Notre Dame Law Review

Volume 44 | Issue 2 Article 4

1-1-1969

Case Comments

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CASE COMMENTS

SECURITIES REGULATION — SECURITIES EXCHANGE ACT OF 1934 — INSIDER DEFINED AS EMPLOYEE IN POSSESSION OF MATERIAL UNDISCLOSED INFORMATION OBTAINED IN THE COURSE OF EMPLOYMENT — DISCLOSURE REQUIREMENT OF RULE 10b-5 NOT SATISFIED WHEN INSIDER PURCHASES STOCK IMMEDIATELY AFTER ANNOUNCEMENT OF MATERIAL INFORMATION AT PRESS CONFERENCE — CORPORATE LIABILITY FOR NEGLIGENCE IN THE ISSUANCE OF A PRESS RELEASE MAY BE PREDICATED ON SECTION 10(b) AND RULE 10b-5. — On August 19, 1966, the Securities and Exchange Commission [SEC] commenced action[1] against the Texas Gulf Sulphur Company [TGS] and thirteen individuals, alleging that these fourteen defendants violated the provisions of Section 10(b)[2] of the Securities Exchange Act of 1934[3], and its rule 10b-5.[4] The events upon which the action was based originated with the extensive aerial exploratory activities of TGS begun in 1957 in eastern Canada. The survey group, led by defendant Mollison, a mining engineer and a Vice President of TGS, included: defendant Holyk, TGS chief geologist; defendant Clayton, an electrical engineer and geophysicist; and defendant Darke, a geologist. The operations of this group resulted in the detection of numerous anomalies,[5] one of which was on the Kidd 55 segment of land located near Timmins, Ontario.

Ground geophysical surveys taken late in October of 1963 confirmed the presence of an anomaly in the Kidd 55 segment and indicated the necessity of drilling for further evaluation. Drilling of the initial hole, K-55-1 at the strongest part of the anomaly was commenced on November 8, 1963 and terminated on November 12. Visual estimates of the cone of K-55-1 indicated high mineral content.[6] The estimates convinced TGS that it was desirable to acquire the remainder of the Kidd 55 segment. In order to facilitate this acquisition, TGS President Stephens instructed the exploration group to keep the results of K-55-1 confidential and undisclosed, even as to other officers, directors, and employees of TGS. Meanwhile, the chemical assay report on the cone of K-55-1 was received.[7] The report confirmed the visual estimates which were so remarkable that neither Clayton, an experienced geophysicist, nor four other TGS expert witnesses had ever seen or heard of a comparable initial exploratory drill hole in a base metal deposit.

Drilling was resumed on March 31, 1964, and ensued to completion with all reports favorable. During this same period, rumors that a major ore strike was

1 The action was commenced pursuant to the Securities Exchange Act of 1934 § 21, 48 Stat. 899 (1934), *as amended,* 15 U.S.C. § 78u (1964), and the Securities Exchange Act of 1934 § 27, 48 Stat. 902 (1934), *as amended,* 15 U.S.C. § 78aa (1964).

2 Securities Exchange Act of 1934 § 10b, 48 Stat. 891 (1934), 15 U.S.C. § 78j (1964). Section 10b is quoted at note 82 *infra.*

3 Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. §§ 78a-78jj (1964).

4 17 C.F.R. § 240.106-5 (1968). The rule is quoted at note 23 *infra.*

5 An anomaly is an extraordinary variation in the conductivity of rocks. It indicates the presence of a conductor of electricity but does not identify the conductor. SEC v. Texas Gulf Sulphur, No. 30882 at 3596 (2d Cir. August 13, 1968).

6 Visual estimates indicated an average content of 1.15% copper and 8.64% zinc over a length of 599 feet. *Id.*

7 The chemical assay revealed an average mineral content of 1.18% copper, 8.26% zinc, and 3.94 ounces of silver per ton over a length of 602 feet. *Id.* at 3596-97.

in the making were circulating throughout Canada. These rumors were a matter of some concern to Stephens and to Fogarty (the Executive Vice President of TGS), and it was decided that a press release designed to quell the rumors would be drafted. This first release appeared in the press on Monday, April 13. On the same day, a reporter for the *Northern Miner,* a Canadian mining industry journal, visited the drill site, interviewed Mollison, Holyk, and Darke, and prepared an article which confirmed a ten million ton strike. This latter article, released on April 16, never became a material issue in the case.

At 10:00 A.M. on April 16, an official detailed statement, announcing a strike of at least twenty-five million tons of ore, was read to representatives of American financial media. This second press release appeared over Merrill, Lynch's private wire at 10:29 A.M. and, somewhat later than expected, over the Dow Jones ticker tape at 10:54 A.M.[8]

During the period from November 12, 1963, when K-55-1 was completed, to March 31, 1964, certain of the individual defendants and persons said to have received "tips" from them purchased TGS stock or calls thereon.[9] Prior to these transactions these persons had owned 1,135 shares of TGS stock and possessed no calls; thereafter they owned a total of 8,235 shares and possessed 12,300 calls.[10]

On February 20, 1964, TGS issued stock options to twenty-six of its officers and employees whose salaries exceeded a specific amount. At this time, neither the TGS Stock Option Committee nor its Board of Directors had been informed of the results of K-55-1, presumably because of the pending land acquisition program which required confidentiality. Individual defendants Stephens, Fogarty, Mollison, Holyk and Kline accepted the options granted to them.[11]

The SEC's complaint alleged: (1) that defendants Fogarty, Mollison, Darke, Murray, Huntington, O'Neill, Clayton, Crawford, and Coates had, either personally or through agents, purchased TGS stock or calls thereon from November 12, 1963 through April 16, 1964 on the basis of material inside information concerning the results of TGS drillings in Canada, while such information remained undisclosed to the investing public generally or to the particular sellers; (2) that defendants Darke and Coates had divulged such information to others for use in purchasing TGS stock or calls while the information was undisclosed to the public or to the sellers; (3) that defendants Stephens, Fogarty, Mollison, Holyk, and Kline had accepted options to purchase TGS stock without disclosing material information to either the Stock Option Committee or the TGS Board of Directors; and (4) that TGS issued a deceptive press release on April 12, 1964. The SEC sought to enjoin the conduct of TGS and the individual defendants and to compel rescission by the individual defendants of the transactions alleged to be contrary to law.

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8 The news should have appeared on the Dow Jones broad tape before 10:25 A.M. The reason for the delay was never explained. *See id.* at 3619 n.19.

9 A detailed chart of the individual purchases appears in the district court's opinion, SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 273-75 (S.D.N.Y. 1966), *rev'd,* No. 30882 (2d Cir., August 13, 1968).

10 These figures are obtained by totaling the number of stocks and calls owned by each of the individuals involved. See *id.*

11 A total of 30,700 options were accepted by the defendants. *Id.* at 290 n.14.

The case was tried in the United States District Court for the Southern District of New York before Judge Bonsal, who decided, *inter alia,* that the insider activity prior to April 9, 1964 was not illegal because the drilling results were not "material" until then; that insider activity subsequent to the April 16 press release was not illegal because the release constituted sufficient disclosure; and that the issuance of the first press release was not unlawful because (a) it was not issued for the purpose of benefiting the corporation, (b) there was no evidence that any insider used the release to his personal advantage, and (c) it was not "misleading, or deceptive on the basis of the facts then known."[12] After *en banc* consideration, a majority of the United States Court of Appeals for the Second Circuit reversed the judgment of the district court and *held:* (1) that insider trading between November 12, 1963 and April 16, 1964 was illegal because drilling results were material as of November 12, 1963; (2) that defendant Coates' trading, which occurred within minutes of the second press release, was illegal because not enough time had elapsed for the release to have been widely disseminated; and (3) that the issue as to whether the first press release was misleading must be decided by its effect on the "reasonable investor" and not on the basis of the "facts then known" to the insiders at the time of its issuance. *SEC v. Texas Gulf Sulphur Company,* No. 30882 (2d Cir. August 13, 1968).

I. The Holding

The *Texas Gulf Sulphur* decision has caused what might be termed an "executive scare." Corporate insiders are taking a new hard look at their vulnerable position. This concern is reflected in part in the recent increase in the number of executive liability insurance policies issued.[13] Confronted with the increasing possibility of liability, insiders must feel a certain nostalgia for the bygone era of "insider immunity." Insider stock trading traditionally involved no duty of disclosure because it was assumed that insiders had a fiduciary duty "only *to the corporation* and to the stockholders in their dealings *with or on behalf of the corporation* . . . ."[14] This "majority" rule, the product of the philosophy of another era, was criticized for its "unconscionable laxity."[15] It did not endure.

In 1903, the "minority" rule was announced by the Supreme Court of Georgia in *Oliver v. Oliver.*[16] The court there held that officers and directors have a fiduciary duty of disclosure to stockholders.[17] Within a decade a variant of the *Oliver* holding was handed down by the Supreme Court of the United States in *Strong v. Repide.*[18] The *Strong* Court held that the existence of certain

12 *Id.*
13 The Wall Street Journal, August 29, 1968, at 1, col. 1.
14 3 L. Loss, SECURITIES REGULATION 1446 (2d ed. 1961) [hereinafter cited as Loss]. The leading case for this view is *Carpenter v. Danforth,* 52 Barb. 581 (N.Y. Sup. Ct. 1868).
15 H. BALLANTINE, CORPORATIONS 213 (Rev. ed. 1946) [hereinafter cited as BALLANTINE].
16 118 Ga. 362, 45 S.E. 232 (1903).
17 *Id.* at 367, 45 S.E. at 233.
18 213 U.S. 419 (1909).

circumstances or "special facts" creates a fiduciary duty of disclosure.[19] With the refinement of fiduciary concepts and business ethics, the "minority" rule came to be generally recognized by the courts. "The 'special facts rule' by its expanding recognition of types of special facts, has tended to merge into the 'minority rule,' relegating the 'majority rule' to decreasing application."[20]

Because of the problems incident to the maintenance of a common law fraud action, the emergence of the "minority" rule caused no great panic among insiders. Two main problems confronted the complaining investor. First, the elements of common law fraud, namely *scienter,* justifiable reliance, and causation, had to be proved.[21] Needless to say, this often developed into an insurmountable obstacle. Second, many courts imposed the requirement of privity of contract, thus excluding stock exchange transactions.[22] These obstacles were substantially responsible for the ineffectiveness of state regulation with respect to insider activities in cases of non-disclosure.

Until the issuance of rule 10b-5[23] [the rule] in 1942, the federal securities law provided no protection for a large class of investors. The SEC had control over only one side of insider activity. The Securities Act of 1933[24] and the Securities Exchange Act of 1934[25] provided remedies exclusively for defrauded *vendees.*

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19 *Id.* at 431.

20 H. HENN, CORPORATIONS 379 (1961).

21 A. BROMBERG, SECURITIES LAW: FRAUD — SEC RULE 10B-5 § 2.7 at 55 (1968) [hereinafter cited as BROMBERG].

22 *E.g.,* Goodwin v. Agassiz, 283 Mass. 358, 186 N.E. 659 (1933) (by implication).

23 17 C.F.R. § 240.10b-5 (1968). The rule provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

24 Securities Act of 1933, 48 Stat. 74 (1933), *as amended,* 15 U.S.C. §§ 77a-77aa (1964). Section 17(a) of the Securities Act of 1933 provides that:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. *Id.* at 48 Stat. 84 (1933), *as amended,* 15 U.S.C. 77q (1964).

25 Securities Exchange Act of 1934, 48 Stat. 891 (1934), 15 U.S.C. §§ 78a-78jj. The Securities Exchange Act of 1934 contains two important antifraud provisions relating to "manipulative or deceptive devices," § 10(b), 48 Stat. 891 (1934), 15 U.S.C. § 78j (1964), and § 15(c)(1), 48 Stat. 895 (1934) *as amended,* 15 U.S.C. § 780 (1964). For the relevant language at Section 10(b), see note 82, *infra.* Section 15(c)(1) provides that:

> No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The

To remedy this situation the SEC first tried to have section 17(a)[26] of the 1933 Act amended to extend it to the purchase as well as to the sale of securities.[27] When this attempt failed the SEC, acting under section 10(b) of the 1934 Act, adopted rule 10b-5 "which merely borrows the language of § 17(a) of the Securities Act, except for the reference in Clause (2) to *obtaining money or property by means of* an untrue statement or half-truth, and applies it "in connection with the purchase or sale of any security' . . . ."[28]

Before the rule could achieve its important position in the federal anti-fraud arsenal, two refinements were necessary. First, although no right of recovery is specified by the rule, such a right was held to exist by implication.[29] Second, it was consistently held by the courts that the federal fraud provisions were not limited to common law fraud.[30] Thus the common law requirement of privity which some courts imposed was, for practical purposes, abandoned.[31] Essentially, *Texas Gulf Sulphur* represents a further refinement of the rule. Unrestricted corporate personnel now have notice that they are subject to high ethical standards.

II. The Issues

A. The Test of Materiality.

The Second Circuit restated the standard of materiality it had earlier adopted in *List v. Fashion Park, Incorporated:*[32] "The basic test of 'materiality,' . . . 'is whether a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question.' "[33] Any fact "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities"[34] is encompassed by the test.[35]

The Second Circuit rejected[36] Judge Bonsal's determination that "the test of materiality must necessarily be a conservative one, particularly since many actions under section 10(b) are brought on the basis of hindsight."[37] It held that the investing public would not be adequately protected if this rationale were adopted, because "[t]he speculators and chartists of Wall and Bay Streets are also 'reasonable' investors entitled to the same legal protection afforded conservative traders."[38] Specifically, Judge Bonsal had held that the drilling results

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Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

Section 10(b) was included in the Act at the time of its enactment. Section 15(c)(1) is a product of a subsequent (1936) amendment to section 15(c).

26 Securities Act of 1933 § 17a, 48 Stat. 84 (1933), *as amended,* 15 U.S.C. § 77q (1964).
27 3 Loss 1426.
28 *Id.* at 1427.
29 *See* BROMBERG § 2.4(1), at 27-28 and cases cited at 27 n.47.
30 *Id.* § 2.7(1), at 55 n.150.
31 *Id.* § 8.5, at 205.
32 340 F.2d 457 (2d Cir. 1965).
33 *Id.* at 462.
34 Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963).
35 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3608 (2d Cir. August 13, 1968).
36 *Id.* at 3608-09.
37 SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 280 (S.D.N.Y. 1966).
38 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3608-09 (2d Cir. August 13, 1968).

were not material until April 9, 1964, the date when the volume of the "mineralization" was ascertained.[39] The Second Circuit disagreed:

> Here, notwithstanding the trial court's conclusion that the results of the first drill core, K-55-1 were "too 'remote' . . . to have had any significant impact on the maket, *i.e.*, to be deemed material," . . . knowledge of the possibility, which surely was more than marginal, of the existence of a mine of the vast magnitude indicated by the remarkably rich drill core located rather close to the surface (suggesting minability by the less expensive open pit method) within the confines of a large anomaly (suggesting an extensive region of mineralization) might well have affected the price of TGS stock and would certainly have been an important fact to a reasonable, if speculative, investor in deciding whether he should buy, sell, or hold. After all, this first drill core was "unusually good and . . . excited the interest in speculation of those who knew about it."[40]

The decision imposed the responsibility on corporate insiders to make an objective determination of the materiality of information in their possession before entering into transactions. Insiders protest that this is too great a burden to bear because the definition of materiality is so general. However, no specific rules can be formulated to deal with the diverse situations that arise. For those in doubt, some guidelines have been proposed. One commentator has set up a two step test for determining what is material: first, only the unusual development in a corporation is of concern; second, it is of concern only when the development goes beyond the preliminary stage.[41] As an alternative, the following suggestion may be of assistance in determining the time at which a fact becomes material:

> As a general proposition I would suggest that if there is a real question in the lawyer's mind, that an officer or employer may have a distinct unfair advantage over the investing public in trading on the basis of information that he has and the public doesn't have, he should not trade.[42]

B. Who Is an Insider.

Texas Gulf Sulphur extended the class of persons to whom the rule is applicable by adopting the general criteria stated in the *Cady, Roberts & Co.*[43] decision:

> [F]irst, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.[44]

39 SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 284 (S.D.N.Y. 1966).
40 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3609-10 (2d Cir. August 13, 1968).
41 Cary, Fleischer & Halleran, *Insider Trading in Stocks,* 21 BUS. LAW. 1009, 1017-18 (1965) (remarks of Mr. Fleischer).
42 *Id.* at 1018.
43 Cady, Roberts & Co., 40 S.E.C. 907 (1961).
44 *Id.* at 912.

Prior to *Cady, Roberts,* the rule's reference to "any person" was limited to traditional "insiders" — officers, directors, and controlling stockholders.[45] But to exclude lesser corporate personnel because of a difference in title is to make a distinction that has no basis in common sense.

The class of persons who may ultimately be encompassed by the rule is still to be determined. The majority in *Texas Gulf Sulphur* applied the rule to the wife of defendant Holyk apparently by implying an agency relationship. Thus the issue of her status was avoided. Also, the SEC did not seek to hold the "tippees" of the insiders responsible for their transactions.[46] However, it should be noted that the insider tipsters were held to answer for the profits made by the tippees.[47]

In an action against tippees, liability might be attached through the imposition of a constructive trust, based on restitutory principles, in favor of complaining sellers.[48] A difficulty in pursuing this action is the requirement that the tippee must have notice that the tipster has breached a fiduciary duty by imparting the information.[49] One commentator expresses this difficulty by asking: "[H]ow can the tippee be said to have notice of breach of duty, the scope of which is so amorphous and judicially unrefined that it defies determination?"[50] He further notes that

> if the pervading purpose of Rule 10b-5 is accurately construed to be the promotion of "fairness" and if the suppression of trading with inside information is a legitimate implementation of that purpose, the constructive trust theory appears to be inadequate to the extent that the tippee is required to have notice.[51]

The reason for the SEC's failure in *Texas Gulf Sulphur* to pursue the constructive trust theory may perhaps be found in these inadequacies.[52] However, in the proper case where there is uncontroverted evidence of notice, the theory could more readily be employed.[53]

C. When May an Insider Trade?

Judge Bonsal held that the material information became public when it was announced at the press conference held prior to the issuance of the second press release on April 16, 1964.[54] Consequently he concluded that the stock purchases made by defendant Coates within minutes after the termination of the conference were not illegal. In doing so, he rejected the SEC's contention

45 Note, 46 B.U.L. Rev. 205, 211 (1966).
46 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3615-16 (2d Cir. August 13, 1968).
47 *Id.* at 3615.
48 3 Loss 1451.
49 Note, *supra* note 45, at 218.
50 *Id.*
51 *Id.*
52 *Id.*
53 Persons who knowingly join a fiduciary in a transaction constituting a breach of his duty become jointly and severally liable for the profits. Jackson v. Smith, 254 U.S. 586, 588-89 (1921).
54 SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 288 (S.D.N.Y. 1966).

that it was for the court to set a reasonable post-announcement waiting period which would allow the released information to be absorbed by the public,[55] and that such a waiting period should be determined on a case by case basis depending on all the circumstances. Disapproving this argument, Judge Bonsal said:

> This could only lead to uncertainty. A decision in one case would not control another case with different facts. No insider would know whether he had waited long enough after an announcement had been made. . . .
> . . . If a waiting period is to be fixed, this could be most appropriately done by the Commission, which was established by Congress with broad rule-making powers. Should the Commission determine that it lacks authority to fix a waiting period, authority should come from Congress rather than from the courts.[56]

Reversing this judgment, the Second Circuit noted that it was probably predicated on a misinterpretation of dicta in the *Cady, Roberts* decision.[57] The court stated:

> The reading of a news release, which prompted Coates into action, is merely the first step in the process of dissemination required for compliance with the regulatory objective of providing all investors with an equal opportunity to make informed investment judgments. Assuming that the contents of the official release could instantaneously be acted upon, at the minimum Coates should have waited until the news could reasonably have been expected to appear over the media of widest circulation, the Dow Jones broad tape, rather than hastening to insure an advantage to himself and his broker son-in-law.[58]

The dilemma confronting insiders because of the general test of materiality is needlessly compounded by this determination. The court merely suggests a minimum standard by which an insider may guide his conduct. Even this minimum is open to serious question because of the majority's suggestion in a footnote that insiders who purchased after the news appeared on the Dow Jones tape would not be automatically exculpated.[59]

The *Texas Gulf Sulphur* court apparently did not favor the argument of the SEC that "there are legal problems so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule."[60] Instead, the majority expressed the view that:

> [T]he permissible timing of insider transactions after disclosures of various sorts is one of the many areas of expertise for appropriate exercise of the SEC's rule-making power, which we hope will be utilized in the future to provide some predictability of certainty for the business community.[61]

55 *Id.* at 289.
56 *Id.*
57 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3618 (2d Cir. August 13, 1968).
58 *Id.* at 3618-19.
59 *Id.* at 3618 n.18.
60 Reply Brief for Appellant SEC at 30, SEC v. Texas Gulf Sulphur Co., No. 30882 (2d Cir. August 13, 1968), *quoting from* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).
61 SEC v. Texas Gulf Sulphur Co., No. 30882 at 3618 n.18 (2d Cir. August 13, 1968).

However, by the very fact that the SEC's charges against the defendants were upheld in the absence of a rule establishing a definite standard, the majority impliedly affirmed the power of the SEC to employ a case by case approach. The approval of such an ad hoc method raises two serious problems, one administrative and one constitutional.

In the wake of *Texas Gulf Sulphur,* a prominent newspaper has reported that the SEC is considering a rule to provide guidance as to when corporate insiders may legally trade on information affecting their company.[62] Perhaps the SEC is taking some of a leading commentator's criticism to heart: "Even the SEC, whose accomplishment in clarifying law through rule making is outstanding among the agencies, unduly refrains from resort to rule making."[63] Professor Davis continues:

> Can *anything* be accomplished in an adjudicatory opinion that cannot be accomplished as well or better in a rule? A rule can be written with any desired degree of precision or vagueness. A rule can be vague except to the extent that a single illustration set forth in it is precise. . . . A rule can set forth any desired number of concrete illustrations, using facts of real cases or using hypothetical facts or using both kinds of facts.[64]

A court is not the proper forum for the adoption of new rules. "[W]herever feasible or appropriate, such policy should not be 'sprung' upon the surprised party in a particular adjudicatory decision, but rather should be made clear through prior rule-making proceedings."[65]

In addition to the problem of ad hoc rule promulgation, the court's determination also raises a constitutional issue. The due process requirement of the Constitution[66] requires clarity in statutes and regulations. This standard must be met whether the action is civil or criminal.[67] "Fair warning" must be given to the public by express language defining what conduct is unlawful. Justice Holmes stated:

> [I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the law should be clear.[68]

Many theories have been advanced as to how long an insider must wait before he may engage in trading. The strictest proposal has come from Mr. Keith Funston, a former president of the New York Stock Exchange, who advocates that insiders should confine most of their trading to a thirty day period beginning one week after the release of the company's annual report.[69] Another

62 The Wall Street Journal, August 30, 1968, at 3, col. 2. The report appeared only 17 days after the decision was handed down.
63 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.13, at 144 (Supp. 1965).
64 *Id.* at 146.
65 Baker, *Policy by Rule or Ad Hoc Approach — Which Should It Be?,* 22 LAW & CONTEMP. PROB. 658, 660 (1957).
66 U.S. CONST. amend. V.
67 *E.g.,* A.B. Small Co. v. American Sugar Ref. Co. 267 U.S. 233, 238-39 (1925).
68 McBoyle v. United States, 283 U.S. 25, 27 (1931).
69 The Wall Street Journal, Oct. 27, 1965, at 4, col. 3.

commentator has proposed a waiting period of twenty-four hours.[70] The SEC has offered the suggestion that the minimum requirement should be "appearance in the [next] morning newspapers."[71] Recent indications point to the adoption of the twenty-four hour period.[72] In any event, the alternatives presented indicate uncertainty as to the ultimate construction to be placed on the rule, and illustrate the ambiguity which provides the basis for the charge of lack of fair warning.

The argument has been made that once a hard and fast rule is laid down, "a certain class of gentlemen of the J. Rufus Wallingford type — 'they toil not neither do they spin' — would lie awake nights endeavoring to conceive some devious and shadowy way of evading the law."[73] However, this argument ignores the valid need of the conscientious corporate investor for some form of definite standard.

D. The First Press Release: Was It False, Misleading or Deceptive?

As drilling operations were nearing completion, rumors of a major ore strike began circulating throughout Canada. To quell these rumors, defendant Fogarty, with the aid of a public relations consultant, drafted the first press release.[74] This release was issued at 3:00 P.M. on Sunday, April 12, 1964, and appeared in the newspapers of general circulation on Monday, April 13, 1964. At the time of issuance Fogarty had been told of all developments that had occurred through 7:00 P.M. on April 10.

Despite the fact that he found the drilling results to be material information as of April 9, Judge Bonsal held that the SEC failed to demonstrate that the release[75] was false, misleading, or deceptive, although he noted that it did appear gloomy from retrospect.[76] His conclusion was derived from the view that the defendants were to be judged *on the basis of the facts then known to them,*[77] and that the draftsmen exercised reasonable business judgment under the circumstances.[78]

The Second Circuit rejected Judge Bonsal's test, and held instead that the statements must be judged according to its effect on the "reasonable investor."[79] Thus, whereas the trial judge merely required that the facts known to the issuers

70 Fleischer, *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding,* 51 VA. L. REV. 1271, 1291 (1965).

71 Brief for Appellant SEC at 74, SEC v. Texas Gulf Sulphur Co., No. 30882 (2d Cir. August 13, 1968).

72 The Wall Street Journal, *supra* note 62, at 3, col. 2.

73 State v. Whiteaker, 118 Ore. 656, 661, 247 P. 1077, 1079 (1926).

74 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3599 (2d Cir. August 13, 1968).

75 The full text of the first release is quoted in *SEC v. Texas Gulf Sulphur Co.,* No. 30882, at 3600-01 (2d Cir. August 13, 1968). The final paragraph, quoted below, gives an indication of the impression conveyed by the document:

> The work done to date has not been sufficient to reach definite conclusions and any statement as to size and grade of ore would be premature and possibly misleading. When we have progressed to the point where reasonable and logical conclusions can be made, TGS will issue a definite statement to its stockholders and to the public in order to clarify the Timmins project. *Id.* at 3601.

76 SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 296 (S.D.N.Y. 1968).

77 *Id.* at 295.

78 *Id.* at 296.

79 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3635 (2d Cir. August 13, 1968).

be accurately reflected in the release, the appellate court focused attention on the manner in which those facts were presented and the probable purpose for such manner of presentation. In remanding the decision, the reviewing court noted that if the statement was found to be misleading to the reasonable investor, it would be necessary to determine whether its issuance resulted from lack of due diligence.[80] The court held that it was unnecessary to determine whether a lack of due diligence, absent a showing of bad faith, would subject the corporation to any liability for damages under the rule.[81] However, the very fact that the issue of due diligence was remanded for a determination implies an affirmative answer.

The adverse effects of this interpretation are twofold. It contravenes the basic policy of the securities laws by creating a situation in which the flow of corporate information may well be inhibited by fear of the imposition of liability for mere negligence in issuing releases. It also raises constitutional questions as to the applicability of section 10(b)[82] and rule 10b-5 to the publication of corporate information.

There are two aspects of the constitutional issue to consider. First, in the interest of promoting free discussion of matters of public interest, the Supreme Court has held that liability cannot be imposed for mere negligence in cases involving the libel[83] or invasion of privacy of "public figures."[84] The extension of this rationale to the area of misrepresentation does not seem to be totally alien to the public interest. The dissemination of important corporate information needs as much protection from the inhibitory imposition of liability as is afforded to the press in their reports on matters of public interest. In *Smith v. California,*[85] the Supreme Court struck down as violative of the first amendment a California anti-obscenity ordinance which permitted the finding of a violation without proof of *scienter.* A requirement that *scienter* be shown before liability is imposed under the rule should adequately protect the investing public and at the same time it would insure the necessary continuing flow of important corporate information. Perhaps judicial or legislative implementation of a provision along the lines of that contained in section 11 of the Securities Act of 1933,[86] which places the burden of disproving *scienter* upon the defendant, would prove useful in this regard.

Second, it is not altogether certain that section 10(b) meets the requisite

80 *Id.* at 3636.
81 *Id.* at 3637.
82 The Securities Exchange Act of 1934 § 10b, 48 Stat. 891 (1934), 15 U.S.C. § 78j provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

83 New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
84 Time, Inc. v. Hill, 385 U.S. 374 (1967).
85 361 U.S. 147 (1959).
86 Securities Act of 1933 § 11, 48 Stat. 82 (1933), *as amended,* 15 U.S.C. § 77k (1964).

statutory specificity that is demanded by the first amendment. The section prohibits the use of any manipulative or deceptive device or contrivance; the rule is a little longer, but no less vague.[87] It is at the least questionable that these prohibitions can be extended to include mere negligence in the issuance of releases. In *Winters v. New York*,[88] the Supreme Court held:

> A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.[89]

The *Winters* Court also noted that "[t]he vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the *applicable tests to ascertain guilt*."[90] (Emphasis added.)

The significance of these constitutional problems, in addition to the inhibiting effect that the imposition of liability will have on the dissemination of corporate information, makes it desirable that the Second Circuit grant the petition of TGS for a rehearing on these issues. Judge Friendly's admonition — that guidance should be provided to the lower courts for a determination of these issues — should be heeded.[91]

III. Conclusion

Former Chairman Cary of the SEC attributes the following statement to Mr. Krueger, the notorious Match King: "Whatever success I have had may be attributed to three things: one is silence; the second is more silence; and the third is still more silence."[92] Mr. Cary is probably correct when he says that "the public and the courts are sensitive to remarks [such as this]."[93]

The basic policy behind the federal securities laws is full disclosure of corporate information. Disclosure protects those who do not know market conditions from the overreachings of those who do.[94] Rule 10b-5 has been an effective tool for prohibiting the type of insider abuse against which it was originally designed. To maintain this effectiveness, two things must be avoided: judicial overextension and ad hoc judicial rule promulgation. Of the former, Professor Loss has written:

> The danger, of course, is that the continued denigration of the buyer's express remedies under the 1933 act in favor of Rule 10b-5, and even § 17(a) of the 1933 act itself, may persuade the Supreme Court — which has yet to consider *any* implied remedy under the SEC statutes — to

87 For the text of the rule, see note 23 *supra*.
88 333 U.S. 507 (1948).
89 *Id.* at 509-10.
90 *Id.* at 515-16.
91 SEC v. Texas Gulf Sulphur Co., No. 30882, at 3644 (2d Cir. August 13, 1968) (concurring opinion).
92 Cary, Fleischer & Halleran, *supra* note 41, at 1014 (remarks of Mr. Cary).
93 *Id.*
94 Charles Hughes & Co. v. SEC, 139 F.2d 434 (2d Cir. 1943).

> throw its collective hands *up* and the *Kardon* doctrine [implied civil liability under section 10b] *out*.[95]

As to the problem of ad hoc judicial rule promulgation, suffice it to say that the unwillingness of the SEC to formulate standards and promulgate rules in those areas in which it is possible to do so, and the attendant dependence on the judiciary to fill its role in this regard are inexcusable. Hopefully the avoidance of these practices will cause a fuller realization of the high standards of conduct required of corporate personnel. There will still be those who look upon the whole trend away from the holding of *Carpenter v. Danforth*[96] as unwarranted legislative and judicial interference with the domain of business ethics. They have been answered:

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[97]

Maurice FitzMaurice

TORTS — DAMAGES — NEW YORK COURT OF APPEALS HOLDS WIFE HAS RIGHT OF ACTION FOR LOSS OF CONSORTIUM RESULTING FROM NEGLIGENT INJURY TO HUSBAND. — In 1965, Cyril H. Millington was injured in an elevator accident and became completely paralyzed from the waist down. His wife brought action for loss of consortium,[1] alleging that her husband's condition was due to defendants' negligence, breach of warranty, and statutory violations. On the authority of *Kronenbitter v. Washburn Wire Co.*,[2] the trial court granted defendants' motion to dismiss the complaint as legally insufficient. The appellate division affirmed without opinion. The New York Court of Appeals granted leave to appeal, and, acknowledging that the interests of a wife in a healthy and normal marital life deserve legal recognition equally with those of her husband, *held:* a wife whose husband has been negligently injured by another has the right to seek compensation from the tortfeasor in an action for loss of consortium. *Millington v. Southeastern Elevator Company,* 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

Prior to the landmark decision of the District of Columbia Court of Appeals in *Hitaffer v. Argonne Company,*[3] not a single American jurisdiction allowed a wife to bring an action for loss of consortium caused by negligent injury to

95 3 Loss 1790.
96 52 Barb, 581 (N.Y. Sup. Ct. 1868). See note 14, *supra* and accompanying text.
97 The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.).

1 "Consortium" has been defined as "[c]onjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation." BLACK'S LAW DICTIONARY 382 (4th ed. 1951).
2 4 N.Y.2d 524, 151 N.E.2d 898, 176 N.Y.S.2d 354 (1958).
3 183 F.2d 811 (D.C. Cir. 1950).

her husband.[4] Judge Clark's forceful opinion in *Hitaffer* served, in a sense, to transform this "rule" into an "issue." The judicial response has taken two principal forms. While a growing minority,[5] now joined by New York, have decided to extend the right to bring the action to the wife, a majority of the jurisdictions which have considered the question in the eighteen years since *Hitaffer* still deny the wife any recovery for loss of consortium.[6] Judge Keating, speaking for a 4-3 majority in *Millington,* has isolated, and rejected, five of the arguments most commonly put forth by those courts denying recovery.

(1) *Fear of double recovery.* This argument received perhaps its most distinguished support from Dean Pound, who wrote:

> The reason for not securing the interest of wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both.[7]

4 There were two instances in which lower state courts allowed the wife recovery, but these were promptly overruled. Hipp v. E. I. duPont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), *overruled,* Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Griffen v. Cincinnati Realty Co., 27 Ohio Dec. 585 (Super. Ct. 1913), *overruled sub silentio,* Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

Apparently no English court definitively passed on the question until after *Hitaffer,* when the House of Lords voted to deny the wife recovery in *Best v. Samuel Fox & Company,* [1952] A.C. 716. Lord Goddard stated in *Best,* that "never during the many centuries that have passed since reports of the decisions of English courts first began has the recovery of damages for such injury been recorded." *Id.* at 730.

5 *E.g.,* Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Stenta v. Leblang, 55 Del. 181, 185 A.2d 759 (1962); Bailey v. Wilson, 100 Ga. App. 405, 111 S.E.2d 106 (2d Div. 1959); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1st Div. 1953); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967); Montgomery v. Stephen, 359 Mich. 33, 101 N.W.2d 227 (1960); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965); Clem v. Brown, 32 Ohio Op. 2d 477, 3 Ohio Misc. 167, 207 N.E.2d 398 (C. P. Paulding Co. 1965); Umpleby v. Dorsey, 39 Ohio Op. 2d 450, 10 Ohio Misc. 288, 227 N.E.2d 274 (C. P. Stark Co. 1967); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

The following federal decisions, "interpreting" the law of Indiana, Montana, and Nebraska respectively, have also allowed the wife recovery: Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Luther v. Maple, 250 F.2d 916 (8th Cir. 1958); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953).

6 *E.g.,* Criqui v. Blaw-Knox Corp., 318 F.2d 811 (10th Cir. 1963); Smith v. United Constr. Workers, 271 Ala. 42, 122 So. 2d 153 (1960); Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Deshotel v. Atchison, T. & Sta. F. Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958); Johnson v. Enlow, 132 Colo. 101, 286 P.2d 630 (1955); Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Burk v. Anderson, 232 Ind. 77, 109 N.E.2d 407 (1952); La Eace v. Cincinnati, N. & C. Ry., 249 S.W.2d 534 (Ky. 1952); Potter v. Schafter, 161 Me. 340, 211 A.2d 891 (1965); State Farm Mut. Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36 (1963); Simpson v. Poindexter, 241 Miss. 854, 133 So. 2d 286 (1961); Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579 (1960); Nelson v. A. M. Lockett & Co., 206 Okla. 334, 243 P.2d 719 (1952); Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962); Krohn v. Richardson-Merrell, Inc., 406 S.W.2d 166 (Tenn. 1966); Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954); Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965); Ash v. S. S. Mullen, Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953); Seagraves v. Legg, 127 S.E.2d 605 (W. Va. 1962).

7 Pound, *Individual Interests in the Domestic Relations,* 14 MICH. L. REV. 177, 194 (1916).

Judge Keating avoids this difficulty by pointing out that, in New York, a husband's action for loss of consortium almost invariably is tried together with the wife's negligence action, and any attempt to bring separate actions could be quashed by motions to consolidate.[8] This approach has been favored by other courts recently, some of which have made the right to sue for loss of consortium conditional on joinder with the negligence action.[9] The Court of Appeals of Maryland, carrying this logic a step further, has held not only that the consortium and negligence actions must be tried at the same time, but also that an action for loss of consortium can only be brought jointly by the husband and wife, for "injury to the marital relationship."[10]

(2) *The action as an anachronism.* It has frequently been argued that the husband's cause of action for loss of consortium is a "fossil from an earlier era,"[11] an "anomaly" which should not be extended.[12] The action originated, it is urged, in the days when a wife was considered little more than a chattel, and its only purpose was to protect the husband's "proprietary right."[13] Since these notions obviously do not comport with modern ideals of equality between the sexes, some courts have even concluded that it is preferable to take away the husband's cause of action, rather than extend it to the wife.[14] It was this argument that apparently led the court of appeals to deny the wife any recovery for loss of consortium in *Kronenbitter* just ten years ago.[15] After reviewing this argument, the *Millington* majority decided that "[w]hatever may have been the historical origins of the action, new policies now sustain the husband's cause of action and equally support its extension to the wife."[16] The "new policies" mentioned seem to amount, in effect, to a simple recognition that a wife's loss of the companionship, society and conjugal love of her husband are real injuries deserving compensation.[17]

(3) *Damages for loss of consortium too conjectural.* One difficulty that is sometimes raised in the discussion of whether a wife should be allowed recovery is that "the measurement of damage for the loss of such things as companionship and society would involve conjecture since their value would be hard to fix in terms of money."[18] The court in *Millington* quickly disposes of this objection with the observation that such elements are no more incapable of measurement in terms of monetary compensation than many of the more tradi-

8 22 N.Y.2d 498, 502, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 307-08 (1968).
9 *E.g.*, Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 92, 215 A.2d 1, 6 (1965); Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137, 145 (Wis. 1967). It has been suggested that this condition may go to defeat any effective recovery. 12 ST. LOUIS U.L.J. 315, 318 (1967).
10 Deems v. Western Md. Ry., 231 A.2d 514, 525 (Md. 1967).
11 Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 LAW & CONTEMP. PROB. 219, 229 (1953).
12 Best v. Samuel Fox & Co., [1952] A.C. 716, 733.
13 *Id.* at 731.
14 Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911); Bolger v. Boston Elev. Ry., 205 Mass. 420, 91 N.E. 389 (1910); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).
15 4 N.Y.2d 524, 151 N.E.2d 898, 176 N.Y.S.2d 354 (1958).
16 22 N.Y.2d 498, 507, 239 N.E.2d 897, 902, 293 N.Y.S.2d 305, 311 (1968).
17 *Id.*, 293 N.Y.S.2d at 312.
18 Deshotel v. Atchison, T. & Sta. F. Ry., 328 P.2d 449, 451 (Cal. 1958).

tional elements of tort recovery such as pain and suffering.[19] Justice Musmanno, answering the same objection while dissenting from a separate decision denying the wife recovery, wrote:

> The music produced by a symphony orchestra and the fragrances which emanate from a flower garden also fall into the world of the incorporeal, but they are nonetheless very real and can be the subject of material compensation if they cease to exist because of the destruction of the means which bring them into existence.[20]

(4) *Practical difficulties.* Judge Keating resolved the practical difficulties involved in changing the law by ruling that, with regard to pending cases brought by an injured husband, the wife's consortium action should be joined with her spouse's claim. In cases where the husband's action has been terminated, the wife's consortium action would be automatically banned.[21] Other courts have made similar determinations.[22]

(5) *Change should come from the legislature.* One of the reasons most frequently given in those decisions disallowing any cause of action to the wife is that any change in the common law rule should come from the legislature.[23] This has been made the grounds for a decision against recovery by some courts which seem to favor allowing the action on the merits. The Supreme Court of Alabama, for example, has said that "[w]hile there is some appeal in the argument and some merit to the contention that the law is inconsistent in this respect, the common law of England is in force in this state except as changed by statute."[24] The court concluded: "It is not our function to change the law, but to determine what it is. The former is rested totally in the legislature."[25] This argument did not deeply trouble the court in *Millington*; it was simply dismissed with the observation that "No recitation of authority is needed to indicate that this court has not been backward in overturning unsound precedent in the area of tort law."[26]

One argument for extending the cause of action for loss of consortium to the wife, and one which has been appearing rather frequently of late, is the contention that denying the right to bring the action to the wife while allowing her husband to bring it is a violation of the equal protection clause of the fourteenth amendment. Judge Keating, although refusing to pass on this issue, indicates that the argument may have some merit.[27] Similarly, the Court of Appeals of Maryland, while deciding to extend the right to bring the action to the wife on the merits, has noted that "the avoidance of a possible conflict

19 22 N.Y.2d, 498, 507, 239 N.E.2d 897, 902, 293 N.Y.S.2d 305, 312 (1968).
20 Neuberg v. Bobowicz, 401 Pa. 146, 167, 162 A.2d 662, 672 (1960).
21 22 N.Y.2d 498, 508, 239 N.E.2d 897, 902-03, 293 N.Y.S.2d 305, 312 (1968).
22 Deems v. Western Md. Ry. 231 A.2d 514, 525 (Md. 1967); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 95-96, 215 A.2d 1, 8.
23 *E.g.*, Smith v. United Constr. Workers, 122 So. 2d 153, 154-55 (Ala. 1960); Deshotel v. Atchison, T. & Sta. F. Ry., 328 P.2d 449, 451 (Cal. 1958); Ripley v. Ewell, 61 So. 2d 420, 423-24 (Fla. 1952); Potter v. Schafter, 211 A.2d 891, 892-93 (Me. 1965); Page v. Winter, 126 S.E.2d 570, 572 (S.C. 1962); Garrett v. Reno Oil Co., 271 S.W.2d 764, 766-67 (Tex. Civ. App. 1954); Seagraves v. Legg, 127 S.E.2d 605, 607-08 (W. Va. 1962).
24 Smith v. United Constr. Workers, 122 So. 2d 153, 154 (Ala. 1960).
25 *Id.* at 155.
26 22 N.Y.2d 498, 508, 239 N.E.2d 897, 903, 293 N.Y.S.2d 305, 313 (1968).
27 *Id.* 293 N.Y.S.2d at 312-13.

between the present law and the federal constitution is an additional reason for adopting now what we think is a sound solution . . . ."[28] In several recent lower court cases, however, the fourteenth amendment has been made the principal basis for decisions in favor of the wife. A federal district judge, for example, supposedly applying Indiana law, held that the equal protection clause prevented him from following Indiana precedents which uniformly denied recovery to the wife.[29] He stated that "such a distinction between a husband and wife is a classification which is unreasonable and impermissible, and likewise a violation of the Fourteenth Amendment guarantees."[30] An Ohio court, while reaching the same conclusion, phrased it a little differently:

> Assuming that there are such things as happy marriages I must conclude that if negligent injury to the wife raises a cause of action in consortium to the husband, equal protection requires a similar cause of action to the wife for negligent injury to her husband.[31]

This mild "trend" towards extending the action on the basis of the equal protection clause may receive a boost from the recent decision of the Supreme Court in *Levy v. Louisiana*.[32] The Court there held that a state which allows children to recover for the death of their parents under a wrongful death statute cannot constitutionally deny such an action to other children because they are illegitimate. Although the weight of this opinion in the area of suits for loss of consortium has yet to be tested, Justice Douglas's statement that the Court has "not hesitated to strike down an invidious classification even though it had history and tradition on its side"[33] should lend some encouragement to plaintiffs' counsels. It would seem, however, that, in order to win the constitutional argument, it is first necessary to win the argument on the facts. After all, if a court is not convinced that discrimination between husband and wife in the matter of allowing suits for loss of consortium is "invidious" or irrational, it will not conclude that such a distinction is a denial of equal protection. Thus, the Supreme Court of Tennessee has dismissed such constitutional arguments with the statement that "the Tennessee rule with respect to recovery for loss of consortium does not work a 'discrimination' but no more than a practical and logical classification."[34]

Some commentators[35] and courts,[36] after reviewing the various "reasons"

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28 Deems v. Western Md. Ry., 231 A.2d 514, 524 (Md. 1967). The Supreme Court of Wisconsin also mentions the constitutional argument with some favor in *Moran v. Quality Aluminum Casting Company*, 150 N.W.2d 137, 141 (Wis. 1967).

29 Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966).

30 *Id.* at 822.

31 Clem v. Brown, 32 Ohio Op. 2d 477, 480, 3 Ohio Misc. 167, 173, 207 N.E.2d 398, 402 (C. P. Paulding Co. 1965).

32 391 U.S. 68 (1968).

33 *Id.* at 71. In a companion case, *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), the Court held that a mother could not be denied an action for the wrongful death of her offspring merely because the child was born out of wedlock.

34 Krohn v. Richardson-Merrell, Inc., 406 S.W.2d 166, 169 (Tenn. 1966), *cert. denied*, 386 U.S. 970 (1967).

35 *E.g.*, Annot., 23 A.L.R.2d 1378, 1391 (1952). *See also* 64 HARV. L. REV. 672, 673 (1951).

36 *E.g.*, Dini v. Naiditch, 20 Ill. 2d 406, 429, 170 N.E.2d 881, 892 (1960). In *Mont-*

given for denying recovery to the wife, have concluded that these arguments amount to no more than rationalizations offered to justify a predetermined conclusion. The fundamental reason for denying the wife any recovery might well be found in the unusually frank remarks of a dissenting judge who recently declared that

> [u]pon the final adoption of the majority opinion, at least one result will be certain; the long-suffering Missouri holders of liability insurance policies will pay still more premiums; upon them and upon the already over-burdened courts will fall the greatest grief of this fallacious idea.[37]

If it is assumed, as seems justified, that it is this practical consideration, rather than the "torturous, twisted reasoning"[38] rejected in *Millington,* which lies behind those decisions refusing to extend the action, then the issue becomes clearer. The question is not whether the courts *can* extend the action, or even whether it *should* be extended, but rather, *who,* in the light of the real interests involved, should determine whether, and under what conditions, it will be extended.

In the final analysis, as one court recently observed,[39] the question boils down to a balancing of interests. It is not only, however, the interests of the individual litigants involved that are at stake. The Supreme Judicial Court of Maine, in refusing to extend the action, wrote that "[t]he proposed creation of a new cause of action in the wide field of torts merits consideration by the legislature, — where upon notice the diverse interests affected by such proposition may be heard."[40] Similarly, the Supreme Court of California has held that:

> In our view the Legislature rather than the courts can best deal with these problems. For example, the Legislature, if it found this type of suit to be desirable, could define the extent of the liability, designate who may maintain the action, and provide safeguards against the danger of double recovery . . . . Clarification by statute as to both the husband and the wife would, of course, be preferable to piecemeal determination of the problems by judicial decision.[41]

In these statements one finds an exercise in judicial restraint which goes deeper than a mere aversion to change "dictated by history and the fear of extending liability."[42] Rather, it is a restraint "dictated" by the inherent limitations binding an appellate court in its fact-finding processes and the "fear" of peremptorily effecting a change in the tort law which may well adversely affect every liability policyholder and insurer in the jurisdiction.[43]

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gomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960), the court remarked:

> Any attempt to pursue the manifold reasons offered by modern courts for their refusals to permit the wife a recovery for her loss of consortium takes us on a tour similar to that of Minos in labyrinth of Daedalus. Each path leads to a dead end of reasoning and logic. *Id.* at 41, 101 N.W.2d at 231.

37 Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 550 (Mo. 1963) (Eager, J.).
38 Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71, 75 (D. Mont. 1961).
39 Montgomery v. Stephan, 359 Mich. 33, 46, 101 N.W.2d 227, 233 (1960).
40 Potter v. Schafter, 211 A.2d 891, 892-93 (Me. 1965).
41 Deshotel v. Atchison, T. & Sta. F. Ry., 328 P.2d 449, 451 (Cal. 1958).
42 Dini v. Naiditch, 20 Ill. 2d 406, 429, 170 N.E.2d 881, 892 (1960).
43 Some indication of the likely effect of such changes on insurance rates may be de-

Because of the prestige traditionally enjoyed by the New York Court of Appeals, the *Millington* decision will no doubt strengthen the movement toward extending to the wife the right to sue for loss of consortium caused by negligent injuries. Whether this increasing judicial activity will precipitate a corresponding concern on the part of the legislatures remains to be seen. To date, it appears that only two states have statutes definitively dealing with the problem. Virginia, on the one hand, has settled the matter by abolishing the husband's action for loss of consortium.[44] This has been interpreted to mean that, a fortiori, a wife cannot bring suit for loss of consortium, because to hold otherwise

> would be to advance the position of the wife from an inferior to superior status — a move freely recognized by many husbands in jest or otherwise, but never yet acknowledged in law and certainly one that will have unascertainable repercussions.[45]

Oregon, on the other hand, has explicitly given the wife "the right of action for loss of consortium of her husband."[46] Unfortunately, it cannot be said that either of these statutes presents a satisfactory solution. A simple declaration by the legislature to the effect that the wife either does or does not have a cause of action, while easy to apply, does little to further justice. What is needed, it is submitted, is not a fast answer, but rather an intelligent legislative balancing of the interests of the wife, who has suffered a real and possibly shattering loss, and the interests of the insurance policy holders, who, ultimately may be called upon to compensate her.

Francis X. Wright

LABOR LAW — BARGAINING LOCKOUT PRIOR TO AN IMPASSE IN NEGOTIATIONS IS NOT A VIOLATION OF SECTIONS 8(A)(1) OR 8(A)(3) OF THE NATIONAL LABOR RELATIONS ACT.—In late 1965, Darling and Company [hereinafter Company], a manufacturer, seller and distributor of fertilizer, was engaged in contract negotiations with the International Chemical Workers Union, Local 127 [hereinafter Union.] The Company employees had been represented continuously since 1945 by the Union or by District 50, United Mine Workers of America. Their current collective bargaining contract was due to expire in December, 1965, and negotiations for a new contract began in October of that year. By the December 14th meeting, however, there were still four main items on which the Company and Union could not agree. The Union had indicated that it was willing to strike to obtain its demands. On December 16th the Company

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duced from the fact that, in the case at hand, Mrs. Millington finally received $50,000 in settlement of her claim for loss of consortium. The total settlement for both her husband and herself was for $418,501, plus medical expenses. Letter from Helen B. Stoller to Francis X. Wright, October 8, 1968, on file with the NOTRE DAME LAWYER.

44 VA. CODE ANN. § 55-36 (1959) provides that a married woman may bring an action for personal injuries and that "no action for such injury, expenses or loss of services or consortium shall be maintained by the husband."

45 Carey v. Foster, 221 F. Supp. 185, 189-90 (E.D. Va. 1963), *aff'd* 345 F.2d 772 (4th Cir. 1965).

46 ORE. REV. STAT. § 108.010 (1965).

laid off its employees because, in its estimation, the negotiations had reached a complete impasse. The parties continued to negotiate and agreed on a new contract in February, 1966, at which time the employees were recalled. In April, the General Counsel, in response to a charge filed by one of the employees, issued a complaint alleging that the Company had violated sections 8(a)(1)[1] and 8(a)(3)[2] of the National Labor Relations Act by locking out its employees during negotiations. The appointed trial examiner found that there had been no impasse in the negotiations at the time of the lockout and that the Company had locked out its employees to bring economic pressure upon them, thereby encouraging them to accept the Company's proposals. The examiner therefore concluded that the Company had violated the Act. This determination was reversed by the National Labor Relations Board which, with one member dissenting, *held:* upon consideration of all the circumstances of the case, including the absence of an impasse, the Company's lockout of its employees was not violative of sections 8(a)(1) or 8(a)(3) of the Act. *Darling and Company,* 171 N.L.R.B. No. 95 (May 29, 1968).

At common law, the lockout was looked upon as a legitimate weapon to be used in employer-employee bargaining disputes.[3] However, since the passage of the original National Labor Relations Act (Wagner Act),[4] which placed great emphasis on the protection of employee rights, the Board has curtailed this uninhibited use.[5] The Wagner Act did not explicitly outlaw the lockout. Indeed, the legislative history of that Act gives the indication that Congress purposely wished to avoid declaring the lockout illegal.[6] The later Taft-Hartley

1 Labor Management Relations Act (Taft-Hartley Act) § 8(a)(1), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964) provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 gives employees the right to engage in or refrain from "concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." *Id.* § 7, 61 Stat. 140 (1947). 29 U.S.C. 157 (1964).

2 Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), *as amended,* 29 U.S.C. § 158(a)(3) (1964) provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

3 Witness the dicta in *Iron Molders' Union v. Allis-Chalmers Company,* 166 F.45 (7th Cir. 1908): "For instance, employers may lock out (or threaten to lock out) employees at will, with the idea that idleness will force them to accept lower wages or more onerous conditions . . . ." *Id.* at 50.

4 49 Stat. 449 (1935), *as amended,* 29 U.S.C. § 141 (1964).

5 *See, e.g.,* Quaker State Oil Refining Corp. 121 N.L.R.B. 334 (1958), *enforced* 270 F.2d 40 (3d Cir. 1959), *cert. denied,* 361 U.S. 917 (1959).

6 The judicial interpretation of the legislative history is seen in the following language of the Supreme Court:

> In the original version of the Act, the predecessor of § 8(a)(1) declared it an unfair labor practice "[t]o attempt, by interference, influence, restraint, favor, coercion or *lockout,* or by any other means, to impair the right of employees guaranteed in section 4." Prominent in the criticism leveled at the bill in the Senate Committee hearings was the charge that it did not accord even-handed treatment to employers and employees because it prohibited the lockout while protecting the strike. In the face of such criticism, the Committee added a provision prohibiting employee interference with employer bargaining activities and deleted the reference to the lockout. A plausible inference to be drawn from this history is that the language was deleted to mollify those who saw in the bill an inequitable denial of resort to the lockout, and to remove any language which might give rise to fears that the lockout was being proscribed *per se.* It is in any event clear that the Committee was concerned with the status of the lockout and that the bill, as

Act,[7] in amending the Wagner Act, not only did not declare the lockout unlawful but in fact contained specific references to the lockout.[8] This "unqualified use of the term 'lock-out' in several sections of the Taft-Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon."[9] The mood behind the Taft-Hartley Act also gives the indication that the lockout was to be used more and more as an employer weapon in collective bargaining.[10]

Nevertheless, the Board, from the time of its creation in 1935, took a dim view of the lockout. The following passage describes its position:

> The Board has held that, absent special circumstances, an employer may not during bargaining negotiations either threaten to lock out or lock out his employees in aid of his bargaining position. Such conduct the Board has held presumptively infringes upon the collective bargaining rights of employees in violation of Section 8(a)(1) and the lockout, with its consequent layoff, amounts to discrimination within the meaning of Section 8(a)(3). In addition, the Board has held that such conduct subjects the Union and the employees it represents to unwarranted and illegal pressure and creates an atmosphere in which the free opportunity for negotiation contemplated by Section 8(a)(5)[11] does not exist. However, the Board has recognized that there are special circumstances where the right of employees to engage in collective bargaining is not absolute but must be balanced against the employer's right to protect his business against loss. Accordingly, it has held that lockouts are permissible to safeguard against unusual operational problems or hazards[12] or economic loss where there is a reasonable ground for believing that a strike was threatened or imminent[13].[14]

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reported and as finally enacted, contained no prohibition on the use of the lockout as such. American Ship Building Co. v. NLRB, 380 U.S. 300, 314-15 (1965). (Emphasis added.)

7 Labor Management Relations Act, 61 Stat. 136 (1947), *as amended,* 29 U.S.C. § 141 (1964).

8 *Id.* at 61 Stat. 143, 154, 155 (1947), 29 U.S.C. §§ 158(d), 173, 176, 178(a) (1964).

9 NLRB v. Truck Drivers Local 449, 353 U.S. 87, 92-93 (1957).

10 The Act arose from a general conviction that the power of employers, vis-à-vis unions, should be increased. In the context of bargaining this means that employers were to have greater power to cope with, or more bluntly, to resist union demands — short of action challenging the basic idea of free association or collective bargaining. It is true, as the Board has urged, that the statutory purpose was to be implemented by proscribing certain allegedly "bad practices" by labor organizations and not [except for the free speech guarantee in Section 8 (c)] by narrowing the pre-existing proscriptions on employer conduct. But, as we have seen, it is far from clear that the bargaining lockout was proscribed by the Wagner Act. Accordingly, the larger statutory purpose of strengthening the employer's bargaining power is plainly relevant in interpreting the provisions of Sections 8(a), 8(d)(4) and the other provisions which coupled strikes and lockouts. Indeed, it is difficult to suggest a consideration which is more important.
Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act,* 24 U. CHI. L. REV. 70, 82 (1956).

11 Labor Management Relations Act § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964) provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)."

12 Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951).

13 Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).

14 Quaker State Oil Refining Corp. 121 N.L.R.B. 334, 337 (1958).

The courts of appeals, on the other hand, were divided on the question of the legality of the bargaining lockout.[15]

The concept that the bargaining lockout was illegal was obliterated when the Supreme Court decided *American Ship Building Company v. NLRB*.[16] In that case, an operator of four shipyards which were engaged in the primary business of repairing ships had locked out his employees after an impasse had been reached in bargaining negotiations. The employer's business was seasonal, with the majority of the work done during the winter. The company had engaged in collective bargaining with the union since 1952 and continued bargaining negotiations after the lockout. After investigating a complaint lodged by the union, the trial examiner concluded that the lockout was economically justified because of the special circumstances of the case.[17] The Board did not agree that the special circumstances existed, *i.e.*, an imminent strike, which could justify the lockout.[18] The court of appeals affirmed the position of the Board.[19] The Supreme Court, with two concurring opinions, reversed and held:

> [A]n employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.[20]

The majority explicitly narrowed its opinion to the above: "This is the only issue before us, and all that we decide."[21]

In finding a violation of section 8(a)(1), the *American Ship Building* Board had said that the lockout after impasse interfered with the employees' right to bargain collectively and their right to strike, which rights were guaranteed to them by section 7 of the Act.[22] The Court, however, noting that there was no evidence of hostile motive, concluded that the lockout did not interfere with collective bargaining:

> The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage. Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.[23]

The Court then rejected the Board's argument that the lockout interfered with the employees' right to strike. It reasoned that the right to strike gave the

15 Duvin, *The Bargaining Lockout: An Impatient Warrior*, 40 NOTRE DAME LAWYER 137, 149-50 (1965).
16 380 U.S. 300 (1965).
17 American Ship Building Co., 142 N.L.R.B. 1362, 1382-83 (1963).
18 *Id.* at 1364-65.
19 Boilermakers Local 374 v. NLRB, 331 F.2d 839 (D.C. Cir. 1964).
20 American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965).
21 *Id.* at 308.
22 Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. 157 (1964).
23 American Ship Building Co. v. NLRB, 380 U.S. 300, 309 (1965).

union the right to cease work but did not give them the right exclusively to determine the timing of the work stoppages. Acknowledging that this latter right would greatly enhance the union's bargaining power, the Court nevertheless concluded that the Act could not be so interpreted even though the Board might think this right necessary for the proper balance of bargaining powers. Thus the Court concluded that the controlling factor in determining the validity of a lockout under section 8(a)(1) is the employer's motivation.

The Court next addressed itself to the alleged violation of section 8(a)(3). It acknowledged that "there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other anti-union animus is required"[24] to prove the violation. However, it did not think that the lockout in question fell into this category, and held that the determination of the 8(a)(3) charge would also turn on the employer's intention:

> To find a violation of § 8(a)(3), then, the Board must find that the employer acted for a proscribed purpose. Indeed, the Board itself has always recognized that certain "operative" or "economic" purposes would justify a lockout. But the Board has erred in ruling that only these purposes will remove a lockout from the ambit of § 8(a)(3), for that section requires an intention to discourage union membership or otherwise discriminate against the union.[25]

Thus the Court in *American Ship Building* changed the criteria to be used in determining violations of sections 8(a)(1) and (3), at least as far as post-impasse bargaining lockouts are concerned. Previously, the Board had used a balancing test. The business interest of the employer in pursuing his course of action was balanced against the prejudice to expressly protected employee rights.

> If, as a result of such balancing, the Board concluded that the policy of the labor statute was more defeated than served by the particular employer action, the Board was authorized to infer from such action, without more, the requisite employer intention to do that which was proscribed under sections 8(a)(1) or (3). In such a situation the Board was not required to demonstrate independent evidentiary support for its finding of unlawful motive.[26]

American Ship Building abandoned this test and established that a violation of either section is dependent on a finding either (1) of an evident anti-union motive, or (2) that the practice is *inherently* prejudicial to union interests, and (or)[27] devoid of significant economic justification.

The concurring justices viewed the case as one in which the fact situation indicated that a strike was imminent, and thus they considered the lockout justified.[28] Though agreeing in the ultimate result, both took strong exception

24 *Id.* at 311.
25 *Id.* at 313.
26 Oberer, *Lockouts and the Law: the Impact of American Ship Building and Brown Food*, 51 CORNELL L. Q. 193, 212-13 (1966).
27 For a discussion of this point see text following note 44 *infra*.
28 American Ship Building Co. v. NLRB, 380 U.S. 300, 319, 327 (1965).

to the majority's reasoning and conclusions. They viewed the new test for 8(a)(1) and (3) violations with apprehension[29] and disapproved of the Court's limitation upon the balancing function of the Board.[30] The lockout question, they felt, should be decided on a case by case basis.[31]

Shortly before the Supreme Court's decision in *American Ship Building* was rendered, the Board had faced a lockout question in *Evening News Association.*[32] In *Evening News,* one of the members of a two-member association, formed for the purpose of handling the labor relations of its member companies, had locked out its employees after the union struck its associate. The Board had found a violation of sections 8(a)(1) and (3).[33] While the case was pending appeal the decision in *American Ship Building* was handed down. The Board then asked the court of appeals to remand the case for further consideration in light of that important decision. The court refused this request and citing *American Ship Building,* also refused to enforce the Board's order.[34] Upon appeal to the Supreme Court, the decision of the court of appeals was vacated and the case was remanded to the Board for further consideration.[35] This time the Board, while acknowledging the narrowness of the decision in *American Ship Building,* proceeded to apply the new test enunciated therein and found no violation.[36]

Darling and Company gave the Board its first opportunity to decide the legality of a bargaining lockout in a situation in which there was no impasse.[37] Because of the absence of an impasse, the trial examiner refused to apply the test of *American Ship Building* and found that the Company was guilty of violations under sections 8(a)(1) and (3).[38] The Board concluded, however, as it had in *Evening News,* that the "reasoning of the Court must be taken into consideration in cases involving lockouts in other factual contexts."[39] Its initial consideration, then, was whether the test enunciated in *American Ship Building* was pertinent to the lockout in *Darling.* Three specific questions were raised: (1) is the *American Ship Building* test applicable to a pre-impasse lockout; (2) if so, is there evidence that the Company was guided by a motive to discourage Union activity or to evade bargaining; and (3) absent such evidence, was the lockout so inherently prejudicial and so devoid of economic justification that no evidence of intent is required to prove the violations?[40]

29 *Id.* at 324, 339. Justice White explicitly stated that:

> If the Court means what it says today, an employer may not only lock out after impasse consistent with §§ 8(a)(1) and (3), but replace his locked-out employees with temporary help, or perhaps permanent replacements, and also lock out long before an impasse is reached. *Id.* at 324.

30 *Id.* at 326, 340-41.
31 *Id.* at 322-27, 337-41.
32 145 N.L.R.B. 996 (1964).
33 *Id.* at 1001.
34 Detroit Newspaper Publishers Ass'n v. NLRB, 346 F.2d 527, 530 (6th Cir. 1965).
35 Teamsters Local 372 v. Detroit Newspaper Publishers Ass'n, 382 U.S. 374 (1966).
36 Evening News Ass'n, 166 N.L.R.B. No. 6 (1967).
37 In *Evening News* the agreement between the two newspapers to stand fast on key issues, and the actual strike against one of the newspapers, can be considered to be the equivalent of an impasse between the union and the employer who locked out. Oberer, *supra* note 26, at 219-20.
38 171 N.L.R.B. No. 95, at 11. (TXD.)
39 *Id.* at 5.
40 *Id.*

The Board first decided that the *American Ship Building* test governed the pre-impasse lockout. It concluded that the presence or absence of an impasse was one of the factors to be considered in determining whether a violation existed, but that it was not conclusive in itself: "[T]he absence of an impasse does not of itself make a lockout unlawful any more than the mere existence of an impasse automatically renders a lockout lawful."[41] The second and third questions were each answered in the negative. The Board could discover no evidence of anti-Union motive. Instead it found that the employer locked out in support of its bargaining position and to avoid a strike in its busy season. Finally, because of the extensive bargaining in good faith, the Board concluded that the lockout could not be deemed to be inherently prejudicial to Union interests. The significant economic justification was supplied by the employer's concern over the timing of the strike. This concern was legitimate because of the history of strike activity and the employer's knowledge that the Union was going to strike at its convenience if its demands were not met.[42]

In both *American Ship Building* and *Darling,* an illegal lockout is referred to as one that is inherently prejudicial *and* devoid of significant economic interests. At first it might appear that both of these are required before the lockout will be adjudged illegal. However, one of the decisions cited by the *Darling* Board which tends to weaken this appearance was *NLRB v. Great Dane Trailers, Incorporated,*[43] wherein the Supreme Court had stated:

> From this review of our recent decisions [including *American Ship Building*], several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justification for the conduct.[44]

Thus it would appear that if the lockout is *either* inherently prejudicial *or* devoid of significant economic interest the employer commits an unfair labor practice by effectuating such a lockout.

After the decision in *American Ship Building,* concern was expressed over the questions that it had left unanswered.[45] These involved the legality of the following employer actions: (1) the pre-impasse bargaining lockout, (2) the bargaining lockout in first contract negotiations, and (3) the hiring of replacements after a bargaining lockout. An ancillary question involved a determina-

41 *Id.* at 6.
42 *Id.* at 6-7. The dissenting member of the Board affirmed the trial examiner's decision and disagreed with the majority's extension of the Supreme Court's limiting language in *American Ship Building* to hold otherwise. *Id.* at 8.
43 388 U.S. 26 (1967).
44 *Id.* at 34.
45 Feldesman and Koretz, *Lockouts,* 46 B.U.L. REV. 329, 335-38 (1966); Oberer, *supra* note 26, at 215-29.

tion of these situations, if any, in which the Court would still allow the Board to balance interests.[46] The first of these issues has been answered, at least as far as the Board is concerned, by the decision in *Darling*. The remainder await their day in court. However, with the added insight provided by the *Darling* decision, it is now possible to speculate as to how the Board will handle these situations when they arise.

As is evident from *Darling* and *Evening News*, the Board is going to apply its reasoning on a case by case basis according to particular facts and circumstances. The fact that a lockout occurred during first contract negotiations would be an important consideration. In both *Darling* and *American Ship Building* there was a long history of collective bargaining. The Board might therefore require less independent evidence of an anti-union motive if the lockout came the first time the employer bargained with the union. Furthermore, since the union in such a case would be representing the employees on a first time basis, its continuation as their representative could be seriously impaired if the employees were locked out. Thus the Board would not have to look at the employer's motivation but could reason that the lockout was inherently prejudicial to union interests. The Board in such a situation would have to consider not only the employer-union relationship but also the employee-union relationship.

Although Justice White, concurring in *American Ship Building*, stated that the Court's reasoning would allow the hiring of temporary and permanent replacements,[47] the majority expressly placed this question beyond the limits of its consideration.[48] Applying the new test as outlined in *Darling*, it can be found that the hiring of replacements is certainly not devoid of significant economic justification. Indeed, nothing could be of more economic significance to the employer than the maintenance of his business activity. However, other problems present themselves when an attempt is made to determine whether such a practice would be inherently prejudicial to union activity. The employer, as long as his business is still operating, might not have the attitude necessary to create the atmosphere which the Act envisioned for collective bargaining, and could thus be seriously impairing the union's ability to bargain. It is suggested that the Board, when confronted with this problem, will attempt to restrict the hiring of replacements. Allowing the employer to hire replacements would make the lockout a more attractive pressure device and thus increase the likelihood of its use. In view of the Board's past attitude toward the lockout, it would seemingly take all possible measures to prevent such an increase.

The Court in *American Ship Building* left the impression that the Board cannot claim general authority to define labor policy by balancing the interests of labor and management.[49] But this cannot mean that the Board is to give

46 Ross, *Lockouts: A New Dimension in Collective Bargaining*, 7 B.C. IND. & COM. L. REV. 847, 859 (1966).
47 American Ship Building Co. v. NLRB, 380 U.S. 300, 324 (1965). Justice White's specific statement is quoted in note 29 *supra*.
48 American Ship Building Co. v. NLRB, 380 U.S. 300, 308 n.8 (1965).
49 *Id.* at 316.

up its balancing function completely.[50] It would seem from the very language of *American Ship Building* that this limitation on the balancing function is only effective in the bargaining stage of employer-employee relations:

> Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the *bargaining process* and to deny weapons to one party or the other because of its assessment of that party's bargaining power.[51] (Emphasis added.)

Moreover, it may be assumed that even in the area of bargaining the Board will still do some balancing:

> One way of describing what the Court has done in the lockout decisions, then, is to say that it has merely redefined the balancing test. . . . The new definition requires, simply, that the scales be more out of balance than was necessary under the old balancing test, sufficiently so that an inference of hostile motive is more solidly based.[52]

To perform its balancing function prior to *American Ship Building* the Board had two questions to ask itself: "how significant is the business interest the employer is seeking to vindicate and to what extent does this employer conduct prejudice expressly protected rights?"[53] Now, as has been established by *Darling,* if there is no evidence of hostile intent, the Board asks: is the lockout either *inherently* prejudicial to union interests or is the lockout *devoid* of significant economic justification? Thus the Board still has a certain balancing function to perform, but it does not consist in balancing the relative bargaining power of the employer and the union.

The Board in *Darling* followed the reasoning of the majority in *American Ship Building,* but it also heeded the warning given by Justices White and Goldberg in their concurring opinions.[54] It did not look upon the case as one to be solved dogmatically or by a sweeping generalization. Instead it considered the lockout in the factual context of the case and judged that, in light of the criteria laid down by the Supreme Court, the lockout was legal.

Darling eliminates for the employer the problem of proof of an impasse with its necessary evidentiary problems.[55] Furthermore, by allowing a lockout before impasse, the decision takes even more control of the timing of a strike away from the union. If impasse were a requirement for a legal bargaining lockout, a union could attempt to avoid it by making minor concessions until it felt that the timing for a strike was most beneficial.[56] Now a union can no longer forestall a lockout by forestalling the impasse. One writer has expressed concern that allowing a lockout after impasse would bring about earlier strikes.[57] From

50 *See* Oberer, *supra* note 26, at 229.
51 American Ship Building Co. v. NLRB, 380 U.S. 300, 317 (1965).
52 Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails,* 52 CORNELL L.Q. 491, 507 (1967).
53 Oberer, *supra* note 26, at 213.
54 See text accompanying note 31 *supra.*
55 Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain,* 28 U. CHI. L. REV. 614, 619 (1961).
56 *Id.;* Oberer, *supra* note 26, at 217.
57 Ross, *supra* note 46, at 867.

this rationale, it would appear that lockouts before impasse would hurry strikes still further. However, this might not hold true. If the hiring of replacements is not allowed, the most frequent use of pre-impasse lockouts will be in the *Darling* situation where there is a seasonal business involved. The union will naturally want to strike during the employer's busy season while the employer will naturally want to lockout during his slack period. Thus the mode of work stoppage (strike or lockout) will depend mainly upon the time at which the negotiations take place.

Since the timing of the work stoppage is the most important advantage of the lockout, the *Darling* Board has, by not requiring an impasse, greatly strengthened the lockout as a bargaining tool. Nevertheless, unless the Board subsequently allows the employer to replace the employees he has locked out, it does not appear that there will yet be a wholesale use of lockouts before or after impasse.[58] Thus, further administrative and judicial refinements are necessary before the lockout becomes as effective a tool for the employer as the strike has been for the employee.

Paul E. Pollock

COMMERCIAL ARBITRATION — SHERMAN ANTI-TRUST ACT — ANTITRUST VIOLATION CLAIM HELD INAPPROPRIATE FOR ARBITRATION. — On August 28, 1963, American Safety Equipment Corporation [hereinafter ASE] and Hickok Manufacturing Company [hereinafter Hickok] entered into an agreement whereby Hickok licensed ASE to use Hickok's trademarks in connection with a variety of safety protective devices and accessories. The contract stipulated that ASE was to pay Hickok a royalty based on ASE's dollar volume sales of safety protective devices, whether or not sold under the Hickok trademark. ASE was further obliged to pay a royalty measured by the dollar volume of accessory sales made under the Hickok trademark. Both parties agreed to submit all disputes to arbitration. The arbitration provision read as follows: "All controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance or breach thereof, shall be settled by arbitration * * * "[1] A harmonious relationship lasted until October 21, 1966 when ASE filed a complaint against Hickok, seeking a declaratory judgment that the contract was void ab initio and that no royalty obligations had accrued under it. Specifically, the complaint alleged that sections 3, 27 and 28 of the contract were in violation of the Sherman Act because they unreasonably restricted ASE's enterprise. On November 3, 1966, J. P. Maguire and Company [hereinafter Maguire], assignee of Hickok's royalty rights, demanded arbitration of a claim for $321,000.25 for royalties accrued under the license agreement. ASE countered by seeking a declaratory judgment against Maguire on the same grounds that it had alleged in its action against Hickok.

58 *Id.* at 867-68.

1 This provision of the contract is quoted in *American Safety Equipment Corporation v. J. P. Maguire & Company*, 391 F.2d 821, 823 (2d Cir. 1968).

Hickok then made a motion to stay ASE's declaratory judgment action pending arbitration. Finally, ASE asked for a preliminary injunction against arbitration. Judge Motley of the United States District Court for the Southern District of New York denied ASE's motion for an injunction, holding that the arbitration clause was broad enough to encompass claims of antitrust violations and that no public policy considerations were violated by submitting the dispute to arbitration.[2] The Court of Appeals for the Second Circuit reversed the determination of the trial judge and *held:* the pervasive public interest in securing enforcement of the antitrust laws makes the charge of an antitrust violation inappropriate for arbitration. *American Safety Equipment Corporation v. J. P. Maguire & Company,* 391 F.2d 821 (2d Cir. 1968).

The *American Safety Equipment* decision represents a judicial limitation upon the use of commercial arbitration. Defined as a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding,"[3] arbitration has been employed to settle commercial disputes in this country since the colonial period.[4] Its effectiveness was limited in the past by court decisions declaring that agreements to arbitrate future disputes were unenforceable.[5] However, modern legislation making such agreements valid and enforceable, and recent decisions evidencing judicial favor of such agreements, have propelled arbitration into a crucial position in American commercial law.[6]

The United States Arbitration Act[7] establishes the government's recognition of agreements to arbitrate by declaring that: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable . . . ."[8] At least nineteen states have enacted similar statutes declaring that agreements to arbitrate future disputes are enforceable.[9] Current case law has gone so far as to allow arbitration of a claim that a contract is void due to fraud in its inducement.[10] This current widespread acceptance of arbitration as a means of settling commercial disputes is quite understandable. Commenting on the advantages of arbitration, Judge Learned Hand said:

> In trade disputes one of the chief advantages of arbitration is that arbitrators can be chosen who are familiar with the practices and customs of the

2 American Safety Equip. Corp. v. Hickok Mfg. Co., 271 F. Supp. 961, 966-67 (S.D.N.Y. 1967), *rev'd sub nom.,* American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

3 Jalet, *Judicial Review Of Arbitration: The Judicial Attitude,* 45 CORNELL L.Q. 519, 521 (1960).

4 Mentschikoff, *Commercial Arbitration,* 61 COLUM. L. REV. 846, 855 (1961). Professor Mentschikoff traces the use of arbitration in the Anglo-American world as far back as the thirteenth century.

5 Note, *Judicial Supervision Of Commercial Arbitration,* 53 GEO. L.J. 1079 (1965). The author points out that this restriction is said to have originated in dictum in *Vynior's Case,* 8 Coke 80a, 77 Eng. Rep. 595 (K.B. 1609).

6 Note, *supra* note 5.

7 9 U.S.C. §§ 1-14 (1964).

8 *Id.* § 2.

9 These jurisdictions are listed in Note, *supra* note 5, at 1079 n.4.

10 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

> calling, and with just such matters as what are current prices, what is merchantable quality, what are the terms of sale, and the like.[11]

Arbitration of commercial disputes has the additional important advantage of reducing already overburdened court dockets.

American Safety Equipment represents a definite break in the long line of legislative enactments and judicial decisions giving arbitrators a relatively "free hand" in resolving commercial disputes. Strictly interpreted, the case merely excludes arbitration from the area of antitrust claims. However, a close analysis of the reasoning behind the decision indicates that this case may be the launching pad for a more extensive judicial supervision over arbitration clauses in contracts.

In order to arrive at its decision, the court first had to distinguish *American Safety Equipment* from overwhelming case precedent permitting the arbitration of claims of illegality in commercial contracts. In *Robert Lawrence Company v. Devonshire Fabrics, Incorporated,*[12] the parties had agreed to arbitrate "[a]ny complaint, controversy, or question which may arise with respect to this contract . . . ."[13] Lawrence alleged that the arbitration clause was void because the entire contract had been induced by fraud. The court upheld the arbitration provision, treating the agreement to arbitrate as a separable part of the contract.[14] The court further declared that "there is no public policy that would stand as a bar to an agreement of such obvious utility . . . ."[15] The contention that fraud in the inducement should be grounds for denying arbitration was dismissed in these words:

> Once it is settled that arbitration agreements are "valid, irrevocable, and enforceable" we know of no principle of law that stands as an obstacle to a determination by the parties to the effect that arbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purposes sought to be achieved by the agreement to arbitrate, *i.e.,* a speedy and relatively inexpensive trial before commercial specialists.[16]

Eight years later in 1967, the Supreme Court of the United States addressed the same issue in *Prima Paint Corporation v. Flood & Conklin Manufacturing Company.*[17] In that case, the contract had involved the sale of Flood & Conklin's paint business to Prima. Flood & Conklin provided Prima with a customer's list and a covenant not to compete. As consideration for these advantages, Prima agreed to pay Flood & Conklin a certain percentage of its receipts. The contract contained a broad arbitration clause which read in part: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration . . . ."[18] Suspecting that Flood & Conklin was

11 American Almond Prods. Co. v. Consolidated Pecan Sales, 144 F.2d 448, 450 (2d Cir. 1944).
12 271 F.2d 402 (2d Cir. 1959).
13 *Id.* at 404.
14 *Id.* at 410.
15 *Id.*
16 *Id.*
17 388 U.S. 395 (1967).
18 *Id.* at 398.

near bankruptcy, Prima delivered its first percentage payment to an escrow agent. Flood & Conklin then demanded arbitration. Prima moved to rescind the agreement, alleging that Flood & Conklin had fraudulently misrepresented itself to be solvent, when in fact it was planning a bankruptcy proceeding. The district court granted Flood & Conklin a stay of the suit pending arbitration, and this grant was subsequently affirmed by the Supreme Court.[19] Since this was a federal case, the Court relied upon section 4 of the United States Arbitration Act of 1925 to determine whether the issue of fraud in the inducement nullified the arbitration provision. Section 4 in part provides:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration . . . . If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof.[20]

The Court interpreted this section as excluding judicial inquiry from all aspects of the contract except the formation of the arbitration clause itself.[21] Once it is established that such an agreement has been made, the Court's jurisdiction ends. The *Prima Paint* court felt that its decision not only upheld the plain meaning of the statute but "also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."[22]

Although the Second Circuit took cognizance of both the *Prima Paint* and *Robert Lawrence* decisions, it had little difficulty in distinguishing them from *American Safety Equipment.* Unlike *American Safety Equipment,* neither of the two earlier cases had concerned a claim of violation of "federal statutory protection of a large segment of the public."[23] Judge Feinberg elaborated upon this distinction by stating that:

> [T]here was not present in *Prima Paint* and *Robert Lawrence* that clash of competing fundamental policies which we find in this case . . . : the conflict between *federal statutory protection of a large segment of the public, frequently in an inferior bargaining position,* and encouragement of arbitration as a "prompt, economical and adequate solution of controversies."[24] (Emphasis added.)

In support of its position the court cited *Wilko v. Swan,*[25] which had treated the same policy conflict. In *Wilko,* the Supreme Court denied a motion to arbitrate a claim arising out of an alleged violation of the Securities Act of

19 *Id.* at 395.
20 Arbitration Act of 1925 § 4, 9 U.S.C. § 4 (1964).
21 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).
22 *Id.* at 404.
23 American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968).
24 *Id.*
25 346 U.S. 427 (1953).

1933.[26] Clearly distinguishable from *American Safety Equipment*,[27] this high court decision was relied upon primarily for its policy of assuring public protection at the expense of an expedited settlement of a dispute by arbitration.[28] The Second Circuit also noted with approval Judge Clark's dissent in *Wilko* at the court of appeals level,[29] which had questioned the desirability of a strictly business solution to this type of problem.[30] The court further mentioned dicta from *Silvercup Bakers, Incorporated v. Fink Baking Corporation*,[31] which had involved the arbitrability of an antitrust claim. In *Silvercup Bakers* there was a broad arbitration clause in a collective bargaining contract between Fink and the baker's union. Fink alleged that the union was conspiring with his competitors to eliminate his business. The union moved to dismiss the antitrust suit, claiming that it should be submitted to arbitration according to the terms of the contract. Judge Frankel ruled that the arbitration clause did not cover this type of dispute, and he therefore denied the union's motion.[32] His remarks concerning the suitability of arbitration of antitrust claims are pertinent to the *American Safety Equipment* decision: "It is arguable, and plaintiff has argued that an agreement requiring arbitration of private antitrust claims would be unenforceable . . . . Suits of this kind are designed to further broad public interests transcending the private objectives of the parties."[33]

The cases relied upon by the Second Circuit, while stemming from diverse factual situations, all had in common a broad judicial recognition of the need to limit the use of arbitration agreements when the public good might be endangered by their enforcement. If the court had wanted to limit enforcement of arbitration clauses solely in the antitrust area, it could have easily done so. One commentator has isolated three advantages which are made available to a litigant under the Sherman Act, but which would be lost if the dispute were submitted to arbitration.[34] First, section 12 of the Clayton Act[35] permits arbitration to be held at the claimant's choice of location.[36] However, most arbitration clauses specify the place where arbitration is to be held. Usually the locale will be the one most convenient to the more powerful party. Second, section 5 (a) of the Clayton Act provides that:

> A final judgment or decree [in a government antitrust suit] to the effect that a defendant has violated [the antitrust laws] shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant . . . .[37]

26 *Id.* at 434-35.
27 Section 14 of the Securities Act of 1933 provides that "[a]ny . . . provision binding any person . . . to waive compliance with any provision of . . . the rules and regulations of the Commission *shall be void.*" Securities Act of 1933 § 14, 48 Stat. 84 (1933), 15 U.S.C. § 77aaaa (1964) (emphasis added). There is no such provision in the Sherman Act voiding non-compliance with its rules.
28 American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968).
29 Wilko v. Swan, 201 F.2d 439 (2d Cir.), *rev'd*, 346 U.S. 427 (1953).
30 201 F.2d at 445.
31 273 F. Supp. 159 (S.D.N.Y. 1967).
32 *Id.* at 164.
33 *Id.* at 162-63.
34 Farber, *The Antitrust Claimant And Compulsory Arbitration*, 28 FED. B.J. 90 (1968).
35 Clayton Act § 12, 38 Stat. 736 (1914), 15 U.S.C. § 22 (1964).
36 Farber, *supra* note 34, at 92.
37 Clayton Act § 5a, 38 Stat. 731 (1914), *as amended*, 15 U.S.C. § 16a (1964).

In cases where a government suit precedes arbitration, it is doubtful whether a claimant would reap the benefits of section 5(a). The author questions whether an arbitrator, who may not be a lawyer, would have the ability to determine precisely what issues were adjudicated in the government action.[38] Finally, section 4 of the Clayton Act,[39] providing for treble damages and attorney fees for the successful litigant, constitutes an incentive to prosecute an antitrust claim.[40] There is no guarantee that an arbitrator will be so generous.

Judge Feinberg did not base his decision on these arguments peculiar to the Sherman Act. Instead, he spoke in broad terms of the need for public protection, which necessitates the voiding of agreements to arbitrate certain disputes. By basing the decision on such broad principles as protection of the public interest and doubt as to the wisdom of a strictly business solution, Judge Feinberg may have authored the first of a series of assaults on the formerly unscaled citadel of arbitration clauses. Two recent developments, namely the more extensive use of arbitration clauses in contracts and the increased acceptance of the Uniform Commercial Code, could provide the impetus for future decisions which would further the trend initiated by *American Safety Equipment.*

From its modest and simple origins, the arbitration clause has evolved into a widely used and complex instrument. One commentator has pointed out that: "The founders of the American arbitration movement thought almost exclusively in terms of transactions between parties of approximately equal bargaining power, and of contracts specifically drafted for each occasion."[41] Arbitration clauses now appear in form contracts between parties unequal in terms of "economic power or capacity to sustain a court action."[42] The presence of arbitration clauses in these types of contracts strongly implies a lack of voluntarism on the part of one of the parties. One of the fundamental prerequisites for arbitration is the freedom to voluntarily contract to relinquish the right of judicial supervision or protection.[43] An individual's signature to a contract with a large retail enterprise containing an arbitration clause can hardly mean that the individual has voluntarily relinquished the protection of the courts. The court in *American Safety Equipment* decided that the public's right to protection from restraint of trade necessitated judicial settlement of the claim. Another court employing the same basic principles might decide that the public's right of protection from one-sided bargains necessitates a judicial solution and thus might hold the adhesion type of contract "inappropriate for arbitration." Thus, the more varied and extensive use of arbitration clauses might well result in closer scrutiny and greater limitation by the courts.

The impact of the Uniform Commercial Code upon agreements to arbitrate is potentially great. In essence, the Uniform Commercial Code could act as the source of specific statutory law that would bridle the use of certain types of arbitration agreements. No longer would a court have to couch its decisions

38 *Id.* This point is discussed in Farber, *supra* note 34, at 93.
39 Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).
40 Farber, *supra* note 34, at 93.
41 Stone, *A Paradox In The Theory Of Commercial Arbitration,* 21 ARB. J. 156, 162 (1966).
42 *Id.*
43 See the definition of arbitration in text accompanying note 3, *supra.*

in vague terms such as "inappropriate for arbitration," since a specific article of the Code would serve the purpose. A decision such as the one in *American Safety Equipment* might be based upon UCC 2-302(1), which reads:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it *may so limit the application of any unconscionable clause as to avoid any unconscionable result.*[44] (Emphasis added.)

Could not the relinquishment of judicial protection in an antitrust suit be considered unconscionable? This single provision could combat one of the most pressing problems of arbitration, namely, the imposition of hard terms by the stronger party upon the weaker one without benefit of judicial protection. Other aspects of the Code also conflict with the more detractive characteristics of arbitration. The separability doctrine, employed by the courts in *Prima Paint* and *Robert Lawrence* to allow arbitration, is diametrically opposed to the Code's conception of an "integrated commercial transaction."[45] Under the Code, the fiction that an arbitration clause can exist without the "structure of the larger commercial understanding" will not be tolerated.[46] Finally, the "general proposition" that the courts cannot void an arbitration award due to errors of law has produced a system of arbitration without any "precedential value."[47] This phenomenon is contrary to one of the Code's main goals, namely a body of uniform commercial law for the United States.[48] One legal scholar has observed that it would be "nothing short of scandalous . . . if it were now to be discovered that the great effort that went into creating the Uniform Commercial Code produced a statute that was viable only when a commercial agreement did *not* contain an arbitration clause."[49]

Arbitration, born out of the need for a simple businesslike alternative to an out of touch judicial approach to business problems, has served this purpose well. However, both arbitration and its raison d'être have undergone considerable change. Once found only in agreements between parties of equal bargaining power, arbitration clauses are now used extensively in form contracts between large enterprises and individual consumers. Providing a speedy solution favorable to businessmen by means of arbitration also has the effect of stagnating the social progress made by commercial law. The revolutionary has now become the reactionary. A general judicial reaction to this turn of events, specifically witnessed in *American Safety Equipment,* can be expected to take place in the near future.

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44 UNIFORM COMMERCIAL CODE § 2-302(1).
45 Collins, *Arbitration And The Uniform Commercial Code,* 21 ARB. J. 193, 203 (1966).
46 *Id.* at 206.
47 Mentschikoff, *supra* note 4, at 856.
48 UNIFORM COMMERCIAL CODE § 1-102(1)(c).
49 Collins, *supra* note 45, at 211.

LANDLORD-TENANT — EVICTION IN RETALIATION FOR REPORTING HOUSING CODE VIOLATIONS PROHIBITED. — In March, 1965, Mrs. Yvonne Edwards, a month to month tenant, reported sanitary code violations in her apartment to the District of Columbia Department of Licenses and Inspections. A subsequent inspection by that Department revealed more than forty violations which the landlord was ordered to correct. The landlord then gave Mrs. Edwards a thirty day statutory notice to vacate as he was authorized to do by section 45-902 of the District of Columbia Code.[1] When Mrs. Edwards had not complied with this notice by the expiration of the thirty day period, he brought an action to recover possession of the premises pursuant to section 45-910 of the District of Columbia Code[2] and obtained a default judgment. A motion to set aside the default judgment was granted, but at the resulting trial the judge entered a directed verdict for the landlord.[3] Mrs. Edwards appealed to the United States Court of Appeals for the District of Columbia Circuit for a stay of execution pending appeal to the District of Columbia Court of Appeals.[4] The stay was granted provided that she continue to pay rent.[5] The judgment of the trial court was subsequently upheld by the District of Columbia Court of Appeals on the ground that any limitation on the landlord's right to terminate tenancy had to be based on specific statutes or special circumstances.[6] Mrs. Edwards then sought review in the United States Court of Appeals for the District of Columbia Circuit. This court reversed the decision of the trial court and *held:* in enacting the housing code of the District of Columbia, the Commissioners impliedly effected a change in the rights of landlords and tenants to the extent that proof of a retaliatory motive now constitutes a defense to an action of eviction. *Edwards v. Habib,* 397 F.2d 687 (D.C. Cir. 1968).

I

The appellant launched a constitutional attack on the judicial enforcement of sections 45-902 and 45-910 on two distinct theories. While avoiding a direct constitutional confrontation, Judge J. Skelly Wright did not diminish the importance of constitutional considerations in delineating the implementa-

1 D.C. CODE ANN. § 45-902 (1967) provides in part: "A tenancy from month to month, or from quarter to quarter, may be terminated by a thirty days' notice in writing from the landlord to the tenant to quit . . . ."

2 D.C. CODE ANN. § 45-910 (1967) provides:

> Whenever a lease for any definite term shall expire, or any tenancy shall be terminated by notice as aforesaid, and the tenant shall fail or refuse to surrender possession of the leased premises, the landlord may bring an action of ejectment to recover possession in the United States District Court for the District of Columbia; or the landlord may bring an action to recover possession before the District of Columbia Court of General Sessions, as provided in sections 11-701 to 11-749.

3 Habib v. Edwards, Civil No. L-T 75895-65 (D.C. Ct. Gen. Sess., Oct. 27, 1965), reprinted in N.Y.U. School of Law Project on Social Welfare Law, HOUSING FOR THE POOR; RIGHTS AND REMEDIES, No. 1, at 43 (1967), *aff'd,* 227 A.2d 388 (D.C. Ct. App. 1967), *rev'd,* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

4 Edwards v. Habib, 366 F.2d 628 (D.C. Cir. 1965).

5 *Id.*

6 Edwards v. Habib, 227 A.2d 388 (D.C. Ct. App. 1967), *rev'd,* 397 F.2d 687 (D.C. Cir. 1968).

tion of the sections in question.[7] Indeed, he devoted the initial two parts of his opinion to a discussion of the constitutional arguments.

The first such question raised involves the concept of "state action." The appellant maintained that the first amendment guaranteed her the right to report violations of the law and to petition the government for redress of grievances. However, the court cautioned that "before appellant can prevail on this theory she must show that the government is in some relevant sense responsible for inhibiting her right to petition for redress of grievances: she must show, in other words, the requisite 'state action.' "[8] Judge Wright premised his discussion of this facet of the tenant's claim by referring to the types of state action present in three well-known cases — *Shelley v. Kraemer*,[9] *New York Times Company v. Sullivan*,[10] and *Marsh v. Alabama*.[11] In each of these decisions the requisite state action had been found even though the court was enforcing essentially private rights:

> There can now be no doubt that the application by the judiciary of the state's common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government.[12]

Apparently it was clear, at least to Judge Wright, that judicial implementation of private rights, such as the rights of a landlord under sections 45-902 and 45-910, may constitute state action — or at least governmental action.[13]

The great difficulty with state action is the visceral reaction that certain members of the legal profession have to its extension. A number of commentators

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7 Edwards v. Habib, 397 F.2d 687, 690 (D.C. Cir. 1968).

8 *Id.* at 690-91. It should be noted that Judge Wright uses the term "state action" to encompass the broader concept of "governmental action." Thus, in this context, "state action" in the District of Columbia means action by an arm of the local government which abridges freedoms secured by the first amendment. *Id.* at 690 n.8, 694 n.22.

9 334 U.S. 1 (1948) (holding that the action of a state court in enforcing a racially restrictive covenant was "state action" within the meaning of the fourteenth amendment).

10 376 U.S. 254 (1964) (holding that the action of a state court in finding *The New York Times* liable in damages for libeling a "public figure" was "state action" within the meaning of the fourteenth amendment).

11 326 U.S. 501 (1946) (holding that the action of a state court in criminally prosecuting an individual for distributing religious literature in a company-owned town was "state action" within the meaning of the fourteenth amendment).

12 Edwards v. Habib, 397 F.2d 687, 691 (D.C. Cir. 1968).

13 Judge Wright — equating governmental action with state action — argues for the prohibition, *through the first amendment only*, of any enforcement of private rights through the judiciary of the District of Columbia. His argument appears difficult to follow in that he initially states that

> the federal court review in *Times* was technically under the due process clause of the Fourteenth Amendment as it incorporates the First, while here the challenge is made under the First Amendment itself. But there is no reason to think that review under the First Amendment is more limited. *Id.* at 694.

But he then admits "that the First Amendment explicitly proscribes only congressional action." *Id.* at 694 n.22. It is at this point that, after stating that the first amendment, by itself, ought to proscribe judicial enforcement of free speech violations completely independent of the fourteenth amendment's "state action" requirement, he falls back again on the fourteenth amendment, leaving him in the exact position from which he started. "But at least as [the first amendment is] incorporated into the Fourteenth, it invalidates any "state action" which abridges the freedom it protects." *Id.* at 694.

have argued that its scope should be limited.[14] As Judge Green, in a lower court opinion, fearing that its scope might be extended too far, said: "If for constitutional purposes every private right were transformed into governmental action by the mere fact of court enforcement of that right, the distinction between private and governmental action would be obliterated."[15] This reflects the obvious fear in extending the use of the state action concept; the reason, of course, is that this concept has a potentially unlimited application. What is involved in determining the scope of this theory is a balancing of rights. The social understanding of freedom involves the power to act as arbitrarily as is desired as long as the actions do not contravene the rights of others. The Supreme Court has stated that, in balancing the constitutional rights of property owners with those of the people to enjoy freedom of speech, "we remain mindful of the fact that the latter occupy a preferred position."[16] A democracy requires that the right to exercise the liberties guaranteed by the first amendment be given full protection.[17]

While Judge Wright did not base his decision on the above state action argument, it is quite clear that the argument has weight.[18] It must be noted, however, that a decision on the above basis would bar only a landlord who used the judicial process. It would not bar a landlord from self help in a state which would allow it.

II

The second constitutional challenge was based on the right of a citizen to seek redress of grievances from the government[19] and report violations of the law without fear of reprisal. "This duty [to protect the citizen] does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force . . . ."[20] In her argument appellant relied heavily on *In re Quarles*.[21] In *Quarles,* Worley reported a violation of the internal revenue law to a federal officer. Subsequently, petitioner and his accomplices threatened to beat Worley. Petitioner was prosecuted under section 6 of the Enforcement Act,[22] which provided for the punishment of conspiracies

14 *E.g.*, Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960); Pollock, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

15 Habib v. Edwards, Civil No. L-T 75895-65 (D.C. Ct. Gen. Sess., Oct. 27, 1965), reprinted in N.Y.U. School of Law Project on Social Welfare Law, HOUSING FOR THE POOR; RIGHTS AND REMEDIES, Supp. No. 1 at 43 (1967).

16 Marsh v. Alabama, 326 U.S. 501, 509 (1946).

17 *Id.*

18 *See* Tarver v. G. & C. Construction Corp., Civil No. 64-2945 (S.D. N.Y., Nov. 9, 1964), discussed at Note, 36 GEO. WASH. L. REV. 190, 192 (1967) and 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193, 196 (1967).

19 Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); United States v. Cruikshank, 92 U.S. 542 (1876).

20 *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884).

21 158 U.S. 532 (1895).

22 Enforcement Act of May 31, 1870, § 6, 16 Stat. 141 (1870), *as amended,* 18 U.S.C. § 241 (1964).

> to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.[23]

In his defense the petitioner maintained that Worley had no federally secured right to inform. If he had no right to inform, then there was no violation of section 6 in that no "right or privilege secured to him by the Constitution" had been violated. The court disagreed.

> The right of a citizen informing of a violation of law . . . to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action.[24]

As the above quotation suggests, the right to inform the government of a violation of the law, while not explicit in the Constitution, is so important to the exercise of government that it is a fundamental aspect of government.

The District of Columbia Court of Appeals rejected the above argument on the ground that " . . . Congress enacted special legislation to procure certain rights."[25] It is not quite clear, by this statement, to what legislation the court was referring. However, it must be noted that section 6 did not create a right to report a crime. It merely provided a criminal sanction against a conspiracy which sought to deprive a person of rights existing under the Constitution and laws of the United States. It is this right, the right to report a violation of the law without fear of reprisal, that Mrs. Edwards asserted as a defense in a civil action. She alleged that to allow a landlord to evict her in retaliation for reporting a sanitary code violation would abridge her constitutionally guaranteed right. *In re Quarles* is important because it states unequivocally that a citizen has a right to report a violation of the law without fear of reprisal. *Quarles* makes it quite clear that, although a statute may be needed to make the violation of this right a federal crime, the right itself exists independently of any legislation. Therefore, it would seem that the absence of a federal criminal statute should not affect the use of this right as a defense in a civil action.

III

As stated above, the present decision does not rest on constitutional grounds.[26] It is based, rather, on the interpretation of sections 45-902 and 45-910 of the District of Columbia Code and the Housing Regulations of the District

23 *Id.*
24 *In re* Quarles, 158 U.S. 532, 536 (1895).
25 Edwards v. Habib, 227 A.2d 388, 391 (D.C. Ct. App. 1967).
26 This is in accord with the
> cardinal principle of statutory construction that if there are two possible interpretations of a statute, one which would raise a question of constitutionality, and another which would not, then the construction which fairly avoids the constitutional question must be adopted. District of Columbia v. Davis, 371 F.2d 964, 966 (D.C. Cir. 1967).

of Columbia.[27] In construing the statutes, Judge Wright examined the purpose of the housing code:

> The Housing and Sanitary Codes, especially in the light of Congress' explicit direction for their enactment,[28] indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live.[29] (Footnotes omitted.)

By their very nature, housing laws depend on private individuals to report violations. In 1966 nearly a third of the cases handled arose from private complaints.[30] "To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington."[31] Insofar as procedural statutes like sections 45-902 and 45-910 clearly frustrate the intent of Congress, they are, by implication, ineffective.[32] In arriving at this conclusion the court stated that: "[W]here there is a possible conflict, the more recent enactment, the housing code, should be given full effect while leaving an area of effective operation for the earlier statute."[33] The court found a positive repugnancy between the District of Columbia Commissioners' intention in enacting the Housing and Sanitary Code, and the specific application of section 45-910 in retaliation for reporting a violation of that code.[34]

IV

Although *Edwards* has been hailed as a "Breakthrough in Tenant Rights,"[35] many problems remain as to its exact scope and effect. The decision was not unanimous; Judge McGowan concurred only to Part III, and Judge Danaher dissented. Although Part III contains the fundamental reasoning behind the decision, it is limited to policy and statutory considerations. Strictly read, the case holds that a landlord may not use statutory means to evict a tenant in retaliation for reporting a housing code violation. Nothing is mentioned concern-

27 HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA (1956).
28 D.C. CODE ANN. § 1-228 (1967).
29 Edwards v. Habib, 397 F.2d 687, 700 (D.C. Cir. 1968).
30 *Id.* at 700 n.43.
31 *Id.* at 700-01.
32 For example, a Florida law, which provided that unemployment benefits would be denied to an individual whose unemployment was a result of a labor dispute, was struck down under the supremacy clause as being inconsistent with the National Labor Relations Act:

> The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board.

Nash v. Florida Indus. Comm'n 389 U.S. 235, 239 (1967).
33 Edwards v. Habib, 397 F.2d 687, 702 n.50 (D.C. Cir. 1968). This reasoning was based on the case of *International Union of Electrical Workers v. NLRB,* 289 F.2d 757 (D.C. Cir. 1960). The court there sought to reconcile two provisions of the Taft-Hartley Act. Section 3(d) made the General Counsel's decisions unreviewable by the Board. Section 10(b), a part of the original Wagner Act, gave the Board power to amend a complaint. In resolving the conflict the court gave full effect to section 3(d) and partial effect to section 10(b).
34 Edwards v. Habib, 397 F.2d 687, 700-01 (D.C. Cir. 1968); *See* United States v. Borden, 308 U.S. 188, 198-99 (1939).
35 Law in Action, vol. 3 no. 2, June, 1968, at 1.

ing the constitutional considerations that would limit the application of non-statutory means of eviction.

An increasing number of jurisdictions have interpreted or reinterpreted forcible entry and detainer statutes as barring such self help. In these jurisdictions the landlord must resort to the legal process to evict a tenant.[36] A decision based on the rationale of Part III of *Edwards* (*i.e.*, statutory interpretation) would prevent the landlord from retaliation for reporting a sanitary code violation.

However, there are still many jurisdictions which allow the landlord to re-enter and expel an overstaying tenant without legal process.[37] For example, under the District of Columbia law, a landlord may re-enter if he can do so without causing a breach of the peace.[38] In spite of the clear mandate in most forcible entry and detainer statutes,[39] these jurisdictions have consistently interpreted such statutes as "not supplant[ing] the common law right of self help in peaceably entering into premises on which a lease has expired where such entry is accomplished without breach of the peace."[40] Clearly in these jurisdictions the *ratio decidendi* of the *Edwards* case would not prohibit self help. Further, since self help is permitted, the constitutional argument based on state action would not be available. There is no state action when the landlord acts on his own initiative according to existing state law. A tenant in a self help jurisdiction, who has been evicted without legal process for reporting a violation of a housing code, could argue on nonconstitutional grounds that retaliatory eviction should not be allowed. This argument would rely solely on the contention that the aims and objectives of the housing code are perverted by allowing a landlord to evict a reporting tenant. Also, an argument analogous to Part II, the right to report a violation of the law without fear of reprisal, would be appropriate. It would be based on the strong policy that private action in retaliation for reporting a violation of the law is contrary to public policy and to the very function of government. The desire that violators of the law be identified should override considerations of the landlord's right to self help. It is "so fundamental to [the] carrying out of the purpose of any legislation that the right to inform should not have to be explicitly stated in each piece of legislation."[41] This is especially true where by its very nature, the legislation, as does the housing code, must rely on informers as a primary source of information.[42]

36 See cases collected in Annot., 6 A.L.R.3d 177, 186-89 (1966).

37 *Id.* at 183-85.

38 Snitman v. Goodman, 118 A.2d 394 (D.C. Mun. Ct. App. 1955).

> It appears to us that this statute [Forcible Entry and Detainer, 22 D.C. CODE ANN. 3101] recognizes that one who is *lawfully* entitled to possession has a right of entry if he can make such entry without the use of force. *Id.* at 397-98.

Judge Greene was of the opinion that *Fisher v. Parkwood, Inc.*, 213 A.2d 757 (D.C. Ct. App. 1965), overruled *Snitman*. Habib v. Edwards, Civil No. L-T 75895-65 (D.C. Ct. Gen. Sess., Oct. 27, 1965), reprinted in N.Y.U. School of Law Project on Social Welfare Law, HOUSING FOR THE POOR; RIGHTS AND REMEDIES No. 1, at 43 (1967). However, *Fisher* is not in point. It concerned the efficacy of the statutory notice. The landlord did not attempt to re-enter the property. In fact, he had regained possession by use of section 910.

39 Annot., *supra* note 36, at 181.

40 Burford v. Krause, 89 F. Supp. 818, 820 (D.D.C. 1950).

41 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193, 201 (1967).

42 See text accompanying notes 30-31, *supra*.

V

Completely left open in the decision is the effect of private law. The landlord may draw up a lease agreement which specifically waives the requirement of notice to quit[43] and the right to re-enter without process. According to the weight of authority a tenant may waive the right to process.[44] California is one of the few states which interprets forcible entry and detainer statutes as barring self help even though the tenant expressly waives the right to legal process in the lease. In California there can be no re-entry without legal process.[45] In other jurisdictions a tenant might attack the validity of the waiver clause on the ground that it violates public policy. It can be argued that the waiver clause defeats the purpose of legislation in that it promotes situations in which a breach of the peace is likely to occur. This is in direct contradiction to the policy of forcible entry and detainer statutes. Certainly the above argument would carry more weight in jurisdictions which interpret forcible entry and detainer statutes as barring self help than it would in jurisdictions which do not.

In addition, a waiver clause could be attacked on the grounds that it is an adhesion contract. Therefore, provisions which patently favor the landlord and force the tenant to waive rights could be struck down as unconscionable. There are a number of authoritative cases on the unconscionableness of adhesion contracts.[46] It would be a very blind court, indeed, which did not recognize that an indigent tenant has no bargaining power. This is especially true when there is a shortage of rental units. In the absence of a housing shortage, the contract may still be adhesive if most of the landlords in the area use essentially the same lease.[47] In such instances there is no freedom of contract; an unconscionable provision should not be enforced.

VI

Assuming the court finds that a tenant may not be evicted through either the legal process, self help, or an adhesive contract, the immense problem of an adequate remedy rears its head. After Judge Wright found that a retaliatory motive, if proven, would be a defense to an action under section 45-910, he said, "This is not, of course, to say that even if the tenant can prove a retaliatory purpose she is entitled to remain in possession in perpetuity."[48]

This raises the difficult question of just how long a tenant in that set of circumstances may stay in possession. If a landlord wants to evict a tenant who has proven an attempted retaliatory eviction, must he have an affirmative reason which will convince the court that he no longer harbors retaliatory motives?

43 D.C. CODE ANN. § 45-908 (1967).
44 Annot., *supra* note 36, at 194-99.
45 Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961). In *Jordan* the court, disregarding traditional interpretation, reasoned that the policy of forcible entry and detainer statutes was to preserve the peace. As such, any rights arising thereunder could not be contracted away.
46 These cases are collected in Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L. J. 519, 554-57 (1966).
47 *Cf.* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
48 Edwards v. Habib, 397 F.2d 687, 702 (D.C. Cir. 1968).

May a landlord ever evict such a tenant for no reason at all? Conceivably, a model tenant could never be forced out. Even to raise the rent, a landlord could be ordered to produce records to prove that the increase was an economic necessity and not another means of retaliation against the tenant.[49] Certainly these are extremely difficult questions for any court to answer. The solution, of course, inheres in legislation. Proper legislation will set forth the exact nature of a remedy and its duration.[50] The absence of legislation results in a quagmire. Judge Danaher put the situation succinctly: "I leave my colleagues where they have placed themselves."[51]

VII

Edwards v. Habib is not a panacea. It does not solve all the pertinent problems of retaliatory eviction. It may be only a local decision with the limited effect of keeping a landlord with a retaliatory motive from resorting to the judicial process. Because of the many problems that a case like *Edwards* creates, most courts will hesitate to follow it. This is especially true since property rights are as deeply entrenched in the legal system as personal liberty. It is a very difficult process to determine when one right ought extinguish another. In view of the difficulties which will arise in delineating the exact scope of the *Edwards* decision, the major long-range result may be a re-affirmance of the principle that social problems call for political and not judicial action.

D. Joseph Potvin

CRIMINAL LAW — SUCCESSIVE STATE PROSECUTIONS OF THE SAME INDIVIDUAL FOR CRIMES ARISING OUT OF THE SAME OCCURRENCE BUT WHICH INVOLVE MULTIPLE VICTIMS DO NOT VIOLATE THE FOURTEENTH AMENDMENT. — On January 10, 1960, the home of John Gladson was entered by three men carrying a shotgun and pistols. Mr. Gladson was playing poker with five other men; Mrs. Gladson was upstairs in bed. The intruders took items from the card table, from each of the players, and from Mrs. Gladson. Four men, including one Ashe, were subsequently arrested and separately convicted for the crime. Ashe was the only defendant subjected to two trials. At the first trial he was charged with the robbery of Knight, one of the card players, but was acquitted because of insufficient evidence. At the second, charged with robbing another of the card players, Roberts, he was found guilty. Having exhausted his state remedies (based mainly on the theory of double jeopardy), Ashe filed a habeas corpus petition in the United States District Court for the Western District of Missouri. Judge Oliver there denied relief, but issued a certificate of probable cause which sent the case to the Eighth Circuit Court of Appeals.

The Court of Appeals, relying on the authority of *Hoag v. New Jersey*,[1]

49 Tarver v. G. & C. Construction Corp., Civil No. 64-2945 (S.D. N.Y., Nov. 9, 1964).
50 Illinois has passed a statute which prohibits a landlord from evicting in retaliation a tenant who has reported a code violation. ILL. REV. STAT. ch. 80, § 71 (1965).
51 Edwards v. Habib, 397 F.2d 687, 705 (D.C. Cir. 1968) (dissenting opinion).

1 356 U.S. 464 (1958).

affirmed the district court's denial of relief and *held:* the state action of trying Ashe twice was not violative of the due process clause of the fourteenth amendment, since such state procedure was not "fundamentally unfair." *Ashe v. Swenson,* No. 19013 (8th Cir. July 30, 1968, *petition for cert. filed,* August 17, 1968).

The Eighth Circuit's reliance on *Hoag* is sound. In that case, three indictments against Hoag, each charging the robbery of five persons in a tavern, were consolidated for trial. All five victims testified against Hoag, who pleaded an alibi. The jury granted acquittal. Six weeks later, another indictment was returned under the name of the fourth victim, the only witness to identify Hoag positively in the previous trial. Although some of the victims testified for the defense as to their inability to identify Hoag, he was convicted.[2] The *Hoag* decision has been severely criticized for two reasons: (1) it fails to apply properly the collateral estoppel doctrine;[3] and (2) it is not in keeping with the "fundamental fairness" doctrine of the fourteenth amendment.[4] The initial objection to Hoag's second trial was double jeopardy. However, traditionally the courts have narrowly construed that limitation, generally using the so-called "same evidence" test. The second trial is barred only if "the evidence necessary to sustain the second indictment would have been sufficient to secure a legal conviction on the first."[5] Such an objection failed in *Hoag* because "the latter indictments charged a forcible taking of *different* property from three *different* individuals."[6]

Having rejected strict double jeopardy, the New Jersey Supreme Court went on to reject Hoag's related argument of collateral estoppel. That doctrine, originally used only in civil cases, "covers the operation of res judicata in a subsequent suit on a different cause of action involving some of the issues determined in the initial action."[7] It would prevent the second jury from considering those issues that were decided by the first jury in favor of the defendant. The difficulty in *Hoag* was in showing exactly what the first jury had decided. Since the only real defense was the alibi, Hoag felt that the initial jury must have decided the case on that issue. But the court disagreed:

> There is nothing to show that the jury did not acquit the defendant on some other ground or because of a general insufficiency in the State's proof. Obviously, the trial of the first three indictments involved several questions, not just the defendant's identity, and there is no way of knowing upon which question the jury's verdict turned.[8]

The court defended its narrow construction of double jeopardy and its strict analytical approach to collateral estoppel by reasoning that:

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2 *Id.* at 465-66.
3 Knowlton, *Criminal Law and Procedure,* 11 RUTGERS L. REV. 71, 91-95 (1956).
4 Hoag v. New Jersey, 356 U.S. 464, 473-74 (1958) (dissenting opinion of Chief Justice Warren).
5 State v. Hoag, 21 N.J. 496, 502, 122 A.2d 628, 631 (1956), *aff'd.,* 356 U.S. 464 (1958).
6 *Id.*
7 *Development in the Law — Res Judicata,* 65 HARV. L. REV. 818, 820 n.1 (1952).
8 State v. Hoag, 21 N.J. 496, 505, 122 A.2d 628, 632 (1956).

> If this procedure [allowing multiple trials] has proven a factor in the vigorous administration of the criminal law, it has been for good and not for evil, which is apparent by its long continuance. No persuasive reason has been proferred why a change should be made and still another obstacle placed in the path of the prosecuting authorities to prevent the escape of the guilty.[9]

At least one commentator has found this presumption of guilt to be completely alien to fundamental principles of American jurisprudence.[10] The superior court apparently anticipated this objection when it "assumed" that the state prosecutor would not take advantage of the procedure to flaunt the protection given by the double jeopardy clause.[11]

The criticism of *Hoag* (and *Ashe*) at the state level centers around this formal avoidance of the double jeopardy limitation which allows the state to obtain what it perceives to be a just result. One theory for change would begin by expanding the double jeopardy limitation to allow appeal by the state from an adverse decision in a criminal case.

> This would remove the spectre of overabundant erroneous determinations and thus deprive the prosecutor who seeks to harass defendants of his most persuasive argument for the restrictive application of double jeopardy rules. The definition of "offense" may then be expanded or a practice instituted by compelling joinders of all offenses arising out of the same broad transaction.[12]

Such a solution, however, would run counter to decades of federal practice now followed by most states.[13] The justification for barring state appeal is that the defendant should not be subjected to repeated attempts by the state, with its superior resources and power, to obtain a conviction. The allowance of such a procedure would leave the defendant in a "continuing state of anxiety and insecurity."[14]

A less drastic solution would require a "presumption of rationality" in construing the first jury's verdict.[15] In *Hoag* and *Ashe,* for example, the central issue appears to be whether the defendants were present when the crimes took place. If the first jury decided that they were not, as a "rational" look at the cases would indicate, then the second trial would be barred. They could hardly have robbed the victim under whose name the second indictment was brought if they were not at the scene of the crime.[16] However, in addressing himself to this point in the Supreme Court's consideration of *Hoag,* Justice Harlan wrote that "jury verdicts are sometimes inconsistent or irrational, *see, e.g.,*

9 *Id.* at 506, 122 A.2d at 633.
10 Knowlton, *supra* note 3, at 92.
11 State v. Hoag, 35 N.J. Super. 555, 561-62, 114 A.2d 573, 577 (1955), *aff'd.,* 21 N.J. 496, 122 A.2d 628 (1956), *aff'd.,* 356 U.S. 464 (1958).
12 Mayers & Yarbrough, *Bis Vexari: New Trials & Successive Prosecution,* 74 HARV. L. REV. 1, 35 (1960).
13 *See, e.g.,* Kepner v. United States, 195 U.S. 100 (1904); AMERICAN LAW INSTITUTE CODE OF CRIMINAL PROCEDURE, June 15, 1930, at 1206.
14 Green v. United States, 355 U.S. 184, 187 (1957).
15 Mayers & Yarbrough, *supra* note 12, at 36-37.
16 *See* Sealfon v. United States, 332 U.S. 575 (1948).

Dunn v. United States, 284 U.S. 390 [1932] . . . ."[17] If he cites *Dunn* to show that juries are not masters of logic, his statement is supported by the opinion; but *Dunn* cannot be made to mean that verdicts preclude a presumption of rationality.[18] To say that jury verdicts can never be analyzed rationally is to go a long way toward the total discreditation of juries. This "presumption of rationality" approach would permit the use of collateral estoppel in the *Hoag-Ashe* type of situation at the state level. In fact, New Jersey has suggested that *Hoag* was not well decided and now applies collateral estoppel more liberally.[19] The American Law Institute also addressed itself to this problem in section 1.08(2) of its Model Penal Code, which provides in part:

> [I]f a person is charged with two or more offenses and the charges are known to the proper officer of the police or prosecution and within the jurisdiction of a single court, they must be prosecuted in a single prosecution when:
>
> . . . .
>
> (c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.[20]

Such a statute would have required the state to consolidate all the indictments against Ashe for prosecution at one trial. The Institute's intention is to prevent the state from bringing successive prosecutions based on essentially the same conduct, "whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass [the defendant] by multiplicity of trials."[21]

Once the case reaches the federal level, collateral estoppel is no longer the best argument. In *Palko v. Connecticut,*[22] the Supreme Court refused to apply the federal double jeopardy standard to the states. This implies that the Court would be even slower in requiring the use of collateral estoppel, a mere procedural adjunct of double jeopardy. As Justice Harlan wrote in *Hoag:* "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement."[23] More important, in a separate opinion in *Abbate v. United States,*[24] Justice Brennan (who took no part in *Hoag* and dissented from its companion case)[25] wrote: "[T]he protection of an essentially procedural concept such as collateral estoppel . . . is less substantial than the constitutional protection of the Double Jeopardy Clause."[26]

If *Hoag* and *Ashe* are to be overruled, such action will probably be based

17 356 U.S. at 472.
18 Mayers & Yarbrough, *supra* note 12, at 37.
19 *See* State v. Cormier, 46 N.J. 494, 507-09, 218 A.2d 138, 145-46 (1966).
20 MODEL PENAL CODE § 1.08(2) (Tent. Draft No. 5, 1956).
21 *Id.* at § 1.08(2), Comment.
22 302 U.S. 319 (1937).
23 356 U.S. at 471.
24 359 U.S. 187 (1959).
25 Cuicci v. Illinois, 356 U.S. 571, 573 (1958).
26 Abbate v. United States, 359 U.S. 187, 200 n.4 (1959).

on the "fundamental fairness" doctrine derived from the due process clause of the fourteenth amendment.[27] Such a determination does not require the Court to overrule *Palko v. Connecticut*;[28] nor does it require the Court to decide whether the "incorporation" theory (which would apply the first eight amendments and their federal procedural refinements in toto to the states)[29] or the "selective incorporation" theory (which approaches the applicability of the first eight amendments on a case by case basis)[30] is the predominant view today. Speaking of the scope of the due process clause of that amendment in *Bartkus v. Illinois*,[31] the Court wrote: "[The] Congress and the States have always believed that the Due Process Clause brought into play a basis of restrictions upon the States other than the undisclosed incorporation of the original eight amendments."[32] A recent decision in the Ninth Circuit makes the same point crystal clear:

> But, apart from the Double Jeopardy Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, standing alone, imposes some limitations on a state's power to reprosecute an individual who has previously been prosecuted for the same offense.[33]

Use of the fundamental fairness doctrine in the *Hoag-Ashe* situation would effectuate the objectives to which the due process clause has traditionally been directed: (1) insuring the reliability of the guilt-determining process; and (2) insuring the protection of the dignity of the individual.[34] The last decade has witnessed several Supreme Court decisions that have found these objectives to far outweigh the claims of law enforcement officials.[35] Cases which appear to run counter to this trend, such as the decisions involving "stop and frisk,"[36] are based more on a desire to protect the police officer involved and those persons who may be near the scene of encounter than to aid general law enforcement.[37]

Specifically, an overruling of *Hoag* and *Ashe* would implement the policy considerations upon which double jeopardy is based. It would insure that an individual would not be harassed by successive trials, that he would not be forced to "marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts."[38] A close look at these cases shows that the

27 Hoag v. New Jersey, 356 U.S. 464, 473 (1958) (dissenting opinion of Chief Justice Warren). For a discussion of the fundamental fairness doctrine, see *Rochin v. California*, 342 U.S. 165 (1952).

28 302 U.S. 319 (1937).

29 Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion of Mr. Justice Black).

30 Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

31 359 U.S. 121 (1959).

32 *Id.* at 126.

33 Crisafi v. Oliver, No. 22335 at 2 (9th Cir. April 29, 1968).

34 Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319, 346-48 (1957).

35 *See, e.g.*, Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

36 *See, e.g.*, Terry v. Ohio, 88 S. Ct. 1868 (1968).

37 *Id.* at 1884. *See* L. TIFFANY, D. MCINTYRE, AND D. ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 44-56 (1967).

38 Abbate v. United States, 359 U.S. 187, 198-99 (1959).

courts are, in substance, violating the double jeopardy limitation. The present Supreme Court, which has been so concerned with protecting the dignity of the individual inside a process which, in so many cases, has been geared toward convictions rather than justice, should see in this procedure another state attempt to place the desired end of conviction over the required means for the attainment of justice. The Court's language is necessarily vague (*e.g.*, "fundamental fairness") because norms rather than rules are being articulated in this area. Never quite certain of the community consensus, the Court has nevertheless taken on the job of formulating it in the hope of protecting what it considers to be safeguards fundamental to basic liberty. Overruling *Hoag* would be a proper step toward insuring that the means required for justice take precedence in the administration of criminal justice at the state level.

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