that while criminal penalties are necessary in cases such as Henson—if only to quell public outrage over the crime—they are ineffective as a deterrent, and possibly can cause more harm to the child than good.

A more effective approach might be through the Family Court, where the court's power of removal of the child from the home combines a strong penalty to the parent with a potentially beneficial result for the child. However, the courts also must take into account a number of problems involved in the placement of a child. For an excellent treatment of the dangers to a child's psychological development that can arise during placement decisions, including suggested guidelines and a model placement statute, see generally J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

1. This section of the Restatement is entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," and its theory is strict liability in tort. Upon publication in its present form in 1965, it represented the law of only a few states, but it now has been accepted as an accurate statement of the law by the courts of a large majority of American jurisdictions. See generally 2 L. Frumer & M. Friedman, Products Liability §§ 16-21 (1973); W. Prosser, Torts 658 (4th ed. 1971) [hereinafter cited as Prosser]. Many of these states also employ the definitions of § 402A, including the definition of "unreasonable danger." R. Hursh, American Law of Products Liability § 5A:8 (Supp. 1972); see Annot., 13 A.L.R.3d 1057, 1080-81 (1967).

2. "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer [of the product] . . . ." Restatement (Second) of Torts § 402A(1) (1965).

3. Id.

element of "unreasonably dangerous." *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), and *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (Super. Ct. L. Div. 1973).

In *Cronin*, defendant sold a delivery van to plaintiff's employer, a bakery. Defendant designed a series of aluminum bread racks, which were later installed within the body of the van. A metal safety hasp also was installed to prevent the trays from falling forward upon the driver in the event of a sudden stop of the van. Nine years later, plaintiff driver came to a sudden stop in order to avoid a collision. The safety hasp broke and the bread racks rushed forward, seriously injuring plaintiff.[4] The trial court refused to instruct the jury on the issue of whether the hasp posed an "unreasonable danger";[5] the facts that the hasp was in a "defective condition" and that the defect caused the injury were sufficient to impose strict liability on defendant.[6] The Supreme Court of California affirmed,[7] and eliminated the "unreasonable danger" element from the strict liability theory[8] because that element "represents a step backward in the area pioneered by this court."[9]

Glass v. Ford Motor Co.[10] followed *Cronin*. Since the *Glass* court omitted to relate the facts and prior history of the case, it is difficult to assess *Glass* in its own right. Nevertheless, it is clear that *Glass* fully approved *Cronin*'s elimination of "unreasonable danger",[11] and, to this extent, it deserves the same critical attention that *Cronin* deserves.

I. The Role of "Unreasonable Danger" in the Theory of Strict Products Liability

Although the plaintiff in strict liability need not specify individual acts of negligence on the part of the manufacturer as the cause of his injury,[12] this is not to say that the plaintiff need prove nothing at all. Instead of "impugn[ing] the maker's conduct," the plaintiff in strict liability must "impugn" the product itself.[13] Recovery in strict products liability requires proof of *defect*.[14]

Although courts and commentators have not been able to define "defect"

4. Cronin v. J.B.E. Olson Corp., 97 Cal. Rptr. 459, 460-61 (3d Dist. 1971).

5. Id. at 464.

6. Id. at 466.

7. 8 Cal. 3d at 135, 501 P.2d at 1163, 104 Cal. Rptr. at 443.

8. The lower court distinguished individual products defectively manufactured, and lines of products defective in their general design. It was only in regard to the former type that the lower court eliminated "unreasonable danger." 97 Cal. Rptr. at 465-66. However, the Supreme Court denied the distinction between defects of manufacture and defects of design, and prohibited "unreasonable danger" altogether. 8 Cal. 3d at 134-35, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43.

9. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

10. 123 N.J. Super. 599, 304 A.2d 562 (Super. Ct. L. Div. 1973).

11. Id. at 602-03, 304 A.2d at 564-65.

12. See Restatement (Second) of Torts § 402A, comment a (1965).

13. Keeton, Product Liability and the Automobile, 9 Forum 1 (1973).

14. Restatement (Second) of Torts § 402A, comment g (1965).

precisely,[15] "defect" has proven to be relatively unproblematic in the "typical" products liability case.[16] When plaintiff's injury is occasioned by an impropriety in manufacture,[17] by a foreign substance in the product,[18] or by a physical decay of the product,[19] proof of defect becomes a matter of showing that this product was unlike others of its type[20] in a way that made it unsafe.[21] However, when the injury is occasioned by the *design* of the product, proof of defect becomes more difficult. The obvious problem in proving defective design is that, insofar as all products in that line manifest the same design, "defect" cannot be defined as a "deviation from the norm."[22] The condition in the product which caused the injury *is* the norm. At least in the context of design-related injuries, "defect" demands special attention.

It is well known that the design or constitution of any product may cause injury.[23] Whisky may cause cirrhosis; the cholesterol content of butter is suspected of inducing heart attacks;[24] ordinary shoes may become slippery in the rain;[25] knives and axes entail the danger of serious cuts.[26] However, the mere fact that these designs are capable of inflicting injury does not render them defective.[27] As Justice Traynor pointed out, "[d]efect becomes a fiction . . . if it means nothing more than a condition causing physical injury."[28] Although it has not been defined conclusively,[29] "defect" may be said to connote, at least minimally, the presence of something *wrongful* in the product.[30] The dangers which inhere in the above designs are *generic*[31] to the very qualities which make those products useful and, as such, are legally "rightful." A knife is not defective be-

15. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 367 (1965) [hereinafter cited as Traynor].

16. Rheingold, What Are the Consumer's "Reasonable Expectations"?, 22 Bus. Law. 589, 590 (1967) [hereinafter cited as Rheingold]; see Annot., 54 A.L.R.3d 352, 356-57 (1973).

17. Rheingold 590.

18. Restatement (Second) of Torts § 402A, comment h (1965).

19. Id.

20. Traynor 367, 370; Wade, Strict Tort Liability Of Manufacturers, 19 Sw. L.J. 5, 14 (1965) [hereinafter cited as Wade].

21. Restatement (Second) of Torts § 402A, comment h (1965).

22. The phrase is Justice Traynor's. Traynor 367. See Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 32 (1973).

23. See Rheingold 592.

24. Restatement (Second) of Torts § 402A, comment i (1965).

25. E.g., Fanning v. LeMay, 38 Ill. 2d 209, 230 N.E.2d 182 (1967).

26. Prosser 659.

27. See Restatement (Second) of Torts § 402A, comment i (1965); Prosser 659; Rheingold 594; Traynor 372, 373.

28. Traynor 372.

29. Id. 367.

30. Prosser 659; Lascher, Strict Liability in Tort for Defective Products: The Road to and Past Vandermark, 38 S. Cal. L. Rev. 30, 47 (1965); see Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

31. Rheingold 594; see Prosser 660.

cause it is capable of cutting; without the capacity to cut, it would not be a knife.

To pronounce these product-designs defective merely because they are capable of injury would subvert not only the defect requirement, but the strict liability theory itself. The effect of such a pronouncement would be to shift the ground for imposing liability from the fact that the product was defective to the fact that the product was a perfectly functioning one which unfortunately happened to function in a manner harmful to plaintiff. In other words, liability would be imposed not because the injury was traced back to something "faulty"[32] in the product, but simply because an injury occurred and by coincidence happened to occur in connection with the use of defendant's product.[33] Liability which is grounded exclusively on the occurrence of injury is not strict liability; it is absolute liability.[34]

It is the "unreasonable danger" element that assures the appropriate limitation to the concept of defect, and hence the appropriate limitation to the manufacturer's liability.[35] The mere fact that a product is dangerous does not qualify it as defective; in order to be defective, the product must be *unreasonably* dangerous.[36] Although the distinction between danger and unreasonable danger is susceptible of various formulations,[37] the Restatement draws the distinction in terms of a "reasonable consumer expectation" test.[38] A product is unreasonably dangerous, according to this test, when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[39] What makes a product unreasonably dangerous is that its injurious potential is not known to the ordinary consumer, and therefore cannot reasonably be expected or guarded against.[40] It is not a reasonable expectation of the

32. Prosser 659; Lascher, Strict Liability in Tort for Defective Products: The Road to and Past Vandermark, 38 S. Cal. L. Rev. 30, 47 (1965).

33. See Prosser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9, 23 (1966).

34. Cf. Prosser 28-29.

35. See Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 32 (1973); Prosser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9, 23 (1966).

36. Prosser 659.

37. See Rheingold 591-92.

38. Restatement (Second) of Torts § 402A, comment i (1965).

39. Id. A majority of those courts that embrace the principle of unreasonable danger employ the Restatement definition. R. Hursh, American Law of Products Liability § 5A:8 (Supp. 1972); Annot., 13 A.L.R.3d 1057, 1080-81 (1967). E.g., Greeno v. Clark Equip. Co., 237 F. Supp. 427, 428 (N.D. Ind. 1965); McGrath v. White Motor Corp., 258 Ore. 583, 596, 484 P.2d 838, 844 (1971); Cornelius v. Bay Motors, Inc., 258 Ore. 564, 572-73, 484 P.2d 299, 302-03 (1971); Ford Motor Co. v. Lonon, 217 Tenn. 400, 419-21, 398 S.W.2d 240, 248-49 (1966); see Suvada v. White Motor Co., 32 Ill. 2d 612, 621, 210 N.E.2d 182, 187 (1965); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 75-76, 215 N.E.2d 465, 468 (1966).

40. Restatement (Second) of Torts § 402A, comment i (1965). Justice Traynor has characterized the essence of danger to be the "surprise" factor. Traynor 370.

ordinary consumer to find whisky which contains fusel oil, or impure butter which contains poisonous fish oil.[41] These products are not merely dangerous, but are unreasonably dangerous. However, if the injurious potential is so well known as to be expected, and guarded against, by the ordinary consumer, then the product is not *unreasonably* dangerous. It does not matter how harmful, in fact, the product was to this particular consumer, if his expectation of safety was not founded in reason. He should have been able to protect himself.[42]

The question generated by *Cronin* and *Glass* is whether the excising of "unreasonable danger" creates absolute liability as to design-related injuries. The *Cronin* court asserted that absolute liability will not result, because there remain other elements which must be proven for the plaintiff to recover.[43] It is principally the element of "defect" which, it is said, will prevent the imposition of absolute liability.[44] However, neither court indicated how "defect" could be used to accomplish this.[45] Rather than resolving the question of absolute liability, the courts have transferred the issue to a different level of discourse: what is the meaning of defect in order that it could insulate the manufacturer from absolute liability?

41. Restatement (Second) of Torts § 402A, comment i (1965).

42. It is appropriate to mention here the landmark case of Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), which established in California the theory of strict liability in tort for product-related injuries. In this opinion, Justice Traynor stated that the purpose of strict liability "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. Although this language may suggest that Greenman contemplated a limitation upon strict liability kindred to the "unreasonable danger" limitation, it is also possible that the court was referring to the fact that consumers were often "powerless" to negotiate commercial warranties due to industry-wide disclaimer clauses. See Seely v. White Motor Co., 63 Cal. 2d 9, 27, 403 P.2d 145, 157, 45 Cal. Rptr. 17, 29 (1965) (concurring opinion).

Greenman was the first case to apply the then inchoate theory of § 402A, and it remains a primary source for the interpretation of that section of the Restatement. Prosser 657; see Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 129-32, 501 P.2d 1153, 1159-61, 104 Cal. Rptr. 433, 439-41 (1972); Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713, 720 (1970). It is significant, therefore, whether Greenman constitutes support for the element of unreasonable danger. The Cronin court asserted that Greenman espoused a theory of strict liability without "unreasonable danger." 8 Cal. 3d at 129-33, 501 P.2d at 1159-61, 104 Cal. Rptr. at 439-42. However, it is also said that "[t]he Greenman opinion does not make clear what the situation will be if it is shown only that the defect or danger should have been known." 2 L. Frumer & M. Friedman, Products Liability § 16A[5][f], at 3-353 (1973). Greenman itself said that "[t]o establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using [the product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made [the product] unsafe for its intended use." 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

43. 8 Cal. 3d at 133-34, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

44. Id.

45. See Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 32 (1973).

Whether or not the *Cronin-Glass* theory constitutes an endorsement of the absolute liability standard is too significant an issue to be deferred until such time as the courts arrive at a viable definition of "defect."[46] The issue of absolute liability demands a present resolution. This Case Note attempts to demonstrate that the assumptions upon which the *Cronin-Glass* theory is based manifest a predisposition in favor of absolute liability. Both courts rest their case against "unreasonable danger" on the contention that it "rings of" the negligence theory of products liability.[47] There are certain principles of the negligence theory which are adverse to strict liability,[48] and if the "unreasonable danger" element imported any of these, its prohibition would be justified. However, the words "unreasonable danger" do not evoke any of the adverse aspects of negligence.[49] The only way in which "unreasonable danger" is reminiscent of the negligence principle is that both envision certain limitations upon liability.[50] To prohibit "unreasonable danger" because it bears *this* kinship with negligence is to presuppose the desirability of a liability without limitation.

II. THE *Cronin-Glass* THEORY

A. *Negligence and Strict Liability*

The theory of strict liability professes to base the liability of the manufacturer upon his status as manufacturer—upon his superior capacity to absorb the risk of loss resulting from product-related injuries. In this regard, it is said that the manufacturer is best able to pay for such loss by virtue of the great wealth commonly ascribed to him;[51] or that the manufacturer is best able to *insure* against such losses by the devices of raising prices or obtaining liability insurance;[52] or that the manufacturer "should" bear such risk of loss as the price of engaging in an enterprise which results in the unreasonable risk of injury to the consumer.[53]

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46. Keeton, Product Liability and the Automobile, 9 Forum 1, 5 (1973).

47. 8 Cal. 3d at 132-33, 501 P.2d at 1162, 104 Cal. Rptr. at 442; 123 N.J. Super. at 602-03, 304 A.2d at 564-65.

48. See text accompanying notes 54-58 infra.

49. See text accompaying notes 69-98 infra.

50. See text accompanying notes 99-103 infra.

51. See James, General Products—Should Manufacturers Be Liable Without Negligence?, 24 Tenn. L. Rev. 923, 925 (1957). But see Lucey, Liability Without Fault and the Natural Law, 24 Tenn. L. Rev. 952, 955 (1957); Smyser, Products Liability and the American Law Institute: A Petition for Rehearing, 42 U. Det. L.J. 343, 350 (1965).

52. See, e.g., Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Restatement (Second) of Torts § 402A, comment c (1965); Ehrenzweig, Negligence Without Fault, 54 Calif. L. Rev., 1422, 1424 (1966); Ehrenzweig, Assurance Oblige—A Comparative Study, 15 Law & Contemp. Prob. 445 (1950); Kessler, Products Liability, 76 Yale L.J. 887, 926-28 (1967). But see Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 Yale L.J. 554, 556 (1961); Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View, 24 Tenn. L. Rev. 938, 946-48 (1957).

53. An analogy is thus drawn between the manufacturer and one who engages in "ultra-

It is apparent that insofar as the negligence[54] standard professes to ground liability upon specific proof of the manufacturer's "fault,"[55] it remains incommensurate with the ideals of the strict liability standard. The negligence standard is not as reliable or invariable a source of imposing liability upon the manufacturer as would be in keeping with the strict liability rationale. Specifically, proof of a prima facie case in negligence entailed considerable difficulty for the plaintiff.[56] The plaintiff had to prove not merely the presence of a defect, but also that such defect was attributable to certain substandard practices in the manufacturer's plant.[57] By the very nature of the situation, proof of these and

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hazardous activities" or who otherwise subjects society to the "unreasonable" risk of danger. See Wights v. Staff Jennings, Inc., 241 Ore. 301, 308, 405 P.2d 624, 629 (1965). But see Heaton v. Ford Motor Co., 248 Ore. 467, 470, 435 P.2d 806, 807-08 (1967); 2 L. Frumer & M. Friedman, Products Liability § 16A[3], 3-257 to 3-260 (1973). See generally Ehrenzweig, Negligence Without Fault, 54 Calif. L. Rev. 1422, 1455-57 (1966); Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972); Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 138 (1958); Kessler, supra note 52, at 899 n.63.

Another justification of strict products liability is that it will provide the manufacturer with an incentive to supply safer products. See, e.g., Cushing v. Rodman, 82 F.2d 864, 869 (D.C. Cir. 1936); Keeton, Product Liability and the Automobile, 9 Forum 1, 2 (1973); Prosser, The Assault upon the Citadel, 69 Yale L.J. 1099, 1122-23 (1960).

54. It is frequently said that the negligence standard was established by Judge Cardozo in the landmark case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). However, MacPherson did not in fact espouse a rule of negligence. Under a negligence theory, plaintiff must prove that the manufacturer foresaw or should have foreseen an unreasonable "risk" of injury. Prosser 681. According to MacPherson, the plaintiff has the more difficult burden of proving that it was "reasonably certain" to the manufacturer that injury would follow. 217 N.Y. at 389, 111 N.E. at 1053. See Boyd v. American Can Co., 274 N.Y. 526, 10 N.E.2d 532 (1937) (mem.); Cohen v. Brockway Motor Truck Corp., 240 App. Div. 18, 268 N.Y.S. 545 (1st Dep't 1934); Field v. Empire Case Goods Co., 179 App. Div. 253, 166 N.Y.S. 509 (2d Dep't 1917); Byers v. Flushovalve Co., 178 App. Div. 894, 164 N.Y.S. 1088 (1st Dep't 1917); James, Products Liability, 34 Texas L. Rev. 44, 61 (1955). But see Davis, A Re-Examination of the Doctrine of MacPherson v. Buick and its Application and Extension in the State of New York, 24 Fordham L. Rev. 204 (1955). Although MacPherson did not itself set up a negligence standard, it served as a vehicle by which other courts enabled themselves to implement a theory of negligence. See Todd Shipyds. Corp. v. United States, 69 F. Supp. 609, 610 (D. Me. 1947); Prosser 658-62. See generally 1 L. Frumer & M. Friedman, Products Liability § 5.03[1] (1973).

55. See, e.g., Prosser 492-94, 644-45; Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L. Rev. 559, 560 (1969).

56. R. Hursh, American Law of Products Liability § 5A:1, at 300 (Supp. 1972); Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 146 (1958).

57. See Noel, Strict Products Liability Compared with No-Fault Automobile Accident Reparations, 38 Tenn. L. Rev. 297, 304-05 (1971); Prosser, The Assault upon the Citadel, 69 Yale L.J. 1099, 1114, 1116 (1960). The variations on the theme of what constitutes negligence on the part of the manufacturer seem to be as diverse as are the products, the defects of which have been litigated. See, e.g., 1 L. Frumer & M. Friedman, Products Liability §§ 7, 8 (1973) (on the issues of "negligent plan or design" and "duty to warn").

related matters was clearly beyond the capacity of the ordinary plaintiff, who was unfamiliar with industry standards and practices.[58] The doctrine of *res ipsa loquitur* generally was available to a plaintiff who found himself at an evidentiary impasse, but the benefits of this doctrine were commonly counteracted by the manufacturer's "affirmative showing of proper care."[59]

Although the theoretical differences between the negligence and strict liability theories are clear in the abstract, the history of products liability displays a failure on the part of courts to maintain the distinction in practice. The principal occasion of the confusion was that, although the courts employed the traditional language of negligence, findings of negligence were based on proof so circumstantial that it was no longer clear that it was a negligence, rather than a strict liability, standard that was being applied.[60] According to Fleming:

> In no other context has the tendency towards relaxed standards of proof taken such dramatic strides. For barely had the principle of liability for negligence been established than it came to be allowed that, in some cases, such negligence might be inferred without specific proof from the mere fact that the accident had occurred. If it could be traced to a defect in the article which most probably existed at the time it passed out of the defendant's hands, the suggestion was open either that the process of production was at fault or that someone had slipped in carrying it out. Even an attempt by him to prove that his was a fool-proof system was doomed to futility, for the very happening of the accident was evidence to the contrary....
>
> The effect of all this has been to straddle in large measure the gap from negligence to strict liability.[61]

In the words of Professor Ehrenzweig, the courts were applying a "negligence without fault."[62]

The problems generated by this confusion of the negligence and strict liability standards are obvious. On one hand, the application of what was in substance a strict liability standard reflected a decision on the part of the courts to relieve plaintiffs of the need to comply with the rigors of proving a negligence case.[63]

58. "An injured person ... is not ordinarily in a position to ... identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is." Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). See Ford Motor Co. v. Lonon, 217 Tenn. 400, 422, 398 S.W.2d 240, 250 (1966); 1 L. Frumer & M. Friedman, Products Liability § 1, at 1-2 (1973); Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L. Rev. 559, 560 (1969); Noel, Strict Products Liability Compared with No-Fault Automobile Accident Reparations, 38 Tenn. L. Rev. 297, 304-05 (1971); Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 110 (1972).

59. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 459, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). But see Prosser, The Assault upon the Citadel, 69 Yale L.J. 1099, 1115 (1960).

60. See Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946); Peairs, The God in the Machine, 29 B.U.L. Rev. 37 (1949).

61. J. Fleming, An Introduction to the Law of Torts 95 (1967).

62. Ehrenzweig, Negligence Without Fault, 54 Calif. L. Rev. 1422 (1966).

63. See text accompanying notes 65-67 infra.

However, so long as the issue of liability continued to be phrased in the traditional language of negligence there remained the possibility that some courts might be led to apply the negligence theory in all its rigor and thereby compel plaintiffs to prove actual negligence, when justice dictated otherwise.[64] It was clear that the strict liability had to be distinguished from the negligence standard and freed from its retarding influences.

Commentators urged the courts not only to recognize and candidly admit their employment of the strict liability standard, but also to disavow their use of the confusing language of negligence.[65] The quest for judicial candor proceeded as well within the domain of the courts themselves, largely under the pioneering influence of Justice Traynor's 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*:[66]

> ...I believe the manufacturer's negligence should no longer be singled out as the basis of the plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings....
>
> ...It is needlessly circuitous to make neglience the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.[67]

The *Escola* doctrine forms a natural point of departure for the *Cronin-Glass* critique of unreasonable danger. The essence of that critique is that the element of unreasonable danger imports the principles of negligence into the theory of strict liability, and thus controverts the modern ideal of differentiation between the two standards.

B. *"Unreasonable Danger" and the Negligence Theory*

Both *Cronin* and *Glass* asserted that "unreasonable danger"

> has burdened the injured plaintiff with proof of an element which rings of negligence ....Yet the very purpose of our pioneering efforts in this field [of strict liability] was to relieve the plaintiff from problems of proof inherent in pursuing negligence....
>
> ...We think that a requirement that a plaintiff also prove that the defect made the product "unreasonably dangerous" places upon him a significantly increased burden and represents a step backward in the area pioneered by this court.[68]

64. See, e.g., Cushing v. Rodman, 82 F.2d 864, 869-70 (D.C. Cir. 1936) (implied warranty as to food).

65. See Ehrenzweig, Negligence Without Fault, 54 Calif. L. Rev. 1422, 1472-77 (1966); Murphy, Medieval Theory and Products Liability, 3 B.C. Ind. & Com. L. Rev. 29, 35-37 (1961); Noel, Strict Products Liability Compared with No-Fault Automobile Accident Reparations, 38 Tenn. L. Rev. 297, 305 (1971). See generally Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359 (1951); Kessler, Products Liability, 76 Yale L.J. 887 (1967).

66. 24 Cal. 2d 453, 150 P.2d 436 (1944).

67. Id. at 463, 150 P.2d at 440-41 (Traynor, J., concurring).

68. 8 Cal. 3d at 132-33, 501 P.2d at 1162, 104 Cal. Rptr. at 442; see 123 N.J. Super. at 602-03, 304 A.2d at 564-65.

Although both courts asserted the existence of a kinship between unreasonable danger and negligence, in neither decision was there an examination of the nature of the alleged kinship. Analysis of the *Cronin-Glass* theory, therefore, becomes a matter of reading between the lines and pursuing unclear hints.

One such hint is that the "unreasonable danger" element "rings of negligence" in that it imposes upon plaintiff the severe problems of proving a negligence case. This explanation is suggested by *Cronin*'s assertion that "unreasonable danger" has retarded "our pioneering efforts in this field [of strict liability] to relieve the plaintiff from *problems of proof* inherent in pursuing negligence . . . ."[69]

The "problems" of proving negligence arise from the difficulty of proving that what occurred at the factory amounted to a breach of defendant's duty of care.[70] It is submitted that "unreasonable danger" may not be justly accused either of resurrecting these "problems of proof" or of importing them into the law of strict liability. "Unreasonable danger" is defined by the Restatement in such a way that it is precisely the difficulty of proving the manufacturer's negligence that is avoided. Proof that a product is "unreasonably dangerous" requires, according to the Restatement definition, proof only of the *reasonableness of the consumer's expectation* of safety, and not of the manufacturer's substandard conduct.[71]

It is true that there is authority for analogizing proof of "unreasonable danger" to proof that the manufacturer was unreasonable in putting the product on the market.[72] The leading proponent of this view is Dean Wade.[73] Although *Cronin* cited Wade in support of its own critique of "unreasonable danger",[74] it is not clear that support is forthcoming. Wade makes it clear that he is suggesting a definition of "unreasonable danger" *alternative*[75] to the Restatement definition. Therefore, the fact that Wade's definition of "unreasonable danger" requires proof of negligence does not mean that the Restatement definition requires proof of negligence. Moreover, it is difficult to see how even Wade's theory of "unreasonable danger" could resurrect the "problems of proof inherent in pursuing negligence."[76] According to Wade, proof of "unreasonable danger" is proof that a reasonable manufacturer would not have put this product on

69. 8 Cal. 3d at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442 (emphasis added).

70. See text accompanying notes 56-59 supra.

71. See text accompanying notes 37-42 supra.

72. LaGorga v. Kroger Co., 275 F. Supp. 373, 379-80 (W.D. Pa. 1967), aff'd, 407 F.2d 671 (3d Cir. 1969); Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L.J. 256, 257 & n.4 (1969); Wade, supra note 20, at 14-15. A related theory of unreasonable danger accepts the "consumer expectation" standard of the Restatement, but defines consumer expectations as revolving upon the reasonableness of the manufacturer's conduct. See Borel v. Fireboard Paper Prods. Corp., No. 72-1492, at 16 & n.21 (5th Cir., Sept. 10, 1973). But see Lunt v. Brady Mfg. Corp., 13 Ariz. App. 305, 475 P.2d 964 (1970).

73. Wade 14-15.

74. The Cronin court cited Wade at 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

75. Wade 15.

76. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

the market *had he known that the product was defective.*[77] "It may be argued that this is simply a test of negligence. Exactly. In strict liability, except for the element of defendant's *scienter,* the test is the same as that for negligence."[78] The Wade definition of "unreasonable danger" thus *assumes*[79] the very element of proof that made negligence a hardship for the plaintiff.

Admittedly, proof of "unreasonable danger" poses the problem of determining what the "reasonable expectations" of the "ordinary consumer" would be in regard to any given product.[80] However, in comparison to proving the manufacturer's negligence, this does not present particular difficulty:

> Consumer expectations are as subtle as perceived meanings; both depend on the particular environments in which they operate. Fortunately, problems of this kind are common grist for the courts, and a judgment as to the reasonable expectations for a particular product is no harder to make than the lexicographical judgment as to what a particular phrase normally means in a particular speech community. It is a familiar exercise in judicial empathy.[81]

The conclusion to which the foregoing considerations point is that if the "unreasonable danger" element implicates the negligence theory, it arguably does not do so in the sense of importing the traditional problems of *proving* negligence.

There is also language in *Cronin* and *Glass* which suggests that these courts understood the "unreasonable danger" element to "ring of negligence" in the sense that it reproduces the operations of the contributory negligence defense.[82] It is submitted that this rationale also is tenuous.

At least three distinct types of substandard behavior attributable to plaintiffs are associated with the phrase "contributory negligence." The plaintiff may have acted unreasonably either in the sense that he used a product known by him to be dangerous[83]or in the sense that he misused the product in a way it was not intended by the manufacturer to be used.[84] These forms of substandard be-

77. Wade 15.

78. Id.

79. Id.

80. See generally Rheingold 593-94 & nn.16-17.

81. Dickerson, Products Liability: How Good Does a Product Have to Be?, 42 Ind. L. J. 301, 307 (1967).

82. See 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal Rptr. at 442: "If, for example, the 'ordinary consumer' would have contemplated that [the product] posed a risk... [the plaintiff] might be denied recovery." There is similar language in Glass. See 123 N.J. Super. at 602, 304 A.2d at 564.

83. See Restatement (Second) of Torts § 402A, comment n (1965); Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267 [hereinafter cited as Epstein]; Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 95 (1972).

84. See Restatement (Second) of Torts § 402A, comment h (1965); Epstein 268; Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 95 (1972).

havior are known respectively as "voluntary assumption of the risk"[85] and "unreasonable misuse of the product."[86] According to the consensus of modern authority, the manufacturer is afforded a defense against a plaintiff whose conduct qualifies under either category.[87] The third type of substandard behavior arising in conjunction with the principle of "contributory negligence" consists of plaintiff's failure to *discover* a defect or danger in the product in the first place.[88] In contrast to "assumption of the risk" and "misuse of the product," proof that the plaintiff merely failed to discover a defect does *not* constitute a defense for the manufacturer.[89] In the words of the Restatement, "[c]ontributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."[90]

It seems appropriate to disallow the manufacturer from defending on the ground that plaintiff failed to *discover* a defect. To deny recovery because there was a "failure to discover" requires plaintiff to stop and examine every product before using it. It may well be said that such a requirement is clearly unreasonable.[91] The ordinary consumer of a bottled beverage cannot be expected to examine for broken glass as a matter of course, and it would be unjust to deny recovery for his failure to do so.[92]

85. See authorities cited in note 83 supra.

86. See Epstein 270, 272-73; Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 94 (1972).

87. See authorities cited in notes 83 & 84 supra.

88. See Restatement (Second) of Torts § 402A, comment n (1965); Epstein 270; Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 94-95 (1972).

89. See, e.g., Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 424-27, 261 N.E.2d 305, 309-10 (1970), as discussed in Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 106-07 (1972); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 458, 212 A.2d 769, 782 (1965); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 786 (Tex. 1967); 1 L. Frumer & M. Friedman, Products Liability § 13.03 (1973); R. Hursh, American Law of Products Liability § 3:9 (Supp. 1972); Epstein 280-81. But see, e.g., Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63-64 (1967).

90. Restatement (Second) of Torts § 402A, comment n (1965).

91. Justice Traynor's theory of strict liability in Escola clearly places the burden of the consumer's failure to inspect upon the manufacturer. See text accompanying note 67 supra. Similarly, the Greenman theory of strict liability partially rests upon the fact that a consumer normally does not inspect a product. See note 42 supra; Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972). But see Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 124, 305 N.E.2d 750, 753, 350 N.Y.S.2d 617, 622 (1973).

92. Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962) (no duty to search for worms in chocolate bar); Prosser 671. However, if plaintiff should have discovered the danger, because a beverage tasted peculiar and irritated the throat, it is possible to defeat a recovery in strict liability on "assumption of risk." Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963).

It is also arguable that the discovery requirement is undesirable in that it recalls the "intricacies of the law of sales," which compelled the transition from a warranty to a tort

If the element of "unreasonable danger" based its denial of recovery on proof that the plaintiff engaged in conduct approaching an "assumption of the risk" or a "misuse of the product"[93] there would be no reason to proscribe that element: the preclusive operations of "unreasonable danger," in that event, would be no more repugnant to the strict liability theory than are "assumption of the risk" and "misuse of the product" themselves.[94] However, if the "unreasonable danger" element based its denial of recovery on facts tantamount to the fact of plaintiff's failure to discover a defect, then that element would clearly violate the strict liability theory,[95] and its excision from the theory would be sound.

It is submitted that the "unreasonable danger" element does not ground its denial of recovery on proof of plaintiff's failure to discover a defect, and accordingly does not revive the prohibited form of the contributory negligence defense. Rather than contemplate a failure to *discover* a defect, the words "unreasonable danger" contemplate only a failure to *expect* generally known dangers.[96] Certainly, there is a difference between failing to discover the presence of broken glass in a soda bottle and failing to appreciate that excessive whisky may cause cirrhosis, that "good tobacco" may cause cancer, or that the cholesterol content of butter is associated with heart illness.[97] The difference is that, in being denied recovery on the latter ground, the plaintiff is penalized for his failure to possess knowledge that is an integral part of being alive,[98] not for his failure to undergo the hardship of examining every product that happens to come into his hands.

The only possible affiliation between "unreasonable danger" and "contributory negligence" is that the former, in analogy with the latter, employs a standard of reasonableness and precludes recovery by any plaintiff whose conduct falls be-

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theory of products liability. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). The two principal problems with the warranty theory were that plaintiff had to give notice of the injury within a reasonable time, despite the fact that most plaintiffs were unaware of this rule, and that sellers engaged in sharp disclaimer practices. Prosser 655-56; see note 42 supra. The discovery requirement is implicit in two commercial rules. According to Uniform Commercial Code § 2-607(3)(a), "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." See generally U.C.C. § 2-715, Comment 5 (unreasonable failure to discover defect precludes proof of proximate causation). U.C.C. § 2-316(3)(b) provides that the buyer's refusal to examine the goods, upon being requested to do so by the seller, constitutes a disclaimer of the seller's implied warranty. See U.C.C. § 2-316, Comment 8. See generally Speidel, The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code, 51 Va. L. Rev. 804, 833-34 (1965).

93. See Note, Products Liability and Section 402A of the Restatement of Torts, 55 Geo. L.J. 286, 302-03 n.96 (1966).

94. See text accompanying notes 83-87 supra.

95. See text accompanying notes 88-90 supra.

96. See text accompanying notes 37-42 supra.

97. See text accompanying notes 22-31 supra.

98. See Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 302 (3d Cir. 1961) (Goodrich, J., concurring). See generally Prosser 153.

low that standard.[99] In other words, the "unreasonable danger" element carries overtones of the fault doctrine. The *Cronin* and *Glass* courts implicitly hypothesized that, since strict liability is a "liability without fault," its integrity is necessarily compromised by the inclusion of an element which evokes the notion of fault.[100] However, strict liability is a "liability without fault" only in the limited sense that a plaintiff in strict liability need not prove defendant's fault.[101] Strict liability is *not* a "liability without fault" in the sense that it is literally and absolutely immune to any and all embodiments of the fault concept,[102] or in the sense that it is immune to considerations of the *plaintiff's* unreasonable behavior in particular.[103] The fact that "unreasonable danger" involves the concept of fault does not of itself render those two words repugnant to the strict liability theory and, accordingly, does not justify their prohibition from that theory.

It must be concluded that the *Cronin* and *Glass* courts understood "strict liability" to mean "absolute liability," for it is the latter only that is incompatible with "unreasonable danger." The difference between strict and absolute liability is "real . . . not semantic,"[104] and if it is in fact an absolute liability standard which has been adopted, then the courts ought to say so explicitly.

Charles Fastenberg

99. 8 Cal. 3d at 132, 501 P.2d at 1161, 104 Cal. Rptr. at 441; 123 N.J. Super. at 602, 304 A.2d at 564; see Note, Products Liability and Section 402A of the Restatement of Torts, 55 Geo. L.J. 286, 302 (1966).

100. "Wherever the ordinary concept of negligence obtains, a showing of 'due care' by the defendant rebuts the plaintiff's contentions. But where strict liability prevails, 'due care' is not relevant. Defendant's liability is predicated upon the fact of the injury's occurrence, and not upon any lack of care." Brody v. Overlook Hosp., 121 N.J. Super. 299, 309, 296 A.2d 668, 673 (Super. Ct. L. Div. 1972). The Glass court expressly incorporated this passage into its own opinion. 123 N.J. Super. at 602, 304 A.2d at 564. See 8 Cal. 3d at 133-34, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43.

101. Restatement (Second) of Torts § 402A, comment a (1965); see, e.g., Rheingold 589. See generally Prosser 494-96.

102. "The notion that 'fault' is no longer the basis for recovery is more of a myth than an actual fact." Keeton, Product Liability and the Automobile, 9 Forum 1, 3 (1973); see Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).

103. See Chapman v. Brown, 198 F. Supp. 78, 86 (D. Hawaii 1961), aff'd, 304 F.2d 149 (9th Cir. 1962) (recognizing plaintiff's negligence in mitigation of damages); People ex rel. General Motors Corp. v. Bua, 37 Ill. 2d 180, 196, 226 N.E.2d 6, 15-16 (1967); Maiorino v. Weco Prods. Co., 45 N.J. 570, 574, 214 A.2d 18, 20 (1965); Codling v. Paglia, 32 N.Y.2d 330, 342-43, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-71 (1973) (applying warranty theory of liability); Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967); Epstein, supra note 83; Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93 (1972); Comment, Tort Defenses to Strict Products Liability, 20 Syracuse L. Rev. 924, 926-28 (1969).

104. Lascher, Strict Liability in Tort for Defective Products: The Road to and Past Vandermark, 38 S. Cal. L. Rev. 30, 47 (1965); see text accompanying notes 32-34 supra.