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Recent Decisions

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RECENT DECISIONS

ALIENS—EXCLUSION HEARINGS—PAROLE BY PRESIDENTIAL INVITATION EXTENDS DUE PROCESS TO EXCLUDABLE ALIEN.—Relator and his family were part of a group of Hungarian refugees who fled to Austria during the Hungarian uprising of 1956. A vast number of these refugees sought asylum in the United States, but the number of allocable visas under the Refugee Relief Act could not accommodate them. Consequently, President Eisenhower directed that emergency admission be granted to thousands of the refugees over the number of available visas, and relator was one of these. He executed the necessary application in Austria and he and his family were paroled to the United States. Later the relator was interrogated in the United States and a discrepancy was found on his written application relative to his connection with the Communist Party before the rebellion. A deportation order resulted without a hearing based on undisclosed confidential information warranting exclusion. However, this order was withdrawn and relator was given an exclusion hearing which was limited to the question of relator's visa. Upon his admission that he had no visa, he was found inadmissible under section 212(a)(20) of the Immigration and Nationality Act.[1] Relator petitioned for writ of habeas corpus, which petition was dismissed in the disrict court. On appeal, *held,* reversed. The presidential invitation and its acceptance effected a change in the status of relator from the usual parolee. He was entitled to the protection of the Constitution and therefore a hearing prior to revocation of parole. *United States ex rel. Paktorovics v. Murff,* 260 F.2d 610 (2d Cir. 1958).

The instant controversy again brings to the fore the question of an alien's right to procedural due process in the government's attempt to expel him from the country or bar his admittance. In resolving the issue the Supreme Court in the past has made the decision turn on the alien's status at the time the proceedings take place. A rule of thumb has evolved by which due process is accorded an alien in an "expulsion" proceeding but not in an "exclusion" proceeding.[2]

An expulsion or deportation proceeding[3] is the means by which an alien, who is actually within the United States or is treated as being so, is forced out of the country. Although the power to expel resident agents has never been questioned,[4] it has long been held that an alien who has lawful permanent residence in the county and remains physically present is within the protection of the Constitution.[5] All the guarantees which extend inalienable privileges to "persons" are his due to his presence within the borders, the most notable being the due process clause.[6] Consequently, a fair hearing is a vital requisite to these proceedings although due process is satisfied by a hearing before an official of an administrative agency.[7]

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1 66 Stat. 182, 8 U.S.C. § 1182(a)(20) (1952).

2 In Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893), the Court evidently refused to recognize the distinction. However, in The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 100 (1903), the Court held that an alien "who has entered the country, and has become subject in all respects to its jurisdiction," cannot be arbitrarily deported without giving him the opportunity to be heard.

3 The term "deportation" is also used in certain exclusion proceedings. *Cf.* Lang May Ma v. Barber, 357 U.S. 185 (1958).

4 Carlson v. Landon, 342 U.S. 527 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

5 Galvan v. Press, 347 U.S. 522, 530 (1954); Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950). However, an exception is made in the case of enemy aliens in the time of war. Here there is no judicial review of the administrative procedure to determine a conformity to due process of law. Ludecke v. Watkins, 335 U.S. 160 (1948).

6 Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953). See also Johnson v. Eisentrager, 339 U.S. 763, 771 (1950); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion).

The Court has at times been lenient in determining the requisite "physical presence" of the alien to qualify for these procedural safeguards. Illegal entry of the alien does not preclude him from the constitutional safeguards,[8] although it has been indicated that he must be within the country for "some time."[9] Also, the status of "permanent resident" remains unchanged if the alien leaves the boundaries of the country as a seaman on a vessel with the home port within the United States.[10] However, if a resident alien leaves the country on a trip abroad, he loses his permanent resident status and is treated as any other alien on his attempt to re-enter the country.[11] His physical presence within the United States is therefore a *sine qua non.*

Exclusion proceedings, on the other hand, are used to prevent someone from entering the United States who is actually outside the country or is treated as being so. Prior to 1950, the Supreme Court's stand on the rights of an excludable alien was not clear although an early opinion indicated that the matter was completely in the hands of the legislative and executive branches of the government.[12] The Court stated its position on the issue in *United States ex rel. Knauff v. Shaughnessy*[13] and held that the constitutional guarantee of procedural due process does not extend to the excludable alien since he has no vested right of entry. The exclusion of aliens is a fundamental act of sovereignty and denial of entry is merely the denial of a privilege. The weight of the opinion was weakened somewhat due to the majority's reliance on the war powers to support its holding;[14] however, the full thrust of the position was reaffirmed in *Shaughnessy v. United States ex rel. Mezei,*[15] where the Court reiterated that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[16] Judicial review of an administrative exclusion order is had only by a petition for writ of habeas corpus or an action for declaratory judgment. The scope of the review is that of the existing law.[17]

The usual aliens within the "excludable" class are those who present themselves to immigration officials at the borders of the country, seeking admittance. However, on occasion aliens have been housed or admitted within the confines of the country for various reasons, *e.g.,* to await the decision of a claim of citizenship.[18] The Supreme

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7 The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 100-02 (1903). The formulation of the nature of the hearing is entrusted exclusively to the legislative and executive departments since the policies pertaining to control of aliens are said to be "peculiarly concerned with the political conduct of government." Galvan v. Press, 347 U.S. 522, 531 (1954). However, the applicable statute must conform to procedural due process. A deportation order will be upset if the procedure itself is arbitrary or the administrative official has abused his discretion. Wong Yang Sung v. McGrath, 339 U.S. 33, 49-51 (1950).

8 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953). The Japanese Immigrant Case, *supra* note 7, at 100-01.

9 Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950).

10 Kwong Hai Chew v. Colding, 344 U.S. 590, 592 (1953).

11 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

12 Ekui v. United States, 142 U.S. 651, 660 (1892). The confusion was probably due to the Court's apparent willingness to grant a hearing where the alien sought entry under a claim of citizenship, *cf.* Chin Yow v. United States, 208 U.S. 8 (1908), United States v. Ju Toy, 198 U.S. 253 (1905), and its requirement that if a hearing be given by statute, it must be a fair one although it need not be judicial. United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904). See also Kwock Jan Fat v. White, 253 U.S. 454 (1920). In any event, some courts prior to 1950 extended protection of due process to the alien in exclusion proceedings. See, *e.g.,* United States *ex rel.* Brandt v. District Director, 40 F. Supp. 371 (S.D.N.Y. 1941). See also 22 So. CAL. L. REV. 307 (1949); Annot., 94 L. Ed. 329 (1950).

13 338 U.S. 537 (1950).

14 *Id.* at 544-46.

15 345 U.S. 206 (1953). See also Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

16 *Id.* at 212. *But cf.* Brownell v. Tom We Shung, 352 U.S. 180, 182 n.1 (1956).

17 Brownell v. Tom We Shung, *supra* note 16, at 186. The existing law in this case was the present section of the Immigration and Nationality Act applicable to exclusion proceedings, 66 STAT. 200, 8 U.S.C. § 226 (1952). This mode of judicial review may be had only by the alien who has at least presented himself at the borders of the country. Brownell v. Tom We Shung, *supra* at 183 n.3.

18 Brownell v. Tom We Shung, *supra* note 16.

Court has restricted the status of these aliens to that of the excludable class. Detention of the alien at Ellis Island pending determination of his admissibility does not effect an entrance,[19] nor does enlargement of the alien under bond pending admissibility proceedings.[20] They are not "within the country" so as to be subject to "expulsion" rather than "exclusion."[21]

The issue in the instant case is the determination of the status of the alien temporarily paroled into the United States. The relator was ordered excluded by a Special Inquiry Officer following an exclusion "hearing" in name only, limited to a question which could only result in an exclusion order against the alien.[22] If the guarantees of the fifth amendment extend to the relator, the "hearing" in question obviously will fall before the traditional standard of fair play demanded by due process of law.

The Supreme Court first defined the legal status of the alien parolee, who was otherwise excludable, in *Kaplan* v. *Tod*.[23] Mr. Justice Holmes declared that the alien "was still in theory of law at the boundary line and had gained no foothold in the United States."[24] In two very recent cases, the Court was asked to depart from this ruling and grant a stay of deportation to five aliens who had been physically present within the country on parole for a number of years.[25] These aliens attempted to make use of section 243(h) of the Immigration and Nationality Act[26] on the ground that their deportation to China would subject them to physical persecution and probable death. This consideration gained the ear of but four Justices. The majority held that there was no evidence that Congress intended to depart from *Kaplan*, and since section 243(h) deals exclusively with expulsion proceedings, the aliens were not qualified to raise the objection. The Court felt that a contrary decision would curtail current parole policy, an intention which it felt "reluctant" to impute to Congress.[27]

The applicable section of the act relating to parole, section 212(d)(5),[28] provides that the parole shall not be regarded as admission of the alien, but that after the purpose of the parole is ended (within the opinion of the Attorney General), the parolee is treated as any other applicant for admission. Therefore, not only the existing case law, but also the explicit terms of the statute militate against extending to the instant relator the status of permanent resident, and the concurrent guarantee of procedural due process.

The majority, however, distinguished the instant case from the usual exclusion proceeding and held that the presidential invitation pursuant to the announced foreign policy of the United States made the case sui generis.[29] The relator's subsequent acceptance changed his status sufficiently to bring him within the protection of the Constitution. A fair hearing therefore is required on the subject of revocation of parole so that the Attorney General's discretion may be openly viewed by the courts to circumvent its arbitrary exercise.

The dissent intimated that the majority opinion was motivated by sympathy for the plight of the Hungarian refugee. It succinctly pointed out that the very considerations which recently persuaded the Supreme Court against changing the alien's status on the

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19 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953) (twenty-one months).

20 Stoma v. Commissioner, 18 F.2d 576 (5th Cir. 1927).

21 See Leng May Ma v. Barber, 357 U.S. 185, 188 (1958).

22 "Having raised the issue of whether . . . [relator] had communistic or subversive tendencies, all of which he vigorously denied, the issue of his communistic connections was abandoned, and he was ruled to be deportable on the sole ground of his failure to produce the visa which everyone knew all along he did not possess." 260 F.2d at 612.

23 267 U.S. 228 (1925).

24 *Id.* at 230.

25 Leng May Ma v. Barber, 357 U.S. 185 (1958); Rogers v. Quan, 357 U.S. 193 (1958).

26 66 Stat. 214, 8 U.S.C. § 1253(h) (1952).

27 Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

28 66 STAT. 182, 8 U.S.C. § 1182(d)(5) (1952).

29 261 F.2d at 613.

strength of parole — contrary precedent, judicial legislation and a disruption of explicit congressional policy[30] — were ignored by the majority. The instant case was, therefore, not sui generis in principle.[31]

The opinions in the instant case present a clear example of a court's difficulty in deciding a case which must turn on the policy dictated by other departments of the government, but which policy is obscured by the inconsistent actions of those departments. The dissent favored the policy of domestic security stated by Congress in a statute and seconded recently by the Supreme Court. The majority favored the advancement of a policy of foreign diplomacy stated by the President and apparently seconded by Congress but not without reservation. The action by the immigration officials, inexcusably indiscreet under the circumstances, would analytically necessitate a decision by the instant court which would be censured by every country on the free side of the Iron Curtain. The ultimate answer to the question lies with Congress, but in the meantime it is submitted that the instant majority chose the stronger policy notwithstanding the decision's analytical inconsistency. The only criticism which might be leveled is that the action of the majority was somewhat presumptuous in extending the scope of the "parolee" status in view of the recent Supreme Court decisions to the contrary;[32] however, under the circumstances in the instant case, its action in pointing to a possible solution to the dilemma is far from being indiscreet.

William J. Harte

CONSTITUTIONAL LAW — EVIDENCE — COMPULSORY DISCLOSURE OF NEWSMAN'S INFORMANT IS NOT VIOLATIVE OF FIRST AMENDMENT OR ANY TESTIMONIAL PRIVILEGE. — Plaintiff, a well-known actress, brought an action against the Columbia Broadcasting System for allegedly defamatory statements appearing in a newspaper article. The statements were attributed to a CBS "network executive." During the pre-trial discovery proceedings, the newspaper reporter who wrote the article refused to disclose the name of her informant. Proceedings were initiated to compel disclosure, but she again refused and was held in criminal contempt. The reporter appealed, claiming that compulsory disclosure of such information would encroach upon the freedom of the press guaranteed by the first amendment and would also violate a confidence protected under an evidentiary privilege.[1] *Held,* affirmed. Freedom of the press conferred no right on the columnist to refuse to disclose the identity of her informant. Also, there was no evidentiary privilege justifying the refusal. *Garland v. Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

Liberty of the press is recognized as an essential requisite to the American way of life.[2] As such it must be given "the broadest scope that could be countenanced in an orderly society."[3] This freedom has substantially given the press immunity from previous restraints or censorship.[4] However, this immunity is not absolute. Freedom of the press has been limited in exceptional cases, most notably those involving the "clear and present danger" concept of *Schenk v. United States.*[5] The limitation has also been re-

30 Leng May Ma v. Barber, 357 U.S. 185 (1958).
31 261 F.2d at 619-20.
32 See cases cited in note 24, *supra.*

1 A third ground was pleaded, namely, that the inquiry would unreasonably annoy, embarrass and oppress the witness and, under FED. R. CIV. P. 30(b), the lower court should have ordered that no inquiry be taken. The instant court found that the trial judge had not abused his discretion in ordering the inquiry. The scope of this article will not include a discussion of this ruling.
2 "Congress shall make no law . . . abridging the freedom . . . of the press." U. S. CONST. amend. I.
3 Bridges v. California, 314 U.S. 252, 265 (1941).
4 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).
5 249 U.S. 47 (1919). This concept has received its most recent interpretation in Dennis v. United States, 341 U.S. 494, 510 (1951).

cognized to curb the abuse of the freedom where the requirements of public decency or the security of community life demand it.[6] Notwithstanding the theory of the limitation, the area in which restrictions have been repeatedly imposed is where the press is said to impair or subvert the impartial decision of either judge or jury.[7] Courts have the authority to punish by means of contempt proceedings those publications which tend directly to prevent the proper and impartial discharge of judicial functions.[8]

The usual abridgment case in this area involves an attempt by the trial court to quiet contemptuous or prejudicial statements or actions of the press regarding a pending trial. The appellate court is faced with the task of balancing freedom of the press against the value of a fair and impartial trial.[9] Thus in *Bridges v. California,*[10] a majority of the Supreme Court concluded that publication of an opinionated newspaper article concerning an action then pending before a court did not constitute a sufficient interference with the orderly administration of justice to justify a restriction of free expression. And in *Pennekamp v. Florida,*[11] the Court held that newspaper comments criticizing a judge's attitude in non-jury proceedings toward those charged with crime were not an abuse of free speech. The effect of these comments on judge and jury in the pending trials was too remote to affect the administration of justice.

In the instant case, the newspaper reporter contended that forced disclosure of confidential news sources would amount to a prior restraint since fear of subsequent disclosure would cut off these sources and thereby diminish the flow of news to the public. The "restraint" therefore was a secondary effect of the compulsion and not the usual direct attempt to quiet the press. In answer to this contention, Judge Stewart [now Mr. Justice Stewart] spoke at great length of the necessity of balancing both "vital" interests, *i.e.,* free press and justice, and concluded that freedom of the press, as it was involved in the instant case, "must give place to a paramount public interest in the fair administration of justice."[12]

Judge Stewart's conclusion was evidently motivated by the remoteness of a possible abridgment of free press, in that it would have to occur secondarily, and by the ever-present necessity of "fair administration." Although he emphasized the duty of a witness to testify in a court of law, he did indicate certain limitations to this duty in keeping with the concept of free press. If the judicial process were used to "force a wholesale disclosure of a newspaper's confidential sources of news" or if the "news source [were] of doubtful relevancy or materiality," there might be an abridgment.[13] Notwithstanding this qualification, the tenor of the opinion indicates a noticeable deference for the value of an orderly administration of justice. There is strong indication that if a borderline case were before the present Supreme Court, such as the *Bridges* case, the Justice would concur in the approach of the minority opinion, written by Justice Frankfurter.[14]

The defendant's second contention was that the information sought was protected by an evidentiary privilege. The prevailing common law rule requires full disclosure by any witness of all information relevant to the proceedings.[15] Exceptions to this rule are recognized, however, if the relationship between the communicants warrants the

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6 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

7 Brownell, *Freedom and Responsibility of the Press in a Free Country,* 24 FORDHAM L. REV. 178, 179 (1955). For a list of cases involving such restrictions see 159 A.L.R. 1379 (1945).

8 Bridges v. California, 314 U.S. 252 (1941).

9 See, *e.g.,* Pennekamp v. Florida, 328 U.S. 331, 346 (1946).

10 314 U.S. 252 (1941).

11 328 U.S. 331 (1946).

12 259 F.2d at 549.

13 *Id.* at 549-50.

14 Judge Stewart quoted at length from Frankfurter's dissent in the *Bridges* case and seemed to concur with that Justice's approach. 259 F.2d at 545.

15 Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951) (dictum); Clein v. State, 52 So. 2d 117 (Fla. 1951) (grand jury proceedings); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936) (grand jury proceedings). See also N.Y. LAW REVISION COMM'N. REP. 35 (1949).

communication's secrecy for various policy reasons. Among these are the following: marital confidences between husband and wife,[16] penitents' confessions to clergymen,[17] patients' revelations to physicians,[18] and clients' communications to attorneys while seeking professional aid.[19] On numerous occasions, litigants have attempted to include as one of the exceptions, communications between the newsman and his informant.

The newsman's case is unique in that the informant knows and intends that the information be published, but intends that his identity be kept secret. In the case of the recognized exceptions, the informant is usually known but the intent is that the information be kept secret. However, the newsman's case also differs from other relationships which have not been afforded the privilege in that he is discharging the important function of keeping the public informed.

The leading American case on the privilege is *People ex rel. Mooney v. Sheriff*.[20] In this case, a newspaper reporter in a grand jury proceeding had refused to divulge the names and addresses of "contacts" from whom he had elicited information to author an article on the "policy rackets" in New York. The court, after noting that the general rule at common law was against this particular privilege, refused to depart from the common law precedent and held that any extension was a matter for the legislature. Reported cases in other jurisdictions, both federal[21] and state,[22] have uniformly denied the existence of the privilege.

In England, save in libel cases, there is no newspaper privilege. As to libel cases, the opinions indicate that it is within the discretionary power of the judge to grant the privilege, and that power appears customarily to be exercised to exempt the newspaper.[23] The distinction has been generally followed in the Dominions.[24] Other foreign jurisdictions have accepted the privilege in varying degrees.[25]

Many policy considerations have been stated in opposition to the privilege, the foremost being that the practice of the courts has been to limit rather than extend the classes to whom an evidentiary privilege is granted.[26] The underlying theory is that the public interest in the search for truth should not be subordinated to the personal attitudes of a relatively small class.[27] It has been argued that such a privilege would engender public distrust of criminal administration and would not assist officials in the performance of their duties,[28] that such unhealthy public sentiment might make a fair trial an impossibility,[29] that the privilege would engender and foster undesirable under-

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16 8 WIGMORE, EVIDENCE §§ 2232-41 (3d ed. 1940).

17 *Id.* §§ 2394-96 (by statute).

18 *Id.* §§ 2380-91 (by statute). See also DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 14-18 (1958).

19 *Id.* §§ 2290-2329.

20 269 N.Y. 291, 199 N.E. 415 (1936).

21 Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); *Ex parte* Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953); Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951) (dictum).

22 Clein v. State, 52 So. 2d 117 (Fla. 1951); Joslyn v. People, 67 Colo. 297, 184 Pac. 375 (1919); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

23 Lyle-Samuel v. Odhams, Ltd., [1920] 1 K.B. 135. *But see* White Co. v. Credit Reform Ass'n [1905] 1 K.B. 653. See generally, N.Y. LAW REVISION COMM'N REP. 97-100 (1949).

24 British Columbia: Schelking v. Cromie, [1918] 3 West. Weekly R. 1038; Saskatchewan: Kaft v. Star Publishing Co., [1925] 1 West. Weekly R. 774 (dictum); Ireland: Fitzgerald v. Watson, [1918] 2 Ir. R. 411 (dictum); New Zealand: Hall v. New Zealand Times Co., Ltd., [1907] 26 N.Z.L.R. 1324 (dictum); Victoria: Watt v. David Syme & Co., [1914] Vict. L. R. 639 (dictum).

25 The German code, up to the time of Nazi control, recognized the privilege only if an editor had been criminally punished as the perpetrator of a libelous article published in a newspaper. N.Y. LAW REVISION COMM'N REP. 99-100 (1949). The privilege is expressly recognized and protected by statute in the Republic of the Phillippines. The privilege is conditional, however, and is not applicable when it is found by a congressional committee that the interests of the state demand disclosure. *Id.* at 97. The privilege has been accorded recognition in Pakistan and Sweden. See U.N. EcoSoc Council Off. Rec. 10th Sess., at 27-28 (E/2693) (1955).

26 People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).

27 Gallup, *Further Consideration of a Privilege for Newsmen*, 14 ALBANY L. REV. 16 (1950).

28 84 U. PA. L. REV. 798 (1936).

29 22 CORNELL L.Q. 115 (1936).

world alliances,[30] and that the real desire for the privilege is not a zeal for the public good but desire for prestige.[31] It is said that instigation of criminal investigations by private individuals who refuse to co-operate in their prosecution are of doubtful value as to promoting the public interest.[32] Such information can be gathered even in the absence of the privilege, which, if granted, would weaken the authority of the court through the exclusion of necessary evidence and open the way to reckless publication.[33]

On the other hand, one of the highest functions of newspapers and news reporting is to keep the public informed. The privilege is said to be necessary for the acquisition of information for public dissemination and that forced disclosure of confidential news sources would restrain the flow of news from news sources to news media and thus diminish the flow of news to the public.[34] It must be noted that the recognized privileges are supported by effective sanctions and safeguards, such as licensing and professional scrutiny in the case of physicians and attorneys, and both ecclesiastical and ethical control in the case of clergymen. The newsman justifies his position on the fact that the journalistic code of ethics forbids the violation of a confidence. The code is reinforced by an economic sanction in that disclosure would destroy his reputation as a confidant and sever his news sources. Although the journalistic code has not been given legal effect[35] since the courts have subordinated the economic sanction to the public interest,[36] these considerations have evidently been persuasive, since the newsman's privilege is today protected by statute in twelve states,[37] and attempts have been made to enact such legislation in fourteen others.[38]

The statutes are almost as definite in favoring an unqualified privilege against disclosure of news sources as the case law is against its extension.[39] The privilege is not absolute in the sense that it forbids the newsman to make an answer, but it leaves him free to choose whether to tell or not to tell.[40] Arkansas stands alone in conditioning the privilege on "good faith," the lack of "malice," and "in the interest of the public welfare."[41] The majority forbid the compulsion[42] or requirement[43] of disclosure. In California and Michigan the privilege is a disqualification to testify.[44]

In regard to the types of news-gathering and news-disseminating covered, two statutes restrict the privilege to newspapers,[45] one to "newspaper or reportorial work,"[46] and another to "newspapers or other publications."[47] Six extend their coverage to

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30 45 YALE L.J. 357 (1935).

31 N.Y. LAW REVISION COMM'N REP. 37 (1949).

32 84 U. PA. L. REV. 798 (1936).

33 45 YALE L.J. 357 (1935).

34 Brief for Appellant, p. 6, Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).

35 Burdick v. United States, 236 U.S. 79 (1915) (dictum).

36 Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

37 ALA. CODE tit. 7, § 370 (1940); ARIZ. REV. STAT. ANN. § 12-2237 (1956); ARK. STAT. ANN. § 43-917 (1947); CAL. CIV. PROC. CODE § 1881(6); IND. ANN. STAT. § 2-1733 (Burns Supp. 1957); KY. REV. STAT. ANN. § 421.100 (1955); MD. ANN. CODE art. 35, § 2 (1957); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODES ANN. § 93-601-2 (Supp. 1957); N.J. STAT. ANN. § 2A:81-10 (1952); OHIO REV. CODE ANN. § 2739.12 (Page 1953); PA. STAT. ANN. tit. 28, § 330 (1958).

38 Conn., Fla., Ill., Kan., Mass., Mich., Mo., N.H., N.Y., R.I., Tex., Va., Wash., Wis. See N.Y. LAW REVISION COMM'N REP. 59-100 (1949).

39 The statutes have not gone without adverse criticism, however. See 8 WIGMORE, EVIDENCE § 2286 (3d ed. 1940); N.Y. LAW REVISION COMM'N REP. 35 (1949); A.L.I. MODEL CODE, FOREWARD, pp. 7, 22-31.

40 Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956) (dictum).

41 *Supra* note 37 (Ark.).

42 Ala., Ariz., Ind., Ky., Md., N.J.

43 Ark., Mont., Ohio, Pa.

44 *Supra* note 37 (Cal., Mich.).

45 Cal., N.J.

46 Ariz.

47 Mich.

radio,[48] five to television,[49] and four to press associations.[50] Only the Indiana statute defines and sets requirements as to which newspapers are covered.[51]

Most of the statutes, in referring to the persons covered, use the expression "any person engaged in, connected with, or employed by a newspaper."[52] Arkansas and California specify a "publisher, editor, reporter or other writer,"[53] while Michigan alone restricts the privilege to reporters.[54]

Six statutes require that the information be published before the privilege attaches,[55] while four do not mention publication but intimate that it is not required.[56] Arkansas includes information "written or published"[57] and Indiana specifically states that such information is privileged "whether published or not."[58] Four states restrict the privilege to information obtained in the course of employment[59] or while engaged in a news-gathering capacity.[60]

The statutes contain sweeping provisions as to the information protected, no distinction being made on the basis of the nature of the news obtained. The privilege is applicable whether the news is of a public interest, such as the exposure of official neglect or misconduct, or whether it concerns only private matters. No mention is made of specific proceedings, either civil or criminal. The usual provision is that the privilege applies "to any legal proceeding." To this, half the statutes add "or elsewhere"[61] and Arizona "or any proceeding whatever."[62]

Since the statutes are in derogation of the common law, they have been strictly construed. In *State v. Donovan*,[63] the court held that where the inquiry was not as to the source but as to the means of acquiring the information, the statutory privilege did not apply. In *Brogan v. Passaic Daily News*,[64] a newspaper editor pleaded fair comment and good faith as affirmative defenses and testified further that his source was "reliable." It was held that the statutory privilege was waived by such voluntary testimony by the party having the privilege. The court impliedly stated that it was the province of the jury to determine whether the source was in fact reliable.[65] Where, however, parts of a news story were attributed to the speech of a union leader and were set out in quotation marks, the privilege was not waived.[66]

"Public interest" is used to deny the privilege at common law in most jurisdictions and grant it by statute in a strong minority. The inevitable conclusion drawn from this incongruity is that there is a dissimilar sense of values as to "public interest." The common law would advance the need for an adequate means of obtaining truth in a legal proceeding; the statutes indicate that this consideration is outweighed by the critical necessity of informing the public. The primary objection to both these views is their inflexibility. It is submitted that some middle ground may be struck to include both "values." Disclosure of the news source should be demanded where the information was received in violation of federal or state law requiring secrecy, or where non-disclosure

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48 Ala., Ark., Ind., Ky., Md., Mont.
49 Ala., Ind., Ky., Md., Mont.
50 Ind., Mont., Ohio, Pa.
51 *Supra* note 37 (Ind.).
52 Ala., Ariz., Ind., Ky., Md., Mont., N.J., Ohio, Pa.
53 *Supra* note 37 (Ark., Cal.).
54 *Id.* (Mich.).
55 Ala., Ariz., Cal., Ky., Md., N.J.
56 Mich., Mont., Ohio, Pa.
57 *Supra* note 37 (Ark.).
58 *Id.* (Ind.).
59 Ind., Mont., Ohio.
60 Ala.
61 Ala., Ariz., Ind., Ky., Md., N.J.
62 *Supra* note 37 (Ariz.).
63 129 N.J.L. 478, 30 A.2d 421 (1943).
64 22 N.J. 139, 123 A.2d 473 (1956).
65 *Id.* at 480 (by implication).
66 *Ex parte* Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

would prevent access to facts necessary to the just solution of the individual case. Where neither of these factors are involved, the newsman should not be permitted to disclose his confidential news source without the consent of the informant. The privilege, if granted, should apply to all legitimate news-gathering organizations and news-disseminating media, but should include only those persons engaged in a legitimate news-gathering capacity and only information received in such a capacity. The determination of the applicability of the privilege should be made by the court upon the circumstances of each case. This type of privilege would circumvent the necessity of punishing newsmen in every case of non-disclosure, and would render moot his contention of a violation of freedom of the press.

In the instant case, plaintiff contended that forced disclosure was proper because efforts to obtain the information from three CBS executives had proved futile, and also because the executive who supplied the information did not ask the reporter to withhold his name.[67]

The reporter, however, contended that plaintiff had not exhausted her means of obtaining the information and that forced disclosure was not necessary for this purpose. Three procedures were still available to obtain the desired information: 1) completion of the depositions of CBS officials (the deposition of one of the two employees who had conceded that they may have made such statements), 2) receipt of further answers to plaintiff's interrogatories (which had been ordered by a court previously), and 3) a demand upon CBS for admission under Rule 36 of the Federal Rules of Civil Procedure.[68]

It has been pointed out previously that if a privilege is granted, it should only apply where the information is not essential to the just solution of the case. Until the other means of obtaining the identity of the news source are explored, the question of whether forced disclosure by the reporter is essential cannot be determined. In view of the public service performed by newspapers in disseminating news to the public, it seems that a qualified privilege such as that outlined above should be granted. The contention that forced disclosure would cut off news sources by destroying the reporter's reputation as a confidant is a practical one, and should be recognized.

John A. Di Nardo

COURTS-MARTIAL — JURISDICTION — ALL CIVILIAN EMPLOYEES OF ARMED SERVICES OVERSEAS ARE NOT SUBJECT TO COURT-MARTIAL JURISDICTION IN TIME OF PEACE. —Petitioner, a civilian employed by the Department of the Air Force as an electrical lineman at a United States air depot in Morocco, was tried and convicted by a general court-martial of larceny and conspiracy to commit larceny. Petition for a writ of habeas corpus was denied by the district court, which rejected petitioner's contention that the statute extending court-martial jurisdiction to civilian employees of the armed forces in peace time was unconstitutional. On appeal, *held*, reversed. Art. 2(11) of the Universal Code of Military Justice[1] is unconstitutional as applied to overseas civilian employees because it denies them the right to trial by jury. Subparagraph (11) could not be subdivided to include the petitioner since there is a complete lack of legislative standard other than a standard which includes all civilian employees. *United States ex rel. Guagliardo v. McElroy*, 259 F.2d 927 (D.C. Cir. 1958), *cert. granted*, 27 U.S.L. WEEK 3231, (U.S. Feb. 24, 1959) (No. 570).

Among the many recent developments in constitutional law, one of the more noteworthy has been the attempt to reconcile the traditional notions of individual

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67 Brief for Respondent, p. 6.
68 Brief for Appellant on Petition for Writ of Certiorari, p. 21.

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1 10 U.S.C. § 802(11) (Supp. V, 1958).

rights under the Constitution with a workable system of dispensing justice to the thousands of civilian employees and dependents with our armed forces outside the territorial United States. Prior to 1957, the Universal Code of Military Justice was utilized in both civil and criminal actions. Article 2 of the code provides in part:

> The following persons are subject to this chapter:
>
> . . . .
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States. . . .[2]

In *Reid v. Covert*,[3] two service wives had been convicted by courts-martial of murdering their husbands while overseas. They subsequently petitioned for writs of habeas corpus. Four separate opinions were announced in the Supreme Court, none by a majority of the Court; however, a majority did feel that this particular action by court-martial was unconstitutional. Justice Black, joined by the Chief Justice and Justices Douglas and Brennan, granted the writs and intimated that military jurisdiction could never be extended to civilians in time of peace.[4] Justices Frankfurter and Harlan concurred in result in separate opinions, carefully restricting their decisions to civilian *dependents* charged with capital crimes in time of peace.[5] Justice Clark, joined by Justice Burton, dissented.[6]

The unusual variance of opinion as to the permissible limits of the *Reid* decision has resulted in confusion in its application in lower courts. The United States Court of Military Appeals, relying on the Frankfurter and Harlan opinions, recently held that *Reid* applied only to civilian dependents charged with capital offenses in time of peace, and upheld the conviction by a general court-martial of a serviceman's wife for involuntary manslaughter.[7] However, the defendant in that case has been granted habeas corpus by a federal district court which held that *Reid* was not so limited in application.[8]

These decisions are readily distinguishable from the instant case since the petitioners were all wives of servicemen. Therefore, court-martial jurisdiction over them was asserted under a different phrase of the subsection in question than that which covered petitioner, a civilian employee.[9] Since the statute contains a severability clause,[10] which established the presumption that Congress intended the act to be divisible,[11] the *Reid* case of itself presumably would not affect the constitutionality of the "employee" phrase. The majority in the instant case apparently would have conceded the separability of this phrase if it was left unharmed by the sweep of *Reid*. However, the considerations which persuaded the Supreme Court in *Reid* to render invalid the phrase encompassing civilian dependents were used by the majority to strike down the phrase embracing overseas civilian employees. The statute was said to deny all civilians in that category

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2 *Ibid.*

3 354 U.S. 1 (1957), *withdrawing and reversing* Reid v. Covert, 351 U.S. 487 (1956) and Kinsella v. Krueger, 351 U.S. 470 (1956).

4 354 U.S. at 40-41 (dictum).

5 *Id.* at 41, 65.

6 *Id.* at 78. Mr. Justice Whittaker took no part in the consideration or decision of the cases.

7 United States v. Dial, 9 U.S.C.M.A. 541, 26 C.M.R. 321 (1958). The Judge Advocate General of the Army recently took the position that the opinions in the *Krueger* and *Covert* cases should be limited to the confines of the majority opinions in those cases, *i.e.*, that courts-martial have no jurisdiction to try dependents for capital crimes in time of peace. Overseas commanders were instructed to this effect and, in particular, that with this exception the court-martial policy would remain unchanged. Shuck, *Trial of Civilian Personnel by Foreign Courts*, 1958 MILITARY L. REV. 39 (Dept. of the Army).

8 United States *ex rel.* Singleton v. Kinsella, 164 F. Supp. 707 (S.D.W. Va. 1958).

9 "Persons . . . accompanying" rather than "employed by . . . the armed forces." 10 U.S.C. § 802(11)(Supp. V, 1958).

10 70A Stat. 640. The severability clause, thouh part of the Public Law, was not enacted into positive law in Title 10. The instant court evidently felt that the presumption for severability was sustained with the original enactment.

11 Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938); Williams v. Standard Oil Co. of Louisiana, 278 U.S. 235, 242 (1929).

the right to trial by jury for *any* offense, capital or non-capital, in the Military Code.[12] The majority admitted that *some* civilian employees might be included within court-martial jurisdiction for some offenses, but the intended broad sweep of the statute rendered it unconstitutional.

The facts in the instant case then presented the issue which has remained unanswered since *Reid,* namely, whether the jurisdictional phrases in section 802(11) may be subdivided within themselves, or more generally, whether the court should rewrite the provision in question by analyzing the validity of the statute as applied to petitioner for this particular offense. The majority felt it was not authorized to carve out a valid portion "of the invalid general spread of that provision."[13] They concluded by calling upon Congress to enact some legislative standard in the jurisdictional section of the statute to provide a definite criterion to assist the courts in determining the employees and offenses that may validly come under court-martial jurisdiction.

The majority has apparently extended *Reid* by including within its purview the civilian employees overseas as well as civilian dependents. This view may be supported by dicta in the opinion of Justice Black, which declared that military jurisdiction can never be extended to civilians in time of peace.[14] It is further supported by the fact that the dictum of *In re Ross*[15] that "the constitution can have no operation in another country" was overruled by a majority of the court in *Reid.*[16]

However, military jurisdiction over civilian employees of the services abroad, first given legislative authorization in 1916,[17] has often been upheld by the federal courts.[18] Two approaches may be used to justify this jurisdiction. First it may be claimed that the article is a valid exercise of the power of Congress "to make rules for the Government and Regulation of the land and naval forces."[19] This provision and the other "war powers" of Congress[20] apparently were intended to be virtually without limitation by the authors of the Constitution;[21] the exercise of these powers has not been limited to actual hostilities but includes the necessary preparation for war.[22] An argument that the present court-martial jurisdiction is essential to the national defense and therefore properly included within the "war power" and "necessary and proper" clauses[23] might be accepted, especially if the court should take judicial notice of the international situation as it did in *Ashwander v. TVA.*[24] However, in *Reid,* the contention that the scope of the "war power" clause could be extended by the "necessary and proper" clause was summarily dismissed by four members of the Court.[25]

The second and probably sounder approach to justify the article in question was intimated in Justice Black's opinion in *Reid,* where it was recognized "that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not been inducted into the military or did not wear a

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12 259 F.2d at 930.

13 *Id.* at 933.

14 354 U.S. at 40-41 (dictum).

15 140 U.S. 453, 464 (1891) (dictum).

16 354 U.S. at 12, 56.

17 Act of Aug. 29, 1916, ch. 418, 39 Stat. 650.

18 United States *ex rel.* Mobley v. Handy, 176 F.2d 491 (5th Cir. 1949), *cert. denied,* 338 U.S. 904 (1950) (state of war no longer existed); Grewe v. France, 75 F. Supp. 433 (E.D. Wis. 1948) (war time); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943) (war time); *Ex parte* Jochen, 257 Fed. 200 (S.D. Tex. 1919) (troops were "in the field").

19 U.S. CONST. art. I, § 8, cl. 14.

20 U.S. CONST. art. I, § 8, cls. 11-14.

21 The Federalist No. 23, at 145 (Ford ed. 1898) (Hamilton).

22 Silesian-American Corp. v. Clark, 332 U.S. 469, 476 (1947); Ashwander v. TVA, 297 U.S. 288, 327 (1936). See also Porter v. Shibe, 158 F.2d 68, 72 (10th Cir. 1946); Lewis v. Anderson, 72 F. Supp. 119, 121 (S.D. Cal. 1947).

23 U.S. CONST. art. I, § 8, cl. 18.

24 297 U.S. 288, 327 (1936).

25 Reid v. Covert, 354 U.S. 1, 21 (1957).

uniform."[26] In speaking for the Court in *Duncan v. Kahanamoku*,[27] Justice Black expressly mentioned the "well established power of the military to exercise jurisdiction over . . . those directly connected with such armed forces. . . ." This necessary connection has been found by the Court to authorize the trial by court-martial, in time of peace and within the United States, of military prisoners who had been dishonorably discharged from the army.[28]

Assuming that the majority was correct in extending the *Reid* rationale to some peace-time civilian employees of the armed services abroad,[29] the decision not to subdivide this provision to determine its valid applications seems a wise one. The Supreme Court first refused to restrict an unconstitutionally broad statute[30] to its valid applications in *United States v. Reese*.[31] The Court held that such a limitation would "make a new law, not . . . enforce an old one. This is no part of our duty."[32] While several Supreme Court decisions have followed this reasoning,[33] similarly broad statutes have often been limited by the Court to their valid applications[34] without reference to the *Reese* line of cases. Since the present policy of the Court seems to be in favor of interpreting statutes to preserve their validity,[35] this policy should generally be controlling. However this would necessitate differentiating civilian employees, so integrally a part of the services, as to be "in" them for the purposes of Article I, § 8, Clause 14 of the Constitution.[36] This determination would clearly involve an evaluation of the relative importance to the military of the functions performed by the thousands of civilians employed by various services overseas, a determination which Congress is better equipped to make than the court. But, while the instant case leaves such legislative determinations to Congress, it gives no indication of a standard by which Congress may be guided in enacting new legislation. The basic question presented, whether or not civilian employees of the armed services overseas can be constitutionally subjected to military jurisdiction in time of peace, has not been clearly met by the instant decision nor the decision in *Reid*. It is this question which must be answered before the problem of separability can be effectively resolved.

Justice Harlan, in restricting his opinion in *Reid* to civilian dependents charged with capital offenses in time of peace, pointed out that foreign military establishments are a new phenomenon in this country's history. He urged against foreclosing future consideration by the Court of the validity of powers exercised by Congress in main-

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26 *Id.* at 23. See also *id.* at 44 (Frankfurter, J., concurring). The Third Circuit recently accepted this argument and held the trial of civilian employees of the armed forces overseas to be constitutional. Grisham v. Taylor, 261 F.2d 204, 206 (3d Cir. 1958). This court explicitly refused to accept the reasoning of the majority in the instant case. However, in its refusal the court stated: "The District of Columbia Circuit Court said . . . that since the Supreme Court had said [article 2(11)] when applied to persons 'accompanying the armed forces . . . was unconstitutional the whole clause fell." 261 F.2d at 205. It is submitted that this analysis is at best superficial. In reaching its decision, the instant majority went far beyond a blind reliance on *Reid*.

27 327 U.S. 304, 313 (1945) (dictum).

28 Kahn v. Anderson, 255 U.S. 1 (1921). The Court stated in this case that there was peace as far as the army was concerned even though the country was officially at war. *Id.* at 9.

29 While purporting to avoid making any constitutional pronouncement, the opinion of the majority in the instant case inescapably, though equivocally, seems to state this proposition.

30 Act of May 31, 1870, ch. 114, §§ 3-4, 16 Stat. 140.

31 92 U.S. (2 Otto) 214 (1874).

32 *Id.* at 221.

33 Butts v. Merchants & Miners Transp. Co., 230 U.S. 126 (1913); Employers' Liab. Cases, 207 U.S. 463 (1908); James v. Bowman, 190 U.S. 127 (1903); Baldwin v. Franks, 120 U.S. 678 (1887); Trade Mark Cases, 100 U.S. (10 Otto) 82 (1879).

34 United States v. Harriss, 347 U.S. 612 (1954); Dennis v. United States, 341 U.S. 494 (1951); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Crowell v. Benson, 285 U.S. 22 (1932). For a discussion of the inconsistent treatment of this problem by the Court, see Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 82-106 (1937).

35 United States v. Harriss, *supra* note 34, is perhaps the most extreme example of such "judicial legislation."

36 See Reid v. Covert, 354 U.S. 1, 23 (1957). See also 354 U.S. at 44 (Frankfurter, J., concurring).

taining the effectiveness of our military installations abroad.[37] Also, the dissent in the instant case pointed out that many of the persons employed by the armed forces are more essential to the military than is the uniformed soldier, especially where the function of the base is the maintenance and operation of the highly complicated weapons of modern warfare. Because of the constant danger of espionage as well as the relatively insecure status of many of our foreign military installations in the present "cold war" with Russia, it seems critical to the national defense that all persons essential to our military effort abroad be subject to the same discipline.

When the instant facts are viewed in this context, the majority's interpretation of *Reid* seems unwarranted. The effect of civilian dependents on the success or failure of our overseas military outposts is at most indirect and the need for their regulation by the military is consequently less urgent. Should the problems resulting from the military's lack of power to regulate civilian dependents become too great, they may be eliminated by discontinuing present policies designed to encourage service dependents to accompany their spouses overseas. In contrast, civilian employees, who serve as an integral part of our modern military force, cannot simply be left at home. The instant petitioner worked side by side with uniformed servicemen and was cleared to handle secret information.[38]

Also, the only practical alternative to trial by court-martial is trial by a foreign court,[39] which may provide substantially less safeguards for the defendant than an American court-martial. Consequently, a denial of court-martial jurisdiction does not necessarily benefit civilian employees. In balancing petitioner's claim to trial by jury against the effective maintenance of our national security, it is suggested that the Supreme Court should find in favor of the validity of the statute, and include overseas civilian employees within the scope of court-martial jurisdiction.

Donald A. Garrity

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF EXCULPATORY STATEMENTS GIVEN DURING PERIOD OF ILLEGAL DETENTION.—Defendent was found guilty of second degree murder. At the trial his principal defense was insanity. A written statement, exculpatory in nature, which defendant had given the police during a period of illegal detention, was admitted in evidence in support of the government's burden to show defendant's sanity. The government used the statement to show the state of mind of the defendant as to his alertness and memory at the time he made the statement. On appeal, defendant contended that admission of the statement was reversible error under the rule established in *Mallory v. United States.*[1] *Held,* affirmed. Non-prejudicial exculpatory statements given during a period of illegal detention are admissible in evidence. *Starr v. United States,* 27 U.S.L. WEEK 2207 (D.C. Cir. 1958).

FED. R. CRIM. P. 5(a) provides that arrested individuals are to be brought before the nearest available commissioner or his equivalent without unnecessary delay.[2] Construing statutes with similar language,[3] the Supreme Court in *McNabb v. United States,*[4] purported to exercise its supervisory powers and held inadmissible as evidence a con-

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37 *Id.* at 77 (Harlan, J., concurring).
38 Brief for Appellee, p. 4.
39 SNEE & PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 44 (1957).

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1 354 U.S. 449 (1957).
2 It is also provided that besides the commissioner, any other nearby officer empowered to commit persons charged with offenses in violation of federal law will satisfy the rule.
3 Act of June 18, 1934, ch. 595, 48 Stat. 1008; Act of March 1, 1879, ch. 125, § 9, 20 Stat. 341.
4 318 U.S. 332 (1943).

fession obtained from the accused during a period of illegal detention. Presumably, the Court felt that a rigid enforcement of the statutes was a means of curbing reprehensible practices used by police.

Subsequent interpretations of the *McNabb* rule exhibited much confusion as to its meaning.[5] The Second Circuit, although holding that the statutes requiring prompt arraignment were not applicable to the case before it, felt that admission of a confession in evidence under the *McNabb* rule depended upon the voluntariness of the confession, with the delay in arraignment being a consideration in the determination of the volition.[6] Similarly, the Tenth Circuit considered the coercion element so patently present in the *McNabb* case as the determining factor,[7] while another federal court determined admissibility of confessions on the basis of their trustworthiness.[8] On the other hand, a liberal Seventh Circuit decision ruled inadmissible *any* confession secured prior to arraignment if the federal officers failed to arraign the defendant promptly.[9] The District of Columbia Circuit, also declaring irrelevant the volition of the confession, held inadmissible a confession procured in the course of a detention which later became illegal.[10] However, this decision was subsequently reversed by the Supreme Court which limited application of the *McNabb* rule to any confession secured during the illegal portion of a detention.[11] Another interpretation was that evidence obtained during an unlawful detention for the purpose of extracting evidence was inadmissible.[12]

In view of this confusion in the lower courts, the Supreme Court in *Upshaw v. United States*,[13] attempted to redefine the *McNabb* rule. The Court tacitly approved the "fruits of illegal detention" doctrine, and held the *McNabb* rule to mean "a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. . . .' "[14]

In 1957, in *Mallory v. United States*,[15] the Supreme Court again set out the policy supposedly basic to Rule 5(a), *i.e.*, checking reprehensible police practices. The Court stated that in order to effectuate this policy, "it was deemed necessary to render inadmissible *incriminating* statements elicited from defendants during a period of unlawful detention." (Emphasis added.)[16] The "without necessary delay" from Rule 5(a) was apparently defined as "as quickly as possible."

A review of the cases in the federal courts subsequent to *Mallory* and prior to the instant case has failed to disclose any case wherein, under the application of the *McNabb-Mallory* rule, the statements held to be inadmissible were other than incriminating.[17] On the other hand, there has been no case in which statements were found to be admissible under the rule because of their exculpatory nature. In the sole case involving an exculpatory statement, it was held admissible because of the finding that no prejudice resulted from the illegal detention, and hence, the court felt that *McNabb-Mallory* was inapplicable.[18]

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5 See Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 6 (1958).

6 United States v. Grote, 140 F.2d 413, 415 (2d Cir. 1944).

7 Ruhl v. United States, 148 F.2d 173, 175 (10th Cir. 1945).

8 United States v. Klee, 50 F. Supp. 679, 685 (E.D. Wash. 1943).

9 United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).

10 Mitchell v. United States, 138 F.2d 426 (D.C. Cir. 1943).

11 United States v. Mitchell, 322 U.S. 65 (1944).

12 Boone v. United States, 164 F.2d 102 (D.C. Cir. 1947).

13 Upshaw v. United States, 335 U.S. 410 (1948).

14 *Id.* at 413.

15 Mallory v. United States, 354 U.S. 449, 452 (1957). *But see* Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 455-58 (1948).

16 Mallory v. United States, *supra* note 15, at 453.

17 See, *e.g.*, United States v. Valente, 155 F. Supp. 577 (D. Mass. 1957); Watson v. United States, 249 F.2d 106 (D.C. Cir. 1957); See Hogan & Snee, *op. cit. supra* note 5, at 17-18, for a history of *Mallory* in the District of Columbia.

18 Morse v. United States, 256 F.2d 280 (5th Cir. 1958).

The majority in the instant case seemed to equate incriminating statements with admissions of guilt, while they impliedly accepted the definition of exculpatory statements given in *Opper v. United States,*[19] *i.e.*, "those that explain actions rather than admit guilt." Given such an interpretation it would seem that exculpatory statements could be incriminating if the actions explained tended to show the guilt of the accused.[20] Using the majority's analogy to the rules concerning the need for corroboration of extra-judicial admissions, it appears to be precisely such incriminating exculpatory statements that the Court in the *Opper* case had in mind when they equated exculpatory statements with confessions in regard to the need for corroboration.[21] Logical consistency would then demand that these incriminating exculpatory statements be barred under the *McNabb-Mallory* rule. The majority either failed to recognize this or summarily dismissed the dissent's contention that the statements, when used to show appellant's sanity, explained actions necessary for the incrimination of the accused.

In any event, the majority argued that implicit in the *Mallory* decision was a finding of prejudice since the statements were incriminating. Absent the incrimination, prejudice must be shown before the *Mallory* rule will render the statements inadmissible. If prejudice is not shown, the "harmless error" rule[22] bars application of the *Mallory* rule where such would be the sole basis for reversal. Presumably, then, the decision is not dependent upon the extension of the *Mallory* rule to include the admission in evidence of *exculpatory* statements obtained during a period of illegal detention. Rather, it turns on the interpretation of the rule as regards admission of *prejudicial* statements. The majority concluded that the statement admitted below had little probative value for the purpose of showing appellant's sanity; it was therefore non-prejudicial and hence, admissible in spite of the *Mallory* rule.

The dissent apparently ignored the majority's interpretation of *Mallory* regarding the necessity for prejudice, and tersely pointed out that the statements were necessarily incriminating. Since proof beyond reasonable doubt is essential for conviction, and since the government carries the burden of proving that the defendant is sane, any evidence tending to prove sanity would not only be prejudicial, but incriminating.

Assuming that the addition of the prejudicial element to the *Mallory* rule is but one more of a number of defensible interpretations of that rule,[23] the court appears to be sacrificing the policy considerations apparently underlying the *McNabb-Mallory* rule for those which are basic to the harmless error doctrine. The policies of the former have been expressed, at least impliedly, as 1) a revulsion against judicial disregard of a congressional mandate[24] and 2) a sanction for the enforcement of the prompt-arraignment statutes.[25] Even more basic is the policy behind the prompt-arraignment statutes—preclusion of arrest on suspicion alone; obviation of the use of arrest as a vehicle for the investigation of crime; preservation of our accusatorial system of criminal justice, rather than the inquisitorial system with its attendant reprehensible third degree practices[26]—all of which are consistent with the protection afforded individual rights under the Bill of Rights. Thus it appears evident that any violation of the prompt-arraignment

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19 348 U.S. 84, 91 (1954).

20 See People v. Gibbs, 349 Ill. 83, 181 N.E. 628 (1932).

21 Opper v. United States, 348 U.S. 84, 91-92 (1954).

22 FED. R. CRIM. P. 52(a). The rule reads: "Any error, defect, irregularity or variance which does not affect the substantial rights shall be disregarded."

23 See Morse v. United States, 256 F.2d 280 (5th Cir. 1958). See also Metoyer v. United States, 250 F.2d 30, 33 (D.C. Cir. 1957) (dissenting opinion).

24 McNabb v. United States, 318 U.S. 332, 345 (1943). The Court stated, "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." See also Olmstead v. United States, 277 U.S. 438, 485 (1927) (dissenting opinion), where Justice Brandeis expressed similar thoughts. "If the Government becomes a lawbreaker, it breeds contempt for the law. . . . To declare that in the administration of the criminal law that the end justifies the means . . . would bring terrible retribution."

25 Mallory v. United States, 354 U.S. 449, 455 (1957).

26 Hogan & Snee, *op. cit. supra* note 5, at 21-27.

statutes would be in derogation of individual rights. Similarly, any interpretation of the *McNabb-Mallory* rule de-emphasizing the illegal detention is to attenuate its effectiveness as a sanction in the enforcement of the prompt-arraignment statutes. If the court finds it necessary to apply the *McNabb-Mallory* rule, the application should be made consistent with the policy considerations underlying its formulation.

On the other hand, the harmless error doctrine is embodied in "the salutary statute which Congress passed to correct the abuses that had grown up because . . . courts of review had come to 'tower above the trial of criminal cases as impregnable citadels of technicality.' "[27] It appears to be the effectuation of this policy for which the court in the instant case shows primary concern, at the expense of the policy underlying the *McNabb-Mallory* rule and prompt-arraignment statutes. In light of this consideration, coupled with the dissent's compelling conclusion that any evidence tending to show the appellant's sanity must necessarily be prejudicial since the burden is on the government, the majority opinion appears, at best, to be a preference for law enforcement over individual rights.

Nick J. Neiers

INCOME TAX: DEDUCTIONS—ORDINARY AND NECESSARY EXPENSES—ATTORNEY FEES EXPENDED IN DEFENSE OF RAPE CHARGE HELD DEDUCTIBLE.—Taxpayer's duties as branch manager of a corporation included the hiring of magazine-subscription solicitors. It was his policy to interview the husband of a married female applicant prior to her employment. Pursuant to this practice, taxpayer went to an applicant's home to interview her husband. Upon being admitted to the house he was informed by the applicant that her husband was not home. Taxpayer left a few minutes thereafter without agreeing to employ the applicant. That afternoon he was arrested on a charge of assault with intent to rape, allegedly arising out of the visit to the applicant's home. The criminal charge was subsequently dismissed and, upon the advice of counsel, taxpayer obtained a release from the applicant of any claim of civil liability by the payment of $1,500.00. He deducted the settlement payment and the attorney's fees for the defense against the criminal charge from his 1954 income tax return as ordinary and necessary business expenses. The Commissioner denied the deduction and assessed a deficiency. *Held:* both payments proximately resulted from taxpayer's business as branch manager and were therefore deductible as ordinary and necessary business expenses under section 162(a) of the 1954 Internal Revenue Code. *John W. Clark,* 30 T.C. No. 140 (Sept. 30, 1958).

Section 162(a) of the 1954 Code,[1] like the analogous provision in the Internal Revenue Code of 1939,[2] sets forth the general rule as follows: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ." The corresponding Regulations which interpret these sections make no reference to the deductibility or non-deductibility of litigation expenses and compromise settlements.[3] Consequently, whether certain legal expenses are deductible as "ordinary and necessary" business expenses must be determined in the light of past judicial construction of the statutory language.

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27 Starr v. United States, 27 U.S.L. WEEK 2207 (D.C. Cir. 1958). See also Kotteakos v. United States, 328 U.S. 750, 759 (1946).

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1 INT. REV. CODE OF 1954, § 162(a).

2 INT. REV. CODE of 1939, ch. 1, § 23(a)(1), 53 Stat. 12.

3 Treas. Reg. § 1.162 (1958); Treas. Reg. 118, § 39.23(a)(1) (1951); Treas. Reg. 103, § 19.23 (a)(1) (1940).

The accepted definition of this provision is that of the Supreme Court in *Welch v. Helvering*,[4] however, the Court's phraseology appears purposely to refrain from a definitive position. It is well-settled that these words are to "be given their commonly accepted meaning,"[5] "according to the ways of conduct and the forms of speech prevailing in the business world,"[6] and that the decision in each case turns on its special facts.[7] Thus, in each case involving the deductibility of legal expenses arising under section 162(a), the court must view the relevant operative facts in the light of what are the commonly accepted "ordinary and necessary" expenses of the type of business in which the taxpayer is engaged.[8]

It is well-established that legal expenses which proximately result from the legitimate normal activities of a trade or business are deductible as "ordinary and necessary" business expenses.[9] However, the problem becomes characteristically perplexing where, as in the instant case, the taxpayer has incurred the legal expenses in the defense of a criminal charge or other statutory violation. Despite earlier assertive language to the contrary,[10] it appears that deductibility, at the present time, depends primarily upon whether guilt or liability for the offense is established.[11] Thus, where the defense is unsuccessful, the legal expenses incurred are generally held to be non-deductible on the ground that a contrary holding would undercut the ordinance of public policy upon which the statute is founded.[12] Yet, in a case involving substantially identical facts as those in the instant decision, the court avoided this issue, denying a deduction to a theatre corporation of legal expenses incurred on behalf of its president in an unsuccessful defense of a rape charge arising out of an interview with a prospective performer.[13] The court based its decision on the fact that the corporation had not committed the crime nor was in any other manner obligated to assume the costs of defense. Correspondingly, where the taxpayer has been exonerated, deduction of attorneys' fees is allowed as "ordinary and necessary" business expenses, assuming the act giving rise to it was directly connected with, or proximately resulted from, the taxpayer's business.[14]

The employment of this criterion to distinguish deductible from non-deductible expenses appears to be inconsistent with the leading case of *Commissioner v. Hein-*

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4 290 U.S. 111, 113-14 (1933):
> We may assume that the payments . . . were necessary for the development of the petitioner's business, at least in the sense that they were appropriate and helpful. . . . Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack.

5 Commissioner v. Heininger, 320 U.S. 467, 471 (1943).

6 Welch v. Helvering, 290 U.S. 111, 115 (1933).

7 Deputy v. Du Pont, 308 U.S. 488 (1939).

8 Deputy v. Du Pont, *supra* note 7; Welch v. Helvering, 290 U.S. 111, 115 (1933).

9 Commissioner v. Heininger, 320 U.S. 467 (1943); Kornhauser v. United States, 276 U.S. 145 (1927).

10 Sarah Backer, 1 B.T.A. 214, 217 (1924). This decision indicated that the innocence or guilt of the taxpayer was immaterial.

11 Thomas A. Joseph, 26 T.C. 562 (1956).

12 Burroughs Bldg. Material Co. v. Commissioner, 47 F.2d 178 (2d Cir. 1931); Thomas A. Joseph, *supra* note 11; Simon Bloom, 17 P-H Tax Ct. Mem. 445 (1948). In several cases this determination was avoided by a finding that the act whereby the taxpayer laid himself open to the charge had no "proximate connection" with his business. George L. Rickard, 12 B.T.A. 836 (1928); Sarah Backer, 1 B.T.A. 214 (1924). See also John Stephens, 2 B.T.A. 724 (1925).

13 Pantages Theatre Co. v. Welch, 71 F.2d 68 (9th Cir. 1934).

14 Commissioner v. People's-Pittsburgh Trust Co., 60 F.2d 187 (3d Cir. 1932); Lindsey C. Howard, 16 T.C. 157 (1951), *aff'd on other grounds*, 202 F.2d 28 (9th Cir. 1953) (legal fees incurred in defense against court-martial); Morgan S. Kaufman, 12 T.C. 1114 (1949); Harry Dunitz, 7 T.C. 672 (1946).

inger.[15] In that case the Postmaster General issued a fraud order depriving the taxpayer the use of the mails in the operation of his business. The taxpayer incurred legal expenses in an *unsuccessful* attempt to enjoin the enforcement of the fraud order. The Supreme Court held the expenses to be deductible as "ordinary and necessary" business expenses inasmuch as it was "normal" for the taxpayer "to employ a lawyer to defend his business from threatened destruction," and such expenses were "appropriate and helpful, and therefore 'necessary.' "[16] The Court rejected the Commissioner's assertion that recognition of the deduction for expenses of an unsuccessful defense would violate public policy, noting that from time to time the "Bureau of Internal Revenue, the Board of Tax Appeals, and the federal courts have . . . narrowed the generally accepted meaning of the language used in section 23(a) [section 162(a) of the 1954 Code] in order that tax-deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct."[17] But the Court was quick to make it clear that this narrowing process had its limits.[18] In order for an otherwise "ordinary and necessary" business expense to be disallowed on grounds of public policy, "it must be because allowance of the deduction would frustrate the sharply defined policies of" the act violated.[19] This requisite was not met in *Heininger* since the Supreme Court found that the policy of the statute authorizing the issuance of fraud orders was not "to impose personal punishment on violators" (this was available under a separate criminal statute), but "to protect the public from fraudulent practices."[20]

Notwithstanding this express direction to make deductibility independent of the legality of the taxpayer's action, the Tax Court has interpreted the Supreme Court's reference to the pre-*Heininger* cases[21] as tacit approval of the theory that deductibility depends upon a finding of guilt or innocence. It is said that if Heininger had been convicted of a criminal charge the Supreme Court would have disallowed the deductions.[22] Consequently, in cases subsequent to *Heininger* the Tax Court has adhered to its traditional distinction as determinative of deductibility where the "ordinary and necessary" requisites were met. Deductibility has turned on the success[23] or failure[24] of the taxpayer's defense against the crime charged.

The rigid observance of this distinction is neither warranted nor supported by the Supreme Court's decision in the *Heininger* case. The Tax Court's present interpretation of *Heininger*—that a different decision would have resulted had the statutes there involved been designated to punish the offender rather than protect the public—may not necessarily follow in view of the following statement by the Court concerning the policy of the postal statutes: "Nor is it [Congress'] policy to deter persons accused of violating their terms from employing counsel to assist in presenting a bona fide defense

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15 320 U.S. 467 (1943).

16 *Id.* at 471.

17 *Id.* at 473.

18 *Id.* at 474: "It has never been thought, however, that the mere fact that an expenditure bears a remote relation to an illegal act makes it non-deductible."

19 *Ibid.* Subsequently, in Lilly v. Commissioner, 343 U.S. 90, 97 (1952), the Supreme Court more explicitly stated that "the policies frustrated must be national or state policies evidenced by some governmental declaration of them."

20 *Id.* at 474. The Court concluded by stating: "We hold therefore that the Board of Tax Appeals was not required to regard the administration finding of guilt . . . as a rigid criterion of the deductibility of respondent's litigation expenses." 320 U.S. at 475.

21 *Id.* at 473 n.8. The Court noted the following cases and their holdings as illustrative of the denial of deduction where the taxpayer was found guilty: Burroughs Bldg. Material Co. v. Commissioner, 47 F.2d 178 (2d Cir. 1931); Estate of John W. Thompson, 21 B.T.A. 568 (1930). As illustrative of allowance of deduction where the taxpayer was found not guilty, the Court cited Helvering v. Superior Wines, 134 F.2d 373 (8th Cir. 1943); Commissioner v. People's-Pittsburgh Trust Co., 60 F.2d 187 (3d Cir. 1932); Hal Price Headley, 37 B.T.A. 738 (1938); Citron-Byer Co., 21 B.T.A. 308 (1930).

22 Thomas A. Joseph, 26 T.C. 562, 564 (1956).

23 *Ibid.* See cases decided after 1943 cited in note 14 *supra*. *But see* Anthony Cornero Stralla, 9 T.C. 801, 821 (1947).

24 See cases decided after 1943 cited in note 12 *supra*.

to a proposed fraud order."[25] Moreover, it is the policy of the United States, as evidenced by the sixth amendment, to provide a person charged with a crime with the full benefit of counsel.[26] In view of this consideration it does not seem likely that the policy of any federal or state law is "to deter persons accused of violating [the law] . . . from employing counsel to assist in presenting a bona fide defense" to a criminal charge. In addition, it is submitted that the Tax Court has erroneously interpreted the Supreme Court's reference to pre-*Heininger* cases as constituting approval of the rationale of those cases. At best, the Court merely recognized the existence of these decisions without passing on their correctness, apparently preferring to leave that problem for another day. Consequently, rigid adherence to the "guilt or innocence" distinction should be repudiated by the courts and the *Heininger* test applied in its stead.

The decision in the instant case was unaffected by this distinction since dismissal of the criminal charge constituted a successful defense. However, the case does present the first decision of record permitting the deduction of legal expenses incurred in the defense of a "personal" crime as an "ordinary and necessary" business expense. The majority of the court found no difficulty in deciding that the criminal charges proximately resulted from petitioner's business in that he placed himself in jeopardy by pursuing a proper business objective, *i.e.*, the intended interview with the applicant's husband. The dissent disagreed with this initial finding, and insisted that the expenses were personal, contending that the fact that the criminal charge arose out of the business appointment is not determinative of its proximity to the taxpayer's business. It maintained that the determinative factor is the *nature* of the alleged crime which in the instant case bore no relation to the taxpayer's business.

Normally, the nature of the crime is a fundamental consideration in deciding the deductibility of legal expenses. However, as in the instant case where the taxpayer has been successful in his defense, the nature of the crime charged has little bearing on the ultimate determination of deductibility. Deduction of the legal expenses should be permitted if the evidence substantiates a finding that the criminal charge proximately resulted from the taxpayer's business. Consideration must be given to all the circumstances surrounding the criminal charge with special emphasis to the possibility of direct harm to the taxpayer's business (as where the charge is brought directly against the business, or where the alleged misconduct reflects unfavorably on taxpayer's professional or business character) if the defense had not been undertaken. The personal nature of the criminal charge of rape should merely be considered along with the other evidence and not be used to turn the case for the Commissioner as the dissent would have it. Consequently, on the instant facts, the majority decision is the correct and desired view.

If, on the other hand, the taxpayer in the instant case had been found guilty of the rape, the legal expenses incurred would automatically have been denied deduction under the present Tax Court interpretation of section 162(a). It is submitted, however, that a two-step process is the more equitable method of determining deductibility. Guilt should be considered initially in determining the nature of the crime, whether personal or non-personal. By personal crime is meant one which has for its chief purpose the satisfaction of personal desires, whereas, a non-personal crime is one which is primarily motivated by, or has for its principal purpose, the economic advancement of the taxpayer's business. Although its import should not be unduly minimized, the fact of guilt should merely raise a rebuttable presumption that the crime is personal. This presumption would shift to the taxpayer the burden of going forward with evidence to show that the crime was in fact non-personal. Regard must also be given to the possible effect of conviction on the taxpayer's business or his right to continue in business as

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25 Commissioner v. Heininger, 320 U.S. 467, 474 (1943).

26 U.S. CONST. amend. VI: "In all criminal prosecutions the accused shall have . . . the Assistance of Counsel for his defence."

well as the circumstances surrounding the incident which gave rise to the criminal charge. As an aid in determining this question when an employee is involved, reference should be made to the common law rules in respondeat superior and agency law. In many instances, crimes, such as assault, which normally are personal in nature become non-personal when they are motivated by concern for the furtherance of the master's or principal's business. If the crime involved is found to be one of this character, this finding would support the further finding that the crime proximately resulted from the taxpayer's business. Briefly, then, where guilt is not established, or guilt is established but it is found that the crime proximately resulted from the taxpayer's business, deduction of the business expenses should be permitted, subject to the limitation that follows.

A determination that the crime was non-personal would then require the court's consideration of the policy issue. Denial of deduction would be justified only if allowance of the deduction would frustrate the sharply defined public policy of the statute involved. This procedure appears to be more consonant with the meaning of *Heininger* than the present treatment of similar situations by the Tax Court.

Most of what has already been said in regard to the deductibility of legal expenses as "ordinary and necessary" business expenses applies with equal vigor to the deductibility of payments made in the voluntary settlement of claims for civil liability. Whether the settlement is "ordinary and necessary" is determined in the light of the Supreme Court's definition of the statutory language.[27] However, in favor of a finding of deductibility is the fact that the law favors compromise settlements.[28] Also, as was pointed out in the instant case, "the settlement of threatened litigation arising from circumstances growing out of [taxpayer's] business or employment status . . . [is] a proper exercise of business judgment" which the courts are reluctant to overrule.[29] Consequently, it is generally held that amounts paid in settlement of litigation directly connected with or proximately resulting from the taxpayer's business are deductible as "ordinary and necessary" business expenses.[30] Where the claim arises out of a business transaction, amounts paid in settlement to avoid litigation are also deductible.[31] Similarly, payments in settlement of a civil action to protect the taxpayer's business reputation are deductible.[32] Also, settlements made pursuant to a judgment rendered against the taxpayer have been held deductible even though the acts committed prior to the judgment were "nonmoral," "wrongful," or unethical."[33]

The considerations of public policy discussed previously in connection with the deductibility of litigation expenses loom large in this connection as well. The courts are quick to apply the public policy test for deductibility as set forth in *Commissioner v. Heininger*[34] and modified in *Lilly v. Commissioner*.[35] The application of that test, it will be recalled, denies deduction where allowance of the deduction would frustrate the sharply defined national or state policies proscribing particular types of conduct.[36] The courts have used this test to deny deduction of amounts paid in settlement of a suit brought under state anti-trust laws for penalties, even though there was no admission

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27 Commissioner v. Pacific Mills, 207 F.2d 177, 181 (1st Cir. 1953); Lomas & Nettleton Co. v. United States, 79 F. Supp. 886, 897 (D. Conn. 1948). See also note 4 *supra*.

28 McCormick, Evidence § 76 (1954).

29 30 T.C. No. 140, at 772. See also Commissioner v. Pacific Mills, 207 F.2d 177, 180 (1st Cir. 1953).

30 Kornhauser v. United States, 276 U.S. 145 (1928); Commissioner v. Pacific Mills, *supra* note 29.

31 North Am. Inv. Co., 24 B.T.A. 419 (1931); Superheater Co., 12 B.T.A. 5 (1928).

32 Laurence M. Marks, 27 T.C. 464 (1956).

33 James E. Caldwell & Co. v. Commissioner, 234 F.2d 660 (6th Cir. 1956), *reversing* 24 T.C. 597 (1955); Helvering v. Hampton, 79 F.2d 358 (9th Cir. 1935).

34 320 U.S. 467 (1943).

35 343 U.S. 90, 97 (1952). See note 19 *supra* and accompanying text.

36 For a comprehensive discussion and application of this test, see Commissioner v. Pacific Mills, 207 F.2d 177, 181-84 (1st Cir. 1953).

of guilt, because such payments constituted non-deductible penalties.[37] Similarly, prior to 1949 the Tax Court held as a matter of law, without regard to the surrounding circumstances, that payments made to the United States on account of price violations constituted penalties and were not deductible.[38] However, in 1949 the Second Circuit reversed the Tax Court and held that if the violation was not intentional and did not result from an unreasonable lack of care, the taxpayer frustrated no public policy and was entitled to the deduction.[39] However, deduction for payments in settlement of alleged violations of labor laws have been denied without regard to surrounding circumstances.[40]

In the instant case the Tax Court was not called upon to apply the test of public policy since no statutory violation, either regulatory or criminal, occurred. The court's finding that the act which gave rise to this litigation was directly connected with or proximately resulted from the taxpayer's business, that is, the contemplated interview of the husband of the job applicant, is sound in the light of all the relevant surrounding circumstances. The settlement by the taxpayer was not an acknowledgment of liability (in fact this was expressly denied in the release), but was made for the purpose of avoiding expensive litigation and protecting his business relations with his employer. His position might very well have been adversely affected even if he had successfully defended any future litigation. In this light, the taxpayer was exercising sound business judgment in an effort to protect his business, *i.e.*, his position as branch manager.

Arthur J. Perry

MUNICIPAL CORPORATIONS—NEGLIGENCE—CITY HAS SPECIAL DUTY TO PROTECT PERSONS WHO COLLABORATE WITH POLICE IN APPREHENDING CRIMINALS.—Deceased, not an underworld character himself, supplied information to the New York police which led to the arrest of a dangerous criminal. His part in the capture was widely publicized, and he later received anonymous threats. The police extended protection, but subsequently informed him that he was probably not in danger and withdrew the protection. An unknown assailant then shot and killed the informant.[1] His administrator brought an action for his death on the theory that the failure of the police to exercise reasonable care in protecting the deceased resulted in his death. A motion addressed to the sufficiency of the complaint was sustained in the trial court. On appeal, *held*, reversed. A city owes a special duty of reasonable protection to a person put in personal jeopardy through collaboration with the police in the apprehension of a dangerous criminal. *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534 (1958).[2]

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37 Commissioner v. Longhorn Portland Cement Co., 148 F.2d 276 (5th Cir. 1945), *cert. denied*, 326 U.S. 728 (1945); Robert S. LeSage, 16 P-H Tax Ct. Mem. 1079, 1083 (1947), *rev'd on other grounds*, 173 F.2d 826 (5th Cir. 1949).

38 New Orleans Motor Co., 18 P-H Tax Ct. Mem. 562 (1949); Nazareth Mills, Inc., 18 P-H Tax Ct. Mem. 132 (1949); Scioto Provision Co., 9 T.C. 439 (1947).

39 Jerry Rossman Corp. v. Commissioner, 175 F.2d 711 (2d Cir. 1949), *reversing* 10 T.C. 468 (1948); *accord*, United States v. Star-Kist Foods, Inc., 240 F.2d 759 (9th Cir. 1956).

40 Davenshire, Inc., 12 T.C. 958 (1949); Cleveland Overall Co., 18 P-H Tax Ct. Mem. 481 (1949) (both cases involve alleged child-labor violations of the Walsh-Healey Public Contracts Act, 49 Stat. 2036 (1936), 41 U.S.C. § 35 (1952).

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1 For details of the slaying, see N.Y. Times, March 9, 1953, § 1, p. 8. The criminal arrested because of deceased's information was Willie "The Actor" Sutton.

2 The court split four-three in the decision, and five judges wrote opinions.

Municipal corporations are usually held to be immune from tort liability.[3] This immunity, however, is not inherent in the nature of the corporation. It is derived from the general immunity of the sovereign because of the quasi-governmental character of the municipality.[4] Pursuant to the derivative nature of the immunity, the courts have developed a well-settled distinction between the "governmental" and "proprietary" functions of the municipality, holding that immunity obtains only where the function is governmental.[5] Despite general confusion in the application of the distinction,[6] the courts have almost universally affirmed the governmental character of police activity.[7]

Following a general repudiation of the doctrine of immunity by text writers,[8] New York through its legislature in 1929 broadly waived its sovereign immunity.[9] In *Bernardine v. City of New York*,[10] this waiver was held to extend to municipalities. The court announced the rule that the civil divisions of the state were answerable equally with individuals and private corporations for their torts. The effect of the waiver was further defined in *Murrain v. Wilson Line, Inc.*[11] This court held that the waiver of immunity merely raised the previous bar against suits for torts committed in the *exercise* of governmental functions; it created no liability for individual injuries caused by the *failure* to exercise such functions. The duty to exercise a governmental function is owed, not to the individual, but to the public, and from the city's default no private cause of action can arise.[12] Pursuant to this concept of the waiver, municipalities in New York have been held liable for torts committed in connection with police activity in a variety of situations.[13]

The plaintiff's theory of recovery in the instant case rested upon an alleged negligent failure to provide police protection. But negligence presupposes a duty. "Without a duty, there can be no breach of duty, and without breach of duty there can be no liability."[14] Consequently, the *Murrain* case presented a formidable barrier to recovery. The plaintiff attempted to avoid *Murrain* by urging that the liability of the city should be based on a special duty of protection which arose out of the dangerous situation the deceased was in as a result of his collaboration with the police. Framed in these terms, the theory was admittedly unique, and even the plaintiff was unable to find precedent to support his position.[15]

Despite lack of precedent, the strength of the plaintiff's theory was undiminished, since it could find substantial support in public policy. The court was thus burdened in its resolution of the question of duty with weighing the relative merits of two conflicting policies. Stated concisely the court was faced with a choice between a policy which would promote public collaboration with the police by a guarantee of subsequent pro-

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3 The leading American case is Mower v. Leicester, 9 Mass. (9 Tyng) 347 (1812) which follows the earlier English case of Russell v. Men of Devon, 2 Term R. 667, 100 Eng. Rep. 359 (1798). *Contra, Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

4 See Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

5 This distinction was first made in Bailey v. Mayor of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842). PROSSER, TORTS 775 (2d ed. 1955).

6 See 33 NOTRE DAME LAW. 304, 305 (1957) for a collection of conflicting decisions involving similar factual situations.

7 See, *e.g.*, Rankin v. Sander, 96 Ohio App. 40, 121 N.E.2d 91 (1953); McSheridan v. City of Talledega, 243 Ala. 162, 8 So. 2d 831 (1942).

8 "Few, if any, scholars and commentators could be found today to defend the full extent of governmental immunity," 2 HARPER & JAMES, TORTS, 1612 (1956).

9 N.Y. CT. CL. ACT § 8.

10 294 N.Y. 361, 62 N.E.2d 604 (1945).

91 270 App. Div. 372, 59 N.Y.S.2d 750 (1946), *aff'd per curiam*, 296 N.Y. 361, 72 N.E.2d 29 (1947).

12 See Mentillo v. City of Auburn, 2 Misc. 2d 818, 150 N.Y.S.2d 94 (Sup. Ct. 1956).

13 See, *e.g.*, O'Grady v. City of Fulton, 4 N.Y.2d 717, 148 N.E.2d 317 (1958) (failure to procure medical aid); Wilkes v. City of New York, 308 N.Y. 726, 124 N.E.2d 338 (1954) (bystander shot).

14 Williams v. State, 308 N.Y. 548, 127 N.E.2d 545, 550 (1955).

15 154 N.E.2d at 537. (dissenting opinion).

tection,[16] or one which eschewed the imposition of the burden of protection with the attendant possibility of liability without a clear mandate from the legislature.[17]

The majority in the instant case chose the policy of protection, and then relied on generally accepted tort principles to substantiate its position, reasoning that the duty of the citizen to aid in the enforcement of the law begets a reciprocal duty of protection on the part of the law enforcement agency. The duty relation arises out of the *active* use of the private individual in such a way as to endanger his person.[18] Such a situation dictates that the duty extend to reasonable police protection.

Although not expressly mentioned, it is submitted that the underlying rationale of the court's decision is that of the *Palsgraf*[19] case. There the court reasoned that the "risk reasonably to be perceived defines the duty to be obeyed. . . ."[20] Here the court implicitly reasoned that a risk to the deceased's person, if he were utilized as an informant, could be reasonably perceived. The duty to protect was thus defined.

It is important to note that the court did not rest its decision solely on the element of foreseeability. The dissenting judge in the appellate division was willing to find the duty to protect simply on the basis of the foreseeability of injury to the deceased because of his status as an informant.[21] The court in the instant case *defined* the duty in terms of foreseeability, but found that it *arose* from the character of the active use the police made of the deceased.

The implications of the difference in holdings are substantial. Had the court of appeals adopted the approach of the dissenting judge in the appellate division, the court would have in effect overruled the *Murrain* line of decisions. A duty to act, even in a governmental capacity, would arise whenever it could be foreseen that a failure to act might result in injury to a particular person. Such a holding would truly be the imposition of a "crushing burden" and a radical departure from precedent.[22] The actual holding of the court, however, is somewhat more restricted. The duty to act is only imposed where *previous action* has created a situation which the prudent eye sees as potent with the possibility of injury.

To this extent the court has not departed from well-recognized precedent. What it has done, however, is to find, on the basis of policy considerations, elements which invoke the application of generally accepted principles in a situation which was previously considered remediless. To this extent the court has made new law, yet the decision seems both justifiable and warranted.

G. R. Blakey

SEARCH AND SEIZURE OF EVIDENCE—EVIDENCE OBTAINED ILLEGALLY BY STATE OFFICIALS IS NOT ADMISSIBLE IN A FEDERAL COURT.—Defendant was convicted in the District Court for the District of Columbia of housebreaking and larceny. Certain evidence, a quantity of stolen money, had been seized by the Maryland state police in a search of defendant's motel room without a warrant. The search was conducted by the officers on mere suspicion and was in no way incident to a valid arrest. Over defendant's objection, this evidence was admitted by the trial judge. The defendant appealed, charging as error the refusal of the district court to suppress this evidence. *Held,* reversed and remanded. The search by the state officials was in violation of the fourteenth amendment, and the evidence gained thereby is inadmissible in a federal court. *Hanna v. United States,* 260 F.2d 723 (D.C. Cir. 1958).

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16 *Id.* at 537.
17 *Id.* at 543 (dissenting opinion).
18 *Id.* at 537-38.
19 Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
20 *Id.* at 100.
21 Schuster v. City of New York, 286 App. Div. 289, 143 N.Y.S.2d 776, 778 (2d Dep't 1955) (Beldock, J., dissenting).
22 154 N.E.2d at 543 (dissenting opinion).

The federal exclusionary rule, *i.e.*, that evidence illegally obtained is inadmissible in a federal court, was first suggested in *Boyd v. United States*.[1] Prior to *Boyd*, the common law had long established the rule that the admissibility of evidence was not affected by the manner in which it was obtained.[2] In *Boyd*, the Supreme Court struck down as unconstitutional a federal statute which permitted a federal attorney, in revenue cases, to subpoena the defendant's private books and papers. The Court held that compulsory production of such evidence was not only violative of the fifth-amendment privilege against self-incrimination, but also constituted an unreasonable search and seizure within the meaning of the fourth. By way of dicta, the Court then suggested that the fourth and fifth amendments were intertwined and that violations of the fourth were almost always made for the purpose of compelling a man to give evidence against himself in a criminal case.[3] Although a less individualistic-minded Court has substantially altered the precise holding of this case in adopting a more restrictive concept of "private" papers,[4] *Boyd* is still the root cause of the present day exclusionary rule.

The rule received its first explicit formulation in *Weeks v. United States*,[5] decided over a quarter of a century after *Boyd*. In this case certain private papers were removed from the defendant's rooms by state officials and later others were removed by a federal marshal without a warrant. The defendant sought to have them returned and objected to their admission as evidence in a subsequent criminal prosecution. The Court first found that the search by the marshal violated the defendant's rights under the fourth amendment. Then relying heavily on *Boyd*, it held that evidence secured in violation of the fourth amendment by a federal official was not admissible in a federal court. The search by the state officials was not violative of the fourth since that amendment reaches only the federal government and its agencies. The evidence obtained by this search was admissible.

While the Court did not explicitly discuss the applicability of the fifth amendment, the reliance on *Boyd* indicates that the rule announced derives part of its validity from this amendment. There is language in the opinion to the effect that the use of illegally obtained evidence weakens the effectiveness of the fourth amendment,[6] but it is submitted that this was intended to bolster the holding of the case which actually was grounded on the joint operation of the fourth and fifth amendments. This rationale of the federal exclusionary rule results in considering the illegal act of seizing the evidence as giving rise to a quasi-right of action in the defendant. The capability to assert this right of action rests on the fifth-amendment right against self-incrimination, and the violation which calls forth this capability is a violation of the defendant's fourth-amendment rights. Thus, the Court in *Weeks* used the term "remedies" in discussing what recourse the defendant may have against state officers who conducted part of the search prior to the appearance of the federal marshal.[7] The use of this term implies a right in the person enforcing it, and it can be inferred that the Court believed the exclusionary rule to be based on such a right.[8]

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1 116 U.S. 616 (1886).

2 Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841); 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

3 Boyd v. United States, 116 U.S. 616, 633-34 (1886) (dictum).

4 Shapiro v. United States, 335 U.S. 1 (1947).

5 232 U.S. 383 (1914).

6 *Id.* at 393.

7 *Id.* at 398.

8 This concept of the federal exclusionary rule was clearly expressed by Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478-79 (1928):

> Every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence, in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

The majority opinion in *Olmstead* recognized the relevance of these two amendments to the question of admissibility of the evidence, 277 U.S. at 462-63, but disposed of the case by holding that the wiretapping involved was not a violation of the fourth amendment.

On the basis of this "quasi-right of action" theory, the Court soon reaffirmed the position in *Weeks*, namely, that evidence gained in an illegal search and seizure by state officials could be admitted in federal courts.[9] As long as no federal official or agency co-operated in the search,[10] there could be no violation of the defendant's fourth amendment rights[11] and, concurrently, no right to object to the admission of the evidence.[12]

The scope of the rule under the "quasi-right" theory would logically include within it only those whose constitutional rights had been invaded.[13] However, the full effect of the theory has been considerably weakened by the decision in *United States v. Jeffers*.[14] The defendant in this case was held to have standing to object to the admission of evidence illegally seized even though the goods seized were not taken from the defendant's person or premises. The Court stated that the goods were his property for the purpose of the exclusionary rule notwithstanding the fact that the goods were narcotics, and therefore contraband. It is precisely the property interest in the goods seized that gives him the protection of the rule.[15] One inference from this holding is that the basis for the exclusionary rule lies elsewhere than in the joint operation of the fourth and fifth amendments since one generally cannot claim standing to vindicate constitutional rights of some third party.[16] However, the *Jeffers* case has been cited as one of those unique situations where broad constitutional considerations have led the Court to proceed without regard to the usual rule.[17] Thus the original basis for the rule may stand, albeit weakened.

The theory that a property interest in the goods seized is sufficient to invoke the exclusionary rule can lead to some strained results. In *Accardo v. United States*,[18] the court was faced with an appeal based on the admission of stolen property over defendant's motion to suppress. The F.B.I. had seized the property from an apartment in which the defendant claimed only the status of an occasional guest. The defendant understandably disclaimed any proprietary interest in the stolen property. The Court stated that the defendant's status as a guest in the apartment was not sufficient to give him standing to object to the admission of the evidence, and since he had not claimed any interest in the property seized, he had no standing to object under the *Jeffers* case. Presumably, if he had claimed the stolen goods he could have demanded their suppression just as Jeffers demanded the suppression of narcotics on the basis of a property right, notwithstanding a statute which explicitly provided that no property right exists in such articles.[19] This type of incongruity occurs because the courts apparently attribute the exclusionary rule to the operation of the fourth and fifth amendments, but are in reality basing the rule on a broader foundation.

Not long after the decision in *Weeks* it became apparent that the courts were at times ready to consider the rule as growing from the fourth amendment, without regard to the fifth.[20] Thus in *Silverthorne Lumber Co. v. United States*,[21] the Court reversed

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9 Burdeau v. McDowell, 256 U.S. 465 (1921).

10 Gambino v. United States, 275 U.S. 310 (1927). State officials made the search in this case. However, they were found to be agents of the federal government in that they acted under the direction of Federal officials. See also United States v. Moses, 234 F.2d 124 (7th Cir. 1956) for a full discussion of federal participation.

11 Twining v. New Jersey, 211 U.S. 78 (1908).

12 Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

13 Ingram v. United States, 113 F.2d 966 (9th Cir. 1940).

14 342 U.S. 48 (1951).

15 *Id.* at 52.

16 See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149-54 (1951) (concurring opinion).

17 Barrows v. Jackson, 346 U.S. 249, 257-58 (1953).

18 247 F.2d 568 (D.C. Cir. 1957).

19 United States v. Jeffers, 342 U.S. 48, 53 (1951).

20 This emphasis of the fourth amendment excluded the possible argument that it was the fifth which prohibited the admission of the evidence. See Boyd v. United States, 116 U.S. 616, 638 (1886) (concurring opinion). If this concept of the exclusionary rule had been adopted the difficulty of

a contempt conviction of a person who had refused to obey a subpoena to produce the books of the defendant company in a criminal proceeding against the company. The Court, speaking through Justice Holmes, concluded that the compulsory production constituted an illegal search and seizure. It added that evidence so acquired could not be used even in formulating an indictment, notwithstanding the fact that a corporation is unprotected against the compulsory production of its books and papers under the fifth amendment.[22] The protection granted was substantially the same as that granted under the exclusionary rule. Mr. Justice Holmes, dissenting in *Olmstead v. United States*,[23] again supported this rationale. He stated that he was neither prepared to accept or reject the conclusion of Justice Brandeis that obtaining evidence by wiretap and its use at trial constituted violations of both the fourth and fifth amendments.[24] However, he did feel that the facts indicated a violation of the fourth amendment, and therefore it was unwise for the Court to soil their hands by dealing with evidence thus obtained.

Inevitably, there emerged in the thinking of the Court the concept that evidence gained by an unreasonable search and seizure is inadmissible not because the defendant has a type of remedy under the fifth amendment, but because the admission of such evidence is silent approval of the very practices by which it was obtained. This view was given academic reinforcement in *Wolf v. Colorado*,[25] where the Court was asked to extend the *Weeks* doctrine to state prosecutions involving the admission of evidence obtained by an unreasonable search and seizure. The Court stated for the first time that the security of one's privacy, the core of the fourth amendment, is "implicit in the concept of ordered liberty" and as such is enforceable against the states through the due process clause of the fourteenth amendment. However, the federal exclusionary rule was said not to be derived from the explicit requirements of the fourth amendment, nor based on legislation, but was rather a matter of judicial interpretation.[26] Consequently, since the exclusion of evidence thus obtained is not an *essential* ingredient of the constitutional right, the states were free to give effect to this obligation in a number of ways, the exclusionary rule being merely one of them.[27]

The majority opinion in *Wolf* suggests that the exclusionary rule was designed not as a remedy for the violation of a constitutional right, but as a rule of evidence created by the Court to render effective the provisions of the fourth amendment.[28] If the former interpretation is adopted, a critical prerequisite for the use of the rule is the violation of the constitutional right of the movant; absent the violation there is no basis for objection. However, if the latter interpretation is adopted, the particular defendant's

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having to find a violation of the fourth in order to invoke the rule would have been obviated. In those cases involving illegal searches by state officials, the federal court would only determine whether the admission of such evidence would be, in effect, compelling the defendant to be a witness against himself.

21 251 U.S. 385 (1920).

22 *Id.* at 392.

23 277 U.S. 438, 469 (1928) (wiretap case).

24 *Id.* at 478. See note 8 *supra.*

25 338 U.S. 25 (1949).

26 *Id.* at 27. Mr. Justice Black, concurring, observed that the exclusionary rule under this interpretation is not a command of the fourth amendment but a "judicially created rule of evidence which Congress might negate." Wolf v. Colorado, *supra* note 25, at 40. Also, although the Justice insists that the fourth and fifth amendments are binding on the states, Adamson v. California, 332 U.S. 46 (1947) (dissenting opinion), he did not choose to adopt the rationale of the rule put forth by Justice Rutledge in his dissent. The latter Justice agreed with Justice Black that the amendments were binding on the states, (and then, citing the *Boyd* case as authority, stated that the issue of admissibility had been settled on the dual grounds of the fourth and fifth amendments. As a result of this view, he concluded that "Congress and this Court... are... powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment. . . ." 338 U.S. at 48.

27 An action for damages against the offending officers is the usual remedy sought. See cases collected in Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949).

28 While this seems to be the tenor of the opinion, Justice Frankfurter also stated that "the exclusion of evidence is a remedy which directly serves only to protect those upon whose persons or premises something incriminating has been found." 338 U.S. at 30-31. This statement seems inconsistent with the rationale of the exclusionary rule as a rule of evidence.

rights are in a certain sense secondary, for the rule is not designed solely for him, but also operates to preserve the dignity of the court and to minimize the incidence of future abuses. The difficulty with this theory is that subsequent to the *Wolf* decision, the Court found it necessary to require that the defendant have a property interest in the goods seized in order to have standing to assert the exclusionary rule.[29]

In the instant case the exclusion of evidence can be reconciled with either theory of the rule,[30] if it is assumed that *Wolf* does read the concept of the fourth amendment into the due process clause. The fourth having been violated by the illegal search in so far as due process requires protection of the individual's privacy and the defendant being the party whose rights were invaded, the result must be the exclusion of the evidence. But the exclusionary rule might still be applied if the rule is considered simply as a rule of evidence designed to protect the dignity of the court, and the interest of the public. However, aside from *Wolf* there is no explicit indication that the exclusionary rule is one of evidence which should apply because of a general policy to discourage such searches and seizures whether or not there was a legal violation of the fourth amendment. In addition to this the *Jeffers* case, decided two years after *Wolf*, indicates that the Court is not willing to accept this interpretation of the rule even in a situation where it would have provided a less strained basis for the decision.

It is submitted that by considering the rule purely as one of evidence the Court could more consistently handle those situations where in all candor it must be admitted there was no violation of the constitutional rights of the person objecting to the evidence, though admittedly there was a violation of someone *else's* rights by the original illegal search and seizure.[31] This "rule of evidence" theory has one weakness in that it is susceptible to congressional alteration; however, the likelihood of this occurrence is remote.

Matthew T. Hogan

TORTS—MENTAL SUFFERING—FEAR OF THE DEVELOPMENT OF CANCER FROM X-RAY BURNS HELD COMPENSABLE.—Plaintiff received a series of X-ray treatments from defendant doctors for bursitis in her shoulder. After the seventh treatment her shoulder blistered badly and scabs formed leaving a permanently marginated area of skin about three by five inches. The condition was diagnosed as chronic radiodermatitis caused by the X-ray therapy. Two years later plaintiff was examined by a dermatologist who advised a checkup every six months as the area of the X-ray burn might become cancerous. She subsequently brought a malpractice action against defendant X-ray therapists and, as part of the damages, alleged that she was suffering from severe cancerphobia, *i.e.*, phobic apprehension that cancer would ultimately develop. Following a jury verdict for plaintiff, defendant was permitted to appeal the recovery for cancerphobia. *Held*, affirmed. Cancerphobia arising from advice given by a doctor that the original injury might become cancerous, was proximately caused by the original injury, and is therefore a compensable segment of the resulting mental anguish. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249 (1958).

An analysis of the instant case reveals two significant factors: the recognition of cancerphobia as a form of compensable mental anguish and an apparent abandonment of the usual foreseeability test of negligence liability.

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29 United States v. Jeffers, 342 U.S. 48 (1951).

30 Since the specific issue has not been decided in the Supreme Court, the instant court could rely on no precedent. However, it attempted to shore up its conclusion by analyzing various favorable comments on the issue from dissents and concurring opinions of most of the Justices since *Wolf*.

31 This was the situation in both United States v. Jeffers, *supra* note 14, and in Accardo v. United States, *supra* note 18.

Mental or emotional disturbance as a facet of damages in a tort action has long proved troublesome to the courts. The danger of vexatious suits and fictitious claims, and the difficulty of measuring the damage in dollars seem to have induced a prohibitive attitude in the mind of the judiciary. The infliction of mental distress standing alone without aid of a recognized tort, *e.g.*, assault, was only recently recognized as the basis of an action in tort, and then only when the conduct of the tort-feasor proved to be intentional or outrageous.[1] The courts have been infinitely more reluctant to allow recovery where the action of the wrong-doer is merely negligent and with very few exceptions,[2] have withheld recovery for mental distress alone without accompanying bodily injury.[3] When physical injury results from the mental disturbance, courts are more prone to allow recovery although further restriction is added in some jurisdictions with the requirement of impact or some physical contact at the time of injury.[4] However, the trend seems to be away from this latter requirement.[5]

The instant case presented a much more favorable situation for recovery since the mental anguish allegedly suffered was incidental to the original injury. As a general rule, when the negligent conduct of the wrong-doer results in physical injury, courts will not hesitate to permit recovery for mental injuries which are a result of the physical harm.[6] Recovery for such "parasitic" damages has been termed the first indication of the "breakdown in the early strict rule against recovery" for mental suffering.[7] Yet, under the traditional rule in tort law, the mere presence of an injury-producing negligent act of the tort-feasor does not make him liable for every consequence. A resulting mental disturbance may be too remote or negligible to warrant recovery.[8] The requirement that the damage be proximately caused by the injury is usually employed to preclude recovery in these cases. Consequently, the courts are required to draw the line somewhere in the chain of causation in each instance of negligent injury to separate the compensable damages from the non-compensable. Case law indicates that this speculative line of demarcation wavers to the point of being indistinguishable and necessitates a case-by-case approach to reach any semblance of clarity.[9]

In the instant case plaintiff claimed that fear caused by the apprehension of the possibility of future disease was a compensable item of damages resulting from the original injury, X-ray burns. The earliest analogous cases favoring this theory were probably those involving injury to pregnant women. It has long been recognized that the mental distress caused by anxiety for her condition[10] or the possible injuries to the

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1 PROSSER, TORTS 38-40 (2d ed. 1955). A few courts adhere to the old rule, however. See, *e.g.*, Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953).

2 See, *e.g.*, Blanchard v. Brawley, 75 So. 2d 891 (La. App. 1954) (negligent mutilation of a corpse).

3 HARPER & JAMES, TORTS 1031 (1956).

4 Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

5 Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955); Nelson v. Black, 266 P.2d 817 (Cal. App.), *aff'd*, 43 Cal. 2d 612, 275 P.2d 473 (1954). See also McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 51-58 (1949).

6 Erie R.R. v. Collins, 253 U.S. 77 (1920). These parasitic damages have been "conceded on all hands." 2 HARPER & JAMES, *op. cit. supra* note 3, at 1032 n4. For a list of cases see Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 164-72 (1943).

7 McNiece, *op. cit. supra* note 5, at 10.

8 See, *e.g.*, Pittman v. Baladez, 312 S.W.2d 210 (Tex. 1958) where plaintiff, injured in a truck collision, was not entitled to recover for worry and mental anguish caused by his inability to work and support his family. See also Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S.E. 152 (1905).

9 *But see* Smith & Solomon, *op. cit. supra* note 6, at 106-10. These writers suggest that a clarification be made by a copious use of the doctrine of remoteness of damages in the light of the stimulus giving rise to the mental suffering. It is their belief that the stimulus which gives rise to psychic reaction in the average person must be much more than minimal. Consequently, when minimal stimulus is present which apparently has caused a severe reaction in the plaintiff, the court should either declare the damage remote or at least recognize the presumption of an idiosyncratic plaintiff, and limit the damages to the aggravation of the idiosyncrasy.

10. See Rebouche v. Shreveport Rys. Co., 53 So. 2d 510 (La. App. 1951).

unborn child[11] is compensable. Other courts have ruled that facts similar to the instant case warranted recovery. In *Coover v. Painless Parker*,[12] a California court found that the original injury, X-ray burns, created a condition which made cancer much more likely than the plaintiff's condition prior to the accident. The predisposition in itself was held to be compensable since it necessitated continual vigilance against the occurrence of the dread disease. In like manner in *Flood v. Smith*,[13] a woman was injured near the site of an amputated breast which had been cancerous before its removal. The injury caused anxiety of a recurrence of cancer and the Connecticut court favored the inclusion of this mental disturbance in the damages. This court reaffirmed its position on the issue in *Figlar v. Gordon*,[14] where evidence was admitted at trial that epilepsy might develop from the original injury in 10 or 15 years. The court held that the danger of future occurrence of the disease was a present fact, and the jury could consider anxiety resulting therefrom. Thus the majority in the instant case was not without precedent in holding cancerphobia to be compensable.

The criticism in the dissent was leveled not at the fact of recovery for cancerphobia, but at the way in which it arose. It concluded that legal responsibility should not include mental suffering resulting from a doctor's statement as to the mere *possible* development of cancer from the original injury.[15] The majority countered by analogizing to cases which held the original tort-feasor liable for the negligent treatment of the injury by the doctor, including mental anguish.[16] It reasoned that the advice of the doctor in the instant case was also treatment, and the mere fact that he did not aggravate the injury does not distinguish the case in principle.[17]

The "generosity" of the holding to the plaintiff plus the language used by the majority, reminiscent of the old "but for" test,[18] indicate that the instant court has apparently disposed of foreseeability as a determinant of proximate cause. The foreseeability test in New York courts seems limited to the issue of negligence under the rule in *Palsgraf v. Long Island R.R.*[19] At any rate the abandonment of the test is in accord with the present majority rule,[20] yet the limitation on negligence liability which the court substituted is peculiarly distinctive. According to the instant court, "liability for damages caused by a wrong ceases at a point dictated by public policy or common sense."[21] It is only where causal connection is "too tenuous" that the original wrongdoer escapes.

The liberal application of this formula to facts such as those in the instant case is criticized as "affording countless oportunities [sic] for fraudulent unverified claims."[22]

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11 Carter v. Public Serv. Coordinated Transp., 47 N.J. Super. 379, 136 A.2d 15 (1957). For a list of cases supporting this rule see 145 A.L.R. 1109 (1943). However, courts have generally withheld recovery when the anxiety arose from observing the injury of another, even a loved one. Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1958); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952). These people are not within the zone of peril. *Cf.* 2 HARPER & JAMES, *op. cit. supra* note 3, at 1037. *But see* Hambrook v. Stokes Bros., [1925] 1 K.B. 141; PROSSER, TORTS 181 & n.37 (2d ed. 1955).

12 105 Cal. App. 110, 286 Pac. 1048 (1930).

13 126 Conn. 644, 13 A.2d 677 (1940).

14 133 Conn. 577, 53 A.2d 645 (1947).

15 152 N.E.2d at 254.

16 Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934).

17 The following cases seem to support the instant court's conclusion but not its rationale. Wells v. Home Indem. Co., 1 So. 2d 453 (La. App. 1941) (neurosis from physician's concern of plaintiff's spine); Malloy v. Southern Cities Distrib. Co., 142 So. 718 (La. App. 1932) (cardiac neurosis from physician's diagnosis).

18 152 N.E.2d at 252: "The risk of such advice must be borne by the wrongdoers who started the chain of circumstances without which the cancerphobia would not have developed."

19 248 N.Y. 339, 162 N.E. 99 (1928). See also Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955).

20 See, *e.g.*, Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 69 N.W. 640, 641 (1896); PROSSER, TORTS § 48 (2d ed. 1955); RESTATEMENT, TORTS § 435(1) (Supp. 1948).

21 152 N.E.2d at 253.

22 *Id.* at 254.

This danger of conscious malingering can be circumvented by the vigilant and educated eye of both the court and defendant.[23] However, the "public policy" upon which the majority rests the decision may be wanting.

The decision marks a further extension of liability of physicians. A recent comment on the decision in the instant case stated:

> What worries medicolegal men about this verdict obviously is this: They fear that henceforth any doctor who informs a patient that an injury he's suffered may lead to complications will be giving the patient grounds for a bigger damage suit whether the complication actually develops or not.[24]

The modern trend toward expansion of doctors' liability—as evidenced by the increased application of "res ipsa loquitur" to physicians,[25] lifting the bar of the statute of limitations through "discovery" doctrine,[26] and charging physicians with responsibility for acts of others in the treatment of a patient[27]—is now extended to include the anxiety of a patient resulting from one doctor's opinion of conceivable complications from another's treatment.

On a broader plain, the policy adopted by the instant court may restrict the candor between a physician and any patient he treats for an injury tortiously caused. The physician must now concern himself not only with counselling the patient against possible future harms, no matter how minimal, but also the value of this advice in view of doing justice to the tort-feasor in the subsequent tort action.

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23 See Smith & Solomon, *op. cit. supra* note 6, at 154-59.
24 Medical Economics, Nov. 24, 1958, pp. 30-32.
25 Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).
26 Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936).
27 McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1949).