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## Recent Developments

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## RECENT DEVELOPMENTS

### ARREST — COMMON LAW RIGHT TO RESIST UNLAWFUL ARREST — JUDICIAL ABROGATION.

*State v. Koonce* (N.J. Super. 1965)

Defendant forcibly resisted the attempt of a police officer, acting without a warrant, to arrest him for allegedly selling alcoholic beverages to minors. Although the charges for the illegal sale of alcohol were dropped for lack of sufficient evidence, defendant was tried and convicted for the attack upon the arresting officer. On appeal, he asserted his common law right to resist the arrest since the crime of selling alcoholic beverages to minors is a misdemeanor and, under New Jersey law, an arrest for a misdemeanor may be made without a warrant only if the crime is committed in the presence of the police officer. Because the officer had not observed the alleged sale, defendant argued that his actions were privileged. The Superior Court of New Jersey *held* that the right to forcibly resist an unlawful arrest is an anachronism for which there is no longer a convincing justification. The court reversed defendant's conviction, however, but declared that its ruling must be applied prospectively. *State v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428 (1965).

The right of personal liberty is a fundamental one guaranteed to every citizen, and any unlawful interference with it may be resisted.<sup>1</sup> At common law every citizen had the right to use reasonable force to resist an unlawful arrest.<sup>2</sup> This doctrine was first enunciated in the early 17th century in *Sir Henry Ferrer's* [sic] *Case*.<sup>3</sup> In that case, the defendant, Sir Henry Ferrers, was charged with aiding and abetting his servant in the murder of an officer of the Crown. The homicide took place when the officer attempted to arrest Ferrers on an action of debt with an improperly issued warrant.<sup>4</sup> The court stated that the resistance was justified since the defective warrant vitiated the legality of the arrest, expressly declaring that "the killing of an officer in executing [an illegal warrant] cannot be murder. . . ."<sup>5</sup>

1. *Stanfield v. State*, 118 Tex. Crim. 47, 38 S.W.2d 94 (1931). See generally 2 R.C.L. 474 (1914).

2. *State v. Robinson*, 145 Me. 77, 72 A.2d 260 (1950); *Wilkinson v. State*, 143 Miss. 324, 108 So. 711 (1926). The right to be free from unlawful arrest has been inherent in Anglo-American jurisprudence since the signing of the Magna Carta (§ 39) in 1215.

3. Cro. Car. 371, 79 Eng. Rep. 924 (K.B. 1635).

4. The warrant issued for Ferrers' arrest was improperly titled, naming the arrestee as Sir Henry Ferrers, *Knight*, when Sir Henry was in fact a *baronet*.

5. Cro. Car. 371, 79 Eng. Rep. 924 (K.B. 1635). It should be noted that this court's decision concerning the right to resist an illegal arrest was dicta, since insufficient evidence was adduced to show that Ferrers had aided and abetted his servant. Some modern American courts have adopted the rule suggested by *Ferrer's* that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder. See, e.g., *People v. Doody*, 343 Ill. 194, 175 N.E. 436 (1931).

A similar situation developed thirty-one years later when Hopkin Huggett asked to see the warrant granting authority for a friend's impressment into the King's military service. When no valid warrant was shown, a demand for the friend's release culminated in a fracas in which Huggett killed the impressing officer. At Huggett's trial for murder, the court polarized the issue before it as being between the fundamental right of personal liberty and the prevention of potential dangers implicit in allowing "self help" to safeguard that personal liberty.<sup>6</sup> Several members of the court indicated their belief that:

[I]f a man be unduly arrested or restrained of his liberty . . . altho' he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends but strangers also for common humanity sake . . . to endeavour his rescue; and if in such endeavour of rescue they kill anyone, this is no murder. . . .<sup>7</sup>

The majority held, however, that the dangers to society in permitting "self help" in the factual situation before it negated the assertion of the inviolable right of personal liberty.

And we thought it to be of dangerous consequence to give any encouragement to private men to take upon themselves to be the assertors of other men's liberties, and to become patrons to rescue them from wrong; especially in a nation where good laws are for the punishment of all such injuries . . . to right men by peaceable means and to discountenance all endeavours to right themselves, much less other men, by force.<sup>8</sup>

Although *Hopkin Huggett's Case* reached a conclusion opposed to that of *Sir Henry Ferrer's* [sic] *Case*, it did not purport to overrule it; in fact, no mention of the case is found in the record.

An examination of the above cases indicates an early common law conflict as to whether the fundamental right of personal liberty countenances the use of "self help" to protect this right. This ambivalence was resolved in *Queen v. Tooley*,<sup>9</sup> a case now firmly entrenched in English law. In that case the court clearly stated that ancillary to the right of personal liberty was the *right to resist unlawful arrest*. That right extended not only to the arrestee, but to third parties as well.<sup>10</sup> In reaching this conclusion the court cited *Ferrer's* [sic] *Case* with approval while overruling *Hopkin Huggett's Case*.

The rule enunciated in *Tooley* became strong precedent. Thus, in *Rex v. Thompson*<sup>11</sup> it was held to be "well-established" that a party arrested without proper authority could use reasonable force to resist the arrest without criminal liability. Until recently, the law in the United States had

6. 1 Kelyng 59, 84 Eng. Rep. 1082 (K.B. 1666).

7. *Ibid.*

8. *Id.* at 61, 84 Eng. Rep. at 1083.

9. 2d Raym. 1296, 92 Eng. Rep. 349 (K.B. 1710).

10. *Ibid.*

11. 1 Moody 132, 168 Eng. Rep. 1193 (K.B. 1825). See also *Rex v. Patience*, 7 Car. & P. 775, 173 Eng. Rep. 338 (N.P. 1837); *Rex v. Curvan*, 1 Moody 132, 168 Eng. Rep. 1213 (K.B. 1826).

never varied from the rule in *Tooley*.<sup>12</sup> Thus, American jurisdictions have generally held that a peace officer making an unlawful arrest is a trespasser who has no right to detain the person. The illegal arrest is often declared to constitute an assault and battery, and the injured party or those coming to his rescue have the same rights as when repelling any other assault and battery.<sup>13</sup>

While it is often indiscriminatingly stated that a person may always resist an unlawful arrest, there are several limitations. One such restriction limits the *quantum* of force which may be exerted against the arresting party. The force used must be no greater than that necessary to meet and resist the force used to subdue the wronged party.<sup>14</sup> Thus, even though an arrest is unlawful, there is a factual question as to whether more force than necessary was used.<sup>15</sup> Another view disallows the arrestee or third parties to *initiate* the use of force.<sup>16</sup> The mere statement that a person is under arrest, even if the officer has no authority, does not justify the use of repellent force on the officer before an attempt is made to take the wronged party into custody.<sup>17</sup>

Perhaps the most stringent limitation upon the right to resist unlawful arrest is that the privilege does not absolve the taking of a life.<sup>18</sup> However, if the killing was committed while the resisting party reasonably apprehended that he was in imminent danger of death or grave bodily harm at the hands of the arresting officer, the right of self-defense may be asserted:<sup>19</sup>

The right to resist unlawful arrest is a phase of the right of self-defense; that as in other cases of self-defense the person sought to be arrested is justified in taking life only when he has reasonable ground to apprehend that he is in imminent danger of death or great bodily harm; that he is not justified in killing merely for the purpose of resisting an unlawful arrest or other restraint upon his liberty where the only injury which could be apprehended is an unlawful detention for a short time or other injury short of death or great bodily harm. . . .<sup>20</sup>

There are a few courts, however, which do not apply this limitation.<sup>21</sup> This minority view would allow a fight to the death of it were necessary to preserve the arrestee's liberty.<sup>22</sup> The theory that a person has as much right to resist invasion of his personal liberty as he has to resist death or serious

12. See, e.g., *People v. Dreares*, 15 App. Div. 2d 204, 221 N.Y.S.2d 819 (1961); *State v. Rousseau*, 40 Wash. 2d 92, 241 P.2d 447 (1952); *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901). See also, HERRIGAN & THOMPSON, *SELECTED AMERICAN CASES ON THE LAW OF SELF DEFENCE* (1874).

13. See, e.g., *State v. Robinson*, 145 Me. 77, 72 A.2d 260 (1950); *Wilkinson v. State*, 143 Miss. 324, 108 So. 711 (1926).

14. *Brown v. United States*, 159 U.S. 100 (1895).

15. *State v. Miller*, 253 Minn. 112, 91 N.W.2d 138 (1958).

16. *State v. Robinson*, 145 Me. 77, 72 A.2d 260 (1950).

17. *State v. Francis*, 152 S.C. 17, 149 S.E. 348 (1929).

18. See *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901). A homicide committed in the course of resisting an unlawful arrest is, however, generally reduced from murder to manslaughter. See note 5, *supra*.

19. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711 (1926).

20. *Id.* at 325, 108 So. at 712.

21. *Simmerman v. State*, 16 Neb. 615, 21 N.W. 387 (1884).

22. *State v. Davis*, 53 S.C. 150, 31 S.E. 62 (1898).

bodily injury surpasses the right of self-defense. Unlike the prevalent view, this doctrine treats the rights of resistance to arrest and self-defense as fundamentally distinct and separate.<sup>23</sup>

The historical development of the right to resist unlawful arrest reveals that this principle is deep-seated in Anglo-American jurisprudence. Yet the instant case, *State v. Koonce*,<sup>24</sup> specifically rejects that rule<sup>25</sup> and expressly states that it will no longer be applied in New Jersey courts.<sup>26</sup> New Jersey is not the first jurisdiction to eliminate this rule; five states have done so by statute. Four of these states (Rhode Island, New Hampshire, Delaware and California)<sup>27</sup> have adopted the substance of section five of the Uniform Arrest Act: "If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest."<sup>28</sup> Although New Jersey did not adopt section five of the Act, the court in *Koonce* expressly based its reasoning on the underlying rationale giving rise to that section.

This rationale has been discussed by Professor Warner, who is a draftsman of the Act.<sup>29</sup> Professor Warner maintains that the right to resist unlawful arrest is obsolete in the context of modern society. He argues that, "the rule developed when long imprisonment often without opportunity of bail, 'goal fever,' physical torture and other great dangers were to be apprehended from arrest, whether legal or illegal."<sup>30</sup> In the past, it was frequently years before a prisoner was brought to trial. Moreover, when the law of arrest developed, resistance to arrest did not involve the mutual dangers to arrestor and arrestee present today. Peace officers today are armed with pistols, whereas during the incipency of the rule officers were armed only with staves and swords. Consequently, while resistance at one time could be successfully accomplished merely by *holding off* the officer with the arrestee's own weapon until flight could be taken, modern firearms make serious bodily injury to either or both of the parties a probable result of resistance. This danger is aggravated by the fact that the police may use whatever force is reasonably necessary to subdue a resisting arrestee.

Professor Warner further asserts that it is the armed and belligerent hoodlum, rather than the innocent outraged citizen, who most often offers resistance.<sup>31</sup> An innocent party will generally not risk serious injury to himself or the arresting officer merely to avoid a brief stay in jail, whereas

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23. *State v. Bethune*, 112 S.C. 100, 99 S.E. 753 (1919).

24. 89 N.J. Super. 169, 214 A.2d 428 (1965).

25. See note 13, *supra*.

26. See note 38 and accompanying text, *infra*.

27. R.I. GEN. LAWS ANN. § 12-7-10 (1956); N.H. REV. STAT. ANN. 594:5 (1955); DEL. CODE ANN. tit. 11, § 1905 (1953); CAL. PENAL CODE § 835(a) (Supp. 1965).

28. UNIFORM ARREST ACT § 5. Illinois has also enacted a law forbidding forcible resistance to illegal arrest. ILL. STAT. ANN. ch. 38, § 7-7 (1964).

29. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

30. *Id.* at 330.

31. *Ibid.*

consciousness of guilt is likely to lead the criminal to resist *any* arrest whether he believes it to be unlawful or not, allowing the courts to make an *ex post facto* determination of the legality of the arrest.<sup>32</sup>

Despite the cogency of the arguments advanced in favor of abolishing the right to resist unlawful arrest, the rule has remained remarkably vital. The most frequently propounded argument in favor of retention of the rule is that regardless of the dangers to be perceived, personal freedom is so fundamental as to demand, not a remedy for unlawful arrest to be provided by the courts after the fact, but prevention of this unlawful restraint on personal liberty at its inception. It has been stated that, "In protecting [the arrestee's] liberty or preventing injury to his person, the law sets such a high value upon the liberty of the citizen that an attempt to arrest him is esteemed a provocation. . . ."<sup>33</sup> It has been further suggested that although many courts feel the rule should be abolished, they continue to uphold it in lieu of an adequate substitute.<sup>34</sup> It is argued that, "civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority."<sup>35</sup> Criminal sanctions also have been criticized as ineffective. "There are criminal penalties in existence providing for the punishment of many types of police violations of individual right but these are ineffective for the obvious reason that policemen and prosecutors do not punish themselves."<sup>36</sup>

*Koonce*,<sup>37</sup> in abolishing the right to forcibly resist unlawful arrest, has added little to the heretofore existing catalogue of arguments against the rule. The primary significance of the decision is the long sought judicial articulation of the above arguments.<sup>38</sup> While the authoritative value of the decision is diluted by the fact that it was not decided by the highest court of New Jersey,<sup>39</sup> it should nonetheless be followed on the intrinsic merit

32. *Ibid.*

33. *Stanfield v. State*, 118 Tex. Crim. 47, 51, 38 S.W.2d 94, 96 (1931).

34. See Comment, 3 TULS. L.J. 40 (1966).

35. Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C.&P.S. 395, 399 (1960).

36. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). See also, LA FAVE, *ARREST — THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 426 (1965).

37. 89 N.J. Super. 169, 214 A.2d 428 (1965).

38. The instant case does not mention whether the right to resist an illegal arrest made by a *private citizen* is also abrogated. It is submitted that it is *not*, since the dangers to be found when a police officer makes the arrest are not present when a private citizen does so. Furthermore, the court purports to be following, in essence, UNIFORM ARREST ACT § 5 and the reasons giving rise thereto. This section abrogates only the right to resist a peace officer and does not affect citizen arrests. The comment to MODEL PENAL CODE § 3.04, which is identical to section five of the uniform act, specifically states that the rule is not applicable when the party asserting the force is unaware that the arrestor is a peace officer, which would indicate that the rule is not intended to apply to one not a police officer.

39. The Supreme Court of New Jersey has never directly passed on the point at issue, but the Superior Court said:

Being confident that the Supreme Court of New Jersey would approve the foregoing views, we declare it to be the law of this State that a private citizen may not use force to resist arrest by one he knows has good reason to believe is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances obtaining.

*State v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428, 436 (1965).

of its rationale. Police officers, in recent times, have been subjected to severe judicial criticism with regard to their occasionally excessive zeal in bringing wrongdoers to justice. It is heartening to note that the current highlighting of the rights of an accused has had the incidental effect of alleviating some of the perils of law enforcement.

In this era of constantly expanding legal protections of the rights of the accused in criminal proceedings, one deeming himself illegally arrested can reasonably be asked to submit peaceably to arrest by a police officer, and to take recourse in his legal remedies for regaining his liberty and defending an ensuing prosecution against him.<sup>40</sup>

It is hoped that other jurisdictions will join New Jersey in abolishing a rule of law that was salutary at its inception but which has endured beyond the period when its justification and advisability lapsed.

*Lee Sherman*

ANTITRUST — SHERMAN ACT — COLLABORATIVE ACTION OF AUTOMOBILE MANUFACTURER AND DEALER ASSOCIATIONS TO ELIMINATE SOURCE OF SUPPLY TO "DISCOUNTERS" IS VIOLATIVE OF SECTION 1.

*United States v. General Motors Corp.* (U.S. 1966)

After an unsuccessful attempt to gain a conviction in a criminal proceeding,<sup>1</sup> the Department of Justice initiated a civil action alleging a conspiracy in restraint of trade under section 1 of the Sherman Act<sup>2</sup> against General Motors and three automobile dealer associations.

In 1950, "discount department stores" in the Los Angeles area entered into arrangements whereby space was leased to independent third parties,

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40. *Ibid.*

1. *United States v. General Motors Corp.*, 216 F. Supp. 362 (S.D. Cal. 1963). General Motors contended that the entire action was designed as an attack on the franchise method of merchandising automobiles. Citing *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), *rehearing denied*, 130 F.2d 196, *cert. denied*, 317 U.S. 695 (1943), wherein a substantially identical dealer franchise agreement was held valid, the court sustained the defendant's contention reasoning that acceptance of the discounters would be tantamount to forcing General Motors to adopt a method of merchandising not of its own choosing. Concerning the conspiracy, the court held that the prosecution had failed to prove beyond a reasonable doubt that the action of the dealer associations was violative of the Sherman Act. The court concluded that the termination of sales to discount operators did not unreasonably lessen and restrain competition by applying a balancing of interests test which weighed consumer interests against the right of free enterprise enjoyed by industry.

2. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964), which provides in relevant part: "Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

for the purpose of merchandising automobiles. The discount outlets, whose source of supply was franchised Chevrolet dealers, operated under two principal methods. In the "referral" scheme, a customer would examine literature and brochures, and in some instances floor models, at the discount operator's location. Upon making his selection, the customer would then be advised that the automobile would be supplied by a particular franchised dealer at a discount. No price would be agreed upon at this time. The dealer would then offer the automobile at a price previously agreed upon with the discount operator. The other prevalent method involved consummation of the sale by the discount operator directly with the customer through the use of a purchase agreement. After the completion of the agreement, the identity of the franchised dealer would be revealed. Under both methods, the franchised dealer would furnish the car and transfer title directly to the customer since the discount operators did not own any of the automobiles involved.<sup>3</sup>

By 1960, 12 of the 85 franchised dealers in the Los Angeles area were engaged in discount operations. Since title was furnished by a franchised dealer, the new-car warranty and ancillary free servicing were preserved. This fact was clearly brought to the attention of the purchasing public through extensive advertising. At its regular meeting in June of 1960, one of the defendant dealer associations, after expressing concern over the increasing discount operations, resolved to complain to the Chevrolet's Los Angeles zone office. Pursuant to a meeting with the complaining dealer association, the zone manager approached the franchised dealers involved, requesting them to desist. When discount sales nevertheless continued, the dealer association instructed its members and their salesmen to send letters directly to General Motors and to the Chevrolet Division, soliciting their assistance. The letters spurred an immediate investigation by General Motors, from which the above facts were ascertained.

The regional Chevrolet manager subsequently met with each recalcitrant dealer for the purpose of dissuading them from continuing discount sales. This effort met with immediate success.<sup>4</sup> After eliciting a promise to cease discount activities from the dealers involved, General Motors solicited and obtained the assistance of the three dealer associations in the Los Angeles area in order to assure compliance.<sup>5</sup> By employing investigators who posed as customers, the associations were able to obtain sufficient evidence of violations to enable the Chevrolet zone manager to

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3. Under a typical referral arrangement, the discount operator received \$50 per sale. In instances where the discounter negotiated the sale, one representative agreement called for the franchise dealer to charge \$85 over his invoice cost, leaving the discount operator free to negotiate the best price he could obtain. Some also accepted trade-ins, and provided financing for the new car purchase.

4. The Court related a conversation between the regional sales manager, and an offending dealer in which the manager states: "... in handling children, I can tell them to do something. If they don't do it . . . I can knock their teeth down their throats." *United States v. General Motors Corp.*, 384 U.S. 127, 136 (1966).

5. All the dealers in the Los Angeles area belonged to one or more of the defendant associations. *Id.* at 129.



coerce dealers into repurchasing the discount automobiles from the investigators. Through these combined efforts, discount sales in the Los Angeles area were effectively eliminated.

After an unsuccessful criminal proceeding,<sup>6</sup> a civil action was initiated in the district court seeking to enjoin dealers from conducting discount operations on the basis that such practices constituted a conspiracy in restraint of trade.<sup>7</sup> Such a practice, contended the Government, amounted to a per se violation of section 1 of the Sherman Act, since it effectively created a boycott ultimately directed towards price control.

General Motors pleaded that: (1) its franchise agreements with dealers prohibited the establishment of additional sales outlets without prior approval; (2) that sales through discount operations amounted to a violation of this covenant, which was not unreasonable and indeed, was essential to preserve the entire program of automobile distribution;<sup>8</sup> and (3) by enforcing the contractual provision, it was acting unilaterally, without any agreement or understanding from the dealer associations.

The district court found that the location clause in the franchise agreement was reasonable, and that the consumer could best be served by a system of dealer franchising commensurate with the needs of the market. In addition, the activities of the dealer associations and General Motors consisted of "parallel action,"<sup>9</sup> and the mere fact that all of the defendants were in pursuit of the same objective did not ipso facto constitute a conspiracy to restrain trade, since there was no proof of express collusive intent. On direct appeal,<sup>10</sup> the Supreme Court reversed, *holding* that a conspiracy existed when the recalcitrant dealers were forced to discontinue operations with the discount operators, through the combined efforts of the dealer associations and General Motors. Finding a conspiracy, the court did not pass upon the validity of the location clause. *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

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6. Section 1 of the Sherman Act provides for the following criminal penalty: "Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor. . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964). An unsuccessful action under this provision will not bar a subsequent civil suit under section 4 of the Act.

7. *United States v. General Motors Corp.*, 234 F. Supp. 85 (S.D. Cal. 1964).

8. The clause (hereinafter referred to as the location clause) required prior approval of locations by the manufacturer and stated that the dealer "shall establish a place of business at a location mutually satisfactory to the dealer and General Motors and shall not establish a branch sales office without prior written approval of Chevrolet." *Id.* at 86.

9. See Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 705 (1962), for a comprehensive discussion of "parallel action." Professor Turner, who is presently the Chief of the Antitrust Division, Department of Justice, draws a distinction between purely parallel behavior by competitors, which is not violative of the Sherman Act, and actions by competitors based on inter-dependence of decisions, which are sufficient to amount to an agreement under the Sherman Act.

10. This was accomplished under section 2 of the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1964), which authorizes a direct appeal to the Supreme Court in every civil action brought in any district court under the Sherman, Clayton, or other Acts having a like purpose, where the United States is the complainant.

Historically, section 1 of the Sherman Act has involved a continuing process of attempting to measure questionable commercial practice against a broadly designed standard. Commenting on the Sherman Act, Chief Justice Hughes succinctly remarked: "As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."<sup>11</sup> To provide some workable guidelines, as to what constitutes undue restraint, the "rule of reason" was declared in *Standard Oil Co. of New Jersey v. United States*:<sup>12</sup> "The criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law, and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve."<sup>13</sup> This declaration framed the standard by which the individual freedom to contract would remain unrestrained, save for prevention of its improper use leading to undue restraint upon freedom of enterprise. The rule of reason therefore created a protean standard to meet the universality of the Sherman Act, which would keep apace with the needs of the nation. With this cursory background, this inquiry may now be narrowed into examination of the nature of a conspiracy, *i.e.*, the point where actions by a commercial entity, be it a manufacturer, distributor or retailer or combination thereof, exceed the ambit of acceptability. Section 1 of the Sherman Act prescribes that every contract, combination or conspiracy in restraint of trade is illegal.<sup>14</sup> Fundamental then, to any section 1 violation is the finding of collusive activity between two or more parties. This analysis must therefore commence by outlining precisely what constitutes a conspiracy.

Initially, the preponderance of section 1 litigation was concerned with ascertaining the degree of permissibility of generally restrictive agreements between competitors (horizontally) or within the various levels of the distributive chain (vertically). In 1911, the Court, in *Doctor Miles Medical Co. v. John D. Park & Sons Co.*,<sup>15</sup> stated the general principle that contractual arrangements between a manufacturer and his distributors setting stipulated resale prices would not be enforceable. The Court declared that such vertical price agreements were unreasonable *per se*<sup>16</sup> since the independent discretion of the distributor would be eliminated. The Court further reasoned that to hold otherwise would permit the manufacturer to achieve a result which would be illegal if the dealers themselves conspired to fix prices.<sup>17</sup>

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11. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

12. 221 U.S. 1 (1911).

13. *Id.* at 62.

14. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

15. 220 U.S. 373 (1911).

16. A *per se* determination relieves the plaintiff from proving that the alleged conduct has resulted in a restraint of trade; a burden of proof which might become formidable in certain situations where the system of merchandising is complex.

17. 220 U.S. 373, 408-09 (1911).

A milestone case in Sherman Act litigation is *United States v. Colgate Co.*,<sup>18</sup> wherein the defendant in a criminal proceeding was charged with stipulating resale prices for its soap products and refusing to transact business with any dealer who failed to comply. The Court, in affirming an acquittal, found that the Government has failed to charge Colgate with establishing any *express* agreement which would have obligated the dealers to maintain prices:

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage in trade or commerce — in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And of course, he may announce in advance the circumstances under which he will refuse to deal.<sup>19</sup>

Under the *Colgate* doctrine, a manufacturer is permitted, having announced a price maintenance policy, to bring about adherence by refusing to deal with anyone who does not elect to comply. The two essential elements are: an announced policy of price maintenance, and *unilateral* enforcement action through refusal to deal further with violators. Thus, the standard formulated in *Doctor Miles* was not diluted, since the *Colgate* doctrine still permitted the exercise of independent discretion by the dealer as to whether adherence to the announced price policy would be in his best interests. Consequently, the *Doctor Miles* prohibition against contractual arrangements was not disturbed.

The long process of limiting the application of *Colgate* commenced with *FTC v. Beech-Nut Packing Co.*<sup>20</sup> Beech-Nut employed a system of coding its products as a means of rapidly identifying the purchasing wholesaler. If a particular retailer was selling at less than the announced price, Beech-Nut would impose a boycott. In addition, the wholesalers were required to report all recalcitrant retailers. The Company maintained a "black list" file on wholesalers who refused to comply with their policies on pricing, and prohibited the distribution of products to them. Only after the wayward wholesaler agreed to adhere to the trade policy would he be reinstated. In reviewing the judgment of the FTC declaring this practice to be an unlawful method of competition, the Supreme Court expressly applied the standard of section 1 of the Sherman Act, as a "declaration of public policy to be considered in determining what are unfair methods of competition."<sup>21</sup> The contention of Beech-Nut that its

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18. 250 U.S. 300 (1919).

19. *Id.* at 307.

20. 257 U.S. 441 (1922).

21. The court construed the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. § 41 (1964), as authorizing the Commission to forbid practices which had a "dangerous tendency unduly to hinder competition or create monopoly."

actions were sanctioned by the *Colgate* doctrine was expressly rejected by the Court on the basis that the non-existence of any contracts was irrelevant, since suppressive methods are just as effective as contractual limitations.<sup>22</sup>

Even in the absence of simultaneous action or agreement among conspirators, conduct resulting from knowledge that concerted action is contemplated and invited may be sufficient to constitute a violation of section 1 of the Sherman Act.<sup>23</sup> Such was the case in *Interstate Circuit, Inc. v. United States*,<sup>24</sup> where eight motion picture distributors were induced by Interstate Circuit, the operator of virtually all the first-run theaters in the principal cities in Texas, to require second-run theaters, as a condition to doing business, to show certain films as single features rather than double features at an abnormally high admission price. The agreements obtained by the unilateral action of Interstate were acquired individually. However, since each distributor knew that identical agreements were either obtained or being negotiated with competing distributors, a conspiracy was formed. The result was to force subsequent-run theater operators to raise prices, thereby reducing the difference between first-run and second-run showings. This constituted an unreasonable restraint, contrary to the interests of the public.<sup>25</sup>

The conclusion that individual agreements on a vertical plane collectively result in a conspiracy was further strengthened by *United States v. Masonite Corp.*<sup>26</sup> By means of individual contracts with dealers and distributors, Masonite reserved the right to establish resale prices for all of its products. The court found that a conspiracy was created at the time each dealer realized that others had also agreed, and that the purpose of the agreement was to effectively reduce competition. All parties involved, particularly the distributors, were charged with knowledge of the conspiracy since it was the necessary consequence of their individual actions.<sup>27</sup> The resulting conspiracy was illegal per se considering the potential power to inflict public injury through a combination which had so extensively manifested itself.<sup>28</sup>

Contracts restricting the process of distribution have also been subjected to close judicial scrutiny. In applying the standard of section 1 of the Sherman Act, the courts have permitted contractual arrangements restricting the establishment of additional locations through franchising and similar devices, but only when the principal purpose is to insure

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257 U.S. at 453-54. In addition, the Sherman Act was construed as establishing guidelines for the determination of unfair competition.

22. See Barber, *Refusals to Deal Under the Antitrust Laws*, 103 U. PA. L. REV. 847, 872-85 (1955), for a discussion of the distinction between group boycotts and refusals to transact business stemming from the existence of contractual obligations or joint ventures.

23. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453, 455 (1922).

24. 306 U.S. 208 (1939).

25. *Id.* at 226.

26. 316 U.S. 265 (1942).

27. *Id.* at 275.

28. *Id.* at 281-82.

adequate systems of supply and outlets for distribution. However, if the purpose is to restrict commercial enterprise, such arrangements have been condemned as unreasonable restraints of trade.<sup>29</sup> In *United States v. Bausch & Lomb Optical Co.*,<sup>30</sup> an antitrust violation was alleged on the basis of two distinct activities. One activity was an arrangement between a distributor of tinted lenses and Bausch & Lomb, which granted exclusive manufacturing rights to Bausch in exchange for a covenant not to manufacture similar lenses for any other market. In the other activity, the distributor entered into a licensing arrangement with its wholesale and retail outlets, which was designed to reduce competition and assure effective price control at every level in the chain of distribution. The latter arrangement was held to be violative of section 1; however, the agreement between the manufacturer and the distributor was considered reasonable, since the overall effect on the consumer was not monopolistic, and the product involved represented only one-third of the total market.<sup>31</sup>

In 1960, the extent of permissible relations between a manufacturer and his channels of distribution was again brought before the Court in *United States v. Parke, Davis & Co.*<sup>32</sup> In dismissing a complaint charging the defendant with a violation of sections 1 and 3,<sup>33</sup> the district court held that a simple refusal to have business relations with retail outlets that chose to ignore all established and promulgated price policy was not illegal in light of *Colgate*.<sup>34</sup> On appeal, the decision was reversed on the basis that more than an announcement of price policy and unilateral action to enforce it (as sanctioned by the *Colgate* doctrine) has transpired. Since Parke, Davis & Co. was able to obtain specific agreements from retailers (after persuading some recalcitrant drug stores) to maintain announced prices or cease carrying its products, a conspiracy to restrain trade was established. This conclusion was reinforced by the fact that wholesalers were recruited to assist in policing the one-price policy.

In the instant case, the specific question was whether the actions of General Motors and the dealer associations constituted a conspiracy in

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29. The "test" for ascertaining the validity of such a covenant has been aptly stated in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898): [n]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. The case involved a horizontal restraint of trade among pipe manufacturers in which the market was divided in a manner that virtually eliminated any element of competition. In a civil suit, the government was successful in obtaining an injunction under both common law principles prohibiting restraints on trade and section 1 of the Sherman Act.

30. 321 U.S. 707 (1943).

31. *Id.* at 710.

32. 362 U.S. 29 (1960).

33. Section 3 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 3 (1964), declares that conspiracies in restraint of trade involving parties residing in the District of Columbia are illegal. Since the activities of Parke involved price arrangements with drug retailers in the District of Columbia, this provision was applicable. In all other respects, section 3 is identical to section 1.

34. *United States v. Parke, Davis & Co.*, 164 F. Supp. 827 (D.D.C. 1958).

restraint of trade. The Supreme Court, in rejecting the district court's finding that no conspiracy existed because there was only "parallel action," reiterated the axiom that "explicit agreement is not a necessary part of a Sherman Act conspiracy."<sup>35</sup> Using the *Parke, Davis* approach, the Court found that the entire relationship between General Motors and the dealer associations, from the inception of the letter-writing campaign to the rendering of assistance in reporting recalcitrant dealers, was permeated with joint and collaborative action. The conspiracy was conceived when the dealers collaborated among themselves and with General Motors to prevent further sales to discount operators. Thus, not only was the conspiracy manifested by the execution and fulfillment of the plan, but *at its inception*, when an accord adverse to the interests of the discount operators was reached between the defendants. The subsequent joint effort of the dealer associations and General Motors to enforce the promises of the recalcitrant dealers to desist, was still another incident of collaborative action. "What resulted was a fabric interwoven by many strands of joint action to eliminate the discount operators from participating in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement."<sup>36</sup> As to the effect of the collaborative action, a per se violation of the Sherman Act resulted, since elimination of additional forms of distribution have long been held as inconsistent with the principles of free enterprise which the Sherman Act has sought to protect.<sup>37</sup>

Since a conspiracy in restraint of trade was aptly found in accordance with the body of law which has evolved since *Standard Oil*, the Court was not forced to consider the validity of the "location clause" which was incorporated into the franchise agreement. Litigation in the area of franchise agreements has been rather sparse in comparison to pricing arrangement violations. However, the issue has been decided, both in suits brought by the Government (e.g., *Bausch & Lomb*,<sup>38</sup> wherein an agreement to exclusively deal in certain products was upheld as "not unreasonable"), and private antitrust suits (e.g., *Boro Hall v. General Motors Corp.*,<sup>39</sup> wherein a location clause, identical in substance to the instant case was an effective device to preclude a franchise dealer from establishing a used-car outlet outside its "zone of influence"). Since this did not prevent the dealer from *selling* used cars outside the zone, but

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35. *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966).

36. *Id.* at 144.

37. In reiterating the per se rule which prohibits boycotting dealers in the market place, reliance was placed upon *Klors, Inc. v. Broadway-Hale Dep't Stores, Inc.*, 359 U.S. 207 (1959). That case involved a civil suit in which a chain appliance store was able to recruit co-operation from major appliance manufacturers to either boycott or sell at discriminatory prices to the plaintiff. Proof that such a practice had no direct effect upon the consumer market, since there were "hundreds" of stores which were not involved, was declared inadmissible and the practice was held a per se violation because it interfered with the natural flow of commerce.

38. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

39. 124 F.2d 822 (2d Cir. 1942), *rehearing denied*, 130 F.2d 196, *cert. denied*, 317 U.S. 695 (1943).

only prohibited additional locations which would "prejudice"<sup>40</sup> other dealers, the restriction was not deemed unreasonable, considering the large degree of competition prevalent in the sales area.<sup>41</sup>

In 1963, the Court, in *White Motor Co. v. United States*,<sup>42</sup> dealt with a civil action involving a vertical franchising arrangement between a truck manufacturer and his distributors, under which each distributor was granted the exclusive right to sell in a designated territory. The district court had found that the contractual provisions creating exclusive territories were per se violations of the Sherman Act and granted a summary judgment in favor of the government.<sup>43</sup> Reversing in a 5 to 3 decision, the Court held that a summary judgment is normally inappropriate in antitrust suits, since the reasonableness of territorial and customer restrictions on competition should be determined in a factual finding.<sup>44</sup> By reversing, the Court left open the possibility that vertical agreements are not comprehended by the unreasonable per se prohibition applied to horizontal agreements.<sup>45</sup> In a concurring opinion, Justice Brennan, reiterating the position of the Court in *Interstate Circuit*,<sup>46</sup> stated: "If it were clear that the territorial restrictions involved in this case had been induced solely or even primarily by appellant's dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement."<sup>47</sup>

Thus, emphasis was placed upon an examination of the effect of the vertical arrangement, rather than the more formalized approach exemplified by *per se* condemnation of price restrictions and agreements among competitors.

The significance of *General Motors* cannot be considered independent of *FTC v. Brown Shoe Co.*,<sup>48</sup> which promulgated guidelines for the determination of the legality of dealer franchise arrangements. This issue was not considered in *General Motors*. In *Brown*, the defendant appealed from an FTC ruling that dealer franchising arrangements, as practiced by Brown, were unfair trade practices in violation of section 5 of the Federal Trade

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40. *Id.* at 823.

41. See *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966), where, in a private antitrust suit, the court also avoided deciding the validity of established exclusive dealerships by finding a conspiracy to restrain trade, employing the rationale of the instant case. For other cases where the validity of exclusive dealerships has not been challenged as such, see *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D.C. Md. 1956), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

42. 372 U.S. 253 (1963).

43. 194 F. Supp. 562 (N.D. Ohio 1961).

44. *White Motor Co. v. United States*, 372 U.S. 253, 262 (1963).

45. "If competitors agree to divide markets, they run afoul of the antitrust laws." *Id.* at 259. See also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

46. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

47. *White Motor Co. v. United States*, 372 U.S. 253, 267 (1963).

48. 384 U.S. 316 (1966).

Commission Act.<sup>49</sup> The practice consisted of a system whereby retail outlets were contractually obligated to deal exclusively with Brown, thus prohibiting retailers from carrying comparable competitive lines. Of its 650 retail outlets, 250 were so bound. In consideration for services furnished by Brown, such as merchandising record assistance and architectural services, the retailer agreed "to have no lines conflicting with Brown. . . ." Finding that the agreement effectively foreclosed Brown's competitors, the FTC concluded that the contract was an unfair method of competition within the meaning of section 5, and ordered Brown to cease and desist.<sup>50</sup> On appeal, the Circuit Court reversed, holding that the power and authority of the FTC did not encompass judgment over the sales practices involved.<sup>51</sup> The Supreme Court, however, reinstated the FTC decree and held<sup>52</sup> that the FTC had extensive powers,<sup>53</sup> especially in trade practices which conflict with section 1 of the Sherman Act and section 3 of the Clayton Act,<sup>54</sup> to curtail unreasonable trade violations and practices in their incipency by projecting the effect upon competition and the general public.<sup>55</sup>

By holding in *Brown* that the FTC has the power to arrest restraints in their incipency without proof that actual violations have occurred, in conjunction with judicial approval of the Commission's analysis of the particular practice with which Brown was charged, the Court has invested the Commission with broader powers than can be exercised through the initiation of a criminal or civil suit. By relieving the Commission from meeting a burden of proof that a particular practice adversely affects commerce and trade, restrictive agreements — exemplified by the loca-

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49. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(6) (1964): "The Commissioner is empowered to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

50. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 319 (1966).

51. *Brown Shoe Co. v. FTC*, 339 F.2d 45, 56 (8th Cir. 1964).

52. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320 (1966).

53. The interrelationship between the function and jurisdiction of the Federal Trade Commission and the Antitrust Division of the Department of Justice is concisely discussed in U.S. DEPT. OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 374-77 (1955). The relationship between the two agencies has been judicially interpreted to result in an interlacing of enforcement responsibilities, manifested in part by a "Memorandum of Agreement," signed by both agencies in 1948, which established a systematic mutual exchange of information regarding pending anti-monopoly investigations.

54. See note 2, *supra*. Section 3 of the Clayton Act, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1964) provides in relevant part:

It shall be unlawful for any person engaged in commerce . . . to . . . make a . . . contract for sale of goods . . . for . . . resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such . . . condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

55. For a comprehensive discussion of the Federal Trade Commission, its functions and procedures, see Connor, *FTC Procedure Revisions: A Critique*, 7 VILL. L. REV. 359 (1962).



tion clause in *General Motors* — will be placed in greater jeopardy.<sup>56</sup> Consequently, the effectiveness of the franchise system may be severely reduced. *General Motors*, considered narrowly, has prohibited enforcement of restrictive covenants by any means other than unilateral action.

It is submitted, that restrictive covenants governing the distribution of commodities will not succumb to a *per se* death; for the complexities of efficient merchandising, after sale, servicing and product maintenance, will require the manufacturer to retain some element of control over the distributive chain.<sup>57</sup>

*Edward Charles Toole, Jr.*

CONSTITUTIONAL LAW — CRUEL AND UNUSUAL PUNISHMENT —  
CONVICTION OF CHRONIC ALCOHOLIC FOR PUBLIC INTOXICATION  
VIOLATES THE EIGHTH AMENDMENT.

*Driver v. Hinnant* (4th Cir. 1966)

*Easter v. District of Columbia* (D.C. Cir. 1966)

Two recent cases have held that an alcoholic cannot be convicted of violating a criminal statute prohibiting public intoxication.

In *Driver v. Hinnant*,<sup>1</sup> appellant, a chronic alcoholic, was convicted and sentenced for the crime of public drunkenness.<sup>2</sup> His conviction was

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56. In *FTC v. Motion Picture Advertising Co.*, 344 U.S. 392, 394-95 (1953), the purposes of the Federal Trade Commission Act were delineated:

It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipency acts and practices which, when full blown, would violate those acts . . . as well as to condemn as unfair methods of competition existing violations of them.

57. In his address to the New York State Bar Association Antitrust Law Symposium held February 2-3, 1966, Mr. Donald F. Turner, the Assistant Attorney General in charge of the Antitrust Division, Department of Justice, discussed the legality of territorial restrictions. Since the efforts to be expended in any particular activity are frequently determined by the emphasis placed at the policy-making level, the following remarks by Mr. Turner are of particular significance:

Without pretending to be exhaustive or definitive, let me deal briefly with the question "are territorial restrictions more restrictive than necessary to achieve any legitimate purpose?" . . . I am not convinced that territorial restrictions are reasonably necessary to any legitimate purpose save for one case, that involving the entry of new firms and/or the introduction of new products. These are commonly associated with relatively high degrees of risk and uncertainty, and it is not unreasonable to suppose that territorial restrictions may be necessary in many of such cases to induce dealers to make the investment necessary . . . to get the product effectively introduced. . . . It should be noted however, that even in this case, the justification for territorial restrictions is one limited in time. . . . I have not yet seen a convincing case made for any other exceptions to the rule of illegality. . . . Why should some buyers be forced to pay a higher price than they would otherwise have to pay in order to subsidize purchases by others? . . . To conclude, my tentative view is that territorial restrictions on dealers are more restrictive than is necessary to obtain legitimate objectives in all but very limited circumstances. There are ample alternative devices, all less restrictive than territorial restraints, whereby a manufacturer can attempt to achieve an efficient, aggressive marketing system.

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1. 356 F.2d 761 (4th Cir. 1966).

2. N.C. GEN. STAT. § 14-335 (1953) provides that "if any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county. . . . He shall be guilty of a misdemeanor. . . ."

affirmed by the Supreme Court of North Carolina,<sup>3</sup> and his petition for a writ of habeas corpus in the federal district court was denied.<sup>4</sup> The Fourth Circuit Court of Appeals reversed,<sup>5</sup> *holding* that because appellant's public intoxication was involuntary and a compulsion symptomatic of the disease of alcoholism, he could not be convicted of the crime charged since the eighth amendment forbids the punishment of a chronic alcoholic for compulsive symptoms of his disease.

Two months later a similar case was presented to the United States Court of Appeals for the District of Columbia Circuit.<sup>6</sup> An inveterate alcoholic had been convicted of public intoxication under a District of Columbia criminal statute.<sup>7</sup> The Court of Appeals reversed, *holding*, alternatively, that the public display of alcoholism by a chronic alcoholic cannot be a crime because: (1) Congress has recognized that alcoholism is a disease which deprives its victim of self-control in the use of alcoholic beverages,<sup>8</sup> and (2) the eighth amendment prohibits the imposition of criminal sanctions to punish conduct symptomatic of a disease.

The eighth amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>9</sup> The origin of the ban on cruel and unusual punishment can be traced to the Magna Carta<sup>10</sup> and the English Declaration of Rights of 1688.<sup>11</sup> In Stuart times torture and barbarous punishments were common, and the provision was designed to correct such practices.<sup>12</sup> In 1776 the phrase formed a part of the Virginia Declaration of Rights,<sup>13</sup> and James Madison included it in the constitutional amendments he drafted in 1789.<sup>14</sup> It was incorporated into the Constitution in 1791 with little debate.<sup>15</sup>

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3. *State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964).

4. *Driver v. Hinnant*, 243 F. Supp. 95 (E.D.N.C. 1965).

5. 356 F.2d 761 (4th Cir. 1966).

6. *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966).

7. D.C. CODE ANN. § 25-128 (1961) provides: "(a) No person shall in the District of Columbia drink any alcoholic beverage in any street, alley, park, or parking; No such person shall be drunk or intoxicated in any street, alley, park or parking; . . ."

8. D.C. CODE ANN. § 24-501 (1961). This provision authorizes the courts of the District of Columbia to take judicial notice of the fact that a chronic alcoholic is a sick person in need of proper medical care, and that such a person has lost the power of self-control with respect to the use of alcohol.

9. Most state constitutions have similar provisions. Only Connecticut and Vermont do not have an express prohibition forbidding cruel and unusual punishment. However, Connecticut does provide against the imposition of excessive fines. CONN. CONST. art. 1, § 13. Vermont applies the common law existing at the establishment of the state, including the English Declaration of Rights. See *State v. O'Brien*, 106 Vt. 97, 170 Atl. 98 (1934). See Note, 1960 WASH. U.L.Q. 160.

10. See ch. 14 of the Magna Carta, printed as confirmed by King Edward I in 1297, 4 HALSBURY, STATUTES OF ENGLAND 24 (2d ed. 1948). See also, Note, 41 N.C.L. REV. 244 (1963).

11. See Note, 34 MINN. L. REV. 134, 135 (1950). This Note also states that the provision appeared in the Massachusetts Body of Liberties in 1641.

12. FELLMAN, THE DEFENDANT'S RIGHTS 207 (1958).

13. VA. CONST., Bill of Rights § 9 (1776); Note, 34 MINN. L. REV. 134, 136 n.26 (1950).

14. Browdy & Saltzman, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961).

15. *Ibid.*

Originally, the provision prohibited the wanton infliction of pain by means of the thumbscrew, the rack, crucifixion, quartering and other tortures.<sup>16</sup> Cruelty in the *method* of punishment was condemned,<sup>17</sup> and many American courts in the 19th century refused to extend this application to restrict the *duration* of imprisonment or *quantity* of punishment.<sup>18</sup>

In 1910, however, the Supreme Court decided in the case of *Weems v. United States*<sup>19</sup> that excessive punishment is constitutionally prohibited. In that case a minor public official in the Philippines had been convicted of falsifying a public record to conceal the wrongful disposition of a trifling sum. He was ordered to pay a substantial fine, sentenced to fifteen years at hard labor in chains, deprived of both his civil and political rights, and subjected to continual surveillance for life. The Court declared the statutory penalty to be unconstitutional,<sup>20</sup> resting its decision on the grounds that the penalty was inherently cruel and that the sentence was excessively severe in relation to the crime committed. The Court held that the punishment for crime should be graduated and proportioned to the offense. In reply to the assertion that the eighth amendment was only intended to prevent barbarous methods of punishment,<sup>21</sup> the Court stated that "there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. . . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth."<sup>22</sup>

Although *Weems* has generally been accepted by both federal and state courts<sup>23</sup> as establishing the rule that excessiveness, as well as mode of punishment, may be unconstitutionally cruel, it has seldom been used to hold harsh sentences invalid.<sup>24</sup> This reflects the reluctance of appellate courts to overturn a sentence legislatively authorized and imposed by a trial

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16. *In re Kemmler*, 136 U.S. 436 (1889); Warner, *Cruel and Unusual Punishment*, 3 CATHOLIC U.L. REV. 117, 119 (1953).

17. *Wilkerson v. Utah*, 99 U.S. 130 (1879). The aim of the provision was said to be the prohibition of unnecessary cruelty and pain.

18. See *Hobbs v. State*, 133 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893). Many 19th century courts felt that since physical cruelty no longer existed as a punishment in the United States, the provision was no longer viable. But see Sultan, *Recent Judicial Concepts Of "Cruel and Unusual Punishment"*, 10 VILL. L. REV. 271, 272 (1965), where the author describes some of the physically cruel punishments currently inflicted on prisoners. See also DEL. CODE ANN. tit. 11, §§ 3905-08 (1953) permitting punishment by the lash for five crimes. In *State v. Cannon*, 190 A.2d 514 (Del. 1963), the Delaware Supreme Court held these statutes do not violate the state constitutional proscription against cruel punishments nor the federal provision against cruel and unusual punishments.

19. 217 U.S. 349 (1909).

20. The Court was actually construing the Philippine Bill of Rights, but construed and applied a portion of it as identical with the cruel and unusual punishment clause of the eighth amendment. *Id.* at 383 (dissenting opinion).

21. See Note, 79 HARV. L. REV. 635, 640 (1966).

22. 217 U.S. at 372-73.

23. Until the case of *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court had never definitely stated that the due process clause of the fourteenth amendment proscribes cruel and unusual punishment although it had strongly indicated such in the earlier case of *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

24. FELLMAN, *THE DEFENDANT'S RIGHTS* 207 (1958).

court acting within its discretion.<sup>25</sup> Until recently, the constitutional provision against cruel and unusual punishment had been of ever decreasing importance.<sup>26</sup>

However, in *Robinson v. California*,<sup>27</sup> decided in 1962, the Supreme Court applied the eighth amendment in a novel manner. In that case, petitioner was arrested by a police officer who noticed hypodermic needle marks on his arm and was convicted under a California statute making it illegal to be addicted to the use of narcotics.<sup>28</sup> The Court held that the petitioner, who was not under the influence of narcotics at the time of his arrest, could not be criminally punished merely because he had the status or condition of narcotics addiction. The majority opinion,<sup>29</sup> written by Mr. Justice Stewart, compared the California statute to a law punishing insanity or leprosy, and declared that such a law "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . . Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."<sup>30</sup> The Court, emphasizing that addiction is an illness often involuntarily contracted, for the first time shifted the focus of the eighth amendment from the punishment inflicted to the nature of the conduct prescribed as criminal. In his concurring opinion, Mr. Justice Douglas stated that "cruel and unusual punishment results not from confinement, but from convicting the addict of a crime."<sup>31</sup> The Court did not object to the segregation of an addict from society, but required that this confinement be non-punitive in nature and therapeutically oriented.<sup>32</sup> The decision is far reaching because both the Court's definition of addiction as an illness and its declaration that an illness per se is not punishable are binding on the states through the fourteenth amendment.<sup>33</sup>

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25. Note, 1960 WASH. U.L.Q. 161, 166. *But see* *Coleman v. United States*, 357 F.2d 563 (D.C. Cir. 1965), noted 11 VILL. L. REV. 644 (1966), where an appellate court reduced the sentence while affirming the conviction.

26. *But see* *Trop v. Dulles*, 356 U.S. 86 (1958), where the Supreme Court held that deprivation of citizenship as a punishment for wartime desertion was cruel and unusual. Mr. Chief Justice Warren, writing for the majority, stated that such a punishment destroys the dignity of man. Also, sterilization has been held to be cruel and unusual by some lower courts, *e.g.*, *Mickle v. Henrichs*, 262 Fed. 687 (D. Nev. 1918); but held to be constitutional by others, *e.g.*, *State v. Feilen*, 70 Wash. 65, 126 Pac. 75 (1912).

27. 370 U.S. 660 (1962).

28. CAL. HEALTH & SAFETY CODE § 11721 (1964).

29. The Court was divided six-to-two. Mr. Justice Harlan concurred on the ground that the statute as construed punished a bare desire to commit a criminal act. Justices Clark and White dissented in separate opinions.

30. 370 U.S. at 666-67.

31. *Id.* at 676.

32. California has recently enacted provisions for the commitment of narcotics addicts. CAL. WELFARE AND INSTITUTION CODE §§ 5625-35 (1966). Under these provisions, if a person, after a hearing and examination, is found to be an addict he is committed to a hospital for an indeterminate period of not less than three months nor more than two years. North Carolina has a similar statute providing for the detention, treatment and cure of inebriates (which includes both alcoholics and addicts). If a person is judicially declared to be an inebriate he is committed to a state institution for treatment and discharged when cured. N.C. GEN. STAT. §§ 35-30 — 35-35 (1950).

33. See note 23 *supra*.

However, the lack of a clear *ratio decidendi* in *Robinson* has resulted in diversity among lower courts and commentators concerning the nature and extent of the immunity to punishment granted narcotics addicts. It has been asserted that the Court declared the California statute invalid solely because it prescribed punitive retribution for an involuntarily contracted addiction to drugs, and that any addiction started by a conscious experimentation with drugs does not require application of the *Robinson* rule.<sup>34</sup> Also, the crime charged in *Robinson* related solely to the condition of addiction and the Court, in dicta, appeared to recognize the power of the states to regulate the sale, purchase or possession of narcotics.<sup>35</sup> Thus, one approach is that "status" and "act" should be sharply distinguished — an "act" being punishable even if it is a product of the pathological condition. Another possibility is that because of the strong relationship between certain acts and a diseased condition, the eighth amendment prohibits punishment of the act as well as the condition. One state court has adopted the narrowest reading of *Robinson* and held that its statute, "penalizes not the status or condition of addiction but rather the habitual use of narcotics leading to such status."<sup>36</sup>

*Driver* and *Easter* in extending the reasoning of *Robinson* to the disease of alcoholism have carefully restricted their holdings to a chronic alcoholic defined by precise standards.<sup>37</sup> By specifically excluding the excessive *voluntary* drinker, they make clear that *Robinson* requires that there be a medically recognized disease so that, in the case of alcoholism, a tendency or predilection towards overindulgence will not suffice.

If *Driver* and *Easter* did no more than apply *Robinson* to another disease, they would be highly significant. However, by extending constitutional protection to drunkenness, an involuntary symptom of the disease, they broaden the *status* concept to include objective manifestations of the disease. This extension would seem to be compelled by considering the untenable alternative that while a person cannot be punished for having a disease, he can be convicted if he exhibits its symptoms. Although dicta in *Robinson*<sup>38</sup> might indicate that the Supreme Court felt differently, it is difficult to be-

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34. *State ex rel. Blouin v. Walker*, 244 La. 699, 154 So. 2d 368 (1963), *cert. denied*, 375 U.S. 988 (1964).

35. 370 U.S. 660, 664 (1962); See also *Whipple v. Martinson*, 256 U.S. 41, 45 (1921):

There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs. . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.

36. *State ex rel. Blouin v. Walker*, 244 La. 699, 706, 154 So. 2d 368, 371 (1963), *cert. denied*, 375 U.S. 988 (1964). *But see* *State v. Bridges*, 360 S.W.2d 648 (Mo. 1962) (per curiam) and *Ex parte Rogers*, 366 S.W.2d 559 (Tex. Crim. App. 1963), striking down similar statutes because they punish a status.

37. The court in *Driver* relied on the definitions of alcoholism prepared by The National Council on Alcoholism, The American Medical Association, and the World Health Organization. The court in *Easter* relied on a District of Columbia statute defining a chronic alcoholic. D.C. CODE ANN. § 24-502 (1961).

38. See text accompanying note 35 *supra*.

lieve that the Court would forbid punishment for having a cold, yet permit criminal sanctions for sneezing. Punishment for such an act would be tantamount to convicting a person for having the disease itself, in direct violation of *Robinson*.

Neither court found that voluntary exposure to the disease should preclude the application of *Robinson*. Judge Fahy, speaking for the majority in *Easter*, stated:

It should be clear . . . that chronic alcoholism resulting in public intoxication cannot be held to be criminal on the theory that before the sickness became chronic there was at some earlier period a voluntary act or series of acts which led to the chronic condition. A sick person is a sick person though he exposed himself to contagion and a person who at one time may have been voluntarily intoxicated but has become a chronic alcoholic and therefore is unable to control his use of alcoholic beverages is not to be considered voluntarily intoxicated.<sup>39</sup>

Criticism of the above reasoning has two primary bases. First, it is contended that laws punishing public intoxication or narcotics addiction deter the initial use of alcohol or narcotics.<sup>40</sup> While such an argument has some merit, it disregards the present diseased condition of the accused and effectively results in the punishment of a sick man in order to deter others from exposing themselves to the same illness. The inability to prosecute a sick man will not dilute the effectiveness of a statute punishing voluntary public intoxication or the sale, possession or use of narcotics by a person who voluntarily commits such acts. Such activity should be met with severe sanctions as long as it is the product of a free will but not when it is the compulsive act of a diseased man.

The second criticism of Judge Fahy's rationale is illustrated by the case of *State ex rel. Blovin v. Walker*.<sup>41</sup> In that case the Louisiana Supreme Court denied habeas corpus relief to prisoners who had been convicted of the habitual use of narcotics. The court distinguished the Louisiana statute<sup>42</sup> from the one declared unconstitutional in *Robinson* by holding that it punishes not mere addiction but the habitual use of narcotics leading to addiction, even though the Louisiana statute expressly penalizes addiction<sup>43</sup> and no specific instances of use were proved. The court's opinion appears to be an attempt to circumvent *Robinson* by reasoning that because the prisoners once *used* narcotics, they can now be punished for *being* addicts. While present addiction most often results from past use, and *Robinson* does not preclude punishment for use, the past acts should be proved just as in any other prosecution based on specific conduct.

Until the *Driver* and *Easter* decisions it was not clear whether *Robinson* would be read to disallow the imposition of criminal sanctions for incidents

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39. 361 F.2d 50, 53 (D.C. Cir. 1966).

40. See Note, 79 HARV. L. REV. 634, 639 (1966).

41. 244 La. 699, 154 So. 2d 368 (1963), *cert. denied*, 375 U.S. 988 (1964).

42. LA. REV. STAT. § 40:962 (1950).

43. *Ibid.* "It is unlawful for any person . . . to be or become an addict. . . ."

closely related to the disease. Although both courts reached the same conclusion their reasoning differed. The *Driver* court declared that although Driver's actions comprised the physical elements of a crime, he lacked mens rea since his conduct was neither actuated by an evil intent nor accompanied by a consciousness of wrongdoing. Moreover, his presence in public was not a voluntary act since he did not will it. In *Easter* the court relied on a comprehensive statutory program providing for the diagnosis, commitment and treatment of alcoholics.<sup>44</sup> In addition, Congressional recognition that an alcoholic possesses no powers of self-control with regard to the use of alcohol<sup>45</sup> precludes the attachment of criminality to the public intoxication of a chronic alcoholic. Although the court was thus able to rely on statutory authority for its conclusion and thereby avoid the constitutional question, four judges<sup>46</sup> specifically stated that their decision would be the same based solely upon the precedential authority of *Driver*.

While the court in *Driver* approaches the issue of whether a chronic alcoholic can be guilty of public intoxication in terms of criminal responsibility for acts committed while involuntarily intoxicated, no sound reason is given for restricting its exculpatory doctrine to "symptoms." Involuntary intoxication has long been recognized as negating mens rea and excusing conduct otherwise criminal,<sup>47</sup> and a condition which negates mens rea should logically immunize an actor from punishment for any objective conduct requiring the presence of criminal intent to be unlawful. Thus, if the drunkenness of a chronic alcoholic is now constitutionally required to be recognized as involuntary because it is a compulsive symptom of a disease, it is possible that a chronic alcoholic can avail himself of the common law defense of involuntary intoxication in any prosecution for a crime committed while he was intoxicated.<sup>48</sup>

Neither court fully discusses the nature of a "compulsive symptom." Judge Bryan in *Driver* states that symptoms of alcoholism may often appear as a "disorder of behavior."<sup>49</sup> In view of clinical data with regard to personality and behavioral changes caused by the use of alcohol, this conclusion is not unreasonable. There are some diseases, however, whose symptoms

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44. D.C. CODE ANN. § 24-501-615 (1961).

45. D.C. CODE ANN. § 24-502 (1961):

The term chronic "alcoholic" means any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare.

46. These were Judges Wright and Leventhal and Chief Judge Bazelon who concurred in the opinion written by Judge Fahy. Judge McGowan concurred in the result and in that part of the opinion relying on the District of Columbia statute. Judges Burger and Tamm joined in an opinion written by Judge Danaher which concurred solely in the result.

47. *State v. Brown*, 38 Kan. 390, 16 Pac. 259 (1888).

48. For example, the District of Columbia statute includes within the definition of a chronic alcoholic one "who while under the influence of alcohol endangers the public morals, health, safety or welfare." Three judges in *Easter* concurred specially in the result in order to indicate their feelings that Congress "had no thought whatever of addressing itself to some revised standards for determining criminal responsibility as to crimes other than public drunkenness." 361 F.2d at 61.

49. 356 F.2d 761, 764 (1966).

include serious behavioral disorders that constitute major crimes. For example, it is not unlikely that a defendant prosecuted for rape who has been found to be a sexual psychopath will argue that his sexual aggression was a "compulsive symptom" of his psychopathy.<sup>50</sup> If the defendant can successfully argue that psychopathy is a disease within the meaning of *Robinson*, and the rape a compulsion symptomatic of the disease as required by *Driver* and *Easter*, criminal punishment for the act would be constitutionally prohibited.

It is possible that the implications of the instant cases foreshadow an eighth amendment standard of criminal responsibility, although neither *Driver* nor *Easter* compel such a conclusion. A narcotics addict may be completely aware that the use of narcotics is a crime yet be unable to control his craving for drugs and be compelled to steal to satisfy this disease. If prosecuted for the theft he might argue that the crime was the result of an uncontrollable urge resulting from his disease. Such a defense, if accepted, might require the formulation of a kind of an irresistible impulse test under the eighth amendment. A due process test for the criminal responsibility of an alcoholic or narcotics addict might follow a standard such as provided by the Illinois Criminal Code:

A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition either:

- (a) Negatives the existence of a mental state which is an element of the offense; or
- (b) Is involuntarily produced and deprives him of substantial capacity to appreciate the criminality of his conduct or *to conform his conduct to the requirements of the law*.<sup>51</sup> (Emphasis added.)

The courts in both *Driver* and *Easter* would permit the confinement of an alcoholic as long as it is civil in nature and without the stigma attached to imprisonment. In *Driver* the court stated, "of course the alcoholic-diseased may be kept out of public sight,"<sup>52</sup> but the court in *Easter* made clear that the absence of rehabilitative and caretaking facilities in a particular jurisdiction in no way revives the power to imprison.<sup>53</sup>

It is submitted that the instant cases are correct, both in applying the rationale of *Robinson* to alcoholism and in extending it to include symptoms of the disease. Although both courts make it abundantly clear that a constitutional test of criminal responsibility is not intended by the instant decisions, such a test now appears to be within the scope of the eighth

50. There are few diseases whose symptoms are more readily classifiable as "disorder of behavior" than psychopathy. See CLECKLEY, *MASK OF SANITY* (1955).

51. ILL. STAT. ANN. ch. 38, § 6-3 (1964).

52. 356 F.2d 761, 764 (1966).

53. 361 F.2d 51, 53 (D.C. Cir. 1966). *But cf.* *People v. Schaletzke*, 239 Cal. App. 2d 971, 49 Cal. Rptr. 275 (1966), holding that it is not cruel and unusual punishment to imprison a convicted sexual psychopath merely because tests show he will not respond to medical treatment.



amendment. By choosing to broaden the use of the eighth amendment through its decision in the *Robinson* case, the Supreme Court has foreshadowed future developments which may have a profound effect on state substantive criminal law.

*Joseph F. Ricchiuti*

CONSTITUTIONAL LAW — OBSCENITY — EVIDENCE OF PUBLISHER'S  
INTENT MAY BE CONSIDERED IN DETERMINING THAT A PUBLICATION  
IS OBSCENE WHERE THE CONTENTS OF THE PUBLICATION, STANDING  
ALONE, MAY NOT SUPPORT THAT CONCLUSION.

*Ginzburg v. United States* (U.S. 1966)

In June of 1963 in the District Court for the Eastern District of Pennsylvania, Ralph Ginzburg and three corporations, Documentary Books, Inc., Eros Magazines, Inc., and Liaison News Letter, Inc., were convicted on all counts of a 28 count indictment, charging them with advertising and mailing obscene publications in violation of a federal statute.<sup>1</sup> From this verdict, defendants filed a motion in arrest of judgment, or, in the alternative, for a new trial, both of which were denied by the District Court.<sup>2</sup> After the judgments were affirmed by the Circuit Court,<sup>3</sup> a final appeal was taken to the Supreme Court. Certiorari was granted,<sup>4</sup> and the Supreme Court affirmed the conviction, *holding* that the Roth test must still be applied in determining that a publication is obscene, but that in a close case, a publication should be judged in the context in which it is placed by the publisher, and thus, evidence of pandering is admissible to support a determination that the publications are obscene, even though the same materials might escape condemnation in another context. *Ginzburg v. United States*, 383 U.S. 463 (1966).

While Chaucer in his *Canterbury Tales* provides us with ample evidence that printed obscenity is not a recent development, the first reported Ameri-

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1. 18 U.S.C. § 1461 states that: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." It further provides that:

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than 10 years, or both, for each such offense thereafter.

2. *United States v. Ginzburg*, 224 F. Supp. 129 (E.D. Pa. 1963).

3. *United States v. Ginzburg*, 338 F.2d 12 (3d Cir. 1964). Appellants' convictions were affirmed based on the opinion of the district judge and also upon an independent determination of obscenity by the Court of Appeals. *Id.* at 17.

4. *Ginzburg v. United States*, 380 U.S. 961 (1965).

can case dealing with the subject concerned the condemnation in Massachusetts, in 1821, of a book entitled *Memoirs of a Woman of Pleasure*.<sup>5</sup> In 1868, the prosecution in England, under Lord Campbell's Acts, of an anti-Catholic pamphlet published solely for political purposes, resulted in the formation of the first legal test of obscenity.<sup>6</sup> That is, "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."<sup>7</sup> Most American courts adopted this test but interpreted the phrase "into whose hands" as requiring the contested material to be suitable reading for anyone who might have access to the publication, including children.<sup>8</sup> Although this interpretation matched the temper of the times, as early as 1913, enlightened voices protested a rule that allowed adults to read only that which was fit for children and that allowed condemnation of a work to be based on isolated passages that might stimulate the most sensitive reader without regard to the value of the work itself.<sup>9</sup>

However, the publication of a pamphlet on sex instruction titled *The Sex Side of Life*, whose social value could not be seriously doubted, led to a modification of this strict interpretation of the *Hicklin* rule. It was held that the rule did not bar all publications that might stimulate sexual impulses and that the main effect of the work should be considered.<sup>10</sup> The *Ulysses* cases,<sup>11</sup> decided three years later, held that "the proper test of whether a given book is obscene is its dominant effect."<sup>12</sup> The court then proceeded in detail to explain what may be used as evidence of "dominant effect," including the opinion of approved literary critics.<sup>13</sup>

The view that literary or scientific value should be considered in determining whether a book was to be classified as obscene and therefore banned, was recognized by the same court that had decided *Ulysses* in *United States v. Levine*,<sup>14</sup> where it was stated that "[t]he standard must be the likelihood

5. *Commonwealth v. Holmes*, 17 Mass. 335 (1821). The first reported case in Anglo-American law on obscenity is Sir Charles Sedley's Case, 1 Keble 620 (K.B. 1663). (Sir Charles was prosecuted for standing drunk and nude on a London balcony while shouting obscenities at the people gathered below.) For a comprehensive treatment of the very early history of obscenity, see *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938).

6. *The Queen ex rel. Henry Scott*, 3 Q.B. 360 (1868). The pamphlet, *THE CONFESSIOAL UNMASKED, SHOWING THE DEPRAVITY OF THE ROMISH PRIESTHOOD; THE INIQUITY OF THE CONFESSIOAL AND THE QUESTIONS PUT TO FEMALES IN CONFESSIOAL*, was published for political purposes rather than to sexually arouse, but it was declared obscene anyway.

7. *Id.* at 371.

8. *United States v. Bennett*, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D.N.Y. 1879); *Rosen v. United States*, 161 U.S. 29, 43 (1896).

9. See Judge Learned Hand's protest against the *Hicklin* rule in *United States v. Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913), at 120-21 where, after following the *Hicklin* rule, he concludes that "[t]o put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy." *Id.* at 121.

10. *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930).

11. *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom. United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).

12. 72 F.2d 705, 708 (2d Cir. 1934).

13. *Id.* at 708.

14. 83 F.2d 156 (2d Cir. 1936).

that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merit [that] it may have in that reader's hands. . . ."<sup>15</sup> *Ulysses* also indicated that the effect of the work should be judged by its effect on the normal person in the community, analogous to the reasonable man in tort law, and not the most immature or saliciously disposed individual in the community.<sup>16</sup> The censors, however, continued to be a major force in determining what books would be allowed to circulate freely, and as late as 1946, the Supreme Court affirmed without opinion the New York decision banning Edmund Wilson's *Memoirs of Hecate County*.<sup>17</sup> The basis for the condemnation in this case was a single but detailed description of sexual intercourse contained in one short story in an anthology of short stories.<sup>18</sup>

However, in 1957, the Supreme Court, after having ignored the question of obscenity for so long, handed down its now famous decision in *Roth v. United States*.<sup>19</sup> In that case the Court held that the proper test to determine whether a publication is obscene was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."<sup>20</sup> However, the affirmance of Roth's conviction and the holding "that obscenity is not within the area of constitutionally protected speech or press,"<sup>21</sup> gave little true indication of the future trend of decisions in this area. In *Roth*, the decision of the lower court was affirmed on the assumption that the materials were in fact obscene, as had been determined by the jury under proper instructions.<sup>22</sup> However, during the term immediately following *Roth*, the Court reversed three separate obscenity convictions, per curiam and without opinion, in each case citing as authority only the *Roth* decision.<sup>23</sup> The proper meaning of these reversals and subsequent decisions was stated most emphatically in the recent case of *Jacobellis v. Ohio*,<sup>24</sup> in which the Court, while reaffirming the *Roth* holding that obscenity does not merit the protection of the first amendment, also made it quite clear that the determination of what is obscene is a constitutional question and therefore always reviewable by the Court.<sup>25</sup> *Manual Enterprises, Inc. v. Day*,<sup>26</sup> decided in 1962,

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15. *Id.* at 158.

16. 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

17. *Doubleday & Co. v. New York*, 335 U.S. 848 (1948), *per curiam*. Affirmance was based on a 4-4 decision, Mr. Justice Frankfurter not participating. For a detailed discussion of the case and the area of obscenity in general before *Roth*, see Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295-301 (1954).

18. Lockhart & McClure, note 17 *supra*, at 296.

19. 354 U.S. 476 (1957).

20. *Id.* at 489.

21. *Id.* at 485.

22. *Id.* at 489-92.

23. *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957); *One, Inc. v. Olesen*, 355 U.S. 371 (1958); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).

24. 378 U.S. 184 (1964).

25. *Id.* at 187-88.

26. 370 U.S. 478 (1962). In addition to the *Roth* test of dominant appeal, the Court here added that the material must be "patently offensive." *Id.* at 486. Thus the absurd result reached was that because the publications of *Manual Enterprises* appealed

serves to illustrate the difficulty, however, of such a review by a tribunal so far removed from the actual setting in which the case first arises, and lends support to the statements of several justices that the Supreme Court is indeed ill suited to this task.<sup>27</sup>

Nevertheless, the present test of obscenity is that material is obscene if it is patently offensive, its dominant theme appeals to the prurient interest, and it is entirely without any redeeming social value.<sup>28</sup> In a companion case to *Ginzburg*, involving the book *Fanny Hill*, it stated that these three elements must coalesce.<sup>29</sup> It has also been made abundantly clear that this test is to be based on a national standard because of the constitutional issues involved.<sup>30</sup> However, this mandate has been widely criticized, especially by proponents of a jury determination of obscenity.<sup>31</sup>

Thus, the *Ginzburg* case has apparently introduced a new and subjective element into the law of obscenity — “the leer of the sensualist.” Although such subjective elements had heretofore been considered to be immaterial, several cases would appear to lend support to the proposition that the publisher’s intent is an element to be considered.<sup>32</sup> However, some severe constitutional problems arise when a publication is banned and the only justification given is that the publisher’s purposes are contrary to accepted principles. The Court has already circumscribed itself in this area by limiting the application of censorship laws only to publications which, if left unfettered, would constitute a “clear and present danger” to our government.<sup>33</sup>

There is no conclusive proof that obscenity in printed form is dangerous.<sup>34</sup> One commentator suggests that obscenity is banned, not because of

solely to a sexually deviant group, there could be no appeal to the prurient interest of the national community and therefore the materials were not legally obscene. This reasoning has been at least tacitly overruled by *Mishkin v. New York*, 383 U.S. 502 (1966), which was decided the same day as *Ginzburg*. In affirming *Mishkin*’s conviction under a New York obscenity statute, the Court stated: “Where the material is designed for and primarily disseminated to a clearly defined sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.” *Id.* at 508.

27. *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 690 (1959) (opinion of Mr. Justice Black); *Jacobellis v. Ohio*, 378 U.S. 184, 204 (1964) (dissent of Mr. Justice Harlan).

28. See notes 19, 25, 26, *supra*.

29. *A Book Named John Cleland’s Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966).

30. See note 24, *supra* at 192-95.

31. *Ibid.* at 199-203 (dissenting opinion of Mr. Chief Justice Warren). See O’Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Law and Obscenity: Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1 (1964); Froessel, *Law and Obscenity*, 27 ALBANY L. REV. 1 (1963); Note, 31 FORDHAM L. REV. 570 (1963).

32. *United States v. One Book Entitled Contraception*, 51 F.2d 525, 527 (S.D.N.Y. 1931); *Commonwealth v. Gordon*, 66 Pa. D.&C. 101, 151 (1949), *aff’d sub nom. Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A.2d 389 (1950).

33. See *Dennis v. United States*, 341 U.S. 494 (1951); *Mendelson, Clear and Present Danger — From Schenck to Dennis*, 52 COL. L. REV. 313 (1952).

34. See Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 385-87 (1954).

its danger; but because of its total lack of value.<sup>35</sup> Lack of value alone, however, does not seem to be a sufficient basis to deny any form of expression the protection of the first amendment.<sup>36</sup> However, if published material is "patently offensive" and completely without value, as are "fighting words,"<sup>37</sup> a stronger argument can be made for prohibition of such expression.

Mr. Justice Harlan and Mr. Justice Stewart, in their respective dissents in *Ginzburg*, are of the opinion that only "hard core pornography" may be constitutionally banned by the Federal government since only that kind of material can be classified as both patently offensive and "utterly without redeeming social value."<sup>38</sup> The majority answers the objection that *Ginzburg's* materials had redeeming social value in *Fanny Hill*.<sup>39</sup> Referring to admission of the evidence of pandering in *Ginzburg*, the Court states: "It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be utterly devoid of social value, but rather that . . . where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value."<sup>40</sup>

Perhaps, one of the undisclosed factors that prompted the majority decision in *Ginzburg* is the Court's concern over the availability of certain publications to minors. But in a footnote to his opinion, Mr. Justice Stewart states that if a case involved a sale to a minor the Court would be presented with a far different situation.<sup>41</sup> A separate statute prohibiting the sale to minors of publications which are not "hard core pornography," but which are certainly unfit reading material for the young and immature, may provide a solution to this area of concern.<sup>42</sup> The obscenity statute invalidated in *Butler v. Michigan*<sup>43</sup> that prohibited the sale to *anyone of any material* which would adversely affect youth does not preclude such a possibility. This is because it is not unreasonable to infer from *Butler* that a statute prohibiting such sales to minors could be constitutionally constructed.<sup>44</sup> The evolution of a separate standard for the sale of reading material to minors could be a partial answer to the dilemma in which the Court presently finds itself. The censors would not then be so ready to condemn, and a truly free press would be one step closer to reality.

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35. Kalven, *The Metaphysics of the Law of Obscenity*, THE SUPREME COURT REV. 1, 8-15 (1960).

36. *Jacobellis v. Ohio*, 378 U.S. 184, 191-92 (1964); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 484-91 (1962).

37. *Ibid.*

38. *Ginzburg v. United States*, 383 U.S. 463, 493 (1966) (dissent of Mr. Justice Harlan); *Id.* at 497 (dissent of Mr. Justice Stewart).

39. See note 29 *supra*.

40. *Id.* (Emphasis added.)

41. See note 38 *supra*, 383 U.S. 463 at 499.

42. See Fagan, *Obscenity and Minors, The Case for a Separate Standard*, 10 CATHOLIC LAW. 270 (1964).

43. 352 U.S. 380 (1957).

44. *Id.* at 383-84.

It is submitted that the Court's decisions in *Ginzburg* and the companion cases, *Mishkin*<sup>45</sup> and *Fanny Hill*,<sup>46</sup> all reach socially desirable results, but that the means which the Court adopted are not as clearly marked as had been hoped for. *Mishkin* should be read to overrule *Manual Enterprises* in that the test of prurient appeal is now, and correctly so, the prurient appeal to the marketing target of the publisher. *Fanny Hill* serves to explain more clearly the *Ginzburg* holding and in this respect should be well received. In conclusion, it should be noted that *Ginzburg* itself gives effect to the reasoning of Mr. Chief Justice Warren as stated in *Roth* nine years ago:

The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.<sup>47</sup>

Richard G. Greiner

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45. Note 26, *supra*.

46. Note 29, *supra*.

47. 354 U.S. 476, 495 (1957).

## BOOK REVIEWS

CASES AND MATERIALS ON OWNERSHIP AND DEVELOPMENT OF LAND.  
By Jan Krasnowiecki.† The Foundation Press, Inc., Brooklyn, 1965.  
Pp. 837.

Property law teachers are the oxen plowing the legal fields. But do not underestimate them. Harnessed to a 1066 plow and using eighteenth century techniques, they have been able to keep 1966 tractors out of the fields. Today, however, many of the oxen are growing restless under Langdell's yoke, and Professor Krasnowiecki is one of them. They would throw it off, but differ as to how to do it. They agree that many valuable classroom hours are lost teaching laws, such the the Rule of Shelley's Case, which do not lend themselves to dialogue. The assignment of cases setting forth the Rule is neither particularly beneficial as a learning technique, nor is it particularly relevant to the needs of the modern real estate lawyer. Does it make sense to devote classroom hours to the history of The Rule of Shelley's Case even in capsuled form? Cannot the Rule be learned as though it were a mathematical equation? Will the equation be better learned in the classroom or from assigned reading? Is it necessary to test knowledge of the equation? Could the test be handled by a number of problems? Would the problems be discussed in the classroom? With each answer to these and other questions comes a variety of teaching techniques, and this book offers material for many different techniques. The teacher is given enough material to permit up to ten hours (course credits) of basic and specialized (land-use) instruction in property law and he must decide how many of the ten hours are justified and how and where to place his "level of emphasis."

Professor Krasnowiecki begins with an engaging comparison between the struggle of the freeholder and his lord and the struggle of the American citizens and the Commissioner of Internal Revenue. He cleverly relates the shifting and the ultimate disappearance of feudal incidents. Although the comparison is apposite, in terms of success the taxpayer is clearly an also-ran. For the student interested in the heroics of the freeholder — the amaranths of which England is most prideful — there are references to Plucknett, Pollock and Maitland, and others. The freeholder's struggle is then (the next 68 pages) placed before the courts and the procedure is meaningfully explained. The chapter is "concerned mainly with the remedies of one who claims recognition and protection of his ownership

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in land", and is only an introduction to procedure. It asks how a right and a remedy are related. It is the cornerstone for an emphasis on procedure which is found throughout the book.

After the notes and cases on procedure, the author offers all of the material currently presented in first year property and special courses in land use. Again, herein lies one of the strengths of this book. It benefits from the author's indefatigable scholarship; he has winnowed from research those materials which permit complete coverage of the subject.

The first fifteen chapters present basic concepts of adverse possession, fee simple, landlord and tenant, concurrent ownership, gifts and concurrent ownership of savings accounts, estates in land, interests in land, and affirmative covenants, in that order. Of interest is the success with which the author develops the concept of title (the disappearance of feudal incidents and movement from tenure to ownership) without showing the maturation of possessory interests into title (*Pierson v. Post*, et al.).

Professor Krasnowiecki states that the impression that one is playing games in basic property so that one can handle real problems in later courses is a pedagogical disaster. He eliminates much of the cause for this impression by explaining the social thought that led to the formation of basic property laws and the possible arrangements which will cause the operation of such laws to achieve the result desired by the client. It is hard to avoid the impression that property laws do not make sense and are laws of a game when clear expressions of intent in a written instrument result in disappointment to the client and there is no policy reason for the disappointment. Perhaps the pedagogical danger lies in the use of classroom hours to discuss basic property laws, whereas the more imaginative students require policy inquiry in depth. To eliminate this danger, Professors Bergin and Haskell in their *Preface to Estates in Land and Future Interests*, The Foundation Press, Inc. 1966) have offered the traditional material for preliminary study in order that 12 to 20 classroom hours may be saved for in-depth case and policy analysis in class. Professor Krasnowiecki's material offers a similar opportunity.

With good balance the last half of the book presents the material generally found in specialized (land use) property courses. In order, the author presents restrictive covenants, zoning and subdivision, easements, water rights, urban renewal and eminent domain, and agreements of sale. The appendices are extremely helpful and include a model agreement of sale, subdivision regulations, seminar type material on zoning, the model home owners association form, and material on cooperatives and condominiums and fair housing.

Interestingly, in 837 pages the author has omitted several landmark cases, such as *Village of Euclid v. Ambler Realty*<sup>1</sup> and *Berman v. Parker*.<sup>2</sup> Perhaps the student has benefited from the omission. The author's notes and more recent cases, which include both the content of the landmark

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1. 272 U.S. 365 (1926).

2. 348 U.S. 26 (1954).



cases and recent developments, are more extensive as a result of the omission. But should not the student always be interested in the entire opinion of the *Euclid* case which was the first decision that placed the determination of the reasonable use of land in the hands of an administrative body and took the determination out of the supposedly iron grip of the owner? Further, the author's thesis that the term police power in a broad sense includes the power of eminent domain must have its foundation in *Berman v. Parker*. As the author says, his thesis runs contrary to the accepted view. So important is this thesis that the student may want *Berman v. Parker* set forth in full rather than paraphrased in another case later in the book. The thesis places urban renewal, the police power and the power of eminent domain in the same bed to the delight of the legal activist. The sources for such a lively thesis deserves more space in the text.

A thread which is perhaps missing in this book is a study of the planning process. Professor Lon L. Fuller, in teaching jurisprudence has used such authors as Michael Polany (*The Logic of Liberty*, 1951), F. A. Hayek (*The Road to Serfdom*, 1956) and Barbara Wootan (*Freedom Under Planning*, 1945) and has sharpened the problem of who should do the planning, of what, and for whom. It seems to me that increasing public regulation of land use requires inquiry into the planning process upon which such regulation is predicated. Also there is the question of the effect of planning and regulation upon mankind. I would hope that some day the law might go further and ask the psychiatrist, the historian and the anthropologist questions such as, what the affect upon man is if he is eliminated from the planning process?; what the affect upon man is when he cannot make his own arrangements for the use of land?; what hostility follows?; and what needless litigation?

Professor Krasnowiecki's new casebook has made a distinguished contribution to the teaching and understanding of law. It is a most prodigious and comprehensive text. It confirms the author's reputation as a scholar and craftsman.

*John Stuart Carnes\**

DRAFTING A UNION CONTRACT. By LeRoy Marceau.† Little, Brown and Company, Boston and Toronto, 1965. Pp. 296. \$12.50.

In this book, the author states, and more than adequately proves, his case for precision in the use of the English language embodied in collective bargaining agreements. At the outset, he lists several qualities of the natural born draftsman, among these being a passion for exactness,

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ability to systematize, inventiveness and persistence. As a reader continues through the book, he is constantly aware of the fact that Mr. Marceau has carefully adhered to each of the attributes he attaches to the natural born draftsman. The result is a volume which should prove to be a very valuable tool to the persons charged with the responsibility for preparing collective bargaining agreements.

Due to the thoroughness with which the book is written it can, of course, be a number of things to a number of people. To the novice in labor-management relations the first three chapters dealing generally with the principles of drafting, preparing to draft and the style of collective bargaining agreements are especially valuable. Matters such as applicable Federal and State laws, reference books, the effect of prior agreements, and even punctuation and capitalization are considered in depth. While these matters are usually assumed by a person with some experience in preparing agreements, a brief review of these basics can be of assistance in avoiding the pitfalls of carelessness into which even the most experienced can occasionally fall.

While the first five chapters may be viewed to be too basic by the "old hand", the author has also dissected complex areas of collective bargaining agreements with such clarity that one can literally see grievances and arbitration issues being foreclosed. Moreover, a study of these later chapters indicates that the author's approach in stating and analyzing the understanding of the parties, in order to properly express such understanding in written terms, forces the parties to reach a clearer understanding in the first instance, thus avoiding subsequent disagreements.

Nowhere is the need for clarity in understanding and expression more important than in the areas of seniority, job classification and scheduling. The author quite cleverly approaches these subjects with a concept entitled "Incumbency," and with the use of a few diagrams he forcefully demonstrates the need to consider a person, group of persons or things in relation to each other and to the particular subject matter, be it identification of a seniority unit, job classification or determination of methods of promotion and demotion.

Since the decisions of the United States Supreme Court in the now famous *Steelworkers* cases,<sup>1</sup> the matters of grievances, arbitrability and the authority of arbitrators have received careful attention by the parties to collective bargaining agreements. The precision with which such provisions must now be drawn cannot be overemphasized. Thus, the author's treatment of these questions is a necessity for all practitioners in the field, particularly those representing the management side of the negotiating table. All of the issues that can arise out of the use of the grievance and arbitration procedures are considered and discussed in detail, making a considerable contribution to the utility of the entire book.

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1. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

It is suggested that the book is primarily in the nature of a reference work to be consulted repeatedly. Actually, because of the depth and complexity of the subject matter and the detail in which the author handles topics such as choosing the correct word or how many copies to make, it is not an easy book to simply read. In this connection, of considerable value to the user is the Table of Contents, in which each Chapter is subdivided into sections dealing with all aspects of the major chapter heading.

The book includes eleven very helpful appendices, not the least of which is Appendix III which lists the day or date of all holidays through 1974. Also helpful to the contract draftsman is the Sample Table of Contents in Appendix IX.

Coupled with the very workmanlike job of Mr. Marceau, the book will be a valuable addition to the library of labor relations practitioners.

*James A. Matthews\**

FEDERAL FOOD, DRUG, AND COSMETIC ACT: 1961-1964. By Vincent A. Kleinfeld† and Alan H. Kaplan.†† Commerce Clearing House, Inc., Chicago. 1965. Pp. 913.

The first comprehensive federal legislation imposing standards of quality on sellers of foods and drugs was passed in 1906.<sup>1</sup> This forerunner of the present Federal Food, Drug and Cosmetic Act<sup>2</sup> proved relatively ineffectual from the standpoint of consumer protection since a manufacturer could be prosecuted by the Food and Drug Administration only if he shipped an article in interstate commerce which he *knew* to contain false or fraudulent claims.

Strong consumer interest groups were eventually instrumental in the passage of the entirely new 1938 Act,<sup>3</sup> which vested greater control in the FDA over interstate traffic of drugs and foods, as well as over cosmetics and advertising. This Act continued virtually unamended until recently, when the 1962 Kefauver-Harris amendments<sup>4</sup> to the Food, Drug and Cosmetic Act were passed as an outgrowth of the much-publicized hearings of the Senate Anti-Trust and Monopoly Subcommittee.<sup>5</sup> There is a great paucity of writing and analysis of these most important amendments,

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†† Member of the District of Columbia Bar and the New York Bar.

1. Ch. 3915, 34 Stat. 768 (1906).

2. Ch. 675, 52 Stat. 1040 (1938), 21 U.S.C. § 1 *et seq.* (1938), as amended 76 Stat. 781 (1962), 21 U.S.C. § 301 *et seq.* (1962), and further amended 79 Stat. 227 (1965), 21 U.S.C. § 301 *et seq.* (1965).

3. Ch. 675, 52 Stat. 1040 (1938).

4. 76 Stat. 781 (1962), 21 U.S.C. § 301 *et seq.* (1962).

5. *Hearing on S. 1552 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st and 2d Sess. (1960).

due in large part to their brief history. Consequently, there is an urgent need of a comprehensive treatise as an aid to lawyers in the food, drug and cosmetic industry.

The instant work is admittedly not such a treatise. Nor does it purport to incorporate the opinions or insights of the authors. It is rather catalog of all cases decided under the act during the years 1961-1963, the act itself and amendments thereto, and regulations and policy statements issued thereunder.

The book is the fifth in a series dealing with the Federal Food, Drug and Cosmetic Act prepared for the Food Law Institute. The four preceding volumes each covered similar short periods in the act's history in the same fashion. This is an especially important volume, however, since it encompasses the passage of the 1962 amendments.

The cases are organized in the book according to the type of government action — seizure, criminal prosecution, or injunction. Most involve seizures by the FDA for misbranding of drugs by false or misleading labeling under section 502(a) of the act. It becomes apparent that the FDA is more successful before the courts than any other government agency. This is probably because the courts respect the scientific judgment of the FDA, or because in this area of public health, the courts are extremely receptive to arguments that the consumer might somehow be harmed.

The remainder of the book is devoted mainly to the act itself and the regulations of the FDA, a branch of the Department of Health, Education and Welfare. Most important, of course, are those sections setting forth the 1962 amendments.

The Food, Drug and Cosmetic Act, as amended in 1962, is preventive rather than punitive. Self-regulation and voluntary compliance by industry are emphasized both in theory and practice. It does, however, impose strict standards of quality control on industry.

The act now requires a showing of efficacy, as well as safety, before a new drug is given marketing approval by the FDA. This provision was supported by the drug industry, as were the sections giving the FDA broad investigative and inspection powers and requiring the registration of manufacturers. Industry has been at odds with the government only on those regulations issued under the act which require the generic name of a drug to accompany each appearance of the brand name,<sup>6</sup> and which call for re-examination and record-keeping for drugs already on the market and generally recognized as safe and effective.

The effects of the amendments have been rather startling. Fewer new drugs are being introduced; only seventeen new drug approvals were granted during 1965. More research is going abroad, since foreign

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6. Drugs; Statement of Ingredients, 28 Fed. Reg. 6375 (1963), 21 C.F.R. 1.104(g)(i) (1966); Prescription — drug advertisements, 28 Fed. Reg. 6376 (1963), as amended at 28 Fed. Reg. 10994 (1963), 29 Fed. Reg. 257 (1964), 29 Fed. Reg. 7284 (1964), 21 C.F.R. 1.105(b)(i) (1966).

governments are quicker to approve new drugs. This is due in large part to the great amount of time (approximately 18 months), expense and paperwork required between drug discovery and FDA marketing approval. This trend should continue unless government de-emphasizes technicality in new drug applications and looks for relative rather than absolute safety and efficacy.

No insight into the aforementioned problems is acquired from a reading of Messrs. Kleinfeld and Kaplan's book. There can be scant appreciation of this controversial and complex act from a bare reading of its passages. Moreover, the vast majority of cases included are decided under the 1938 Act. A crying need remains for an illuminating treatise on food, drug and cosmetic law.

The instant work does achieve the authors' avowed purpose. It serves as a handy and complete compilation of the act, regulations, and available relevant material — up to 1963. A similar book would be more valuable several years hence, when important cases under the 1962 amendments have been decided and included.

Thomas F. Schilpp\*

INTRODUCTION TO LAW AND THE LEGAL PROCESS. By Bernard F. Cataldo, Cornelius W. Gillam, Frederick G. Kempin, Jr., John M. Stockton, and Charles M. Weber.† John Wiley and Sons, Inc., New York. 1965. Pp. 880.

When a textbook achieves a compilation of materials rendering a full scope of coverage of fundamental areas otherwise difficult for an undergraduate student to obtain, it is indeed an occasion for instant delight. *An Introduction to Law and the Legal Process*, written primarily for the nonprofessional student by five distinguished members of the Business Law Department of the Wharton School of Finance and Commerce of the University of Pennsylvania, reveals remarkably well the full development of the law through a concern for its current problems and its application to the important substantive areas of contracts, torts, and agency. Never once does the text indicate in its structure the collaboration by a group of authors. In contrast to the often met awkwardness of texts which suffer from collaboration, lending little cohesion to the finished draft, *Introduction to Law and the Legal Process* left this reviewer with an appreciation of the wealth and refinement in the presented materials which likely could best only be served in the manner of this joint effort.

So often a course in law for the undergraduate student is devoid of an expressive survey of the full meaning of the law and its historic

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development. In the first two parts of this text a full third of the book has brilliantly drawn together the vital areas of the law's development; its application to legal reasoning; the court's function in the law; current problems in the administering of justice; the law's jurisdictional conflicts and pluralism; and the procedure usually encountered in typical litigation. Useful repetition of several segments of the judicial structure and process is quite apparent, but to the lay reader, whether undergraduate or not, its convenience is comforting to the understanding of these amplified facets of this most important area.

In the coverage of the law of contracts, an interesting method, quite different from the classical approach of similar undergraduate texts, is exercised by the initial study of "consideration" followed by an insight into the element of damages and mutual assent. However, the depth of each step which is taken by the authors and the generous discussion of helpful cases and examples should present the reader with little difficulty in its study. The treatment of current problems in the law of contracts in certain areas and a complete discussion of the alternatives lends sophistication to this text rarely met in other nonprofessional school texts on law and business law. It was also interesting to note that the breadth of materials on contract law far exceeds that found in the leading competing texts.

It is evident that *Introduction to Law and the Legal Process* is a new venture in the writing of undergraduate law texts and one which shall make a significant impact in the much needed improvement of legal education at the college level. The authors have prepared an excellent treatment of an often stilted undergraduate subject and have succeeded in this accomplishment very likely by being ever mindful of one of their most important observations: "Legal concepts, doctrines, and rules are not measuring rods or exact formulas. They are, at best, verbal containers for judicial discretion."

Leonard J. Tripodi\*

THE NEGRO AND THE FIRST AMENDMENT. By Harvey Kalven, Jr.†  
Ohio State University Press, Columbus, 1965. Pp. ix, 190. \$4.75.

"The greatest fascination of law study is, I think, to watch some great event from the real world intersect with existing legal doctrine."<sup>1</sup> The great event on the domestic scene during the present decade has been the emergence of the Negro rights protest movement. The instant book is a compilation of lectures by Professor Kalven which discuss the

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† Professor of Law, University of Chicago.

1. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 3 (1965).

repercussions the civil rights movement has had on the first amendment. The book is aimed at tracing the connections between civil rights and civil liberties. Thus, two popular labels of the day are joined in order to show their impact on the constitutional doctrine of free speech.

Professor Kalven examines in detail three fresh problems which the Negro issue has produced for free speech theory. The first is the problem of group defamation as illuminated by *Beauharnais v. Illinois*<sup>2</sup> and *New York Times Co. v. Sullivan*.<sup>3</sup> The second problem surrounds attempts made to legally curb and control the NAACP, the key case being *Gibson v. Florida Legislative Investigation Comm.*<sup>4</sup> The final problem concerns the self-help tactics of the Negro and the extent to which they represent a new form of speech entitled to certain privileges. The key case here is *Garner v. Louisiana*.<sup>5</sup>

The first chapter on group libel must be read in conjunction with Professor Kalven's article on the *New York Times* case in the *Supreme Court Review*.<sup>6</sup> Professor Kalven saw *Beauharnais* as creating two levels of speech, one being constitutionally protected, the other not. Libel, being in the latter level along with such phrases as yelling "fire" in crowded movies, is therefore beneath any first amendment concerns. The *Beauharnais* case involved anti-Negro propaganda which the Court found not to be protected by the first amendment. After a detailed and thorough analysis of *Beauharnais*, the book turns to the *New York Times* case which, at first reading, appears to be diametrically opposed to *Beauharnais*.<sup>7</sup> The *New York Times* case seems to say that libel is at the heart of first amendment concerns. Some authors have reconciled these two opinions by restricting the *New York Times* case to public officials. Professor Kalven, rather than attempting such an effort, sees the Court in protecting statements against public officials, as possibly starting a dialectic progression from public official to government policy to public policy to matters within the public domain.<sup>8</sup> If the Court follows this logic, a theory of free speech similar to that which Alexander Micklejohn offered fifteen years ago will evolve.<sup>9</sup> In any event, Professor Kalven points to the statement of Justice Brennan in the *New York Times* case as a true expression of free speech.

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2. 343 U.S. 250 (1952).

3. 376 U.S. 254 (1963).

4. 372 U.S. 594 (1963).

5. 368 U.S. 157 (1961).

6. Kalven, *The New York Times Case — A Note on the Central Meaning of the First Amendment*, *Supreme Court Rev.* 1964, p. 191.

7. See, for example, Professor Franklin who saw the Court in the *New York Times* case as limiting *Beauharnais* to cases where breach of the peace is actually threatened; Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 *STAN. L. REV.* 789, 820 (1964).

8. See *Pauling v. Globe-Democrat Publishing Co.*, 35 U.S.L. WEEK 2010 (U.S. July 5, 1966). In this case the Eighth Circuit extended the libel rule of the *New York Times* case by holding that a prominent scientist who actively thrust himself into public discussion of a controversial foreign policy question cannot recover in a libel suit against a newspaper that, without malice, published an editorial falsely stating that he had been held in contempt of Congress.

9. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1948).

We have, he tells us, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>10</sup>

The second chapter of *The Negro and the First Amendment* is entitled "Anonymity, Privacy, and Freedom of Association." Those who read this chapter cannot help but grasp the important contribution the NAACP has made to free speech. In 1954 the Supreme Court declared discrimination in public education to be unconstitutional.<sup>11</sup> This decision was a reflection of the changing philosophy of our era expressed in a new approach to constitutional rights.<sup>12</sup> The long battle leading to this decision was spearheaded by the NAACP. The advancement of first amendment theory arises out of what has often been called the "counterattack of the South". In brief, Professor Kalven explores the series of Supreme Court cases dealing with Southern attempts to control and eliminate the effectiveness of the NAACP. The chapter draws together in logical progression the national efforts to curb the domestic communist conspiracy and the South's efforts in opposing the NAACP, which from the South's standpoint is considered a second domestic conspiracy aimed at revolution. Many of the legal tactics used to fight communism were unsuccessfully adopted in an attempt to control the NAACP.

There is a limit to the space accorded a reviewer, and the details of Professor Kalven's review of the Supreme Court cases cannot be given. Suffice it to say that they are concise, well correlated and the interdiction of the McCarthy era progeny of cases on this subject is artful. Professor Kalven does not, however, give us an answer as to what effect these cases have on the overall theory of free speech. He points out the five different legal rules for review of investigatory committees,<sup>13</sup> but concludes that the present cases present an unresolved problem for the first amendment.<sup>14</sup>

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10. 376 U.S. 254, 270 (1964). See KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 64 (1965).

11. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

12. The change from the "separate but equal" doctrine was gradual. In 1938 the Court emphasized the need for real equality and rejected any attempt at mock equality. It would not suffice for a state to provide a law school at home for whites and mere fiscal aid to qualified Negroes to help them attend law schools in other states. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). In *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U.S. 631 (1948), the Court maintained that qualified Negroes must be furnished the equivalent of legal training within the state if they are not admitted to the state law school. When Negroes are admitted to a regular state university, they may not be segregated for purposes of scholastic activity. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). In *Sweatt v. Painter*, 339 U.S. 629 (1950), the requirement of real equality was stressed as far as to suggest that, at least in professional education, nothing less than identical treatment would satisfy the Constitution.

13. The five positions for review of investigative committees evolve from the *Gibson* opinion. They are: (1) Some reasonable basis for troubling the particular witness must be established (majority); (2) The Court should not scrutinize very carefully a "foundation" if any is offered (Justice White); (3) Inquiry is limited to the substantiality of the state's interest and by the relevance to it of the information sought (Justice Harlan); (4) Bar all consequential abridgements resulting from disclosure (Justice Black); and (5) Create certain islands of inviolate privacy in the society which a committee could not invade by investigative process (Justice Douglas). See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

14. See KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 121 (1965).



In the final chapter an attempt is made for forecast the possible influence the "sit in" cases will have on first amendment theory. While discussing the most recent "sit in" cases, Professor Kalven focuses on the Court as protecting the self-help measures of the civil rights movement. To put it technically, he feels the self-help tactics may be privileged under the first amendment. Professor Kalven readily admits that the Court has not adopted this approach, and because of the adoption of the Civil Rights Act of 1964,<sup>15</sup> they are not likely to pass on this issue.<sup>16</sup>

This section of the book attempts to pose the issue in the light of trespass versus free speech. Thus the question then turns on whether the forum used during the "sit in" is public or private. The argument would then evolve around Justice Douglas' expansion of the concept of state action under the fourteenth amendment to include "quasi-public" places. Justice Douglas, for example, maintains that restaurants are public accommodations, since state licensing and surveillance of such businesses become a service to the public rather than a mere income-producing licensing requirement. Thus, Justice Douglas would conclude that no state can endow a restaurant "with the authority to manage that business on the basis of *apartheid* which is foreign to our Constitution."<sup>17</sup> Under the doctrine of trespass versus freedom of speech, the adoption of Douglas' theory is not necessary, although the resulting argument is the same. Professor Kalven distinguishes between two categories of private property to which the doctrine of trespass would apply. He states:

There is at one extreme the private home; that is, property in no sense open to the public and which is properly viewed as an asylum for privacy. We are not suggesting that the First Amendment empowers anyone to invade the home for the purpose of edifying, with a speech, its owners against their will. There is, however, the other extreme — where the property, although privately owned, is in an important sense open to the public; here values of privacy are at a minimum.<sup>18</sup>

The practical problem is the same as that faced by Justice Douglas in *Garner* and *Lombard* where he posed the issue as to whether property was sufficiently in the public domain so that the owner under the fourteenth amendment had lost his power to discriminate among invitees on the basis of race. Neither of these two approaches seems destined to receive the backing of a majority of the Court.

The "sit in" cases seem to point out and bring to the foreground the distinction between liberty and equality. The civil rights movement is essentially a call for equality, a call for that form of justice seen in treating

15. 78 Stat. 241 (1965), 42 U.S.C. 2000(a) (1965). In fact many new state laws have been passed within the past two years. See Robison & Flicker, *Summary of 1964 and 1965 State Anti-Discrimination Laws*, 3 L. IN TRANSITION Q. 94 (1966).

16. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 163, 72 (1965).

17. *Lombard v. Louisiana*, 373 U.S. 267, 283 (1963). (Douglas, J., concurring.)

18. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 146-47 (1965).

all men alike. The insistence upon civil rights culminates in a rule of law with its emphasis on all members of the community being treated identically rather than what the law should be, this restraint on uniformity of treatment being the only restraint upon the government. The advocates of liberty, on the other hand, tend to place greater emphasis on restraining government power and limiting what the government may do. Thus the libertarian often prefers to endure inequality rather than permit restrictions on liberty designed to establish or protect equality.

Obviously, much can be said for each approach, but they do not always work hand in hand and the "sit in" cases seem to signify a new balance between liberty and equality. The influence the "sit in" cases have had on free speech theory seems minimal; however, Professor Kalven's presentation of this idea will certainly challenge the intellectuals of this era.

*The Negro and the First Amendment* gives very few answers, but it does illustrate the role of the courts in the present day struggle and presents a clear documentary on the first amendment. The fact that no answers are given only points out the fact that there are no absolutes for the first amendment. The balance of liberty and equality must be struck differently at different times, reflecting differences in prevailing philosophy. In illustrating this movement in the first amendment, Professor Kalven has brought to the attention of his readers the ever present progression in the law.

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