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Recent Cases

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RECENT CASES

Constitutional Law—First Amendment—School Authorities May Prohibit High School Student's Distribution of Sex Questionnaire to Prevent Possible Psychological Harm to Other Students

I. Facts and Holding

Plaintiff, editor of a high school publication,[1] brought suit in federal court[2] seeking an order compelling defendant school officials[3] to allow the student publication to distribute a sex questionnaire[4] to students in the high school and to publish the results.[5] Plaintiff claimed that defendants had not shown that the planned distribution would disrupt school activities and that, therefore, defendants' prohibition of the questionnaire violated 42 U.S.C. § 1983[6] and the first and fourteenth amendments.[7] Pointing to potential psychological harm to students, defendants argued that the state's interest in protecting the students' emotional well-being outweighed plaintiff's interest in distributing the questionnaire. The trial court held that

1. Plaintiff attended Stuyvesant High School in New York City and was editor of *The Stuyvesant Voice*, a student publication.

2. Plaintiff, suing individually and by his father, filed suit in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief.

3. Defendants were the Chancellor of New York City Public Schools, the members of the Board of Education, the Administrator of Student Affairs for the Board of Education, and the principal of Stuyvesant High School.

4. Plaintiff proposed a random distribution of the questionnaire on school grounds. The questionnaire consisted of 25 questions and covered topics such as contraception, homosexuality, masturbation, and the extent of students' sexual experience. The questionnaire included a proposed cover letter describing the nature and purpose of the survey. It emphasized the importance of honest answers but advised the students that "[y]ou are not required to answer any of the questions and if you feel particularly uncomfortable—don't push yourself." Trachtman v. Anker, 563 F.2d 512, 515 (2d Cir. 1977). Plaintiff intended to collect the answers anonymously and keep the answers confidential.

5. Plaintiff planned to tabulate the results of the survey and to publish them in an article in the student publication. Plaintiff intended to attempt to interpret the results in the article.

6. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. The first amendment provides that Congress "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The fourteenth amendment makes this proscription applicable to the states. U.S. Const. amend. XIV.

defendants could prohibit distribution of the questionnaire to ninth- and tenth-grade students but not to eleventh- and twelfth-grade students.[8] On appeal[9] to the United States Court of Appeals for the Second Circuit, *held,* reversed in part[10] and remanded with instructions to dismiss the complaint. If school officials reasonably believe that distribution on school grounds of a high school student's questionnaire soliciting information about the sexual habits of his fellow students might cause psychological harm to other students, then prohibition of the questionnaire does not violate the right to freedom of expression of the student seeking to distribute the questionnaire. *Trachtman v. Anker,* 563 F.2d 512 (2d Cir. 1977).

II. LEGAL BACKGROUND

The degree to which school authorities may limit high school student expression on school grounds is a recurring first amendment problem. Under the doctrine of *in loco parentis,* school authorities traditionally acted in the place of parents when children were on school grounds,[11] making courts reluctant to overturn discretionary actions by school officials[12] unless such actions were clearly arbitrary and unreasonable.[13] Some courts granted a strong presumption of authority to school board rules[14] and at times characterized as reasonable even clearly abusive acts by school officials.[15]

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8. The court noted that the district court evidently found a strong possibility that distribution of the questionnaire would result in significant psychological harm to ninth- and tenth-grade students. Trachtman v. Anker, 563 F.2d at 519. The district court concluded, however, that psychological and educational benefits from the questionnaire outweighed any harm to eleventh- and twelfth-grade students. By agreement of the parties, the district court based its decision upon the briefs and upon affidavits of the parties and their expert witnesses. *Id.* at 515.

9. On appeal both parties agreed that defendants' prohibition of students' efforts to collect and distribute information and ideas involved rights protected by the first amendment. *Id.* at 516.

10. The court reversed the district court's order insofar as it restrained defendants from prohibiting distribution of the questionnaire to eleventh- and twelfth-grade students. *Id.* at 520.

11. *See* note 32 *infra. See generally* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis,* 117 U. PA. L. REV. 373, 377-402 (1969). Courts have long recognized the right of parents to direct the upbringing and education of their children. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (liberty interest of parents to control upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (power of parents to control education of their children).

12. *See* note 28 *infra.*

13. *See* Kissick v. Garland Ind. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959); 54 MINN. L. REV. 721, 722-23 (1970); 45 N.Y.U. L. REV. 1278, 1284 (1970).

14. *See* State v. Stevenson, 27 Ohio Op. 2d 223, 189 N.E.2d 181 (Ct. C.P. 1962).

15. *See* Wooster v. Sunderland, 27 Cal. App. 51, 148 P. 959 (1915) (court held

In the 1960's, however, the federal courts increasingly scrutinized school authorities' efforts to restrict students' freedom of expression. In two Fifth Circuit cases, *Blackwell v. Issaquena County Board of Education*[16] and *Burnside v. Byars*,[17] authorities in all-black high schools suspended students who violated a regulation that prohibited the wearing of "freedom buttons."[18] Balancing the interests involved, the court stated that if the conduct in question materially and substantially interferes with the effective operation of the school, the state's interest in maintaining an orderly school system outweighs the students' right to express themselves. The Fifth Circuit upheld the *Burnside* students' claim that school officials had violated their rights to freedom of expression because the buttons attracted only "mild curiosity,"[19] but the court found no infringement of first amendment rights in *Blackwell* because students wearing the buttons disrupted school activities.[20]

In the landmark case of *Tinker v. Des Moines Independent School District*,[21] the Supreme Court agreed that high school students have a positive, though limited,[22] constitutional right to express themselves on school grounds. Pursuant to a school board regulation prohibiting the wearing of armbands in public schools,[23] school officials suspended three students[24] for wearing black armbands in protest of American involvement in Vietnam. Alleging violation of their first amendment rights to freedom of expression, the students brought an action under 42 U.S.C. § 1983,[25] to enjoin their suspension. The Court held that wearing black armbands to symbolize a political grievance was "closely akin to 'pure speech' "[26] and therefore fell within the protection of the first amendment. Citing *Burnside,* the majority reasoned that in order to restrict stu-

"reasonable" tbe suspension of a student for criticizing the school board for maintaining an unsafe school building).

16. 363 F.2d 749 (5th Cir. 1966).

17. 363 F.2d 744 (5th Cir. 1966).

18. The "freedom buttons" were small buttons that supported civil rights. *Id.* at 746, 750.

19. *Id.* at 748.

20. The students wearing buttons attempted to force them on other students. *Id.* at 751.

21. 393 U.S. 503 (1969).

22. The Court stated that first amendment rights, "applied in light of the special characteristics of the school environment," extend to high school students. *Id.* at 506.

23. The school authorities adopted the regulation prohibiting the wearing of armbands after learning that a group of adults and their children intended to wear black armbands during the Cbristmas holiday season. *Id.* at 504.

24. Two of the students were high school students, and the third attended junior high school. *Id.*

25. *See* note 6 *supra.*

26. 393 U.S. at 505.

dents' freedom of speech without transgressing first amendment guarantees, school authorities must reasonably forecast "substantial disruption of or material interference with school activities."[27] The Court emphasized that mere fear of disturbance does not justify restriction of student expression.[28] Although the Court stated that a reasonable forecast of "invasion of the rights of others"[29] also may justify limitation of students' expression, it did not base its holding on this language.

After *Tinker* lower federal courts actively scrutinized freedom of expression claims by high school students, and most courts refused to accept untested assertions by high school officials that student expression would provoke material or substantial disruption of school discipline. In *Breen v. Kahl*[30] a high school student sued to enjoin his suspension for violating a school regulation governing hair length. The Seventh Circuit held the regulation unconstitutional, reasoning that the first or the ninth amendment protected the student's right to wear his hair as he wished[31] and that in certain matters school authorities must share their control over school discipline with students' parents.[32] The court emphasized that in order

27. *Id.* at 514.

28. Noting the controversial nature of free speech, the Court asserted:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . ; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the hasis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09. Despite its holding the Court nevertheless recognized the need for comprehensive control of conduct in the schools by school officials. The Court stated that it had upheld repeatedly the authority of school officials, consistent with constitutional safeguards, to control student conduct on school grounds. *Id.* at 507.

29. *Id.* at 513.

30. 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

31. The court asserted that the student's right fell either within the "penumbras" of the first amendment freedom of speech or within the ninth amendment as an additional fundamental right that exists alongside the fundamental rights specifically mentioned in the first eight amendments. *Id.* at 1036.

32. The court noted:

> [T]he doctrine invoked by the School Board of "in loco parentis" does not holster its discipline argument. Although schools need to stand in place of a parent, in regard to certain matters during the school hours, the power must be shared with the parents, especially over intimately personal matters such as dress and grooming. Since the students' parents agree with their children that their hair can be worn long and because it would be impossible to comply with the long hair regulation during school hours and follow the wishes of the students and their parents outside of school, in the absence of

to justify a restriction on plaintiff's right to wear long hair, school authorities must meet a substantial burden of demonstrating that plaintiff's hair caused disruption in the school.[33]

Subsequent federal court decisions have continued the trend of protecting students' rights to freedom of expression unless school officials show that the expression involved will substantially disrupt school discipline.[34] The Seventh Circuit, in *Scoville v. Board of Education*,[35] prohibited school officials from censoring high school students' "underground" newspaper[36] because the school officials objected solely to the content of the newspaper's critical editorial. Acknowledging the editorial's "disrespectful and tasteless attitude toward authority,"[37] the court nevertheless held that the school officials had not met their burden of proof under the *Tinker* standard since they could not have reasonably forecast that publication and distribution of the newspaper containing the editorial would substantially disrupt school procedures or invade the rights of other students.[38]

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any showing of disruption, the doctrine of "in loco parentis" has no applicability. *Id.* at 1037-38.

33. To define the state's substantial burden of justification, the court quoted from United States v. O'Brien, 391 U.S. 367 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

34. Most courts confronted with restrictions imposed on student expression because school officials objected to the content of the expression have upheld students' right to express themselves, absent actual disruption of school activities. *See, e.g.*, Shanley v. Northeast Ind. School Dist., 462 F.2d 960 (5th Cir. 1972) (school officials cannot restrain distribution of school newspaper containing information on birth control); Butts v. Dallas Ind. School Dist., 436 F.2d 728 (5th Cir. 1971) (upholding students' rights to wear black armbands); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975) (school officials cannot prohibit distribution of school newspapers containing birth control information); Aguirre v. Tahoka Ind. School Dist., 311 F. Supp. 664 (N.D. Tex. 1970) (upholding students' rights to wear armbands); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969) (right of students to refuse to stand or leave classroom during daily pledge of allegiance); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (upholding students' rights to publish in their school newspaper a paid advertisement opposing the Vietnamese war).

35. 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

36. The students wrote their newspaper, *Grass High*, off the school premises and distributed 60 copies to faculty and students at a price of 15 cents per copy. The newspaper contained poetry, essays, movie and record reviews, and a critical editorial. *Id.* at 11.

37. *Id.* at 14. The editorial imputed a "sick mind" to the dean of the school, *id.*, and urged students to refuse to deliver to parents any "propaganda" issued by the school. *Id.* at 12. The newspaper also contained the random statement "Oral sex may prevent tooth decay." *Id.* at 14.

38. When high school officials have demonstrated that students' expression caused or

Other courts have been less willing to recognize secondary students' rights to freedom of expression and have applied a rational basis test to the control of student expression by school officials. In *Katz v. McAulay*,[39] for example, the Second Circuit examined the constitutionality of school officials' threats to expel students who distributed on school grounds leaflets soliciting funds in violation of a New York Board of Regents' rule.[40] Although the evidence disclosed minimum potential interference[41] with school discipline, the court rejected the students' request for anticipatory relief against enforcement of the rule on the ground that the rule was reasonable and had a rational relationship to the orderly operation of the educational system.[42] Prior to the instant decision, however, no court had held that the first amendment permits school authorities to restrict high school students' freedom of expression solely because the expression might cause psychological harm to other students.

III. THE INSTANT OPINION

The instant court initially sought to identify the appropriate standard for determining whether defendants' prohibition of the sex questionnaire violated the first amendment. Although the court recognized that the potential disruption in this case was psychological rather than physical, it nevertheless determined that the proper test was whether defendants had demonstrated reasonable cause to believe that the questionnaire would have caused significant psychological harm to some students.[43] Focusing next on whether defen-

would cause violence or physical disruption of school activities, however, courts have upheld disciplinary action by school officials. Thus in Hernandez v. School Dist. Number One, 315 F. Supp. 289 (D. Colo. 1970), the district court held that, under *Tinker*, the first amendment does not protect the wearing of black berets by high school students if such conduct interferes with school order or invades the rights of other students. In *Hernandez* the evidence disclosed that the wearers of the black berets engaged in boisterous conduct, bullied other students, disobeyed teachers, and created an atmosphere of tension and apprehension in the school.

39. 438 F.2d 1058 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972).

40. The New York Board of Regents' rule prohibited "soliciting funds from the pupils in the public schools." *Id.* at 1059.

41. *Id.* at 1061.

42. *Id.* The court reasoned that allowing solicitation in this case could expose students to "literally dozens of organizations" importuning students to seek contributions for them. *Id.* The court further reasoned that pressure groups within the student body soliciting funds for these organizations could foreseeably resort to threats and violence to obtain contributions.

43. In a footnote the court distinguished the instant facts from cases holding that school officials could not restrain the distribution of school newspapers containing birth control information. *See* note 34 *supra*. The court reasoned that the questionnaire did not seek to convey information; instead, it sought to obtain information in a manner that could cause psychological harm. The court further stated that defendants could have a legitimate concern

dants had met this burden,[44] the court noted defendants' knowledge and experience in educational matters and stated that federal courts should not intervene in such matters when a rational basis exists for school authorities' actions. Because of the imprecision of psychological diagnoses, defendants' experts' affidavits failed to predict with certainty that a specific number of students would suffer psychological harm. The court nevertheless concluded that defendants had a rational basis for believing that distribution of the questionnaire on school grounds might result in significant psychological harm to some students. Consequently, defendants' decision to prohibit distribution of the questionnaire did not violate plaintiff's freedom of expression.[45]

The dissent[46] charged the majority with overextending the phrase "invasion of the rights of others"[47] to justify the drastic censorship that defendants had imposed. Although the dissent approved abridgment of students' speech when the expression might result in physical violence, it rejected fear of possible psychological harm to some students as too vague a justification for restricting students' first amendment rights.[48] The dissent further asserted that even if the majority's standard is proper, defendants failed to meet

about the proposed article, which would attempt to make conclusions about the results of the survey.

44. In support of their argument that the questionnaire could cause serious psychological damage to some students, defendants submitted affidavits from four experts in the fields of psychology and psychiatry, two of whom were employed by the mental health agency of the New York City school system. Trachtman v. Anker, 563 F.2d at 517-18. Plaintiff submitted affidavits from five experts, one of whom was plaintiff's father. *Id.* at 518-19.

45. In reaching its conclusion, the court emphasized that the school officials' action was principally a measure to protect students under their care instead of a curtailment of plaintiff's first amendment rights. *Id.* at 519-20.

In a concurring opinion Judge Gurfein initially noted the importance of protecting students against psychological harm. Second, he recommended that in areas of dispute among psychiatrists, federal courts should allow professional educators to resolve problems relating to students. Finally, the concurring opinion emphasized the distinction drawn by the majority between newspapers containing birth control information and questionnaires, *see* note 43 *supra*, in order to prevent the majority opinion from serving as "an unintended precedent in derogation of [a] First Amendment right." 563 F.2d at 520.

46. Judge Mansfield wrote in dissent. *Id.* at 520-27.

47. *See* text accompanying note 29 *supra*.

48. The dissent emphasized that the majority's standard posed a grave threat to freedom of speech in high schools. The dissent failed to find a significant legal distinction between *Shanley* and *Bayer* and the instant facts. *See* notes 34 & 43 *supra*. According to the dissent, school officials could use the court's holding to bar distribution of a broad range of other materials on school premises because of possible psychological harm. The dissent further noted: "A public school's premises are the 'very marketplace of ideas' where personal intercommunication between students, in or out of the classroom, is 'an important part of the educational process' even though some students may experience a degree of mental trauma in the process." 563 F.2d at 521.

their burden of demonstrating that the risk of psychological harm outweighed plaintiff's right to freedom of expression.[49] Although admitting that the questionnaire might harm some students, the dissent nevertheless contended that the outcome of the case should depend upon the effect of the questionnaire on the average student. Applying this standard, the dissent concluded that defendants failed to demonstrate any reasonable likelihood of substantial psychological harm to an appreciable number of students.

IV. COMMENT

The Second Circuit's application of a rational basis test to a student's free speech claim demonstrates its unwillingness to follow the analysis laid down by *Tinker* for determining the degree of control that the first amendment allows school officials to exercise over student expression. *Tinker* and subsequent lower court cases required school authorities to show actual or potential physical disruption of school activities in order to restrict student expression on school grounds. Under the instant court's test, however, school authorities may limit students' freedom of expression merely by showing potential psychological harm to some students. The court's test thus allows school officials to circumvent the *Tinker* standard in almost all free speech cases.

Because the burden of proof under the Second Circuit's test is easier to meet than the burden imposed by *Tinker* and because experts cannot predict and evaluate psychological harm with precision, school authorities conceivably could regnlate any student expression they deem objectionable by finding experts to testify that the expression at issue would cause psychological harm to at least some students.[50] Although the instant court attempted to distinguish the distribution of sex questionnaires from the distribution of

49. The dissent first emphasized the importance of permitting high school students to exercise their first amendment rights, and therehy learn greater appreciation for the value and meaning of the Bill of Rights. Maintaining that the statements in the affidavits suhmitted by the defendants were conclusory, the dissent next criticized these affidavits for assuming that students with fragile sensibilities not only would read the questionnaire but also would make a concentrated effort to answer it, despite the warning of the cover letter. The dissent reviewed the affidavits submitted by the plaintiff and pointed to some of the positive aspects of the questionnaire. The dissent contended that the survey would provide the students with genuine information about sex, making many of them more secure in their sexual identities. Finally, arguing that sex and sexual stimuli permeate the environment of these New York City high school students, the dissent concluded that no reasonable likelihood of substantial psychological harm to an appreciable number of students existed.

50. For example, school authorities could suppress a student's criticism of the safety features of a school building if they could find experts to testify tbat psychological damage to other students might result. *See* note 15 *supra* and accompanying text.

other sexual literature,[51] the distinction is unpersuasive under the court's test since distributing sexually-related information arguably could cause as much psychological harm to high school students as soliciting such information. Publishing in a school newspaper the results of a national survey of high school students' sexual habits probably would affect students as much as would the questionnaire and the proposed article in the instant case.[52] Such potential for extreme regulation of student expression contradicts *Tinker's* interpretation of high school students' rights to express themselves and allows school officials to chill freedom of expression on high school grounds by couching their objections to student expression in terms of psychological harm.

The court might have avoided providing a means to circumvent the *Tinker* standard by replacing *Tinker's* disruption analysis with an analysis that focuses on the interest of parents in directing the education and upbringing of their children.[53] Such parental interest presumably includes the control of the intellectual intake of children even though a child's desires might contradict those of his parents.[54] In *Tinker* the school authorities sought to prevent physical disruption caused by students' reactions to black armbands, but in the instant case the student expression threatened no physical disruption. Therefore, instead of applying the *Tinker* standard, the instant court should have directed plaintiff to send the questionnaires to the parents of each child chosen to participate in the survey so that the parents could read the questions and decide what would be best for their children. In response to plaintiff's freedom of expression claim, the court could have reasoned that defendants were restricting plaintiff's freedom of expression only to the extent that the parents of other students desired. The court then could have upheld prohibition of the questionnaire on the ground that the interest of parents in regulating the intellectual intake of their chil-

51. *See* note 43 *supra.*

52. Courts conceivably could employ the Second Circuit's test to restrict student expression in circumstances similar to those in *Tinker.* For example, the Supreme Court in *Tinker* could have reached the opposite result because the school authorities reasonably could have concluded that the wearing of black armbands might have caused psychological harm to some high school students.

53. *See* note 11 *supra.*

54. The Supreme Court has recognized this parental interest even when children's first amendment rights are affected. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that the state could not constitutionally compel Amish parents to keep their children in public high schools to age 16. Writing in dissent, Justice Douglas pointed out that the majority, by allowing a religious exemption to the parents without consulting the students about their religious preferences, imposed the parents' choice of religion on their children, who were mature enough to express potentially conflicting desires. *Id.* at 241-46.

dren outweighed plaintiff's right to express himself. The *Tinker* facts did not permit a similar approach because, as a practical matter, if some parents had objected to their children's exposure to the armbands, school officials could not have enforced the decisions of those parents without frustrating the desires of other parents who approved such exposure. In the instant case, however, asking parents to decide whether their children could complete the questionnaire would have placed no additional burden on defendants.

There are two advantages in asking parents to determine what type of student expression is suitable for their children. First, by deferring to parental judgment, courts in cases such as the instant one would avoid the difficult determination of how far school authorities may restrict students' freedom of expression. When deference to parental judgment is practicable, courts would need to decide only the degree to which school authorities, conforming to the judgment of students' parents, may control the intellectual intake of students. Allowing school authorities to limit students' freedom of expression to the extent that parents of other students object to their children's exposure to the expression is a more defensible position than allowing a blanket prohibition of students' freedom of speech based solely on abstract perceptions of what the average parent would want for his child. *Tinker* clearly asserted that such abstract fear cannot justify suppression of high school students' rights to freedom of expression.[55] Second, deference to parental judgment would comport with the doctrine of less drastic means,[56] which disfavors complete prohibition of speech when less restrictive alternatives are available. If the instant court had required defendants to defer to parental discretion, some of the parents probably would have allowed their children to participate in the survey, and defendants would not have prohibited completely plaintiff's freedom of expression.

Admittedly, deference to parental discretion would not be prac-

55. *See* note 28 *supra.*

56. Traditional first amendment teaching requires that when "legitimate legislative [or state] concerns are expressed in a statute [or a provision] which imposes a substantial burden on protected First Amendment activities, Congress [or the state] must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." United States v. Robel, 389 U.S. 258, 268 (1967). *See also* United States v. O'Brien, 391 U.S. 367 (1968); James v. Board of Educ., 461 F.2d 566, 574 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972). Commentators have criticized federal court decisions failing to require the least restrictive means of regulating students' right to express themselves. *See* 45 N.Y.U. L. REV. 1278, 1283 (1970) (criticizing failure to use least restrictive alternative to regulate students' expression in Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971)).

ticable in all cases involving freedom of speech claims in the high school context. For example, school authorities could not perform their duties if they had to obtain parental permission to expose students to every arguably objectionable piece in a school newspaper and then enforce the decisions of each child's parents. Moreover, parents do not have sufficient time to read every article in order to make a proper decision about its content. In such situations school authorities probably will continue to limit student expression according to their perception of parental desires, and courts must apply the *Tinker* standard to such decisions to determine whether school authorities have met their burden of proof. Courts should require deference to parental judgment, however, when an analysis of the facts of a case reveals that deference is practicable. Deference to parental judgment would carve out a clear exception to the general body of cases involving freedom of expression claims in high schools and would allow courts to uphold school authorities' regulation of arguably objectionable student expression according to the desires of the parents in the community without having to erode the *Tinker* standard.

ROBERT EDWARD BANTA

Corporations—Freeze-Out Mergers—The Delaware Supreme Court Requires Majority Shareholder Proof of a Valid Business Purpose As a Component of Entire Fairness in Freeze-Out Merger Challenges

I. INTRODUCTION

Recent declines in stock market averages[1] accompanied by costly disclosure requirements imposed under the federal securities laws[2] have prompted many companies to reconsider their positions as publicly held corporations. In response to the resulting minimal

1. Between January 1973 and December 1974 the Dow Jones Industrial Average dropped over 400 points to 577.60, its lowest closing level since October 1962. *See* N.Y. Times, Dec. 7, 1974, at 39, col. 5. Although the Average has experienced recovery since 1974, reaching a high of 1011.96 on March 24, 1976, it recently dropped below 770. *See* Wall St. J., Mar. 25, 1976, at 33, col. 1; Wall St. J., Jan. 27, 1978, at 27, col. 4.

2. The cost of SEC registration and compliance can amount to $100,000 per year. *See* Freeman, *Going Private: Corporate Insiders Move to Eliminate Outside Shareholders,* Wall St. J., Oct. 18, 1974, at 1, col. 6; Note, *Going Private,* 84 YALE L.J. 903, 907 (1974).

benefits of public ownership,[3] many controlling shareholders now seek to increase their control and participation in a corporation's future profits by going private.[4] One means of going private is the freeze-out merger,[5] by which a parent company forces the liquidation of minority interests in a publicly held subsidiary through a merger of the subsidiary with the parent. By complying with applicable state merger statutes,[6] the parent[7] may eliminate the minority's shares by tendering a cash-out price, which the minority either must accept or have appraised judicially.[8] The merger statutes thus represent a legislative compromise between total majority control and the single vote veto available to the minority at common law.[9]

Because the majority's elimination of the minority pursuant to a merger statute arguably is oppressive,[10] the freeze-out merger has fallen under increased judicial challenge by angered minority shareholders. The United States Supreme Court's refusal in *Santa Fe Industries, Inc. v. Green*[11] to apply rule 10b-5[12] to freeze-out mergers fully complying with state statutory disclosure requirements appar-

3. Although most companies find public listing beneficial because it provides a means of advertisement and a source of future funding, these benefits often are outweighed by burdensome SEC regulations requiring a corporation to send to its shareholders proxy statements and annual financial reports. *See* Note, *supra* note 2, at 904 n.7.

4. Going private is the designation given to a corporation's reacquisition of all its publicly held common stock, usually at depressed market prices. *See, e.g.*, Borden, *Going Private—Old Tort, New Tort or No Tort?*, 49 N.Y.U. L. REV. 987 (1974); Brudney, *A Note on "Going Private,"* 61 VA. L. REV. 1019 (1975); Note, *supra* note 2, at 903.

5. A merger under a state statute allowing subsequent elimination of minority shareholders is commonly referred to as a "freeze-out" or "take-out" merger. *See* Borden, *supra* note 4, at 989, 994-97.

6. *E.g.*, CAL. CORP. CODE §§ 1101, 1110 (West 1977); DEL. CODE ANN. tit. 8, §§ 251, 253 (Michie 1975); N.Y. BUS. CORP. LAW §§ 901, 902, 905 (McKinney 1976).

7. A corporation can obtain the majority interest in another corporation necessary to effect a statutory freeze-out merger in a number of ways. A parent company already might hold a majority interest in its subsidiary, or a wholly unaffiliated company might acquire the requisite majority interest by making a tender offer to purchase all the shares of an independent corporation and by subsequently purchasing the needed shares. Likewise, a company's majority shareholders may form a nonoperating shell corporation, transfer all of their shares to the shell, and force the merger of the company into the shell, thereby freezing out the minority shareholders. *See, e.g.*, Borden, *supra* note 4, at 987-89; Brudney, *supra* note 4, at 1019-20. *See generally* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973).

8. *E.g.*, CAL. CORP. CODE § 1304 (West 1977); DEL. CODE ANN. tit. 8, § 262 (Michie 1975); N.Y. BUS. CORP. LAW § 910 (McKinney 1976).

9. *See* Voeller v. Nielston Warehouse Co., 311 U.S. 531, 535 (1941); Teschner v. Chicago Title & Trust Co., 59 Ill. 2d 452, 456, 322 N.E.2d 54, 56 (1974); Note, *Elimination of Minority Share Interest by Merger: A Dissent*, 54 NW. U.L. REV. 629 (1959).

10. *See, e.g.*, Sommer, *"Going Private": A Lesson in Corporate Responsibility*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,010, at 84,694 (1974).

11. 430 U.S. 462 (1977).

12. 17 C.F.R. § 240.10b-5 (1974).

ently foreclosed most opportunities for minority shareholders to assert a federal cause of action.[13] Thus state corporate law remained the primary remedy for dissatisfied minority shareholders. Because state challenges prior to *Green* generally had upheld the validity of freeze-out mergers,[14] no substantial federal or state law obstacles seemed to prevent elimination of minority ownership.[15] Two recent Delaware Supreme Court decisions, however, have articulated a state law ground for challenging freeze-outs—the common law fiduciary duty imposed on majority shareholders for the benefit of the minority. In *Singer v. Magnavox Co.*,[16] the Delaware court held that the merger of a Delaware corporation for the sole purpose of freezing out its minority shareholders violates this fiduciary duty. The court ruled that in addition to complying with Delaware's merger statute, a merger also must be grounded in a valid business purpose and must meet a test of entire fairness to the minority. The court in *Tanzer v. International General Industries, Inc.*[17] reaffirmed *Singer's* requirement of entire fairness and found that a merger transacted solely to benefit a parent company may be based on a bona fide business purpose. Analysis of these decisions requires insight into the problems posed when the desire to prevent minority oppression conflicts with Delaware's traditional judicial policy favoring majority stockholder control.[18]

II. Legal Background

Delaware courts consistently have recognized a policy of judicial noninterference with a majority shareholder's corporate management policies.[19] In *Ringling Brothers-Barnum & Bailey Combined Shows v. Ringling*,[20] the Delaware Supreme Court found that a corporate shareholder's vote may be motivated by desire for personal profit so long as the shareholder violates no duty owed to fellow shareholders.[21] *Ringling* thus implicitly relieved majority

13. *But see* Goldberg v. Meridor, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,162 (2d Cir. Sept. 8, 1977) (holding that *Green* does not prohibit a 10b-5 action when all statutory merger disclosure requirements are met, but the disclosures nevertheless are misleading or deceptive).

14. *See* notes 24-57 *infra* and accompanying text.

15. *See* Borden, *supra* note 4, at 997.

16. 380 A.2d 969 (Del. 1977).

17. 379 A.2d 1121 (Del. 1977).

18. *See* Folk, The Delaware General Corporation Law, at xii (1973); Sommer, *supra* note 10.

19. *See* Folk, The Delaware General Corporation Law, at xii (1973); Sommer, *supra* note 10.

20. 53 A.2d 441 (Del. 1947).

21. *Id.* at 447.

shareholders of any duty to the corporate entity, allowing them to vote contrary to its best interests over objection of the minority.[22] The court subsequently held in *Guth v. Loft, Inc.*,[23] however, that a corporation's directors owe minority shareholders a fiduciary obligation of good faith and fairness. Subsequent extension of this fiduciary duty to majority shareholders[24] conflicted with the traditional judicial policy of nominterference with internal corporate management.

Delaware's judicial attempt to reconcile these conflicting doctrines in the context of freeze-out mergers has produced inconsistent results. A line of cases beginning with *Federal United Corp. v. Havender*[25] took a promanagement stand in holding that judicial appraisal constituted minority shareholders' sole remedy in freeze-out merger challenges. In *Havender* defendant majority shareholders of a parent company sought to merge its subsidiary. To accomplish the merger, defendants recapitalized the parent by forcing its minority shareholders to accept the conversion of old preferred stock with accumulated dividends into common stock and new preferred shares yielding a lower return.[26] When the minority shareholders sued to recover accumulated dividends, the Delaware court adhered to its promanagement stand by holding the minority to the recapitalization terms imposed by the defendants and by approving the merger.[27] Similarly, in *Stauffer v. Standard Brands, Inc.*,[28] in which plaintiff objected to a freeze-out merger by alleging oppressive treatment by the majority, the Delaware Supreme Court found that plaintiff's challenge reflected only disagreement with the monetary value of his shares and that the statutory right to appraisal provided

22. For support, the court in *Ringling* cited Heil v. Standard Gas & Elec. Co., 17 Del. Ch. 214, 151 A. 303 (1930) (stockholders may exercise wide liberality of judgment when voting), and Allied Chem. & Dye Corp. v. Steel & Tuhe Co., 14 Del. Ch. 1, 120 A. 486 (1923) (court will not inquire into personal motives prompting a stockholder's vote in favor of the sale of corporate assets).

23. 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).

24. *See, e.g.*, Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952).

25. 24 Del. Ch. 318, 11 A.2d 331 (Sup. Ct. 1940).

26. As part of the recapitalization, defendants offered plaintiffs the option of receiving for each share of $6 preferred stock with accumulated dividends one share of new $3 preferred stock and six shares of class A common stock or cash liquidation. *Id.* at 323-24, 11 A.2d at 334.

27. *Id.* at 325-26, 11 A.2d at 334-35. *See also* MacCrone v. American Capital Corp., 51 F. Supp. 462, 466 (D. Del. 1943) (adopting a "presumption of bona fides of business purpose" and noting that "reasons for the merger . . . are not matters for judicial determination") (citing Allied Chem. & Dye Corp. v. Steel & Tube Co., 14 Del. Ch. 1, 120 A. 486 (1923)).

28. 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962).

his only remedy.[29] When a chancery court faced allegations of a majority shareholder's self dealing intended to eliminate the minority in *David J. Greene & Co. v. Schenley Industries, Inc.*,[30] the court agreed with the *Stauffer* opinion that the sole issue concerned valuation of the minority's shares, which could be resolved only by resort to the statutory right of appraisal.[31] In so concluding, the court expressly approved *Stauffer* and emphasized Delaware's judicial policy against impeding the consummation of an orderly merger under the state's statutes.[32] Therefore, according to the line of cases from *Havender* through *Schenley Industries,* the statutory right of appraisal appeared to offer the exclusive remedy for dissatisfied minority shareholders contesting a freeze-out merger.[33]

A separate line of cases offered greater protection to minority shareholders contesting the oppressiveness of freeze-out mergers. This marked change in Delaware judicial attitude began with the decision of *Sterling v. Mayflower Hotel Corp.*,[34] in which minority shareholders attempted to enjoin Mayflower's merger with its parent. Emphasizing the majority's fiduciary role, the court held that the majority shareholders' involvement on both sides of the transaction[35] placed on them the burden of establishing the merger's entire fairness and subjected the merger to careful judicial scrutiny. In determining the merger's entire fairness, however, the court scrutinized only the fairness of the price paid for minority shares,[36] thereby creating uncertainty whether the entire fairness test extended to examination of factors other than the freeze-out price.[37] Relying on *Sterling,* a chancery court in *David J. Greene & Co. v.*

29. *Id.* at 11, 187 A.2d at 80.

30. 281 A.2d 30 (Del. Ch. 1971).

31. *Id.* at 33.

32. *Id.* at 36.

33. In regard to the exclusiveness of the appraisal remedy, see Vorenberg, *Exclusiveness of the Dissenting Stockholders Appraisal Right,* 77 HARV. L. REV. 1189 (1964).

34. 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952).

35. In freeze-out mergers, the majority shareholder of the subsidiary usually is the majority shareholder or owner of the parent. Consequently, his motives in freezing out the minority shareholders of the subsidiary are suspect because of an inherent possibility of self-dealing. Thus the court in *Sterling* shifted the burden of proof to the majority to establish the merger's fairness in such cases. *Id.* at 298-99, 93 A.2d at 109-10.

36. After *Sterling,* a Delaware chancery court in Bennett v. Breuil Petroleum Corp., 34 Del. Ch. 6, 99 A.2d 236 (1953), stated that "action by majority stockholders having as its purpose the 'freezing-out' of a minority interest is actionable without regard to the fairness of price." *Id.* at 12, 99 A.2d at 239. Defendants in *Bennett* were not seeking to force a merger, however, but were attempting to cancel stock under a plan adopted by the requisite statutory vote, which plaintiffs alleged was oppressive and imposed for unfair consideration.

37. *See* Borden, *supra* note 4, at 997.

Dunhill International, Inc.[38] enjoined the merger of a parent and its subsidiary, finding that the parent had not met its burden under *Sterling* of proving the transaction's fairness.[39] Although the decision in *Dunhill International* was based in part on inadequate merger terms,[40] the court also found that the majority stockholders' diversion to the parent of a business opportunity available to the minority[41] breached the majority's fiduciary obligation.[42] In an unpublished subsequent opinion, a chancery court in *Pennsylvania Mutual Fund, Inc. v. Todhunter International, Inc.*[43] enjoined a proposed freeze-out merger. The court held that when the majority has no valid business purpose for the merger, the appraisal remedy is not exclusive. Thus *Dunhill* and *Todhunter* evidenced attempts by the Delaware judiciary to extend *Sterling's* entire fairness test to scrutinize the majority's fiduciary obligations. Lower courts rendered both these decisions, however, and at least one commentator argued that the Delaware Supreme Court would not adopt their logic.[44]

Other jurisdictions experienced similar difficulties in compromising the conflicting policies inherent in merger challenges. In *Bryan v. Brock & Blevins Co.*,[45] defendants attempted to cash out the plaintiff, a retired director and minority shareholder, allegedly to restrict stockholders to active employees only.[46] When plaintiff

38. 249 A.2d 427 (Del. Ch. 1968).

39. *Id.* at 436.

40. Plaintiffs in *Dunhill* contested the proposed merger's fairness, contending *inter alia* that the proposed exchange of 1.6 shares of parent common for each share of subsidiary stock was grossly unfair and inequitable. The court held that because the minority shareholders would experience substantial dilution in earnings and book value, they sustained the burden of proving the probability of their success at trial, thereby establishing a right to temporary injunction. *Id.*

41. Plaintiffs alleged that the parent company diverted to itself the opportunity to acquire Child Guidance Toys, Inc., which the subsidiary was able financially to undertake. The court sustained this contention, finding the diversion to be a breach of the majority's fiduciary duty under *Guth v. Loft, Inc. Id.* at 434-35.

42. Despite *Dunhill*'s intimation that equity will enjoin an unfair merger regardless of the fairness of price, the later case of *Schenley Industries, see* notes 30-33 *supra* and accompanying text, nevertheless suggests that the appraisal remedy should be exclusive. *See* Brudney, *supra* note 4, at 1029 n.40.

43. No. 4845 (Del. Ch. Aug. 5, 1975). For a discussion of *Todhunter*, see Arsht, *Minority Stockholder Freezeouts Under Delaware Law*, 32 BUS. LAW. 1495 (1977).

44. Prior to the instant opinions, one commentator argued that Delaware courts would not expand on the *Todhunter* logic but would limit the case to its particular facts, thus reemphasizing confidence in the fairness to minority shareholders guaranteed by the appraisal remedy. *See* Arsht, *supra* note 43, at 1496. In any event, the dispute involved in *Todhunter* was settled prior to appeal, thus leaving the issue undecided by Delaware's highest court. *Id.* at 1495.

45. 490 F.2d 563 (5th Cir. 1974).

46. Defendants alleged a long-standing corporate policy of allowing only active employ-

refused to sell, defendants caused the merger of defendant corporation into a recently formed nonoperating parent[47] and attempted to force a statutory[48] freeze-out merger. The Fifth Circuit, applying Georgia law under pendent jurisdiction,[49] enjoined the transaction. The court held that a merger with a nonoperating parent formed for no other business purpose than to effect a freeze-out constituted a breach of defendants' fiduciary duty.[50] A New Jersey court faced with a challenge similar to *Bryan* in *Berkowitz v. Power/Mate Corp.*[51] found the *Bryan* approach tempting to follow, but analyzed only the adequacy of the freeze-out price, refusing to scrutinize the allegedly improper business purpose.[52] In *Jutkowitz v. Bourns, Inc.*,[53] however, a California superior court fully scrutinized an allegedly improper business motive, holding that minority shareholders have a right to continued participation in the subsidiary and may not be eliminated without a legitimate business reason.[54]

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ees to remain as shareholders of the company. *Id.* at 565.

47. Active shareholders of Brock & Blevins formed a new corporation, Power Erectors, Inc., and transferred their Brock & Blevins stock to the new corporation. Power Erectors' resulting 85% majority interest in Brock & Blevins was adequate under the merger statute to force the cash-out of plaintiff. *Id.* at 567.

48. GA. CODE ANN. §§ 22-1001 to 1202 (Harrison 1977).

49. Jurisdiction in the United States district court was obtained by allegation of specific violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and rule 10b-5 of the Securities & Exchange Commission, 17 C.F.R. § 240.10h-5 (1974). Pendent jurisdiction attached to the state claim. 490 F.2d at 564-65.

50. The *Bryan* court reached this conclusion without citing any supporting state decision. *See* Note, *supra* note 2, at 921. The court relied on fiduciary principles discussed in Lehold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), and Pepper v. Litton, 308 U.S. 295 (1939), to support its conclusion that a majority shareholder's use of a merger statute for no valid business purpose other than elimination of minority shareholders violates general principles of equity and corporate law. A Fifth Circuit district court subsequently followed *Bryan* but found a clear business purpose underlying the challenged freeze-out merger. Grimes v. Donaldson, Lufkin & Jenrette, Inc., 392 F. Supp. 1393 (N.D. Fla. 1974), *aff'd*, 521 F.2d 812 (5th Cir. 1975). A Utah district court in a memorandum decision also adopted *Bryan*'s business purpose analysis. Albright v. Bergendahl, 391 F. Supp. 754 (D. Utah 1974).

51. 135 N.J. Super. 36, 342 A.2d 566 (1975).

52. Although plaintiffs in *Berkowitz* alleged an improper business purpose, the court found that "[i]t may well be that the public stockholders of Power/Mate would benefit from the purchase of their stock. If so, the question at issue is whether the price they are being offered . . . is a fair and reasonable one." *Id.* at 49, 342 A.2d at 574. *See also* Note, *The Second Circuit Adopts a Business Purpose Test for Going Private*, 64 CALIF. L. REV. 1184, 1202 (1976).

53. No. CA 000268 (Cal. Super. Ct., L.A. County, Nov. 19, 1975).

54. The California court based its conclusion on Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969), finding that the appraisal guarantee of fair market value did not protect adequately the minority's right of participation. Jutkowitz v. Bourns, Inc., No. CA 000268, slip op. at 4 (Cal. Super. Ct., L.A. County, Nov. 19, 1975). *See also* Note, *supra* note 52, at 1203-04. By approving a minority's right of participation based on a possible "sentimental attachment" to stock, the California court has taken a position

The opinions in *Bryan* and *Jutkowitz* thus evidenced a trend toward increased minority shareholder protection in freeze-out merger challenges.[55] Despite the reluctance of Delaware courts[56] to look beyond the price fairness of a freeze-out merger, the broad *Sterling* mandate of entire fairness clearly could be extended to encompass analysis of a merger's underlying business purpose.[57] The availability and the scope of nonstatutory remedies to minority shareholders in freeze-out mergers nevertheless remained uncertain in Delaware prior to the instant decisions.

III. THE INSTANT OPINIONS

In *Singer v. Magnavox Co.*, plaintiffs sought an order[58] nullifying the merger[59] of Magnavox into T.M.C. Development Corporation, a wholly owned subsidiary of North American Philips Corporation.[60] Plaintiffs, minority shareholders in Magnavox, contended that the merger served no valid business purpose other than the forced removal of minority shareholders and that in approving the merger at a grossly inadequate price, defendants breached their fiduciary duty.[61] Defendants asserted their full compliance with the

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long abandoned by most jurisdictions after the adoption of merger statutes. *See* Borden, *supra* note 4, at 1000-01.

55. In Grimes v. Donaldson, Lufkin & Jenrette, Inc., 392 F. Supp. 1393, 1402 (N.D. Fla. 1974), *aff'd*, 521 F.2d 812 (5th Cir. 1975), however, it was argued that *Bryan* is limited to those transactions involving the merger of a close subsidiary with a nonoperating parent. Likewise, *Jutkowitz* involved a merger with a nonoperating shell parent and similarly may be distinguished. *See* Note, *supra* note 52, at 1203.

56. Professor Folk, in his commentary on the Delaware general corporate law, notes that over two-thirds of all corporations whose securities are listed on the New York Stock Exchange are incorporated under the laws of Delaware. Thus, he states, "viewed realistically, Delaware corporation law is national corporation law." FOLK, *supra* note 18, at xii.

57. For an argument that Delaware would not and should not adopt a business purpose analysis in freeze-out merger challenges, see Arsht, *supra* note 43.

58. Plaintiffs also sought compensatory damages. 380 A.2d at 972.

59. The merger was transacted as a "long form" merger pursuant to DEL. CODE ANN. tit. 8, § 251 (Michie 1975). Section 251 authorizes the merger of two or more Delaware corporations upon approval by the directors of each corporation and upon majority vote of the outstanding stock of each corporation followed by filing of the appropriate documents with the county in which each constituent corporation is located. For a discussion of § 251, see FOLK, *supra* note 18, at 315-45.

60. The merger in dispute was transacted in two steps. North American Philips Corporation, originally wholly unaffiliated with Maguavox, formed North American Philips Development Corporation for the purpose of making the original tender offer for the purcbase of Magnavox shares. Once a majority interest was secured, Magnavox formed T.M.C. Development Corporation to act as the parent in the transaction. The merger subsequently was accomplished under § 251. *See* note 59 *supra*.

61. Plaintiffs also contended tbat the merger violated the antifraud provision of the Delaware Securities Act. DEL. CODE ANN. tit. 6, § 7303 (Michie 1975). The court rejected this contention, finding that plaintiffs, residents of Pennsylvania, did not establish sufficient contact with Delaware to invoke the statute. 380 A.2d at 981.

Delaware merger statute and contended that statutory appraisal[62] furnished the plaintiff's exclusive remedy. The court first established that the majority shareholders owe a high standard of fiduciary fairness to minority shareholders, which is not satisfied necessarily by full compliance with the applicable merger statutes[63] and by relegation of the minority to an exclusive appraisal remedy.[64] Despite case law[65] indicating that minority shareholders purchase with notice of the majority's statutory merger right, the court stated that Delaware courts will not be indifferent to the purpose of a merger when a freeze-out of minority shareholders is alleged as its sole purpose.[66] The court thus held that the majority must prove a valid business purpose for the merger in order to satisfy Delaware's high fiduciary standards. In addition, the court stated that proof of a valid business purpose will not necessarily discharge fiduciary obligations. Lower courts still must scrutinize all aspects of the merger for compliance with *Sterling*'s mandate of entire fairness.[67] A concurring opinion emphasized that future cases should scrutinize a merger's economic reasonableness based on all relevant facts.[68]

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62. Pursuant to DEL. CODE ANN. tit. 8, § 262 (Michie 1975), the stockholders of any merged corporation who opposed the merger agreement may demand judicial determination of the value of their stock by a court appointed appraiser. For a discussion of § 262, see FOLK, *supra* note 18, at 369-97.

63. Despite statutory authorization for the merger and defendants' compliance with the statute's terms, the court held that the merger nevertheless was assailable because "inequitable action does not become permissible simply because it is legally possible." 380 A.2d at 975 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971)).

64. Defendants conceded that they owed plaintiffs a fiduciary duty but contended that in the context of the present merger, they had met their duty by offering fair value for the Magnavox shares. The court found, however, that the fiduciary duty defined by *Guth v. Loft, Inc.*, *see* text accompanying note 23 *supra*, entitles minority shareholders to enjoin a merger for proper cause and forbids majority stockholders from causing a merger for the sole purpose of eliminating the minority. 380 A.2d at 977-78.

65. The court cited Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (Sup. Ct. 1940). *See* note 22 *supra* and accompanying text.

66. In so concluding, the instant court distinguished *Havender*, *Stauffer*, and *Schenley Industries* as factually noncontrolling. *See* notes 24-33 *supra* and accompanying text. Since *Stauffer* concluded that the complaint alleged only a difference of opinion as to cash-out value, the instant court decided that *Stauffer* did not approve a merger transacted solely to eliminate the minority. 380 A.2d at 978-79. Furthermore, the court expressly stated that any statement in *Stauffer* inconsistent with its opinion is inapplicable to a § 251 merger. *Id.* at 980. *But see* Kemp v. Angel, 381 A.2d 241 (Del. Ch. 1977).

67. *See* notes 34-37 *supra* and accompanying text.

68. According to the concurring opinion, *Sterling* established an avenue for judicial scrutiny of "the business purpose, or economic necessity, desirability and feasibility involved, evidence of self-serving, manipulation, or overreaching, and all other relevant factors of intrinsic fairness or unfairness." 380 A.2d 982. The concurrence also emphasized the continu-

Less than a month later, the court decided *Tanzer v. International General Industries, Inc.*, an appeal by minority shareholders from denial of an order to restrain temporarily a proposed merger of the Kliklok Corporation into International General Industries (IGI). Plaintiffs, minority owners of Kliklok, contended that Kliklok's majority shareholders[69] breached their fiduciary duty because their sole purpose was to benefit IGI, the parent corporation. Defendants asserted that their intent to benefit the parent established a valid business purpose[70] and that the cash-out price was intrinsically fair. Although recognizing that *Singer* established a minority shareholder's right not to be eliminated for an improper business purpose, the court first stated that it must analyze the majority's rights as voting stockholders of the subsidiary in relation to the competing rights of the subsidiary's minority shareholders.[71] The court concluded that since under *Ringling,* the majority shareholders are entitled to vote in their best interests[72] and need not sacrifice these interests in dealing with the minority, their intent to benefit the parent satisfies *Singer's* requirement of a bona fide business purpose. As in *Singer,* the court stated that establishment of a bona fide business purpose necessarily does not discharge fiduciary obligations because the majority also must prove the merger's entire fairness.[73]

IV. COMMENT

The court's adoption of a business purpose requirement as a component of the entire fairness test marks a shift from the Delaware judiciary's reliance on exclusiveness of the appraisal remedy as protection for minority shareholder interests to the imposition on

ing legislative approval of mergers and the judicially mandated avoidance of their disruption by the dissenting minority. *Id.*

69. Defendants, International General Industries, Inc., and its directors owned an 81% interest in the Kliklok Corporation. To transact the merger, defendants formed the KLK Corporation and approved the merger of KLK into Kliklok. 379 A.2d at 1122.

70. Defendants contended and the lower court found that the principal reason for the merger was to facilitate long-term debt financing by IGI, the parent company. *Id.* at 1124.

71. The court stated that since "it is the power and right of IGI as a *stockholder* of Kliklok which is really under review . . . IGI is entitled to have its rights in dealing self-interestedly with Kliklok measured by reference to its status as stockholder." *Id.* at 1123.

72. According to the court, this conclusion is supported by general corporate law detailed in W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2031 (Perm. ed. 1970).

73. Because the chancery court had concluded that IGI's need to facilitate long-term debt financing established a legitimate, present, and compelling business reason to merge, the court remanded the case only for determination of the merger's entire fairness. 379 A.2d at 1125.

majority shareholders of a higher fiduciary standard. Prior to the instant decisions, exclusiveness of the statutory appraisal remedy[74] provided majority shareholders certainty that a merger would be completed by leaving only the cash-out price subject to judicial scrutiny. Moreover, the entire legislative merger scheme provided minority shareholders with constructive knowledge of the majority's right to effect a freeze-out merger.[75] Thus prior to *Singer* minority shareholders arguably purchased a subsidiary's stock subject to a potential cash-out merger as an implied contractual agreement. Further, legislative enactment of a statutory appraisal remedy arguably provided a legislative exception to high common law fiduciary standards. Finally, exclusive judicial application of the appraisal remedy served to further Delaware's policy of promoting orderly consummation of statutory mergers while protecting minority stockholders from potential majority overreaching.[76]

Although *Singer* purports to base its business purpose requirement on Delaware's continuing high fiduciary standard,[77] prior Delaware merger decisions do not support fully the high standard's existence.[78] *Tanzer*'s withdrawal from *Singer*'s emphasis on the majority's fiduciary duty by approving *Ringling*'s tolerance of self-interested stockholder voting further questions the existence of this paramount duty.[79] By clearly holding that intent to benefit the parent satisfies *Singer*'s business purpose requirement, *Tanzer* expressly endorses a majority shareholder's self-dealing if any business motive other than a sole desire to eliminate the minority exists. Such self-interested voting, which results in the elimination of minority stockholders, cannot satisfy high standards of fiduciary fairness. Thus, although *Tanzer* approves *Singer*'s requirement of a valid business purpose as a component of entire fairness, it undermines the strength of the requirement by permitting proof of intent to benefit the parent to satisfy the business motive test.

Singer's intentional refusal to define whose business purpose[80]

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74. *See* notes 25-33 *supra* and accompanying text.

75. *See* notes 65-66 *supra* and accompanying text.

76. Several commentators have argued that appraisal remedies should not foreclose other lines of attack on proposed mergers. *See, e.g.*, Vorenberg, *supra* note 33. Nevertheless, several state appraisal statutes expressly are exclusive, and case law has interpreted many others to be exclusive. *See* Borden, *supra* note 4, at 1023-28.

77. *See* note 64 *supra* and accompanying text.

78. For an extreme example of the Delaware judiciary's refusal to recognize high fiduciary standards owing by majority to minority shareholders, see Stauffer v. Standard Brands, Inc., 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962).

79. *See* notes 20-22 *supra* and accompanying text.

80. According to the *Singer* court, if the majority asserts intent to benefit the subsidiary, the result is academic to the minority who no longer holds any subsidiary interest.

satisfies fiduciary obligations leaves the scope of the business purpose test unclear and subject to the kind of judicial undermining illustrated by *Tanzer*. If *Singer* had demanded majority shareholder proof of a compelling need to merge,[81] proof of benefit to the subsidiary would appear to be required since the majority owes a fiduciary duty only as stockholders of the subsidiary. The more demanding compelling need test would provide greater certainty for majority shareholders of merging parents questioning whether a particular business purpose will satisfy *Singer*'s requirements. *Tanzer*'s less stringent business purpose requirement, however, is satisfied more easily by majority shareholders, who must show only incidental economic benefit to the parent to overcome any allegation of intent to eliminate the minority. Since the parent is unlikely to merge its subsidiary without incurring some incidental economic benefit, it easily may disguise any true intent to eliminate the minority.

Although both *Singer* and *Tanzer* require the majority to go beyond establishment of a valid business purpose to satisfy entire fairness, neither case defines the relevance of a bona fide business purpose to the determination of entire fairness nor the steps that must be taken by the majority to prove entire fairness to minority shareholders in a freeze-out merger. The entire fairness test requires formulation of an equitable remedy that demands subjective lower court evaluation of policies underlying the multitude of merger forms,[82] and thus may result in inconsistent resolution of factually similar mergers. For example, lower courts must consider whether the parent is public or private,[83] whether the subsidiary has been consistently held or recently acquired,[84] whether the parent is a nonoperating shell corporation,[85] and whether the parent or subsidiary is a closely held corporation.[86] Adjudication thus will depend on

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Conversely, the court stated, intent to benefit the parent raises issues that the minority has difficulty contesting. Thus, although denying that exploration of the business purpose is without merit, the court chose to analyze competing majority and minority interests rather than scrutinizing the alleged business purpose. 380 A.2d at 976.

81. The adoption of a "compelling need to merge" standard is suggested in Note, *supra* note 2, at 922-24.

82. One commentator consistently has urged that neither a valid business purpose nor an entire fairness test can consider fairly all the various policy considerations underlying factually different mergers. *See* Borden, *supra* note 4, at 1022-23; Borden, *Delaware Speaks Out Again on Takeouts*, N.Y.L.J., Oct. 25, 1977, at 1, col. 2; Borden, *Some Comments on Singer v. Magnavox*, N.Y.L.J., Oct. 4, 1977, at 1, col. 2.

83. *See* Borden, *supra* note 4, at 1018-19; Note, *supra* note 52, at 1212-13.

84. *See* Borden, *supra* note 4, at 1018-19; Note, *supra* note 52, at 1212-13.

85. *See* Borden, *supra* note 4, at 1019; Note, *supra* note 52, at 1213-16.

86. *See* Borden, *supra* note 4, at 1019-20.

the emphasis accorded each consideration by various judges and inevitably will result in inconsistencies not present under an exclusive appraisal remedy. Furthermore, adoption of an undefined entire fairness test will serve to deter parent corporations from transacting freeze-out mergers because of fear of judicial injunctions that minority shareholders will utilize to demand unrealistic cash-out prices.[87]

The instant decisions' requirement of a bona fide business purpose as a component of an undefined entire fairness test eliminates the certainty provided by Delaware's statutory merger scheme.[88] This uncertainty resulting from inevitable inconsistency in application of a vague fairness test emphasizes the need for a legislative remedy that will provide increased minority shareholder protection while retaining the certainty afforded majority shareholders by exclusive application of the appraisal remedy. If Delaware desires to increase minority stockholder protection while maintaining its policy of promoting statutory mergers, legislative amendment of the appraisal remedy offers the only satisfactory solution to these con-

87. Various courts have expressed some reluctance to enjoin freeze-out mergers when it appears that minority shareholders are seeking only bargaining leverage to demand a higher cash-out price. Thus the California court in *Jutkowitz v. Bourns, Inc.* sought to shape an alternative remedy to prevent this form of inequity. *See* text accompanying note 53 *supra*. *See also* Note, *supra* note 52, at 1203-04.

88. Professor Folk argues that "these two decisions, within a defined ambit, yield a greater measure of certainty and predictability than existed before." Folk, *Holding by State Court Grounded in Prior Law*, N.Y.L.J., Dec. 19, 1977, at 29, col. 5. He bases his contention on the conclusion that prior to the instant decisions, the Delaware Supreme Court had promulgated the entire fairness test in *Sterling v. Mayflower Hotel Corp.*, *see* notes 34-37 *supra* and accompanying text, but subsequently had adopted a procedural device requiring minority shareholder proof of actionable majority shareholder self-dealing, which allowed the courts to dispose of most cases without applying the entire fairness test. *E.g.*, Chasin v. Gluck, 282 A.2d 188 (Del. Ch. 1971). According to Professor Folk, this procedural device, which he labels a doctrinal deviation from *Sterling*'s entire fairness mandate, created uncertainty in planning freeze-out mergers because no parent corporation could be sure that the Delaware judiciary would not reverse its position and scrutinize the conflict of interest merger without requiring preliminary proof of actionable self-dealing. Indeed, *Tanzer* bears out Folk's contention by remanding the case for lower court determination of the proposed merger's entire fairness even though no actionable self-dealing was established.

Promanagement cases such as *Stauffer v. Standard Brands, Inc.* and *David J. Greene & Co. v. Schenley Industries, Inc.*, *see* text accompanying notes 28-33 *supra*, however, established at the very least a judicial attitude of promoting statutory mergers when no evidence of fraud or blatant overreaching exists. This judicial attitude, in turn, made parent corporations confident that most statutory mergers would receive judicial approval if the parent tendered a fair price for minority shares. Moreover, Delaware's statutory merger scheme requires no proof of entire fairness but does provide an appraisal remedy for resolution of minority shareholder claims. DEL. CODE ANN. tit. 8, § 262 (Michie 1975). If this appraisal remedy had been adjudged the exclusive remedy for minority shareholder challenges to proposed freeze-out mergers, greater certainty clearly would have been provided to parent corporations that now must plan a merger's entire fairness without judicial guidance.

flicting policies.[89] The amendment should provide that the merging parent must offer a stock conversion of the parent for subsidiary shares or alternatively, a minority share in the parent's expected post-merger profits.[90] The amendment essentially would expand the appraisal remedy by requiring the judiciary to derive an estimate of the parent's potential post-merger profit and to distribute this additional amount to the minority on a per share basis. If the parent expects a loss, it still should be required to pay fair value for minority shares, thus deterring the merger to the extent that it is uneconomical for the parent to absorb the whole loss. Amending the appraisal remedy thus will protect the minority from loss of potential future profits while affording majority shareholders certainty that the merger will be upheld if the minority challenges its fairness. Until statutory relief is forthcoming, Delaware courts must grope for consistent adjudication of freeze-out merger challenges guided only by the undefined tests of valid business purpose and entire fairness.

OBY T. BREWER III

Criminal Procedure—Prosecutorial Immunity—Federal Prosecutor Is Not Absolutely Immune From Suit for Alleged Perjury

I. FACTS AND HOLDING

Plaintiffs[1] brought a civil action in tort[2] charging that defendant federal prosecutor's[3] alleged perjury at a hearing incident to a

89. *Cf.* Borden, *Delaware Speaks Out Again on Takeouts*, N.Y.L.J., Oct. 25, 1977, at 1, col. 2 (arguing that judicial relief in freeze-out merger challenges is wholly inadequate and that only adoption of a legislative remedy can provide adequate and certain relief).

90. Various commentators have suggested the distribution of post-merger profits as an equitable solution to an unfair cash-out price. *See* Brudney, *supra* note 4, at 1025; Note, *supra* note 52 at 1216-20. Although this solution may prove difficult to apply when expected future profits are uncertain, its adjudication should prove no more difficult than an appraisal of a prospering corporation's share value in a depressed market.

1. Plaintiffs were members of an antiwar activist group known as the Vietnam Veterans Against the War/Winter Soldier Organization (VVAW/WSO).

2. Relying on Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the plaintiffs sought declaratory relief, damages, and the appointment of a special prosecutor to explore the alleged official wrongdoing. The instant court did not determine whether the *Bivens* action extended to cases of this type; it assumed the extension for the purposes of its discussion, leaving the determination to be made at the district court level. *See* note 48 *infra* and accompanying text.

3. In 1972 Goodwin, an attorney in the Justice Department's Internal Security Division,

grand jury investigation of plaintiffs' activities[4] violated their constitutional rights. On motion to dismiss, defendant[5] contended that he enjoyed absolute quasi-judicial immunity because he had been acting at the hearing in his official capacity as a special federal prosecutor. The district court[6] denied the motion, holding that the doctrine of quasi-judicial immunity does not apply when the prosecutor is alleged to have committed perjury.[7] On interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit, *held,* affirmed. Because a federal prosecutor's perjury during a court hearing incident and prior to a grand jury investigation falls within his investigative duty rather than his advocatory duty, the prosecutor is entitled only to a qualified immunity.[8] *Briggs v. Goodwin,* No. 75-1642 (D.C. Cir. Sept. 21, 1977).

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was appointed to serve as a Special Attorney for the investigation into the activities of the VVAW/WSO and to "assist in the trial of the case or cases" growing out of the investigation.

4. On the day of Goodwin's appointment subpoenas were served on more than twenty members of the organization scattered over four states and the District of Columbia. All were ordered to appear before a grand jury in Tallahassee, Florida. Many of the individuals had not met before and there were rumors that informants were among those who appeared with their attorneys. Prior to the commencement of the grand jury hearing, counsel filed a motion asking the district court to direct Goodwin and his associates to disclose whether any agents or informers were among those subpoenaed. During a hearing on the motion the district court peremptorily ordered Goodwin to take the witness stand and be sworn. The court then asked Goodwin whether "any of [the] witnesses represented by counsel [were] agents or informants" of the United States. Goodwin said, "No, Your Honor." The court denied counsel's request for an opportunity to question Goodwin.

The grand jury eventually indicted six of the plaintiffs, charging them with a variety of crimes centering around an alleged conspiracy unlawfully to disrupt the 1972 Republican National Convention. During discovery prior to the criminal trial the plaintiffs received materials which revealed that one Emerson Poe had been functioning as an FBI informant for some period of time. They alleged that prior to the grand jury proceeding Poe had relayed to federal investigators the substance of his conversations with one plaintiff, and that Poe served as an ongoing source of information concerning the defense strategy even after the indictments were returned. The plaintiffs were acquitted of all criminal charges.

5. In addition to Goodwin, the complaint named as defendants two regular federal prosecutors from the Northern District of Florida and a special agent of the FBI. The complaint was dismissed as to the latter three defendants for lack of venue and jurisdiction. The plaintiffs appealed, and the United States Court of Appeals for the District of Columbia reversed and reinstated the complaint as to all defendants.

6. The United States District Court for the District of Columbia.

7. The defendant Goodwin subsequently filed a motion to dismiss, alleging that he had absolute witness immunity from any damage action or civil suit based on his alleged false testimony. The district court also denied this motion, but certified only the question of prosecutorial immunity for interlocutory appeal.

8. It is important to note the procedural differences between an absolute immunity and a qualified immunity. An absolute immunity defeats a suit at its outset as long as the act complained of was committed while acting within the scope of the immunity. Whether an official is protected under a qualified immunity is dependent upon the circumstances and motivations of his actions, and if the claim is properly pleaded this often can be determined only after all the relevant evidence is introduced at trial. *See* Wood v. Strickland, 420 U.S. 308, 320-22 (1975); Scheuer v. Rhodes, 416 U.S. 232, 238-39 (1974).

II. LEGAL BACKGROUND

The common law principle that governmental officers should not be held liable for harm caused by their official conduct is rooted in the premise that public officials who exercise discretion will be unreasonably deterred from independent and vigorous decision making if they fear later review of their judgments through vindictive civil litigation.[9] Although the absolute immunity of judges has long been recognized,[10] the development of an immunity rule for prosecuting attorneys has been complicated by the diversity of prosecutorial functions. Some activities, such as decisions to prosecute and to present particular evidence to a jury, are closely associated with the judicial process and cast the prosecutor in the role of an officer of the court. Others, such as the direction of investigations or participation in surveillance activities, are further removed from the judicial function and cast the prosecutor in the role of an administrative or investigative officer.

At common law a prosecutor was immune from suit for malicious prosecution[11] and for defamatory remarks made in the exercise of his discretion during the course of judicial proceedings.[12] The prosecutor's immunity, however, was not absolute.[13] In a malicious prosecution action arising from criminal proceedings in which a prosecutor did not obtain an indictment, the privilege could be overcome by a showing of malice or lack of probable cause.[14] Additionally, a prosecutor was not absolutely immune from suit for false arrest,[15] and presumably, his immunity did not encompass assault.[16]

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9. Pierson v. Ray, 386 U.S. 547, 554 (1967). *See* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937) (listing nine identifiable reasons for the rule: (1) saving judges' time; (2) preventing influence on decisions through fear of subsequent suits; (3) removing discouragement to judicial office; (4) separation of powers; (5) necessity of finality of decisions; (6) existence of avenues of redress for erroneous decisions; (7) unfairness in penalizing honest error; (8) direction of judges' duty to public rather than individuals; and (9) judicial self-protection).

10. Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1871). At common law a judge was not liable for any injury resulting from acts performed within his jurisdiction, and jurisdiction was construed so broadly that a judge was held liable only if he acted entirely without color of authority. The common law immunity of judges was fully preserved in suits alleging deprivation of constitutional rights under 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. at 553-55. *See* note 19 *infra* and accompanying text.

11. *See* Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 4.3, at 305 n.7 (1956).

12. Yaselli v. Goff, 12 F.2d at 402-03; *see* RESTATEMENT (SECOND) OF TORTS § 586 & comment *b* (1977); 1 HARPER & JAMES, *supra* note 11, §§ 5.21-.22, at 419-27.

13. *See* W. PROSSER, THE LAW OF TORTS § 132, at 989 (4th ed. 1971).

14. *See, e.g.*, Carpenter v. Sibley, 153 Cal. 215, 94 P. 879 (1908); Leong Yau v. Carden, 23 Hawaii 362 (1916).

15. Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182 (1916); 1 HARPER & JAMES, *supra*

Prosecutorial liability at common law thus varied greatly with the nature of the prosecutor's activity.[17]

Federal courts traditionally held that prosecutors at the federal level enjoy absolute immunity under the common law for their judicial functions.[18] The courts also held that section 1983[19] did not modify a state prosecutor's quasi-judicial immunity and continued to utilize common law principles to define prosecutorial immunity.[20] Many of the federal courts nevertheless recognized that the scope of prosecutorial immunity could not be determined solely by reference to the prosecutor's official status but must be ascertained by examining the nature of his conduct.[21] Courts thus granted absolute immunity from section 1983 actions to a prosecutor's "judicial" acts, including the filing of complaints, the institution of proceedings for search or arrest of a suspect, and the drawing of indictments and informations.[22] When a prosecutor engaged in investigative, police-like roles, however, he often was granted only a qualified

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note 11, §§ 3.17-.18.

16. McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 RUT.-CAM. L.J. 65, 92 (1976).

17. *Id.*

18. Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

19. 42 U.S.C. § 1983 (1970), originally passed as § 1 of the Civil Rights Act of 1871, 17 Stat. 13, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The advent of the 1871 Civil Rights Act and § 1983 actions caused a re-examination of the doctrine of common law immunity with respect to all officials. Section 1983 provided remedies for violations of federally-protected rights by persons acting under color of state law. Although its narrow language clearly seemed to abrogate all immunities in tort actions, arguments that it should be strictly interpreted did not prevail. Imbler v. Pachtman, 424 U.S. 409, 417 n.11 (1976). In Tenney v. Brandhove, 341 U.S. 367 (1951), the Supreme Court established that § 1983 was to be read in harmony with general principles of tort immunity rather than in derogation of them.

20. *E.g.*, Fanale v. Sheeby, 385 F.2d 866 (2d Cir. 1967); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966); Hurlburt v. Graham, 323 F.2d 723 (6th Cir. 1963). A prosecutor acting within the scope of his prosecutorial duties was immune from § 1983 damage suits, since he was shielded by the same immunity protecting a judge acting within his jurisdiction. *E.g.*, Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965). A prosecutor acting outside the scope of his jurisdiction was not absolutely immune from suit. *E.g.*, Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969); Bauers v. Heisel, 361 F.2d 581, 591 (3d Cir. 1966); Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955); Cooper v. O'Connor, 99 F.2d 135, 138 (D.C. Cir. 1938).

21. *E.g.*, Corsican Prods. v. Pitchess, 338 F.2d 441, 444 (9th Cir. 1964); Balistrieri v. Warren, 314 F. Supp. 824, 826 (W.D. Wis. 1970); *see* Tyler v. Witkowski, 511 F.2d 449, 450 (7th Cir. 1975).

22. McCormack & Kirkpatrick, *supra* note 16, at 92.

immunity, which entitled him to the good faith defense shielding police officers.[23]

Because a prosecutor is an executive officer, he also may be entitled to immunities granted members of the executive branch. In early common law challenges to executive actions, the Supreme Court held that high federal officers are absolutely immune from civil liability for actions taken within the scope of their authority.[24] The Court also granted immunity to lower administrative officials and police officers for "discretionary" acts, requiring personal deliberation and judgment and carried out in good faith.[25]

Although section 1983 did not abolish the common law good faith defense, the Supreme Court in *Scheuer v. Rhodes*[26] departed from common law guidelines to decide the issue of state executive immunity under section 1983. In *Scheuer* personal representatives of three students killed by the Ohio National Guard at Kent State University sued the Governor of Ohio and other state officials for damages under section 1983. Plaintiffs alleged that defendants had unnecessarily deployed the Ohio National Guard on the Kent State campus and had ordered the Guardsmen to perform illegal actions that ultimately caused the deaths of plaintiffs' decedents. By refusing to extend absolute immunity to even the highest state executive official,[27] a unanimous Supreme Court narrowed the scope of execu-

23. *See* Apton v. Wilson, 506 F.2d 83, 91, 93-94 (D.C. Cir. 1974); Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974); Hilliard v. Williams, 465 F.2d 1212 (6th Cir.), *cert. denied,* 409 U.S. 1029 (1972); Robichaud v. Ronan, 351 F.2d 533, 536-37 (9th Cir. 1965). The rationale most often employed is that a prosecutor enjoys absolute immunity only by reason of the integral relationship between his acts and the judicial process. If the immunity is derivative from that of judges then it is absolute except for acts taken wholly in the absence of jurisdiction. If it is deemed to rest on the prosecutor's role, however, then the reason for the immunity ceases to exist when he acts in other than a quasi-judicial capacity. McCormack & Kirkpatrick, *supra* note 16, at 91.

24. *See, e.g.,* Spalding v. Vilas, 161 U.S. 483 (1896) (Postmaster General); Kendall v. Stokes, 44 U.S. (3 How.) 86 (1845) (Cabinet officials); Cooper v. O'Connor, 107 F.2d 207 (D.C. Cir.), *cert. denied,* 308 U.S. 615 (1939) (Comptroller of the Currency).

25. Ward v. Fidelity & Deposit Co., 179 F.2d 327 (8th Cir. 1950) (policeman). *See generally* PROSSER, *supra* note 13, § 132, at 989; HARPER & JAMES, *supra* note 11, § 3.18, at 227-28. The distinction between discretionary and ministerial functions is often difficult to ascertain; the decisional technique relies more on labeling than analysis. Recent Supreme Court decisions have generally avoided the "ministerial-discretionary" language in favor of analysis focusing on the nature of the official function. PROSSER, *supra* note 13, § 132, at 989.

26. 416 U.S. 232 (1974).

27. The Court stated:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable

tive immunity under section 1983.[28] At common law good faith alone generally had been sufficient to establish qualified immunity.[29] To obtain immunity under section 1983, however, *Scheuer* required an executive official to prove three elements: (1) that he acted in good faith; (2) that he had reasonable grounds to believe that his conduct was valid; and (3) that his actions fell within the scope of his official duties.[30] The Court failed to explain clearly whether an executive's qualified good faith immunity was a defense or an element of the cause of action.[31]

The scope of the immunity doctrine announced in *Scheuer* was refined in *Wood v. Strickland.*[32] In *Wood* two high school students, expelled from school without a hearing for violating a school regulation,[33] sought damages under section 1983 against school board members, claiming denial of their right to due process. The district court, relying on common law principles, granted the defendants' motion for a directed verdict on the ground that school board members were immune from suit absent proof of malice. The Supreme Court, however, refused to adopt the absolute common law immunity and held that *Scheuer*'s good faith standard requires an objective as well as a subjective analysis of the challenged conduct.[34] The appropriate standard thus asks whether the official knew or should have known that his actions would deprive those accused of misconduct of their constitutional rights and whether the official acted with malicious intent to cause such a deprivation.[35] Viewed together

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grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48.

28. McCormack & Kirkpatrick, *supra* note 16, at 84. *See generally* Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions,* 30 VAND. L. REV. 941, 974 (1977).

29. *See, e.g.,* Cobb v. City of Malden, 202 F.2d 701, 706-07 (1st Cir. 1953).

30. 416 U.S. at 247-48. Some lower courts, however, have overlooked the "reasonable grounds" criterion, citing *Scheuer* as establishing merely a good faith defense. Laverne v. Corning, 522 F.2d 1144, 1148 (2d Cir. 1975); Sapp v. Renfroe, 511 F.2d 172, 176 (5th Cir. 1975).

31. After *Scheuer* federal officers should at least be denied absolute immunity when the claims against them are constitutionally based. *See, e.g.,* Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (United States Attorney General and other high-ranking officials held not absolutely immune from liability for constitutional violations).

32. 420 U.S. 308 (1975).

33. The students brought alcohol to a school social function.

34. *Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1213 (1977) [hereinafter cited as *Developments in the Law*].

35. 420 U.S. at 321-22. The Court specifically held that no immunity would attach to the school official "if he knew or *reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the student

Scheuer and *Wood* clearly establish that the good faith executive "immunity" is a defense on the merits,[36] dependent on the circumstances and motivation of the defendant established at trial,[37] and ordinarily not determinable on a motion to dismiss but subject to the further factual development attendant to a motion for summary judgment.[38] Although the *Wood* Court explicitly limited its holding to "the specific context of school discipline,"[39] the Court's general phrasing of the qualified immunity standard led lower courts to apply it to a variety of defendants.[40]

In *Imbler v. Pachtman,*[41] the Supreme Court refused to apply the good faith immunity standard to a state prosecuting attorney. Plaintiff, a convicted murderer who had been released after the state prosecuting attorney revealed newly-discovered evidence, brought suit against the prosecutor for alleged knowing use of false evidence and suppression of material evidence at trial. After carefully analyzing the policy considerations underlying the common law rule of absolute prosecutorial immunity,[42] the Court held that a prosecutor enjoys the same immunity from civil suit under section

affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights." *Id.* at 322 (emphasis added).

36. *Developments in the Law, supra* note 34, at 1213; *see* note 8 *supra.*

37. *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); Scheuer v. Rhodes, 416 U.S. at 242-49.

38. *See* Scheuer v. Rhodes, 416 U.S. at 249-50; Safeguard Mut. Ins. Co. v. Miller, 472 F.2d 732, 733-34 (3d Cir. 1973); Greenlow v. California Dep't of Benefit Payments, 413 F. Supp. 420, 425-27 (E.D. Cal. 1976).

39. 420 U.S. at 322.

40. *E.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975) (superintendent of a state mental hospital); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975) (prison administrators); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.) (police officer), *cert. denied,* 423 U.S. 930 (1975); M.J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975) (city councilman, planning commissioner); Burkhart v. Saxbe, 397 F. Supp. 499 (E.D. Pa. 1975) (attorney general).

41. 424 U.S. 409 (1976).

42. The Court stated that granting only qualified immunity to a prosecutor would disserve the public interest by preventing vigorous and fearless performance of duties essential to the proper functioning of the criminal justice system: (1) a prosecutor's independence in bringing and conducting suit would be constrained by the possibility of his own potential liability in suits for damages; (2) frequent suits would divert the prosecutor's energy and attention from enforcement of the law; (3) the honest prosecutor wonld face danger of liability; (4) defending suits long after decisions are made imposes unique and intolerable burdens upon a prosecutor responsible for hundreds of suits annually; (5) a prosecutor would face greater difficulty in meeting the standards of qualified immunity than other administrative and executive officials; (6) the veracity of witnesses is frequently in doubt and triers of fact would be denied relevant information since a prosecutor would be hesitant to use such witnesses through concern for personal liability; (7) the ultimate fairness of the system could be weakened in post-trial procedures if there is a possibility that a post-trial decision in favor of the defendant might subject the prosecutor to suit. *Id.* at 424-25. *Compare* this list of concerns *with* note 9 *supra.*

1983 that he enjoyed for malicious prosecution actions at common law.[43] Although the Court purported to accept Judge Learned Hand's "balancing of evils,"[44] which balances the nature of prosecutorial conduct causing an injury against the degree of impairment of prosecutorial functions caused by subjecting a prosecutor to liability,[45] it rested its decision on its belief that "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest."[46] The Court expressly avoided the issue whether a balancing would require absolute immunity for a prosecutor's responsibilities that cast him in the role of an administrative or investigative officer rather than in the role of an advocate.[47]

Two post-*Imbler* decisions by the Third Circuit touched the issue of prosecutorial immunity in an action brought under *Bivens v. Six Unknown Named Agents*.[48] In *Brawer v. Horowitz*[49] the court determined that a prosecutor's advocatory role encompassed his attempts to solicit perjured testimony[50] and conceal exculpatory

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43. 424 U.S. at 424.

44. The Court quoted the reasoning of Judge Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950):

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

45. Judge Hand expressed his concerns as follows:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to subject all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have heen honestly mistaken to suit by anyone who has suffered from their errors.

Id.

46. 424 U.S. at 427.

47. *Id.* at 430-31. The Court rejected any distinction between presentation of perjured testimony and suppression of evidence.

48. 403 U.S. 388 (1971). In *Bivens* the Supreme Court established that federal law enforcement officers' violations of fourth amendment rights give rise to a federal civil cause of action analogous to the § 1983 action against state officials. Numerous lower federal courts have interpreted *Bivens* as creating a cause of action for damages arising from the violation of *any* constitutional right by a federal official. Other courts have read the leading case more narrowly, restricting its impact to fourth amendment violations. Briggs v. Goodwin, No. 75-1642, slip op. at 12-13 n.8 (D.C. Cir. Sept. 21, 1977).

49. 535 F.2d 830 (3d Cir. 1976).

50. A second issue addressed in *Brawer* was that of immunity for a witness who deliberately gave false testimony under oath during a federal proceeding. Assuming *arguendo* that

evidence. The court thus held that the prosecutor was entitled to absolute immunity under *Imbler*.[51] In *Helstoski v. Goldstein*,[52] however, the court held that deliberate prosecutorial leaks of false information designed to damage plaintiff's political prospects fell outside the rationale for absolute immunity set forth in *Imbler*. Because the *Helstoski* court did not address fully the investigative-advocatory distinction, its rationale does not establish clearly whether the court based its decision on a characterization of the activity as investigative or on a determination that such activity fell outside the scope of prosecutorial authority.[53] Although both cases accepted an apparent investigative exception to *Imbler*'s immunity doctrine, neither offered a definitive interpretation of the scope of such an exception. The instant case represents the first judicial attempt to define the investigative exception to a prosecutor's absolute liability.

III. THE INSTANT OPINION

After acknowledging that the prosecutor's testimony before the grand jury fell within "general matters committed by law to his control or supervision,"[54] the instant court addressed the issue whether the defendant's conduct fell within the scope of prosecutorial immunity granted by *Imbler*. The court stressed *Imbler*'s failure to determine whether public policy considerations that dictate recognition of absolute immunity when a prosecutor engages in advocatory activities[55] compel a similar result when he engages in

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a *Bivens* action would lie against a witness at a federal trial, the court followed the *Imbler* analysis, weighing the common law immunities and policy considerations and then adopting them. *Id.* at 836-37.

51. The court held that federal prosecutors sued under a *Bivens* theory should be accorded the same immunities as state officials sued under § 1983. The court acknowledged the distinction between investigative and advocatory roles, hut charcterized Horowitz's role as advocatory with no explanation. *Id.* at 834.

52. 552 F.2d 564 (1977).

53. In an equivocal explanation the court stated:

> Even if absolute prosecutorial immunity extends to the administrative and investigative functions of a United States Attorney, it is our opinion that certain paragraphs of Mr. Helstoski's complaint aver conduct which goes heyond the proper performance of these aspects of a prosecutor's job. . . . It would appear that such activity, if it occurred would lie outside of the rationale for absolute immunity set forth in *Imbler*. At most, it would be subject to a qualified good-faith immunity.

Id. at 566.

54. Briggs v. Goodwin, slip op. at 9 (quoting Spalding v. Vilas, 161 U.S. 483, 498 (1896)). The instant court also assumed *Bivens* authorized constitutional actions against federal officers to the same extent that § 1983 allows similar litigation against state functionaries. They left the question to be decided hy the district court at the appropriate time. *Id.* at 13 n.8.

55. *See* notes 9 & 42 *supra* and accompanying text.

essentially investigative activities.[56] Analyzing pre-*Imbler* circuit court decisions, the court discerned that the decisions distinguished between a prosecutor's judicial functions and his investigative activities and concluded that a prosecutor functioning primarily as an investigator should be accorded only the qualified immunity conferred on other investigative officers.[57] To determine whether the nature of defendant's activity was investigative, the court focused on its relationship to the trial proceeding.[58] Although the defendant's statement was made under oath in open court, the court found that such statement was related essentially to his investigative activities and not related directly to his judicial functions.[59] Accordingly, the court found that the prosecutor's protection from liability was a qualified immunity dependent on a showing that he entertained a good faith reasonable belief of the truth of his response.[60]

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56. Briggs v. Goodwin, slip op. at 16-20.

57. *Id.* at 20; *see* note 23 *supra.*

58. The court stated:

> Throughout the [*Imbler*] Court's opinion, the concentration on claims likely to arise from prosecutorial behavior at or immediately before trial is manifest. . . . All of the worrisome issues thus enumerated by the [*Imbler*] Court involve possible prosecutorial errors of commission or omission in connection with the *trial* of a criminal case . . . . Although [*Imbler*] makes clear that a prosecutor's advocacy function does extend beyond the confines of the trial courtroom, the examples of such preliminary advocate activities provided by the Supreme Court are instructive for tbeir common focus on a particular criminal proceeding.

Briggs v. Goodwin, slip op. at 15-17 (emphasis is the Court's).

59. As stated by the court:

> [A]ppellant's alleged perjury bears no relation whatever to the advocate's role as conceived by the Supreme Court in *Imbler.* The obligation to disclose, pursuant to judicial direction, the presence of Government informants among those subpoenaed to testify before the grand jury is entirely foreign to advocacy issues such as whether to initiate a prosecution or how to conduct a prosecution once hegun. Such disclosure was, rather, an action required of appellant by the court in order to enable the court to deal with a possible defect in the conditions under which subpoena compulsions had been brought to bear in tbe grand jury investigation.

Id. at 21.

60. *See* notes 26-38 *supra* and accompanying text. Additionally, since two of the three judges desired to avoid further trial court proceedings if the appellant was shielded by any kind of absolute immunity, the court addressed the witness immunity pursuant to the collateral order exception to the final judgment rule. *See* Abney v. United States, 97 S. Ct. 2034 (1977). Judge McGowan felt that the witness immunity issue was preserved in the record and available for review upon appeal of any final judgment on the action. Briggs v. Goodwin, slip op. at 31 n.14. The majority concluded that the issue of witness immunity was not relevant to a determination of the prosecutor's liability for suit. The court stressed that had Goodwin merely volunteered the information as an officer of the court there would have been no witness immunity question. The difference between the falsity of a nontestimonial representation and the technical consequence of perjury attached to a statement under oath was not deemed determinative of the immunity issue here. *Id.* at 32.

A lengthy and vigorous dissent charged the majority with creating a specious distinction between advocatory and investigative-administrative activities. According to the dissent, the prosecutor's action before a judge during a grand jury proceeding was clearly one "intimately associated with the judicial phase of the criminal process,"[61] and as such was entitled to absolute prosecutorial immunity under *Imbler*.[62] The dissent stressed that every example of prosecutorial activity described by the *Imbler* Court as administrative or investigative, unlike the prosecutor's conduct in the instant case, occurred outside the courtroom and courthouse.[63]

IV. COMMENT

As the first circuit court decision to adopt explicitly the *Imbler* investigative-advocatory distinction,[64] the instant opinion demonstrates that the distinction serves to sharpen rather than resolve the issue of prosecutorial immunity. The court's distinction between a prosecutor's advocatory and investigative conduct allows identical acts to be treated differently merely because a court might place them in different prosecutorial roles. For example, the court's equation of the advocatory role of a prosecutor with his functions at trial brings within the *Imbler* immunity perjured testimony given during the course of formal trial proceedings.[65] The same testimony given in a grand jury proceeding is not immune under the *Imbler* doctrine, however, because the court places the prosecutor's actions in such a proceeding within the scope of his investigative role. Although the court's dictinction is consistent with *Imbler*'s precise holding, which granted immunity for both willful suppression of exculpatory evidence and willful use of perjured testimony at trial,[66] the court ignores *Imbler*'s command that similar acts should be treated equally irrespective of the context in which they arise.[67]

The dissent's conclusion that no conduct inside a courtroom is investigative suggests a locational distinction that ignores the argu-

61. Briggs v. Goodwin, slip op. at 6 (Wilkey, J., dissenting) (quoting Imbler v. Pachtman, 424 U.S. at 430).

62. Additionally, the dissent alleged that Goodwin was entitled to absolute witness immunity for his sworn answer before the judge. Though the issue was neither briefed nor argued, the dissent raised the arguments that might be expected to be utilized on remand of the case.

63. Briggs v. Goodwin, slip op. at 4 n.10 (Wilkey, J., dissenting).

64. The Third Circuit decision in *Helstoski v. Goldstein* is inconclusive. *See* notes 52-53 *supra* and accompanying text.

65. *See* text accompanying note 59 *supra*.

66. 424 U.S. at 431 n.34.

67. *Id.*

ably advocatory or "judicial" nature of decisions to indict, prosecute, or dismiss as well as choices of witnesses and evidence, all of which occur outside the courtroom. Although such decisions and choices at some point may become truly investigative in nature, a dividing line cannot be drawn by use of the dissent's analysis. Moreover, the *Imbler* dictum impliedly repudiates a distinction based on location of the conduct by rejecting the argument that no conduct outside the courtroom may be advocatory.[68]

A more manageable distinction for imposing liability is to extend the Learned Hand balancing test.[69] The critical factors in determining liability thus should be: (1) the nature of the prosecutorial conduct causing the alleged injury, and (2) the degree of impairment of prosecutorial functions caused by subjecting a prosecutor to liability.[70] In cases in which the nature of a prosecutor's activity is such that the existence of liability will deter him from effective performance of his duties or protection of the constitutional rights of others, the balance should be struck in favor of immunity.[71] *Imbler* was such a case since the exculpatory evidence which led to the plaintiff's release on habeas corpus might not have been revealed by a prosecutor who was not immune from suit. In cases such as the instant case, however, because the existence of a private damage cause of action will encourage the prosecutor to exercise his duties with vigor, integrity, and honesty, justice demands that a cause of action be made available to citizens aggrieved by a prosecutor's conduct. Prosecutors will be less likely to falsify their responses to judicial inquiries if such conduct will subject them to civil liability. By employing a balancing test to determine prosecutorial immunity, courts will ensure that similar reprehensible acts will not be treated differently under the *Imbler* immunity doctrine.

The lack of guidance provided by *Imbler* adds confusion to the struggle to articulate a rational dividing line between conduct that falls within and conduct that falls outside the scope of prosecutorial immunity. The instant decision indicates that absolute prosecutorial immunity in all situations is neither feasible nor desirable, but it also illustrates that inconsistency inheres in any less than an absolute standard for immunity. If the Supreme Court intends to afford a prosecutor absolute immunity from suit, it should address the issue explicitly. Otherwise, it should adopt the impairment-of-

68. *Id.* at 431 n.33.
69. *See* notes 44-45 *supra* and accompanying text.
70. *See* Kattan, *supra* note 28, at 965.
71. *Id.* at 966.

function balancing test, which can be applied consistently to a prosecutor's various activities whether they are advocatory or investigative in nature.

CORNELIA ANNE CLARK

Securities Law—Rule 10b-5—Defense of *In Pari Delicto* Bars Private Damage Action Brought Against Tipper by Tippee Who Fails to Disclose Before Trading

I. FACTS AND HOLDING

Tippees[1] brought a private action for damages under section 10(b)[2] of the Securities Exchange Act of 1934 and rule 10b-5[3] charging that defendant tippers[4] disseminated false and misleading mate-

1. For the purposes of this discussion a "tipper" is a person who possesses material inside information on corporate affairs and who makes selective disclosure of such information for trading or other personal purposes. A "tippee" is one who receives such information from a "tipper." *See generally* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); Ross v. Licht, 263 F. Supp. 395 (S.D.N.Y. 1967); 3 L. LOSS, SECURITIES REGULATION 1450-51 (2d ed. 1961).

Plaintiff tippees were three individual investors who purchased more than 2,500 shares of Meridian Industries, Inc., common stock.

2. Section 10(b) of the Securities Exchange Act of 1934 [hereinafter cited as the 1934 Act], 15 U.S.C. § 78(j) (1970), provides:

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

3. SEC rule 10b-5, 17 C.F.R. § 240.10b-5 (1976), promulgated in 1942 pursuant to the SEC's rulemaking authority, provides:

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

4. Defendant tippers were Pittsburgh National Bank and one of its officers.

rial inside information[5] in advising plaintiffs of an imminent merger between two corporations that would result in appreciated stock values.[6] In reliance on this information, plaintiffs purchased stock in one of the corporations and subsequently incurred substantial losses on the stock when the proposed merger did not occur.[7] Defendants moved for summary judgment, claiming that the doctrine of *in pari delicto*[8] barred plaintiffs' recovery because plaintiffs also had violated rule 10b-5 by failing to make full disclosure of the inside information before trading on the open market.[9] The district court granted the tippers' motion for summary judgment.[10] On appeal to the United States Court of Appeals for the Third Circuit, *held,* affirmed. When a tippee violates rule 10b-5 by failing to make full disclosure to the investing public of material inside information prior to trading on the open market, the defense of *in pari delicto* bars a rule 10b-5 private damage action by the tippee against the tipper. *Tarasi v. Pittsburgh National Bank,* 555 F.2d 1152 (3d Cir. 1977).

II. LEGAL BACKGROUND

Section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 prohibit the use of material inside information in securities transactions prior to the disclosure of such information to the in-

5. Material information reveals the earnings, distributions, and probable future of a corporation and affects a reasonable investor's decision to buy, sell, or hold the corporation's securities. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848-49 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969).

6. Defendant bank officer had discussed explicitly the proposed merger with two of the plaintiffs and had given the third plaintiff express assurance that Meridian was "good stock."

7. Plaintiffs' losses totaled $22,000.

8. *In pari delicto* is an equitable defense judicially invoked to bar a plaintiff's action when both parties are equally or mutually engaged in illegal conduct. 1 J. POMEROY, EQUITY JURISPRUDENCE 942 (5th ed. 1941). The defense is based primarily on the court's desire to protect its integrity by declining to be used as an instrument of the wrongdoer and on the principle that a wrongdoer should not be permitted to profit from his misdeeds. *See* Perma Life Muffiers, Inc. v. International Parts Corp., 392 U.S. 134, 151 (1968) (Marshall, J., concurring in the result); Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits,* 78 HARV. L. REV. 1241, 1242 (1965).

9. In promulgating rule 10b-5, the SEC established the policy of equal disclosure to ensure to all trading parties equal access to information affecting their decisions. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969). According to the courts, 10b-5 thus requires anyone possessing material inside information to either disclose it to the investing public or abstain from trading on or recommending stock until disclosure is made. 401 F.2d at 848.

10. The suit was brought initially in the District Court for the Western District of Pennsylvania.

vesting public.[11] This prohibition and the concurrent sanctions provided[12] by the Securities Exchange Act apply to tippees as well as to tippers.[13] Furthermore, although the Act does not provide explicitly for private damage actions under section 10(b) and rule 10b-5, such actions have been implied judicially by reliance on the broad purpose of the Act to regulate securities transactions and to eliminate fraudulent conduct.[14] Consequently, when a nondisclosing tippee brings a private action to recoup losses stemming from a false or misleading tip given by the defendant tipper, the court must choose between allowing recovery to the tippee because he has been victimized by the tipper's fraudulent conduct, or denying recovery to the tippee on the ground of *in pari delicto* because he also has violated rule 10b-5 by failing to disclose. The courts denying the tippee recovery have viewed him as a joint tortfeasor who should not be permitted to escape liability under section 10(b) and rule 10b-5 by seeking indemnification from his fellow tortfeasor.[15] Other courts, relying on the overriding purpose of the Securities Exchange Act to ensure full disclosure of all material inside information prior to trading, have permitted nondisclosing tippees to recover from tippers, reasoning that an additional basis of liability will encourage tippers

11. Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *In re* Investors Management Co., [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,163 (S.E.C. 1971).

12. 15 U.S.C. § 77x (Supp. V 1975) provides:

> Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction he fined not more than $10,000 or imprisoned not more than five years, or both.

13. Ross v. Licht, 263 F. Supp. 395 (S.D.N.Y. 1967). *See also* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961). For a discussion of tippee liability under rule 10b-5, see Glickman, *"Tippee" Liability Under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934*, 20 U. KAN. L. REV. 47 (1971); Rapp & Loeb, *Tippee Liability and Rule 10b-5*, 1971 U. ILL. L.F. 55; Note, *SEC Rule 10b-5: A Recent Profile*, 13 WM. & MARY L. REV. 860, 930-36 (1972).

14. The federal judiciary first found an implied private action under the section and the rule in Kardon v. National Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946), and the United States Supreme Court confirmed the right in J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) and in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975). *See also* Comment, *Private Remedies Available Under Rule 10b-5*, 20 SW. L.J. 620 (1966); Note, *Implied Liability Under the Securities Exchange Act*, 61 HARV. L. REV. 858 (1948).

15. *E.g.*, Kuehnert v. Texstar Corp., 412 F.2d 700, 703 (5th Cir. 1969). *See* text accompanying notes 28-31 *infra*.

to forbear from initially disseminating inside information.[16] Thus the propriety of applying the *in pari delicto* defense in private actions by tippees under rule 10b-5 presents conflicting policy considerations that have not been resolved conclusively by the courts.

Some lower courts,[17] ruling on the availability of *in pari delicto* in a securities action, have relied on the antitrust decision handed down by the Supreme Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*[18] These courts have viewed *Perma Life* as having significant securities law implications because of the analogous enforcement policies underlying both the antitrust and the securities statutory schemes.[19] In refusing to recognize *in pari delicto* as a defense to an antitrust action,[20] the *Perma Life* Court concluded that the strong public policy in favor of competition is best served by ensuring that the private action will be an ever-present threat to deter those contemplating violation of the antitrust laws.[21] The Court also noted in dictum the impropriety of invoking broad common law barriers to relief when a private suit serves an important purpose.[22]

Some courts have relied upon the *Perma Life* reasoning and dictum to limit or exclude the defense of *in pari delicto.*[23] In *Nathanson v. Weis, Voisin, Cannon, Inc.*,[24] the District Court for the Southern District of New York, following the *Perma Life* approach, noted at the outset that the basic question was not whether the parties were equally at fault, but rather whether allowing *in pari delicto* promoted the primary purpose of the securities laws, the protection of the investing public.[25] The *Nathanson* court concluded that such a purpose is best furthered by disallowing the *in pari*

16. *E.g.*, Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50 (S.D.N.Y. 1971). *See* notes 24-26 *infra* and accompanying text.

17. *See, e.g.*, Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971); Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50 (S.D.N.Y. 1971).

18. 392 U.S. 134 (1968).

19. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); Note, *The Demise of In Pari Delicto in Private Actions Pursuant to Regulatory Schemes*, 60 CALIF. L. REV. 572, 603-04 (1972).

20. 392 U.S. at 140.

21. *Id.* at 139.

22. *Id.* at 138. The Court's assertion, however, may be limited in scope since both cases cited to support its statement were antitrust actions.

23. *See, e.g.*, Pearlstein v. Scudder & German, 429 F.2d 1136, 1141 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971).

24. 325 F. Supp. 50 (S.D.N.Y. 1971).

25. The court held that a plaintiff's fraudulent conduct is only one factor to be weighed in determining the availability of the *in pari delicto* defense. The court did not state, however, how much weight should be afforded the plaintiff's conduct.

delicto defense and holding the tipper liable regardless of the degree of tippee culpability, thus discouraging the tipper from making the initial selective disclosure.[26]

Other courts have viewed *Perma Life*'s disallowance of the defense as limited to its facts and have noted that the opinion as a whole manifests a recognition that a plaintiff who shares substantially equal fault may be barred from recovery, notwithstanding the public policy favoring private enforcement.[27] Approximately one year after the *Perma Life* decision, the Fifth Circuit, in *Kuehnert v. Texstar Corp.*,[28] allowed the *in pari delicto* defense in a tippee-tipper suit brought under rule 10b-5. The Fifth Circuit concluded that when a plaintiff's fraudulent intent is clear,[29] permitting the defense provides a strong deterrent to rule 10b-5 violations by tippees. The tippee thus knows that if the information is false, he is left with no legal recourse to recoup his losses,[30] and that if the information is true, he may be liable to the person with whom he has traded.[31]

Still other courts, in determining the applicability of *in pari delicto,* have considered the plaintiff's relative magnitude of culpability, emphasizing the nature and degree of plaintiff's participation in the illicit securities transaction. In *Katz v. Amos,*[32] the court held that the plaintiff's subsequent transfers of unregistered stock to third parties in violation[33] of the 1933 Securities Act constituted transactions separate from plaintiff's purchase of the stock from the defendant. Thus the court denied the *in pari delicto* defense since plaintiff's illegal conduct was not sufficiently connected to defendant's violation. In *James v. DuBreuil,*[34] however, the court found plaintiff's willingness to backdate certain documents illegally to be

26. The court reasoned that by denying the defense, the would-be tipper, aware of potential litigation should his tip prove unprofitable, will be deterred from making any selective disclosure of inside information. 325 F. Supp. at 58.

27. *E.g.,* James v. DuBreuil, 500 F.2d 155 (5th Cir. 1974); Kuehnert v. Texstar Corp., 412 F.2d 700 (5th Cir. 1969).

28. 412 F.2d 700 (5th Cir. 1969).

29. In *Kuehnert* plaintiff bought stock in defendant corporation on the strength of false inside information with the knowledge that nondisclosure before trading was improper. 412 F.2d at 702.

30. According to the court, allowing recovery would give the tippee an enforceable warranty that the information was true and therefore would encourage 10b-5 violations. 412 F.2d at 705.

31. *See also* Ross v. Licht, 263 F. Supp. 395 (S.D.N.Y. 1967).

32. 411 F.2d 1046 (2d Cir. 1969).

33. Plaintiff had violated § 12(1) of the Securities Act of 1933, 15 U.S.C. § 77*l*(1) (1970), which prohibits the sale of unregistered securities.

34. 500 F.2d 155 (5th Cir. 1974).

an essential part of the transaction claimed by plaintiff to be fraudulent.[35] Stressing plaintiff's intent to consummate and profit from an obviously unlawful transaction,[36] the court allowed *in pari delicto.* The rule emerging from these cases is that when a plaintiff's violation constitutes a vital part of the transaction of which he complains and when plaintiff's culpability roughly equals in magnitude that of the defendant, plaintiff should be barred from recovery.[37]

By automatically disallowing the *in pari delicto* defense whenever enforcement of statutory regulations is promoted by private actions, decisions such as *Nathanson* indicate that some courts do not view the degree of plaintiff culpability as a significant factor in determining the applicability of the defense.[38] Other courts, such as those in *Kuehnert, Katz,* and *DuBreuil,* however, have regarded degree of plaintiff culpability as an important element in assessing the propriety of the defense in a securities action. The latter approach requires some standard by which to determine when a plaintiff's culpability is substantially equal to a defendant's so as to trigger the application of the defense. The Supreme Court's decision in *Ernst & Ernst v. Hochfelder*[39] suggests a framework by which the lower courts can evaluate a plaintiff's culpability. In *Hochfelder* the Court reviewed section 10(b), its legislative history, and the administrative history[40] of rule 10b-5, and without discussing the public policy issues,[41] concluded that an allegation of scienter is required in a private action for damages.[42] In construing the langnage of section 10(b) the Court relied upon terms within the statute strongly suggesting that section 10(b) was intended to proscribe knowing or

35. In *DuBreuil,* defendant, an insider of a merging bank, persuaded plaintiff to sell defendant his shares in the bank on the pretext that their value would appreciate when placed in a nonexistent "organizers' trust." Plaintiff had agreed to hackdate the transfer documents so that sale of the stock to the insider during the merger period would appear legal under a rule then in effect. 500 F.2d at 156-57, 159.

36. *Id.* at 157-58.

37. This rule reflects the notion posited in *Perma Life* that a full participant in a statutory violation may not be immune from liability. 392 U.S. at 140. *See also* Comment, *Securities Actions: Equitable Defenses and the Good Faith Defense for "Controlling Persons,"* 44 FORDHAM L. REV. 1173, 1180 (1976).

38. *See* note 25 *supra* and accompanying text.

39. 425 U.S. 185 (1976).

40. For a summary of the legislative history of § 10(b), see A. BROMBERG, SECURITIES LAW: FRAUD—SEC RULE 10b-5 § 2.2, at 331-40, and for a summary of the administrative history of rule 10b-5, see A. JACOBS, THE IMPACT OF RULE 10b-5 § 5.02, at 1-108 to -113 (1974).

41. Finding the language and legislative history of § 10(b) dispositive, the Court declined to consider matters of policy. 425 U.S. at 214 n.33.

42. *Id.* at 193.

intentional misconduct.[43] Examining the section's legislative history,[44] the Court found evidence that Congress did not intend one to be liable for prohibited practices unless he acted in bad faith.

The utility of the *Hochfelder* decision, however, is limited by the ambiguous standard posited for the mental state necessary to establish 10b-5 liability. Because the Court found an absence of an expansive congressional intent in enacting section 10(b), it refused to extend coverage of the section to private actions for damages based on negligence alone.[45] Unfortunately, despite the Court's initial definition of scienter as "a mental state embracing intent to deceive, manipulate, or defraud,"[46] the Court expressly declined to decide whether reckless behavior is sufficient[47] and did not discuss whether knowledge without proof of intent to deceive will impose civil liability. The decision, however, has provided federal courts a foundation with which to begin a formal evaluation of the scienter standard.

Absent empirical evidence assessing the effectiveness of the *in pari delicto* defense in enforcing security regulations and without a legislative pronouncement or an authoritative Supreme Court ruling as to the propriety of the defense in tippee-tipper suits, the lower courts must continue to exercise discretion in applying this common law barrier to relief. When a court determines that public policy favors the invocation of the defense, equality of fault must be established. Because Congress apparently has relegated the task of implying the rights and liabilities under 10b-5 to the judiciary, each new tippee-tipper case affords the courts an opportunity to reexamine both the propriety of the application of *in pari delicto* in a 10b-5 action and the standard by which to evaluate plaintiff's culpability under section 10b and rule 10b-5.

III. The Instant Opinion

In determining whether to grant the defendants' motion for summary judgment, the instant court[48] adopted the two-part analytical framework developed in *Perma Life*. Accordingly, the court initially inquired whether the unlawful conduct of the tippees was

43. The Court particularly was persuaded by the use of such terms as "manipulative," "device," and "contrivance," all of which tend to evince an element of intent. *Id.* at 199.

44. *See* note 41 *supra*.

45. 425 U.S. at 214.

46. *Id.* at 193-94 n.12.

47. *Id.*

48. Judge Adams delivered the opinion of the court in which Judges Kalodner and Hunter concurred.

substantially equal to that of the tippers, thereby warranting invocation of the *in pari delicto* defense.[49] The court determined that the tippees' voluntary, illegal conduct was of sufficient magnitude and had sufficient causal relation to their losses to render their conduct as culpable as the behavior of defendants.[50] The second phase of the court's inquiry focused on whether the purposes of the 1934 Act in general, and rule 10b-5 in particular, are better served by subjecting the tipper to liability for his misrepresentation or by denying the tippee relief if he accepts and trades upon inside information that later proves to be false. After limiting *Perma Life*'s denial of *in pari delicto* to its facts,[51] the court concluded that when the parties are of substantially equal fault, permitting the *in pari delicto* defense more effectively deters 10b-5 violations.

The court grounded its opinion in both practical and theoretical considerations. From a practical standpoint, the court observed that discouraging a tippee's use of inside information abates the flow of all inside information, not simply that for which a tipper may be held liable.[52] Furthermore, the court maintained that elimination of the defense actually might encourage tippee violations by giving a tippee an enforceable warranty that the inside information is true.[53] The court also noted that tippers are deterred substantially by the possibility of SEC and criminal actions and private suits by nontippee purchasers and sellers who have been affected adversely. Consequently, permitting the defense would not detract significantly from the deterrence of tipper violations.

As a theoretical justification for its decision, the court stated that its position effectuated the underlying policy of the *in pari*

49. *See* note 8 *supra.*

50. Although the court acknowledged in a footnote that 10b-5 liability is limited by the *Hochfelder* scienter requirement, it failed to address specifically that issue in the instant case. 555 F.2d at 1163 n.54. Rather than basing its determination of the applicability of the *in pari delicto* defense on an analysis of plaintiff culpability, the court seemed to regard the causal relationship between plaintiffs' conduct and their injury as sufficient to render the plaintiffs in equal fault with the defendants. *Id.* at 1162.

51. The court maintained that in *Perma Life* the plaintiffs' participation in the illegal agreement was passive and perhaps coerced in contrast to the present plaintiffs' active, voluntary involvement in the wrongdoing. The court explained *Perma Life*'s denial of the defense by reasoning that application of *in pari delicto* to passively involved plaintiffs would not serve the purposes of the antitrust laws because such application would not deter future violations and might undermine the effectiveness of treble damage actions. *Id.* at 1163-64.

52. The court observed that the absence of the defense would have the greatest deterrence to would-be deliberate purveyors of false information since they would be liable to tippees. In light of the *Hochfelder* requirement of scienter, it is uncertain whether tippers believing their tips to be true would be forestalled from disseminating inside information by the threat of tippee suits.

53. *See* note 30 *supra* and accompanying text.

delicto defense—protecting the integrity of the courts and preventing wrongdoers from profiting from their misdeeds.[54] The court also observed that the invocation of the defense is stronger in the securities context than in the antitrust field because it is more appropriate to engraft judicially fashioned defenses onto judicially implied causes of action than to engraft such defenses onto causes of action provided by statutory enactments.[55] Thus the court determined that rule 10b-5 enforcement considerations mandate invocation of the *in pari delicto* defense.

IV. COMMENT

The instant decision evidences the Third Circuit's attempt to achieve both equitable results and effective 10b-5 enforcement by examining the conduct of the parties and balancing the equities in each case before imposing liability in a tippee-tipper suit. The balancing approach employed by the court adopts the *Perma Life,*[56] *Katz,* and *DuBreuil*[57] position that a plaintiff should be barred from recovery when his violation constitutes a part of the transaction of which he complains and when his culpability essentially equals that of the defendant. The court clearly rejects *Nathanson*'s inelastic adherence to broad policy rules,[58] which implies a full recovery to a tippee regardless of his fraudulent activities, because absent a realistic weighing of the specific equities in each case, culpable plaintiffs might be rewarded and the protective purpose of 10b-5 effectively defeated when the defrauding tippee's conduct is as injurious to the investing public as the conduct of the defrauding tipper. The *Hochfelder* requirement that scienter be shown in order to impose 10b-5 liability further supports the instant holding since this stricter standard of conduct presumably applies to both plaintiffs and defendants.[59]

Although the court employed an exhaustive and well-reasoned analysis to decide the propriety of the *in pari delicto* defense in a 10b-5 action, its summary invocation of the defense in the instant case failed to consider adequately whether the parties' conduct placed them *in pari delicto.* The application of the *in pari delicto*

54. *See* note 8 *supra.*

55. Private antitrust actions are provided for in § 4 of the Clayton Act, 15 U.S.C. § 15 (1964). Private suits under the securities laws, however, have been judicially implied. *See* note 14 *supra.*

56. *See* note 27 *supra* and accompanying text.

57. *See* note 38 *supra* and accompanying text.

58. *See* notes 24-26 *supra* and accompanying text.

59. *See* notes 39-47 *supra* and accompanying text.

defense traditionally has required a court to scrutinize the conduct of the parties in order to determine their relative fault.[60] Furthermore, in view of the scienter requirement imposed by *Hochfelder*, a court invoking the *in pari delicto* defense in a 10b-5 action must find scienter on the part of both the plaintiff and the defendant. The court's apparent assumption that the tippee's conduct after receipt of the inside information was as culpable as the behavior of the defendant ignores *Hochfelder*'s scienter requirement. Thus the court's failure to ascertain the relative degree of tippee culpability before imposing liability under rule 10b-5 departs from both common law principles and the Supreme Court's interpretation of rule 10b-5.

The *de minimis* standard employed by the court for reprovable tippee participation clearly risks overinclusiveness by threatening the imposition of liability for nonculpable behavior.[61] The court's strict and apparently indiscriminate sanction on tippee conduct evidences a punitive policy that often might defeat the protective purpose of rule 10b-5. Additionally, by automatically invoking the *in pari delicto* defense without a realistic balancing of the equities of the parties, the court adopts an approach that resembles in form the *Nathanson* analysis, which the court regarded as effectively undermining the protective purposes of rule 10b-5. Although the court correctly perceived that rule 10b-5 is sufficiently expansive to cover tippees, its interpretation should have distinguished between tippees possessing scienter and tippees whose conduct is less culpable. By failing to make such a distinction, the court risks invoking the sanctions of rule 10b-5 to punish those investors whom the rule was designed to protect.

Although the court correctly concludes that determination of the propriety of the *in pari delicto* defense in securities actions should be left to the discretion of the court, courts must proceed cautiously in exercising such discretion. They should apply the standard of conduct set forth in *Hochfelder* in determining whether a plaintiff and defendant have engaged in the substantially equal conduct necessary to invoke the *in pari delicto* defense. Because the existence of scienter by the plaintiff tippee always will constitute a material issue to be resolved on the basis of the evidence proferred

60. *See* note 8 *supra.*

61. *See* note 51 *supra.* Some commentators have suggested that the standard of proof for actions against tippees should be even stricter than that for tipper actions. *See* Bromberg, *Corporate Information: Texas Gulf Sulphur and its Implications,* 22 Sw. L.J. 731, 747-49 (1968).

by both parties, a court recognizing the propriety of the *in pari delicto* defense will be compelled to reach the merits of the case before ruling on the applicability of the defense in a 10b-5 tippee-tipper suit.

I. TERRY CURRIE

Torts—Negligence—Child Has Cause of Action for Preconception Medical Malpractice

I. FACTS AND HOLDING

Plaintiff, claiming that she suffered permanent physical injuries[1] as a result of defendants' conduct prior to her conception, sought to recover damages in a negligence action.[2] In 1965 plaintiff's mother,[3] who had Rh negative blood, was given two transfusions of incompatible Rh positive blood[4] in defendant hospital where defendant physician was director of laboratories.[5] Plaintiff's mother did not discover that these transfusions had sensitized her blood until shortly before plaintiff's birth in 1973.[6] Defendants moved to dismiss for failure to state a cause of action, arguing that because plaintiff had not been conceived at the time of the alleged negligent conduct, defendants owed no duty of care to plaintiff. The trial

1. Plaintiff alleged permanent damage to various organs, including her brain and nervous system. Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1251 (Ill. 1977).

2. The complaint also alleged willful and wanton misconduct by the defendants. Plaintiff claimed that the defendants had discovered that improper transfusions had been given to plaintiff's mother but had failed to notify plaintiff's mother or her family. *Id.* This claim was not considered on appeal.

3. At the time of the alleged misconduct, plaintiff's mother was thirteen years old. *Id.*

4. A person whose blood contains the Rh factor, a substance causing the formation of antibodies in the blood, has Rh positive blood. About 85% of all people are Rh positive. The remaining 15% of the population is Rh negative. When Rh positive blood is transferred into the system of a person having Rh negative blood, "sensitization" results, making the blood antagonistic to future transfusions. 2 ATTORNEY'S DICTIONARY OF MEDICINE R-39 (J. Schmidt ed. 1975).

5. The complaint alleged that the hospital, the director of laboratories, and their agents were in complete control of the selection of blood to be used in the two 500 c.c. transfusions. Renslow v. Mennonite Hosp., 367 N.E.2d at 1251.

6. The mother's physician discovered defendants' error during a routine blood screening performed as a part of prenatal care. The mother's physician induced labor to bring about the premature birth of plaintiff because his diagnosis had determined that the life of the unborn child was in jeopardy. At birth the plaintiff suffered from hyperbilirubinemia, necessitating immediate, complete exchange transfusions of her blood. *Id.* The primary symptom of hyperbilirubinemia is an abnormally large amount of bilirubin, a red bile pigment formed from hemoglobin, circulating in the blood, which may result in jaundice if its concentration is sufficient. STEDMAN'S MEDICAL DICTIONARY 668 (4th ed. 1976).

court[7] granted defendants' motion, but the Illinois Appellate Court reversed and remanded the case for further proceedings.[8] On appeal to the Supreme Court of Illinois, *held,* affirmed. A child injured by the negligent acts of a physician and a hospital committed against his mother prior to his conception has a cause of action based on negligence. *Renslow v. Mennonite Hospital,* 367 N.E.2d 1250 (Ill. 1977).

II. LEGAL BACKGROUND

Prior to 1946 courts generally denied recovery to children who allegedly were injured as a result of prenatal negligent conduct.[9] *Dietrich v. Inhabitants of Northampton,*[10] the first American case to deal with the issue, held that the administrator of the estate of a child who had survived for only a few minutes after his negligently-caused premature birth[11] could not maintain a wrongful death action.[12] Noting the absence of precedent, the court reasoned that because the common law courts had considered an unborn child to be a part of the mother, only she could recover damages.[13] The Supreme Court of Illinois in *Allaire v. St. Luke's Hospital*[14] also employed the common law idea that prior to birth a child did not have a "distinct and independent existence"[15] to deny a child's cause of action for injuries allegedly suffered in an accident during the prenatal period.[16] The dissent, however, argued that neither the lack of precedent nor the common law's characterization of the unborn child as a part of its mother justified denying a child's cause of action to redress prenatal injuries.[17] Because medical science had shown that a fetus could survive the death of its mother and was

7. The trial court was the Circuit Court of McLean County.

8. Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976). *See* Note, *Torts Prior to Conception: A New Theory of Liability,* 56 NEB. L. REV. 706 (1977); 10 J. MAR. J. PRAC. & PRO. 417 (1977).

9. W. PROSSER, THE LAW OF TORTS § 55 (4th ed. 1971).

10. 138 Mass. 14 (1884). Justice Holmes wrote the court's opinion.

11. The mother of the deceased child, during her fourth or fifth month of pregnancy, slipped on a defect in a public highway, fell, and subsequently suffered a miscarriage. *Id.* at 14-15.

12. The court found that the deceased was not a "person" under the administration statute. 1882 Mass. Pub. Stat. ch. 52, § 17.

13. 138 Mass. at 17.

14. 184 Ill. 359, 56 N.E. 638 (1900) (*per curiam*).

15. *Id.* at 365, 56 N.E. at 639.

16. Plaintiff allegedly was injured in an accident on an elevator operated by defendant hospital less than 10 days before his birth. Plaintiff's mother also suffered severe harm. *Id.* at 359-63, 56 N.E. at 638.

17. *Id.* at 368-72, 56 N.E. at 640-41 (Boggs, J., dissenting).

therefore a separate entity, the dissent concluded that the defendant owed a duty of ordinary care to the plaintiff during the prenatal period.[18]

The ideas stated in the *Allaire* dissent emerged in 1946 as the majority opinion in *Bonbrest v. Kotz,*[19] a decision that initiated a sequence of cases rejecting the traditional rule.[20] In *Bonbrest,* a medical malpractice action, the court emphasized that at the time of the claimed misconduct the plaintiff had been a viable fetus, and subsequent to the misconduct plaintiff had been born alive.[21] The court thus refused to find that the plaintiff had been merely a part of her mother at the time of the negligent acts.[22] The court also rejected the policy argument raised by defendant that allowing a cause of action in prenatal cases would lead to difficult proof problems and determined that proof of causation in such cases would be no more difficult than in other medical malpractice actions.[23]

Although the cases that followed *Bonbrest* rejected the common law rule expressed in *Dietrich* and *Allaire,* they generally did not accept the viability criterion laid down by *Bonbrest.*[24] The court in *Smith v. Brennan*[25] refused to apply the viability rule because experts could not determine positively that a fetus was viable at the time of injury unless birth occurred immediately thereafter and the child survived.[26] Moreover, the court maintained that denying recovery because plaintiff could not prove that he was viable at the time of the wrongful acts, even though he could prove that the acts had caused the injury, was simply unjust.[27] The court therefore

18. *Id.* at 374, 56 N.E. at 642.

19. 65 F. Supp. 138 (D.D.C. 1946).

20. These cases "brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." PROSSER, *supra* note 9, at § 55.

21. A fetus is viable when it is sufficiently developed to live outside the uterus. STEDMAN'S MEDICAL DICTIONARY, *supra* note 6, at 1151.

22. 65 F. Supp. at 140. The court argued that although a viable unborn child depended on its mother heavily, it was "not a 'part' of the mother in the sense of a constituent element." *Id.*

23. *Id.* at 142-43; *accord,* Woods v. Lancet, 303 N.Y. 349, 356, 102 N.E.2d 691, 695 (1951); PROSSER, *supra* note 9, at § 55. The court concluded that the plaintiff's cause of action should be recognized because "[T]he law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884 [the date of *Dietrich*]." 65 F. Supp. at 143.

24. Many courts indicated in dictum that recovery should he limited to plaintiffs who were viable at the time of the misconduct, but when actually confronted with the issue, most courts have allowed recovery for negligence occurring in the early part of preguancy. PROSSER, *supra* note 9, at § 55.

25. 31 N.J. 353, 157 A.2d 497 (1960).

26. *Id.* at 367, 157 A.2d at 504.

27. *Id.* This injustice was the court's "primary consideration."

concluded that a child has a separate, legally recognizable existence from the moment of conception.[28] Reaching the same result, the court in *Sinkler v. Kneale*[29] emphasized the ability of medical science to demonstrate that a fetus has an existence separate from its mother from the moment of conception.[30] The dissent in *Sinkler* was concerned that the majority had made an unwarranted assessment of the state of medical knowledge[31] and feared that the determination whether the alleged negligent conduct had proximately caused the prenatal injury would, in most cases, be no more than "sheer speculation."[32] Nevertheless, most courts that have considered cases in which negligent conduct occurred early in pregnancy have agreed that plaintiff's failure to prove that he was viable at the time of the negligence should not bar recovery.[33]

Having permitted recovery for previability negligence, the courts next faced the question whether negligence occurring prior to conception also was actionable. In *Zepeda v. Zepeda*[34] the court indicated in dictum that a plaintiff might have a cause of action for a wrongful act committed before he was conceived, reasoning that "[i]t makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them."[35] Prior to the instant case, however, only two cases had considered the question whether a child's physical injuries[36] caused by preconception negligent conduct might give rise to a cause of action. In the first of these cases, *Jorgensen v. Meade Johnson Laboratories, Inc.*,[37] plaintiff alleged that his mother's consumption of

28. *Id.* at 362, 157 A.2d at 502. The court cited several medical texts to show that a child has a separate, medically-recognized existence from the moment of conception and concluded that the law also should recognize this fact.

29. 401 Pa. 267, 164 A.2d 93 (1960). In both *Smith v. Brennan* and *Sinkler v. Kneale*, the plaintiffs' injuries allegedly were due to defendants' negligence in automobile accidents.

30. *Id.* at 272, 164 A.2d at 95.

31. The dissent considered the majority's conclusion on the state of medical knowledge to be unsupported by the record of the case. *Id.* at 276, 164 A.2d at 97 (Bell, J., dissenting).

32. *Id.* at 278, 164 A.2d at 98. *See also* PROSSER, *supra* note 9, at § 55 n.33; Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962). The dissent's concern that inadequate medical knowledge would lead to "sheer speculation" on the connection between the misconduct and injury should have been directed to the element of causation in fact rather than the element of proximate cause. *See* notes 56-59, 63 *infra* and accompanying text.

33. PROSSER, *supra* note 9, at § 55; *see* cases collected in Annot., 40 A.L.R.3d 1222, 1230-52 (1971).

34. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

35. *Id.* at 250, 190 N.E.2d at 853; *see* James, *Scope of Duty in Negligence Cases*, 47 Nw. U.L. REV. 778, 788 (1953).

36. A cause of action has been allowed for fraudulent misrepresentations occurring prior to plaintiff's conception. Piper v. Hoard, 107 N.Y. 73, 13 N.E. 626 (1887).

37. 483 F.2d 237 (10th Cir. 1973).

birth control pills manufactured by defendant had altered her chromosome structure and that plaintiff consequently had developed a Mongoloid deformity during the prenatal period.[38] In deciding that the plaintiff should have an opportunity to prove his allegations, the court analogized the facts before it to a hypothetical situation[39] in which an infant, injured by a defective food product manufactured before his conception, would have a cause of action.[40] *Jorgensen*'s utility to a plaintiff alleging preconception negligence might be limited because the court did not state clearly that a cause of action for preconception misconduct could be predicated on negligence alone.[41]

The second case to confront the question whether a cause of action for preconception negligence could be maintained was *Park v. Chessin.*[42] In that case, decided by the trial court on a motion to dismiss, plaintiff sought damages for physical injuries allegedly caused by defendant physicians' negligent conduct prior to plaintiff's conception.[43] The court found that the plaintiff's birth had been forseeable to the defendants when they committed the alleged tortious acts[44] and that the defendants were or should have been aware of the danger that plaintiff might be born with defects.[45] Although *Park,* like *Jorgensen,* evidences a judicial willingness to recognize a cause of action for preconception negligence, its precedential value is limited since the issue of preconception liability was decided at the trial level. The instant court is the first court of last resort to consider whether preconception negligence gives rise to a cause of action.

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38. The plaintiff sought to hold defendant liable under theories of strict liability, negligence, and breach of express and implied warranties. Remanding the case for proof on the issues of causation in fact and proximate cause, the court did not indicate which claim would entitle plaintiff to relief. *Id.* at 240-41; *see* note 52 *infra.*

39. Professor James has employed the same hypothetical to conclude that "the interests within the range of peril" need not exist when the misconduct occurs to find liability. James, *supra* note 35, at 788.

40. 483 F.2d at 240. The *Jorgensen* court stated that "the pleading should not be construed as being limited to effects or developments before conception." *Id.* at 239. This language demonstrates the court's recognition of the principle that the negligent conduct and the alleged injury need not coincide for liability to accrue. Although the misconduct takes place prior to conception, no injury to the plaintiff can occur until after that moment. *See* note 35 *supra* and accompanying text. *But see* Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law,* 28 Sw. L.J. 414, 418 n.27 (1974).

41. *See* note 38 *supra.*

42. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).

43. The complaint alleged that the defendants negligently advised the plaintiff's parents that it would be safe to have children after one child had died of congenital kidney disease.

44. 88 Misc. 2d at 228, 387 N.Y.S.2d at 208.

45. *Id.* at 230, 387 N.Y.S.2d at 210.

III. The Instant Opinion

After assessing the historical development of the law of prenatal torts, the instant court rejected the defendants' contention that a plaintiff must allege that he was viable at the time of injury in order to recover for negligently-inflicted harm.[46] The court then sought to determine a proper method for analyzing plaintiff's preconception tort claim. In its view, both *Jorgensen* and *Park* had focused upon causation in permitting a cause of action for preconception negligent conduct. The court, however, analyzed the case in terms of duty, finding no reason to abandon the policy considerations traditionally defining duty merely to establish other policies for limiting the element of causation in fact.[47] Citing several medical authorities on blood transfusions and prenatal defects and noting that defendants were a doctor and a hospital,[48] the court determined that plaintiff's injuries were reasonably foreseeable to the defendants at the time of the alleged negligence. The court also found that advancements in medical science have made many prenatal injuries preventable. Stating that duty should be determined not by foreseeability alone[49] but also by public policy, the court determined that because plaintiff's injuries had been foreseeable to defendants and because public policy required prevention of prenatal injuries whenever practicable, defendants owed a duty to the plaintiff even though she had not been conceived at the time of the misconduct.[50] The court thus concluded that denying plaintiff's cause of action for preconception negligence was no more defensible than denying a

46. The Supreme Court of Illinois had never considered the issue although the Appellate Court previously had abandoned the viability criterion. *See* Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961). The court recognized the trend toward abandonment of the viability criterion, and in support of this trend cited medical authority to show that some congenital defects develop only during previability stages. Renslow v. Mennonite Hosp., 367 N.E.2d at 1252-53.

47. Renslow v. Mennonite Hosp., 367 N.E.2d at 1254.

48. Among the court's findings was the statement that routine Rh-typing had been a standard medical practice since 1961. *Id.* at 1253.

49. The court found that the appellate court opinion had implied that a duty of care existed whenever lack of care could foreseeably result in harm. *Id.*

50. The court found unpersuasive two policy arguments offered by the defendants. First, defendants cited the potential for claims brought by successive generations of plaintiffs against a single defendant for genetically-transmitted injuries. The court found the instant case distinguishable because the alleged damage was not self-perpetuating and the plaintiff was not a remote descendant. Second, the defendants pointed out that under the present statute of limitations, a plaintiff could wait until he reached majority to assert a claim, thereby creating a problem of defending against stale claims. The court argued that the possibility of a stale claim was inherent in the adoption of the discovery rule and the present statute of limitations. The likelihood that stale claims would be asserted was not sufficient to deny a cause of action for preconception negligence. *Id.* at 1255.

cause of action for prebirth or previability misconduct.

One member of the court concurred,[51] and three wrote separate dissenting opinions.[52] The principal dissent charged that the majority had abandoned the fault concept of negligence by paying mere "lip service" to the traditional elements of foreseeability and duty and had established causation as the sole determinant of liability.[53] The dissent objected to the majority's tacit acceptance of the policy of compensating all injured individuals by spreading the risk of loss over a broad base without regard for social consequences and competing policy considerations.[54] Finding that recognition of a duty of care to a plaintiff not in existence at the time of the misconduct would create an excessive economic burden on the public, the dissent concluded that such duty should not be recognized.[55]

IV. COMMENT

The instant court properly chose to employ a duty analysis in ruling on the motion to dismiss plaintiff's preconception negligence claim. The court clearly could have assumed that the negligent transfusions supervised by the defendants were the cause in fact of plaintiff's injuries[56] and thus could have decided the case in terms of proximate cause—a question of law.[57] By focusing instead on the element of duty as defined by foreseeability and public policy,[58] the

51. Justice Dooley in a concurring opinion stated that the duty question was central to a proper analysis of the instant case because, in his opinion, the factual question of causation could not properly be before the court on a motion to dismiss. Additionally, he did not agree with the majority's conclusion that *Jorgensen* and *Park* focused principally on causation. *Id.* at 1257-61 (Dooley, J., concurring).

52. The dissents of Chief Justice Ward and Justice Underwood essentially agreed with Justice Ryan's principal dissent. Justice Underwood found *Jorgensen* and *Park* unpersuasive because he considered the former to have been decided on a strict liability theory and the latter to be inappropriate because it was a trial court decision still in the process of appeal. *Id.* at 1261-62 (Underwood, J., dissenting).

53. *Id.* at 1262 (Ryan, J., dissenting).

54. Convinced that the costs of risk spreading were no longer insignificant, the dissent concluded tbat the public was neither willing nor able to absorb the economic burden caused by the accelerating malpractice insurance rates and medical costs. The dissent reflects the criticisms offered in Cooperrider, *A Comment on the Law of Torts,* 56 MICH. L. REV. 1291 (1958), of the views expressed in F. HARPER & F. JAMES, THE LAW OF TORTS (1956).

55. The dissent viewed the majority's holding as a "classic illustration of 'negligence in the air.' " Renslow v. Mennonite Hosp., 367 N.E.2d at 1264 (Ryan, J., dissenting).

56. The majority did not state specifically that it accepted all well-pleaded facts as true for the purpose of considering the motion to dismiss. The concurrence, however, did point out that such acceptance was proper in the instant case. *See* note 51 *supra. See generally* F. JAMES, CIVIL PROCEDURE § 4.2 (1965).

57. *See* PROSSER, *supra* note 9, at § 42.

58. *See* notes 48-50 *supra* and accompanying text. The court refused to rely on *Jorgensen* and *Park* even though it is not clear that either was decided on questions of causation.

court was able to remand the case for the presentation of proof on the issue of causation in fact. In a case involving preconception malpractice, the plaintiff would have the burden of establishing by means of expert medical testimony that the defendant's acts created a condition in the mother that in turn caused the plaintiff's injuries.[59] Assuming that plaintiff proves causation in fact, the court then could decide whether defendant's wrongful conduct was the proximate, or legal, cause of plaintiff's injury on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict. The proximate cause question is essentially the same as the duty question—whether, as a matter of social policy and justice, the defendant should be held responsible for the consequences of his misconduct.[60] Although the policy assessment made in answering the duty question should be restated in proximate cause language at this procedural stage,[61] some cases will have been eliminated by plaintiffs' failure to prove that defendants' malpractice was the cause in fact of plaintiffs' injury. Using a duty analysis to deny the defendant's motion to dismiss thus allows the element of causation in fact to limit the number of cases that the court must decide on a policy basis.

Although the instant court's duty analysis did not distinguish between the negligence of a medical expert and the negligence of a person possessing ordinary knowledge, future courts should limit the duty to refrain from preconception negligence to those with expert medical knowledge.[62] The instant court recognized that pub-

59. *See* Note, *supra* note 32, at 568-69. Generally, proof of causation in fact in a medical malpractice case is more difficult than in other types of negligence cases and normally requires presentation of expert testimony. Expert testimony in a malpractice case often involves a description and evaluation of the victim's condition at various times during treatment. Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489, 511 (1977); *see* D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 11.20 (1973). In the instant case, for example, questions might be raised on the reasons for administering the transfusions to plaintiff's mother and on the condition of her hemolitic system prior to the transfusions.

60. *See* PROSSER, *supra* note 9, at § 42. Proximate cause questions often are answered by finding that the defendant owed no duty of care to plaintiff. *Id.*

61. In its effort to show that the decision was not grounded on a consideration of causation, the instant court stated that it did not use causation because "new policy lines" would have to be drawn. *See* note 47 *supra* and accompanying text. This unfortunate language may indicate that the court did not recognize the essential identity of the policy considerations involved in the duty and proximate cause questions. The words may have been intended, however, merely to emphasize the court's refusal to consider proximate cause at the procedural level of the motion to dismiss.

62. In the three cases that have allowed a cause of action for preconception negligence, the defendants were all chargeable with expert medical knowledge: in *Jorgensen* the defendant was a drug manufacturer and developer; in *Park* defendants were doctors; and in the instant case defendants were a hospital and a physician who was director of laboratories.

lic policy requires a physician to use his expert knowledge to prevent injuries to children who have not yet been conceived[63] and consequently, imposed a duty on the expert defendants in order to regulate the future conduct of other experts in similar situations. Imposing a similar duty on nonexpert defendants, however, would do little to regulate the conduct of other nonexperts. For example, a driver who causes a collision could thereby physically damage a woman's reproductive system, ultimately causing injury to a child born years after the misconduct. Because traffic laws are designed to regulate this conduct, finding that the negligent driver owed the child a duty of care would do little to improve the driving habits of this defendant or of other drivers. Moreover, a nonexpert defendant should not be required to recognize that his conduct eventually could harm a child conceived years after the mother's injury.[64] Limiting the duty to refrain from preconception negligence to those defendants chargeable with expert medical knowledge thus would be consonant with established tort principles that define a defendant's duty to encompass only reasonably foreseeable harm.

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63. By citing medical authorities on hemolitic diseases of newborns to determine that the plaintiff's injury was reasonably foreseeable, the court avoided the *Sinkler* dissent's criticism that relying on the state of medical knowledge is unwarranted unless supported by the record of the case. *See* notes 31-32 *supra* and accompanying text.

64. The refusal to impose a duty on nonexpert defendants in preconception negligence cases is consistent with the court's willingness to impose a duty on nonexpert defendants in prenatal negligence cases such as *Smith v. Brennan* and *Sinkler v. Kneale,* if one views each case from a foreseeability standpoint. *See* note 29 *supra.* A person with ordinary knowledge should recognize that if he injures a pregnant woman, her unborn child also might be harmed. The nonexpert, however, should not be expected to foresee that his misconduct could injure a child conceived years later.