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In *O'Callahan v. Parker*,[1] the Supreme Court held that a member of the armed forces cannot be tried by court-martial for any offense which is not shown to be "service-connected." In 1956, O'Callahan, a sergeant in the United States Army, was charged by military authorities[2] with attempted rape, housebreaking, and assault with intent to commit rape in violation of Articles 80, 130 and 134 of the Uniform Code of Military Justice UCMJ.[3] The alleged offenses occurred while O'Callahan, wearing civilian clothes, was off base with an evening pass. Upon conviction, he was sentenced to ten years imprisonment at hard labor, forfeiture of all pay and allowances and a dishonorable discharge. After his conviction was affirmed by an Army Board of Review, O'Callahan filed a petition for a writ of error coram nobis with the United States Court of Military Appeals, alleging that he was denied due process at his court-martial.[4] This petition was denied[5] and O'Callahan began serving his sentence. While in confinement, he filed with the District Court for the Middle District of Pennsylvania, a petition for a writ of habeas corpus alleging, *inter alia*, that the court-martial was without jurisdiction to try him for nonmilitary offenses which were committed while he was off base on authorized leave. The district court denied relief[6] and the Court of Appeals for the Third Circuit affirmed.[7] The Supreme Court granted certiorari,[8] limiting its consideration to the question of whether a "court-martial . . . [has] jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, [and which is] alleged to have been committed

1. 395 U.S. 258 (1969).
2. O'Callahan was apprehended by a hotel security guard and turned over to the Honolulu police. When it was discovered that he was a member of the armed forces, he was turned over to military authorities. *Id.* at 260.
3. 10 U.S.C. §§ 880, 930, 934 (1964).
4. Specifically, O'Callahan claimed that certain depositions which were introduced against him at the court-martial were obtained in violation of his constitutional rights, *viz.*, his right to counsel, since neither he nor his counsel were present when they were taken. United States v. O'Callahan, 16 U.S.C.M.A. 568 (1967).
5. *Id.*
6. United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966).
7. O'Callahan v. Parker, 372 F.2d 136 (1967). This decision, likewise, did not consider the case on its merits. On reargument, however, the Third Circuit did consider the merits and again affirmed the district court's denial of relief. United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (1968).
8. O'Callahan v. Parker, 393 U.S. 822 (1968).

off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?"[9]

The Court, in reversing O'Callahan's conviction, held that a crime, in order to come under military jurisdiction, must be "service connected, lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers."[10] By so limiting court-martial jurisdiction, the Court manifested a reluctance to subject military citizens to a system of "so-called military justice"[11] which, the Court believed, was "singularly inept in dealing with the nice subtleties of constitutional law."[12] The decision, however, has consequences which go far beyond the mere granting of these constitutional protections to a serviceman.[13] These effects will presently be considered.

To Apply Constitutional Protections or to Limit Military Jurisdiction

Although the Court, in reversing his conviction, held that O'Callahan was deprived of his constitutional rights to an indictment by a grand jury[14] and trial by a petit jury,[15] this part of the decision appears to be a mere smoke

9. *Id.* Thus phrased, it appears that the Court assumed the very issue to be decided, namely, whether the alleged crimes had any military significance.

10. O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969).

11. *Id.* at 266 n.7.

12. *Id.* at 265.

13. The decision should not be read to guarantee a serviceman these constitutional protections in a court-martial proceeding. What it does do, is to allow a serviceman to be tried in a civilian court where he will be able to take advantage of these protections.

14. U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." The amendment, however, contains the exception that this requirement is not present "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." *Id.* This provision has been interpreted to mean that an indictment is not required in courts-martial since Congress has the constitutional power [U.S. CONST. art. I, § 8] to formulate rules for the regulation of the armed forces. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Kurtz v. Moffitt, 115 U.S. 487, 500 (1885); Owens v. Markley, 289 F.2d 751 (7th Cir. 1961); Becker v. Webster, 171 F.2d 762 (2d Cir.), *cert. denied*, 336 U.S. 968 (1949).

The words "when in actual service in time of war or public danger" have been held to apply to the militia only, and not to the regular members of the armed services. *See* Johnson v. Sayre, 158 U.S. 109, 114 (1895); *Ex parte* Mason, 105 U.S. 696, 701 (1882); Owens v. Markley, 186 F. Supp. 604, 606 (S.D. Ind. 1960), *aff'd*, 289 F.2d 751 (7th Cir. 1961).

15. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." This right, however, has been held not to extend to courts-martial. *Ex parte* Quirin, 317 U.S. 1 (1942); Owens v. Markley, 186 F. Supp. 604 (S.D. Ind. 1960), *aff'd*, 289 F.2d 751 (7th Cir. 1961).

screen for the Court's primary holding that Congress does not have the power to determine which offenses are triable by courts-martial. This conclusion is supported to some extent by the fact that the Court has never required indictment by grand jury in either court-martial proceedings[16] or in state criminal proceedings[17] and also the fact that at the time O'Callahan was convicted, the right to a trial by jury was not required in state criminal proceedings.[18] The *O'Callahan* Court, therefore, attempts to justify its limitations of the congressional power to regulate the land and naval forces by invoking the right to an indictment by a grand jury, which right is not guaranteed to civilians and by the retroactive application of the right to trial by a petit jury which the Court had previously held was not to be applied retroactively to civilians in state criminal proceedings,[19] thereby granting to O'Callahan certain rights which, at the time of his conviction, were not extended at trials in civilian courts.

Jurisdiction over the Person v. Jurisdiction over the Subject Matter

Prior to *O'Callahan* it was generally held that *status, i.e.*, membership in the armed forces, was a necessary element in conferring court-martial jurisdiction over a person. In *Reid v. Covert*,[20] Justice Frankfurter said that "[t]rial by court-martial is constitutionally permissible only for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces' . . . ."[21] This statement has been interpreted to mean that "[t]he test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' "[22] In *O'Callahan*, the Government argued that these cases

16. *See* note 14, *supra*.

17. *See* Hurtado v. California, 110 U.S. 516 (1884); Morford v. Hocker, 394 F.2d 169, 170 (9th Cir.), *cert. denied*, 392 U.S. 944 (1968). Although the court in *O'Callahan* does not specifically mention state courts, it does refer to "civilian courts." However, since federal courts, with the exception of those in the District of Columbia, normally have no jurisdiction over common law crimes such as rape and housebreaking, it is apparent that "civilian courts" means state courts. The power of Congress to declare an act criminal is limited to acts which have "some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate." United States v. Fox, 95 U.S. 670, 672 (1877). *Cf.* Screws v. United States, 325 U.S. 91, 138 (1945) (dissent).

18. In *Duncan v. Louisiana*, 391 U.S. 145 (1968) the Supreme Court held that the sixth amendment right to a trial by jury was extended to the states through the fourteenth amendment. This right, however, was restricted to cases involving "serious" crimes. *Id.* at 161-62.

19. DeStefano v. Woods, 392 U.S. 631, 633 (1968).

20. 354 U.S. 1 (1957).

21. *Id.* at 42 (concurring).

22. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240-41 (1960).

should be read to require trial by court-martial for any person who is a member of the armed forces. The Court, rejecting this interpretation, held that these cases are to be read only as precluding court-martial jurisdiction over those persons who were not members of the armed forces at the time of the offense.[23] The Court said that " 'Status' is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense."[24]

O'Callahan is a departure from these prior cases to the extent that now, for the first time, not only will the jurisdiction of the military over the person be considered, but also considered will be the military's jurisdiction over the particular offense involved. In holding that status was only indicative of jurisdiction over the person and not over the offense, the Court appeared to ignore its prior holding in *Kinsella v. United States* ex rel. *Singleton*,[25] to the effect that, given a person's military status, Congress and not the courts had the power to determine which offenses would be punishable by military authorities. The Government argued in *Kinsella* that *Reid v. Covert*,[26] a case which held that the military did not have jurisdiction over a serviceman's dependent who committed a capital crime, was not applicable to a case where the offense was noncapital. The Court rejected this argument on the ground that the dependent was not to be included in the term "land and naval Forces." As to the power of Congress to define which offenses are punishable by courts-martial the Court stated:

> [T]he power [of Congress] to "make Rules for the Government and Regulation of the land and naval Forces" bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefor. If civilian dependents are included in the term "land and naval Forces" at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses. *This Court cannot diminish and expand that power,* either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments. Due process cannot create or enlarge power. (Emphasis added.)[27]

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23. All of the cases cited by the Government and in turn relied upon by the Court concerned persons who were not members of the armed forces at the time of their conviction. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (civilian employee of armed forces); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (dependent of military personnel overseas); Reid v. Covert, 354 U.S. 1 (1957) (dependent of military personnel); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (discharged soldier accused of a crime committed while in the military).

24. O'Callahan v. Parker, 395 U.S. 258, 267 (1969).

25. 361 U.S. 234 (1960).

26. 354 U.S. 1 (1957).

27. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960).

Congress is well aware of the scope of jurisdiction it has granted to the military courts. In 1962, a Senate committee considered the constitutional rights of military personnel and recommended that no revision of the UCMJ be made regarding the court-martial of military offenders for civil crimes.[28] The committee concluded that to deny the military jurisdiction over its personnel would put an undue burden on the military in maintaining discipline.[29]

The Supreme Court has noted that the framers of the Constitution gave to Congress the task of defining the rights of military personnel in view of the demands of military discipline and duty.[30] Congress performed that task and granted jurisdiction to the military over civilian offenses committed by servicemen. In *O'Callahan*, the Court shows its disapproval of this decision of Congress and takes upon itself the duty of correcting it.

The Scope of Military Jurisdiction

Prior to the Civil War, court-martial jurisdiction was limited to "all crimes not capital, and all disorders and neglects . . . to the prejudice of good order and military discipline."[31] This "general article" was recognized as giving the military jurisdiction over only those offenses which had a direct impact on military discipline[32] and not those the commission of which was punishable in civilian courts.[33] Thus, when a member of the armed forces committed an offense while he was away from the post, on pass or on leave, he was immune from prosecution by court-martial.[34] During the Civil War, Congress granted to the military jurisdiction over certain offenses without regard to their effect upon military order or discipline.[35] This jurisdiction, however, was applicable only in times of war, insurrection and rebellion.[36]

In 1916, Congress amended the Articles of War to provide for court-

28. *Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 425 (1962).

29. SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., SUMMARY REPORT OF HEARINGS ON CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL 22-26 (Comm. Print 1963).

30. Burns v. Wilson, 346 U.S. 137, 140 (1953).

31. 1776 Articles of War 1, § 18, Art. 5 (reprinted in W. WINTHROP, MILITARY LAW AND PRECEDENTS 1503 (1895)) [hereinafter cited as WINTHROP].

32. WINTHROP 1123.

33. This preference for a trial in a civilian court is clearly indicated by the fact that any commanding officer who willfully refused or neglected to turn an offender over to civilian authorities was himself subject to dismissal from the service. *See* 1776 Articles of War § 10, Art. 59, *id.* at 1071.

34. *See* WINTHROP 1073-74. This general rule was applicable even when the accused was a deserter or otherwise on unauthorized leave. *Id.* at 1073.

35. These offenses included larceny, robbery, burglary, arson, mayhem, manslaughter, murder, and assault and battery with intent to kill. *See* Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736.

36. *Id.*

martial jurisdiction over "all crimes or offenses not capital" irrespective of whether a state of war, insurrection or rebellion existed.[37] In 1950, Congress again considered the scope of military jurisdiction and passed the Uniform Code of Military Justice.[38] Under this code, military jurisdiction was extended to cover offenses, whether capital or noncapital, committed during peacetime as well as wartime.[39]

It appears from this brief review of the evolution of the scope of military jurisdiction that it has run a complete cycle, from the limited jurisdiction of the pre-Civil War period, through the periods of extended jurisdiction, *i.e.*, 1916 and 1950, back to limited jurisdiction under *O'Callahan*.[40]

The "New" Criteria

In announcing its "new" criteria for military jurisdiction, the Court's choice of the term "service connected" is unfortunate since the phrase is without a background in military law.[41] While the Court tersely criticizes Article 134 as unconstitutionally vague, the "service connected" criterion appears to be no less vague.

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37. Act of August 29, 1916, ch. 418, § 3, 39 Stat. 650, 666. Under Article 92, any person subject to military law (Article 2) who committed murder or rape was to be punished as a court-martial might direct. A court-martial did not, however, have jurisdiction over a rape or murder committed by a serviceman in one of the states or in the District of Columbia. *Id.* at 664. As to noncapital crimes, these were punishable by court-martial irrespective of whether they were committed in a state or in the District of Columbia. *Id.* Art. 93.

38. Act of May 5, 1950, ch. 169, 64 Stat. 107.

39. Under Article 18 (10 U.S.C. § 818 (1964)) a general court-martial has jurisdiction "to try persons subject to this [code] for any offense made punishable by this [code] . . . ." Under Article 118 (10 U.S.C. 918 (1964)) persons subject to the code can be tried and punished for murder, a capital offense, regardless of where the murder was committed.

40. Considering the holding in *O'Callahan*, it is reasonably accurate to suggest that the Court desired to return to the pre-Civil War standards of limited jurisdiction. In fact, some of the reasons given by the Court in *O'Callahan* for limiting court-martial jurisdiction to service-connected offenses are strikingly similar to those discussed by Winthrop when considering the 1776 Articles of War in his treatise on military jurisdiction. For example, the *O'Callahan* Court emphasized that the offenses were committed in peacetime and had no connection with O'Callahan's military duties (395 U.S. 258, 273 (1969)). Winthrop, in discussing the limitations on military jurisdiction under the original Articles of War, said that there was no military jurisdiction where the defendant's acts were committed in a civil capacity in time of peace (WINTHROP 1072). The *O'Callahan* Court also stressed that the offenses committed did not involve a flouting of military authority (395 U.S. 258, 274 (1969)), while Winthrop stressed that there was no military jurisdiction where the offense did not involve "insubordination or failure to comply with a lawful order" (WINTHROP 121).

41. In a computer search by Air Force Project LITE of 37 volumes of the opinions of the Court of Military Appeals and the Military Boards of Review, the phrase "service connected" appeared only once and in that instance was not material to any issue in the case. Interview with Mr. Louis Evans, Assistant to Senator Sam Ervin, Jr., in Washington, D.C., Aug. 14, 1969.

In earlier cases, the Court has looked to the maintenance of "obedience and fighting fitness,"[42] "prompt . . . means of compelling . . . order"[43] and "discipline of the army"[44] in considering court-martial jurisdiction. Judging from the Court's past regard of these factors and its strong reliance on Winthrop's treatise, the term "to the prejudice of good order and discipline" would be a logical starting point to attempt to define "service connected." Furthermore, if the Court is returning to the standards of court-martial jurisdictions existing prior to the Civil War, Winthrop's analysis of this term, which at that time had legal significance,[45] will provide some guidance for determining what is "service connected."

Modeled after British military law, Article 62 of the 1776 Articles of War (the predecessor of Article 134) provided for the punishment of "all crimes not capital, and all disorders and neglects, . . . to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war . . . ."[46] The term "to the prejudice of good order and military discipline" was understood to mean directly prejudicial, not merely indirectly or remotely prejudicial. Also, the act or duty neglected must have been one which the military person could legally and properly be called upon to perform. A failure to comply with a civil order, however, was not considered a neglect to the "prejudice of good order and military discipline."[47] The phrase "to the prejudice of good order and military discipline" qualified the term "crime" as well as the term "disorders and neglects." It was well understood that a crime, in order to be subject to the jurisdiction of a court-martial under Article 62, must have directly offended against the government and discipline of the military state.[48] It would appear, therefore, that if the Court is in fact returning to the pre-Civil War scope of military jurisdiction then the Government, in order to obtain court-martial jurisdiction over a military defendant for a "service connected" crime, must demonstrate that the offense was directly and significantly prejudicial to the government or discipline of the armed forces.

42. Reid v. Covert, 354 U.S. 1 (1957).
43. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).
44. *Ex parte* Mason, 105 U.S. 696, 700 (1882).
45. *See* 1776 Articles of War 62, WINTHROP 1118.
46. *Id.* This "general article" soon became known as the "Devil's Article" because of the high number of servicemen prosecuted under its provisions. Whenever the offense was not described or provided with a punishment under another article, or when doubt arose as to which of two or more articles should be applied against an offender, the "comprehensive and serviceable" provisions of Article 62 were used as the foundation for the charge. *See* WINTHROP 1119.
47. WINTHROP 1123. Note, however, that included in Winthrop's tabulation of "neglects and disorders," were the destruction of civilian property and disorderly conduct while in town. *Id.* at 1124-36.
48. *Id.* at 1123-24.

O'Callahan *and Retroactivity*

While statistics on the number of military personnel who were convicted by courts-martial since the Uniform Code of Military Justice was adopted are not available at this time, the tabulation in Appendix II of the Government's brief gives some indication of the number of cases which would be affected if *O'Callahan* is applied retroactively.[49] In addition to its effect on convicted military offenders presently serving sentences imposed by courts-martial, *O'Callahan* could affect military records, types of dismissals, questions of back pay, veterans' rights, burial rights and other benefits.

The considerations determining retroactive application of a Supreme Court ruling may differ significantly depending upon whether a decision is based upon the protection of the accused's constitutional rights or upon a lack of subject matter jurisdiction on the part of the deciding court. It is therefore imperative that the basis for the *O'Callahan* decision be clearly delineated.

It has generally been held since *Linkletter v. Walker*[50] that the Constitution neither requires nor prohibits retroactive application of decisions expounding new constitutional rules affecting criminal trials and numerous new constitutional rules have been denied retroactive application.[51] In *Duncan v. Louisiana*[52] the Supreme Court held that the right to a trial by jury was so basic to our concepts of liberty and justice that the right is applicable to the states through the fourteenth amendment in all cases which would have been tried by jury if prosecuted in a federal court.[53] In *DeStefano v. Woods*,[54] the Court faced the question of whether *Duncan* should be applied retroactively. In ruling that *Duncan* should receive only

49. From 1956 to 1967, a total of 105,109 nonmilitary offenses were tried by Air Force courts-martial resulting in 88,648 convictions. In the years 1966-68, the Army tried 808 defendants by general courts-martial for civil offenses, convicting 699.

Air Force figures also show that 34 percent of the offenses tried by courts-martial were "civil" offenses while Army figures show that 20 percent of its court-martial cases involved "civil" offenses. *See* Brief for Respondent at App. II, O'Callahan v. Parker, 395 U.S. 258 (1969).

50. 381 U.S. 618 (1965).

51. Linkletter v. Walker, 381 U.S. 618 (1965) (exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961)); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966) (rule in Griffin v. California, 380 U.S. 609 (1965), that a defendant's fifth amendment right against self incrimination was violated by the prosecutor's commenting on the defendant's failure to testify); Johnson v. New Jersey, 384 U.S. 719 (1966) ("Miranda warnings" as required by Miranda v. Arizona, 384 U.S. 436 (1966)); Stovall v. Denno, 388 U.S. 293 (1967) (the assistance of counsel at line-ups as required by United States v. Wade, 388 U.S. 218 (1967)); DeStefano v. Woods, 392 U.S. 631 (1968) (the right to a trial by jury in state criminal proceedings as set down in Duncan v. Louisiana, 391 U.S. 145 (1968)); Fuller v. Alaska, 393 U.S. 80 (1968) (exclusion of evidence obtained in violation of the Federal Communications Act, Lee v. Florida, 392 U.S. 378 (1968)).

52. 391 U.S. 145 (1968). *See also* Bloom v. Illinois, 391 U.S. 194 (1968).

53. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

54. 392 U.S. 631 (1968).

prospective application the Court applied the same criteria for determining retroactivity as it expressed in *Stovall v. Denno*.[55] The Court indicated that the purpose of the new requirement of trial by jury would not be served by requiring the retrial of all persons convicted without benefit of a jury and that the states had relied in good faith in a great number of cases on the old rule.[56]

Similarly, the military courts have relied in good faith, in a large number of cases,[57] on the rule that trial by jury did not apply to military personnel who were tried by courts-martial.[58] It would appear that, in view of *DeStefano*, if *O'Callahan* is based on the right to trial by jury, its rule should be applied prospectively only.

If, however, *O'Callahan* is based on the military's lack of subject matter jurisdiction the question of retroactive application is a bit more complicated. The fact that the court rendering a judgment was found to have lacked subject matter jurisdiction does not automatically render the judgement void.[59] It is only where the court clearly exceeds its jurisdictional grant that its judgment is void.[60] The court must be given the power to interpret the language of the instrument from which it derives its jurisdiction in order to determine whether it has jurisdicton over the subject matter in a given case.[61] Barring a complete usurpation of power, even a finding that the statute under which the court proceeded was later held to be unconstitutional will not render the judgment void if the court otherwise has jurisdiction over similar subject matter.[62]

Since the military courts have subject matter jurisdiction over crimes which are "service connected" and which crimes are in substance the same as their civil counterparts, and since the military courts did not *usurp* subject matter jurisdiction over crimes which were not "service connected" it would appear that *O'Callahan* should be applied prospectively even if it is based on the military courts' lack of jurisdiction. This is especially necessary if *O'Callahan* is read as denying to the military subject matter jurisdiction which it had previously possessed.

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55. 388 U.S. 293 (1967). The criteria to be utilized in determining whether a ruling should be applied retroactively are: "(a) the purpose to be served by the new [constitutional] standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

56. DeStefano v. Woods, 392 U.S. 631, 634 (1968).

57. *See* note 49, *supra.*

58. *See* note 15, *supra.*

59. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). *See also* Stoll v. Gottlieb, 305 U.S. 165 (1938); American Sur. Co. v. Baldwin, 287 U.S. 156 (1932).

60. United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940); Kalb v. Feuerstein, 308 U.S. 433 (1940).

61. Stoll v. Gottlieb, 305 U.S. 165 (1938).

62. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

Military Reaction to O'Callahan

Since the *O'Callahan* decision, military prosecutors have been instructed to endeavor to establish some military connection or significance in each case at the trial level in order to avoid post trial litigation challenging military jurisdiction.[63] When the specification alleges a crime cognizable in a civilian court, military trial counsel are instructed to establish the military connection by witnesses and by documentary evidence where possible. The Army Judge Advocate General feels that the "service connected" requirement may be established by answers to the following questions:

A. Was the accused on leave, pass, duty or in an unauthorized absence status at the time?
   (1) If on leave or pass, when was he due to return to duty?
   (2) If on duty, was he in the actual performance of any specific military duty?
   (3) If so, was the accused's military position employed or abused in any way perpetrating the alleged offense?
   (4) Was he in uniform or otherwise identified with the military at the time?

B. What, if any, relationship existed between the accused's military duties and the alleged crime?

C. To what extent is the trial essential to the maintenance of discipline? If essential, identify the specific military interests which would be promoted by such trial.

D. Was the alleged offense committed on a military post, camp, or station? If not, exactly where did the incident take place and how far from the nearest military installation?

E. Was the alleged victim, if any, a person subject to the Code?
   (1) If so, was he performing any duties relating to the military at the time?
   (2) If not, what was his status and relationship to the military (*e.g.*, civilian employee of the Army; dependent wife or child; employee of a nonappropriated fund; FBI agent acting for the military)?

F. Does the alleged offense involve any question of the flouting of military authority? If so, what were the facts and circumstances?

G. Does the alleged offense involve any question of the security of a military post? If so, what were the facts and circumstances?

H. Does the alleged offense involve any question of the integrity of military property? If so, what were the facts and circumstances?[64]

63. *See* Message from the Army Judge Advocate General to Staff Judge Advocates, Ref. No. 911687 (Copy on File with the Law Review).

64. *Id.*

While it is perhaps too early to accurately formulate a working definition of "service connected," it is necessary to note that arguments have been heard in the United States Court of Military Appeals which may help "carve out" the boundaries of this presently vague criterion. Included are cases which involve rape in a military housing area;[65] larceny from a fellow serviceman while off base;[66] and possession and use of marijuana both on and off base.[67] Some cases have already been decided and give an indication as to how the service connected test will be applied. In a Navy Board of Review case[68] the Board held that the use of LSD off-base is clearly a "service connected" offense within the doctrine of *O'Callahan*, since the Navy has an obligation to furnish the user with medical care and since, in the view of some medical authorities, the use of LSD may render a person totally unfit to perform his military duties.

In another Navy Board of Review case[69] the accused was charged with housebreaking (and other offenses) off the military reservation while on unauthorized leave. The Board held that the circumstances of the case were such as would come under *O'Callahan* but refused to apply *O'Callahan* retroactively.

In *United States v. Rine*,[70] the United States Court of Military Appeals affirmed a conviction in a case involving the fatal stabbing of one serviceman by another while in Thailand. This decision, however, was subject to a vigorous dissent which in part argued that the petitioner's counsel should be given an opportunity to brief the applicability of *O'Callahan* to the facts of this case.[71] This dissent implies that at least one member of that court considered that *O'Callahan* might have a retroactive application. Subsequently, in *United States v. Borys*,[72] the Court of Military Appeals, by a vote of two to one, held that the *O'Callahan* decision was retroactively applicable. Captain Borys had been arrested for the crimes of rape, robbery, sodomy

65. United States v. Smith, No. 22,180 (U.S.C.M.A., Sept. 26, 1969). The court held that since the offenses occurred on the base, there was a sufficient "service-connection" to confer jurisdiction on the military. *Id.* at 2.

66. Rego v. United States, No. 21,661 (U.S.C.M.A., Oct. 10, 1969); Camacho v. United States, No. 21,659 (U.S.C.M.A., Oct. 10, 1969); Plamondon v. United States, No. 21,569 (U.S.C.M.A., Oct. 10, 1969).

67. United States v. Beeker, No. 21,787 (U.S.C.M.A., Sept. 12, 1969). The court ordered a reversal of the defendant's conviction and a dismissal of the charges of importing and transporting marihuana. This part of the decision reflected adherence to *O'Callahan* in that these crimes were committed off base and were punishable in the civilian courts. The defendant's conviction on the remaining three counts, however, was affirmed since there was ample "military significance" to confer jurisdiction. *Id.* at 3.

68. United States v. Reid, No. 691762 (N.C.M., June 11, 1969).

69. United States v. Spears, No. 691277 (N.C.M., June 6, 1969).

70. 18 U.S.C.M.A. 421 (1969).

71. United States v. Rine, 18 U.S.C.M.A. 421, 426 (1969).

72. No. 21,501 (U.S.C.M.A., Sept. 5, 1969).

and attempts to commit these crimes. These offenses were committed in Georgia and South Carolina. In 1965 he was tried and acquitted in a South Carolina state court. In 1967, however, he was tried by military court-martial for these same offenses, convicted and sentenced to a long prison term. All of the crimes alleged to have been committed by Captain Borys occurred while he was off duty, on leave, and involved only civilian personnel. The only "service connection" in the case was the presence of a bumper sticker on his automobile identifying him as a military officer. In reversing the Captain's conviction, the majority concluded that *O'Callahan* "requires us to set aside the findings of guilty and sentence and order the charges dismissed, relegating accused's case to such action as the State of Georgia may wish to take in light of his alleged transgressions."[73] Thus, the Court of Military Appeals has given *O'Callahan* full retroactive effect, opening the door for a flood of appeals by incarcerated servicemen.

Conclusion

In an effort to "restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service"[74] the Supreme Court reversed the presumption enjoyed by military courts concerning their jurisdiction over military offenders. The military will now be expected to demonstrate, on the record, their jurisdiction in each criminal case.

The Court no longer will hold that the reputation of the military in the civilian community constitutes sufficient military need, nor will it accept the argument that a military court-martial is a stronger deterrent to crime by military personnel than a civil trial.[75]

In the absence of more current reasons than those used by the Court in limiting the scope of military jurisdiction over military personnel, it would appear that Congress, not the Supreme Court, is better equipped to weigh the needs of the military against the constitutional protections to be granted to our military citizens and strike the balance in view of policy and experience. The Court's reliance on such an old writing as Winthrop's *Military Law and Precedents*, notwithstanding its highly respected reputation, appears to add validity to the dissenting opinion's statement that the Court

73. *Id.* at 7. In United States v. Shockley, No. 21,667 (U.S.C.M.A., Sept. 26, 1969) the Court reversed the court-martial conviction of the accused based on acts of sodomy which occurred off base. The court affirmed his conviction relative to those acts of sodomy which occurred on base.

74. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).

75. This was the position of Mr. Justice Frankfurter in his concurring opinion in Reid v. Covert, 354 U.S. 1, 49 (1957).

relied upon "what are at best wholly inconclusive historical data" which fall short of supporting its conclusion.[76]

Having undertaken the task of scrutinizing military justice in an attempt to secure constitutional protections for the military defendant, however, it is unfortunate that the Court chose to limit military jurisdiction over "civil" crimes rather than face the more basic problem of protecting the constitutional rights of our military citizens by moving to correct the weaknesses from within the system. Perhaps the Court's distrust of "so-called military justice"[77] will be the impetus for it to recognize, as did the District Court for the District of Columbia in *Kaufman v. Secretary of the Air Force*,[78] that the military establishment is not a foreign jurisdiction, but a specialized one. Unless the military can show a need for a different rule, the constitutional protections guaranteed to civilians must also be granted to military personnel. The time has come for all to recognize that an individual should not be required to forfeit the protections of the Constitution simply because he joins the armed forces.

Gelbman v. Gelbman: The Demise of Parent-Child Tort Immunity in New York—Recognition of a Terminal Illness

Early in 1969, the New York Court of Appeals in *Gelbman v. Gelbman*,[1] ruled that suits between children and their parents for nonwillful torts are permissible, notwithstanding the argument that such suits have serious consequences on family unity and encourage fraudulent claims. This decision effectively put to rest in New York the doctrine prohibiting such parent-child suits, a doctrine which had been extant in that state since 1928. Considering the weight given to decisions of the New York Court of Appeals by the courts of other jurisdictions and in light of the New York court's comments in *Gelbman* concerning the insurance industry, an analysis of this case and the possible effects it may have on future decisions by the courts and the insurance companies is warranted.

The Birth of the Doctrine

The parent-child immunity doctrine prohibits suits between parent and minor child for personal injuries arising from nonwillful torts committed by one

76. O'Callahan v. Parker, 395 U.S. 258, 274 (1969).
77. *Id.* at 266 n.7.
78. — F. Supp. — (1969).

1. 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

against the other. It has no precedent in English common law.[2] Rather, it was first enunciated in 1891 by the Supreme Court of Mississippi in *Hewellette v. George*,[3] a case involving a willful tort suit brought by a daughter against her mother for maliciously confining the child in an insane asylum. There, without citation for its assertion, the court said:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.[4]

The doctrine thereafter was applied to cases involving negligently caused injuries without any change in its underlying reasoning[5] and eventually became the majority rule in the United States[6] with most courts citing the *Hewellette* rationale as authority.[7]

Modification

Through the years, however, the parent-child immunity doctrine has been gradually eroded by judicial decisions which have increasingly limited its

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2. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059 (1930); W. PROSSER, TORTS 886 (3d ed. 1964); Annot., 19 A.L.R.2d 423, 425 (1951).

3. 68 Miss. 703, 9 So. 885.

4. *Id.* at 711, 9 So. at 887.

5. *See, e.g.*, Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

6. *See* Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201, 202 (1967); Barlow v. Iblings, — Iowa —, 156 N.W.2d 105, 111 (1968). Among the states that have adopted the doctrine are: Alabama, Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Arizona, Purcell v. Frazer, 7 Ariz. App. 5, 435 P.2d 736 (1967); Arkansas, Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Connecticut, Bricault v. Deveao, 21 Conn. Supp. 468, 157 A.2d 604 (Super. Ct. 1960); Florida, Rickard v. Rickard, 203 So. 2d 7 (Dist. Ct. App. 1967); Georgia, Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Iowa, Barlow v. Iblings, — Iowa —, 156 N.W.2d 105 (1968); Kentucky, Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (1961); Maine, Downs v. Poulin, 216 A.2d 29 (1966); Maryland, Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930); Massachusetts, Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Missouri, Brown v. Parker, 375 S.W.2d 594 (Ct. App. 1964); Nebraska, Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); New Jersey, Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); New Mexico, Nahas v. Noble, 77 N.M. 139, 420 P.2d 127 (1966); North Carolina, Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Oklahoma, Tucker v. Tucker, 395 P.2d 67 (1964); Oregon, Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964); Rhode Island, Castellucci v. Castellucci, 96 R.I. 134, 188 A.2d 467 (1963); South Carolina, Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930); Tennessee, McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Texas, Aboussie v. Aboussie, 270 S.W.2d 636 (Civ. App. 1954); Virginia, Norfolk S. R.R. v. Gretakis, 162 Va. 597, 174 S.E. 841 (1934); Washington, Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905); Wyoming, Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954).

7. "To some degree at least, the Mississippi case has been followed by most of the courts of this country having occasion to rule on the subject." Annot., 19 A.L.R.2d 423, 425 (1951).

scope. The doctrine has been held not to apply in actions where the child was emancipated;[8] when the suit involved an injury to property;[9] when personal injuries were willfully inflicted;[10] where the parent-child relationship had been terminated by the death of one of the parties;[11] where through his "outrageous conduct" the parent was held to have temporarily abdicated his parental responsibilities;[12] where the child's injuries were caused by his parent's acting in a business capacity;[13] and when the parent involved in the suit was not the natural parent.[14] In spite of these exceptions, the general rule still prevailed. But in 1963, the Supreme Court of Wisconsin ruled that suits were allowable for nonwillful torts between parent and child except in those instances "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."[15] Minnesota, in *Balts v. Balts*, decided in 1966, abrogated the doctrine in tort actions brought by a parent against a child but specifically mentioned that it was not passing on the doctrine when raised as a defense in an action brought by a child against his parent.[16] New Hampshire was the first jurisdiction to abrogate the doctrine totally, allowing suits by either party in any action based on nonwillful injury.[17]

In each of those three cases, the individual courts dealt with the same basic contentions in favor of the rule and in each the court found the presence of insurance the vital factor in negating any possibility of family discord in the bringing of the suit.

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8. This exception to the rule was noted in Hewellette v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891). *See also* Farrar v. Farrar, 41 Ga. App. 120, 121, 152 S.E. 278, 279 (1930); Wurth v. Wurth, 322 S.W.2d 745, 746 (Mo. 1959). Emancipation has been defined as the primary sense of "complete severance of the filial tie, and an entire surrender of care and custody of the child, as well as renunciation of parental duties." Thompson v. Thompson, 264 S.W.2d 667, 668 (Ky. 1954).

9. Suits have been successfully maintained which involved contracts, wills and inheritances. W. PROSSER, TORTS 886 (3d ed. 1964).

10. Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956). *See also* Cannon v. Cannon, 287 N.Y. 425, 429, 40 N.E.2d 236, 238 (1942) (dictum).

11. Palcsey v. Tepper, 71 N.J. Super. 294, 176 A.2d 818 (1962). *See also* Vidmar v. Sigmund, 192 Pa. Super. 355, 162 A.2d 15 (1960) (willful tort).

12. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965).

13. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952). *Contra*, Barlow v. Iblings, — Iowa —, 156 N.W.2d 105 (1968).

14. Burdick v. Nawrocki, 21 Conn. Supp. 272, 154 A.2d 242 (Super. Ct. 1959).

15. Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).

16. 273 Minn. 419, 433, 142 N.W.2d 66, 75.

17. Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966).

The Doctrine in New York

New York adopted the parent-child immunity doctrine in a memorandum decision issued in 1928. In *Sorrentino v. Sorrentino*[18] the Court of Appeals of New York affirmed without comment the decision of the Appellate Division which had held that an action for personal injuries resulting from negligence may not be maintained against a parent by an unemancipated child.

The doctrine was reaffirmed in *Cannon v. Cannon*[19] by a unanimous vote. Here, the plaintiff, an unemancipated child, sued his father and the estate of his mother for injuries sustained in an auto accident. At the time of the accident his mother was driving the car with his father's permission. Recognizing the rule in *Sorrentino*, plaintiff argued that the rationale in the case of *Rozell v. Rozell*[20] (decided after *Sorrentino*) should allow a suit between him and his parents. *Rozell* had allowed a suit by a brother against his sister. But the court in *Cannon* rejected the plaintiff's contention since it felt that the "natural kinship between parent and child . . . involves legal duties peculiar to that relationship . . . ."[21] The court further noted that "if within the wide scope of daily experiences common to the upbringing of a child a parent may be subjected to a suit for damages for each failure to exercise care commensurate with the risk . . . a new and heavy burden will be added to parenthood."[22]

In *Badigian v. Badigian*,[23] a third case involving the doctrine that was heard before the New York Court of Appeals, the court, by a vote of six to one, affirmed the parent-child immunity doctrine, calling it "a direct application of a concept that cannot be rejected without changing the whole fabric of our society, a fundamental idea that is at the bottom of all community life."[24] As it had earlier in *Cannon*, the court intimated that if any change were to be made in the doctrine's application, such change was within the province of the legislature.

But in *Badigian*, in a lone dissent, Associate Judge Fuld argued for the doctrine's abolition. He found the rule to be "based on dubious prophecy and, at least when applied to deny redress in automobile negligence cases, [to be] wrong in principle and at odds with justice and modern-day reali-

18. 248 N.Y. 626, 162 N.E. 551 (mem.), *aff'g*, 222 App. Div. 835, 226 N.Y.S. 907 (1928) (mem.). The vote in the Court of Appeals was four to three with then Chief Judge Cardozo and Associate Judges Crane and Andrews dissenting without comment.
19. 287 N.Y. 425, 40 N.E.2d 236 (1942).
20. 281 N.Y. 106, 22 N.E.2d 254 (1939).
21. Cannon v. Cannon, 287 N.Y. 425, 427-28, 40 N.E.2d 236, 237 (1942).
22. *Id.* at 429, 40 N.E.2d at 238.
23. 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).
24. *Id.* at 474, 174 N.E.2d at 719, 215 N.Y.S.2d at 36-37.

ties."[25] Judge Fuld catalogued the various exceptions which different courts had carved out of the doctrine.[26] He also undertook to point out the importance of insurance as a consideration in abrogating the doctrine.[27] It was Judge Fuld's dissent which was to be the basis of the Court of Appeals' turn-about decision in *Gelbman* some seven years later.

In *Gelbman*, plaintiff was seriously injured while riding as a passenger in an automobile owned by her but driven by her 16-year-old son. Her suit was based on his allegedly negligent conduct as driver and the insurance company, which represented her son in the action, interposed as an affirmative defense the fact that the defendant was the unemancipated son of the plaintiff. The trial court relied on the prior decisions in *Sorrentino*, *Cannon* and *Badigian* and dismissed the complaint.[28] This determination was unanimously affirmed by the Appellate Division.[29]

The Court of Appeals reversed the lower courts and in the process buried the parent-child immunity doctrine forever in New York.[30] The opinion[31] noted that the court in *Badigian* had set forth three reasons for maintaining the parent-child immunity doctrine. First, the court in the earlier case had noted that no other jurisdiction had seen fit to abolish the doctrine.[32] The *Gelbman* court noted that since *Badigian* was decided in 1961 there had been a "judicial erosion" of the doctrine in courts of sister states.[33]

Secondly, the *Badigian* court had reiterated the feelings expressed in *Cannon* that the legislature should undertake any changes that were to be

25. *Id.* at 474-75, 174 N.E.2d at 720, 215 N.Y.S.2d at 37.

26. *See* notes 8-14 *supra* and accompanying text.

27. Badigian v. Badigian, 9 N.Y.2d 472, 479, 174 N.E.2d 718, 722-23, 215 N.Y.S.2d 35, 41 (1961).

28. Gelbman v. Gelbman, 52 Misc. 2d 412, 275 N.Y.S.2d 712 (1966).

29. Gelbman v. Gelbman, 28 App. Div. 2d 826, 282 N.Y.S.2d 670 (1967) (mem.).

30. The court in *Gelbman* noted that though the three cases relied upon by the trial court dealt with suits by minors against their parents, which was converse of the *Gelbman* situation, still the "underlying policy considerations which influenced those decisions—if presently viable—should [have been] equally determinative" of the appeal in *Gelbman*. Gelbman v. Gelbman, 23 N.Y.2d 434, 436, 245 N.E.2d 192, 297 N.Y.S. 2d 529, 530 (1969).

31. Associate Judge Burke wrote the unanimous opinion. He had joined with the majority in *Badigian* when now Chief Judge Fuld wrote the sole dissent. The remaining five judges who joined in *Gelbman* were not on the Court of Appeals when *Badigian* was decided.

32. Badigian v. Badigian, 9 N.Y.2d 472, 473, 174 N.E.2d 718, 719, 215 N.Y.S.2d 35, 36 (1961).

33. Gelbman v. Gelbman, 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530 (1969). Though the court gave no citation to other states, it must surely have been alluding to the action of Minnesota, Wisconsin and New Hampshire. In addition to these three states, Illinois, in Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968) declared the doctrine abrogated in situations not connected with the family relationship. *Id.* at 202, 241 N.E.2d at 15.

made in the doctrine.[34] The *Gelbman* opinion noted that in the face of the judicial erosion of the doctrine in other states, the legislature in New York had demonstrated no inclination to abrogate the rule through statutory action. The court felt that such inaction by the legislature illustrated the fact that "the rule will be changed, if at all, by a decision of this court."[35] Since the doctrine was created by judicial decision, it was within the purview of the courts to take the lead in abrogating the doctrine.

The third reason advanced by the *Badigian* court was that the doctrine was essential to the preservation of family unity.[36] The court in *Gelbman* reversed its prior thinking and said that, in the circumstances of the case, family unity could only be preserved by permitting the action.[37] Adopting the view that such action could be validly construed as the manifestation of the parent's right to discipline and punish his child, the court determined that such an action "would be a proper exercise of parental authority, which authority should not be impaired by the doctrine of intrafamily tort immunity."[38]

The court, in addition to refuting the three reasons raised in *Badigian* for the preservation of the doctrine, also commented on the effect of the presence of insurance in New York, a compulsory insurance state. The court felt that insurance removed finally and effectively the argument favoring continued family harmony as a basis for prohibiting the suit. The court discerned that the litigation, when an insurer is present, becomes in reality an action between the injured party and the insurance carrier. Thus, the harmony of the family could hardly be impeded by this action. The presence of insurance also effectively counters the *Gelbman* court's own argument that an action brought by a parent against his child for a nonwillful tort could be viewed as a proper exercise of parental authority. If, as the court said, the litigation was really between the injured party and the insurance company, then the child could never be said to be disciplined or punished by this action, since he is removed from it.

Countering the argument that permitting suits like the one in *Gelbman* would encourage fraudulent lawsuits, the court voiced its confidence in the ability of the jury to distinguish between valid and fraudulent claims.[39]

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34. Badigian v. Badigian, 9 N.Y.2d 472, 474, 174 N.E.2d 718, 719, 215 N.Y.S.2d 35, 37 (1961).

35. Gelbman v. Gelbman, 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530 (1969).

36. Badigian v. Badigian, 9 N.Y.2d 472, 474, 174 N.E.2d 718, 719, 215 N.Y.S.2d 35, 36-37 (1961).

37. Gelbman v. Gelbman, 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530 (1969).

38. *Id.* at 437, 245 N.E.2d at 193, 297 N.Y.S.2d at 531.

39. *Id.* at 438-39, 245 N.E.2d at 194, 297 N.Y.S.2d at 532. "Just as strong a

The Importance of Insurance in Abrogation of the Doctrine

Most of the litigation in which the doctrine has come into play has involved automobile accidents. In that regard, the presence of insurance has been the most telling point in the argument favoring the abolition of the doctrine.[40] Insurance covers legal liability; it does not create liability where none exists initially.[41] The mere fact that the particular defendant is protected by liability insurance does not enable the injured party to maintain an action when, in the absence of such insurance, he would not be able to otherwise maintain it.[42]

The presence of insurance is important, however, since it "tends to negate any possible disruption of family harmony and discipline."[43] A fund to provide care for injuries is available and, hence, the fear of impoverishing the family through unexpected medical and other expenses, and thereby destroying family harmony, is removed.[44] As noted in *Gelbman*, when insurance is present the suit is actually one between the injured party and the insurance company and there is no possibility of family harmony being disturbed by this type of suit.

It has been argued, however, that to allow suits between parent and child for nonwillful torts would lead to collusion between the parties.[45] It is said

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possibility of fraud exists in suits between close friends and between relatives, especially in intersibling suits, and yet a cause of action is not denied in those cases." 1967 U. ILL. L.F. 805, 807.

40. Professor McCurdy, who in his 1930 article, *Torts Between Persons in Domestic Relation, supra* note 2, listed seven reasons in support of the doctrine that a child has no cause of action for a personal injury inflicted by the parent upon him while a minor, *Id.* at 1072-77, said this about insurance coverage in an article written 30 years later:

> It is apparent that the two reasons which have come to be regarded as the principal, if not the only, ones for denying a cause of action in tort between parent and minor child, *viz.* danger of disrupting or disturbing domestic tranquility and interference with the exercise of parental rights and the performance of parental duties in the matter of rearing and disciplining the child, have no application when the action is, in substance if not in form, against an insurance company which will pay the damages recovered.

McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 546 (1960).

41. Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963); Hinkle, *Intrafamily Litigation—Parent and Child*, 1968 INS. L.J. 133, 143.

42. McCurdy, *Torts Between Parent and Child, supra* note 40, at 545.

43. Goller v. White, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963).

44. 12 S.D.L. REV. 364, 368 (1967). One court has gone so far as to say: "We concur in the view that where a child is protected by liability insurance there is more likelihood of friction, resentment, and discord by a parent's failure to assert a claim than by instituting suit." Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966). Further, without the presence of insurance, the chances of any party's bringing a suit are remote. Briere v. Briere, 107 N.H. 432, 435, 224 A.2d 588, 590 (1966).

45. "Common sense, not to speak of judicial omniscience, recognizes that this type of litigation [parent-child nonwillful tort suits] almost invariably amounts to a fictionalized

that since insurance coverage places upon the insured a duty to cooperate with the insurer, cooperation would be endangered when a parent is otherwise responsible for medical expenses of a family member. It is alternatively contended that in the case of the injured child, he is probably ignorant of his legal rights and so it is not he who initiates the suit but rather someone in his family, possibly the defendant. Thus, it is said these suits would be collusive and would lead to the disintegration of the family's individual integrity.[46]

It should first be noted that in these actions "[f]raud is never presumed."[47] Actions between husband and wife, between brother and sister, between near relatives, and between host and guest are allowed in many states. The possibility of collusion is as great in these other actions. The Minnesota court, reviewing this contention in *Balts*, looked to the jurisdictions where interspousal immunity had been abolished and found that "[n]othing has come to our attention which indicates that these jurisdictions are deluged with collusive actions or that such litigation is ridden with fraud."[48]

Each court that has had to contend with the collusion argument has placed its final trust in the ability of the court system itself to ferret out fraudulent claims. The *Gelbman* court noted that "[t]here are analogous situations in which we rely upon the ability of the jury to distinguish between valid and fraudulent claims. The effectiveness of the jury system will pertain in the present situation."[49]

It should be noted that a great number of states, not including New York, have enacted automobile guest statutes which restrict the liability of an owner or operator of an automobile for injury to gratuitous guests to those instances in which the driver commits a willful or wantonly negligent act leading to the passenger's injury or where the driver is grossly negligent or intoxicated and as such causes the accident. Hence, the abolition of the parent-child immunity doctrine in states with guest statutes will still not afford the injured relative a clear path to recovery in view of the criteria established by the guest statutes, where such relative is, as is likely, a gratuitous guest. This consideration is all the more important since most of the litigation in which the parent-child immunity doctrine has been invoked has involved automobile accidents.

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action against the parent's liability insurer, and, as such, is patently collusive." 17 DEF. L.J. 586, 594 (1968).

46. Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960).

47. Midkiff v. Midkiff, 201 Va. 829, 833, 113 S.E.2d 875, 878 (1960).

48. Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966).

49. Gelbman v. Gelbman, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969). *See also* Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966); Briere v. Briere, 107 N.H. 432, 434-35, 224 A.2d 588, 590 (1966).

A further argument has been raised that since automobile liability insurance premiums are based on recent experience and since there is no loss experience as to injuries involved in parent-child nonwillful tort suits, the current rates do not contemplate such indemnity.[50] This contention yields two alleged results. First, it is said that insurance rates will rise if the doctrine is abrogated.[51] It has not been proven, however, that the allowance of intrafamily suits has been a cause for any rate rise. Furthermore, the fact that insurance rates possibly might rise is no real defense to the argument that insurance will cover the loss. Secondly, it may be argued that insurance companies have no experience in this field, and since their rates do not reflect consideration of such suits, it would be unfair to the insurance companies to subject them to claims not contemplated when the contract was made. This contention lacks force since, in a policy of liability insurance which purports to cover the persons who qualify under the definition of "insured" within the policy contract, the company agrees to pay on behalf of the insured all sums which he shall become legally obligated to pay as damages arising out of the activities covered in the contract. Unless the policy has language expressly eliminating coverage of the insured for torts which he commits against the members of his own household, then he will be covered for these torts. "Standard insurance policies do not eliminate coverage to the insured for nonintentional torts committed against the members of his family."[52] Hence, conceding the fact that insurance companies have had no recent experience in determining rates in parent-child suit situations, by the terms of "standard insurance policies" they should still be prepared to pay for damages in such actions.

The Effect of Gelbman

The ruling of the New York Court of Appeals in *Gelbman* may well be a harbinger of further action by New York's sister states to abrogate the parent-child immunity doctrine for nonwillful torts.[53] This abrogation may either be total as in New York or in some way qualified, as in Wisconsin and Minnesota.[54] It is true that the greater number of states still follow the rule announced in *Hewellette* but it seems increasingly hard to justify the

50. Badigian v. Badigian, 9 N.Y.2d 472, 474, 174 N.E.2d 718, 720, 215 N.Y.S.2d 35, 37 (1961).

51. 12 S.D.L. REV. 364, 368 (1967).

52. Hinkle, *Intrafamily Litigation—Parent and Child*, 1968 INS. L.J. 133, 146.

53. Hawaii qualified the scope of the doctrine, citing *Gelbman*, in Tamashiro v. DcGama, — Hawaii —, 450 P.2d 998 (1969).

54. No jurisdiction seems to have gone as far in abrogating the doctrine as New York, for the court in *Gelbman* not only abrogated the doctrine totally but announced it was applying the rationale in *Gelbman* retroactively to matters which had not yet progressed to final judgment. Gelbman v. Gelbman, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969).

full import of the doctrine in the light of present-day realities.[55] Since New York's highest court has now unanimously abrogated the doctrine, the prestige of this court may well cause other states to reconsider their positions.

Since New York has historically been a leader in insurance matters,[56] it is not unlikely that the decision in *Gelbman* may prompt some deep thinking on the part of insurance companies in order to assess their positions and the alternatives available in the light of *Gelbman*. This concern will be especially extensive in states, such as New York, where automobile insurance is compulsory, since litigation between parent and child has usually arisen out of auto accidents. Assuming that this will continue to be the most frequent situation in which the parent-child immunity doctrine will appear, it is certain that insurance companies will be involved in a great number of suits between parent and child.

Many avenues are open to insurance companies in adjusting to abrogation of the doctrine. It has been suggested that strict enforcement of the cooperation clause,[57] requiring an insured to assist his insurer in the defense of litigation would be an effective means of discouraging collusion between the insured and the members of his family.[58] However, the cooperation clause is subject to interpretation and the interpretation given by the courts has usually favored the insured. The burden of proving a failure to cooperate is on the insurer and a lack of good faith by the insured must be proven, not inferred.[59] Unless the insured's actions appear so obviously a sham to all parties and to the court, the insurer may find it difficult to demonstrate the type of obstruction the court demands.[60] The advantage of

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55. It should be noted, however, that certain states have recently reaffirmed their adherence to the *Hewellette* rationale: Florida, Denault v. Denault, 220 So. 2d 27 (Dist. Ct. App. 1969); New Jersey, Franco v. Davis, 51 N.J. 237, 239 A.2d 1 (1968); Tennessee, Wooley v. Parker, — Tenn. —, 432 S.W.2d 882 (1968); West Virginia, Freeland v. Freeland, — W. Va. —, 162 S.E.2d 922 (1968).

56. New York has pioneered in antidiscrimination insurance law; the combining of insurers for rate-making purposes; the establishment of security arrangements; and commissioner control over liquidation of insurers. *See* C. KULP & J. HALL, CASUALTY INSURANCE 958-1027 (4th ed. 1968).

57. *E.g.*, Assistance and Cooperation of the Insured. . . .

> The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury, property damage or loss with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses.

Government Employees Insurance Company, Policy A-4 (1968).

58. 1967 U. ILL. L.F. 805, 813-14.

59. Albert v. Public Serv. Mut. Cas. Ins. Corp., 266 App. Div. 284, 42 N.Y.S.2d 124 (1943).

60. Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367 (1928).

resorting to a strict enforcement of the cooperation clause lies in its economy of application and the lack of administrative procedure accompanying it. However, in light of the high burden of proof placed on the insurer to prove a failure to cooperate, this method may not be feasible.

If the insurance company were able to exclude the undesired risk, the *Gelbman* decision would be of no significance. Whether the insurance companies would want to alter their policies to exclude such risks is still an open question. Absent statutory inhibitions,[61] it has been held that "the insurer need not protect against all liabilities and . . . a clause exempting certain liabilities from coverage is valid."[62] Absent statutory barriers there would still be the question of whether public policy would allow an alteration such as the one contemplated. A court could easily find that public policy was a bar to exclusion. As stated in *Gelbman*, "it seems obvious that family unity can only be preserved . . . by permitting the . . . action."[63] Furthermore, the existence of a policy containing an intrafamily exclusion might very well not be sufficient to satisfy a state's financial responsibility law, if one exists in the state. For example, in Connecticut in 1966, the Connecticut State Attorney General at the request of the Connecticut Commissioner of Motor Vehicles, rendered a formal opinion that in an automobile accident in which a member of the insured's family was injured, the existence of such a policy containing the intrafamily exclusion did not meet the standards of that state's financial responsibility law. Consequently, an insured who was involved in such an accident would have to obtain a release from the injured relative, or post a cash bond or surrender his driver's license. Thus, accidents involving minor relatives of the insured put the insured in an intolerable position. Therefore, the insurance department of the state took the position that policies containing this type of exclusion would have to bear a prominent warning legend to the effect that the policy might not be sufficient to satisfy the financial responsibility laws. In preference to this, the licensed Connecticut insurers chose to waive the exclusion on all policies.

Traditionally, an insurer could not limit its liability without granting some consideration to its insured for reducing the coverage under the policy.[64] However, the Tenth Circuit Court of Appeals recently held that an insurer

61. *See, e.g.*, "No policy of automobile liability insurance . . . written or renewed after July 1, 1969, shall contain an exclusion of liability for damages for bodily injury solely because the injured person is a resident or member of the insured's household or related to the insured by blood or marriage." Law of May 19, 1969, ch. 474, § 1, Minn. Laws 530.

62. Hill v. Standard Mut. Cas. Co., 110 F.2d 1001, 1004 (7th Cir. 1940).

63. Gelbman v. Gelbman, 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530 (1969).

64. *See, e.g.*, Southern Farm Bureau Cas. Ins. Co. v. United States, 395 F.2d 176 (8th Cir. 1968).

may limit its liability merely by postponing amendment until renewal,[65] and then attaching an endorsement that would be obvious to the policy holder. The argument is that each year's insurance contract is a separate and distinct entity and, hence, there is a right to modify the terms of the contract yearly.[66]

The use of arbitration between insured and insurer is another possible solution. Often an arbitration provision is provided with regard to the uninsured motorist section of the liability policy. It would appear that the use of arbitration is considered contrary to public policy in only nine states.[67] Arbitration may be an effective device for three reasons. First, it does serve public policy in that it remedies a wrong. Second, it effectively keeps cases off the civil docket. Third, it affords the parties the opportunity to have their case heard by a professional arbitrator who might have more expertise in the area than the average juryman. The cost of arbitration, however, may not be so much less than that of a trial so as to make it desirable in that regard.

Insurers could also provide alternative fixed benefits to members of the family in lieu of any right of action. The objective of such a provision would be to negate the effect of the *Gelbman* decision while providing a satisfactory remedy for the wrong that was committed. An insurance policy usually provides for such fixed benefits under the medical payments portion but only for an additional premium. The insurer here, however, would apparently be moving into the area of absolute liability, an area in which insurance companies fear to tread.

Finally, an insurer could discontinue doing business in the state, although this would create an impossible situation for local underwriters who operated mainly or only in a state that had abrogated the doctrine. Further study of the effects of abrogation would have to be undertaken before any insurance company could prudently consider so drastic a move.

Conclusion

The doctrine of parent-child immunity for nonwillful torts is slowly dying in American law. Only time will tell to what extent its demise has been hastened by the *Gelbman* decision. More courts seem to be realizing that in the field of parent-child immunity "[t]o allow such a distinction as now exists between tort and other forms of action is indeed not only to perpetuate confusion and irreconcilable decisions . . . but to entrench a policy from

65. Government Employees Ins. Co. v. United States, 400 F.2d 172 (1968).
66. *Id.* at 174.
67. Those states are: Arkansas, Georgia, Kentucky, Louisiana, Mississippi, South Carolina, Tennessee, Virginia, West Virginia. *See* HOUSE COMM. ON THE JUDICIARY, AUTOMOBILE INSURANCE STUDY, H.R. REP. No. 815, 90th Cong., 1st Sess. 28 (1967).

which changing times have drained most of such vitality as it may have once possessed."[68] As Judge Fuld said in his dissent in *Badigian*, "[a] rule which so incongruously shields conceded wrongdoing bears a heavy burden of justification."[69]

This "heavy burden" will be able to be justified to a lesser degree in each succeeding year and the only question that will remain is to what extent the doctrine will be altered. For those states seeking a total abrogation, the Court of Appeals decision in *Gelbman* will be the clarion call. As more states abrogate or qualify the doctrine, the insurance companies will be faced with an increasing number of law suits to defend and *Gelbman* may, in the final analysis, be the most important insurance case of recent years.

68. Briere v. Briere, 107 N.H. 432, 436, 224 A.2d 588, 591 (1966).

69. Badigian v. Badigian, 9 N.Y.2d 472, 475, 174 N.E.2d 718, 721, 215 N.Y.S.2d 35, 38 (1961).