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Recent Decisions

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RECENT DECISIONS

PAROLE — DUE PROCESS — TIME SERVED ON PAROLE NOT DEDUCTED FROM SENTENCE. — Plaintiff had been sentenced to a term of two to six years for assault with a deadly weapon. After two years in prison, he was paroled and remained on parole for almost twenty months. Plaintiff's parole was revoked when he was jailed for intoxication, and subsequently he was returned to prison to serve the unexpired portion of his original sentence without credit for his time on parole. The district court dismissed plaintiff's motion for a declaratory judgment in which he claimed credit against his sentence for the twenty months he served on parole. The United States Court of Appeals for the District of Columbia *held:* affirmed. The court gave effect to the clear language of the statute: "the time a prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced." *Bates v. Rivers,* 323 F.2d 311 (D.C. Cir. 1963).

The District of Columbia statute applied here does indeed seem to be clear and unequivocal.[1] Nonetheless, Judge J. Skelly Wright dissented, arguing that parole is imprisonment in legal effect, and consequently a statute authorizing imprisonment in excess of the maximum sentence imposed on a criminal, would raise constitutional doubts. Therefore, if the statute is susceptible to another interpretation, the statute should be construed to avoid the constitutional question. In the dissenter's view, the alternate construction of the statute is that "a sentence may not be diminished for good conduct while on parole."[2] While this alternate construction does violence to the plain words of the statute, it quite effectively removes the stinger without the necessity of declaring the statute unconstitutional.

The law on the question of whether or not time spent on parole should be deducted from the original sentence when a parolee is returned to prison is primarily statutory.[3] Roughly twenty-three states provide that the time spent on parole shall be counted as time on the original sentence,[4] while another eight states[5] and the federal statute[6] provide that the time may be credited at the discretion of the parole board. The remaining states[7] and the District of Columbia explicitly forbid giving credit for the time spent on parole. The Supreme Court has apparently never expressly decided the constitutionality of these statutes. In *Anderson v. Corall,*[8] the petitioner violated his parole shortly after his release from

1 D.C. CODE ANN. § 24-206 (1961) provides, in part:
> If the order of parole shall be revoked, the prisoner, unless subsequently reparoled, shall serve the remainder of the sentence originally imposed less any commutation for good conduct which may be earned by him after his return to custody. For the purpose of computing commutation for good conduct, the remainder of the sentence originally imposed shall be considered as a new sentence. The time a prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced.

2 Bates v. Rivers, 323 F.2d 311, 314 (D.C. Cir. 1963).

3 See MODEL PENAL CODE § 305.22, comment (Tent. Draft No. 5, 1956).

4 *E.g.,* ALA. CODE tit. 42, § 12 (1940):
> The board . . . may, if it sees fit, require such prisoner to serve out in prison the balance of the term for which he was originally sentenced calculated from the date of delinquency or, such part thereof as it may determine.

5 MODEL PENAL CODE, *supra* note 3.

6 18 U.S.C. § 4205 provides, in part:
> The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve. (Emphasis added.)

18 U.S.C. § 4207 further provides:
> If such order of parole shall be revoked and the parole so terminated, the said prisoner *may be required* to serve all or any part of the remainder of the term for which he was sentenced. (Emphasis added.)

7 MODEL PENAL CODE, *supra* note 3.

8 263 U.S. 193 (1923).

a federal prison. Before he could be retaken, he was convicted of another crime by a state court and subsequently confined. Upon his release from the state prison, the federal parole board ordered him retaken and returned to serve the remainder of his first sentence, remaining time to be computed as that due on the date of his parole. The Supreme Court upheld the action of the parole board. However, the thrust of the Court's opinion was directed at the board's refusal to credit the time served in the state prison and not the four months on parole before the violation: "his status and rights were analogous to those of an escaped convict."[9] In fact, some of the language in the opinion has formed the nucleus of later attacks on the constitutionality of these statutes.

> Mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence. . . . While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term. . . . While this is an amelioration of punishment, *it is in legal effect imprisonment.*[10]

Though numerous attacks have been made on the federal statute and similar state statutes, often citing this very language from *Anderson v. Corall,* the lower federal courts[11] and the state courts[12] have consistently held the statutes constitutional and the Supreme Court has several times denied certiorari.[13]

Under our political system the legislature has the power to determine what conduct will be considered criminal and to provide the punishment for such conduct. This legislative authority is restricted only by Constitutional limitations and prohibitions. The attacks on the parole statutes which deny credit for time on parole have been based on claims such as cruel and unusual punishment,[14] double jeopardy,[15] equal protection,[16] and most often, due process.[17]

Even though the decisions have been to the contrary, petitioners' hopes are never completely extinguished because of frequent dicta characterizing the legal effect of parole such as that in *Anderson v. Corall.* In *McCoy v. Harris,*[18] where the parolee's right to a hearing before revocation of his parole was at stake, the court said:

> Granting of a parole does not change the status of a prisoner; it merely "pushes back the prison walls" and allows him the wider freedom of movement while serving his sentence. The paroled prisoner is legally in custody the same as the prisoner allowed the liberty of the prison yard, or of working on the prison farm.[19]

In a recent case, the Supreme Court pointed out that the custody and control of a parolee both in theory and in fact "involve significant restraints on petitioner's liberty."[20] The Court pointed out that the parolee is subject to restrictions above and beyond those imposed on the ordinary citizen; the parolee is limited in his choice of a community, choice of a job, and choice of friends. In addition he must report periodically to his parole officer and follow the officer's advice.

However, in most of the cases dealing with the subject, the precise legal effect of parole and the restrictions it imposes are not thoroughly explored and often

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9 Anderson v. Corall, *supra* note 8, at 196.
10 *Id.* at 196. (Emphasis added.)
11 *E.g.,* Dolan v. Swope, 138 F.2d 301 (7th Cir. 1943); U.S. v. Rundle, 218 F. Supp. 567 (E.D. Pa. 1963); Woods v. Steiner, 207 F. Supp. 945 (D. Md. 1962).
12 *E.g.,* Mayo v. Warden of the Md. Penitentiary, 231 Md. 635, 190 A.2d 810 (1963); Greenwood v. Gladden, 231 Ore. 396, 373 P.2d 417 (1962).
13 *E.g.,* Howard v. U.S. 274 F.2d 100 (8th Cir. 1960), *cert. denied,* 363 U.S. 832 (1960); Dalton v. Warden of Md. Penitentiary, 216 F. Supp. 600 (D. Md. 1963), *cert. to the Court of Appeals for the Eighth Circuit denied* 373 U.S. 942 (1963).
14 *E.g.,* Woods v. Steiner, 207 F. Supp. 945 (D. Md. 1962).
15 *E.g.,* Dolan v. Swope, 138 F.2d 301 (7th Cir. 1943).
16 *E.g.,* Woods v. Steiner, 207 F. Supp. 945 (D. Md. 1962).
17 *E.g.,* Dalton v. Warden of Md. Penitentiary, 216 F. Supp. 600 (D. Md. 1963), *cert. to the Court of Appeals for the Eighth Circuit denied* 373 U.S. 942 (1943).
18 108 Utah 407, 160 P.2d 721 (1945).
19 *Id.* at 722.
20 Jones v. Cunningham, 371 U.S. 236, 242 (1963).

simply ignored.[21] The courts seem to be satisfied merely with a statement that there is a difference between parole and actual imprisonment. Thus, a state supreme court has suggested that for certain purposes a person on parole continues to be under the custody of the warden, but that this does not mean that custody during parole is in all respects tantamount to incarceration.[22] A federal court admitted that under the federal statute a prisoner might remain in the custody of state authorities for a period in excess of the term of his sentence originally imposed, but it pointed out that he could not be incarcerated for a period in excess of that term.[23] The court further said that while parole may sometimes constitute imprisonment in legal effect, "it clearly is not the equivalent of legal imprisonment in every case."[24]

In conjunction with their contentions that parole is a legal equivalent of incarceration, petitioners claim that the failure to deduct time spent on parole from the remaining sentence is "inherently unfair"[25] and may amount to, what one counsel termed, "the yo-yo theory of prisoner rehabilitation."[26] This argument is simply that under these statutes the state's "custody" or "control" of an individual can be extended by successive paroles and revocations far beyond the maximum sentence imposed by the judge. In meeting this line of attack, the courts frequently seem to be preconditioned by traditional theories about parole; that parole is merely an act of grace subject to whatever terms the legislature may impose, or that it is a contract between the parolee and the state which includes certain terms.[27] It is obvious that once the consideration of the problem is so structured, the prisoner is almost precluded from complaining that the term of his sentence has been extended beyond the date when it originally would have expired, since it logically follows that the extension results from his conditional release which he voluntarily accepted.

Another reply to the charge that the parolee's sentence is being extended is that the provisions governing the granting and revocation of parole are established by the legislature and consequently are "potentially a part of the original sentence."[28] Thus it has been said that the judges are aware of the possibility in sentencing.[29] The emphasis here is not on whether parole is a legal equivalent of imprisonment, but on the fact that the parole is a legitimate part of the sentence and not an addition to the sentence.

It is generally felt that the purpose of parole is to aid in the reformation and rehabilitation of the offender by permitting him to live in the community much like an average citizen except that the parolee remains under the supervision of the authorities.[30] In view of this function of parole, it would seem that in coming to grips with the problems which arise in this area, parole should be considered as an integral part of the penal system and not characterized as "mere grace" or as a "contract"; nor is it realistic to say that by accepting parole, the prisoner consents to whatever conditions may be attached.

Many of the difficult questions concerning parole arise because parole is not easily characterized. It is obvious that in many respects parole is quite different from actual imprisonment; however, it is also clear that the imposition and

21 *E.g.*, Howard v. U.S., 274 F.2d 100 (8th Cir. 1960).
22 Greenwood v. Gladden, 231 Ore. 396, 373 P.2d 417 (1962).
23 Woods v. Steiner, 207 F. Supp. 945, 951 (D. Md. 1962).
24 *Id.* at 950.
25 Brief for Appellant p.9, Bates v. Rivers, 323 F.2d 311 (D.C. Cir. 1963).
26 Woods v. Steiner, 207 F. Supp. 945, 952 (D. Md. 1962).
27 See Burns v. U.S., 287 U.S. 216 (1932) cited in Dolan v. Swope, 138 F.2d 301 (7th Cir. 1943); Woods v. Steiner, *supra* note 26. See generally 65 HARV. L. REV. 309 (1951); MODEL PENAL CODE § 305.21, comment (Tent. Draft No. 5, 1956).
28 Dolan v. Swope, *supra* note 27, at 304.
29 Woods v. Steiner, 207 F. Supp. 945 (D. Md. 1962).
30 See 5 WAYNE L. REV. 237 (1959); Street, *Parole — Policy and Procedure*, 4 CRIM. L. Q. 432 (1962).

restrictions of parole are considerably greater than those upon the ordinary citizen. The determination of the legal effect of parole as diminishing or extending a sentence should be made with this ambiguous nature of parole kept in mind and in light of two general, but conflicting considerations. The first is based on one of the primary purposes of modern penology — the restoration of the criminal to a normal law-abiding citizen, while at the same time affording maximum protection to society. It is, however, nearly impossible to predict the exact length of imprisonment and supervision which will most effectively assist in reaching this goal.[31] On the other hand, the universal sentencing procedure of either a fixed sentence or a minimum and maximum sentence reflects the underlying feeling that there should be some set limit to the length of time one may be imprisoned or kept in custody.[32] The statutes which deny credit for time served on parole may indeed extend the duration of control beyond the prisoner's maximum sentence, yet the total period of control, though not expressly stated, is limited in theory and even more so in practical operation. The parole-revocation-imprisonment-reparole cycle can only last until either the offender serves his maximum sentence in prison or his sentence expires while he is on parole. Thus, the system of not granting credit for time served on parole falls between an express and definite maximum period of custody and a wholly indeterminate sentence in this respect.

The constitutional attack upon these statutes must mean either that the legislature does not have the power to establish this type of system or that the means of accomplishing it are improper. It seems clear that the legislature could achieve the similar result merely by providing that all maximum sentences will also include a parole period of equal length. Hence, a five year sentence would also include a five year parole period which in effect would amount to a ten year period of permissive custody. Nevertheless, the present method utilized by the legislature, the nondeduction of time on parole, leaves a faint but lingering odor of unfairness even though it may be "potentially part of the original sentence." The drafters of the Model Penal Code felt that "it is a demoralizing experience to the parolee who has conformed to the rules over an extended period then to be required to 'back up' such time and serve it over in prison."[33] The Model Penal Code provides:

> A parolee whose parole is revoked for violation of the conditions of parole should be recommitted for the remainder of his maximum parole term, *after credit thereon for the period served on parole prior to the violation* and for reductions for good behavior earned while on parole.[34]

Nonetheless, it should be noted that the parole board's aim is not to "demoralize" parolees, but just the opposite, to assist them to conform to the necessary rules of society. Thus, even where the decision of whether or not to credit the time spent on parole is not left to the discretion of the parole board, the parolee usually will be again encouraged to reform and accelerate his release by the availability of good conduct time and the opportunity for reparole.[35]

It is submitted that while the relative merits of granting or forbidding credit for time served on parole are debatable, the statutes forbidding credit do not so drastically shift the balance between social needs and individual liberty that they fall below the Constitutional minimum.

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31 THE COMMITTEE ON PUNISHMENT FOR CRIME, REPORT TO THE JUDICIAL CONFERENCE (1942).
32 *Ibid.*
33 MODEL PENAL CODE § 305.22, comment (Tent. Draft No. 5, 1956).
34 MODEL PENAL CODE § 305.17 (Proposed Official Draft, 1962). (Emphasis added.)
35 *E.g.*, D.C. CODE ANN. *supra* note 1.

ANTITRUST — SECTION 1, SHERMAN ACT — TYING ARRANGEMENTS — NETWORK AGREEMENT CONDITIONING SALE OF DESIRED STATIONS TO THE PURCHASE OF OTHER STATIONS CONSTITUTES PER SE VIOLATION. — Kemper Insurance Companies[1] brought an action in the United States District Court for damages and injunctive relief alleging its agreement with American Broadcasting Company (hereinafter ABC) to sponsor the news program "Evening Report" on the thirty-five unwanted stations in addition to the ninety-five[2] desired stations to be a tying agreement, a per se violation of section 1 of the Sherman Act.[3] Upon a motion by defendant ABC to dismiss or strike certain paragraphs of Kemper's complaint under Federal Rule 12(b)(6), the District Court, citing Moore, *Federal Practice,* that

> . . . a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.[4]

held: motion denied. The complaint stated a claim upon which relief could be granted. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.,* 221 F. Supp. 848 (S.D.N.Y. 1963).

This case represents the first attempt to apply the tying agreement violation to network-sponsor agreements, and its importance lies in the ultimate decision on this question. As the practice is not limited to ABC (National Broadcasting System and Columbia Broadcasting System (hereinafter NBC and CBS) engage in similar practices), a holding that these practices constitute a tying agreement in violation of the Sherman Act will have a profound effect on the television and advertising industries.[5]

Viewing this case in a historical framework, a holding that these arrangements constitute per se violations would be the furthest extension of an ever-expanding concept of tying agreements. Since it does not seem that the question is strictly controlled by existing precedents, policy considerations will undoubtedly weigh heavily in determining the merits of extending section 1 of the Sherman Act to these arrangements.

The arrangement complained of is a hybrid of "must buy," a refusal by the networks to sell less than a basic unit of stations,[6] and the "minimum buy," a refusal by networks to sell less than a minimum dollar value of advertising.[7] Although it was not alleged in Kemper's complaint that any of the one hundred and thirty television stations had been designated "basic required" stations,[8] and counsel for ABC have urged that ABC does not engage in the "must buy" practice, the "dominant gene" appears to be "must buy," and in discussing the merits of these arrangements it is more accurate and helpful to consider this a type of "must buy" practice.

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1 Plaintiffs: American Mfrs. Mut. Ins. Co., American Motorists Ins. Co., Federal Mut. Ins. Co., and Lumberman's Mut. Cas. Co. are commonly called and hereinafter referred to as the Kemper Insurance Companies, or Kemper.

2 Complaint of Plaintiff, p. 3, states: the geographical pattern of Kemper's sales of insurance is such that it is desirable to advertise by television in these 95 market areas; Kemper does not make extensive sales and did not wish to advertise in the other thirty-five.

3 15 U.S.C.A. § 1 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . ."

4 2 MOORE, FEDERAL PRACTICE, ¶ 12.08, at 2245 2d ed. (1962). (Emphasis omitted.)

5 At the present time these network practices are neither sanctioned nor prohibited by the Federal Communications Commission rules.

6 At the time of this survey, Comm. on Interstate and Foreign Commerce, *Network Broadcasting,* H.R. REP. No. 1297, 85th Cong., 2d Sess. 480-81 (1958), (hereinafter *Network Broadcasting*), NBC had a basic list of 58 stations while CBS had a basic list of 56. The list has undoubtedly grown.

7 ABC used the minimum dollar requirement of $60,000 per Class A hour. On the average, an ABC advertiser would have to order 85 to 90 of the 220 ABC affiliates in order to meet the minimum dollar requirement. *Network Broadcasting,* 496, 477.

8 Brief for Plaintiff, p. 23.

While standing to maintain this suit only requires a direct injury to Kemper,[9] the courts will undoubtedly look to the various policy considerations involved in making a determination on the per se violation question. Counterbalancing the repercussions of such arrangements on advertisers, independent stations and affiliates, are the practical needs of a network in successfully maintaining its national character.

It is unlikely that the "must buy" policy has any significant effect on the accessibility of network television to smaller advertisers, and therefore in actuality gives no competitive advantage to large advertisers. Even without "must" or "minimum buy" requirements the cost of network time and programs would be prohibitive for small advertisers, and so long as there are national advertisers anxious to purchase most of the network's lineup of stations on a wholesale basis the networks are not likely to accept a substantial loss of revenue by selling piecemeal merely to accommodate smaller advertisers. While the effect of forcing advertisers to purchase larger station groupings is minimized by *Network Broadcasting*,[10] a comprehensive congressional study, the instant case illustrates that this effect may be a problem in at least some instances.

It has been reported that "must buy" puts the independent station at a competitive disadvantage vis-à-vis the network affiliate operating in the same market.[11] One of the few reported complaints was registered by KTTV (Los Angeles) against CBS:

> [W]e are told by the advertiser or his agency that despite the fact that the KTTV proposal is more attractive, the advertiser must place the program on the network station in Los Angeles or he will be deprived of the opportunity of placing the program on stations affiliated with that network in other cities.[12]

CBS replied that KTTV's complaint is not grounded on the must buy arrangement but rather on the right to first call and territorial exclusivity conferred on network affiliates by their contracts (an unaffiliated station can only gain access to a program after the primary affiliate has turned it down). Still if the network can name the affiliates the sponsor must purchase, the network will have a strong weapon for driving out competition. There is little evidence, however, to refute the Network Study Staff's conclusion that "the 'must buy' policy, as such, is not a significant restraint on the independent station."[13]

Affiliates are generally delighted if included in the basic unit. There is an economic benefit in the procurement by the networks of sponsors, and the affiliates are anxious to be granted access to a larger share of network programming. While it has been contended that even optional or supplementary stations benefit because once the advertiser has made the larger investment he is more disposed to add other stations to his lineup, this claim is debatable,[14] perhaps fictive.

The augmentation of network bargaining leverage through selection of stations presents a problem. A network certainly can and will "remind" an affiliate of its favored position when seeking clearance for network commercial programs. Such extension of economic pressure represents a serious issue of public interest. The Federal Communications Commission policy has always been that the "station licensee must be free to exercise his best judgment with respect to the programs broadcast over his facilities."[15] Because of its ability to select stations to be sold to its national advertisers, a network may persuade affiliates to accept other network

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9 See: Osborn v. Sinclair Refining, 286 F.2d 832 (4th Cir. 1960). It was held that the buyer could recover for harm suffered as a result of a tie-in imposed directly on him.

10 *Network Broadcasting*, 484.

11 Antitrust Subcommittee, Committee on the Judiciary, *The Television Broadcasting Industry*, H.R. Rep. No. 607, 85th Cong. 1st Sess., 86 (1957).

12 *Network Broadcasting*, 492.

13 *Id.* at 494.

14 *Id.* at 489-90.

15 *Id.* at 491.

programs it would not otherwise be disposed to carry. This practice itself would be a type of tying agreement.

Is the "must or minimum buy" requisite for the running of a network? Yes, is the unanimous reply of network managing executives. ABC President Robert Kinter asserted "It is axiomatic that a minimum economic base must be maintained if the operation of a network is to be supported."[16] Robert Sarnoff of NBC put it in these words:

> The must buy policy provides for use of a national network on a national basis. It is *essential* to networking, and each network has worked out its own formula on the matter. . . . The must buy stations . . . provide basic national circulation. They form a reasonable and logical minimum-purchase unit for national-marketing purposes.[17]

These needs are not imaginary. It is apparent that the national television network as presently constituted could not continue to exist if it were unable to sell the time of more than a small proportion of its affiliated stations to any advertiser.[18] Without a minimum group, fragmentation would result; the networks would be unable to meet staggering interconnection costs and national programming would be impossible.

The concept of tying arrangement was introduced as early as 1910 in *Standard Oil v. United States*.[19] In that case "the rule of reason" was the criterion. This rule has been supplemented during the last seventeen years by Supreme Court decisions, from *International Salt Co. v. United States*[20] to *United States v. Loew's Inc.*,[21] which cases provide an excellent context in which to evaluate the per se violation issue in question. Upon analysis, at least two doctrinal variations of a per se violation of section 1 appear applicable, casting serious doubt on the legality of the ABC-Kemper arrangement.

Professor Bernard Schwartz concludes that "the 'must buy' practice . . . seems to fit squarely within the *Northern Pacific*[22] definition of a tying arrangement."[23] In that case the Supreme Court held that preferential routing clauses (in contracts for the sale of railroad land) which compelled the grantee or lessee to ship over railroad lines all commodities produced or manufactured on these lands (provided the rates were equal to those of competing carriers) were tying arrangements and *per se* violations of section 1 of the Sherman Act. The Court defines tying arrangement as

> [A]n agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. . . .[24]

The ABC-Kemper agreement certainly seems to fit this formula. ABC agrees to sell one product (time on ninety-five affiliated stations desired by Kemper) only on the condition that the buyer (Kemper) purchase a different product (time on the thirty-five undesired stations).

The recent case of *United States v. Loew's Inc.*[25] is even more directly on point. The Supreme Court enjoined Loew's from conditioning, or tying the sale or license of the right to exhibit any film over any television station to the purchase

16 Statement of Robert Kintner before the Committee on Interstate and Foreign Commerce, U.S. Senate (1956), pp. 2500-01, quoted in *Network Broadcasting*, 496.

17 Testimony of President Robert Sarnoff, NBC, Hearings before the Antitrust Subcommittee on the Judiciary, House of Representatives (1956), p. 6020, quoted in *Network Broadcasting*, 495.

18 *Network Broadcasting*, 497.

19 221 U.S. 1 (1910).

20 332 U.S. 392 (1947).

21 371 U.S. 38 (1962). The unanimous Court held: the block-booking rationale of *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), applies with equal force to the television industry.

22 Northern Pacific Ry. v. United States, 356 U.S. 1 (1958).

23 Bernard Schwartz, *Antitrust and the FCC: The Problem of Network Dominance*, 107 U.PA. L. REV. 753, 780 (1959).

24 Northern Pacific Ry. v. United States, *supra* note 22, at 5.

25 371 U.S. 38 (1962).

or sale of other films. This practice called "block booking" was held to be a per se violation of the Sherman Act. The conditioning of the sale of "Treasure of Sierra Madre," "Casablanca," "Johnny Belinda" and other desired films upon the acceptance of "Tugboat Annie Sails Again," "Nancy Drew Troubleshooter," and "Gorilla Man" is undeniably analogous to the ABC-Kemper arrangement of conditioning the sale of the affiliates in Chicago, Pittsburgh, and Dallas to those of Pembina, Monahans, and Klamath Falls.

The *Loew's* case also seems to destroy the network argument that tying arrangements involve the tying of different products whereas this arrangement deals only with *quantity* rather than *different products.* Unless the court is willing to distinguish "Tugboat Annie" from Pembina, there is no escaping the *Loew's* rationale. The District Court is justified in rejecting the ABC contention based on *Times-Picayune*[26] that there is only one product involved.[27] Affiliates seem to be sufficiently dissimilar to be classified as "different" products.

The *Times-Picayune* requirement of dominance or monopoly power over the tying product as a prerequisite to the application of the "per se rule" has also been vitiated by the *Northern Pacific* and *Loew's* decision.

> While there is some language in the *Times-Picayune* opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product. . . .[28]

Loew's buttresses *Northern Pacific,* holding:

> Market dominance — some power to control price and to exclude competition — is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness of its attributes.[29]

It is submitted that a consideration of the ABC-Kemper arrangement in view of *Loew's* and *Northern Pacific* leads to the inescapable conclusion that it is a tying agreement and a per se violation of section 1 of the Sherman Act. The only reason for distinguishing the instant case would be strong policy considerations necessitating the continuance of the "must buy" practice. Such weighty considerations are not manifest.

While a minimal network requirement seems reasonable as an incident to the national advertising and programming services provided by the networks, no cogent argument that the "minimum buy" will not satisfy the network's needs is apparent. The real objections to the must buy practice, (1) the forcing of advertisers to order particular stations against their wishes (Kemper's complaint) and (2) the use of the increased economic leverage given the network permitting it to obtain clearances that might not otherwise be forthcoming, are not inherent in minimum buy. No need is shown for the specification of stations by the networks. The advertiser is certainly in a better position to determine the importance of different stations in his national advertising scheme.

Minimum buy can also be legally distinguished and justified. It is submitted that the legal objections to tying arrangements vaporize when the advertiser is free to choose his own stations at a specified aggregate minimum price. This is more approximative of a limitation on quantity. A purchaser can't buy one cigarette or one stuffed olive; he has to buy a pack or a jar. They are marketed this way because it is the most financially sound way to sell them. For the same reason, minimum buy is a valid marketing device. The stock tests for "same" or "different

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26 Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).
27 American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848 (S.D.N.Y. 1963).
28 Northern Pacific Ry. v. United States, 356 U.S., at 11.
29 371 U.S. at 45.

products"[30] are not helpful "out of context." The affiliate station is certainly different enough to be a tied product and consequently serve monopolistic ends when the network has control over its saleability to national advertisers. Conversely, stations are sufficiently similar that when the advertiser, limited only by a minimum purchase requirement, is choosing they look to be quantities of the same product.

While a judicial decision grounded on such a protean classification would be tenuous, it might well facilitate the charting of the judicial course between the Scylla of network monopolistic greed and the Charybdis of network extinction.

Richard D. Catenacci

DOMESTIC RELATIONS — SUPPORT OF INSANE PERSONS — STATUTE IMPOSING LIABILITY ON RELATIVES FOR SUPPORT OF THE INSANE HELD UNCONSTITUTIONAL.— In January, 1953, Mrs. Auguste Schaeche, a California resident, was adjudged mentally ill and was committed to Agnews State Hospital, California. In August, 1960, Ellinor Vance, Mrs. Schaeche's adult daughter, died, and in November of that year the Director of Mental Hygiene acting under the laws of the state[1] filed a claim against Ellinor's estate for $7,554.22, the reasonable cost for maintenance and care of Mrs. Schaeche from 1956 to 1960. The administratrix of the daughter's estate defended on the ground that the state could not statutorily impose upon one adult, the daughter, liability for the cost of maintenance and care of another adult, the parent, whom the state had committed to a hospital for the mentally insane. The Supreme Court of California, in a unanimous opinion, *held:* judgment for the Director of Mental Hygiene reversed. The statute imposing liability on relatives of insane persons for support of such persons confined in state institutions violates equal protection of the laws. *Department of Mental Hygiene v. Kirchner,* 388 P.2d 720 (Cal. 1964).

At common law, since the parents were under a duty to support their minor children, they were also under a duty to support their minor insane children.[2] Concomitantly, since there was no legal duty to support adult children, there was none to support an adult incompetent,[3] though there was some authority to the contrary.[4] The legal obligation imposed on the state to care for the mentally incompetent is created by statute.[5] These statutes alone do not create a right in the state to reimbursement from those individuals legally liable to support even an insane child,[6] so separate support statutes imposing liability on the relatives were devised.[7] To date, all but five states have passed laws imposing this liability on the

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30 See: Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50, 72 (1958).

1 CAL. WELF. & INST. CODE § 6650:

> The husband, wife, father, mother, or children of a mentally ill person or inebriate and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution in which he is an inmate.

2 Guthrie County v. Conrad, 133 Iowa 171, 110 N.W. 454 (1907).

3 Humboldt County v. Biegger, 232 Iowa 494, 4 N.W.2d 422 (1942).

4 In Re Glass' Estate, 175 Kan. 246, 262 P.2d 934 (1953).

5 MADDEN, PERSONS AND DOMESTIC RELATIONS § 232 (1931).

6 Jones County v. Norton, 91 Iowa 680, 60 N.W. 200 (1894).

7 The earliest support statute, upon which all others are based, was Stat. 43 ELIZ., ch. 2, § 7:

> And be it further enacted, that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of

relatives. The instant case involves such a statute.

These statutes, which reflect divergent views as to the extent of the liability to be imposed on the insane person and his relatives,[9] have successfully withstood numerous constitutional attacks,[10] thereby inferring a general accord with the basic policy of relieving the state of the full burden of support. One of the main grounds for attack has been that the statute subjects the relative to double taxation. He is taxed once by the state to support public institutions, and he is taxed a second time by being required to pay for a patient's support therein, even though the state has assumed responsibility for these insane. The answer, variously phrased, has been essentially this: maintenance and care of the insane by the state not only benefits the public, for which the tax is assessed, it also benefits the relatives of the insane patient by supplying the facilities for treating the patient. Thus the relatives are not taxed a second time, but are merely charged a reasonable cost for services which but for the performance by the state should have been carried out by these relatives.[11] Courts have long recognized that support statutes are necessary to "protect the public from loss occasioned by neglect of a moral or natural duty imposed on individuals, and to do this by transforming the imperfect moral duty into a statutory and legal liability."[12] For a state to act upon the assumption of the existence of such ties between family members is not contrary to our legal history. The fact that the state at the same time recognizes its moral responsibility to care for those indigent insane who have no financially able relatives is a clear example of this.[13]

A second ground for attack arises because of a relatively recent change in the coverage of support statutes in some states. Illinois has specifically exempted from the support provisions relatives of an insane person committed on a criminal charge.[14] The argument was raised in *Kough v. Hoehler*[15] that the statute discriminated between those insane persons held in custody on a criminal charge and those committed in a civil action for treatment and care. These people, the court said, "are in custody initially for the protection of the public, when convicted or accused of a crime,"[16] their insanity merely being incidental; thus their detention in the mental institution should be equated with those prisoners held in jail at public expense for the public benefit. California, on the other hand, amended its support

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peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be affected; (2) upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein.

8 One state, New Mexico, imposes no charge at all. Four states, Arizona, Hawaii, Montana and South Carolina. impose liability on the patient or his estate only.

9 These are 1) on the patient only (*e.g.*, CODE OF LAWS, S.C., §§ 38-1026, 38-1027 (1962)); 2) on the patient and, in order of preference, spouse, parents, and children (*e.g.*, ALASKA STAT. § 47.30.270 (1962)); 3) on the patient and all relatives in the direct line of ascendancy and descendancy, thus including grandparents (LA. STAT. ANN. C.C. § 229 (1952)); 4) on the patient, parents *and* friends (FLA. STAT. ANN. § 394.11 (1960)).

10 *E.g.*, Beach v. District of Columbia, 320 F.2d 790 (1963); State v. Troxler, 202 Ind. 268, 173 N.E. 321 (1930); State v. Bateman, 110 Kan. 546, 204 Pac. 682 (1922); In Re Idleman's Commitment, 146 Ore. 13, 27 P.2d 305 (1933).

11 *E.g.*, State Commission in Lunacy v. Eldridge, 7 Cal.App. 298, 94 Pac. 597 (1908); Kough v. Hoehler, 413 Ill. 409, 109 N.E.2d 177 (1956); State v. Bateman, 110 Kan. 546, 204 Pac. 682 (1922); Kaiser v. State, 80 Kan. 364, 102 Pac. 454 (1909).

12 People v. Hill, 163 Ill. 186, 46 N.E. 796, 798 (1896).

13 CAL. WELF. & INST. CODE § 6651:

> The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid . . . on satisfactory proof that the estate or relatives . . . are unable to pay the cost of such care, support and maintenance. . . .

14 ILL. ANN. STAT. ch. 91½, § 1-8: "[N]othing in this Act shall be construed to apply to any mentally ill person, or person supposed to be mentally ill, who is in custody on a criminal charge."

15 413 Ill. 409, 109 N.E.2d 177 (1952).

16 *Id.* at 181.

provisions to specifically include the criminally insane,[17] and the court held that this could not be done consistently with the constitution, on the ground that relatives of criminals should not be deprived of their property merely because a relation is a criminal.[18]

A third ground is that the support statutes impose one or another type of unconstitutional discrimination. It has been argued that since not all insane persons are treated alike, those having no wealthy relatives being entitled to charity, there is discrimination within the class against those who have wealthy relatives. The short answer to this has been that "the distinction between the helpless and those able to help themselves is a natural one,"[19] and therefore there is a valid basis for the classification.

It was against this background of repeated rulings in favor of the constitutionality of patient support statutes that the decision in the instant case was reached, reversing the law in California. To what extent this case will affect future decisions in other jurisdictions depends in large part upon the peculiarities of the statute involved, as well as upon the soundness of the reasoning used. Both points will be considered.

In regard to the statute itself, the wording is such that the state is not required to first seek recovery from the estate of the patient. "The liability of such persons and estates shall be a joint and several liability."[20] The court in the instant case cites *Department of Mental Hygiene v. Black*[21] as standing for the proposition that, when construed with other sections of the Code, this provision imposes an unconditional obligation on the relatives, regardless of the size of the estate of the patient. This imposition of "absolute liability" led the court to conclude that the relatives had no "right of control over, or to recoup from, the assets of the patient."[22] One of the facts in the instant case was that the insane mother had an estate of $11,000 which the state made no attempt to attach. Many state statutes provide that this fund is to be attached first.[23]

In regard to the court's reasoning, it should be noted at the outset that the court makes an obvious attempt to establish a new state policy toward public welfare. This in itself tends to undermine the validity of reliance on legal precedent and traditional views of classification in the area of relative support. Nevertheless, the court proceeds roughly in three steps to reach the desired result. The first step consists in the extension of *Department of Mental Hygiene v. Hawley*[24] to the instant case. There it was held that the state could not require the relatives of an insane person charged with a crime to pay the cost of his support. This was extended in the present case to cover commitment in a civil action on the finding that "the purposes of confinement and treatment or care in either case encompass the protection of society from the confined person, and his own protection and possible reclamation as a productive member of the body politic."[25] Thus the court recognizes in the state the paramount obligation to pay since society receives this substantial benefit.

The second phase of the argument of the court involves a citation of three cases which are said to sustain the proposition that the state cannot discriminate

17 CAL. WELF. & INST. CODE § 6650: "Such liability shall exist whether the mentally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or . . . the Penal Code."

18 Department of Mental Hygiene v. Hawley, 59 Cal.2d 247, 379 P.2d 22 (1963).

19 In Re Yturburri's Estate, 134 Cal. 567, 66 Pac. 729 (1901), quoted in McKenna v. Roberts County, 72 S.D. 250, 32 N.W.2d 687, 690 (1948).

20 CAL. WELF. & INST. CODE § 6650.

21 50 Cal.2d 742, 329 P.2d 689 (1963).

22 Department of Mental Hygiene v. Kirchner, 388 P.2d 720, 724 (Cal. 1964).

23 *E.g.*, ALASKA STAT. § 47.30.270 (1962); MICH. STAT. ANN. ch. 127, § 14.818 (1956). State v. Panzeri, 76 Idaho 211, 280 P.2d 1064 (1955).

24 59 Cal.2d 247, 379 P.2d 22 (1963).

25 Department of Mental Hygiene v. Kirchner, 388 P.2d 720, 722 (Cal. 1964).

against a person just because he is the relative of someone else. Two of these, *In Re Tetsubumi Yano's Estate*[26] and *Oyama v. California*,[27] dealt with California's land laws which prevented Japanese aliens from owning property, and as a result limited the rights of their naturalized children to hold property. It was held that limiting the rights of citizens just because their parents were aliens not eligible for citizenship was a denial of equal protection of the laws. In other words, the discrimination was on the basis of racial descent. The third case, *Hoeper v. Tax Commission*,[28] held that when the state granted to the wife the right to separate property income, it could not continue to assess a tax against the husband based in part on the income of the wife. The state has so acted as to prevent itself from recognizing the otherwise legally enforceable obligations of the family relationship. It is therefore clear that the court here is put to the proof of one further fact before it can utilize any of these cases: either 1) that insane persons in state institutions are a burden of the state only, and so mental illness in a relative should not be cause for limiting another's rights; or 2) that the state has so conducted itself toward inmates of state institutions that others should not pay for their keep. This constitutes the basis for the final part of the argument.

In the third phase the court deals with policy, mainly along the lines of the second point made above:

> [W]e need not blind ourselves to the social evolution which has been developing during the past half century; it has brought expanded recognition of the *parens patriae* principle . . . and other social responsibilities, including the California Rehabilitation Center Act . . . and divers other public welfare programs to which all citizens are contributing through presumptively duly apportioned taxes. *From all this it appears that former concepts which have been suggested to uphold the imposition of support liability upon a person selected by an administrative agent from classes of relatives designated by the Legislature may well be re-examined.*[29] [Emphasis supplied.]

Some of these welfare programs do not require contribution on the part of the relatives.[30] This, however, does not present a self-evident contradiction between statutes as was found in the *Hoeper* case, but only reflects an inconsistency in the policy of the state toward public charity. The conclusion thus seems to be that public charity for some means public charity for all. A corollary to this proposition, giving support to the use of the *Tetsubumi* and *Oyama* decisions, is that persons in state institutions are no longer the kind for which relatives ought to pay. The argument of the court could therefore be reduced to the statement that because the state has exhibited a new policy toward supporting public welfare programs there is no longer any need to impose liability on relatives, especially since the primary obligation rests upon the state.

Although it may be conceded that the growth of the *parens patriae* principle is a valid consideration in formulating a new policy toward support law, there are, nevertheless, numerous objections which can be made to the decision. First, even though the relative can be sued before the estate of the patient is attached, much of the hardship of this result could be alleviated because of the duty of contribution on behalf of those who are jointly and severally liable. Thus, the relative could get contribution from other relatives or the patient's estate. Also, in regard to the argument of the court, it should be within the province of the legislature to determine whether or not the role of the state as *parens patriae*

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26 188 Cal. 645, 206 Pac. 995 (1922).
27 332 U.S. 633 (1948).
28 284 U.S. 206 (1931).
29 Department of Mental Hygiene v. Kirchner, 388 P.2d 720, 723-24 (Cal. 1964). (Emphasis added.)
30 *E.g.*, The Disabled Person's Act, CAL. WELF. & INST. CODE § 4011 provides in part: "No relative shall be held legally liable to support or to contribute to the support of any applicant for or recipient of aid under this chapter." Also, the section on the Mentally Deficient, CAL. WELF. & INST. CODE § 7011.5, now reads in part: "This section shall not be construed to impose any liability on the parents of mentally deficient persons."

has precluded it from seeking support from the relatives of the insane. Another objection is that there is no contradiction inherent in extending charity to some but not to all. A third rests on the fact that in supporting this decision it is necessary to admit that which has always been held to the contrary in our legal system — that family ties will no longer be sufficient to enforce legal duties. To adopt this new view would tend to undermine the sense of family responsibility which is all too rapidly disappearing in our society. Especially in the area of mental health, where the emphasis today is on care, cure, and return to society,[31] there is more need than ever for the family to remain closely bound, to maintain an interest in the future of the insane. To prevent enforcement of a legal obligation to pay support will at least have the effect of encouraging presently interested families to surrender all their familial obligations to the state.

Because of the drastic reversal by this court in prevailing sociological policy, it is submitted that few, if any, courts in other states will follow the lead of California. Since the bulk of the court's argument rests on California's own scheme of statutes, there is reason to believe that this case can be distinguished in many jurisdictions. On the more practical level, the states over the years have become increasingly dependent on this source of revenue to help defray their expenses.[32] Since the rationale of the decision could be easily applied to other areas of the law, such as old age assistance statutes,[33] there is cause to expect further impairment of the income of the state. If this, or any of this, be true, the impact of the decision should not reach beyond the borders of California.[34]

John M. Lamont

CRIMINAL LAW—CONTRACTS—NOLLE PROSEQUI AGREEMENT BETWEEN ACCUSED AND PROSECUTOR NOT ENFORCEABLE AS LACKING ADEQUATE CONSIDERATION.—Joseph Ashby was indicted on five counts of "Open Lewdness"[1] by a Burlington County, New Jersey, grand jury for exposing himself during a forty-day period ending May 16, 1962. A subsequent psychiatric examination revealed his responsiveness to treatment with a favorable prognosis of complete rehabilitation. His counsel sought the aid of the prosecutor in urging that Ashby be allowed to enter pleas to the lesser charges of being a "Disorderly Person"[2] and nolle prosequi the criminal indictments. The prosecutor deferred and suggested this matter be taken up with the assignment judge. Inasmuch as the assignment judge was vacationing, the acting assignment judge was consulted, and his permission to allow the nolle prosequi was in the form of a letter to the county judge. The county judge acknowledged receipt and concurrence with the acting assignment judge in directing the prosecutor to notify the municipal magistrates with jurisdiction of the newly selected approach to the offenses. Ashby appeared, pleaded guilty to being disorderly, and was fined in two of the five scheduled municipal hearings. The assignment judge, upon returning from his vacation, refused to allow the remaining three indictments similar disposition, insisting upon the criminal prosecution, and the prosecutor accordingly refused to move that they be nolle prosequied. On appeal of a denied motion before the county judge to nolle prosequi or dismiss the criminal indictments, the New Jersey Appellate Court *held:* motions for dismissal and nolle prosequi are proper only before assignment judge; the prosecutor has no authority to make

31 Respondent's petition for rehearing, pp. 22-29.

32 See generally Rushfelt, *Liability for Support of Patients in State Hospitals,* 26 J.B.A. KAN. 409 (1958).

33 Such statutes have generally been upheld as constitutional. *E.g.,* Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949); Kelley v. State Board, 82 Cal.App.2d 627, 186 P.2d 429 (1947); Mallat v. Luihn, 206 Ore. 678, 294 P.2d 871 (1956).

34 *The Attorney General of California plans to file a petition for writ of certiorari to the Supreme Court in this case. Letter from John C. Porter, Deputy Attorney of California, to the* NOTRE DAME LAWYER, *May 8, 1964, on file in the* NOTRE DAME LAWYER office.

1 N.J. STAT. ANN. § 2A:115-1 (1953).

2 N.J. STAT. ANN. § 2A:170-5 (1953).

any agreement on the subject of guilt of a particular crime, and if made, defendant is charged with the knowledge that it is clearly illegal. *State v. Ashby,* 81 N.J. Super. 350, 195 A.2d 635 (1963).

The correctness of this denial is firmly buttressed by a New Jersey procedural rule,[3] vesting the dismissal power prior to trial in the assignment judge. This portion of the holding is incapable of generating much well-reasoned disagreement. The unenforceability aspect of the agreement between the accused and the state does not, however, enjoy such a quiet repose.

New Jersey shares the approach of the American Law Institute[4] in the mechanics of a nolle prosequi motion, *i.e.,* a duality of functions divided between the prosecutor and the court. Briefly stated, the prosecutor or equivalent officer can enter a nolle prosequi motion, but to the court is reserved the power to grant or deny the motion. This curtailment is obviously designed to preclude any abuses of the nolle prosequi.[5] There are, however, jurisdictions that do impart to the prosecutor both functions without any allowance for any judicial participation in the nolle prosequi.[6]

The tacit existence of "deals," "agreements" or "bargains" between an accused and the state[7] has apparently failed to provoke a volume of decisional law commensurate with the vigor attributed to this practice. A likely explanation is the full performance rendered by the state, as a party to these agreements. Kentucky is a proponent of strict statutory requirements to be followed in nolle prosequi situations by the moving prosecutor, which refuses to recognize the enforceability of arrangements, this statutory compliance lacking. The New Jersey Court in rejecting Ashby's motion to nolle prosequi relied upon two Kentucky cases, which faced somewhat analogous situations. In *Commonwealth v. Hughes,*[8] the prosecutor entered an agreement with defendant's counsel to dismiss a manslaughter charge if a third continuance was necessary to produce a key state witness. This oral agreement was made with court knowledge. The witness did not appear and the prosecutor insisted upon trial. The Kentucky Court of Appeals held the lower court's dismissal in error, recognizing the prosecutor's right to repudiate the previously entered agreement. *Commonwealth v. Smith*[9] involved a defendant indicted for murder on two counts, who in consideration for pleading guilty to one charge, was assured no further prosecution would be sought on the other outstanding charge. This agreement also was made by the prosecutor with the knowledge of the judge. Three years later, a different prosecutor revived the charge and moved to prosecute the second murder charge. Here the Court of Appeals found no legal machinery to make this agreement binding. The language of the court provides some interesting insight into their sentiments:

> We feel constrained to say that this Court thinks appellee has been most unfairly treated by the Commonwealth. . . . The present Commonwealth Attorney is going back on the agreement made . . . and approved by the Trial Judge. . . . Of all persons appearing in criminal courts, the prosecuting officer should be the last to go back on an agreement. . . .[10]

This statement was followed by a suggestion that executive clemency be granted to Smith since the courts were without authority to "right the great injustices done him."[11]

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3 N.J. RULES 3:11-3.

4 ALI MODEL CODE OF CRIM. PROC. § 295 (1930).

5 See Bennett, *Louisiana Criminal Procedure — A Critical Appraisal,* 14 LA. L. REV. 11, 25-26 (1953).

6 *Ibid*; See Kosicki, *The Function of Nolle Prosequi and Motion to Dismiss in Connecticut,* 36 CONN. B. J. 159 (1962).

7 See Arnold, *Law Enforcement — An Attempt at Social Dissection,* 42 YALE L. J. 1, 9 (1932).

8 153 Ky. 34, 154 S.W. 399 (Ct. App. 1913).

9 244 S.W.2d 724 (Ky. Ct. App. 1951).

10 *Id.* at 726.

11 *Ibid.*

An articulate judicial pronouncement in favor of upholding agreements is *State v. Ward.*[12] Ward, the perpetrator of bank law violations in West Virginia, was indicted on fourteen counts. He agreed, with the consent of the court, to cooperate with the Banking Commission in unraveling his misdeeds, in return for allowing him to plead to a single indictment, the remaining thirteen to be nolle prosequied. He rendered the cooperation, was tried, sentenced to prison, released, and the prosecutor moved on the thirteen indictments outstanding against Ward. The court held:

> Promises of immunity from prosecution made to a witness by a prosecuting officer with the consent of the court are justified on the ground of public policy. . . . The courts treat such promises as *pledges of the public faith.* . . . The promise alleged in the instant plea (that of the prosecuting attorney with the approval of the court) is equally a pledge of *the public faith* which in our opinion should be duly kept.[13]

The instructive force derived from this case law holding that bargains entered by the prosecutor with the consent of the court should be binding upon the state is greatly diminished by the New Jersey Court's election to impeach the nature of the lower court's consent granted to Ashby. It is the feeling of the Appellate Court that Ashby's counsel did not fully and fairly inform the acting assignment judge that five indictments were involved or the predilection of the regular assignment judge to deny his consent to this type of agreement. Thus the letter of acquiescence from the acting assignment judge is totally disregarded in framing the case issue for resolution. The court says:

> A significant issue in this case is the question of the validity of an agreement between the prosecutor and a defendant to *nolle prosequi* or dismiss an indictment.[14]

The decision in the case as a result, cannot transcend the restrictions so imposed, thus brutally excluding from view the *Ward* line, which emphasizes the pledge of public faith.

The court also distinguishes the *Ward* line by the absence of consideration accruing to the state for its promise to allow Ashby to plead to the lesser charge. Ashby did not have, hence could not give, the state adequate consideration in the form of assistance or information for subsequent prosecution, his or anyone else's. The manifest uneasiness of this position concluding this agreement illegal as lacking consideration, hence not a bar to prosecution of the indictments is shown by the court's words:

> This is simply the balancing of a reduction in the charge or the elimination of a charge against a cooperative defendant with the probability of a conviction of another defendant resulting from that cooperation. On balance, there is a gain accruing to the public.[15]

Summoned in support of this rationale is the Restatement:

> A bargain by a prosecuting officer with a person accused of a crime to recommend to the court a nol. pros. in consideration of the accused becoming a witness for the State, is not illegal. But any other bargain to secure a nol. pros. or the recommendation of a nol. pros., except by the presentation of facts showing that the accused person is not guilty, is illegal.[16]

The dissenting judge reflects, "the morals of the market place are a poor guide for the sovereign's actions,"[17] questioning the wisdom of contractual abstraction being determinative of criminal cases. The Restatement[18] says contracts that induce definite and substantial action binding if injustice can be avoided only by enforcement of the promise. Ashby has forgone his right to trial on two counts in pleading guilty in the municipal court, which can hardly be termed less than definite and substantial action.

12 112 W.Va. 552, 165 S.E. 803 (Sup. Ct. App. 1932).
13 *Id.* at 554-555, 165 S.E. at 804-805 (emphasis added).
14 State v. Ashby, 195 A.2d 635, 641 (1963).
15 *Id.* at 642.
16 RESTATEMENT, CONTRACTS, § 549 (1932).
17 State v. Ashby, 195 A.2d 635, 646 (1963) (dissenting opinion).
18 RESTATEMENT, CONTRACTS, § 90 (1932).

Of eminent importance in the resolution of the problems surrounding prosecutor-accused agreements is the public faith pledge extended to a citizen. The merits and wisdom of any particular bargain aside, the population as a whole, justifiably expects the state, above all others, to keep its bond. Engaging as the efforts of the *Ashby* court are to distinguish his case from the favorable precedent, the public pledge, the honor of the sovereign is upheld slightly, if at all. The American "grandfather" case which strongly espouses the necessity for fundamental fairness by the state in dealing with the citizens is *Commonwealth v. St. John.*[19] The accused was promised immunity from prosecution by police officials, and the discretion of the trial judge was held decisive in denying him immunity. The court did, however, include the oft cited language:

> When such promises are made by the public prosecutor, or with his authority, the court will see that due regard is paid them, and that the public faith which has been pledged by him is duly kept.[20]

This denial of immunity from prosecution was accompanied by a recommendation for executive clemency.

The dignity of this public pledge is to be sharply and critically distinguished from the contentions arising on habeas corpus applications.[21] Those seeking the writ have an understandable tendency toward fabricating agreements with the prosecutor in seeking to "catch the judicial eye." The reaction of the judiciary in giving these contentions equally understandably cursory treatment presents an entirely different slant on good faith pledges. It is from this context of judicial skepticism that the New Jersey court drew its support for the following holding in *Ashby:*

> [W]e have held in our State that a prosecutor has no authority to make any agreement on the subject of guilt of a particular crime or a sentence . . . that even if such an agreement were made, defendant is charged with the knowledge that it is clearly illegal.[22]

In the exceptional case,[23] executive clemency was suggested as the proper avenue for relief rather than test the existence of such an agreement.

A less important policy consideration than that of a public pledge which is raised by this decision is the effect on the further use of the agreement in New Jersey law enforcement. Initial recognition of the good that does result from "deals" in apprehending suspected offenders that would otherwise be beyond the reach of law enforcement officers leads one to believe, as the writer does, that such use will be greatly frustrated by this holding. With the advent of mandatory counsel assignment in state courts,[24] will not New Jersey be placed in a position of suspect? May, would, or should an attorney be a party to any agreement for a lesser charge for his client under fear of being faced with rules of contract law as grounds for repudiation by the state, holding the information supplied was "inadequate consideration," thus illegal? The instant case provides no predictable guidelines for prior determination of "adequate consideration."

Hopefully, on appeal, the New Jersey Supreme Court will return the luster to the sovereign's crown and hold binding a pledge made to an apparently earnest citizen who sought justice in its courts. Judicial consent, formal or informal was given. Consideration, as detrimental reliance in forbearing trial by jury was incurred by the defendant. But most importantly, the public faith was pledged and this pledge was repudiated.

John T. Mulvihill

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19 173 Mass. 566, 54 N.E. 254 (1899).

20 *Id.* at 569, 54 N.E. at 254.

21 State v. Pometti, 12 N.J. 446, 97 A.2d 399 (1953); *In re* Cardinale, 36 N.J. Super. 137, 115 A.2d 125 (App. Div. 1955); State v. Terry, 30 N.J. Super. 288, 104 A.2d 332 (App. Div. 1954).

22 State v. Ashby, 195 A.2d 635, 642.

23 State v. Miller, 16 N.J. Super. 251, 84 A.2d 459 (App. Div. 1951), *cert. denied* 342 U.S. 934 (1952).

24 Gideon v. Wainwright, 372 U.S. 335 (1963).