**RECENT DEVELOPMENTS**

**ANTITRUST — CLAYTON ACT — FTC FINAL ORDERS MAY BE USED AS PRIMA FACIE EVIDENCE IN PRIVATE TREBLE DAMAGE ACTION.**

*Farmington Dowel Prods. Co. v. Forster Mfg. Co.* (1st Cir. 1969)

Plaintiff brought a private action in 1962 pursuant to section 4 of the Clayton Act¹ to recover treble damages for defendant Forster's violations of section 2 of the Sherman Act² and section 2(a) of the Clayton Act as amended by the Robinson–Patman Act³ in attempting to monopolize interstate trade in wooden skewers and engaging in discriminatory pricing practices. Prior to the present suit, the Federal Trade Commission (FTC) had instituted an action against the defendant charging it with the same violations, which resulted in a cease and desist order.⁴ At trial in the present suit, pursuant to section 5(a) of the Clayton Act,⁵ plaintiff attempted to use the FTC order as prima facie evidence of the violations alleged in his complaint. The district court admitted parts of the FTC order,⁶ and the Court of Appeals for the First Circuit affirmed, holding that an order of the FTC constitutes a final judgment or decree within the meaning of the statute and may be used as prima facie evidence under section 5(a).⁷ *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, ...... F.2d ...... (1st Cir. 1969).

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2. 15 U.S.C. § 2 (1964), provides in pertinent part that "[e]very person who shall monopolize . . . or combine or conspire . . . to monopolize . . . shall be deemed guilty of a misdemeanor. . . ."
3. 15 U.S.C. § 13(a) (1964), provides in pertinent part:
   It shall be unlawful for any person engaged in commerce . . . to discriminate in price . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly. . . .
5. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964), provides:
   A final judgment or decree . . . rendered in any civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .
7. The case was, however, remanded to the District Court with instruction to modify its prior order to include an award of $85,000 "reasonable attorney's fee" to plaintiff. ...... F.2d at ......
Section 4 of the Clayton Act authorizes a party injured by violations of the antitrust laws to bring suit for treble damages. By enacting section 5(a), Congress sought to provide for the redress of private injury caused by antitrust violations and also to aid the antitrust enforcement effort by encouraging private action. The issue of the inclusion of FTC orders within the ambit of section 5(a) has been affected by both decisional interpretation and legislative modification. The first case to consider this issue construed the applicable statute restrictively, holding that FTC orders provide no prima facie assistance to private litigants. One of the major reasons for this position

8. The primary reason for the enactment of section 4 was to induce private plaintiffs to bring these suits in order to aid the government in the enforcement of the antitrust laws. Wham, Antitrust Treble Damage Suits: The Government’s Chief Aid in Enforcement, 40 A.B.A.J. 1061 (1954). See also Bruce’s Juices, Inc. v. American Can Co., 330 U.S. 743, 751–52 (1947).

The treble damage recovery is sometimes referred to as a windfall for plaintiffs. See, e.g., Johnston, Damages Under Section 4 of The Clayton Act From The Perspective Of Defense Counsel, 7 ANTITRUST BULL. 87 (1962). While this may be true theoretically, in practice it is virtually impossible for a plaintiff to show by tangible evidence the full amount of his damages. Second, deprivation of business and profits result in a business handicap that is never compensated, nor is the depreciated value of money considered. Finally, the unrecoverable expenses of litigation are always substantial. Loevinger, Private Action — The Strongest Pillar of Antitrust, 3 ANTITRUST BULL. 167, 173 (1958).


10. Proper v. John Bene & Sons, Inc., 295 F. 729 (E.D.N.Y. 1923). The district court set forth six reasons why the FTC order could not be admitted pursuant to section 5 of the Clayton Act. First, the Commission’s order lacked finality for the order had no effect in itself unless made operative by a circuit court of appeals. Second, the Commission proceeding was not a “proceeding in equity” as the statute then required. Third, the Commission proceeding was not brought “by or on behalf of the United States.” Fourth, the defendant in Proper had violated the FTC Act, which has never been considered an antitrust law, and consequently the order was not under the antitrust laws. Fifth, based upon the fourth finding of the court, there was no finding “to the effect” that defendant had violated an “antitrust law.” Finally, the FTC order was only against defendant Bene, and plaintiff had sought to introduce it against several additional defendants. Id. at 732. Because the FTC order in Farmington cited violations of the Clayton Act, and the FTC orders were sought to be admitted against defendant who had himself been before the FTC, only the first three objections to admissibility cited in Proper are relevant to the Farmington case.

11. See Brunswick-Balke-Collendar Co. v. American Bowling & Billiard Corp., 150 F.2d 69 (2d Cir. 1945), rev’d in part on reh’g, 150 F.2d 74 (1945), cert. denied, 326 U.S. 757 (1945); Volasco Prods. Co. v. Fry Roofing Co., 223 F. Supp. 712 (E.D. Tenn. 1963), aff’d, 346 F.2d 661 (6th Cir. 1965), cert. denied, 382 U.S. 904 (1965); Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15 (E.D. Mo. 1963), rev’d on other grounds but aff’d on issue at bar, 327 F.2d 725 (8th Cir. 1964), on remand, 245 F. Supp. 510 (E.D. Mo. 1965); United States v. United Shoe Mach. Corp., 89 F. Supp. 349 (D. Mass. 1950); International Tag & Salesbook Co. v. American Salesbook Co., 6 F.R.D. 45 (S.D.N.Y. 1943). But see Carpenter v. Central Arkansas Milk Producers Ass’n, Inc., Trade Cas. ¶ 71,817 (W.D. Ark. 1966). In Brunswick-Balke-Collendar (BBC), the Second Circuit initially held that pursuant to a 1938 amendment, 52 Stat. 111 (1938), 15 U.S.C. § 45(g) (1964) (commonly referred to as the Wheeler-Lea Act), a Commission order became final unless judicial review was sought, and therefore the FTC order must be considered to be within section 5. However, on rehearing, the court properly recognized that this amendatory legislation was applicable to the FTC Act, not the Clayton Act, and thus was forced
was that, until recently, FTC orders indicating violations of the Clayton Act had no independent vitality, but rather had to rely upon the courts of appeals for enforcement. Therefore, FTC orders standing alone could not satisfy the finality requirement indicated in section 5(a). However, in 1959, the Finality Act repealed this cumbersome procedure and made Commission orders in and of themselves complete relief. Thus, lack of finality is no longer a bar to Commission orders under section 5(a).

Subsequently, judicial focus was turned to section 5(b), the tolling provision of the statute. In Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., the Supreme Court held that any actions brought by the FTC are within the meaning of section 5(b) and hence the four year statute of limitations is suspended whenever the Commission begins proceedings. Although the Court expressly left open the question of section 5(a), it did determine that sections 5(a) and 5(b) are neither interdependent nor co-extensive. Despite this, the significance of the Minnesota Mining & Mfg. Co. case for the purposes of section 5(a) is that the Court necessarily held that a Commission action falls within the meaning of the statutory term "civil or criminal proceeding" in section 5(b). This terminology is common to both section 5(a) and 5(b).

12. Formerly, enforcement of an FTC order under the Clayton Act followed an arduous path. The initial effort of the agency amounted to little more than investigating and noting breaches of the antitrust law. If the FTC later suspected disregard of its cease and desist order, it was required to make that determination by formal hearing and then apply to a federal court of appeals for execution of its order. The court in turn not only had to resolve the legality of the order, but further had to decide whether the facts found by the FTC constituted a violation of the Act. Matteoni, An Antitrust Argument: Whether A Federal Trade Commission Order Is Within The Ambit Of The Clayton Act's Section 5, 40 NOTRE DAME L. REV. 158, 163 (1965).


15. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(b) (1964), provides in pertinent part:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private right of action arising under said laws . . . shall be suspended during the pendency thereof and for one year thereafter . . . .


19. Id. at 318. The Court recognized that section 5(b) tolls the statute of limitations regardless of whether a final judgment or decree is ultimately entered. Moreover, Congress, in framing section 5(a), focused on the use by private parties of judgments or decrees as prima facie evidence, but in section 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions. Id. at 316-17.

20. For an opposing argument based upon the prevalent meaning given to civil or criminal proceedings and the lapses in statutory construction in the Clayton Act, see Note, 63 MICH. L. REV. 400, 401-02 (1964).

The court in the instant case placed great reliance upon the Supreme Court's decision in Minnesota Mining & Mfg. Co. Proceeding from the position that FTC orders constitute civil or criminal proceedings under section 5(b), the Farmington court noted that the same language exists in section 5(a), and deemed it inconceivable that the same phrase — "civil or criminal proceeding" — could support a different meaning, particularly since the same overall policy underlies both sections. Although not mentioned in the decision, further justification for this position lies in the well-settled principle of statutory construction that the same words in different parts of a statute have the same meaning. Moreover, the very nature and effect of a Commission order bears a close analogy to a civil proceeding. An FTC order does not serve to punish or fasten liability for past conduct but rather bars specific harmful practices for the future. This is the same remedy an injunction grants in an equitable action; hence, FTC orders provide the same substantive relief that can be obtained in a civil proceeding. Grounded upon either the logical extension of Minnesota Mining & Mfg. Co. or the nature of the remedy the FTC affords, the conclusion seems justified that a Commission proceeding is a civil proceeding within the meaning of the statute.

The Finality Act, which removed the need for adoptive ratification by a court of appeals for enforcement of an FTC order, constituted an important advance toward the inclusion of FTC orders within the scope of section 5(a). In giving the orders legal significance without the need for court affirmance, the First Circuit felt that Congress was demonstrating its confidence in the maturation of the FTC. Furthermore, heavy sanctions are placed upon violations of orders, which consequently removes them from the realm of mere advisory opinions. Due process is no objec-

23. The "entire provision was intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 319 (1965).
24. Schooler v. United States, 231 F.2d 560, 563 (8th Cir. 1956); 82 C.J.S. Statutes § 348 (1953); Note, 63 MICH. L. Rev. 400, 404 & n.31 (1964).
   Any person who violates any order issued by the Commission . . . shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation . . . Each separate violation of such order shall be a separate offense . . . See Austern, Five Thousand Dollars A Day, 21 A.B.A. Surr. of Antitrust Law 285 (1962), where the point is made that the potential fine for a Commission cease and desist order can be far larger than what Congress has specified for Sherman Act violations. 76. at 287 & n.10.
tion to such finality since a statutory right of review accompanied the provision. Thus, in this regard, Commission orders are analogous to federal district court rulings.

The question confronting the court on which there was no decisional precedent was whether an FTC order constitutes a judgment or decree within the meaning of section 5(a). Although the court conceded that historically the words judgment or decree referred primarily to the culmination of court proceedings, it felt the fundamental inquiry should be directed toward the issue of whether or not a litigant gets his day in court before the FTC. The rationale behind this approach was that a judgment or a decree is merely an incident of the trial or the party's day in court.

In resolving the question of whether an FTC order is representative of the requisite day in court, the court considered the following elements: (1) the commission's rules of practice; (2) the division of adjudicatory and prosecutorial functions within the FTC; (3) the evidentiary safeguards present in an FTC action; (4) the similarity between the FTC and the ICC, whose orders may be used by private litigants in certain situations; and (5) the fairness of an inclusionary rule.

Analysis of the Commission's Rules of Practice led the court to the conclusion that, while not as extensive as the Federal Rules of Civil Procedure, litigants are provided with a substantial body of rights and privileges under the Commission rules which bear close resemblance to The Federal Rules. Significantly, the FTC rules have no glaring omissions; every protection given to litigants by the federal rules is available before the FTC. Furthermore, the effect of the similarity of the FTC rules with the federal rules is to allow counsel not overly familiar with FTC procedure to proceed without undue disadvantage.

The court observed that a fundamental difference between federal agencies and federal courts is the division of the functions of adjudication

31. __ F.2d at __.
32. Id. at __. For additional support for the position that the primary concern of Congress in enacting the Statute was a full opportunity to be heard, see Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 324-35 (1965) (Black, J., dissenting).
35. __ F.2d at __.
36. Compare the FTC complaint, 16 C.F.R. § 3.11(b)(2) (1969), which requires a clear concise factual statement giving the type of acts alleged to be violative of the law with Fed. R. Civ. P. 8(a) & 8(c). Compare the pre-trial hearing in the FTC, 16 C.F.R. § 3.21 (1969), which is called by the hearing examiner to consider simplification of issues, stipulations, admissions and matters of which official notice is to be taken. Fed. R. Civ. P. 16. 16 C.F.R. § 3.31 (1969), establishes the rules to be applied to the taking of depositions. They are not as extensive as Fed. R. Civ. P. 26-37, but they do provide for orderly pre-trial preparation. Finally, compare the subpoena provisions of 16 C.F.R. § 3.34 (1969) with Fed. R. Civ. P. 45.
and prosecution.\textsuperscript{38} In the federal courts complete external separation is the scheme adopted. Federal agencies, on the other hand, operate under the internal separation plan of the Administrative Procedure Act.\textsuperscript{39} The FTC has adopted this internal separation procedure which provides that investigators and prosecutors never serve as judges in adjudicatory hearings; this function is performed by hearing examiners.\textsuperscript{40} Therefore, the accusatorial bias that could affect a judge’s performance is eliminated. Even when perfectly executed, however, a plan of internal separation involves some combination of functions, notably common superiors.\textsuperscript{41} The danger lies in the agency’s interest in successful litigation which might color the examiner’s determination. The FTC attempts to remove this potential bias by freeing examiners from responsibility to any supervisor or any prosecuting officer.\textsuperscript{42}

Fundamentally, the problem of separation of functions is one of procedural due process\textsuperscript{43} and in this regard it is generally held that when the functions of prosecution and adjudication are combined in the same agency, due process is not violated where internal separation is present.\textsuperscript{44} Therefore, without specific evidence of unfairness, the conclusion seems justified that the structure of the FTC proceedings comport with due process.

The primary objection relied upon by the defendant in seeking to bar admission of the FTC order was the different standard of evidence used by the FTC in comparison to that in the federal courts. The Farmington court, in dismissing this argument, felt the difference to be merely one of degree and unlikely to be dispositive of the case.\textsuperscript{45} The FTC rule of evidence admits all relevant, material and reliable evidence and specifically excludes unreliable evidence.\textsuperscript{46} The justification and necessity for this relaxed evidentiary standard are found in the nature of the issues before the FTC which call for different kinds of evidence — especially economic and documentary proof — than that commonly presented at a jury trial.\textsuperscript{47} It is clear that the rule on admissibility does not exclude hearsay, but

\textsuperscript{38} See generally 2 H. Davis, Administrative Law § 13 (1958).

\textsuperscript{39} 5 U.S.C. § 1004(c) (1964), provides that “[N]o officer, employee, or agent engaged in the function of investigative or prosecuting functions . . . shall . . . participate or advise in the decision. . . .”

\textsuperscript{40} 16 C.F.R. § 3.42(a) (1969). See Matteoni, supra note 12, at 163. Hearing examiners are civil service appointees and each agency may appoint as many as are necessary for efficient proceedings. 5 U.S.C. § 1010 (1964).

\textsuperscript{41} 2 H. Davis, supra note 38, at § 13.05.

\textsuperscript{42} 16 C.F.R. § 3.42(f) (1969), provides in pertinent part:

In the performance of their adjudicatory functions, hearing examiners shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions. . . .

\textsuperscript{43} 2 H. Davis, supra note 38, at § 13.11 (1969).

\textsuperscript{44} Marcello v. Bonds, 349 U.S. 302 (1955); Shaughnessy v. United States ex rel. Accardi, 347 U.S. 260 (1954); Pangburn v. CAB, 311 F.2d 349 (1st Cir. 1962). See also 2 H. Davis, supra note 38, at § 13.02.

\textsuperscript{45} F.2d at . . .

\textsuperscript{46} 16 C.F.R. § 3.43(b) (1969).

there are cogent arguments for admitting reliable evidence before the FTC despite its hearsay character. First, a safeguard or substitute for the opponent’s inability to cross-examine the declarant\(^{48}\) takes the form of the agency’s expertise in its particular field, thus reducing the probability that the trier of fact will be misled by untrustworthy evidence.\(^{49}\) Second, the rules of evidence, particularly the hearsay rule, are products of trial by jury and as such are inappropriate in any proceeding where a jury is not present.\(^{50}\) Therefore, the evidentiary rule of the FTC should not be limited by rules which contemplate the separation of judge and trier of fact. They should, however, be similar to the practice observed by judges who also serve as fact-finders.\(^{51}\) In such trials in the federal courts the emphasis is upon probative, reliable, and substantial evidence despite its hearsay character.\(^{52}\) This is precisely the direction of the FTC rule. Third, the guidelines that the FTC has established are consistent with the thrust of modern evidentiary rules and proposed codes.\(^{53}\) Finally, when the functions of judge and trier of fact are consolidated, as they are in FTC actions as well as in most civil antitrust proceedings,\(^{54}\) objections to evidence offered should go to the weight to be given to the evidence, and not to its admissibility.\(^{55}\)

In refuting the defendant’s contention that the internal separation of functions within the FTC made it difficult to get a fair hearing, the court in *Farmington*, noting that the Interstate Commerce Commission (ICC) employs the same separation plan as the FTC, mentioned the prima facie assistance given private litigants by ICC orders.\(^{56}\) While this analogy

\(^{48}\) See D. LOUISELL, J. WALTZ & J. KAPLAN, CASES AND MATERIALS ON EVIDENCE 55 (1968); C. MCCORMICK, EVIDENCE 459 (1954); J. WIGMORE, EVIDENCE § 1362 (3d ed. 1940).


\(^{51}\) United States v. United Shoe Mach. Corp., 89 F. Supp. 349, 356 (D. Mass. 1950); Davis, *An Approach To The Problems Of Evidence In The Administrative Process*, 55 Harv. L. Rev. 364, 373 (1942). Some federal agencies incorporate this practice into their evidentiary rules. The standards for admissibility in the ICC and FCC, for example, are the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States. FCC: 47 C.F.R. § 1.351 (1969); ICC: 49 C.F.R. § 1100.75 (1969). It has been observed, however, that these tests are vague in that there is no uniform recognized compilation of these rules. There is no single practice but rather a discretionary relaxation of the exclusionary rules. Davis, *supra* note 50, at 693-94.


\(^{54}\) Davis, *supra* note 50, at 692.


\(^{56}\) 24 Stat. 384 (1889), as amended, 49 U.S.C. § 16(2) (1964), provides in pertinent part:

If a carrier does not comply with an order . . . the complainant . . . may file in the district court of the United States . . . or in any state court of general jurisdiction having jurisdiction of the parties, a complaint setting forth . . . the
was not developed beyond the internal separation factor, three additional considerations should be emphasized. First, the constitutionality of providing private litigants with the prima facie assistance of an ICC order has never been successfully attacked. Second, the rules of practice of both agencies are homogenous. Third, both the FTC and the ICC employ standards of evidence that are consistent with each other. It is submitted that these similarities establish a valid analogy which the court might well have used to justify its position with regard to section 5(a).

The final element the court considered in treating an FTC order as a judgment or decree within section 5(a) was the fairness that would result from its holding and the sharp contrast with the certain unfairness wrought under the present scheme. Noting that there presently exist four areas of concurrent Clayton Act jurisdiction between the FTC and the Justice Department, the court recognized the illogic, unfairness, and inconsistency of having a litigant's rights and burden of proof turn upon the fortuity of which government enforcement agency brings the initial action. Moreover, by excluding FTC orders from section 5(a), the transgressor actually benefits from having the FTC bring suit as opposed to the Justice Department. Since the FTC is de facto the primary enforcer of sections two and three of the Clayton Act, an exclusionary rule effectively insulates these violations from private redress, which is contrary to the Congressional intent in enacting for which he claims damages, and the order of the commission. In the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated.

58. Compare 49 C.F.R. § 1100.28 et seq. (1969), with note 36 supra. In this context, the major significant difference may lie in the long established permanence of the ICC procedures. The FTC rules are relatively new, having been significantly revised in 1961, while the ICC rules have been in use over fifty years. This long experience and consistency may have been a source of congressional confidence in the agency. See Sigmon, supra note 47, at 258, 275.

59. Compare 16 C.F.R. § 3.43(b) (1969), supra note 46, with 49 C.F.R. § 1100.75 (1969), supra note 51. However, the ICC has specific, detailed rules for admission of certain documentary evidence which supply objective order and regularity to its proceedings. This may well be at the root of the ICC prima facie rule. Cf. Sigmon, A Comparison of the ICC Rules of Practice with the Uniform Rules of Evidence, 26 ICC PRACTITIONER'S J. 537, 538 (1959). See also E. Anderson, ICC PRACTICE AND PROCEDURE 229-42 (1966).

60. -- F.2d at --.


63. -- F.2d at --. A pattern of enforcement has emerged which indicates that sections 2 and 3 of the Clayton Act are almost exclusively enforced by the FTC unless the violations are part of a larger Sherman Act violation. See Note, supra note 20, at 405 & n.40.
acting section 5(a).64 Also, it is arguable that giving different effect to the same conduct under the same statute results in a due process violation.65

With respect to the antitrust violator, the court recognized that its holding worked no inequity since the rule of section 5(a) is only a prima facie rule of evidence and consequently a right of rebuttal exists and no defense is eliminated.66 Furthermore, it is wasteful to relitigate issues previously dealt with and this inefficiency affects both the parties and the courts.

The most important aspect of the instant case is the extent to which the holding applies. Initially, this presents the question of whether all FTC final orders will be admissible in private antitrust actions. The threshold problem lies in the requirement of section 4 of the Clayton Act that the private action must issue pursuant to the antitrust laws.67 Similarly, section 5(a) requires that the decree sought to be admitted constitutes a violation of the antitrust laws.68 The problem arises because the Commission issues orders under the FTC Act, in addition to issuing orders for violations of the Sherman and Clayton Acts. However, the FTC Act is by statutory definition and decisional interpretation not an antitrust law. Therefore, it may be argued that the Farmington rule cannot extend to orders which proscribe violations of the FTC Act. However, section 5 of the FTC Act has been successfully used to attack unfair practices of the type covered by the Clayton and Sherman Acts.69 Furthermore, there is increasing evidence that the general ban on unfair methods of competition in section 5(a) is regarded by the FTC as a Congressionally designed "catch-all" provision for conduct embracing practices that are

64. A major concern of Congress in enacting section 5(a) was to assist actions for redress by private parties damaged by antitrust violations. See note 9 supra. Since the plaintiff's burden of proof is increased by excluding FTC orders from section 5(a), it becomes less likely that those violations will be compensated. Therefore, the FTC action can be seen as a device that limits the potential liability of antitrust violators.


66. See the authorities collected in Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 716-27 (9th Cir. 1959); Hardy, The Evisceration of Section 5 Of The Clayton Act, 49 Geo. L.J. 44, 49 (1960); Note, 65 HARV. L. REV. 1400 (1952).

67. See p. 740 & note 1 supra.

68. See note 5 supra.


70. See note 5 supra.


equivalent to antitrust violations under the Sherman and Clayton Acts.\textsuperscript{73} In \textit{FTC v. Motion Picture Advertising, Inc.},\textsuperscript{74} the Commission, finding that the company's exclusive contracts unreasonably restrained trade and tended toward the creation of a monopoly, issued a cease and desist order pursuant to section 5(a), even though the action substantively constituted a Sherman Act violation.\textsuperscript{75} The Supreme Court, in sustaining the Commission's section 5(a) order, reasoned that when an arrangement results in tying up the market so tightly for the benefit of a few that it falls within the prohibition of the Sherman Act, it is also an unfair method of competition within section 5(a) of the FTC Act.\textsuperscript{76} It is evident that although the Sherman Act provisions were applicable, the FTC Act was sufficiently broad to cover the violation.

When conduct subject to proceedings brought under the FTC Act constitutes de facto antitrust violations, adoption of the restrictive view that the FTC Act is not an antitrust law for the purposes of section 5(a) of the Clayton Act may result in an unjust deprivation of the compensatory benefits afforded private litigants by section 4 of the Clayton Act, as well as denial of the evidentiary aid provided in section 5(a). If, however, a court were to adopt a functional approach and focus upon the nature of the conduct at which the proceeding was directed rather than the statutory and decisional interpretation,\textsuperscript{77} a result consistent with \textit{Farmington} would obtain. In order to avoid increasing the private litigant's burden of proof where an antitrust violation has in fact occurred, a workable approach would be to allow an FTC order enforcing the provisions of the FTC Act to be admitted in the private antitrust action when, on its face, the order delineates the elements necessary for a Sherman or Clayton Act order to issue.\textsuperscript{78} This approach would appear to solve the problem of

\textsuperscript{73} Oppenheim, \textit{supra} note 72, at 823.
\textsuperscript{74} 47 F.T.C. 378 (1950).
\textsuperscript{76} FTC \textit{v. Motion Picture Advertising Serv. Co.}, 344 U.S. 392 (1952). The Court went on to say that the FTC Act was designed to supplement and bolster the Sherman and Clayton Acts by condemning, as unfair methods of competition, violations of these acts. \textit{Id.} at 394-95 and cases cited therein. \textit{But see} Mr. Justice Frankfurter, dissenting. \textit{Id.} at 398-406.
\textsuperscript{77} Rockefeller, \textit{supra} note 62, at 284.
\textsuperscript{78} \textit{E.g.}, In FTC \textit{v. Motion Picture Advertising Serv. Co.}, 47 F.T.C. 378 (1950), the FTC found that respondent was in substantial competition with other firms in the same line of business, that the exclusive contracts into which respondent entered had forced competitors out of business, and that these exclusive contracts were unduly restrictive of competition and trade because of their duration. Finally, the FTC found that the activities of the respondent were clearly in interstate commerce. \textit{Id.} at 384-88. For an action to be brought under the Sherman Act, the following elements are basic: (a) there must be a contract, combination or conspiracy, the result of which is a restraint of trade; (b) the restraint must be unreasonable; (c) if the contract actually resulted in a restraint of trade, no specific intent is necessary to establish liability in a civil action; and (d) the contract need not refer to the limitation of the trade, it is enough if the effect of the agreement is to necessarily restrict trade or commerce. 2 H. TOULMIN, \textit{THE ANTITRUST LAWS OF THE UNITED STATES} §§ 13.1-27 (1949). A comparison of these factors with the FTC findings in the above case demonstrates that the action could have been brought under the Sherman Act as well as under the FTC Act.
whether the unfair competition provision or antitrust laws apply and yet compensate for the effect upon private litigants of FTC enforcement of antitrust laws under FTC section 5. Moreover, this use of section 5 of the FTC Act would be consistent with the purposes underlying section 5(a) of the Clayton Act.

It should be recognized that this approach does not provide a solution to the problem of admitting, pursuant to section 5(a) of the Clayton Act, an FTC section 5(a) order which falls short of a de facto antitrust violation. Since the FTC Act is not an antitrust law and the functional argument suggested above is inapplicable in the absence of de facto antitrust violations, it is submitted that courts should hesitate in applying these mere violations of section 5(a) of the FTC Act to sections 4 and 5(a) of the Clayton Act until Congressional action clarifies the issue.

An anomalous development not considered by the court and certainly not intended by it may well result from the antitrust violator's reaction to the inclusionary rule adopted in Farmington. The inclusion of FTC orders within section 5(a) reduces the private litigant's burden of proof absent a consent decree in the prior action. This easier burden increases the likelihood of success by the private litigant and consequently means that antitrust violators face increased exposure to large monetary judgments. Therefore, the desire to accept a consent judgment will be formidable, because the prudent path for a violator to take when FTC orders are within section 5(a) may well be to immunize himself from the operation of that section by opting for a consent judgment before any evidence is taken and, as a result, fall within the exclusionary proviso of section 5(a).

Acknowledging that the most efficient and effective method of curtailing trade violations is to accept consent judgments, the FTC encourages this procedure in spite of the adverse effect on private litigants. The quixotic result is that under the exclusionary rule private plaintiffs, although foreclosed from prima facie assistance may, in most instances,

79. In this regard defendants might argue that by being economically coerced into a consent judgment they were deprived of the right to have a hearing and present a defense. The opportunity to present a case and be heard is fundamental to the validity of the proceedings by administrative tribunals as well as by courts. Green Spring Dairy, Inc. v. Commissioner, 208 F.2d 471, 475 (4th Cir. 1953), and cases cited therein.

80. The consent proviso was placed in section 5(a) to give every accused antitrust violator an avenue for avoiding the prima facie evidence sanction of the section as well as to aid the government in seeking the relief it might not obtain through litigation. Note, 111 U. Pa. L. Rev. 232, 233-34 (1962). The consent provisions of the FTC are found in 16 C.F.R. §§ 31-34 (1969).


82. Barber, supra note 9, at 203. In excess of eighty percent of all actions brought by the FTC in 1962, for example, terminated in consent decrees. Note, 62 Colum. L. Rev. 671, 689 (1962). Nothing indicates a decrease in this percentage, especially since there are two additional factors which make consent decrees desirable. First, the consent settlement is accompanied by little publicity, an attractive inducement to a defendant who is wary of adverse public reaction. Id. at 690. Second, if the matter is not contested before the FTC there is no formal record, so prospective litigants cannot even inspect the findings and recommendations made. Barber, supra note 9, at 202.
obtain pleadings, transcripts of testimony, exhibits and documents resulting from litigation before the FTC. Moreover, difficult questions of law may be resolved by the FTC litigation. However, under the Farmington inclusionary rule, when antitrust violators capitulate by accepting a consent decree before any evidence is taken, the private litigant will receive no benefit from the prior action. The ultimate question raised is one of inconsistent priorities; that is, does the acknowledged goal of the FTC to eliminate unfair competition supersede the desire to aid private litigants? This untoward effect constitutes a serious weakness in the court's position.

Finally, the Farmington holding that a federal agency order is within the scope of section 5(a) raises the question whether the orders of other agencies are also within the purview of the rule when their proceedings involve antitrust violations. Section 11 of the Clayton Act specifically authorizes the ICC, FCC, Civil Aeronautics Board, and Federal Reserve Board to enforce sections 2, 3, 7 and 8 of the Clayton Act when antitrust violations arise within their particular jurisdiction. It is obvious that the instant case presents encouragement to those who contend that the orders of these agencies should qualify under section 5(a). However, specific analysis of each agency would be a prerequisite to admissibility since the vagaries of these administrative agencies are so enormous that a blanket rule of admissibility could not, in fairness, be imposed.

In conclusion, it is evident that the complexity of the issue and the value judgments which must be made to resolve it contemplate Congressional action. However, the thrust of recent Congressional interest in section 5(a) has been toward giving prior judgments the effect of a conclusive presumption. This necessarily changes the nature of section 5(a) from an evidentiary aid to a rule of res judicata and it is submitted that this would upset the balance the Farmington court struck between the competing interests. Absent such Congressional action, it is submitted that the Farmington holding constitutes a most enlightened and equitable approach.


85. But see Olympic Refining Co. v. Carter, 332 F.2d 266 (9th Cir. 1964), where it was held that information obtained from a defendant which terminated in a consent decree by the Justice Department was discoverable by plaintiff in a subsequent antitrust action. But this information is not likely to add anything the private litigant does not already have.

86. The FTC Act was passed to proscribe certain unfair trade practices and to investigate and order the cessation of all unfair methods of competition. Note, 62 Colum. L. Rev. 671, 672 (1962). Compare with p. 740 & note 9 supra.


88. Matteoni, supra note 12, at 169.

89. It is especially important to determine which interest, public or private, shall take precedence in antitrust violations. See p. 740 supra.


91. See Hardy, supra note 66. at 47-53.
to the issue of the FTC and section 5(a). But the efficacy of the holding presupposes the existence of actual litigation before the FTC. If, however, the reaction of the antitrust violator is as suggested with respect to consent decrees, the solution of the First Circuit will become inadequate.

Thomas F. Heilmann

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — DOUBLE JEOPARDY CLAUSE REQUIRES THAT PUNISHMENT ALREADY EXACTED MUST BE FULLY "CREDITED" IN IMPOSING SENTENCE UPON A NEW CONVICTION FOR THE SAME OFFENSE. NEITHER DOUBLE JEOPARDY CLAUSE NOR EQUAL PROTECTION CLAUSE IMPOSE ABSOLUTE BAR TO MORE SEVERE SENTENCE UPON RECONVICTION, BUT DUE PROCESS REQUIRES THAT JUDGES SET FORTH FACTUAL DATA SUPPORTING MORE SEVERE SENTENCE.

North Carolina v. Pearce (U.S. 1969)
Simpson v. Rice (U.S. 1969)

In separate criminal proceedings, respondents Pearce and Rice were convicted of charges of assault to commit rape and burglary, respectively. Both respondents had their convictions set aside on constitutional grounds, were given new trials, and were once again convicted and sentenced to prison terms. In both instances, the second sentence was lengthier than the one originally imposed. In addition, in Rice's case, the respondent was denied "credit" for the prison time he had already served. Subsequently, both respondents, in habeas corpus proceedings, petitioned federal district courts for relief from the harsher sentences alleging them to be violative of constitutional guarantees. The district courts granted the writs, holding that the longer sentences imposed at retrial were "unconstitutional and void," and unwarranted so as to amount to a denial of due process of

1. Respondent Pearce successfully argued before the North Carolina Supreme Court that an involuntary confession had unconstitutionally been admitted into evidence against him, State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1966). Respondent Rice's new trial was obtained through an Alabama coram nobis proceeding on the ground that he had been denied his right to counsel.
2. The approximate expiration date of Pearce's original sentence, assuming all allowances of time for good behavior, was November 13, 1969. The approximate expiration date of his new sentence assuming all allowances of time for good behavior, was October 10, 1972. North Carolina v. Pearce, 395 U.S. 711 n.1 (1969).
3. 395 U.S. at 714. The district court in an unreported proceeding decided Pearce on the authority of the then very recent Fourth Circuit opinion, Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), cert. denied, 390 U.S. 905 (1968), which held that:

[1]Increasing Patton's punishment after the reversal of his initial conviction constituted a violation of his fourteenth amendment rights in that it exacted an un-
Both judgments were affirmed by the courts of appeal. The United States Supreme Court, in a three man plurality decision, affirmed the judgment in both cases, holding that (1) the constitutional guarantee against multiple punishments provided by the double jeopardy clause of the fifth amendment, applicable to the states through the fourteenth amendment, requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense, and (2) neither the double jeopardy clause nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction, but due process requires that judges set forth factual data supporting a more severe sentence. North Carolina v. Pearce, 395 U.S. 711 (1969).

Traditionally, the prohibition against double jeopardy has not immunized the accused from retrial when the original conviction has been set aside at his own behest. Although retrial is constitutionally permissible, it is equally clear that the imposition of a "multiple punishment" constitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense.

Id. at 646.

4. Rice v. Simpson, 274 F. Supp. 116 (M.D. Ala. 1967). District Judge Frank M. Johnson, Jr., who wrote the opinion found that:

[u]nder the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post conviction right of review and for having the original sentence declared unconstitutional.

Id. at 122.


6. U.S. Const. amend. V, states in relevant part:

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

7. Benton v. Maryland, 395 U.S. 784 (1969), noted in 15 Vill. L. Rev. 233 (1969), which overruled Palko v. Connecticut, 302 U.S. 319 (1937), was decided the same day as the instant decision, and held that the double jeopardy clause was applicable to the states. Further, the federal standard was adopted as the minimum standard to be applied to the states.

8. Ball v. United States, 163 U.S. 662 (1896). This result is generally justified on the theory that, by appealing, the defendant "waives" his right against being put in jeopardy twice. However, as the Court observed in United States v. Tateo, 377 U.S. 463 (1964):

While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Id. at 466.

for an offense would violate the double jeopardy clause. Thus, the combination of these doctrines has raised the perplexing question of whether a harsher sentence on retrial may be considered within the definition of "multiple punishment." This problem appeared to have been resolved in *Stroud v. United States*\(^\text{10}\) where the Supreme Court upheld a first degree murder conviction imposing the death penalty following the reversal of a similar conviction fixing the punishment at life imprisonment. A unanimous Court held that this was not forbidden by the double jeopardy clause and rejected any idea that the "multiple punishment" rule forbade a higher sentence on a new trial obtained as a result of the accused's appeal. This decision prevailed unchallenged until 1957 when the Court, in *Green v. United States*,\(^\text{11}\) beclouded the issue by holding that on reversal of a second degree murder conviction where a term of imprisonment had been imposed, the double jeopardy clause prohibited a conviction on retrial for first degree murder which carried the death sentence. The *Green* decision, though distinguishable from *Stroud* on its facts,\(^\text{12}\) raised serious doubts as to the continuing viability of the latter decision. The ambiguity thus created afforded the circuit courts wide latitude in formulating solutions to the constitutional questions involved and resulted in a marked disagreement as to the constitutional implications of imposing a more severe sentence on retrial.\(^\text{13}\) The instant case has finally resolved the problem


10. 251 U.S. 15 (1919), *aff'd on rehearing*, 251 U.S. 380 (1920). Stroud was convicted of first degree murder and sentenced to death. On remand, he was found guilty but the jury specified that the death penalty was not to be imposed. He appealed, the case was remanded a second time, and he was again found guilty but the sentence to be imposed was not specified by the jury. He was sentenced to death and from this latter sentence he appealed.

11. 355 U.S. 184 (1957). Green was charged, in two separate counts, with arson and the murder of a woman brought about by the alleged arson. The jury at the first trial was instructed that they could find Green guilty of arson under the first count and of either first or second degree murder under the second. The jury returned a verdict of arson and second degree murder. The conviction was appealed and reversed. On retrial, he was convicted of arson and first degree murder.

12. *See* notes 10 & 11 supra.

13. The most stringent position was that of the Fourth Circuit which found a constitutional prohibition against all harsher sentencing at retrial. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir.), *cert. denied*, 390 U.S. 905 (1968). The other circuits that have considered the argument do permit harsher sentencing on retrial, but under varying circumstances and with varying conditions. The First Circuit permits an increased sentence only when justified by events subsequent to the first trial. *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967). The Second Circuit goes further in requiring that the harsher sentence be based on information not known at the first sentencing, *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968). This position permits the sentence to be increased on the basis of new evidence of the crime, and is much like the Seventh Circuit requirement that standards of sentencing need only be rational and free of an intent to penalize the defendant for seeking a new trial. *United States v. White*, 382 F.2d 445 (7th Cir. 1967). The widest discretion is given the judges of the Third, Tenth, and D.C. Circuits who are permitted to adopt whatever course they deem appropriate under the circumstances, *United States ex rel. Starner v. Russell*, 378 F.2d 808 (3d Cir. 1967); *Newman v. Rodriguez*, 375 F.2d 712 (10th Cir. 1967); *Short v. United States*, 344 F.2d 550 (D.C. Cir. 1965). Heretofore, only the First Circuit and the Fifth Circuit cases, the latter which is noted herein, have indicated that the trial judge should reveal on the record for purposes of appellate review the
of applying the double jeopardy clause to harsher sentencing, and has ended
the inconsistencies among the lower federal courts.

As consolidated, the cases presented two issues for the Court's deter-
mation: (1) the constitutional requirement that "credit" be given for
time already served in the event of retrial and reconviction and (2) the
constitutional limitation of a judge's power to impose upon a defendant
after a second conviction on retrial, punishment more severe than had
been originally imposed. In resolving the initial and narrower issue in
the respondent's favor, the Court reasoned that the fifth amendment guar-
antee against double jeopardy protects a citizen against multiple punish-
ments for the same offense.\textsuperscript{14} Thus, when punishment already exacted for
an offense is not fully "credited" in imposing sentence upon a new con-
viction for the same offense, there is, in actuality, a multiple punishment.\textsuperscript{15}
Jurisdictions which have permitted a sentencing authority to deny "credit"
for time already served have traditionally justified their position upon the
premise that the original conviction has, at the defendant's behest, been
wholly nullified and the slate wiped clean. Rejecting this rationale, the
Court declared that, "as to whatever punishment has actually been suf-
fured under the first conviction, that premise is, of course, an unmiti-
gated fiction. . . ."\textsuperscript{16}

Turning to the major issue, the case respondents urged upon the
Court the position that the absolute prohibition of a harsher sentence on
retrial was required by both the double jeopardy clause of the fifth amend-
ment and the equal protection clause of the fourteenth amendment. In
addressing itself first to the double jeopardy argument, the Court found
that "[l]ong established constitutional doctrine makes clear that . . . the
guarantee against double jeopardy imposes no restriction upon the length
of a sentence imposed upon reconviction."\textsuperscript{17} This conclusion was gleaned
from two major precedents — Ball v. United States\textsuperscript{18} which, as noted
earlier, affirmed the power of the government to retry a defendant who
has succeeded in getting his first conviction set aside; and Stroud v. United

\textsuperscript{14} See note 9 supra.
\textsuperscript{15} North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). By the same reason-
ing, any imposition by the sentencing authority of a second fine would have to give
credit to the defendant for any amount previously paid. Credit must also include the
time credited during service of the first prison sentence for good behaviour, etc. \textit{Id.}
at ns.12 & 13.
\textsuperscript{16} 395 U.S. at 721. This point is made dramatically clear in an example given
by the Court:
Suppose, for example, in a jurisdiction where the maximum allowable sentence for
larceny is 10 years imprisonment, a man succeeds in getting his larceny conviction
set aside after serving three years in prison. If, upon reconviction, he is given a
10-year sentence, then, quite clearly, he will have received multiple punishments
for the same offense.
\textit{Id.}
\textsuperscript{17} \textit{Id.} at 719.
\textsuperscript{18} 163 U.S. 662 (1896). \textit{See also} Robinson v. United States, 324 U.S. 282
(1945); Murphy v. Massachusetts, 177 U.S. 155 (1900).
Recent Developments

States\textsuperscript{19} which the Pearce Court read as standing for the power to impose upon a new conviction whatever sentence may be legally authorized. The Court rejected the position that Green v. United States\textsuperscript{20} limited the Stroud holding by interpreting Green as authority applicable only to the double jeopardy guarantee against retrial for the same offense after the jury failed to convict him. Criticising this finding in separate concurring opinions, Justices Douglas and Harlan point out that to distinguish Green because its facts presented two different crimes with different punishments is to engage in mere semantics.\textsuperscript{21} Mr. Justice Douglas sets forth the position of three concurring Justices saying:

> From the point of view of the individual and his liberty, the risk here of getting from one to 15 years for specified conduct is different only in degree from the risk in Green of getting life imprisonment or capital punishment for specified conduct.\textsuperscript{22}

On its face Green appeared as an orthodox case which merely carried out a traditional double jeopardy policy of restricting the government to a single error-free trial for a given offense following a reversal. However, as noted by Justices Douglas and Harlan, a close reading of Green allowed a different view — that the use of the double jeopardy clause in that case was based on the Court's concern with unfettered access to post conviction remedies, rather than a concern to protect Green from any further prosecution. If this is so and if, in addition, the double jeopardy clause is to be an effective counterweight to the awesome power of the state — a guarantee that the accused shall not be required to "run the gauntlet twice"\textsuperscript{23} — then the distinction implicit in the majority position becomes tenuous. Since the imposition of an increased sentence on retrial has the same consequences as the conviction on an increased degree of the offense, it would seem to follow that the double jeopardy prohibition should apply

\textsuperscript{19} 251 U.S. 15 (1919), aff'd on rehearing, 251 U.S. 380 (1920).
\textsuperscript{20} 355 U.S. 184 (1957).
\textsuperscript{21} 395 U.S. at 728. Justice Frankfurter, dissenting in Green v. United States, 355 U.S. 184 (1957), first questioned the wisdom of distinguishing reconviction of a greater offense on retrial and reconviction of the same offense but with the imposition of a greater sentence. He pointed out that:

> As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment.

Id. at 213.

\textsuperscript{22} 395 U.S. at 728. See also People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963), noted in 9 Vill. L. Rev. 517 (1964). The technical argument given in support of this position would be as follows:

> When a particular penalty is selected from a range of penalties prescribed for a given offense, and when that penalty is imposed upon the defendant, the judge or jury is impliedly "acquitting" the defendant of a greater penalty, just as the jury in Green is impliedly acquitting the accused of a greater degree of the same offense.

Van Alstyne, supra note 8, at 634-35.

\textsuperscript{23} Mr. Justice Douglas, in his concurring opinion, takes this position and employs an historical analysis to demonstrate what he feels to be the proper role of double jeopardy in accidental jurisprudence. 395 U.S. at 728-37.
equally to the cases, such as Stroud, where an appeal might be taken from a conviction of the same offense for which the original conviction was less than maximum.

It is interesting to note that in its treatment of the first issue presented by this case, the Court rejected as mere fiction the argument that by initiating an appeal, defendant has "waived" the time credited to his first conviction and has had the "slate wiped clean." However, in its reliance on Stroud, the Court here uses this same fiction to find no double jeopardy prohibition against a harsher sentence on retrial. Mr. Justice Stewart justifies this apparent inconsistency by saying:

[S]o far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate has been wiped clean. The conviction has been set aside, and the unexpired portion of the original sentence will never be served.

While the Court seems to consider the distinction they have drawn as obvious, it is difficult not to question the wisdom of the inconsistent analysis of the two issues in the instant case.

Having decided the issue of double jeopardy, the Court then considered and rejected the equal protection argument as an ingenious attempt to fit the problem of harsher sentencing on retrial into a rather inappropriate mold. The theory advanced by respondents was that the risk of a harsher sentence on retrial denies an appellant the protection of his original sentence as a condition of appealing his conviction and since in all jurisdictions those who do not appeal are protected from an increase in their sentences the result is a constitutionally prohibited invidious classification. Although this argument had been adopted by several other courts, the Supreme Court rejected it under close scrutiny, pointing out that in addition to the possibility of a harsher sentence, "[a] man who is retried after his first conviction has been set aside may be acquitted [or] [i]f convicted . . . he may receive the same sentence . . . ." Mr. Justice Stewart points out that:

It simply cannot be said that a State has invidiously "classified" those who successfully seek new trials, any more than that the State has invidiously "classified" those prisoners whose convictions are not set aside by denying the members of that group the opportunity to be acquitted.

Concluding that neither the double jeopardy nor equal protection clauses imposes an absolute bar to a more severe sentence upon reconven-
tion, the Court turned to a consideration of the impact of the due process clause of the fourteenth amendment. The Supreme Court in United States v. Jackson held that a practice of penalizing those who choose to exercise constitutional rights would be patently unconstitutional. Proceeding from this premise and recognizing the artificiality of restricting the operation of this concept to the special situation where the inhibition is on the exercise of a constitutional right, Mr. Justice Stewart observed that “the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.”

In addition to the due process requirement that vindictiveness not be a motive for a harsher sentence, the Court concluded that due process requires that a defendant's fear of a retaliatory motive on the part of the sentencing judge must be allayed so as not to deter the defendant's exercise of a right of appeal. Believing this evil of a vindictive motivation on retrial to be difficult to detect, the Court sought a solution by establishing a presumption in favor of defendants requiring that:

[w]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

While all members of the Court agreed that due process prohibited a harsher sentence for exercising a right of appeal, the presumption of

30. 390 U.S. 570 (1968). The Court held invalid a provision of the Federal Kidnapping Act which provided that if a defendant chose to be tried by a jury he was subject to the death penalty, but if he waived his right to a jury trial he gained immunity from the death sentence. See 14 Vill. L. Rev. 329 (1969).
31. 390 U.S. at 581.
32. The doctrine of unconstitutional conditions used in Jackson generally holds that enjoyment of governmental benefits may not be conditioned upon the waiver of a constitutional right, at least in the absence of compelling societal interests which justify the subordination of such rights. See 14 Vill. L. Rev. 329, 330–32 (1969). In the present context the argument would be applicable only to a discussion of the rights of those defendants who seek a new trial because of constitutional error in their first conviction. It would not be relevant to a discussion of the rights of defendants seeking new trials on the basis of non-constitutional error (for example, an improper failure to exclude hearsay evidence). See Van Alstyne, supra note 8, at 613. See also Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Comment, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968). Seeking to avoid the difficulties of this dichotomy, the Court in Pearce posits instead the proposition that penalizing a citizen for the exercise of his statutory right to appeal is simply against due process:
33. 395 U.S. at 724–25 (citations omitted).
35. Id. at 725.
36. Id. at 726.
punitive motivation advanced by the Court's plurality is criticized by Mr. Justice Black as unwarranted.\textsuperscript{86} The latter's point that a constitutional doctrine should have a stronger basis than a fear that judges will be unworthy of their trust is well taken. Nevertheless, the difficulty in finding evidence of judicial vindictiveness may be a sufficient basis for the position adopted.\textsuperscript{87}

A final point, largely ignored by the Court, is raised by Mr. Justice White in a one-sentence concurring opinion. The due process standard announced in the instant case would permit a harsher sentence based on conduct of the defendant occurring \textit{after the time} of the original trial. Mr. Justice White would extend this ruling to authorize an increased sentence on retrial based on \textit{any} objective factual data not known to the judge at the time of the trial.\textsuperscript{88} Either position, Mr. Justice Douglas warns, would give to the government "continuing criminal jurisdiction." He illustrates his point with the example of a defendant whose sentence is enlarged because of antisocial acts committed in prison. To increase his sentence because of conduct subsequent to his trial is to hold him criminally responsible for that conduct without the right of a trial.\textsuperscript{89} A third option, limitation of the data used as a basis for the new sentence to \textit{newly discovered evidence of the crime}, would circumvent this evil; however, this possibility was not discussed by the Court.\textsuperscript{40}

In conclusion, the Court will undoubtedly draw criticism for refusing to place an absolute bar on the imposition of a more severe sentence on retrial. Indeed, it remains to be seen how much objective identifiable data appearing on the record will be required to support a more severe sentence on retrial. Regardless, the Court, in laying down due process standards, has done much to afford to a prisoner seeking to overturn a conviction, some standard to measure the risk involved in seeking a new trial. Thereby, one need not be completely at the mercy of a court whose policy had been to discourage post conviction appeals by punishing petitioners for exercising their right to seek post conviction relief. In addition, the full "crediting" to defendants of prison time already served will eliminate the harsh effects of multiple punishments for a single offense.

\textbf{John W. Nilon, Jr.}

\textsuperscript{36} In addition to his standing objection that the implementation procedures laid out by the Court pursuant to its decision are beyond the proper constitutional function of that body, Justice Black criticized the Court's assumption that an increased sentence is the result of judicial vindictiveness. He warns that such a presumption may prove a stumbling block for future defendants because if trial judges are limited in their discretion to impose a harsher sentence on retrial this might prove to be an inhibition in the practice of exchanging a more lenient sentence for a guilty plea.

\textsuperscript{37} See \textbf{ABA STANDARDS RELATING TO POST CONVICTION REMEDIES} 95–96 (Approved Draft 1968). For an informal study lending empirical support to the Court's position, see 1965 \textit{Duke L.J.} 395, 399 n.25.

\textsuperscript{38} 395 U.S. at 751.

\textsuperscript{39} Id. at 736 n.6.

\textsuperscript{40} For a discussion of the relative merits of the various positions, compare United States v. Coke, 404 F.2d 836 (2d Cir. 1968), with Marano v. United States, 374 F.2d 583 (1st Cir. 1967). See also The Supreme Court 1968 Term, 83 \textit{Harv. L. Rev.} 7, 190–92 (1969).
CONSTITUTIONAL LAW — SELF-INCrimINATION — CALIFORNIA

Hit and Run Statute Held Unconstitutional as Violative of Fifth Amendment Privilege Against Self-Incrimination.

Byers v. Justice Court for the Ukiah Judicial District (Cal. 1969)

Respondent was charged with two misdemeanor violations of the California Vehicle Code arising out of an automobile collision. One count charged him with failing to pass on the left at a safe distance while overtaking a vehicle proceeding in the same direction. The second count charged respondent with a violation of section 20002(a) — failing to stop at the scene of an accident resulting in property damage. Byers demurred to the second count on the grounds that section 20002(a) was unconstitutional as violative of the privilege against self-incrimination. The Justice Court overruled the demurrer but the Superior Court granted a writ of prohibition restraining the Justice Court from proceeding further against respondent on count two. On appeal, the Court of Appeals reversed the prohibition holding that respondent could be compelled to comply with section 20002(a) but that the information elicited from him in compliance with the statute could not be used against him at a subsequent criminal trial. The Supreme Court of California affirmed, holding that the privilege against self-incrimination is violated when a driver of a motor vehicle is confronted with a statutory requirement to stop and divulge his identity when he reasonably believes that compliance with the statute will result

1. CAL. VEH. CODE § 21750 (West Supp. 1970), which provides:
   The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated.

2. At the time of the accident, CAL. VEH. CODE § 20002(a) (West Supp. 1965), provided:
   The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both.

In 1967, this section was amended in several minor respects not pertinent to this case.

3. "No person shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. In Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court held that the fifth amendment privilege against self-incrimination was applicable to citizens of the states through the fourteenth amendment. For a history of the privilege, see Morgan, The Privilege Against Self-Incrimination, 34 MINN. L. REV. 1 (1949).

in incriminating himself with regard to another statute. However, the court also held that in such situations drivers will still be compelled to comply with the statute provided that state prosecuting authorities do not use the information disclosed as a result of such compliance or its "fruits" in connection with any criminal prosecution related to the accident. Byers v. Justice Court for Ukiah Judicial District, Cal. 2d 465, 80 Cal. Rptr. 553 (1969), cert. granted, U.S. 3401 (Apr. 21, 1970).

The fifth amendment privilege against self-incrimination in a criminal case reflects a policy that the public's interest in effectively enforcing criminal laws must defer to an individual's right not to aid the government in procuring his own conviction. In recent years, many of the government's regulatory and taxation statutes have come in conflict with the protections afforded by the privilege due to the nature of the disclosures required by the various statutes.

Prior to 1964, state courts, in applying their own state-imposed privilege against self-incrimination, have generally held that hit and run statutes were immune from attack on the grounds of self-incrimination either because the tendency of the required information to incriminate was too remote or because acceptance of the privilege to drive on the highways constituted an implied waiver of the right against self-incrimination. However, in 1964, the Supreme Court in Malloy v. Hogan.

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5. See Note, Required Information and the Privilege Against Self-Incrimination, 65 Colum. L. Rev. 681 (1965). Mr. Justice Bradley speaking for the Court in Boyd v. United States, 116 U.S. 616 (1886), characterized the privilege as: [A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of free government. Id. at 631-32. This seemingly absolute rule concerning papers and documents has been limited by judicial characterization. See Shapiro v. United States, 335 U.S. 1 (1948), where the Court held that the privilege against self-incrimination which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." Id. at 33. For a thorough analysis of the "required records doctrine," see Meltzer, Required Records, The McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).


The only reported pre-Malloy state case that declared a "hit-run" statute unconstitutional as violative of the fifth amendment is Rembrandt v. Cleveland, 28 Ohio App. 4, 161 N.E. 364 (1927). It is important to note that the statute involved in Rembrandt required a "full report" concerning all details of the accident to the police.

held that the fourteenth amendment guaranteed a citizen of a state the protection of the fifth amendment’s privilege against self-incrimination and that to implement this privilege, the applicable federal standards were to be applied in determining whether or not an abridgment of that privilege had taken place. Such federal standards were soon forthcoming from the Supreme Court, in the *Marchetti, Grosso, Haynes* triad.  

In the standards set forth in these cases, the crucial inquiry in determining the applicability of the privilege against self-incrimination to a statutory "disclosure-of-information" requirement is whether the individual seeking to avoid disclosure faces "substantial hazards of self-incrimination"  by compliance with the statute. An individual faces such a hazard when the disclosure statute forces him to identify himself as a member of a highly selective group "inherently suspect of criminal activity," and he reasonably believes that the required information will be made available to prosecuting authorities and would provide grounds for conviction or a significant "link in a chain" of evidence tending to establish his guilt.  

In both *Marchetti v. United States* and *Grosso v. United States*, petitioners were compelled by disclosure statutes to identify themselves as gamblers at a time when wagering was prohibited in 49 of the 50 states and the information obtained in compliance with federal wagering tax laws was made readily available to local and federal prosecuting authorities. In *Haynes*, compliance with one provision of the Internal Revenue Code would have compelled petitioner to admit to the Internal Revenue Service that he had violated some other code section.  

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12. *Marchetti v. United States*, 390 U.S. 39, 48 (1968). The "link in a chain" approach was first adopted by the Supreme Court in *Hoffman v. United States*, 341 U.S. 479 (1951), but perhaps the clearest statement of the concept was issued by Judge Learned Hand in *United States v. Weisman*, 111 F.2d 260, 262 (2d Cir. 1940):

> All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar’s jimmy in his pocket, though that is no part of the crime of burglary.

13. More specifically, Marchetti was charged with willful failure to register his name and address, and other information concerning his gambling operations with Internal Revenue officials and with willful failure to pay the fifty dollar occupational tax levied on all persons engaged in the business of receiving wagers. Grosso was charged with willful failure to pay the ten percent excise tax imposed on all wagers accepted by him. The Supreme Court held that the above-mentioned registration and taxation statutes violated the petitioners’ fifth amendment privilege against self-incrimination. In so doing the Court explicitly overruled United States v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis v. United States*, 348 U.S. 419 (1955).
14. *Haynes* was convicted of knowingly possessing an unregistered firearm in violation of section 5851 of the Internal Revenue Code. According to this section, in order to lawfully possess a firearm the possessor must have registered pursuant to section 5841. Section 5841, however, provides that one who possesses a firearm in violation of certain other requirements of the Code must register the fact of his possession. Since compliance with section 5851 turned on registration which neces-
Decisions of the Supreme Court also make it clear that invocation of the privilege against self-incrimination is not limited to situations in which the purpose of the inquiry is to get an incriminating answer.\textsuperscript{15} It is the effect of the answer that is determinative.

The only other state court to have considered the constitutionality of a hit and run statute in light of recently promulgated federal standards against self-incrimination was the Supreme Court of Illinois in \textit{People v. Lucas}.\textsuperscript{16} There the court held that the Illinois hit and run statute did not present a substantial and real hazard of self-incrimination for it only required the driver involved in an accident to disclose his name and address, the registration number of his vehicle, and, upon request, his driver’s license.

The primary issue facing the court in \textit{Byers} was to determine whether or not the privilege against self-incrimination was abridged by section 20002(a) of the California Vehicle Code which required the driver to stop and divulge his identity when he caused property damage due to an alleged violation of another section of the Vehicle Code.\textsuperscript{17} The attorney general argued that the threshold requirement of identification at the scene of an accident is not self-incrimination since being in an accident is not a crime in itself and the state still has to prove criminal fault on the part of one or both drivers.\textsuperscript{18} The respondent, on the other hand, contended that by virtue of the duties imposed upon him by section 20002(a), he would be required to admit that he was the driver of the vehicle that caused the property damage and thus admit that he was the driver of the vehicle that failed to pass to the left in a safe manner — an essential element of the alleged crime in count one.\textsuperscript{19} The court held that “[w]here circumstances in addition to membership in a suspect group regulated by a disclosure statute show that compliance with the statute would involve self-incrimination, the rules set forth in \textit{Marchetti, Grosso, and Haynes} are applicable.”\textsuperscript{20}

It would appear from an analysis of the recent Supreme Court decisions that what the Court meant by a group “inherently suspect” of sarily disclosed incriminating admissions, the Court reasoned that the practical effects of both this section and section 5841 were identical and therefore, that neither section could be enforced over a fifth amendment objection. Haynes v. United States, 390 U.S. 85, 94 (1968).

For a thorough discussion of \textit{Marchetti, Grosso} and \textit{Haynes}, see Note, 13 \textit{Vill. L. Rev.} 650 (1968).

\textsuperscript{15} In Hoffman v. United States, 341 U.S. 479 (1951), the Court stated that: [t]o sustain [a claim of] the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

\textsuperscript{16} 41 Ill. 2d 370, 243 N.E.2d 228 (1968).

\textsuperscript{17} See note 2 \textit{supra}.


criminal activity was that an admission to being a member of the group was tantamount to an admission of guilt for another state or federal crime. It was this testimonial aspect of the self-identification which brought it within the protection of the fifth amendment ban on self-incrimination. Clearly membership in a group composed of drivers involved in automobile accidents resulting in property damage is not "inherently suspect" within this definition for the drivers may or may not be guilty of any crime depending on the entire factual situation. While the Byers court recognized that the group subject to hit and run statutes is not "inherently suspect" within the Marchetti-Grosso-Haynes guidelines, the court felt that there was in accident cases "a substantial shadow of suspicion cast upon the persons regulated by the statute" stating that "there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws." The court in effect has extended the purview of the Marchetti-Grosso-Haynes doctrine to suspect situations where other circumstances indicate a likelihood of incrimination.

The court, however, does not make clear what additional circumstances besides membership within a suspect group it is concerned with. It would appear that it was referring to a "reasonable belief" on the part of drivers that compliance with Section 20002(a) would result in self-incrimination — yet the court never really analyzes what reasonable belief respondent had in the instant case. "Reasonable belief" on the part of drivers regulated by a hit-run disclosure statute should be composed of 3 factors: 1) a reasonable belief that the particular driver committed another motor vehicle violation incident to the accident for which

21. Id. at ___, 458 P.2d at 470, 80 Cal. Rptr. at 558. Here the court failed to cite any statistics to buttress its statement. One writer has suggested that the relationship between accidents and traffic violations remains somewhat obscure and that it has not been conclusively established that driving behavior which leads to traffic violations also leads to accidents. Crampton, Driver Behavior and Legal Sanctions: A Study of Deterrence, 67 Mich. L. Rev. 421, 436-37 (1969).

22. Id. at ___, 458 P.2d at 470, 80 Cal. Rptr. at 558.

23. The court stated that:
[w]e are satisfied that the privilege [against self-incrimination] is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes that compliance with the statute will result in self-incrimination.

Id. at ___, 458 P.2d at 471, 80 Cal. Rptr. at 559 (emphasis added).

In arriving at this conclusion the court relied heavily on Mansfield, The Albertsen Case: Conflict Between The Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103. There the author stated at 121-22:

The driver's prosecution [after compliance with a hit run statute] and conviction of some criminal offense — driving under the influence of liquor, reckless driving, manslaughter — are rendered more likely. It makes no difference that the facts stated by the driver in his report are susceptible to an interpretation consistent with innocence, or that his report deals with facts relevant to only one element of a possible criminal offense. The privilege would be deprived of most of its value if it were held to apply only when a disclosure constitutes a full confession covering all elements of a crime, or is susceptible only to an interpretation of guilt. 24

24. Apparently the fact that subsequent to the accident respondent was charged with a criminal violation is sufficient justification for application of the privilege in this case.
disclosure is required; 2) a reasonable belief that the testimony elicited by the statute will form a significant “link in the chain” of evidence tending to establish his guilt;25 and 3) a reasonable belief that the information supplied will reach the appropriate prosecuting authority.

While the first two items above are certainly integral to the application of the privilege against self-incrimination, the real “hazard” is the individual’s fear that the information he supplies will be made available to the police. The Supreme Court was very much concerned by the fact that in Marchetti a statute required the Internal Revenue Officers to provide to prosecuting officers a listing of those who had paid the occupational tax and thus admitted their guilt as gamblers. The Court said that this would lead the petitioner to the reasonable belief that he was providing a significant “link in a chain” of evidence tending to establish his guilt.26 Likewise, in Grosso the Court found that while there was no statutory instruction that state prosecuting authorities be provided listings of those who have paid the excise tax, the Revenue Service had undertaken to tender this information to interested prosecuting authorities.27 The Byers court, however, does not discuss how the information provided in compliance with section 20002(a) reaches the appropriate prosecuting authority. Apparently the California court felt that this “hazard” of incrimination was fully met. But it may not be, especially if, as in the present case, the driver involved is only required to locate the owner or person in charge of the property damaged and disclose to that individual his and the automobile owner’s name and address.28 The Byers court should have examined the whole statutory scheme for reporting accidents and determined if an individual could reasonably believe that the information he supplied would be turned over to the police as the Supreme Court did in Marchetti and Grosso.29

Having found that the protection of the fifth amendment was applicable to the California hit and run statute, the court next had to balance the individual’s privilege against self-incrimination with the state’s interest in promoting a legitimate civil regulatory measure.30 The court accom-

25. See note 12 supra.
28. Section 20002(a) of the Vehicle Code imposes alternative requirements which depend upon the facts presented. If the driver can locate the owner or person in charge of the property damaged he need only disclose to that individual his and the automobile owners’ name and address; if he cannot locate such person, he must leave a written notice containing the same information and a “statement of the circumstances” surrounding the accident as well as notify local law enforcement officials of the accident. See note 2 supra. It is apparent from the second offense charged — failure to pass to the left safely — that Byers was obligated to fulfill the requirements of the first alternative of section 20002(a). Obviously if a driver complied with the second alternative, the police would find out directly about the accident.
29. Probably the reason that the court failed to do this was that the statutes involving the reporting of accidents to the police were not placed in issue below. In this regard the Byers opinion can be criticized as being overly broad and assuming the results of statutes not in issue.
30. The purpose of the “hit and run” statute is to promote the satisfaction of civil liabilities arising from automobile accidents involving property damage by requiring all drivers involved in such accidents to stop and identify themselves to the owners.
modated these conflicting interests by establishing a use-restriction on the information divulged in compliance with the statute, thus precluding state prosecuting authorities from using the information or its "fruits" in connection with any criminal prosecution related to the accident. By the same token, since the privilege against self-incrimination is only applicable in criminal cases, it is clear that the information divulged in compliance with a hit and run statute may be used in any civil proceeding. To ensure the effectiveness of the use-restriction rule, the court provided that in the event of a prosecution of the disclosed offense, the state must bear the burden of showing that its evidence derives from an independent source and the prosecution must establish that the immunized testimony was in no manner used to discover its evidence.

While seemingly a plausible solution, the use-restriction rule places a much greater burden on prosecuting authorities. In situations where there are no witnesses to an accident anything flowing from the testimony of a driver in fulfilling his section 20002(a) obligation will be a "fruit" of that testimony. Seemingly the use-restriction might encourage drivers who are involved in property damage accidents and who suspect that they might have committed a vehicle violation, to give the police at the scene of the accident practically a general confession in answer to the "statement of the circumstances" alternative of section 20002(a). Drivers would, thereby, hopefully immunize themselves from subsequent criminal prosecution because of the tremendous burden the police would have in proving that their evidence was not "fruit" of the required disclosure. It is apparent that the number of criminal convictions for vehicle violations resulting in accidents would fall sharply. However, it is submitted that this result


The present case exemplifies a conflict much discussed in recent years between the individual's right to protection under the fifth amendment privilege against self-incrimination and the government's substantial interest in having citizens divulge information to effectuate various regulatory measures designed to promote the public welfare. See, e.g., Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103; McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193.

31. The California court found precedent for the judicial imposition of appropriate restrictions on the use of statements in order to compel otherwise privileged testimony in Murphy v. Waterfront Comm., 378 U.S. 52 (1964).

In addition to use-restriction rules, immunity statutes have become quite popular in recent years. For a complete analysis of the effects of immunity legislation, see Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 St. Louis L.J. 327 (1966); Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568 (1963).


33. One writer has suggested that only testimony be disallowed at a subsequent criminal trial thus permitting the "fruits" of the testimony to be introduced. Note, Self-Incrimination and the States: Restricting the Balance, 73 Yale L.J. 1491, 1499 (1964). This solution would not comport with the federal guidelines for self-incrimination, however, especially the "link in the chain" approach. See note 20 supra.
is more desirable than rendering the statute unconstitutional and frustrating
the important non-criminal objective of the legislation.\textsuperscript{34}

Perhaps the most perplexing part of the \textit{Byers} opinion is the manner
in which the majority exonerates the respondent from punishment. Despite
the fact that respondent could have stopped at the scene of the accident
and invoked the privilege against self-incrimination by refusing to give
any information or alternatively, invoked the privilege at trial when and
if the prosecution ever sought to introduce evidence obtained, the majority
holds that it would be unfair to prosecute respondent for his failure to
comply with the statute.\textsuperscript{35} The dissent validly points out that there is
nothing in the record to suggest that respondent was acting in reliance
of the privilege against self-incrimination when he left the scene of the
accident and that he certainly was not acting in reliance upon existing
state law which at that time did not recognize the application of the privilege
to "hit and run" cases.\textsuperscript{36}

In other areas of the law, a defendant is required to take his chances
when he chooses to violate the law. If he incorrectly assesses the legal
situation, he is to stand trial for his violation. Here, since the court has
held that Byers should have complied with the statute he should have been
held responsible for his failure to comply.

The California Supreme Court has extended the \textit{Marchetti}, \textit{Grosso}
and \textit{Haynes} decisions to encompass disclosure statutes which require in-
formation of an identifying nature which could possibly lead to criminal
prosecution. By compliance one is not giving testimony as to his illegal
activity but merely identifying himself as a possible criminal violator. If
this case is followed in other jurisdictions it may sound the death knell
for many other disclosure statutes which are typically aimed at a suspect
group of criminal violators where compliance might lead one to reasonably
believe that he would incriminate himself.\textsuperscript{37} By the same token, however,
it is still clear that it would be "an extreme if not an extravagant applica-
tion of the Fifth Amendment" to apply it to statutes which require replies

\textsuperscript{34} See note 30 \textit{supra}.
\textsuperscript{35} \textit{Byers} v. Justice Court for Ukiah Judicial District, \textit{\ldots} Cal. 2d \textit{\ldots}, \textit{\ldots}, 458
\textsuperscript{36} \textit{Id. at \ldots}, 458 P.2d at 479, 80 Cal. Rptr. at 567.
\textsuperscript{37} One writer has suggested that there are three categories of statutes requiring
registration, the first two of which are not within the purview of the \textit{Marchetti}
document. The first is truly neutral registration in which there is no illegality con-
nected with the activity. This classification includes registration requirements, 26
U.S.C. \$ 4101 (1964), for those persons subject to taxes on gasoline, 26 U.S.C. \$ 4081
(1964), and lubricating oil, 26 U.S.C. \$ 4091 (1964), and for the manufacturers of
white phosphorus matches, 26 U.S.C. \$ 4801 (1964). The second category of statutes
includes those which are in an area somewhere between neutrality and criminality. This
type of statute is exemplified by the federal registration requirements on authorized
as well as unauthorized manufacturers of vinegar, 26 U.S.C. \$\$ 5502, 5504 (1964),
renovated or adulterated butter, 26 U.S.C. \$ 4821 (1964), filled cheese, 26 U.S.C.
\$ 4841 (1964), and distilled spirits, wines, and beer, 26 U.S.C. \$\$ 5081, 5173, 5179
(1964). The final group is the inherently criminal group. Here, as in \textit{Marchetti},
\textit{Grosso}, and \textit{Haynes}, the tax is on an activity whose legality is so controlled that it is
considered suspect unless there is an explanation. Note, \textit{Registration Statutes and
to questions which are neutral on their face, and directed at the public at large and could only possibly lead to criminal prosecutions in a minority of situations.38

In expanding the scope of the fifth amendment privilege against self-incrimination, however, the Byers court has failed to establish clear, workable guidelines for application of the privilege in the future. This will, in turn, cause confusion in California’s lower courts and force the California Supreme Court to clarify the Byers case and clearly delineate the limits and scope of the privilege.

Gordon B. Aydelott

CRIMINAL LAW — CONSTITUTIONAL LAW — CONTRIBUTING TO THE DELINQUENCY OF A MINOR STATUTE DECLARED VOID ON THE GROUND OF VAGUENESS.

State v. Hodges (Ore. 1969)

Petitioner Hodges was charged with wilfully and lewdly exposing, fondling, and manipulating his private parts in the presence of a ten year old female child and was indicted for “contributing to the delinquency of a minor.”1 Upon conviction, petitioner appealed on the ground that

38. United States v. Sullivan, 274 U.S. 259, 263-64 (1927). The taxpayer in Sullivan was convicted of failure to file an income tax return, despite his contention that the return would have obliged him to admit violation of the National Prohibition Act. The Court affirmed the conviction, and rejected the taxpayer’s claim of the privilege. It concluded that most of the return’s questions would not have compelled the taxpayer to make incriminating disclosures and that “[h]e could not draw a conjurers circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.” Id. at 264.

When a child is a delinquent child as defined by any statute of the state, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, or any person who by threats, command or persuasion, endeavors to induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child, shall be punished upon conviction by a fine of not more than $1,000, or by imprisonment in the county jail for a period not exceeding one year, or both, or by imprisonment in the penitentiary for a period not exceeding five years.

Ore. Rev. Stat. § 419.476 (1968), defines the term delinquent child as follows:
(1) The juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and:
(a) who had committed an act which is a violation, or which if done by an adult would constitute a violation, of a law or ordinance of the United States or a state, county or city; or
(b) who is beyond the control of his parents, guardian or other person having his custody; or
(c) whose behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others; or
the "catch all" clause of the Oregon statute, proscribing any act which manifestly tends to cause a child to become delinquent, was unconstitutionally vague on its face. The Supreme Court of Oregon, sitting in banc, reversed the conviction of the trial court, holding that the vagueness of the "catch all" clause was violative of the due process clause on three grounds: (1) the terms of the statute were not sufficiently explicit to adequately inform the public as to what conduct would render them subject to its penalties; (2) the law failed to establish adequate standards for adjudication permitting the judge and jury at their uncontrolled discretion to punish or withhold punishment; and (3) the looseness of the statutory language created a potential inequality in the administration of criminal justice by permitting the police to selectively choose which individuals to prosecute. State v. Hodges, 457 P.2d 491 (1969).

Since the offense of contributing to the delinquency of a minor did not exist at common law, the crime and its definition are exclusively statutory in nature. The first such legislation was enacted in Colorado in 1903, as a result of pressures generated by such groups as the Society for the Prevention of Cruelty to Children. The statute was designed to provide protection of juveniles unable to defend themselves from the corrupting influence of adults because of their emotional, physical, and intellectual immaturity, and at the same time to prevent juvenile delinquency. At present, every American jurisdiction except Maine and Georgia has enacted such statutes, and some states have supplemented

2. The language tested for vagueness, as applied to the case at bar reads: any person who does any act which manifestly tends to cause any child to become a delinquent child.

3. State v. Harris, 315 S.W.2d 849, 851 (Mo. 1958); State v. Williams, 73 Wash. 678, 679, 132 P. 415, 416 (1913).


5. See Gies, supra note 4, at 62.

6. For a complete discussion of the policy considerations behind contributing to delinquency statutes, see Comment, Contributing to Delinquency — An Ounce of Prevention, 5 WILLAMETTE L.J. 104, 104-05 (1968). The policy underlying the statute involved in the instant case has been commented upon in several previous Oregon decisions. See, e.g., State v. Eisen, 53 Ore. 279, 300, 99 P. 282, 283 (1909), which maintained that the general purpose of the Juvenile Court Act is for the common welfare and good of neglected and delinquent children. See also State v. Doud, 190 Ore. 218, 225 P.2d 400, 404 (1950), where the court stated that: The primary purpose of statutes upon the subject of child delinquency is not to punish those who, through wrongful conduct incline children toward delinquency, but to prevent the type of conduct condemned by the act, which, if pursued, would be injurious to children and lead them on a downward course. The welfare of the State demands that youth ripen into wholesome, useful citizenship.

7. MODEL PENAL CODE § 207.13, Comment (Tent. Draft No. 9, 1958). See, e.g., PA. STAT. tit. 11, § 262 (1965), which provides:

Any person who contributes to the delinquency of any child to whom the jurisdiction of any juvenile court within this Commonwealth has attached, or shall hereafter, or who knowingly assists or encourages such child of violating his or her parole or any order of the said court, shall be guilty of a misdemeanor.

The Pennsylvania law on contributing to delinquency, enacted in 1933, was held constitutional and it was explained that the purpose of the act is to "stamp out juvenile delinquency at the roots." Commonwealth v. Jordan, 136 Pa. Super. 242, 249,
these statutes with laws proscribing acts which corrupt or tend to corrupt the morals of a minor.8

The initial interpretation of these statutes emphasized a limiting construction because of their far reaching scope.9 As the courts became increasingly receptive to the lauditory policies underlying the legislation, they consequently began to construe the statutes to broaden their effect. As a result, an overwhelming majority of the "contributing" statutes have been upheld in the face of constitutional challenges on the grounds that they were violative of the due process10 and equal protection clauses of the fourteenth amendment.11 However, such "contributing" statutes have been declared unconstitutionally vague in Louisiana, where the legislation proscribed enticing a child to perform an "immoral act,"12 and in Wyoming, where conduct endangering the health, welfare, or morals of the child was prohibited.13 Recently, "contributing" statutes have been severely criti-

7 A.2d 523, 527 (1939). The court in Jordan also stated that "[c]onsidering the beneficient purpose of the legislation, no court should be astute in finding reasons to relieve those who violate its provisions." Id. at 528.

8. See, e.g., PA. STAT. tit. 18, § 4532 (1963), which provides:

Whoever, being of the age of eighteen years and upwards, by any act corrupts or tends to corrupt the morals of any child under the age of eighteen, or who aids, abets, entices or encourages any such child in the commission of any crime, or . . . is guilty of a misdemeanor . . .

This latter statute was held not so vague and indefinite that it violates the due process clause of the fourteenth amendment since it sufficiently conveyed definite warning as to the proscribed conduct. Commonwealth v. Randall, 183 Pa. Super. 603, 133 A.2d 276 (1957), cert. denied, 355 U.S. 954 (1958). See also IND. ANN. STAT. § 10-812 (1956), which proscribes inter alia:

[A]ny person to knowingly encourage or contribute to or in any way cause any such boy or girl to violate any law of this state or ordinance of any city; [A]ny person to knowingly encourage or contribute to in any way cause any such boy or girl to be guilty of any vicious or immoral conduct.

9. See, e.g., Gibson v. People, 44 Colo. 600, 99 P. 333 (1909), construing the phrase "any other person" in the designation "parent or parents, legal guardian, or persons having custody of such child, or any person . . ." to mean any other like person, i.e., persons such as parents or guardians. It was not until 1923 that Colorado altered its contributing statute to apply to any person. See Gies, supra note 4, at 63.


12. State v. Vallery, 212 La. 1095, 34 So. 2d 329 (1948), held that to "clothe the several courts with the power . . . to decide what constitutes an immoral act . . . thus (delegates) to the judiciary a function that is exclusively within the province of the legislature . . ." Id. at 1097, 34 So. 2d at 331.

The precise language objected to in Vallery was the statutory definition of "contributing to delinquency," which proscribed the following acts:

the intentional enticing, aiding, or permitting by any one over the age of seventeen, of any child under the age of seventeen to: . . . perform any immoral act.

This particular section of the statute was amended by the Louisiana legislature by substituting the phrase "perform any sexually immoral act." See LA. REV. STAT. ANN. § 14:92 (1951).

13. State v. Gallegos, 384 P.2d 967 (Wyo. 1963). The court's objection to the statute in this case was that it furnished no standard as to what endangering a child's health, welfare, and morals is and hence it leaves its decision to arbitrary judgment,
cized not only because they are often unconstitutionally vague, but also because they are generally ineffective in preventing juvenile delinquency, and because they have overlapped into areas covered by other sections of the criminal code. For these reasons, such laws have been discarded from model codes and acts.

The Supreme Court has construed the due process clause of the Constitution as requiring that crimes be defined with appropriate certainty. According to the Court, the minimal standard of certainty is that no one may be compelled at peril of life, liberty, or property to speculate as to the meaning of a penal statute. Due process requires that terms of a penal statute be sufficiently explicit and not so vague that men of common intelligence must guess at its meaning and differ as to its application. In providing that any act which manifestly tends to cause a child to become a delinquent constitutes a felony, the instant statute furnishes no standard as to what conduct would violate its provisions. This statute prohibits no specific acts and requires no specific intent to commit a crime. Similarly, it is not necessary for an act to proximately whim, and caprice. The statute at issue in Gallegos, Wyo. Stat. Ann. § 14-23 (1957), provided:

- It shall be unlawful for any person (including but not limited to parent, guardian, or custodian) knowingly to commit any of the following acts with respect to a child under the age of 19 years:
  - (d) to cause, encourage, aid or contribute to the endangering of the child's health, welfare or morals.

The initial impetus for the constitutional attack on the contributing statutes originated in Musser v. Utah, 333 U.S. 95 (1947), which held the Utah statute prescribing "acts injurious to the public morals" violative of the due process clause of the fourteenth amendment. The Court reasoned that the statute failed to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.

14. See generally Gies, supra note 4, at 79-81; Comment, supra note 6; Model Penal Code § 207.13, Comment (Tent. Draft No. 9, 1958). One commentator has noted that the largest groups of cases arising under "contributing" statutes are concerned with sexual or liquor related acts. See Comment, supra note 6.


19. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). The vagueness doctrine was initially formulated by the Supreme Court to create a buffer zone for the protection of first amendment freedoms. Therefore, the certainty requirement is strictly applied to statutes which may infringe on first amendment rights. See, e.g., Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242 (1937); Stromberg v. California, 283 U.S. 359 (1931). However, the doctrine becomes more flexible where the legislation concerns economic regulation. Compare Connally v. General Constr. Co., 269 U.S. 385 (1926), with Edgar A. Levy Leasing Co. v. Siegal, 258 U.S. 242 (1922). In regard to statutes proscribing certain acts which are considered immoral, the recent trend of cases appear to apply the stricter standard of vagueness. See, e.g., Linger v. Texas, 355 U.S. 58 (1957).
cause the delinquency of the child, whereby the least nexus between the act of the adult and the potential delinquency of the child may result in a conviction for contributing to his or her delinquency. As a consequence of such vague provisions, it is possible that a conviction might result from an ostensibly innocent and innocuous act, of which the individual is given neither adequate notice nor fair warning. For example, parents who smoke or drink alcoholic beverages in the presence of their minor children are conceivably violating the act. For these reasons, it would appear that the Hodges court was justified in finding that the statute failed to meet the minimal due process requirements established by the Supreme Court for penal statutes.

In response to the adequate notice requirement of due process, proponents of "contributing" statutes contend that to limit in any way the sweeping language of the statute would seriously impair its effectiveness. Such an approach has been taken by other courts who have based their decision on the worthy purpose of such laws and the desirability of carrying out legislative intent. For example, in Commonwealth v. Randall, the Pennsylvania statute, prohibiting any act which corrupts or tends to corrupt the morals of a minor, was held constitutionally valid, despite its vague language. The Randall court emphasized the fact that "the mandates of the statutes are salutary measures designed to protect youth," and sweeping language is necessary to achieve this legislative intent. Assuming that the legislative policy which led to the enactment of the "contributing" statutes is a valid consideration, the question remains whether such purposes will permit a more flexible application of the vagueness doctrine as a constitutional standard. When legislative policy is used to justify the vague and imprecise language of a penal statute, the effect is to vitiate the constitutional guarantee of certainty in criminal statutes. Therefore, it is submitted that by the subordination of the requirement of certainty to policy, the courts have ventured beyond the permissible limits of due process.

By proclaiming the "catch all" clause of the "contributing" statute unconstitutionally vague, the decision of the Hodges court will in no way cause an increase in indiscriminate corruption and debauchery of juveniles.

20. State v. Williams, 236 Ore. 18, 386 P.2d 461 (1963). For this reason, the "catch-all" clause creates the potential to extend the statute to relatively harmless activity.

21. People v. Cohen, 62 Cal. App. 521, 526, 217 P. 78, 80 (1923), which stated that "the purpose of the juvenile law as now framed is to protect the youth of our State from those evil and designing persons who would lead them astray."


24. See note 8 supra.


26. One critic of the "contributing" statutes has noted that their administration is a distortion of procedural regularity and judicial logic, whereby the end of the process — protection of youth — becomes the major element of the process itself, overshadowing by the very power of its semantic sweep considerations more basic to a sense of justice and fairness. Gies, supra note 4, at 62.
Initially, the policy underlying the statute is not impaired because the remaining sections of the act are left intact. Under these provisions, any person who by act, threat, command, or persuasion endeavors to induce a child to perform a delinquent act can still be prosecuted under the statute. Secondly, "contributing" statutes are generally applied to conduct which is specifically and adequately dealt with by other provisions in the criminal code.27 This is especially true where sexual and alcohol related offenses are concerned,28 as indicated by the instant case, where the petitioner could have been prosecuted more realistically under the Oregon statute prohibiting indecent exposure.29 Finally, the fact that the "catch all" clause of the provision has been declared unconstitutional does not in any way constitute a bar to legislative revision and clarification. The effect of such a revision, specifying the precise acts and intent prohibited, could preserve the constitutional guarantee of due process as well as the underlying policy of the act.30

After finding the statute failed to convey a fair warning to potential defendants, the Hodges court further held that the "catch all" clause failed to sufficiently define standards to ensure proper court and police enforcement of the statute. A vague law grants broad discretion to the court and police in the administration of the statute. Such unfettered discretion creates the potential for abuse, ultimately resulting in arbitrary arrests and convictions.31 Among the underlying reasons for the vagueness doctrine is a legitimate concern that a statute which is too vague may be used as an instrument for oppression by those entrusted with its enforcement.32 The Supreme Court has held that a law fails to meet the requirements of the due process clause if it is so vague that it leaves the jury free to decide without any legally fixed standards what specific acts or conduct is prohibited in each particular case.33 The Oregon "contrib-

27. See note 1 supra.
28. See note 14 supra.
29. ORS. REV. STAT. § 167.145 (1968), concerning indecent exposure, provides: Any person who wilfully and lewdly exposes his person or the private parts thereof in any public place, or in any place where there are present other persons to be offended or annoyed thereby. . .

Since a conviction for contributing to delinquency imposes a maximum of five years imprisonment compared to only one year for a conviction of indecent exposure, it appears that the prosecution in the instant case was attempting to seek the greater punishment.

30. Assuming, arguendo, that such a revision would constitute a difficult legislative problem, the "catch-all" clause could simply be dropped without defeating the purposes of the enactment, since the other provisions remain intact.
31. See Amsterdam, supra note 17, at 220–24 (1967).
32. Harris v. State, 457 P.2d 638 (Alaska 1969). It is conceivable that the looseness of the statutory language, which was found to offend due process, could also be found violative of equal protection, where the statute is selectively utilized to rid the community of individuals deemed subjectively less desirable than other offenders. See generally Amsterdam, supra note 17, at 229.
33. Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966). See also Lanzetta v. New Jersey, 306 U.S. 451 (1939). The Supreme Court has also recognized that a vague criminal law "licenses the jury to create its own standard in each case," Hernandez v. Lowry, 347 U.S. 146, 151 (1954), and is "susceptible of sweeping and improper
uting” statute, proscribing any act which manifestly tends to cause delinquency establishes a no more viable standard on which the jury could base their decision than it does for the potential defendant to base his conduct. As a result of these vague standards, the criminality is permitted to depend only on the subjective moral standards of the venire before which the defendant is tried, making any conduct a crime, if found improper under the circumstances in which it took place.

Similarly, the legislature in drafting the sweeping language of the “catch all” clause to provide an added protection for juveniles, has granted virtually uncontrolled discretion to the police and prosecutor. This situation creates a serious danger of inequality in the administration of criminal justice. Since the statute furnishes no standards as to what acts would manifestly tend to cause delinquency, the enforcement of the statute is left to arbitrary judgment, whim, and caprice.

In upholding “contributing” statutes, some courts have maintained that the inherent vagueness of the term “delinquency” renders a strict definition of what constitutes “contributing to delinquency” impossible. Broad terms are deemed to be necessary to achieve the intent and pur-


34. Harris v. State, 457 P.2d 638 (Alaska 1969), held an Alaska statute, punishing any act viewed as a “crime against nature,” void on the ground of vagueness. The court reasoned that vague terms in criminal statutes, if permitted to stand, could be used to cover varieties of conduct not generally regarded as criminal by the public, quoting United States v. Cardiff, 344 U.S. 174, 176 (1952):

The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.

The Harris court also noted that:

[The courts] should avoid the fallacy that a rule of morality is necessarily a rule of law, or the morality of some groups is, without more, entitled to legal enforcement.

457 P.2d at 645.

In regard to the statute in the Hodges case, it was clearly the type of morality statute criticized by the Harris court. The lack of definition in the act is to be supplied by:

The common sense of the community, as well as the sense of decency, the propriety, and the morality which most people entertain, [which] is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it.


35. See Comment, supra note 6.


39. Delinquency is a vague and slippery concept indeed. Acts that may serve to get a juvenile labeled delinquent are enormously varied. Many of our difficulties at all stages of prevention, adjudication, and correction are rooted in the tremendous variety of acts that may at different times and places be defined as delinquent.


40. State v. Stone, 111 Ore. 227, 235, 226 P. 430, 433 (1924), maintained:

The arts of seduction are so varient and insidious, especially when applied to different individuals, that it is impossible to make a law to lay down any
pose of the statute. This result has been justified in two ways. In the first place, it is within the province of the legislature to draft a penal statute either by proscribing particular acts or by defining it as an act which produces a certain proscribed result. In the instant case, the “catch all” clause of the “contributing” statute fails to meet the above test because it does not proscribe the particular acts constituting an offense, and since it is not necessary to demonstrate that the child in fact became delinquent in order to secure a conviction under the Oregon statute, it does not define a proscribed result. Secondly, the broad language of the statute is said to be justified by the fact that absolute precision of language is not required in statutory provisions. By using the latter justification, the courts have avoided the fundamental problem regarding such statutes—that of establishing with adequate precision the relationship between the act of the adult and the consequent effect on the child which would constitute the crime of contributing to delinquency.

The courts have attempted to avoid this latter objection by holding that “contributing” statutes place an obligation of self-imposed judicial restraint on the courts. Under the doctrine of judicial restraint, the judge will refuse to find a violation unless the causal connection is clear and delinquency is reasonably sure to follow. This approach, however, may no longer be effectively utilized to justify a vague law, since the Supreme Court has recently held that well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. A cogent example of the relevance of the Supreme Court’s decision is the instant case itself, which demonstrates the potential to extend the “contributing” statute to a wide variety of behavior despite judicial restraint. In the instant case, Justice Holman in his concurrence noted that as a matter of

41. Commonwealth v. Stroik, 175 Pa. Super. 10, 15, 102 A.2d 239, 241 (1954), stated that “delinquency is a very broad term involving in some cases a single act and in others a course of conduct, sometimes with no single act sufficiently serious to warrant a finding of delinquency.” Contributing to delinquency, therefore, is also “a broad term” and it involves “conduct towards a child in an unlimited variety of ways which tends to produce or encourage or to continue conduct of the child which would amount to delinquent conduct.” Furthermore, State v. McKinley, 53 N.M. 106, 111, 202 P.2d 964, 967 (1949), noted:

The ways and means by which the venal mind may corrupt and debauch the youth of our land, both male and female, are so multitudinous that to compel a complete enumeration in any statute designed for the protection of the young before giving it validity would be to confess the inability of modern society to cope with the problem of juvenile delinquency.

law the acts of an exhibitionist, under these circumstances, would not in
his opinion manifestly tend to cause delinquency in a child, as distasteful
as such acts may be. Consequently, the judicial restraint that was
posited as a cure for vague statutes proved to be insufficient to restrain
the trial court in the instant case.

The most important judicial process utilized by the courts to avoid
uncertainty in criminal statutes is that of narrow construction. Other
state courts have construed their "contributing" statutes narrowly in
order to satisfy the minimal requirements of certainty — notice and ade-
quate standards for court and police enforcement — thus obviating the
need to declare the statute unconstitutional. These courts have reasoned
that it was their duty to uphold the statute wherever possible in order to
effectuate the legislative intent. This has been done by construing words
narrowly or by resorting to a history of common law interpretation of
such words or ordinary usage to provide the requisite certainty. In State v. Casson, the Supreme Court of Oregon followed this approach,
construing the same "contributing" statute to prohibit only those acts
which as a matter of law would produce delinquency. Despite this limit-
ning construction, the act of the petitioner in the instant case, which was
clearly not encompassed by that rule, was still found sufficient to convict
him. Thus, the narrow construction approach had failed to neutralize the
vice of the vague law, and the Hodges court was justified in declaring the
"catch all" clause invalid in order to obviate inconsistent judicial appli-
cation of the Casson holding.

48. See, e.g., United States v. Harris, 347 U.S. 612 (1954), where the Court
construed the disclosure provision of the Federal Lobbying Act, 2 U.S.C. § 261-70
(1964), narrowly so as to obviate the necessity of declaring the legislation unconstitutionally void. See also Williams v. United States, 341 U.S. 97 (1951); Screws v.
United States, 325 U.S. 91 (1945).
49. Loveland v. State, 53 Ariz. 131, 86 P.2d 942 (1939); People v. Cohen, 62 Cal. App. 521, 217 P. 78 (1923); McDonald v. Commonwealth, 331 S.W.2d 716
(Ky. 1960).
50. McDonald v. Commonwealth, 331 S.W.2d 716 (Ky. 1960), which upheld a statuteprohibiting any act which would intentionally encourage, aid, cause, or in any
manner contribute to the conditions which cause or tend to cause a child to be-
come delinquent.
51. There have been four rationales utilized by the Supreme Court, in refusing
to find a statute unconstitutionally uncertain: (1) construction of the statute in such
a way as to avoid unconstitutionality; (2) the finding that a requirement of scienter
(sometimes written into the statute by construction) clarifies the statute; (3) the
finding of external standards (e.g., common usage, common law interpretation, and
judicial interpretation); (4) the finding that a statute is not uncertain in comparison
with other statutes earlier held constitutionally certain. For a complete discussion of
these explanations, see Collings, supra note 15, at 223-32.
52. Brockmuller v. State, 86 Ariz. 82, 340 P.2d 992 (1959), upholding a statute
prohibiting any act which tends to debase or injure the morals, health, or welfare
of a child.
54. The Hodges court could have merely reversed the decision of the lower court,
as was urged by Justice Holman in his concurring opinion. However, it is implicit
that the Hodges court was less than satisfied with the judicial administration of the
statute, in that it was not applied as limited by the Casson decision.
In final analysis, the soundness of the policy underlying the "contributing to delinquency" statutes can not be impugned, nor can the reprehensible act of the petitioner be condoned. The problem encountered in the instant case is that the subjective morality of the trial court was substituted for the rule laid down by the Casson court, resulting in the petitioner's conviction and in his deprivation of the minimal requirements of due process. In recent years, the propensity of the courts has been to scrutinize closely criminal statutes which establish standards of guilt based on concepts of morality. This is not to say that the legislature cannot draft such laws but only that if it does, it has the responsibility to define the specific acts which are to be proscribed and not to abdicate this function to the courts. The instant statute failed to meet the minimal due process requirements in that fair warning was not given to the potential offender nor were standards sufficiently precise to guide the judge, jury, and police in determining whether a crime had in fact been committed. The Hodges court properly recognized that there was no justification for the vagueness of the statutory language, especially since a subsequent legislative revision could provide the requisite certainty required by the due process clause without detracting from the laudable policy underlying the statute.

Frank L. Tamulonis

LABOR LAW — EMPLOYER UNFAIR PRACTICES — DENIAL OF ENFORCEMENT OF ORDER TO BARGAIN DUE TO UNION INACTIVITY.

NLRB v. Patent Trader, Inc. (2d Cir. 1969)

The Westchester County Printing, Pressmen and Assistants Union Local 366 brought charges of unfair labor practices against Patent Trader, Inc., alleging that company officials violated sections 8(a) (1) and 8(a) (5) of the National Labor Relations Act.1 These alleged violations consisted of (1) refusing to bargain in good faith with the union; (2) changing wages, working conditions and other terms of employment of its employees without prior notification to the union and thus precluding the opportunity to bargain collectively; and (3) inducing abandonment or with-


1. 29 U.S.C. §§ 158(a) (1), (5) (1964), provides:
   It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
drawal from the union and relating to its employees the futility of self-
organization. Subsequent to the filing of the unfair labor practices and
more than one year after the first election, which resulted in the union's
certification, a second election was conducted by secret ballot. The union
lost the second election reflecting a loss of union majority. After review-
ing the trial examiner's findings, the National Labor Relations Board
issued an order requiring the employer to bargain collectively with the
union. On appeal, the United States Court of Appeals for the Second
Circuit affirmed the Board's findings as to all but one of the unfair labor
practice charges but refused to enforce the bargaining order, holding
that such an order is inappropriate where a loss of union majority could
be explained by inactivity of the union itself, and that a bargaining order
should issue only after a second Board-conducted election has been held.

Section 10(c) of the National Labor Relations Act permits the Na-
tional Labor Relations Board wide discretion in ordering a party found
guilty of committing unfair labor practices to take such affirmative action
as will effectuate the policies of the Act. The courts have uniformly held
that "the relation of remedy to policy is peculiarly a matter for admin-
istrative competence" and further that "it is for the Board, not the courts,
to determine how the effect of prior unfair labor practices may be ex-

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2. Certification is defined as an official designation by the NLRB of a labor
organization or person as the exclusive representative of employees in a designated
unit for collective bargaining with the employer.

1 BNA LAB. REL. EX. 42(b) (1962). Certification occurs when the results of a
Board-conducted election are deemed conclusively valid or certified.

3. 29 U.S.C. § 160(a) (1964), provides:
The Board is empowered, as hereinafter provided, to prevent any person from
engaging in any unfair labor practice (listed in section 158 of this title) affecting
commerce.


4. 29 U.S.C. § 160(f) (1964), provides:
Any person aggrieved by a final order of the Board granting or denying in
whole or in part the relief sought may obtain a review of such order ... in the
circuit wherein the unfair labor practice in question was engaged . . . .

5. The court found that the granting of a wage increase was not an unfair labor
practice as it was given pursuant to company policy. Since the wage increase policy
was a working condition that existed prior to the negotiations, there was no unfair

6. 29 U.S.C. § 160(f) (1964), provides in part:
[T]he court . . . shall have the same jurisdiction to grant to the Board such
temporary relief or restraining order as it deems just and proper, and in like
manner to make and enter a decree enforcing, modifying, and enforcing as so
modified, or setting aside in whole or in part the order of the Board . . . .

7. 29 U.S.C. § 160(c) (1964), provides in part:
If upon the preponderance of the testimony taken the Board shall be of the
opinion that any person named in the complaint has engaged in or is engaging in
any such unfair labor practice, then the Board shall state its findings of fact and
shall issue and cause to be served on such person an order requiring such person
to cease and desist from such unfair labor practice, and to take such affirmative
action including reinstatement of employees with or without back pay, as will
effectuate the policies of this subchapter . . . .


8. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).
The Board can thus adapt its remedies to fit the needs of the particular situation in its attempt to restore the conditions and relationships that would have existed had there been no unfair labor practice. In applying its remedies, the Board may properly order an employer who has committed unfair labor practices to bargain directly with a union which lost its majority after the employer's wrongful refusal to bargain with it. The Board has many times expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.

When reviewed by the various circuits, bargaining orders have met with varying degrees of success. The courts have uniformly agreed with...
the Board that the overriding concern in the issuance of an order to bargain is to prevent the employer from profiting by his unlawful conduct which rendered a fair election impossible by the prior unfair labor practices.\textsuperscript{18} But at the same time the right of employees to decide not to be represented is also recognized.\textsuperscript{17} Since the order to bargain dispenses with the necessity of an election, there is always the risk that a bargaining representative may be imposed on employees when they no longer wish it to represent them.\textsuperscript{18}

Therefore, in some jurisdictions, the enforcement of an order to bargain is deemed "strong medicine"\textsuperscript{19} because it may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees and thus frustrate rather than effectuate the policies of the Act.\textsuperscript{20} Recognizing the potency of the order to bargain, many courts have implicitly realized that the remedy should be applied with restraint. Accordingly, they are more likely to enforce such orders in cases of serious violations of sections 8(a)(2),\textsuperscript{21} 8(a)(3),\textsuperscript{22} and 8(a)(5),\textsuperscript{23} coupled with a section 8(a)(1)\textsuperscript{24} violation.\textsuperscript{25}

In the Second Circuit, the usual test relevant to section 8(a)(1) violations was that enforcement of a bargaining order without a secret election should be mandated "where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union that a secret election

Less Discount Foods, Inc., 405 F.2d 67 (6th Cir. 1968). Rather, the Board's choice of remedy, because of its knowledge and experience, must be given special respect by the reviewing courts. NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969).


25. For a discussion of combinations of violations warranting an order enforcing the order to bargain, see Teamsters Local 152 v. NLRB, 343 F.2d 307 (D.C. Cir. 1965); NLRB v. Philamon Laboratories, Inc., 298 F.2d 176 (2d Cir. 1962), cert. denied, 370 U.S. 919 (1962); Piascecki Aircraft Corp. v. NLRB, 280 F.2d 575 (3d Cir. 1960), cert. denied, 364 U.S. 933 (1961); Editorial "El Imparcial," Inc. v. NLRB, 278 F.2d 184 (1st Cir. 1960); Summit Mining Corp. v. NLRB, 260 F.2d 894 (3d Cir. 1958); NLRB v. Stowe Mfg. Co., 217 F.2d 900 (2d Cir. 1955), cert. denied, 384 U.S. 964 (1955); D.H. Holmes Co. v. NLRB, 179 F.2d 876 (5th Cir. 1950); Texarkana Bus Co. v. NLRB, 132 F.2d 480 (5th Cir. 1943).
has undoubtedly been corrupted as a result of the employer's militant opposition." Ordinarily, in these cases, it was presumed that a union lost its majority through unfair labor practices by the employer and an order to bargain was the traditional remedy. The effect of the majority decision in *Patent Trader* is to inject the additional element of disaffection with the union into the determination of the enforcement of an order to bargain where the employer has engaged in unfair labor practices. Writing for the majority, Judge Moore was of the opinion that "where the employees have voted to disassociate themselves from the Union which originally prevailed in an election and where there is no proof that this desire for disassociation was other than a voluntary act by the employees" brought about by union inactivity, the court will not enforce the order to bargain as a matter of course. As a result, the majority felt that the Board should have ordered a new election within a reasonable time to permit the employees to express their choice as to a bargaining representative.

The dissenting opinion indicated that the majority could be criticized in four major ways. The first consideration is that the decision, in its effect, gives an employer incentive to disregard his obligation to bargain in good faith. Second is the apparent violation of the one-year certification rule requiring one year of good faith bargaining. Third is the avoidance of the broad mandate set out in *NLRB v. Gissel Packing Co.* which dealt with the propriety of the bargaining order as a proper remedy and fourth is the fact that a statutory remedy is already available to the employees to rid themselves of an unwanted union.

In his dissent in *Patent Trader*, Judge Feinberg expressed the opinion that the implication of the holding was that if any employer "stall[ed]"

26. NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965). Accord, NLRB v. Pembeck Oil Corp., 404 F.2d 105 (2d Cir. 1968). The Second Circuit has extended the "flagrantly hostile" test to apply to a violation of section 158(a)(3) — wrongful discharge of an employee for union activities.
27. Such an order is especially appropriate where the bargaining agent has been certified by a Board-conducted election. In the instant case, the union won the first election by a vote of 8 to 2 and was duly certified as the collective bargaining representative for the employees.
28. NLRB v. Patent Trader, Inc., 415 F.2d 190, 202 (2d Cir. 1969). Following the election, the parties held collective bargaining meetings during which time the company committed the various unfair labor practices. Shortly thereafter, in a secret ballot taken without interference by the company, the employees decided to terminate their membership in the union.
29. Many of the employees felt that the local representatives "were not qualified to determine how many men and who goes where on the press and how the hourly wage should be" and that the union had not "kept in touch with them." Id. at 201. In addition, the shop steward contacted the International office and learned that it had no record of a union at the company and that the required dues had never been received. One of the employees summed up the feeling toward the union by testifying that he and his colleagues were "disappointed in and disgusted with the union" and that the union "let us all down and played us all for chumps." Id. at 201–02.
31. See p. 781 infra.
long enough, he could "lose the battle with a union but still win the war." 33  
That is to say that an employer could, by engaging in unfair labor practices, cause the disestablishment of a union majority with relative impunity. 34  
By disregarding his obligation to bargain in good faith the employer might cause the union — "because of employee turnover, internal dissension, or, more likely, lack of progress in negotiating a contract" 35  
— to lose its majority status. 36  
Since a bargaining order is designed as much to deter future misconduct as to remedy past election damage, 37  
the majority's holding seems inadequate as it only satisfies the latter. The employer would probably see no need in engaging in subsequent unfair labor practices once his aim of union disestablishment is accomplished. Once the employer's desired result is obtained "[t]he damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign." 38  
Because the majority in Patent Trader has deemed the union's general inactivity resulting in its failure to reach an agreement with the employer of utmost significance it has overlooked the equally important aim of remedying employer misconduct. 

As mentioned previously, the majority seems to overlook an apparent violation of the one-year certification rule. The courts are uniformly in accord that where a bargaining agent has been certified as the result of a board-conducted election, the employees can not revoke the union's bargaining authority until the passage of a "reasonable time." 39  
Such "reasonable time" has been generally construed as one year from the date of certification. 40  
During the one-year time period, the essence of the requirement of collective bargaining implies that the employer must bargain in good faith for the period of certification. The facts indicate that neither party in the instant case observed the one-year certification rule. It is also clear that throughout the negotiations, the employer bargained on sterile issues and in an absence of good faith. 41  
In these circumstances, it would be reasonable to require him to continue to bargain with the
union until the requisite one year good faith period had expired. It is posited that an extension to include a continuous one year of good faith bargaining is a proper remedy if there has been an absence of such good faith bargaining on the part of the employer during the certification year. Although couched in terms of an attempt to implement the employee's will, the failure of the majority to enforce this stringent requirement can serve only as a weakening of the one-year bargaining requirement.

Both the majority and dissent found it necessary to discuss NLRB v. Gissel Packing Co. In Gissel, the Court held that where a union obtains authorization cards from a majority of employees, it may obtain recognition as the exclusive bargaining representative without the necessity of certification by a Board-conducted election. The Court also held that the issuance of a bargaining order is an appropriate remedy where the employer has committed unfair labor practices which have undermined the union's majority and made a fair election unlikely. The Supreme Court felt that the compelling reason for the issuance of an order to bargain was to prevent an employer from delaying or disrupting the election process and from putting off indefinitely his bargaining obligation. Clearly, the employer is not to be rewarded by allowing him to profit from this refusal to bargain. By allowing an employer to continually disrupt and confuse the election and bargaining process and put off indefinitely his bargaining obligation, it is not likely that an election held under these circumstances would reflect the employee's true, unaffected desires. Although the majority circumvented the mandates of Gissel by distinguishing Patent Trader on its facts, the dissent felt that Gissel was to be interpreted as a statement of broad policy concerning the enforcement of bargaining orders in all situations. In any case, the conclusion to be drawn is that the second election that was held in the instant case, with results favorable to management's position, must be viewed with suspicion. The danger in basing a holding on the reliability of the second election is that such an election may not mirror the true undistorted views of the majority of employees.

One additional factor that tends to place suspicion on the latter election was the preponderant victory enjoyed by the union in the initial election. The vote in the original election was eight employees for and two employees against unionization. Although union inactivity may be an important factor in all bargaining order cases, this consideration

42. NLRB v. Burnett Constr. Co., 350 F.2d 57, 60 (10th Cir. 1965); NLRB v. Commerce Co., 328 F.2d 600, 601 (5th Cir. 1964), cert. denied, 379 U.S. 817 (1964).
45. See note 37 supra.
47. Gissel dealt with the issue of the propriety of a bargaining order based on authorization cards as evidence of a majority of employees favoring unionization.
48. See note 26 supra.
would be more properly applied where the original vote was much closer. However, where the original vote was overwhelmingly pro-union, the propriety of the court's action is more in question. The effects of unfair practices on the part of the employer seem more apparent in such situations and the danger in using the fact of disaffection with the union as justification for a refusal to enforce an order to bargain is to ignore the greater possibility of inherent unreliability of such elections.\textsuperscript{50} By focusing on union shortcomings the dual purpose of the bargaining order becomes frustrated.\textsuperscript{51} It is important to note that employee rights are affected whether or not a bargaining order is entered. Those who desire a union to represent them may not be adequately protected by a rerun election, and those employees who oppose collective bargaining may be prejudiced by a bargaining order if, in fact, the union would have lost an election absent employer coercion.\textsuperscript{52}

\textit{Gissel} is also significant in that it appears to have modified the "flagrant violation" test as used in the instant case to determine the propriety of enforcing an order to bargain. The \textit{Gissel} Court stated that,

\begin{quote}
[T]he only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.\textsuperscript{53}
\end{quote}

The implication of such language is that an order to bargain may be enforced in situations of less "flagrant violations."\textsuperscript{54} It would seem that the Court favors greater liberality in the enforcement of the bargaining order despite its effect as "strong medicine." Consequently, it appears that an order to bargain is a desirable remedy in situations involving less flagrant violations of the NLRA, at least where the practices have caused a weakening of union strength or have given a subsequent election a distorted indication of union support. In such cases, the Supreme Court has also deemed the balancing of employee free choice against the issuance of the bargaining order to be of equal countervailing influence. Thus, the Second Circuit's opinion in \textit{Patent Trader}, by focusing only on effectuating employee free choice, seems to violate the balancing test set forth in \textit{Gissel}.

\textsuperscript{50} See Pollit, supra note 47.  
\textsuperscript{53} 395 U.S. at 614 (emphasis added).  
\textsuperscript{54} It is also of significance to note that the decision in \textit{Pembeck} advocating the "flagrant violations" test was vacated and remanded to the Board for further proceedings consistent with the \textit{Gissel} opinion. NLRB v. Pembeck Oil Corp., \textit{sub nom.} Atlas Engine Works, Inc. v. NLRB, 395 U.S. 828 (1969).
While the refusal to enforce an order to bargain may be a proper remedy where the employees have become disinterested in union representation, it is important, in the alternative, to note that the employees have a statutory remedy — decertification — to rid themselves of an unwanted bargaining agent after the one-year period has expired. Decertification is the procedure whereby a union's authority to bargain for the employees is withdrawn by the NLRB upon a vote by the majority of employees in the unit that they do not wish to be represented by the union. If the reviewing court feels that the employees are unaware of the remedy it may require the Board to give the employees actual notice of it. In light of this remedy, it is posited that the intrusion of the court in this instance overlooks the desirability of allowing the Board to implement the provisions of the Act.

The reliance on the doctrine of union inactivity as grounds for the refusal to enforce an order to bargain could result in more strict attention paid to local unions by the national office after certification. This implies that more vigorous and continuing union activity may be expected in post-certification periods. Above all, the disposition in the instant case may serve as an inducement by employers to engage in unfair labor practices with a view towards disestablishment of a union majority where the employer feels that the union is neglecting the interests of the employees. It is posited that in balancing the fear that employees might be harnessed with a representative that they do not wish to represent them against the proscription against unfair labor practices by the employer which undermine strength, the latter clearly outweighs the former. The broad mandate of Gissel indicates that other circuits must not follow the Second Circuit. Even limiting Gissel to its facts, there nonetheless remains the violation of the one year certification rule. Even assuming that the employer has not bargained in good faith, the one-year requirement should still be satisfied. The fact that the majority opinion has minimized the mandates of certification procedure might give employers even greater reason to attempt tactics that would frustrate unionization attempts.

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55. 29 U.S.C. § 159(c)(1) (1964), provides in part:
Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
(A) by an employee or a group of employees . . . alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified . . . is no longer a representative as defined in subsection (a) of this section . . . the Board shall investigate such petition and . . . provide for an appropriate hearing upon due notice . . . If the Board finds upon the record . . . that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(3) (1964), provides:
No election shall be directed in any bargaining unit . . . within which in the preceding twelve-month period, a valid election shall have been held . . . .