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Recent Developments

Admiralty—Second Circuit Rejects Classification of Longshoremen as Seamen for the Purpose of Assessing the Validity of a Tort Claim Release.—Plaintiff, while working as a longshoreman aboard defendant's vessel, suffered an injury to his back in October, 1972. On December 24th, 1974, plaintiff signed a document purporting to release the defendant from all claims arising out of the accident. Plaintiff, claiming mutual mistake, subsequently challenged the validity of the release. Plaintiff also asserted that longshoremen should be considered seamen when the validity of a release is in question. He maintained that the release in issue would be invalid for a seaman due to the inadequacy of plaintiff's counsel. Plaintiff appealed from a dismissal by the United States District Court for the Eastern District of New York. The Second Circuit affirmed, holding that the district court's conclusion that there was no mutual mistake was not clearly erroneous, and that longshoremen's releases were not subject to the stringent scrutiny given to seamen's releases. *Capotorto v. Compania Sud Americana de Vapores, Chilean Lines Inc.*, 541 F.2d 985 (2d Cir. 1976).

In maritime law, the identity of the signer of a release from liability determines which party has the burden of proving the validity of the release. If the releasing party is a seaman, this burden rests with the other party.[1] However, if the signer is not considered a seaman, common law rules apply and the signer must prove that the release is void.[2] The reason for the special view which admiralty courts take of seamen's releases can best be appreciated by examining the favored status that seamen have long occupied before these courts. As Justice Story said, "[seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat . . . wards with their guardians . . . . [T]he most rigid scrutiny is instituted into the terms of every contract, in which they engage."[3]

The validity of a seaman's release is adjudged on a case-by-case basis.[4] Certain factors, however, have repeatedly influenced the court's evaluation of the release. The educational level of the seaman is one such factor.[5] Also

1. Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942).

2. See, e.g., Wagoner v. Mountain Savings & Loan Ass'n, 311 F.2d 403, 406 (10th Cir. 1962) (party seeking to avoid the operation of the release must show that it is invalid). Cf. Restatement of Contracts § 402 (1932).

3. Harden v. Gordon, 11 F. Cas. 480, 485 (No. 6047) (C.C.D. Me. 1823).

4. 1B Benedict on Admiralty § 6, at 1-49 (7th rev. ed. 1975); 1 M. Norris, The Law of Seamen § 505 (3d ed. 1970).

5. McBrien v. United States Petro. Carrier's, Inc., 177 F. Supp. 627, 634 (S.D.N.Y. 1959) (seaman graduated from high school); Zoldan v. American Export Isbrandtsen Lines, Inc., 302 F. Supp. 388, 390 (S.D.N.Y. 1969), aff'd, 432 F.2d 784 (2d Cir. 1970) (eighth grade); Thomas v. Humble Oil & Refining Co., 292 F. Supp. 260, 266 (E.D. Va. 1968), aff'd, 420 F.2d 793 (4th Cir. 1970) (third grade). If the seaman is literate the court might take notice of the degree of difficulty of the material he reads. See Descendia v. American Export Isbrandtsen Lines, Inc., 1975

important is the nature of his employment on the ship,[6] his prior experience with releases,[7] the availability of adequate counsel[8] and the adequacy of the consideration given for the release.[9] A failure by the employer adequately to explain the release will also invalidate it.[10] The release form itself is one of the most significant factors weighed by the court. The complexity of its language, the size of the print, and the overall effect of the document all bear on the question of whether the seaman understood the importance of what he was signing.[11]

Significantly, these factors are not uniquely applicable to those who go to sea. Certainly they could as readily be employed to evaluate the release of a longshoreman as that of the crew member of a vessel. Nonetheless, when the validity of a release is in question, the court must define the plaintiff as a seaman before special scrutiny will be given to the release.

A.M.C. 1403, 1404, 1409 (S.D.N.Y. 1975) (Wall Street Journal and Time Magazine); Parker v. States Marine Lines, Inc., 1967 A.M.C. 1547, 1551 (S.D.N.Y. 1967) (New York Times and Ebony). Releases executed by illiterate seamen have been allowed. E.g., Parodi v. American President Lines, Ltd., 269 F. Supp. 696 (N.D. Cal. 1967). But other courts have struck down releases when the seaman is "not a good reader." Morris v. Fidelity & Cas. Co., 321 F. Supp. 320, 323 (E.D. La. 1970), aff'd, 441 F.2d 1146 (5th Cir. 1971). See also Blanco v. Moran Shipping Co., 483 F.2d 63 (5th Cir. 1973), cert. denied, 416 U.S. 904 (1974).

6. See Maher v. United States, 1974 A.M.C. 1585 (C.D. Cal. 1972) (releaser was an officer on the ship); Jones v. American Export Isbrandtsen Lines, Inc., 285 F. Supp. 345 (S.D.N.Y. 1968) (ship's yeoman). Courts also consider prior military service relevant. See Zoldan v. American Export Isbrandtsen Lines, Inc., 302 F. Supp. 388 (S.D.N.Y. 1969), aff'd, 432 F.2d 784 (2d Cir. 1970) (seaman had prior military service and civilian employment).

7. See Parodi v. American President Lines, Ltd., 269 F. Supp. 696 (N.D. Cal. 1967).

8. See Gilbert v. United States, 479 F.2d 1267 (2d Cir. 1973); Robles v. Trinidad Corp., 270 F. Supp. 570 (S.D.N.Y. 1966); Flener v. Waterways Oil Co., 261 F. Supp. 740 (W.D. Tenn. 1966). A lack of counsel or the situation where the attorney does not or can not communicate with the seaman will help defeat the release. See Waters v. United States, 191 F.2d 212 (9th Cir. 1951) (attorney did not inform a chief engineer of his rights); Blanco v. Moran Shipping Co., 483 F.2d 63 (5th Cir. 1973), cert. denied, 416 U.S. 904 (1974) (attorney did not speak Spanish); Perdikouris v. Liberian S.S. Olympos, 185 F. Supp. 140 (E.D. Va. 1960) (Greek attorney did not explain release to seaman).

9. The amount of the settlement itself is not determinative of the validity of a release but an inadequate settlement adds greatly to the defendant's burden of proving that no advantage was taken of the seaman's position. See Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942) ("[t]he adequacy of the consideration . . . [is] relevant to an appraisal of this understanding."). See also Perdikouris v. Liberian S.S. Olympos, 185 F. Supp. 140 (E.D. Va. 1960).

10. See Trahan v. Superior Oil Co., 204 F. Supp. 627 (W.D. La. 1962), aff'd, 322 F.2d 234 (5th Cir. 1963). The seaman will not be bound if his ability to comprehend the ramifications of the release is impaired. Premeaux v. Socony-Vacuum Oil Co., 144 Tex. 558, 192 S.W.2d 138 (1946) (seaman had contracted tuberculosis and had a fever of 102 degrees).

11. The "red form general release," so named because of its large, red, boldfaced print, has been a successful release from the shipowner's point of view. In this release form the seaman answers six questions that relate to his understanding of the release. See Parker v. States Marine Lines, Inc., 1967 A.M.C. 1547 (S.D.N.Y. 1967); Robles v. Trinidad Corp., 270 F. Supp. 570 (S.D.N.Y. 1966); McBrien v. United States Petro. Carrier's Inc., 177 F. Supp. 627 (S.D.N.Y. 1959). When the importance of the matter is not readily evident to the seaman, the release will be voided. See Longbottom v. American Dredging Co., 1958 A.M.C. 594 (E.D. Pa. 1957).

The question of when a longshoreman is to be considered a seaman has long vexed Congress and the courts but no general standard has yet been formulated. In an early case, the Supreme Court held that federal admiralty jurisdiction extended to longshoremen because they are " 'as clearly identified with maritime affairs as are the mariners.' "[12] Again in *Southern Pacific Co. v. Jensen*,[13] the Supreme Court held that longshoremen were ineligible for state workmen's compensation because their job was "maritime in its nature."[14] The Court stated that the interstate character of longshoring dictated the need for a uniform, nationwide compensation plan.[15] Congress first tried to satisfy this need by enacting a statute which made state plans applicable to those under admiralty jurisdiction, including seamen and longshoremen.[16] The Supreme Court voided this law as an unconstitutional delegation of Congressional power.[17] Again Congress tried to make state plans applicable, this time excluding masters and crews from those who could recover under state workmen's compensation plans;[18] and again the Supreme Court declared the law unconstitutional.[19] Soon thereafter, in *International Stevedoring Co. v. Haverty*,[20] Justice Holmes noted that longshoring "was a maritime service formerly rendered by the ship's crew."[21] The unanimous Court ruled in *Haverty* that Congress intended to include stevedores and longshoremen under the definition of "seamen" in the recently enacted Jones Act,[22] which provided uniform coverage for seamen injured in the course of their employment.[23]

If the matter had ended there, longshoremen today would have nearly identical rights to those of seamen because of the common application of the

12. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 62 (1914) (The longshoreman was suing his employer in an admiralty court alleging that the employer did not provide him a safe place to work. The employer argued that loading and unloading a ship was not a maritime operation.).

13. 244 U.S. 205 (1917).

14. Id. at 217.

15. Id. at 216-17.

16. Congress amended the "saving to suitors" clause in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77, to save "to claimants the rights and remedies under the workmen's compensation law of any State." 40 Stat. 395 (1917).

17. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

18. This time the "saving to suitors" clause was amended in order to preserve "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under workmen's compensation law of any State . . . ." 42 Stat. 634 (1922).

19. Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924).

20. 272 U.S. 50 (1926).

21. Id. at 52. For opposing views to this proposition, see Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L.Q. 381, 413-14 (1954); Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen, 111 U. Pa. L. Rev. 1137, 1139-47 (1963).

22. 41 Stat. 1007 (1920), as codified, 46 U.S.C. § 688 (1970). Under the Jones Act a "seaman" injured in the course of his employment may maintain an action under any federal statute that applies to injured railway employees. Id.

23. 272 U.S. at 52.

Jones Act. However, at the time *Haverty* was decided, Congress had already completed committee action on the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[24] Congress enacted the LHWCA not to differentiate the status of longshoremen from that of seamen, but to comply with the pre-*Haverty* Supreme Court decisions which had seemed to mandate a special plan to provide for injured longshoremen.[25] Nonetheless, the timing of its passage created doubts over whether longshoremen were to be classified as seamen regarding issues outside the scope of LHWCA.

Under the LHWCA, the statutory compensation became the exclusive remedy of the longshoreman against his employer, the stevedore.[26] His rights against third parties, however, were preserved by the statute.[27] Through these actions against third parties, the courts reaffirmed the longshoreman's status as a seaman. In *Seas Shipping Co. v. Sieracki*,[28] a longshoreman employed by an independent stevedoring company was injured while loading a ship when a ship's boom fell. Relying largely on *Haverty*,[29] the Court held that because plaintiff was doing seaman's work and incurring a seaman's hazards, he was entitled to the traditional protection afforded to seamen by the admiralty courts.[30] The shipowner had the obligation, traditionally owed to seamen, to provide a seaworthy ship to the longshoreman. Due to the increase in the number of third party actions brought under *Sieracki*, the right of longshoremen to raise the unseaworthiness claim was eliminated by the 1972 amendments to the LHWCA.[31] The 1972 amendments, however,

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24. 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1970).

25. See Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924) ("[t]his power [to enact maritime law], we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States." Id. at 227). See also S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926); Calbeck v. Travelers Ins. Co., 370 U.S. 114, 120-21 (1962). The bill originally excluded seamen but later was amended to include both master and crew within its coverage. Seamen then requested to be excluded and the statute, as enacted, does not include masters or crews. See 68 Cong. Rec. 5908 (1926) and Nogueira v. New York, N.H. & H. R.R., 281 U.S. 128, 136 (1930).

26. 33 U.S.C. § 905 (1970).

27. 33 U.S.C. § 933 (1970).

28. 328 U.S. 85 (1946).

29. The Court also cited to Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914) for the policy regarding longshoremen. 328 U.S. at 97-98.

30. 328 U.S. at 99. The Court also stated that Haverty was not overruled by the passage of the LHWCA. Id. at 100-01.

31. 33 U.S.C. § 905b (Supp. V, 1975). Between the time of the decision in Sieracki and the 1972 amendments, the applicability of the unseaworthiness doctrine to longshoremen had undergone changes. First, in Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963), the doctrine was extended to all longshoremen. Here, a longshoreman was injured on a pier when he slipped on beans which had fallen from the ship's cargo. Later, the Court limited Gutierrez to its facts in Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971). Here, the Court did not allow a recovery for a longshoreman injured on a pier. It stated that the injury in Gutierrez was caused by an appurtenance of the ship and that the holding was not based on the fact that the plaintiff was performing the function of a longshoreman. 404 U.S. at 210-11.

did not purport to affect the right of the longshoreman to sue the shipowner for negligence under other pro-plaintiff admiralty rules.[32]

Congress and the courts have not yet formulated a general policy as to the status of longshoremen. They have traditionally been viewed as seamen because of the maritime nature of their work. However, the existence of two different systems of statutory compensation, the Jones Act and the LHWCA, could indicate that they are not to be considered seamen for every type of action. This has led to a general uncertainty in the courts as to when longshoremen are to be considered seamen.

Until *Capotorto*, however, every appellate court that had reviewed the status of longshoremen when a release was in issue had classified longshoremen as seamen. This might be due in part to the decision in *Garrett v. Moore-McCormack Co.*,[33] wherein the Supreme Court implied that longshoremen were to be considered seamen by citing the LHWCA as evidence of the solicitous congressional policy toward seamen's releases.[34] The question was first squarely addressed in *W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel*.[35] There a longshoreman was injured while unloading cargo on board ship. The Third Circuit held that a longshoreman was a seaman and therefore the release was subject to special scrutiny.[36] The court voided the release, finding it indefinite, lacking in mutuality and against public policy.[37]

In *Wooten v. Skibs A/S Samuel Bakke*,[38] a longshoreman injured his ankle while working aboard the defendant's vessel. At the time the release was signed both parties assumed that the injury was temporary. Subsequently, the longshoreman claimed that the injury was permanent and sought to have the release set aside for mutual mistake.[39] The Fourth Circuit held that on remand the shipowner should bear the burden of proving that the release was valid.[40]

32. One such rule is the doctrine of comparative negligence. See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). A harbor worker was injured and the Court would not apply the state rule on contributory negligence which would have barred a recovery by the plaintiff. Instead, the Court applied the admiralty rule on comparative negligence. See also Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431-33 (1939) (assumption of risk not a defense in an admiralty case).

33. 317 U.S. 239 (1942).

34. Id. at 247. The Court cited 33 U.S.C. §§ 915, 916 (1970) for this congressional policy. Under these sections, releases not made under the express terms of the act are invalid. Neither section was changed by the 1972 amendments. See text accompanying note 31 supra. See also 1 P. Edelman, Maritime Injury and Death 442 (1960).

35. 41 F.2d 651 (3d Cir. 1930).

36. Id. at 653-54. The shipowner never claimed that a longshoreman should not be considered a seaman but the court, relying on Haverty and Imbrovek, held that the seamen's rule on releases applied.

37. Id. at 653.

38. 431 F.2d 821 (4th Cir. 1969).

39. Id. at 822. The plaintiff had declined to be represented by an attorney during the negotiations leading to the release. Id. at 822 nn.2 & 3.

40. Id. at 823. To prove that the release was valid, the shipowner would have the burden of

The Fifth Circuit in *Robertson v. Douglas Steamship Co.*[41] also held that a longshoreman's release should be scrutinized in the same way as that of a seaman. Here a longshoreman who was injured aboard a vessel later signed a release for $2,000. When he sought to have the release set aside, the court rejected the argument that the state laws governing releases should apply because of the longshoreman's connection with the onshore community.[42] It held that for the purposes of determining the applicability of maritime law, a longshoreman stood in the position of a seaman. The court affirmed the district court's ruling that under the standards applicable to seamen, the release was void.[43]

In *Capotorto*, the longshoreman injured his lower back while working on defendant's vessel. This injury was initially diagnosed as a sprain.[44] Plaintiff claimed that the back pain was seriously aggravated, however, by a second unrelated injury incurred two years later.[45] After the second injury, Capotorto consulted an attorney to discuss whether to consent to a release regarding the back injury. He met with the attorney for less than five minutes during the attorney's office Christmas party and that same day signed the release. Capotorto neither read nor wrote English and spoke it only to a limited extent.[46] He later had his injury rediagnosed and found that a serious, permanent back ailment had developed. Plaintiff sought to set aside the release on grounds of mutual mistake and because he had inadequate counsel. The court rejected these claims and held that longshoremen should not be treated as seamen for the purpose of evaluating their releases.[47]

The majority stated that longshoremen were not subject to isolation from the legal, economic and psychological support of the community which puts seamen at a bargaining disadvantage and thus warrants the special consideration given their releases.[48] But as the dissent noted, this view is inconsistent with cases which hold that crews of inland barges and dredges are seamen entitled to the special protection of the admiralty courts.[49] Moreover, releases have been subject to special scrutiny when executed by a crewmember of a vessel operating in Tampa Bay,[50] another which sailed in a Louisiana

proving that the injury was not permanent. Id. See also Melson v. Naviera Bilbanbaina, S.A., 1973 A.M.C. 876 (4th Cir. 1973); Allen v. Grace Line, Inc., 1971 A.M.C. 2320 (D. Md. 1970).

41. 510 F.2d 829 (5th Cir. 1975).

42. Id. at 834-35.

43. Id. at 835-36. See also Panama Agencies Co. v. Franco, 111 F.2d 263 (5th Cir. 1940). Contra, Harris v. Lykes Bros. S.S. Co., 375 F. Supp. 1155 (E.D. Tex. 1974); Beckham v. Reed, Kapt. H. Krohn, G.M.B.H., 217 F. Supp. 749 (S.D. Tex. 1963). The significance of these two decisions, however, must be questioned in view of the holding in Robertson.

44. 541 F.2d at 986.

45. Id. The majority affirmed a holding that the second accident could not " 'exacerbate or create a herniated disc condition not theretofore diagnosed.' " Id. at 986.

46. Id. at 990 (Oakes, J., dissenting).

47. Id. at 987.

48. Id.

49. Id. at 989 (Oakes, J., dissenting).

50. Blanco v. Moran Shipping Co., 483 F.2d 63 (5th Cir. 1973) (en banc), cert. denied, 416 U.S. 904 (1974).

bayou[51] and a third which ferried men and material between the shore and an offshore drilling tower.[52] In all these cases the mariner was no more isolated from a land-based community than a longshoreman would be, yet the seaman's rule on releases was applied.

The majority also noted that the difference in treatment was justified by the authoritarian relationship of shipowners to seamen—a factor not present in the case of longshoremen.[53] Although this argument might have carried some weight in the past, it no longer seems valid. Both mariners and longshoremen are now heavily unionized.[54] The National Labor Relations Board is involved in many actions brought by seamen as well as longshoremen.[55] Also, many statutes prescribe manning levels, working conditions and various other requirements for the protection of seamen.[56]

The court further justified its position by noting that Congress had recognized a difference between the status of the seaman and the longshoreman by eliminating the shipowners' liability to longshoremen for unseaworthiness in the 1972 amendments to the LHWCA.[57] But as one commentator has noted, these amendments were simply a tradeoff among interest groups.[58] The longshoremen's claim for unseaworthiness was abolished in return for higher compensation payments. The purpose of the amendments was to cut down on the number of third party actions under *Sieracki* and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[59] and to extend coverage of the act inland.[60] The

51. Morris v. Fidelity & Cas. Co., 321 F. Supp. 320 (E.D. La. 1970), aff'd, 441 F.2d 1146 (5th Cir. 1971) (per curiam).

52. Trahan v. Superior Oil Co., 204 F. Supp. 627 (W.D. La. 1962), aff'd, 322 F.2d 234 (5th Cir. 1963). See Longbottom v. American Dredging Co., 159 F. Supp. 296 (E.D. Pa. 1958) (release signed by a seaman on an inland dredge held invalid); Flener v. Waterways Oil Co., 261 F. Supp. 740 (W.D. Tenn. 1966) (defendant had the burden of proof on a release executed by a seaman who operated defendant's vessel, from which rope was sold to ships passing Memphis).

53. 541 F.2d at 987.

54. See, e.g., C. Larrowe, Maritime Labor Relations on the Great Lakes (1959). See also Kifner, Liberia: A Phantom Maritime Power Whose Fleet Is Steered by Big Business, N.Y. Times, Feb. 14, 1977, at 14, col. 4, in which the author states that the high wages paid to seamen because of maritime labor unions have caused the Liberian and other flag of convenience fleets to increase dramatically in size.

55. See, e.g., Ira S. Bushey & Sons, Inc., 175 N.L.R.B. 1015, 73 L.R.R.M. 1286 (1969) (right of seaman to gain employment on a ship); Int'l Longshoremen's Assoc., Local 1526 (Tropical Shipping & Construction Co.), 184 N.L.R.B. 438, 76 L.R.R.M. 1752 (1970) (secondary boycott due to use of containers).

56. See, e.g., 46 U.S.C. § 222 (1970) (manning levels); 46 U.S.C. § 660a (1970) (Coast Guard to inspect crew quarters of American vessels at least once a month) and 46 U.S.C. §§ 701-03, 705-07 (1970) (regulations concerning disciplinary procedures).

57. 541 F.2d at 987.

58. G. Gilmore & C. Black, The Law of Admiralty 411 (2d ed. 1975). See also Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 40 (2d Cir. 1976).

59. 350 U.S. 124 (1956). Here the Court held that a shipowner who was liable to a longshoreman for unseaworthiness could be indemnified by the longshoreman's employer, the stevedore. Id. at 132-34.

60. See S. Rep. No. 1125, 92d Cong., 2d Sess. 12 (1972).

amendments did not, however, purport to change the traditional admiralty view of longshoremen.[61]

Finally, the majority stated that several other reasons "formerly cited" for the special treatment of seamen, such as their propensity toward rash conduct and the government's special interest in seamen to protect the commercial and military interests of the country, did not also dictate that longshoremen be given special treatment.[62] By referring to them as "formerly cited" the majority suggested their doubts as to whether these reasons remain valid today. In fact, the court's skepticism toward these arguments may well evidence the underlying justification for the decision in *Capotorto*.

An examination of the majority's expressed rationale reveals no material differences between seamen and longshoremen which justify the abandonment of their traditional similarity of treatment. While the court made cursory mention of the three contrary circuit court cases on the issue, it failed to distinguish them convincingly.[63] What the expressed rationale does clearly demonstrate, however, is the anachronistic nature of most of the justifications for the traditional wardship doctrine as applied today to either seamen or longshoremen. The legendary rashness of the sailor, the authoritarian relationship of seamen and shipowner, the mariner's long isolation from a supportive onshore community—all are assertions with undeniably firm historical foundations; yet these arguments for special treatment seem curiously inappropriate in this day of strong maritime unions and various statutory protections for workers connected with the shipping industry.[64]

Thus, while the reasoning of the majority in *Capotorto* is unpersuasive, the result in the case may, nonetheless, be justifiable. Today longshoremen have powerful, well-organized unions. If union representatives feel that releases constitute a question of sufficient interest to longshoremen, the matter can be discussed at the bargaining table. Should they choose not to raise the issue

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61. Longshoremen may still sue the shipowner for negligence. 33 U.S.C. § 905 (Supp. V, 1975). The admiralty rules regarding comparative negligence and assumption of the risk were also maintained. See House Committee Report, 1972 U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess. 4698, 4705.

62. 541 F.2d at 987.

63. The majority cited McCahan as being contra to their reasoning, but did not try to distinguish that decision. Id. at 988. It referred to Wooten and Robertson in footnotes and purported to distinguish these cases on the ground that they dealt with mutual mistake. Id. at 987-88 nn.2 & 3. The distinction is curious in view of the fact that Capotorto too claimed mutual mistake. Id. at 986. Moreover, the point seems immaterial since the issue of which party must bear the burden of proof should not be affected in this instance by the nature of the plaintiff's claim. The majority also stated that the court in Wooten relied on Sieracki, which was overruled by the 1972 amendments. Id. at 988 n.3. However, as the dissent noted, that court relied on Sieracki, not for the creation of the cause of action, but for its general statement that a longshoreman is thought of as a seaman. Id. at 989 (Oakes, J., dissenting).

64. See also Staring, Seamen's Law in the Seventies, 9 Forum 529, 540 (1974) where it is suggested that union representation will cause an end to the wardship doctrine.

in collective bargaining, however, the ruling in *Capotorto* deprives longshoremen of an advantage premised not on fairness but on history.[65]

Patrick J. Bonner

Constitutional Law—Double Jeopardy—Inclusion of the Corporate Criminal Defendant Within the Privilege.—Congress amended the Criminal Appeals Act[1] in 1971 to permit the United States to appeal unsuccessful criminal prosections[2] to the constitutional limit.[3] The intent of Congress was to remove statutory limitations[4] on federal appeals and to ensure that the Act be liberally construed.[5] This extension of the government's right of appeal in

65. One commentator, however, has criticized the ruling in Capotorto and supported the traditional view of longshoremen as seamen when the validity of a release is in issue. Edelman, Releases by Seamen—"Wards of the Admiralty," N.Y.L.J., Mar. 4, 1977, at 1, col. 1.

1. Omnibus Crime Control Bill of 1970, Pub. L. No. 91-644, Tit. III, § 14(a), 84 Stat. 1890, amending 18 U.S.C. § 3731 (1964) (codified at 18 U.S.C. § 3731 (1970)). In relevant part the statute reads: "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." Id. The statute also authorizes appeals "From a decision or order . . . suppressing or excluding evidence . . ." made prior to the defendant being placed in jeopardy. Id. It should be noted that the statute does not permit government appeals of sentences. See Advisory Committee on Rules of Practice and Procedure, Proposed Rule 35.1 of the Federal Rules of Criminal Procedure 5 (1976).

2. The appellate jurisdiction of a federal court over a specific type of case must be granted by statute. Carroll v. United States, 354 U.S. 394, 399 (1957). The prosecution has no right to appeal the termination of a criminal proceeding favorable to the accused "except under and in accordance with express statutes . . . . " United States v. Sanges, 144 U.S. 310, 312 (1892). This may not have been the law of England in the period of the Declaration of Independence. Id. See United States v. Jenkins, 420 U.S. 358, 364 (1975).

3. S. Rep. No. 1296, 91st Cong., 2d Sess. 18 (1970) (hereinafter cited as Senate Report). See United States v. Wilson, 420 U.S. 332, 338 (1975); United States v. Martin Linen Supply Co., 534 F.2d 585, 586-87 (5th Cir.), cert. granted, 97 S. Ct. 308 (1976).

4. United States v. Wilson, 420 U.S. 332, 339 (1975); Senate Report, supra note 3, at 2-3.

5. Omnibus Crime Control Bill of 1970, Pub. L. No. 91-644, Tit. III § 14(a), 84 Stat. 1890, amending 18 U.S.C. § 3731 (1964) (codified at 18 U.S.C. § 3731 (1970)). The courts had viewed criminal appeals by the government as "unusual, exceptional, [and] not favored." Carroll v. United States, 354 U.S. 394, 400 (1957). Judicial interpretation of the previous criminal appeal statute was restrictive and became embroiled in highly technical distinctions of common law pleading. The courts rigidly adhered to archaic terminology which resulted in ambiguity as to the statute's meaning and prevented the United States from appealing in a substantial number of criminal cases. Serfass v. United States, 420 U.S. 377, 385-86 (1975); Senate Report, supra note 3, at 3-5. Another shortcoming of the previous Act was the requirement that many cases had to be appealed directly to the Supreme Court. This resulted in many decisions which should have been reviewed not being appealed as they lacked sufficient importance for Supreme Court review. Senate Report, supra note 3, at 2.

criminal cases[6] has required an intensified examination of the fifth amendment's double jeopardy clause[7] as a limitation on such appeals.[8] Statutory restrictions had formerly made such constitutional inquiries unusual and unnecessary.[9]

One such inquiry is whether the double jeopardy clause applies to a corporate defendant, an issue never directly discussed by the Supreme Court.[10] The recent case of *United States v. Security National Bank*[11] has brought this question into focus. The prosecution appealed from a jury verdict of acquittal of a corporate defendant,[12] contending it resulted from erroneous instructions by the trial judge.[13] The government argued that the amended Act permitted such an appeal[14] since a corporation was not entitled to the double jeopardy protection of the fifth amendment.[15] The Second

6. For a history of criminal appeals legislation in the federal jurisdiction, see United States v. Sisson, 399 U.S. 267, 291-296 (1970); F. Frankfurter & J. Landis, The Business of the Supreme Court, 113-20 (1927); Kurland, The Mersky Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute, 28 U. Chi. L. Rev. 419, 445-55 (1961). A review of the early history of criminal appeals in state jurisdictions is given in United States v. Sanges, 144 U.S. 310, 313-18 (1892).

7. U.S. Const. amend. V.

8. The reason that the question of constitutional jeopardy rarely arose was that the former Criminal Appeals Act prohibited appeals when the defendant had been "put in jeopardy." Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246. The courts literally construed this phrase as barring any appeal after technical jeopardy attached. United States v. Sisson, 399 U.S. 267, 305 (1970). ("To read this limitation as no more than a restatement of the constitutional prohibition . . . [is] completely superfluous."). See United States v. Zisblatt, 172 F.2d 740, 742-43 (2d Cir.), appeal dismissed, 336 U.S. 934 (1949). For a discussion of the attachment of jeopardy, see United States v. Jenkins, 490 F.2d 868, 875 n.12 (2d Cir. 1973), aff'd, 420 U.S. 358 (1975).

9. United States v. Wilson, 420 U.S. 332, 339 (1975).

10. In Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam), the government appealed a directed acquittal for a corporate and two individual defendants and requested that the case be reassigned for trial. Id. at 141-42. In a per curiam opinion, the Supreme Court held review of the acquittals would violate the double jeopardy clause. Id. at 143. The fact that one defendant was a corporation was not considered in the opinion. The issue of double jeopardy as being applicable to a corporation was neither presented for the Supreme Court's consideration nor was it briefed by the parties. Petitioner's Brief for Certiorari at 17 & n.25, United States v. Security Nat'l Bank, 45 U.S.L.W. 3543 (U.S. Feb. 4, 1977) (No. 1077). Since the issue was not presented for consideration it cannot be considered adjudicated. See Stone v. Powell, 96 S. Ct. 3037, 3045 (1976); Edelman v. Jordan, 415 U.S. 651, 670-72 (1974).

11. 546 F.2d 492 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3652 (U.S. Mar. 29, 1977).

12. Id. at 492.

13. Security National Bank was indicted for violation of 18 U.S.C. § 610 (1970) for making unlawful political contributions. The scheme involved giving raises to bank officers which money was to be used for political contributions on behalf of the bank. The district court judge charged the jury over the repeated objection of the prosecution that in order to convict it must be proven beyond a reasonable doubt that the contributions were actually made with bank funds. Brief for Appellant at 4, 14, United States v. Security National Bank, 546 F.2d 492 (2d Cir. 1976).

14. The appeal could not have been made under the former criminal appeals act as the statute specifically provided that there could be no appeal "in any case where there has been a verdict in favor of the defendant." Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246.

15. 546 F.2d at 493.

Circuit dismissed the action holding that the privilege applied to a corporate defendant.[16]

This Note will examine the constitutional basis for a corporation's right to claim the fifth amendment's double jeopardy privilege.

The fifth amendment of the Constitution provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[17] The history of the clause indicates that the drafters of the amendment intended to incorporate the common law protections[18] of *autrefois acquit*[19] and *autrefois convict*.[20] Although the wording of the clause implies that it is only applicable to serious crimes such as felonies and treason, it has been applied to all crimes, including misdemeanors.[21] The Supreme Court in *Ex parte Lange*[22] noted that "the pleas of *autrefois acquit* and *autrefois convict* . . . depend on the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation."[23] This provides protection against second prosecutions for the same offense after either acquittal or conviction and prevents multiple punishments for the same offense.[24]

However, the prohibitions of the double jeopardy clause are not absolute.[25] The application of the protection is based on policy considerations,[26] one of the most important being the avoidance of multiple trials.[27] This rationale was expressed in *Green v. United States*,[28] since

> "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an *individual* for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[29]

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16. Id.

17. U.S. Const. amend. V.

18. United States v. Jenkins, 490 F.2d 868, 873 (2d Cir. 1973), aff'd, 420 U.S. 358 (1975).

19. "[A] defendant could block a second trial by proving that he had previously been acquitted of the same offense." Id. at 871.

20. "[A] defendant could plead a former conviction in bar of a second indictment for the same crime." Id. at 871.

21. Ex parte Lange, 85 U.S. (18 Wall.) 163, 169-70 (1873). The protection applies to every criminal penalty. Clawans v. Rives, 104 F.2d 240, 242 (D.C. Cir. 1939) (Plea of double jeopardy could be raised before police judge for a disorderly conduct conviction involving a five dollar fine or five days in jail).

22. 85 U.S. (18 Wall.) 163 (1873).

23. Id. at 173. "Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at common law or by statute, a plea of autrefois acquit or autrefois convict is a good defense." Id. at 169.

24. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

25. United States v. Larry, 536 F.2d 1149, 1152 (6th Cir. 1976).

26. United States v. Choate, 527 F.2d 748, 750-51 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976); United States v. Brown, 481 F.2d 1035, 1040 (8th Cir. 1973).

27. United States v. Wilson, 420 U.S. 332, 343 (1975).

28. 355 U.S. 184 (1957).

29. Id. at 187-88. (emphasis added).

Thus, the protection of the clause is designed to prevent the government from having more than one opportunity to secure a conviction from the trier of fact.[30] In contrast, the amended Criminal Appeal Act allows the government to subject a defendant to the "embarrassment," "expense," "ordeal," and "anxiety" of multiple judical proceedings as long as the point of conviction is never reached.[31] "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy."[32] Retrial may be had after the declaration of a mistrial.[33] Government appeal is allowed when a judge overrides a guilty verdict.[34] The appellate court may reinstate the guilty verdict if further findings of fact are not required.[35] Appeal and retrial are permitted if a defendant succeeds in dismissing an indictment in a pretrial hearing involving findings of fact, even if the judge rules that a defense has been established as a matter of law.[36]

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30. Serfass v. United States, 420 U.S. 377, 391-92 (1975). The exceptions would be a mistrial where in the trial judge's discretion "the ends of public justice" require a new trial (United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824)), and when a defendant overturns a judgment upon appeal (United States v. Ball, 163 U.S. 662, 672 (1896)).

31. The possibility of multiple government initiated proceedings under the amended criminal appeals act is exemplified in United States v. Sanford, 97 S. Ct. 20 (1976). A charge of illegal game hunting has resulted in the following sequence of events: a mistrial due to a hung jury; dismissal of the indictment following the mistrial; appeals by the government to obtain another trial which have resulted in three Court of Appeals decisions and two Supreme Court decisions. Despite this, the case is currently continuing in the Court of Appeals with the prosecution attempting to get a new trial. Id. at 21. For other examples, see United States v. Morrison, 97 S. Ct. 24 (1976); United States v. Rose, 97 S. Ct. 26 (1976).

32. Serfass v. United States, 420 U.S. 377, 391-92 (1975).

33. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (When the ends of justice would be defeated); United States v. Tateo, 377 U.S. 463, 467 (1964) (Mistrial granted at defendant's insistence); Illinois v. Somerville, 410 U.S. 458, 468 (1973) (Mistrial due to incurably defective indictment).

34. United States v. Wilson, 420 U.S. 332, 352-53 (1975). In United States v. Ceccolini, 542 F.2d 136 (2d Cir. 1976), the district court judge consolidated a hearing on a motion to suppress evidence with the trial. Id. at 139. The judge found the defendant guilty but set aside the verdict upon suppression of essential testimony. Id. at 138. The appeal was not barred by the double jeopardy clause as a verdict of guilty could be reinstated without a retrial on the merits. Id. at 140. See United States v. Lasater, 535 F.2d 1041, 1046-47 (8th Cir. 1976).

35. United States v. Jenkins, 420 U.S. 358, 365 (1975) (dictum). See United States v. De Garces, 518 F.2d 1156 (2d Cir. 1975). After a jury verdict of guilty, the district court judge directed a judgment of acquittal ruling that the government failed to prove an essential element of the crime beyond a reasonable doubt. Id. at 1159. The Court of Appeals found the evidence sufficient and "vacat[ed] the judgment of acquittal and remand[ed] the case to the district court with directions to reinstate the guilty verdict . . . . " Id. at 1157. However, "[i]t does not necessarily follow from the fact that a verdict of guilty erroneously set aside is reinstated that the defendant's conviction is validated. He may still move for a new trial or he may appeal from an ultimate judgment of conviction on the basis of errors occurring in the course of the trial." United States v. Donahue, 539 F.2d 1131, 1134 (8th Cir. 1976).

36. Serfass v. United States, 420 U.S. 377, 382 (1975).

In *United States v. Security National Bank*,[37] the government attempted to broaden the scope of its right to appeal to encompass jury acquittals of a corporate defendant, on the grounds that double jeopardy protection did not apply to a corporation.[38] The government argued "that both the language and history . . . [and] an analysis of the basic values underlying the Double Jeopardy Clause . . . compels the conclusion that it is not applicable to corporations."[39] The Court of Appeals for the Second Circuit held that a corporation was entitled to constitutional protection against double jeopardy, and dismissed the appeal.[40] This was the first appellate federal court to discuss the merits of this issue in an opinion.[41] As authority, citation was made to the Supreme Court's decision in *Fong Foo v. United States*,[42] a case in which the issue was neither briefed by the parties nor considered in the Court's opinion;[43] the Fourth Circuit's decision in *United States v. Southern Ry.*,[44] a case which relied on *Fong Foo* without further discussion to hold the privilege applied to a corporation;[45] and the Fifth Circuit's decision in *United States v. Martin Linen Supply Co.*,[46] a case in which the issue was not briefed nor explicitly considered in the opinion.[47] Further citation was made to a group of cases where applicability of the double jeopardy clause to a corporation was assumed but was not an issue,[48] and by stating that there was "no valid reason" why a corporation is not a *person* within the meaning of the double jeopardy clause.[49] The court might have laid this issue to rest by examining the valid reasons for concluding that a corporation is a person entitled to double jeopardy protection.

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37. 546 F.2d 492 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3652 (U.S. Mar. 29, 1977).

38. In order for the government to successfully appeal it was necessary to show the double jeopardy clause did not apply to a corporation. In the prior proceeding, the trier of fact had the power to convict. A successful appeal would require further proceedings before the trier of fact. See notes 30-36 supra and accompanying text.

39. Brief for Appellant at 19, United States v. Security Nat'l Bank, 546 F.2d 492 (2d Cir. 1976).

40. 546 F.2d at 495.

41. The issue was discussed by a district court in United States v. Armco Steel Corp., 252 F. Supp. 364 (S.D. Cal. 1966) which concluded that a corporation is entitled to double jeopardy protection. For a criticism of this decision see Note, Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision," 28 Stan. L. Rev. 805, 815-17 [hereinafter cited as Double Jeopardy and Corporations].

42. 369 U.S. 141 (1962). For a discussion of Fong Foo v. United States see note 10 supra.

43. Id.

44. 485 F.2d 309 (4th Cir. 1973).

45. Id. at 312.

46. 534 F.2d 585 (5th Cir.), cert. granted, 97 S. Ct. 308 (1976).

47. Petitioner's Brief for Certiorari at 18 n.27, United States v. Security Nat'l Bank, 45 U.S.L.W. 3543 (U.S. Feb. 4, 1977) (No. 1077).

48. United States v. Security Nat'l Bank, 546 F.2d 492, 493 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3652 (U.S. Mar. 29, 1977).

49. Id. at 494.

Although most discussions of the application of double jeopardy protection center on policy considerations,[50] the determination of whether a corporation is entitled to this protection must be based on an examination of whether a corporation is a person within the meaning of the clause. Once this determination is made, policy considerations come into play in deciding if the protection extends to a given factual situation.[51]

The amendment's "person" is entitled to three constitutional guarantees: protection against double jeopardy, protection against self-incrimination, and the right to due process of law. Therefore, the inquiry focuses on whether the word person includes a corporation for some of the protections but not for others.

Although few in number, corporations were in existence when the Constitution was drafted. The quasi-public corporation was well known since the seventeenth century.[52] In the year 1800 there were 335 profit-oriented corporations in the United States.[53] There was some question as to whether a corporation could commit a crime at early common law,[54] but the concept of corporate crime was not unknown when the Constitution was drafted.[55] Thus, in *United States v. Amedy*[56] the Court held that a corporation was a person within the meaning of a criminal statute.[57] To argue, as a matter of constitutional interpretation, that the drafters of the amendment did not have corporations specifically in mind when they drafted this clause of the fifth amendment should not be conclusive:

> "It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception."[58]

Early decisions of the Supreme Court recognized that in certain situations a corporation was encompassed by the term person. In *The Trustees of Dartmouth College v. Woodward*,[59] the Court held that a corporation was equivalent to a natural person when exercising the same powers, and thus protected from the arbitrary power of the state with respect to its constitu-

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50. See, e.g., United States v. Wilson, 420 U.S. 322, 342-44 (1975); Green v. United States, 355 U.S. 184, 187-88 (1957); United States v. Choate, 527 F.2d 748, 751 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976); United States v. Brown, 481 F.2d 1035, 1040-41 (8th Cir. 1973); Double Jeopardy and Corporations, supra note 41, at 817-27.

51. See text accompanying notes 26-31 supra.

52. A. Berle & G. Means, The Modern Corporation and Private Property, at 11 (rev. ed. 1968).

53. Id.

54. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492 (1909).

55. United States v. Amedy, 24 U.S. (11 Wheat.) 392, 412 (1826).

56. 24 U.S. (11 Wheat.) 392 (1826).

57. Id. at 412-13.

58. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644 (1819).

59. 17 U.S. (4 Wheat.) 518 (1819).

tional guaranty against impairment of contracts.[60] When called upon to construe the Treaty of Peace of 1783, the Court in *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*[61] held that a corporation was protected by the treaty which provided " 'that no person shall . . . suffer any future loss or damage, either in his person, liberty or property.' "[62] By 1838, it was settled that the inclusion of a corporation within the meaning of the word person was fully justified when a corporation acted in the same capacity as a natural person.[63]

However argument can be made that a corporation is not included in the protection of the double jeopardy clause since it is firmly established that a corporation is not entitled to the amendment's companion protection against self-incrimination.[64] A corporate officer cannot refuse to produce potentially incriminating corporate books and papers in a criminal proceeding.[65] The constitutional privilege against self-incrimination is personal and applies only to natural persons.[66] Since the word person is the subject of both protections,[67] it is persuasive to argue that if a corporation is excluded from one, it is necessarily excluded from the other. This position is reinforced by dicta in many cases stating that double jeopardy is an individual or personal right.[68]

The answer to this argument lies in the nature of the protection afforded. The privilege against self-incrimination cannot be applicable to a corporation since a corporation cannot incriminate itself within the meaning of the amendment."[T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ."[69] Evidence given by an employee

60. Id. at 636-37.

61. 21 U.S. (8 Wheat.) 464 (1823).

62. Id. at 489-90.

63. Beaston v. Farmers' Bank, 37 U.S. (12 Pet.) 102, 134 (1838). The applicability of the double jeopardy clause to a corporation was never considered by the Supreme Court in the early years of the Republic. The small number of corporations during this period made the question statistically improbable. See text accompanying note 53 supra. De novo criminal trials are unlikely, as the corporation could raise the pleas of res judicata and collateral estoppel. See Double Jeopardy and Corporations, supra note 41, at 812-13. Additionally, the pleas of autrefois acquit and autrefois convict were available. See notes 19 & 20 supra and accompanying text. A prosecutorial appeal was impossible without statutory authority. See notes 2 & 6 supra.

64. Hale v. Henkel, 201 U.S. 43, 74 (1906). See Bellis v. United States, 417 U.S. 85 (1974).

65. Hale v. Henkel, 201 U.S. 43, 74 (1906). See Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968).

66. United States v. White, 322 U.S. 694 (1944).

67. U.S. Const. amend. V.

68. See, e.g., Green v. United States, 355 U.S. 184, 187 (1957); United States ex rel. Rogers v. LaVallee, 517 F.2d 1330, 1332 (2d Cir. 1975), cert. denied, 423 U.S. 1078 (1976); Ferina v. United States, 340 F.2d 837, 839 (8th Cir.), cert. denied, 381 U.S. 902 (1965); Kistner v. United States, 332 F.2d 978, 980 (8th Cir. 1964); Caballero v. Hudspeth, 114 F.2d 545, 547 (10th Cir. 1940). Levin v. United States, 5 F.2d 598, 600 (9th Cir.), cert. denied, 269 U.S. 562 (1925). It should be noted that these courts were not speaking in terms of excluding a corporation from the protection.

69. Schmerber v. California, 384 U.S. 757, 761 (1966). The privilege protects against "the use

or agent of a corporation cannot violate the corporation's privilege as the corporation is not testifying. Thus, an agent or employee cannot claim a third person's privilege.[70] Likewise, compelling a custodian to produce a corporation's books and records would not violate the privilege.[71] Such papers were not prepared by the corporation nor do they contain testimonial declarations of the corporation.[72] As these papers were voluntarily prepared, "they cannot be said to contain compelled testimonial evidence . . . ."[73] These rules apply equally to an individual or a corporation.[74] An individual is afforded no protection against self-incrimination unless that incrimination is in fact testimonial in nature.[75] No rule of construction is contradicted by holding that a corporation is included within the term person of the double jeopardy clause, but at the same time cannot invoke the privilege against self-incrimination.

The third protection offered by this clause of the fifth amendment is that of due process.[76] A corporation, like an individual, is protected against deprivation of property without due process of law.[77] Moreover, Congress in exercising its regulatory powers must do so in accordance with "the guarantee of due process of law found in the Fifth Amendment."[78] In accord are the Supreme

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of physical or moral compulsion to extort communications . . . ." Holt v. United States, 218 U.S. 245, 252-53 (1910).

70. Hale v. Henkel, 201 U.S. 43, 70 (1906).

71. Id. at 74-75. The custodian may be compelled to produce these documents even if he claims the documents will incriminate him. Wilson v. United States, 221 U.S. 361, 378-79 (1911). For a discussion of a corporation's rights against unreasonable search and seizure, see notes 82-86 infra and accompanying text.

72. Fischer v. United States, 425 U.S. 391, 409 (1976).

73. Id. at 409-10.

74. "The [individual] cannot avoid compliance with [a] subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." Id. at 410. However, an individual is protected from producing private communicative papers. Along these lines, corporate records cannot be made private by keeping personal letters with them. Wilson v. United States, 221 U.S. 361, 378 (1911). The issue of what personal private records are protected by the right against self-incrimination has been left open by the decision in Fischer v. United States, 425 U.S. 391 (1976).

75. See, e.g., California v. Byers, 402 U.S. 424, 432 (1971) (Driver involved in an accident may be required to stop at the scene and give his name and address.); United States v. Wade, 388 U.S. 218, 222-23 (1967) (Accused can be required to utter statements purportedly said during a criminal act for the purpose of witnesses identifying the voice.); Schmerber v. California, 384 U.S. 757, 765 (1966) (Accused may be required to submit to a blood test.); Shapiro v. United States, 335 U.S. 1, 32-33 (1948) (Privilege does not protect records which are required to be kept by a valid government regulation.); United States v. Sullivan, 274 U.S. 259, 263 (1927) (Privilege does not protect an individual from being required to file an income tax return for income derived from an unlawful business.); Holt v. United States, 218 U.S. 245, 252-53 (1910) (Accused can be required to dress in certain clothing for purpose of identification by witnesses.).

76. U.S. Const. amend. V.

77. United States v. Chicago, Mil., St. P. & Pac. R.R., 282 U.S. 311, 327 (1931); Sinking Fund Cases, 99 U.S. 700, 718-19 (1878).

78. Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 347 (1935). See ICC v. Oregon-Washington R.R. & Navigation Co., 288 U.S. 14 (1933).

Court's holdings that the fourteenth amendment's[79] guarantees of due process and equal protection are applicable to corporations as well as individuals.[80]

Thus an examination of the three constitutional guarantees afforded a person under this clause of the fifth amendment reveals no reason why a corporation should be excluded from the term person. The construction of these protections has been consistent with the views expressed in the early Supreme Court decisions that a corporation will be considered a person in those circumstances where a corporation's actions or interests are the same as a natural person.[81] In addition, the large number of constitutional guarantees extended to a corporation support the conclusion that the double jeopardy clause should encompass the corporate entity. The protections of the fourth amendment[82] against unreasonable search and seizure apply to a corporation.[83] A corporation cannot be required to produce its books and papers absent a showing that such is necessary and reasonable for the prosecution of a case.[84] Although literally using the term "house," the amendment has been liberally construed[85] to include business offices, and entry "may only be compelled . . . within the framework of a warrant procedure."[86]

In a criminal proceeding, it is a "fundamental principle that corporations enjoy the same rights as individuals to trial by jury . . . ."[87] A corporation is presumed innocent until proven guilty. "The presumption of honest intent and right conduct attends the action of [corporations] . . . as well as it does the action of . . . individuals . . . ."[88] A corporation has an attorney-client privilege protecting employee communications if made within the scope of employment, and at a superior's direction.[89] Additional constitutional guarantees extended to a corporation are freedom of expression,[90] the right to

79. U.S. Const. amend. XIV, § 1.

80. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 79-80 (1938); Gulf Colorado & Sante Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897).

81. See notes 59-63 supra and accompanying text.

82. U.S. Const. amend. IV.

83. Hale v. Henkel, 201 U.S. 43, 76 (1906). However, there is dictum to the effect that fourth amendment rights are primarily individual, personal rights. See, e.g., United States v. White, 322 U.S. 694, 698 (1944).

84. 201 U.S. at 76-77.

85. Lanza v. New York, 370 U.S. 139, 143 (1962); See Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931).

86. See v. Seattle, 387 U.S. 541, 545 (1967). This applies to administrative agencies as well as to criminal investigations. Id. However, a "business premises . . . [may] reasonably be inspected in many more situations than private homes . . . ." Id. at 546.

87. United States v. R. L. Polk Co., 438 F.2d 377, 379 (6th Cir. 1971).

88. ICC v. Chicago Great W. Ry., 209 U.S. 108, 119 (1908).

89. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir.), aff'd 400 U.S. 348 (1971). An exception is that a communication to a corporation's patent department is not included within the attorney-client privilege. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D. Mass. 1950).

90. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). Although a corporation does not have the guarantee of freedom of speech, Hague v. CIO, 307 U.S. 596 (1939), it has standing to defend the rights of others if it suffers economic harm due to the

petition the government,[91] and the right of association.[92] A corporation has standing to defend the constitutional rights of individuals when it suffers economic injury due to the deprivation of those rights,[93] or when it "exists primarily for the expression and defense of the right sought to be protected."[94] The large number of constitutional privileges applicable to corporations indicate a trend and a philosophy which would support the extension of double jeopardy protection now that that issue has been raised.

The two cases which have discussed the issue concluded that a corporation is entitled to this protection.[95] There are also a small number of cases in which the court assumed the protection applied, and therefore gave the corporate defendant the benefit of the guarantee.[96] In other cases, corporations were allowed to assert the guarantee without challenge. However, the invocation of the privilege in these cases did not affect their disposition.[97] No case has been found that denied the privilege to a corporation in circumstances where it would have been available to an individual. The group of cases which, in dicta, stated that double jeopardy was an individual or personal privilege did not specifically exclude a corporation.[98] The case law therefore supports the proposition that it is reasonable and proper to afford a corporation this constitutional guarantee.

The conduct of business is being subject to ever increasing government regulation enforced by criminal sanctions.[99] A corporation can be guilty of a large variety of crimes,[100] many of which involve substantial fines.[101] Allow-

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deprivation of these rights. Cf. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Gajon Bar & Grill, Inc. v. Kelly, 508 F.2d 1317, 1322 (2d Cir. 1974).

91. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961). This is true even if the right of petition is used with the intent and result to injure another party. Id. at 142-43.

92. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

93. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

94. Gajon Bar & Grill, Inc. v. Kelly, 508 F.2d 1317, 1323 (2d Cir. 1974) (Kaufman, C.J., concurring) and cases collected therein.

95. United States v. Security Nat'l Bank, 546 F.2d 492 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3652 (U.S. Mar. 29, 1977); United States v. Armco Steel Corp., 252 F. Supp. 364 (S.D. Cal. 1966).

96. Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); United States v. Martin Linen Supply Co., 534 F.2d 585, (5th Cir.), cert. granted, 97 S. Ct. 303 (1976); United States v. Certified Grocers Co-op, 546 F.2d 1308 (7th Cir. 1976); United States v. Southern Ry., 485 F.2d 309 (4th Cir. 1973); United States v. American Honda Motor Co., 271 F. Supp. 979, 986 (N.D. Cal. 1967); State v. Detco, Inc., 66 Wis. 2d 95, 223 N.W.2d 859 (1974).

97. See, e.g., Rex Trailer Co., v. United States, 350 U.S. 148 (1956); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. H. E. Koontz Creamery, Inc., 232 F. Supp. 312 (D. Md. 1964).

98. See note 68 supra.

99. Petitioner's Brief for Certiorari at 8, United States v. Security Nat'l Bank, 45 U.S.L.W. 3543 (U.S. Feb. 4, 1977) (No. 76-1077).

100. See, e.g., N.Y. Penal Law § 10 (McKinney 1975). For the purposes of the New York penal law a corporation is included within the definition of person where appropriate. Id. The fifth amendment was made applicable to the states by Benton v. Maryland, 395 U.S. 784 (1969).

101. United States v. Security Nat'l Bank, 546 F.2d 492, 494 (2d Cir. 1976), cert. denied, 45

ing the government repeated attempts to prosecute their case against a corporation would permit continual attacks on its reputation and result in a constant drain of its resources. To destroy a corporation's reputation would be to destroy its business. There would seem to be an additional unfairness inherent in subjecting corporate officials to the ordeal of testifying repeatedly, exposing them time and again to the rigors of the criminal justice system. Most corporations are small businesses[102] with limited capital. Very few are industrial giants with the ability to battle the government on an equal footing. The bludgeon of multiple prosecutions for the same offense may well allow the government to exact unwarranted guilty pleas. It would also allow prior prosecutorial blunders to be rectified in a subsequent trial. In short, the abuse which the fifth amendment sought to remedy would still exist. For these reasons, extension of double jeopardy protection to a corporate criminal defendant is certainly permissible and definitely appropriate.

John J. Kelly, Jr.

Constitutional Law—First Amendment—Ninth Circuit Holds Press Entitled to Greater Access to Prison Than That Afforded General Public.—Prior to the filing of this action, the appellant, sheriff of Alameda County, California, completely excluded both the news media and the general public from access to the Santa Rita jail. The prison facility included the controversial Greystone building, where substandard conditions had previously been described by one court as "truly deplorable" and conducive to the destruction of the human spirit and sanity of its inmates.[1] After appellees, members of the news media, filed suit, appellant amended his restrictive order to provide a program of monthly tours open to the general public. In the district court, the news media maintained that this concession was inadequate because the tours were limited to twenty-five persons, were booked months in advance, and omitted certain areas of the prison, including the Greystone building. In addition, participants were forbidden to speak with inmates or to use cameras or sound equipment.

The district court held that the restrictions violated appellees' first and fourteenth amendment rights. The court issued a preliminary injunction restraining appellant from excluding "responsible representatives of the news media"[2] from the Santa Rita jail, including the Greystone area. The injunction further mandated that the press be given access to the facility at "reasonable times and hours"[3] and that reporters be permitted to interview

U.S.L.W. 3652 (U.S. Mar. 29, 1977).

102. Id.

1. Brenneman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972). "The shocking and debasing conditions which prevailed there constituted cruel and unusual punishment for man or beast as a matter of law." Id.

2. KQED, Inc. v. Houchins, 546 F.2d 284, 285 (9th Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3653 (U.S. Mar. 3, 1977) (No. 76-1310).

3. Id.

inmates and use cameras and sound equipment. Appellant was granted the discretion to regulate the administrative aspects of the program, such as press identification and inmate consent, and to exclude the media when necessary to maintain prison security.

The issue on appeal was whether the trial court had abused its discretion by granting greater prison access to the press than to the general public. The Court of Appeals for the Ninth Circuit agreed that appellees' constitutional right to gather news had been denied by the sheriff's exclusionary policy and affirmed the order, holding that the greater access provisions of the injunction did not constitute an abuse of discretion by the district court.[4] *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3653 (U.S. Mar. 3, 1977) (No. 76-1310).

The first amendment to the Constitution[5] was intended to insure the vitality of a democratic system in which "debate on public issues should be uninhibited, robust, and wide-open . . . ."[6] The press was specifically protected as an autonomous institution so that it might expose the deficiencies of government through broad and vigorous discussion.[7] The goal was an informed electorate and a government responsive to the demands of the people for political and social change.[8] Consequently, the press has functioned within our constitutional system as a forum for commentary on public affairs and a disseminator of opinions from diverse and conflicting sources.[9]

The right of the press to publish has repeatedly been granted extraordinary constitutional protection against prior restraint by governmental action.[10] In

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4. The preliminary injunction was stayed on the grounds of reasonable likelihood that the petition for certiorari would be granted. Houchins v. KQED, Inc., 97 S. Ct. 773, 776 (1977).

5. The amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." U.S. Const. amend. I. The fourteenth amendment protects the press against infringement of this fundamental right by state action. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Near v. Minnesota, 283 U.S. 697, 707 (1931).

6. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

7. New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring); Martin v. City of Struthers, 319 U.S. 141, 143 (1943). "[I]nformed public opinion is the most potent of all restraints upon misgovernment . . . ." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

8. Mills v. Alabama, 384 U.S. 214, 218-19 (1966). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); Branzburg v. Hayes, 408 U.S. 665, 714 (1972) (Douglas, J., dissenting), quoting Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 255, 257 (1961); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

9. Associated Press v. United States, 326 U.S. 1, 20 (1945); Comment, Bans on Interviews of Prisoners: Prisoner and Press Rights after Pell and Saxbe, 9 U. San Fran. L. Rev. 718, 730-31 (1975) [hereinafter cited as Bans on Interviews]; Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 838, 838 (1971) [hereinafter cited as Colum. L. Rev.].

10. Grosjean v. American Press Co., 297 U.S. 233, 249 (1936); Near v. Minnesota, 283 U.S. 697, 713 (1931). Prior restraints of expression bear a heavy presumption against their constitutional validity. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). In the interest of free debate, this protection has been extended without regard for the truth or falsity of the statements. Gertz v. Robert Welch, Inc.,

order to maintain the flow of information, the Supreme Court has also recognized the antecedent right of the media to gather news; however, the extent of this right has not yet been clearly defined.

The existence of a right to gather news was first suggested in *Zemel v. Rusk.*[11] There a United States citizen challenged the Government's refusal to validate his passport application for travel to Cuba on the novel ground that the denial constituted a violation of his right to become better informed about foreign affairs. The court found no infringement of first amendment rights, characterizing the governmental ban as "an inhibition of action"[12] rather than of expression. Although the decision addresses a citizen's right to increase his personal store of knowledge, it further suggests that "[t]he right to speak and *publish* does not carry with it the unrestrained right to gather information."[13]

The petitioner newsman in *Branzburg v. Hayes*[14] asserted that his right to gather news would be abridged if he were required to identify confidential sources or disclose certain facts which he had promised to conceal. Petitioner argued that a reporter should be exempt from the obligation of ordinary citizens to respond to a grand jury subpoena unless the prosecutor could demonstrate a compelling public interest, *i.e.*, that the reporter possessed information relevant to the crime and that such knowledge was unavailable from any other source.[15] The Court refused to recognize a special media privilege, holding that the public interest in effective law enforcement outweighed the burden on newsgathering which resulted when newsmen were required to respond to grand jury questions.[16] The Court noted further in

418 U.S. 323, 339-40 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964); NAACP v. Button, 371 U.S. 415, 444-45 (1963).

11. 381 U.S. 1 (1965).

12. Id. at 16. "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." Id. at 16-17.

13. Id. at 17 (emphasis added). One writer has suggested that the authority of this decision is questionable since the Court's reluctance to interfere with foreign affairs may have weighed heavily in its decision not to examine the newsgathering issue. Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505, 1520 (1974) [hereinafter cited as Harv. L. Rev.]. Further, certain actions have been extended first amendment protection when the right to disseminate information was at issue. Id. at 1519. E.g., Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

14. 408 U.S. 665 (1972).

15. Id. at 680. It has consistently been held that first amendment rights may not be limited by governmental action in the absence of a compelling public interest. NAACP v. Button, 371 U.S. 415, 439 (1963) (freedom of expression and association); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (freedom of association); see Schneider v. State, 308 U.S. 147, 161 (1939) (freedom of speech and press). For a general discussion of the newsman's privilege asserted in Branzburg, see Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970).

16. 408 U.S. at 690-91. However, the Court made it clear that governmental harassment of the press for the mere purpose of disrupting the newsgathering process would not be tolerated. Id. at 707-08. A recent case has held that in a civil trial newsmen have a first amendment right to withhold their confidential sources unless there is no other means to acquire that critical evidence. Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976). The court there

Branzburg that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[17] The Court emphasized, however, that the right to gather news does warrant first amendment protection without which "freedom of the press could be eviscerated."[18] The Court suggested some limitations on the scope of newsgathering rights:

> [T]he press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial . . . .[19]

Two years later, the Supreme Court applied the principles discussed in *Branzburg* to the issue of media access to prisons. In *Pell v. Procunier*,[20] three professional journalists challenged the constitutionality of a California Department of Corrections regulation prohibiting interviews with inmates specifically designated by the newsmen in advance.[21] Plaintiffs claimed that a first amendment right to gather news should have enabled them to interview any consenting inmate unless the discourse posed a clear and present danger to security or infringed some other substantial interest of the prison system.[22]

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found that the benefit to be derived from protecting the anonymity of the newsman's sources outweighed the social interests behind private civil litigation. Id. at 510.

The Branzburg opinion provides a thorough discussion of prior instances in which the media was not exempted from the force of laws serving a public interest. 408 U.S. at 682-84. E.g., Craig v. Harney, 331 U.S. 367, 377-78 (1947) (newspaper may be punished for contempt of court); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-94 (1946) (newsgathering organization subject to the requirements of the Fair Labor Standards Act); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (newspaper may be taxed in a nondiscriminatory manner).

17. 408 U.S. at 684. However, the press must be afforded newsgathering access to the same extent as the general public. Estes v. Texas, 381 U.S. 532, 540 (1965) (dictum); United States v. Mitchell, 386 F. Supp. 639 (D.D.C. 1975) "Absent special circumstances, any member of the public has a right to inspect and obtain copies of . . . judicial records." Id. at 641 (emphasis omitted); accord, Lewis v. Baxley, 368 F. Supp. 768, 775 (M.D. Ala. 1973).

18. 408 U.S. at 681; accord, Lewis v. Baxley, 368 F. Supp. 768, 775; see Harv. L. Rev., supra note 13, at 1505-10. See generally Colum. L. Rev., supra note 9.

19. 408 U.S. at 684-85. See 368 F. Supp. at 775, where the Court noted that reasonable access to the news does not include the invasion of privacy rights.

20. 417 U.S. 817 (1974). Saxbe v. Washington Post Co., 417 U.S. 843 (1974), was a companion case. The fact patterns in Saxbe and Pell are similar except that in the former case a Policy Statement of the Federal Bureau of Prisons was at issue. The Court found the cases "constitutionally indistinguishable." Id. at 850.

21. The media had previously been free to conduct personal interviews with designated inmates. However, the Department of Corrections determined that this policy contributed substantially to prison unrest since the subjects of press attention became "public figures" capable of influencing their fellow inmates to engage in violent behavior. Id. at 831-32.

22. Id. at 829. Traditionally, federal courts have observed a "hands-off" policy with respect to prison administration. However, if a prison regulation violates a fundamental constitutional right, federal courts will intervene. Procunier v. Martinez, 416 U.S. 396, 404-07 (1974).

The Court noted that the restriction imposed on individual interviews was not intended to conceal prison conditions or to harass the press in their newsgathering activities.[23] In fact, the state provided a program of public tours and cooperated with the media to the extent of allowing them greater access to prisons than that afforded the general public.[24] The Court also found a compelling state interest in maintaining prison security and preventing the sort of disciplinary problems which the Department of Corrections had attributed to face-to-face communications between prisoners and newsmen.[25] Despite these considerations, the Court seemed to rest its holding primarily on the principles enunciated in *Branzburg* and *Zemel*.[26] The regulation was constitutional because it denied only a newsgathering opportunity beyond that afforded the general public.[27]

> The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public . . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.[28]

The Court acknowledged in *Pell* that information on prison conditions is both newsworthy and a matter of public concern.[29] The decision is trouble-

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In Pell, four prison inmates also challenged the constitutionality of the correction regulation as an inhibition of free speech. The Court found that paramount security interests and alternative means of communication open to inmates justified the limitation on first amendment rights. 417 U.S. at 823-28.

23. 417 U.S. at 830. The Court in Branzburg was also critical of any deliberate attempts to frustrate the newsgathering process. See note 16 supra.

24. 417 U.S. at 830-31. Newsmen had access to both minimum and maximum security areas of the prison and were permitted to interview any inmate encountered during the tour.

The press could also interview inmates selected at random by prison officials and those present at any group meeting the press chose to attend. Id. at 830.

25. See note 21 supra.

26. 417 U.S. at 833-34.

27. Id. at 835. Under the California regulations, inmates were permitted visits by family, friends, attorneys and clergy. The Court noted that these did not qualify as members of the general public for the purposes of allowing the press equal access. Id. at 831 n.8. Cf. Houston Chronicle Publishing Co. v. Kleindienst, 364 F. Supp. 719, 725 (S.D. Tex. 1973). The regulation did not discriminate against the press as a class. 417 U.S. at 831. See note 17 supra.

28. 417 U.S. at 834-35 (footnote omitted); accord, Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); see United States v. Mitchell, 386 F. Supp. 639, 641 (D.D.C. 1975) (quoting "Or of the Press," Yale Law School Sesquicentennial Convocation, Nov. 2, 1974 at 9).

29. 417 U.S. at 830 n.7. In addition to the tax burden, the public has an interest in the efficacy of the correctional system because most inmates eventually return to society. Id. at 840 (Douglas, J., dissenting) (" 'The cost to taxpayers is over one billion dollars annually. Of those individuals sentenced to prison, 98% will return to society.' "). It has recently been estimated that $12,000 per inmate is spent each year in New York prisons just for custodial care. Wicker, Unchanging Prisons, N.Y. Times, Sept. 3, 1976, at 19, cols. 5-6 [hereinafter cited as Unchanging Prisons].

Noting the tragic tendency of the general public to ignore that part of the criminal justice

some, however, because the test which the Court posited to determine press access to newsworthy events fails to make adequate allowance for the public interest in the status of the penal system. In fact, the *Pell* decision is a retreat from the approach in *Branzburg* where the governmental and societal interests in criminal investigation were at least weighed against the burden on the newsgathering process.[30] The Court in *Pell* chose instead to define the right of press access to information strictly in terms of that afforded the general public. Equating the two presents an attractive but simplistic formula for testing the constitutionality of bans on preliminary newsgathering activity.[31] Criticism of this test is twofold. First, the Court's formulation of the test seems circular. The statement that "newsmen have no constitutional right of access . . . beyond that afforded the general public"[32] is of little value since the right of public access to news remains undefined at present.[33] In view of this fundamental uncertainty, mere nondiscriminatory treatment of the press and public is no guarantee against first amendment infringement since the rights of both may be unduly limited.[34]

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system which postdates conviction and sentencing, the Pell Court observed that in order to effect prison reform the public attitude must be changed. 417 U.S. at 830 n.7. " 'A visit to most prisons will make you a zealot for prison reform.' " Id. (quoting W. Burger, For Whom the Bell Tolls, 25 Record of N.Y.C.B.A. (Supp.) 21 (1970)); accord, Saxbe v. Washington Post Co., 417 U.S. 843, 861 n.7 (1974); see Brenneman v. Madigan, 343 F. Supp. 128, 132 (N.D. Cal. 1972), where the court visited the Santa Rita prison because "the reality of confinement is so elusive." See generally Burger, Our Options Are Limited, 18 Vill. L. Rev. 165 (1972).

The New York State Special Commission on Attica made several proposals toward restructuring the correction system. The Commission encouraged community participation in prison life through such activities as teaching, counselling, and leading group therapy sessions. New York State Special Commission on Attica, Official Report xvii-xviii (1972). The Commission further recommended that the press be granted access to prisons in order that these institutions no longer be insulated from public view. Id. at xvii. See Causes, Preventive Measures, and Methods of Controlling Riots & Disturbances in Correctional Institutions 20 (American Correctional Association 1970).

30. See note 16 supra and accompanying text; Saxbe v. Washington Post Co., 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting); Comment, Prisons and the Right of the Press to Gather Information: A Review of Pell v. Procunier and Saxbe v. Washington Post Co., 43 U. Cin. L. Rev. 913, 917-18 (1974) [hereinafter cited as U. Cin. L. Rev.].

31. 417 U.S. at 875 (Powell, J., dissenting). This approach also eliminates the difficult task of defining the term "press." Id. at 873. See notes 74-76 infra and accompanying text.

32. Pell v. Procunier, 417 U.S. 817, 834 (1974).

33. See Harv. L. Rev., supra note 13, at 1507. The first amendment has been construed to protect the right to receive information against unjustified governmental interference. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (right of addressee to receive correspondence from prison inmate); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969) (public's right of access to ideas obligated broadcaster to present balanced coverage of issues); Lamont v. Postmaster General, 381 U.S. 301, 305-07 (1965) (right to receive communist political propaganda in the mail from abroad). See Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). However, since the right to receive presumes a voluntary source, one writer has suggested that the right of access to information should necessarily be broader in order to encompass involuntary and neutral sources. Harv. L. Rev., supra note 13, at 1506, 1510-14, 1517-23.

34. Saxbe v. Washington Post Co., 417 U.S. 843, 860 (1974) (Powell, J., dissenting); Pell v. Procunier, 417 U.S. 817, 841 (1974) (Douglas, J., dissenting).

Secondly, the constitutional underpinning of the *Pell* test has been criticized by those who maintain that the press should have special access to information beyond that afforded the general public.[35] In his dissenting opinion in *Pell,* Justice Douglas noted that a free press exists to protect the interests of the populace.[36] Since practical limitations make it unlikely that the average person would investigate thoroughly matters of legitimate public concern,[37] Justice Douglas asserted that the press should occupy a " 'preferred position' "[38] in pursuing newsgathering activity. This preference would be granted " 'not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know.' "[39]

Since the Supreme Court's decision in *Pell,* there appears to have been little constructive reform of penal institutions.[40] Overcrowded conditions prevail[41] and inmate uprisings remain a constant threat.[42] Official indifference and neglect further contribute to a system in which drug traffic, inmate suicide, and poor medical care remain serious problems.[43] Moreover, since the families of inmates are often poorly educated and unlikely to vote, they have never constituted a potent political entity.[44] Hence, a better informed populace remains a clear prerequisite to significant prison reform.[45] It is against this background that the Ninth Circuit in *KQED, Inc. v. Houchins*[46] faced the issue of whether the press should be granted greater access to Santa Rita jail than the monthly tours permitted to the general public.

The Ninth Circuit agreed with the trial court that the first amendment rights of both the public and the press had been violated by the sheriff's policy of permitting only restricted monthly tours.[47] Thus, in this case the mere equality of treatment of the press and public was held insufficient to

35. 60 Cornell L. Rev. 446, 459-60 (1975); U. Cin. L. Rev., supra note 30, at 919-20; Bans on Interviews, supra note 9, at 730-31.

36. 417 U.S. at 839-40 (Douglas, J., dissenting).

37. Id. at 841.

38. Id. at 840.

39. Id. Justice Powell argued in Saxbe that no person could realistically obtain all the information necessary to exercise the ballot intelligently. "By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment." 417 U.S. at 863.

40. T. Murton, The Dilemma of Prison Reform 77-95 (1976) [hereinafter cited as Murton]; State of New York Commission of Investigation, Report Concerning the State Commission of Correction (1975) [hereinafter cited as Commission Report]; Unchanging Prisons, supra note 29.

41. Comment, Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis, 36 Md. L. Rev. 182 (1976); Unchanging Prisons, supra note 29.

42. See Murton, supra note 40, at 51; Commission Report, supra note 40, at 35-36; Unchanging Prisons, supra note 29.

43. Commission Report, supra note 40, at 12-14, 24, 30-35.

44. Unchanging Prisons, supra note 29.

45. See notes 6-9 supra and accompanying text. See Commission Report, supra note 40, at 36 where it was noted that a series of newspaper articles prompted official investigation of prison unrest.

46. 546 F.2d 284 (9th Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3653 (U.S. Mar. 3, 1977) (No. 76-1310).

47. Id. at 285 n.2, 286.

rebut a constitutional attack on the sheriff's restrictions.[48] The Ninth Circuit endorsed the test employed by the district court to determine the minimum prison access compatible with the first amendment.[49] Under this test the governmental restriction is permissible only if it furthers "an important or substantial governmental interest unrelated to suppressing speech and the restriction is the least drastic means of furthering that governmental interest."[50]

The court was satisfied that the terms of the injunction allowed for reasonable protection of the governmental interests of prison security and inmate privacy while necessitating far less drastic curtailment of first amendment rights than was dictated by the sheriff's restrictions.[51]

The Ninth Circuit held further that the district court did not abuse its discretion by mandating greater access for the news media than for the general public.[52] The court noted that the injunction was designed to accommodate different needs.[53] Public access might be satisfied by a formal tour, while the media would require access upon reasonable notice to cover newsworthy events.[54] Moreover, the court reasoned that the administrative problems of accommodating large public tours posed a greater security threat than granting access to a single reporter familiar to prison officials.[55]

Judge Pregerson, writing for the court in *Houchins*,[56] did not find the result

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48. Id. at 286. See notes 27-28 supra and accompanying text. This part of the court's decision can perhaps be reconciled with Pell. The entire access policy in that case was less disruptive of first amendment rights than the flagrant restrictions in Houchins whereby an inmate could never be interviewed, certain areas could not be investigated, and prison access might not be possible if a newsworthy event arose on a day when no tour was scheduled. Id. at 285 n.2. Furthermore, in Pell there was no attempt on the part of the state to conceal prison conditions or harass the press in its investigation. See notes 16, 23 supra and accompanying text. In Houchins, however, the limited monthly tour could frustrate attempts to report on certain controversial areas of the Santa Rita jail. Finally, in Pell, both the press and the public enjoyed access to state prisons, with the press accorded somewhat greater latitude. Pell v. Procunier, 417 U.S. 817, 830-31 (1974); see note 24 supra and accompanying text.

49. The Supreme Court had previously used this test in cases where certain prohibited conduct also constituted expression. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974) (prison censorship regulations of inmate correspondence held unconstitutional); United States v. O'Brien, 391 U.S. 367, 377 (1968) (regulation forbidding destruction of Selective Service registration certificate held constitutional).

50. 546 F.2d at 286. This test is to be distinguished from the more stringent compelling interest test applied by the Supreme Court to governmental restrictions on pure expression. See note 15 supra.

51. Id. The appellant could not limit press access to the prison solely to prevent criticism or incorrect evaluation. Procunier v. Martinez, 416 U.S. 396, 413 (1974). The fact that the regulation advances a substantial governmental interest, such as prison security, does not render it constitutional if less drastic means could be utilized. Id. at 413-14. See generally Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

52. 546 F.2d at 285-86.

53. Id. at 286.

54. Id.

55. Id.

56. Judges Duniway and Hufstedler filed separate concurring opinions. Id. at 294-96.

contrary to the principles of *Pell* since that decision "[did] not stand for the proposition that the correlative constitutional rights of the public and the news media to visit a prison must be implemented identically."[57]

Nevertheless, as Judge Duniway noted in his concurring opinion, *Houchins* seems to be directly at odds with the Supreme Court's uncompromising "no greater access" language in *Pell*.[58] In fact, both concurring opinions in *Houchins* recognized that the preliminary injunction granted the press greater latitude than strict application of the formula in *Pell* would allow.[59] Judge Duniway argued that the press should have a preferred right of access to matters of public interest based on their superior ability to gather and disseminate news.[60]

Judge Hufstedler, in her concurrence, maintained that the first amendment does not mandate co-extensive physical access to prisons for the press and the general public.[61] The press should have preferred access, but only to enable it "to see and to hear everything within the institution about which the general public is entitled to be informed."[62] Judge Hufstedler acknowledged that the public's right to know about prisons is broad; only information needed to protect personal privacy and institutional security is excluded from that right.[63] Furthermore, prisons are unique among public institutions due to the violent nature of inmates and the strong need for security and discipline.[64] Thus, prison access regulations should be designed with these special considerations in mind.[65] Guided tours can serve a worthwhile purpose by acquainting the public with certain aspects of a penal institution; but limitations of space and time seriously restrict the potential of such tours to permit comprehensive public scrutiny of the prison system. They are highly unlikely to rival the media's unique capacity to disseminate newsworthy information concerning prison conditions to a wide public audience.[66] However, a private, in-depth tour conducted with a small group of newsmen, concluded Judge

57. Id. at 286.

58. Id. at 294-95 (Duniway, J., concurring). Judge Duniway further noted that Pell disregarded precisely those administrative considerations found to be dispositive by Judge Pregerson. Id.

59. Id. at 294-95 (Duniway, J., concurring); id. at 295 (Hufstedler, J., concurring). Judge Hufstedler would confine the decision in Pell to its facts. Id. Judge Duniway, however, conceived of Houchins and Pell as reaching contradictory results. Id. at 294-95 (Duniway, J., concurring).

60. Id. at 294 (Duniway, J., concurring).

61. Id. at 295-96 (Hufstedler, J., concurring).

62. Id. "For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large." Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

63. 546 F.2d at 295-96 (Hufstedler, J., concurring). A prisoner's conversations with his clergyman, his lawyer, or his spouse are not proper subjects of public scrutiny. Id. at 296 (Hufstedler, J., concurring). The public also has no right to attend a meeting of prison officials. Id. But see Garrett v. Estelle, 424 F. Supp. 468 (N.D. Tex. Jan. 13, 1977), where the court lifted a total ban on news media access to interview "death row" inmates and view executions.

64. 546 F.2d at 296 (Hufstedler, J., concurring).

65. Id.

66. Id.

Hufstedler, would achieve the latter goal without posing a substantial security problem.[67]

Given the special nature of the prison system and the fact that the need for reform is critical,[68] greater press access to prisons may be the only way to secure the first amendment's objective of an informed public.[69] Yet such a solution is not immune from criticism. It confers a privileged position upon a self-designated subset of the general populace. Furthermore, although the press may have a responsibility to report events accurately or to present the full range of debate on a public issue,[70] such a duty cannot readily be enforced.[71] "A responsibile press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[72] However, without access equal to that accorded the press, the public is denied the opportunity to assess the situation for itself, although ultimately the risk of error for unfair press presentation falls on the public.[73]

Granting the press special access to prisons presents the further problem of defining the beneficiaries of this privilege.[74] Since the first amendment protects "the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as . . . the large metropolitan publisher,"[75] to afford greater prison access to some media groups rather than others could be

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67. Id.

68. See notes 40-45 supra and accompanying text.

69. See notes 6-9 supra and accompanying text.

70. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); Geo. L.J., Media and the First Amendment in a Free Society 27-28 (1973) [hereinafter cited as Free Society]. This responsibility derives from the reliance placed by society on the ability of the press to present the facts of governmental operations in concise form. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

71. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974). Government cannot compel the press to publish that which " ' "reason" tells them should not be published.' " Id. at 256. The Court has been reluctant to subvert the editorial function despite any benefit to be derived from controlling the press. Id. at 259 (White, J., concurring); see Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (under Fairness Doctrine, broadcaster may refuse to accept paid editorial advertisements by individuals and organizations); note 10 supra and accompanying text; note 76 infra.

72. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974). Thus, it appears that the aspect of the preliminary injunction in Houchins which mandated that only "responsible" members of the press be granted access to the Santa Rita jail could not be enforced. See 546 F.2d at 285.

73. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 260 (White, J., concurring).

74. Branzburg v. Hayes, 408 U.S. 665, 704 (1972); Harv. L. Rev., supra note 13, at 1508.

75. Branzburg v. Hayes, 408 U.S. 665, 704 (1972); see Mills v. Alabama, 384 U.S. 214, 218-19 (1966); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). This protection is especially necessary in view of the trend toward monopolization of the media and the consequential barriers which restrict the entry of new publications into the communications field. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-50 (1974); Free Society, supra note 70, at 21-27; B. Schmidt, Freedom of the Press vs. Public Access 37-46 (1976).

to discriminate on the basis of size, financial resources, or even content.[76]

Hence, if it is to be accorded greater access privileges, "the press" must be defined broadly to encompass "every sort of publication which affords a vehicle of information and opinion."[77] Even if press responsibility cannot be mandated, such an expansive definition provides the best insurance consistent with the first amendment that the free competition of ideas will purge an erroneous statement.[78] The Ninth Circuit's holding in *Houchins,* coupled with a broad definition of the news media, could alert the public to the need for prison reform. Such a result would eventually expose the prison system to the same accountability as other, more visible public institutions.

Mary Anne Wirth

Corporations—Second Circuit Refuses To Allow Layman To Prosecute Derivative Action Pro Se.—Randolph Phillips, a non-lawyer, filed a pro se derivative action against Alleghany Corporation[1] and its directors in the

76. Branzburg v. Hayes, 408 U.S. 665, 705 n.40 (1972). "[T]he First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste." Id., citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959); Winters v. New York, 333 U.S. 507, 510 (1948); Thomas v. Collins, 323 U.S. 516, 537 (1945).

77. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). The Ninth Circuit in Houchins recommended that the trial court consider the contact with news media provided by the federal prison system. 546 F.2d at 286. Under that scheme, certain representatives of the news media are accorded greater visiting privileges than those groups not listed in the regulation. U.S. Dep't of Justice, Federal Prison System Policy Statement No. 1220.1C (Jan. 17, 1977). The Policy Statement defines the preferred group as:

Persons who are primarily employed in the business of gathering or reporting news for (a) a newspaper qualifying as a general circulation newspaper in the community to which it publishes, (b) news magazines having a national circulation being sold by newsstands to the general public and by mail circulation, (c) national or international news services, (d) radio and television news programs of stations holding Federal Communication Commission Licenses. Id. at ¶ 4(a)(1).

The federal policy seems unconstitutional since it limits access privileges only to the most well established organs of communication. See notes 74-76 supra and accompanying text.

78. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945); see New York Times v. Sullivan, 376 U.S. 254, 271 (1964), quoting NAACP v. Button, 371 U.S. 415, 444-45 (1963).

1. This current cause of action is a chapter in over twenty-five years of litigation involving these parties. "The affairs of Alleghany Corporation . . . have given rise to a flood of litigation that must be unparalleled in American corporation law." Willheim v. Murchison, 342 F.2d 33, 35 (2d Cir.), cert. denied, 382 U.S. 840 (1965). These cases have included: Alleghany Corp. v. Kirby, 333 F.2d 327 (2d Cir. 1964); Willheim v. Murchison, 312 F.2d 399 (2d Cir. 1963), cert.

United States District Court for the Southern District of New York alleging, *inter alia,* violations of federal statutes and breach of fiduciary duties.[2] The corporation moved that plaintiff be disqualified on two grounds: that not being an attorney he had no right to prosecute an action on behalf of Alleghany pro se, and that he was not an adequate representative plaintiff under the requirements of Federal Rule of Civil Procedure 23.1.[3] The district court denied this motion[4] and the corporation appealed. The Second Circuit, reaching the merits only of the adequacy of counsel question, held that a layman may not prosecute a derivative action pro se. *Phillips v. Tobin,* 548 F.2d 408 (2d Cir. 1976).

Section 1654 of Title 28 of the United States Code[5] continues the well-established common law rule that parties have the right to plead and conduct their own cases:[6]

In all courts of the United States the parties may plead and conduct their own cases

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dismissed, 384 U.S. 28 (1966); Phillips v. Bradford, 228 F. Supp. 397 (S.D.N.Y. 1964); Willheim v. Murchison, 206 F. Supp. 733 (S.D.N.Y. 1962), appeal dismissed, 312 F.2d 399 (2d Cir. 1963); Zenn v. Anzalone, 46 Misc. 2d 378, 259 N.Y.S.2d 747 (Sup. Ct. 1965).

The question of a layman bringing a derivative action pro se, while conceptually interesting, has a limited practical significance since it is a rare layman who would attempt this complex litigation without professional guidance. Mr. Phillips, however, has had considerable success in this area. In Brief for Plaintiff at 5-6 he gives a list of nine cases which he conducted pro se. Phillips claims to have recovered $613,000 in fees and damages. Id. at 9.

2. "[T]he remaining counts alleged violations by the directors of Alleghany of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a et seq. [(1970), as amended, (Supp. V, 1975)]) (proxy and fraud claim, S.E.C. Rules 10b-5 (17 C.F.R. § 240.10b-5 [(1976)]) and 14a-9 (17 C.F.R. § 240.14a-9 [(1976)]), and the state claim arising from the [acquisition] of the Jones Motor Company . . . ." Phillips v. Tobin, 548 F.2d 408, 409 (2d Cir. 1976) (italics deleted). The court also took pendant jurisdiction over the state breach of fiduciary duty claim, Phillips v. Tobin, 403 F. Supp. 89, 95 (S.D.N.Y. 1975) rev'd, 548 F.2d 408 (2d Cir. 1976), and dismissed several causes of action stated in the complaint. Id. at 94-95.

In addition to seeking injunctive relief, divestiture of the Jones Motor Company acquisition, and registration under the Investment Companies Act, plaintiff also sought declaration and distribution of approximately $80 million in dividends. The Second Circuit observed that in seeking the dividend plaintiff was confusing a personal class action right of the stockholders against the corporation with the derivative stockholder's action to enforce the rights of the corporation. This misjoinder, the court stated, was subject to a motion for a severance under Rules 21 and 42(b) of the Federal Rules of Civil Procedure. 548 F.2d at 409. In its opinion the court only dealt with the rights of the parties in the derivative suit.

3. 403 F. Supp. 89, 95 (S.D.N.Y. 1975) rev'd, 548 F.2d 408 (2d Cir. 1976). Rule 23.1 governs shareholder derivative actions in federal court. Fed. R. Civ. P. 23.1.

4. Id.

5. 28 U.S.C. § 1654 (1970).

6. Faretta v. California, 422 U.S. 806, 830 n.39 (1975); see 17 Rutgers L. Rev. 651, 652 & n.3 (1963).

In a criminal prosecution a defendant has the constitutional right to represent himself under the sixth and fourteenth amendments. Faretta v. California, 422 U.S. 806 (1975).

personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.[7]

Prior to *Phillips,* no United States Court of Appeals had ruled on the question of whether a stockholders' derivative action was sufficiently the nominal plaintiff's "own case" for the purpose of the right to pro se representation under section 1654. However, a federal district court had dealt with this question in *Willheim v. Murchison.*[8]

In *Willheim* the same plaintiff as in *Phillips,* together with his mother-in-law, brought a pro se derivative action in connection with a contest for control of Alleghany Corporation. The defendants argued that as used in section 1654 "their own cases" did not include cases in which plaintiffs represented others: since the corporation had to be represented by an attorney admitted to practice before the court,[9] and since derivative actions are brought for the benefit of the corporation—which is the real party in interest[10]—the action could not be brought by a layman pro se.[11]

The court concluded that even though the corporation was the real party in interest[12] and any recovery would accrue to it,[13] the plaintiff could still conduct the case personally since "[s]uch an action is the action of a stockholder even though it may be brought for the benefit of the corporation."[14] This conclusion was supported by the assertion that "[f]or most if not all procedural purposes a derivative suit is considered to be an action of the nominal plaintiff."[15] It was noted, for example, that in determining whether there is diversity for federal jurisdiction, courts generally treat the nominal plaintiff as the actual plaintiff and the corporation as the party defendant.[16]

The *Willheim* court attempted to support its conclusion by noting that an

7. 28 U.S.C. § 1654 (1970).

8. 206 F. Supp. 733 (S.D.N.Y. 1962), appeal dismissed, 312 F.2d 399 (2d Cir. 1963). Randolph Phillips and Else Willheim were plaintiffs, with Phillips appearing pro se and Willheim represented by counsel. The court observed that Phillips bore the "laboring oar in the litigation," and that the lawyer's participation had been "nominal." Id. at 735.

Willheim is discussed at Annot., 19 A.L.R.3d 1073, 1085 (1968). For a comprehensive analysis of the Willheim decision, see 17 Rutgers L. Rev. 651 (1963). The author praised the Willheim decision for rejecting the "automatic prohibition of pro se appearances," id. at 657, but criticized the decision for inadequately protecting the rights of other shareholders. Id. at 655.

9. 206 F. Supp. at 735; see also MacNeil v. Hearst Corp., 160 F. Supp. 157, 160 (D. Del. 1958).

10. Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522-23 (1947); see Ross v. Bernhard, 396 U.S. 531, 532-33 (1970).

11. 206 F. Supp. at 735.

12. Id. at 736; see note 10 supra.

13. 206 F. Supp. at 736.

14. Id.

15. Id.

16. Id.; see Smith v. Sperling, 354 U.S. 91 (1957). The Court ruled that in determining whether or not there was diversity courts should only examine the face of the pleadings. The corporation would be considered antagonistic to the plaintiff stockholder whenever the corporate management defended against a cause of action instituted by the stockholder. Id. at 96-97. See notes 22-24 infra and accompanying text.

attorney is merely an instrumentality through which rights are enforced: if the right to bring an action does not exist, hiring an attorney cannot create the right. Since it is not questioned that a stockholder can bring a derivative action, it must follow, according to the court, that it is his own for purposes of section 1654.[17]

The court in *Willheim* failed to discuss the danger to a potentially large group of other stockholders from an unqualified plaintiff proceeding pro se. The court cited one New York case, *Brooks v. Saxony Tobacco & Sales Corp.*)[18] as precedent for the proposition that a stockholder can bring a derivative action pro se. However, in *Brooks*, the problem of the damage an unqualified representative may cause to a large group of stockholders was not an issue: there were only two other stockholders, and they were represented by the same attorney as the defendant corporation.[19]

Similarly, the court cited the California case of *Reed v. Norman*[20] in support of the position that a derivative suit could be considered the stockholder's. In *Reed*, the corporation had failed to pay its franchise taxes and, therefore, could not be a plaintiff. Nevertheless, the court allowed the stockholder to bring a derivative action. This decision was based on the fact that the plaintiff could not pay the franchise tax because, as the court explained, access to the corporate books—which were in the possession of the adverse party and hence unobtainable—was required to compute the tax. The decision stressed that equity would not be served by barring the derivative suit since plaintiff would have no other possible remedy.[21] It appears that in light of these special facts, the *Reed* case is weak authority for the proposition that a derivative suit could be considered to be the stockholder's.

The *Willheim* decision also overemphasized the importance of using the domicile of the nominal plaintiff and the citizenship of the corporation to determine diversity.[22] This does not indicate that the cause of action belongs to the stockholder. Rather, as Justice Jackson explained in *Koster v. (Amer-*

17. 206 F. Supp. at 736. The court stated that: "[Plaintiff's] representation of the other stockholders results from the fact that he is permitted to bring this action as plaintiff and not from the fact that as plaintiff he chooses to appear in court for himself." Id.

18. 20 Misc. 2d 401, 188 N.Y.S.2d 384 (Sup. Ct. 1959).

19. Id. In Brooks, the New York court allowed the non-lawyer stockholder to bring the derivative action pro se even though the suit was brought for the benefit of the corporation, and even though, under then § 236 of the N.Y. Civil Practice Act (now N.Y. C.P.L.R. § 321(a) (McKinney Supp. 1976)), a corporation must appear by a licensed attorney. In this case the corporation and two remaining stockholders were joined as party defendants, and were all represented by the same lawyer. In that situation the court allowed plaintiff to personally commence the action, "notwithstanding his lack of direct interest, solely to set the machinery of justice in motion, and to prevent what would otherwise be a complete failure of justice." Id. at 402, 188 N.Y.S.2d at 385.

20. 48 Cal. 2d 338, 309 P.2d 809 (1957). The court stated that "it is not equitable to permit section 23301 of the Revenue & Taxation Code to stand as a shield for protecting allegedly dishonest corporate officials." Id. at 343, 309 P.2d at 812.

21. 48 Cal. 2d at 343, 309 P.2d at 812.

22. 206 F. Supp. at 736.

ican) Lumbermens Mutual Casualty Co.,[23] derivative actions are an exception to the general rule that the real party in interest should be treated as plaintiff in determining diversity since "the corporation is in antagonistic hands."[24] Given the purpose of derivative suits—to provide stockholders with an action where the corporation will not sue—use of the nominal plaintiff's domicile in determining diversity helps to effect this purpose by increasing the likelihood that the action will withstand jurisdictional attack.

It is also inaccurate to state that a derivative action is generally treated as plaintiff's rather than the corporation's. While it is true that as long as there is a genuine dispute, the nominal plaintiff will be treated as the real plaintiff and the corporation as a defendant for purposes of diversity,[25] this is not true for all procedural considerations. In a derivative suit venue may be the same as where the corporation could sue,[26] and the required jurisdictional amount is measured with reference to the damage asserted to have been sustained by the corporation and not to the nominal plaintiff.[27] The nominal plaintiff in a derivative action is generally not an "opposing party" under Federal Rule 13:[28] the defendant cannot counter-claim against him.[29] Finally, the Supreme Court has held that the right to jury trial exists in a derivative suit if that right would have existed had the corporation initiated the suit.[30]

In *Phillips*, the Second Circuit decided the question of whether a derivative action could be construed as the stockholder's "own case" within section 1654. The logic of the *Willheim* court—that if a derivative action was not the stockholder's own, he could not bring the suit even with an attorney—was deemed a "non sequitur."[31] Denying a stockholder the right to appear pro se would not entail denying him the right to "appear by an attorney on behalf of the corporation."[32] The court held that since a corporation could only appear in court by an attorney, the representative stockholder would also have to be represented by licensed counsel.[33]

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23. 330 U.S. 518 (1947).

24. Id. at 523.

25. Smith v. Sperling, 354 U.S. 91 (1957).

26. 28 U.S.C. § 1401 (1970). The purpose of this rule is to prevent a possible failure of venue. 7B J. Moore, Federal Practice § 1401 (2d ed. 1976).

27. Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 523 (1947).

28. "A pleading shall state as a counterclaim any claim which . . . the pleader has against any opposing party . . . ." Fed. R. Civ. P. 13(a).

29. See Tryforos v. Icarian Dev. Co., 49 F.R.D. 1, 3 (N.D. Ill. 1970); Cravatts v. Klozo Fastener Corp., 15 F.R.D. 12, 13 (S.D.N.Y. 1953). However, in Selama-Dindings Plant v. Cincinnati Union Stock Yard Co., 337 F.2d 949 (6th Cir. 1964) (per curiam), the court allowed a counterclaim in a derivative action although no relief was awarded to either side.

30. Ross v. Bernhard, 396 U.S. 531, 532-33 (1970).

31. Phillips v. Tobin, 548 F.2d at 411 n.4.

32. Id.

33. Phillips v. Tobin, 548 F.2d at 411. The court, at 411, cited numerous cases holding that under 28 U.S.C. § 1654 (1970) corporations and partnerships must be represented in court by lawyers: Jackson v. Statler Foundation, 496 F.2d 623, 626 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975); Shapiro, Bernstein & Co. v. Continental Record Co., 386 F.2d 426 (2d Cir. 1967); Turner v. American Bar Ass'n, 407 F. Supp. 451, 476 (N.D. Tex. 1975), aff'd sub nom. Pilla v.

The court stated several reasons why plaintiff did not have the right to proceed without counsel. First, under the laws of many states a corporation would have to indemnify the individual defendant directors if the suit was unsuccessful.[34] This would reduce the corporate assets and could reduce the value of stockholders' shares. Therefore, both the corporation and its shareholders deserved professional representation.[35]

Second, the plaintiff in a derivative suit was, in the words of Justice Jackson, a " 'self-chosen representative and a volunteer champion.' "[36] It was therefore necessary to set standards to protect the interests of the others that would be involved.[37] The court cited cases which were analogous to derivative suits in which plaintiffs were not permitted to bring suits for the benefit of others pro se.[38] The court stressed that in such cases the interests of others

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American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976); Brandstein v. White Lamps, Inc., 20 F. Supp. 369, 370-71 (S.D.N.Y. 1937); Algonac Mfg. Co. v. United States, 458 F.2d 1373, 1375 (Ct. Cl. 1972).

The reason for requiring a corporation to be represented by licensed counsel seems to be that corporations, as fictional persons, must act through agents. If there is a particular requirement to qualify the agent, it must be met. Therefore, an agent who would appear in court must be a licensed attorney. This rule is supported by the policy requirement that lawyers are bound to certain standards of competence and ethics by the Code of Professional Responsibility. See, e.g., Merrick v. America Sec. & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), cert. denied, 308 U.S. 625 (1940); Brandstein v. White Lamps, Inc., 20 F. Supp. 369, 370-71 (S.D.N.Y. 1937). This policy goes back to Chief Justice Marshall's decision in Osborn v. United States Bank, 22 U.S. (9 Wheat.) 737 (1824). See notes 48 & 49 infra and accompanying text.

34. Phillips v. Tobin, 548 F.2d at 412 n.6; Maryland, Alleghany's state of incorporation, has such a statute. Md. Corp. & Ass'n Code Ann. §§ 2-418(c) & (d) (Supp. 1976).

35. See Phillips v. Tobin, 548 F.2d at 412.

36. Id., quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949).

37. Phillips v. Tobin, 548 F.2d at 412, citing Saylor v. Lindsley, 456 F.2d 896, 899-900 (2d Cir. 1972). The Saylor court stated that there would be at least some difference of interest in every case. A small settlement might yield a proportionately high fee to attorneys if it required little work. The court also noted that the possible conflict of interest between the plaintiff and the entire class of stockholders is illustrated by the fact that the assent of the plaintiff may not even be essential to the settlement of a derivative suit. Id.; Stull v. Pool, 63 F.R.D. 702 (S.D.N.Y. 1974) (woman could not be a class representative when her husband was the class counsel, since the interest in legal fees might adversely influence her representation of the class).

The court also mentioned that the interests of a plaintiff in a stockholder's derivative suit might differ from those of his attorney, and cited with approval a recent Third Circuit class action case, Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir.), cert. denied, 45 U.S.L.W. 250 (U.S. Oct. 5, 1976) (No. 75-1791), in which an attorney could not serve as both class representative and class counsel. In Kramer, not only would it be improper for the class representative, an attorney, to bring the class action pro se, but no attorney closely related to the class representative could serve as class counsel. Id. at 1089.

38. United States v. Onan, 190 F.2d 1, 6 (8th Cir.), cert. denied, 342 U.S. 869 (1951) (Two laymen sought to bring a suit pro se on behalf of the United States under 31 U.S.C. §§ 231 and 232 against defendants who had allegedly made false claims against the government. The Eighth Circuit disqualified the pro se plaintiffs stating that only a licensed attorney could appear in court for anyone other than himself. This was a public policy consideration since attorneys, unlike laymen, were officers of the court "sworn to act with all good fidelity toward both his client and

required that licensed attorneys be employed as protection from the " 'mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other.' "[39]

Third, the *Phillips* court noted that since large-scale litigation would be involved, the results of which would be res judicata for the corporation and its shareholders,[40] the suit had to be prosecuted by someone who was "subject to the standards of ability, responsibility, liability and accountability required of members of the bar, as officers of the court and by the Code of Professional Responsibility."[41] The corporation and its stockholders should not be subject to the "transgressions, distractions and deficiencies"[42] of their unsolicited advocate,[43] and should have the protection of being represented by a member

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the court."); Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) (per curiam) (A prisoner was not allowed to represent his fellow inmates in a class action. The court ruled that his competence was clearly insufficient to allow him to represent others.); Niklaus v. Abel Constr. Co., 164 Neb. 842, 83 N.W.2d 904 (1957) (The Supreme Court of Nebraska refused to allow a disbarred attorney to prosecute a taxpayer's action for the benefit of a municipal corporation. The court reasoned that the cause of action still belonged to the corporation which would have to appear in court through a licensed attorney. The device of naming oneself plaintiff would not avoid this, since the policy was to protect the public from inept or unethical persons.); Otto v. Patterson, 173 Ohio St. 174, 180 N.E.2d 575 (1962) (per curiam) (taxpayer, not a licensed attorney, could not prosecute pro se suit on behalf of a municipal corporation and other taxpayers).

39. Phillips v. Tobin, 548 F.2d at 413, quoting Niklaus v. Abel Constr. Co., 164 Neb. 842, 852, 83 N.W.2d 904, 911 (1957), quoting Bennie v. Triangle Ranch Co., 73 Colo. 586, 216 P. 718, 719 (1923).

40. Id., citing Armstrong v. Frostie Co., 453 F.2d 914, 917 (4th Cir. 1971); Smith v. Alleghany Corp., 394 F.ed 381, 391 (2d Cir.), cert. denied, 393 U.S. 939 (1968); Rosenfeld v. Black, 336 F. Supp. 84, 92 (S.D.N.Y. 1972); Breswick & Co. v. Briggs, 135 F. Supp. 397, 404 (S.D.N.Y. 1955); Liken v. Shaffer, 64 F. Supp. 432 (N.D. Iowa 1946); 3B J. Moore, Federal Practice § 23.1.16 [3] at 23.1-57 to 62 (2d ed. 1976).

"Thus, in the absence of fraud or collusion, even an inadequate derivative judgment, arrived at because of the plaintiff's negligence or economic inability to more vigorously prosecute the action, serves to bar relitigation of the action." Note, Res Judicata in the Derivative Action: Adequacy of Representation and the Inadequate Plaintiff, 71 Mich. L. Rev. 1042, 1046 (1973).

41. Phillips v. Tobin, 548 F.2d at 413.

42. Id. at 414.

43. In Phillips, the court remarked that Phillips had been involved in litigation with Alleghany for many years. During that period Phillips had been subject to judicial criticism. In the footnote, the court mentioned that Judge Kaufman rebuked Phillips for "his cavalier and outrageous use of the federal courts," Judge Frankel pointed to "the tenacious bellicosity and abusiveness of the plaintiff," and then Chief Judge Ryan pointed to "many fallacious arguments (at times accompanied by unwarranted and unjustified personal remarks directed to counsel by objectant Phillips) . . . . Unfortunately, the consideration of the objections raised here, although we have found them to be totally worthless, have taken up a great deal of the time of the Court [sic] and delayed its determination. This was not fair to anyone, including the shareholders." Phillips v. Tobin, 548 F.2d at 413 n.7. The Phillips court went on to mention that Phillips' brief in the instant case "is neither logically arranged nor free of irrelevancies or immaterial matters. . . . Such a brief simply demonstrates plaintiff's inability to meet the requirements . . . of R 23.1 . . . that the plaintiff 'fairly and adequately represent the interests of the shareholders . . . similarly situated in enforcing the right of the corporation.' " Id.

of the bar.[44]

The court concluded that if Phillips chose to continue the suit by hiring an attorney,

> the protection of other shareholders similarly situated requires that such counsel be more than the alter ego or "co-counsel" of this particular plaintiff, but be an attorney-at-law who, in accordance with the standards of *Eisen v. Carlisle & Jacquelin,* . . . is approved by the court as "qualified, experienced and generally able to conduct the proposed litigation.[45]

At first blush *Phillips* is distressing because it makes it more difficult to bring derivative suits—an action which developed at equity as a way to prevent injustice.[46] Furthermore, a court comprised of lawyers appears to be requiring the employment of their own priestly caste as the entree to the temple of justice.[47] However, a closer scrutiny of the policies upon which this holding is based shows that equity is being served.

With few exceptions, corporations can only appear in court through licensed attorneys.[48] This policy affords stockholders at least some protection since the courts will apply the *Code of Professional Responsibility* to maintain standards of competence and ethics.[49] The need for protection is increased

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44. The District Judges Conference of April 8-11, 1974, in discussing class actions, was of the clear opinion that "it is not permissible for a pro se plaintiff to represent any person other than himself." Federal Judicial Center, Reports of the Conference for District Court Judges, 64 F.R.D. 475, 505 (1974).

45. Phillips v. Tobin, 548 F.2d at 415 (footnotes and citation omitted), quoting Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968). The court was referring to the fact that in earlier litigation Philips had conducted the case even when his co-plaintiff was represented by counsel. See note 8 supra.

The court specifically cited the protections afforded in Rule 5 of the General Rules of the United States District Court for the Southern District of New York (1974), and Canons 5, 6, and 9 of the Code of Professional Responsibility (1970) as relevant provisions binding on attorneys. Phillips v. Tobin, 548 F.2d at 414-15.

46. For a criticism of New York's first security bond requirement see, e.g., Hornstein, The Death Knell of Stockholders' Derivative Suits in New York, 32 Cal. L. Rev. 123 (1944). Justice Black, dissenting in Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 532-33 (1947), stressed that stockholders should not be placed at too great a disadvantage in bringing derivative suits.

47. One court, perhaps somewhat defensively, wrote that paying an attorney's fee to get representation for another was part of the ordinary administration of justice, and in no way like the abuse of selling justice which the Magna Carta sought to end. State ex rel. Baker v. County Court, 29 Wisc. 2d 1, 11-12, 138 N.W.2d 162, 168 (1965).

48. E.g., N.Y. City Civil Ct. Act § 1809 (McKinney Supp. 1976) allows a corporation appearing as a defendant in small claims court to be represented by a shareholder who owns more than one-third of its shares, or by an officer if the corporation has no more than ten shareholders.

49. The Second Circuit ruled that courts, not only bar associations, have supervisory power over lawyers and have a duty to "disqualify counsel for unethical conduct prejudicial to his adversaries." Ceramco, Inc. v. Lee Pharmaceuticalas, 510 F.2d 268, 271 (2d Cir. 1975). In J. P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975) (per curiam), it was asserted that the court would apply the bar's disciplinary rules. See also Gullo v. Hirst, 332 F.2d 178, 179 (4th Cir. 1964) (per curiam) (abuse of process case, in which the district court was ordered to sanction plaintiff's counsel); Phipps v. Wilson, 186 F.2d 748, 751 (7th Cir. 1951) (court has the right to

when the suit is a derivative action which will affect both a corporation and its potentially numerous shareholders.

It is well settled that class actions, in which the plaintiff may recover for his own personal injury as well as gaining recovery for members of the class, cannot be brought pro se.[50] This being so, it is illogical to allow a derivative action to be brought pro se. First, the plaintiff, unlike in class action situations, has no personal injury: he is representing the corporation.[51] Second, in a class action, opportunity is given to members of the class to opt out of the class so as to escape being bound by the judgment. In a derivative suit, no such opportunity is afforded, and all shareholders, through res judicata, are bound by the judgment once it is obtained.

As a practical matter, since lawyers' fees are awarded in successful derivative actions,[52] and since some attorneys will take the cases on a contingency basis, it should be possible for a stockholder with a meritorious complaint to obtain counsel.

It is to be hoped that courts will construe *Phillips* narrowly, so that if a situation similar to the New York *Brooks* case were to arise, in which all the other shareholders were before the court and represented by counsel,[53] the court could, in its discretion, allow the action to be prosecuted pro se.[54] Mechanical rules should not be allowed to obfuscate the fact that derivative suits were developed to do justice. In those rare cases where the harm which the plaintiff would suffer by not being allowed to bring a pro se derivative action outweighs possible prejudice to other shareholders, the court should allow the action to be brought.

While the *Phillips* case might be viewed as taking away a plaintiff's right to seek an equitable remedy, it is more accurate to say that the court is refusing to expand the existing right. Courts are loath to extend the right to prosecute actions pro se.[55] While in civil matters the statutory right to sue or defend on one's own behalf is well settled,[56] courts will not allow these rights to be

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disbar attorney); Warrick v. Commissioner, 173 F.2d 905, 908-09 (8th Cir. 1949) (lawyer is officer of the court with an obligation to protect his clients' interests and rights). See Code of Professional Responsibility, Disciplinary Rule 7-102(A)(1), (2).

50. See note 44 supra and accompanying text.

51. A derivative stockholder action may be considered a class action. Weiner v. Winters, 50 F.R.D. 306, 309 (S.D.N.Y. 1970); accord, Himmelblau v. Haist, 195 F. Supp. 356, 357 (S.D.N.Y. 1961).

52. See, e.g., Saltzman v. Technicolor, Inc., 51 F.R.D. 178, 185 (S.D.N.Y. 1970). New York, for example, includes provision for the award of plaintiff's expenses including attorneys' fees in successful suits. N.Y.B.C.L. § 626(e) (McKinney 1963).

53. See notes 18-19 supra and accompanying text.

54. Courts might still hesitate to rule in this way since orders allowing actions to proceed pro se are immediately appealable. See note 57 infra and accompanying text.

55. Even in Willheim, in which Judge Dawson allowed the prosecution of a derivative action pro se, he criticized plaintiff for "insisting upon proceeding in time wasting layman fashion in court appearances . . . ." 206 F. Supp. at 736.

56. See notes 6-7 supra and accompanying text.

extended to representing others. The *Phillips* decision helps to delineate this distinction.[57]

Peter C. Kostant

Criminal Law—District of Columbia Circuit Examines the Burden of Proving Prejudice in Inadequate Counsel Cases.—On May 27, 1970, Roger Crump allegedly had his wallet stolen by three men who accosted him at knifepoint in a parking lot. Two policemen saw the robbery in progress and chased the assailants. They apprehended two of the men, including the appellant, Willie DeCoster, Jr. The victim immediately identified the appel-

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57. It is possible to criticize the Phillips court for reaching only the issue of whether plaintiff could prosecute the derivative action pro se, without considering the related issue of plaintiff's adequacy as a representative under Rule 23.1. The court, at 548 F.2d 409, states that since Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc), the Second Circuit has held that orders granting or denying disqualification of attorneys have been appealable under 28 U.S.C. § 1291 (1970). These orders meet the prerequisites of Cohen since "[they are] a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-547 (1949). Prior to 1974, such orders were not appealable. See, e.g., Willheim v. Murchsion, 312 F.2d 399 (2d Cir. 1963) (per curiam).

The Phillips court stated that a failure to disqualify an attorney was immediately appealable, but that failure to disqualify a representative plaintiff was not an appealable order. It reasoned that the issue of adequacy of representation did not fall within the narrow collateral right doctrine of Cohen. Since there would always be factual variations in determining adequacy of representation, an immediate appeal would not "establish a legal principle once and for all as is true of Cohen . . . ." Phillips v. Tobin, 548 F.2d at 410. Rather it would, in the words of Judge Friendly, " 'open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit.' " Id., quoting Weight Watchers of Phila., Inc. v. Weight Watchers Int'l, Inc., 445 F.2d 770, 773 (2d Cir. 1972). For example, in Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973), the court stated that "the primary criterion for determining whether the class representative has adequately represented his class . . . is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class."

In the recent decision of Sanders v. Levy, Nos. 75-7608, 75-7610, 75-7611 (2d Cir., June 30, 1976), the Second Circuit held that the district court's discretionary ruling that an action met the requirements of a class action could be immediately reviewed by the appellate court, if it was part of an order that was properly before the court on another ground. There the court found that there was "sufficient overlap in the factors relevant to both issues to warrant . . . exercising plenary authority over this appeal." Id. at 4589-90.

Thus, the court in Phillips could have adjudicated the related issue of plaintiff's adequacy of representation once and for all, since it was part of the order over which they had jurisdiction. Failure to consider that issue could waste the court's time if plaintiff chooses to continue the suit with an attorney. An immediate adjudication could have saved time, while not opening the courts to a "flood of appeals" since jurisdiction was based on the otherwise appealable part of the order.

lant as one of his attackers.[1] At trial there was some dispute as to the events preceding the alleged attack,[2] but the jury found the appellant guilty of aiding and abetting in an armed robbery and an assault with a dangerous weapon.[3] On appeal, the District of Columbia Circuit Court *sua sponte* raised the issue that the convicted appellant might not have had the effective assistance of counsel at his trial.[4] It then remanded the case for further hearings to determine that question. *United States v. DeCoster,* 487 F.2d 1197 (D.C. Cir. 1973) (*DeCoster I*).

On remand, the district court found that the defendant had had the effective assistance of counsel and upheld the conviction.[5] Again the case returned to the court of appeals and this time the court concluded that since the attorney had failed to undertake a factual investigation, the defendant had been denied the effective assistance of counsel.[6] Further, it maintained that the government was unable to sustain its burden of proof that the defendant was not prejudiced by his inadequate counsel. Therefore, the conviction of appellant was reversed and the case was remanded once more.[7] *United States v. DeCoster*, No. 72-1283 (D.C. Cir., Oct. 19, 1976) (*DeCoster II*).

These two appeals have done much to ventilate two issues which courts are increasingly facing in recent years: what constitutes ineffective counsel, and who should bear the burden of proving that such ineffective counsel was in some way prejudicial to the defendant.[8] The first issue has been the subject of

1. United States v. DeCoster, 487 F.2d 1197, 1199 (D.C. Cir. 1973). Crump was unable to identify the appellant at trial. It seems that between the assault and the trial he was in a serious automobile accident that damaged his eyesight and caused lapses in his memory. Id.

2. Id. DeCoster testified he met Crump for the first time on the afternoon of the incident. He claimed he had a few drinks with Crump at a bar near the parking lot in question, then was arrested while trying to obtain the key to his hotel room. Crump, on the other hand, was unclear whether he had met the appellant before the incident. A third story was presented by an accomplice of DeCoster who testified that he had seen the two men together at a bar in the afternoon. He also claimed that they had been fighting in the parking lot when the police arrived. Id.

3. Id. In the District of Columbia the charge of assault with a dangerous weapon is a lesser included offense to the charge of armed robbery arising from the same transaction. Thus, although DeCoster was convicted of both counts, the assault conviction was vacated. Id. at 1199 n.2.

4. Id. at 1199-1201. Indeed, defendant's brief addressed only three issues: (1) denial of a speedy trial, (2) insufficiency of the evidence and (3) alleged error in submitting the aiding and abetting issue to the jury. United States v. DeCoster, No. 72-1283, at 3 (D.C. Cir., Oct. 19, 1976) (MacKinnon, J., dissenting) [hereinafter cited as DeCoster II]. Although DeCoster II spells the appellant's name with a small "c," it will be spelled as it appears in DeCoster I throughout this piece.

5. DeCoster II, supra note 4, at 2.

6. Id. at 19. The court concluded that this was true, "even if an investigation would not have produced a scintilla of evidence favorable to the defense . . . ." Id. at 22.

7. Id. at 25. Since over six years had now elapsed from the date of the alleged crime, it was unclear whether a new trial would be appropriate. The circuit court mentioned there would be due process problems if a new trial was desired. Also, the appellant had already served most, if not all, of his sentence. Id. at 26-27.

8. Normally, a court presented with an inadequate counsel problem asks two questions: was

extensive commentary in recent years,[9] and the *DeCoster* decisions evidence the trend toward requiring a higher standard of competence for members of the legal profession. The burden of proof issue, on the other hand, though not so widely examined, is hotly disputed among the courts that have faced it.[10]

The sixth amendment has been held to guarantee the effective assistance of counsel for every defendant in a criminal case.[11] Generally, there is a strong presumption that an attorney is competent,[12] and a defendant has a heavy burden to show otherwise.[13] Indeed, the original test devised to judge a lawyer's ability was a very lenient one. It was said that effective representation was denied only when "the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice."[14]

Although this standard meant that attorneys would be found incompetent

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counsel inadequate; and, if so, was this inadequacy prejudicial? See McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974). However, the majority in DeCoster II adopted a three step approach: (1) did counsel violate one of his duties as articulated in DeCoster I (see note 19 infra); (2) was such a violation substantial; and (3) was the substantial violation prejudicial? DeCoster II, supra note 4, at 11. Although this extra step added by DeCoster II, whether the violation was substantial, makes interpretation of the case somewhat difficult, it appears to be just another element that the defendant is required to prove before he establishes that his counsel is indeed inadequate. The majority opinion discusses its unique approach in id. at 20 n.32.

9. See, e.g., Bazelon, The Realities of Gideon and Argersinger, 64 Geo. L.J. 811 (1976); Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1077 (1973); Fitzhugh, Providing Effective Assistance: The Duty of Defense Counsel, 4 Am. J. Crim. L. 123 (1976); Note, The Emerging Right to Effective Assistance of Counsel, 14 Washburn L.J. 541 (1975).

10. Compare McQueen v. Swenson, 498 F.2d 207, 218-20 (8th Cir. 1974) with Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).

11. The sixth amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The first case to read the guarantee of effective assistance of counsel into this amendment was Powell v. Alabama, 287 U.S. 45 (1932). This was the famous case involving the "Scottsboro Boys." The facts showed that nine black youths were arrested for allegedly raping two white girls. The black youths were ignorant and illiterate. The trial was held in a community where there was much hostility toward the accused. The defendants all pleaded not guilty but were convicted and sentenced to die. The Supreme Court reversed the convictions, finding that defendants had never had the aid of counsel in any real sense and thus had been denied a fair trial. Id. at 71-73. Later cases have since affirmed the notion, implicit in Powell, that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). See also Reece v. Georgia, 350 U.S. 85, 90 (1955); Avery v. Alabama, 308 U.S. 444, 446 (1940).

12. Michel v. Louisiana, 350 U.S. 91, 101 (1955); Crowe v. South Dakota, 484 F.2d 1359, 1361 (8th Cir. 1973), cert. denied, 415 U.S. 927 (1974); State v. White, 5 Wash. App. 283, 287, 487 P.2d 243, 245 (1971), rev'd on other grounds, 81 Wash. 223, 500 P.2d 1242 (1972) (en banc).

13. Rickenbacker v. New York, No. 76-2036 (2d Cir., Dec. 22, 1976); United States v. Hammonds, 425 F.2d 597, 600 (D.C. Cir. 1970). It is certainly clear that a lawyer's competency is not measured by his success. Id. at 601. After all, the fact is that some defendants are guilty and "no amount of forensic skill is going to bring about an acquittal." State v. White, 5 Wash. App. 283, 288, 487 P.2d 243, 246 (1971), rev'd on other grounds, 81 Wash. 223, 500 P.2d 1242 (1972) (en banc).

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

only in the most blatant of circumstances,[15] most courts readily accepted the test.[16] In recent years, however, the legal profession has become more concerned with the phenomenon of unskilled practitioners and has begun to seek ways of ensuring a higher level of performance.[17] This has resulted in courts consistently repudiating the "farce and mockery" standard in favor of stricter guidelines.[18] Today, the most commonly used standard is that a defendant must show he was denied reasonably competent assistance.[19]

15. One example of such obvious imcompetence was displayed in United States v. Benn, 476 F.2d 1127 (D.C. Cir. 1972). In that case, counsel advised the trial court that he was going to sum up his case quickly because he "would like to move [his] car before 5:00." Id. at 1134 n.29.

Another example of such total disregard for a client appeared in United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972). There, the attorney replied to a request from the judge for a more recent case than the 1895 one he was presenting by stating: "Your Honor, I tried to shephardize . . . the case, but the Shepherd . . . citator was absent from the library." Id. at 439.

It was lawyers such as these which led one judge to label such attorneys "walking violations" of the sixth amendment. Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 2 (1973).

16. See, e.g., United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1213 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

17. For a discussion of the concern about the increasing number of unskilled lawyers see generally Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973). Chief Judge Bazelon has stated that "no one could seriously dispute that ineffective assistance [of counsel] is a common phenomenon." Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 2 (1973). See also Note, The Emerging Right to Effective Assistance of Counsel, 14 Washburn L.J. 541 (1975).

18. Circuits that no longer apply the rule include: United States v. Elksnis, 528 F.2d 236, 238 (9th Cir. 1975); United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975); Johnson v. United States, 506 F.2d 640, 646 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975); Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974); Moore v. United States, 432 F.2d 730, 736-37 (3d Cir. 1970) (en banc); Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967); MacKenna v. Ellis, 280 F.2d 592 (5th Cir.), modified, 289 F.2d 928 (1960) (per curiam), cert. denied, 368 U.S. 877 (1961). But see Lunz v. Henderson, 533 F.2d 1322, 1327 (2d Cir.), cert. denied, 97 S. Ct. 136 (1976) ("farce and mockery" test is still appropriate standard); Moran v. Hogan, 494 F.2d 1220, 1222 n.4 (1st Cir. 1974) (might consider changing the old standard).

This trend away from the "farce and mockery" test is also evident in the state courts; see Bazelon, The Realities of Gideon and Argersinger, 64 Geo. L.J. 811, 820 (1976).

19. See cases cited in note 18 supra. DeCoster I adopted this test. United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973). The opinion was significant for it went even further in detailing what constitutes adequate representation by an attorney. It established specific obligations that would be required of a competent counsel. These were: "(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client. (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . . (3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . [I]n most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include

Once incompetency has been shown, a question arises as to whether this ineffectiveness prejudiced the proceedings to such an extent that a reversal is mandated. The landmark case in determining whether a constitutional violation can be "harmless error"[20] is the Supreme Court decision in *Chapman v. California*.[21] There, the defendants were on trial for allegedly robbing, kidnapping and murdering a bartender. Throughout the trial, the fact that they would not testify was commented on and considered as evidence.[22] The California Supreme Court upheld their convictions since it believed the error was harmless.[23] In reversing, the Supreme Court declared that, while not all constitutional violations automatically mandate a reversal,[24] some constitutional rights were so important that their violation could never be deemed harmless.[25] Then, in an important statement for the burden of proof issue in ineffective counsel cases, the Court commented that: "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless."[26] The Court concluded "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[27]

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efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research." 487 F.2d at 1203-04 (footnotes omitted). The dissenting opinion concurred in these guidelines. Id. at 1205 (MacKinnon, J., concurring and dissenting).

20. The "harmless error" rule has been derived from at least two sources. One is 28 U.S.C. § 2111 (1970), which states: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." It is also detailed in the following manner: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a).

21. 386 U.S. 18 (1967).

22. Id. at 19. This practice was found to be unconstitutional in Griffin v. California, 380 U.S. 609 (1965).

23. The California courts adhered to the state constitutional requirement that reversal was required only if a "miscarriage of justice" would otherwise result. People v. Teale, 63 Cal. 2d 178, 193-97, 404 P.2d 209, 218-20, 45 Cal. Rptr. 729, 738-40 (1965) (en banc), rev'd sub. nom., Chapman v. California, 386 U.S. 18 (1967).

24. Id. at 23. This point is universally accepted. The problem is determining which errors do call for reversal and which do not.

25. Id. at 23-24. The Court gave three examples of such violations: (1) coerced confessions, (2) impartial judge and (3) right to counsel. Id. at 23 n.8.

26. Id. at 24.

27. Id. The Supreme Court had previously dealt with this harmless error problem in Fahy v. Connecticut, 375 U.S. 85 (1963). That case involved an illegal search and seizure that produced paint which was used as evidence to help convict the defendants of painting swastikas on a Connecticut synagogue. In a 5-4 decision, the Court reversed the convictions, holding that the admission was prejudicial. It reasoned that the question involved in harmless error cases "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. at 86-87. The four dissenters, however, felt the standard should have been whether there was sufficient independent evidence to maintain the conviction. Given this rule,

Chapman has been interpreted[28] as supporting four different views concerning the burden of proof in cases involving inadequate counsel: (1) the prosecution has the burden of showing lack of prejudice;[29] (2) the defendant has the burden of showing prejudice;[30] (3) the prosecution must prove lack of prejudice only when the constitutional violation was caused by the state;[31] and (4) the question of burden of proof need not be reached since such a violation is so fundamental that prejudice is assumed.[32]

Despite these conflicting viewpoints, however, courts have been reluctant to specify why one approach is favored over another.[33] *DeCoster II* is particularly significant in this regard because the burden of proof issue is given its most thorough analysis to date.

Chief Judge Bazelon,[34] writing for the majority, held that the burden of proof was on the government to show "that the constitutional violation was harmless."[35] In so deciding, the majority relied on two justifications that were set forth in *DeCoster I*. First, placing the burden upon the accused would, in effect, make the defendant establish the likelihood of his innocence.[36] The court reasoned that this would be contrary to our constitutionally prescribed adversary system, which requires the government to prove the guilt of a defendant.[37] However, this argument overlooks the fact that a defendant need only show a minimal amount of prejudice to acquire a new trial;[38] he does not actually have to establish his innocence. The second rationale outlined by *DeCoster I* was that a defendant may be unable to prove his prejudice precisely because his counsel was incompetent.[39] It was argued that, due to this incompetency, "the record may not indicate which witnesses

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they would have upheld the convictions. Id. at 93 (Harlan, J., dissenting). Chapman placed much reliance on this divided opinion in formulating its harmless error rule. 386 U.S. at 23.

28. Indeed, the Supreme Court itself has had trouble interpreting Chapman. In Harrington v. California, 395 U.S. 250, 254 (1969), the majority opinion expressly affirmed its position in Chapman. However, the dissent stated "[t]he Court today overrules Chapman . . . the very case it purports to apply." Id. at 255 (Brennan, J., dissenting) (italics omitted). See also Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973), which states that "the cryptic language of the case [Chapman] makes analysis difficult . . . ." Id. at 1014.

29. See DeCoster II, supra note 4, at 23-24; 487 F.2d at 1204.

30. See DeCoster II, supra note 4, at 55-57 (MacKinnon, J., dissenting).

31. See McQueen v. Swenson, 498 F.2d 207, 218-19 (8th Cir. 1974). In Chapman the error could be said to be the fault of the state since it was the prosecution that committed the constitutional violation by commenting on the defendant's refusal to testify.

32. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

33. See, e.g., United States v. Elksnis, 528 F.2d 236, 238 (9th Cir. 1975); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).

34. The problem of incompetent lawyers appears to be of particular interest to Chief Judge Bazelon. See, e.g., Bazelon, The Realities of Gideon and Argersinger, 64 Geo. L.J. 811 (1976); Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1 (1973).

35. DeCoster II, supra note 4, at 23.

36. Id., relying on 487 F.2d at 1204.

37. 487 F.2d at 1204.

38. See Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 1014 (1973).

39. DeCoster II, supra note 4, at 23, relying on 487 F.2d at 1204.

he could have called, or defenses he could have raised."[40] However, most courts agree that the existence of admissible evidence which could have proved helpful to the accused is usually more available to the defendant than to the state.[41] Therefore, it does not seem unreasonable to make the defendant show the existence of such evidence before granting him a new trial.

The majority also maintained that normally it is impossible to know "precisely how the defendant was affected by counsel's failures," and that therefore whoever is saddled with the burden of proof will most likely be unable to meet it.[42] Thus, it was reasoned that the state should bear this burden to avoid penalizing the defendant for having an ineffective counsel.[43]

The majority did not feel, however, that the state could never meet its burden. Indeed, the court was careful to point out that it was not aligning itself with the view that believes that inadequate counsel can never be harmless error.[44] Rather, the majority simply mandated that the government establish harmlessness "beyond a reasonable doubt."[45]

Judge MacKinnon, dissenting,[46] advocated that the defendant bear the burden of showing prejudice.[47] In so doing, he gave the issue its most

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40. 487 F.2d at 1204.

41. Thomas v. Wyrick, 535 F.2d 407, 414 (8th Cir. 1976), cert. denied, 97 S. Ct. 178 (1976); 487 F.2d at 1205 (MacKinnon, J., dissenting). Moreover, in DeCoster II the attorney was held incompetent for failing to undertake an investigation, DeCoster II, supra note 4, at 19, although it was fairly certain that such an investigation would be fruitless. Id. at 8-24 (MacKinnon, J., dissenting).

42. Id. at 25.

43. Id. In so reasoning, the court claimed support from its decision in DeCoster I.

44. Id. at 24. This position was advocated by Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). The court considered the ineffective assistance of counsel to be akin to the total absence of counsel, which can never be considered "harmless error" (see note 25 supra). 491 F.2d at 696; see McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). See also United States ex rel. Mandrier v. Hewitt, 409 F. Supp. 38, 43 (W.D. Pa. 1976). However, while such reasoning may appear to be sound on the surface, a deeper analysis reveals that in the burden of proof context, there is a distinction between the total absence of counsel and the ineffective performance of counsel. The existence of counsel is so crucial to the exercise of all of the defendant's rights that his absence must be harmful. McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974). However, the performance of counsel is a matter of degree which can be judged only by the particular facts of every case. Id.; see Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434, 1437 (1965) ("Unless one accepts the irrational view that any deprivation of a constitutional right is a bad seed that somehow infects an entire criminal proceeding, it would seem that use of a harmless error rule is constitutionally permissible in adequacy of counsel cases").

45. DeCoster II, supra note 4, at 24.

46. Judge MacKinnon did concur with the majority in the enactment of the guidelines to determine the competency of an attorney as set forth in DeCoster I. 487 F.2d at 1205 (MacKinnon, J., concurring and dissenting). However, in DeCoster II he disagreed with the majority's finding of incompetent counsel under the given facts. He felt that the defendant had received adequate counsel and that his conviction should therefore be sustained. DeCoster II, supra note 4, at 1-30 (MacKinnon, J., dissenting).

47. Id. at 1-2 (MacKinnon, J., dissenting).

thorough discussion to date. His initial argument was that the defendant should bear the burden since he usually has better access to the pertinent information.[48] Next, it was argued that since the government's actions had not been improper, there was no justification for placing the burden of proof upon the prosecution.[49] He added that the defendant should bear the burden because the accused normally has that burden when he is seeking a new trial.[50] Further, the defendant usually carries the burden in due process claims,[51] such as claims of inadequate counsel.[52] However, the dissent may be overstating its case. After all, it is the ineffectiveness of counsel itself which constitutes the denial of due process,[53] and as to this the defendant does have the burden of proof.[54] The burden of showing prejudice does not arise until this determination has been made.[55]

Perhaps the most interesting argument put forth by Judge MacKinnon was the unhappy scenario he wrote of the problems which would be caused by placing the burden on the government.[56] Starting with the premise that such a burden would be difficult to meet,[57] he reasoned that the prosecuting authorities,[58] in order to protect their guilty verdicts, would increasingly have to monitor the activities of defense counsel. Such protection would require a showing that certain decisions made by the defense were proper. Not only would this draw the prosecution into previously prohibited areas like the criminal defendant-attorney relationship, but it would "strike at the lawyer's independence and integrity."[59]

Thus, the majority and dissenting opinions in *DeCoster II* outlined the two diametrically opposed viewpoints on the burden of proof issue. However,

48. Id. at 33 (MacKinnon, J., dissenting); see text accompanying note 41 supra.

49. DeCoster II, supra note 4, at 33, 50 (MacKinnon, J., dissenting).

50. DeCoster II, supra note 4, at 45-48 (MacKinnon, J., dissenting). A claim of ineffective counsel is considered to be a motion for a new trial. 487 F.2d at 1204-05. However, all new trials are not brought about by constitutional infringements such as the lack of adequate counsel. When constitutional violations are suspected a court will probably be more willing to grant a new trial. See Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

51. Leighton v. Neil, 317 F. Supp. 959, 965 (M.D. Tenn. 1970), aff'd, 443 F.2d 1183 (6th Cir. 1971) (per curiam), cert. denied, 405 U.S. 947 (1972).

52. DeCoster II, supra note 4, at 48-49 (MacKinnon, J., dissenting).

53. The denial of counsel altogether has been held to be a violation of the due process clause of the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). By drawing the analogy between the total absence of counsel and ineffective counsel, see note 11 supra and accompanying text & note 44 supra, it can be said that incompetent counsel also violates the fourteenth amendment.

54. See note 13 supra and accompanying text.

55. See note 8 supra and accompanying text.

56. DeCoster II, supra note 4, at 61-69 (MacKinnon, J., dissenting).

57. Id. at 1-2, 61 (MacKinnon, J., dissenting). The majority agreed that either party would find it difficult to meet the burden. See note 42 supra and accompanying text.

58. When Judge MacKinnon refers to the prosecuting authorities in this context, he means not only the lawyers but the law enforcement agencies as well. DeCoster II, supra note 4, at 63-64 & n.19 (MacKinnon, J., dissenting).

59. Id. at 63 (MacKinnon, J., dissenting).

both approaches are attempting to mold many dissimilar fact patterns into a rigid analysis. A more flexible approach, which would decide the issue on an ad hoc basis, may be preferable.[60] For example, if the trial judge himself were shown to be at fault in causing the ineffectiveness of the attorney through the late appointment of counsel,[61] the defendant should be granted a new trial.[62] However, if the existence of evidence that went undiscovered due to the incompetence of defendant's counsel is more readily available to the accused, or even equally ascertainable to both parties, then the court should not intervene in the criminal process until the defendant can prove that the absence of this information somehow prejudiced his defense.[63] Thus, when an attorney fails to interview potential witnesses that are known to the prosecution, the defendant should have the burden of showing that these witnesses would have revealed information helpful to his defense.[64] Further, a defendant claiming to be prejudiced by the failure of his counsel to conduct a factual investigation should have the burden of proving that such an investigation could have produced beneficial admissible evidence.[65] Lastly, if no special circumstances exist justifying placing the burden on either party,[66] it would seem fair to place it on the state and grant a new trial, since the defendant's liberty is at stake. Thus, if the record clearly indicates that there were serious flaws in the presentation of the defendant's case, but the prejudicial effect is not easily determinable,[67] the state should have the

60. Some form of this approach has been adopted by two circuits: McQueen v. Swenson, 498 F.2d 207, 218-20 (8th Cir. 1974); United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970). For a good discussion of McQueen see 43 Fordham L. Rev. 310 (1974). One commentator read Green as placing the burden solely on the defendant. Note, Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons Chapman, 43 Geo. Wash. L. Rev. 1384, 1396-97 (1975). However, McQueen interpreted Green to be adopting a "flexible" approach. 498 F.2d at 220.

61. See Garland v. Cox, 472 F.2d 875 (4th Cir.), cert. denied sub nom., Slayton v. Garland, 414 U.S. 908 (1973). Chapman was an example of placing the burden on the state due to their wrongdoing in a non-inadequate counsel situation. See notes 21-27 & 31 supra and accompanying text.

62. See notes 31 & 50 supra and accompanying text. In this regard, a viable distinction may be drawn between court appointed counsel and retained counsel. If the incompetent counsel was court appointed, it would seem that the court should be more willing to grant a new trial, since this is arguably the fault of the court, than if the incompetent counsel was retained.

63. See, e.g., McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974).

64. This was the position advocated by the dissent in DeCoster II. The majority held that the attorney's failure to interview certain witnesses was such a grievous error that it was inherently prejudicial to the defendant. DeCoster II, supra note 4, at 19-23. The dissent strongly disagreed. Id. at 13-22 (MacKinnon, J., dissenting).

65. See McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974).

66. In United States ex rel. Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970), the court listed two instances where such special circumstances would automatically result in a new trial: when the ineffective assistance has had a pervasive effect on the entire proceedings, and when events changed beyond the petitioner's control (e.g., the death of a witness who was not called). Id. at 1115.

67. As the court said in United States ex rel. Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970):

burden of demonstrating lack of prejudice. It is hoped that the forceful opinions in *DeCoster II* will lead to the adoption of such a flexible approach to the burden of proving prejudice in inadequate counsel cases.

Richard W. Lynn

Labor Law—Second Circuit Expands Scope of Section 301, L.M.R.A.—Prior to 1967, Painters District Council No. 9 of New York City (Painters), an affiliate of the International Brotherhood of Painters and Allied Trades (Painters Brotherhood), had established collective bargaining relationships with 21 woodwork shops in New York City. Defendant, District Council of New York City and Vicinity of United Brotherhood of Carpenters and Joiners of America (Carpenters), an affiliate of the United Brotherhood of Carpenters and Joiners of America, had established similar collective bargaining relationships in 27 other woodwork shops. All 48 shops were members of the Manufacturing Woodworkers Association of Greater New York (the Association). This Association served as a collective bargaining representative for its member shops. Both Painters' and Carpenters' members were engaged in similar work in all these shops, specifically, woodwork finishing.[1]

In 1967, Painters failed to agree on a successor collective bargaining agreement with the Association, and went on strike. During this strike, Carpenters' members crossed the picket lines and performed the woodfinishing jobs in the affected shops. Painters' members returned to work without a new agreement. Painters again went on strike in 1969, and, due to renewed efforts by Carpenters to take over the idle shops,[2] Painters, through the

"In many instances ineffective assistance of counsel may have had so pervasive an effect on the process of guilt determination that it is impossible to determine accurately the presence or absence of prejudice." Id. at 1115.

1. Not all job classification jurisdiction in these 48 shops overlapped. Both unions have members who do woodwork finishing. The relationships between the unions and the Association had evolved in such a way that each union controlled that job classification in particular shops. See Joint Appendix at 18a, Santos v. United Bhd. of Carpenters and Joiners, 547 F.2d 197 (2d Cir. 1977) [hereinafter cited as Joint Appendix].

2. The facts which gave rise to this action do not make it clear that Carpenters was actually trying to "take over" any jobs controlled by Painters.

Carpenters actually represented most of the workers involved in woodfinishing in the Association shops. Id. at 28a. In those shops where Painters represented the woodfinishers, Carpenters represented all the other workers. Id. at 38a, quoting Manufacturing Woodworking Ass'n, 194 N.L.R.B. 1122 (1972). Surprisingly, both Carpenters and Painters had union shop agreements in the same shops. Id. at 38a-39a, quoting Manufacturing Woodworking Ass'n, 194 N.L.R.B. 1122, 1123 (1972). The union shop agreements provided that the employer agreed to bargain only with that particular union in regard to woodwork finishers. Since these agreements were made on behalf of the entire Association, both unions could not have exclusive jurisdiction. Id. Prior to 1967, when the parties had co-existed peacefully, they had not tried to enforce these provisions strictly against one another. Id.

Painters Brotherhood, filed a complaint with the AFL-CIO, alleging violations of sections two and three of article XX of the AFL-CIO constitution.[3] An impartial unpire[4] made a determination that Carpenters had violated the constitution's anti-raiding provisions in regard to 17 of the 21 shops.[5]

From 1969 to 1975, Painters and its individual members made repeated attempts to have Carpenters comply with the umpire's determination.[6] Requests that AFL-CIO president George Meany take action against Carpenters as provided by the constitution[7] were not satisfied.[8] Consequently, the plaintiffs, individual members of the 27 local unions comprising Painters, brought a class action to enforce compliance with the umpire's determination,[9] alleging jurisdiction under section 301(a) of the Labor Management Relations Act (LMRA).[10]

3. Joint Appendix, supra note 1, at 33a. The complaint under section 2 was later disregarded by the impartial umpire, and it is not the subject of the present litigation. Joint Appendix, supra note 1, at 20a, 34a.

Section 3 provides in part that "[n]o affiliate shall . . . seek to obtain work for its members as to which an established work relationship exists with any other affiliate . . . ." AFL-CIO Const., art. XX, § 3.

Both appellee and Painters are bound by the AFL-CIO constitution through their respective parent-affiliates, Santos v. United Bhd. of Carpenters and Joiners, 547 F.2d 197 (2d Cir. 1977).

4. AFL-CIO Const., art. XX, §§ 7, 9, 10.

5. Joint Appendix, supra note 1, at 20a-21a. Carpenters could have appealed this decision to the AFL-CIO president and executive council. AFL-CIO Const., art. XX, § 12. They did not choose to do so.

6. Joint Appendix, supra note 1, at 8a-9a.

7. AFL-CIO Const., art. XX, §§ 14-15 provide:

"Sec. 14. Any affected affiliate may file a complaint with the President that another affiliate has not complied with an effective determination of the Impartial Umpire or of the Executive Council on appeal. Upon receipt of such a complaint the President shall immediately convene a meeting of the subcommittee of the Executive Council referred to above. If non-compliance with the determination is found at such meeting, notice of such non-compliance shall be issued by the President to each affiliated national or international union and department."

"Sec. 15. Immediately upon the issuance of such notification, the following shall apply:

(1) The non-complying affiliate shall not be entitled to file any complaint or appear in a complaining capacity in any proceeding under this Article until such non-compliance is remedied or excused as provided in Section 16;

(2) The Federation shall, upon request, supply every appropriate assistance and aid to any organization resisting the action determined to be in violation of this Article;

(3) The Federation shall appropriately publicize the fact that the affiliate is not in compliance with the Constitution;

(4) No affiliate shall support or render assistance to the action determined to be in violation of this Article.

In addition, the Executive Council is authorized, in its discretion, to:

(1) Deny to such an affiliate the use of any or all of the services or facilities of the Federation;

(2) Deny to such an affiliate any protection under any of the provisions or policy determinations of the Federation;

(3) Apply any other authority vested in the Executive Council under this Constitution."

8. 547 F.2d at 199.

9. Santos v. United Bhd. of Carpenters and Joiners, 75 Civ. 4355 (S.D.N.Y., March 11, 1976). [Hereinafter cited as Metzner slip opinion].

The district court granted defendant's motion for summary judgment on the ground that the suit was barred by article XX, section 20 of the AFL-CIO constitution, which prohibits resort to the courts for settlement or enforcement of inter-union disputes.[11] Characterizing this as a case of first impression, the Second Circuit reversed and remanded, holding that the action was not barred by the constitutional provision.[12] The court based the decision on the grounds that: (1) "there is . . . no general doctrine that a person desiring judicial enforcement of a contract's or a constitution's terms" must be bound by the entire contract;[13] (2) congressional policy favors judicial enforcement of labor contracts;[14] and (3) Painters, the Painters Brotherhood, and the AFL-CIO had failed in their duty to fairly represent and enforce the plaintiffs' claims.[15] *Santos v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO,* 547 F.2d 197 (2d Cir. 1977).

Section 301 of the LMRA was enacted to ensure a complete remedy for any breach of a labor contract.[16] The statute increases access to the federal courts

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Carpenters argued that plaintiffs did not have standing because, inter alia, the individual union members were not signatories to the constitution, and the constitution was not made for their benefit. 547 F.2d at 200. See Abrams v. Carrier Corp., 434 F.2d 1234, 1249 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971); cf. McLaughlin v. E-Systems, Inc., 403 F. Supp. 67 (N.D. Tex. 1975) (retired employees had no standing under section 301 of the Labor Management Relations Act because the collective bargaining agreement never included them.) However, the Santos court dismissed this argument, stating that the Carpenters had misapplied the court's language in Abrams, supra, wherein the court had denied standing to the individual plaintiffs, not because they were not signatories, but because they had not made " 'the necessary allegations of demonstrable, particularized injury.' " 547 F.2d at 200, quoting Warth v. Seldin, 422 U.S. 490, 508 (1975). The court rejected the argument that one must be a signatory to a contract in order to have standing to sue for its enforcement under section 301. 547 F.2d at 200 n.3, and cases cited therein.

10. 29 U.S.C. § 185(a) (1970). Section 301 provides in pertinent part:

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

11. AFL-CIO Const. art. XX, § 20 provides:

"The provisions of this Article with respect to the settlement and determination of disputes of the nature described in this Article shall constitute the sole and exclusive method for settlement and determination of such dispute and the provisions of this Article with respect to the enforcement of such settlements and determinations shall constitute the sole and exclusive method for such enforcement. No affiliate shall resort to court or other legal proceedings to settle or determine any disputes of the nature described in this Article or to enforce any settlement or determination reached hereunder."

12. 547 F.2d at 203.

13. Id. at 201.

14. Id. at 202.

15. Id. at 202-03.

16. Textile Workers Union v. Cone Mills Corp., 268 F.2d 920, 925 (4th Cir.), cert. denied, 361 U.S. 886 (1959). The union constitution is a contract between the union and its members. Polin v. Kaplan, 257 N.Y. 277, 281-82, 177 N.E. 833, 834 (1931). See Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 179-80 (1960).

by removing the federal jurisdictional restrictions regarding amount in controversy and diversity of citizenship[17] for parties involved in a labor dispute. In potential conflict with resort to a section 301 remedy, however, is the strong congressional policy favoring settlement of labor disputes through the arbitration process,[18] which provides a quick, inexpensive, and efficient alternative to litigation.[19]

The Supreme Court attempted to reconcile these policies in *Hines v. Anchor Motor Freight, Inc.*[20] In that case, plaintiffs filed a grievance alleging that their employer had wrongfully discharged them. Plaintiffs' union processed the grievance through the arbitration procedure authorized in the

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17. 28 U.S.C. §§ 1331, 1332 (1970).

18. It is federal policy to favor arbitration of labor disputes. See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458 (1957); McLaughlin v. E-Systems, Inc., 403 F. Supp. 67, 69 (N.D. Tex. 1975).

Difficulties may arise because the effect of an arbitration agreement is to provide exclusive relief which is final and binding on all parties; this would seem to foreclose the remedies provided by section 301.

In Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), the Supreme Court held that both these provisions could be harmonized with the section 301 right, while Congress' strong preference for arbitration could also be effectuated. The Court simply required that a party who wishes to bring a section 301 action must first exhaust the remedies provided to him in the collective bargaining agreement. Id. at 652-53. (In Santos, the plaintiffs' vain efforts to settle the dispute from 1969 to 1975 would seem to constitute a sufficient exhaustion of internal remedies. See Joint Appendix, supra note 1, at 8a-9a).

There are two exceptions to this "exhaustion of contractual remedies" rule. In Vaca v. Sipes, 386 U.S. 171 (1967), the Court held that an employee is not required to exhaust contractual remedy procedures where the employer has repudiated those procedures, or where the union has sole power to invoke them, and has wrongfully refused to do so. Id. at 185. Thus, if a union breaches its statutory duty of fair representation, an employee is relieved of the obligation to exhaust the collective bargaining remedies. Id. at 177, and cases cited therein. However, the fact that the plaintiff's claim has merit does not prove breach of duty by the union. Rather, the test is whether the union's conduct was "arbitrary, discriminatory, or in bad faith." Id. at 190. See Hardin v. Strickland Transp. Co., 404 F. Supp. 585, 593 (E.D. Mo. 1975).

The second exception to the "exhaustion of remedies" rule is based upon the rule that a collective bargaining agreement cannot demand the waiver of a statutory right. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974). Where an injured party has two separate and distinct causes of action, one based on breach of contract and the other on violation of a statutory right, he may sue directly to enforce the statutory right without regard to the requirements or limitations of the collective bargaining agreement. Id. See U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 356-57 (1971) (5-4 opinion); Leone v. Mobil Oil Corp., 523 F.2d 1153, 1157-58 (D.C. Cir. 1975). Justice White, dissenting in U.S. Bulk Carriers, Inc. v. Arguelles, supra at 376-77, would require exhaustion of contractual remedies, even if a statutory right has been violated. The issue of violation of a statutory right was not raised in Santos, and will not be further discussed in this casenote. See Metzner slip opinion, supra note 9, at 5.

19. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 (1974); Ruzicka v. General Motors Corp., 523 F.2d 306, 312 (6th Cir. 1975).

20. 424 U.S. 554 (1976).

collective bargaining agreement, and a decision was made against the plaintiffs.[21]

In a subsequent section 301 action against the employer, plaintiffs alleged that their union had failed in its duty of fair representation.[22] The employer argued that since it had fully complied with the arbitration procedure required by the contract, it should receive the benefit of that contract's provision which made an arbitration award final and binding upon all parties. The employer further argued that if the plaintiffs were entitled to any relief, it should be against their union.[23]

Although a party who loses in a contractually prescribed arbitration procedure may not seek court review of that award absent a showing of some serious irregularity in the process,[24] the Court held that the breach of duty by the union constituted such an irregularity and removed the bar of finality.[25] Furthermore, the Court held that the bar of finality would not protect the employer, despite the fact that it had fully complied with the arbitration procedure, because the contractual procedures had been seriously undermined by the union's breach of duty. The Court refused to allow the union's breach of duty to shield the employer from the natural consequences of its own breach.[26]

Santos presented a similar conflict between the grant of free access to the courts in section 301 and the strong congressional preference for arbitration over litigation as a means of settling labor disputes. In *Santos*, the Second Circuit was faced with the question of whether a member of one union may sue another union for the enforcement of an arbitral decree made pursuant to a union constitution which bars such suit.[27]

The Second Circuit first considered the contention that since appellants sought relief under the AFL-CIO constitution, they were bound by that document's prohibition against judicial enforcement. The district court in *Santos* had accepted this proposition. It stated that: "an employee who seeks to invoke the protections of the AFL-CIO constitution is bound by the limitations it imposes."[28] This view can be supported by a long line of analogous cases, which held that where a collective bargaining agreement provides that an arbitration award is final and binding, that award will not be reviewed by a court[29] absent a showing of serious impropriety in the arbitral

21. Id. at 557-58.

22. Id. at 558.

23. See id. at 558-59, 569.

24. These irregularities include fraud, misconduct by the arbitrator, an award made in excess of the agreement's authorization, or, as in Santos, a failure by the union to properly represent its member. See 9 U.S.C. § 10 (1970). See also notes 29-30 infra and accompanying text.

25. 424 U.S. at 567-69. See note 18 supra.

26. Id. at 569-70.

27. 547 F.2d at 198.

28. Metzner slip opinion, supra note 9, at 7.

29. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); Boone v. Armstrong Cork Co., 384 F.2d 285, 291 (5th Cir. 1967); Miller v. Spector Freight Systems, Inc., 366 F.2d 92, 93 (1st Cir. 1966) (per curiam); Haynes v. United States Pipe & Foundry Co., 362 F.2d 414, 416-17 (5th Cir. 1966) and cases cited therein.

process.[30] The Second Circuit, however, distinguished these cases on the ground that they dealt with judicial *review*, while *Santos* dealt with judicial *enforcement*.[31] The court acknowledged the general doctrine that "a person claiming rights under a contract 'must take the entire contract.' "[32] In view of the strong congressional preference for judicial enforcement of labor contracts,[33] however, the court found that this doctrine was not binding on the issue of judicial enforcement.[34] Citing several cases, the court noted that "it is equally well established that the victor in an arbitration proceeding may seek court enforcement of his award under L.M.R.A. § 301(a)."[35]

The precedent relied upon by the court to reach this conclusion, however, was based on facts crucially different from those present in *Santos*. In each of the cited cases, the collective bargaining agreements specifically provided for mandatory awards and enforcement, either by the arbitrator or by a court.[36] The AFL-CIO constitution, the authority upon which the umpire's decision was made in *Santos*, provides only that the umpire "shall make [a] determination" after a hearing.[37] The umpire is not empowered to grant any relief;

30. E.g., Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 561-67 (1976). One court has stated that contractual remedies under a collective bargaining agreement can be made exclusive, "even to the point of making a § 301(a) suit unavailable." Boone v. Armstrong Cork Co., 384 F.2d 285, 289 (5th Cir. 1967). See also Haynes v. United States Pipe & Foundry Co., 362 F.2d 414, 418 (5th Cir. 1966). This view conforms to the idea that the parties to a labor agreement should be allowed to choose their own remedies. For example, in enacting LMRA § 203d, Congress refused "to prescribe the remedy of compulsory arbitration for grievance disputes on the ground that it was not desirable for the federal government to dictate particular methods for settling such disputes." Id. at 416, n.2, citing S. Rep. No. 105, 80th Cong., 1st Sess. 433-35 (1947), Legislative History of the LMRA, 1947, pp. 434-35. Furthermore, a court cannot order a party to submit to arbitration unless the collective bargaining agreement creates such a duty. John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964); Amalgamated Meat Cutters, Local 295 v. Servomation Corp., 402 F. Supp. 1058, 1062 (M.D. Pa. 1975). See also Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973). But cf. Goodall-Sanford, Inc. v. United Textile Workers, Local 1802, 233 F.2d 104, 107 (1st Cir. 1956), aff'd, 353 U.S. 550 (1957) (some form of judicial review will always be allowed).

31. 547 F.2d at 201.

32. Id., quoting Metzner slip opinion, supra note 9, at 6.

33. See note 18 supra and accompanying text.

34. 547 F.2d at 201. "[T]here is therefore no general doctrine that a person desiring judicial enforcement of a contract's or constitution's terms must take the bitter with the sweet . . . ." Id. But see Metzner slip opinion, supra note 9, at 7: "[t]here is clearly an element of judicial discretion to be applied where a provision absolutely precludes review, and the same should be applied to a contract term which precludes judicial enforcement." See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 (1976); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452-56 (1957), and sources cited therein.

35. 547 F.2d at 201.

36. Truck Drivers Local 89 v. Riss & Co., 372 U.S. 517, 519 (1963) (per curiam); White Motor Corp. v. International Union, 491 F.2d 189, 190 (2d Cir. 1974) (per curiam); Textile Workers Union v. Cone Mills Corp., 268 F.2d 920, 922 (4th Cir.), cert. denied, 361 U.S. 886 (1959).

37. AFL-CIO Const. art. XX, § 10. Cf. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 565 n.1 (1960), where a collective bargaining agreement is cited which specifically authorizes the arbitrator to interpret and apply the contract, and which binds the parties to

rather, the constitution provides that the losing party shall decide how it will comply with the determination.[38] In fact, if the umpire had done anything more than make a simple determination on the facts, judicial precedent would have precluded the court from enforcing his award.[39]

Nevertheless, the court stated that even the specific prohibition in the AFL-CIO constitution against resort to litigation did not prevent judicial enforcement of the umpire's determination in the instant case.[40] The bar to judicial enforcement was held to be contingent upon Painters' and the AFL-CIO's good faith efforts[41] to gain compliance with the determination through the sanctions provided in the constitution.[42] Since the plaintiffs alleged that Painters and the AFL-CIO had acted "half-heartedly" in imposing those sanctions,[43] the function of arbitration as a judicial surrogate had been frustrated. In order to prevent what it deemed a serious undermining of the integrity of the arbitral process,[44] the Second Circuit refused to enforce the constitution's bar on judicial enforcement of the umpire's decision.[45]

In so ruling, the court seems to have misinterpreted the function of judicial enforcement, which, in this context, should be to compel a party to do that which he has agreed to do. The incongruity in *Santos* is that the court granted permission for the plaintiffs to proceed with their action for enforcement of the umpire's determination when the parties themselves had never agreed to such enforcement.[46]

The court further held that the breach of duty by Painters and the AFL-CIO justified a section 301 action against Carpenters.[47] In support of this ruling the court cited the Supreme Court's decision in *Hines*[48] in which

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"observe and abide by same." Id. See also Leone v. Mobil Oil Corp., 523 F.2d 1153, 1156 n.3 (D.C. Cir. 1975) and Hellman v. Program Printing, Inc., 400 F. Supp. 915, 917 (S.D.N.Y. 1975) for other examples of collective bargaining agreements which specifically provide for enforcement in the courts.

38. AFL-CIO Const. art. XX, § 10. In this case, the Santos court treated the terms arbitrator and umpire as synonymous. 547 F.2d at 201 n.5.

39. "[The arbitrator's] award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

40. 547 F.2d at 203.

41. Id. at 202.

42. AFL-CIO Const. art. XX, § 15. See note 7 supra.

43. 547 F.2d at 203.

44. Id. at 202. "[T]he instant case, like Hines, presents a situation in which allegations of a union's breach of duty are sufficiently serious to enable a court action, filed in the face of a non-judicial settlement requirement, to survive a motion for summary judgment." Id. (Italics omitted).

45. Id. at 203. "With the critical presuppositions of the AFL-CIO constitutional provision thus undermined, we would be blinding ourselves to reality were we to hold that Article XX's restriction on resort to the courts must be enforced regardless of the surrounding circumstances." Id.

46. AFL-CIO Const. art. XX, § 20. See text accompanying note 39 supra.

47. 547 F.2d at 203.

48. 424 U.S. 554 (1976). See notes 20-26 supra and accompanying text.

the bar of finality to an arbitrator's award was found contingent upon the union's proper discharge of its duty: " '[W]e cannot believe that Congress intended to foreclose the employee from his § 301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of duty . . . .' "[49]

Had the court limited the relief granted to permission to proceed with a section 301 action, the decision in *Santos* would not present any problem. However, in granting the right to seek enforcement of the umpire's determination, the court has *expanded* the scope of section 301 to cover actions which do not constitute a breach of contract.[50] The failure of Carpenters to comply with the umpire's determination[51] was not a breach of contract because the umpire was not empowered to make a mandatory award,[52] and because Carpenters never agreed to be bound by that determination.[53]

Section 301 grants jurisdiction to enforce an arbitral award only where non-compliance is itself a breach of contract.[54] An approach preferable to that taken in Santos would have been for the court to dismiss the enforcement action, and to indicate that a section 301 action for breach of section three of article XX of the AFL-CIO constitution would be the appropriate way for the plaintiffs to seek redress.[55] In that subsequent section 301 action, the umpire's determination, though not enforceable, would not be ignored. The court would review the section three claim *de novo*, admitting the arbitration award as evidence and giving it such weight as the court would deem appropriate.[56]

The *Santos* decision now stands as an unfortunate hybrid of prior law. In most instances, courts have required that the parties in a labor dispute follow the agreed-upon settlement procedures;[57] however, when the arbitral procedure has been seriously flawed by a breach of the union's duty of fair representation, an injured party has been allowed to "step outside" the

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49. 547 F.2d at 203, quoting 424 U.S. at 570.

50. Section 301 grants jurisdiction specifically to enforce contract rights. See note 10 supra.

51. But see Joint Appendix, supra note 1, at 37a, where it is alleged that Carpenters has fully complied with the umpire's determination.

52. See notes 38-39 supra and accompanying text.

53. AFL-CIO Const. art. XX, § 10. Section 10 places compliance on a voluntary rather than mandatory basis. Cf. note 37 supra and text accompanying note 38.

54. See note 10 supra.

55. The alleged violation of section 3 of article XX of the AFL-CIO constitution would be grounds for a section 301 action because the wrong complained of is a breach of a promise by Carpenters not to raid another union's shops. See note 3 supra and accompanying text.

56. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974).

57. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455-56 (1957). See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960), where suit was brought to compel the defendant to submit to arbitration. The collective bargaining agreement which was the basis for the action specifically provided for arbitration of disputes, and the defendant had agreed to that procedure. Id. at 565 n.1. Another example is found in Textile Workers Union v. Cone Mills Corp., 268 F.2d 920 (4th Cir.), cert. denied, 361 U.S. 886 (1959), where an employer refused to comply with an arbitration award. There, the court granted specific performance of the award because the parties had expressed an intent to allow judicial enforcement. Id. at 925. See note 36 supra and accompanying text.

agreed-upon procedures, and to sue directly under section 301.[58] The *Santos* court has granted relief which "steps outside" the AFL-CIO's constitutional bar to judicial enforcement; but rather than directing a trial *de novo, Santos* requires that the defendant submit to a settlement procedure created not by agreement, but by the court.[59] Thus, in *Santos* the umpire's hearing was made the final and exclusive forum for settlement of the dispute.[60] Carpenters' rights are threatened by submission of their claim to arbitration rather than to a formal judicial proceeding because of the differences both in procedure[61] and in the types of relief[62] granted by an arbitrator as opposed to a court.[63] Such a result seems unfair to Carpenters, which should be granted either the benefits of its contract, or the full protections of a trial *de novo*.

The Federal Arbitration Act states that a court may confirm and enter judgement on an arbitration award, if the parties have so agreed.[64] The

58. E.g., Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571-72 (1976). Other serious improprieties in the arbitral process produce the same result. See note 24 supra.

59. It might be said that the court has added to the AFL-CIO constitution a clause allowing specific enforcement of the umpire's determination.

60. A hearing can be re-opened, of course, if it is tainted by misconduct. See note 30 supra and accompanying text. E.g., if the arbitrator "manifestly disregards the clear and unambiguous terms of the controlling contract from which [his] powers are drawn," the court may review the award. I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 432 (2d Cir. 1974) (Mansfield, J., dissenting). See note 26 supra and accompanying text.

61. Due to the inexpensive, quick, and informal nature of arbitration, that forum provides fewer protections than would a court. Discovery, compulsory process, and the strength of the oath are all inferior to that found in a court. Furthermore, the rules of evidence are lax, an incomplete record may be kept, and the right of cross-examination may be limited. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56-58 (1974); Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956). As was stated in Bernhardt, "[t]he nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result." Id. at 203.

62. In addition to a deficiency in procedural protections, judicial enforcement of an arbitral award may subject the losing party to harsher penalties than the arbitration process could impose. For example, a court might require specific performance, award damages, or levy fines for failure to comply. The arbitrator, on the other hand, is limited to those remedies specified in the collective bargaining agreement. See note 39 supra. In Santos, for example, Carpenters knew that the umpire's sole power was to make a determination, and that the sanctions, if any, would come only from the AFL-CIO. See note 7 supra; note 53 supra and accompanying text. The fact that the agreed-upon sanctions might have been ineffective, even if faithfully applied, is not sufficient reason to disregard the specific intention of the parties. See Vaca v. Sipes, 386 U.S. 171, 184 (1967). ("Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." Id.). If the contract is clear and express, the court's only role is to enforce the contract. Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 180 (1960). See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562-63 (1976).

63. "[T]he choice of forums inevitably affects the scope of the substantive right to the vindicated . . . ." U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring); cf. Sheet Metal Workers Local 49 v. Los Alamos Constructors, Inc., No. 76-1073 (10th Cir., Mar. 7, 1977).

64. 9 U.S.C. § 9 (1970).

Second Circuit has previously noted that the purpose of that requirement "is to ensure that the parties have *affirmatively agreed*" to allow their contract to be interpreted by a federal court.[65] In *Santos*, that same court has ignored the manifest intention of the parties.

Since the issue presented in *Santos* has not been considered by any other court, the Second Circuit's decision may carry substantial weight. However, care should be taken in applying the *Santos* precedent to future actions of this nature. It is now well established that a collective bargaining agreement bar to judicial enforcement of an arbitral award will be disregarded if the union has failed in its duty of fair representation.[66] The relief granted in *Santos*, however, is unfortunate: rather than authorizing a court to enforce the arbitral award, permission should have been granted to proceed with a section 301 action based directly on the breach of contract which originally gave rise to the arbitration.[67]

Stephen F. Ruffino

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65. I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 426 (2d Cir. 1974) (emphasis added). See U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 361 (1971) (Harlan, J., concurring); Hellman v. Program Printing, Inc., 400 F. Supp. 915, 917 (S.D.N.Y., 1975).

66. See notes 41-45 supra and accompanying text.

67. If the court had followed this course, it would have complied with its prior decision in Steinman v. Spector Freight Systems, Inc., 441 F.2d 599 (2d Cir., 1971), where it ruled that an employee whose own union is derelict in its duty has the option of "su[ing the union] for that dereliction or proceed[ing] against his employer for the latter's breach of the collective bargaining agreement." Id. at 603.

Intra-union political considerations may have prevented the plaintiffs in Santos from joining Painters, the Painters Brotherhood, and the AFL-CIO as co-defendants. However, in light of the fact that the Santos decision strongly indicated the propriety of such a course of action, it remains possible that those parties will be joined as the litigation progresses. See 547 F.2d at 203 & 204 n.7.