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Recent Decisions

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RECENT DECISIONS

SELECTIVE SERVICE — ACTIONS & DEFENSES — IMMUNITY — MISCLASSIFICATION AND HARASSMENT BY DRAFT BOARD GIVES RISE TO NO RECOGNIZED CAUSE OF ACTION, AND DOES NOT PRESENT FEDERAL QUESTION. — Plaintiff Koch alleged that defendant Zuieback, as chairman of Koch's Draft Board, and other defendants, as members and employees of the Board, subjected plaintiff to harassment, delay, uncertainty and suspense regarding his draft status over a period of ten years, that defendants, acting under color of federal law, had thereby exceeded their authority, maliciously conspiring to deprive plaintiff of due process during his processing by the Selective Service System. Specifically, defendants were accused of failing to post the names and addresses of Advisors to Registrants or Appeal Agents, denying Koch a hearing to which he was entitled, intentionally mailing a notice of reclassification to an obsolete address, denying him the use of attorney and witnesses when he finally was granted a hearing some five years after his difficulties had begun, abusing their discretion in wilfully and arbitrarily refusing to consider the evidence presented regarding his right to an overage classification, and attempting to entrap plaintiff and cause his imprisonment by withholding from him the opportunity to fully present his case. With a plea for a declaratory judgment as to his proper classification, Koch asked for general and punitive damages. The district court held the issue of plaintiff's appropriate classification moot, because before trial Koch had been given the classification he wanted. That court dismissed plaintiff's action for damages on the ground that since there was no federal question presented, Koch had failed to establish jurisdiction in the court. It further stated that assuming a federal question, the defendants were protected by the doctrine of sovereign immunity. On appeal to the United States Court of Appeals for the Ninth Circuit, *Held:* Order affirmed. Plaintiff's subjection to the Universal Military Training and Service Act does not entitle him to maintain an action in a federal court for an abuse claimed to arise as a result of the administration of the act. There is no basis for action under the Civil Rights Act of 1871 because that statute only authorized an action for damages in federal courts when the conspiring defendants have acted under the color of state law. Further, the fifth amendment imposes no limits upon the conduct of individuals; the conduct complained of is alleged to be beyond the scope of the official authority of the defendants, and hence relates to them as individuals. *Koch v. Zuieback,* 316 F.2d 1 (9th Cir. 1963).

The district court ordered dismissal reluctantly.[1] The opinion implies that Koch has been wronged, and that it is unfortunate that the wrong knows no remedy in this instance. The court did not approve of defendants' conduct, the decision against plaintiff being made because of "the overwhelming weight of authority. . . ." Although an injunction may be available to remedy abuse of discretion by a draft board,[2] there is clearly no relief at law today, in the federal system, for the unauthorized conduct complained of in the instant case.

Authority to entertain damage actions based on the Universal Military Training and Service Act[3] is not given in the act itself. There being no such provision in that act, there is nothing requiring construction by the court which would confer jurisdiction under the "arising under" rule of 28 U.S.C. § 1331. There are no cases which deal with an action for damages said to arise under the act.[4]

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1 Koch v. Zuieback, 194 F. Supp. 651, 653 (S.D. Cal. 1961).

2 Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956). *But see,* Petition of Soberman, 37 F. Supp. 522 (E.D. N.Y. 1941).

3 50 APP. U.S.C. §§ 451-473.

4 For a discussion of due process in military law and under the act see Recent Decisions, *Military Law — Due Process,* 35 NOTRE DAME LAWYER 457 (1960).

The relevant part of the Civil Rights Act of 1871, under which plaintiff claims his case arises, is broadly phrased:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.[5]

The courts have nevertheless given this legislation narrow interpretation with correspondingly limited application.[6] First, any action under the Civil Rights statutes must be based on acts done under color of state law, even though section 1985 does not expressly contain this requirement.[7] Secondly, section 1985 extends only to conspiracies to deny equal protection, as distinguished from conspiracies to effect a denial of due process.[8] Third, the rights allegedly infringed must be rights "inherent in federal citizenship."[9] Whether plaintiff's right to a fair hearing and due process of law before a federal administrative agency is inherent in federal citizenship or is a personal right, a right inherent in state citizenship, is not decided by the *Koch* court. The court's finding that it lacks jurisdiction under the act is based on the first limitation outlined above: the acts complained of could not have been committed under color of state law. Color of state law is demanded for one or both of two reasons. Individuals without the support of state authority are assumed incapable of impairing civil rights because they cannot deprive others of equal protection of the laws. Supporting this theory, it is also said that since the Civil Rights Act was adopted to implement the fourteenth amendment, it is applicable only in those situations where the fourteenth amendment itself is applicable.[10] The first of these statements is questionable in the light of the facts of this, and similar, cases. The second, and more pragmatic, rationale may be utilized in this case with the same validity, and narrowing effect on the statute, as it has had in the past.

After deciding that there was jurisdiction in the federal district court to ascertain whether or not a claim was stated,[11] the district court held, and the court of appeals affirmed, that no federal cause of action for damages was presented by allegations that defendants had injured plaintiff by depriving him of due process in violation of the fifth amendment. While a draft board's failure to grant a hearing or its arbitrary use of discretion is unquestionably a denial of due process,[12] no liability was thereby incurred. The courts reasoned that the acts of the draft board officials must either be within the scope of their authority as federal officers, in which case the doctrine of sovereign immunity protects them, or the defendants must act as individuals outside the scope of their authority. In the latter situation the fifth amendment cannot be the basis of any cause of action because it does not apply to individual conduct. Koch's complaint alleges that defendants acted under color of federal law, although, it says, they exceeded their authority. The fifth amend-

5 42 U.S.C. § 1985 (3).

6 *E.g.*, Byrd v. Sexton, 277 F.2d 418 (8th Cir. 1960), *cert. denied*, 364 U.S. 818 (1960).

7 *E.g.*, Hoffman v. Halden, 268 F.2d 280, 291 (9th Cir. 1959).

8 *E.g.*, Lynn v. McElroy, 176 F. Supp. 661, 663 (N.D. Ala. 1959). The *Hoffman* decision, *supra* note 7, at 293, maintains that § 1983 will support a cause of action against the members of a conspiracy for acts in furtherance of the conspiracy which under color of state law deprive plaintiff of due process. The court in the instant case does not bar plaintiff's action on the theory that the act covers only equal protection cases, although this action was brought under § 1985, and not § 1983.

9 Snowden v. Hughes, 321 U.S. 1, 5 (1944).

10 See generally Koch v. Zuieback, 194 F. Supp. 651, 658 (S.D. Cal. 1961).

11 See generally Bell v. Hood, 327 U.S. 678 (1946).

12 United States v. Sage, 118 F. Supp. 33, 35 (D. Neb. 1954); United States v. Laier, 52 F. Supp. 392, 394 (N.D. Cal. 1943).

ment, held to limit only federal action,[13] cannot be the basis of any cause of action against individuals *qua* individuals for a violation of its guarantee.

To paraphrase the court in the instant case, if the defendants had been acting within the scope of their authority as federal officers the doctrine of sovereign immunity protects them. Although generally sovereign immunity will not bar injunctive proceedings against a federal officer acting unconstitutionally,[14] the court's decision in refusing damages is founded on relatively well-settled law. Aside from the provisions of the Tort Claims Act,[15] the United States is not itself liable for harm resulting from a denial of due process.[16] To prevent burden upon the agencies of the government and to assure that public servants are not intimidated in their duties, immunity is extended to federal officials in some of their capacities. If the officer is performing a discretionary duty, acting within the scope of his authority, he is absolved from liability.[17] Some courts also require that the officer be free from malicious motive.[18] Draft boards are executive agencies with discretionary powers.[19] Because the conduct of defendants was in excess of jurisdiction rather than without jurisdiction over the subject matter, the finding that defendants acted within the scope of their authority is correct. According to the opinion in *Gibson v. Reynolds*,[20] a draft board acts within the scope of its authority in passing on all questions or claims with respect to exemption. Another federal case prescribes that acts are within the scope of official authority:

> . . . if they are done by an officer "*in relation* to matters committed by law to his control or supervision." . . . or . . . have "*more or less connection with* the general matters committed by law to his control or supervision."[21]

The *Koch* court has not deviated from established federal law in refusing to consider plaintiff's allegations of malice as controlling the decision.[22]

While the Civil Rights Act of 1871 has not affected the immunity of federal officials, the areas of personal liability of state officers who violate the provisions of the fourteenth amendment have multiplied as a result of that act's emergence from dormancy. As with the fifth, the fourteenth amendment is inapplicable to the acts of individuals.[23] However, unlike the judicial interpretation received by the fifth amendment, it has been held that one need only act under color of state law, and need not be within the scope of his state authority, in order to be liable for

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13 Johnston v. Earle, 245 F.2d 793, 796 (9th Cir. 1957); Simkins v. Moses H. Cone Memorial Hosp., 211 F. Supp. 628 (D. N.C. 1962); Garfield v. Palmieri, 193 F. Supp. 582, 586 (E.D. N.Y. 1960), *aff'd*, 290 F.2d 821 (2d Cir.), *cert. denied*, 368 U.S. 827 (1961); Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

14 See, *e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Philadelphia Co. v. Simpson, 223 U.S. 605 (1912); United States v. Lee, 106 U.S. 196, 218 (1882). In reality, an equity action against a federal officer is a suit against the government. See 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 27.04 at 556 (1958). Sometimes the Supreme Court is influenced by the reality: the United States is held to be a necessary party, and sovereign immunity bars the suit against the officer. See, *e.g.*, Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945); Morrison v. Work, 266 U.S. 481 (1925); Louisiana v. Garfield, 211 U.S. 70 (1908).

15 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.

16 Pflueger v. United States, 121 F.2d 732 (D.C. Cir. 1941), *cert. denied*, 314 U.S. 617 (1941); Hadley v. United States, 66 F. Supp. 140 Ct. Cl. 1946), *cert. denied*, 329 U.S. 815 (1946).

17 Barr v. Matteo, 360 U.S. 564 (1959).

18 *E.g.*, Gibson v. Reynolds, 172 F.2d 95 (8th Cir. 1949), *cert. denied*, 337 U.S. 925 (1949). *Contra*, Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

19 Dodez v. Weygandt, 173 F.2d 965, 966 (6th Cir. 1949).

20 77 F. Supp. 629, 638 (W.D. Ark. 1948), *aff'd*, 172 F.2d 95 (8th Cir.), *cert. denied*, 337 U.S. 925 (1949).

21 Cooper v. O'Connor, 99 F.2d 135, 139 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 643 (1938).

22 See 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 26.04 (1958).

23 See Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

damages under the Civil Rights Act for a violation of the fourteenth amendment.[24] The only requirement is that the act be committed by virtue of the public position held by the offender.[25] The prohibited acts are still called acts of the state, as distinguished from individual acts, because the officer acts in the name of and for the state.[26]

A state officer who acts under the color of state law, and who is not immune, is liable in a federal court for injury caused through his violation of the fourteenth amendment. Under present law, a federal officer acting under color of federal law, who is not immune, may be sued for the same offense only in a state court in a common law or local statutory action. This remedy depends on the existence in the state of a cause of action against the defendant for violating the Constitution for misuse of legal process. The anomaly is apparent: infringement of a federal constitutional right by a federal officer, absent diversity, may be remedied only in state courts, if at all; a violation of plaintiff's fourteenth amendment rights by an officer of the state is considered an act of the state, and a cause of action therefor exists in a federal court by virtue of the Civil Rights Act.

Where the federal official has acted with proper motives and clearly within the scope of his authority, the immunity of the defendant is justified, and we are not concerned that the federal courts refuse jurisdiction for lack of a recognized cause of action. Nonliability seems undeserved, however, when an officer grossly abuses his authority and thereby vitiates one of a plaintiff's guaranteed freedoms. If the state courts will offer no adequate remedy the citizen will suffer unredressed wrong.

In *Bell v. Hood*,[27] the Supreme Court of the United States held that there was jurisdiction in the district court to determine whether or not a claim was stated. That Court did not itself decide that there was no federal cause of action for a violation of fourth and fifth amendment rights by an F.B.I. agent, but remanded, saying, "[W]here federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief."[28] Nevertheless, *Bell v. Hood* died in the district court. The Supreme Court, not having dealt with the cause of action issue directly,[29] can still make an "adjustment"; such a decision would not be surprising. To give the citizen greater protection, the judiciary has been extending the coverage of the Bill of Rights. The fourth amendment's assurance against unreasonable search and seizure was made applicable to the states in *Mapp v. Ohio*.[30] In *Betts v. Easley*,[31] the Supreme Court of Kansas found that discrimination in violation of fifth amendment rights is enjoinable when by an organization (here a union) acting as an agency created and functioning under provisions of federal law, stating: "the constitutional guarantees of due process . . . are a restraint . . . upon all administrative and ministerial officials who act under governmental authority."[32] Likewise, an injunction issued against a draft board in *Townsend v. Zimmerman*[33] for an abuse of discretion in ordering plaintiff inducted. *Robinson v. California*[34] made the eighth amendment's rule against cruel and unusual punishments applicable to the states. In 1963 denial by a state of the right to assistance of counsel, in a state felony trial, was held by the Supreme Court to be a violation of the fourteenth amendment.[35] The fifth amendment's command

24 *E.g.*, Sterling v. Constantin, 287 U.S. 378, 393 (1932).
25 Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).
26 Indiana Natural & Illuminating Gas Co. v. State *ex rel.* Ball, 158 Ind. 516, 63 N.E. 220, 221 (1902).
27 327 U.S. 678, 681 (1946).
28 *Id.* at 684.
29 See discussion of *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).
30 367 U.S. 643 (1961).
31 161 Kan. 459, 169 P.2d 831 (1946).
32 *Id.* at 838.
33 237 F.2d 376 (6th Cir. 1956).
34 370 U.S. 660 (1962).
35 Gideon v. Wainwright, 372 U.S. 335 (1963).

that private property shall not be taken for public use without just compensation was made obligatory on the states in *Chicago, B. & Q. R. Co. v. Chicago.*[36]

The gradual extension of the fourteenth amendment to give the citizen greater protection from the state in his individual rights should be matched by increased protection against unconstitutional conduct by federal agents. Federal officers should enjoy only conditional immunity, and when not immune should be subject to a federal right of action, compensatory in nature, for violation of due process while acting under the color of federal law.

One objection to such a proposal is that creation of a cause of action for a violation of the fifth amendment would have undesirable far-reaching effects. On the contrary, the courts of the United States are capable of limiting themselves to actions for violation of fifth amendment rights by defendants acting under color of federal law. Causes of action need not be created for the violation of other constitutional provisions; nor must suits against individuals not acting under color of federal law be permitted. Duplication of state remedies is not really in issue because plaintiff's complaint in cases like *Koch v. Zuieback* may fail to state any cause of action under state law.[37] Moreover, even though there may be a state remedy for misuse of official position, it may be desirable to have the federal courts available to plaintiff. Federal courts might more effectively measure damages.[38] One seeking both equitable and legal relief in the federal court would not have to split his claim. The removal statute[39] would no longer discriminate in favor of the officer-defendant by giving him alone access to the federal tribunal.[40] The 1963 case of *Wheeldin v. Wheeler,*[41] narrowly avoided answering such a constitutional cause-of-action question. The case reached the Supreme Court on certiorari to the Court of Appeals for the Ninth Circuit. The petitioner's complaint alleged that the defendant, an investigator for the House Un-American Activities Committee, had, without authority, served petitioner with a subpoena to appear before the Committee; thus causing petitioner to lose his job and suffer disgrace, scorn, public shame, and so on. Although the court of appeals found for the defendant because he was immune from liability,[42] the basic question presented was, by the Supreme Court's reading, whether a federal claim for damages was stated.

> Dawson's [petitioner Wheeldin was in the case when certiorari was granted, but withdrew his petition] main reliance is on the Fourth Amendment, which protects a person against unreasonable searches and seizures. . . . But there was neither a search nor a seizure of him . . . the facts alleged do not support a violation of the Fourth Amendment.[43]

"Apart from any rights which may arise under *the Fourth Amendment,"* the Court goes on to say, "Congress has not created a cause of action for abuse of the subpoena power by a federal officer . . . ."[44] Thus, the Court has left open the question of whether there would be a right of action for a violation of the fourth amendment, were the facts to make out such a violation.

Mr. Justice Brennan, joined in dissent by the Chief Justice and Mr. Justice Black, discussed the possibility of an action for malicious abuse of federal process by a federal officer — to be available in the federal courts. He begins by explaining that since the court of appeals, by defendant's counsel's admission, decided wrongly against petitioner on the immunity issue, the case should be remanded to the lower court for adequate argument on the cause of action issue. The dissenters did not agree with the majority that petitioner's main reliance was on the fourth

36 166 U.S. 226 (1897).
37 See PROSSER, TORTS ch. 21 on *Misuse of Legal Procedure* (2d ed. 1955).
38 See Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493, 512 (1955).
39 28 U.S.C. § 1442.
40 Wheeldin v. Wheeler, 373 U.S. 647, 665, n.13 (1963) (dissenting opinion).
41 373 U.S. 647 (1963).
42 Wheeldin v. Wheeler, 302 F.2d 36 (9th Cir. 1962).
43 Wheeldin v. Wheeler, 373 U.S. 647, 649-50 (1963).
44 *Id.* at 650 (Emphasis added.)

amendment; in a footnote Mr. Justice Brennan said that he did not mean to intimate a view of whether a remedy in damages is available for a violation of the fourth amendment.[45] Four possible solutions were suggested, any one of which might be applied on remand in order to retain the petitioner's complaint in federal court; that is, any one of which would sustain federal jurisdiction over the complaint.

1. The nonfrivolous claim under the fourth amendment[46] gives the court jurisdiction, thereby permitting decision, under *Hurn v. Oursler*,[47] of the common-law state claim based upon the same set of facts. Mr. Justice Brennan admitted[48] that the district court in *Bell v. Hood*[49] held there was no pendent jurisdiction over the state claim where the federal claim did not state a cause of action. He explained that some writers feel that "the dog would be wagged by his tail if plenary trial of an ancillary claim was compelled by a primary claim which could be disposed of on the pleadings."[50]

2. The dissenting opinion cited *Smith v. Kansas City Title and Trust Co.*[51] as authority for the principle that a federal court has jurisdiction over a state-created cause of action when "federal law has inserted itself into the texture of state law,"[52] and where "the claim under federal law was an essential ingredient of the plaintiff's case, without which he could assert no relief."[53] According to Mr. Justice Brennan, there may be jurisdiction in a federal court to hear a state claim for abuse of process when the principles controlling the proper use of process are implicit in the notion of the state-recognized action, and these principles must be drawn from a network of federal statutory and constitutional provisions governing the processes allegedly abused.[54] He implies here that if the suit is not in the federal court, the state tail will wag the federal dog.

3. A remedy for malicious abuse of federal process by a federal officer may be implied from the Act of Congress which specifies the conditions under which the subpoena power is validly exercised. In restricting the use of federal process, here the subpoena power, Congress has created a protected class of people which includes petitioner.[55] Implicit in the protection afforded is the right to a remedy if it is denied.

4. Federal jurisdiction may be founded by way of federal common law.

> . . . I am not suggesting that this court enjoys the same freedom to create common-law rights of action as do truly common-law courts. But there is a matrix of federal statutory and constitutional principles governing the rights, duties, and immunities of federal officers acting under color of federal authority. The existence of this matrix makes the matter of private actions against such officers respecting conduct alleged to be in excess of their authority of essentially federal concern, which justifies, in my view, the exercise of the residual common-law power which we unquestionably possess.[56]

The majority of the court must not have agreed with any of the dissenters' four suggestions; the adoption of one of them would have given the federal courts jurisdiction and the petitioner a remand. Yet the Court, it should be emphasized, left open the possibility that a right of action may arise in similar circumstances. It remains to be seen what the Court will do when squarely faced with both

45 *Id.* at 655 n.3.
46 See Bell v. Hood, 327 U.S. 678 (1946).
47 289 U.S. 238 (1933).
48 Wheeldin v. Wheeler, 373 U.S. 647, 658, n.6 (1963).
49 71 F. Supp. 813 (S.D. Cal. 1947).
50 Wheeldin v. Wheeler, 373 U.S. 647, 658, n.6 (1963).
51 255 U.S. 180 (1921).
52 Mishkin, *The Federal "Question" in the District Courts*, 53 COL. L. REV. 157, 166 (1953), quoted in Wheeldin v. Wheeler, 373 U.S. 647 at 659 (1963) (dissenting opinion).
53 HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 766 (1953), quoted in Wheeldin v. Wheeler, 373 U.S. 647 at 659 (1963) (dissenting opinion).
54 *Id.* at 660.
55 *Id.* at 662.
56 *Id.* at 665-66.

a plea for damages based on a violation of the Bill of Rights by one acting under color of federal law, and facts which show a clear violation of the constitutional guarantee. Hopefully, one of Mr. Justice Brennan's four recommendations will be applied to retain the case in the federal system.

Even if there were a federal cause of action, the federal officer's charge of responsibility would enable him to escape liability, though he acts maliciously. It is unjust that because an official's duties are discretionary, as in the instant case, he is immune while acting with malicious motives and in excess of his authority. As long as the draft board official, or other federal officer, is within the broadly defined scope of his authority, he is absolutely immune from civil liability. In defense of absolute immunity, the courts have explained that it is better to leave unredressed the wrongs done by dishonest officers that to subject those who try to do their duty to the constant dread of retaliation.[57] When a plaintiff alleges malice, the courts assert, it is impossible to say if the claim against the official is well founded until the case has been tried; to subject both innocent and guilty to trial dampens the ardor of all in the discharge of their duties. The fear of suit would supposedly hamper independent decision, deter capable men from accepting office, and impair efficiency due to courtroom attendance.[58] Some claim that a quasi-judicial officer owes a duty to the public only and not to any individual.

Some writers feel that denying plaintiff justice on the premise that justice will produce unwanted effects in other cases is unnecessary. Professor Davis proposes that something short of trial can show whether the claim of malice is well founded or whether it is only a vigorous assertion of error. Defendant's motion to dismiss, he says, could be treated by the court as one for summary judgment, "and [the court] could enter judgment for the defendant unless the plaintiff's affidavit satisfied the court that a trial on the issue of malice is appropriate, as it would be only in the rare case in which the charge of malice seems to be justified."[59] He also states that to solve the problem governmental liability may be necessary, the government to have a cause of action against the officer for reimbursement if the latter acted maliciously.[60] Professor Jennings would abolish all distinctions between discretional and ministerial functions, supplying a new test: whether the officer has acted with proper motives, due care, and diligence in the performance of his official duties.[61]

Even if the allegations of plaintiff's complaint in the *Koch* case are true, his injury will go unredressed both under state and federal law. In the state court, providing Koch makes out a cause of action for misuse of legal procedure, he can get no judgment against defendants because of the doctrine of sovereign immunity. In a federal court, as we have seen in the instant opinions, not only are defendants immune, but no cause of action is recognized for such a wrong. Immunity should not exist for truly malicious conduct on the part of administrative officials, nor should plaintiff be denied the use of the federal system when the federal courts are capable of creating a cause of action, based on a constitutional right and limited to appropriate circumstances, for the redress of such wrongs.

John P. McQuillan

EVIDENCE — JUVENILE COURTS — PROCEEDINGS HELD TO BE CIVIL IN NATURE AND HEARSAY INADMISSIBLE. — During the recent racial disturbances in Cambridge, Maryland, two fifteen year-old children participated in "sit-ins" staged at privately owned places of public accommodation. For this they were arrested

57 See Barr v. Matteo, 360 U.S. 564, 571 (1959); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

58 See Keefe, *Personal Tort Liability of Administrative Officers*, 12 FORDHAM L. REV. 130 (1943).

59 3 DAVIS, ADMINISTRATIVE LAW TREATISE, § 26.04 at 529 (1958).

60 *Id.* at 105 (Supp. 1963).

61 Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

and charged with disorderly conduct. The juvenile court took jurisdiction because of the ages of the children. At the subsequent hearings, the children were found to be delinquent, and a determination was then made that the children should be placed permanently in a juvenile home. The children appealed, contending that the evidence was insufficient to require permanent treatment. Upon reviewing the decision of the juvenile court, the Court of Appeals of Maryland *held:* reversed. Although the disorderly conduct shown was sufficient to support the finding of delinquency, standing alone, it did not require permanent treatment, as distinguished from temporary care. Moreover, summaries of reports introduced without notice during the hearings to buttress the case for detention were hearsay and, as such, inadmissible. The court said that the rules of evidence still apply although the proceedings are civil in nature, and that a minimum standard of fairness must be observed. The admission of hearsay was unfair and prejudicial, and therefore, in error. *In re Cromwell,* 232 Md. 305, 194 A.2d 88 (1963).

In the last thirty years, it has been generally recognized that juvenile proceedings are civil, rather than criminal, in nature, since the proceedings are designed to salvage and treat the youthful wrongdoer rather than to punish him for his misconduct. In the main, those courts which have recognized that the juvenile cases are civil in nature, have professed to follow the civil rules of procedure and evidence.[1]

The statutes which establish the juvenile courts, however, generally provide that the hearings shall be informal.[2] As a consequence, many courts have disregarded certain rules of civil procedure and evidence.

By and large, the hearings before the juvenile court serve two functions. First, the court determines the delinquency of the minor, and second, the court determines what treatment will best serve the interest of the child, as well as that of the state.[3]

A. The admissibility of hearsay at the determination of delinquency.

In those cases which have involved the admissibility of hearsay in determining the question of delinquency, three rules have emerged. In what would appear to be the main line of cases, the courts have held that the rules which govern the admission of evidence in civil cases apply, and that hearsay is inadmissible in determining delinquency. The classic statement of the rule appears as dictum in *People v. Lewis,*[4] in which the juvenile appellant with other boys, broke into a store and took twelve dollars, and in the subsequent escape, stole three cars in succession. He was later apprehended, and, at the juvenile hearing, was found delinquent. Lewis appealed, contending that to establish delinquency where it would amount to criminal conduct if done by an adult, evidence had to establish the delinquency beyond a reasonable doubt. In reviewing the finding of delinquency, the New York Court of Appeals held that the proceedings were civil in nature, and that the usual criminal safeguards did not apply. The court then added:

> [T]he customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence adduced under those rules. Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feelings, the hopes and fears of social workers, are all sources of error and have no more place in Children's Court than in any other court.[5]

In *In re Contraras*[6] a similar result was reached. There a police officer testi-

1 WHARTON, CRIMINAL LAW AND PROCEDURE § 1474 (12th ed. 1957).
2 *Id.* § 1473.
3 NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR JUVENILE COURT JUDGES 59 (1957).
4 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied,* 289 U.S. 709 (1935).
5 *Id.* at 178, 183 N.E. at 355.
6 109 Cal. App.2d 787, 241 P.2d 631 (1952).

fied that the victim of a stabbing told him that Contraras had knifed him. The testimony was admitted to establish delinquency. In reviewing, a California Appellate Court held the evidence incompetent, quoting *In re Hill:*

> [W]hile the exact truth should be searched out, and all mere technicalities of procedure as distinguished from rules which protect substantial rights should be disregarded, the regular processes of the law provided to produce evidence, and the ordinary rules established to aid courts in testing and weighing it, are not scrapped because the proceeding is a summary one.[7]

Following the rule of the earlier decisions, in *In re Mantell*[8] another commitment which rested on hearsay was reversed. In this case an eighteen year-old boy was found delinquent because hearsay testimony had been admitted to show that he had perpetrated immoral acts, and associated with immoral people.

In a more recent case, *State v. Shardell,*[9] the Supreme Court of Ohio upheld a finding of delinquency. Here a policeman's testimony was introduced to show that the youth had participated in planning burglaries, and had shared in the loot. The Juvenile Court excluded the hearsay, but found other evidence sufficient to establish delinquency. In affirming, the court pointed out that this was proper:

> Long experience has shown that the truth can be arrived at by competent and reliable firsthand information rather than by information that comes from the mouths of individuals who are not in court and who cannot for that reason be cross-examined to determine the accuracy or validity of their statements.[10]

Although the majority of courts which have considered the question have found hearsay inadmissible at proceedings to establish delinquency,[11] hearsay evidence has not been condemned by all the courts. Pennsylvania has developed a rule of its own. In *In re Holmes,*[12] the Pennsylvania Supreme Court upheld the finding of delinquency where hearsay had been admitted to establish delinquency. In earlier proceedings Holmes had been found delinquent twice. In the first case he was granted probation, which was allowed to continue in spite of the second determination of delinquency. Five days after this second determination, however, Holmes was charged with participating in the robbery of a church. During the subsequent hearings, a police officer was allowed to introduce into evidence an alleged confession (later repudiated) by one of the actual robbers. Again Holmes was found delinquent, but this time, in view of his past record, and in view of the evidence adduced at the hearing, probation was revoked and Holmes was committed for treatment. On appeal, in spite of the hearsay testimony, the Pennsylvania Supreme Court affirmed, pointing out that strict rules of evidence do not apply in juvenile proceedings.

> [I]n order to accomplish the purposes for which the juvenile court legislation is designed, [the court may] avoid many of the legalistic features of the rules of evidence customarily applicable to other judicial hearings. Even from a purely technical standpoint hearsay evidence, if it is admitted without objection and is relevant and material to the issue, is to be given its natural probative effect and may be received as direct evidence.[13]

The soundness of this rule, however, is questionable in those hearings where the child is without counsel. It is clear that few children or parents know when objections might be raised.

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7 Id. at 633, quoting, *In re* Hill, 78 Cal. App. 23, 27, 247 Pac. 591, 592 (1926).
8 157 Neb. 900, 62 N.W.2d 308 (1954).
9 107 Ohio App. 338, 153 N.E.2d 510 (1958).
10 *Id.* at 342, 153 N.E.2d at 513.
11 *E.g., In re* Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952); *In re* Sanders, 168 Neb. 458, 96 N.W.2d 218 (1959); *In re* Barkus, 168 Neb. 257, 95 N.W.2d 674 (1959); Williams v. State, 219 S.W.2d 509 (Tex. Civ. App. 1949); Ballard v. State, 192 S.W.2d 329 (Tex. Civ. App. 1946); *In re* Bentley, 236 Wis. 69, 16 N.W.2d 390 (1944).
12 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied,* 348 U.S. 973 (1955). Accord, *In re* Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954).
13 *In re* Holmes, 379 Pa. 599, 606, 109 A.2d 523, 526 (1954), *cert. denied,* 808, 348 U.S. 973 (1955).

A third group of courts has refused to accept the proposition that juvenile proceedings are purely civil in nature. Because subsequent to the establishing of delinquency, commitment follows, these courts have found the proceedings essentially criminal, even though the legislatures have thought it desirable to call them civil. Consequently, where the juvenile is charged with an act which would be criminal if perpetrated by an adult, these courts have ruled that the requirements of due process which govern in criminal trials must also be applied at the juvenile proceedings.[14]

This third rule found early expression in two New York cases — *In re Madik*[15] and *People v. Fitzgerald.*[16] Operating under a revised statute, however, the *Lewis* case changed the older New York rule, Nevertheless, this old rule has found new expression by implication. In *In re Poff*[17] a federal district court has held that the legislatures cannot deprive children of constitutional rights by mere nomenclature, and consequently, that the criminal rules, fundamental to "fairness" and justice, must be applied. This court has pointed out that children are entitled to the same rights as adults when charged with acts which would amount to crimes if perpetrated by adults and if commitment is likely to follow determination of delinquency. The criminal rules of evidence apply. The criminal rules as regards hearsay would seem to apply by implication.

Of the three rules that have developed, the first — the rule of the *Lewis* line — appears preferably. It would seem that this rule comes closest to striking a proper balance between the protection of the child's rights, and the state's desire to provide an atmosphere conducive to his rehabilitation as a good and useful member of society. Any court that would unqualifiedly allow hearsay at the determination of delinquency would have to be looking solely to that part of its Juvenile Court Statute which would prescribe that the hearings were to impart no taint of criminality, and to result in no civil disabilities. The Court would have to be oblivious to numerous latent dangers;

> no matter how trained and experienced a Juvenile Court judge may be, he cannot by a magical fishing rod draw forth the truth out of a confused sea of speculation, rumor, suspicion, and hearsay.[18]

In the long experience of the common law, hearsay has been too often found unreliable. Consequently, though held admissible in *In re Holmes,*[19] it is allowed only where admitted without objection. Even this limitation, however, appears inadequate. A child without advocate is unlikely to raise objections. Moreover the child is likely to be without counsel.

The courts have recognized that where an *issue of fact* remains to be determined, proceedings in the Juvenile Court are not simply administrative.[20] Behind all these rules requiring competent evidence, there is a realization, in spite of the civil nature of the proceedings, that where a child is adjudicated delinquent, social stigma will attach. Then too, it is recognized that the child has a right to remain at home with his parents,[21] and that removal of the child from home, in fact, constitutes a punishment. In trying to assure the child all these things, the courts strive for justice — and "fairness."[22]

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14 *E.g., In re* Poff, 135 F.Supp. 224 (D.D.C. 1955); Campbell v. Siegler, 10 N.J.Misc. 987, 162 Atl. 154 (Sup. Ct. 1932).

15 233 App. Div. 12, 251 N.Y.Supp. 765 (1931).

16 244 N.Y. 307, 155 N.E. 584 (1927).

17 135 F.Supp. 224 (D.D.C. 1955).

18 *In re* Holmes, 379 Pa. 599, 614, 109 A.2d 523, 529 (1954), *cert. denied,* 348 U.S. 973 (1955) (dissenting opinion).

19 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied,* 348 U.S. 973 (1955).

20 Elson, *Juvenile Courts & Due Process, in* Justice for the Child 95, 105-106 (1962).

21 *In re* Holmes, 379 Pa. 599, 610, 109 A.2d 523, 528 (1954), *cert. denied,* 348 U.S. 973 (1955) (dissenting opinion).

22 Alexander, *Constitutional Rights in the Juvenile Court,* 46 A.B.A.J. 1206 (1960) in Justice for the Child 82 (1962).

"Fairness," however, does not require that facts be found beyond a reasonable doubt. Although the proceedings do in some respects resemble criminal proceedings, the fact is that they are not. The *Lewis* line of cases alone takes cognizance of this, as well as the other considerations, and therefore, seems to be the most acceptable.

B. Admissibility of hearsay — disposition of the child.

There have been few cases dealing with admissibility of hearsay evidence to determine the most appropriate treatment for delinquents.

In *In re Brown*[23] a boy who had knifed another boy to death in a street fight was found to be delinquent. During the course of the trial, Brown's teachers and high school principal had been allowed to introduce hearsay testimony as to his reputation. Brown was afterwards committed to a juvenile home. On appeal he contended that it was error to allow the hearsay to be admitted into the court. The intermediate appellate court, however, upheld the conviction.

> The evidence concerning the history and disposition of the child was admissible in aid of the court in deciding what order should be made concerning the care and custody of said child in the event he was found to be a delinquent. The evidence being admissible on one feature of the case, it will be presumed that the court made the proper application of the same to the feature of the case for which it was admissible.[24]

The rule laid down in *Brown,* however, would seem too broad. Other cases hold that where an *issue of fact* remains to be determined, hearsay is inadmissible even at the disposition part of the proceedings. The California Supreme Court, earlier in *Mill v. Brown,*[25] reached a different decision. Here the committal of a thirteen year-old boy who had stolen cigars was reversed. The court ruled that the justification for committal had not been established by competent evidence. The court pointed out that the finding of delinquency, standing alone, was insufficient to show that the extra-parental treatment in a state school was a necessity. (The case did not deal specifically with hearsay.)

Quite similar to the cases involving commitment of delinquent children are another group of cases involving neglected and dependent children. In both, children are removed from their homes, and placed in state homes for their own and for the state's benefit. Then too, statutes creating the Juvenile Courts usually make provision for the handling of both delinquent and dependent children.[26]

The cases involving the removal of neglected and dependent children from their homes, and their placement in state homes generally demand that the need for assistance be shown by competent evidence. Where the courts have found issues of fact unanswered, hearsay has been ruled inadmissible. This was the result reached in *In re Morris,*[27] where a probation officer introduced hearsay evidence to the effect that the child's mother was incapable of caring for the child. The trial court found the child dependent, but the intermediate appellate court reversed, pointing out that the admission of such evidence was improper.

Similarly, in *Diernfield v. People,*[28] where a child in the care of its grandparents was found dependent on the basis of hearsay testimony, and placed in a juvenile home, the California Supreme Court also reversed the juvenile court. Here the court noted that although the child was without parents, yet hearsay was inadequate to show that the child had not been receiving proper care.

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23 201 S.W.2d 844 (Tex. Civ. App. 1947). *Accord, In re* Gonzales, 328 S.W.2d 475 (Tex. Civ. App. 1959).

24 *In re* Brown, 201 S.W.2d 844, 849 (Tex. Civ. App. 1947).

25 31 Utah 473, 88 Pac. 609 (1907).

26 CAL. WELFARE AND INST. CODE § 700; ILL. REV. STAT. ch. 23 § 2009, 2013; N.Y. FAMILY COURT ACT § 312, 712.

27 331 Ill. App. 417, 73 N.E.2d 337 (1947).

28 137 Colo. 238, 323 P.2d 628 (1958).

C. Conclusion.

The purpose that the courts have had in excluding hearsay in both stages of the proceedings where an issue of fact remains unresolved, is clear. The courts have attempted to insure "fairness."

Generally, the statutes setting up the juvenile courts provide that the hearings should be informal in nature. Since it is felt that with proper care there is a greater likelihood that the child can make himself into a good and useful citizen, the first step in this treatment is provision for an informal atmosphere wherein the child can make a clean breast of his wrongs, without fear of criminal punishment.[29]

Like the other courts, here the Maryland Court of Appeals, in *In re Cromwell,*[30] has looked to see what is "fair." This entailed a look at what the legislature was attempting to do. Under the Maryland statute[31] it is at least implicit that the hearings are not criminal in nature. Consequently, the court found that the civil rules of procedure should apply. Thus the Maryland Court made no distinction between the finding of delinquency, and the determination of treatment where it came to the application of the rules of evidence. The judgment made by the court follows the law laid down in the majority of the cases, where an issue of fact remains to be determined, either as to delinquency or as to the need for disposition. However, where no issue of fact remains, a different rule is reasonable. This is true even in criminal cases. In *Williams v. New York,*[32] the accused had been found guilty of murder, and all that remained was for the judge to impose an appropriate punishment. To prepare for this, the trial judge studied ex parte reports compiled by a probation officer. Thereafter, a death sentence was imposed. On appeal, the defendant contended that the rules of evidence should have been applied as to the admission of the reports. On certiorari to the state court, the Supreme Court rejected the contention and affirmed the state court's judgment, pointing out that given a conviction, no issue of fact remains to be determined, and that

> Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information.[33]

This rule seems well worth following in disposing of the delinquent where no issue of fact remains as to the need for treatment. The recommendations of the Children's Bureau are in accord.

> In the disposition part of the hearing [the admission of] any relevant and material information, including that contained in a written report, . . . may be relied upon to the extent of its probative value.[34]

The determination reached by the Maryland court does, of course, restrict state juvenile courts to some extent. The cases, however, have held due process typical of civil cases should be applied. What the individual courts will consider due process will vary. Perhaps it can be said that the rule laid by the court reflects that court's opinion as to the efficacy of the system of juvenile proceedings as a whole.

The present case seems to have achieved "fairness."

Don O'Shea

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29 People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied,* 289 U.S. 709 (1933).
30 232 Md. 305, 194 A.2d 88 (1963).
31 MD. ANN. CODE art. 26 § 60 (1957).
32 337 U.S. 241 (1949).
33 *Id.* at 249.
34 NATIONAL PROBATION AND PAROLE ASSOCIATION, STANDARD JUVENILE COURT ACT 19, comment, p. 50.

CRIMINAL LAW — CRUEL AND UNUSUAL PUNISHMENT — DEATH PENALTY FOR RAPE-MURDER NOT BASED SOLELY ON RETRIBUTION. — One Lawrence Jackson was convicted of a rape-murder and sentenced to death. He petitioned for a writ of habeas corpus on the ground that the death penalty constituted a cruel and unusual punishment in violation of the eighth amendment when imposed upon a "mentally abnormal sex offender."[1] The Superior Court of Marin County, California, *held:* Petition denied. Although the Constitution forbids the imposition of punishment prompted solely by a desire for retribution, the death penalty under the present circumstances bears a reasonable relationship to an objective of punishment other than retribution, namely, the deterrence of others. A given punishment, to be held cruel and unusual, must offend the "common conscience," not simply the conscience of those who hold enlightened views on penology. *In re Jackson,* No. 37866, Cal. Super. Ct., Marin County, Sept. 13, 1963.

The original accent of the constitutional prohibition against cruel and unusual punishment was placed upon the means utilized to inflict corporal punishment.[2] From this beginning, an added constitutional objection to penalties highly disproportionate to the crime for which they were inflicted developed. In *Weems v. United States,*[3] a sentence of fifteen years at hard labor was held to be so severe in relation to the crime of falsifying a public document as to violate the cruel and unusual punishment provision in the Philippine Bill of Rights. To determine whether an objection on either of these grounds should be sustained, courts fostered a vague "shock the conscience" test.[4] Thus a threatened punishment would be upheld against an eighth amendment objection unless it was of a type or duration which tended to outrage the sense of justice of the populace (or the court's perception thereof). But, as might be guessed, the successes of defendants were few, a conclusion bolstered no little by the invariable reluctance of the courts to overturn sentences imposed within the limits of valid statutes.[5]

Two recent decisions, however, have contributed significantly to the necessity of reappraising cruel and unusual punishment standards. In *Trop v. Dulles,*[6] the Supreme Court held that a statute which assessed denationalization as a punishment for a wartime desertion involving no attempt on the part of the deserter to align himself with a foreign power was unconstitutional by reason of permitting a cruel and unusual punishment. The decision was based on neither a disproportionate sentence nor a barbaric corporal punishment; instead, for the first time, the Court keyed on the possible mental suffering incident to a given punishment. Chief Justice Warren, speaking for a majority of the Court, gently pulled the eighth amendment into the Twentieth Century:

> The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. . . . This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress.[7]

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1 CAL. WELF. & INST. CODE § 5600:
> The term "mentally abnormal sex offender" as used in this chapter means any person who is not mentally ill or mentally defective, and who by an habitual course of misconduct in sexual matters has evidenced an utter lack of power to control his sexual impulses and who, as a result is likely to attack or otherwise inflict injury, loss, pain or other evil upon the objects of his uncontrolled and uncontrollable desires.

2 See, *e.g.,* Weems v. United States, 217 U.S. 349, 389-90 (1910) (dissent); Hemans v. United States, 163 F.2d 228, 237 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947); State v. Cannon, 190 A.2d 514, 516 (Del. 1963).

3 217 U.S. 349 (1910).

4 See generally Note, 36 N.Y.U.L. REV. 846, 850-51 (1961).

5 Martin v. United States, 317 F.2d 753, 755 (9th Cir. 1963); United States *ex rel.* Bryant v. Fay, 211 F.Supp. 812, 814 (S.D.N.Y. 1962); State v. Rubio, 385 P.2d 1017, 1018 (Ariz. 1963); State v. Westfall, 367 S.W.2d 593 (Mo. 1963).

6 356 U.S. 86 (1958).

7 *Id.* at 101-02.

And then, to demonstrate these "evolving standards of decency," the Court pointed out that:

> The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment. . . . The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.[8]

The departure of the *Trop* case from previous cruel and unusual punishment decisions may be summarized as encompassing consideration of a mental element in punishments and an apparent modernization of the "shock the conscience" test. The basic criterion for determining the existence of a cruel and unusual punishment, however, remained — a more or less universal distaste for the punishment assessed.

In *Robinson v. California,*[9] the Supreme Court held unconstitutional as inflicting a cruel and unusual punishment a statute which permitted the punishment of the "status" of narcotics addiction as a crime. Again the emphasis was on neither the nature of the punishment nor the proportionate relationship between a crime and its punishment; the emphasis was placed upon the unconstitutionality of the infliction of *any* punishment. The Court said, in effect, that when a statute permits the imposition of punishment for something which is not in itself criminal, that statute violates the eighth amendment.

Mr. Justice Stewart, delivering the majority opinion, stated:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be inflicted with a venereal disease. . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . . We cannot but consider the statute before us as of the same category.[10]

The *Robinson* decision, then, is consistent with other cruel and unusual punishment cases only insofar as a basic sense of justice was offended by the penalizing power. The criterion for determining the existence of a cruel and unusual punishment was quite novel — a universal distaste for the mere imposition of punishment in a given situation, found to exist by analogy from a general class of cases. It remains to be seen whether this decision will become only a curiosity or will revitalize the characteristically unassuming phraseology of the eighth amendment.[11]

The theory of the petitioner in the instant case requires further elaboration. His primary contention was that the principle to be extracted from the *Trop* and *Robinson* decisions is that any punishment the motive for which is solely retributive violates the eighth amendment. The petitioner then attempted to demonstrate that the death penalty in his case was based solely on society's desire for vengeance by showing that a lesser penalty could just as well accomplish the permissible motives of punishment. The "permissible" motives of punishment named were rehabilitation, prevention of further offenses, and deterrence of others — the latter becoming crucial to petitioner's case. He said that while conduct like his may legally be characterized as wilful, psychologically it must be termed nonvolitional. Thus, the petitioner urged, the death sentence will not deter other "mentally abnormal sex offenders" any more than will a sentence of life imprisonment.

Petitioner Jackson's alternate avenue of attack was the assertion that the theories of contemporary penologists regarding the death penalty in a case such as his are most characteristic of the "evolving standards of decency" alluded to by the Court in *Trop v. Dulles,*[12] and thus should serve as the guide in determining whether a cruel and unusual punishment is threatened.

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8 *Id.* at 102-03.
9 370 U.S. 660 (1962).
10 *Id.* at 666, 667.
11 See generally Note, 42 NEB. L. REV. 685 (1963).
12 356 U.S. 86, 101 (1958).

As indicated earlier, the California court was duly impressed by the petitioner's analysis of the *Trop* and *Robinson* cases. Judge Wilson accepted the proposition that these decisions were based

> upon the Court's view that the punishments are so disproportionate to the conduct involved that the only basis for such punishments was society's desire to revenge itself upon the war-time coward, or the narcotic addict, who had failed to measure up to its standards.[13]

The court was of the opinion, however, that the punishment in the principal case could be sustained as bearing a reasonable relation to motives of punishment other than retribution, *i.e.*, to the permissible aims of punishment. It pointed out that the punishment might reasonably be based on a desire to deter "normal" persons from crimes of a similar nature, or on a desire to deter other "mentally abnormal sex offenders" from taking the lives of their victims, since the latter element of the offense should not necessarily be classified as nonvolitional.

In reply to petitioner's objection that modern penology should be the measure of whether the death penalty constitutes cruel and unusual punishment, the court concluded that the "evolving standards of decency" test enunciated in the *Trop* case did not substantially alter the "common conscience" test previously applied.

Jackson's quarrel with the imposition of the death penalty was destined to fail unless it could retain its basic appeal and freshness and avoid the recognized pitfalls of an orthodox overt attack on capital punishment. It is, after all, fairly well settled that capital punishment is not per se unconstitutional.[14] His task was magnified by the easy assumption that rape-murder presents a proper subject for the death penalty if, indeed, any subject ever would. In addition, the California sexual psychopath law is very explicit in providing that sex offenders shall not escape liability for their conduct.[15] Herein lies the necessity for use of the novel.

It is highly doubtful that the *Trop* and *Robinson* cases were based on the principle urged by the petitioner and accepted by the California court; it is also doubtful that the majority of the Supreme Court would accept this principle as a constitutional mandate today. The basis for these conclusions will appear presently.

The discussion of the motives of punishment in both state and federal courts has generally, and until quite recently, not involved constitutional considerations. Several courts have, however, indicated that punishment should not be based solely on retributive motives without pinpointing the basis of their objection.

In *Williams v. New York*,[16] the Supreme Court stated:

> Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[17]

The Court, in *Morrissette v. United States*,[18] noted its previous statement in *Williams v. New York* in commenting on a "tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."[19]

A more concise statement expressing a state court's disenchantment with the motive of retribution is found in *France v. State*:[20]

> The sole purpose of punishment assessed on conviction of crime is not "punishment for punishment's sake," retaliation or vengeance, but the objective is that it may act as a deterrent or cause reformation.[21]

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13 In re Jackson, No. 37866, Cal. Super Ct., Marin County, Sept. 13, 1963, p. 3.
14 See Trop v. Dulles, 356 U.S. 86, 99 (1958); State *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947); United States *ex rel.* Melton v. Hendrick, 218 F.Supp. 293, 296 (E.D.Pa. 1963).
15 CAL. WELF. & INST. CODE §§ 5500.5, (West Supp., Dec. 1963).
16 337 U.S. 241 (1949).
17 *Id.* at 248.
18 342 U.S. 246 (1952).
19 *Id.* at 251.
20 95 Okla. Crim. 244, 244 P.2d 341 (1952).
21 *Id.* at 343.

And in *Gabriel v. Brame*,[22] the court stated:

> [P]unishment for crime has its basis solely in its effect as a deterrent as against future offenses — that punishment for the sake of punishment, or for vengeance alone, has no place in the processes of human tribunals.[23]

The constitutions of two states, Indiana[24] and Oregon[25] have provisions asserting that punishment for crime shall be based on motives of reformation rather than retribution. While early decisions in both states upheld the death penalty against this constitutional objection,[26] no recent challenges apparently have been made, although a recent Oregon decision indicates that the early decisions would be affirmed.[27]

The language of the Supreme Court in *Trop v. Dulles* indicates that it was well aware of the principle asserted by the petitioner in the *Jackson* case and, in fact, chose not to accept it.

> Whatever the arguments may be against capital punishment, both on moral grounds *and in terms of accomplishing the purposes of punishment* — and they are forceful — the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.[28]

The concurring opinion of Justice Brennan in the *Trop* case also reflects the Court's awareness of the retribution argument, in that it represents a substantial adherence to that principle.[29]

The Supreme Court, in *Rudolph v. Alabama*,[30] recently denied a petition for a writ of certiorari based upon the allegation that the death penalty for a conviction of rape constituted a cruel and unusual punishment. Justices Goldberg, Brennan and Douglas dissented from the denial. Among the questions they posed as meriting consideration in relation to the petition was the following:

> Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death . . . ; if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"?[31]

This quotation should at once be encouraging and fatal to the petitioner's appeal in the case under consideration. It is an indication that at least three members of the Supreme Court believe that mere retribution is not a constitutionally permissible motive for punishment. It also indicates that three members of the Court are willing to consider the possibility that the death penalty does not deter potential perpetrators of certain serious crimes. But the dissent in *Rudolph v. Alabama* itself mirrors the futility of the petitioner's request. In the first instance, of course, it was only a dissent. Secondly, it was a dissent from a denial of certiorari in a case imposing the death penalty for a crime which did not involve the taking of human life. Finally, the dissenters were able to point to statistics purporting to demonstrate a universal distaste for the death penalty when imposed subsequent to a conviction of rape.[32] Petitioner Jackson could make no similar claim.

The last statement points up once again the distinction between the *Trop* and *Robinson* cases regarding the test to be applied in cruel and unusual punishment

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22 200 Miss. 767, 28 So.2d 581 (1947).

23 *Id.* at 773, 28 So.2d at 582-83.

24 IND. CONST. art. 1, § 18 provides, "The penal code shall be founded on the principles of reformation, and not of vindictive justice."

25 ORE. CONST. art. 1, § 15 provides, "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."

26 Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941); McCutcheon v. State, 199 Ind. 247, 155 N.E. 544 (1927); Driskell v. State, 7 Ind. 338 (1855); State v. Finch, 54 Ore. 482, 103 Pac. 505 (1909).

27 Tuel v. Gladden, 379 P.2d 553, 555 (Ore. 1963).

28 Trop v. Dulles, 356 U.S. 86, 99 (1958) (Emphasis added).

29 *Id.* at 111-12.

30 375 U.S. 889 (1963).

31 *Id.* at 891.

32 *Id.* at 889. The dissenters noted a recent United Nations survey in which only five of sixty-five reporting countries indicated the retention of the death penalty for rape.

cases. The Court in *Trop v. Dulles* began with a particular proposition, namely, the use of denationalization as a punishment for desertion, and demonstrated that this particular proposition was itself universally distasteful. In *Robinson v. California,* however, the Court began with a general proposition, namely, the punishment of any disease as a crime, and found this general proposition universally distasteful. It then molded the punishment of the particular "crime," narcotics addiction, to its general proposition. Consistency with *Trop v. Dulles* would have demanded the original demonstrability of a universal distaste for the punishment of narcotics addiction itself — quite a different task.

It is one thing to say that the Supreme Court may well perceive a universal distaste for any punishment based solely on retribution. It is quite another thing to assert that the death penalty when inflicted upon a mentally abnormal sex offender for the commission of a rape-murder is itself universally distasteful. The former finding would at least afford the petitioner an opportunity to prove that the death penalty for a rape-murder by a mentally abnormal sex offender is based solely on vindictive motives. The further test then required could well be supplied by the principal case. The petitioner would have to show that no "rational relationship" existed between the particular punishment threatened and the permissible motives of punishment in general.

As has been noted, the Court in *Trop v. Dulles* indicated that the death penalty of itself cannot be attacked as a cruel and unusual punishment. The ray of hope for those sentenced to death by authority of valid statutes may well inhere in an eventual acceptance of the principle that punishment for the sake of punishment is unconstitutional, applied by way of the reasoning in the *Robinson* case. But by the same token, the denial of certiorari in *Rudolph v. Alabama* gives fair warning that the Supreme Court is not presently of a mind to review a challenge of the propriety of capital punishment under the reasoning of either the *Trop* or *Robinson* decisions. Perhaps the majority of the Court is willing, save only in specially difficult cases, to let the primary responsibility for bringing criminal penalties into harmony with "evolving standards of decency" rest in the legislatures. Or perhaps an attack on a lesser punishment by way of the principle that vengeance is not a permissible motive would more easily lend itself to the Court, because of the basic appeal of the proposition, where an attack on the greater penalty would be refused. Such a situation could only be explained by a reluctance on the part of the Supreme Court to become involved in one of the most recurrent and burning issues of the criminal law, that of the retention or abolition of capital punishment.

Frank J. Walz

AUTOMOBILES — DISCRETION OF ADMINISTRATIVE OFFICER — REVOCATION OF OPERATOR'S LICENSE FOR CRIMINAL RECORD UNRELATED TO USE OF A MOTOR VEHICLE. — Part V, Traffic and Motor Vehicle Regulations of the District of Columbia authorizes the Director of Motor Vehicles to revoke the operator's license of any person who, in his opinion, "is not physically, mentally, or *morally qualified to operate a motor vehicle in such a manner as not to jeopardize the safety of persons or property.* . . ." (Emphasis added). Petitioner's license was revoked on the grounds that he was "morally" unfit to operate a motor vehicle because of his prior criminal record and recent convictions for larceny and housebreaking. None of the crimes of which petitioner had been convicted involved the use of a motor vehicle. The District of Columbia Court of Appeals *held:* affirmed. The Director of Motor Vehicles did not exceed his discretionary power. The court said that a convicted felon whose past criminal record discloses such conduct as to manifest a deliberate disregard of the criminal law, and whose past and present conduct evinces no indication of rehabilitation, may properly have his license revoked as

being "morally unfit to operate a motor vehicle." *James v. Director of Motor Vehicles,* 193 A.2d 209 (D.C. Ct. App. 1963).

The regulation of motor vehicle operators is an exercise of the state's police power.[1] The primary purpose for the regulation of operators of motor vehicles is for safety on the highways — to insure a minimum of competence and skill on the part of persons driving vehicles.[2] Thus, most states require a practical examination of a driver's ability to control a vehicle and specifically forbid issuance of a license to persons under a minimum age, to drug addicts, to habitual drunks, and to those affected with mental disease.[3] A majority of states also provide for mandatory revocation of a licence when the holder is convicted of certain offenses which indicate a disregard for public safety, such as manslaugher resulting from the use of an automobile or driving a motor vehicle while under the influence of narcotics.[4]

In addition to the various regulations relating to a driver's competence, most licensing statutes also contain provisions for withholding driving privileges from persons who use automobiles in the perpetration of serious crimes. These provisions are usually in the form of a statutory requirement of mandatory revocation of the operator's license where a motor vehicle was used in the commission of a felony.[5]

Very few states have motor vehicle regulations which specifically forbid issuance or authorize revocation of the operator's license of a person convicted of crimes which are unrelated to the use of a motor vehicle. Michigan prohibits issuance of a license to any person who is an "habitual criminal," but apparently qualifies this by stating that two felony convictions in which a motor vehicle was used shall be evidence that such a person is an habitual criminal.[6] One state, New York, unequivocally provides that the Commissioner of Motor Vehicles may revoke or suspend a license for the "conviction of the holder at any time of a felony."[7] The New York statute also requires mandatory revocation of the license of a person convicted "pursuant to twenty three hundred eighty five Title eighteen U.S.C.A. of the crime of advocating the overthrow of government. . . ."[8] In addition to these few express provisions concerning revocation for crimes unrelated to the use of a motor vehicle, a number of statutes include a broad "catchall" delegation of discretion to the motor vehicle license administrator to revoke or refuse to issue a license to persons he believes are "unfit or unsafe,"[9] or not a "proper person,"[10] or that the licensee's operation of a motor vehicle "would be inimical to public safety or welfare."[11] Except for a few decisions in which such broad provisions were held unconstitutional because of inadequate standards,[12] there appear to be few decisions which expressly circumscribe the motor vehicle commissioner's authority under these broad catchall provisions. Nevertheless, it would seem that the most reasonable interpretation of such provisions in light of the statutory context, the primary function of a motor vehicle bureau, and perhaps even the title of the administrative bureau, *e.g.,* The Department of Public Safety,[13] is that the

1 Ragland v. Wallace, 80 Ohio App. 210, 70 N.E.2d 118 (1946); South Carolina State Highway Dept. v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955).
2 Mundy v. Pirie-Slaughter Motor Co., 146 Tex.314, 206 S.W.2d 587 (1947).
3 *E.g.,* COLO. REV. STAT. ANN. § 13-3-3 (Supp. 1961).
4 *E.g.,* CAL. VEHICLE CODE § 13350 (West Supp., Dec. 1963).
5 *E.g.,* FLA. STAT. ANN. § 322.26 (1958).
6 MICH. STAT. ANN. § 9.2003 (Supp. 1961).
7 N.Y. VEHICLE & TRAFFIC LAW § 510.
8 N.Y. VEHICLE & TRAFFIC LAW § 510 (McKinney Supp., Jan. 1963).
9 MD. ANN. CODE art. 66½, § 105 (1957).
10 ME. REV. STAT. ANN. ch. 22, § 60 (Supp. 1963).
11 ARIZ. REV. STAT. ANN. § 28-413 (1956).
12 South Carolina State Highway Dept. v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955); Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930). Here a city ordinance was held unconstitutional.
13 OKLA. STAT. ANN. tit. 47 § 2-106 (1962).

director's authority is limited to considerations of highway safety. Thus, in *State v. Barber* a Connecticut court said:

> The commissioner's authority extends to the suspension of the right to operate of those whose conduct indicates to him a propensity which, if continued, would menace the safety of others, as well as his own, in the use of public highways.[14]

However, this presumption is not shared by the New York courts which have held that the commissioner can consider qualifications other than capacity to operate a motor vehicle.[15]

Except for New York and now the District of Columbia, the general rule seems to be that the discretion of the administrative officers who have charge of licensing motor vehicle operators is limited to considerations of competency and prior use of a motor vehicle in crime.

The ostensible purpose for the revocation of the license in *James v. Director of Motor Vehicles* was that "the danger exists that he will make such unlawful use of an automobile as will 'jeopardize the safety of persons or property.' "[16] This rationale was more explicitly set forth in an early Rhode Island case, where in interpreting "unfit or improper person" in a former version of the statute, the state supreme court said:

> We think that a thief should not be permitted to operate an automobile; for as long as his character remains unchanged the danger of his making unlawful use of the automobile is such that the privilege should be denied him.[17]

If the purpose of revoking operator's licenses of persons convicted of crimes unrelated to the use of a motor vehicle, and even those who have used motor vehicles in the commission of crimes, is to prevent their future unlawful use of a vehicle, it would seem that this purpose is largely wishful thinking. It would be naive to expect that the mere lack of a driver's license would deter a criminal from using a motor vehicle, if one were needed, in perpetrating a crime. Perhaps an unarticulated reason for such a policy of withholding operators' licenses is a feeling that these persons have demonstrated a propensity toward evil, and since the right to drive is not an inherent right, these persons need not be afforded a convenience which can so easily be used to harm the community. In any case the practical effect of denying operators' licenses to certain persons with criminal backgrounds, either related or unrelated to the use of motor vehicles, is that these persons must choose between carrying on their business — legitimate and otherwise — without the convenience of an automobile, or using a vehicle and providing the police with a ready excuse for arrest and possibly a prison sentence. Thus, a policy of withholding operators' licenses from persons with criminal backgrounds, and perhaps from those with "criminal reputations," may make criminal activities more difficult, or at least more inconvenient, and provide the police with an additional weapon to use in combating crime. This legal harassment of criminals as an indirect means of controlling crime could be extended to other areas, *e.g.*, the withholding of telephone service.[18]

On the other hand, a policy of disfranchisement of the criminal element of operators' licenses may have serious drawbacks. Possession of a driver's license is often a prerequisite for a job and consequently it is quite possible that lack of an operator's license could make a normal life much more difficult for those trying to overcome a criminal background. The merit, then, of such a policy is at best questionable.

The most serious problem in *James v. Director of Motor Vehicles,* however,

14 24 Conn. Supp. 346, 190 A.2d 497, 500 (Cir. Ct. App. Div. 1962).
15 Bernola v. Fletcher, 280 App. Div. 870, 114 N.Y.S.2d 152 (1952).
16 193 A.2d 209, 212 (D.C. Ct. App. 1963).
17 Glass v. State Board of Public Roads, 44 R.I. 54, 115 Atl. 244, 246 (1921).
18 Taglianetti v. New Eng. Tel. & Tel. Co., 81 R.I. 351, 103 A.2d 67 (1954). The telephone company refused to restore service because petitioner had been using the telephones for illegal bookmaking and had attached unauthorized extension cords to his telephones.

is not the substantive result, the withholding of driving privileges on the basis of a criminal record, but rather the method by which this was accomplished. The revocation was based on an administrative rule which authorized an administrative officer (Director of Motor Vehicles) to suspend or revoke the license of any person who, he believes, is not "morally qualified to operate a motor vehicle in such a manner as not to jeopardize the safety of persons or property."[19] The court noted that the rule itself was not attacked as being unreasonable or being unduly vague, but rather that petitioner claimed that the rule was improperly applied in his case. Very likely the order itself was not challenged because these same words ("morally qualified. . . .") were used by Congress in the act which authorized the Commissioners of the District of Columbia to exercise control over traffic in the Capital. The act empowered the Commissioners to issue licenses to persons who, in the opinion of the Commissioners or their agent, are "mentally, morally, and physically qualified to operate a motor vehicle in such a manner as not to jeopardize the safety of individuals or property"[20] and further, that the Commissioners may revoke an operator's license "for any cause which they or their agent deem sufficient."[21]

Such broad delegations of authority have sometimes been successfully challenged. In *South Carolina State Highway Department v. Harbin,*[22] the South Carolina Supreme Court reviewed a similar delegation of power by the state legislature to the State Highway Department.[23] It was contended that the discretion of the Highway Department must be viewed within the act as a whole and consequently, the discretion of the Department could only be exercised for a cause having to do with public safety. The court refused to read such a limitation into the act and held the act void as lacking a standard and, therefore, an unconstitutional delegation of legislative power. Nevertheless, in *LaForest v. Board of Commissioners,*[24] where the Act was challenged on the grounds that it vested legislative power and unqualified discretion in administrative officers, the Court of Appeals of the District of Columbia upheld the Act. The court read the delegation provisions in light of another provision which authorized the Commissioners to make "usual and reasonable traffic rules and regulations."[25] The court held that the Commissioners' power could not be arbitrarily exercised and that revocation was authorized only where there was a breach of the "usual and reasonable regulations made *concerning the control of traffic.*"[26] Thus the court in the first instance (*LaForest v. Board of Commissioners*) upheld the delegation of power to the Commissioners, presumably by reading into the statute a guide for the discretion of the administrators, *i.e.,* traffic safety; then, in *James v. Director of Motor Vehicles* ignored the standard and interpreted "morally qualified" to include possible future use of a motor vehicle in crime. With the removal of the standard of "traffic safety," the scope of "morally qualified" would seem to be left to conjecture.

The New York statute, permitting revocation of a license of a felon at any time,[27] clearly enlarges the discretion of the Commissioner of Motor Vehicles

19 Commissioner's Order No. 296, 973/ 1-371A, Sect. 5(a), as amended, Part V, Traffic & Motor Vehicle Regulations of the District of Columbia.
20 D.C. CODE ANN. § 40-301 (1961).
21 D.C. CODE ANN. § 40-302 (1961).
22 226 S.C. 585, 86 S.E.2d 466 (1955).
23 S.C. ACTS 1930, XXVI Stats. 1057 provides:
For cause satisfactory to the highway department, said department is hereby authorized and empowered to suspend or cancel or revoke the driver's license of any person for a period of not more than one year.
24 92 F.2d 547 (D.C. Cir. 1937).
25 D.C. CODE § 40-603 (1961) (Emphasis added).
26 LaForest v. Board of Commissioners, 92 F.2d 547, 549 (1937).
27 N.Y. VEHICLE & TRAFFIC LAW § 510.

beyond considerations only of traffic safety. Yet, the effect of this provision upon the Commissioner's discretion in withholding a license on grounds of "fitness"[28] is not clear. In *Davis v. Hults*[29] the New York Supreme Court held that the commissioner exceeded his discretion when he withheld the license of a person on the grounds that he had been convicted by a federal court of being a communist. The court said that establishing a policy of denying operators' licenses to communists was a function of the legislature and not of the Commissioner of Motor Vehicles. In *Funaro v. Hults*,[30] a New York court held that the Commissioner exceeded his discretion when he refused to issue a license on the basis of the petitioner's five misdemeanor convictions. The Appellate Division, however, reversed,[31] holding that the petitioner's criminal record *and* his failure to give complete answers on the renewal application could be properly considered by the Commissioner. A similar case[32] upheld the Commissioner's refusal to issue a license on the grounds that the applicant had a criminal reputation, that is, for bookmaking, *and* that he had previous convictions for speeding and reckless driving. Thus in New York it is unclear whether misdemeanor convictions or a "criminal reputation" are alone sufficient for withholding an operator's license. The state of the law in the District of Columbia after *James v. Director of Motor Vehicles* is even more ambiguous.

The general and often quoted rule is that an ordinance or statute which vests discretion in an administrative official without fixing a standard to guide him is an unconstitutional delegation of legislative power.[33] The underlying principle for such a rule is that under our system the rights of men are to be determined by the law itself and not by the let-or-leave of an administrative official or bureau.[34] On the other hand, it has also been recognized that the exigencies of modern government have increasingly dictated the use of general standards rather than minutely detailed standards in regulatory enactments under the police power. This is especially true in an area like zoning where courts have upheld such standards as "subserve the general welfare of the neighborhood and city,"[35] or where "the public convenience and welfare will be substantially served."[36] The result in these areas seems to be that in fact the standards develop on an almost *ad hoc* basis.

It is submitted that the law of revocation of operators' licenses is not one which must or should be developed in such an *ad hoc* manner. The principles of constitutional government militate against empowering an administrative officer to decide that it is not "good for society" to permit a particular person or class of persons to operate motor vehicles. There is no reason why the discretion of the director of motor vehicles cannot be restricted by an express statement of policy indicating toward what end his discretion is to be be used, namely, traffic safety. If the director of motor vehicles is to have the authority to promote other social policies, these should be stated explicitly, as should the factors which he may or should consider, in the enabling act, or at least in the administrative rule. If communists, felons, bookies, or other such persons are to be denied operators' licenses, the law should so indicate and it should be applied to all with some uniformity.

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28 N.Y. VEHICLE & TRAFFIC LAW § 501.
29 24 Misc.2d 954, 204 N.Y.S.2d 865 (Sup. Ct. 1960).
30 210 N.Y.S.2d 405 (Sup. Ct. 1960).
31 Funaro v. Hults, 16 App. Div. 2d 654, 226 N.Y.S.2d 618 (1962).
32 Bernola v. Fletcher, 280 App. Div. 870, 114 N.Y.S.2d 152 (1952).
33 Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956); South Carolina State Highway Dept. v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955).
34 Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930).
35 Gorieb v. Fox, 145 Va. 554, 134 S.E. 914, 915 (1926), *aff'd* 274 U.S. 603 (1927).
36 Carson v. Board of Appeals, 321 Mass. 649, 75 N.E.2d 116, 117 (1947).