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Recent Developments

Various Editors

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RECENT DEVELOPMENTS

CIVIL RIGHTS — JUDICIAL IMMUNITY — PROSECUTING ATTORNEY HELD TO BE IMMUNE FROM SUIT BROUGHT UNDER THE CIVIL RIGHTS ACT OF 1871.

_Bauers v. Heisel_ (3d Cir. 1966)

Plaintiff was tried and convicted for automobile larceny and prison escape while a juvenile because of an erroneous determination made by defendant, the Hunterdon County prosecutor, that he was an adult. Following the completion of his sentence, plaintiff successfully applied for the vacation of his conviction and instituted a civil suit for damages under the Civil Rights Act, alleging that he had been deprived of his liberty and his right to a speedy trial. The United States District Court for New Jersey dismissed the complaint. On appeal, the Court of Appeals for the Third Circuit affirmed, holding that the common law doctrine of judicial immunity was not abrogated by 42 U.S.C. 1983 and that a prosecuting attorney has the same immunity afforded members of the judiciary. _Bauers v. Heisel_, 361 F.2d 581 (3d Cir. 1966).

The Civil Rights Act of 1871, re-enacted in 1952, was one of the statutes and constitutional amendments that came into being as a result of the Civil War and the subsequent era of increased concern for civil liberties. It was designed to provide relief for persons subjected to "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . ."

Section 1983 has engendered considerable debate concerning its effect on the common law doctrine of judicial immunity. This doctrine, which

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1. In vacating the sentences, the court held that since plaintiff was not eighteen years old when the offenses were committed, jurisdiction was vested in the Juvenile and Domestic Relations Court and no criminal process could be invoked against a juvenile without a reference of the case to the county prosecutor by the juvenile court. *N.J. Stat. Ann.* 2A: 4-14-15 (Supp. 1965). *State v. Bauers*, No. A-510-63, May 8, 1964 (unreported).
2. *Section 1983 Civil Action for Deprivation of Rights.*
   
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. *Rev. Stat.* § 1979 (1875), 42 U.S.C. § 1983 (1952) (formerly Civil Rights Act of April 20, 1871, Ch. 22 § 1, 17 Stat. 13).
5. _Comment, 36 Ind. L.J. 317, 318 (1961)._ 

(171)
exempts judges from liability "for acts done by them in the exercise of their judicial function," would seem to be unavailing under a literal reading of the statute since it imposes liability on "every person" who affects the deprivation of another's civil rights.

Reference to debates in the enacting Congress sheds little light on congressional intent to abolish or leave the immunity intact since only those opposed to the enactment of the bill referred to its effect on judicial immunity. Their charges which indicate that they feared that judicial immunity would be no defense to an action under the bill, were not answered during the debates by the proponents of the bill. The court in the present case attributed this failure to respond to the lengthy duration of the debates and the likelihood that the proponents were not present at the sessions during which the charges were made, thus refusing to infer agreement from silence. Although the court's historical analysis showing the lack of clear congressional intent is persuasive, there are other factors supporting a different conclusion. Representative Shellabarge, who introduced the bill, and other proponents discussed and explained every other major criticism and consistently corrected errors and misunderstandings. A reasonable explanation for their failure to respond to the comments concerning judicial immunity would be that a response would have required an admission that immunity would be abrogated by the bill. Such an admission would have solidified the opposition. Thus, the legislative history of the bill could be used to support the thesis that judicial immunity is no defense to a suit brought under the act.

The Civil Rights Act of 1871 was seldom used as a basis for relief until the last quarter century. Its recent revival has generated many arguments against a literal reading of the statute. Such arguments have

7. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871). Coke held that "judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the King himself. . . ." Id. at 347-48.
10. Congressmen Arthur of Kentucky stated:

Hitherto, . . . no judge or court has been held liable, civilly or criminally, for judicial acts and the ministerial agents of the law have been covered by the same aegis of exemption. . . . Under the provisions of this section every judge in the State court and every officer thereof . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him. . . .


Congressman Lewis of Kentucky stated:

By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in a Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be. . . .

Id. at 385.
16. The arguments include: (1) The danger of influencing officials by the threat of a law suit; (2) The deterrent effect on men who are entering public life; (3) The
been favorably received by the courts and common law legislative and judicial immunity have generally been recognized as a defense to suits under the act. In Tenney v. Brandhove, the United States Supreme Court held that legislative immunity was a valid defense to a suit brought under the act. In so holding, the Court stated: "We cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."

Judicial immunity from suits under the Civil Rights Act had been upheld, for the most part, even prior to the Tenney decision. Although it can be argued that Tenney does not require judicial immunity, the courts have used it to support an apparent predisposition toward immunity by reasoning that judicial immunity has a stronger foundation in tradition than does legislative immunity. The presence of the holding in Tenney has merely made lower courts more willing to expressly base their

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18. Id. at 376.
19. There appears to have been only four cases holding a judge liable for damages up to the time that Tenney was handed down. These cases are: Ex parte Virginia, 100 U.S. 339 (1880) (liability for selection of jury; ministerial function); Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950); McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949) (this case did not consider judicial immunity being decided on the basis of the phrase "color of law" in the statute); Kenney v. Fox, 232 F.2d 288, 293 (6th Cir.), cert. denied sub nom., Kenney v. Kilihan, 352 U.S. 855 (1956); Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945).
20. As Mr. Justice Douglas stated in Monroe v. Pape, 365 U.S. 167 (1961): "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.'" Id. at 174-75. "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." Id. at 176. Thus, Congress was largely concerned with law enforcement. An intent to retain legislative immunity and to abrogate judicial and executive immunity would be consistent with this attitude.
The present case now means that each of the federal circuit courts that has considered the question recognizes the defense, subject to the one generally recognized limitation which holds judicial officers liable for acts performed in the complete absence of jurisdiction.

The Third Circuit, as well as most other circuits, has extended immunity to "quasi-judicial" officers, in this case a prosecuting attorney. The term "quasi-judicial" is applied to officers who participate in the judicial process and whose duties demand the exercise of judgment and discretion.

The earliest case upholding this grant of immunity was *Yaselli v. Goff* which held that a prosecuting attorney was immune from suit even when malice was alleged. Although the extension has been less rapid in this area, the prosecuting attorney has enjoyed an expanding shield of protection since the *Yaselli* decision and especially after the *Tenney* decision.

It seems that there have been only three cases in which a cause of action under the Civil Rights Act against a prosecuting attorney has been recognized and in only two was it decisive of the case. Nevertheless, the scope of the prosecuting attorney's immunity is largely undefined. Many courts

22. Comment, 18 ARK. L. Rev. 81, 86 (1964), e.g., Johnson v. MacCoy, 278 F.2d 37 (9th Cir. 1960); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955); Francis v. Craft, 203 F.2d 809, 812 (1st Cir. 1953); Ginsberg v. Stern, 125 F. Supp. 596, 602 (W.D. Pa.); aff'd, 225 F. 2d 245 (3d Cir. 1954); Morgan v. Sylvester, supra note 21.

23. E.g., Francis v. Craft, supra note 22; Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir.), cert. denied, 379 U.S. 825 (1964); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966); Scolnick v. Lefkowitz, supra note 22; Francis v. Lyman, 216 F.2d 583 (1st Cir. 1954).


25. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.


26. Many courts appear to use the term "quasi-judicial" in a broad sense. When used in the immunity context the term refers not only to adjudicative functions performed by administrative bodies but also to duties performed by nonjudicial officials who participate in judicial proceedings, such as prosecuting attorneys, and jurors, and to many other functions demanding the exercise of judgment and discretion.

Comment, 44 Calif. L. Rev. 887, 888 n.14 (1956).

27. Id. at 402.


30. See Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Corsican Productions v. Pitchess, 338 F.2d 441 (9th Cir. 1964); Lewis v. Braultigam, 227 F.2d 124 (5th Cir. 1955).


32. The United States Supreme Court has not dealt with the question of the prosecutor's immunity in actions under § 1983.
adhere to the guidelines presented in *Bauers*. He is given the same immunity enjoyed by judges and is protected when the acts complained of are not done in the total absence of jurisdiction.\(^\text{33}\)

It is submitted that the scope of the prosecuting attorney's immunity should be re-evaluated. Complete immunity to all officials would eliminate whatever remaining effectiveness is present in the Civil Rights Act\(^\text{34}\) since the "under color" provision of the act can be fulfilled generally only by a state official.\(^\text{35}\) The standard followed in *Bauers* prescribing complete immunity with only a jurisdictional limitation beckons toward total emasculation of section 1983.

With the *Bauers* case, the only clear distinctions among officers participating in the judicial process have been by-passed.\(^\text{36}\) Several factors justify the distinctions. Judges are assumed to be neutral and careful to protect the rights of litigants while prosecutors are generally viewed as partisans.\(^\text{37}\) The need to protect the aura of authority and thus attain a point of finality in litigation\(^\text{38}\) is a powerful justification for the judge's immunity and applies little to the prosecutor. Moreover, the same reasons advanced for providing immunity to the prosecuting attorney apply likewise, although with lesser force, to many other officials in the judicial process who also would be deterred,\(^\text{39}\) their time consumed,\(^\text{40}\) and their independence affected.\(^\text{41}\) By granting complete immunity to the prosecuting attorney for acts within the scope of his jurisdiction, the courts have opened the door to the granting of a similar immunity to all officers participating in the judicial process. It is necessary to temper any developing trend toward the wholesale granting of immunity since the individual whose rights have been violated deserves some form of redress.\(^\text{42}\)

*Bauers* held that complete immunity with only a jurisdictional limitation was warranted by the judicial nature of the prosecutor's duties and the vast amount of discretion exercised by him.\(^\text{43}\) Several courts base the

\(^{33}\). See Sires v. Cole, 320 F.2d 877 (9th Cir. 1963); Jennings v. Nester, 217 F.2d 153 (7th Cir. 1955); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); see also note 24 supra.

\(^{34}\). Hoffman v. Holden, 268 F.2d 280 (9th Cir. 1959), overruled on another issue by Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

\(^{35}\). Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

\(^{36}\). Some of these officers are: court appointed deposition officers: Sarelos v. Sheehan, 353 F.2d 5 (7th Cir. 1965); bailiffs: Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); clerks of court: Rhodes v. Meyer, 334 F.2d 709 (6th Cir.), *cert. denied*, 379 U.S. 915 (1964); court reporters: Peckham v. Scanlon, 241 F.2d 761 (7th Cir. 1957); see also note 23 supra.


\(^{38}\). See note 16, no. 13, supra.

\(^{39}\). Id. at no. 2.

\(^{40}\). Id. at no. 3.

\(^{41}\). Id. at no. 1.

\(^{42}\). See Note, 66 Harv. L. Rev. 1285, 1298 (1953).

\(^{43}\). 361 F.2d at 889–90. Consider also: "The authority vested in him by law to refuse on his own judgment alone to prosecute a complaint or indictment enables him to end any criminal proceeding without appeal and without the approval of another official." Attorney General v. Tufts, 239 Mass. 458, 489, 132 N.E. 322, 326 (1921).
granting of immunity on the discretionary nature of the official's duties. While this standard would restrict the application of the immunity doctrine since many officials have primarily ministerial duties, it is logically unsound for two reasons: (1) the distinction between a ministerial and a discretionary function is not susceptible to precise determination, and (2) valid arguments may be made supporting immunity for both types of activity. It could be argued that officials exercising discretion should be immune in order to encourage independence and effective performance of duties while those performing ministerial functions warrant immunity because of the injustice of imposing liability on subordinate officials who are acting in conformity with an order from an immune superior.

Two further limitations should have been imposed on the scope of the prosecuting attorney's immunity by the court in the Bauers case. Although their imposition would not have affected the result reached in the case, these limitations would restrict and clarify the scope of immunity. The following proposals would not unduly burden the prosecuting attorney and would, on the contrary, encourage effective and efficient performance of duties. Moreover, they should be applied to other officials who participate in the judicial process.

Acts by the prosecuting attorney which are engendered by malice should not be palliated by the immunity doctrine. In Bauers, malice was not alleged and the court did not consider it. Apparently, there has been only one case where relief was granted when one of the violations involved the commission of malicious acts clearly within the scope of the prosecuting attorney's jurisdiction. In Robichaud v. Ronan, it was alleged that defendant, a prosecuting attorney, maliciously refused to drop murder charges which allegedly were not based on probable cause. However, the court based its decision on the prosecutor's attempt to coerce a confession which was allegedly not based on probable cause. On the other hand, an overwhelming majority of cases has held that the allegation of malice does not destroy the prosecuting attorney's immunity. This is based on

44. United States ex rel. McNeill v. Tarumianz, 141 F. Supp. 739, 741 (D. Del. 1956), aff'd, 242 F.2d 191 (3d Cir. 1957); Comment, 36 Ind. L.J. 317, 339 (1961). Support for this standard is found in Ex parte Virginia, 100 U.S. 339 (1880) wherein it was held that a judge is not immune from prosecution for discriminatory practices in the selection of jurors because this is a ministerial duty.
45. See Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263, 301 (1937).
47. See generally note 16 supra.
48. Francis v. Lyman, 216 F.2d 583 (1st Cir. 1954); see Comment, 44 Calif. L. Rev. 887, 888-89 N. 18 (1956).
49. 351 F.2d 533 (9th Cir. 1965).
51. 351 F.2d at 537.
52. The court may have classified the malicious abuse of the prosecuting attorney's investigatory function as in the "absence of jurisdiction." See Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).
53. E.g., Sires v. Cole, 320 F.2d 877 (9th Cir. 1963); Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959); Eaton v. Bibb, 217 F.2d 446 (7th Cir. 1955) (by implication);
the reasoning that it would be impossible to determine whether the allegations were well founded until the case had been tried and thus innocent officials would be subjected to the burdens and dangers of litigation.\textsuperscript{54} However, it has been suggested that this problem can be minimized by providing punishment for false allegations and sending to trial only those complaints showing clear abuses.\textsuperscript{55} Such a limitation would deter and restrict the independence\textsuperscript{56} of only corrupt officials. The only effect it would have on honest officials would be the consumption of time\textsuperscript{57} which could be minimized by the procedure. The public interest is hardly advanced by ignoring corruption in office and allowing wrongs to remain unremedied.

In addition, or alternatively, the complete quasi-judicial immunity of the prosecuting attorney should not be extended to acts which are investigatory as opposed to judicial in nature. In the Bauers case, the acts of the prosecuting attorney were quite clearly judicial in nature\textsuperscript{58} and thus the court was not called upon to impose such a limitation. The jurisdictional limitation accepted by most of the courts would be encompassed and expanded by a functional basis for determining the liability of the prosecuting attorney. The expansion would be accomplished by subjecting the prosecuting attorney to liability for acts which are within the scope of his authority but which are not judicial in nature.\textsuperscript{59} This is an area of some confusion because the courts have not adequately defined the jurisdictional limitation.\textsuperscript{60}

Moreover, in addition to malicious acts, relief should also be granted for negligent and innocent deprivation of rights, when caused by conduct not judicial in nature. The burden on the prosecutor can be relieved by a system where the state compensates him to the extent of his liability\textsuperscript{61} or requires him to secure personal liability insurance with the expense borne by the state.\textsuperscript{62} Thus the injured would be relieved and the prosecutor would not be unduly burdened.

It is urged that the Third Circuit not extend the principle of Bauers beyond its facts and adopt the foregoing limitations on judicial immunity at the opportune time.

\textit{Jay Rose}

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Laughlin v. Rosenman, 163 F.2d 838 (D.C. Cir. 1947) (dictum).


56. See note 16, no. 1, \textit{supra}.

57. See note 16, no. 3, \textit{supra}.

58. Prosecuting the plaintiff as an adult instead of as a juvenile involved a discretionary decision within the judicial process. See also note 25 \textit{supra}.


60. See note 52 \textit{supra}.


CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS —
STATE CANNOT DEPRIVE AN INDIVIDUAL OF JURY REVIEW OF CIVIL
COMMITMENT DECISION OR JUDICIAL DETERMINATION OF DANGEROUS
PROPENSITIES SOLELY ON GROUND THAT HE IS PRESENTLY SERVING
PENAL SENTENCE.

Baxstrom v. Herold (U.S. 1966)

Petitioner was convicted of second degree assault in April 1959 and was
sentenced to a term of two and one-half to three years in a New
York prison. On June 1, 1961, he was certified as insane by a prison
physician and transferred to Dannemora State Hospital, an institution
maintained by the State Department of Correction and used for the con-
finement and care of male prisoners declared mentally ill while serving
a criminal sentence. In November 1961, the director of Dannemora filed
a petition in the Surrogate's Court of Clinton County stating that peti-
tioner's penal sentence was about to terminate and requesting that he be
civilly committed pursuant to section 384 of the New York Correction
Law. The Surrogate certified that petitioner was possibly in need of in-
stitutional care and on December 18, 1961, the expiration date of his penal
sentence, custody over him shifted from the Department of Correction to
the Department of Mental Hygiene but he was retained at Dannemora.

Petitioner twice sought writs of habeas corpus in the state courts,
alleging that he was sane, or if insane, he should be transferred from
Dannemora to a civil mental hospital. Both writs were dismissed. On
appeal to the Appellate Division, Third Department, the denial of the latter
was affirmed without opinion, and a motion for leave to appeal to the Court
of Appeals of New York was denied. The United States Supreme Court
granted certiorari and reversed, holding that petitioner was denied equal
protection of the laws since the procedures provided by section 74 of the
New York Mental Hygiene Law allow a person to be civilly committed at

1. As it appeared when applied to petitioner in 1961, N.Y. CORRECTION LAW
§ 384 provided in part:
   1. Within thirty days prior to the expiration of the term of a prisoner confined
      in the Dannemora State Hospital, when in the opinion of the director such
      prisoner continues insane, the director shall apply to a judge of a court of record
      for the certification of such person as provided in the mental hygiene law for the
      certification of a person not in confinement on a criminal charge. The court in
      which such proceedings are instituted shall, if satisfied that such person may
      require care and treatment in an institution for the mentally ill, issue an order
      directing that such person be committed to the custody of the commissioner of
      mental hygiene or of the department of correction as may be designated for
      the custody of such person by agreement between the heads of the two departments.
   2. Baxstrom's retention at Dannemora was in consequence of the Department
      of Mental Hygiene having already determined ex parte that he was not suitable for
      care in a civil hospital.
   5. N.Y. MENTAL HYGIENE LAW § 74 grants the right to de novo review by jury
      trial of a determination made concerning the insanity of all persons civilly committed
      other than those committed at the expiration of a penal term.
the expiration of his penal sentence without the jury review available to all
other persons civilly committed in New York. Petitioner also was denied
equal protection of the laws by the failure to afford him the same judicial
determination of criminal insanity granted all others before their commit-
ment to an institution maintained by the Department of Correction.6


The equal protection clause of the fourteenth amendment has primarily
been used to invalidate discriminatory legislation and functions as a limita-
tion upon permissible legislative classifications. In using the clause to com-
bat discriminatory legislation the United States Supreme Court has estab-
lished its right to pierce the façade of disputed legislation and discover the
fairness of its actual enforcement.7 It has also exercised the right to
evaluate legislative classifications to determine whether they are so unre-
asonable that they become discriminatory in nature.8

Since the passage of the fourteenth amendment, the courts have con-
stantly been faced with the problem of evaluating the classifications that are
the bases upon which most legislation is grounded. Following the amend-
ment's ratification, the Supreme Court affirmed the right of state legisla-
tures to pass "special" legislation, recognizing that the states could not be
compelled to run all their laws in the channels of general legislation,9 for
such a directive would invalidate any effort to promote the general welfare
of the state through the use of its police power.10

State legislation also enjoys the benefit of a presumption of reasonableness
when the validity of a legislative classification is attacked.11 Therefore,
if any state of facts reasonably could be conceived that would sustain
the classification in question, there is a presumption of the existence of that
state of facts.12 Similarly, an individual assailing the classification has the
burden to show that the legislative action is actually arbitrary,13 and not

6. N.Y. Mental Hygiene Law § 85.
7. See Norris v. Alabama, 294 U.S. 587 (1935); Reagan v. Farmers Loan and
Trust Co., 154 U.S. 420 (1894); Yick Wo v. Hopkins, 118 U.S. 356 (1885); Neal v.
Delaware, 103 U.S. 370 (1881); Ex parte Virginia, 100 U.S. 339 (1880); Henderson
v. Mayor of the City of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92
U.S. 275 (1876).
10. See Barbier v. Conolly, 113 U.S. 27, 31-32 (1885), wherein Mr. Justice Field
writing for the Court noted:

Special burdens are often necessary for general benefits, — for supplying
water, preventing fires, lighting districts, cleaning streets, opening parks, and many
other objects. Regulations for these purposes may press with more or less weight
upon one than another, but they are designed, not to impose unequal or unnecessary
restrictions upon any one, but to promote, with as little individual inconvenience as
possible, the general good. Though, in many respects, necessarily special in their
character, they do not furnish just ground of complaint if they operate alike upon
all persons and property under the same circumstances and conditions.
12. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934). See also
Independent Dairymen's Ass'n v. City and County of Denver, 142 F.2d 940 (10th Cir.
1944); Hayes v. United States, 112 F.2d 417 (10th Cir. 1940).
merely possibly so, for a certain deference is shown to the state legislature’s sensitivity to practical problems and circumstances within its jurisdiction.

As the instant case illustrates, the legislative right of classification is not without constitutional limitations. Although the fourteenth amendment does not require that things different in fact be treated in law as though they were the same, it does require that those who are similarly situated be similarly treated. Accordingly, in Skinner v. Oklahoma, the Court invalidated Oklahoma’s Habitual Criminal Sterilization Act, which prescribed sterilization for those persons convicted two or more times of crimes “amounting to felonies involving moral turpitude,” who were thereafter convicted of such a felony in Oklahoma and sentenced to an Oklahoma penal institution. Offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, however, were designated exceptions within the statute. The Court explained that:

Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. We have not the slightest basis for inferring that [the substantive distinction between larceny and embezzlement] has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinction which the law has marked between those two offenses. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.

Consequently, although the power of classification has often been upheld “whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished,” it cannot be upheld if it rests on not real, but illusory differences, or if classificatory distinctions have little relevance to the purpose for which the classifications are made.

15. Patstone v. Pennsylvania, 232 U.S. 138, 144-45 (1914). Mr. Justice Holmes, upholding a Pennsylvania law making it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal, except in defense of property, and to that end making it unlawful for such foreign-born persons to own or be possessed of a shotgun or rifle, stated:

Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong on its facts... it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong. (Citations omitted.)

16. Tigner v. Texas, 310 U.S. 141 (1940). Here the Court upheld a Texas statute that exempted agricultural groups from the same criminal sanctions imposed on industrialists and commercial middlemen engaged in monopolistic activities. The Court reasoned that the statutory classification was not violative of the equal protection clause, for a state could properly differentiate between groups whose activities were so dissimilar that they had substantially different effects on the welfare of the state.

17. See note 9 infra; see also Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 344 (1949), who suggest that “the measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.”
19. Id. at 541-42.
The Court in the instant case was presented with a statutory scheme which both withheld a jury review of a judicial determination of mental competency to those committed at the expiration of a penal term and which denied them a judicial proceeding to determine whether they were so dangerously mentally ill that they required detention in an institution maintained by the Department of Correction. By invalidating both procedures as the product of an unreasonable classification, the Court based its decision on a well reasoned body of precedent demanding that any differences in rights and liabilities be founded upon a reasonable relation between the purpose of the law and the characteristics of the group that is singled out for distinctive treatment.

The equal protection clause does not require identity of treatment, but only that the disparities within a law have a reasonable basis. The procedures under examination in the instant case were methods by which the State of New York attempted to prolong its control over individuals serving penal sentences whom it considered presented essentially different custodial problems from those who were committed from a purely civilian context. Under these circumstances, the judgment of the state legislature should receive a certain presumption of reasonableness. Because those serving penal sentences have been shown to have antisocial tendencies not common to all persons civilly committed, a legislative determination based on this fact might in a context not related to procedural safeguards for the mentally ill have merited judicial approbation.

It is therefore suggested that the Court was in part motivated by an unexpressed concern for the more controversial problems underlying commitment procedures, although a logically sound disposition of the case under the equal protection clause was justified by the peculiar manner chosen by the New York legislature to execute its judgment based on the differences between mentally ill prisoners and civilians.

22. Discussing the classification which denied those serving penal sentences the right to a jury review, Mr. Chief Justice Warren noted:

For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.

383 U.S. at 111-12.

In dismissing the argument that Baxstrom's dangerous (i.e., "criminal") tendencies were established by the fact that he was presently serving a penal sentence for a criminal offense (hence eliminating the necessity of a judicial hearing on the issue), the Court noted:

A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears.

383 U.S. at 115.

23. See notes 17, 19 and 20 supra.

24. See note 15 supra.

25. See note 16 supra.

26. See note 14 supra.

27. But see note 22 supra.

28. While the underlying reasons for the classification were not wholly arbitrary, the implementation of the statutory scheme worked unreasonable results such as the
The due process problems raised by civil commitment procedures are epitomized in the respective positions taken by the medical profession, which has constantly advocated commitment procedures with as little legal formality as possible, and the legal profession which has often expressed concern that current modes of commitment ignore what it considers fundamental protections of personal freedom. Confronted with such conflicting considerations, the courts have shown little uniformity in their interpretations of the procedures that meet due process standards. This lack of uniformity is illustrated by the fact that although the Supreme Court has often recognized that notice of allegations and an opportunity to be heard are essential ingredients of a "fair" proceeding, state procedures, unlike those in the instant case, have been upheld which grant no notice or hearing until after the individual has been hospitalized.

In Baxstrom, the Court was given an opportunity to shed some light on this troubled area. The Court's studious avoidance of the complex problems of due process, however, is exemplified by its failure to consider the extensive arguments presented by petitioner's counsel urging a due process requirement of right to counsel at a sanity hearing. By refusing to take any position on this question, which has been so thoroughly examined in criminal proceedings, the Court has regrettably shown its willingness to postpone any explicit determinations in this confused area of due process.

It is suggested, however, that despite its reluctance to specifically outline any due process requirements, the Court's uneasiness with prevalent commitment procedures is made evident by its readiness to insure the fact that a prisoner adjudged insane while serving a sentence for forgery or embezzlement would be denied a hearing on the question of his dangerous propensities (for the statute assumes he is dangerous because he is presently in a penal institution serving a criminal sentence), while a person with a past record of conviction for crimes involving physical violence would be entitled to such a hearing solely because he is not in prison when the commitment procedures are initiated.


32. The Court in Skinner v. Oklahoma, 316 U.S. 535 (1942), followed a course similar to that taken in Baxstrom by avoiding issues of due process and cruel and unusual punishment in favor of a disposition based on unreasonable statutory classifications.


34. That the underlying "principle" of Baxstrom may well be based on due process of law and be more pervasive than the narrowly based opinion would indicate is suggested by its application in the following Memorandum opinion of the New York Court of Appeals:

equal application of whatever safeguards have already been instituted by the various states. It is hoped that Baxstrom is but the initial step in a sorely needed examination of the constitutional questions presented by present civil commitment procedures.

James D. Hutchinson

CONSTITUTIONAL LAW — RIGHT TO CONFRONTATION AND CROSS-EXAMINATION — COMMITMENT PROCEEDING UNDER THE BARR-WALKER ACT IS CRIMINAL, THEREBY REQUIRING RIGHT TO CONFRONTATION AND CROSS-EXAMINATION OF ADVERSE WITNESSES.

United States ex rel. Gerchman v. Maroney (3d Cir. 1966)

Petitioner pleaded guilty to a charge of assault with intent to ravish on an indictment that charged him with assault and battery, indecent assault and assault with intent to ravish. At the sentencing, the trial judge invoked the Barr-Walker Act and committed petitioner for psychiatric examination in accordance with the provisions of that statute. The confidential report submitted to the judge by the Commissioner of Mental Health indicated that petitioner, although not mentally ill, would pose a potential threat of bodily harm to the community if allowed to remain at large. The judge then committed petitioner for an indeterminate sentence as prescribed by the Barr-Walker Act.

Eleven months later, petitioner sought a writ of habeas corpus alleging that the act was unconstitutional on its face and, as applied to him, was violative of due process and the equal protection of the laws. The sentenc-

an indigent mental patient, who is committed to an institution, is entitled, in a habeas corpus proceeding, (brought to establish his sanity), to the assignment of counsel as a matter of constitutional right. Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636 (1966).

35. The rule announced in the instant case led to eventual freedom for Baxstrom. Shortly after the Court's decision, he was transferred to a civil hospital and was again certified as insane and in need of further treatment (although not dangerously insane). He requested a jury trial on the question of his insanity and was found by the jury not to be insane and was released from custody. Letter from Leon B. Polsky, Esq., Counsel for the Petitioner, to the Villanova Law Review, August 29, 1966.

ing judge refused to grant the writ as did the Superior Court of Pennsylvania. When the writ was again refused by the District Court for the Western District of Pennsylvania, appeal was taken to the Court of Appeals for the Third Circuit where, by a unanimous vote, the court granted the writ, holding that the Barr-Walker commitment proceedings were criminal in nature and, therefore, the constitutional safeguards of confrontation and cross-examination must be afforded the petitioner. United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966).

Since 1937 more than half of the States and the District of Columbia have passed statutes aimed at the sexual offender. Today, there are twenty-nine jurisdictions with some form of sexual offender legislation. The underlying purposes of these statutes are: (1) to protect society from the potentially dangerous sexual recidivist; and (2) to attempt cure and rehabilitation of the sexual offender through special programs of psychiatric treatment and special confinement.

In 1951 Pennsylvania enacted such a statute, commonly referred to as the Barr-Walker Act. This act provides that upon conviction of any one of several named offenses, the convicted person may be bound over for sixty days to the Department of Public Welfare psychiatrist or to a court-appointed psychiatrist, to assist the court in determining if such person is mentally ill or, if left at large, would pose a threat of bodily harm to the community. The act further provides: "Whenever a court, after the psychiatric examination of and report on a person convicted shall be of the opinion that it would be to the best interests of justice to sentence such person under the provisions of this act . . .," upon arraignment, the indeterminate sentence of from one day to life must be imposed.

Under Pennsylvania law, a sentence for an indeterminate term is deemed for the maximum term described in the law; therefore, an indeterminate sentence under the Barr-Walker Act is actually a life

10. Upon request by the psychiatric examiner to the court, the period may be increased to ninety days. Pa. Stat. Ann. tit. 19, § 1166(a) (Supp. 1965).
sentence. Furthermore, “exclusive control” over the convict is placed with the Board of Parole.\textsuperscript{15} Even if he were to be paroled, he would nonetheless remain subject to the Board of Parole for the remainder of his natural life because of the indeterminate sentence rule.\textsuperscript{16}

Traditionally, sex offender statutes have been treated as civil proceedings, analogous to sentencing hearings or commitments of the insane.\textsuperscript{17} The theory is that the sexual offender is the beneficiary of this commitment and treatment, and that the state stands in the position of \textit{parens patriae}. The traditional safeguards of due process in criminal proceedings were thus considered unnecessary.\textsuperscript{18} In recent years, however, there has been growing concern about the hazards of such a theoretical position.\textsuperscript{19} The potentiality of life imprisonment, coupled with the inadequacy of facilities specially designed to treat the sex offender, has caused the courts in some jurisdictions to require minimum standards of procedure in the commitment of sex offenders under these statutes.\textsuperscript{20}

As early as 1938 the Michigan Supreme Court in \textit{People v. Frontczak}\textsuperscript{21} overturned such a sexual offender statute as a violation of due process under the Michigan constitution. In discussing this statute, which was part of Michigan’s code of criminal procedure, the court noted that: “When the law penalizes an overt act it cannot, under criminal procedure and under the guise of hospitalization, in another court and a different jurisdiction, try him on the footing of his conviction elsewhere and add to or subtract or change his sentence.”\textsuperscript{22} The court specifically distinguished this proceeding from an insanity hearing since jurisdiction in the latter case attaches only by reason of the accused’s insanity, whereas under the sex offender statute, jurisdiction accrues only after conviction and the determination of sanity.\textsuperscript{23} Shortly after the law was declared unconstitutional, the Michigan legislature passed a new law which was not a part of

\textsuperscript{17} Miller v. Overholser, 206 F.2d 415, 417 (D.C. Cir. 1953); Gross v. Superior Court, 42 Cal. 2d 816, 820, 270 P.2d 1025, 1028 (1954); People v. Chapman, 301 Mich. 584, 596, 4 N.W.2d 18, 26 (1942); State \textit{ex rel.} Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950).
\textsuperscript{18} See, e.g., Minnesota \textit{ex rel.} Pearson v. Probate Court, 309 U.S. 270 (1940); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).
\textsuperscript{20} See Gross v. Superior Court, 42 Cal. 2d 816, 821, 270 P.2d 1025, 1027-28 (1954), holding that a finding of sexual psychopathy may be appealed and the cost of the transcript of record must be paid for by the state, because the person’s liberty is at stake and the state is his opponent, thus similar to a criminal proceeding; Commonwealth v. Page, 339 Mass. 313, 317, 159 N.E.2d 82, 85 (1959), requiring that in order to maintain its nonpenal character the treatment facilities for sexual offenders must have been established.
\textsuperscript{21} 286 Mich. 51, 281 N.W. 534 (1938).
\textsuperscript{22} Id. at 58, 281 N.W. at 536.
\textsuperscript{23} Id. at 59, 281 N.W. at 537.
the criminal code, but which was substantially the same as the prior act. In 1942 this law was upheld as a civil proceeding in *People v. Chapman.*

The Supreme Court of the United States had an opportunity to consider the constitutionality of a similar Minnesota statute in 1940 in *Minnesota ex rel. Pearson v. Probate Court.* The petitioner in that case contended that the statute violated the equal protection clause because the classification of sex offenders was not rational and, in addition, claimed that the procedural safeguards required under the due process clause were lacking. The Court decided that it was within the power of the legislature to deal with the evils of society by assigning them degrees of harm and treating them accordingly. Consequently, it held that the classification was reasonable. While other criminal offenses might be just as grave and in need of special treatment, the Court held that this alone did not destroy the validity of the sex offender statute. The Court dismissed the procedural challenges as premature, with the caveat that such subtleties as the law contained could be used to abuse the constitutional rights and privileges of the sex offender, thus opening the door to a reconsideration of the constitutionality by the Court in the event such abuses did occur.

Legal scholars have not been alone in their attacks on the sex offender legislation. These statutes have been the subject of much criticism by the medical profession as well. Many of the statutes employ the term "psychopath" or "sexual psychopath" to classify the group of offenders covered under the law. These terms have been much misused and, in a medical sense, are said to be neither sufficiently explanatory nor adequately descriptive. Moreover, such terms are rendered meaningless because of the widely varying interpretations given to them by members of both the medical and legal professions. Finally, the theory that sexual offenders can be easily identified and classified together as a homogeneous group has been strongly attacked by medical experts.

The deficiencies in sexual offender legislation do not result solely from their own inadequacy. The facilities for treatment in many cases are almost nonexistent and, as yet, very little is known about the kind of treatment that sex offenders require. In 1950 a group of New Jersey psychiatrists

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25. 309 U.S. 270 (1940).
26. Id. at 275.
27. Ibid.
28. Id. at 277.
reported that a desirable doctor-patient ratio would be one doctor for every twenty-three patients. In the same year, the California Assembly reported that the hospital in California which received the majority of the state's sexual psychopaths had eight doctors for 8,000 inmates.

Consequently, it was with considerable controversy raging in both medical and legal circles as to the validity and efficacy of these statutes that the Court of Appeals for the Third Circuit heard the Gerchman case. The court cut through the mass of challenges to the law which had been raised in the courts below and again on appeal, by determining that the Barr-Walker Act involved an independent criminal proceeding. The court agreed that if it were a simple sentencing procedure, no right to confrontation and cross-examination of adverse witnesses would be present.

It noted that what requirements were present in civil commitment proceedings were unclear. By making analogy to the decision in Kennedy v. Mendoza-Martinez and two cases involving habitual criminal acts, the court found that the conviction of one of the enumerated crimes under the Barr-Walker Act was a prerequisite to the invocation of the law, but was only subordinate to a new issue. The maximum penalty for the crime to which petitioner had pleaded guilty was five years in jail. To make a new finding of fact as to his potential threat to society which would require the judge to sentence him to an indeterminate term under the act took away the discretionary feature of judicial sentencing. This factor, coupled with the placement of the Barr-Walker Act in the section on criminal procedure, indicated to the court that this was a criminal proceeding. Following the Supreme Court opinions in Pointer v. Texas and Douglas v. Alabama, which held that the rights of confrontation and cross-examination basic to a fair trial under the sixth amendment are obligatory on

39. 372 U.S. 144 (1963) (the draft evasion conviction was preliminary to, but separate from, the denationalization procedure which was penal).
42. Pa. Stat. Ann. tit. 19, § 1166 (Supp. 1965). Under the act, once the judge finds the person a threat and invokes the act, the only sentence he may impose is from one day to life. There is no discretion allowed the judge; it now passes to the Board of Parole. Pa. Stat. Ann. tit. 19, § 1173 (Supp. 1965).
44. Title 19 is the Pennsylvania title on criminal procedure.
45. 380 U.S. 400 (1965).
the States through the fourteenth amendment, the Court of Appeals established this requirement for the Barr-Walker procedure. Writing for the court, Judge Freedman said: "The effort of enlightened penology to alleviate the condition of a convicted defendant by providing some elements of advanced, modern methods of cure and rehabilitation and possible ultimate release on parole cannot be turned about so as to deprive a defendant of the procedure which the due process clause guarantees in a criminal proceeding."\(^\text{47}\) The court granted the writ, which was to be issued after sixty days during which time the Commonwealth had the opportunity to proceed against the petitioner under the new rules.\(^\text{48}\)

The position taken by the court regarding the criminal nature of the Barr-Walker Act closely parallels the finding of the Pennsylvania Supreme Court in Commonwealth ex rel. Dermendzin v. Myers,\(^\text{49}\) a case involving the Habitual Criminal Act. Petitioner in this case had been sentenced to twelve years for voluntary manslaughter and an additional twelve to twenty-four years under the second offender section of the Habitual Criminal Act.\(^\text{50}\) The court found that the judge had the discretion to impose the additional sentence and to fix its length.\(^\text{51}\) The court concluded, however, that because of the factor of discretion, the defendant must have notice of the possible additional sentence and an opportunity to be heard. "In other words, a defendant's sentence may not be increased on the ground that he is a second offender without a supporting judicial determination of the issue of recidivism after the defendant has been informed of and had an opportunity to be heard in the premises."\(^\text{52}\)

Similarly, in a case involving a second offender under the Drug Act, the Pennsylvania Superior Court held that "the trial court may not rely upon its own record to come to its own conclusion on the fact of recidivism without the convict's knowledge of what is taking place."\(^\text{53}\)

In proceedings under the Barr-Walker Act, one psychiatrist examines the defendant.\(^\text{54}\) In making his decision, the judge relies solely on the examiner's report, coupled with a recommendation by the Department of Public Welfare on the place of commitment. Once he has determined that commitment of the defendant under the Barr-Walker Act is "in the best interests of justice,"\(^\text{55}\) his discretion is at an end. If the psychiatric report

\(^{48}\). Ibid.
\(^{49}\). 397 Pa. 607, 156 A.2d 804 (1959).
\(^{50}\). PA. STAT. ANN. tit. 18, § 5108 (Supp. 1965).
\(^{52}\). Id. at 613, 156 A.2d at 807.
\(^{54}\). PA. STAT. ANN. tit. 19, § 1167 (Supp. 1965). No requirement is made for a minimum of two or more psychiatrists.
RECENT DEVELOPMENTS

is kept confidential, the defendant has no way of explaining or rebutting
the testimony of the psychiatrist. In addition, since the psychiatrist need not
be present in court, his hearsay testimony becomes the sole basis for
a life sentence instead of a five year term. Furthermore, the statute makes
no requirements nor sets forth any guidelines for the type of psychiatric
examination to be conducted. It merely says that a “complete psychiatric
examination” with a complete written report is to be submitted. There
is no definition of “qualified psychiatrist” nor are the qualifications of the
personnel to staff the facilities to be created under the Act by the Department
of Public Welfare enumerated. No cross reference is made to the
definitional terms set forth in the Mental Health Act. The Barr-Walker
Act was enacted without debate in either the House or Senate; moreover,
there is no record of hearings held or evidence taken. Consequently,
no legislative history emerges which might aid in clarifying these points.

The decision by the court that a Barr-Walker commitment is a criminal
proceeding, subject to the safeguards of confrontation and cross-examina-
tion, opens the door to another troublesome area of inquiry. The act
provides for a psychiatric examination by order of the court. Since this
is now declared to be a criminal proceeding, may a defendant be com-
pelled to undergo the psychiatric examination leading to his possible in-
carceration for life, without violating his fifth amendment privilege against
self-incrimination?

In 1965, in the midst of a sentencing proceeding under the Illinois
Sexually Dangerous Persons Act, the defendant was called as a witness
for the state. His attempts to invoke his privilege against self-incrimina-
tion in this hearing were rebuffed by the court. The appellate court over-
turned the proceeding under which he was committed, stating that even
though this was a civil proceeding, the privilege of the fifth amendment
applies to all testimonial compulsion. In addition, the hearsay evidence
of police concerning his arrest twice previously on similar charges was held
to be inadmissible. Earlier, in 1949, a defendant who refused to undergo
a psychiatric examination under this act, claiming that it violated his fifth
amendment rights, was jailed in civil contempt. His imprisonment for

58. PA. STAT. ANN. tit. 50, § 1072(3) (Supp. 1965). Psychiatrist is defined essen-
tially as a qualified physician who by reason of five years training and experience in
acquiring skills related to “mental and nervous disorders” has achieved professional
standing in the field of psychiatry.
59. Brief for the ACLU as Amicus Curiae, p. 20, United States ex rel. Gerchman
61. Ill. Rev. STAT. ch. 38, §§ 105-1.01-105-12 (Supp. 1965).
63. Id. at 458-59, 213 N.E.2d at 61.
64. Id. at 461, 213 N.E.2d at 62.
civil contempt was upheld by the court, but the case was reversed on other grounds.\textsuperscript{66}

Some statutes, recognizing the problem of disclosure by the accused of prior criminal conduct during the course of a psychiatric examination, require that the examination be submitted to under penalty of contempt of court, but make the psychiatric report incompetent evidence for other than a determination of the subject's mental condition.\textsuperscript{67} It is obvious that if no psychiatric examination may be had, the purpose of the law is defeated. But at the same time, the candor of the patient and his willingness to cooperate are requisite to a meaningful report. If the patient is reluctant to answer for fear of reprisals and the examiner is hesitant to inquire for fear of reaching an impasse in his examination, then nothing is gained by the procedure. It seems clear that testifying in your own hearing as a state witness would be barred by the fifth amendment if the proceeding is deemed criminal. In Illinois this would apply even in a civil proceeding.\textsuperscript{68}

The question remains as to what the Pennsylvania defendants under the Barr-Walker Act can expect concerning the actual psychiatric examination. This may depend in part on a close reading of the recent Supreme Court opinion in \textit{Schmerber v. California}\textsuperscript{69} concerning the problems surrounding lie detector tests. If the colloquy between doctor and patient is more important for what it says about the patient's mental characteristics than for what the patient actually relates as fact, perhaps this is no more than a fingerprinting of the mind. But since psychiatry is not nearly an exact science which can be compared in its precision to fingerprinting, it would seem that revelation of previous conduct is as crucial to the psychiatric report for what it reveals of the mind as it is for what it reveals of the criminal or recidivistic conduct.

The \textit{Gerchman} case has opened a new era in the field of sexual offender statutes which will necessitate a reappraisal not only of the quality of the laws medically, but of their impact on the constitutional rights of the sex offender. By clearly placing this kind of proceeding in the criminal category, the court has taken a significant step in the right direction. The instant case stands as an important reminder to those legislators who would cure age-old problems with swift and unreasoned action, that constitutional standards must be maintained, regardless of the validity of the social necessity for legislation.

\textit{Miriam L. Gafni}

\textsuperscript{66} Id. at 278, 83 N.E.2d at 741.

\textsuperscript{67} See Note, 41 \textit{Notre Dame Law.} 527, 547 & n.127 (1966).

\textsuperscript{68} See \textit{supra} note 65.

\textsuperscript{69} Schmerber v. California, 384 U.S. 757 (1966).
The Delaware “short form” merger statute permits a parent corporation to merge with a subsidiary, in which it owns ninety per cent or more of the outstanding capital stock, without the shareholder approval necessary for “regular” mergers. The merger plan may provide for the payment of cash to minority shareholders of the subsidiary rather than issuance of stock in the surviving corporation. Respondent, the Olivetti Underwood Corporation, effected such a merger with its subsidiary, and petitioners initiated proceedings for statutory appraisal and payment for their minority registered shares. During the proceedings below, respondent was notified that petitioners were stockbrokers allegedly holding the shares registered in their names for certain unidentified beneficial owners. Respondent adduced proof tending to show that many petitioners sought appraisal as to only a portion of their shares, withholding other shares as to which the merger was tacitly accepted. From an order of the Chancery Court denying its demands that petitioners be required to submit proof of their authority to demand appraisal and to reveal the beneficial owners’ identities, respondent appealed to the Supreme Court of Delaware which affirmed, holding that a corporation cannot as a matter of right question the authority of dissenters, known to be broker-nominees, to seek appraisal of stock registered in their names, or compel disclosure of beneficial owners represented. Olivetti Underwood Corp. v. Jacques Coe & Co., 217 A.2d 683 (Del. Sup. Ct. 1966).

A major question under the so-called appraisal statutes, which enable a shareholder dissenting from a merger to have the surviving corporation pay the fair value of his shares, is whether one must be the registered holder of the stock in order to exercise the remedies conferred by the statute. The problem most often arises in states where the term “shareholder” is not statutorily defined to be the registered holder of shares.

1. For purposes of this article, mergers may be divided into two categories: “short form” and “regular.” In Delaware, a short form merger may be effected between parent and ninety per cent owned subsidiary by mere resolution of the parent’s board of directors. Del. Code Ann. tit. 8, § 253 (Supp. 1964). In a regular merger, the shareholders of the constituent corporations have voting rights in respect thereto.


3. In Ohio and Pennsylvania, the applicable corporation law expressly defines the term “shareholder” as the registered holder of shares. Ohio Rev. Code Ann. § 1701.01(F) (Page 1964); Pa. Stat. Ann. tit. 15, § 2852-2 (Supp. 1965). In these states, the courts have felt logically compelled to conclude that only registered holders were intended by the legislature to fall within the definition of shareholder as that term is used in the appraisal statute. See Clarke v. Rockwood & Co., 110 Ohio App. 38,
Among such states, New York has continued to hold that the remedies afforded by its appraisal statute shall accrue to the benefit of the "real" owner of stock, whether or not such ownership appears of record. Consequently, in New York, an unregistered beneficial owner\(^4\) or a voting trust certificate holder\(^5\) may initiate appraisal proceedings. On the other hand, the Superior Court of New Jersey has recently expressed a contrary view;\(^6\) and Indiana law has been construed similarly.\(^7\) In 1945, the Supreme Court of Delaware, without the aid of statutory definition, held in the landmark decision of *Salt Dome Oil Corp. v. Schenck*\(^8\) that only a registered holder is a "shareholder" within the meaning of the Delaware appraisal statute and, consequently, a corporation is entitled to refuse a demand for appraisal made by a beneficial owner not of record. Delaware courts have continued to adhere to the *Salt Dome* rule in analogous situations.\(^9\)

Related to the issue of whether an unregistered beneficial owner qualifies for statutory appraisal is whether a corporation may impose any conditions or restraints upon the appraisal rights of registered shareholders. The New York position that the appraisal remedy accrues to the benefit of the "real" owner of shares has been interpreted to countenance the denial of appraisal rights to a registered holder shown not to be the actual owner of the shares dissented.\(^10\) However, in *In Re Northeastern Water*

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5. In the Matter of Bacon, 287 N.Y. 1, 38 N.E.2d 105 (1941).

6. Bache & Co. v. General Instrument Corp., 74 N.J. Super. 92, 180 A.2d 535 (1962). The facts presented here made it necessary for the court to decide only that a registered shareholder is entitled to seek statutory appraisal, but, in a strong dictum, the court expressed its opinion that the remedies afforded by the appraisal statute are exercisable only by a registered shareholder. See *In Re Northeastern Water* supra.

7. In *Lesch v. Chicago & E. Ill. R.R.*, 226 F.2d 687 (7th Cir. 1955), a federal court construed the Indiana appraisal statute as applicable only to registered shareholders. See *In Re Northeastern Water* supra.

8. 28 Del. Ch. 433, 41 A.2d 583 (Sup. Ct. 1945); Annot., 158 A.L.R. 984 (1945); see 31 Va. L. Rev. 698 (1945).

9. In *In the Matter of Gen. Realty & Util. Corp.*, 28 Del. Ch. 284, 42 A.2d 24 (Ch. 1945) (denying appraisal to a beneficial owner whose shares were registered in his broker's name at the time of his objection to the proposed merger and demand for payment); Schwartz v. *The Olympic, Inc.*, 74 F. Supp. 800 (D. Del. 1947) (construing applicable Delaware law, after *Salt Dome*, to deny standing to an unregistered shareholder in an action to set aside a merger); Coyne v. *Schenely Indus., Inc.*, 38 Del. Ch. 535, 155 A.2d 288 (Sup. Ct. 1959) (denying appraisal to an unregistered beneficial shareholder of a subsidiary after a short form merger).

Co., the Delaware Chancery Court held that mere corporate awareness that a dissenting registered shareholder is not the beneficial owner but a mere nominee of the shares dissented is insufficient to put the corporation on inquiry of his authority to demand appraisal and therefore an inadequate reason to deny his demand.

A more recent question arising under appraisal statutes concerns whether it is permissible for an individual shareholder, who dissents from a proposed merger and demands appraisal for a portion of his total shareholdings, to concurrently vote for or even tacitly accept the merger as to the balance of his stock — a practice which shall hereinafter be referred to as appraisal splitting. Delaware’s statute, like most others, qualifies for appraisal rights only a stockholder “whose shares were not voted in favor of” a regular merger. Immediately ambiguous, however, is the term “shares.” Does it refer only to those shares surrendered for appraisal, in which case there would be no statutory bar to voting for and accepting the merger as to other shares, or does it comprehend the totality of shares held by an individual dissenter, in which case the practice of appraisal splitting would fall within statutory prohibition?

The legislative history of appraisal statutes suggests that they were primarily intended to benefit the shareholder who is unwilling to accept corporate action which has the effect of compelling him to abandon his association with the business — an association that would have continued but for the consent of his peers. Therefore, as a matter of construction, a shareholder who manifests his partial acceptance of the merger would not seem to have been intended to fall within the statute’s protection and, indeed, might justifiably be estopped from taking the anomalous position of dissenting from corporate action for which he is in part responsible.

Although there is little case authority on the issue, Reynolds Metals Co. v. Colonial Realty Corp., decided by the Supreme Court of Delaware,
offers some insight into judicial reaction. In that case, the corporation disputed the right to seek appraisal of a stockbroker-registered holder who had voted all the shares registered in his name for merger, except those of a customer desiring appraisal. In holding for the broker, the court reasoned that for the protection of beneficial owners desiring to exercise appraisal rights through their registered nominee, a broker-registered holder of shares beneficially owned by several different customers should, for purposes of appraisal, be regarded to be as many different shareholders as he has customers. For example, a broker may lawfully dissent and demand appraisal of the shares of customer A registered in his name, notwithstanding the fact that he voted the shares of customers B and C in favor of the merger. In so holding, however, the court was careful to limit its condonation of appraisal splitting to the precise facts presented. Although it declined to decide the broader question of whether a beneficial owner of record could practice appraisal splitting in a regular merger, the court appeared to assume that if the broker demanding appraisal were acting for himself as beneficial owner, and not as nominee for another, he would be ineligible under the statute since he voted some shares in favor of merger. Because the broker appeared upon the corporate books as the absolute owner of the shares dissented, the court suggested, in adumbrated but significant dicta, that the corporation has a right to inquire into the facts concerning the broker's agency in demanding appraisal in order, presumably, to determine whether a beneficial owner of record is engaged in appraisal splitting.

Though judicial treatment of the practice of appraisal splitting is quite limited, an increasing number of states have recently come to recognize and deal with the problem by statute. The appraisal statutes of both New York and Pennsylvania appear to prohibit the practice except in the precise situation covered by Reynolds. On the other hand, those states in which the applicable code provisions follow the terminology of the Model Busi-

beneficially owned shares was voted in favor of merger. Due to the substantial similarity between these two cases in issues, judicial reasoning and disposition, discussion will be confined to the Reynolds opinion.

15. True, Bache & Co. is not registered as agent on the corporate books. But this inflicts no disadvantage on the corporation. If it questions whether Bache & Co. is acting as an agent in demanding payment for shares, it may inquire into the facts. . . . If the corporation receives two opposing proxies from a broker, and a demand for appraisal in respect of the shares represented by only one, and if (as is probably unlikely) the broker fails to inform the corporation that he is acting for a customer, the corporation can readily ascertain the fact.


16. N.Y. BUS. CORP. LAW § 623(d) provides:

A shareholder may not dissent as to less than all the shares, as to which he has a right to dissent, held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee. . . .

PA. STAT. ANN. tit. 15, § 2852-515(B) (Supp. 1965) provides:

. . . A dissenting shareholder may dissent as to all or less than all of those shares registered in his name of which he is not the beneficial owner, but there may not be dissent with respect to some but less than all shares of the same class or series owned by any given beneficial owner of shares whether or not the shares so owned by him are registered in his name.
ness Corporation Act appear to allow appraisal splitting by any shareholder, whether a mere registered nominee or an actual beneficial owner.

In Olivetti, the respondent corporation, recognizing that it had no duty to inquire into the brokers' authority in order to protect unregistered beneficial owners from possible breaches of trust by their registered nominees, nevertheless claimed a right to make such inquiry, invoking the Reynolds dicta to support this contention. Citing Northeastern Water only in passing, the court denied the claimed right primarily upon the authority of Salt Dome. It reasoned that since Salt Dome relieves the corporation of the duty of inquiring into the authority of a broker who is the registered holder of the shares dissented, the corporation should not even be granted a right to do so, any dicta in Reynolds notwithstanding.

It would appear that the court was under no compulsion by reason of Salt Dome to so hold. Indeed, it could have rendered a contrary decision upon equally persuasive authority. Nevertheless, there are policy considerations in favor of such a holding which justify the court's decision. Specifically, it must be assumed that since a corporation is admittedly protected under both Northeastern Water and Salt Dome if it chooses to recognize a broker-registered holder's demand for appraisal without inquiry into his authority, it will so choose whenever its own interests will be best served thereby. This logically suggests that a corporation would choose to exercise the optional right of inquiry into the broker's authority claimed in Olivetti only when it is in the corporation's best interest to avoid payment of the judicially appraised value of the shares dissented, such as

17. ABA-ALI MODEL BUS. CORP. ACT § 73 (1953) provides: "A shareholder may dissent as to less than all of the shares registered in his name. In that event, his rights shall be determined as if the shares as to which he has dissented and his other shares were registered in the names of different shareholders." State appraisal statutes using identical or similar language include: IOWA CODE ANN. § 496A.77 (1962); Neb. Rev. Stat. § 21-2079 (Supp. 1963); S.C. CODE ANN. § 12-16.27(1) (Supp. 1965); WISC. STAT. ANN. § 180.72 (Supp. 1966). In addition, CAL. CORP. CODE § 4300 and VA. CODE ANN. § 13.1-75 (1964) would appear, by their respective provisions, to permit appraised splitting without limitation.

18. See note 15 supra.

19. The court perhaps recognized, for various reasons, including those set out in note 11 supra, that Northeastern Water is inapposite as precedent warranting denial of the corporate claim of a right, independent of a duty, to inquire into the broker-registered holder's authority to demand appraisal.

20. The rule of Salt Dome clearly finds its justification and essential purpose in the principle of corporate protection; without such a rule, a corporation would, in many cases, find itself faced with the unduly burdensome task of resolving misunderstandings and clashes of opinion between non-registered and registered stockholders over the matter of appraisal. Yet, in Olivetti, the corporation, though recognizing the protection afforded it by Salt Dome, deliberately chose to waive such protection in the exercise of an optional right of inquiry. To the extent Salt Dome was applied to deny this optional right of inquiry, it would appear that the rule was extended beyond its purpose.

21. In Zeeb v. Atlas Powder Co., 32 Del. Ch. 486, 87 A.2d 123 (Sup. Ct. 1952), for example, the Supreme Court of Delaware, though recognizing the right of a registered stockholder to comply with the formalities of the appraisal statute through an agent, nevertheless conceded that the corporation may inquire into such agent's authority and assert any actual lack thereof as a defense in appraisal proceedings. Since a registered shareholder who is a mere nominee for unregistered beneficial owners is, in effect, nothing more than an agent when he seeks appraisal, Zeeb could conceivably be authority for granting the right of inquiry claimed in Olivetti.
where the judicially appraised value will probably exceed the price or exchange opportunity offered under the merger plan. In such a situation the corporation would undertake the inquiry in the hope of discovering a lack of authority to seek appraisal on the broker's part which would enable it to avoid appraisal proceedings. Yet when appraisal proceedings will probably benefit a customer's shares, the chances that a broker lacks authority to seek appraisal are the least. The inquiry therefore becomes a mere fishing expedition, the cost of which to the corporation, and ultimately to the corporation's other shareholders, is totally unjustified by the prospects of its success.

In Olivetti, it was established that many petitioners had sought appraisal of only a portion of the shares registered in their names, withholding others as to which the merger was tacitly accepted. Since petitioners appeared of record as the absolute owners of the shares in question, they could have been beneficial owners of record rather than, as claimed, only registered nominees. If so, appraisal splitting would have been practiced by beneficial owners of record rather than by registered nominee-stockholders as permitted in Reynolds. Presumably because of such a possibility, the corporation alternatively claimed a right to inquire into the agency of the petitioners and the identities of their beneficial owners for the specific purpose of discovering whether any beneficial owner was engaged in appraisal splitting. In this connection, it relied heavily upon the Reynolds dicta22 which appeared to sanction corporate inquiry into the agency of a broker-registered holder practicing appraisal splitting in a regular merger. Having rejected such Reynolds dicta earlier in its opinion, the court made no attempt to qualify its rejection here. In specifically denying such inquiry, the court again reserved decision on the general question of whether a beneficial owner of record may appraisal split in a regular merger. Instead, it reasoned that since the instant case involved a "short form" merger,23 in which a dissenter has neither voting rights nor an option to remain in the surviving corporation, there is nothing in the letter or spirit of the appraisal statute which would bar the practice. Thus a shareholder, even a beneficial owner of record, should be allowed to appraisal split by electing to accept the price offered under the merger plan for some of his shares while demanding appraisal as to the balance.

In this holding, the court is unquestionably justified by the fact that there is simply no tangible reason for prohibiting appraisal splitting by minority shareholders of a subsidiary in the typical short form merger situation. Certainly, the ambiguous wording of the appraisal statute24 is no bar since such terminology is logically inapplicable to the minority subsidiary shareholder who has no voting rights which could possibly be exercised in favor of a short form merger.25 Moreover, it is even statu-

22. See note 15 supra.
24. Del. Code Ann. tit. 8, § 262(b) (Supp. 1964) qualifies for appraisal only a shareholder "whose shares were not voted in favor of such consolidation or merger."
torily inapplicable to such a shareholder. On this technical point alone an argument could be made that even if the legislature intended section 262 (b) to prohibit appraisal splitting in regular mergers, it showed by its refusal to make this section applicable to the rights of minority shareholders dissenting from a "short form" merger, that any such prohibition should not be extended to such a shareholder. Further, if there are, as previously suggested, independent policy reasons against appraisal splitting, they would seem confined to the regular merger situation and inapposite to the "short form" merger situation. Even if relevant, they are probably outweighed by the desirability of compensating minority subsidiary shareholders for their total lack of voting rights or option to remain in the surviving corporation after a "short form" merger, with as much flexibility in the exercise of appraisal rights as possible.

Any criticism of the Olivetti decision must be confined to the court's unqualified rejection of the Reynolds dicta which had appeared to allow corporate inquiry into the agency of a registered nominee-shareholder practicing appraisal splitting in a regular merger. Such rejection, though clearly justified upon the facts of Olivetti, is shortsighted in that it tends to invite appraisal splitting in regular mergers beyond the scope presently permitted by the Delaware Supreme Court. To illustrate, suppose a beneficial owner of record were to vote some of his shares in favor of a regular merger and seek appraisal of the balance. It may be that such a practice violates the appraisal statute, although due to the reservation of decision in both Reynolds and Olivetti this question is still unanswered. Yet, if the beneficial owner were to attempt to circumvent a possible adverse ruling by falsely claiming that the shares he dissented were beneficially owned not by himself but by another — for whom he sought appraisal in the capacity of a registered nominee — the corporation would be powerless to refute his claim without the right of inquiry suggested in the Reynolds dicta. Indeed, the corporation would be forced to recognize his demand for appraisal made under the authority of Reynolds. It is, of course, conjectural whether the court intended its rejection of the Reynolds dicta to have this effect. It is precisely because of this doubt, however, that clarification of the Delaware position on the practice of appraisal splitting by beneficial owners in regular mergers is now needed, whether such clarification be legislative, as has been the case in an increasing number of states, or judicial.

William H. Danne, Jr.

26. The effect of Del. Code Ann. tit. 8, §§ 253(d), (e) (Supp. 1964) is to make only §§ 262(c)-(j) applicable to a shareholder dissenting from a short form merger. Section 253(e) grants the general appraisal remedy to a dissenting minority shareholder of a subsidiary made a party to a short form merger, and then refers to sections 262(c) through (j) for procedures to be followed.
27. See note 15 supra.
29. See notes 16 and 17 supra.
CRIMINAL PROCEDURE — SELF-INCrimINATION — Prosecution May Not Use Statements Stemming From Questioning Initiated By Law Enforcement Officer After Accused Has Been Taken Into Custody Unless It Demonstrates Use Of Procedural Safeguards Effective To Secure The Privilege Against Self-Incrimination.

*Miranda v. Arizona (Vignera v. New York; Westover v. United States; California v. Stewart)* (U.S. 1966)\(^1\)

Petitioner Miranda was arrested in connection with a kidnapping and rape; petitioners Vignera and Westover were arrested as suspects in robberies; and respondent Stewart was arrested in connection with a series of purse-snatch robberies as a result of which one of the victims had subsequently died. In each case the defendant was subjected to an incommunicado interrogation without a full and effective warning of his rights at the outset of the questioning process. In all four cases the questioning elicited oral admissions, and in three of them,\(^2\) signed statements all of which were admitted in evidence at the trials. On appeal, the state high courts affirmed the convictions of Miranda and Vignera and reversed the conviction of Stewart; The Court of Appeals for the Ninth Circuit affirmed the conviction of Westover. The United States Supreme Court granted certiorari in each case and in reversing petitioners’ convictions and affirming the California high court held, four justices dissenting, that in the absence of other effective measures the following procedures to safeguard the fifth amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation and that, if he is indigent, a lawyer will be appointed to represent him.\(^3\) *Miranda v. Arizona*, 384 U.S. 436 (1966).

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2. *Miranda, Westover and Stewart*.

3. The Court stated that:

   We hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed...
Prior to the decision of the United States Supreme Court in Massiah v. United States, the admissibility of confessions stemming from custodial interrogation was determined on the basis of the “totality of circumstances” test as applied under the due process clause of the fourteenth amendment. The sixth amendment guarantees of the right to counsel had been held binding on the states through the fourteenth amendment in Gideon v. Wainwright and the “critical stage” concept of when this right accrues had been expanded in Hamilton v. Alabama and White v. Maryland. However, the question of the accused’s right to counsel during police interrogation remained unsettled.

In Massiah, the Court, basing its decision specifically on the sixth amendment, held inadmissible incriminating statements obtained from a defendant after indictment and in the absence of retained counsel. The Court pointed out that its decision was a logical extension of the developing pre-trial right to counsel announced previously in the Hamilton and White decisions. One month after Massiah the fifth amendment was held binding on the states in Malloy v. Hogan. The fact that the Court had relied heavily on the confession cases in reaching this decision gave rise to speculation concerning the relation of the privilege against self-incrimination to police interrogation, but its full implications were unclear.

The following week the Court handed down its decision in Escobedo v. Illinois. This case, argued prior to Malloy, involved incriminating statements obtained from a defendant prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.


7. 368 U.S. 335 (1963). In this case, which was decided prior to Gideon, the Court found that under Alabama law arraignment was a “critical stage in a criminal proceeding” because a defendant must then assert certain defenses or lose the right to assert them at trial.

8. 373 U.S. 59 (1963) (per curiam). Defendant, not represented by counsel, pleaded guilty at a preliminary hearing although no plea was required under Maryland law. Although he changed his plea to not guilty, his confession was used against him at trial. The Court found the hearing a “critical stage,” therefore requiring appointed counsel under the fourteenth amendment.

9. See generally Enker & Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 MINN. L. REV. 47, 49-51 (hereinafter cited as Enker and Elsen); Developments, supra note 5, at 998.

10. 378 U.S. 1, 8 (1964).

11. See Herman, supra note 5, at 462-81; Developments, supra note 5, at 982-83.

statements elicited by police interrogations that had been conducted prior to indictment, without a warning to the accused of his right to remain silent, and after a denial of Escobedo's request to consult with his attorney who was present at the time in the police station. Mr. Justice Goldberg, speaking for a five to four majority, relied on the sixth amendment to reverse Escobedo's conviction by finding that police interrogation is a "critical stage," as was the arraignment in *Hamilton* and the hearing in *White*. But in contrast with the broad language of the opinion, the actual holding was limited to the particular facts of the case, thereby engendering conflicting views as to its implications. 13

Against this confusing background, the Supreme Court in *Miranda* announced that by applying long recognized principles it would lay down concrete constitutional guidelines for law enforcement agencies to follow. 14 The issue before the Court was whether the privilege against self-incrimination is fully applicable during a period of custodial interrogation.

The Court reviewed the modern methods of interrogation 15 and found them so inherently compulsive that without adequate protective devices no statement from a defendant could be considered the product of free choice. 16 A study of the historical development of the privilege led the Court to conclude that it is fulfilled only when an individual is guaranteed the right "to remain silent unless he chooses to speak in the un fettered exercise of his own will." 17 The Court found judicial precedent for applying this privilege to incommunicado interrogation by adopting the following language from *Bram v. United States* 18

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the 5th Amendment... commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Examining the scope of the privilege against self-incrimination the Court declared that in federal interrogations, the *McNabb-Mallory* 19 supervisory rules are based on the same fifth amendment principles that were before the Court in the instant case. 20 As to the states, the Court declared

13. See Enker & Elsen, supra note 9; Comment, 31 U. Chi. L. Rev. 313 (1964); Developments, supra note 5, at 1000-06. However, the Court in *Johnson v. New Jersey*, 384 U.S. 719, 734 (1966), reiterated the precise holding of *Escobedo*, indicating that it is to be limited to its facts in application.
15. Id. at 445-58 (quoting authorities used).
16. Id. at 448.
17. Id. at 460 [quoting Mallory v. Hogan, 378 U.S. 1, 8 (1964)].
18. 168 U.S. 532, 542 (1897) [quoted at 384 U.S. 436, 461 (1966)].
20. 384 U.S. at 463 n.32, where the Court declared that the instant case does not indicate in any manner that the supervisory rules can be disregarded.
that the Malloy opinion had made it clear that the "voluntariness doctrine" reflects all the policies embedded in the privilege against self-incrimination21 and that the failure of the police to advise the defendant of his right to remain silent was an essential ingredient in Escobedo.22 The Court explained that since it was the compelling atmosphere of the in-custody interrogation that had caused the defendant to speak,23 the presence of counsel was selected as a device to protect the defendant's rights there and at the trial.24

Certain aspects of this rule as explained by the Court require further consideration. The warnings as to the accused's right to silence, that any statements that he may make will be used against him and of his right to have counsel at the interrogation are considered by the Court to be indispensable. The Court stressed that it will not even inquire in individual cases as to whether the defendant was aware of his rights if such a warning was not given.25

Failure to request an attorney does not constitute a waiver26 and no effective waiver of the right will be recognized unless it was specifically made after such warnings have been given.27 If there were no attorney present at the interrogation, a heavy burden rests on the prosecution to demonstrate that the defendant knowingly and intelligently waived his rights.28 Although an express declaration that the individual is willing to make a statement and does not want the assistance of counsel, followed closely by such a statement, could constitute a waiver, a waiver will not be

22. 378 U.S. 478, 483, 485, 491 (1964) (referred to by the instant Court at 384 U.S. at 465).
24. The presence of counsel when statements are taken during interrogation enhances the integrity of the fact finding processes in court. See 384 U.S. at 466 n.36, citing authorities including Note, 73 YALE L.J. 1000, 1048-51 (1964); Comment, 31 U. CHI. L. REv. 313, 320 (1964).
27. 384 U.S. at 470; but see id. at 474 n.44, where the Court indicates that if an individual has his attorney present, further questioning may be permissible even though the suspect indicates a desire to remain silent.
28. Id. at 475. The placing of the onus on the prosecution might very well be the backbone of the decision in that it is necessary to prevent the issue from resolving itself into a shouting match. This was frequently the situation in prior confession cases due to the courts lack of knowledge of what happened at the police station. See Herman, supra note 5, at 497.
In Miranda, the Court declared that the "mere fact that the defendant signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights." 384 U.S. at 492.
presumed merely from the silence of the accused; and no matter what testimony is offered by the prosecuting authorities as to the waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before such a statement is made is strong evidence that no valid waiver was made.\textsuperscript{29} It should be noted that the rules established in the instant case apply to any statement made by a defendant and that the Court makes no distinction between "confessions" and "admissions" or between inculpatory and exculpatory statements.\textsuperscript{30}

Mr. Justice White, in his dissent joined in by Justices Harlan and Stewart, asserted that the decision leaves open the questions of whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation.\textsuperscript{81} The majority in the instant case declared that these principles apply when an individual is first subjected to interrogation — whether in custody at the police station or otherwise deprived of his freedom of action in any way.\textsuperscript{82} At the very least, the rules set forth by the Court apply at the arrest stage, and this would appear to include any form of "stop-and-frisk" detention.\textsuperscript{83} The majority stressed that it is a compelling atmosphere that invokes the \textit{Miranda} standards. The deprivation of freedom, and not the suspicion of crime, is the critical factor in determining whether one was under compulsion.

As to the spontaneity of the statements, the Court emphasised that the fundamental import of the privilege does not involve merely talking to the police without warnings and the advice of counsel, "but whether [the defendant] can be interrogated" in ignorance of his rights.\textsuperscript{84} The rules do not apply to one who enters a police station on his own and wants to confess or to one who calls the police in order to make a statement.\textsuperscript{85}

Although the question of whether non-testimonial evidence introduced at trial is the actual "fruit" of an inadmissible statement may be an open question in an individual case, the use of such "fruits" appears to have been foreclosed by the Court when it stated that, "unless and until such warnings

\textsuperscript{29} 384 U.S. at 476; In \textit{Stewart}, the defendant had been held for five days and questioned nine times before confessing. The Court held that these circumstances were "subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege." \textit{Id.} at 499.

\textsuperscript{30} \textit{Id.} at 476-77. This appears to preclude the use of statements for impeaching the testimony of a defendant, therefore indicating that the fifth amendment exclusionary rule is broader than that of the fourth amendment; see Walder v. United States, 347 U.S. 62 (1954); \textit{Developments, supra} note 5, at 1029–30.

\textsuperscript{31} 384 U.S. at 545.

\textsuperscript{32} \textit{Id.} at 444, 477, 478.


\textsuperscript{34} 384 U.S. at 478.

\textsuperscript{35} \textit{Ibid.}
and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. 36

The instant decision was handed down in the midst of a widespread and heated controversy over the necessity and propriety of police interrogation and the use of confessions obtained thereby. 37 Lack of factual data has precluded an authoritative evaluation of the claims of the argument in the past; and for the same reason, the question of the overall impact of Miranda on law enforcement must remain open until adequate study has been made. 38 However, the results of a study recently completed by Evelle J. Younger, District Attorney of Los Angeles County, 39 indicated that confessions were found necessary to successful prosecution in fewer than 10 per cent of the 4,000 felony cases considered. This evidence contradicts the frequent claims by police and prosecutors that a large percentage of the convictions in major cases are based on statements or confessions obtained during interrogation. Furthermore, this study reported that 50 per cent of the suspects confessed in spite of warnings by the police of their right to remain silent and to have an attorney. 40

However, even if confessions do play such a minor role in overall law enforcement, the kind of cases in which interrogation is most critical is a necessary consideration. If the need is greatest in crimes of violence — assault, rape, robbery, and homicide 41 — then an inability to obtain convictions as a result of strict interrogation procedures could pose a serious threat to society. It is the effect that the instant decision will have on the protection of society against this type of crime that will determine the price paid for the stronger constitutional protections that have been afforded the individual.

Albert A. Lindner

36. 384 U.S. at 479 (Emphasis added.) ; but see Enker & Elsen, supra note 9, at 79, for an argument that the "fruits" doctrine should not apply to confessions. See generally Developments, supra note 5, at 1024–28.

37. See Developments, supra note 5, at 938–51 for a review of the arguments and authorities.

38. The potential impact of Miranda was somewhat lessened one week later when the Court held in Johnson v. New Jersey that Escobedo and Miranda are applicable only to those cases in which trial began after the decisions were announced. However, the Court declared that "the nonretroactivity of those cases does not preclude persons whose trials have already been completed from invoking the newly established safeguards as part of an involuntariness claim." 384 U.S. at 750. See Davis v. North Carolina, 384 U.S. 737 (1966), decided the same day as Johnson.


VILLANOVA LAW REVIEW

TORTS — STRICT LIABILITY FOR DEFECTIVE PRODUCTS — PENNSYLVANIA ADOPTS SECTION 402A OF RESTATEMENT (SECOND) OF TORTS.

Webb v. Zern (Pa. 1966)

Plaintiff sustained severe injuries when a keg of beer, purchased by his father and tapped by his brother, exploded while plaintiff was in the room in which the keg had been placed. Plaintiff alleged negligence, relying on the doctrine of exclusive control,1 and joined as defendants the manufacturer of the keg, the brewer who had filled the keg, and the distributor who had sold the keg to plaintiff's father.

The trial court dismissed the complaint, ruling that the failure of the plaintiff to join his father and brother as defendants prevented invocation of the exclusive control doctrine thus rendering futile plaintiff's attempt to prove negligence. On appeal, the Pennsylvania Supreme Court reversed, holding that Section 402A of the Restatement (Second) of Torts2 providing for strict liability in tort for sellers of defective products is now the law of Pennsylvania. The plaintiff was permitted to amend his complaint to benefit from the newly adopted basis of liability. Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

The evolution of the modern law of products liability has been marked by the inexorable disintegration of the classical prerequisites to recovery for damages arising out of personal injury or property loss due to a defective product: privity of contract and proof of negligence. The premise that a manufacturer of a defective product could not be liable, even for negligence, to a party with whom he was not in contractual privity came from the misunderstanding and misinterpretation of Lord Abinger's dicta in Winterbottom v. Wright.3 This bar to recovery persisted for three-quarters of a century, with certain exceptions,4 until 1916 when Judge Cardozo, speaking for the New York Court of Appeals, permitted re-

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1. This is a doctrine very similar to that of res ipsa loquitur and more or less peculiar to Pennsylvania law in accident cases. See Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953).

2. RESTATEMENT (SECOND), TORTS § 402A (1965) provides:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


4. See 1 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY 5.02 (1966).
covery against the manufacturer of a defective automobile, upon proof of negligence, by one not in privity of contract.  

Generally concurrent with this inception and development of the negligence action was a striking development in the common law and statutory action for breach of warranty. The privity requirements previously deemed essential by common law conceptualists were being abandoned by some courts when impure foodstuffs and medicines caused injury to a human being. In later years, this derogation of privity was continued when products intended for intimate bodily use caused personal injury due to some latent defect. Henningson v. Bloomfield Motors, Inc. went even further toward abandoning privity requirements in permitting the wife of a new car purchaser, injured after a mechanical defect caused the car to leave the road while she was driving, to recover from both the dealer and the manufacturer of the car. The liability of both defendants was expressed in strict warranty liability despite the absence of privity of contract with the plaintiff wife. Henningson has since become the landmark decision for those courts which have used the warranty action to afford relief to an injured party not in privity with the manufacturer or seller of a defective product.

Many courts which have considered the problem, however, have not been willing to extend the strict warranty liability to parties when no privity of contract exists. In these jurisdictions, the "citadel of privity" has remained a formidable bar to recovery in spite of increased demand for more adequate consumer protection.

In a concurring opinion to Escola v. Coca-Cola Bottling Co., Justice (now Chief Justice) Traynor of the California Supreme Court first promulgated the underlying rationale for granting increased protection when he stated:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market, it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the

7. Id. at 1110.
10. See 2 Fruemer and Friedman, Products Liability § 16.01(5) (1966).
manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.\(^{13}\)

But more importantly, Justice Traynor's opinion is thought by many to have alluded to a new approach to this old problem: a strict liability in tort for manufacturers of defective products.\(^{14}\) The decisional breakthrough for this concept of liability in the products area did not come until almost twenty years later when in 1963, Justice Traynor, in *Greenman v. Yuba Power Prods., Inc.*,\(^{16}\) stated for a unanimous California Supreme Court that the manufacturer of a defective product is strictly liable in tort. Since *Greenman*, at least thirteen jurisdictions\(^{18}\) have approved or adopted strict liability in tort as a basis for recovery. With the development of this apparent trend, privity of contract and proof of negligence in products cases seem to be on the wane as meaningful concepts.

Section 402A of the *Restatement* appears to take a compromise position between those progressive jurisdictions which give credence to Justice Traynor's early insights and those jurisdictions still inhibited by conceptual abstractions and procedural niceties. Of those progressive courts, many have reached results, either in strict tort liability or by liberal construction of their warranty provisions, which far exceed the compromise provisions of the Restatement.\(^{17}\) Indeed, if section 402A is not given liberal construction, its provisions may already be antiquated. In this respect, the Pennsylvania Supreme Court has an opportunity to play a pioneer role.

A plaintiff who brings an action in Pennsylvania under section 402A avoids most of the horizontal\(^{18}\) and vertical\(^{19}\) strictures heretofore imposed by privity of contract. Horizontally, the plaintiff need only be a user or consumer\(^{20}\) of the defective product. The *Restatement* expresses no opinion as to whether recovery should be extended to parties not meeting this dis-

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\(^{13}\) Id. at 462, 150 P.2d at 441. See also Prosser, Torts § 97 (3d ed. 1964).

\(^{14}\) The following excerpt from Justice Traynor's concurring opinion in *Escola* is said to support this view:

'It should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.'  
*Id.* at 461, 150 P.2d at 440


\(^{18}\) Horizontal privity pertains to those parties other than the purchaser who might have a cause of action against the seller.

\(^{19}\) Vertical privity pertains to those parties in the distributive chain besides the immediate seller who may be sued when a defective product causes injury or property damage.

\(^{20}\) See *Restatement* (Second), Torts § 402A, comment l, at 354 (1965).
RECENT DEVELOPMENTS

Vertical, a cause of action may be brought against any party in the distributive chain who sells a defective product. This would include retailers, wholesalers, distributors, and manufacturers as well as any other party in the business of selling a product. The requirement of a sale of a product would preclude recovery under the Restatement where the transaction was, for example, a bailment, a pre-purchase trial arrangement or the sale of passage by a carrier, although two recent cases offer very persuasive reasoning favoring the inclusion of the first two situations in the protection afforded by strict liability in tort.

The protection given the user or consumer under section 402A allows recovery for physical harm done to him or his property as a result of the defective product. This language does not encompass a result similar to the holding in Santor v. A. & M. Karagheusian, Inc. that a purchaser may recover damages for economic loss against the manufacturer of a defective product under the theory of strict tort liability.

As to other issues relating to defective products and certain to arise in future litigation, the ALI has expressed no opinion, for the most part relying on the lack of sufficient authority to support any conclusive posi-

21. Id. caveat 1, at 348.
22. Id. comment o at 356. See also Note, Strict Products Liability And The Bystander, 64 COLUM. L. REV. 916 (1964).
23. Id. comment f at 350. See also 2 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16A (4) (b) (i) (1966).
24. Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964) (involving a pre-purchase trial arrangement); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965) (involving a bailment). See Goldberg v. Kolfsan Instrument Co., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (a warranty action in which it was recognized that strict tort liability was "surely a more accurate phrase"). The question of an airplane manufacturer's strict liability when the plane proved defective and crashed was involved in Goldberg. However, the possibility of strict liability for the airline carrier was not discussed. The requirement of sale provision in section 402A is illustrative of the compromise position taken by the Institute, whereby a traditional prerequisite of warranty recovery was incorporated into the Restatement provision. To this extent, the Restatement position may be dated, as progressive jurisdictions unimpeded by common-law concepts and working outside of the Restatement have and, undoubtedly, will continue to afford strict liability relief when social policy requires.
26. Economic loss would include diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured as well as lost profits incurred as a result of the product defect. See Comment, Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages — Tort or Contract?, 114 U. PA. L. REV. 539 (1966); Note, The Scope of the Manufacturer's Strict Liability in Tort for Defective Goods, 27 U. PITT. L. REV. 693 (1966). In Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), the California Supreme Court expressly refused to permit recovery for economic loss damages under the theory of strict tort liability. Cf. Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966) where economic loss damages were recoverable under the misrepresentation principle as developed in Restatement (Second) TORTS § 402B (1965) and in a parallel rule relating to pecuniary loss (tent. draft of proposed § 552D — Council Draft No. 17, p. 76).
tion. Typical of these issues are the liability of the manufacturer of a defective component part\textsuperscript{27} and the liability of a manufacturer of a defective product which is expected to be processed or otherwise substantially changed before it reaches the user or consumer.\textsuperscript{28} Concerning the former, the ALI did suggest that where there is no change in the component part itself, it merely being incorporated into something larger, the strict liability advantage will be found to devolve to the ultimate user or consumer.\textsuperscript{29} The policy considerations\textsuperscript{30} supporting an action against the manufacturer of the defective finished product are equally applicable to a manufacturer of a defective component part, and there is case authority supporting this extension of liability.\textsuperscript{31} As to products expected to be processed, the ALI suggests\textsuperscript{32} that the mere fact that a product is to undergo further processing or substantial change should not of itself preclude liability against the manufacturer of that product. The question seems essentially one of shifting responsibility to the intermediate party where the factual situation justifies the shift.

One issue not expressly covered in the text or comments of section 402A but deserving of mention is whether the seller of a defective used product is to be covered by the Restatement. The suggestion has been made that the language of section 402A appears to include the seller of a defective used product\textsuperscript{33} and the New Jersey Supreme Court,\textsuperscript{34} in dicta, expressly stated that no distinction would be made between new or used chattels in holding the seller strictly liable in tort or warranty.

By adopting section 402A, the Pennsylvania Supreme Court has substantially followed the same course as the Tennessee Supreme Court\textsuperscript{35} which also approved strict liability in tort in the face of numerous precedents demanding the establishment of privity in warranty, without expressly overruling any prior decisions dealing with warranty. Strict liability in tort under section 402A has not been made the exclusive theory for recovery available to a Pennsylvania plaintiff seeking redress for personal injury or property damage resulting from a defective product. An action

\textsuperscript{27} See Restatement (Second), Torts § 402A, caveat 3, at 348 (1965).
\textsuperscript{28} Id. caveat 2, at 348.
\textsuperscript{29} Id. comment q at 358.
\textsuperscript{30} See text accompanying note 13 supra.
\textsuperscript{31} Suveda v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (manufacturer of a defective brake system strictly liable in tort). Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) and Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963) held the component parts manufacturer strictly liable in warranty but the policy considerations would apply as well for strict liability in tort. But see Goldberg v. Kollsman Instrument Co., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) where the court refused to extend strict liability to the manufacturer of a defective altimeter which caused a plane to crash, reasoning that adequate protection was provided for the passengers by holding liable the solvent airplane manufacturer which put into the market the completed aircraft.
\textsuperscript{32} See Restatement (Second), Torts § 402A, comment p at 357 (1965).
\textsuperscript{33} 2 Frumer & Friedman, Products Liability § 16A (4)(b)(iv) (1966).
\textsuperscript{34} Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).
\textsuperscript{35} See Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966).
based on negligence is not precluded and a warranty action is available under the appropriate sections of the Uniform Commercial Code.

The restrictive construction given section 2-318 of the Code by the Pennsylvania Supreme Court probably contributed to the position taken by the court in the instant decision. In Hochgertel v. Canada Dry Corp., recovery was denied to a bartender who was injured when an unopened bottle of soda water exploded, on the ground that the non-purchasing bartender was not a member of the buyer's family, his household or a guest in his home. In a case decided the same day as the instant decision, it was held that a nephew of a buyer, living next door to the buyer, was "in the family" and that the nephew's administrator was entitled to recovery from the immediate vendor to the aunt, after a defective vaporizer splashed boiling water on the child causing his death. In so holding, the court disallowed recovery from parties above the immediate seller in the distributive chain, thus failing to act affirmatively on the possibility of enlarged liability suggested by the neutrality comment to section 2-318.

This apparent determination of the Pennsylvania Supreme Court to treat the provisions of section 2-318 as exclusive will give added significance to the strict tort action when an individual or corporate user or consumer not in privity of contract and incurring only physical property damage as a result of a product defect, brings suit in a Pennsylvania forum. There is no present reason to believe that the Pennsylvania Supreme Court will extend protection in warranty under this section beyond "natural persons" or for property damage not accompanied by personal injury. However, section 402A clearly includes corporate users and consumers within the ambit of recovery and, in addition, extends protection where physical property damage is the only result of the defective product.

36. See RESTATEMENT (SECOND), TORTS § 402A, comment a at 348 (1965).
38. PA. STAT. ANN. tit. 12A, § 2-318 (Supp. 1965) provides:
A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
40. Although the Pennsylvania Supreme Court, on facts similar to those in Hochgertel, might reach the same holding under § 402A by refusing to extend recovery beyond users and consumers (see note 21 supra), it is indisputable that in Pennsylvania the Restatement provision is much broader in scope than § 2-318 of the Code in light of its narrow construction by the Pennsylvania Supreme Court.
42. UNIFORM COMMERCIAL CODE § 2-318, comment 3 which reads:
This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.
43. See Atlas Aluminum Corp. v. Borden Chem. Corp., 233 F. Supp. 53, 54-55 (E.D. Pa. 1964), in which the court held "that under Pennsylvania substantive law the privity defense has not been vanquished where the claim is based on an implied warranty and the damages sustained are solely property damages or commercial losses without personal injury."
Until there is case law construing the scope of coverage permitted by section 402A, the Code — as section 2-318 has been construed in Pennsylvania — may offer a ground for recovery in one area where the Restatement might not. Thus, if it is reasonable to expect that a person in the family, a member of the household, or a guest of the buyer would be “affected” by the defective goods, the Code would permit recovery although the Restatement requirement of “user or consumer” has not been fulfilled.

Procedurally, a Code action in Pennsylvania under sections 2-318 and 2-714 offers the significant advantage to an injured plaintiff of a longer statute of limitations. In other respects, an action under the Restatement would seem more advantageous. It has been held recently that a wrongful death action is not permitted for breach of warranty under the Code. Also, Code requirements of notice to the seller, and the possibility of disclaimer could undermine recovery by an injured plaintiff.

Although the decision in the instant case has moved the Pennsylvania Supreme Court into the forefront of modern progressive courts, section 402A, unconstrued, is not a panacea for all Pennsylvania plaintiffs injured by defective products. The parallel actions of negligence and warranty under the Code will initially be significant in problem areas not clearly encompassed by the Restatement or where a rule of procedure bars its use. Of course, where there can be optional theories of recovery, the Restatement cause of action is most desirable. Later vitality of negligence and warranty actions will depend on the construction given to section 402A. A continued progressive approach to the problems in this area will undoubtedly show that the decision in the principal case has initiated the demise of privity of contract and proof of negligence in Pennsylvania products liability cases.

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46. UNIFORM COMMERCIAL CODE, § 2-607(3) (a). See comment 5 id. But see Santor v. A&M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (action by buyer against manufacturer of defective rug), Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965) (action by bystander against manufacturer of defective shotgun shell) and Wights v. Staff Jennings, Inc., 405 P.2d 624 ( Ore. 1965) (action by buyer's wife against seller of defective boat), all arising under the Uniform Sales Act and holding that notice as required by section 49 was not required by these plaintiffs who were not in privity with the defendants. Section 49 of the Uniform Sales Act is covered by sections 2-607 (2) and (3) of the Code.

47. UNIFORM COMMERCIAL CODE, § 2-316. But see §§ 2-302 and 2-719(3). Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) held that a manufacturer's attempted disclaimer was "inimical to the public good" and void. Id. at 405, 161 A.2d at 95.