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Recent Decisions

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RECENT DECISIONS

ADMINISTRATIVE LAW — CIVIL RIGHTS COMMISSION — PROCEDURAL SAFEGUARDS OF WITNESSES BEFORE INVESTIGATIVE BODIES REQUIRE CONFRONTATION AND CROSS-EXAMINATION. — The Civil Rights Commission scheduled a hearing to investigate sworn complaints that Negroes were being denied the right to vote in certain Louisiana parishes. The Commission subpoenaed the voting registrars of several parishes to appear before it and to produce their voting registration records for its inspection. Plaintiffs, voting registrars, refused to obey the subpoenas and brought suit to stay their effectiveness and to enjoin the Commission from conducting its proposed hearing. *Held:* injunction granted. Even though the creation of the Commission itself was not unconstitutional, as the plaintiffs had contended, Congress did not authorize the Commission to adopt rules of procedure which would prevent witnesses before it from confronting and cross-examining those who had complained against them. *Larche v. Hannah,* 177 F. Supp. 816 (W. D. La. 1959), *leave granted to argue certiorari, jurisdiction, and the merits,* 361 U. S. 910 (1959), *argued* January 19, 1960, 28 U.S.L. WEEK 3221.

The Administrative Procedure Act[1] grants witnesses before federal agencies certain procedural rights.[2] As the court points out in the principal case, however, this act applies only to agencies which are engaged in rule-making or adjudication;[3] since the Civil Rights Commission does neither, it is not subject to the procedural provisions of the APA.[4]

What, then, does the Civil Rights Commission do? Most likely, the proceedings of the Commission, including the hearing enjoined in *Larche v. Hannah,* can best be described as "investigations."

Earlier cases have distinguished between "investigation" and the more formal kinds of agency activity.[5] An investigation has its own peculiar characteristics. For example, it is held to obtain information, not to take action against someone;[6] there are no parties in opposition;[7] no rights of parties are finally determined;[8] and it is preliminary to the filing of any criminal charges.[9] Since the proceedings of the Civil Rights Commission fall within this description, it is safe to say that they are "investigations" within the meaning attributed to that term by present judicial opinion.[10] The APA also seems to recognize that there is a third form of agency activity

1 60 Stat. 237-44 (1946), 5 U.S.C. §§ 1001-11 (1958). The Administrative Procedure Act will henceforth be referred to as the APA.

2 See, *e.g.,* 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958), which grants parties to disputes the right to present their cases, to submit rebuttal evidence, and to "conduct such cross-examination as may be required for a full and true disclosure of the facts."

3 *I.e.,* agencies which are exercising quasi-legislative or quasi-judicial powers. For purposes of definition we may say that rule-making involves prescribing rules to govern future action; adjudication involves determining the present legal status of definite parties with regard to past action. 1 DAVIS, ADMINISTRATIVE LAW TREATISE, § 5.01, at 286-87 (1958). For a more extended discussion of these distinctions see Note, 35 NOTRE DAME LAW. 77 (1959).

4 Larche v. Hannah, 177 F. Supp. 816, 819 n.3 (W. D. La. 1959).

5 Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944), and *In re* SEC, 84 F.2d 316 (2d Cir. 1936), *rev'd as moot sub nom.,* Bracken v. SEC, 299 U. S. 504 (1936), distinguish between the "investigation" and the "hearing." They describe a "hearing" as a formal, trial-type procedure, with named adversary parties and issues of law and fact to be decided.

6 Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944).

7 *In re* SEC, 84 F.2d 316 (2d Cir. 1936), *rev'd as moot sub nom.,* Bracken v. SEC, 299 U. S. 504 (1936).

8 Torras v. Stradley, 103 F. Supp. 737 (N. D. Ga. 1951).

9 *In re* Groban, 352 U. S. 330 (1957).

10 See cases cited, notes 5-9 *supra.*

distinct from rule-making or adjudication. It exempts from its procedural requirements such matters as are subject to a later trial de novo.[11]

Since the *Larche* opinion speaks in terms of witnesses before the Commission being "deprived" of "rights," [12] particularly those of confronting and cross-examining their "accusers," it is of interest to examine just what rights — if any — inhere in witnesses before investigative bodies.

With but few exceptions the courts liken the investigative body to a grand jury.[13] Notably, witnesses before investigative bodies are denied the right to counsel,[14] to a transcript of the proceedings,[15] to a public hearing,[16] and to have a personal stenographer present.[17] The right of an individual witness before such bodies to cross-examine adverse witnesses seems never to have been considered;[18] nor has confrontation. One would think, however, that in a proceeding wherein witnesses are denied such basic rights as counsel, a transcript, and a public hearing, it would be inconsistent with the nature of the activity to assert that they have a right to confront or to cross-examine adverse witnesses. And, if we may trust the grand jury analogy used in the cases, the fact that witnesses before grand juries are traditionally denied such rights should settle the question.

Witnesses before investigative tribunals are accorded the privilege against self-incrimination, where the state constitution provides for it,[19] or where the case involves a substantial possibility of incrimination under a federal statute.[20] In the light of the foregoing discussion, this privilege would seem to be the only protection these witnesses have.

Thus it would seem that the plaintiffs in *Larche v. Hannah* did not possess the procedural rights they claimed the Civil Rights Commission would deny to them. Hence, any discussion of whether or not the Commission had congressional authority to "deny" these "rights" is moot. Even if we grant for the purpose of argument that the Commission did need such congressional authority, the facts of the case show that it possessed it.

The majority in *Larche* based its reasoning largely upon the opinion of the Supreme Court in *Greene v. McElroy*.[21] In that case, Greene, an employee of a firm of government contractors, lost his job because a Defense Department loyalty board revoked his security clearance. This result followed a hearing at which the testimony of secret informers was introduced to show Greene guilty of highly questionable contacts with Communists and Russian Embassy officials. Greene was given no opportunity to confront or cross-examine his hidden accusers. The Court held that, "in the absence of explicit authorization from . . . the President or Congress [the Defense Department was] not empowered to deprive [Greene] of his job in a pro-

11 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958).

12 177 F. Supp. 816 *passim* (1959).

13 Anonymous Nos. 6 and 7 v. Baker, 360 U. S. 287 (1959); *In re* Groban, 352 U. S. 330 (1957); Genecov v. Federal Petroleum Board, 146 F.2d 596 (5th Cir. 1944), *cert. denied,* 324 U. S. 865 (1945); Wooley v. United States, 97 F.2d 258 (9th Cir. 1938), *cert. denied,* 305 U. S. 614 (1948).

14 Anonymous Nos. 6 and 7 v. Baker, 360 U. S. 287 (1959); *In re* Groban, 352 U. S. 330 (1957).

15 Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944); *In re* SEC, 84 F.2d 316 (2d Cir. 1936), *rev'd as moot sub nom.,* Bracken v. SEC, 299 U. S. 504 (1936).

16 Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944).

17 Torras v. Stradley, 103 F. Supp. 737 (N. D. Ga. 1951).

18 In one case a *corporate* party to a Tariff Commission hearing was not allowed to cross-examine other parties on the grounds that the Tariff Commission is analogous to the Congressional Committees which formerly heard testimony on tariff rates, and which did not allow cross-examination. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 (1933).

19 *In re* Groban, 352 U. S. 330, 336 (1957) (concurring opinion).

20 United States v. Goodner, 35 F. Supp. 286 (D. Colo. 1940); Graham v. United States, 99 F.2d 746 (9th Cir. 1938).

21 360 U. S. 474 (1959).

ceeding in which he was not afforded the safeguards of confrontation and cross-examination." [22]

The *Greene* case differs plainly from *Larche v. Hannah,* since Greene's hearing was obviously not a mere investigative proceeding, but rather one in which his rights were being determined. The purpose of the hearing was to take action on his *specific* case, not just to obtain information. The safeguards to which Greene might have been entitled in such a proceeding do not necessarily apply to witnesses in an investigative proceeding.

Even ignoring this obvious distinction between *Greene* and *Larche,* however, one can see that the Government's argument in *Greene* that it had been authorized to use the procedures actually utilized in that case was very weak. The Defense Department based its claim of authorization on three statutes and two executive orders, none of which makes any mention of rules of procedure at loyalty board hearings.[23] On the other hand, the act establishing the Civil Rights Commission prescribes definite, detailed rules of procedure for commission hearings.[24] It is not coincidental that these rules are identical with the "House Fair Play Rules" [25] which govern investigations by committees of the House of Representatives — and which do not provide for either cross-examination or confrontation. It is evident that these are the rules Congress wished the Civil Rights Commission to follow; the rules adopted by the Commission to supplement the statute are not inconsistent therewith.[26]

The *Larche* court cites Executive Order No. 9835,[27] also cited by Mr. Justice Clark in his dissent to *Greene v. McElroy,* to show that the Government's case for authorization of the procedures used in *Greene* was even clearer than in *Larche.* The *Greene* majority opinion, however, does not even mention this order, probably because it was revoked by Executive Order No. 10450 [28] prior to the hearing Greene complained of.

Thus we see that in *Larche v. Hannah* the Civil Rights Commission was enjoined from denying to witnesses "rights" which it appears they did not have in the first place. It was enjoined from doing so because it was not authorized by Congress to "deny" these "rights." Yet any clear reading of the statute involved shows clearly that Congress did so authorize the Commission.

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22 *Id.* at 508.

23 The statutes and Executive Orders involved were the following: 10 U.S.C. §§ 2304, 2306 (1958), which establish procedures for making contracts to supply the Armed Forces; 18 U.S.C. § 798 (1958), which makes it criminal to divulge secret information; 64 Stat. 991 (1950), 50 U.S.C. § 783(b) (1958), which makes it criminal for government employees to divulge such information; Exec. Order No. 10290, 16 Fed. Reg. 9795 (1951) and Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953), both of which establish criteria by which security data may be classified as "secret," "confidential," etc.

24 See 71 Stat. 634 (1957), 42 U.S.C. § 1975a (a)-(i) (1958).

25 See 101 CONG. REC. 3569 (1955).

26 Although no case has arisen on this point, Circuit Judge Wisdom in his dissent to *Larche v. Hannah* notes that the Commission, in supplementing the statutory rule of procedure granting witnesses the right to counsel "for the purpose of advising them concerning their constitutional rights" quite properly read it to mean that counsel were *not* permitted to cross-examine. 177 F. Supp. 816, 829 (1959).

27 12 Fed. Reg. 1935 (1947). The order provided that names of confidential informants might be withheld from federal *agencies* which requested information about their personnel; even had the rule been in effect at the time of the Greene hearing, it would not necessarily authorize the withholding of the names of the informants from *individual* "defendants."

28 18 Fed. Reg. 2489 (1953).

CONFLICT OF LAWS — PUBLIC POLICY — DISCRIMINATION IN EMPLOYMENT CONTRARY TO POLICY OF FORUM DISALLOWED. — The American Jewish Congress charged that the Arabian-American Oil Company[1] had violated subdivisions (1)(a) and (1)(c) of section 296 of the Executive Law of New York.[2] By a vote of the State Commission Against Discrimination Aramco would be permitted to inquire into the religion of job applicants as a "bona fide occupational qualification" and would be authorized to have applicants fill out a visa to Saudi Arabia containing inquiries as to the applicant's religion. The King of Saudi Arabia prohibits the employment of Jews in that country and employment by Aramco includes possible service in Saudi Arabia. Aramco had contended that interference with the arrangements between Aramco and Saudi Arabia in connection with the employment of Jewish individuals would jeopardize American foreign policy by creating friction in relations with the King of Saudi Arabia. In order to substantiate this position, Aramco relied upon informal statements of lower officials in the United States State Department. On application by the American Jewish Congress for an order annulling the determination of the Commission, *held:* order granted. Aramco "cannot defy the declared public policy of New York State and violate its statute within New York State, no matter what the King of Saudi Arabia says."[3] *American Jewish Congress v. Carter,* 19 Misc. 205, 190 N.Y.S.2d 218 (Sup. Ct. 1959).

The Commission Against Discrimination was created by the legislature of New York to effectuate a public policy against discrimination in employment based on race, creed, color or national origin.[4] It is composed of five members appointed by the governor with the advice and consent of the senate and is empowered to receive, investigate and pass upon complaints alleging violations under Article 15 of the Executive Law.[5]

In the present case there was not only the conflict between the policy of New York prohibiting such discrimination in employment and the policy of Saudi Arabia prohibiting the employment of Jews, but there was also to be considered the question of possible unfavorable repercussions on the foreign policy of the United States as regards Saudi Arabia. When there arises a question as to which of several competing policy considerations is to prevail, the courts are presented with a difficult choice.

Generally a state will not enforce foreign law or rights acquired under such law if to do so would violate the laws or the public policy of the state wherein enforcement is sought.[6] Courts will refuse to enforce a foreign right if such en-

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1 Hereafter referred to as Aramco.

2 N.Y. EXECUTIVE LAW § 296 (1)(a), (c):

> It shall be unlawful discriminatory practice: (a) For an employer, because of the age, race, creed, color or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . . (c) For any employer or employment agency . . . to use any form of application for employment or to make inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification.

3 American Jewish Congress v. Carter, 19 Misc.2d 205, 190 N.Y.S.2d 218, 220 (1959).

4 N.Y. EXECUTIVE LAW § 290. For a discussion of the "inquiry" aspect of § 296(c) see Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954) and the annotation, 44 A.L.R.2d 1130 (1954).

5 N.Y. EXECUTIVE LAW §§ 293, 295.

6 Home Insurance Co. v. Dick, 281 U.S. 397, 410 (1930); Perutz v. Bohemian Discount Bank, 304 N.Y. 533, 110 N.E.2d 6, 7 (1953); 11 AM. JUR. *Conflict of Laws* § 6 (1938); RESTATEMENT, CONFLICT OF LAWS § 612 (1934); See also cases cited in RESTATEMENT, CONFLICT OF LAWS, NEW YORK ANNOTATIONS § 612 (1935).

forcement would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[7] Even the contracting parties cannot effect by contract a disregard for the public policy of a state.[8] Where two parties, as here, enter into a contract (or negotiate) within the state and the contract is to be performed elsewhere, the state may constitutionally control the terms and obligations of the contract.[9]

On the basis of this general principle it is not hard to justify the decision in the present case. If Aramco had been seeking in the courts of New York a recognition of the force of Saudi Arabian law in Saudi Arabia, then such employment requirements would be upheld regardless of the policy of New York.[10] But Aramco is seeking recognition of its rights in New York. The fact that Saudi Arabia prohibits Jews from working in that country should not override the express policy of the State of New York prohibiting such discrimination in regard to employment.

The question presented in regard to the possible repercussions on the foreign policy of the United States by the decision in the present case is worthy of further discussion. In respect to foreign relations generally, state lines disappear.[11] The external powers of the United States are to be exercised without regard to state law or policies.[12] The federal government has exclusive control over foreign relations.[13] Were there a valid treaty or even a valid executive agreement involved here there would be no question but that New York policy would be ignored.

In the present case, it is true, there was no such treaty or agreement. However, there were "informal statements of State Department underlings,"[14] cautioning against the possible adverse effect upon American foreign policy. In this context it is relevant to inquire whether or not a treaty or agreement, if there were one, would have been valid.

The Supreme Court of the United States has said several times that the only limits on the exercise of the treaty power or in the field of international relations are the provisions of the Constitution itself.[15] No treaty has ever been held to be unconstitutional.[16] In *Oetjen* v. *Central Leather Co.*[17] it was said that the propriety of what may be done in the exercise of foreign relations is not a subject of judicial inquiry. But this all-inclusive statement would seem limited, by the very authorities cited to support it, to political questions.[18] A treaty to the effect that Aramco (or Saudi Arabia) could discriminate against Jews in the United States would probably be held unconstitutional.[19]

With this in mind should statements from lesser State Department officials in this regard be made the basis for upsetting the established policy of New York? It would seem that the policy of New York would be controlling, at least in the absence of some treaty or agreement showing the desire of the federal government to override that policy. The policy of the United States to keep on friendly terms

7 Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).
8 The Kensington, 183 U.S. 263, 269 (1902).
9 Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 540-41 (1935).
10 Kleve v. Basler Lebens - Versicherungs - Gesselschaft in Basel, 182 Misc. 776, 782, 45 N.Y.S.2d 882, 887 (1943).
11 United States v. Belmont, 301 U.S. 324, 331 (1937).
12 *Ibid.*
13 United States v. Pink, 315 U.S. 203, 233 (1942).
14 American Jewish Congress v. Carter, 19 Misc.2d 205, 190 N.Y.S.2d 218, 223 (1959).
15 Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).
16 See Corwin, *Annotated Constitution of the United States,* S. Doc. No. 170, 82d Cong., 2 Sess. 428 (1953); Note, *The Treaty Power — Its Scope and Limitations Under the Constitution,* 19 GEO. WASH. L. REV. 422 (1951).
17 246 U.S. 297, 302 (1918).
18 Foster v. Neilson, 27 U.S. (2 Pet.) 253, 309 (1829); *In re* Cooper, 143 U.S. 472, 503 (1892).
19 Corwin, *supra* note 16, at 428-31: "No doubt there are specific limitations in the Constitution in favor of private rights which 'go to the roots' of all power."

with Saudi Arabia is laudable but it should take more than a mere off-hand and informal statement of such policy to override the power of a state.

Another interesting policy that could be considered here is the declaration of Articles 55 and 56 of the United Nations Charter:

> . . . . the United Nations shall promote: . . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.
> All members pledge themselves to take joint and separate action in connection with the organization for the achievement of the purposes set forth in Article 55.[20]

Several state courts have been faced with the argument that this charter, as a treaty, prohibits certain discriminatory practices.

The Supreme Court of California has held that the charter is a treaty, but since it is not self-executing it does not purport to impose legal obligations on member nations or create rights in private persons unless the several members so legislate.[21] The Supreme Court of Michigan said that the pronouncements of the charter "are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples." [22] In *Rice v. Sioux City Memorial Park Cemetery*[23] the Iowa Supreme Court held that the provisions of the charter had no bearing on a case in which the plaintiff had sued for breach of contract after the Cemetery Association refused to bury her husband (11/16 Indian) after she had purchased a lot. There was a clause in the purchase contract that burial privileges accrued only to Caucasians. In an unusual series of procedural steps the Supreme Court of the United States first granted certiorari and affirmed by an equally divided vote,[24] then dismissed the writ of certiorari as improvidently granted.[25] However, Mr. Justice Frankfurter in the opinion stated:

> The Iowa courts dismissed summarily the claim that some of the general and hortatory language of this Treaty, which so far as the United States is concerned is itself an exercise of the treaty-making power under the Constitution, constituted a limitation on the rights of the States and of persons otherwise reserved to them under the Constitution. It is a redundancy to add that there is, of course, no basis for inference that the division of this Court reflected any diversity of opinion on this question.[26]

Despite the unfavorable reaction to attempts to enforce the provisions of the charter as a treaty, these provisions would seem to present another policy consideration to buttress the determination by the New York court in the present case, even conceding the validity of the holding that it is not a self-executing treaty.

In terms of policy considerations then, Aramco would appear to be in no position to contest the decision. It might be argued that the effect of the decision

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20 U. N. CHARTER arts. 55-6. Saudi Arabia ratified the Charter on October 18, 1945. 59 Stat. 1214 (1945).

21 Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952), *affirming* 217 P.2d 481, *rehearing denied*, 218 P.2d 595 (1950). The lower court held that the charter was a treaty and therefore the Alien Land Law, being in conflict with the treaty, was invalid. The California Supreme Court said that the charter did not govern the case but affirmed the decision holding that the Alien Land Law violated the fourteenth amendment.

22 Sipes v. McGhee, 316 Mich. 614, 628, 25 N.W.2d 638, 644 (1947), *rev'd*, 334 U.S. 1 (1948). The Michigan Supreme Court held that it was a treaty but that it was inapplicable to the contractual rights of citizens of the United States suing in state courts. The United States Supreme Court never mentioned the Charter in its opinion which is better known as Shelley v. Kramer.

23 245 Iowa 147, 60 N.W.2d 110, 116-17 (1953).

24 348 U.S. 880 (1954).

25 349 U.S. 70 (1955). The writ was dismissed after the Supreme Court was informed that Iowa had passed a statute which would bar the question presented to the Court here from arising again in Iowa.

26 349 U.S. 70, 73 (1955).

would be nullified if Aramco made the obtaining of a visa to Saudi Arabia a condition precedent to employment when it appeared likely that the employee would be required to serve in that country. Doubtless the New York courts could not require the Saudi Arabian government to grant visas only in accord with New York policy. However, it would seem that the courts would look to the realities of the requirement, and if it was an obvious attempt to circumvent the holding of the instant case, such a requirement would be disallowed.

William J. Luff, Jr.

CRIMINAL LAW — SEARCH AND SEIZURE — CONSPIRACY TO OBSTRUCT JUSTICE AND TO PERJURE — THE APALACHIN TRIAL — On November 14, 1957, approximately 63 men met at the Apalachin, New York, home of Joseph Barbara to conduct what newspaper accounts surmised to be a "crime convention." [1] Believing a criminal conspiracy to be in progress, New York state police set up a check-point outside the Barbara estate and questioned the twenty defendants as they left. The defendants claimed that their presence was merely coincidental, and not by any prearranged plan.[2] When subsequently summoned before the federal grand jury of the Southern District of New York, they reaffirmed their "coincidence" explanation under oath, in the face of evidence that all arrived at the estate at approximately the same time, and that they had come from points as distant as Cuba and California. The grand jury returned an indictment charging the twenty defendants with a conspiracy[3] to give false, misleading, and evasive testimony before a federal grand jury,[4] and thereby to obstruct the orderly administration of justice.[5] *Held:* guilty. *United States v. Bonanno,* 177 F. Supp. 106 (S.D.N.Y. 1959); 178 F. Supp. 62 (S.D.N.Y. 1959); N.Y.L.J. (Feb. 5, 1960).

The Supreme Court, in *Haas v. Henckel,*[6] established the range of the Federal Conspiracy Statute as "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of the Government." Notwithstanding a later apparent restriction[7] of the *Haas* view, the statute has been traditionally interpreted as making the concealment or misstatement of information before a government agency criminal conduct.[8]

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1 New York Times, Dec. 19, 1959, p. 1, col. 1; Washington Post, Dec. 19, 1959, p. 1, col. 1.

2 For example: Defendant Cannone claimed to be at the estate to inquire into the purchase of beer equipment. Instructions to the jury, p. 51; defendants Castellano and Gambino claimed that they came to find out if Barbara's recent heart operation was successful, *id.* at 55; defendant Civello claimed he was to attend a barbecue and dice game at the estate, *id.* at 59; defendants DeSimone and Scozzari claimed their presence was for social reasons, *id.* at 63; defendant Larasso claimed to be in the area to buy real estate, *id.* at 71.

3 If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1954).

4 Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury. . . .

18 U.S.C. § 1621 (1954).

5 18 U.S.C. § 1503 (1954) makes it an offense to corruptly influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice.

6 216 U. S. 462, 479 (1910).

7 Hammerschmidt v. United States, 265 U. S. 182 (1924).

8 Ingram v. United States, 360 U. S. 672 (1959) (conspiracy to conceal income tax information); Fiswick v. United States, 329 U. S. 211 (1946) (filing of false information under the Alien Registration Act); United States v. Morehead, 243 U. S. 607 (1917) (conspiracy to commit subornation of perjury in filing of soldier's declaratory statements under the Home-

Conspiracy convictions have been sustained even where the objective of the agreement was not a crime at the inception of the conspiracy,[9] and where the objective was not a violation of a federal statute.[10] Perhaps the broadest application has been to cases where the objective alleged was not a crime, but a violation of a federal statute prescribing only civil redress for its breach.[11]

The conspiracy conviction in *Bonanno,* although heralded by some as a "landmark in the Government's fight against organized crime," [12] and assailed by others as an unfortunately broad interpretation of the conspiracy doctrine,[13] is not without precedent.[14] In *Outlaw v. United States,*[15] the Fifth Circuit affirmed a conviction for conspiracy to "impede justice" and "defraud the United States by defeating a lawful government function." The defendant was convicted for conspiracy to bribe a witness in a criminal case to commit perjury. It can hardly be claimed that a conspiracy to actually commit perjury is of greater breadth.

Although the conspiracy conviction in *Bonanno* is based upon sound historical authority, it must be observed that acceptance of it will provide an effective tool for government prosecutors who are unable to accumulate evidence to convict a suspect of the crime of which he was originally suspected, and might prove to be a dangerous weapon in the hands of an overly zealous prosecuting attorney. In this regard, it is instructive to note some of the background of the instant case.

When the police originally made their investigation of the meeting of November 14, 1957, they did so on suspicion of a possible liquor-violation conspiracy.[16] It was this suspicion, based upon prior convictions of several of the defendants,[17] that gave rise to the grand jury investigation of the meeting. But when the defendants appeared to be conspiring to give false testimony, investigations of the original sus-

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stead Law); CIT Corp. v. United States, 150 F.2d 85 (9th Cir. 1945) (conspiracy to file false statements of security, asset value and income under the National Housing Act); United States v. Perlstein, 126 F.2d 789 (3d Cir. 1942) (conspiracy to tamper with witnesses in criminal case); Wilder v. United States, 143 Fed. 433 (4th Cir. 1906) (conspiracy to tamper with witnesses in civil litigation); Curley v. United States, 130 Fed. 1 (1st Cir. 1904) (impersonation of a candidate to take a civil service examination).

9 Bailey v. United States, 5 F.2d 437 (5th Cir. 1925), *appeal dismissed,* 269 U. S. 589 (1925); Nyquist v. United States, 2 F.2d 504 (6th Cir. 1924), *cert. denied,* 267 U. S. 606 (1925).

10 United States v. Belisle, 107 F. Supp. 283 (W. D. Wash. 1951). See Note, 72 HARV. L. REV. 920 (1959).

11 In United States v. Hutto, 256 U. S. 524 (1921) the Supreme Court held that an indictment charging conspiracy to violate a statute forbidding anyone employed in the Indian Department to have an interest in any trade with the Indians was sufficient, even though this statute prescribed only a civil penalty. In United States v. Wiesner, 216 F.2d 739 (2d Cir. 1954), the court found that a conspiracy to violate the Gold Reserve Act by the unlicensed handling of gold was properly indictable, although only a civil penalty was prescribed by the statute. Judge Harlan stated:

> It is true that the construction which we think § 371 [the section in issue in *Bonanno*] must bear is anomalous in that a conspiracy to commit a noncriminal "offense" may carry a greater punishment than a conspiracy to commit a misdemeanor.
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> . . .The cure for this anomaly may well be something which the Congress will wish to consider, but the courts must take the statute as they find it.

Supra at 742.

12 New York Times, Dec. 19, 1959, p. 1, col. 1.

13 St. Louis Post Dispatch, Dec. 20, 1959 (editorial).

14 The agreement to give false statements links the Conspiracy Statute to the federal perjury statute, while the intent to give evasive or misleading testimony seems to link the Conspiracy Statute to the "obstructing justice" section of 18 U.S.C. § 1503 (1948). Defendants could be convicted of either a conspiracy to violate the perjury statute, or to obstruct justice, or both.

15 81 F.2d 805 (5th Cir. 1936).

16 N.Y.L.J., Feb. 5, 1960.

17 Newspaper accounts served as a constant and unnecessary reminder of the past criminal records of the defendants. See New York Times, Dec. 19, 1959, p. 1, col. 1; Washington Post, Dec. 19, 1959, p. 1, col. 1.

pected conspiracy came to a halt, and the grand jury returned the indictment for conspiracy to perjure and obstruct justice. The government was thus able to manipulate the conviction of the defendants without ever having accumulated evidence of their original wrongdoing. It is this use of conspiracy theory to bring a substitute conviction that has prompted the Supreme Court to remark recently in *Grunewald v. United States*:[18] "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."[19]

The *Bonanno* conviction may certainly be assailed on grounds that it is dangerous in that it allows a proceeding based essentially on suspicion of one crime to result in conviction of conspiracy to commit a different crime, without proof of the original crime ever being obtained. But, while there is substance to this argument, it is really an argument against the developed structure of conspiracy law, rather than a criticism of the *Bonanno* conviction alone. If conspiracy in its present development is to be accepted as a basis of prosecution, it is difficult to reject the *Bonanno* conviction since it is apparently in accord with prior prosecutions under the Federal Conspiracy Statute.

However, the challenge to the legality of the interrogation and detention of the Apalachin defendants on November 14, 1957 may not be easily dismissed. After the trial had been under way for a week, defendants moved to suppress all evidence procured in the original investigation of the gathering at the Barbara estate, claiming that the actions of the state police and federal agents[20] was an illegal search and seizure in violation of the fourth amendment and the evidence was inadmissible under the rule of *Mallory v. United States*.[21] At a hearing on the motion held *in camera* to avoid prejudice, the only witness, a police officer, testified that stopping the defendants' cars at the check-point outside the Barbara estate and the subsequent interrogation at the police station was prompted by a belief, induced by prior convictions of several defendants for liquor violations, that an illegal liquor conspiracy was transpiring.[22]

Judge Kaufman, in denying the motion, held that no arrest took place. The officers were merely conducting an investigation based upon probable cause. In addition, the statements made by defendants were not in the nature of a confession,

18 353 U. S. 391, 404 (1957).

19 See also Della and Paoli v. United States, 353 U. S. 232 (1957); Bollenbach v. United States, 326 U. S. 607 (1946). In *Grunewald* the government was unable to proceed against defendants for bribery to avoid income tax prosecution since the statute of limitations had run. Attempting to save the case, the prosecution alleged an agreement to conceal the original bribery, constituting a continuance of the crime in its "conspiracy to conceal" form. Acceptance of this theory would certainly avoid any statute of limitations problem, even to the point of nullifying the statute in any case involving two or more persons. It was this pervasiveness of the prosecution's theory that led the court to decide for defendant. However, the *Bonanno* theory seems much narrower, since it rests upon more than an agreement to *conceal;* it involves an agreement to *perjure.* The defendants in *Bonanno* could have agreed to conceal by relying upon their fifth amendment right and refusing to testify at all, but they chose to speak and, assuming the correctness of the jury's factual determination, to speak falsely before a federal grand jury. See N.Y.L.J., Feb. 5, 1959, n. 21.

20 See 35 NOTRE DAME LAW. 461 (1960).

21 354 U. S. 449 (1957).

22 At 12:30 p.m. on November 14, 1957, the officers drove to the Barbara Estate and noticed a large gathering there. At 12:50 p.m. they set up a check-point in order to identify Barbara's guests as they left and stopped several of the defendants, questioning them by the roadside. At 2:00 p.m. the officers noticed men running through a nearby woods. The majority of the defendants were stopped after this incident and were sent to the police station without objection. No formal arrests were made. While at the police station, the defendants were questioned as quickly as possible as to name, age, address, previous criminal record, and the purpose for being at Apalachin, and then released. Defendants did not claim that any coercion or pressure was used in the questioning. None were questioned for more than 30 minutes, although it is not made clear in the court's opinion how long they were detained. N.Y.L.J., Feb. 5, 1960.

23 N.Y.L.J., Feb. 5, 1960.

but were voluntary and exculpatory in nature; thus there was no question of extracting a confession by coercion or detention involved.[23]

Cases in New York have drawn a distinction between an actual arrest and a mere investigation or identification when an officer believes a crime has been committed but does not have probable cause to make an arrest.[24] Relying on *United States v. DiRe*,[25] to the effect that the state law as to arrest is determinative in the absence of a federal statute, the court concluded that the police procedures did not constitute an arrest. *Mallory v. United States*[26] would not seem applicable, since it concerned an illegal detention after *arrest*. Nevertheless, the court went on to find no unreasonable delay, nor opportunity for coercion. What is most important in the court's discussion of the arrest versus investigation problem is that defendants here were not taken into custody, were not forced to go to the police station, and were free to leave when they wished, as one defendant, Vito Genovese, actually did.

In justifying an "investigation" officers must show a reasonable belief that a crime is in progress, and an absolute necessity for immediate investigation.[27] A more difficult problem is presented in the court's determination that the questioning was prompted by probable cause. Probable cause for arrest, a constitutional requirement, has been held to exist "if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." [28] The original impetus of the investigation in question came from the questionable reputation of Joseph Barbara, based upon his previous conviction. While this would probably not justify an investigation of a gathering at his home, it seems that the element of flight, which was added at 2 p.m. when men were seen running through the woods near Barbara's estate, supplies the necessary confirmation of suspicion.[29] But before the flight took place, it is doubtful that the police had reason to believe that a crime was in progress. Essentially, they knew only that a large gathering was taking place at the home of a person who had previously been convicted of a liquor violation, and that Barbara had associated with liquor law violators since his conviction. If this constitutes probable cause for investigation and identification of guests at Barbara's home, then it seems that police might properly "investigate" any large gathering of persons with questionable reputations and prior convictions. That this is dangerously close to "roundup" techniques and harassment seems apparent, whether defendants submit voluntarily to the investigation or not. For this reason, it seems that all evidence obtained from defendants questioned before the element of flight appeared was tainted by its basis of suspicion without reasonable belief. On the other hand, the questioning after 2 p.m. was adequately supported by probable cause, since flight generally confirms suspicion enough to support not only investigation, but actual arrest.[30]

24 Hook v. State, 181 N.Y.S.2d 621 (Ct. Cl. N.Y. 1958); People v. Yerman, 246 N.Y.S. 665 (Oneida County Ct. 1930). Federal cases lend some support to this doctrine. See Green v. United States, 259 F.2d 180 (D.C. Cir. 1958). But see Henry v. United States, 361 U. S. 98 (1959), distinguished in the *Bonanno* case on grounds that the question of whether an arrest occurred was not in issue.

25 332 U. S. 581 (1948).

26 354 U. S. 449 (1957).

27 Smith v. United States, 264 F.2d 469 (8th Cir. 1959); McCarthy v. United States, 264 F.2d 473 (8th Cir. 1959). See Brinegar v. United States, 338 U. S. 160 (1948). Judge Kaufman, seeming to realize that the discussion of arrest versus investigation was something of a pioneer venture into an undefined area of the law, discussed the quantum of probable cause necessary to justify what he had already termed an *investigation* in terms of traditional probable cause for *arrest* requirements. It is submitted that the distinction between arrest and investigation is valid, but that the probable cause necessary for investigation should be less than that required to justify an arrest.

28 Carroll v. United States, 267 U. S. 132, 161 (1924).

29 Brinegar v. United States, 338 U. S. 160 (1948).

30 Brinegar v. United States, 338 U. S. 160 (1948); Allen v. United States, 164 U. S. 492, 499 (1896); McCarthy v. United States, 264 F.2d 473 (8th Cir., 1959); Green v. United States, 259 F.2d 180 (D.C. Cir., 1958). In each of these cases flight was the determinative factor supporting probable cause for arrest. In Henry v. United States, 361 U. S. 98 (1959),

Although the *Bonanno* trial has derived most of its publicity from its implementation of conspiracy theory, it seems that its long-range significance will be primarily in the hazy area of arrest-search and seizure law. Judge Kaufman's instructions to the jury on the conspiracy issue effectively delineate the specific meaning of the crime, that is, a conspiracy to perjure and to obstruct justice by giving false, misleading, and evasive testimony.[31] This essential nature of the crime fits easily into the conspiracy statute, and can be criticized only by arguments against the doctrine of conspiracy itself. But the *Bonanno* defendants were "investigated" on grounds very close to bare suspicion, and the prosecution is apparently in a more precarious position regarding this issue. A reversal of *Bonanno* on fourth amendment and *Mallory* grounds is not improbable but, although it would allow some or all of the defendants to go free, it would permit similar usage of the conspiracy theory in the future.

GRAND JURY — GRAND JURY REPORTS — GRAND JURY REPORT CRITICAL OF INDIVIDUALS IN THEIR PRIVATE CAPACITY DISALLOWED — In September, 1958, the Court of General Sessions for New York County empaneled a grand jury to investigate the manner in which certain television quiz programs had been conducted. The grand jury conducted its investigation over a period of nearly nine months, during which time it examined over two hundred witnesses. Finding that no crime had been committed, the grand jury failed to return any indictment. It did, however, tender to the court a report of its findings and recommendations. Counsel, representing various television interests, moved to suppress the report on the grounds that it was beyond the grand jury's authority to file such a report. *Held:* Motion granted. Where private citizens are involved, the function of the grand jury ends when it determines that no crime has been committed. *In re Grand Jury Report Concerning Investigation,* 193 N.Y.S.2d 553 (Ct. Gen. Sess. 1959).

There is no question about the power of a grand jury to inquire into irregular conditions in the community and to return an indictment after determining that there is cause to believe that a crime has been committed. Nor is there any dispute about its power to inquire into and report on the status of public institutions. Difficult questions arise, however, when the grand jury goes beyond this and renders reports which are critical of individuals for conduct which, although below generally accepted standards of behavior, is not violative of the criminal law. With an increasing frequency, reports of this type, which are presented to the court to be placed on record, have been challenged as exceeding the authority of the grand jury.[1]

The exact limits of the grand jury's power to issue reports are not clear and vary from state to state. In a few jurisdictions the matter is specifically covered by statute.[2] But in the great number of states the legislature has either been silent on

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the Court found no probable cause for arrest indicating that the defendants' "movements in the car had no mark of fleeing men or men acting furtively."

31 In order to find guilt, the jury had to find an agreement between two or more persons, including the defendants, to act in concert to give false, evasive, or misleading testimony before a federal grand jury. They had to find, in addition, some overt act toward the object of the conspiracy, and the overt act had to be a positive one, an actual giving of testimony of a tainted nature; mere silence was not enough. Instructions to the jury, pp. 15, 18; 19a, 23, 24, 33a, 44a, 139.

1 The method most frequently used to challenge grand jury reports is the motion to expunge which is directed to the court by persons criticized or prejudicially affected by a report. *E.g., Ex parte* Cook, 199 Ark. 1187, 137 S.W.2d 248 (1940). Libel actions against grand jurors provide another source of litigation over the legality of these reports. See Application of United Electrical, Radio and Machine Workers, 111 F. Supp. 858, 866 n. 26 (S.D.N.Y. 1953) for a collection of cases.

2 See, *e.g.,* LA. REV. STAT. § 15:210 (1951): "the grand jury shall not, in any case whatever, make any report on any matter submitted to it for investigation . . . as the grand

the subject or sufficiently equivocal so as to allow the courts to follow their own policy, either under the guise of statutory construction[3] or by purporting to follow the common law.[4]

Grand juries apparently exercised some sort of reportorial powers at common law.[5] However, the origin and scope of these powers are obscure.[6] It is sufficient for the purpose of this comment to say that whatever the common law powers were, they have largely fallen into disuse in this country.[7]

In those jurisdictions where grand jury reports are not adequately covered by statute, some courts hold that a grand jury has no authority to issue a report commenting on the character of conduct of any person unless it is followed by an indictment.[8] Other courts have allowed reports which were critical of public officials.[9] In these cases the dominant consideration appears to be that official laxity and indifference should be exposed even though it does not amount to an indictable offense.[10] Many official acts and omissions that are barely within the shadow of legality are as prejudicial to the community welfare as conduct which is unquestionably criminal. Admittedly the legislature or executive branches of government have the power to investigate and remedy such conditions, but these powers are seldom exercised.[11] In only a few cases has a private individual who has been criticized in a grand jury report been unsuccessful in an effort to have the offending report expunged.[12]

The major objection to the grand jury report is that it accuses without providing an opportunity to reply.[13] While accusations by reports are technically different from accusations by indictment, to members of the community they carry the same stigma while depriving the person criticized of the indictment's principal attribute: a forum to answer his accuser.[14] This objection is fortified by the fact that when a report is filed, it becomes a matter of public record, thus presumably conferring upon the press and other media of communication a privilege to publish

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jury is an accusatory body and not a censor of public morals." See also Edgar, *The Propriety of the Grand Jury Report*, 34 TEXAS L. REV. 746, 747 (1956) for a current compilation of statutes.

3 *In re* Jones, 101 App. Div. 55609, 92 N.Y.S. 275 (1905).

4 Matter of Quinn, 5 Misc. 2d 466, 166 N.Y.S.2d 418 (1957).

5 English grand juries as far back as the seventeenth century reported on such matters of public concern as abusive marketing practices, horseracing, cockfighting, the use of false drink measures by innkeepers, and the maintenance of bridges. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COLUM. L. REV. 1103, 1109-10 (1955).

6 See Edgar, *supra* note 2 at 747.

7 4 WHARTON'S CRIMINAL LAW AND PROCEDURE 471 (1956).

8 Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); *In re* Grand Jury Report, 204 Wis. 409, 235 N.W. 789 (1931). For a collection of cases dealing with the grand jury report see instant case at 560-62.

9 *In re* Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952); *In re* Report of Grand Jury, 152 Fla. 189, 11 So.2d 316 (1943); *In re* Jones, 101 App. Div. 55609, 92 N.Y.S. 275 (1909).

10 See, *e.g.*, *In re* Presentment by Camden County Grand Jury, *supra* note 9.

11 *Id.* at 65, 89 A.2d at 443.

12 Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882 (1952). Hayslip, a public school teacher, had instigated a grand jury investigation with allegations of immoral practices in the local high schools. The grand jury found the charges to be without foundation and incorporated in its report a statement that Hayslip's continual employment in city schools would be unadvisable. See also Application of Knights, 176 Misc. 635, 28 N.Y.S.2d 353 (1941) where the court refused to expunge a report critical of an attorney who had also instigated a grand jury investigation with unfounded charges. It is not clear from the opinion whether Knight was or was not a public official.

13 See Judge Woodward's dissent in *In re* Jones, 101 App. Div. 55609, 92 N.Y.S. 275, 277 (1905).

14 People v. McCabe, 148 Misc. 330, 266 N.Y.S. 363, 367 (1933).

matters contained in it without subjecting them to liability for defamation.[15]

The second major objection to these reports stems from the aura of solemnity which the public mind attaches to utterances of the grand jury. The public regards the grand jury as a deliberate body which carefully weighs all evidence before making accusations.[16] Because it occupies this position of dignity and respect, much more weight is given to charges made by the grand jury than is given similar charges made by a private individual.[17] Therefore, a person is at a distinct disadvantage in meeting such accusations.

On the basis of what has been said earlier, a distinction can be made between grand jury reports relating to private individuals and those pertaining to public officials. While courts are uniform in condemning the former,[18] some will permit the latter.[19] The instant court labeled the proferred report as one relating to private persons engaged in a private enterprise and applied the law accordingly. However, it could be urged that officials of the television industry more properly fall into the old common law category of persons engaged in a business affected with a public interest, such as innkeepers, ferrymen, millers, and common carriers.[20] Because of the unique position from which they can exercise control over the "public intellect," the line of cases dealing with public officials would appear more appropriate to determine the reportorial powers of the grand jury when investigating the industry.[21]

However, it is doubtful that the instant court would have decided differently had the distinction been urged upon it. The court did not pass on the legality of reports concerning public officials. Nevertheless, it was clear in holding that the grand jury's function was to ascertain the incidence of crime and "not to censure or criticize generally public morals or business ethics."[22]

This comment has been limited to a discussion of a few of the most frequently advanced policy considerations favoring or disapproving grand jury reports. In closing it might be well to focus attention on the fundamental issue in all of these cases. That is, is the investigation and exposure of noncriminal wrongdoing an appropriate function for the grand jury? It would seem not. For the grand jury to perform such a function would in effect make it an arm of the legislature. Whatever benefit would be derived from directing public and official attention to quasi-criminal activities in the community would probably be counterbalanced by a decline in the grand jury's efficiency as a law enforcement agency.

Thomas Kavadas, Jr.

JAPAN — CONSTITUTIONAL LAW — AMERICAN ARMED FORCES STATIONED IN JAPAN NOT VIOLATION OF JAPANESE CONSTITUTION. — Seven Japanese left-wing unionists and students demonstrating against the extension of runways to accommodate jet planes were arrested and charged in a Japanese court with trespassing on an American military base near Tokyo.[1] A Tokyo court ruled that the criminal law under

15 *But see* Parsons v. Age-Herald Publishing Co., 181 Ala., 439, 61 So. 345 (1913) where it was held that a privilege did not attach to a newspaper's publication of matter contained in an extralegal grand jury report.

16 See Comment, 52 Mich. L. Rev. 711, 717 (1954).

17 See Application of United Electrical, Radio and Machine Workers, 111 F. Supp. 858, 861 (S.D.N.Y. 1953).

18 See cases cited *supra* note 8.

19 See cases cited *supra* note 9.

20 See Munn v. Illinois, 94 U.S. 113, 125 (1877).

21 *Cf.* Kuh, *supra* note 5, at 1123.

22 193 N.Y.S.2d 553, 571 (1959).

1 New York Times, Dec. 16, 1959, p. 19, col. 4.

which the charges were brought violated article 31 of the constitution of Japan[2] since the stationing of American armed forces in Japan was contrary to the constitutional command not to maintain "war potential."[3] On direct appeal to the Japanese Supreme Court, *held:*

> [T]he original verdict which ruled that the stationing of United States forces in Japan is in violation of the [peace clause] of the Constitution, exceeded the authority given to a court of justice to conduct judicial examinations and is a misinterpretation of the [peace] clause and of the preamble of the constitution. Accordingly, the original judgment which negated the validity of article 2 of the Special Criminal Law under such an assumption was improper.[4]

State v. Sunakawa, Supreme Court of Japan (Dec. 15, 1959).

This case presented to the Supreme Court of Japan emotion-packed political issues[5] interlaced with international and diplomatic implications.[6] The court in its decision acted not unlike our own Supreme Court.

The history of Japan as a sovereign nation begins at least seven centuries before the birth of Christ.[7] But it was not until during its rise to world power, following the Perry expedition of 1853, that a constitution was promulgated by the Emperor Meiji.[8] It should not be assumed that the constitution served the same function as ours,[9] nor was the judiciary independent.[10] During the second World War it was claimed that the Meiji constitution was at least partially responsible for the chauvinistic and militaristic spirit of Japan.[11]

After the surrender a second American military figure played a major role in the changing Japan. General MacArthur was given the task of occupying and restoring the country to the community of nations.

It was during this time of revolutionary flux[12] that the present constitution of Japan was enacted. Officially a revision[13] of the Meiji constitution, it was the antithesis of that document, patterned largely after the United States Constitution. The people were said to be the source of sovereignty.[14] Individuals were protected by one of the most comprehensive cataloguing of civil rights in existence.[15] The difficulty created by the historical role of the Emperor was solved by making him only the

2 "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." JAPAN CONST. art. 31 in 2 PEASLEE, CONSTITUTIONS OF NATIONS 514 (2d ed. 1956).

3 JAPAN CONST. art. 9 in 2 PEASLEE, *op. cit. supra* note 2, at 512.

4 Department of State, American Embassy, Tokyo, Japan, translated copy of summary of the opinions in the case prepared and released by the Japanese Supreme Court, hereafter cited as *State* v. *Sunakawa.*

5 New York Times, Dec. 27, 1959, § IV, p. 4, col. 6 reports that opposition to rearmament has caused riots and is still a powerful force in Japanese politics.

6 During this period Premier Kishi was negotiating a new security treaty with the United States. New York Times, Dec. 17, 1959, p. 36, col. 2.

7 2 PEASLEE, *op. cit. supra* note 2, at 508; MAKI, JAPANESE MILITARISM 95 (1945). "According to Japanese chronology, Jimmu Tenno ascended the throne on a date corresponding to February 11, 660 B.C., the year 1 in Japanese chronology. The present emperor, Hirohito, is the 124th occupant of the throne and is descended in an unbroken line from Jimmu."

8 Quiegly, *Japan's Constitutions: 1890 and 1947,* 41 AM. POL. SCI. REV. 865, 867 (1947); Blakemore, *Post-War Developments in Japanese Law,* 1947 WIS. L. REV. 632, 637-39; Maki, *op. cit. supra* note 7, at 114-22, 155-81.

9 The Constitution was declared to be a gift from the Emperor to his subjects. Its primary function was to officially set up and strengthen the position of the Emperor. The document had been patterned largely after German-Prussian models. *Ibid.*

10 "[I]n the past the judges in Japan were civil servants under the Ministry of Justice." Oppler, *The Reform of Japan's Legal and Judicial System under Allied Occupation,* 24 WASH. L. REV. 290, 299-300; Maki, *op. cit. supra* note 7, at 180-81.

11 Maki, *op. cit. supra* note 7, at 114-22, 155-81.

12 VAN ADUARD, JAPAN FROM SURRENDER TO PEACE 27-57 (1953).

13 Oppler, *op. cit. supra* note 10, at 297.

14 "The Emperor shall be the symbol of the State and of the unity of the people deriving his position from the will of the people with whom resides sovereign power." JAPAN CONST. art. 1 in 2 PEASLEE, *op. cit. supra* note 2, at 511.

15 JAPAN CONST. arts. 10-40 in 2 PEASLEE, *op. cit. supra* note 2, at 512-15.

"symbol of the state." [16] A separation of powers was established,[17] and the Supreme Court was specifically given the power "to determine the constitutionality of any law, order, regulation or official act." [18]

The preamble to the constitution demonstrated a new motivating spirit with the emphasis on peace in the international community.[19] This spirit was carried out by the enactment of article 9 which provides:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, *land, sea, and air forces, as well as other war potential, will never be maintained.* The right of belligerency of the State will not be recognized. (Emphasis added).[20]

Perhaps the two atomic bombs which exploded over Japan were reflected in these provisions. It is more likely that the change was imposed by General MacArthur,[21] but reports indicate that the constitution has now been accepted by the Japanese people.[22] Tremendous and rapid changes must have taken place in Japan to give rise to the controversy in *Sunakawa,* since only a few years before, the country had been told that "war is father to culture." [23]

The Supreme Court of Japan is the apex of its judiciary. Like our Supreme Court, it also requires a case or controversy before acting.[24] The court first ana-

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16 See text cited *supra* note 14.

17 The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State. [art. 41]
Executive power shall be vested in the Cabinet. [art. 65]
The whole judicial power is vested in a supreme court and in such inferior courts as are established by law. [art. 76]
JAPAN CONST. arts. 41, 65, 76 in 2 PEASLEE, *op. cit. supra* note 2, at 515, 517, 519.

18 JAPAN CONST. art. 81 in 2 PEASLEE, *op. cit. supra* note 2, at 519.

19 Portions of the preamble provide: "[w]e shall secure for ourselves and our posterity the fruits of peaceful co-operation with all nations . . . . We, the Japanese people, desire peace for all time. . . . [W]e have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. . . . We desire to occupy an honored place in an international society striving for the preservation of peace. . . . We recognize that all peoples of the world have the right to live in peace. . . ." JAPAN CONST. preamble in 2 PEASLEE, *op. cit. supra* note 2, at 511.

20 JAPAN CONST. art. 9 in 2 PEASLEE, *op. cit. supra* note 2, at 512.

21 A realist would point out that the constitution was promulgated November 3, 1946 during a time of military occupation. It has been reported that the new constitution had been drafted by Major General Cortney Whitney "and presented to the Japanese diet as a Government-supported draft." Dionisopoulos, *The No-War Clause in the Japanese Constitution,* 31 IND. L. J. 437, 438 (1956).

22 New York Times, Dec. 27, 1959, § IV, p. 4, col. 6; Tabata, *Two Treatises on Japanese Constitution,* 1 DOSHISHA L. REV. 23 (1956); Tanaka, *Peace and Justice: Japan's Place in the Family of Nations,* 38 A.B.A.J. 663 (1952).

23 Okamoto, *War-Thought,* 2 DOSHISHA L. REV. 52 (1957).

24 The Chief Justice of the Japanese Supreme Court, Kotaro Tanaka, has pointed out:

> The new system in Japan differs from the prewar one in that now courts can take up the question of constitutionality in regard to laws and other public acts — in this we have followed the United States model. The United States Federal Supreme Court has the right to decide on constitutionality but this right can be invoked only when concrete controversies arise as to rights and obligations. A case on constitutionality is subject to the system of instances just like any other case.

DOUGLAS, WE THE JUDGES 48 (1956).

It is reported that the Supreme Court of Japan applied this principle in dismissing the suit of a politician who sought a determination of the constitutionality of all laws and regulations for the establishment and maintenance of a National Police Reserve. A decision as to the meaning of the peace clause was thus avoided. *Suzuki v. State,* 6 Supreme Court 783 (1952) in Nathanson, *Constitutional Adjudication in Japan,* 7 AM. J. COMP. L. 195, 196-97 (1958).

lyzed the peace provision's inhibition of "war potential." After pointing to the national acceptance of the Potsdam Proclamation, the preamble and the peace clause of the constitution, it was stated that Japan has renounced war and the maintenance of war potential.[25] "It goes without saying," said the Court, "that this does not in the least negate the inherent right of self-defense of this country, as a sovereign state." [26]

The lower court had held that Japan could *only* request the aid of the Security Council and other organs of the United Nations. But the Supreme Court declared the nation could choose "measures that are deemed appropriate in the light of existing international situation, so long as they are suitable as security measures for maintaining the peace and security of this country." [27] It followed that the peace clause of the constitution did not forbid requesting security forces from foreign countries.[28] The Court observed that the constitutional command against maintaining war potential was intended to prevent Japan from starting aggressive wars. Even if war potential for defensive purposes be forbidden, the phrase included only that which "Japan can command and supervise as a chief component, namely [Japan's] own war potential." [29]

The second portion of the opinion examined the constitutionality of the Security Treaty[30] between the United States and Japan because the stationing of American armed forces was pursuant to this document. Japan had reacquired its sovereignty following the San Francisco Peace Conference when the Peace Treaty[31] and the companion Security Treaty were debated and accepted by the Japanese Diet, ratified by the government, and signed by the Emperor on November 19, 1951.

After alluding to this history the Supreme Court indicated that the Security Treaty was extremely important in the nation's reacquisition of sovereignty and therefore "highly political in nature." [32] Unless its unconstitutionality was "patently apparent" the question of its validity should be left to other means of political expression.[33]

The decision concluded with the statement that the American armed forces, not controlled by Japan,[34] had as their goal the maintenance of international peace in the Far East, and the protection of Japan against foreign attacks and internal disorder.[35] These conditions were found not to be clearly inconsistent with the peace clause.[36] A challenge of the Administrative Agreement[37] because it had not been specifically approved by the Diet was also rejected.[38] The Court then held that the trial judge had exceeded his authority and misinterpreted the peace clause of the constitution.

One point of the opinion seems clear; the district court judge had misinter-

25 *State v. Sunakawa,* 1.
26 *Id.* at 2.
27 *Ibid.*
28 *Ibid.*
29 *Ibid.*
30 Security Treaty with Japan, Sept. 8, 1951, [1952] 3 *U.S. Treaties and Other International Agreements* 3329.
31 Multilateral Peace Treaty, Sept. 8, 1951, [1952] 3 *U.S. Treaties and Other International Agreements* 3169.
32 *State v. Sunakawa,* 4.
33 *Ibid.*
34 *Ibid.*
35 *Id.* at 4-5.
36 The Court said: "[T]he stationing of United States armed forces in Japan is consistent with the purport of article 9, and it cannot be discerned that the stationing of United States armed forces in Japan constitutes a clear violation of the Constitution and is therefore invalid." *Id.* at 5.
37 Administrative Agreement with Japan, Feb. 28, 1952, [1952], 3 *U. S. Treaties and Other International Agreements* 3341.
38 *State v. Sunakawa,* 5.

preted the constitution. Japan has the inherent right of self-defense and can therefore request foreign military aid for security purposes. Even if Japanese war potial for defense is barred, the American forces are not such potential because they are not controlled by Japan. This interpretation of the unique peace clause seems to be an abandonment of the original idealistic dream. Different interpretations of the clause had been advocated. Some were purely pacifistic[39] while others more realistically relied on the concept of self-preservation.[40] The reality of the cold war had in fact forced the partial abandonment of the dream by other arms of the Japanese government.[41]

The second point of the opinion raises some problems. Apparently the lower court "exceeded the authority given to a court of justice to conduct judicial examinations" when it decided that the Security Treaty was unconstitutional. This seems difficult to reconcile with the power of the judiciary "to determine the constitutionality of any law, order, regulation or official act." [42] Dictum in a United States Supreme Court case discussing the nature of political questions is helpful:

> There are many illustrations in the field of our conduct of foreign relations, where there are 'considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.' [43]

Judges have usually entered the area of international or foreign affairs with caution.[44]

In the *Sunakawa* case, in addition to the complicating element of foreign relations, was the fact that Japan had reacquired its sovereignty partly as the result of the treaty which was being challenged. After scanning the treaty and finding it not patently unconstitutional the validity of its enactment was left to the more political arms. Because the district court had entered this political area it exceeded its judicial authority.

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39 Tabata, *Two Treatises on Japanese Constitution,* 1 DOSHISHA L. REV. 23 (1956).

40 Tanaka, *Peace and Justice: Japan's Place in the Family of Nations,* 38 A.B.A.J. 663 (1952).

41 On July 8, 1950, General MacArthur asked the Japanese government to take measures for the maintenance of domestic peace and order. This was the beginning of a skeleton armed force for Japan. By 1955 the total authorized strength of the Defense Agency was "195,810 men, including 179,769 uniformed self-defense forces men and 16,041 civilians." MINISTRY OF FOREIGN AFFAIRS, JAPAN, A REVIEW OF JAPAN'S DEFENSE STRENGTH 5 (1956). See Dionisopoulos, *The No-War Clause in the Japanese Constitution,* 31 IND. L. J. 437 (1956) for the various fictions used to ignore the inhibitions of article 9.

42 JAPAN CONST. art. 81 in PEASLEE, *op. cit. supra* note 2, at 519.

43 *Coleman v. Miller,* 307 U. S. 433, 455 (1939). See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 192, 194-97 (1953).

44 Mr. Justice Douglas has written:

> Once the dispute coming before the court is seen to lie in [the diplomatic] field, judges would act improvidently if they laid hold of it. Lawsuits and diplomatic exchanges are oil and water that do not mix. When a dispute concerns foreign affairs . . . judges are not competent to act, or, if competent, are likely to do more harm than good in trying to intervene.

DOUGLAS, WE THE JUDGES 55 (1956).

A dramatic illustration of judicial reluctance was recently given by our Supreme Court in *Wilson v. Bohlender,* 361 U.S. 281 (1960). The Government had argued in its brief that petitioner could be court-martialled, under the war powers, because Berlin was still occupied territory. It concluded with the following:

> Since the position that Berlin is still occupied territory has been taken and is now being taken by this country in the conduct of its foreign relations, we close by noting the long line of cases which hold that the courts will be most slow to go contrary to a definite position taken in foreign affairs by the executive *vis-à-vis* a foreign country, so as not 'to embarrass the executive arm in its conduct of foreign affairs.' Republic of Mexico v. Hoffman, 324 U. S. 30, 35 (1945); Chicago & S. Air Lines v. Waterman Corp., 33 U. S. 103, 111 (1948); United States v. Pink, 315 U. S. 203 (1942).

Brief for Respondent, p. 23, *Wilson v. Bohlender,* 361 U.S. 281 (1960).

The Court avoided a decision on this issue by pointing out that the "war powers" had not been relied upon below. 361 U.S. 283, n. 2.

This approach was not unlike that taken by our Supreme Court in the *Girard* case,[45] which arose out of the controversy between Japan and the United States as to who should try the soldier for the killing of a Japanese civilian. The same Security Treaty and Administrative Agreement were involved. In a brief per curiam opinion, after finding no constitutional or statutory barriers, the Court felt that "the wisdom of the arrangement is exclusively for the determination of the executive and legislative branches."[46] A secondary question was raised in both *Sunakawa* and *Girard;* it concerned the validity of the administrative agreement which had not been officially ratified by the Japanese Diet or the United States Senate. In their decision finding the agreement constitutional both Courts[47] referred to article 3 of the ratified Security Treaty[48] authorizing the making of further arrangements.

Although Japan borrowed most of its law from the civil law countries,[49] in the area of constitutional law, it seems to have turned to the United States, probably because of the MacArthur occupation. Their Supreme Court appears to be functioning like our own. The way it handled the constitutional challenge of the treaty is justified in a government where a true separation of powers exists.[50] In interpreting the peace clause it is obvious that the present international situation was reflected in the decision. The court was also careful not to give the clause a strict interpretation which would have prevented the flexibility and adaptation required of a useful constitution. There is language in the opinion which will permit its adaptation to changing conditions, whether those conditions require pacifism or more active military preparations.

Joseph A. Marino

MILITARY LAW — DUE PROCESS — ADMINISTRATIVELY DETERMINED DISCHARGE WITHOUT HEARING VIOLATES DUE PROCESS. — Fannie Mae Clackum, on active duty in the United States Air Force in 1951, was interrogated by her commanding officer and a representative of the Office of Special Investigations (OSI) concerning homosexuality. She denied any knowledge of the matters alleged, but was repeatedly interviewed by the OSI until January, 1952. When offered an opportunity to resign, she refused and demanded a court martial. She was discharged on January 22, 1952, without having had a hearing and without having been informed of the nature of the evidence against her. After her discharge was approved by the Air Force Discharge Review Board, Miss Clackum brought suit for back pay, claiming that her discharge was illegal. Proceedings were suspended to permit her to file an application before the Air Force Board for the Correction of Military Records. Her application was denied, and the suspension of proceedings was removed. On the defendant's motion to dismiss the petition, which the court treated as a motion for summary judgment, *held:* denied. *Clackum v. United States,* Ct.Cl. No. 246-56 (1960).

The court conceded that the Air Force could have discharged the plaintiff at any time and for any reason. But the character of the discharge given her was considered penal in nature; the court said it could not be imposed "without respect for even the most elementary notions of due process of law."[1] But, undertaking

45 *Wilson v. Girard,* 354 U. S. 524 (1957).
46 *Id.* at 530.
47 *Id.* at 528; *State v. Sunakawa,* 5.
48 "The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administration agreements between the two governments." Security Treaty with Japan, Sept. 8, 1952, [1952] 3 *U. S. Treaties and Other International Agreements* 3329, 3332.
49 See Takayanagi, *Contact of the Common Law with the Civil Law in Japan,* 4 AM. J. COMP. L. 60 (1955).
50 See HAND, THE BILL OF RIGHTS 1-30 (1958).

1 Clackum v. United States, Ct. Cl. No. 246-56, at 4.

to review an administrative decision of the Secretary of the Air Force, the court faced a jurisdictional problem. Relying solely upon *Harmon v. Bruckner*,[2] the court noted that not all the actions of executives of the armed forces with regard to the discharge of servicemen are beyond review.[3] In a case prior to *Harmon*, the Court of Claims had held that a court martial was void, saying, "We have no power to review court martial proceedings; we can give relief only if the court martial was absolutely void and, therefore, forms no foundation for plaintiff's dismissal. If it was void, it is settled that we have jurisdiction to render judgment for the pay of which he was illegally deprived."[4]

The incidents of Miss Clackum's discharge were characterized by the court as "penalties."[5] There are five types of discharge granted by the Air Force.[6] Three may be given by administrative action: *honorable; general,* given under honorable conditions; and *undesirable,* given under conditions less than honorable. A *bad conduct* discharge may be given by either a general or special court martial. A *dishonorable* discharge may be given by a general court martial.

A court martial is considered under Air Force Regulations 35-66(5)(b)[7] when a person charged with an offense under that section refuses to resign. The Secretary of the Air Force, if conviction by a general court martial seems unlikely, can administratively determine whether the discharge furnished should be honorable, general, or undesirable.

In the *Clackum* case the court said that a dishonorable discharge is one of the most severe penalties that can be imposed by a court martial,

> yet . . . if the evidence . . . is so insubstantial that a conviction by court martial would be unlikely, the executive officers of the Air Force may [under Air Force regulations] themselves convict the soldier and impose the penalty.[8]

The court compared this procedure to authorizing a prosecuting attorney to personally impose sentence when he doesn't have enough evidence for a conviction.

The court does not argue that the undesirable discharge given to the plaintiff was so similar in effect to a dishonorable discharge that it should not have been administratively given, but considers instead the "dishonorable nature"[9] of the discharge, apparently treating an undesirable discharge under A.F.R. 35-66 as if it were a dishonorable discharge because it would seem so to the public and to the plaintiff's prospective employers. The veteran's benefits lost because of each are substantially identical.[10]

The contention that less than honorable discharges are in effect dishonorable has been made by the New York Supreme Court.[11] The court, granting a request for review of a "discharge (not honorable)" from the New York Air National Guard, said that such a proclamation impugns the character and reputation of a citizen. The effect on a man's civilian life is the same whether done by an officer or a board, and whether it results in a discharge described as "dishonorable" or

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2 355 U.S. 579 (1958).

3 *Harmon* created no small amount of comment in holding subject to judicial review an administrative discharge based on the serviceman's allegedly subversive activities before induction. See, *e.g.*, MIL. L. REV. 123 (April 1959); 70 HARV. L. REV. 533 (1957); 33 ST. JOHN'S L. REV. 133 (1958).

4 Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205, 207 (1947).

5 Ct. Cl. No. 246-56 at 4, 6.

6 A.F.R. § 39-10 (14 Apr. 1959).

7 Plaintiff was discharged under A.F.R. 35-66 (12 Jan. 1951), which has been superseded by A.F.R. 35-66 (14 Apr. 1959).

8 Ct. Cl. No. 246-56, at 3-4.

9 *Id.* at 6.

10 57 MICH. L. REV. 130 (1958); 9 STAN. L. REV. 170 (1956).

11 Nistal v. Hausauer, 282 App. Div. 7, 121 N.Y.S.2d 712 (1953).

"without honor."[12] In another case,[13] the court after passing upon the validity of the discharge, noted,

> [A]n honorable discharge is an extremely valuable property right as well as a personal right, and to deprive a person of an honorable discharge is to deprive him of property rights, as well as civil rights and personal honor.[14]

And again, "the honor and standing of the citizen in his home town . . . is not a trifle."[15]

On the other hand, it has been said that an honorable discharge is a "formal final judgment . . . that [the serviceman] . . . left the service in a status of honor."[16] And the argument is often made that the incidents of an honorable discharge are not a matter of right, but must be earned.[17] The character of the discharge given to a soldier upon termination of his enlistment, according to this theory, should be left to the discretion of the executive officer having the power to grant discharges.[18]

The Government's contention, drawn in question in the *Clackum* case, is that the procedure followed was necessary for an efficient military establishment. The Court of Claims saw this as an attempt to "load [Miss Clackum] down with penalties"[19] in violation of due process. No authority was cited for the proposition. The opinion may also fairly be read to imply that the absence of confrontation was a denial of the plaintiff's rights.[20]

The Supreme Court has apparently spoken to the contrary. In *Reaves v. Ainsworth*,[21] the court said, "For those in the military or naval service of the United States the military law is due process."[22] In a later case, the court pointed out that "the experience of our Government . . . and of the English Government . . . proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs."[23]

Each of these opinions supported the proposition that administrative actions of armed services executives, and decisions of courts martial are beyond judicial scrutiny. *Harmon v. Brucknер*[24] rejected this contention. The question remaining, once the power of judicial review has been established, is whether the procedure followed in Miss Clackum's discharge violated due process. The proposition advanced by the Court of Claims is not without its supporters.[25]

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12 *Id.* at 12, 121 N.Y.S.2d at 716. *But see* Nistal v. Hausauer, 308 N.Y. 146, 154, 124 N.E.2d 94, 98 (1954), *reversing:* "This form of discharge is probably damaging to plaintiff's reputation and to his prospects in life, but ours is a pure legal question only, as to whether or not it can be reviewed by the civil courts."

13 United States *ex rel.* Roberson v. Keating, 121 F. Supp. 477 (N.D. Ill. 1949).

14 *Id.* at 479.

15 *Ibid.*

16 United States v. Kelly, 82 U.S. (15 Wall.) 34, 36 (1872).

17 United States v. Kingsley, 138 U.S. 87 (1891).

18 Reid v. United States, 161 Fed. 469 (S.D.N.Y. 1908).

19 Ct. Cl. No. 246-56 at 4.

20 *Id.* at 6: "The so-called 'hearing' . . . was not a hearing at all, in the usual sense of that word. . . . The appellant and her counsel were futilely tilting at shadows. However vulnerable the secret evidence may have been, there was no possible way to attack it."

21 219 U.S. 296 (1911).

22 *Id.* at 304. *But see* Burns v. Wilson, 346 U.S. 137 (1953).

23 United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343 (1922).

24 355 U.S. 579 (1958).

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> The loyalty board convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is 'a paragon of veracity, a knave, or the village idiot.' . . . The accused has no opportunity to show that the witness lied or was prejudiced or venal. Without knowing who her accusers are she has no way of defending. She has nothing to offer except her own word and the character testimony of her friends.

Douglas, J., concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 180 (1951).

The Air Force did a number of things which, it may be argued, violated plaintiff's rights. It in effect accused Miss Clackum of conduct which is a crime under the Uniform Code of Military Justice, but did not notify her of this fact.[26] Neither the accusations nor the evidence upon which they were based were made known to her or to her counsel prior to her discharge.

As in the *Shapiro* case,[27] the relief requested, back pay, could be granted only if the court held the original discharge invalid, but the effect of the decision is not to reinstate the plaintiff in the Air Force.[28] Nevertheless, if this is to be the final judicial determination of the case, it may affect future administrative determination of discharges. The effects which it might have should be considered in the light of recently changed Air Force regulations.

In a case such as Miss Clackum's, where a court martial is not deemed appropriate, the accused person is entitled to a hearing before a board of officers prior to discharge.[29] He may appear in person before the board with or without counsel. He may request the appearance of any witness whose testimony he believes to be pertinent to his case, and may cross-examine the witness.[30] But "an investigative report will not be made available to the respondent . . . or his counsel."[31] Nor will

> information which might compromise investigative sources, investigative methods or the identity of confidential informants . . . be disclosed to members of the board or to any person whose case is being considered . . . unless authorized by the Director of Special Investigations . . . or higher authority.[32]

The recommendations of the board are not binding upon the officer having general discharge authority, but they limit him so that he may not order discharge if the board recommends retention. Nor, where the board recommends discharge, may he order a type of discharge inferior to the type imposed by the board. He may, however, set aside the findings of the board as being inconsistent with the facts, or set aside the recommendations as inconsistent with the findings, if he also appoints a new board to hear the case.[33] Only an honorable, general or undesirable discharge may be administratively imposed.[34]

The only significant change effected by the new regulations is that an accused person has a right to a hearing prior to discharge at which he may call and question witnesses. Where he does not know who his accusers are, this procedure will not guarantee confrontation unless he is given permission to examine secret reports. In *Clackum,* the court seemed more concerned with the fairness of the hearing than with the fact that it followed the discharge. A case can still arise in which access to the statements of petitioner's accusers are denied, thus creating a situation similar to that in *Clackum.*

It is to be hoped that, in future cases, the distinction between *undesirable* and *dishonorable* discharges will be more clearly drawn. Then it may be argued that armed services regulations should be changed so that neither discharge may be imposed in violation of due process.

James J. Harrington

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26 Ct. Cl. No. 246-56 (1960) at 3.
27 Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).
28 "[T]he sort of 'review' contemplated in an action to recover lost pay in the Court of Claims is an original suit for a money judgment and not a review looking to the alteration or correction of an official military record or to the compelling of official action by an officer of an executive department." Friedman v. United States, 158 F. Supp. 364, 376 (Ct. Cl. 1958).
29 A.F.R. 35-66 § 15 (14 Apr. 1959).
30 A.F.R. 35-66 § 20 (14 Apr. 1959).
31 A.F.R. 35-66 § 9 (14 Apr. 1959).
32 A.F.R. 35-66 § 9(a) (14 Apr. 1959).
33 A.F.R. 35-66 § 21(b) (14 Apr. 1959).
34 A.F.R. 39-10 (14 Apr. 1959).

SEARCH AND SEIZURE — EVIDENCE — INFORMATION GIVEN STATE OFFICER BY FBI AGENT IS NOT FEDERAL COOPERATION. — On March 15, 1958, petitioner was arrested without a warrant in his uncle's home by police officers of the city of Milwaukee, Wisconsin. Pursuant to the arrest, a search was made and unwrapped heroin was found on his person. On March 10, 1958 the arresting officer had been informed by an FBI agent of narcotics activities at the residence where petitioner was arrested. The residence had been under surveillance by city police prior to this tip.

State charges were preferred against petitioner, but on motion the heroin evidence was suppressed as being the result of an illegal search and seizure.[1] The evidence thus suppressed was turned over to the federal authorities who obtained an indictment. Petitioner was subsequently convicted in federal district court of illegally possessing the heroin.[2] He appealed on the grounds that the evidence should have been suppressed because obtained through illegal search and seizure. *Held:* Affirmed. Evidence illegally seized by state officials in a search in which federal officers did not participate is admissible in prosecutions in federal courts. *United States v. Camara,* 271 F.2d 787 (7th Cir. 1959).

Traditionally at common law the test for admissibility of evidence was its trustworthiness and relevance,[3] subject to certain exclusionary rules employed by federal courts and some state courts.[4] The federal courts have seen fit to employ an exclusionary rule, explicitly formulated in *Weeks v. United States,*[5] whereby evidence which is obtained as a result of an illegal search and seizure by federal agents is inadmissible in federal courts.[6]

In the *Weeks* case an illegal search was conducted by both state and federal authorities. It was held that evidence obtained by the federal government was inadmissible, while evidence seized by state officers could be admitted in federal courts. The reason for the qualification in this exclusionary rule was that the fourth and fifth amendments were thought to extend only "to the federal government and its agencies."[7] Difficulty arose in the application of the rule when federal officers were not directly involved in the search. Since *Weeks* stated that the exclusionary rule applied only to the federal government, the courts would not inquire into the propriety of the search unless federal officers had "participated" in the search.[8]

Attempts to distinguish between federal and state searches has not been accomplished without some difficulty and inconsistency as to what degree of federal participation will make the search a federal search. Nice distinctions between "participation" and "cooperation" have been devised.[9] In *Byars v. United States*[10]

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1 Wisconsin has adopted the exclusionary rule for illegally seized evidence. See State v. Drew, 217 Wis. 216, 257 N.W. 681 (1934).

2 64A STAT. 550, 26 U.S.C. § 4704(a) (1954); INT. REV. CODE of 1954, § 7237.

3 1 WIGMORE, EVIDENCE § 10 (3d ed. 1940).

4 See Wolf v. Colorado, 338 U.S. 25 (1949). For a table showing the states which employ the federal exclusionary rule see the appendix to Justice Felix Frankfurter's opinion at p. 33.

5 232 U.S. 383 (1914).

6 In that case the court expanded on the decision in Boyd v. United States, 116 U.S. 616 (1886). There it was held that the government could not force Boyd, by statute, to produce his private papers to be used against him in a federal proceeding. Such a statute, it was decided, would be in violation of defendant's constitutional rights guaranteed by the fourth and fifth amendments to the Constitution.

7 Weeks v. United States, 232 U.S. 383, 398 (1914).

8 Byars v. United States, 373 U.S. 28 (1927); see Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers,* 1959 WASH. U.L.Q. 236 for a discussion of this rule as it developed in Center v. United States, 267 N.S. 575 (1925), Byars v. United States, 273 U.S. 28 (1927), Feldman v. United States, 322 U.S. 487 (1944).

9 In United States v. Scotti, 102 F. Supp. 747 (S.D. Tex. 1950) the court said:

> The crux of (the) doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a

federal officers accompanied the state officers on the search, remained during the search, and illegally seized part of the evidence. The evidence was suppressed in the federal court. The facts allowed the formulation of a narrow rule that the presence and activity of the federal officers during the search was participation.

During the Prohibition era, when there was much cooperation between federal and local officers in enforcing the federal prohibition laws, the federal courts took a more liberal view of federal participation. In *Gambino v. United States*,[11] although no federal officers were present when the illegal search was conducted, the fact that state officers were acting solely to enforce federal law was the basis for concluding that the evidence must be suppressed.

Later cases relying on *Gambino* expanded federal cooperation to an even broader area. In *Fowler v. United States*[12] the fact that there was a general practice and custom that state officers would act for the federal prohibition authorities by seizing, and turning over to federal authorities, large quantities of illicit liquor, rendered the evidence inadmissible. Such practice, the Court said, was a federal ratification of the original illegal search and seizure. In *Sutherland v. United States*[13] a prior understanding that the federal government would accept evidence which the state officers uncovered was deemed sufficient federal cooperation to make inadmissible any illegally obtained evidence. The very fact that the evidence presented in a federal court was seized by state officers had some effect on deciding whether the evidence was to be excluded.

However, the modern trend has been to limit the idea of participation to active participation by federal officers in an illegal search.[14] *Gambino, Fowler,* and *Sutherland* are restricted to their facts or tacitly nullified.[15] Proof of a pattern set by custom, whereby incriminating evidence which will support a federal charge is often turned over to federal officials by state officers, is no longer sufficient to prove that the search is a federal search or one conducted on behalf of the federal government.[16] The fact that state and federal officers have acted together in the past will no longer support a charge of participation or cooperation.[17] Where a federal marshall notified city police of his suspicion that a state crime had been committed the resulting search was not a federal activity,[18] and evidence uncovered thereby was admitted in federal court. *United States v. Moses*[19] required, to support the exclusion of the evidence, proof that the cooperation between state and federal officers led to the illegal search and seizure.

In *Camara,* it was held that the FBI agent's tip to the Milwaukee city police that narcotics users were frequenting the place subsequently searched was not sufficient federal participation to require that the illegally seized evidence be suppressed.

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silver platter. The decisive factor in determining the applicability of the Byars case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it. Where there is participation on the part of the federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers.

10 273 U.S. 28 (1927).
11 275 U.S. 310 (1927).
12 62 F.2d 656 (7th Cir. 1932).
13 92 F.2d 305 (4th Cir. 1937).
14 United States v. Scotti, 102 F. Supp. 747 (S.D. Tex. 1950).
15 See, *e.g.,* Frederick v. United States, 208 F.2d 712 (5th Cir. 1953); Serio v. United States, 203 F.2d 576 (5th Cir. 1953); Parker v. United States, 183 F.2d 268 (9th Cir. 1950).
16 Parker v. United States, 183 F.2d 268 (9th Cir. 1950).
17 Serio v. United States, 203 F.2d 576 (5th Cir. 1953).
18 Fredericks v. United States, 208 F.2d 712 (5th Cir. 1953).
19 234 F.2d 124 (7th Cir. 1956).

Even though the city police acted on this tip, the illegal search and seizure was conducted solely by them and the search was entirely state-conducted.

The court relied heavily on the *Moses* decision, but in doing so went beyond the ruling to restrict the idea of federal participation or cooperation even further. Not only must the federal agents' cooperation produce the illegal search to have the evidence excluded, but federal officers may cooperate with state officers by supplying them with information and tips of illegal activity. If such information leads to unlawful seizures of evidence, the participation by federal officers will not be a basis for excluding the evidence.

Thus the federal government has come full circle on the question of interpreting state searches. The test for federal participation in illegal state searches now seems to be that a federal officer may inform state officials of activities violating both state and federal laws and subsequently use evidence illegally obtained by state officials in federal prosecutions so long as the federal officer does not actively participate in the search itself.

On the basis of the application of the federal exclusionary rule to searches by state officers as announced in *Camara,* the policy consideration on which this exclusionary rule is founded is thwarted. The rule stems originally from an attempt to safeguard the rights of citizens guaranteed in the fourth and fifth amendments.[20] Even if the guarantee of these rights is secure from federal action, the ruling in *Camara* offers opportunity for federal officers, by collusion with state officers, to violate constitutional rights. The rule can encourage federal officers to make surreptitious pacts with local police to make illegal searches and seizures without fear of the penalty imposed by the exclusionary rule and thus subvert the courts' attempt to supervise federal officers.[21]

The question of whether evidence illegally seized by state officers is admissible in federal courts is presently pending before the Supreme Court.[22] The Courts of Appeal admit evidence illegally seized by state officers[23] with the notable exception of the District of Columbia Court of Appeals which excludes all evidence with an unconstitutional taint.[24] When the Supreme Court does finally speak on this issue, if the full implications of the *Camara* extension are considered, the court may very likely adopt the more logical and realistic rule followed in the District of Columbia Court of Appeals.

Cornelius J. Collins

TORTS — ATTRACTIVE NUISANCE — IT IS FOR TRIER OF FACT TO DETERMINE IF SWIMMING POOL IS ATTRACTIVE NUISANCE. — Plaintiff's one and one-half year old son drowned in defendant's private swimming pool. Decedent, prior to the date of the accident, had on many occasions visited defendant's premises in the care of the defendant's daughter who acted as his baby sitter. Neighborhood children frequently congregated in the defendant's yard, attracted by both the pool and

20 Weeks v. United States, 232 U.S. 382 (1914).

21 See Justice Felix Frankfurter's dissent in United States v. Rabinowitz, 339 U.S. 56 (1959).

22 Rios v. United States, 256 F.2d 173 (9th Cir. 1958), *cert. granted,* 359 U.S. 965 (1959).

23 Costello v. United States, 255 F.2d 389 (8th Cir. 1958), *cert. denied,* 358 U.S. 830 (1958); Gaitan v. United States, 252 F.2d 256 (10th Cir. 1958), *cert. denied,* 356 U.S. 937 (1958); Collins v. United States, 230 F.2d 424 (6th Cir. 1956); Fredericks v. United States, 208 F.2d 712 (5th Cir. 1953), *cert. denied,* 347 U.S. 1019 (1954); Parker v. United States, 183 F.2d 268 (9th Cir. 1950); Wheatley v. United States, 158 F.2d 599 (4th Cir. 1946); United States v. Diuguid, 146 F.2d 848 (2d Cir. 1945), *cert. denied,* 325 U.S. 857 (1945); Miller v. United States, 50 F.2d 505 (3d Cir. 1931), *cert. denied,* 284 U.S. 651 (1931).

24 Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958). See 34 NOTRE DAME LAW. 278 (1958) for a full discussoin of the *Hanna* decision.

several animals kept there which were clearly visible and easily accessible from the street. No one saw decedent enter the yard on the date of the accident. The trial court sustained a demurrer to the complaint. The district court of appeals affirmed.[1] *Held:* reversed. The complaint states a cause of action under section 339 of the Restatement of Torts which has been adopted by California as the law with respect to the liability of a landowner to trespassing children. *King v. Lennen,* 1 Cal. Rptr. 665 348 P.2d 98 (Sup. Ct. 1959).

As early as 1841, an English Court recognized that a property owner owed a special duty of care to trespassing children who because of their age would not recognize a concealed danger.[2] The first recorded American cases adopting this principle involved injuries to children on railroad turntables, the locks of which had been negligently left open.[3] From these decisions this special consideration for trespassing children acquired the name "turntable doctrine."[4] In California's first case invoking the attractive nuisance doctrine, also involving a railroad turntable, the court delineated the policy underlying the doctrine. It asserted: "In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self restraint as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly."[5] In spite of this broad statement, courts recognized that the unnecessary extension of the policy would place an undue burden on property owners[6] and the subsequent history of the doctrine has been one of confinement to rather nebulously defined settings and circumstances. Within these boundaries certain general ideas as to what constitutes an attractive nuisance have emerged. One of the first formulations of the attractive nuisance doctrine in California was that the condition must constitute a "trap."[7] Originally the "trap" theory was applied only to dangerous machinery and occasionally to other artificial conditions created by an affirmative act of the property owner.[8] It was generally concluded that the condition had to be one that children would not recognize as being dangerous.[9] This premise resulted in a distinction by the courts between conditions harboring concealed dangers and those the inherent dangers of which were presumed to be recognized by all, *regardless of age.* Among the latter conditions have been included fire, water, and heights.[10] This presumption of the knowledge of even small children of the dangers inherent in water has given rise to the widely accepted position that ponds, pools, lakes, streams, reservoirs and other bodies of water are not, in their ordinary condition, attractive nuisances,[11] even though they may be artificially constructed.[12] This idea repeatedly has been accepted by the California courts[13] and has been applied

1 King v. Lennon, 342 P.2d 459 (Cal. App. 1959).

2 Lynch v. Nurdin, 1 Q.B., 113 Eng. Rep. 1041 (1841). Child injured while playing on a negligently loaded cart that had been left in the street.

3 Sioux City & Pacific R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873); Keffe v. Milwaukee & St. Paul R.R., 21 Minn. 207, 18 Am. Rep. 393 (1875).

4 See generally Prosser, *Trespassing Children,* 47 CALIF. L. REV. 427 (1959).

5 Barrett v. Southern Pacific Co., 91 Cal. 296, 27 Pac. 666, 667 (1891).

6 PROSSER, TORTS 439 (2d ed. 1955).

7 Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 Pac. 1060 (1928); Faylor v. Great Eastern Quick Silver Mining Co., 45 Cal. App. 194, 187 Pac. 101 (1919).

8 Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Beeson v. Los Angeles, 115 Cal. App. 123, 300 Pac. 993 (1931); Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193 (1884).

9 Malendez v. City of Los Angeles, 8 Cal. 2d 741, 68 P.2d 971 (1937); Beeson v. Los Angeles, 115 Cal. App. 123, 300 Pac. 993 (1931).

10 Malendez v. City of Los Angeles, 8 Cal. 2d 741, 68 P.2d 971 (1937); Demmer v. Eureka, 78 Cal. App. 2d 708, 178 P.2d 472 (1947); Beeson v. Los Angeles, 115 Cal. App. 123, 300 Pac. 993 (1931); Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 Pac. 414 (1918).

11 56 AM. JUR. WATERS § 436 (1947).

12 65 C.J.S. *Negligence* § 29(12)j (1950).

13 Malendez v. City of Los Angeles, 8 Cal. 2d 741, 68 P.2d 971 (1937); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Ward v. Oakely, 125 Cal. App. 2d 840, 271 P.2d

to swimming pool cases quite similar to *King* to defeat recovery.[14] The courts have mitigated the results of the water presumption somewhat by holding that the existence of a deceptive condition belying the innocent appearance of the accepted water hazard, would make the artificial water condition a "trap" and hence an attractive nuisance.[15]

California courts have adopted the Restatement rule, promulgated in 1934,[16] respecting attractive nuisances and have used it in water cases while maintaining that no conflict exists between it and the trap theory.[17] There has been speculation in other jurisdictions that the Restatement rule could conceivably give a much broader base to the liability of landowners to trespassing children than did the older theories.[18]

While comment (b) to section 339 provides that the section is not to apply ". . . to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them," it is also true that the courts are left to their discretion in determining what these "conditions" are. As already mentioned, fire, water, and falling from a height have been the traditional conditions included within comment (b).[19] The courts have often applied it to defeat recovery even where the injured party has been so young that it would be absurd to suppose that he possessed knowledge of the danger.[20]

So unreasonable has been this presumption in many instances that the California courts in recent decisions have shown a tendency to relax the rule somewhat.[21] In *Reynolds v. Willson*,[22] the California Supreme Court ruled that a par-

536 (1954); Demmer v. Eureka, 78 Cal. App. 2d 708, 178 P.2d 472 (1947); King v. Simons Brick Co., 52 Cal. App. 2d 586, 126 P.2d 627 (1942); Beeson v. Los Angeles, 115 Cal. App. 123, 300 Pac. 993 (1931); Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 Pac. 414 (1918).

14 Wilford v. Little, 144 Cal. App. 2d 477, 301 P.2d 282 (1956); Lake v. Ferrer, 139 Cal. App. 2d 114, 293 P.2d 104 (1956).

15 *E.g.*, Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 Pac. 1060 (1928): The court held that the existence of a syphon on the floor of a canal, concealed by muddy waters, constituted a trap — that the child had accepted the dangers of the water but not those of the *artificially* constructed syphon.

16 RESTATEMENT, TORTS § 339 (1934):

> A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

Courtell v. McEachen, 51 Cal. 2d 448, 334 P.2d 870 (1959); Reynolds v. Willson, 51 Cal. 2d 94, 331 P.2d 48 (1958); Davis v. Goodrich, 171 A.C.A. 88, 340 P.2d 48 (1959); Garcia v. Soogian, 52 A.C. 107, 338 P.2d 433 (1959); Woods v. San Francisco, 148 Cal. App. 2d 958, 307 P.2d 698 (1957). See generally Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959).

17 Long v. Standard Oil Co., 92 Cal. App. 2d 455, 207 P.2d 837 (1949).

18 16 FORDHAM L. REV. 295 (1947).

19 PROSSER, TORTS 441 (2d ed. 1955).

20 Wilford v. Little, 144 Cal. App. 2d 477, 301 P.2d 282 (1956); Lake v. Ferrer, 139 Cal. App. 2d 114, 293 P.2d 104 (1956).

21 Courtell v. McEachen, 51 Cal. 2d 448, 334 P.2d 870 (1959); Reynolds v. Willson, 51 Cal. 2d 94, 331 P.2d 48 (1958); Davis v. Goodrich, 171 A.C.A. 88, 340 P.2d 48 (1959). In *Davis*, a child, two and one-half years old, fell from an abandoned roller coaster. The court stated: "However, when dealing with a child of plaintiff's tender years, it cannot be stated as a matter of law that he either did or did not have sufficient mental development to fully appreciate the consequences of a fall from a high elevation. . . . Under such circumstances, this determination would ordinarily be a question for the trier of fact." Judgment was for the

tially filled pool, the bottom of which was covered with algae, dead leaves, and other decomposed matter, satisfied condition (c) of section 339[23] and constituted a trap. A two-year-old boy was seriously injured when he fell into the pool and apparently was unable to extricate himself because of the slippery bottom. A strong dissent by Mr. Justice Spence pointed out the inconsistency of this holding with prior attractive nuisance cases,[24] emphasizing the Summary of California Law[25] statement that it is only "where the natural or artificially created body of water contains an additional *artificial* contrivance constituting a concealed danger or trap [that] recovery may be allowed."[26] In *Courtell*,[27] where a little girl was injured when her dress caught fire, the court extended the application of the Restatement rule by holding that it was for the trier of fact to determine whether or not the girl had been injured by a risk not open and obvious to her. There was a dispute as to whether or not open flames had been visible, but no dispute as to the existence of smoldering live coals. Though the case was reversed because of faulty instructions to the jury and there was the added problem of a violation of a fire control ordinance, the dicta in the case shows a limiting of the concept that young children presumably are aware of the dangers under these conditions.

Each of these cases indicated the California Supreme Court's tendency to reassess some long-held concepts regarding the attractive nuisance doctrine.[28] In *King* the Court openly acknowledged that it approves a departure from the old rule that a water hazard, natural or unnatural, if common in nature, would not subject a landowner to liability to trespassing children, regardless of the age of the child. It expressly overruled a long line of decisions so holding,[29] and adopts the Restatement, section (c), in its literal sense — leaving the question of knowledge as one for the trier of fact.

While *King* will stand for trial on its merits, it appears certain that more

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defendant because plaintiff failed to show that defendant knew or should have known that young children were likely to trespass upon his property. See also Garcia v. Soogian, 52 A.C. 107, 338 P.2d 433 (1959); Woods v. San Francisco, 148 Cal. App. 2d 958, 307 P.2d 698 (1957).

22 51 Cal. 2d 94, 331 P.2d 48(1958).

23 See note 15 *supra*.

24 Malendez v. City of Los Angeles, 8 Cal. 2d 741, 68 P.2d 971 (1937); Wilford v. Little, 144 Cal. App. 2d 477, 301 P.2d 282 (1956); Lake v. Ferrer, 139 Cal. App. 2d 114, 293 P.2d 104 (1956); Ward v. Oakely, 125 Cal. App. 2d 840, 271 P.2d 536 (1954); Demmer v. Eureka, 78 Cal. App. 2d 708, 178 P.2d 472 (1947); King v. Simons Brick Co., 52 Cal. App. 2d 586, 126 P.2d 627 (1942).

25 (1946) p. 748, *et seq.*

26 The conclusion of the court in *Reynolds* is hard to reconcile with Ward v. Oakely, 125 Cal. App. 2d 840, 271 P.2d 536 (1954), where two youths were drowned while wading in a slough. An industrial firm had been extracting a slimy colloidal substance from the floor of the slough and had abandoned operations. The youths became mired in the slimy material and were unable to save themselves. The court sustained a demurrer to the complaint on the ground that the colloidal substance was a natural condition. Malendez v. City of Los Angeles, 8 Cal. 2d 741, 68 P.2d 971 (1937); King v. Simons Brick Co., 52 Cal. App. 2d 586, 126 P.2d 627 (1942). See also Betts v. San Francisco, 108 Cal. App. 2d 701, 239 P.2d 456 (1952) (the court denied recovery, as a matter of law, holding that it was common knowledge among everyone that wet concrete is slippery.)

27 51 Cal. 2d 448, 334 P.2d 870 (1959).

28 See generally comment, 46 CALIF. L. REV. 610 (1958); 31 MISS. L.J. 109 (1959); Note, 32 So. CAL. L. REV. 421 (1959); 6 U.C.L.A.L. REV. 487 (1959).

29 Knight v. Kaiser Co., 48 Cal.2d 778, 782, 312 P.2d 1089 (1957); Melendez v. City of Los Angeles, 8 Cal.2d 741, 745, 68 P.2d 971 (1937); Doyle v. Pacific Electric Ry. Co., 6 Cal.2d 550, 552, 59 P.2d 93 (1936); Peters v. Bowman, 115 Cal. 345, 350-51, 355-56, 47 Pac. 113 (1896); Van Winkle v. City of King, 149 Cal. App. 2d 500, 506, 308 P.2d 512 (1957); Wilford v. Little, 144 Cal. App. 2d 477, 480-82, 301 P.2d 282 (1956); Lopez v. Capitol Co., 141 Cal. App. 2d 60, 65-67, 296 P.2d 63 (1956); Lake v. Ferrer, 139 Cal. App. 2d 114, 117-18, 293 P.2d 104 (1956); Ward v. Oakely Co., 125 Cal. App. 2d 840, 845, 271 P.2d 536 (1954); King v. Simons Brick Co., 52 Cal. App. 2d 586, 590, 126 P.2d 627 (1942); Beeson v. City of Los Angeles, 115 Cal. App. 122, 126-28, 300 Pac. 993 (1931); Reardon v. Spring Valley Water Co., 68 Cal. App. 13, 15-17, 228 Pac. 406 (1924).

stringent safeguards by the owners of private swimming pools will result from the California Supreme Court's action. The increasing number of private swimming pools coupled with the consequent danger to wandering infants seems to make obsolete much of the dicta of the older cases.[30] Today the problem consists, as in *King*, of having swimming pools, attractive to children of all ages, situated in densely populated residential districts where only an inattentive minute on the part of a mother or baby sitter can result in death to children that obviously do not appreciate the danger. Public concern over the problem in Florida and Virginia, states with judicial rulings similar to California,[31] has resulted in legislation designed to prevent further infant deaths from unfenced swimming pools.[32]

Future swimming pool cases promise to focus attention on section 339 (d) of the Restatement which balances the utility to the possessor of maintaining the condition against the risk to young children involved therein. Requiring adequate fences would not impose an undue burden on the landowner compared to the danger to wandering children where none exists. This could be the next development of the attractive nuisance doctrine in California as applied to private swimming pools.

George P. McAndrews

TORTS — PARENT AND INFANT — FATHER CAN MAINTAIN DERIVATIVE ACTION AGAINST MINOR UNEMANCIPATED SON. — Plaintiff sought to maintain a derivative action for damages against his minor unemancipated son. The damages sought were for loss of services and medical expenses incurred as a result of personal injuries sustained by another of plaintiff's unemancipated sons in a collision between automobiles driven by his brother, the defendant, and by the co-defendant. Contending that an action by a father against his unemancipated son is contrary to public policy, the defendant son moved to dismiss the complaint as to him. *Held:* motion denied. A father can maintain a derivative action for negligence against an unemancipated minor son. *Becker v. Reick*, 188 N.Y.S.2d 724 (Sup. Ct. 1959).

Traditionally, the Anglo-American courts have been reticent to entertain intra-family suits. In England, while actions between child and parent affecting real property and contract rights were allowed in equity,[1] there is no record of such

30 *E.g.*, Peters v. Bowman, 115 Cal. 355, 47 Pac. 598 (1896). Mr. Justice Beatty, speaking for the court, said: "A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or in other words, destroyed." In 1896, when this case was decided, the principal problem concerning water hazards involved venturesome youths quite capable of realizing the dangerous potentialities of water, and it was true that fences would have been practically useless in preventing them from subjecting themselves to danger.

31 Adler v. Copeland, 105 So. 2d 594 (Fla. App. 1958); Washabaugh v. Northern Virginia Constr. Co., 187 Va. 767, 48 S.E.2d 276 (1948), quoting Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896).

32 FLA. STAT. ANN. §§ 125.01, 167.101 (Supp. 1959).

§ 125.01: County Commissioners — Powers and Duties

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(1) To require fences around public or residential swimming pools in said county, outside municipalities, *so as to relieve attractive nuisances* and may prescribe reasonable regulations which such fences must meet in order to protect the public health, welfare, and safety. (Emphasis added.)

§ 167.101: General Powers of Municipalities:

Fencing of private swimming pools.

"Any municipality may by ordinance require and regulate the fencing of private swimming pools."

See also: VA. CODE ANN. § 15-18.1 (Supp. 1958) (Ordinances requiring the fencing of swimming pools. Penalties for violation include fine and/or jail sentence.)

1 Dunlap v. Dunlap, 84 N.H 352, 150 Atl. 905 (1930); See generally McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

action in tort.[2] Some interpreted this as indicating that clearly the tort action would not lie,[3] while others concluded that the right of action was so clear that it was not questioned.[4] Early text writers, commenting on child v. parent tort actions, voiced concern for parental discipline should such actions be allowed.[5]

In America, the landmark case involving a child v. parent action is *Hewlette v. George*,[6] an 1891 Mississippi decision, which refused to allow a minor unemancipated child to maintain a false imprisonment action against her parent. Citing no authority, the court based immunity on protection of parental authority and family and social peace. This decision was quickly adopted by the majority of American courts.[7] However, as in England, intrafamily suits concerning property rights were unaffected by the *Hewlette* decision.[8]

In the great majority of tort actions involving parent and child as adverse parties, the child is plaintiff. Immunity has also been granted in the reverse situation, the child's immunity often stated as the reciprocal of the parental immunity.[9] But all of the reasons asserted in support of parental immunity do not bear out this reciprocity.[10]

Particularly inapplicable to actions in which the parent is plaintiff is the fear that allowing children to sue parents would undermine parental authority.[11] Indeed, this might even be ascribed as a ground for the abolition of immunity. A similar argument which would deem the immunity of the parent as analogous to the immunity of the sovereign[12] likewise falls when the "sovereign" brings the suit. The rationale that to allow a judgment would deplete the family exchequer and sacrifice the family income for the benefit of a member of the family[13] would not apply with force where the child is the defendant, since the unemancipated child's income rarely supports the family.

On the other hand, some of the bases underlying the intrafamily immunity doctrine are equally apt if either parent or child brings the action. That an uncompensated tort in the family would disturb family harmony less than a legal action,[14] if true at all, becomes no less true when the parent is the tort-feasor. The suggestion that recovery should be barred since the defendant possibly could succeed

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2 See, *e.g.*, Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); see McCurdy, *supra* note 1.

3 Durham v. Durham, 272 Miss. 76, 85 So.2d 807 (1956); COOLEY, TORTS 171 (1879).

4 Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).

5 1 BLACKSTONE COMMENTARIES *452; REEVE, DOMESTIC RELATIONS 420 (1874).

6 Hewlette v. George, 68 Miss. 703, 9 So. 885 (1891).

7 See, *e.g.*, McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); PROSSER, TORTS 676 (2d ed. 1955). Negligent torts were logically included. See, *e.g.*, Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Small v. Morrison, 185 N.C. 557, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925).

8 See, *e.g.*, McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920); Bobb v. Bobb, 89 Mo. 411, 4 S.W. 511, (1887).

9 See, *e.g.*, Boem v. C. M. Gridley & Sons, 187 Misc. 113, 63 N.Y.S.2d 587 (Sup. Ct. 1946); Annot., 60 A.L.R.2d 1285.

10 See LoGalbo v. LoGalbo, 138 Misc. 485, 246 N.Y.S. 565 (Sup. Ct. 1930).

11 See, *e.g.*, Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925); Wick v. Wick, 192 Wisc. 260, 212 N.W. 787 (1927).

12 See Martarese v. Martarese, *supra* note 11. This argument would not seem valid, as it would preclude any child v. parent action, and clearly such is not the case, property and contract actions never having been challenged. See notes 2 and 11 *supra*.

13 See Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). This argument would apply as well in property and contract actions, but does not prevent them. Further, it is completely inapplicable if the defendant is indemnified by insurance.

14 See Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927). That this proposition is generally true would seem doubtful, and it is clearly false when the defendant is insured. Further, it is not recognized in property and contract actions.

to the judgment[15] would apply with equal or greater weight in a case in which the child is the defendant. Likewise, where there is indemnification by insurance, an intrafamily action is equally susceptible to fraud or collusion[16] regardless of which family member sues.

The wisdom of the immunity doctrine, at least in its broad application, has been questioned[17] and a growing minority recognize exceptions to it. Courts are abandoning immunity in cases of intentional or wilful and wanton torts, asserting that domestic tranquility has already been breached,[18] and that parental authority does not extend to such behavior.[19] Persons standing in *loco parentis,* particularly when representing a deceased parent, enjoy a much more limited immunity. It is asserted that there no longer exists a family relation to be affected.[20] Another exception has appeared where the injury can be characterized as arising from a business rather than parental relation.[21] In these cases, the fact that the defendant is often insured is thought to overcome the reasons for the immunity doctrine. However, thus far insurance has not been expressly recognized as an acceptable basis for removing immunity outside of these cases using the business relation rationale.[22]

Missouri, in *Wells v. Wells,*[23] appears to have abolished immunity altogether.[24] In the *Wells* case, the court spoke out against all the policies for immunity that had been asserted, reasoning that they would be equally applicable in property and contract actions, yet no immunity is afforded in such cases; thus the tort action was not distinguished so as to warrant immunity.[25] Nevertheless, the threat to parental authority seems more serious in tort actions, and probably should not be summarily dismissed. The decisions allowing actions for intentional or willful and wanton torts recognize the desirability of protecting parental authority, but reason that the parent has put himself outside the scope of immunity by behavior not in accord with proper performance of the parental duty. The policies other than protecting parental authority appear to be little more than make-weight,[26] and are often added when the facts of the case do not actually support this primary policy.[27]

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15 Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). This argument would appear to be of little consequence, as it is based on a mere possibility that the defendant could be returned to the same position as the court is leaving him in by denying the action. Further, it does not prevent property and contract actions.

16 Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938).

17 Judge Lord in Davis v. Smith, 126 F. Supp. 497, 503 (1954):

> The Hewlette, McKelvey and Roller cases set the stage and laid a foundation for a large body of decisions in numerous jurisdictions in the United States flatly denying any right of recovery to a child against a living parent under any circumstances. But in more recent years it would seem that the trend of judicial decisions and the thinking of legal writers has been toward amelioration and limitation of the rule, based upon a recognition that the Hewlette, McKelvey and Roller cases were wrongly decided.

See also the criticism of broad immunity by Judge Musmano, dissenting in Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).

18 See, *e.g.,* Nudd v. Matsoukas, 7 Ill. App.2d 608, 131 N.E.2d 525 (1956).

19 See, *e.g.,* Buttram v. Buttram, 98 Ga. App. 226, 105 S.E.2d 510 (1958); Henderson v. Henderson, 169 N.Y.S.2d 106 (Sup. Ct. 1957); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

20 See, *e.g.,* Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913); Clasen v. Pruhs, 69 Neb. 789, 95 N.W. 640 (1903); Steber v. Norris, 188 Wis. 266, 206 N.W. 173 (1925).

21 See, *e.g.,* Signs v. Signs, 156 Ohio St. 556, 103 N.E.2d 743 (1952); Worrell v. Worrell, 74 Va. 11, 4 S.E.2d 343 (1939).

22 Compare Canadian law allowing action against a negligent parent indemnified by insurance. Fidelity & Cas. Co. v. Marchand, 4 D.L.R. 157 (1924).

23 48 S.W.2d 109 (Mo. App. 1932).

24 PROSSER, *supra* note 8.

25 Wells v. Wells, 48 S.W.2d 109 (Mo. App. 1932).

26 See Borst v. Borst, 42 Wash.2d 642, 251 P.2d 149, 154 (1952).

27 Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). (Daughter denied action against her father for rape.)

The policy of prevention of fraud,[28] and the insurance that gives rise to it, warrants separate attention, since the bulk of the recent reported child v. parent actions, and apparently all reported parent v. child actions have involved automobile accidents, and, presumably, indemnified defendants.[29] When the defendant is idemnified by insurance, the force of the immunity arguments fail, except for the fraud argument. The family funds will not be diminished; in fact, insurance could prevent ruinous depletion. The authority of the parent would hardly be seriously challenged since the parent probably institutes the suit himself. In short, naught but good could come to the family as a result of such an action. Some courts assert that insurance cannot create liability, only indemnify already existing liability.[30] But this formal argument has been met by the argument that this would not be a creation of liability, only a removal of immunity from liability when insurance removes the reason for immunity.[31] With the family standing to gain from a judgment in an action covered by insurance, there may be a temptation toward fraud — but there is danger of fraud in any action. The question then becomes whether this situation and this class of co-defendants are such as to justify immunity. The insurance company is a professional defendant, and owes its very existence to the possibility of liability. If any defendant can rely on the legal safeguards against fraud, this class of defendants is able to use these safeguards most effectively.

That the decision in the present case was based on the coverage by insurance was denied by the court, but this fact was possibly an important factor. The court classified the plaintiff's loss, "although predicated on negligence," as "in the nature of an infringement on a property right"[32] and thus outside the scope of the immunity. However the cases decided under the property approach are concerned exclusively with interests in real property,[33] and an inspection of New York precedent reveals that actions such as that in the present case are now clearly regarded as personal injury actions.[34]

Only one of the traditional bedrocks for immunity — protection of domestic tranquility — was explicitly recognized by the court. But this they avoided by reasoning that to allow the brother recovery against the defendant while at the same time denying the father recovery would disturb family harmony more than an action by the father. An equally strong argument would apply in any case in which the child is insured and the father unable to recover.

It is submitted that the court groped for fictions to reach a desirable conclusion — the practical abolition of immunity in parent v. child or child v. parent actions. At the very least, the decision is precedent for a court to determine ad hoc if to allow the action would actually disrupt domestic tranquility or undermine parental authority. This indeed would be a long step toward correcting the folly of the *Hewlette* decision.

Richard M. Bies

28 Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938).
29 See 60 A.L.R.2d 1285.
30 See, *e.g.*, Duffy v. Duffy, 117 Pa. Super. 500, 178 Atl. 165 (1935); Lasecki v. Kabara, 253 Wis. 645 294 N.E. 33 (1940).
31 See Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).
32 Becker v. Reick, 188 N.Y.S.2d 724, 727 (Sup. Ct. 1959).
33 See, *e.g.*, McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920); Bobb v. Bobb, 89 Mo. 411, 4 S.W. 511 (1887).
34 Bailey v. Roat, 178 Misc. 870, 36 N.Y.S.2d 465 (1942); Ballentine v. Ahearn, 170 Misc. 651, 10 N.Y.S.2d 937 (1939).

WORKMEN'S COMPENSATION — MENTAL INJURY — SCHIZOPHRENIA STEMMING FROM MENTAL CAUSES IS NONCOMPENSABLE. — Claimant, a taxi driver, hit and injured a pedestrian who darted out in front of the cab he was driving. When the police sought to question him and asked for his license he became angry and appeared disturbed although he had suffered no physical injury. A month later he was admitted to a hospital suffering from a mental disturbance. The Workmen's Compensation Board awarded compensation for paranoid schizophrenia stemming from a repressed emotional disorder aggravated by the police questioning after the accident. On appeal, *held:* reversed. Under the Workmen's Compensation Law of New York, there can be no recovery for mental disorder in the absence of other physical injury. *Cherin v. Progress Service Co.*, 9 App. Div. 2d 170, 192 N.Y.S.2d 758 (1959).

Cherin represents an unfortunate importation from tort law of a long standing reluctance to recognize the reality of mental suffering. Despite the remedial character of workmen's compensation the court here has imposed an aspect of the stringent requirements of tort liability, drawn from the familiar justifications of public policy and difficulty of proof. The impropriety of tort concepts in the compensation field is apparent in the underlying theories of both.

Workmen's compensation was a revolt from the common law and not merely an improvement, as it substituted a statutory liability resting upon status rather than fault.[1] The problems caused by proximate cause are avoided by the broader requirement of a work-connected injury. Most important, the gravamen of the action in compensation cases, with certain exceptions,[2] is disability and not damage.[3] This latter fact requires that the compensability of the specific type of injury be determined by criteria peculiar to the field of workmen's compensation and that the corresponding rules of tort law not be unquestionably adopted as a body of principles.

Under New York tort law it was originally held in *Mitchell v. Rochester Ry. Co.*[4] that since fright could not be a basis of injury there could be no recovery for its consequences. Exceptions to this rule subsequently developed, as in *Comstock v. Wilson*[5] where injuries were sustained from a fall occasioned by fright arising from a minor automobile accident. In allowing recovery the court said that fright was only a link in the chain of causation between the collision and the injuries. Recently there has been a greater relaxation of this rule, and recovery is now allowed for mental injuries not stemming from a physical injury.[6] From the attitude of the courts in these cases it remains doubtful whether New York would allow recovery for mental injuries without prior physical impact or consequent physical manifestations.

The courts of New York have exhibited a tendency to apply these tort rules in workmen's compensation cases. Thus, where the mental injury accompanies physical impact, or physical injuries result from mental shock, compensation has been awarded.[7] But in cases involving hysterical blindness,[8] "compensation neurosis,"[9] and other similar conditions the courts have notably abandoned these tort concepts

1 HOROVITZ, WORKMEN'S COMPENSATION 8 (1944).
2 Swartout v. Niagara Falls YMCA, 258 App. Div. 828, 15 N.Y.S.2d 625 (1939) (facial disfigurement); Farnum v. Gardner Print Works, 229 N.Y. 554, 129 N.E. 912 (1920) (loss of sexual powers).
3 Charon's Case, 321 Mass. 694, 75 N.E.2d 511, 513 (1947).
4 151 N.Y. 107, 45 N.E. 354 (1896).
5 257 N.Y. 231, 177 N.E. 431 (1931).
6 Battalla v. State, 17 Misc.2d 548, 184 N.Y.S.2d 1016 (Sup. Ct. 1959) (physical manifestations); Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958) (X-ray burn causing cancerphobia), noted in 34 NOTRE DAME LAW. 282 (1958).
7 Underwood v. Whitney, 282 App. Div. 783, 122 N.Y.S.2d 468 (1953); Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y.S. 355 (1926).
8 Weber v. George Haiss Mfg. Co., 229 N.Y. 525, 181 N.Y.S. 140, 129 N. E. 900 (1920).
9 Rodriguez v. New York Dock Co., 256 App. Div. 875, 9 N.Y.S.2d 264 (1939), *leave to appeal denied*, 280 N.Y. 852, 20 N.E.2d 398.

and interpreted the workmen's compensation statutes to allow compensation.[10] If in the instant case the claimant had suffered a heart attack the next day and died, he would have received compensation, presumably because the court would have felt sure that it was real.[11] It seems an unwarranted distinction to hold that where an emotional trauma is fatal, compensation will be allowed but not where it merely disables the worker.

There is a definite trend toward allowing compensation of workmen for mental injuries which arise solely from fright or shock, and are not accompanied by other physical injuries.[12] One of the most significant cases yet to appear in this area is *Bailey v. American Gen. Ins. Co.*[13] where a structural steel worker was put in fear of his life when a scaffold on which he was working gave way on one end and he witnessed a co-worker plunge to death. Subsequently the claimant suffered a traumatic neurosis from the shock and was unable to work. The court granted compensation, reasoning that it was no longer realistic to draw a line between injuries to the "mind" and those to the "body." An earlier case of similar import was *Yates v. South Kilby Collieries, Ltd.*[14] where a miner helped a maimed co-worker and subsequently suffered a nervous collapse. It should be noted that in both Texas and England, where these two cases were decided, recovery in tort is generally permitted for mental injury without physical impact.[15]

Generally the workmen's compensation cases which have allowed recovery for mental disorders produced by mental shock have had to interpret "injury" to include those which are mental.[16] Courts have even made this interpretation in the face of a legislative definition requiring "damage or harm to the physical structure of the body."[17] The New York law does not define "injury," but merely states that it must be accidental.[18] Other states with identical statutes have interpreted "injury" to include those purely mental.[19] It is interesting to note that the New York workmen's compensation act was originally modeled after the English law,[20] which was interpreted in *Yates v. South Kirby Collieries, Ltd.*[21] to include mental injuries caused by a mental shock. In some states where the courts failed to compensate purely mental injuries special legislative provisions have been added to specifically include such injuries.[22]

It is also necessary in most states to show that the condition claimed was the result of an accident.[23] In the present case it might be held that routine questioning by police does not constitute an accident and was traumatic only in light of the pre-existing paranoia. And the Board found the cause in the questioning, not in the collision. However, the psychic trauma which was the basis of the accident claimed would not have occurred but for the collision and the resulting questioning,

10 Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y.S. 355 (1926).
11 Pickerell v. Schumacher, 215 App. Div. 745, 212 N.Y.S. 899, *aff'd*, 242 N.Y. 577, 152 N.E. 434 (1926).
12 Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955); Charon's Case, 321 Mass. 694, 75 N.E.2d 511, 513 (1947); Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941); Yates v. South Kirby Collieries, Ltd., (1910) 2 K.B. 538. See Annot., 109 A.L.R. 892 (1937); 1 LARSON, WORKMEN'S COMPENSATION LAW § 42.23 (1952).
13 154 Tex. 430, 279 S.W.2d 315 (1955).
14 [1910] 2 K.B. 538.
15 Houston Elec. Co. v. Dorsett, 145 Tex. 95, 194 S.W.2d 546 (1946); Wilkinson v. Downton, (1897) 2 Q.B. 57.
16 1 LARSON, WORKMEN'S COMPENSATION LAW § 42.20 (1952).
17 TEX. REV. CIV. STAT. ANN. art. 8306, § 3b (Vernon, 1941), interpreted in *Bailey* to include mental injuries caused by fright.
18 N.Y. WORKMEN'S COMP. LAW § 2 (McKinney, 1946).
19 Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941); Klein v. H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922).
20 Workmen's Comp. Act, 1906, 6 Edw. 7, c. 58.
21 [1910] 2 K.B. 538.
22 WIS. STAT. § 102.01 (1957).
23 See RIESENFIELD & MAXWELL, MODERN SOCIAL LEGISLATION 196-97 (1950).

which was certainly an untoward occurrence. The New York courts in heart cases have been very liberal in interpreting what was an accidental occurrence, and in *Thompson v. City of Binghamton*[24] it was held that a false fire alarm was an accident within the meaning of the statute.

The arguments usually advanced for denying recovery for mental suffering are the difficulty of proof and the "wide door" of claims that would be opened if recovery were allowed.[25] In answer, it has been pointed out that mental disorders are real diseases which can be caused by psychic trauma and therefore are real injuries completely analogous to physical injuries. That it may be difficult to establish the existence or extent of such injury or the causal relationship between the accident and the disorder is not sufficient ground for the court to quit the field. Medical experts are increasingly available to help the courts in these matters and both symptoms and proof of mental suffering can now be discerned with reasonable certainty.[26]

Failure to recognize purely mental injuries defeats the remedial purpose of workmen's compensation legislation and extends an inequity of tort law. Where there is doubt as to the right of the injured employee to compensation, it should be solved in favor of such right as workmen's compensation legislation is remedial, not fault-finding.[27] The important fact in the instant case remains that the claimant was incapacitated due to a work-connected injury. Merely because the injury was mental and could not be attributed to any physical impact he was not compensated. Such injuries can be as real as physical injuries in terms of disability, and they ought not be distinguished in workmen's compensation law.

George A. Pelletier, Jr.

WRONGFUL DEATH — INSANITY-SUICIDE — SUICIDE RESULTING FROM INSANITY INDUCED BY DEFENDANT'S TORT IS ACTIONABLE. — Plaintiff brought a wrongful death action to recover for her husband's suicide.[1] The complaint alleged that decedent, a diamond broker, delivered a diamond to the defendants with the understanding that the diamond or its stated value was to be returned upon demand. Defendants refused to return the diamond to the deceased or to pay for it, and informed decedent that they would deny having received possession thereof. This induced in deceased an irresistible impulse to take his own life. Upon motion to dismiss, *held:* motion denied. The allegation of irresistible impulse is sufficient to constitute an allegation of insanity. Insanity caused by defendants' conversion and resulting in decedent's suicide is adequate to make defendants' intentional tort a proximate cause of decedent's suicide. *Cauverein v. DeMetz,* 188 N.Y.S.2d 627 (Sup. Ct. 1959).

Whether an action for wrongful death would lie, where as a result of an intentional wrong a person becomes insane and commits suicide, was a proximate cause issue that had not been decided in New York before this decision.[2] Notwithstanding

24 218 App. Div. 451, 218 N.Y.S. 355 (1926).

25 See PROSSER, TORTS § 37 (1955) where these arguments are discussed and the author comments that they are losing their force in workmen's compensation.

26 Satterfield, *Forensic Psychiatry,* GRADWOHL, LEGAL MEDICINE 867 (1954); *Goodrich, Emotional Disturbance as Legal Damage,* 20 MICH. L. REV. 497 (1922).

27 Jones v. Texas Indem. Ins. Co. 223 S.W.2d 286, 288 (Tex. Civ. App. 1949).

1 The complaint contained two other causes of action: that the suicide was brought about by extreme apprehension and severe emotional distress intentionally caused by the wrongful and malicious conduct of defendants, and for the conversion of the deceased's property. The trial court dismissed the first of these causes for insufficiency and sustained the second. The scope of this article does not include a discussion of these rulings.

2 Koch v. Fox, 71 App. Div. 288, 75 N.Y.S. 913, 920-1 (1902) (The court did not decide this issue of proximate cause); Salsedo v. Palmer, 278 Fed. 92 (2d Cir. 1921) (The Second Circuit, sitting in a case from the federal district court of New York, affirmed a demurrer to a wrongful death action for suicide).

the diverse tests which have been formulated by the courts to determine proximate cause,[3] in suits for suicide under wrongful death and workmen's compensation acts only two tests are generally used.

The foreseeability test, first applied under a wrongful death act in *Scheffer v. Railroad Co.*,[4] requires that proximate cause can be found only when the deceased's insanity and/or suicide could be reasonably expected and foreseen.[5] Recovery has been denied in one negligence[6] and three intentional tort cases[7] where this test has been used in actions brought under wrongful death acts. No case has been found using the foreseeability test where the action has been brought under the workmen's compensation acts.

The almost universally used "uncontrollable impulse" test was first laid down in *Daniels v. New York, N.A., & H.R.R.* where the court held that

> . . . the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy [caused by the wrongful act] . . . and without conscious volition to produce death.[8]

As in all the other cases involving wrongful death acts,[9] all of which were based on defendant's negligence toward the deceased, application of the uncontrollable impulse test resulted in no recovery.[10] However, under the workmen's compensation acts, where the deceased employee is physically injured at work and as a result subsequently becomes insane or emotionally upset and commits suicide, recovery has been granted. The cases granting recovery usually involve an eccentric, violent or weird form of self-destruction close in time to the physical injury,[11] while those denying recovery often involve a melancholy form of derangement which results in a quiet, solitary and planned suicide,[12] although there are exceptions.[13] In work-

3 PROSSER, TORTS 252-8 (2d ed. 1955); 27 FORDHAM L. REV. 457 (1958).

4 105 U. S. 249 (1881).

5 *Id.*, at 252.

6 *Ibid.*

7 *E.g.*, Stevens v. Steadman, 140 Ga. 680, 79 S.E. 564, 566 (1913). (Decedent took an overdose of narcotics); Salsedo v. Palmer, 278 Fed. 92, 96 (2d Cir. 1921) (While confined and tortured, decedent jumped from hotel window); Jones v. Stewart, 183 Tenn. 176, 191 S.W.2d 439 (1946) (Decedent hanged himself).

8 183 Mass. 393, 67 N. E. 424, 426 (1903) The court continued:

> An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues.

9 *E.g.*, Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N. E. 80 (1909) (Deceased ran away from home and slit his neck in a cornfield); Long v. Omaha & C. B. Ry., 108 Neb. 342, 187 N. W. 930 (1922) (Seven days after accident decedent blew the top of his head off; he had been of low mentality and nervous before the accident); Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 Pac. 436 (1930) (Deceased threatened to shoot himself; a few days later he did). See RESTATEMENT, TORTS § 455 (1934).

10 By *recovery* or *no recovery* is meant that the complaint was sustained with a subsequent trial or dismissed without a trial, or that the verdict should have been for the plaintiff or for the defendant.

11 *In re* Sponatski, 220 Mass. 526, 108 N. E. 466, 468 (1915) (Deceased, while in a hospital for treatment of his injury, jumped from a window during an hallucination); Lupfer v. Baldwin Locomotive Works, 269 Pa. 275, 112 Atl. 458 (1921) (Five days after the accident deceased shot himself while delirious with pain); Sinclair's Case, 248 Mass. 414, 143 N. E. 330 (1924) (Gradual starvation); Wilder v. Russell Library Co., 107 Conn. 56, 139 Atl. 644 (1927) (Physical, then mental breakdown followed by suicide); Gasperin v. Consolidated Coal Co., 293 Pa. 589, 143 Atl. 187 (1928) (While in hospital, decedent jumped from a window); Baber v. Knapp & Sons, 164 Md. 55, 163 Atl. 862 (1933) (Decedent wounded two neighbors while in a rage and then shot himself); Jackson Hill Coal & Coke Co. v. Slover, 102 Ind. App. 145, 199 N. E. 417 (1936) (Decedent had periods of complete despondency and rage after the accident; during one of these periods, three years later, he shot himself); McFarland v. Dept. of Labor and Industries, 188 Wash. 357, 62 P.2d 714 (1936) (During a fit of violence decedent hanged himself). See Voris v. Texas Employers Insurance Ass'n, 190 F.2d 929 (5th Cir. 1951) (Decedent shot himself).

12 *E.g.*, Tetrault's Case, 278 Mass. 447, 180 N.E. 231 (1932) (Decedent jumped from a bridge); Kazazian v. Segan, 14 N. J. Misc. 78, 182 Atl. 351 (1936) (Care-

men's compensation actions the uncontrollable impulse test has been used exclusively except in New York.[14] There, suicide resulting simply from discouragement or melancholy is insufficient to meet the proximate cause requirements. The suicide must derive from a "brain derangement" or disease caused by the physical injury.[15]

The instant court recognized that the New York courts had used the "brain derangement" test to determine proximate cause in the workmen's compensation cases, but it rejected this test as not up-to-date.[16] It then noted that the wrong was intentional, which makes the wrongdoer responsible for direct injuries even though they may have been unforeseeable. Rejecting the foreseeability test, the court construed the allegation of irresistible impulse as sufficient to constitute an allegation of insanity — the proximate cause of the decedent's death.[17] In effect, it used the uncontrollable impulse test.

The court's rejection of the foreseeability test because the wrong was intentional may be legally sound. But whether the uncontrollable impulse test is always more appropriate in insanity-suicide cases under a wrongful death act is questionable.

The court's choice of tests is guided by the interplay of problems of policy and the mixed considerations of logic, common sense, justice, and philosophical commitments.[18] This can readily be seen in the workmen's compensation cases where the aim of the acts — to redress the economic loss of the laboring class in industrial accidents[19] — overrides other considerations which may influence the choice of proximate cause tests. Recovery is generally allowed regardless of the test applied.[20] However, the wrongful death acts, although originally enacted to alleviate the harsh common law rule of no recovery for the representatives of a wrongfully killed deceased,[21] do not result in such strict liability. All the legal requirements for a negligent or intentional tort action must be met.[22] It would seem, therefore, that the general social policy of the acts does not outweigh the mixed considerations underlying whatever proximate cause test the court may choose.

The court in the *Daniels* case had recognized the philosophical consideration

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fully executed hanging); Konazewska v. Erie R. R., 132 N.J.L. 424, 41 A.2d 130 (1945) (Decedent hanged himself in a basement); Barber v. Industrial Commission, 241 Wis. 462, 6 N.W.2d 199 (1942) (Decedent went to Canada by himself and committed suicide in a hotel room; Workmen's Compensation Act excludes compensation for an intentionally self-inflicted injury).

13 *E.g.*, Industrial Comm. of Ohio v. Brubaker, 129 Ohio St. 617, 196 N. E. 409 (1935) (Decedent shot himself); Kasman v. Hillman Coal & Coke Co., 149 Pa. Super. 263, 27 A.2d 762 (1942) (Decedent shot himself; Workmen's Compensation Act excludes compensation for intentionally self-inflicted death or injury).

14 Delinousha v. Nat'l Biscuit Co., 248 N.Y. 93, 161 N. E. 431, 432 (1928) (Recovery); Pushkarowitz v. Kramer, 300 N.Y. 637, 90 N. E.2d 484 (1950) (Recovery); Aponte v. Garcia, 279 App. Div. 269, 109 N.Y.S.2d 761, 766 (1952) (No recovery) (Dissent: Doctrine in *Delinousha* case must be applied cautiously because mental derangement exists independently of actual physical degeneration of the brain); Sulfaro v. Pellegrino, 2 A. D.2d 426, 156 N.Y.S.2d 411 (1956) (Recovery).

15 Delinousha v. Nat'l Biscuit Co., 248 N.Y. 93, 161 N. E. 431, 432 (1928). In 1957, a memorandum decision from a lower New York appellate court held that recovery could be had because there was a causal relation between the injury, insanity and the suicide. The decision intimated that the facts could satisfy even the stricter test enunciated in *Delinousha*, if that test was still the law. Nohe v. Sheffield Farms Co., 4 A. D.2d 711, 163 N.Y.S.2d 455, 457 (1957).

16 Cauverein v. DeMetz, 188 N.Y.S.2d 627, 632 (Sup. Ct. 1959).

17 *Id.*, at 632-3.

18 See PROSSER, *op. cit. supra* note 3, at 257; Annot., 29 A.L.R.2d 690, 693 (1953).

19 Delinousha v. Nat'l Biscuit Co., 248 N.Y. 93, 161 N. E. 431, 432 (1928); *In re* Sponatski, 220 Mass. 526, 108 N. E. 466, 468 (1915).

20 See cases cited, notes 11, 12, 13 and 14 *supra*.

21 PROSSER, *op. cit. supra* note 3, at 710.

22 2 HARPER & JAMES, LAW OF TORTS 1285, 1289 (1956). Courts narrowly interpret the wrongful death acts so as not to impose strict liability upon defendant. Likewise affirmative defenses which would be good against the deceased, if living, are good against the deceased's representatives suing under the wrongful death acts.

which might underly its decision. It stated: "Some contend that we are all slaves of destiny. Our subject brings us near to the vexed theological problem as to free will and predestination." [23] The final decision, resulting in the choice of the irresistible impulse doctrine, seems to have been motivated by an extreme freewill view. Such a perspective sees every deliberate act of man as the result of his freedom to choose.[24] This view pursued to its logical conclusion holds man responsible for all his deliberate acts, no matter what the circumstances.[25] It seems to be committed to an extreme view which holds the suicidal victim, not the tort feasor, responsible for his suicide if he had more than one choice. No other person can be the cause of the deceased's action unless the deceased was entirely without choice as a result of the defendant's wrong.[26]

From this extreme, the courts espousing the foreseeability test seem to move to a contrary extreme and adopt the mechanistic view which sees man as a part of a mechanistic universe wherein he reacts in any given situation as he must because he is completely controlled by external cause; man has no choice.[27] Under the foreseeability test, the responsibility of the actor to the suicide's estate is nothing more than a deterrent to such unsocial reactions.[28]

It is submitted that neither the uncontrollable impulse test nor the foreseeability test is supported by a proper philosophical commitment. Each view is an extreme which excludes entirely any of the basic propositions of the other.[29] In addition, each test poses problems for the fact finder. The uncontrollable impulse test is too specific; fact finders will seldom be able to determine that the deceased was completely devoid of the power to choose. The foreseeability test is too vague; the fact finders are unable to say that the resulting insanity of the deceased was foreseeable or within the reasonably expectable risk of the defendant's action. A proximate cause test which affords the fact finder some guide more specific than foreseeability and less rigid than irresistible impulse would be preferable. It should recognize man as *one* of the prime causes of his deliberate acts because of his freedom of choice, but also appreciate that man in his choice may be primarily motivated by many external factors. This view — *in medio stat virtus* — is more readily supported by modern science.

It is suggested that a more appropriate proximate cause test for these tort-insanity-suicide cases would be one similar to the substantial factor test.[30] It should ask: Were the defendant's wrongful acts a substantial factor in motivating the deceased to commit suicide? The fact finder should scrutinize the facts of each case, and if the actor's wrong has substantially influenced the decedent's particular conduct even though the decedent may not have been completely devoid of conscious

23 Daniels v. New York, N. H. & H. R. R., 183 Mass. 393, 67 N.E. 424, 426 (1903).

24 See KOESTLER, REFLECTIONS ON HANGING 90-91 (1957).

25 See KOESTLER, *id.* at 97-104 (Koestler maintains that criminal law with its basic idea of criminal responsibility is a judicial philosophy of man's freedom to react in more ways than one to a situation). *E.g.* People v. Lewis, 124 Cal. 551, 57 Pac. 470 (1899); Whiteside v. State, 29 S.W.2d 399 (Tex. Crim. 1930); Stephenson v. State, 205 Ind. 141, 179 N. E. 633 (1932).

26 *Contra,* KOESTLER, *op. cit. supra* note 24, at 102.

27 See *id.,* at 86-92.

28 In a reasonably expected situation the civil liability will be a factor automatically causing a socially useful solution, but the situation must be foreseeable so that the civil liability can be a mechanical, automatic cause in determining useful conduct.

29 Man's deliberate acts are either perfectly or imperfectly voluntary according to circumstances and the influence of outside forces. Many forces external to a particular man may, in a particular situation, lessen his voluntariness or freedom; for example, fear, passion, and coercion from another. 1 J. MCHUGH & C. CALLAN, MORAL THEOLOGY 16-22 (1958).

30 Jeremiah Smith originally suggested the "substantial factor" test, but it received little acceptance until the Restatement of Torts in 1934 adopted it in sections 431-2. In some jurisdictions this test has become and still is predominantly used. See 2 HARPER & JAMES, LAW OF TORTS 1158-60, 1161 n. 54 (1956).

volition, recovery should be allowed.[31] With no binding precedent in New York, the instant court would have done well to re-evaluate the two tests used in sister states and to formulate a more appropriate one to determine whether an action for wrongful death will lie, where as a result of an intentional wrong a person becomes insane and commits suicide.

Thomas M. Clusserath

ZONING — LIMITATIONS — CITY COUNCIL LIMITED BY MUNICIPAL CHARTER AND FEDERAL AND STATE CONSTITUTIONS. — The Colorado State Constitution grants to the people of Denver the right of full self-government in local and municipal matters.[1] Denver amended its city charter in 1923 to authorize the city council to pass zoning laws. Relying upon this grant Denver passed an ordinance[2] on November 7, 1956, which divided the commercial area of the city into two districts, B-6 and B-5. The ordinance required that arrangements be made for off-street parking facilities, varying according to eight specified trade categories,[3] before a building permit would be issued for a business use otherwise lawful in district B-6. Building of apartment houses was forbidden and existing apartment houses were declared to be nonconforming uses,[4] subject to a number of conditions and regulations. These provisions, which purported to be effective as of February 11, 1955, did not apply to district B-5. Plaintiffs, property owners in district B-6,[5] attacked the validity of the ordinance, praying for a declaration of their rights and for an injunction restraining its enforcement. *Held:* the ordinance constituted retrospective legislation,[6] was in part beyond the authority conferred upon the city by the charter amendment and was so unreasonable and arbitrary as to be without due process of law and to be a taking of private property for public use without just compensation. *City and County of Denver v. Denver Buick, Inc.*, 347 P.2d 919 (Colo. 1959).

Zoning is the classification of land into districts with different regulations applying to the property in each district.[7] The division is made according to the character of lands and structures and their peculiar suitability for particular uses, with regard

31 Elliott v. Stone Baking Co., 49 Ga. App. 515, 176 S. E. 112 (1934). In sustaining a complaint against defendant under the wrongful death act, the court used a substantial factor-proximate cause test rather than the foreseeability test applied in an earlier Georgia Supreme Court decision, Stevens v. Steadman. 140 Ga. 680, 79 S.E. 564 (1930).

1 COLO. CONST. art. xx § 1. See Heron v. City of Denver, 131 Colo. 501, 283 P.2d 647 (1955). Such cities are commonly called "home rule cities." Fishel v. Denver, 106 Colo. 576, 108 P.2d 236 (1940).

2 Ordinance No. 392, series of 1956.

3 The ordinance is not fully set out in the case. However, it appears that the area required for parking varies in relation to the square feet of proposed use of different trade classes. Thus more parking space must be set aside for 1000 square feet of proposed restaurant use than for 1000 square feet of proposed office use.

4 A pre-existing use of property valid before the enactment of any zoning regulation or valid under a previous zoning law and allowed to exist under a subsequent zoning law in technical violation of it is a nonconforming use. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

5 There were a number of plaintiffs. Their specific positions were not made clear but it appears that one was denied a permit because his plan did not meet the requirements of the proposed but not yet enacted ordinance. After passage of the ordinance, another had his permit denied because his plans provided for insufficient off-street parking. A third owned an apartment house which constituted a nonconforming use.

6 Because of the recent, comprehensive coverage of retroactive zoning ordinances in 34 NOTRE DAME LAW. 109 (1958), this point will not be discussed in this comment.

7 Toulouse v. Board of Zoning Adjustment, 147 Me. 387, 87 A.2d 670 (1952); Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938).

to the uniformity of use within each district.[8] Zoning laws and regulations find their justification in some aspect of the police power exercised for the public welfare or in the public interest.[9] The states possess this authority inherently, since it is a derivative of the power of the state to create the municipality itself.[10]

In the public interest the state can and does specifically delegate this authority to municipal corporations.[11] The municipal corporation, however, must not act beyond the authority so delegated to it by the enabling legislation.[12]. For although ordinances passed under enabling legislation specifically authorizing the passage of zoning ordinances may restrict the use of property,[13] such restrictions under general police power grants to a municipality are viewed with hostility by the courts.[14]

Zoning ordinances are by their nature susceptible to a three-pronged attack. The contentions, traditionally urged, are that the ordinance exceeds the power conferred by the enabling legislation,[15] that the classification into districts does not distinguish upon a reasonable basis,[16] and that as to a particular district the regulations have no substantial relation to ends proper to the police power but constitute a taking of private property without due process of law.[17]

On the first ground of attack the courts are divided upon the proper approach to the problem. On occasion the judges cannot agree among themselves. The scope of the power conferred by the zoning enabling act may be enlarged by a liberal construction in recognition of the needs of a changing world,[18] or narrowly confined by strictly construing all zoning legislation as being in derogation of the common law.[19] In the instant case the contention was made that the enabling amendment conferred no power upon the city to enact legislation concerning nonconforming uses. The majority, in accordance with the settled practice in the Colorado courts in such cases,[20] construed the enabling legislation narrowly. It found no specific authorization concerning nonconforming uses and concluded that the city council had none of the powers which it purported to exercise concerning them. The dissenters concluded that such powers did not have to be specifically stated since they were implicit in any enabling legislation. It is submitted that the dissenters were in error. The enabling amendment was passed in 1923. At that time the authority to eliminate or restrict nonconforming uses was usually not delegated because it was then thought that such regulations would be unconstitutional,[21] and that they were unnecessary in any event since nonconforming uses would soon disappear without regulation.[22]

The approach of the courts to the second and third lines of attack is uniform. It is recognized that in the first instance it is a legislative function to determine

8 Northwest Merchants Terminal v. O'Rourke, 191 Md. 171, 60 A.2d 743 (1948); Bogert v. Washington Tp., 21 N.J. 180, 135 A.2d 1 (1957).

9 Hedgcock v. People *ex rel.* Reed, 91 Colo. 155, 13 P.2d 264 (1932).

10 Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938).

11 General Outdoor Advertising Co. v. Goodman, 128 Colo. 344, 262 P.2d 261 (1953); City of Colorado Springs v. Miller, 95 Colo. 337, 36 P.2d 161 (1934).

12 Bishop v. Board of Zoning Appeals of New Haven, 133 Conn. 614, 53 A.2d 659 (1947).

13 Colby v. Board of Adjustment, 81 Colo. 344, 255 Pac. 443 (1927).

14 Cross v. Bilett, 122 Colo. 278, 221 P.2d 923 (1950).

15 Bishop v. Board of Zoning Appeals of New Haven, 133 Conn. 614, 53 A.2d 659 (1947).

16 Hedgcock v. People *ex rel.* Arden Realty and Investment Co., 98 Colo. 522, 57 P.2d 891 (1936).

17 Bahn v. Board of Adjustment of City and County of Denver, 129 Colo. 539, 271 P.2d 1051 (1954); American University v. Prentiss, 113 F. Supp. 389 (D.D.C. 1953).

18 *In re* Gilfillan's Permit, 291 Pa. 358, 140 Atl. 136 (1927).

19 Toulouse v. Board of Zoning Adjustment, 147 Me. 387, 87 A.2d 670 (1952).

20 *E.g.*, City and County of Denver v. Thrailkill, 125 Colo. 488, 244 P.2d 1074 (1952).

21 44 CORNELL L.Q. 450 (1959). In 1953 the authority to legislate concerning nonconforming uses was specifically delegated to the counties of Colorado for the development of unincorporated territories. COLO. REV. STAT. ANN. § 106-2-19 (1953).

22 City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

what zoning rules and regulations are legitimate expressions of the police power[23] and that a large area of discretion is necessarily vested in the local legislative body to determine what the public interest requires and what measures are necessary for the protection of that interest.[24] It is said that there are so few scientifically certain criteria of legislation, that it is often difficult to mark the line where the police power is limited by constitutional provision, and that the courts should therefore be slow to find enactments of the law-making power unconstitutional.[25]

Thus, in determining whether a legislative classification is upon a reasonable basis[26] or whether a regulation in any particular district bears a substantial relation to the public health, safety, morals, comfort or welfare,[27] every presumption in favor of the validity of the ordinance obtains in the courts.[28] Moreover, the burden of proof is upon the party attacking the zoning ordinance to prove its unreasonableness.[29] If the constitutionality of a zoning ordinance is questionable, the ordinance must stand.[30]

The determination as to validity must be made upon an examination of the particular facts and circumstances in each case,[31] since a zoning ordinance valid as a proper exercise of the police power in one set of circumstances may be invalid in another.[32]

This mode of approach appeared to be that followed by the Colorado courts,[33] but in the present case the court ignored it and, as it had done on two other occasions, also in the name of judicial review,[34] substituted its judgment for a proper discretionary judgment of another body.

The court did not permit Denver to introduce evidence to prove the reasonable basis of its classification or regulations. The trial court was permitted to make its findings instead upon "knowledge common to any citizen."

One of the dissenters[35] objected to the court's upholding of the determination of the trial court that the off-street parking requirements were a deprivation of property without due process of law and a taking of private property without just compensation. He reasoned that this close question of degree[36] could not be decided upon general propositions without looking at the particular facts. In addition he stated that neither could the reasonableness of the classification be determined from the record, and that he would have remanded this phase of the proceeding to the trial court to take and hear evidence.

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23 Greenberg v. City of New Rochelle, 206 Misc. 28, 129 N.Y.S.2d 691 (1954); Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938).

24 Mansfield & Swett v. Town of West Orange, *supra* note 23.

25 *Ibid.*

26 Zahn v. Board of Public Works, 195 Cal. 497, 234 Pac. 388 (1925).

27 Bahn v. Board of Adjustment of City and County of Denver, 129 Colo. 539, 271 P.2d 1051 (1954).

28 Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (Fla. App. 1950); 101 C.J.S. Zoning § 362 (1958).

29 Sinclair Refining Co. v. City of Chicago, 178 F.2d 214 (Ill. App. 1949); 101 C.J.S. Zoning § 363 (1958).

30 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); American University v. Prentiss, 113 F. Supp. 389 (D.D.C. 1953).

31 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Anchor Steel and Conveyor Co. v. City of Dearborn, 342 Mich. 361, 70 N.W.2d 753 (1955); Gordon v. City of Wheaton, 12 Ill. 2d 284, 146 N.E.2d 37 (1957).

32 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of New York v. Jack Parker Associates, Inc., 5 Misc. 2d 633, 161 N.Y.S.2d 731 (1957).

33 DiSalle v. Giggal, 128 Colo. 208, 261 P.2d 499 (1953); Hedgcock v. People *ex rel.* Arden Realty and Investment Co., 98 Colo. 522, 57 P.2d 891 (1936).

34 Jones v. Board of Adjustment, 119 Colo. 420, 204 P.2d 560 (1949); Board of Adjustment of the City and County of Denver v. Perlmutter Construction Co., 131 Colo. 230, 280 P.2d 1107 (1955).

35 Judge Sutton concurred in part and dissented in part.

36 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

That this view and the law upon which it rests is most reasonable[37] is made poignantly clear by what happened in this case. The majority of the court found the classification unreasonable and arbitrary "upon knowledge common to any citizen."[38] It is submitted that the determinations made by the trial court and upheld by the Supreme Court of Colorado were founded upon insufficient facts and that the opinion, with its sweeping prohibitions and flagrant disregard for legislative determinations in this area, exhibits a philosophical aversion to all zoning.[39]

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37 See footnotes 31, 32, 33 and accompanying text.
38 Yet one of the dissenting judges stated that by looking out his office window one could see the very marked differences in the districts accounting for their different treatment.
39 City and County of Denver v. Denver Buick, Inc., 347 P.2d 919,943 (1959).